No. 46654-6-II

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

THE PORT OF LONGVIEW, a Washington municipal corporation,

Respondent,

v.

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

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

Appellants,

and

ARROW INDEMNITY COMPANY; MARINE INDEMNITY INSURANCE COMPANY OF AMERICA,

Defendants.

LONDON MARKET INSURERS' SUPPLEMENTAL REPLY BRIEF ON FEES

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A. INTRODUCTION

Despite admitting having violated multiple policy provisions, including providing notice of its claims more than twice as late as any published decision in Washington history, the Port of Longview ("Port") argues attorney fees were warranted on equitable grounds because the London Market Insurers ("LMI") defended against the Port's lawsuit. The Port admits that an equitable award of attorney fees under *Olympic Steamship*[1] is not available when an undisputed policy breach caused the litigation, but nevertheless claims LMI caused this litigation.

The Port, not LMI, caused this litigation when the Port: (1) delayed notice to its insurer for 19 years and then provided only post-suit notice, (2) entered into cost share agreements, (3) destroyed evidence of the sources of contamination, (4) allowed potentially liable parties to go out of business, (5) lost insurance policies, (6) knowingly bought still more contaminated property, and (7) allowed key witnesses and evidence to become unavailable through death, memory loss, document loss, and more.

Clear case law from our Supreme Court controls here. The Port is not entitled to *Olympic Steamship* fees.

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

B. REPLY ON STATEMENT OF THE CASE[2]

The Port concedes, as it must, that its notice was late. Supp'l Br. of Resp't at 15. The trial court so found. CP 5019. However, the Port argues that its notice was not 19 years late, but some shorter, unspecified amount of time. Br. of Resp't at 15. The Port suggests that its late notice was not *so* late that it would justify LMI's defense against the Port's lawsuit.

The Port admitted in its principal merits brief that its notice was at least 16 years late. Br. of Resp't at 39.[3] That is more than twice as late as the latest notice ever recorded in a Washington decision, which was 7 years. *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 435, 983 P.2d 1155 (1999), *as amended* (Apr. 24, 2000).

Also, the Port's suggestion that it did not have sufficient facts to notify its insurers in the early 1990's is contradicted by its own admissions. At the TWP/MFA parcels, the Port admitted it knew they

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[2] In a footnote to its introduction, the Port suggests that the trial court's finding of fact are unchallenged and therefore "verities on appeal." Supp'l Br. of Resp't at 1 n.3. The only findings of fact the trial court entered with respect to the fee award are pro forma recitations of the procedural history of this case. CP 23625. Any suggestion by the Port that the trial court's "findings" regarding the Port's conduct in this matter (for example, on page 15 of its brief) are "verities" is incorrect.

[3] The Port claimed that although it knew of an occurrence under the policy in 1991, it was not obligated to notify LMI until 1994 when the Supreme Court issued an opinion on the subject. Br. of Resp't at 39. This issue has been discussed in the principal briefing.

were polluted and that International Paper ("IP") had questioned whether the Port was a potentially liable party ("PLP") as early as 1996. CP 3247. At the TPH site, the Port began investigating groundwater contamination, and hired lawyers to identify other PLPs in 1991. CP 10904. The Port's risk manager admitted she was aware by the mid-1990s that other ports were pursuing environmental claims against their carriers. RP 593-94, 623-24.

The Port next blames LMI for the Port's own failure to provide notice pre-suit, alleging LMI were "dodging their insureds' notice." Supp'l Br. of Resp't at 3-4. The Port denies reality; its failed attempts were not the fault of LMI.[4] Also, it should be clear that the Port's failed attempts to notify LMI begin in 2009, almost two decades late, and have no bearing on the trial court's unappealed ruling that the Port's notice was "late by any standard we use." CP 5019.

The Port appears to suggest that LMI's entire basis for defending against the Port's lawsuit was LMI's inability to find certain market information. Supp'l Br. of Resp't at 4. This is also patently untrue, as

[4] As explained in LMI's briefing below, the Port's failure to notify LMI was due to its own delay and mistakes, and not any "dodging" by LMI. CP 23288-90. This issue was also addressed in the merits briefing already filed. Reply Br. of Appellants at 7 n.6. Due to space constraints in this brief, LMI will rest on that briefing regarding this issue.

LMI not only raised many defenses to the Port's claims, but in several instances succeeded. CP 5015, 5019, 8681, 10090, 10097, 10101, 20784.

The Port also erroneously claims that its belated lawsuit succeeded in "establishing its rights to defense and indemnity coverage…estimated to be in the millions of dollars." Supp'l Br. of Resp't at 1, 5, 19. The Port did not provide *any* evidence at trial that it was in fact responsible for a penny of remedial costs, and it walked away from past claims for damages and defense costs.[5] CP 20784. The trial court ruled that the Port must actually substantiate any future claims for remedial damages, which it did not do at trial. CP 10104. The "millions of dollars" to which the Port refers was presented in a declaration for the first time in connection with its attorney fee motion. CP 23039. That declaration estimates the costs to remediate the TWP site, for which *IP* – not the Port – is responsible under a consent decree. *Id.*, CP 707-41.

The Port suggests that it benefited from this litigation because in 2012, LMI offered to defend the Port under a reservation of rights. Supp'l Br. of Resp't at 5. However, that defense was not tendered because of a trial court order, nor has the Port demonstrated that there is any "claim"

[5] The Port blames LMI's manner of litigation for the Port's decision to dismiss all its claims for past damages. Supp'l Br. of Resp't at 8. However, any of the Port's past damages would have been precluded by the trial court's ruling that the Port violated the voluntary payment policy provision. CP 5019.

against which it must be defended. LMI's pragmatism should not be confused with defeat at trial, nor can the Port claim it has succeeded in securing defense costs that were tendered under a reservation of rights.

The Port claims the trial court made "factual determinations" that the Port's late notice was "merely negligent" and that its voluntary payments did not violate express policy provisions. Supp'l Br. of Resp't at 6. The trial court made no such findings of fact, CP 23639, and in fact the trial court found that the voluntary payments did violate the policy and prejudiced the Port. CP 5019 ("the Court ruled as a matter of law that voluntary payments occurred without the consent of the insurers in breach of the policies…").

C. ARGUMENT

(1) Standard of Review

The Port correctly observes that the legal basis for an award of fees is reviewed *de novo,* and that the issue of the amount of fees is reviewed for abuse of discretion. Supp'l Br. of Resp't at 7. However, the Port immediately contradicts itself, and claims (without a supporting citation) that "the trial court's refusal to apply *PUD*[6] or the clean hands doctrine to deny…fees…is reviewed for an abuse of discretion." *Id.*

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[6] *PUD No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994).

The trial court's refusal to apply controlling Supreme Court authority to its decision on the Port's entitlement to fees is an issue of law reviewed *de novo*. *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001).

(2) The Port Did Not Obtain Coverage of Any Current Claim Against It, Because There Is None; The Port Must Still Demonstrate Whether a Future Claim Is Covered

The Port suggests that, as a result of this litigation, it has obtained coverage of future claims against it. Supp'l Br. of Resp't at 8-10.

The Port is incorrect. The Port has nothing more than a generic declaration regarding the policy language and findings that it did not expect or intend groundwater contamination before it obtained the policies. CP 18648-51. If the Port claims as-of-yet nonexistent remedial liability in the future, it will still have to demonstrate that those remedial costs are the result of claims for damage to property. CP 18846, 20761. The trial court retained perpetual jurisdiction over this matter. *Id.*

Olympic Steamship fees are not available when the insured fails to obtain a policy benefit. *Olympic Steamship*, 117 Wn.2d at 52. The Port has not obtained a policy benefit from its decision to file a declaratory judgment action. It still has to present a future claim and demonstrate that the claim is covered. This litigation, instigated by the Port, was unproductive.

(3) The Port Does Not Have Clean Hands Because It Breached Policy Provisions

The Port claims that despite the trial court's findings that the Port violated express policy provisions and prejudiced LMI, it is entitled to *Olympic Steamship* fees because it has "clean hands." Supp'l Br. of Resp't at 10. It claims, without citing authority, that the clean hands doctrine "only precludes equitable relief to a party whose conduct is "unconscionable, morally reprehensible, unjust, or marked by a lack of good faith." *Id.*

Contrary to the Port's characterization, a party has unclean hands if it has been, *inter alia,* "unconscientious." *Income Inv'rs v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940). The Port cannot credibly claim an insured who knowingly bought contaminated property, entered into cost-sharing agreements and made voluntary payments, and tendered decades-late notice, has acted conscientiously and with clean hands. The Port admitted that it brought the present litigation not because it was facing any actual claims from the State, but because its decades of knowing inaction on notifying its insurer of the occurrences was causing the policies to become "stale." CP 1557-58. The Port admitted that it knew in the 1990s that other public entities were making insurance claims for identical harm.

RP 593-94, 623-24. The Port breached the voluntary payments provision of its policies. CP 5019.

The trial court's conclusion of law that the Port was entitled to *Olympic Steamship* fees because it had clean hands was in error. CP 23640.

(4) The Port Cannot Distinguish this Case from Other Cases Where *Olympic Steamship* Fees Were Denied Due to Express Policy Breaches

The Port claims that this case is distinguishable from other cases in which far less egregious policy violations warranted denial of *Olympic Steamship* fees. Supp'l Br. of Resp't at 10-15. The Port claims that *PUD* and *Tripp*[7] involved more "extreme" and "intentional" conduct than the Port engaged in here. *Id.*

This Court should reject the Port's attempt to invent new language that exists nowhere in *PUD* and *Tripp*. The *PUD* court made no statements about culpability, intentionality, or any other doctrine in analyzing the *Olympic Steamship* fee claim. *PUD*, 124 Wn.2d

[7] *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 25 P.3d 997 (2001).

at 815. The Court simply said that in circumstances where an insured undisputedly violates an express policy term – even when the insurer is ultimately found to have suffered no prejudice – an *Olympic Steamship* fee award is unjustified. *Id.*

Tripp likewise contains none of the "intentionality" language that the Port invents in its brief. The Supreme Court in that case concluded that even if the insurer was not prejudiced by a policy breach, *Olympic Steamship* fees are not available to an insured who "precipitated [the] action" by failing to "comply with express terms of the insurance contract." *Tripp*, 144 Wn.2d at 20. This is true even when it is the insurer, rather than the insured, who instigates the litigation by filing a declaratory judgment action regarding coverage issues. *Id.*

The Port relies on *Pederson's*[8] for its claim to fees. Supp'l Br. of Resp't at 13-14. The Port claims that this case is similar to *Pederson's* in that there was no factual determination that the Port "undisputedly failed to comply with express coverage terms." *Id.* at 14. In likening this case to *Pederson's* and distinguishing it from *PUD* and *Tripp*, the Port suggests that its policy violations here are somehow still up for dispute.

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[8] *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 454-55, 922 P.2d 126 (1996).

The Port cannot continue to deny reality: the trial court here found express policy violations by the Port, and those violations are "extreme." The trial court expressly found that the Port violated coverage terms, particularly late notice and voluntary payments. CP 5019. The notice was extremely late, and the voluntary payments were prejudicial to LMI and resulted in those claims being precluded from coverage. *Id.* The Port has not appealed those rulings, thus they are (despite the Port's claim to the contrary) "undisputed."

Finally, the Port intimates that the Supreme Court has somehow overruled *Tripp* and *PUD sub silentio*,[9] arguing that its decision in *Mut. of Enumclaw Ins. Co. v. T & G Const., Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008) "suggests" that a showing of prejudice is now "required for the *PUD* exception to apply." Supp'l Br. of Resp't at 14-15.

Even setting aside that *T & G* does not mention *PUD* or *Tripp*, the Port's reliance on *T & G* is not well taken. In that case, the "policy violation" the insured supposedly committed was failure to obtain the insurer's consent before settlement. *T & G*, 165 Wn.2d at 268-69. However, the *reason* the insured did not obtain consent is that the insurer

[9] The Washington Supreme Court disfavors *sub silentio* overruling of binding precedent. *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999), *as amended* (July 2, 1999).

refused to participate in the settlement discussions. *Id.* Thus, the insured's conduct did not precipitate the coverage litigation.

Here, the Port's conduct, not LMI's precipitated the litigation. The trial court's rulings on the Port's express policy violations are undisputed on appeal.[10] They also made it far more complicated because of the sheer volume of time elapsed from when the Port knew of an occurrence, and when it finally sent its insurer a summons and complaint demanding coverage.

This case is not like *Pederson's*. It is exactly like *PUD* and *Tripp*. The trial court erred in awarding the Port fees when it undisputedly violated express policy provisions.

(5) Even If the Port Is Entitled to *Olympic Steamship* Equitable Fees, the Port Has Not "Recovered" Anything Proportional to a $2.8 Million Fee Award

The Port claims that the trial court did not abuse its discretion in entering a $2,538,103 fee award in this case, a mere $214,000 less than the Port requested. Supp'l Br. of Resp't at 17-19. This issue has been addressed in LMI's initial supplemental fee brief, and due to space constraints, LMI rests on that briefing.

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[10] The Port tries to suggest that this Court should review the trial court's "findings" regarding late notice, voluntary payments, and intentionality for an abuse of discretion. Supp'l Br. of Resp't at 15-17. The trial court made no such findings; what the Port is referring to are conclusions of law, reviewed *de novo*. CP 23640.

However, LMI will address the Port's erroneous claim that the award is proportional to the recovery because it has "established its right to millions of dollars in coverage under the policies." Supp'l Br. of Resp't at 19. As explained *supra,* the Port has not "established its right" to a single penny. The Port walked away from its damages claims. CP 20784. The judgment the Port obtained simply allows for the possibility of coverage in the future, *if* the Port is ever actually asked by the state to pay for remedial costs. CP 18846. The "millions of dollars" the Port refers to were not in evidence at trial, and have always been the legal responsibility of a third party not involved in this litigation. CP 23039. The defense the Port received – not as the result of a court order but volunteered four years ago during discovery – is under a reservation of rights and there are serious questions about whether voluntary environmental investigative costs are "defense costs" under the policy.[11]

The Port repeatedly faults LMI for "vexatious litigation" (Supp'l Br. of Appellants at 1, 19) without acknowledging its own culpability in this process. The Port's own actions and inactions not only caused this litigation, but caused it to be far more complex and lengthy that it would

[11] Division One of this Court recently ruled that a duty to defend does not arise in the environmental cleanup context based merely on statutory liability or a notice letter from a governmental agency, unless there is formal enforcement action. *Gull Indus., Inc. v. State Farm Fire & Cas. Co.*, 181 Wn. App. 463, 478, 326 P.3d 782 (2014).

have been otherwise. The Port delayed notice by 19 years, causing evidence, documents, witnesses, and the like to be lost. The Port filed suit for indemnification against non-existent third party claims that have not materialized to this day. The Port knowingly purchased contaminated property, causing litigation over the issue of known loss. The Port made voluntary payments and then tried to recoup them as damages, causing litigation over that issue. And although it conveniently omits this fact while excoriating LMI's discovery problems, the Port disclosed critical documents for the first time during trial and *caused a mistrial.* CP 10374, 10472-73; RP 106.

This litigation was complex due not only to the nature of the issues, but due in large part to the Port's own behavior. And although the Port ostensibly prevailed, it still has gained little more than the opportunity to return to court in the future.

D. CONCLUSION

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 11th day of April, 2016.

Respectfully submitted,

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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' Supplemental Reply Brief on Fees, Case No. 46654-6-II with e-service on the following parties:

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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: April 7, 2016, at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

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