No. 46654-6-II

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

THE PORT OF LONGVIEW, a Washington municipal corporation,

Respondent,

v.

ASSICURAZIONI GENERALI S.P.A.; BALOISE INSURANCE COMPANY, LTD.; BISHOPSGATE INSURANCE COMPANY, LTD.; COMMERCIAL UNION ASSURANCE COMPANY, P.L.C.; CONTINENTAL ASSURANCE OF LONDON, LTD.; DRAKE INSURANCE COMPANY LTD.; ECONOMIC INSURANCE COMPANY; EDINBURGH ASSURANCE COMPANY, LTD.; ELDERS INSURANCE COMPANY, LTD.; EXCESS INSURANCE COMPANY, LTD.; FUJI FIRE AND MARINE INSURANCE COMPANY (U.K.) LTD.; HANSA MARINE INSURANCE COMPANY (U.K.) LTD.; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; INTERESTED UNDERWRITERS AT LLOYD'S LONDON; LA REUNION FRANCAISE S.A. d'Assurances ET DES REASSURANCES; LONDON & OVERSEAS INSURANCE COMPANY, LTD.; NIPPON FIRE & MARINE INSURANCE COMPANY (U.K.) LTD.; NIPPON FIRE AND MARINE INSURANCE COMPANY U.K.W. LTD.; NORTHERN ASSURANCE COMPANY LTD.; NORTHERN MARITIME INSURANCE COMPANY, LTD.; OCEAN MARINE INSURANCE COMPANY, LTD.; ORION INSURANCE COMPANY LTD.; PEARL ASSURANCE P.L.C.; PHOENIX ASSURANCE COMPANY LTD.; PROVINCIAL INSURANCE COMPANY, LTD.; PRUDENTIAL ASSURANCE COMPANY, LTD.; RIVER THAMES INSURANCE COMPANY, LTD.; SCOTTISH LION INSURANCE COMPANY, LTD.; SKANDIA U.K. INSURANCE PLC; SPHERE INSURANCE COMPANY LTD.; SWITZERLAND GENERAL INSURANCE COMPANY (LONDON) LTD.; THREADNEEDLE INSURANCE COMPANY, LTD.; VESTA (U.K.) INSURANCE COMPANY LTD.; WURTTEMBERGISCHE FEUREVERISCHERUNG

A.G.W. A/C; YASUDA FIRE & MARINE INSURANCE COMPANY (U.K.) LTD.,

Appellants,

and

ARROW INDEMNITY COMPANY; MARINE INDEMNITY INSURANCE COMPANY OF AMERICA,

Defendants.

REPLY BRIEF OF APPELLANTS

Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Carl E. Forsberg, WSBA #17025
Kenneth J. Cusack, WSBA #17650
Charles E. Albertson, WSBA #12568
Forsberg & Umlauf P.S.
901 5th Avenue, Suite 1400
Seattle, WA 98164-2047
(206) 689-8500

Attorneys for Appellants
London Market Insurers

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A. INTRODUCTION

Almost 50 years after open and obvious pollution was intentionally dumped into an unlined ditch, 19 years after it knew it had a potential insurance claim, 11 years after having intentionally purchased polluted property that was subject to a consent decree for environmental cleanup, the Port of Longview sought declaratory judgment that its general comprehensive liability policies should pay for any future cleanup the Port might be asked to undertake. Appellant London Market Insurers ("LMI") has challenged a number of trial court rulings that erroneously allowed the Port to succeed in its claim despite a number of legal principles that should have precluded it. The Port's response brief is a reflection of the proceedings below. It relies on confusing, contradictory, and impenetrable arguments in an effort to disguise the many infirmities of its legal position.

This Court should not be taken in by the Port's bluster. Litigation of this case was replete with erroneous partial summary judgment and evidentiary rulings that enabled the Port to evade the application of basic principles of insurance law.

B. REPLY ON STATEMENT OF THE CASE

The Port does not contest the factual recitation in LMI's opening brief.[1] LMI, however, has responses to a number of the Port's assertions.

The Port concedes. and its expert testified, that for many years in the 1960's when the Port owned the maintenance facility area ("MFA"), the former owner, International Paper ("IP"), was discharging polluted wastewater into an unlined surface ditch across the MFA from its plant on the adjoining portion of the TWP site. Br. of Resp't at 3; RP 1076. The TWP site, had also been the subject of massive open and obvious pollution. The ditch across the MFA (referred to as the lineament ditch) was five feet deep and "in direct contact with groundwater." RP 1984. While the ditch was in use and open to the surface, it absorbed at least 53 pounds of creosote *per day*, which has a "pungent odor" that one could smell "from quite some distance." *Id.* at 1081, 1098.

In a footnote, the Port tries to downplay its tolerance of this open and obvious pollution by noting that such discharges were "standard, agency approved, practice...." Br. of Resp't at 3 n.4.[2] However, the Port

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[1] The Port claims that it did not have enough time or space to identify each "inaccuracy or ambiguity" in LMI's opening brief. Br. of Resp't at 2. However, in its "counterstatement" of the case, the Port does not identify any such "inaccuracy or ambiguity," so presumably the Port has found none.

[2] The record the Port cites, RP 1077-78, does not support its assertion that this open pollution was agency approved. The Port's expert testified about *one other instance* where the Washington State Department of Ecology ("DOE") directed a party to move chlorinated solvents from one landfill to another because it would lessen the

does not contest that the ditches were on the surface, visible, full of smelly pollutants, and were not designed to contain the pollutants.

The Port next states that despite this open and obvious pollution on its own property, the Port was "[u]naware of the contamination," citing RP 635-37. Br. of Resp't at 3. The Port's record citation does not support the Port's statement that it was unaware of the contamination that was open and obvious in the 1960's, and before. Instead, it is a description of the Port's development of part of the MFA property in the 1990's.

The Port never offered any witness who denied knowledge of the open and obvious polluting activities on the properties for which it now seeks coverage. As regards the MFA, this is likely because the witnesses with direct knowledge of the Port's operations in the 1960's and 1970's have died or become unavailable since the Port first learned of potential claims in the 1990's. CP 13531.[3] Of course, the Port cannot deny that it knew of TWP pollution before it purchased the property. CP 469.[4]

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environmental impact of those solvents. RP 1077-78. The notion that DOE, even in its early days, would "approve" of intentional groundwater pollution is without basis in fact.

[3] The loss of these witnesses to historical operations in the decades that the Port delayed notice relates to LMI's claims regarding late notice prejudice.

[4] The Port tries to suggest that it was somehow *forced* to buy IP's property – which the Port knew to be polluted – stating cryptically that the purchase of IP's property "included the Plant at IP's insistence." Br. of Resp't at 4. The cited record, CP 2704-16, is the purchase and sale agreement between IP and the Port. It makes no reference to IP "insisting" on the sale.

The Port claims that the trial court found that the Port's PLP status as to the MFA arose by virtue of its ownership of the MFA. Br. of Resp't at 4. This is incorrect. The trial court found that the Port was an "owner or operator" with respect to the TWP site and the MFA. CP 5954. This finding is unremarkable, because purchasing the TWP rendered the Port an "owner or operator" of the TWP by definition. RCW 70.105D.020.

DOE never identified the Port as a PLP by virtue of its ownership of the MFA since the 1960's, and the trial court never so found. There is no evidence in the record to suggest that the Port had ever been considered a PLP by virtue of its ownership of the MFA. Before the Port chose to purchase the TWP, it had not received a PLP letter regarding the MFA. Only after the TWP purchase did the Port receive a PLP letter. CP 2718.

Apparently hoping to bolster its response to LMI's argument regarding the qualified pollution exclusions in some of the excess policies, the Port misleads this Court about their language.[5] In describing its historical insurance policies, the Port describes the qualified pollution exclusion to "preclude coverage for property damage arising out of the release of contaminants in a body of water unless that release is sudden or

[5] LMI has argued that the trial court erred in conflating an "occurrence" under the Port's policies, which required some knowledge of the damage to groundwater, with the exclusionary language of the qualified pollution exclusions, which preclude coverage if the Port knew of any "polluting event" regardless of damage to groundwater. Br. of Appellants at 59.

accidental." Br. of Resp't at 7. This suggests, as the Port wants to argue, that the exclusion does not apply if the Port expected the discharge of pollutants but did not expect the pollutants to reach groundwater.

The actual language of the excess policies precludes coverage of any discharge or dispersal of pollutants "into or upon the land, the atmosphere, or any watercourse or body of water...." CP 18596-600. As LMI has already explained, this broad language excludes coverage if the Port expected a release of contaminants in the environment, regardless of whether they expected it to reach groundwater. Br. of Appellants at 54-61.

Despite admitting that it knew of groundwater contamination as early as 1991, the Port tries to excuse its excessively late notice by claiming that it was ignorant of MTCA and of its own insurance policies. Br. of Resp't at 8. The Port claims that Judy Grigg, the Port's environmental manager, "did not consider" that the Port might have an insurance claim with respect to the TPH until 2009. *Id.*

The trial court found that the Port's notice, which was due when the Port became aware of potential groundwater contamination, was late as a matter of law. CP 5019. The Port has not challenged that ruling on appeal. The Port does not argue in its brief that it had any legal excuse to fail to give notice for 19 years.

Also, the Port's statement regarding its knowledge of a claim is inaccurate. Kathy Oberg, the Port's risk manager, admitted that she was aware by at least the mid-1990s that other Pacific Northwest ports were pursuing claims against their carriers for environmental liabilities. RP 593-94, 623-24. The Port also fails to cite other testimony by Oberg that she talked with Kenneth O'Hollaren and Grigg in the 1990s about contamination, and was having quarterly meetings with the Port's *insurance brokers* during the same time period. RP 774-75. Oberg also testified that it was not her job to make an insurance claim. RP 763-64.

The Port also ignores the transcript of its Commissioners' meeting authorizing the suit against the Port's insurers, wherein O'Hollaren states the Port could have filed these claims in the 1990s, "when, you know, of course, other entities were discovering they did have a claim." CP 1562. The Port also ignores Grigg's deposition testimony that she "could have, should have, and would have" notified the insurers of the TPH site at the same time she was providing status reports of the site to the DOE in 1992. CP 13724. The Port also cites Grigg's deposition testimony for the proposition that the Port did not think it had any liability in the 1990s because the other PLPs would step up to pay for the cleanup. Br. of Resp't at 8. However, Grigg stated that the Port took a 20 percent share of the TPH costs because it was the property owner and because Chevron and

Longview Fibre refused to participate in the Calloway-Ross portion of the site. CP 13723. The Port also ignores Grigg's admission that she knew in the 1990s of other ports bringing claims against their insurers for environmental liabilities, but never took the time to figure out if the Port's policies provided the same coverage. CP 21286.[6]

The Port claims that the trial court continued the first trial because of LMI's repeated discovery abuses. Br. of Resp't at 10. This is false. The record cited by the Port (RP 70-71) is not the Court's order or colloquy. Rather it is *argument* by the Port's counsel. The Court continued the original trial date due to a combination of concerns, none of which were "LMI's repeated discovery abuses." RP 73-81. Instead, the Court pointed out that there was a genuine dispute regarding two discovery topics which were was not resolved before a deposition took place. *Id.*

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[6] The Port then engages in a lengthy recitation of why it never provided actual notice to LMI before it filed suit. Br. of Resp't at 8-9. This discussion does not inform any of the legal issues on appeal, but does contain factual misstatements that should be corrected. J. Gordon Gaines was the Port's domestic American broker, not an LMI agent. RP 755-60. The Port incorrectly states that Gaines was identified in the primary policies as the agent for notice, when in fact, the Port never located the primary policies. The domestic broker named itself as the agent for notice, LMI did not. RP 1399-1415. The Port also fails to mention that the broker's certificates include the name and Seattle address of Fred S. James & Co., whom the Port conceded was also the Port's broker. RP 762. The Port fails to mention that it did not attempt to give claim notice for the primary policies to Fred S. James, although it gave notice of claims to Fred S. James for the excess policies.

The Port also mischaracterizes the record regarding the discovery matters. Br. of Resp't at 11-15. Under "July 31, 2012" the Port mischaracterizes the conduct of the deposition; there was an ongoing dispute, which the trial court had already ruled was "genuine," regarding two items on the CR 30(b)(6) deposition notice. RP 73-81. Under "December 28, 2012" through "January 4, 2013," the Port fails to mention that it admitted LMI produced over 600 pages of documents from market syndicates, as ordered by the court, by the deadline of December 28. CP 9467-68, 10042-60. An additional 95 pages were produced on January 4, after London completed its review for privileged and confidential information. CP 9467. The Port also admitted that none of the documents LMI found contained any policy terms or actual policies, which was what the Port sought. CP 9468. Under "January 10-11, 2013" the Port misstates deposition testimony when it states that searches of the LIDS database could have been performed as early as 2009 with the aid of an IT technician. The testimony on this issue is exactly contrary. CP 9695-701.

The Port states that the trial court tailored the sanction to the missing policy information that LMI "wrongfully withheld." Br. of Resp't at 14. There is nothing in the Court's order stating that LMI wrongfully withheld any policy information. In fact, none of the ancient policy information was located. The Port could never locate its own policies and

LMI never had them. As the Port admitted, all that the compelled searches produced was the identity of the syndicates underwriting the Port's policies. CP 9468.

The Port attempts to downplay LMI's substantial offer of proof to the trial court regarding late notice prejudice. Br. of Resp't at 27. The Port suggests that the "large volume of documents" excluded from the trial are somehow irrelevant to this Court's decision because they were not specifically referenced in LMI's brief on appeal, or because a scant few documents were ultimately admitted. *Id.* at 27 n.22.

LMI offered thousands of pages of documents in support of its late notice prejudice defense, the vast majority of which were excluded at trial. CP 1461-1640, 6816-6933, 13489-935, 15538-58, 17394-926. The basis for their exclusion was a series of trial court orders restricting late notice prejudice evidence to *one issue*: whether the Port's late notice "prejudiced LMI's ability to investigate the TPH site." CP 16865.

It would be impossible in the space of this brief to explicate each individual piece of evidence that was denied at trial. However, there are some key examples. LMI was not allowed to present evidence regarding the prejudice from its inability to timely pursue other entities in equitable indemnity/contribution actions. CP 17396-505. LMI was not allowed to present evidence or argument that key witnesses working at the Port

during the critical heavy pollution phase during the 1960's and 1970's had died, prejudicing LMI's interests. CP 17747. These witnesses, McNannay and Foster, the former general manager and former director of engineering for the Port, were identified by the Port as two of the three most knowledgeable persons regarding the Port's historical operations. CP 17747. The Port in argument *faulted* LMI for failing to present sufficient evidence of the Port's knowledge of pollution from the 1960's and 1970's, despite the fact that this evidence that would have been available had the Port's notice been timely. CP 15510.

C. ARGUMENT IN REPLY

In its opening brief, LMI demonstrated that the Port's extraordinarily late notice regarding its claims at the TPH and TWP/MFA sites – 19 years and 14 years, respectively – actually and substantially prejudiced LMI's ability to defend its interests. Br. of Appellants at 30-41. LMI explained that such massive delay would be prejudicial in almost any circumstances, but was especially so in this MTCA-related matter, because of the complex and evanescent nature of the evidence involved, and because of lost rights to seek equitable contribution from entities that have dissolved or otherwise cannot be reached. *Id.*

(1) Late Notice Prejudice Was Proven as a Matter of Law, Also Evidence of Prejudice Was Improperly Ignored or Excluded

(a) Notice Was Late

In its response, the Port first attempts to downplay and obscure the lateness of its notice, which the trial court found as a matter of law and the fact of which was undisputed below. Br. of Resp't at 39. The Port first claims it has not conceded the trial court's ruling that its notice was late. *Id.* at n.24. The Port claims that it was not obligated to seek cross-review in order to raise this issue, because the trial court denied LMI's summary judgment motion. *Id.*[7] However, the Port offers no argument to counter the fact that its notice was extraordinarily late. Br. of Resp't at 39.

Despite the Port's footnoted assertion it has not conceded the issue, the Port did not ever claim that its notice was timely, either below in summary judgment pleadings or in its brief on appeal. LMI and other defendants repeatedly asserted that the Port's notice was 19 years late with respect to the TPH site, and 14 years late with respect to the MFA/TWP site. CP 1439, 1446, 3078, 3683. The Port never argued that its notice was timely, nor did it contest that it was 19 years late regarding the TPH site and 14 years late regarding the MFA/TWP. CP 3364-74, 6664-70,

[7] The Port misstates the record when it claims that the trial court denied LMI's motion for summary judgment on the issue of late notice. CP 5019. Although the trial court declined to rule that LMI was *prejudiced* as a matter of law, the order clearly states that the motion was granted in part and found that the Port provided late notice "by whatever standard we use." *Id.*

7872-83, 8443-49. Instead, the Port accepted the reality that it was extremely late in providing notice, choosing to focus on prejudice arguments instead. *Id.*

Now, for the first time on appeal, the Port takes issue with precisely *how* late its own notice was, at least as to the TPH site. Br. of Resp't at 39 n.2. It now asserts that its notice was only 16 years late, not 19 years late. *Id.* It argues that as to the TPH site, notice might not have been due in 1991, but in 1994. Br. of Resp't at 39 n.26.

Since the Port has conceded below and in its brief that its notice was late, the Port's only remaining issue regarding late notice is that as to the TPH site it was not 19 years late, but only 16 years late. Br. of Resp't at 39.[8] The Port admits it was aware of groundwater contamination at the TPH site in 1991, but argues that it was not obligated to notify LMI of its potential claim until 1994, when our Supreme Court ruled that "there is coverage for 'cleanups conducted in cooperation with state agencies.'" *Id.* at 39 n.26 (*citing Weyerhaeuser Co. v. Aetna Casualty and Surety Co.*, 123 Wn.2d 891, 874 P.2d 142 (1994)). The Port claims that it was not required to notify LMI in 1991 because it "did not understand there was a claim against it for which it might have insurance coverage." *Id.* at 39.

[8] It is questionable whether the three-year difference is material to the question of whether the Port's notice was extremely late.

The Port's claim that its notice might have merely been 16 years late, and not 19 years late, based on the Supreme Court's *Weyerhaeuser* decision is baseless. Under LMI's policy language notice was due when the Port became aware of damage to property, which was in 1991. CP 1040, 1539. Even assuming *arguendo* the Port can raise this issue for the first time on appeal, the Port does not explain how being 16 years late, as opposed to 19 years, assists its argument. By either measure, the Port's notice was extremely tardy.

(b) The Trial Court Misapprehended the *Mutual of Enumclaw* Standard for Demonstrating Prejudice, that Legal Error Led to an Improper Denial of Judgment as a Matter of Law and Improper Exclusion of Evidence of Prejudice

The Port's main argument against late notice prejudice as a matter of law is that LMI failed to produce sufficient evidence that it was prejudiced. Br. of Resp't at 42-50. It claims that all of the extensive evidence of lost evidence, documents, witnesses, and investigatory opportunity were not prejudicial because they did not affect LMI's "defense to coverage or liability." *Id.* at 42. But what the Port really means is LMI must prove the Port lacked any responsibility for groundwater contamination, otherwise LMI was not prejudiced. *Id.* This theme is repeated in the Port's argument, as a response to real and concrete evidence of prejudice LMI presented. *Id.* at 44 ("the evidence

cited in LMI's brief...does not prove that any "lost" evidence deprived LMI of the ability to put forth defenses to coverage or contest the value of the Port's future damages").

In claiming that LMI must show it was prejudiced solely with respect to the Port's liability to the State, the Port mistakenly relies on a sentence from Division I's ruling in *Canron, Inc. v. Fed. Ins. Co.*, 82 Wn. App. 480, 918 P.2d 937 (1996). Br. of Resp't at 61. *Canron* does contain a sentence suggesting that a showing of prejudice must "demonstrate some concrete detriment which harms...defenses to coverage or liability," *Canron,* 82 Wn. App. at 486, however this statement from *Canron* is not the rule of law in Washington on late notice prejudice.

Our Supreme Court has determined that the test for whether an insurer can show prejudice is far more expansive and "nuanced" than the single sentence the Port quotes from *Canron. Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 430, 191 P.3d 866, 878 (2008).[9] In *Mut. of Enumclaw,* the Court recounted a long (but not "exhaustive") list of ways an insurer can show prejudice. Were damages concrete or nebulous?

[9] Although the Supreme Court said that it "largely agree[d]" with the *Canron* court's "more flexible" formulation of the prejudice test, that was only in contrast to an even more narrowly drawn rule contained in Division I's ruling in *Northwest Prosthetic & Orthotic Clinic, Inc. v. Centennial Insurance Co.,* 100 Wn. App. 546, 997 P.2d 972 (2000). The critical language of the *Mutual of Enumclaw* ruling is the "we hold" language, described *infra.*

Was there a settlement or did a neutral decision maker calculate damages; what were the circumstances surrounding the settlement? Did a reliable entity do a thorough investigation of the incident? Could the insurer have eliminated liability if given timely notice? Could the insurer have proceeded differently in the litigation? *Id.* at 430.

The *Mutual of Enumclaw* court summarized the expansive and nuanced test for prejudice thus: "We hold that in order to show prejudice, the insurer must prove that an insured's breach of a notice provision had an *identifiable and material detrimental effect on its ability to defend its interests. The rule will manifest itself differently depending on the kind of prejudice an insurer claims.*" *Id.* at 430 (emphasis added). Thus, the question with respect to late notice prejudice is not simply whether the late notice harmed the insurer with respect to its defenses to coverage or liability, but whether the late notice hindered the insurer's ability to defend its interests, and is evaluated based upon the type of prejudice claimed. *Id.* The Port cannot ignore the Supreme Court's expansive ruling on demonstrating late notice prejudice and claim a different, limited rule applies simply because it benefits the Port's position.

Here, LMI's "interests" extend far beyond its defenses to coverage or the claim that the Port might be asked to pay for cleanup under MTCA. In the MTCA context, a timely notified insurer has the ability and right to

(1) investigate documentary evidence and witnesses that might shed light on the nature, length, and multiple sources of the contamination, including the Port's knowledge thereof, (2) work with the State to conduct cleanup and mitigate or even avoid worsening damage, and/or (3) bring an action to seek contribution from other parties. LMI was hindered in its ability to defend any of these interests by decades of delay.

An example of how the improper legal standard hindered LMI's prejudice defense is the dispute about scientific evidence regarding the nature, source, and timing of the multiple sources of contamination at issue. CP 13910-32. LMI offered expert testimony that the evanescent and complex nature of this type of contamination meant that valuable scientific data that LMI could have been used to trace sources of contamination for a contribution action was lost. *Id.* Conceding that the evidence was lost, the Port claims that the trial court properly disregarded this evidence of prejudice on summary judgment because "none of the lost evidence could change the fact that contamination existed in the groundwater during all of the policy periods...." Br. of Resp't at 50. The Port raises a similar argument that valuable investigatory data "would not have changed the fact that the significant groundwater contamination from the Chevron and Longview Fibre operations was released prior to the policy periods" and thus the Port would still be liable. *Id.* at 45.

However, the question is not simply whether the Port would still be liable to the State, but whether LMI was impaired in its ability to defend its interests, for example by investigating the Port's historical knowledge or bringing a contribution action.[10]

Another example of the Port's straw man in action is its attempt to minimize the very serious problem of LMI's inability to pursue other potentially liable parties. Br. of Resp't at 46. In response to evidence that numerous other non-Port operators might have been responsible for the contamination, the Port responds that the evidence "is not a legal determination that the Port would have no MTCA liability and no equitably allocated share of remedial costs for the site." *Id.* No one is saying that evidence of other polluters is evidence that the Port has *no* MTCA liability. It is evidence that the Port, by its dilatory conduct in bringing its admittedly "stale" insurance claim 19 years later (CP 1557), hindered LMI's ability to defend its interests in pursuing other parties.

Once the Port's straw man argument – that LMI must demonstrate it was prejudiced in the ability to prove a total lack of liability, rather than

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[10] As explained in LMI's opening brief, MTCA, like other tort laws in Washington, allows those with joint and several liability to pursue other tortfeasors in an equitable action to recover any costs they voluntarily undertake, or which are imposed on them by DOE. Br. of Appellants at 26. However, such contribution actions can only be brought against entities that still exist and have assets, and they must be proven with evidence which can be more difficult to gather 19 years later.

demonstrate that it was prejudiced in the ability to "defend its interests" is dismantled, the Port's arguments regarding late notice prejudice crumble. The Port cannot claim LMI suffers no late notice prejudice after the Port's 20 year delay by merely stating that the groundwater contamination would still have existed. A MTCA contribution action is not a zero sum game. It is an equitable proceeding in which specific evidence of each potentially liability party's participation in, and culpability for, contamination is weighed and measured. Full and proper apportionment of fault and the right of contribution to "relatively innocent defendants" are important public policy goals in Washington. *See* RCW 4.22.005, 4.22.040; *Price v. Kitsap Transit*, 125 Wn.2d 456, 471, 886 P.2d 556 (1994). *Any* future contribution action LMI is forced to bring on the Port's behalf will indisputably be hindered by the loss of data, witnesses, and even the inability to reach the actual polluters such as Calloway Ross, who have gone out of business or become judgment-proof. CP 17863.

(c) The Port's Proposed Standard for Proving Late Notice Prejudice – that the Insurer Must Present the Very Evidence that the Late Notice Thwarted It from Gathering – Is a Catch-22 that Washington Courts Have Never Endorsed

The Port next argues that the evidence of prejudice that LMI did provide was deficient, and that LMI's argument regarding late notice prejudice is "generalized." Br. of Resp't at 43-50. The Port tries to

discount or minimize LMI's evidence, arguing that it does not actually *prove* that LMI would have succeeded in its coverage or liability defenses.[11] *Id.* As it did at the trial court, the Port insists on appeal that in order to show prejudice, LMI was obligated to produce evidence that it was unable to obtain, because fifteen to twenty years had passed. Br. of Resp't at 40-50.

The essence of the Port's argument regarding LMI's burden of proving late notice prejudice is a catch-22: "You did not produce the evidence that you were unable to produce because of our late notice, thus you cannot prove you were prejudiced." The trial court adopted this position both in rejecting LMI's summary judgment motion, and also in limiting the scope of late notice prejudice the jury could consider, particularly in the Jury Instruction 10. CP 8688-89, 10125, 16865, 18644.

The clearest example of this catch-22 is the exclusion of evidence that the deaths of eyewitnesses prejudiced LMI. The Port notes that the trial court excluded any testimony about these deceased eyewitnesses to the Port's operations "because *LMI had no evidence about what they might have said* or how that lost testimony was detrimental." Br. of Resp't at 49 (emphasis added).

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[11] Again, the Port's argument presumes an incorrect and narrow standard that LMI's task was to prove that it would have prevailed in its defenses.

LMI had no way of ascertaining the testimony the two most knowledgeable witnesses on relevant environmental and operating issues, McNannay and Foster, because they died during the decades that the Port delayed notice to LMI. Surely the Port does not suggest LMI should produce the testimony of bystanders in violation of the hearsay rule, convene a séance, or build a time machine.

LMI was, however, able to identify why McNannay and Foster's testimony was critical. Kenneth O'Hollaren, the Port's general manager in the 1990s and 2000s and a Port witness, identified McNannay and Foster as knowledgeable witnesses regarding the Port's operations at the critical time periods at issue here. CP 13531, 13741. Knowledge of operational matters in the 1960's and 1970's would include knowledge of the extensive and open polluting activity going on at the relevant sites. There is ample evidence to suggest that McNannay and Foster would have provided critical testimony. They were the former general manager and former director of engineering, respectively, at the Port during the decades when open and obvious pollution was ongoing from multiple sources and entities. CP 3709, 3711. Foster was actually involved in the process of installing groundwater monitoring. CP 3711-12. They would have had knowledge about all of the various entities and individuals who were involved with the polluting activity, and might have shed light on whether

those individuals had knowledge of intentional pollution. For example, there is evidence that fuel was being intentionally spilled from trucks as they were being loaded. CP 823. In an equitable MTCA contribution action, intentional polluters certainly have more exposure to liability than accidental polluters, who in turn have more exposure than mere property owners who actually caused no pollution at all. RCW 70.105D.080.

The Port also disingenuously claims that the loss of McNannay and Foster, along with other eyewitnesses, is not prejudicial because those witnesses were interviewed by the Port's attorney at the time, Davis Wright Tremaine. Br. of Resp't at 48. The Port claims that the interviews by the Port's attorneys were sufficient to protect LMI's interests, because LMI's interest in those witnesses' testimony was coextensive with the Port's. *Id.*

Although LMI's and the Port's interests are aligned regarding defending the Port against liability, they are *not* aligned on another important matter: defenses to coverage. If McNannay and Foster had knowledge (as the evidence suggests) of the open and obvious pollution on the MFA in the 1960's and 1970's (CP 458, 17383) or of the leaking pipelines that were replaced in 1974 (CP 2152-53), then the Port knew about potential groundwater contamination before the policy periods and is prohibited from coverage by the known loss defense.

In sum, the trial court erred as a matter of law in ruling that the deaths of these key eyewitnesses – and the loss of numerous other kinds of evidence – is not evidence of prejudice under Washington law. The trial court ignored or excluded a great deal of evidence of prejudice, both at the summary judgment stage and at trial, based upon an incorrect understanding of LMI's legal burden. The Port advanced that incorrect standard at trial, and now attempts to advance it on appeal. This Court should examine all of the evidence LMI presented, under the broad and expansive *Mutual of Enumclaw* test, and rule that LMI proved prejudice as a matter of law, or order a new trial.

(d) LMI Submitted an Extensive Offer of Proof Regarding Late Notice Prejudice, the Issue is Raised and Supported by the Record

Possibly sensing the weakness of its position, the Port first asserts that LMI did not "properly" raise the late notice issue at the trial court, and thus this Court should not consider it. *See, e.g.,* Br. of Resp't at 42.

The notion that the issue of late notice prejudice was not raised below is absurd. The issue was the central focus of numerous motions, and was raised, litigated and decided. CP 1437, 1984, 3077, 5017, 6796, 7753, 8687, 8748, 10125, 13447, 16243, 18863, 18847, 18849.

The Port next complains that LMI did not provide a sufficiently thorough list of its offer of proof regarding late notice prejudice. Br. of

Resp't at 43. It again asserts that because LMI did not provide this exhaustive list in its opening brief, it has somehow failed to preserve the issue for appeal. *Id.* No authority is cited in support of this novel proposition.[12]

Nonetheless, this Court certainly can and should peruse LMI's entire offer of proof on the subject of late notice prejudice. The documents are located at CP 1461-1640, 6816-6933, 13489-13935, 15538-58, 17394-17926. They include a wide array of specific instances of prejudice, including lost critical witnesses, lost environmental analysis, lost opportunities to pursue contribution/indemnity, voluntary payments by the Port, intentional purchase of polluted property, and others. *Id.*

Finally, the Port argues that LMI cannot challenge the trial court's summary judgment ruling because the trial court concluded there was a "disputed issue of material fact" regarding the issue of late notice prejudice, and thus this Court should not review the denial. Br. of Resp't at 60. The Port claims that only the record at trial is relevant to the issue of late notice prejudice. *Id.*

When summary judgment denial turns on an issue of law, that denial can be appealed. *Kaplan v. Nw. Mut. Life Ins. Co.,* 115 Wn. App.

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[12] Although it certainly is a party's obligation to raise issues and support them with arguments and evidence, no Washington court has ever held that a party has failed to

791, 799, 65 P.3d 16 (2003); *see also*, *Bulman v. Safeway, Inc.*, 96 Wn. App. 194, 198, 978 P.2d 568 (1999) (When denial of summary judgment turns on a substantive legal issue, an appellate court may review the denial after entry of final judgment).

Although the trial court ostensibly ruled that fact issues existed on late notice prejudice, that ruling was predicated on an error of law: that late notice prejudice may only be demonstrated by evidence of a lost ability to "investigate" or other narrow grounds. CP 16865, 18644. The trial court failed to apply the *Mutual of Enumclaw* standard for what constitutes prejudice, and what evidence an insurer may present to show prejudice. *Mutual of Enumclaw*, 164 Wn.2d at 430. Not only did this erroneous legal standard improperly restrict LMI's ability to introduce evidence, it led the jury to believe that any argument regarding the broad array of ways in which it was prejudiced by the Port's 19-year delay should be disregarded.

Had the trial court applied the correct legal standard, summary judgment should have been granted.

(e) Waiting Almost 20 Years to File a Claim Is Extreme Delay; Prejudice Exists as a Matter of Law

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preserve an issue by not citing to each and every scrap of evidence in support of the argument.

The Port argues that it would be unjust to find prejudice as a matter of law when it waited almost 20 years to file an insurance claim with respect to a complex, evanescent matter of environmental contamination, which even in 1991 was already a decades-old problem. Br. of Resp't at 39-40, 59-65. The Port suggests that finding prejudice as a matter of law would result in a "windfall" for LMI. *Id.* at 39-40.

The Port first claims that prejudice based on delay should only be found as a matter of law in "extreme" circumstances. *Id.* at 61. The Port cites numerous cases for this proposition, including *Mutual of Enumclaw, supra, Canron, supra,* and *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 922 P.2d 126 (1996).

LMI agrees that finding prejudice as a matter of law should be reserved for extreme cases. The notice delays in this case *were* extreme. LMI could find *no example* of an insured waiting 19 years to notify its insurer, particularly in a complex environmental matter. Apparently also could not find a single instance of a case with delay even remotely approaching the length of time in this case.[13] The cases the Port cites

[13] Their failure to cite such a case suggests none exists. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post–Intelligencer,* 60 Wash.2d 122, 126, 372 P.2d 193 (1962); *State, Dep't of Ecology v. Wahkiakum Cnty.*, 184 Wn. App. 372, 377 n.3, 337 P.3d 364 (2014) *review denied sub nom., Dep't of Ecology v. Wahkiakum Cnty.*, 182 Wn.2d 1023, 347 P.3d 459 (2015).

involve the following periods of delay between the insured's knowledge of a potential claim and notice to the insurer: about 6 months (*Pederson's,* 83 Wn. App. at 439); "almost one year," (*Canron,* 82 Wn. App. at 484); and 4 years (*Mutual of Enumclaw,* 164 Wn.2d at 430).

Certainly, if no case can be found anywhere in the country involving an almost 20-year delay in notice, then this case can safely be considered to be "extreme." This is not to say that the specific nature of the case – a complex, long-standing MTCA matter with many multiple witnesses and parties – is not also important to the prejudice determination. However, when evaluating whether prejudice exists as a matter of law, this is without doubt an extreme case of delay.

In addition to being distinguishable in terms of the length of delay, the cases the Port cites in support of its position on prejudice are distinguishable. In *Pederson's*, the insured delayed *less than six months* in bringing its claim. And the insurer in that case presented no evidence of any witnesses, documents, parties, or evidence that had become unavailable in that short period of time. *Pederson's,* 83 Wn. App. at 439-442. In *Canron,* less than one year passed and the insurer made generalized claims about "possible detriment." *Canron,* 82 Wn. App. at 490. In *Mutual of Enumclaw*, although the Supreme Court declined to rule that a four year delay was "late" as a matter of law, the issue of late notice

prejudice was remanded for trial, reserving for the insurer the right to put on a wide array of evidence to show late notice prejudice, not simply evidence of investigation. *Mutual of Enumclaw,* 164 Wn.2d at 429-31.[14]

This case is unique in the extremity of the late notice. Given the wide array of specific evidence of prejudice presented on summary judgment below, this Court should rule that as a matter of law, on these facts, LMI demonstrated prejudice and the Port's claim should have been dismissed as a matter of law.[15]

(2) The Jury Instructions Misstated the Law and Prejudicially Affected the Verdict

In its opening brief, LMI challenged jury instructions and the special verdict form that were given, and two jury instructions that were omitted on the ground that the trial court misstated the applicable law and

[14] The Port also incorrectly suggests that late notice prejudice should only be found as a matter of law only when a trial on the insured's liability is over or is impending. Br. of Resp't at 61. One cannot measure prejudice in a MTCA case only by whether a trial is impending, because that liability can be imposed without a trial ever occurring. *Pederson's*, 83 Wn. App. at 436 (insured worked with DOE to clean up pollution). As the Port has repeatedly argued in this case, the State is not required to take a PLP to court to establish MTCA liability, it is statutory. *Id.*; RCW 70.105D.030. To say that an insurer is never prejudiced unless a trial has been had on liability also ignores that a PLP has statutory rights under MTCA to pursue others for equitable contribution. Under the Port's theory, it could have waited 30, 40, 50 years or more before filing its claim with LMI, while countless parties, witnesses, documents, and soil samples disappeared, but LMI would suffer no prejudice because the matter was never tried.

[15] The Port claims that even if its notice was late, its late notice does not "apply to the excess policies." Br. of Resp't at 38. The Port seems to suggest that even if the underlying policies are unavailable due to its extraordinarily late notice, the excess policies would somehow still be available. Excess policies are only available if the underlying policy limits are exhausted. If the underlying policies are not available due to

prejudiced the jury's verdict. Br. of Appellants at 43, 60-61. The jury instructions, like the trial court's rulings denying judgment as a matter of law, misapprehended Washington law on late notice prejudice and qualified pollution exclusions. *Id.*

(a) LMI Preserved the Jury Instruction Issues for Appeal

The Port first responds by arguing that LMI only properly preserved one of these issues, and that this Court should therefore disregard the rest. Br. of Resp't at 51. The Port claims that LMI did not specifically object to the jury instructions and special verdict form (except Instruction 10) and thus is attempting to raise the late notice prejudice and qualified pollution exclusion errors "for the first time on appeal." *Id.*

The Port's contention that LMI failed to raise or preserve the qualified pollution exclusion and late notice prejudice issues at trial is demonstrably false. These issues were both thoroughly litigated, and the trial court was well apprised of the legal grounds for LMI's objections. CP 1437, 3077, 3681, 6796, 7753, 8405, 8748, 9378, 13447, 14658, 16770, 18470, 18537, 18590, 20176.

In addition to the many motions in which these two issues were raised, LMI specifically objected *in writing* to all of the instructions that

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the Port's late notice, then there can be no exhaustion and thus no access to the excess policies.

are at issue on appeal. CP 16837-41 (objecting to the Port's proposed instructions). LMI also apprised the trial court of what the proper statement of law would be by offering its own jury instructions and special verdict form, which were rejected. CP 18619-22, 18627-31.

The issues were raised below.

(b) The Jury Instructions and Special Verdict Form Misstated the Legal Test for Determining Whether the Qualified Pollution Exclusions in the Policies Applied

The Port's sole substantive response regarding the legal infirmities of Instruction 11 and the special verdict form is that they properly stated the law. Br. of Resp't at 51-52. This issue is addressed in LMI's opening brief and *infra* section C(3). Those legal arguments are incorporated herein by reference.

(c) The Evidence of Late Notice Prejudice at Trial Was Erroneously Restricted by the Trial Court, Thus the Jury Instruction Limited to that Evidence Was Also Erroneous

The Port argues that the severely restrictive Instruction 10 regarding late notice prejudice was appropriate because it fit the evidence LMI produced at trial.

What the Port refuses to acknowledge is that the evidence of prejudice at trial was limited by the same erroneous legal ruling that the trial court enunciated in Instruction 10. As LMI has argued *supra* section

C(1)(b), there is no legal basis, either on summary judgment, evidentiary decisions, or jury instructions, for claiming that LMI can only demonstrate prejudice by showing it was hampered in its investigation.

As the Port offers no substantive legal argument as to why the jury instruction should have limited LMI's late notice prejudice defense in violation of *Mutual of Enumclaw*, this Court should presume it has none.

(3) There Was No "Occurrence" Because the Port Expected or Intended the Property Damage

In its response, the Port attempts to ignore that no "occurrence" happened to trigger coverage under the respective policies. Washington law is clear that the burden to prove there is an occurrence is on the insured; it is a subjective standard, whether the insured "expected or intended" a harmful event. *Queen City Farms, Inc. v. Central National Insurance Company of Omaha,* 126 Wn.2d 50, 69, 71, 72, 882 P.2d 703 (1994). "There is never coverage where the harm is expected or intended." *Id.* at 71.

In order to meet its burden, the Port could have put on evidence as to what the Port knew about the contamination from the time frame contemporaneous with the period before it purchased the policies from the 1960s and 1970s. The Port submitted no such evidence, instead stating

that one employee who did not work for the Port during the relevant time period was unaware of the groundwater contamination. RP 577-79.

Yet the Port did not deny, because it cannot, that it was well aware of polluting events, including those that would lead a rational person to know groundwater contamination and property damage would result. Such circumstantial evidence is appropriate even with a subjective standard as our Supreme Court has held.

> Finally, in deciding whether an insured subjectively expected or intended the damage, circumstantial evidence is, of course, admissible. One commentator has suggested that the difference between an objective standard and a subjective standard may not be a substantial one:
>
> > Since proof of state of mind normally is indirect or circumstantial, even a subjective test must rely on facts from which an inference about the insured's state of mind must be drawn, such as the obviousness of already occurring harm.
> >
> > K. Abraham, *Environmental Liability Insurance Law* 134 (1991).

Id. at 69.

Here, the Port purchased the MFA site from IP in 1963 and 1965. It had to be aware the MFA site included a wastewater ditch leading from the abutting TWP site, which was open, unlined, and reeked of pollutants and had for decades. No "expert" is necessary to prove an unlined ditch that actually contacts groundwater would "leak" its contaminated slime

into the surrounding land and groundwater. *See Queen City Farms*, 126 Wn.2d at 79 (discussing difference between depositing contaminants into a pit or landfill designed to contain materials, and onto the land without any filtering mechanism).

In regard to the TWP site, when the Port purchased the property from IP in 1999, the site was already covered by an agreed order and consent decree and the purchase and sale agreement acknowledged the contamination. Purchasing a property under the conditions present here is "intentional."

As for the TPH site, the Port was aware of the industrial operations of its tenants, it was aware that leaking fuel pipes had been replaced in the 1970's. CP 823-26, 2152-53, 17498-505. Under these circumstances, the Port cannot claim with a straight face that it had no idea that contamination and property damage was occurring when policies were procured. Thus, under the holding of *Queen City Farms,* there is no occurrence or coverage.

Faced with its failure to provide contemporaneous evidence prior to policy purchase and common sense circumstantial evidence of "expected" contamination, the Port tries to side step by claiming it only had to prove it did not expect or intend groundwater contamination exceeding mandated MTCA clean up levels prior to the policy periods.

Br. of Resp't at 34. It grounds this assertion by citing an inapposite case, *Puget Sound Energy v. Certain Underwriters at Lloyd's,* 134 Wn. App. 228, 138 P.3d 1068 (2006). That case did not analyze what constitutes an "occurrence." *Puget Sound Energy* examines contribution and what constitutes making an insured "whole" in light of contribution and set-offs from prior settlements.

The Port ignores *Overton v. Consolidated Insurance Company,* 145 Wn.2d 417, 38 P.3d 322 (2002) which does deal with what constitutes an "occurrence." There, our Supreme Court rejected an argument similar to what the Port is making here. The Court reaffirmed that there is no occurrence causing "property damage" when the insured is on notice of the damage caused by pollution prior to purchasing the property. *Id.* at 426. Formal notification that an insured has the status of a PLP is not required. *Id.* at 425. More significantly, the Court distinguished "property damage" from "property damages" which is the amount the insurer must pay if there is coverage. Like the Port, Spokane Transformer/Overton argued that they needed to have specific knowledge of MTCA liability, there in a context of damage to a third party. The Court held that for purposes of coverage, if the insured had knowledge of property damage, there was no coverage regardless of when the insured learned of MTCA clean-up levels and its exposure for contribution for cleanup costs.

Thus, as a matter of law, the Port could not demonstrate that the property damage was not expected or intended at the TWP/MFA sites. The Port's claims to coverage for those sites fails.

(4) The Qualified Pollution Exclusions Preclude Coverage Because the Port Did Not Meet Its Burden to Prove It Was Unaware of the Polluting Events

The Port claims that it met its burden under *Queen City Farms* to prove that it was unaware of the massive pollution events on its property dating back to the 1960's. Br. of Resp't at 37-38. The Port avers that it need not have proved this because no one knew in the 1960's that pouring tens of thousands of gallons of creosote into an unlined ditch would cause contaminants to be released into the environment. *Id.* The Port also claims that the qualified pollution exclusions as analyzed in *Queen City Farms* only applies to "intentional" polluters. *Id.* Finally, the Port claims that proving it had no expectation of contamination of the groundwater is sufficient to meet its burden under *Queen City Farms*.

The Port's reading of *Queen City Farms* is wrong. There is no functional distinction between an insured who buys a liability policy having *personally* polluted the property, and one that buys a liability policy knowing that the property was polluted by someone else. The fact that the Port claims to not directly have caused the contamination has no

bearing on its burden of proof regarding knowledge of contamination under *Queen City Farms.*

Also, the Port again (as it did at the trial court) denies the clear determination in *Queen City Farms* that a qualified pollution exclusion analysis examines whether the insured knew of pollution (i.e. a discharge or release of pollutants), rather than resulting property damage. The Port all but admits it knew of pollution in the 1960's, but claims that no one knew at the time that it was a problem. Br. of Resp't at 37-38.

If the Port knew of a polluting event, there is no coverage. As explained in LMI's opening brief, the only evidence the Port adduced at trial was that it was unaware of groundwater contamination in the 1990s. Br. of Appellants at 58-59. This is insufficient as a matter of law.

(5) The Trial Court Abused Its Discretion in Imposing a Draconian Sanction, and Refusing to Lift the Sanction When the Port Caused a Mistrial

In its opening brief, LMI argued that the trial court failed to properly apply *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 489, 933 P.2d 1036 (1997), *as amended on denial of reconsideration* (June 5, 1997) and *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 694, 41 P.3d 1175 (2002), in imposing the sanction of issue preclusion against LMI. Br. of Appellants at 61-66.

In the trial court, and now on appeal, the Port portrays itself as an aggrieved innocent victim of insurance companies who failed to timely produce documents. The irony of the Port's position is apparent in light of the fact (1) the Port failed to give notice to LMI for 19 years, (2) the Port could not produce all the policies it claimed were applicable nor witnesses from the applicable time periods as to what it knew when policies were procured, and (3) the Port's own discovery violations caused a mistrial.

Undeterred by reality, the Port continues its drumbeat in response using hyperbole and misrepresentation. For example, the Port claims the trial court tailored the sanction (the extraordinary sanction of issue preclusion) because of policy information that "LMI wrongfully withheld." Br. of Resp't at 14. Yet the trial court's order does not state LMI "wrongfully withheld" any policy information. LMI did not produce terms or conditions or actual policies because LMI did not have them years later, and neither did the Port.

Perhaps more egregious is the Port's misrepresentation that the trial court "*sua sponte* continued the first trial date as a result of LMI's repeated discovery abuses."[16] Br. of Resp't at 10. In fact, the trial court continued the original trial date for a variety of reasons, including

[16] It is telling that the Port supports this statement by referencing the argument of its counsel.

concerns about bringing in jurors when there were other issues that needed addressing such as the Port's Statement of the Case was way too lengthy to read to the jury. The trial court wanted to use the vacated trial date to resolve these pre-trial issues and to hear argument about the objections to the Port's 30(b)(6) notice so an order was in place when the deposition resumed. RP (9/7/2012):73-81.

The extraordinary sanction of issue preclusion arose because of a one week delay in producing some documents that had to be obtained in London and reviewed for privilege issues during the Christmas/New Year's holidays.[17] Awards of attorney fees are an appropriate compensatory sanction for a discovery violation. *Washington Motor Sports Ltd. Partnership v. Spokane Raceway Park Inc.*, 168 Wn. App. 710, 282 P.3d 1107 (2012). In balancing the appropriate sanction to be imposed for a one week delay in producing documents, required by *Washington State Physicians Ins. Exc. & Associates v. Fisons Co.*, 122 Wn.2d 299, 858 P.2d 1054 (1993) and *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006), the trial court was driven by the impending trial date.

[17] LMI produced over 600 pages of documents from various market syndicates by the court's deadline of December 28. It produced an addition 95 pages on January 4. None of the documents produced contained the policy terms which was the main point of the additional, late discovery the Port was pursuing. CP 9963.

> Well, what's a week? In the context of this case, in the context of a trial date looming a month later, I think a week is pretty important. 2/4/2013 RP 85.

In making its decision, the trial court was aware "the law makes real clear I'm supposed to use the least serious sanction that addresses the problem..." *Id.*; RP 86. Yet the trial court's discussion then ignores the imposition of monetary sanctions.

Even if the trial court was correct in imposing the extraordinary sanction of issue preclusion at the time, its justification evaporated when it later declared a mistrial of the Phase I trial because of the Port's dilatory production of documents that came to light when it produced a new set of documents near the close of its case in chief, which should have been produced in discovery. With a new trial date then set months in the future, the Port had no conceivable prejudice resulting from a week delay in obtaining documents that were produced on January 4, 2013. When the rationale for imposing a sanction no longer exists, particularly an extraordinary sanction that deprives a party of its right to present a defense, there is sound reason to provide relief from that sanction. CR 60 allowed the trial court to do so. CR 60(b)(4) allows the court to provide relief from the order when the basis of the relief sought was caused by "misconduct of an adverse party," which is present here because the

mistrial was caused by the Port's discovery abuse. Denying such relief was clearly an abuse of discretion and should be reversed by this Court.

(6) The Port Is Not Entitled to Attorney Fees Under *Olympic Steamship*[18]

The Port baldly claims, without analysis or argument, that it is entitled to equitable attorney fees on appeal under *Olympic Steamship*. The Port offers no analysis or argument as to why this equitable doctrine applies here. *Id.*

RAP 18.1 requires more than a bald request for attorney fees on appeal. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590, 599 (1998), *citing Thweatt v. Hommel*, 67 Wn. App. 135, 148, 834 P.2d 1058, *review denied*, 120 Wn.2d 1016 (1992). Argument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs. *Id., citing Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 313, 869 P.2d 404, *review denied*, 124 Wn.2d 1015 (1994).

Argument and authority are particularly warranted when a party seeks *Olympic Steamship* fees. Such fees are not automatic "prevailing party" fees, but are based on the nature of the litigation. Whether there are grounds for *Olympic Steamship* fees in a particular case is often a subject

[18] *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

of controversy even at our highest court. *See Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 661, 272 P.3d 802 (2012) (6-justice majority concludes that the fees are available with 3 justices dissenting).

When the legal basis for fees is contested, a party should be obligated to set forth reasoned arguments supporting the request for fees. The Port has not met that burden.

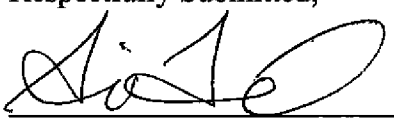
In the alternative, the trial court has not yet ruled on the Port's request for *Olympic Steamship* fees. The matter is currently set for argument in November. Once the trial court rules regarding *Olympic Steamship* fees one party will likely appeal from that ruling. The parties will have a full and fair opportunity to litigate it at this Court then.

D. CONCLUSION

This Court should reverse the trial court's coverage decisions in this case and dismiss the Port's complaint. The trial court simply erred in concluding that coverage was present here under the LMI policies in light of well-developed principles of insurance law. Alternatively, this Court should award a new trial on liability to LMI with the issues correctly configured. Costs on appeal should be awarded to LMI.

DATED this 29th day of October, 2015.

Respectfully Submitted,



Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Tukwila, WA 98188
(206) 574-6661

Carl E. Forsberg, WSBA #17025
Kenneth J. Cusack, WSBA #17650
Charles E. Albertson, WSBA #12568
Forsberg & Umlauf PS
901 5th Avenue, Suite 1400
Seattle, WA 98164-2047
(206) 689-8500
Attorneys for Appellants
London Market Insurers

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Reply Brief of Appellants in Court of Appeals Cause No. 46654-6-II to the following parties:

Carl E. Forsberg
Kenneth J. Cusack
Charles E. Albertson
Forsberg & Umlauf PS
901 5th Avenue, Suite 1400
Seattle, WA 98164-2047

Mark Nadler
Liberty Waters
John Dolese
The Nadler Law Group, PLLC
720 Third Avenue, Suite 1400
Seattle, WA 98104

Richard E. Mitchell
Miller Nash Graham & Dunn, LLP
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121

Original E-filed with:
Court of Appeals, Division II
Attn: David Ponzoha
950 Broadway, Suite 300
Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 29th, 2015, at Seattle, Washington.

Matt J. Albers

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE FITZPATRICK LAW

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Reply Brief of Appellants

Sender Name: Christine Jones - Email: matt@tal-fitzlaw.com

A copy of this document has been emailed to the following addresses:

cforsberg@forsberg-umlauf.com
kcusack@forsberg-umlauf.com
calbertson@forsberg-umlauf.com
mnadler@nadlerlawgroup.com
lwaters@nadlerlawgroup.com
jdolese@nadlerlawgroup.com
richard.mitchell@millernash.com

sidney@tal-fitzlaw.com