

65046-7

65046-7

NO. 650467

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

AMERICAN STATES INSURANCE COMPANY,

Respondent,

v.

CENTURY SURETY COMPANY,

Appellant.

2010 OCT 13 PM 4:51
FILED

BRIEF OF RESPONDENT

Gregory L. Harper, WSBA No. 27311
Charles K. Davis, WSBA No. 38321

HARPER | HAYES PLLC
One Union Square
600 University Street, Suite 2420
Seattle, Washington 98101
Telephone: 206.340.8010
Facsimile: 206.260.2852

Attorneys for Respondent

TABLE OF CONTENTS

	PAGE
I. <u>INTRODUCTION</u>	1
II. <u>ASSIGNMENTS OF ERROR</u>	3
III. <u>ISSUES PRESENTED</u>	3
IV. <u>STATEMENT OF THE CASE</u>	5
V. <u>ARGUMENT</u>	9
A. CENTURY IS <i>CONTRACTUALLY</i> LIABLE TO AMERICAN STATES AS PHB’S ASSIGNEE	9
1. Century’s Policy Says Century Will Pay Excess of American States’ 1999-2000 Policy—Period	10
2. "Horizontal Exhaustion" is Not the Law in Washington or Relevant Here	10
3. Century’s "Other Insurance" Clause is Irrelevant.....	10
4. Century Presented No Admissable Evidence of Covered Property Damage During the 1998-99 Policy Period.....	22
B. THE TRIAL COURT CORRECTLY DISMISSED CENTURY’S BAD FAITH CLAIMS.....	26
1. American States' Duty of Good Faith Runs Only to PHB- Not to Century.....	27
2. <i>First State v. Kemper</i> is Irrelevant Because Century Never Paid on Behalf of PHB.....	28
3. Even if Century Were PDB's Subrogee, PHB Released American States.....	29

TABLE OF CONTENTS

	PAGE
C. THE TRIAL COURT PROPERLY AWARDED AMERICAN STATES ITS ATTORNEY’S FEES	33
1. Olympic Steamship Applies Because American States is Standing in PHB's Shoes.....	34
2. The Trial Court Properly Excersized its Discretion Determining the Amount of Fee Award	37
D. THE COURT SHOULD AWARD AMERICAN STATES IT'S ATTORNEY FEES ON APPEAL	40
VI. <u>CONCLUSION</u>	41

TABLE OF AUTHORITIES

PAGE

Cases

<u>Absher Const. Co. v. Kent School Dist. No. 415,</u> 79 Wn. App. 841, 917 P.2d 1086 (1995).....	40
<u>American Employers' Ins. Co. v. Dallas Joint Stock Land Bank,</u> 170 S.W.2d 546, 550 (Tex. Civ. App. 1943).....	28
<u>American Nat'l Fire Ins. Co. v. B&L Trucking and Constr. Co., Inc.,</u> 134 Wn.2d 413, 951 P.2d 250 (1998).....	13
<u>Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.,</u> 45 Cal. App. 4th 1, 52 Cal. Rptr. 2d 690 (Cal. App. 1st Dist. 1996).....	18
<u>Bohemia, Inc. v. Home Ins. Co.,</u> 725 F.2d 506, 512 n.6 (9 th Cir. 1984).....	27
<u>Brower v. Ackerley,</u> 88 Wn. App. 87, , 943 P.2d 1141 (1997).....	35
<u>Cadet Mfg. Co. v. American Ins. Co.,</u> 391 F. Supp. 2d 884 (W.D. Wash. 2005).....	13, 15, 16
<u>Cincinnati Ins. Co. v. CPS Holdings, Inc.,</u> 875 N.E.2d 31 (Ohio 2007).....	12
<u>Commercial Union Assurance Cos. v. Safeway Stores, Inc.,</u> 26 Cal.3d 912, 164 Cal. Rptr. 709, 610 P.2d 1038 (1980).....	26
<u>Community Redevelopment Agency v. Aetna Cas. and Sur. Co.,</u> 50 Cal. App. 4th 329 (Cal. Ct. App. 1996).....	17
<u>Dart Industries, Inc. v. Commercial Union Ins. Co.,</u> 28 Cal. 4th 1059, 124 Cal. Rptr. 2d 142, 52 P.3d 79 (Cal. 2002).....	22
<u>Demelash v. Ross Stores, Inc.,</u> 105 Wn. App. 508, 20 P.3d 447 (2001).....	35

TABLE OF AUTHORITIES

PAGE

<u>Devington Condo. Ass'n v. Steadfast Ins. Co.</u> , No. C06-1213 MJP, 2007 U.S. Dist. LEXIS 19761 (D. Wash. 2007)19, 20, 21	
<u>Emplrs Ins. of Wausau v. Granite State Ins. Co.</u> , 330 F.3d 1214 (9th Cir. 2003)	16
<u>Essex Ins. Co. v. Heck</u> , 186 Cal. App. 4th 1513, 112 Cal. Rptr. 3d 915 (Cal. App. 5th Dist. 2010)	35, 36
<u>Fed. Ins. Co. v. Pac. Sheet Metal</u> , 54 Wn. App. 514, 774 P.2d 538 (1989)	20
<u>Fireman's Fund Ins. Co. v. Maryland Cas. Co.</u> , 65 Cal. App. 4th 1279, 77 Cal. Rptr. 2d 296 (1998).....	10, 30, 31, 32
<u>First State Ins. Co. v. Kemper Nat'l Ins. Co.</u> , 94 Wn. App. 602, 971 P.2d 953 (1999)	28, 29
<u>Fiscus Motor Freight v. Universal Sec. Ins. Co.</u> , 53 Wn. App. 777, 770 P.2d 679 (1989)	10, 21
<u>Flintkote Co. v. General Accident Assur. Co.</u> , 2008 U.S. Dist. LEXIS 10824 (N.D. Cal. Aug. 6, 2008).....	21
<u>Fluke Corp. v. Hartford Acc. & Indemn.</u> , 102 Wn. App. 237, 7 P.3d 825 (2000)	34
<u>In re New England Fish Co.</u> , 749 F.2d 1277 (9 th Cir. 1984)	28
<u>Insurance Co. of North America v. Kayser-Roth Corp.</u> , C.A. No.: PC 92-5248, 1999 R.I. Super. LEXIS 66, 114-15 (R.I. Super. Ct. 1999)	23
<u>K.O. Jordan v. Hartford Accident and Indemn. Co.</u> , 120 Wn.2d 490, 844 P.2d 403 (1993).....	34

TABLE OF AUTHORITIES

	PAGE
<u>Kitsap County v. Allstate Ins. Co.</u> , 136 Wn.2d 567, 964 P.2d 1173 (1998).....	11
<u>Kottler v. State</u> , 136 Wn.2d 437, 963 P.2d 834 (1998).....	28
<u>Leingang v. Pierce County Med. Bureau</u> , 131 Wn.2d 133, 930 P.2d 288 (1997).....	33
<u>Lynott v. National Union Fire Insurance Co.</u> , 123 Wn.2d 678, 871 P.2d 146 (1994).....	12
<u>Mahler v. Szucs</u> , 135 Wn.2d 398, 957 P.2d 632 (1998).....	37
<u>Mancuso v. Rothenberg</u> , 67 N.J. Super. 248, 170 A.2d 482, 487 (N.J. Super., App. Div. 1961)	23
<u>McGreevy v. Oregon Mut. Ins. Co.</u> , 128 Wn.2d 26, 904 P.2d 731 (1995).....	34
<u>McRory v. Northern Ins. Co. of N.Y.</u> , 138 Wn.2d 550, 980 P.2d 736 (1999).....	34, 41
<u>Mike M. Johnson, Inc. v. County of Spokane</u> , 150 Wn.2d 375, 78 P.3d 161 (2003).....	36
<u>Millers Casualty Ins. Co. v. Briggs</u> , 100 Wn.2d 9, 665 P.2d 887 (1983).....	28
<u>Morgan v. Kingen</u> , 141 Wn. App. 143, 169 P.3d 487 (2007).....	40
<u>Mutual of Enumclaw Ins. Co. v. USF Ins. Co.</u> , 164 Wn.2d 411, 191 P.3d 866 (2008).....	10
<u>N. River Ins. Co. v. Grinnell Mut. Reinsurance Co.</u> , 369 Ill. App. 3d 563, 307 Ill. Dec. 806, 860 N.E.2d 460 (Ill. App. Ct. 1st Dist. 2006).....	16
<u>Olympic Steamship Co., Inc. v. Centennial Ins. Co.</u> 117 Wn.2d 37, 811 P.2d 673 (1991).....	passim

TABLE OF AUTHORITIES

	PAGE
<u>Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.</u> , 144 Wn.2d 130, 26 P.3d 910 (2001).....	37
<u>Polygon Northwest Co. v. American Nat'l Fire Ins. Co.</u> , 143 Wn. App. 753, 189 P.3d. 777 (2008).....	passim
<u>Port of Seattle v. American Nat'l Fire Ins. Co.</u> , No. C96-434D, 1998 U.S. Dist. LEXIS 23038 (W.D. Wash. 1998).....	13, 14, 15, 19
<u>Puritan Ins. Co. v. Canadian Universal Ins. Co., Ltd.</u> , 775 F.2d 76 (3d Cir. 1985).....	33
<u>Queen City Farms v. Cent. Nat'l Ins. Co.</u> , 126 Wn.2d 50, 882 P.2d 703 (1994).....	22, 26
<u>R.A. Hanson Co. v. Magnuson</u> , 79 Wn. App. 497, 903 P.2d 496 (1995).	26
<u>Robinson v. Hamed</u> , 62 Wn. App. 92, 813 P.2d 171 (1991).....	24
<u>Schauerman v. Haag</u> , 68 Wn.2d 868, 416 P.2d 88 (1966).....	11
<u>Scott Fetzer Co. v. Weeks</u> , 122 Wn.2d 141, 859 P.2d 1210 (1993).....	39
<u>Sequoia Ins. Co. v. Royal Ins. Co. of Am.</u> , 971 F.2d 1385 (9th Cir. 1992)	31, 32
<u>Signature Dev. Co. v. Royal Ins. Co. of Am.</u> , No. 97-WM-2688, 1999 U.S. Dist. Lexis 23322, *7-8 (D. Colo. July 22, 1999)	25
<u>St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co.</u> , 919 F.2d 235 (4th Cir. 1990)	20
<u>State Farm v. Parrella</u> , 134 Wn. App. 536, 141 P.3d 643 (2006)	10
<u>State v. National Auto. Ins. Co.</u> , 290 A.2d 675 (Del. Ch. 1972)	23
<u>Taco Bell Corp. v. Cont'l Cas. Co.</u> ,	

TABLE OF AUTHORITIES

	PAGE
388 F.3d 1069 (7th Cir. 2004)	20
<u>Tank v. State Farm Fire & Cas. Co.</u> , 105 Wn.2d 381, 715 P.2d 1133 (1986).....	27, 29, 32
<u>Transcon. Ins. Co. v. Wash. Pub. Util. Dists.’ Util. Sys.</u> , 111 Wn.2d 452, 760 P.2d 337 (1988).....	10
<u>Travelers Cas. and Sur. Co. v. Transcontinental Ins. Co.</u> , 19 Cal. Rptr. 3d 272, 279 (Cal. Ct. App. 2004).....	17
<u>Tribble v. Allstate Prop. & Cas. Ins. Co.</u> , 134 Wn. App. 163, 139 P.3d 373 (2006).....	38
<u>Trinity Homes LLC v. Ohio Cas. Ins. Co.</u> , 1:04-cv-1920-JDT-WTL, 2007 U.S. Dist. LEXIS 24370, *36 (S.D. Ind. Mar. 30, 2007).....	12
<u>Truck Ins. Exchange v. Vanport Homes, Inc.</u> , 147 Wn.2d 751, 58 P.3d 276 (2002).....	23
<u>Truck</u> , 76 Wn. App. at 535	23, 27, 29
<u>Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.</u> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	37
<u>Weyerhaeuser Co. v. Commercial Union Ins. Co.</u> , 142 Wn.2d 654, 15 P.3d 115 (2000).....	15, 23
<u>Wlasiuk v. Whirlpool Corp.</u> , 81 Wn. App. 163, 914 P.2d 102 (1996).....	22

TABLE OF AUTHORITIES

PAGE

Treatises

Allan D. Windt, INSURANCE CLAIMS AND DISPUTES, 4th ed. (2001)..... 21
.....

Appleman, INSURANCE LAW AND PRACTICE (1980)..... 12, 18, 21, 23
.....

I. INTRODUCTION

This is an insurance coverage dispute. The primary issue is what coverage Appellant Century Insurance Company *contractually* owes to its insured, in whose shoes Respondent American States now stands. The case has nothing to do with “contribution”—that word does not appear in the summary judgment motions that gave rise to the judgment at issue in this appeal.

Century issued an excess liability insurance policy to Professional Home Builders (“PHB”) with a 1999-2000 policy period. The policy requires Century to pay for PHB’s liability in excess of the limits of the policies *listed in the Century policy’s “schedule of underlying insurance.”* That schedule lists a \$1 million, 1999-2000 primary policy issued to PHB by American States. *Century’s schedule does not list a \$1 million policy that American States issued to PHB for the 1998-1999 policy period.*

PHB became liable for a \$1,922,000 arbitration award. When Century refused to pay the \$922,000 in excess of the \$1 million limit of the *scheduled* American States’ 1999-2000 policy, American States paid the entire award. PHB then assigned its rights against Century to American States, and American States in turn sued Century in this lawsuit *as PHB’s assignee.*

The fundamental issue in this case is whether Century is liable to American States—as PHB’s assignee—for the \$922,000 in excess of the \$1 million limit of American States’ 1999-2000 policy. The trial court correctly determined that it is, and this Court should affirm.

The plain language of Century’s insurance contract says it will pay in excess of American States’ 1999-2000 one million dollar policy limit. Century could have written its policy to say it would pay in excess of the limits of *all of PHB’s underlying insurance*, but Century chose not to—a fact that Washington law construes against Century. In addition, PHB had no obligation to “horizontally exhaust” American States’ 1998-1999 policy because (a) that “rule” does not trump the plain language of the contract between Century and PHB; and (b) “horizontal exhaustion” is not the law in Washington anyway. Century’s “other insurance” clause is similarly irrelevant because such clauses do not apply to insurance policies that have different policy periods or afford different “levels” of coverage. Finally, even if American States’ 1998-1999 policy were relevant, Century offered no *admissible* evidence to sustain *its* burden of proving that covered property damage occurred during American States 1998-1999 policy period.

Also correct was the trial court’s ruling that dismissed Century’s bad faith “failure to settle” claims against American States. This is true

because a primary insurer owes no duty to an excess insurer unless the excess insurer stands in the shoes of the policyholder as its subrogee. But Century never paid anything on behalf of PHB, so Century is not PHB's subrogee. And even if it were, PHB released American States, barring all claims by anyone suing American States in PHB's shoes. Moreover, PHB—not American States—elected not to settle the underlying lawsuit. Thus, Century's numerous complaints about how American States and PHB's defense lawyer handled the underlying lawsuit are wholly irrelevant.

Finally, the trial court correctly awarded American States its attorney's fees because American States is suing Century as the assignee of Century's policyholder, and Olympic Steamship Co., Inc. v. Centennial Ins. Co. entitles a policyholder suing its insurance company to recover fees. Moreover, the trial court correctly exercised its discretion in calculating the amount of that award.

For each of these reasons, American States respectfully requests that this Court affirm the judgment against Century on all grounds.

II. ASSIGNMENTS OF ERROR

American States assigns no error to the trial court rulings.

III. ISSUES PRESENTED

Issue No. 1: Whether Century's policy contractually obligates it to pay PHB's liability in excess of the single \$1 million American States policy listed in Century's schedule of underlying insurance because (a) the plain language of the Century policy says that; (b) the so-called "horizontal exhaustion rule" is not the law in Washington, and cannot trump the language of the contract between PHB and Century; (c) Century's "other insurance" clause is irrelevant because American States' 1998-1999 policy has a different policy period and affords a different "level" of coverage; and (d) Century failed to carry *its* burden of proving that covered damage occurred during American States' 1998-1999 policy period.

Issue No. 2: Whether the trial court properly dismissed Century's bad faith "failure to settle" claims because (a) a primary insurer owes no duties to an excess insurer unless the excess insurer is a subrogee of the policyholder; (b) Century is not a subrogee of PHB because Century never paid anything on PHB's behalf; and (c) even if Century were PHB's subrogee, Century would have no viable claims because PHB has released American States.

Issue No. 3: Whether the trial court's attorney's fee award should be affirmed because attorney fees are recoverable under Olympic

Steamship by the assignee of a policyholder suing its insurer, and because the trial court properly exercised its discretion in determining the amount of American States' fee award.

IV. STATEMENT OF THE CASE

The Insurance Policies: Respondent American States insured PHB under two commercial general liability policies, each with a \$1 million "per occurrence" limit. The first policy had a September 19, 1998 to September 19, 1999 policy period. The second had a September 19, 1999 to September 19, 2000 policy period.¹

Century issued a Commercial Excess Liability policy to PHB with a December 1999 to September 2000 policy period.² The Century policy states that Century will pay "those sums that the insured becomes legally obligated to pay as damages because of . . . property damage . . . to which this insurance applies" in excess of PHB's "underlying insurance."³ The Century policy then defines "underlying insurance" as the policies "*listed in the Schedule of Underlying Insurance.*"⁴ That "Schedule of Underlying Insurance" lists American States' 1999-2000 policy, *but not*

¹ CP 701.

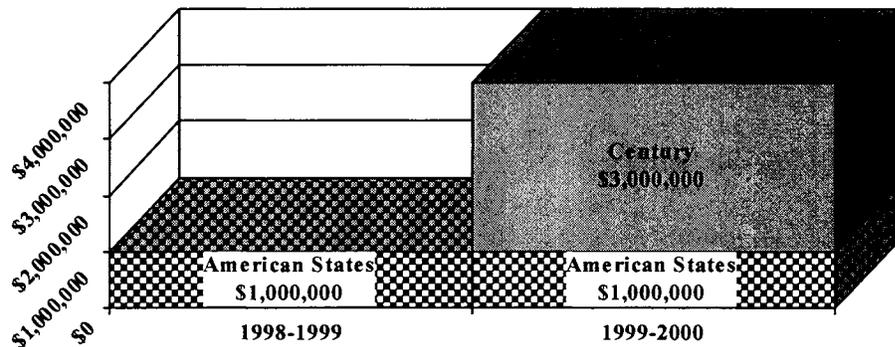
² CP 319-30.

³ CP 327.

⁴ CP 329.

*American States' 1998-99 policy.*⁵

Depicted graphically, the relevant coverage is:



The Underlying Lawsuit: Residential Investment Partners, 1997, LLC (“RIP”) was the developer of the Heritage Ridge Apartments in Mill Creek, Washington.⁶ In 1998, RIP hired PHB to construct the siding system and underlying weatherproof barrier for Phase I of the apartment complex.⁷ In 2003, RIP sued PHB for alleged

⁵ CP 321. An entity related to PHB also purchased primary coverage during the 2000-2001 policy period through a company called “First Financial,” and a 2000-2001 excess policy from Century. That 2000-2001 “tower” is not at issue here because the United States District Court for the Western District of Washington ruled that the 2000-2001 primary policy does not afford coverage (and the 2000-2001 excess policy is therefore not responsive either).

⁶ CP 50.

⁷ CP 33-45.

construction defects and resulting property damage caused by PHB's faulty work.⁸

PHB sent the claim to American States, which agreed to defend subject to a complete reservation of rights.⁹ American States appointed Pauline Smetka at the Helsell Fetterman firm to defend PHB. Ms. Smetka's firm attempted to involve Century in the defense.¹⁰ In a March 30, 2005 letter to Century, Helsell Fetterman told Century that RIP had sued PHB, detailed the nature of RIP's claims, disclosed the anticipated arbitration dates, and offered to provide any other information Century wanted: "If you should have any questions or concerns, please do not hesitate to call. Please let me know if I can provide additional information."¹¹

Century refused to get involved. In an April 21, 2005 letter, Century claimed that because its policies were excess, it would not participate in PHB's defense.¹² Century closed its letter with a single request: "We request prior notice as soon as it appears as though the

⁸ CP 50.

⁹ CP 706-18.

¹⁰ CP 1255-56.

¹¹ CP 1255-56.

¹² CP 1257.

underlying limits will not be sufficient to cover the amount of *loss*.”¹³ Century did not request any information from PHB and never asked any questions about the size—or any other details—of the pending claim against PHB. Century never contacted American States. Nor did Century ever contact PHB or its counsel with any questions or concerns as was offered. On June 2, 2005, Century closed its claim file.¹⁴

The RIP/PHB arbitration occurred in May and July 2005.¹⁵ On July 27, 2005, the Arbitrator issued a \$1,511,478 Interim Award against PHB.¹⁶ PHB immediately informed Century of the award and requested coverage for the amount in excess of American States’ 1999-2000 policy.¹⁷

By letter dated August 8, 2005, Century again denied it had any obligation to indemnify PHB.¹⁸ On September 23, 2005, the Arbitrator issued a Final Award, adding attorney fees and other costs of litigation, of \$1,922,044.60.¹⁹

¹³ CP 1257 (emphasis added).

¹⁴ CP 698.

¹⁵ CP 500.

¹⁶ CP 194-96.

¹⁷ CP 318.

¹⁸ CP 3104-06.

¹⁹ CP 61-64.

American States investigated and determined that PHB's work did not cause any covered property damage during American States' 1998-99 policy period.²⁰ By September 28, 2005, American States had informed Century that its excess coverage was triggered.²¹ Nevertheless, Century continued to refuse to participate in funding the judgment, telling American States that it "should be making [its] arguments to [PHB's 2000-2001 primary carrier], not us."²² A Federal judge later determined that the 2000-2001 primary policy to which Century was referring did not even insure PHB.

Despite repeated requests from American States and PHB, Century refused to fund any part of the award against PHB.²³ On December 8, 2005, PHB, RIP, and American States entered into an agreement under which American States paid the entire judgment against PHB, and PHB assigned its rights against Century and released American States from all liability.²⁴

²⁰ CP 3053-54.

²¹ CP 200-02.

²² CP 200.

²³ CP 2714 (September 1, 2005 claim file entry: "[American States claims adjuster] wanted to know if we would agree to fund some of the settlement . . ."). CP 2712 (claim file entries regarding phone calls and letters from PHB's personal counsel).

²⁴ CP 69-77.

V. ARGUMENT

A. **CENTURY IS CONTRACTUALLY LIABLE TO AMERICAN STATES AS PHB'S ASSIGNEE**

This a contract dispute. American States sued Century, as PHB's assignee, for breaching its insurance contract with PHB. "Contribution" is not an issue here because, among other reasons, the summary judgment motions that gave rise to American States' judgment against Century were based solely on the *contractual* rights that PHB assigned to American States.²⁵

1. **Century's Policy Says Century Will Pay Excess of American States' 1999-2000 Policy—Period**

The proper interpretation of an insurance policy is a question of law.²⁶ Insurance policies are construed as contracts.²⁷ To determine the

²⁵ Throughout its brief, Century erroneously claims that "[t]his is an action for contribution." *See, e.g., Brief of Appellant*, at 1. But not only was "contribution" not an issue in the summary judgment motions that gave rise to the judgment that Century is appealing, contribution applies only "to insurers who share the same level of obligation on the same risk as to the same insured." *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1294 n.4, 77 Cal. Rptr. 2d 296 (1998). As a result, *there is no right of contribution between primary and excess insurers.* *See, e.g., Fiscus Motor Freight v. Universal Sec. Ins. Co.*, 53 Wn. App. 777, 787-88, 770 P.2d 679 (1989) ("Contribution is required only when *both* policies are primary, *both* are excess, or *both* are contingent."); *Fireman's Fund*, 65 Cal. App. 4th at 1294 n.4 ("As a general rule, there is no contribution between primary and excess carriers of the same insured absent a specific agreement to the contrary."). American States' assigned contractual claims could also be labeled "conventional subrogation." *See Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 424, 191 P.3d 866 (2008) ("Because conventional subrogation can arise only by agreement, some jurisdictions have found it to be synonymous with assignment.").

²⁶ *Transcon. Ins. Co. v. Wash. Pub. Util. Dists.' Util. Sys.*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988) ("The interpretation of insurance policies is a question of law.").

²⁷ *State Farm v. Parrella*, 134 Wn. App. 536, 540, 141 P.3d 643 (2006).

intent of the parties, courts look first to the plain language of the policy.²⁸

Where a term is defined in the policy, “then the term should be interpreted in accordance with that policy definition.”²⁹

Century’s policy states that Century will pay on behalf of PHB “those sums that [PHB] becomes legally obligated to pay as damages because of . . . property damage . . . to which this insurance applies,”³⁰ in excess of PHB’s “underlying insurance.”³¹ The policy then defines “underlying insurance” as “all insurance . . . *listed in the Schedule of Underlying Insurance.*”³² Thus, because only the 1999-2000 American States policy is listed in Century’s schedule, Century has a contractual duty to pay the portion of the arbitration award in excess of the 1999-2000 policy’s \$1 million per-occurrence limit.

The fact that Century defined its coverage as excess only to policies “listed in the Schedule” is particularly significant because other excess policies define “underlying insurance” as scheduled insurance *and*

²⁸ Schauerman v. Haag, 68 Wn.2d 868, 873, 416 P.2d 88 (1966) (“Where the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed.”).

²⁹ Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 576, 964 P.2d 1173 (1998).

³⁰ CP 327.

³¹ CP 328.

³² CP 329. The definition includes “any renewals or replacements thereof.” However, an earlier-issued policy cannot even arguably qualify as a “renewal” or “replacement” of a later-issued policy. Additionally, another court has already ruled that the policy that insured PHB after American States’ 1999-2000 policy did not cover the Judgment.

all other insurance. In Cincinnati Ins. Co. v. CPS Holdings, Inc., for example, the policy defined “underlying insurance” to include “all other insurance policies applicable to the ‘occurrence’”:

Cincinnati Insurance’s umbrella policy defines “underlying insurance” as “the policies of insurance listed in the Schedule of Underlying Policies *and the insurance available to the insured under all other insurance policies applicable to the ‘occurrence’*.”³³

Century could have similarly written its policy to be excess of all other policies, but chose not to. That omission is significant under Washington law: “In evaluating the insurer’s claim as to meaning of language used, courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question.”³⁴ Thus, the Court should apply Century’s policy as written—excess only to American States’ 1999-2000 policy.

2. “Horizontal Exhaustion” is Not the Law in Washington or Relevant Here

Notwithstanding the plain language of its policy, Century claims that under the so-called “horizontal exhaustion rule,” Century has to pay

³³ Cincinnati Ins. Co. v. CPS Holdings, Inc., 875 N.E.2d 31, 34-35 (Ohio 2007) (emphasis added); *see also* Trinity Homes LLC v. Ohio Cas. Ins. Co., 1:04-cv-1920-JDT-WTL, 2007 U.S. Dist. LEXIS 24370, *36 (S.D. Ind. Mar. 30, 2007) (“underlying insurance” defined as “the policies of insurance listed in the Schedule of Underlying Polices *and the insurance available to the insured under all other insurance policies applicable to the ‘occurrence’*.”) (emphasis added).

³⁴ Lynott v. National Union Fire Insurance Co., 123 Wn.2d 678, 688, 871 P.2d 146 (1994) (quoting 13 *John A. Appleman & Jean Appleman, Insurance Law & Practice* § 7403 (1976)).

only if PHB has exhausted all of its primary coverage (including policies *not* listed in Century's "Schedule of Underlying Insurance"). That argument first fails because "horizontal exhaustion" is not the law in Washington.

Two cases have addressed "horizontal exhaustion" under Washington law: Port of Seattle v. American Nat'l Fire Ins. Co.³⁵ and Cadet Mfg. Co. v. American Ins. Co.³⁶ In Port of Seattle, the Port's umbrella carriers ("the LMIs") argued that the Port had to first exhaust all primary coverage that insured the Port during any part of a "continuous injury" before the LMIs' had to pay. The Port countered that this "horizontal exhaustion" argument contradicted B&L Trucking,³⁷ which states that any insurer "on the risk" during any part of a continuing loss is jointly and severally liable for the entire loss.³⁸ The court agreed:

Thus, argues the Port, it would be inconsistent to make the insured recover from each of the primary insurers before it could recover on any excess policy. In other words, the objective of imposing joint and several liability, speedy indemnity for the insured, would be defeated if the insured

³⁵ Port of Seattle v. American Nat'l Fire Ins. Co., No. C96-434D, 1998 U.S. Dist. LEXIS 23038 (W.D. Wash. 1998).

³⁶ Cadet Mfg. Co. v. American Ins. Co., 391 F. Supp. 2d 884 (W.D. Wash. 2005).

³⁷ American Nat'l Fire Ins. Co. v. B&L Trucking and Constr. Co., Inc., 134 Wn.2d 413, 951 P.2d 250 (1998).

³⁸ See B&L Trucking, 134 Wn.2d at 424 ("[A]ll insurers on the risk during the time of ongoing damage have a joint and several obligation to provide full coverage for all damages.").

had to sue each of several primary insurers before it could reach its excess policies.³⁹

The Court agrees that [the Port's argument regarding B & L Trucking] casts doubt on the propriety of horizontal exhaustion in Washington.⁴⁰

The Port of Seattle court further concluded that because the “Schedule of Underlying Insurances” in each of the excess policies identified the limits of the primary policy with the same policy period, “horizontal exhaustion” was also inconsistent with the policies’ language:

The Port presents contrary evidence showing an intent to require exhaustion of only the coverage directly underlying any given LMI contract. It points to the specific dollar figures given in the “Schedule of Underlying Insurances,” to which the limit of liability directly refers in some or most of the contracts. . . .

The Court interprets the liability limit clauses as unambiguously requiring only vertical exhaustion, except in the case of the 1981 contract cited by the LMIs. But even were the provisions ambiguous (as is the latter), the extrinsic evidence offered by the parties does not resolve the ambiguity. Therefore, the Court resolves this issue in favor of the insured and denies summary judgment on horizontal exhaustion.⁴¹

³⁹ Port of Seattle, 1998 U.S. Dist. LEXIS 23038, at *12.

⁴⁰ Port of Seattle, 1998 U.S. Dist. LEXIS 23038, at *12-13.

⁴¹ Port of Seattle, 1998 U.S. Dist. LEXIS 23038, at *15-16. The Port of Seattle court also found it persuasive that the excess policies’ requirement to “maintain underlying insurance” could logically refer only to concurrent primary coverage. See Port of Seattle, 1998 U.S. Dist. LEXIS 23038, at *15-16 (“[A]nother provision requires the Port to maintain the underlying policies on the schedule ‘in full effect during the policy period.’ This suggests that the schedule of underlying insurances contemplates only concurrent policies, not prior or future ones, because the latter could not be ‘maintained in full effect.’”). Century’s policy has this same language. See CP 87 (“The ‘underlying insurance’ . . . shall be maintained in effect during the policy period of this Coverage Part . . .”).

In Cadet, an excess insurer (Granite State) issued four excess policies with policy periods that corresponded to four primary policies issued by Royal.⁴² Granite State alleged that Cadet had also purchased other primary coverage with policy periods before or after Royal's.⁴³ When Royal exhausted its limits, Granite State claimed that it still did not have to respond because, among other reasons, Cadet had not shown it had "horizontally exhausted" its non-Royal coverage.⁴⁴

The Cadet court disagreed. The court explained that when the Granite States policies said they would pay upon exhaustion of "underlying insurances," that was a reference only to the *Royal* policies: "Finally, each of the Granite State policies requires that Cadet exhaust only the 'underlying insurances' before its coverage is triggered. The 'underlying insurances' are the Royal policies"⁴⁵ In other words, the court found "underlying" meant a policy with the same policy period as the excess policy. Citing Port of Seattle and Weyerhaeuser v. Commercial Union,⁴⁶ the Cadet court further held that the concept of "horizontal

⁴² Cadet, 391 F. Supp. 2d at 888.

⁴³ *See Cadet*, 391 F. Supp. 2d at 891 and 892 n.4.

⁴⁴ Cadet, 391 F. Supp. 2d at 891 ("Granite State further argues that this Court should require horizontal exhaustion of all primary policies.").

⁴⁵ *See Cadet*, 391 F. Supp. 2d at 892.

⁴⁶ Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 15 P.3d 115 (2000).

exhaustion” contradicted Washington’s rule of “joint and several liability among insurers of a continuous loss”:

The Court is also unpersuaded by Granite State’s proposal that the Court should require horizontal exhaustion of all primary insurers because to do so flies in the face of the terms of Granite State’s own policies and Washington’s law of joint and several liability among insurers of a continuous loss.⁴⁷

Notwithstanding these holdings, Century claims that Polygon Northwest Co. v. American Nat’l Fire Ins. Co.⁴⁸ establishes a rule of horizontal exhaustion in Washington.⁴⁹ It does not. Significantly, the term “horizontal exhaustion” appears nowhere in the decision. This makes sense because horizontal exhaustion addresses when the excess insurer’s obligation *to the policyholder* arises.⁵⁰ In other words, horizontal exhaustion addresses whether a claim implicates the excess layer of coverage in the first place (as opposed to how to apportion liability once the excess layer is triggered).⁵¹

⁴⁷ See Cadet, 391 F. Supp. 2d at 892 (emphasis added).

⁴⁸ Polygon Northwest Co. v. American Nat’l Fire Ins. Co., 143 Wn. App. 753, 189 P.3d 777 (2008).

⁴⁹ *Brief of Appellant*, at 22-23.

⁵⁰ N. River Ins. Co. v. Grinnell Mut. Reinsurance Co., 369 Ill. App. 3d 563, 569, 307 Ill. Dec. 806, 860 N.E.2d 460 (Ill. App. Ct. 1st Dist. 2006) (“Horizontal exhaustion *requires an insured* who has multiple primary and excess policies covering a common risk to exhaust all primary policy coverage *before invoking excess coverage.*”) (emphasis added)

⁵¹ See Emplrs Ins. of Wausau v. Granite State Ins. Co., 330 F.3d 1214, 1221 (9th Cir. 2003) (“Under a principle commonly termed the ‘horizontal exhaustion’ rule, in California, ‘liability under a secondary [excess] policy will not attach until all

Polygon, on the other hand, had nothing to do with the policyholder or anyone exercising the policyholder's rights; Polygon was a contribution action among the various excess insurers exercising *their own rights*.⁵² The limits of all applicable (and valid and collectible) primary policies had already been exhausted, so there was never any question that the excess layer of coverage was implicated. Horizontal exhaustion was therefore not an issue. Thus, only two courts have addressed "horizontal exhaustion" under Washington law, and both rejected it.

Century's "horizontal exhaustion" argument also fails because even in states that have adopted that "general rule," horizontal exhaustion is not required if the excess policy language—like Century's—"states that it is *excess over a specifically described policy*."⁵³ Therefore, Century's out-of-state cases and treatises are irrelevant because an exception to the rule they cite would apply here anyway.⁵⁴

primary insurance is exhausted, even if the total amount of primary insurance exceeds the amount contemplated in the secondary policy."").

⁵² Polygon, 143 Wn. App. at 763.

⁵³ See Travelers Cas. and Sur. Co. v. Transcontinental Ins. Co., 19 Cal. Rptr. 3d 272, 279 (Cal. Ct. App. 2004) (explaining general rule quoted in Community Redevelopment Agency v. Aetna Cas. and Sur. Co., 50 Cal. App. 4th 329 (Cal. Ct. App. 1996) does not apply where excess policy "states that it is *excess over a specifically described policy*") (emphasis added).

⁵⁴ For example, the Windt quote is irrelevant because (a) it does not address Washington law, and (b) it relies upon the same line of California cases that Community Redevelopment says does not apply if an excess policy says it is excess

3. Century's "Other Insurance" Clause is Irrelevant

Century's arguments about its "other insurance" clause are equally baseless. First, an "other insurance" clause defines the insurer's rights with respect to other insurance companies, not its policyholder:

[A]pportionment among multiple insurers must be distinguished from apportionment between an insurer and its insured. When multiple policies are triggered on a single claim, the insurers' liability is apportioned pursuant to the "other insurance" clauses of the policies or under the equitable doctrine of contribution. That apportionment, however, *has no bearing upon the insurers' obligations to the policyholder*. A pro rata allocation among insurers "does not reduce their respective obligations to their insured." The insurers' contractual obligation to the policyholder is to *cover the full extent of the policyholder's liability* (up to the policy limits).⁵⁵

The language of Century's other insurance clause confirms its lack of applicability to its duties to PHB: "If other valid and collectible insurance is available to the insured for a loss we cover under this Coverage Part, then this insurance is excess of *and not contributing with* such insurance."⁵⁶ Because the language speaks only of Century's right to

of particular scheduled policies. Also, the Appleman quote merely says "horizontal exhaustion" is "favored by excess carriers" and "appears to be the dominant exhaustion theory"; it does not claim that "horizontal exhaustion" is the law in Washington.

⁵⁵ Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., 45 Cal. App. 4th 1, 105-06, 52 Cal. Rptr. 2d 690 (Cal. App. 1st Dist. 1996) (citations omitted) (emphasis added).

⁵⁶ CP 89.

“contribution,” it does not affect Century’s obligations *to PHB* (and thus to American States as PHB’s assignee).⁵⁷

Notably, the Polygon court used the other insurance clauses of the excess policies strictly to apportion liability among the various excess insurers in their contribution actions against one another, not to determine whether any insurer had breached its duties to its policyholder.⁵⁸

Century’s “other insurance” arguments also fail because that clause does not apply to policies with different policy periods. Like here, Devington Condominium Association v. Steadfast Ins. Co.⁵⁹ was an insurance coverage dispute arising out of an underlying construction defect lawsuit. The plaintiff in the underlying lawsuit, a condominium association, had sued its contractor, Reed, for damage resulting from ongoing water intrusion. Reed was insured under two successive policies: an “NAC” policy with a 1998-2000 policy period, and an American Safety

⁵⁷ American States did *plead* a claim for contribution. But that claim was not the subject of the motions that gave rise to the judgment against Century. Moreover, pleading alternative theories is allowed. *See* CR 8(e)(2); Port of Seattle v. Lexington Ins. Co., 111 Wn. App. 901, 919, 48 P.3d 334 (2002) (“[A] pleading should not be construed as an admission against another alternative or inconsistent pleading in the same case.”).

⁵⁸ Polygon, 143 Wn. App. at 778 (“Thus, each excess insurer’s liability *for purposes of contribution* was defined . . . by its ‘other insurance’ clause”) (emphasis added).

⁵⁹ Devington Condo. Ass’n v. Steadfast Ins. Co., No. C06-1213 MJP, 2007 U.S. Dist. LEXIS 19761 (D. Wash. 2007).

policy with a 2000-2001 policy period.⁶⁰ American Safety filed a summary judgment motion, claiming the “other insurance” clauses in its and NAC’s policy made American Safety’s coverage excess to NAC’s.

Applying Washington law, the Devington court held that because “other insurance” clauses are applicable only when two policies insure the same risk “during the same period of time,” they do not apply in disputes regarding consecutive insurance policies:

A number of courts have concluded that “other insurance” clauses do not apply in the context of consecutive insurance policies. . . . In addition, legal commentators have argued that “other insurance” clauses only apply in the context of concurrent policies because “while successive policies might insure the same type of risk, they do not insure the same risk” and because applying “other insurance” clauses to successive policies might make insurers liable for damages occurring outside their policy periods.

. . . .

The Court concludes that *“other insurance” clauses do not apply where the at-issue policies provided consecutive rather than concurrent insurance coverage.*⁶¹

⁶⁰ The court had already ruled that a third policy, issued by Steadfast, was inapplicable.

⁶¹ Devington Condo. Ass’n v. Steadfast Ins. Co., 2007 U.S. Dist. LEXIS 19761, at *7-10 (W.D. Wash. 2007) (emphasis added, citations omitted); *see also* Fed. Ins. Co. v. Pac. Sheet Metal, 54 Wn. App. 514, 519, 774 P.2d 538 (1989) (“The OTHER INSURANCE clause at issue refers to *other* valid and collectible insurance covering a loss also covered by the Federal policy, *i.e.*, concurrent, ***not to the underlying policy which provides coverage that is not concurrent*** with the Federal policy.”) (emphasis added); Taco Bell Corp. v. Cont’l Cas. Co., 388 F.3d 1069, 1078-79 (7th Cir. 2004) (“But this analysis does not fit the case in which the two policies, each with an ‘other insurance’ clause, insure merely the same kind of risk, but not the same risk because the policies are successive.”); St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co., 919 F.2d 235, 241-42 (4th Cir. 1990) (“It appears that the district

Significantly, the Devington court also rejected American Safety's attempt to distinguish the above rule on grounds that American Safety's policy was an "excess" one:

In addition, American Safety's argument assumes that the policies provide different layers of coverage. But American Safety's policy is only excess *if* the NAC policy (or another insurer's policy) is primary during American Safety's policy period.⁶²

Citing the same principle underlying this Devington holding, courts have also held that "other insurance" clauses do not apply to disputes over policies at different "levels" of coverage:

"[T]he application of 'other insurance' clauses requires, as a foundational element, that there exist multiple policies applicable to the same loss." These several insurers must insure the same risk *at the same level of coverage*. For the provision to apply, it is imperative that the insurers cover the same risk at the same level. *In other words, an "other insurance" dispute cannot arise between excess and primary insurers.*⁶³

court may have been incorrect in relying on the policies' 'other insurance' clauses to resolve this question. As Vigilant points out, such clauses apply only when the coverage is concurrent. Where, as here, the policies periods did not overlap at all, such clauses are not applicable."); 22 Eric Mills Holmes, HOLMES' APPLEMAN ON INSURANCE 2d § 140.1[A] (1998) ("'Other insurance' refers to the existence of other insurers that insure the same risk, for the benefit of the same entity, *during the same period of time.*") (emphasis added); *id.* § 140.1[C][2] ("[I]f the policies do not cover the same policy term, the other insurance clause does not apply."); Allan D. Windt, INSURANCE CLAIMS AND DISPUTES, 4th ed. § 7:1 (2001) ("'[O]ther insurance' clauses apply only when the coverage is concurrent. Accordingly, for example, 'other insurance' clauses do not generally apply as between insurers covering different policy periods.").

⁶² See Devington, 2007 U.S. Dist. LEXIS 19761 at *10-11.

⁶³ Flintkote Co. v. General Accident Assur. Co., 2008 U.S. Dist. LEXIS 108245, 39-40 (N.D. Cal. Aug. 6, 2008). See also Fiscus Motor Freight v. Universal Sec. Ins. Co.,

Thus, Century's "other insurance" clause is irrelevant. Instead, Century's liability turns solely on the Century policy's (limited) definition of "Scheduled Underlying Insurance."

4. Century Presented No Admissible Evidence of Covered Property Damage During the 1998-99 Policy Period

Even if American States' 1998-99 policy were relevant in determining Century's contractual duties to PHB, Century would still be liable because Century cannot prove that any covered damage occurred during American States' 1998-99 policy period.

Century raised the applicability of American States' 1998-99 policy as an affirmative defense, and therefore has the burden of proving that defense.⁶⁴ Moreover, Century bases that argument on its "other insurance" clause, and "[t]he burden of proof is upon the insurer to establish the existence of concurrent insurance, where relied upon either to

53 Wn. App. 777, 787-88, 770 P.2d 679 (1989) ("Here, the language of Universal's 'other insurance' clause unambiguously provides coverage regardless of the existence of other insurance that applies on an excess basis. Contribution is required only when both policies are primary, both are excess, or both are contingent."); Dart Industries, Inc. v. Commercial Union Ins. Co., 28 Cal. 4th 1059, 1079 n.6, 124 Cal. Rptr. 2d 142, 52 P.3d 79 (Cal. 2002) ("Other insurance' clauses become relevant only where several insurers insure the same risk at the same level of coverage. An 'other insurance' dispute cannot arise between excess and primary insurers.").

⁶⁴ Wlasiuk v. Whirlpool Corp., 81 Wn. App. 163, 179, 914 P.2d 102 (1996) ("The burden of proof is upon defendant to prove an affirmative defense . . ."); Queen City Farms v. Cent. Nat'l Ins. Co., 126 Wn.2d 50, 97, 882 P.2d 703 (1994) ("Since misrepresentation is an affirmative defense, the burden of proof is on defendant Central National."); Raytheon Co. v. Continental Cas. Co., 123 F. Supp. 2d 22, 28 (D. Mass. 2000) ("An insurer denying coverage under a policy has the burden of proving its affirmative defenses.").

defeat or reduce liability.”⁶⁵ Thus, Century had to prove that *covered* damage occurred during American States’ 1998-99 policy period.

Century first claims that a triable fact issue exists because American States’ June 13, 2005 reservation of rights letter is a “party admission” under “ER 802(d)(2)”[sic].⁶⁶ This is incorrect. American States’ letter does not even mention whether any damage occurred during the 1998-99 policy period (let alone “admit” covered damage occurred). Instead, the letter acknowledges that the first building was completed during the 1998-99 policy period, creating the *potential* for coverage under the 1998-99 policy and triggering the duty to defend (*i.e.*, one could *speculate* that damage *might* have occurred during that policy period).⁶⁷ Moreover, ER 801(d)(2) simply defines what type of out-of-court

⁶⁵ Appelman, 21 INSURANCE LAW AND PRACTICE § 12246 at 295 (1980). *See also* Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 674, 15 P.3d 115 (2000) (“The burden of showing entitlement to an exclusion of liability based upon the existence of other insurance is properly CU’s.”); Mancuso v. Rothenberg, 67 N.J. Super. 248, 256, 170 A.2d 482, 487 (N.J. Super., App. Div. 1961) (“The burden of proving defense of ‘other insurance’ is on the insurer urging it.”); State v. National Auto. Ins. Co., 290 A.2d 675, 678 (Del. Ch. 1972) (“The insurer has the burden of proving ‘other insurance.’”); Insurance Co. of North America v. Kayser-Roth Corp., C.A. No.: PC 92-5248, 1999 R.I. Super. LEXIS 66, 114-15 (R.I. Super. Ct. 1999) (“[T]he other-insurance provision is not a condition precedent to coverage and [the insurer] failed to carry its burden of proof with respect to the other-insurance provision”).

⁶⁶ *Brief of Appellant*, at 28.

⁶⁷ *See* Truck Ins. Exchange v. Vanport Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (the “duty to defend is broader than [the] duty to indemnify” and “based on the potential for liability”).

statement is *admissible* as non-hearsay—it says nothing about whether that statement creates a triable issue of fact.

Century’s argument about 1998-99 property damage also fails because Century failed in its burden to present evidence—as opposed to mere speculation—that covered property damage occurred at Heritage Ridge before the end of American States’ 1998-99 policy period (September 19, 1999). First, not all damage results in coverage; the American States policy covers only “physical injury to tangible property” for which PHB is liable.⁶⁸ And the Arbitrator ruled that “PHB substantially completed the siding work on all Phase One buildings [at the Project] *between July 22, 1999 and October 28, 1999.*”⁶⁹ That is, PHB did not completely cover the first building with siding until July 22, 1999. Therefore, Century had the burden to present substantial evidence of property damage—caused by PHB’s faulty work—that occurred in the narrow *eight-week* “window” between July 22, 1999 and September 19, 1999.⁷⁰

⁶⁸ CP 741, 751-52 (defining Century’s coverage obligation, “occurrence,” and “property damage”).

⁶⁹ CP 364 (emphasis added). *See also Robinson v. Hamed*, 62 Wn. App. 92, 97, 813 P.2d 171 (1991) (“[I]t is well settled that in an appropriate case the decision in an arbitration proceeding may be the basis for collateral estoppel or issue preclusion in a subsequent judicial trial.”).

⁷⁰ It follows that property damage from water that contacted the building *before the siding was on* is not “because of” PHB’s siding installation.

Century's only evidence—the speculative testimony of wood scientist Kevin Flynn—failed to satisfy that burden. Mr. Flynn simply testified that because he saw damage in pictures that were taken during *2002* and *2003*, he assumed that damage “would have had to have” been present before September 19, 1999:

There are photographs and that that show damage in an advanced state during later time periods. But because the fungus takes a time to become established and considerably longer time to break down the wood to an advanced state, that it would have had to have initiated during the earlier time – time period.⁷¹

Mr. Flynn's “investigation” involved looking solely at pictures—*none* of which depict any damage prior to 2002.⁷² Mr. Flynn provides no foundation for his opinion that decay “would have had to have initiated” during the 1998-99 policy period. He provides no analysis of the extent of damage in the 2002-03 photos or the basis for any calculation of rate of decay. In fact, Mr. Flynn does not appear to have calculated a rate of decay at all. In short, Mr. Flynn's testimony is sheer speculation based on damage observed years later.⁷³ Speculation is insufficient to avoid summary judgment.⁷⁴

⁷¹ CP 1659.

⁷² CP 1655, 1659.

⁷³ See *Signature Dev. Co. v. Royal Ins. Co. of Am.*, No. 97-WM-2688, 1999 U.S. Dist. Lexis 23322, *7-8 (D. Colo. July 22, 1999) (“Even taken in a light most favorable to [the developer], this evidence is not sufficient to create reasonable factual issue. [The adjuster] *does not specify any home that incurred damage, the extent of any damage*”).

B. THE TRIAL COURT CORRECTLY DISMISSED CENTURY'S BAD FAITH CLAIMS⁷⁵

This Court should also affirm the trial court's order dismissing Century's bad faith "failure to settle" claims. Neither American States nor PHB⁷⁶ owed any duty to Century to settle the underlying lawsuit. And Century never paid on behalf of PHB, so it cannot claim as PHB's subrogee that American States breached its duty to settle. Moreover, even

incurred, or exactly when a home incurred damage. While he states that the homes began to have soils related problems within the first year, the letter does not specify in what way the problems caused damage, if any, during the policy period, and ultimately, he states satisfactory corrections were made. In any case, [the adjuster]'s statement, to the extent it suggests that homes incurred damage during the policy period that was not corrected, is conclusory which does not preclude summary judgment. . . . [T]he letter from Mr. Aiello is not sufficient to meet the standards of Rule 56(e) of 'specific facts showing that there is a genuine issue for trial.'").

⁷⁴ Queen City Farms v. Cent. Nat'l Ins. Co., 126 Wn.2d 50, 102-03, 882 P.2d 703 (1994) ("[T]here is no value in an opinion that is wholly lacking some factual basis. . . . Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.").

⁷⁵ Although Century assigns error to the entirety of the trial court's order granting American States' Motion for Partial Summary Judgment Regarding Counterclaim and Bad Faith Affirmative Defenses, Century does not argue all the issues decided by that motion. This motion sought a ruling, among other things, that Century's non-*per se* CPA counterclaim fails as a matter of law because Century cannot satisfy the elements of a CPA claim. Century provides no argument or authority regarding the CPA claim in its brief. Therefore, that issue is abandoned on appeal. See R.A. Hanson Co. v. Magnuson, 79 Wn. App. 497, 505, 903 P.2d 496 (1995) ("While University City assigned error to the contempt order, it effectively abandoned the issue by not presenting any relevant argument."). Century's *per se* CPA counterclaims were dismissed by order dated February 12, 2009. CP 286-88. Century has not assigned error to that order.

⁷⁶ See Commercial Union Assurance Cos. v. Safeway Stores, Inc., 26 Cal.3d 912, 921, 164 Cal. Rptr. 709, 610 P.2d 1038 (1980) (An excess insurance policy imposes no "duty which would require an insured contemplating settlement to put the excess carrier's financial interests on at least an equal footing with his own. Such a duty cannot reasonably be found from the mere existence of the contractual relationship between insured and excess carrier in the absence of express language in the contract so providing.").

if Century were PHB's subrogee, its claims against American States would be barred because PHB has released American States.

1. **American States' Duty of Good Faith Runs Only to PHB—Not to Century**

In Washington, a primary insurer's contractual duties—including the duty to attempt in good faith to settle—run *only* to the policyholder.⁷⁷ While an excess insurer may become subrogated to the policyholder's rights, the primary insurer owes no *direct* duty to the excess insurer:

Century also urges this court to hold the primary insurer owes to the excess insurer a direct duty of reasonable care in the defense and settlement of claims. While most courts have adopted the theory of equitable subrogation, only a minority have found the primary insurer owes a direct duty of good faith to the excess insurer. Under the theory of equitable subrogation, an excess insurer's claims against the primary insurer are subject to any defenses the primary insurer could assert against an insured, including, for example, a refusal to settle or failure to cooperate. *We decline to recognize a cause of action against the primary insurer which might give the excess insurer greater rights than the insured would have.*⁷⁸

In other words, an excess insurer may enforce the policyholder's contractual rights against the primary insurer *only if* that excess insurer is the policyholder's subrogee.⁷⁹

⁷⁷ Tank v. State FarmFire & Cas. Co., 105 Wn.2d 381, 391, 715 P.2d 1133 (1986) (“We hold that third party claimants may not sue an insurance company directly for alleged breach of duty of good faith under a liability policy.”).

⁷⁸ Truck, 76 Wn. App. at 535 (emphasis added) (citations omitted).

⁷⁹ See Bohemia, Inc. v. Home Ins. Co., 725 F.2d 506, 512 n.6 (9th Cir. 1984) (“We emphasize, however, that Home did not owe an independent duty to Employer's but

But Century is not PHB's subrogee because it paid nothing toward the underlying judgment. An *essential element* of a right to subrogation is that the subrogee has first paid the obligation of another.⁸⁰ Because Century undisputedly paid no part of the loss, Century cannot be subrogated to—and therefore cannot assert against American States—any rights of PHB.

2. **First State v. Kemper is Irrelevant Because Century Never Paid on Behalf of PHB**

Ignoring this distinction, Century claims a primary insurer's duty of good faith runs to "any excess insurer."⁸¹ This is a demonstrable misstatement of the law. The very case Century cites for support—First State Ins. Co. v. Kemper Nat'l Ins. Co.⁸²—explains that any duty that the primary insurer owes to the excess insurer is *derivative of the duty owed to*

rather a single duty to Bohemia whose rights, if any, Employer's acquired through equitable subrogation." (emphasis added).

⁸⁰ Kottler v. State, 136 Wn.2d 437, 449 n.12, 963 P.2d 834 (1998) ("These theories [equitable subrogation and unjust enrichment], however, *do not apply where the party seeking reimbursement did not pay the debts of another . . .*") (emphasis added); Millers Casualty Ins. Co. v. Briggs, 100 Wn.2d 9, 13-14, 665 P.2d 887 (1983) ("The right to subrogation exists when a party, not a volunteer, *pays another's obligation* for which the subrogee has no primary liability in order to protect such subrogee's own rights and interests.") (emphasis added); In re New England Fish Co., 749 F.2d 1277, 1282 (9th Cir. 1984) ("A right to subrogation exists *only when the subrogee pays or discharges a debt* for which another is primarily liable.") (emphasis added); American Employers' Ins. Co. v. Dallas Joint Stock Land Bank, 170 S.W.2d 546, 550 (Tex. Civ. App. 1943) ("Of course, a person is not entitled to a legal right of subrogation *until he has first paid the debt.*") (emphasis added).

⁸¹ *Brief of Appellant*, at 33.

⁸² First State Ins. Co. v. Kemper Nat'l Ins. Co., 94 Wn. App. 602, 610-11, 971 P.2d 953 (1999).

the policyholder, and is not a direct duty to the excess insurer: “A majority of cases from other jurisdictions hold as we do that, ***under the doctrine of equitable subrogation***, the duty a primary insurer owes an excess insurer is identical to that owed the insured.”⁸³

Importantly, in First State the excess insurer paid on behalf of its policyholder, settling the underlying lawsuit for \$1.5 million.⁸⁴ It was that payment that gave First State the right to pursue its policyholder’s remedies (in that case, a *per se* CPA claim). The court specifically pointed out that First State’s *status as subrogee* is what enabled it to pursue its bad faith claims despite the holding in Tank that *only a policyholder* may assert a *per se* CPA action premised on breach of the duty of good faith.⁸⁵

3. Even if Century Were PHB’s Subrogee, PHB Released American States

A subrogee is subject to *any defense* that would apply to the subrogor.⁸⁶ Here, PHB released American States from all claims arising

⁸³ First State, 94 Wn. App. at 610-11 (emphasis added).

⁸⁴ First State, 94 Wn. App. at 608.

⁸⁵ First State, 94 Wn. App. at 610 n.6 (“*But see Tank* . . . (holding that only the insured has standing to bring *per se* CPA actions for breach of an insurer’s duty of good faith). We distinguish Tank because First State’s claims are not limited to bad faith, and it is subrogated to Lumbermens’ insured’s claims as if Great Western itself were filing suit against Lumbermens.”).

⁸⁶ Truck, 76 Wn. App. at 535 (“Under the theory of equitable subrogation, an excess insurer’s claims against the primary insurer are subject to any defenses the primary insurer could assert against an insured . . .”).

out of the underlying lawsuit or American States' actions in connection with it.⁸⁷ As the California Court of Appeals recognized, such a release bars any claim by the excess insurer as the policyholder's subrogee:

We conclude summary judgment on Fireman's claim for equitable subrogation was properly granted because several elements of such a claim are absent here. We also conclude a primary insurer's obligation of good faith is ordinarily owed to its insured, not to an excess insurer, and that *Kelly's release of Maryland is therefore fatal to Fireman's claim.*⁸⁸

First, *Kelly expressly released Maryland from all claims, including bad faith.* Accordingly, *there was no existing cause of action which Kelly could have assigned or asserted on its own behalf* against Maryland. Since the subrogated insurer stands in the shoes of its insured, *the insurer has no greater rights* against the third party than did the insured and is subject to all defenses the third party could have asserted against the insured. Thus, *when an insured has released a third party, neither the insured nor the subrogated insurer has any rights to recover from the third party.*⁸⁹

⁸⁷ CP 71 ("Further and in addition, Mun and PHB release, remise and forever discharge American States from any and all demands, claims, causes of action or requests for relief, action or forbearance of any kind which were asserted in or could have been asserted in the Residential Declaratory Judgment Action or other declaratory judgment action concerning coverage for [any] claims for improper claims handling arising [out] of the Claims and related to the Policies.").

⁸⁸ *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 21 Cal. App. 4th 1586, 1594, 26 Cal Rptr. 2d 762 (1994) (emphasis added).

⁸⁹ *Fireman's Fund*, 21 Cal. App. 4th at 1596-97 (emphasis added). See also *Certain Underwriters of Lloyd's v. General Acc. Ins. Co.*, 909 F.2d 228, 232-33 (7th Cir. 1990) ("A subrogee, however, acquires no greater or lesser rights than those possessed by the subrogor. Thus *the actions of the insured . . . can defeat the excess insurer's right of recovery* by failing to cooperate with the primary insurer *or otherwise acting to supply the primary insurer with a defense to a bad faith action.*") (emphasis added).

PHB's release also renders Sequoia v. Royal distinguishable.⁹⁰ The Sequoia court did not hold that a party can be subrogated to another's rights without payment. Instead, the court simply explained that for purposes of judicial economy, it would decide the outcome of the excess insurer's subrogation claims without requiring the insurer to first pay and then file a separate lawsuit.⁹¹ But Sequoia says nothing about what that outcome is when, like here, the policyholder has already released its primary insurer.⁹²

That the release bars Century's "failure to settle" claims is entirely fair. PHB and American States timely informed Century of the arbitration award,⁹³ the 2000-2001 carrier's denial of coverage,⁹⁴ and the lack of

⁹⁰ Sequoia Ins. Co. v. Royal Ins. Co. of Am., 971 F.2d 1385 (9th Cir. 1992).

⁹¹ Sequoia, 971 F.2d at 1391. *But see* Schmer v. Hawkeye-Security Ins. Co., 230 N.W.2d 216, 218 (Neb. 1975) ("No right of subrogation would arise *until the claim had been paid*. Subrogation rights follow and do not precede payment.") (emphasis added) (citing 16 Couch on Insurance (2d Ed.), § 61:46, p. 267.); Fireman's Fund, 65 Cal. App. 4th at 1292 (subrogation requires "an *existing, assignable cause of action* against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer").

⁹² Contrary to Century's claims in the trial court, the release was not "extracted" from or otherwise imposed on PHB, but was part of a bargained-for settlement agreement negotiated by PHB's counsel. CP 1910 (settlement agreement "was not presented as a take it or leave it document."). Also, PHB's release does not affect coverage obligations because (1) Century had already breached its policy, *see* Allan D. Windt, INSURANCE CLAIMS AND DISPUTES, 4th ed. § 3:10 at 222 (2001) ("[O]nce the carrier has denied coverage, an insured is no longer bound by the insurance policies provisions governing cooperation . . . [or] releases . . ."); and (2) unlike some other policies, Century's does not contain a provision requiring PHB to refrain from acts that impair Century's subrogation rights. *See* CP 319-30.

⁹³ CP 318.

⁹⁴ CP 2714.

covered property damage during American States' 1998-99 policy period.⁹⁵ At that point, Century could have protected both its and its policyholder's interests by paying the portion of the judgment that exceeded the limits of the 1999-2000 American States policy. Century would have honored its obligations to PHB and stepped into PHB's shoes, acquiring its rights against other insurers. Instead, Century chose to do nothing. Although PHB's release terminated any possibility of Century asserting PHB's rights as PHB's subrogee,⁹⁶ it was Century's own breach of its policy that ultimately led PHB to enter into that agreement.

Century's failure to settle argument last fails because even if Century were subrogated to PHB's rights, Century would have no claim because PHB, not American States, controlled settlement. In Washington, when an insurer defends a policyholder under a reservation of rights (as American States did here), it is the policyholder—and not the insurer—who retains the “ultimate choice regarding settlement.”⁹⁷ Thus, even if Century had paid, it could not use PHB's choice not to settle to support a

⁹⁵ CP 200-02.

⁹⁶ *See Fireman's Fund*, 21 Cal. App. 4th at 1594 (“[The policyholder's] release of [primary insurer] Maryland is therefore fatal to [excess insurer] Fireman's claim.”).

⁹⁷ *Tank*, 105 Wn.2d at 389 (“[T]he insured . . . make[s] the ultimate choice regarding settlement.”). *Sequoia* is additionally distinguishable on this ground. In *Sequoia*, the *primary insurer* maintained the ultimate choice regarding settlement. *See generally Sequoia*, 971 F.2d 1385.

bad faith claim against American States.⁹⁸

C. THE TRIAL COURT PROPERLY AWARDED AMERICAN STATES ITS ATTORNEY'S FEES

The trial court correctly awarded PHB's assignee, American States, its attorney's fees in this action. Washington allows the recovery of attorney's fees when permitted by contract, statute, or recognized ground in equity.⁹⁹ In Olympic Steamship v. Centennial Ins. Co., the Washington Supreme Court recognized one such equitable ground, holding that "[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees, regardless of whether the duty to defend is at issue."¹⁰⁰

As in this case, when an insurer denies¹⁰¹ and then unsuccessfully contests coverage, it places its interests above the insured, and equity

⁹⁸ See Puritan Ins. Co. v. Canadian Universal Ins. Co., Ltd., 775 F.2d 76 (3d Cir. 1985) ("[T]he insured's consent, and indeed direction, to try the case after being fully informed of the risks involved is an insurmountable barrier to the maintenance of a bad faith claim against the insurer. . . . We fail to see how Northwest could successfully prove bad faith in a decision to follow a course which it approved and advocated at the time the decision was made.").

⁹⁹ Leingang v. Pierce County Med. Bureau, 131 Wn.2d 133, 143, 930 P.2d 288 (1997).

¹⁰⁰ Olympic Steamship v. Centennial Ins. Co., 117 Wn.2d 37, 54, 811 P.2d 673 (1991).

¹⁰¹ There is no question that Century denied coverage for the underlying lawsuit. See CP 2590 ("*No Coverage Under Commercial Excess Liability Policies*. Plaintiff's claims against Century are limited or barred, in whole or in part, by the terms, conditions, exclusions endorsements and other provisions of the commercial excess liability insurance policy or policies Century issued to PHB.").

compels a fee award.¹⁰² A fee award is reviewed for abuse of discretion.¹⁰³

1. **Olympic Steamship Applies Because American States is Standing in PHB's Shoes**

Washington courts hold that the rule of Olympic Steamship applies not only to policyholders, but also to their assignees.¹⁰⁴ Thus, because American States is the assignee of Century's policyholder, PHB, American States is entitled to recover its attorney's fees under the rule articulated in Olympic Steamship.¹⁰⁵

Notwithstanding this precedent, Century claims that Polygon bars an insurer from recovering Olympic Steamship fees *in an equitable*

¹⁰² McGreevy v. Oregon Mut. Ins. Co., 128 Wn.2d 26, 39-40, 904 P.2d 731 (1995).

¹⁰³ Fluke Corp. v. Hartford Acc. & Indemn., 102 Wn. App. 237, 255, 7 P.3d 825 (2000) ("We review a trial court's award of attorney fees for abuse of discretion.").

¹⁰⁴ McRory v. Northern Ins. Co. of N.Y., 138 Wn.2d 550, 556, 980 P.2d 736 (1999) ("[W]e have not confined the recovery of fees under the Olympic Steamship rule to the insured personally. . . . [A]ssignees of the insured may recover fees if they are compelled to sue an insurer to secure coverage."). See also K.O. Jordan v. Hartford Accident and Indemn. Co., 120 Wn.2d 490, 508, 844 P.2d 403 (1993) ("Hartford argues that Olympic Steamship only allows awarding attorney fees to an insured and not to the insured's assignee. However, Hartford cites no authority for this proposition. We hold that Jordan is entitled to reasonable attorney fees in an amount to be determined by the Supreme Court commissioner pursuant to *RAP 18.1(f)*.").

¹⁰⁵ Century's argument, at page 42 of its brief, that PHB had no Olympic Steamship rights against Century to assign to American States is devoid of merit; no case holds that a policyholder must first *accrue* attorney fees litigating against an insurance company before it may assign those rights to another insurer.

*contribution action.*¹⁰⁶ But that argument fails because this is *not* an equitable contribution claim, while Polygon *was*.¹⁰⁷

Citing Essex Ins. Co. v. Heck,¹⁰⁸ Century also attempts to avoid the fee award by arguing that American States “waived” its subrogation rights against Century.¹⁰⁹ That argument fails for at least two reasons.

First, Century never raised the argument in the trial court, so this Court should refuse to consider it.¹¹⁰

Second, Essex is distinguishable on its facts and the law. The Essex court held that the settlement agreement *in that case* was inconsistent with an intent by the insurer to pursue subrogation:

Applying the principle of implied waiver here, Essex’s act of entering into a settlement of the three lawsuits without identifying its insured or apportioning the payment is so inconsistent with an intent to enforce its right to subrogation so as to induce a reasonable belief it had relinquished that right. While subrogation gives Essex the right to step into the shoes of its insured and assert whatever rights the insured could, since Essex never settled the issue of who its insured was nor allocated damages between Dompeling’s various claims, or even between Dompeling’s economic and noneconomic damages,

¹⁰⁶ *Brief of Appellant*, at 39-41.

¹⁰⁷ Polygon, 143 Wn. App. 753.

¹⁰⁸ Essex Ins. Co. v. Heck, 186 Cal. App. 4th 1513, 112 Cal. Rptr. 3d 915 (Cal. App. 5th Dist. 2010).

¹⁰⁹ *Brief of Appellant*, at 43-45.

¹¹⁰ See Demelash v. Ross Stores, Inc., 105 Wn. App. 508, 527, 20 P.3d 447 (2001) (“We generally will not review an issue, theory or argument not presented at the trial court level.”); Brower v. Ackerley, 88 Wn. App. 87, 96, 943 P.2d 1141 (1997) (“An issue not briefed or argued in the trial court will not be considered on appeal.”).

Dr. Heck reasonably could believe Essex did not intend to seek subrogation.¹¹¹

In this case, by contrast, the settlement agreement unambiguously preserved American States' right to pursue PHB's assigned claims against other carriers:

WHEREAS, Mun and PHB wish to pursue all claims (contractual and extracontractual) against insurers ("Other Insurers") other than American States

. . . .

Mun and PHB assign to American States all claims and rights, if any, they have against the Other Insurers. The assigned claims include, but are not limited to, claims arising from the handling of or coverage for the Claims. Mun and PHB shall cooperate fully with American States, and hereby consent to American States prosecuting any coverage or extracontractual claims in the names of PHB and Mun. American States shall bear all reasonable expenses incurred as part of its prosecution of PHB and Mun's claims against the Other Insurers.¹¹²

Thus, because the PHB/American States settlement demonstrates that American States *did* intend to pursue Century as PHB's assignee, Essex is irrelevant, and the trial court did not abuse its discretion in

¹¹¹ Essex, 186 Cal. App. 4th at 1526.

¹¹² CP 69, 72. Moreover, the "implied waiver" principle that the Essex court relied on is not the law in Washington. Under California law, courts may find waiver "when a . . . party's acts are so inconsistent with an intent to enforce the right *as to induce a reasonable belief* that such right has been relinquished." Essex, 186 Cal. App. 4th at 1526 (emphasis added). But in Washington, courts will not find a waiver of rights absent "*unequivocal acts* of conduct evidencing an intent to waive." Mike M. Johnson, Inc. v. County of Spokane, 150 Wn.2d 375, 391, 78 P.3d 161 (2003) (emphasis added).

awarding American States its reasonable attorney fees and litigation expenses as PHB's assignee.¹¹³

2. The Trial Court Properly Exercised its Discretion Determining the Amount of the Fee Award

The trial court properly exercised its discretion in determining the amount of the attorney fee award and supported its award with detailed findings of fact and conclusions of law.¹¹⁴

The trial court properly applied a reasonable multiplier of 1.25, which was supported by both the contingent nature of success and quality of work performed.¹¹⁵ Although Century argues that no contingency adjustment can be made unless the attorneys risk receiving no fee whatsoever, this is not the law. In Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,¹¹⁶ the Supreme Court upheld a multiplier of 1.5 when the "case was tried partially on a guaranteed fee arrangement and the

¹¹³ Washington's Supreme Court holds that an award of attorney's fees under Olympic Steamship shall include "all of the expenses necessary to establish coverage as part of those attorney fees which are reasonable," which includes expert witness and other attendant fees and costs. Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 144, 26 P.3d 910 (2001).

¹¹⁴ See CP 2630-42. That the Olympic Steamship award is greater than the principal amount sued for is of no moment. "We will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small." Mahler v. Szucs, 135 Wn.2d 398, 433, 957 P.2d 632 (1998).

¹¹⁵ CP 2638, ¶26.

¹¹⁶ Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 336, 858 P.2d 1054 (1993).

remainder on a contingency agreement.” Additionally, this Court has held:

[t]he phrase ‘contingent nature of success’ is broad enough to allow the trial court, in its discretion, to consider the degree to which the prevailing party risked receiving either no recovery at all *or a monetary judgment insufficient to adequately compensate its counsel for all work performed*. In exercising its discretion, a trial court is entitled to consider the risk borne by the attorney of recovering objectively inadequate compensation, *not just the risk of recovering no compensation whatsoever.*”¹¹⁷

Moreover, the trial court’s finding of high quality work is supported by substantial evidence—the declaration of Dale Kingman.¹¹⁸ Mr. Kingman is a Seattle area insurance coverage lawyer with over 33 years of experience.¹¹⁹ He testified that American States’ attorneys’ standard hourly rates are reasonable and “less than [the rates of] other Seattle area firms engaging in the same practice areas”¹²⁰; the legal work performed by American States’ attorneys was “of superior quality and yielded an excellent result”¹²¹; the fee sought was “lower than the average hourly rate of similarly skilled Seattle insurance coverage litigators”¹²²; and

¹¹⁷ Tribble v. Allstate Prop. & Cas. Ins. Co., 134 Wn. App. 163, 171-72, 139 P.3d 373 (2006) (emphasis added).

¹¹⁸ CP 2044-50.

¹¹⁹ CP 2044, ¶2.

¹²⁰ CP 2047, ¶13.

¹²¹ CP 2048, ¶16.

¹²² CP 2049, ¶18.

that the quality of work “would reasonably merit an upward adjustment.”¹²³ The court’s finding that the quality of work supported an upward adjustment is supported by substantial evidence, and thus Century has failed to establish an abuse of discretion.¹²⁴

Finally, Century’s complaint that the court failed to deduct for duplicative or excessive work fails because American States’ attorneys already deducted a substantial amount of attorney hours before making the request.¹²⁵ Century’s specific complaints of “unreasonable” hours similarly fail to establish that the court abused its discretion.¹²⁶ For example, Century represents that attorney Greg Harper “billed 14.4 hours to ‘take deposition of . . . M. Hart’ even though the deposition lasted less than 5 hours.”¹²⁷ However, the actual billing entry Century complains of shows that the time billed also includes other work, including preparing for the following day’s deposition.¹²⁸

¹²³ CP 2049, ¶18.

¹²⁴ See Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 156, 859 P.2d 1210 (1993) (“As discussed above, in arriving at a determination of reasonable fees, the trial court may be aided by expert opinion. The trial court did not abuse its discretion in agreeing with Delay’s analysis.”).

¹²⁵ CP 2634.

¹²⁶ See *Brief of Appellant*, at 48-49.

¹²⁷ *Brief of Appellant*, at 48-49.

¹²⁸ CP 2254. The same holds true for Century’s complaint regarding the entry for the deposition of J. Olsen—that entry included other work as well. CP 2255.

Similarly, the trial court properly awarded fees for paralegal time because paralegal hours are compensable as a component of attorney fees.¹²⁹ Moreover, time worked prior to filing the lawsuit included analyzing coverage under the Century policy, preparing the complaint, and responding to Century's requests for information.¹³⁰

Century's exhaustive line-by-line mining of American States' attorneys' time entries for evidence of excessive time failed to establish that the court abused its discretion and is unnecessary anyway—the trial court considered the relevant factors and thoroughly supported the fee award with findings of fact and conclusions of law.¹³¹

D. THE COURT SHOULD AWARD AMERICAN STATES ITS ATTORNEY'S FEES ON APPEAL

Under Olympic Steamship, a policyholder who must sue to recover benefits under an insurance policy is entitled to an award of reasonable attorney's fees and costs.¹³² As explained above, Olympic Steamship fees

¹²⁹ Morgan v. Kingen, 141 Wn. App. 143, 164, 169 P.3d 487 (2007) (“A party is entitled to compensation for a paralegal’s services for legal work performed as long as the rate reflects a reasonable hourly rate.”).

¹³⁰ CP 2232-33.

¹³¹ See Absher Const. Co. v. Kent School Dist. No. 415, 79 Wn. App. 841, 48, 917 P.2d 1086 (1995) (“The determination of the fee award should not become an unduly burdensome proceeding for the court or the parties. *An ‘explicit hour-by-hour analysis of each lawyer’s time sheets’ is unnecessary* as long as the award is made with a consideration of the relevant factors and reasons sufficient for review are given for the amount awarded.”) (emphasis added).

¹³² Olympic Steamship, 117 Wn.2d at 54.

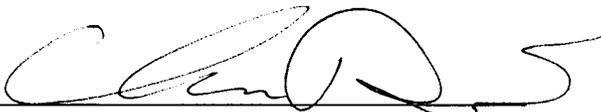
are equally available to the assignee of a policyholder—even when that assignee is another insurer.¹³³ Pursuant to RAP 18.1, American States therefore requests that this Court award American States its fees and costs in defending this appeal.

VI. CONCLUSION

For the foregoing reasons, American States respectfully requests that the trial court's judgment be affirmed.

Respectfully submitted this 13 day of October, 2010.

HARPER | HAYES PLLC

By: 
Gregory L. Harper, WSBA No. 27311
Charles K. Davis, WSBA No. 38321
Attorneys for American States Insurance Co.

¹³³ See McRory, 138 Wn.2d at 556 (“[A]ssignees of the insured may recover fees if they are compelled to sue an insurer to secure coverage.”); Amazon.com, 120 Wn. App. at 619-20 (awarding Olympic Steamship fees to American Dynasty Insurance Company).