
COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

THE PORT OF LONGVIEW, a Washington municipal corporation,

Respondent,

v.

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

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

Appellants,

and

ARROW INDEMNITY COMPANY; MARINE INDEMNITY
INSURANCE COMPANY OF AMERICA,

Defendants.

LONDON MARKET INSURERS'
SUPPLEMENTAL BRIEF ON FEES

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A. INTRODUCTION

Pursuant to this Court's January 8, 2016 order, London Market Insurers ("LMI") hereby provide this supplemental brief on the trial court's belated and unjustified award of attorney fees to the Port of Longview ("Port") under the *Olympic Steamship* equitable exception to the American Rule on fees in civil litigation.

As will be noted in this brief, the Port is not entitled to a fee award at all because of its own inequitable conduct in waiting two decades to notify LMI of its claims, and in entering into settlements regarding its environmentally contaminated sites without the knowledge or consent of LMI. The trial court found that the Port both breached policy conditions and such breaches actually prejudiced LMI.

Moreover, the trial court's fee award of more than \$2.538 million is excessive and an abuse of discretion where that court allowed the Port to recover far more in fees than that to which it was entitled under the lodestar methodology, particularly where the Port (other than its attorneys) has derived little actual policy-based benefit from this litigation.

B. STATEMENT OF THE CASE

This Statement of the Case supplements the factual recitations in LMI's principal briefing.

The Port engaged in inequitable conduct by waiting *19 years* to notify LMI of its claims, and then simply suing rather than tendering the claims to the insurer. During the 19-year delay, the Port also breached the voluntary payments policy condition. Moreover, the Port derived little actual benefit from the extensive coverage litigation below, because it has no present third party damages claims against it and it waived all past damages. Finally, the fees requested by the Port are bloated, and inconsistent with the lodestar methodology. The facts on these points will be developed *infra* in connection with each of the arguments.

Procedurally, although the so-called declaratory judgment on the jury's verdict, and the order dismissing all of the Port's damages claims against LMI was entered on January 8, 2013, CP 18831-46, and the trial court certified the order as final under CR 54(b) on August 1, 2014, CP 22526-28, the Port did not file its motion seeking recovery of fees until September 9, 2015, CP 22670,¹ contrary to the time deadlines of CR 54(d)(2).²

¹ As of the date of filing, Cowlitz County has not issued the supplemental clerk's papers index for the attorney fee proceedings. When that index issues, LMI will update these citations accordingly.

² Our Supreme Court promulgated CR 54(d)(2) precisely to avoid the impact on the appellate process of trial court delay in addressing post-judgment fee matters that has occurred in this case. As the drafters' 2007 comments to CR 54(d)(2) indicated, the intent of the 10-day provision of that rule was "to prevent parties from raising trial-level attorney fee issues very late in the appellate process, sometimes after one or all appellate briefs have been submitted." Karl B. Tegland, 4 *Wash. Practice* (6th ed.) at 333.

The trial court acquiesced in the Port's demand for additional time to present its request for fees and to conduct discovery on that issue. CP 22582.³ Ultimately, after additional delay, the trial court made its decision on fees on December 2, 2015, CP 23582,⁴ and entered an order granting fees and a supplemental judgment on fees on December 23, 2015. CP 23602-04.⁵ After modest reductions, the Court awarded more than \$2.538 million in fees and costs to the Port's attorneys. CP 23585.⁶

C. SUMMARY OF ARGUMENT

The trial court erred in awarding fees to the Port under the *Olympic Steamship* equitable exception to the American Rule on fees where the Port's own conduct was inequitable, and where the Port's own actions raised substantial coverage defenses. The Port failed to comply with policy provisions in LMI's primary and excess policies by delaying action by 19 years, and then simply sued rather than actually presenting any claims to insurers. The Port also had unclean hands because it entered into cost sharing agreements in violation of the voluntary payment conditions of the policies, thereby prejudicing LMI. Moreover, the Port's extensive

³ See n.1.

⁴ See n.1.

⁵ See n.1.

⁶ See n.1.

litigation, apart from benefitting its attorneys, has provided little real benefit to the Port, because the Port has no claims against it.

The trial court abused its discretion in calculating fees due to the Port by failing to faithfully apply the lodestar methodology. In particular, it failed to excise the many hours spent by the Port's counsel on wasteful and unsuccessful activities, particularly those relating to the Port's failure to timely tender its claims, its voluntary payments, its misconduct leading to a mistrial below, and because the Port dismissed all damages claims, any damages-related activities.

D. ARGUMENT

(1) The Trial Court Improperly Applied the *Olympic Steamship* Exception to the American Rule on Attorney Fees

Our Supreme Court initially authorized the recovery of attorney fees by an insured seeking coverage by litigation from an insurance carrier in *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).⁷ There, the Court held that an insured may recover attorney fees incurred if the insurer's actions compelled the insured to litigate to secure full benefit of the insurance policy. *Id.* at 52. In the subsequent case of *McGreevy v. Oregon Mutual Ins. Co.*, 128 Wn.2d 26, 904 P.2d 731 (1995), the Supreme Court placed the *Olympic Steamship*

⁷ Whether or not a party is entitled to an award of attorney fees is a question of law reviewed de novo. *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001).

decision in the appropriate context of the American Rule⁸ and its exceptions, specifically holding that the *Olympic Steamship* basis for recovering attorney fees was an equitable exception to the American Rule on attorney fees. *Id.* at 34-35.

The *Olympic Steamship* exception is not universally available in every controversy between an insurer and an insured. It applies only in circumstances where the dispute is, in fact, over coverage under a policy rather than the amount of insurance proceeds due an insured, and then only if circumstances warrant. *See Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 876 P.2d 896 (1994); *PUD No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994).

As befits an *equitable* exception to the American Rule, the insured must act with clean hands, including complying with policy provisions. Thus, if the insured breaches key policy provisions, it may not recover fees. *PUD No. 1*, 124 Wn.2d at 815; *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999), *review denied*, 140 Wn.2d 1009 (2000) (failure of insured to inform insurer of PLP status under MTCA for seven years required reversal of *Olympic Steamship* fee award).

⁸ Under the American Rule, each side in civil litigation bears its own fees, unless a statute, contract, or equitable principle permits the prevailing party to recover fees. Philip Talmadge, *The Award of Attorneys' Fees in Civil Litigation in Washington*, 16 Gonz. L. Rev. 57, 57-59 (1980).

(a) The Port's Conduct in Undisputedly Breaching Policy Conditions Bars the Port from Recovering Fees

The two principal cases addressing the defenses to *Olympic Steamship* fee requests are *PUD No. 1* and *Leven*. In *PUD No. 1*, our Supreme Court held that if an insured breaches policy conditions that might extinguish policy coverage, the insured is not entitled to an equitable fee award:

We cannot authorize the imposition of attorney fees, however, when an insured undisputedly failed to comply with express coverage terms, and the noncompliance may extinguish the insurer's liability under the policy.

124 Wn.2d at 815. The insured who breaches policy provisions may not recover fees *even when the court finds the insurer was not prejudiced*. *Id.* In *Leven*, this Court deemed a seven year delay in failing to notify an insurer of a claim sufficient to defeat the insured's fee request: "Leven's undisputed failure to inform Unigard of his PLP designation until seven years after the fact violated the Unigard policy and prevents the court from awarding him *Olympic Steamship* fees." *Leven*, 97 Wn. App. at 434.

An insurer need not demonstrate that an insured's failure to comply with policy terms necessarily resulted in prejudice to it to avoid equitable *Olympic Steamship* fees. *PUD No. 1*, 124 Wn.2d at 815. But where, as here, the insurer was prejudiced, it is plain that fees may not be

awarded. *See Liberty Mutual Ins. Co. v. Tripp*, 144 Wn.2d 1, 25 P.3d 997 (2001) (insurer prejudiced by insured's noncompliance with policy conditions, when insured settled claim without insurer consent, but Court noted that result would be no different if there was no actual prejudice to insurer).

Logically, if an insured is barred from receiving *Olympic Steamship* fees even when its policy breaches did not result in prejudice to the insurer, then when the trial court does find that some prejudice resulted as happened here – a fee award to the insured is erroneous.

(i) The Port Compelled Litigation Because It Breached Policy Provisions by Delaying Action for 19 Years

The trial court determined as a matter of law that the Port breached the notice conditions in LMI's policies when it granted LMI's motion for summary judgment, finding that the Port's notice was late "by whatever standard we use...." CP 23329.⁹

The *Olympic Steamship* court held that the insured can recover fees when "*the conduct of the insurer imposes upon the insured the cost of compelling the insurer to honor its commitment*" under the policy. *Olympic Steamship*, 117 Wn.2d at 53 (emphasis added). However, when an insured's own actions in breaching the policy conditions – rather than

the insurer's – results in litigation, *Olympic Steamship* fees are not available. *PUD No. 1*, 124 Wn.2d at 815.

Once the Port so egregiously and indisputably breached a central policy requirement – timely notice – there was nothing “inequitable” in defending against the Port's demand for coverage. The Port's own actions, not the actions of the LMI insurers, compelled the Port to sue.

For the additional reasons enumerated in LMI's briefing on the merits, br. of appellants at 30-37, 43-48; reply br. at 10-24, 30-35, the Port's unjustified failure to provide LMI timely notice of any claims associated with the possible contamination of its property,¹⁰ including property purchased by the Port *knowing* it was contaminated, prejudiced LMI and foreclosed coverage under the primary and excess policies. The Port lacked clean hands in seeking fees under an equitable exception and it should be denied fees here.

(ii) The Port Breached the Fundamental Duty to Tender Its Claims to LMI Before Suing

Tender of a potential claim by an insured to an insurer is a fundamental prerequisite to initiate coverage. *Leven*, 97 Wn. App. at 427.

⁹ The Port has not sought review of this ruling.

¹⁰ The Port's staff knew in the early 1990's that it had potential insurance claims for environmental hazards on its properties. CP 1562, 13724; RP 593-94, 623-24, 774-75.

Such tender puts the insurer on notice of the existence of a claim; an insurer cannot have a duty under the policy unless the insured affirmatively informs the insurer about a claim or potential claim. *Id.*

The *Olympic Steamship* equitable fee award was instituted to prevent insurers from wrongfully denying claims and forcing their insureds to expend legal fees to obtain the benefit of their policies. *Olympic Steamship*, 117 Wn.2d 52-53. It is designed to prevent “conduct” by the insurer that imposes the cost of obtaining coverage on the insured. *Id.* It also encourages “prompt payment of claims.” *Id.* Thus, a logical predicate to claiming the right to *Olympic Steamship* fees is giving the insurer the opportunity to make good on the insurance contract and pay a claim, which prevents the insured from being compelled to sue.

If an insurer does not know about a claim, it has no opportunity to address it to avoid litigation. Particularly, if the first the insurer hears of a claim is when it receives a summons and complaint from the insured, then it cannot be said that the insurer’s conduct “compelled” litigation.

Here, as the Port admits, the first LMI insurers heard of the Port’s claim is when the Port sued LMI.¹¹ Br. of Resp’t at 8-9. The Port’s

¹¹ The Port *attempted* to notify LMI insurers about its claims, but it failed to do so. CP 1571-80; Br. of Resp’t at 8-9; Br. of Appellants at 7 n.6. Although the Port would like to blame LMI for its failures, the Port’s massive delay in addressing the issue caused policies to become lost and thus engendered confusion at the Port as to the relevant contact persons/entities. CP 755-60; RP 762, 1399-1415; Br. of Resp’t at 8-9.

conduct, not any conduct by the insurers, “compelled” this litigation. In fact, in 2009 the Port even admitted that although no one was suing the Port, it should sue for coverage because the policies were getting “stale.” CP 1557-58.

It is not equitable for an insured to file a lawsuit rather than tendering a claim, having already breached numerous policy conditions, and then penalize the insurer for defending against the lawsuit in good faith – particularly when the trial court affirmed that those policy breaches occurred – by demanding an attorney fee award. *Olympic Steamship* does not apply.

(iii) The Port’s Voluntary Payments Were Also Policy Breaches that Preclude Equitable Fees

The trial court ruled that the Port made voluntary payments on possible claims without LMI’s involvement or approval. CP 5019. There is little question that under Washington law, an insured’s choice not to present a claim or the payment of claims without the insurer’s involvement or acquiescence may negate coverage under the applicable insurance policy. *E.g., Felice v. St. Paul Fire & Marine Ins. Co.*, 42 Wn.

Again, the insurance policies involved here were taken out in the late 1970’s and early 1980’s. If the Port had acted promptly, those policies would have been only 6 or 7 years old, rather than 25 years old, when it began its belated and failed attempt to notify its insurer.

App. 352, 711 P.2d 1066 (1985), *review denied*, 105 Wn.2d 1014 (1986) (insured represented himself in claim through adverse trial result without notifying insurer of claim); *Northwest Prosthetic v. Centennial Ins. Co.*, 100 Wn. App. 546, 997 P.2d 972 (2000) (payment of claim); *Key Tronic Corp. v. St. Paul Fire & Marine Ins. Co.*, 134 Wn. App. 303, 139 P.3d 383 (2006), *review denied*, 160 Wn.2d 1011 (2007) (same); *MacLean Townhomes, LLC v. Am-States Ins. Co.*, 138 Wn. App. 186, 156 P.3d 276 (2007) (agreement to binding arbitration before claim notice). *See generally*, *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 191 P.3d 866 (2008).

Not only did the Port breach the voluntary payment condition, which itself bars *Olympic Steamship* fees, the trial court specifically found the Port's breach prejudiced LMI. CP 5019. The trial court disallowed sums the Port paid at the TPH site because of the Chevron agreement and disallowed any pre-suit defense costs. *Id.*¹² In fact, in the face of indisputable prejudice to LMI its late notice caused, the Port chose to dismiss all of its damages claims for alleged past cleanup and investigation costs. CP 19617.

¹² The Port has not sought review of that decision. The Port has not claimed, and the trial court never found, that the Port incurred any costs or will incur any costs, at the TPH site outside the parameters of the 1998 Chevron agreement. And the Port has no covered claims at the TPH site.

LMI prevailed on its defense that the voluntary payments both breached policy terms and prejudiced LMI. The Port's indisputable policy breaches disqualify it from an award of *Olympic Steamship* fees.

(b) The Port Failed to Derive of the Full Benefit of the LMI Policies

The fundamental thrust of the *Olympic Steamship* exception to the American Rule is that the insurer must have deprived the insured of the benefits of insurance coverage. 117 Wn.2d at 54. While no case has specifically articulated the meaning of “policy benefits” in the context of an *Olympic Steamship* fee award,¹³ the benefits of liability insurance coverage have historically been considered in Washington to be (1) defense of *claims* brought against the insured (duty to defend); (2) payment of any *claims* against the insured (duty to indemnify). Resolution of *claims* against the insured (duty to settle) is an associated benefit. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 129, 196 P.3d 664 (2008).

¹³ Washington courts have discussed this question when differentiating between circumstances in which coverage, as opposed to the valuation of a claim under *Dayton*, is at issue. In *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 147-48, 930 P.2d 288 (1997), for example, the Supreme Court made clear that coverage pertained to the scope of coverage and any policy exclusions. *Accord, Ainsworth v. Progressive Casualty Ins. Co.*, 180 Wn. App. 52, 81-82, 322 P.3d 6 (2014). But such cases plainly contemplate that a *tangible, not theoretical*, benefit must be derived by the insured's litigation effort – the insurer must be compelled to provide a defense when requested by an insured (not at issue here), the insurer must be compelled to pay money for a settlement or judgment that the insured has been, or will be, compelled to pay (again, something not at issue here).

Although it is named as a PLP at the TWP/MFA site, the Port is not compelled to perform any investigation or cleanup activity, and has not done so. It has *no claim* against it. At TPH, it has *voluntarily* investigated and remediated the site, in conjunction with other PLPs, but has not been compelled to do so by the government. Nor is the Port performing any tasks at the TPH site in cooperation with the government. To this day, the Port has not been named a PLP at the site and has not been required, by the DOE, to investigate or remediate the site. Again, it has *no claim* against it.¹⁴

Remarkably, the Port cannot point to any tasks it is undertaking or has undertaken at either site that are covered by its insurance contracts and has therefore failed to prove that it obtained the full benefit of its insurance contracts through this lawsuit.

Furthermore, the Port has chosen to dismiss *all its claims for any past costs*. CP 19617. The Port's failure to recover the indemnity damages it sought under its insurance contracts is undeniable evidence of its failure to obtain the full benefit of its insurance contracts through this

¹⁴ The Port's own expert testified at trial that the "natural attenuation" remedy the Port and other entities have adopted at the TPH site is without the approval or authority of the DOE. RP 1132.

lawsuit.¹⁵

With respect to the excess policies, the Port failed to meet its *Olympic Steamship* burden because it has not obtained any benefits under those policies. The excess coverage is explicitly contingent on exhaustion of the underlying policies. CP 19836. The Port has failed to offer any evidence that exhaustion has occurred or will occur. Indeed, because the Port has dismissed all of its claims for past costs, and has asserted no new claims for coverage, it has no evidence that the excess coverage will be triggered. Given these facts, the Port is not entitled to an *Olympic Steamship* attorney fees award at all in connection with the excess policies.

(2) The Port's Request for Attorney Fees Is Excessive and Unreasonable¹⁶

The Port's breaches of policy conditions preclude a fee award, but even if this Court thinks *Olympic Steamship* applies, the Port failed in its

¹⁵ In fact, since the Phase I trial concluded, the Port has not submitted any claim or invoice to LMI for payment under the declarations of coverage. Trial court retained continuing jurisdiction over the case, in the event the Port actually ever incurs costs it claims are covered, LMI will have the right to challenge those bills if they are not genuine investigative or remedial costs (e.g., capital improvements, voluntary payments, or costs already disallowed by the trial court). CP 18831-46. Thus, any alleged "benefit" to the Port actual payment of claims resulting from this litigation is speculative.

¹⁶ While the amount of a fee award is ordinarily entrusted to the discretion of a trial court and reviewed for its abuse, the trial court must be active in exercising such discretion. *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (2013), review denied, 179 Wn.2d 1026 (2014).

burden to prove that the fees awarded under this exception to the American Rule were reasonable.¹⁷ The trial court's fee award reflects only modest reductions in the Port's bloated fee request. CP 23585.¹⁸

The trial court here abused its discretion in failing to deduct the Port's fees relating to plainly unsuccessful activities.¹⁹ The total number of hours submitted by an attorney must be discounted for hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Berryman* at 662, citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). This Court has noted that trial courts must be vigilant and aggressive in excising wasteful, unproductive time. *Smith v. Behr Processing Co.*, 113 Wn. App. 306, 344-45, 54 P.3d 665 (2002) (rejecting trial court refusal to segregate time spent on unsuccessful theories because the effort was too "complex" or "difficult").

¹⁷ Reasonable fees under this exception, as is generally true in Washington, are calculated under the lodestar methodology. *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 966 P.2d 305 (1998). Under *Berryman*, the burden of proving a fee request is reasonable is on the party seeking fees. 177 Wn. App. at 657. Courts must take an active role in assessing the reasonableness of fee requests and should not merely accept without question the fee affidavits of counsel. A court is required to independently determine whether the applicant has sustained its burden of demonstrating that the number of hours expended was reasonable, rather than simply relying upon the applicant's billing records.

¹⁸ See n.1.

¹⁹ As recounted below, the Port's fee request contained time relating to administrative and clerical tasks, plainly duplicative and unproductive time, Appendix A, CP 23311-21 (subject to County's issuance of supplemental clerk's papers index). The trial court should have excised this time under the lodestar methodology. LMI focuses here on the time spent on obviously unsuccessful activities.

The trial court awarded time spent on unsuccessful efforts by the Port. The Port was unsuccessful in one of its major claims, and unsuccessful on many issues, including indemnity for past damages, policy breaches such as late notice and voluntary payments, prejudice, and numerous summary judgment motions. CP 5019, 8695, 10097, 10101, 12702-03, 12705, 16852, 16861, 18848, 18850, 19617, 20211, 20784. Its misconduct caused a mistrial below. CP 10758. It dismissed all damages claims against LMI *after* trial. CP 19617.

Washington law provides that time spent on unsuccessful activities associated with otherwise successful theories of recovery must be excised by a court in calculating the lodestar fee. For example, in *Pham v. City of Seattle*, 151 Wn.2d 527, 151 P.3d 976 (2007), the Supreme Court affirmed a trial court ruling excluding attorney time spent on unsuccessful motions, the preparation of a complaint that was never filed, and media contacts associated with an otherwise successful theory of recovery. The Court rejected the idea that this time related to a common core of facts and related legal theories.

The Port sued for a declaration of coverage and for indemnity for past costs. LMI prevailed on a number of important summary judgment motions, including that the Port breached the notice conditions of its primary policies, that it breached the voluntary payment condition of

LMI's policies, that LMI was prejudiced by the Port's breach of the voluntary payment condition, that the Port was not entitled to pre-suit defense costs from any of LMI's policies, and that the Port could not increase its liability by purchasing the TWP site when it knew it was polluted. As a result of LMI's successful motion practice, the Port's damages claim was reduced to \$300,000, which the Port then dismissed in the face of LMI's remaining challenges to the Port's damages claim. Even the declaration of coverage regarding LMI's excess policies is conditioned on exhaustion of the underlying primary policies.

Ultimately, the Port has had little real success in this litigation.²⁰ The trial court awarded fees of \$2.58 million for an indemnity claim of approximately \$1 million, on which the Port did not recover, and for declarations of coverage for unknown future claims that even the Port concedes will be subject to challenge on the basis of whether they will be recoverable remediation or investigation costs.

Further, the trial court permitted duplicative recoveries. It allowed the Port to recover twice for fees associated with a sanctions award.

²⁰ A "vital" consideration in determining whether a fee request is reasonable is the "size of the amount in dispute in relation to the fees requested." *Berryman, supra* at 660.

CP 23585.²¹ It allowed the Port to recover for fees made necessary by the Port's misconduct that resulted in a mistrial.²² The trial court allowed the Port fees to litigate with co-defendants. CP 23584.²³

If the Port is eligible for an *Olympic Steamship* fee award at all (and it is not), then it is only entitled to a reasonable fee award calculated by a faithful application of the lodestar methodology. The Port's fee request was unreasonable in failing to meet its burden to prove that all of the hours it expended and for which it seeks recovery are reasonable.

²¹ See n.1. The Port filed a motion below for CR 37 monetary sanctions for regarding its discovery dispute with LMI over searching the following markets, seeking over \$95,000 in fees as a monetary sanction, and submitting copies of billing statements to support its claim. CP 4038. The trial court awarded \$25,000. CP 16248. The trial court then allowed the Port to recover as *Olympic Steamship* fees the \$70,000 not awarded as a sanction. CP 23585.

²² Although the Port excised its fees for the mistrial in February of 2013, the trial court allowed to recover its fees incurred to prepare for that trial. CP 23584. The Port met with and prepared witnesses, worked on jury *voir dire*, worked on opening statements, worked on pre-trial motions, and conferred regarding case strategy, among other precatory tasks. Most, if not all of these tasks were repeated for the Phase I retrial in November, 2013. The Port incurred fees to prepare for trial in the amount of \$131,977. *Id.* Those fees should have been disallowed. The Port also incurred costs of \$21,641 for the mistrial, including a vendor's invoice for \$15,384, which presumably was for its expert to prepare for trial testimony. That cost was repeated in November, 2013. These costs should also have been disallowed.

²³ See n.1. The Port's fee request asserts that it removed fees incurred *solely* to litigate with the Marine defendants, but the trial court allowed the Port to recover fees totaling \$34,000 responding to the Marine defendant's discovery and propounding discovery to the Marine defendants. CP 23584. It is not reasonable to award fees against LMI for tasks related to the Port's claims against the Marine defendants. The trial court should have made a percentage reduction in such fees.

E. CONCLUSION

The trial court erred in awarding fees to the Port where the Port lacked clean hands by plainly violating critical policy terms to LMI's prejudice, and (apart from its lawyers) derived little policy benefit from the litigation.

That court then abused its discretion in condoning the bloated fee request of the Port's lawyers, failing to excise time spent on obviously wasteful and unsuccessful efforts as required by the lodestar methodology, particularly the Port's abandoned damages claims.

This Court should reverse the fee award in its entirety, or alternatively, reverse the award and remand the fee issue to the trial court for a proper application of the lodestar methodology.

DATED this 8th day of February, 2016.

Respectfully submitted,



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Attorneys for Appellants
London Market Insurers

APPENDIX

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SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

**THE PORT OF LONGVIEW, a
Washington municipal corporation,**

Plaintiff,

vs.

**ARROWOOD INDEMNITY
COMPANY, et al.**

Defendants.

No. 10 2 01478 1

**COURT'S DECISION ON
AWARD OF ATTORNEYS'
FEES**

It has already been decided that The Port of Longview (Port) is entitled to an award of attorneys' fees pursuant to Olympic S.S. Co., Inc. v. Centennial Ins. Co. 117 Wash.2d 37, 52-53, 811 P.2d 673, 681 (Wash.,1991). The London Market Insurers (LMI) have raised objection to certain of those fees. Each of those objections will be addressed in turn.

1) CLERICAL AND ADMINISTRATIVE TASKS

To make such plaintiffs whole, "reasonable attorney fees" must, by necessity, contemplate expenses other than merely the hours billed by an attorney. The insured must therefore be compensated for all of the expenses necessary to establish coverage as part of those attorney fees which are reasonable. Failure to reimburse expenses would often eat up whatever benefits the litigation might produce and additionally impose a

1 backbreaking burden upon the small, but justified, litigants." *Asarco Inc.*,
2 131 Wash.2d at 606, 934 P.2d 685 (Sanders, J., concurring).

3 *Panorama VII. Condo. Owners Ass'n Bd. of Directors v. Allstate Ins. Co.*
4 144 Wn.2d 130, 144, 28 P.3d 910, 917 (2001)

5 Based on the above language, LMI's objection to the charges for administrative and
6 clerical tasks is not well taken. Those amounts are included as part of the award of fees.

7 **2) DUPLICATION OF EFFORT**

8 Reason dictates that there is some upper limit on the number of attorneys for
9 whom the insurer is responsible under an Olympic Steamship analysis. Given the
10 thoroughness exercised by both parties in this case I do not believe that four
11 attorneys attending trial exceeds that limit. Those costs and fees are allowed.

12 **3) UNPRODUCTIVE TIME-**

13 The award of fees pursuant to Olympic Steamship does not necessarily exclude an
14 award for time associated with an unsuccessful motion or researching a theory
15 ultimately not brought to the court. I believe researching a possible removal to
16 another jurisdiction to be within the bounds of reasonable inquiry and preparation.
17 Claims for damages have either been dismissed or held in abeyance for further
18 litigation. Fees related to damages would not be appropriate given the status of
19 those claims. The objection to \$114,229 is well taken and that amount should be
20 deducted from the fees requested.

21 **4) EXCESSIVE TIME**

22 **a. Bifurcation-**

23 Fees of \$5,000 are permitted for the bifurcation motion. Accordingly
24 \$12,060 of the fees requested are disallowed.

25 **b. Olympic Steamship-**

26 in the context of the amount of fees at issue, and the time necessary to
27 present those fees in pleadings, the amount requested is reasonable.

28 The fees charged for discovery regarding Olympic Steamship appear
within the realm of reason. Those fees are allowed.

5) SANCTIONS

1 In the order granting sanctions for discovery violations of \$25,000, the words
2 "attorneys' fees" are crossed out and the word "sanction" is inserted instead. It
3 was a cost imposed on the defendants based upon their conduct, and not
4 reimbursement for plaintiff's costs or fees incurred. Therefore it is appropriate to
5 award the fees requested.

6 **6) MISTRIAL**

7 LMI has objected to an award of attorneys' fees incurred by the Port in preparation
8 for the trial which ended in a mistrial. I agree that, based on the reason for the
9 mistrial, such an award would not be appropriate. However I also have no reason
10 to question the Port's claim that some portion of that preparation carried over to
11 the second trial. Fees of \$60,000 for trial preparation are allowed. The requested
12 fees are reduced by \$71,977.

13 The costs incurred in the first trial are not awarded.

14 **7) FEES ATTRIBUTABLE TO LITIGATION WITH CO-DEFENDANT**

15 I agree with LMI's assertion that there is no practical way to segregate work
16 performed by the Port's counsel when the Marine defendants were still involved in
17 the case. To my recollection, the only issues unique to the Marine defendants
18 brought before the court resulted from relatively minor differences in language
19 between Marine policies and LMI policies. There were only minimal differences in
20 the positions of the defendants during that time period. While I believe that LMI
21 should not pay for time that the Port's counsel spent pursuing their case
22 exclusively against the Marine defendants, I find the amount of time so spent to
23 have been inconsequential. No reduction in the fees requested is ordered.

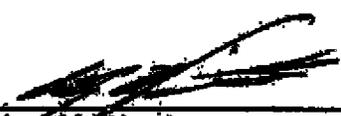
24 **8) EXCESSIVE COSTS**

25 While the information provided regarding Mr. Beard's services is minimal, his
26 participation in the case as an expert on behalf of the Port is well documented.
27 The Port is entitled to recovery the Landau Associates costs. The capacity in
28 which Mr. Pederson served is unclear from the records presented. That cost is not
29 allowed. It is unclear if the court reporter costs for the Youell deposition have
30 already been paid. Those costs are not allowed.

1 The total fee and cost request of the Port is \$2,752,141. The court has disallowed
2 \$214,037.93. The total award of fees and costs is \$2,538,103.07.

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DATED: December 2, 2015



Stephen M. Waring
Superior Court Judge

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2015 DEC 23 PM 2 18

COWLITZ COUNTY
STACI L. NYKLEBUST, CLERK

BY _____

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

THE PORT OF LONGVIEW,
a Washington municipal corporation,

Plaintiff,

v.

ARWOOD INDEMNITY COMPANY,
et al.,

Defendants.

No. 10-2-01478-1

**ORDER GRANTING PORT OF
LONGVIEW'S MOTION FOR
ATTORNEY FEES PURSUANT
TO OLYMPIA STEAMSHIP**

THIS MATTER came before the Court on the Port of Longview's Motion for Attorney Fees Pursuant to *Olympic Steamship*. The Court considered the following (1) Port of Longview's Motion for Attorney Fees Pursuant to *Olympic Steamship*; (2) Declaration of Liberty Waters in Support of Port of Longview's Motion for Attorney Fees Pursuant to *Olympic Steamship*; (3) Declaration of Mark Nadler in Support of Port of Longview's Motion for Attorney Fees Pursuant to *Olympic Steamship*; (4) London Market Insurers' Opposition to Port of Longview's Motion for Attorney Fees Pursuant to *Olympic Steamship*; (5) Declaration of Kenneth J. Cusack in Support of London Market Insurers' Opposition to Port of Longview's Motion for Attorney Fees Pursuant to *Olympic Steamship*; (6) Port of Longview's Reply In Support of Motion for Attorney Fees Pursuant to *Olympic Steamship*; (7) Reply Declaration of Liberty Water in Support of Port of Longview's Motion for *Olympic Steamship* Fees; (8) Oral argument of Counsel; and (9) the Court's file. The Court hereby finds as follows:

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FINDINGS OF FACT

1. The Port of Longview purchased primary, excess and umbrella general liability policies subscribed to by the defendants London Market Insurers. See Order Entering Partial Declaratory Judgment dated January 8, 2014 and the May 20, 2014 Order Entering Partial Declaratory Judgment Re Excess Policies.
2. On August 20, 2010, the Port of Longview filed a lawsuit against London Market Insurers, and others, seeking (a) a declaration of coverage for environmental cleanup costs; and (b) indemnity for claimed damages based upon the Port's payment of alleged environmental cleanup costs.
3. All of the Port of Longview's claims for damages based upon alleged past cleanup costs were dismissed pursuant to London Market Insurers' motion and/or upon motion by the Port of Longview.
4. On August 1, 2014 the Court entered a Judgment in the Port's favor establishing its right to coverage under the LMI policies as set forth in the August 1, 2014 Judgment Pursuant to CR 54(b). The Court incorporated by reference the August 1, 2014 Judgment Pursuant to CR 54(b); the Order Entering Partial Declaratory Judgment dated January 8, 2014; and, the May 20, 2014 Order Entering Partial Declaratory Judgment Re Excess Policies.

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CONCLUSIONS OF LAW

1. The Port of Longview is the prevailing party in this case. The Port received the full benefit of its policies by virtue of this litigation.
2. The *Olympic Steamship* rule (*Olympic Steamship v. Co. v. Centennial Insurance Co* 117 Wn. 2d 37 (1991).) applies to Declaratory Actions. Although it is certainly true in this case that there are some limits on what LMI might have to pay in the future, the Port sought and did successfully eliminate the coverage issues. The Port does not have to prove that damages occurred to be entitled to the benefit of the *Olympic Steamship* rule.

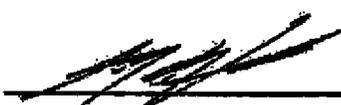
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3. Under the exception of the *Olympic Steamship* rule set forth in *Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn. 2d 789,815,881 P.2d 1020 (1994) ("*PUD*"), attorney's fees are not authorized when an insured undisputably failed to comply with express coverage terms and the noncompliance may extinguish the insurer's liability under the policy. The *PUD* case is an application of the clean hands rule.
4. The *PUD* exception does not apply in this case. Voluntary payment by the Port were not an undisputable failure to comply with express coverage terms. Furthermore, late notice is a negligent act that does not trigger the *PUD* exception. The clean hands rule is a doctrine related to intent.
5. The Port successfully sued LMI to establish the Port's right to insurance coverage under the LMI insurance policies as set forth in the August 1, 2014 Judgment Pursuant to CR 54(b). Under *Olympic Steamship*, the Port is entitled to recover its reasonable attorney fees incurred in doing so.
6. The Court incorporated by reference the Court's Decision on Award of Attorney's Fees dated December 2, 2015 in which the Court awarded \$2,538,103.07 in fees and costs to the Port.

RELIEF

The Port of Longview's Motion for Attorney Fees Pursuant to *Olympic Steamship* is GRANTED. Defendants London Market Insurers are ordered to pay the Port of Longview its attorney fees and cost in the amount of \$2,538,103.07 plus post-judgment interest.

DATED: 12/23/15



Stephen M. Warning
Superior Court Judge

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Presented by:

THE NADLER LAW GROUP, PLLC

**Mark S. Nadler, WSBA #18126
Liberty Waters, WSBA #37034
John S. Dolese, WSBA #18015
Attorneys for Plaintiff Port of Longview**

**Approved for Entry;
Notice of Presentation Waived**

FORSBERG & UMLAUF, P.S.

**Carl E. Forsberg, WSBA #17025
Kenneth J. Cusack, WSBA #17650
Attorneys for Defendants London Market Insurers**

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COWLITZ COUNTY
STACI L. MYRLEBUST, CLERK

BY _____

THE HONORABLE STEPHEN M. WARNING

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF COWLITZ

THE PORT OF LONGVIEW,
a Washington municipal corporation,

Plaintiff,

v.

ARROWOOD INDEMNITY
COMPANY, et al.

Defendants,

NO. 10-2-01478-1

SUPPLEMENTAL JUDGMENT RE
OLYMPIC STEAMSHIP FEES
ENTERED PURSUANT TO CR 54(b)

[CLERK'S ACTION REQUIRED]

JUDGMENT SUMMARY

- | | | |
|----|-------------------|---|
| 1. | Judgment Creditor | The Port of Longview |
| 2. | Judgment Debtors | Assicurazioni Generali S.P.A.
Balise Insurance Company, Ltd.
Bishopsgate Insurance Company, Ltd.
Commercial Union Assurance Company P.L.C.
Continental Assurance of London, Ltd.
Drake Insurance Company Ltd.
Edinburgh Assurance Company
Edinburgh Assurance Company, Ltd.
Edinburgh Assurance Company, No. 2 A/C
Edinburgh Assurance Company, Ltd. No. 2 |

SUPPLEMENTAL JUDGMENT RE *OLYMPIC STEAMSHIP FEES* ENTERED PURSUANT TO CR 54(b)- 1

THE NADLER LAW GROUP PLLC
Pacific Building
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206-621-1433

1		Edinburgh Assurance Company, Ltd. No. 2 A/C
2		Edinburgh Assurance Company, Ltd. No. 3
3		Edinburgh Assurance Company, Ltd. No. 3 A/C
4		Edinburgh Insurance Company
5		Edinburgh Insurance Company, Ltd. No. 2 A/C
6		Edinburgh Insurance Company No. 3 A/C
7		Excess Insurance Company, Ltd.
8		Hansa Marine Insurance Company (U.K.) Ltd.
9		Indemnity Marine Assurance Company, Ltd.
10		Indemnity Marine Assurance Company, Ltd. T A/C
11		Interested Underwriters at Lloyd's, London
12		La Reunion Francaise S.A. d'Assurances et des
13		Reassurances
14		La Reunion Francaise S.A. d'Assurances et des
15		Reassurances "PL" A/C
16		Nippon Fire and Marine Insurance Company U.K. W
17		Ltd.
18		Northern Assurance Company Ltd.
19		Northern Maritime Insurance Company, Ltd.
20		Northern Maritime Insurance Company
21		Ocean Marine Insurance Company, Ltd.
22		Ocean Marine Insurance Company, Ltd. T A/C
23		Phoenix Assurance Company Ltd.
24		Phoenix Assurance Public Company Ltd.
25		Provincial Insurance Company, Ltd.
		River Thames Insurance Company, Ltd.
		Scottish Lion Insurance Company, Ltd.
		Skandia U.K. Insurance PLC
		Sphere Insurance Company Ltd.
		Threadneedle Insurance Company, Ltd.
		Threadneedle Insurance Company
		Vesta (U.K.) Insurance Company Ltd.
		Wurttembergische Feuerversicherung A.G. A.W. A/C
		Yasuda Fire & Marine Insurance Company (UK) Ltd.
		Yasuda Fire & Marine Insurance Company (UK) Ltd.
		T A/C
3.	Principal Judgment Amount	Not Applicable, See Judgment Pursuant to CR 54(b) dated August 1, 2014
4.	Interest to Date of Judgment	\$0
5.	Attorney's Fees and Costs	\$2,538,103.07 (Two million, five-hundred-thirty eight thousand, one-hundred-three dollars and seven cents)
6.	Attorney's fees and Costs shall bear interest at 12% per annum.	
7.	Attorney for Judgment	The Nadler Law Group, PLLC

SUPPLEMENTAL JUDGMENT RE *OLYMPIC STEAMSHIP FEES* ENTERED PURSUANT TO CR 54(b)- 2

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Creditor 720 Third Avenue, Suite 1400
Seattle, WA 98104

8. Attorney for Judgement Forsberg & Umlauf PS
Debtor 901 Fifth Avenue, Suite 1400
Seattle WA 98164-2047

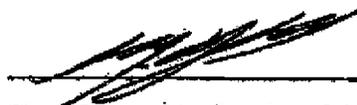
JUDGMENT

On December 2, 2015 this Court issued the Court's Decision On Award Of Attorneys' Fees, ordering fees and costs of \$2,538.103.07 against the defendants in this matter (see Judgment Debtors *supra*). On December 16, 2015, this court entered the Order Granting Port of Longview's Motion for Attorney's Fees Pursuant to *Olympic Steamship*. This Court now enters a final partial judgment regarding *Olympic Steamship* fees pursuant to the August 1, 2014 CR 54(b) certification.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. A supplemental judgment of fees and costs of \$2,538.103.07 is entered against the defendants. The judgment is joint and several against the defendants named above.
2. This supplemental judgment of fees and costs is final pursuant to the Court's previous ruling in the Judgment Pursuant to CR 54(b) dated August 1, 2014.

DONE in open Court this ²³16th day of December, 2015.



The Honorable Stephen M. Warning

SUPPLEMENTAL JUDGMENT RE *OLYMPIC STEAMSHIP* FEES ENTERED PURSUANT TO CR 54(b)- 3

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PRESENTED BY:
THE NADLER LAW GROUP PLLC

Mark S. Nadler, WSBA No. 18126
Liberty Waters, WSBA No. 37034
John S. Dolese, WSBA No. 18015
Attorneys for Plaintiff Port of Longview

APPROVED FOR ENTRY, NOTICE
OF PRESENTATION WAIVED:

FORSBERG & UMLAUF, PS

Carl E. Forsberg, WSBA # 17025
Charles E. Albertson, WSBA # 12568
Julie S. Nicoll, WSBA # 40953
Attorneys for London Market Insurers

SUPPLEMENTAL JUDGMENT RE *OLYMPIC*
STEAMSHIP FEES ENTERED PURSUANT
TO CR. 54(b)- 4

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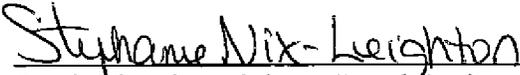
DECLARATION OF SERVICE

On said date set forth below, I e-filed a true and accurate copy of the London Market Insurers' Corrected Supplemental Brief on Fees, Case No. 46654-6-II with e-service on the following parties:

Carl E. Forsberg Kenneth J. Cusack Charles E. Albertson Forsberg & Umlauf PS 901 5th Ave Ste 1400 Seattle, WA 98164-2047	Mark Nadler Liberty Waters The Nadler Law Group, PLLC 720 Third Avenue, Suite 1400 Seattle, WA 98104
Richard E. Mitchell Miller Nash Graham & Dunn, LLP Pier 70 2801 Alaskan Way, Suite 300 Seattle, WA 98121	John Dolese Law Office of John S. Dolese P.O. Box 1089 Poulsbo, WA 98370-0057

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

DATED: March 10, 2016, at Seattle, Washington.



Stephanie Nix-Leighton, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE FITZPATRICK LAW

March 10, 2016 - 11:30 AM

Transmittal Letter

Document Uploaded: 1-466546-Supplemental Appellants' Brief.pdf

Case Name:

Court of Appeals Case Number: 46654-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Supplemental Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

London Market Insurers' CORRECTED Supplemental Brief on Fees

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

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

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