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Court of Appeals No. 40231-9-II

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

COMMUNITY ASSOCIATION UNDERWRITERS OF AMERICA,
INC. ("CAU")

a/s/o Harbour Commons, A Condominium

Appellant,

v.

HAROLD E. KALLES and DEBORAH L.

KALLES, husband and wife, DEREK KALLES and "JANE DOE"
KALLES (if married); and MICHAEL QUINN and "JANE DOE"
QUINN, (if married); and LEASE POLICE, INC., a Washington
corporation,

Respondents.

**BRIEF OF APPELLANTS, COMMUNITY ASSOCIATION
UNDERWRITERS OF AMERICA, INC. ("CAU") A/S/O
HARBOUR COMMONS, A CONDOMINIUM**

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INTRODUCTION

The underlying subrogation action arises out of a fire that occurred on January 15, 2009, at the Harbour Commons Condominium located at 7512 Stanich Avenue, Gig Harbour, Washington. The fire originated in Unit F, which was leased to Harold Kalles, Derek Kalles and Michael Quinn (hereinafter collectively "Lease Police") by Paul and Kathy Elkins (hereinafter the "Elkinses"), the unit owners. Community Association of Underwriters of America, Inc. (hereinafter "CAU") insured the Harbour Commons Condominium Association (hereinafter "Association"). CAU alleges that the fire was caused by the negligence of Lease Police and/or its employees who placed combustible materials in close proximity to a portable space heater. As a result, a fire erupted causing substantial property damage. CAU paid its insured, the Association, for the damages sustained and is now subrogated to the Association's claims against Lease Police.

CAU seeks reversal of two rulings issued by the Washington Superior Court. First, CAU seeks reversal of the Superior Court's ruling that granted Lease Police's Motion for Summary Judgment dismissing CAU's claims on the incorrect basis that Lease Police was an "implied co-insured" under CAU's insured's insurance policy. The effect of this ruling was that CAU's subrogation claim against Lease Police was barred.

Under Washington law, although the “implied co-insured” status has been applied in landlord-tenant relationships – resulting in barring subrogation by the landlord’s insurer against a negligent tenant – it has not been held to bar subrogation by the insurer of a condominium association against a negligent tenant of a unit owner. Here, the status of a co-insured should not be extended to remote third parties such as tenants of unit owners of condominium associations; to do so is inequitable. Thus, CAU respectfully requests that this Honorable Court reverse the Superior Court’s Order granting Lease Police’s Motion for Summary Judgment, and remand the matter for further proceedings consistent with a fair interpretation of applicable law, i.e. that a condominium’s insurer can subrogate against a unit owner’s tenant. Alternatively, CAU respectfully requests that this Honorable Court reverse the Superior Court’s Order granting Lease Police’s Motion for Summary Judgment, and remand the matter for discovery on the pertinent issues of, *inter alia*, the association’s ability to obtain insurance that waived subrogation against tenants, and the tenant’s reasonable expectations as to whether it would indeed be a co-insured on the association’s policy.

Second, CAU seeks reversal of the Washington Superior Court’s Order granting Lease Police’s request for attorney fees. CAU has found no case law that extends the application of *Olympic Steamship* fees

specifically to the facts presented in this matter. By deviating from the general rule and awarding Lease Police attorney fees, the Superior Court effectively created an inequitable outcome, contrary to the equitable principles identified in *Olympic Steamship* and its progeny. Accordingly, CAU respectfully requests that this Honorable Court reverse that Order, and order disgorgement of the funds paid pursuant thereto (with interest).

ASSIGNMENTS OF ERROR

1. The Washington Superior Court erred in granting Lease Police's Motion for Summary Judgment and ruling as a matter of law that Lease Police was an implied co-insured under the Association's insurance policy with CAU, thereby barring CAU's subrogation claim. CP 200-201.

2. The Washington Superior Court erred in granting Lease Police's Motion for Attorney Fees and ruling as a matter of law that Lease Police was entitled to attorney fees pursuant to *Olympic Steamship*. CP 255-256.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the Washington Superior Court err in ruling as a matter of law that CAU did not have a valid right of subrogation?

2. Did the Washington Superior Court err in ruling as matter of law that Lease Police was an implied co-insured under CAU's insured's fire insurance policy?

3. Is reversal and remand required, where there is no evidence that establishes that Lease Police had a reasonable expectation that Lease Police would be covered under CAU's insured's insurance policy?

4. Did the Washington Superior Court err in awarding Lease Police attorney fees pursuant to *Olympic Steamship*, where the equitable factors set forth in *Olympic Steamship* and its progeny are not present?

STATEMENT OF THE CASE

A. BACKGROUND

1. INTRODUCTION

The underlying action arises out of a fire that occurred on January 15, 2009, at the Harbour Commons Condominium located at 7512 Stanich Avenue, Gig Harbour, Washington. The fire originated in Unit F, which was owned by the Elkinses and leased to Lease Police. As a result of the fire, substantial damage was caused to units E and F, including the common areas, rendering them uninhabitable. The Gig Harbor Fire Department responded to the scene and investigated the cause of this fire. According to the Gig Harbor Incident Investigation Report, “based on all the evidence available it appears the most likely source of ignition was a portable space heater located under the desk in the reception area.” CP 25-29. The Pierce County Fire Department also investigated the fire and determined that “the most probable ignition source was the portable heater.” CP 31-37. Moreover, CAU’s independent investigation revealed that this fire occurred when combustibles were placed too close to (or otherwise came in contact with) a portable space heater located under Lease Police’s employee’s desk, which had been left on overnight.

2. PARTIES

Appellant, Community Association of Underwriters of America, Inc. (“CAU”), insured the Harbour Commons Condominium Association under a policy that was in full force and effect at the time of the fire. Pursuant to the terms of the insurance policy, CAU was required to reimburse its insured, the Association, for the property damage sustained in incidents such as the fire. CAU, pursuant to the doctrine of subrogation, commenced this action against Lease Police to recover the money paid to its insured.

Respondent, Lease Police, was the tenant of Unit F, where the fire originated. Lease Police leased Unit F from the Elkinse, which relationship was memorialized in the commercial lease agreement discussed below. The Elkinse are not parties to this action.

3. PROCEDURAL HISTORY

On or about September 25, 2009, CAU, as subrogee of the Association, commenced this action to recover the money it paid to its insured as a result of this loss. CP 1-4. As set forth in its Complaint, CAU alleged that Lease Police and/or Lease Police’s employees were negligent in placing combustible materials in close proximity to an activated portable space heater, which caused a fire to ignite. CP 2. Prior to the exchange of any written discovery or completion of depositions,

Lease Police on or about November 6, 2009, filed a motion for summary judgment arguing that it was an implied co-insured under the Association's fire insurance policy; thus barring CAU's subrogation action. CP 5-15. On or about December 7, 2009, CAU filed its opposition arguing that Lease Police was not an implied co-insured under the Association's policy and that CAU had a valid right of subrogation. CP 90-98. Thereafter, Lease Police filed a reply brief. CP 194-199. On or about December 18, 2009, the Superior Court heard oral argument and granted on Lease Police's motion, therein dismissing all of CAU's claims. CP 200-201. Thereafter, on January 13, 2010, CAU filed its Notice of Appeal. CP 202-205.

After the Superior Court granted Lease Police's motion for summary judgment, Lease Police filed a motion seeking attorney fees on or about January 26, 2010. CP 206-214. On or about February 3, 2010, CAU filed a response in opposition arguing, among other things, that the extension of fees, pursuant to the standards set forth in the *Olympic Steamship* case, would be inequitable. CP 240-248. On or about February 5, 2010, the Superior Court heard oral argument on, and subsequently granted, Lease Police's motion, awarding Lease Police attorney fees in the amount of \$9,433.50. CP 255-256. Thereafter, on our about February 12,

2010, CAU filed an Amended Notice of Appeal identifying its intention to appeal the award of attorney fees.

B. THE HARBOUR COMMONS CONDOMINIUM ASSOCIATION

The Harbour Commons Condominium was created in 1986. It is a seven-unit condominium building located in Gig Harbor, Washington. The Declaration and Covenants, Conditions, Restrictions and Reservations (hereinafter “Declaration”) recorded on July 2, 1986, is the operable document creating and controlling the condominium and sets forth the rules and regulations governing the Owners’ Association and the management of the condominium. The Declaration includes the articles of incorporation, bylaws and rules governing the condominium.

C. THE LEASE AGREEMENT

On or about November 30, 2007, the Elkinses entered into a commercial lease agreement with Lease Police for the property located at 7512 Stanich Avenue, #5 (Unit F), Gig Harbour, Washington (hereinafter “subject property”). CP 19-23. The execution of the lease coincided with the stock purchase of Lease Police, Inc., sold to Lease Police by the Elkinses; this was memorialized by an agreement entitled “Lease Police, Inc. Stock Purchase Agreement. CP 19 at ¶4. The lease was for a ten-year period commencing on December 1, 2007, continuing until November 31, 2017. CP 19 at ¶3. Importantly, CAU’s insured, the Harbour Commons

Condominium Association, was not a party to the lease agreement and had no input into the terms and/or conditions in the lease.

ARGUMENT

A STANDARDS OF REVIEW

1. Summary Judgment

This Court reviews “summary judgment order[s] *de novo*, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *King v. Rice*, 146 Wn. App. 662, 668, 191 P.3d 946 (2008), *rev. denied*, 165 Wn.2d 1049 (2009). Summary judgment is proper only where there is no “genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Shields v. Enter. Leasing Co.*, 139 Wn. App. 664, 670, 161 P.3d 1068 (2007); CR 56. The evidence must be such that “reasonable minds could reach but one conclusion.” *Shields*, 139 Wn. App. at 670.

2. Award of Attorney Fees

This Court reviews an award of attorney fees *de novo*. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App 120, 126-27, 857 P.2d 1053 (1993). Under Washington law, a Court has no authority to award attorney fees to a party in the absence of contract, statute, or recognized ground of equity permitting fee recovery. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277,

280, 876 P.2d 896 (1994). In a narrow exception to this rule, the Washington State Supreme Court held that an insured may recover reasonable attorney fees where the insurer, by denying coverage, “compels the insured to [take] legal action, to obtain the full benefit of his insurance contract, regardless of whether the insurer’s duty to defend is at issue.” *Olympic Steamship Co. v. Centennial Insurance Company*, 117 Wn.2d 37, 811 P.2d 673 (1991). However, to the extent that Lease Police’s summary judgment motion should not have been granted in the first place, factual scenarios as presented in this case should not be governed by the rules of *Olympic Steamship*. Alternatively, even if this Honorable Court determines that the summary judgment motion should have been granted, CAU’s pursuit of subrogation against Lease Police, and opposition to Lease Police’s summary judgment, should not result in the grant of fees in that CAU’s actions in both regards were fair and reasonable under the applicable case law at the time.

B. CAU has a valid right of subrogation in the instant case because Lease Police is not an implied co-insured under the Association’s insurance policy.

Subrogation is an equitable doctrine, the purpose of which is to provide for a proper allocation of payment responsibility. *Maher v. Szucs*, 135 Wn.2d. 398, 411, 957 P.2d 632 (1998). It seeks to impose ultimate responsibility for a wrong or loss on the party who, in equity and good

conscience, should bear it. *Id.* Subrogation is founded on the equitable powers of the Court and is intended to provide relief against loss and damage to a meritorious creditor who has paid the debt of another. In the usual context, subrogation allows an insurer to recover what it has paid its insured under a policy by suing the wrongdoer. *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr.*, 119 Wn.2d 334, 341, 831 P.2d 724 (1992) (citing *General Ins. Co. of Am. v. Stoddard Wendle Ford Motors*, 67 Wn.2d 973, 976, 410 P.2d 904 (1966)); see also *Johnny's Seafood Co. v. City of Tacoma*, 73 Wn. App. 415, 869 P.2d 1097, 1101 (1994) (“subrogation allows insurer to recover that it ‘has paid’ its insured.”).

It is well settled law that “[s]ubrogation is always liberally allowed in the interests of justice and equity.” *J.D. O’Malley & Co. v. Lewis*, 179 Wash. 194, 201, 28 P.2d 283 (1934). Subrogation has two features: the right to reimbursement and the mechanism for the enforcement of that right. The right to reimbursement may arise by operation of law, termed “legal” or “equitable” subrogation, or by contract, called “conventional” subrogation. *Maher*, 135 Wn.2d at 412, 957 P.2d 632 (1998).

Here, CAU’s right of subrogation arises from the insurance policy it issued to the Association. CAU alleges that the actions of Lease Police and/or its employees in placing combustible materials in close proximity

to a portable heater caused the subject fire, resulting in CAU's damages. As such, subrogation is applicable against Lease Police.

The next step is to determine whether CAU's right to subrogation is limited. The right to subrogation can be limited by contract or law. Under Washington law, an insurer may not subrogate against its own insured. *Mahler, supra*, 135 Wn.2d 398, 407, 957 P.2d 632, (1998). In other words, "[n]o right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty." *Id.* This principle is recognized as an "anti-subrogation rule."

Though there are no cases directly on point addressing the situation presented in this case, CAU (and its insured, the Association) owed no duty to Lease Police. In their motion for summary judgment, Lease Police relied solely on *Cascade Trailer Court v. Besson*, 50 Wn. App. 678, 749 P.2d 761 (1998), which addressed the issue of a lessor (i.e., landlord – in this case, the Elkinses) seeking to recover from its lessees (i.e., tenants – in this case, Respondents). In *Cascade*, the tenant negligently left a pan of grease unattended on an electric stove, causing a fire that destroyed landlord's property. *Id.* at 679. The insurer of the landlord/lessor sought to subrogate against the tenant/lessee for the damages paid as a result of

the fire. *Id.* The primary issue was whether landlord's/lessor's insurer could subrogate against the tenant/lessee. *Id.* at 679. The landlord's insurer and tenant both moved for summary judgment. The *Cascade* Court granted summary judgment in favor of the tenant, ruling that it "will adopt a rule that in a residential landlord/tenant situation, absent an express agreement to the contrary, a lessor's insurer cannot be surrogated to any rights against a tenant for negligently causing a fire." *Id.* at 680. The landlord appealed. On appeal, the appellate court affirmed the holding of the superior court. The Court reasoned that:

[w]hether rent covers all of the landlord's expenses, including insurance premiums, is not the critical question. Rather, the issue concerns the parties' reasonable expectations...

Cascade, 50 Wn. App. at 686 [emphasis added].

The instant case differs from the situation addressed in *Cascade* in several respects. First, *Cascade* involved a residential lease, not – as here – a commercial lease. Second, CAU's insured was not a lessor/landlord, and not a contracting party to the lease agreement between the Elkinses and Lease Police. Third, the *Cascade* court's rationale did not extend the applicability of the "reasonable expectations" test to the insurer of a third party (i.e. the Association); rather, employed it only in the specific relationship of a landlord and tenant. Hence, though *Cascade* may

preclude a landlord's insurer from subrogating against the landlord's tenant, it does not preclude subrogation by a third-party's insurer against that tenant. In extending the rule in *Cascade* to include CAU's subrogation interest here, the Superior Court unduly stretched the *Cascade* rule beyond the bounds of its "landlord vis-à-vis tenant" rationale. Thus, because the facts of *Cascade* are distinguishable from the case at bar, the rationale that supported the *Cascade* rule is not present. Accordingly, it was improper for the Superior Court to extend the holding in *Cascade* beyond landlords to condominium associations.

Further, any reliance on various provisions of the Declaration for the proposition that the Association was responsible for obtaining insurance on the building for the benefit of the unit owners *and tenants* is misplaced. The Declaration provides that "the Board ... shall acquire and pay for out of the common expense fund ... policies of insurance or bonds providing coverage for fire and other hazard, liability for personal injury and property damage." CP 54 (*Article X, Section 3(b)*). The mere fact that the Association was required to purchase insurance for the Condominium is not evident that it intended – or expected – to provide coverage for any unit owner's tenants, nor does it remotely give rise to such an expectation on the part of a tenant (who probably would not even know of the provision anyway). Moreover, the Declaration further

provides that “each owner may obtain additional insurance respecting his condominium unit ... at his own expense...” CP 66-67 (*Article XII, Section 2*). Regardless of whether the Association obtained insurance for the building, there is no evidence that the insurance coverage existed to the benefit of a tenant.

Next, any contention that the Declaration required the Association to obtain a waiver of subrogation in the insurance policy – at least with respect to tenants – is also misplaced. The Declaration provides:

4. Additional Policy Provisions: **To the extent deemed practicable and desirable by the Board, after consultation with the Association’s insurance broker, agent or carrier,** the insurance policy or policies required under Section 1 of this Article shall:

d. Contain a waiver by the insurer of any right of the Board, and the Association, or either against the owner or lessee of any condominium unit.

CP 68 (*Article XIII, Section 4*) [emphasis added]

Such an argument ignores the conditional provision “to the extent deemed practicable and desirable by the Board.” Thus, this waiver was explicitly optional, and by no means a pre-requisite, nor a requirement. What’s more, obtaining such a waiver was apparently not deemed “practical and desirable” because there is no language in the policy waiving subrogation claims against the unit owners’ tenants. Lease Police offers no evidence that the Association’s insurance policy contained an

anti-subrogation provision with respect to tenants or unit owners, nor even that obtaining such a waiver was ever considered, let alone sought.

Finally, no such evidence can be provided, as the Superior Court dismissed CAU's case before any discovery could have been pursued on these issues. Thus, when viewed many different ways, the point is well made: There is no language in the policy waiving subrogation claims against the unit owners' tenants. Moreover, not even the unit owner is an "insured" under CAU's insurance policy. Only the Association itself is the insured. In fact, this has been expressed by CAU to the unit owner in correspondence related to the unit owner's damages arising from this suit. CP 187-193. Accordingly, the unit owner is not an insured under CAU's policy; therefore, Lease Police is not an insured under the policy.

Importantly, as addressed above in the discussion of the *Cascade* case, though jurisprudence exists amounting to an anti-subrogation rule barring subrogation claims between landlords and tenants (commonly known as the "Sutton Doctrine"), there exists no such body of law barring claims by community associations against unit owners' tenants. CAU in this matter is the insurer of the Association; it thereby steps into the shoes of the Association when pursuing subrogation. Since no anti-subrogation rule precludes CAU from subrogating against a negligent tenant, the

Superior Court erred in granting Lease Police's motion and dismissing CAU's claims.

Before the Superior Court Lease Police relied on various provisions of the lease agreement for the proposition that the lease contemplates that Lease Police would be covered by the Association's insurance policy. However, it bears restating in this context that CAU's insured was not a party to the lease agreement; therefore no privity exists between the Lease Police and CAU's insured. Here, CAU provided insurance to the Association, the owner of the entire buildings and common areas; however, Lease Police does not have a contractual relationship with CAU's insured. Lease Police's only relationship is with the Elkinses – as the owners of Unit F, they are members of the Association. Lease Police (i.e. tenants) and the Elkinses (i.e. landlords) are in privity of contract and privity of estate with one another; however, the Association is not the landlord/lessor, nor really anything vis-à-vis Lease Police. Lease Police, in other words, did not bargain for the benefit of fire insurance coverage with CAU's insured, and offers no basis for the apparent bald assertion that it expected to have it. Indeed, Lease Police's actions in obtaining insurance of its own strongly suggests that it had no such expectation, i.e. of enjoying insurance obtained by the Elkinses, nor certainly the Association of which the Elkinses were members

Although it is clear there is no privity between Lease Police and CAU (or CAU's insured – the Association) in its motion for summary judgment Lease Police cited to various provisions in the lease, which CAU will address here:

First, it is anticipated that Lease Police will argue the lease only requires it to purchase general liability insurance, not separate fire insurance. This is irrelevant as it pertains to CAU because the reasonable expectations, confusions or misunderstandings between the Elkinses (as landlord/lessor) and Lease Police (as tenants/lessees) as to fire insurance coverage should not be assigned to CAU.

Second, it is anticipated Lease Police will point to the provisions in the lease that prohibit the Lease Police from doing anything on the premises which will increase the rate of fire insurance on the building, maintain the premises and “commit no waste,” and comply with the Association's rules and regulations. CP 20 at ¶¶14, 17 and 21. These provisions cannot be fairly interpreted as evidence that the Association's fire insurance was for the benefit of tenants. They merely pertain to and/or regulate Lease Police's conduct within the Elkinses' unit, and only secondarily within the larger condominium community.

Third, it is anticipated that Lease Police will argue that the lease required it to pay to the Elkinses “the amount equal to the HOA

['Homeowners Association'].” Importantly, Lease Police was required to make this payment to the Elkinses, not the Association. There is no evidence that the Elkinses took the payments made by Lease Police and assigned the monies to the Association. Moreover, the HOA dues do not pertain solely to insurance, but also for other goods and services for the proper functioning of a condominium, including: water, sewage, garbage collection, electrical, telephone, gas and other utility services as required for the common areas, services of persons or firms as required to properly manage the affairs of the condominium, legal and accounting services, painting, maintenance, repair and all landscaping and gardening work for the common areas, furnishings and equipment for the common areas, structural alterations, taxes and assessments. CP 54-55 (*Article X, Section 3(a)-(g)*). Regardless, according to the *Cascade* court “[w]hether rent covers all of the landlord’s expenses, including insurance premiums, is not the critical question....” *Cascade*, 50 Wn. App. at 686.

Finally, it is anticipated that Lease Police will point to the surrender clause of the lease and argue that fire damage was “excepted.”

The lease provides:

Not later than the last date of the term Lessee shall, at Lessee’s expense, removal all of Lessee’s personal property and those improvements made by Lessee which have not become the property of the Lessor, including trade fixture, movable paneling, partitions and the like; repair all injury

done by or in connection with the installation or removal of the property at the beginning of the terms, **reasonable wear and damage by fire, the elements, casualty, or other cause not due to the misuse or neglect by Lessee or Lessee's agents, servants, visitors, servants or licensees, excepted.**

CP 20 at ¶15. [emphasis added]

Here, the surrender clause expressly does not except fire or other casualty damage “due to the misuse or neglect by lessee or lessee’s agents, servants, visitors, servants or licensees.” *Id.* In the underlying action, CAU alleges the loss was caused by negligence in the misuse of a portable space heater. The surrender clause does not relieve Lease Police from their own negligence. Instead the clause implies that Lease Police would be liable if damages were due to Lease Police’s misuse or neglect in the premises. Accordingly, placing a portable space heater too close to combustible materials would constitute misuse and neglect.

None of the provisions cited above, nor any other provision in the lease, can be interpreted that the Association’s fire insurance policy would benefit a unit owners’ tenant. In other words, the Elkinses and Lease Police negotiated the terms of the lease, which does not bind the Association, as neither party has the power to do so. Therefore, it is disputed that the Association could possibly have even been aware that Lease Police was entirely dependant upon fire insurance being provided

by the Association – as claimed by Lease Police – and certainly it is disputed that any such dependency was reasonable.

C. Even applying the “Reasonable Expectation” analysis there is no evidence that would establish that Lease Police’s reasonably expected to be covered under the Association’s fire insurance policy.

The concept of reasonable expectation would require some proof as to the expectations of the parties. Lease Police filed its motion for summary judgment prior to any discovery being pursued, and failed to identify in their motion any evidence which would establish that the Association reasonably expected to cover a unit owners’ tenant, or vice-versa. For example, Lease Police did not provide any evidence or testimony related to whether any discussions occurred between Lease Police and the Association, the Association and the Elkinses, or Lease Police and the Elkinses as to whether the Association’s fire insurance policy would cover Lease Police as tenants. Moreover, there is no evidence that Lease Police prior to signing the lease (or after) even read the Declaration or Bylaws, attended condo meetings, or was a member of the Association. In any event, it is illogical and baseless to assume that the Association intended to carry Lease Police as a co-insured where neither the Declaration and/or lease expressly state so and there is no evidence that the parties even discussed it. Accordingly, this Honorable

Court should adhere to the view that the trier of fact must, on a case-by-case basis, determine what the reasonable expectations of the parties were and who should bear the risk of loss for the fire damage.

D. Lease Police is not entitled to attorney fees under the holding of *Olympic Steamship*

Adding monetary insult to dispositive injury, the Superior Court erred in its ruling that Lease Police was entitled to attorney fees under *Olympic Steamship Co. v. Centennial Insurance Company*, 117 Wn.2d 37, 811 P.2d 673 (1991). Under Washington law, a court has no authority to award attorney fees to a party in the absence of contract, statute, or recognized ground of equity permitting fee recovery. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). In a narrow exception to this rule, the Washington State Supreme Court held that an insured may recover reasonable attorney fees where the insurer, by denying coverage, “compels the insured to [take] legal action, to obtain the full benefit of his insurance contract, regardless of whether the insurer’s duty to defend is at issue.” *Olympic Steamship Co.*, 117 Wn.2d 37, 811P.2d 673. A court’s award of *Olympic Steamship* attorney fees are an equitable remedy, based on the “special fiduciary relationship ... existing between an insurer and insured.” *McGreevy v. Or. Mut. Ins. Co.*, 128 Wn.2d 26, 36, 904 P.2d 731 (1995). *Olympic Steamship* provides an

equitable ground upon which an insured successfully suing to obtain coverage may also recover reasonable attorney fees necessarily incurred in the endeavor. *McRory v. N. Ins. Co. of New York*, 138 Wn.2d 550, 554-50, 980 P.2d 736 (1999) (quoting *Olympic Steamship*, 117 Wn.2d at 52-53, 811 P.2d 673). Here, attorney fees are not justified pursuant to *Olympic Steamship* because there is no authority for such an award.

Olympic Steamship involved a case where a comprehensive liability insurer disclaimed coverage on a claim against its insured, Olympic (a salmon packer), for loss sustained by the packer's customers due to defective packing. The Washington Superior Court granted summary judgment in favor of Olympic and awarded Olympic attorney fees that it had incurred settling claims with third parties and obtaining the coverage judgment. *Id.* at 42. The insurer, Centennial, appealed to the Court of Appeals, which reversed the Superior Court's ruling. Thereafter, Olympic appealed.

On appeal, the Washington Supreme Court – with respect to attorney fees – “extend[ed] the right of an insured to recoup attorney fees that it incurs because an insurer refuses to defend or pay the justified action or claim of the insured, regardless of whether a lawsuit is filed against the insured.” *Id.* at 53. Specifically, the court held that an insured may recover reasonable attorney fees where the insurer, by denying

coverage, “compels the insured to [take] legal action, to obtain the full benefit of his insurance contract, regardless of whether the insurer’s duty to defend is at issue.” *Olympic Steamship Co.*, 117 Wn.2d 37, 811P.2d 673. In reaching its holding that an award of attorney fees would be granted, the court’s analysis focused on: (1) a disproportionate bargaining power of an insurer and the insured; (2) actions of the insurer that cause an insured to suffer the costs of litigation in order to compel an insurer to honor its commitment to provide coverage; and (3) the encouragement of prompt payment of claims. *Id.* at 52-53. However, the case at bar presents an entirely different set of circumstances than the underlying equitable principles discussed in *Olympic Steamship*.

The Washington Supreme Court revisited its *Olympic Steamship* holding in *McGreevy v. Or. Mut. Ins. Co.*, 128 Wn.2d 26, 36, 904 P.2d 731 (1995), and reaffirmed that an insured that is compelled to assume the burden of legal action to obtain benefit of its insurance contract is entitled to attorney fees, regardless of whether a duty to defend is at issue. In *McGreevy*, the court articulated that *Olympic Steamship* fees are an equitable remedy, based upon “the special fiduciary relationship existing between an insurer and insured.” *McGreevy*, 128 Wn.2d at 36, 904 P.2d 731 (1995). The court further stated that an insurer has an “enhanced duty” to the insured which prevents it from putting its own

interests before that of its insured's. *Id.* The fiduciary relationship arises from the disparity in bargaining power that generally exists between an insurer and insured, and the insured's unique vulnerability when faced with a casualty loss. *Id.* However, in the instant case, neither basis – a fiduciary relationship nor an enhanced duty – exists between Appellant and Respondents.

Indeed, the circumstances presented in the instant case do not fit into the underlying equitable principles of *Olympic Steamship* and its progeny at all. First, no disproportionate bargaining power existed between CAU and Lease Police. The policy at issue was provided by CAU to the Association only, not Lease Police. There is absolutely no evidence of any discussion between Lease Police and CAU (or CAU's insured) regarding the Association's fire insurance coverage. Simply put, there is no privity or contractual relationship between CAU and Lease Police, and certainly no existence of a disparity in bargaining power between same. Thus, the application of *Olympic Steamship* fees is not warranted here.

Second, as discussed in *McGreevy*, there is no "special fiduciary relationship" or "enhanced duty" between CAU and Lease Police. There was no contractual relationship between CAU and Lease Police; therefore there is no "fiduciary relationship" or "enhanced duty" that CAU owes Lease Police. Importantly, Lease Police did not, and cannot, assert a

claim seeking reimbursement for property damage against CAU as a result of the fire. Presumably Lease Police has done so through its general liability insurance carrier. In other words, this case does not involve “a suit between an insurer and its insured to obtain the benefit of an insurance policy or contractual obligation” in any identifiable context. Rather, this case merely concerns CAU’s right of subrogation against an allegedly negligent third-party tenant. Again, the underlying equitable principles set forth in *Olympic Steamship* and its progeny are not present in the case at bar, hence the application of *Olympic Steamship* fees is not warranted here.

Moreover, public policy does not warrant application of an exception to the general rule requiring each party bear its own litigation expenses. The issue presented in this case – to wit: whether a tenant of a unit owner / landlord is entitled to co-insured status not only under the landlord’s insurance policy, but also under the Association’s insurance policy, thereby barring subrogation – is an issue of first impression under Washington law. This case does not present the typical insurance coverage issues between an insurer and its insured that were addressed in the rationale of *Olympic Steamship* and its progeny.

Specifically, there are no issues of prompt payment of a claim to an insured for an unforeseen casualty loss, or the perceived fundamental

inequity of an insured not receiving the benefit of an insurance policy that it procured to protect it in the event of a loss. Rather, this case involves the right of CAU to seek compensation from a third party, that it did not insure and had no contractual or cognizable implied obligation to insure. Application of the *Olympic Steamship* rule in this scenario would be contrary to the equitable principles for which it was established.

Accordingly, the Superior Court erred in granting Lease Police's motion requesting attorney fees pursuant to *Olympic Steamship*. CAU respectfully requests that this Honorable Court reverse the Superior Court's order granting Lease Police attorney fees.

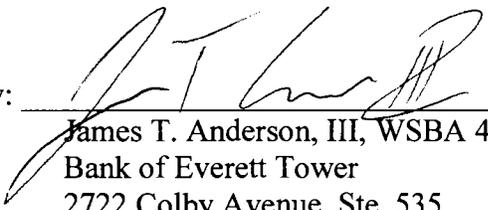
CONCLUSION

In conclusion, Lease Police is not an implied co-insured under the Association's insurance policy; thus CAU is not prohibited from subrogating against Lease Police. Though the anti-subrogation rule may be applicable between the landlord (i.e., the Elkinses) and the tenant (i.e., Lease Police), there is no basis to apply it as between CAU (a/s/o the Association) and the tenant (i.e., Lease Police). Accordingly, the Superior Court erred in granting Lease Police's Motion for Summary Judgment. In addition, Lease Police is not entitled to attorney fees in the underlying action. Lease Police did not bargain for the benefit of insurance coverage. Moreover, there was no privity between CAU's insured and Lease Police.

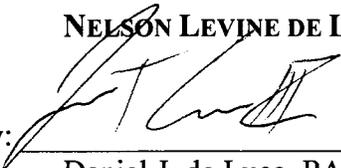
As such, CAU should be entitled to litigate its position – successfully or unsuccessfully – without being subject to attorney fees under the *Olympic Steamship* rule. To hold otherwise would be contrary to the equitable principles set forth in *Olympic Steamship* and its progeny.

RESPECTFULLY SUBMITTED this the 11th day of May 2010.

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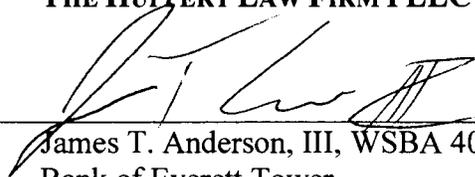
CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF APPELLANT, COMMUNITY ASSOCIATION UNDERWRITERS OF AMERICA, INC. postage pre-paid, via U.S. mail on the 11th day of May, 2010, to the following counsel of record at the following address:

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