No. 46654-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

THE PORT OF LONGVIEW, a Washington municipal corporation,

Respondent,

v.

INTERESTED UNDERWRITERS AT LLOYD'S, LONDON, et al.,

Appellants,

and

ARROWOOD INDEMNITY COMPANY, MARINE INDEMNITY INSURANCE COMPANY OF AMERICA, INDEMNITY MARINE ASSURANCE COMPANY, LTD,

Defendants.

PORT OF LONGVIEW'S SUPPLEMENTAL RESPONSE BRIEF

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I. INTRODUCTION

The Port successfully sued LMI to obtain insurance coverage for the TPH and MFA sites under eleven LMI policies, establishing its rights to defense and indemnity coverage for all future remedial costs, estimated to be in the millions of dollars. Applying *Olympic Steamship*,[1] the trial court correctly awarded the Port its fees incurred as a direct result of LMI's vexatious litigation tactics contesting coverage. Having lost the coverage issue at trial, LMI now contends the Port's recovery does not justify the amount of fees. LMI's contention is unsupported and defies the policy behind *Olympic Steamship*. Moreover, neither the clean hands doctrine nor the *PUD* opinion[2] precludes the Port from recovering an *Olympic Steamship* award, because the evidence supports the trial court's findings that the "late notice" under the Primary Policies was not intentional and the "voluntary payments" at the TPH site did not violate any express policy provision. The trial court's award should not be disturbed.[3]

II. COUNTERSTATEMENT OF FACTS[4]

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[1] *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991)

[2] *Public Utility District No. 1 of Klickitat County, et al, v. International Insurance Company, et al*, 124 Wn.2d 789, 815, 881 P.2d 1020 (1994).

[3] LMI have failed to identify any findings of fact or conclusions of law regarding the award of fees, to which they assign error, in violation of RAP 10.3(g). Unchallenged findings of fact are verities on appeal. *In re A.W.*, 182 Wn. 2d 689, 711, 344 P.3d 1186, 1197-98 (2015).

[4] The Port incorporates the facts set forth in the Brief of Respondent ("Rsp.Br."), generally, and specifically at pp. 2-14, 29-33, 38-39.

A. The Port's Notice Was Not 19 Years Late

As discussed in RspBr. at pp. 7-10, 24-26, the trial court never found, nor did the evidence establish, that the Port's notice was 19 years late. Although the Port first discovered contamination at the TPH site in 1991, it did not then understand that it had a loss that was "apt to be a claim" under the Primary Policies. Further, the Port did not learn of contamination beneath its MFA property until after IP discovered that contamination in 1997.[5] Ironically, LMI still assert today that there is no third party claim against the Port without a PLP letter for the TPH site and with IP conducting the MFA investigation thus far.[6] LMI contradict their own contention that the Port should have recognized it had a "loss that was apt to be a claim" under the Primary Policies in *1991*.[7]

The Port first sent its claims to the notice agent identified in the Primary Policies and then to Lloyd's[8] agent Mendes & Mount. *See* Rsp.Br.

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[5] 11/7/2013 RP 618-20; 11/8/2013 RP 749,771; 11/14/2013 RP 1532-3; CP 13723, 21286. *See also*, CP 22747, 22760.

[6] *See* LMI's Supplemental Brief on Fees ("LMI Sup.Br."), p. 13. This assertion ignores the trial court's orders that determined the Port has strict, joint and several liability at the sites under MTCA and that the statutory liability, combined with Ecology's involvement at the sites is sufficient to qualify as legal liability for third party property damage under the insurance policies. CP 12720; 6/12/2013 RP 67-8. LMI did not appeal these rulings, and as such, they are verities on appeal. *In re A.W.*, 182 Wn. 2d at 711.

[7] LMI's "no third party claim" assertion also wholly undermines the allegations of "actual and substantial prejudice" from late notice in Appellants' Brief at pp. 30-36.

[8] "Underwriters at Lloyd's London ("Lloyd's") underwrote the Primary Policies.

at pp. 7-10. [9] Neither LMI nor Mendes responded. *Id.* In order to ensure LMI received notice, the Port initiated the instant lawsuit and served the defendants via the Insurance Commissioner ("OIC"), pursuant to RCW 48.05.215. The OIC forwarded the Port's summons and complaint to Mendes, as Lloyd's agent for service of process. CP 22856-61. Upon receipt, Mendes immediately forwarded these documents to Resolute, the adjuster for all Lloyd's pre-1993 liability policies. CP 22863-5, 22808-16.

B. LMI's Conduct Prevented Receipt of the Port's Claims Prior to the Lawsuit

At the Phase 1 trial, LMI testified that Mendes did not forward the Port's pre-suit notice because it did not know where to send that notice without the identity of the underwriting syndicates. 11/15/2013 RP 1727-8, 1734. The Port later learned through its *Olympic Steamship* discovery, that Mendes was aware prior to receiving the Port's notice, that Resolute was adjusting all claims under these types of policies, regardless of which syndicates underwrote the risk.[10] LMI then contradicted their prior testimony, and asserted that Mendes did not forward the Port's claim because they were not authorized to do so unless they were identified as the notice agent in the policies. CP 22812, lns 21-23. LMI testified at trial

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[9]CP 22784-90. As LMI acknowledged under oath at trial, Mendes has acted as Lloyds' coverage counsel and agent for service of legal process for nearly one hundred years. Mendes also serves as notice agent for Lloyd's. 11/15/2013 RP 1705-8.

[10]Mendes was informed in June of 2009, that Resolute Management Company would be assuming the role of third party claims administrator for all Lloyds' pre-1993 non-life policies. CP 22810. Further, as Lloyd's agent, notice to Mendes five months prior to the lawsuit is imputed to Lloyd's. For a more detailed discussion of this agency relationship, *see* Port's Motion for *Olympic Steamship* fees, CP 22711-18.

that they took no steps to provide an alternative means of notice for insureds whose policy-identified notice agents were not available. 11/15/2013 RP 1711-12. It was this practice of dodging their insureds' notice[11] that compelled the Port to file a lawsuit.

C. LMI Disputed Coverage After Notice of the Lawsuit

Even after receiving actual notice via the lawsuit, LMI did not agree to coverage or even adjust the Port's claim, alleging instead that the "missing"[12] market was a "basic obstacle to a coverage determination."[13] Two years later, after the trial court ordered LMI to search for and produce[14] the market information for the Primary Policies, LMI finally agreed to accept the Port's tender of defense under a full reservation of rights. 5/22/2013 RP 171-2; CP 8366-70, 22888, 22898-901.

D. The Port Successfully Litigated Coverage Under All Eleven LMI Policies

Based upon the numerous summary judgment rulings and the

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[11]This practice also violates WAC 284-30-330(3) requiring procedures for prompt investigation of claims, and WAC 284-30-920 requiring insurers to assist in the search for lost policies. (With a lost policy, the policy-authorized notice agent is unknown).

[12]After years of litigation, LMI finally produced this information from their own computer database, which was available since at least 2009. *See* Rsp.Br., pp. 11-15. Reply Brief of Appellants (at pp. 37-38) seeks to mischaracterize this discovery misconduct as merely producing a few pages a week late.

[13]Although this information was no longer necessary to adjust claims under the NICO-reinsured Lloyds policies (because NICO pays all such claims), LMI still seized upon the excuse as a basis upon which to deny coverage. CP 6720-4, 22820-2, 22888.

[14]LMI's assertion that the Port's late notice caused the policies to be lost is unsupported. Further, if the Port had not discovered the contamination beneath the two sites until 2009 (so that its notice was undeniably timely), the outcome wouldn't have changed.

jury's unanimous findings in favor of the Port on all factual issues, the trial court declared that LMI are liable for all the Port's costs arising out of the liabilities at the sites. CP 18831-46, 20760-62. The trial court certified those declarations as a final judgment, upon the specific finding that the "coverage issues involve environmental cleanup claims of great significance," and after ruling that the ten-day limit under CR 54(d) for the Port to bring its *Olympic Steamship* motion was waived by LMI in open court and would not apply. 8/1/2014 RP 26; CP 22526-8.

Contrary to LMI's repeated assertion that the Port has received *no benefit* from the litigation, the Port's consultants working on the sites are now being paid directly by LMI. CP 23552-65. The future remedial costs for the TPH site are unknown. However, the Port's expert opined that it will cost more than $500,000 just to complete the investigation to determine the required remedy. CP 23040-42. The Port's expert opined that the MFA remediation was estimated to cost at least $8.9 million. CP 23038-39. Ecology is requiring the Port to enter into an agreed order for the cleanup of that contamination. CP 23550.

E. The *Olympic Steamship* Award

After the Port completed limited discovery on the topic, the Port brought its *Olympic Steamship* motion. CP 22670-735. The trial court found that the Port successfully litigated all coverage issues, that the "late notice" was not intentional, and that the "voluntary payments" did not violate any express policy provision. Based upon these findings, the trial court properly awarded the Port its *OSS* fees. 11/25/2015 RP 74-8; CP

23624-7.

III. LEGAL ARGUMENT

The Judgment declared coverage under all eleven insurance policies, for two separate occurrences. CP 22526-54. LMI attempt to escape liability for the Port's *OSS* fees based upon a late notice and ruling that applied to only four of the eleven policies and upon a voluntary payments ruling that applied to only one of the two occurrences (the TPH Site). CP 5017-20; 10/4/2013 RP 87. *See, also*, Rsp.Br. at pp. 21, 24-27. Substantial evidence supported the trial court's factual determinations that (1) the Port's late notice was merely negligent and not intentional, and (2) that the Port's voluntary payments did not violate an express provision of any LMI policy. With these findings, the trial court properly refused to apply either *PUD* or the clean hands doctrine to preclude an *Olympic Steamship* award.

A. Standard of Review

Appellate courts apply a dual standard of review to a trial court's award of attorney fees. The initial determination of the legal basis for an award of fees is reviewed de novo. However, the discretionary decision to award or deny attorney fees, as well as the reasonableness of the award are reviewed for an abuse of discretion.[15] Here, the trial court's determination

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[15] *Cook v. Brateng*, 180 Wn. App. 368, 375, 321 P.3d 1255 (2013). The factual findings made by the trial court based upon its personal knowledge of the proceedings and trial testimony, are reviewed for substantial evidence. Substantial evidence exists so long as a rational trier of fact could find the necessary facts were shown by a preponderance of the evidence. *In re A.W.*, 182 Wn. 2d at 711.

that *Olympic Steamship* authorizes a fee award because the Port prevailed, is reviewed de novo. In contrast, the trial court's refusal to apply *PUD* or the clean hands doctrine to deny *OSS* fees and its determination of the amount of fees, are reviewed for an abuse of discretion. A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Cook*, 180 Wn. App. at 375.

B. The Port is Entitled to *Olympic Steamship* Fees

An award of attorney fees is required when an insurer unsuccessfully engages an insured in litigation to deny coverage, because by doing so an insurer delays the benefit of the bargain and violates its enhanced fiduciary obligations. *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 34-40, 904 P. 2d 731 (1995). This rule also encourages prompt payment of claims and balances the inequities from the disparity of bargaining power between an insurer (who promised to *protect* the insured from litigation) and its insured. *Olympic S.S.*, 117 Wn.2d at 52-53.

An insured is entitled to *OSS* fees when it successfully litigates any coverage issue in order to make the insured whole.[16] Coverage disputes include issues such as policy terms and the application of any exclusions rather than the degree of the injuries or the amount of the bills.[17] The trial

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[16] *Leingang v. Pierce Cty Med. Bureau*, 131 Wn.2d 133, 147-149, 930 P.2d 288 (1997); *Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 143-144, 26 P.3d 910 (2001).

[17] *Leingang*, 131 Wn.2d at 147-149; *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280-281, 876 P.2d 896, (1994)(when insurer admits coverage, but merely disputes the value of a claim, *OSS* fees are not available).

court correctly determined that the Port was entitled to the fees it incurred to successfully litigate every element of coverage under the LMI policies.

1. The Port Prevailed on All Eleven Policies

LMI's assertion that the Port did not prevail because it dismissed its damages claim is baseless and conflates coverage litigation, with litigation over the value of the claim. LMI seek to escape *Olympic Steamship* liability because they made the litigation so expensive the Port could not economically justify pursuing its damages claims to judgment.[18]

a. Primary Policies

There is no requirement under *Olympic Steamship* or any other case, for an insured to obtain a judgment for damages in order to recover the fees it incurred to establish coverage. *OSS* fees are awarded for litigating coverage, regardless of whether the suit is for a declaratory judgment action or damages. *Olympic S.S.*, 117 Wn. 2d at 53. Here, the Port brought its own declaratory judgment action to establish coverage, and it was compelled to defend LMI's counterclaim for a converse declaratory judgment of no coverage. CP 26.

The Judgment declares coverage for a liability estimated to be millions of dollars.[19] The Port's expert testified that there is significant

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[18]Such a holding would turn *Olympic Steamship* on its head, given that one of the purposes behind the rule is to ensure that small but justified insurance claims were not barred by the sheer cost of litigation. *Panorama Vill. Condo. Owners Ass'n Bd. of Directors*, 144 Wn. 2d at 144.

[19]If LMI truly believed that the Port's future liability was minimal, they would have agreed to coverage and paid those minimal costs rather than spending millions in attorney fees to litigate coverage, while risking liability for the Port's fees as well.

contamination at both sites. 11/12/2013 RP 958-967, 1016-7,1047-50, 1089-99. Thus, the only unknown is the quantum of costs that the Port will incur to resolve its liability for that contamination. Further, the Port has already benefitted from the Judgment, as LMI are directly paying defense counsel and environmental consultants for both sites.[20]

b. Excess Policies

LMI's assertion that the Port did not obtain the benefit of its Excess Policies because it did not obtain a damages award is perplexing given that *OSS* fees are definitively unavailable for litigating damages. *Dayton*, 124 Wn.2d at 280; *Leingang*, 131 Wn.2d at 144. At the Phase 1 trial, the Port proved the policy terms and the occurrences, and it disproved the applicability of exclusions. CP 18648-54. The Port then established by summary judgment motion, that LMI had no evidence to support any other defense to coverage. CP 20210-12. Consequently, the trial court entered a judgment declaring LMI liable under the Excess Policies for all the Port's future remedial costs that exceed the underlying limits. CP 22546-8. Thus, the Port prevailed on all coverage questions, leaving only the quantum of the Port's losses to be determined. The Port could not afford to wait until for exhaustion of the primary policies to bring this coverage action, because no insurer was providing coverage under the Port's primary policies. It would have been a waste of judicial

[20]LMI disingenuously assert that the duty to defend was not at issue, presumably because they agreed, subject to a full reservation of rights, to defend the Port in 2012, two years into the lawsuit. LMI's Suppl. Brief on Fees, p. 12, ftnt 13.

resources to litigate the Excess Policies separately from the Primary Policies, especially given the amount of overlapping evidence. Precluding *OSS* fees in this instance would force insureds to either 1) pay all costs that they would be paid by their primary insurers before litigating against all insurers (risking defense arguments based upon those payments), 2) litigate multiple times as each layer is exhausted, or 3) forego *OSS* fees for litigating coverage under excess policies. LMI's position is unsupported and is contrary to the principles behind the *Olympic Steamship* rule.

Further, exhaustion is not a coverage issue[21] since it turns on the amount of the Port's claims. *Greengo v. Public Emples. Mut. Ins. Co.*, 135 Wn.2d 799, 817-819, 959 P.2d 657 (1998)(*OSS* fees appropriate after resolving threshold coverage question, despite reserving factual entitlement to monetary recovery to remand). Thus, the Port is entitled to recover its fees for successfully litigating coverage under all eleven LMI policies.

2. The Clean Hands Doctrine Does Not Preclude *OSS* Fees for Claims Under the Primary Policies

The clean hands doctrine only precludes equitable relief to a party whose conduct is unconscionable, morally reprehensible, unjust or marked by a lack of good faith. This bad faith or unconscionable conduct must

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[21] *See, e.g. Westport Ins. Corp. v. Appleton Papers Inc.*, 2010 WI App 86, ¶¶ 90-91, 327 Wis. 2d 120, 173-74, 787 N.W.2d 894, 921 (Wis. Ct. App. 2010) (declaration of coverage upheld despite lack of exhaustion evidence; exhaustion was not proper subject of coverage trial). Again, LMI did not agree to coverage under the Excess Policies, subject to exhaustion, they disputed and litigated coverage under these policies for five long years. Further, the exhaustion issue is solely an internal LMI dispute since they issued both the primary and excess policies.

involve intention as opposed to a misapprehension of legal rights.[22] A negligent or unintentional breach of a policy provision is insufficient to invoke unclean hands.[23]

3. The *PUD* Decision Does Not Preclude *OSS* Fees for Every Policy Breach

Neither *PUD*, nor any later case has held that *any* breach of *any* policy provision (or any voluntary payment not precluded by the policies) disqualifies an insured from *OSS* fees. Such a rule would defeat the purpose for the *Olympic Steamship* rule. *PUD* is distinguishable from this case because it involved an extreme set of circumstances where there was a clear, intentional, and undisputed breach of an express consent to settle provision.[24] As the trial court correctly recognized and LMI admits, the *PUD* holding was an application of the clean hands doctrine to the specific facts present in that case.

In the 22 years since the *PUD* opinion, the Washington Supreme Court has only applied this exception to the *Olympic Steamship* rule in one other case - *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 30-31, 25 P.3d

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[22] *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 73, 113 P.2d 845 (1941).; *Lavretta v. First National Bank of Mobile*, 235 Ala. 104, 108-109, 178 So. 3, 6 (1937).

[23] *J.L. Cooper & Co.*, 9 Wn.2d at 74-75; *Dollar Systems, Inc. v. Avcar Leasing Systems, Inc.*, 890 F.2d 165, 173 (9th Cir. Cal. 1989)(even gross negligence in complying with contract terms is insufficient to amount to unclean hands).

[24] *Public Utility District No. 1 of Klickitat County, et al, v. International Insurance Company, et al,* 124 Wn.2d 789, 795-6, 815 (1994).

997 (2001).[25] Neither *PUD* nor *Tripp* involved an insured's unintentional breach of a notice provision,[26] nor the insured's payment of costs where the policy terms did not preclude such payment (and where the insurer was not liable for those costs). In *PUD*, the insureds settled the entire underlying litigation without consent from the insurers, and in direct contravention of an express policy provision. Although the court noted that the settlement triggered the no-action clause in the policy, there was insufficient prejudice to defeat coverage. When reviewing the trial court's $2.8 million attorney fee award, the *PUD* court reasoned that by settling all of the underlying claims without the consent of their insurers, the insureds undisputedly took actions inconsistent with the express coverage terms of their policies and the court could not justify an attorney fee award under those circumstances. *PUD,* 124 Wn.2d at 815 (1994). It did not determine that every breach of a policy provision would preclude *Olympic Steamship* fees.[27] Instead, the *PUD* court merely recognized that there are certain, extreme circumstances in which the equitable *Olympic Steamship* rule would be inequitable.

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[25]LMI cites to *Unigard v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999), but in that case the insured failed to prove coverage. *Id.* at 435.

[26]For a more detailed discussion of why the *PUD* holding should not be extended to the late notice context, *see* Port's Motion for *Olympic Steamship* fees at CP 22691-2 (As a highly factual issue, late notice is not capable of being a clear, undisputed breach).

[27]Such a ruling would effectively gut *Olympic Steamship* by creating one more barrier for insureds pursuing meritorious claims and allowing insurers to escape liability upon any minor breach, regardless of its irrelevance to the insurer's decision to contest coverage or to the necessity for litigation.

Further, *Liberty Mutual v. Tripp* involved UIM insurance, which implicates entirely different public policies and regulations than general liability insurance. 144 Wn.2d at 7-8, 25. The Tripps had UIM and PIP coverage under a Liberty Mutual policy when Gordon Tripp was involved in an automobile accident. Liberty Mutual paid PIP benefits to the Tripps, but delayed resolving the UIM claim until resolution of the Tripps' personal injury lawsuit. *Id.* at 7-8. However, after agreeing to keep Liberty Mutual apprised of developments in that litigation, the Tripps settled the lawsuit and agreed to release all of their claims, including any subrogated claims, all without notifying Liberty Mutual. *Id.* This violated the express terms of the Tripps' policy, which required them to notify Liberty Mutual prior to any settlement. *Id.* at 14. Consequently, and only after learning of the settlement and release, Liberty Mutual filed a complaint seeking a declaration that it owed no UIM benefits, alleging the Tripps had destroyed its subrogation rights. *Id.* at 8. The majority held that even if Liberty Mutual failed to prove prejudice, the Tripps should not be entitled to *OSS* fees because "it was the Tripps' failure to comply with the express terms of the insurance contract, not Liberty's conduct, that precipitated this action." *Id.* at 20.

In contrast, this Court upheld a trial court's refusal to vacate its *Olympic Steamship* award based upon the insured's late notice. *Pederson's Fryer Farms, Inc.* v. *Transamerica Ins. Co.*, 83 Wn. App. 432, 454-455, 922 P.2d 126 (1996). In that case the insured had not provided notice until after it had conducted a complete cleanup of the entire contaminated site.

Id. at 436. Although the trial court (and the jury) found insufficient prejudice to bar coverage, the insurer argued that the *PUD* rule should have precluded *OSS* fees because of the late notice. This Court disagreed, holding that the absence of a factual determination that the insured undisputedly failed to comply with express coverage terms precluded the application of the *PUD* rule. *Id.* at 454-455. The Ninth Circuit also refused to apply the *PUD* exception because the late notice was not "undisputed." *Genie Indus. v. Fed. Ins.* Co., 316 Fed. Appx. 540, 542 (9th Cir. Wash. 2008).

Further, the *Liberty Mutual v. Tripp* court made it clear that an insured's breach must be the actual cause of the litigation in order to preclude an *OSS* award. That court held that the exception to *OSS* fees only applies when it is the insured's undisputed failure to comply with an express terms of the insurance contract, not the insurer's conduct, that precipitates the litigation. 144 Wn.2d at 20. Thus, the *PUD* rule is not a "gotcha" to be applied in every case with any policy breach by the insured (which would contravene the policy behind the *Olympic Steamship* rule).[28]

More recent caselaw also suggests that actual prejudice from the breach that would potentially defeat coverage, is required for the *PUD*

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[28]*See also, Madera West Condo. Ass'n v. First Specialty Ins. Corp.*, 2013 U.S. Dist. LEXIS 144045, *14 (W.D. Wash. Oct. 1, 2013)(*PUD* exception does not preclude *OSS* award where it was insurer's conduct, not insured's breach that precipitated litigation. Further, to foreclose an equitable remedy based upon the clean hands doctrine, the "misconduct" must relate directly to the relief that is sought. *J.L. Cooper & Co.*, 9 Wn.2d at 73. Thus, if the alleged misconduct (the policy breach) did not cause the litigation, it should not preclude the award of *Olympic Steamship* fees.

exception to apply. *Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 267-8, 274, 189 P.3d 376 (2008) (affirming trial court's award of *Olympic Steamship* fees, despite insured's clear and undisputed failure to obtain consent prior to settling with third party complainant). As Judge Jones noted in the *Terhune Homes* case, the *Mutual of Enumclaw* holding indicates that noncompliance alone does not bar *OSS* fees and that such a holding would create a windfall for the insurer. *Terhune Homes, Inc. v. Nationwide Mut. Ins. Co.*, 20 F. Supp. 3d 1074, at 1082-1084 (W.D. Wash. 2014).

4. The Evidence Supports the Trial Court's Findings

Here, the evidence supports the trial court's findings, that 1) the Port's late notice was not intentional and 2) the voluntary payments the Port made were not violations of any express policy provision. Based upon these findings, the trial court did not abuse its discretion when it determined that neither *PUD* nor the clean hands doctrine preclude the Port from recovering its *Olympic Steamship* fees. Although the trial court ruled that the Port's notice under the Primary Policies[29] was late, it did not determine when the Port should have given notice, and the court specifically found that the late notice was not intentional. CP 5017-20, 23626. Given that LMI still contend there are no third party claims being

[29]These policies only require notice as soon as may be practicable when an occurrence of a loss that apt to be a claim under the policy is known by the Port's management. CP 22747, 22760.

made against the Port,[30] they cannot prove the Port undisputedly knew it had a liability that was "apt to be a claim" under the policies in 1991 and intentionally delayed notifying LMI. The evidence below is contrary to such allegations. Rsp.Br. at pp. 7-8, 25-26. Consequently, the trial court properly refused to apply the clean hands doctrine or the *PUD* exception to deny *OSS* fees based upon the Port's late notice under the Primary Policies.

Further, the trial court's determination that the "voluntary payments" did not violate an express policy provision should be upheld. There is no provision in the Primary Policies prohibiting voluntary payments.[31] The only policy provision LMI cited in its summary judgment motion that led to the trial court's ruling regarding "voluntary payments" was the defense provision, which promised that the policy would pay, in addition to the indemnity limits of the policy, the costs to investigate or settle liability if the liability was contested with the consent of LMI. CP 1499. This provision does not prohibit the Port from making voluntary payments, it is a promise by LMI to pay for defense costs, if LMI consents to investigate or contest the insured's liability. The Port's failure to obtain

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[30]The lack of a formal claim does not affect the Port's statutory liability, or the fact that the trial court determined that the Port has the requisite legal liability for coverage (which LMI have not appealed), it merely explains the Port's misapprehension of its own liability prior to 2009.

[31]Further, the only "voluntary payments" that the trial court addressed in its September 2012 order related to the TPH site, so this ruling is wholly inapplicable to the Port's MFA claims. CP 5017-20 (The 1998 Chevron Agreement referenced in this order relates only to the TPH site. CP 2266-75)

consent prior to entering into the Chevron Agreement did not violate an express provision prohibiting such agreement. It just precluded the Port from recovering those costs from LMI under the defense provision.[32] Thus, even if the "voluntary payments" could be considered a policy breach, they certainly were not violations of an express provision that could defeat coverage (since it had no impact on the indemnity provisions in the policies). Accordingly, neither *PUD* nor the clean hands doctrine is applicable and the Port is entitled to its *OSS* fees.

C. The Trial Court's Fee Award Should Not Be Disturbed

LMI's appeal of the amount of the Port's *OSS* award is fatally flawed because it is unsupported by citations to fees allegedly erroneously awarded. Further, in at least one case, it seeks reversal of the ruling LMI requested in the trial court. On appeal, LMI contend the trial court failed to disallow fees for duplication of effort, unsuccessful activities, the mistrial, and litigation with a co-defendant. However, the trial court did consider LMI's objections to these fees and costs, ultimately disallowing the following: all of the $114,229 LMI sought for unproductive time (CP 23315-6, 23635); $71,977 of the $131,977 LMI sought for the mistrial (CP 23318, 23636); $15,961.93 of the $107,608.93 LMI sought for

[32] In contrast, the policy language in *PUD* expressly provided in the Conditions section of the policy, that the insured *shall not* voluntarily make any payment, assume any obligation or incur any cost. *PUD*, 124 Wn.2d 789, 802 (1994).

excessive costs (CP 23320, 23636).[33] Aside from naming these categories of fees in their appeal, LMI provide no further detail as to any aspect of the trial court's alleged error regarding them. Instead LMI merely list factual rulings in LMI's favor that were insufficient to defeat coverage. LMI Sup.Br. at p. 16. The trial court did not err. The trial court properly exercised its discretion[34] when it determined a reasonable fee award in the context of LMI's litigation tactics that the trial court personally witnessed for more than five years.

1. The Amount of *OSS* Fees Was Properly Determined

The trial court took an active role in determining the fee award by properly applying the lodestar method after reviewing and considering the Port's fee affidavit, LMI's objections, and the court's own experience throughout the litigation. *Steele v. Lundgren*, 96 Wn.App. 773, 780, 982 P.2d 619 (1999). LMI only raised limited objections below to a small amount of specific fee requests, and the findings of fact in the trial court's order demonstrate how it resolved disputed issues of fact, and the conclusions explained its analysis. CP 23634-7. These findings clearly meet the standard set forth in *Steele.* 96 Wn.App. at 780. Ultimately, the

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[33]LMI also seem to assert that the Port recovered twice for fees related to LMI's discovery misconduct conduct. However, the Port deducted the fees it was previously awarded as reimbursement for the costs it incurred to enforce a deposition notice. CP 23044-5. And, the $25,000 the court awarded because of LMI's failure to comply with the court's order to search for the missing market information was a punitive sanction rather than a reimbursement of the Port's attorney fees. CP 16248, 23635-6.

[34] Appellate courts review a trial court's determination about the reasonableness of fees for abuse of discretion. *Chuong Van Pham v. City of Seattle*, 159 Wn. 2d 527, 538, 151 P.3d 976 (2007).

trial court disallowed $214,037.93 of the Port's requested attorney fees in addition to the $650,000 in attorney fees the Port had already excluded for litigation with co-defendants, claims for past costs, duplication of costs from the mistrial, dismissed policies and bad faith claims. CP 23044.

2. The Port's Fees are Proportional to its Recovery

LMI's argument that the Port should be deprived of attorneys fees because the Port's recovery is small is without merit. First, the amount at stake in this case was significant. The Port established its right to millions of dollars in coverage under policies with indemnity limits totaling approximately $200 million. *See*, Rsp.Br., Appendix A. However, even if the recovery were small, this would not make the fees award unreasonable. The amount of recovery is only one factor in determining reasonableness, and the court "will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small." *Berryman v. Metcalf,* 177 Wn.App. 644, 660, 312 P. 3d 745 (2013), *rev.den.*,179 Wn.2d 1026 (2014). Doing so here would turn *Olympic Steamship* on its head by allowing LMI to escape liability for *OSS* fees by using scorched earth litigation to drive the attorney fees up higher than the amount LMI now characterizes the Port's recovery to be. LMI compelled the Port to suffer five years of vexatious litigation in an attempt to avoid their obligations under their contracts with the Port. LMI's litigation resulted in the significant fee award, not any abuse of discretion by the trial court, and its award should not be disturbed.

D. The Port's Motion Was Timely

CR 54(d)(2) requires a party to bring its attorney fee motion within ten days after a Judgment is entered *unless otherwise provided for by order of the court.* Here, the trial court modified the ten-day requirement, and LMI expressly agreed to that ruling to obtain its requested CR 54(b) ruling. 8/1/2014 RP 26. The Port complied with the trial court's order to file its motion by September 10, 2015. Supp. CP__.[35] LMI did not raise the issue below and LMI's current protests on this issue should be disregarded.

IV. ATTORNEY FEES REQUEST

Pursuant to RAP 18.1, the Port requests its reasonable attorney's fees incurred on appeal to defend the trial court's award of *OSS* fees.

V. CONCLUSION

The trial court's *Olympic Steamship* award and the Supplemental Judgment should be affirmed, and the Port should be awarded its reasonable attorney's fees on appeal.

Respectfully Submitted this 9th day of March, 2016.

THE NADLER LAW GROUP PLLC

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[35]The Port included the order setting the *Olympic Steamship* briefing schedule in its Second Supplemental Designation of Clerk's Papers, filed on March 9, 2016. The Port will update this citation when the index for the additional Clerk's Papers is available.

Foreign Unpublished Authority

MADERA WEST CONDOMINIUM ASSOCIATION, Plaintiff, v. FIRST SPECIALTY INSURANCE CORPORATION, Defendant.

CASE NO. C12-0857-JCC

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2013 U.S. Dist. LEXIS 144045

October 1, 2013, Decided
October 1, 2013, Filed

SUBSEQUENT HISTORY: Related proceeding at, Summary judgment denied by, Costs and fees proceeding at, Motion granted by, Motion denied by *Madera West Condo. Ass'n v. First Specialty Ins. Corp., 2014 U.S. Dist. LEXIS 71457 (W.D. Wash., May 23, 2014)*

PRIOR HISTORY: *Madera West Condo. Ass'n v. First Specialty Ins. Corp., 2013 U.S. Dist. LEXIS 110688 (W.D. Wash., Aug. 6, 2013)*

COUNSEL: [*1] For Madera West Condominium Association, Plaintiff: Adil Aziz Siddiki, Todd K Skoglund, CASEY & SKOGLUND PLLC, SEATTLE, WA; Joseph Andrew Grube, BRENEMAN GRUBE, SEATTLE, WA.

For First Specialty Insurance Corporation, Defendant, Counter Claimant: Karen Southworth Weaver, SOHA & LANG PS, SEATTLE, WA.

For Madera West Condominium Association, Counter Defendant: Adil Aziz Siddiki, Todd K Skoglund, CASEY & SKOGLUND PLLC, SEATTLE, WA.

JUDGES: THE HONORABLE John C. Coughenour, UNITED STATES DISTRICT JUDGE.

OPINION BY: John C. Coughenour

OPINION

ORDER ON MOTIONS FOR SUMMARY JUDGMENT ON DAMAGES

This matter comes before the Court on the parties' cross motions for summary judgment on damages (Dkt. Nos. 66, 70). Having thoroughly considered the parties' briefing and the relevant record, the Court hereby GRANTS IN PART and DENIES IN PART the motions (Dkt. Nos. 66, 70) for the reasons explained herein.

I. BACKGROUND

This is an insurance coverage dispute arising from alleged defects in the construction of condominiums. Plaintiff Madera West Condominium Association ("Association") settled its claims against all of the defendants in the underlying construction defect suit, including non-parties Madera West, LLC, the condominium project's [*2] general contractor, and Steadfast Construction, Inc., a subcontractor. (Dkt. No. 22-18.) Steadfast agreed to entry of a confession of judgment against it in the amount of $516,889. (Dkt. No. 22-18.) The judgment against Steadfast in the underlying suit was approved as reasonable by the presiding state trial court judge. (Dkt. No. 69-2.) Defendant First Specialty Insurance Company ("First Specialty") insured

Steadfast and covered Madera West, LLC as an additional insured. (Dkt. No. 22-4.)

The Court previously ruled that First Specialty breached its duty defend Steadfast. (Dkt. No. 58 at 7-15.) Moreover, the Court ruled that under Washington law the breach was in bad faith and First Specialty was estopped from asserting further coverage defenses. (Dkt. No. 58 at 15-16.) The Court dismissed all of the Association's other claims. (*Id.*)

The issue before the Court on the parties' cross motions for summary judgment is the amount of damages to which the Association may be legally entitled. The parties appear to agree that the confession of judgment against Steadfast is the appropriate measure of damages caused by First Specialty's breach. (Dkt. No. 70 at 3; Dkt. No. 74 at 5); *see also Besel v. Viking Ins. Co. of Wis., 146 Wn.2d 730, 49 P.3d 887, 889 (Wash. 2002)* [*3] (holding that "a settlement approved as reasonable is the proper measure of damage caused by an insurance company's bad faith"). The primary disputes between the parties are whether First Specialty is entitled to an offset for amounts paid to the Association by another Steadfast insurer, the amount of any interest to which the Association is entitled, and whether the Association is entitled to attorney's fees, and if so, the appropriate amount of those fees.

II. DISCUSSION

A. Summary Judgment Standard

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a).* An issue of fact is genuine if there is sufficient evidence for a reasonable jury to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).* At the summary judgment stage, evidence must be viewed in the light most favorable to the nonmoving party, and all justifiable inferences are to be drawn in the nonmovant's favor. *Id. at 255.* The disputes between the parties are legal, not factual, so resolution of the motions on summary judgment is appropriate.

B. Offset

The [*4] Association argues that First Specialty has waived its right to claim any offset for payments made to the Association by other insurers on behalf of either Steadfast or Madera West, LLC. *Federal Rule of Civil Procedure 8(c)* requires that a defendant state any "avoidance or affirmative defense" in its answer to a pleading. As a general rule, defenses not properly raised in a party's responsive pleading are deemed waived. *Morrison v. Mahoney, 399 F.3d 1042, 1046 (9th Cir. 2005)* (citing *Fed. R. Civ. P. 8(c)* and *12(g)*). The Ninth Circuit, however, has "liberalized the requirement that affirmative defenses be raised in a defendant's initial pleading." *Rivera v. Anaya, 726 F.2d 564, 566 (9th Cir. 1984).* The court has said that "absent prejudice to a defendant, the district court has discretion to allow a defendant to plead an affirmative defense in a subsequent motion." *Simmons v. Navajo Cnty., 609 F.3d 1011, 1023 (9th Cir. 2010).* The court has approved district court decisions allowing a defendant to raise an affirmative defense for the first time in a motion for summary judgment where there is no prejudice to the plaintiff. *Rivera, 726 F.2d at 566.*

First Specialty asserted its entitlement [*5] to an offset in its first motion for summary judgment. (Dkt. No. 35 at 17.) The Court has since given both parties the opportunity to file a second round of motions for summary judgment addressing damages. Moreover, the black letter law that a party may not obtain double recovery for the same damages is well established in Washington. *See, e.g., Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 9 P.3d 898 (Wash. Ct. App. 2000)* ("It is a basic principle of damages, both tort and contract, that there shall be no double recovery for the same injury."). The Association argues that if First Specialty had pled offset in its answer, the Association would have gathered and prepared evidence in response. (Dkt. No. 74 at 2.) The Court, however, cannot imagine what "evidence"--beyond the hundreds of pages of documents already filed by the parties in this matter--could be relevant to this issue or outside of the Association's control. The Association was an active participant in the settlement negotiations resulting in the confession of judgment against Steadfast and Madera West, LLC. If there were a witness who had admissible evidence about those negotiations that was relevant to the offset question, the [*6] Association would know about the witness and could have filed a declaration either in support of its own motion for summary judgment on damages or in opposition to First Specialty's motion. Accordingly, the Court concludes that although First

Specialty failed to raise offset in its answer to the Association's complaint, the Association has suffered no prejudice in its ability to respond to the offset claim and the Court will consider it.

An insurer seeking an offset for payments made by another insurer in exchange for a general release bears the burden of proving a double recovery. *Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 15 P.3d 115, 126-27 (Wash. 2000)*. Weyerhaeuser sued its thirty-four different insurers for coverage of property damage at forty-two polluted sites around the country. *Id. at 120*. Commercial Union was the only insurer that did not settle with Weyerhaeuser before trial. *Id.* The Washington Supreme Court concluded that Commercial Union failed to show that Weyerhaeuser had been fully compensated for its liabilities by the settlements with its other insurers and therefore Commercial Union was not entitled to any offset. *Id. at 127*. The court also explained that the [*7] settling insurers had received more than "a simple release of liability at specific sites," they also "purchased certainty by avoiding the risks of an adverse trial outcome-- not to mention forgoing the expenses associated with a risky trial." *Id. at 126*. The court adopted Weyerhaeuser's description of the benefit to the settling insurers as "a release from an unquantifiable basket of risks and considerations." *Id.*

The Association argues that First Specialty is not entitled to any setoff under *Weyerhaeuser* because Steadfast's other insurer (Colony Insurance Company) settled for more than just a release of liability for damages caused by Steadfast's work on the Madera West condos. The Association argues that Colony received a release of all "known, unknown and unquantifiable claims," litigation peace, and a promise from the Association to "defend, indemnify, and hold it harmless for claims by the remaining parties to the underlying suit." (Dkt. No. 22-18 (settlement agreement terms).) Unlike *Weyerhaeuser*, this is not a complex environmental pollution case. It involves straightforward claims for construction defects at a single condominium project. (*See* Dkt. No. 33-16 at 7-12 (Madera West, [*8] LLC's third-party complaint against Steadfast).) There were no potential bad faith claims against Colony, because Colony actively and ably defended its insured. Moreover, the Association has filed a declaration from the attorney Colony hired to represent Steadfast, stating that during negotiations with the Association, the attorney was "resolute" that the consent judgment against Steadfast be limited to the cost to repair those areas of the project on which Steadfast worked. (Dkt. No. 47.)

Despite Colony's $300,000 payment to the Association, the Association argues that it "has not collected a penny to satisfy" the judgment entered against Steadfast. (Dkt. No. 66.) In support, the Association has submitted a declaration from one of its members, Tamara Vera, stating that her understanding was that the confession of judgment entered against Steadfast was "in addition to the other terms and considerations contained in the settlement." (Dkt. No. 68 at ¶ 2.) The Court finds the Association's argument disingenuous at best. Ms. Vera's self-serving statement of her understanding of the settlement terms is presumably based on the advice of the Association's counsel. The Court does not agree [*9] with counsel's legal argument regarding offsets. There were simply no "unknown" or "unquantifiable" claims against Steadfast or Colony from which Colony needed release. First Specialty has carried its burden of showing that Colony's $300,000 payment to the Association was a payment toward Steadfast's liability for damages to the Madera West condos because, logically, it could not have been for anything else. Colony's classification of the $300,000 check as an "indemnity" payment on Steadfast's behalf supports this conclusion. (Dkt. No. 71-1 at 7-8.)

For the foregoing reasons, First Specialty is entitled an offset for the $300,000 payment by Colony and is liable for the $216,889 balance of the confession of judgment entered against Steadfast.

C. Interest

The Association argues that it is entitled to "interest on its judgment against Steadfast," which it argues began to run on the date the confession of judgment against Steadfast was entered in King County Superior Court. (Dkt. No. 66 at 12.) The Association is seeking prejudgment interest (i.e., interest that accrued before the date on which this Court enters judgment). There is no issue of post-judgment interest because the Court has [*10] not yet entered judgment. *See Fed. R. App. P. 37*.

"State pre-judgment interest rules are to be applied in diversity actions." *James B. Lansing Sound, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 801 F.2d 1560, 1569 (9th Cir. 1986)*. Under Washington law, a party is entitled to prejudgment interest where the exact amount due is "liquidated," which means a "claim where the evidence, if believed, makes it possible to compute the

amount due with exactness, without reliance on opinion or discretion." *Weyerhaeuser, 15 P.3d at 132* (citing *Prier v. Refrigeration Eng'g Co., 74 Wn.2d 25, 442 P.2d 621 (Wash. 1968)).* A claim may be liquidated "even though the adversary successfully challenges the amount and succeeds in reducing it." *Id.* When the only question presented to the trier of fact is liability and the award of damages does not involve an exercise of discretion, a claim is liquidated. *Id. at 133.* Moreover, in an insurance coverage dispute, "a settlement made in an underlying civil action represents a liquidated amount and an award of prejudgment interest is appropriate." *Pub. Util. Dist. No. 1 of Klickitat Cnty. v. Int'l Ins. Co., 124 Wn.2d 789, 881 P.2d 1020, 1032 (Wash. 1994).*

Applying these rules, the Association's [*11] claim was liquidated as of the date that the confession of judgment against Steadfast was approved as reasonable. The Association asserted that First Specialty was liable for the entire amount of the confession of judgment, but the Court has significantly reduced that amount based on setoff. Because that result was required by application of relevant legal rules and did not involve any exercise of discretion, the claim was liquidated as of April 12, 2012, when the state trial court entered an order finding the confession of judgment reasonable. (Dkt. No. 33-19).

Under Washington law, "prejudgment interest on liquidated claims ordinarily is a matter of right" but a trial judge has "discretion to disallow such interest during periods of unreasonable delay in completing litigation that is attributable to claimants." *Colonial Imps. v. Carlton Nw., Inc., 83 Wn. App. 229, 921 P.2d 575, 583 (Wash. Ct. App. 1996).* First Specialty argues that the Court should decline to award prejudgment interest because the Association's procedural missteps, including failing to have the confession of judgment properly entered as a judgment, caused unreasonable delay in resolving the litigation. The Court does not agree. The [*12] Association promptly notified First Specialty that the confession of judgment had been entered against Steadfast and found reasonable by the trial court. (Dkt. No. 33-19.) First Specialty did not respond by questioning whether there was in fact a "judgment" against its insured. Instead it asserted that it owed Steadfast no duty to defend based on lack of tender and various coverage defenses.

For the foregoing reasons, the Association is awarded prejudgment interest on $216,889 at the statutory rate of twelve percent per annum from April 12, 2012, to the date of this order. *Wash. Rev. Code § 19.52.020(1).* The Court calculates the total prejudgment interest to be $38,172.46. [1]

1 The Court has used the simple interest formula (I = P x r x t), where P = principle, r = rate and t = time. Using that formula, the Court calculates the monthly interest rate on $216,889.00 to be $2,168.89 and the daily rate to be $72.30.

D. Attorney's Fees

The Association argues that it is entitled to an award of attorney's fees under *Olympic Steamship Company v. Centennial Insurance Company, 117 Wn.2d 37, 811 P.2d 673 (Wash. 1991). Olympic Steamship* held that "an award of fees is required in any legal action where the insurer [*13] compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract." *Id. at 681.*

First Specialty argues that the Association is not entitled to attorney's fees in this matter because Steadfast breached the terms of the insurance policy by failing to provide First Specialty with a copy of the third-party complaint filed against it. First Specialty relies on *Liberty Mutual Insurance Company v. Tripp, 144 Wn.2d 1, 25 P.3d 997 (Wash. 2001).* In *Tripp*, the court concluded that attorney's fees were not available where an insured breached the express terms of an underinsured motorist policy by failing to give the insurer notice of a potential settlement with the at-fault driver. *Id. at 1006.* The court explained that "it was the Tripps' failure to comply with express terms of the insurance contract, not Liberty's conduct, that precipitated this action." *Id.* The court specifically relied on a previously established exception to *Olympic Steamship*; fees are not available "when an insured has undisputedly failed to comply with express coverage terms, and the noncompliance may extinguish the insurer's liability under the policy." *Id.* (quoting [*14] *Pub. Util. Dist. No. 1 of Klickitat Cnty. v. Int'l Ins. Co., 124 Wn.2d 789, 881 P.2d 1020 (1994)).*

The Association is entitled to attorney's fees under *Olympic Steamship.* The exception discussed in *Tripp* does not apply in this case because--as previously discussed at length in the Court's summary judgment order (Dkt. No. 58)--Steadfast's failure to provide First Specialty with a copy of the third-party complaint was the result of First Specialty's unambiguous denial of

Steadfast's prior tender of the claims against it. Steadfast's failure to provide First Specialty with the third-party complaint did not extinguish First Specialty's liability under the policy and it was First Specialty's conduct--not Steadfast's--that precipitated this litigation.

The Association seeks attorney's fees in the amount of $397,061.44. (Dkt. No. 76 at ¶ 7.) First Specialty objects that the Association's fee request is not reasonable and argues that in any event the amount of fees should be determined upon the filing of a separate motion after the Court enters judgment. (Dkt. No. 72 at 8 (citing *Fed. R. Civ. P. 54(d)(2)(B)*). *Federal Rule of Civil Procedure 54(d)(2)(B)* provides that a claim for attorney's fees should be filed within fourteen days after [*15] the Court enters judgment "unless a statute or court order provides otherwise." The Court's prior scheduling order gave the parties notice that it would consider whether an award of attorney's fees was appropriate and if so, the appropriate amount of such an award. (Dkt. No. 63 at 1.) Moreover, the Court has permitted First Specialty to file a supplemental brief setting forth its specific objections to the attorney's fees requested. (Dkt. Nos. 79, 81.)

A party seeking attorney's fees "bears the burden of proving the reasonableness of the fees." *Mahler v. Szucs, 957 P.2d 632, 651 (Wash. 1998), overruled on other grounds by Matsyuk v. State Farm Fire & Cas. Co., 173 Wn.2d 643, 272 P.3d 802 (Wash. 2012).* [2] In determining a reasonable fee, courts should be guided by the lodestar amount, which is calculated by multiplying a reasonable hourly rate by the number of hours reasonably expended on the litigation. *McGreevy v. Or. Mut. Ins. Co., 90 Wn. App. 283, 951 P.2d 798, 802 (Wash. Ct. App. 1998).*

2 First Specialty cites federal authority regarding award of attorney's fees. (Dkt. No. 81 at 2.) The Court applies Washington law to determine the amount of fees because Washington law dictates whether fees are available in this [*16] case. As First Specialty concedes, the state and federal rules for determining the reasonableness of a fee award are essentially the same.

1. Reasonable Hourly Rate

The Association is represented by the law firm of Casey & Skoglund. It seeks compensation for work done by partners Todd Skoglund and Chris Casey at a rate of $365 per hour. (Dkt. No. 76 at ¶ 6.) The Association seeks compensation for work performed by associate Adil Siddiki at the rate of $300 per hour. (Dkt. No. 69 at ¶¶ 8, 11.) It seeks compensation for work performed by paralegal Sarah Noble at the rate of $135 per hour. (Dkt. No. 69 at ¶¶ 9, 11.) The Association argues that the complexities of the case necessitated association with Joseph Grube, a partner at Breneman & Grube (Dkt. No. 69 at ¶ 6), and with John Petrie, a partner at Ryan Swanson & Cleveland (Dkt. No. 69 at ¶ 10). The Association seeks compensation for Mr. Grube's work at the rate of $365 per hour (Dkt. No. 69 at ¶ 11) and for Mr. Petrie's work at the rate of $380 per hour. Finally, it seeks compensation for the work of Teru Olsen, an associate at Ryan Swanson & Cleveland, at the rate of $275 per hour (Dkt. No. 67 at ¶¶ 5-6).

If the attorney seeking fees [*17] has "an established rate for billing clients, that rate will likely be a reasonable rate." *Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 675 P.2d 193, 203 (Wash. 1983).* Courts may also consider a contingent fee agreement as a factor in making a fee award. *Allard v. First Interstate Bank of Wash., N.A., 112 Wn.2d 145, 768 P.2d 998, 1000 (Wash. 1989).* The contingent nature of a fee agreement may justify an increase in the reasonable hourly rate because the attorney risks receiving no compensation at all. *McGreevy, 951 P.2d at 803.* But, it is not appropriate to adjust the lodestar amount to reflect the contingent nature of a fee arrangement if the hourly rate sought already accounts for the risk undertaken by counsel working under a contingent fee agreement. *Id.* The court may also consider the "experience, reputation, and ability of the lawyer or lawyers performing the services" when setting a reasonable hourly rate. *Mahler, 957 P.2d at 651 n.20.*

The Association entered into a "contingent hourly agreement" with Casey & Skoglund, under which the work of partners is billed at $365 per hour, the work of associates is billed at $300 per hour, and the work of paralegals is billed at $135 per hour. (Dkt. No. 69 at [*18] ¶ 11.) The Association's willingness to agree to compensation at an hourly rate that it would never become responsible for paying, however, is of little aid in determining the reasonableness of the rates requested. [3] Counsel's declaration states that the fees requested are at the high end of the rates that Casey & Skoglund typically charges for its legal services. (Dkt. No. 69 at ¶ 17.)

3 In a typical contingency fee arrangement, the client agrees that counsel will receive a percentage of the client's ultimate recovery.

First Specialty challenges the rates requested for attorneys Skoglund, Casey, Grube and Siddiki on the grounds that that its own attorney charges far less, $200 per hour. (Dkt. No. 71 at 9 n.4.) In addition, First Specialty's counsel declares that her practice has focused on insurance coverage since 1983, that she is a founding shareholder of the insurance defense firm Soha & Lang, that she has taught the Insurance Law course at the University of Washington School of Law since 1993, and that she is active in the local insurance coverage bar. (Dkt. No. 82 at ¶ 2.) She asserts that she has never seen attorneys Casey or Grube appear as counsel in an insurance coverage matter. [*19] (*Id.* at ¶ 3.) She asserts that attorneys Skoglund and Siddiki practice primarily in the field of construction defect litigation, not in the field of insurance coverage. (*Id.*) First Specialty also points to procedural missteps by the Association's counsel as evidence of their lack of experience in the insurance coverage arena. (Dkt. No. 82 at ¶ 4.) First Specialty did not provide evidence that the rates requested by the Association are inconsistent with the prevailing market rates for contingent fee work by plaintiffs' attorneys in insurance coverage disputes.

The Court concludes that high-end rates are justified by the contingent nature of counsel's fee arrangement with the Association. No further upward adjustments will be awarded on that basis. *McGreevy, 951 P.2d at 803.* Nonetheless, based on the declarations of all counsel filed in this matter, as well as the Court's familiarity with hourly rates regularly charged in the Seattle area, the Court concludes that the hourly rates requested should be reduced. The Court concludes that a reasonably hourly rate for attorneys Skoglund, Casey, and Grube is $325 per hour and for attorney Siddiki is $270 per hour. Because First Specialty does [*20] not request any reduction in the hourly rates claimed by the attorneys at Ryan Swanson & Cleveland, they will be compensated at the requested hourly rates.

2. Hours Reasonably Expended

The attorneys seeking fees must provide "reasonable documentation of the work performed" in order to allow the court to assess whether the number of hours expended was reasonable. *McGreevy, 951 P.2d at 803.* The court will "exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims." *Mahler, 957 P.2d at 651.* First Specialty argues that much of the time expended by the Association's counsel was unreasonable.

The Association seeks compensation for over 1,000 hours of attorney time expended by the law firm of Casey & Skoglund and attorney Joseph Grube in this case. (Dkt. No. 76 at 2.) The Association also seeks compensation for over 200 hours of paralegal time. (*Id.*) In addition, the Association seeks compensation for over fifty hours of time by an outside attorney hired to advise Casey & Skoglund on insurance issues. The case involved limited discovery and all issues of liability were resolved on cross motions for summary judgment. As a result, [*21] the hours expended are not reasonable.

First Specialty challenges 15.37 hours expended on the Association's unsuccessful motion to amend its complaint. *See Mahler, 957 P.2d at 651* (time spent on unsuccessful claims not compensable.) The Association concedes that time expended on the unsuccessful motion should not be compensated. (Dkt. No. 69 at ¶ 13.) The challenged hours appear to have been erroneously included in the fee request. Even if they were not, the Court concludes that a reduction for these hours is appropriate. Accordingly, 3.69 hours will be deducted from Mr. Siddiki's time entries and 10.51 hours [4] will be deducted from Mr. Skoglund's time entries. For the same reason, the Court reduces the time entries of Mr. Siddiki by 17.02 hours [5] and the entries of Mr. Skoglund by 2.35 hours, for time spent on unsuccessful claims under the Insurance Fair Conduct Act and Washington Consumer Protection Act. (Dkt. No. 82-1 at 9.) The Court also deducts fees requested for work opposing First Specialty's request for a setoff. Accordingly, Mr. Grube's time entries are reduced by 5.10 hours, Mr. Siddiki's entries are reduced by 1.00 hour and Mr. Skoglund's entries are reduced by 6.5 hours. [*22] (Dkt. No. 69-3 at 3, 30, 39-40.)

4 The Court has not reduced Mr. Skoglund's time by the 1.17 hours expended on March 18, 2013, as request by First Specialty. (Dkt. No. 82-1 at 13.) That time appears to have been spent on the Association's motion for summary judgment.

5 This includes a reduction of 8 hours expended on June 10, 2013. (Dkt. No. 82-1 at 9.) That time is also listed on First Specialty's list of total time spent on the Association's motion for summary judgment (Dkt. No. 82-1 at 11), but the Court has not considered it further in discussing the time spent on the summary judgment motion.

First Specialty challenges 60.05 hours expended on reasonableness motions filed in the underlying construction defect suit. (Dkt. Nos. 81 at 7, 82-1 at 7.) The Court agrees that the reasonableness motions were not part of the coverage suit before this Court and should not be charged to First Specialty. Moreover, it appears that much of Mr. Siddiki's time was spent on a reasonableness motion pertaining to the confession of judgment against Madera West, LLC, which has no relevance to this case. (*See* Dkt. No. 69-3 at 27 (entries dated February 13, 2012 to March 15, 2012)). Accordingly, 47.04 hours [*23] will be deducted from Mr. Siddiki's time entries and 13.01 hours will be deducted from Mr. Skoglund's time entries.

The Court next turns to the hours expended on the motions for summary judgment on liability (Dkt. Nos. 31, 35). By the Court's conservative estimate, the Association seeks compensation for over 220 hours of time expended by four attorneys on those motions. The Court recognizes that the motions and supporting documents were voluminous, but that level of billing is simply beyond anything for which an attorney could reasonably charge a client for a motion involving relatively straightforward issues of insurance coverage. In light of the fact that the Court is permitting high-end rates for the work of partners on this matter, the Court concludes that having three partners (and an associate) working on drafting and reviewing the motions for summary judgment was excessive. Moreover, Mr. Casey's time entries reflect an initial determination that Mr. Skoglund would "take lead" on the case. (Dkt. No. 69-3 at 1 (entry dated April 27, 2012).) Accordingly, the Court deducts all the time spent by Mr. Casey on the motions for summary judgment from the fee award. This results in a reduction [*24] of 40.68 hours from Mr. Casey's time entries. The Court finds that a further reduction of the time spent by Mr. Skoglund, Mr. Grube, and Mr. Siddiki by twenty-five percent is appropriate based on the number of claims on which the Association was not successful. Accordingly, the time entries of Mr. Siddiki are reduced by 16.10 hours, the entries of Mr. Skoglund are reduced by 29.44 hours, and the entries of Mr. Grube are reduced by 12.33 hours.

After the reductions discussed above, the Association requests fees for at least 600 hours of attorney time, none of which were expended on the summary judgment motions filed in the case. The Court has difficulty imagining that all of those hours were necessary, particularly in light of the fact that only one deposition was taken in this case. In many cases, counsel's time records are too vague to allow the Court to determine whether specific time was reasonably necessary. Additionally, some time entries concern the Court. For example, Mr. Grube, Mr. Siddiki, Mr. Skoglund and Mr. Petrie spent at least 5.1 hours "reviewing" First Specialty's motion for reconsideration. (Dkt. No. 69-3 at 3, 30, 38; Dkt. No. 67 at 5.) The motion was ten pages long, [*25] the Association was not permitted to respond to it except at the Court's request, *see Local Civil Rule 7(h)*, and the Court denied it less than forty-eight hours after it was filed. Similarly, Mr. Skoglund billed .17 hours (10.2 minutes) for sending a text message. (Dkt. No. 69.3 at 37 (time entry dated August 14, 2013).) For these reasons, the Court further reduces the hours requested by Mr. Skoglund, Mr. Siddiki, and Mr. Grube by twenty percent.

Next the Court turns to the time billed by attorneys at the firm of Ryan Swanson & Cleveland. The time expended by associate Teru Olsen was for research on a claim on which the Association did not prevail and will not be compensated. The Court further finds that First Specialty's objections to the billing records submitted by Mr. Petrie are justified and reduces his hours as requested, with an additional reduction of two hours for time spent researching the offset issue. (Dkt. Nos. 81 at 6, 82 at 3, 82-1 at 2-5.)

Finally, [*26] the Court agrees with First Specialty that approximately 47.04 hours of time expended by paralegal Sarah Noble was for purely clerical functions, which cannot be billed at paralegal rates, and reduces the requested fees accordingly.

Summary of Fee Award

Professional	Reasonable Hourly Rate	Hours Requested	Reduction in Hours	Hours Reasonably Expended	Total Fees
Todd Skoglund	$325	530.24	155.50	374.74	$121,790.50

Chris Casey	$325	75.37	40.68	34.69	$11,274.25
Joseph Grube	$325	132.30	40.40	91.90	$29,867.50
Adil Siddiki	$270	264.47	120.77	143.70	$38,799.00
John Petrie	$380	50.80	21.90	28.90	$10,982.00
Teru Olsen	$275	2.80	2.80	0	$0
Sarah Noble	$135	207.04	47.04	160	$21,600.00
TOTAL FEES:					$234,313.25

E. Costs

The Association seeks $10,268.81 in costs. First Specialty is correct that a bill of costs should be submitted to the Clerk after judgment is entered. *Fed. R. Civ. P. 54(d)*; Local Rules W.D. Wash. 54(d). The Association should submit a bill of costs as provided by the local rule. Any motion directed to the Court under *Local Civil Rule 54(d)* for excess costs that are not permitted by statute will be carefully scrutinized. No further requests for attorneys' fees based on disputes over costs will be entertained.

III. CONCLUSION

For the foregoing [*27] reasons, the parties' cross motions for summary judgment regarding damages (Dkt. Nos. 66, 70) are GRANTED IN PART and DENIED IN PART. The Court will enter judgment in favor of the Association and against First Specialty in the amount of $489,374.71.

DATED this 1st day of October 2013.

/s/ John C. Coughenour

John C. Coughenour

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that I arranged for the originals of the preceding Port of Longview's Supplemental Response Brief to be electronically filed in Division II of the Court of Appeals at the following address:

Court of Appeals of Washington, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

And that I arranged for a copy of the preceding Port of Longview's Supplemental Response Brief to be served on Appellant at the address below, by U.S. Mail:

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Charles E. Albertson
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Seattle, WA 98164

Philip A. Talmadge
Sidney Tribe
Talmadge/Fitzpatrick
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Signed this 9th day of March, 2016 in Seattle, WA.

Alex Beaulieu

NADLER LAW GROUP PLLC

March 09, 2016 - 4:13 PM

Transmittal Letter

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