No. 46654-6-II

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

THE PORT OF LONGVIEW, a Washington municipal corporation,

Respondent,

v.

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

Appellants,

and

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

Defendants.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case involves the Port's[1] claims for insurance coverage under liability insurance policies issued by LMI[2] between 1977 and 1984. After a long trial, and a unanimous Jury verdict, the trial court entered a judgment declaring LMI liable for coverage under those policies. LMI initially pled twenty different affirmative defenses, and argued that the Port's claims were premature because no third party claims were yet being asserted. After vigorously pursuing these defenses, LMI abandoned all but four issues.

LMI's brief raises the following matters: (1) the discovery sanctions related to LMI's lost policy defense; (2) LMI's allegations of "known loss/no fortuity" at the time the policies were purchased; (3) whether the Port established the "unexpected/unintended" requirement of the occurrence provisions and the qualified pollution exclusions; and (4) whether LMI established actual and substantial prejudice from late notice.

Although LMI purport to assign error to four given jury instructions and the Special Verdict Form, only two instructions and the verdict form that LMI attached were actually given at trial, and LMI only preserved arguments for one of those instructions below.

LMI's brief basically ignores all of the trial evidence and instead

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[1] Plaintiff and Respondent Port of Longview ("Port").

[2] London Market Insurers ("LMI") include the Certain Underwriters at Lloyd's London and London Market Company defendants who underwrote the Port's insurance policies at issue in this case.

assigns error to the trial court's denial of LMI's pre-trial summary judgment motions due to the existence of disputed material facts. LMI cites almost exclusively to declarations submitted with these motions, while ignoring opposing pre-trial declarations and subsequent trial evidence, including the cross examination of their witnesses that undermine the statements made in the pre-trial declarations.

LMI complain about limitations on evidence at trial, but do not disclose what specific evidence was allegedly excluded, nor do they discuss any offer of proof.

It is difficult to respond to LMI's brief because of the many technical deficiencies such as factual assertions followed by an unsupportive citation; assignments of error to trial orders identified only by date; and assignments of error to orders without disclosing that the order was subsequently modified at LMI's request, and without assigning error to the subsequent order. The Port has attempted to correct the major errors in LMI's brief in the course of presenting the actual trial evidence to this Court and responding to LMI's arguments. However, time and page constraints prevent the Port from identifying or addressing each inaccuracy or ambiguity.

II. COUNTERSTATEMENT OF FACTS

A. Port's Contaminated Sites and Insurance Policies

The Port faces liability due to groundwater contamination at two

sites, the TPH site and the MFA area (that became part of the TWP site).[3] This contamination was released prior to and during the policy periods for each of the Port's comprehensive general liability ("CGL") insurance policies issued by LMI.

The MFA Claim. The Port purchased the parcels of property comprising the MFA area from International Paper ("IP") on November 12, 1963 and April 4, 1965. Exs. D-13, D-15. Up to that time the only development on the MFA was a ditch that IP built in 1947 to convey wood treating wastewater off site. Exs. P-90, 91, 94, 186; 11/12/2013 RP 1053-1064. IP continued using the ditch to dispose of the wastewater for some time after the Port's purchase, and aerial photos of the site show that the ditch was filled in by 1968.[4] 11/12/2013 RP 1063-1066,1069, 1076-1077; Exs. P-95, 186, 187.

Unaware of the contamination, in 1992 the Port built a $1 million mechanic shop with state-of-the-art environmental controls on a portion of the MFA property. 11/07/13 RP 635-637.

The first indication of the MFA contamination came in 1997, when IP installed an underground barrier wall around its wood treating plant ("the Plant") pursuant to a consent decree with the Washington State Department of Ecology ("Ecology"). CP 707-741 at 720, 1699. Prior to

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[3]Total Petroleum Hydrocarbon ("TPH") Site and Treated Wood Products ("TWP") Site, which includes the Maintenance Facility Area ("MFA").

[4]At trial, the Port's expert testified that this was a standard, agency approved, practice in that time period. 11/12/2013 RP 1077-1078.

that time neither the Port nor IP were aware of contamination on the MFA area. CP 1699; 11/7/2013 RP 632-633, 639-640.

In 1998, Ecology determined that the MFA area and the Plant area were both part of a single site or facility for purposes of remediation. That site is referred to as the TWP site. CP 2772-2774.

When the Port purchased the remainder of IP's Longview property in 1999, the sale included the Plant at IP's insistence. CP 2704-2716. IP, however, expressly retained full responsibility for all contamination remediation on that property. CP 2707. By letter dated March 4, 2005, Ecology notified the Port that it was a potentially liable person ("PLP") under MTCA for the entire TWP site. CP 2718-2720. Ecology, however continued to exclusively pursue IP for remediation actions and sought no enforcement at that time against the Port. CP 1762-1769; 3227-3228.

The trial court subsequently found that the Port's PLP status as to the TWP site initially arose because of the Port's ownership of the MFA area since the 1960s, and this liability was not increased by the Port's 1999 acquisition of the Plant area. CP 5943-5952; 5953-5961.

The TPH Claim. The TPH site is located in the Port's rail yard, and is contaminated with petroleum products released between 1926 and 1985. 11/12/2013 RP 1011-1026, 1047-1050. The primary sources of contamination include the underground pipelines that Standard Oil used to transfer petroleum products from vessels on the Columbia River up to

Chevron's[5] adjacent 3.9 million gallon tank farm; the underground pipeline that Longview Fibre used to transfer bunker fuel from the dock to its 80,000 barrel (3.3 million gallon) above ground storage tank ("AST") as well as that AST; and the appurtenant loading rack that Longview Fibre used to load the bunker fuel from the AST into railcars for transport off site. 11/12/2013 RP 975-1006; 11/14/2013 RP 1505-1517. The Port's expert opined that the releases of contamination from these sources began shortly after their operations commenced, and that they caused groundwater contamination above cleanup levels during all of the policy periods. 11/12/2013 RP 1008-1009, 1011-1026, 1047-1050. A secondary, and nearly insignificant source of contamination was the 675-gallon underground storage tank ("UST") used by a small construction company named Calloway Ross and/or its predecessors to fuel their vehicles. 11/12/2013 RP 949, 1028-1029; 11/7/2013 RP 620-621. The Port never operated any of these facilities. 11/7/2013 RP 560-561, 603-604.

The TPH site contamination was first discovered in 1991 when the Port removed Calloway Ross' 675-gallon UST because it was no longer in use. 11/13/13 RP 1192-1193; 11/7/2013 RP 592; 11/12/2013 RP 964-965, 1450-145. The Port discovered a small hole in the tank, so it sampled the area for contamination. 11/13/2013 RP 1199-1203. Follow up testing revealed contamination from Chevron's and Longview Fibre's adjacent operations. 11/13/2013 RP 1202-1203; 11/12/2013 RP 965, 975-995.

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[5]Chevron is the successor to Standard Oil.

The Port's Insurance. The Port initially made claims for its liability at these sites under all of its historical CGL insurance policies. Ex. P-52-55; CP 8153-8154. The policies were issued by two sets of insurers, the Marine defendants (including Arrowood Indemnity Company) and LMI. *Id;* CP 8158-8159. The Marine defendants were dismissed from the litigation after they reached a settlement with the Port in February 2013. CP 10189-10190. The Port went to trial on its primary Lloyd's[6] CGL policies[7] in effect from 1979 to 1985, and its excess LMI CGL policies[8] in effect from 1977 to 1985. These policies are the subject of the August 1, 2014 Judgment Pursuant to CR 54(b) ("Judgment") that LMI appeals. CP 22526-22554. They are also set forth in the insurance coverage chart used as an illustrative exhibit (Ex. P-185) at trial and attached hereto as Appendix A. LMI promised in these policies to indemnify the Port for all sums it is obligated to pay on account of third party property damage as the result of an accident or occurrence. Exs. P-36, P-40, P-41, P-105, P-15, P-106, P-107, P-16, P-44, P-46, P-47, P-18 and D-340 at POL 035496-035505. Although the Primary Policies do not

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[6] The Primary Policies were insured by "Underwriters at Lloyd's, London". Lloyds is a marketplace where individual investors who are known as "Names" and who operate as members of syndicates, subscribe to insurance risks accepted by the Lloyd's market. The identity of the individual Names and/or syndicates that underwrote a particular policy is referred to as "the market."

[7] Policies Numbered MC 5757, MC 5998, MC 6016, and MC 6027 ("Primary Policies"). *See* generally Ex. D-340.

[8] Policies Numbered AN 5707, JSL 1021/212186300/212186400, JSL 1041/212248400, JSL 1055, JSL 1065/830007500, JSL 1087/820040700, JSL 1136/820136600 ("Excess Policies"). *See* generally Ex. D-340.

define "accident" or "occurrence," the Excess Policies define an "occurrence" as an event or continuous or repeated exposure to conditions which unexpectedly and unintentionally results in property damage during the policy period. Exs. P-36, P-40, P-105, P-15, P-16, P-18 and D-340 at POL 035496-035505. The qualified pollution exclusions in six of the Excess Policies preclude coverage for property damage arising out of the release of contaminants in a body of water unless that release is sudden or accidental.[9]

The Primary Policies require notice be given "as soon as may be practicable" once the insured's management actually knows of a loss which is "apt to be a claim". Exs. P-107, P-44, and P-46. In contrast, the Excess Policies (which are not at issue in the late notice orders LMI appeal) require notice only when the insured has information from which it may reasonably conclude that a covered occurrence is likely to involve the excess policy. Exs. P-36, P-40, P-41, P-105, P-15, P-16, P-18 and D-340 at POL 035496-035505.

B. The Port's Attempted Notice and the Lawsuit

In the late 1990s when Port management learned of the MFA contamination, it was not aware the Port could be liable for it, or that the Port potentially had insurance coverage for it. 11/7/2013 RP 618-620. The 1999 real estate transaction allocated all liability for the contamination on

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[9]The following policies contain an absolute pollution exclusion: AN 5707, JSL 1021, JSL 1041, JSL 1055, JSL 1065, JSL 1087. Exs. P-36, P-40, P-41, P-105, P-15, P-16, P-18 and D-340 at POL 035496-035505.

the Plant area to IP. CP 2704-2716. Consequently, the Port answered Ecology's 2005 PLP letter by arguing that the Port should not be a PLP because it merely owned the property, and that IP should remain solely responsible for the cleanup of the site. CP 2722-2723. As discussed in more detail below, it was not until 2009 that the Port had any understanding that it might have an insurance claim.

Similarly, earlier in the 1990s when Port management learned of the TPH site contamination, it was not aware the Port could be liable for it, or that the Port potentially had insurance coverage for it. 11/7/2013 RP 618-619. Kathy Oberg, the Port's risk manager testified that no one informed her the Port had a loss at the TPH site for which a claim should be made, nor did anyone ask her to search for the Port's historic insurance policies. RP 749, 771. The Port's executive director Ken O'Hollaren testified that he did not know that any claim was being asserted against the Port or that the Port had any potential insurance coverage if there were a claim. 11/7/2013 RP 618-620; 11/14/2013 RP 1532-1533.

Judy Grigg, the Port's environmental manager from 1991 to 2009, testified in deposition that at first she did not believe that the Port would be responsible for any of the TPH site contamination, because the other PLPs would step up and pay to clean up the site. CP 13723. Ms. Grigg also testified that she did not consider whether the Port of Longview might have an insurance claim for the Port's TPH site liability until 2009. CP 21286.

In 2009, the Port sought to notify LMI of its insurance claims

relating to both sites via letter to J. Gordon Gaines, the agent for notice identified in the Primary Policies. Ex. P-55 The Port had no reason to give notice under the Excess Policies at the time because the Port did not know then that its claims would ultimately exhaust its primary coverage. CP 7951. The notice letter sent to J. Gordon Gaines was returned as undeliverable. Ex. P-54.

The Port then forwarded its LMI notice letter to Mendes & Mount, the New York law firm that is Lloyds' long time coverage counsel and agent for receipt of legal process. Ex. P-54; 11/8/2013 RP 728-730; 11/15/2013 RP 1706-1708. Upon receiving the Port's claim notice, Mendes told the Port that they did not "generally" act as notice agent, but that they would respond to the Port's notice after reviewing the Port's policies. Ex. P-113; 11/8/2013 RP 730-731. The Port forwarded copies of its Primary Policies to Mendes, but heard nothing further from it or from LMI for nearly five months. Ex. P-114; 11/8/2013 RP 732-733. In early 2010, the Port's consultants estimated the potential future cleanup costs at the sites, which provided the Port its first indication that its potential liability for the sites might exceed the limits of its primary policies. CP 7951. Based upon that, the Port sent notice of its claims under its Excess Policies, but it received no response. 11/8/2013 RP 733-735 Exs. P-52 and P-53.

The Port filed suit in August 2010 because it was unable to get a

response to its notices. 11/8/2013 RP 735-736.[10] The trial court bifurcated the case into two phases, liability (coverage) and damages (past site costs). On February 17, 2012, the trial court set the Phase 1 trial to begin on September 10, 2012. CP 118-120. As discussed more fully below, the trial court *sua sponte* continued the first trial as a result of LMI's repeated discovery abuses. 9/7/2012 RP 70-71.

The case was tried to a Jury beginning November 4, 2013 on all factual issues regarding coverage under the Primary Policies, and on all factual issues regarding coverage under the Excess Policies except LMI's late notice defense. Any late notice issue as to the Excess Policies was reserved for the second trial because LMI claimed the determination of whether the Port's notice was late turned in part on issues relating to the amount of the Port's past costs. 10/4/2013 RP 73, 88-89; CP 16851-16853. The Phase 1 trial resulted in a unanimous verdict, finding for the Port on all factual issues presented. CP 18648-18651. Accordingly, a declaration of coverage under the Primary Policies was entered on January 8, 2014. CP 18831-18846.

With all the coverage related factual issues decided, other than late notice under the Excess Policies, and with LMI unable to provide any evidence of prejudice from the alleged late notice, the trial court dismissed LMI's late notice defense under the Excess Policies on March 27, 2014,

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[10] The Port served Lloyd's by sending a summons and complaint to the Washington Insurance Commissioner ("OIC") pursuant to RCW 48.05. The OIC forwarded the Port's legal process to Mendes, because Mendes is the agent that Lloyd's themselves designated to the OIC for receipt of legal process. CP 8170-8172.

and entered a declaratory judgment order for these policies on May 20, 2014. CP 19835-19836, 20760-20761. On August 1, 2014 the trial court entered and certified the declaratory judgment orders as final under CR 54(b), and stayed the Port's remaining bad faith claims. CP 22526–22554.

C. LMI's Lost Policy Defense, Discovery Abuses, and Sanctions

LMI placed great reliance on their lost policies coverage defense. LMI argued that without the original policies, which were kept only by the London broker, the Port could not meet its burden to prove policy wording, particularly the policy's listing of the Lloyd's syndicates and names that underwrote each Lloyd's policy (referred to as the "subscribing market" information). CP 1770-1782, 6719-6726, Supp. CP 22633-22669[11]. While asserting this as an absolute defense and moving for summary judgment based upon the Port's lack of evidence, LMI simultaneously refused to produce a CR 30(b)(6) witness on the topic before the discovery cut-off and refused to comply with multiple orders to produce information from LMI's files.

January 18, 2011, The Port propounded written discovery requests to LMI seeking all LMI's relevant documents and other evidence, including among other things, the missing subscribing market information. CP 11064-11072. LMI responded on April 4, 2011 with objections but no

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[11] On July 30, 2015, pursuant to RAP 9.6, Respondents filed a Supplemental Designation of Clerk's Papers and Exhibits Admitted at Trial. Accordingly, those documents do not yet have CP numbers assigned. The September 18, 2012 Amended Statement of London Market Insurers Regarding Payment of Judgments contained in the Supplemental Designation will be cited in this brief as Supp. CP and numbered from 22633-22669.

substantive evidence. *Id.*

March 8, 2012, The Port propounded a notice of CR 30(b)(6) deposition of LMI on multiple topics including the missing subscribing market and LMI's search for responsive policy evidence. CP 4074-4076.[12] Three months later LMI announced that their witness on the allegedly critical missing subscribing market information would be available only in London and not until late August 2012, well after the August 3, 2012 discovery cut-off and only a matter of days before the trial. CP 4123-4125, CP 1340-1341.

July 31, 2012, The trial court ordered the deposition to take place in London on August 23-24, 2012. At the deposition LMI produced a different witness who was not prepared to provide testimony regarding the missing subscribing market, among other topics, and was repeatedly instructed by counsel not to answer numerous questions about matters not involving questions of privilege. CP 4066-4069; 4138-4305.

September 7, 2012, (the Friday before the Monday that trial was to start) The trial court granted the Port's sanctions motion and *sua sponte* continued the trial to February 4, 2013 based upon LMI's discovery abuses. 9/7/2012 RP 67-71. The Court subsequently also imposed

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[12]The detailed history of LMI's pattern of tactical non-disclosure in response to the Port's discovery requests relating to LMI's key affirmative defense based on lost policies and missing subscribing market information is set forth in the Port's August 30, 2012 and January 28, 2013 sanctions motions (CP 4038-CP 4060 and CP 9461-CP 9472, respectively) and their supporting declarations (CP 4062-CP 4447 and CP 9474 -9703). The trial court considered all of these materials in rendering its decision regarding the February 4, 2013 sanction order (CP 10099).

sanctions of $30,925.79 against LMI. CP 11536-11538; 9/7/2012 RP 67.

September 28, 2012 The trial court ordered LMI to search all of their underwriters' files for responsive documents and to re-proffer their CR 30(b)(6) witnesses for deposition.[13] CP 5940-5942; 9/28/2012 RP 82-88.

November 19, 2012 The trial court ordered LMI to complete their document search of all their underwriting files by November 27, 2012. CP 7661-7665. LMI failed to do so.

November 28, 2012 The trial court ordered that LMI must complete their search and produce documents no later than December 28, 2012. CP 8366-8370. The trial court left open the issue of additional sanctions against LMI. CP 8367.

December 28, 2012 LMI produced several hundred pages of documents from their underwriters' files, but not the subscribing market information. CP 9522.

January 3, 2013 Port counsel wrote to LMI complaining about apparent gaps in the documents LMI produced. *Id.*

January 4, 2013 LMI finally produced printouts from their LIDS[14] database, containing the allegedly critical missing market information that had formed the cornerstone of their lost policy defense for the last year.

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[13]LMI had taken the position that they were not required to search all of the files of all the underwriters on the Port's policies, and should be allowed to search only the files of the "lead" underwriters.

[14]Lloyd's Information Database System

CP 9525-9526, 9558-9690.

January 10-11, 2013 LMI re-proffered their CR 30(b)(6) witness, who testified that LMI have had the ability to perform computerized searches of their LIDS database with the help of a computer technician as early as 2009, and they have had the ability to do so without the aid of a technician since June of 2012. CP 9692, 9695-9699.

The trial court imposed sanctions on February 4, 2013 because LMI engaged in a pattern of obstructing and refusing to cooperate with the Port's discovery throughout the case. CP 10099. The trial court recapped the situation on May 22, 2013:

> "And LMI made a corporate decision that the people in charge of searching through Indiana Jones' warehouse [165,000 boxes] consists of one full-time and two part-time folks. They did that in the context of what we've been told are multiple other legal actions about these policies.
>
> ...
>
> And that didn't change basically, I think, until I forced it really at the point of a gun. And was that objectively reasonable? I think the answer is no, that LMI made a corporate level decision to make the pipe through which this information could possibly flow so narrow as to be more or less useless."5/22/2013 RP 171-172.[15]

The trial court specifically tailored the sanction to the missing policy information that LMI wrongfully withheld:

> "The sanction ordered is that the wording in primary policies (MC 5757, MC 5998, MC 6016) is deemed consistent with the Broker's Certificates. Further,

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[15]It is misleading for LMI to state that "the trial court acknowledged that LMI had searched in good faith...." Br. App. at 64. The trial court specifically found that LMI violated the rule from *Hyundai* by limiting their search to an insufficient artificial construct. 2/4/2013 RP 74.

> Defendant LMI is prohibited from presenting any evidence to the contrary." CP 10099.[16]

The trial court elaborated on the effect of the sanction on May 22, 2013:

> "The order doesn't say that the broker certificates constitute the entire policy or are not the proof of everything the [Port] has to prove. The order is in essence that you can't argue that the broker's certificate language is for some reason different than the policy language." 5/22/2013 RP 157:11-16.

LMI put on their entire defense without offering any such evidence either to the Jury, or in an offer of proof. LMI also did not identify any such evidence on appeal. The sanction did not result in the exclusion of any evidence, because LMI had no evidence to offer.

Furthermore, LMI's witness admitted at trial that LMI had all the necessary information for all but the one policy, MC 6027 (which was not a subject of the sanctions order).

> "A. Yes, that's correct. Policy 6027 is where we haven't got policy wording showing us the terms and conditions of the policy.
>
> * * *
>
> For all the other policies, we either have wordings or **certificates that tell us the terms and conditions**." 11/15/13 RP 1703 (emphasis supplied).

Based on that testimony, the trial court granted a directed verdict that the

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[16]Unlike the single page "Accord" certificates commonly used in the United States, the "Broker's Certificates" referred to here originated in England, and are many pages long, containing all the salient policy terms and provisions: named insured, policy period and limits, premiums and instructions for paying them, insuring language, exclusions and conditions, and notice instructions to name a few. An example is attached as Appendix B to this brief (Ex. P-46).

material terms and conditions of all but one of the policies (MC 6027) was proved. CP 18652-18654. The Jury found the Port proved the terms and conditions of policy MC 6027. CP 18648-18651.

D. MFA Claim Defenses

Known Loss Defense. The known loss or lack of fortuity affirmative defense is not based upon policy language but is essentially a common law anti-fraud provision that allows an insurer to avoid coverage if the insurer proves that at the inception of the policy, the insured knew there was a substantial probability of the liability for which it was purchasing coverage. LMI sought dismissal of the Port's MFA claim arguing it was a known loss because the Port purchased the Plant area in 1999.

The Port has owned the MFA property since the 1960s. Exs. D-13, D-15; CP 2684-2685, 2690-2716. In response to LMI's motion, the Port provided undisputed evidence that the Port did not learn of the contamination at the MFA until at least 1997, well after its purchase of the MFA property and the insurance policies. CP 3355-3357, 3360-3362.

LMI sought to argue that but for the Port's subsequent purchase of the Plant in 1999, the Port would have been able to avoid any liability for the MFA groundwater contamination discovered in 1997 based upon the plume defense to MTCA liability. CP 2889-2892. Both experts' opinions and testimony, however, established that a plume defense would not have been available to the Port because the contamination did not migrate solely via groundwater. CP 2744, 4543. This was further confirmed by

Ecology's determination that the MFA area and the Plant area were both part of the original facility which remained a single facility for remediation purposes. CP 3227-3228.

The Port filed a motion seeking a ruling that the Port's statutory environmental liability as a result of owning the MFA site was joint and several as to the entire TWP site, including both the MFA property as well as Plant area ("TWP Liability Motion").[17] The trial court determined that the Port had joint and several liability for the entire TWP site based upon its ownership of the MFA, and this was unchanged by the 1999 purchase. CP 5953-5961. In denying LMI's known loss motion, the trial court found that the undisputed facts established that the plume defense to MTCA liability (RCW 70.105D.020(22)(iv)) which LMI raised, would not have been available to the Port prior to the 1999 acquisition CP 5035-5038; 5013-5016; 5031-5034.

The Port also sought a legal determination that if the Port established insurance coverage for a portion of that site, this coverage would extend to the entire site for which the Port was strictly, jointly and severally liable under MTCA ("Site Wide Liability Motion").[18] The Port explained that because the Port's liability to Ecology is indivisible, the insurers' defense and indemnity obligations apply to the entire site as

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[17] Port of Longview's Motion for Partial Summary Judgment re Port's MTCA Liability at the TWP Site. CP 2676-2682.

[18] Port of Longview's Motion for Partial Summary Judgment re Site Wide Liability. CP 2667-2675.

defined by statute and determined by Ecology. The court granted the Port's Site Wide Liability and TWP Liability motions. CP 5943-5952, 5953-5961.

By mischaracterizing the Port's TWP site claims as liability arising solely out of the Port's 1999 purchase of the Plant area, LMI seek dismissal of the Port's MFA claims based upon the known loss defense. LMI alleged that the Port purchased the "TWP Site" in 1999, with full knowledge of the contamination at that site, so that the loss at that site was not "fortuitous."[19] CP 1641-1655 at 1649, 1652. In addition to mischaracterizing the 1999 transaction as being a purchase of the entire TWP site instead of just the Plant area, LMI ignore that the Port's liability at the site arises out of its ownership of the MFA prior to and during the policy periods 1977 to 1984, which liability is independent of the 1999 purchase. LMI's arguments also ignore the fact that the known loss defense only applies at the time of the purchase of the policies.

LMI did not attempt to further litigate their known loss defense after their summary judgment motion was denied. They did not propose any jury instructions on this defense, nor did they propose a question on the Special Verdict Form to decide any issues of fact on this defense.

Occurrence. LMI also sought dismissal of the Port's MFA claims based on the alleged lack of an occurrence between 1977 and 1985,

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[19] Defendants London Market Insurers' Motion for Partial Summary Judgment Regarding Known Loss/No Occurrence at the TWP Site ("Known Loss/Occurrence Motion") CP 1641-1656.

because the Port was aware of contamination prior to the 1999 acquisition of the Plant area. CP 1641-1655. For the same reasons discussed above, the court found the Port's expectations in 1999 irrelevant to coverage for the Port's joint and several MTCA liability based upon its ownership of the MFA area prior to and during the policy periods, and the court denied LMI's motion as it related to the occurrence element of the Port's claims. CP 5013-5016, 5953-5961.

At trial, the Port proved that it did not expect or intend the groundwater contamination (neither the release to groundwater nor the exceedence of cleanup standards) between 1977 and 1984. Mr. O'Hollaren, the Port's former Executive Director who began working at the Port in 1980, testified that in his various capacities he never had any personal knowledge of any contamination at the TWP site prior to 1984, and that had there been such knowledge or expectation within the management of the Port during or prior to that time, there would have been conversations about it and he would have been part of those conversations. 11/7/2013 RP 577-581.

Norm Krehbiel, the Port's current Chief Operating Officer and Director of Facilities and Engineering testified that he did not know of or expect groundwater contamination on the MFA property prior to 1997. 11/07/2013 RP 640. As evidence that the Port did not have any knowledge or expectation of contamination as late as 1992, he testified about the Port's construction of its maintenance building with state-of-the-art environmental controls above what turned out to be a plume of creosote

contamination. 11/07/2013 RP 635-637.

The Port's expert witness explained that the contamination on the MFA came from IP's adjacent wood treating plant operations via groundwater and subsurface migration. 11/12/2013 RP 1084-1086, 1107. He also testified that from 1947 to sometime prior to 1968, wastewater from those operations was discharged into an unlined ditch that ran across the MFA and into an offsite pond. 11/12/2013 RP 1076-1077. The contamination in that wastewater infiltrated through the soil and into the groundwater beneath the MFA property. 11/12/2013 RP 1085-1086. The Port's expert also testified that even as late as the 1970s, this was a common way to dispose of waste materials, and that Ecology directed disposal in this manner on other sites because it believed the contamination would better infiltrate in the soil. 11/12/2013 RP 1077-1078.

LMI offered no expert testimony regarding the TWP site, and no evidence at all of the Port's expectations and intentions regarding groundwater contamination exceeding cleanup levels at the TWP site prior to or during the policy periods. LMI merely pointed to the existence of the ditch across the MFA in the 1960s and the fact that a strong creosote odor emanated from a six foot deep test pit excavated on the MFA **in 2011**. 11/8/2013 RP 825-829; 11/19/2013 RP 2123, 2125-2126.

Finding substantial evidence to support the Jury's findings, the trial court denied LMI's CR 50 motions. CP 18498-18499, 20189-20190. The Jury found that the Port proved it did not expect or intend

groundwater contamination exceeding cleanup levels at the TWP Site prior to or during any of the policy periods, thereby establishing that element of the occurrence under each policy. CP 18649-18650.

Qualified Pollution Exclusion. The Port similarly proved it fits within the sudden and accidental carve out in the Excess Policies' qualified pollution exclusions because the above evidence also established that prior to 1984, the Port had no knowledge, expectation or concerns that contamination had or would be released to the groundwater at the TWP site.

LMI oppose the Jury's unanimous finding based solely on the fact that the MFA ditch, in which *a party other than the Port* deposited wastewater with the intention that it be transported offsite in accordance with a standard Ecology approved practice of the time, ran across the MFA in the 1960s. The trial court denied LMI's CR 50 motions and ruled that the trial evidence was sufficient for the Jury to find for the Port. CP 18544-18545, 20191-20192.

Late Notice Prejudice. On August 3, 2012, LMI moved for summary judgment dismissing the Port's TWP site claims based upon their late notice defense. CP 1437-1453. The trial court found the Port's notice under the Primary Policies was late,[20] but denied the motion because LMI's evidence failed to establish the actual and substantial prejudice required to defeat coverage. 8/31/2012 RP 225-229; CP 5017-

[20] The Port's notice under the Excess Policies was not at issue in this motion.

5019.

Consequently, on November 1, 2012, the Port moved for dismissal of LMI's late notice defense to the Port's TWP site claims based on the lack of actual and substantial prejudice. CP 6564-6570. The trial court granted the Port's motion and struck LMI's Ninth Affirmative Defense (late notice) to the Port's claims for coverage at the TWP site. CP 8687-8690. LMI unsuccessfully sought reconsideration of this order. CP 10123-10126. Accordingly, LMI was precluded from presenting evidence in support of this defense at trial, the Jury was not instructed on this defense, and the issue was omitted from the Special Verdict Form.

E. TPH Claim Defenses

Occurrence. The Port proved at trial that it did not expect or intend the groundwater contamination (neither the release to groundwater nor the exceedence of cleanup standards) at the TPH site prior to purchasing the policies (between 1977 and 1984). Mr. O'Hollaren gave the same testimony about lack of discussions, concerns or even knowledge regarding the contamination at the TPH site that he gave with respect to the TWP site (including the MFA area). 11/7/2013 RP 577-581. Mr. O'Hollaren also testified that the Port did not conduct the operations that caused the contamination at the TPH site, and the Port's fact witnesses, the Port's expert witness, and LMI's expert witness all testified that the contamination at the TPH site was first discovered in 1991. 11/7/2013 RP 592; 11/12/2013 RP 964-965; 11/14/2013 RP 1450-1451, 1598.

LMI provided no evidence that anyone at the Port had any

knowledge or expectation of groundwater contamination at the TPH Site prior to the policy periods. LMI merely pointed to the fact that another entity (Standard Oil/Chevron) replaced pipelines in the 1960s or 1970s and that it was required by the license agreement to obtain the Port's permission before changing the location of the pipelines. 11/19/2013 RP 2115-2116; Ex. P-83.

The trial court denied LMI's CR 50 motions with respect to the TPH site, and the Jury found the Port proved it did not expect or intend groundwater contamination exceeding cleanup levels at the TPH site prior to any of the policy periods. CP 18498-18499, 20189-20190, 18648-18651.

Qualified Pollution Exclusion. The qualified pollution exclusions in six of the Excess Policies exclude coverage for property damage resulting from the release of contamination to a body of water, unless that release was sudden and accidental, which Washington courts have interpreted to mean unexpected and unintended.

With the occurrence evidence discussed above, the Port proved its TPH claim fits within the exception to the qualified pollution exclusion, and LMI failed to produce any evidence that the Port expected or intended the releases to groundwater at the TPH site. Appellant's brief only argues based upon pre-trial declarations, that the operations of other entities in the 1950s, 1960s, and 1970s caused spills. App. Br. at 9-10.

The trial court denied LMI's CR 50 motions and the Jury found the Port proved it did not expect or intend the release of contamination to

groundwater at the TPH Site prior to any policy periods. CP 18544-18545, 20191-20192, 18648-18651.

Late Notice Prejudice. On August 3, 2012, as part of the same motion described above with respect to the TWP site, LMI moved for summary judgment dismissal of the TPH site claims based upon their late notice defense. CP 1437-1453. Although the court found the Port's notice under the Primary Policies was late, it did not address notice under the Excess Policies nor did it determine when the Port's notice obligation was triggered. The trial court denied LMI's motion because LMI failed to prove the actual and substantial prejudice required to defeat coverage. CP 5017-5020.

Unable to show actual and substantial prejudice to support their late notice defense, LMI changed direction and began trying to establish its late notice defense based on *no* evidence, seeking a presumption of prejudice based solely on the number of years LMI believed the notice was late. On November 1, 2012 and August 30, 2013, LMI filed additional motions on this basis. CP 6796-6807, CP 13447-13477. The court denied each of these motions, ultimately finding that there was "a question of fact regarding whether the Port's late notice has prejudiced LMI's ability to investigate the TPH site".[21] CP 8699-8702, CP 16863-

[21] While the trial court never decided by how many years the notice was late, the court found the Port made voluntary payments pursuant to the 1998 Chevron Agreement, and denied the Port's recovery for those costs. None of those costs are subject to the Judgment that LMI appeals, and LMI have not appealed any of the court's rulings regarding their voluntary payments defense.

16866.

On November 1, 2012, the Port moved for dismissal of LMI's late notice defense to coverage based upon their lack of evidence of prejudice. Although the court initially granted the Port's motion, it later modified that order and allowed LMI to present its late notice defense at trial. CP 8687-8690, 16851-16853, 16863-16866. At trial, the Port's fact witness testimony established that:

- Calloway Ross was a small construction company that operated on property leased from the Port. 11/7/2013 RP 620-621.
- The Port first discovered the contamination at the TPH site in 1991 when it removed 675-gallon UST on the Calloway Ross leasehold that was no longer in use, and found a small hole in that tank. 11/7/2013 RP 592; 11/13/2013 RP 1193, 1200.
- The Port did not understand at the time, that a third party claim was being asserted against it, and did not known that it had policies that might provide coverage for such a claim. 11/7/2013 RP 592-593, 618-619; 11/14/2013 RP 1532-1533.
- The Port conducted an investigation of the soil and groundwater contamination in and around the tank pit, which identified significant contamination sources other than the 675-gallon UST. 11/12/2013 RP 964-965; 11/13/2013 RP 1193, 1202-1203.
- The contamination on the site was primarily diesel and bunker fuel, while the the Calloway Ross 675-gallon UST only stored gasoline, and the former owner of the tank (Nate Davis) claimed that the leak from the UST was recent. *Id.*; 11/13/2013 RP 1222.
- The Port investigated the site history to determine the other sources and other parties liable for that contamination. 11/13/2013 RP 1202-1203, 1237-1238.
- The Port and its counsel had numerous meetings with the other PLPs including Calloway Ross, Chevron, Longview Fibre, and James River (the successor in ownership of the 3.4 million gallon AST, first owned by Longview Fibre). 11/14/2013 RP 1541-1546.
- In 1992, the Port, Longview Fibre and James River agreed to share

the costs of certain investigation tasks. 11/14/2013 RP 1548-1550; Ex. D-96.

- A consultant (Golder Associates) was selected to represent the major responsible parties in the investigation of the site. 11/14/2013 RP 1545-1548.

- Chevron, Longview Fibre and the Port met with Golder to give direction on each phase of the investigation. 11/14/2013 RP 1552.

- In 1998, the Port entered into an agreement with Chevron and Longview Fibre that required Chevron to pay a share of past costs and all parties to pay shares of future expenses up to $100,000. 11/14/2013 RP 1612, Ex. D-169.

- Calloway Ross paid a share of the costs related to contamination from the 675-gallon UST. The Port pursued Calloway Ross for contribution until it believed the company was no longer financially viable. 11/14/2013 RP 1605-1614; 11/7/2013 RP 620-621.

The Port's expert witness testified at trial that the groundwater contamination at the TPH site exceeded permissible levels prior to and during each of the policy periods (thus triggering the insurance policies), and that no additional information, especially regarding the Calloway Ross UST, would change that opinion. 11/12/2013 RP 951, 1017-1029, 1047-1050. His testimony established the following:

- There were no reliable chemical analyses ("fingerprinting or age dating") that could have been performed in the 1990s to determine when the releases from a specific source occurred. The only studies which attempted to do so would be inapplicable to this site because it involves multiple releases and unpaved surfaces. 11/8/2013 RP 896-912; 11/12/2013 RP 953-958.

- The more reliable method for determining the timing and source of releases at the TPH Site is the analysis of historical operations. 11/8/2013 RP 869-874; 11/12/2013 RP 953-958.

- The primary sources of contamination at the TPH Site were the Chevron pipelines, and the Longview Fibre pipeline, loading rack and 3.4 million gallon AST. The groundwater contamination at the

TPH site would have triggered all of the policies even if the release from the Calloway Ross UST had never occurred. 11/12/2013 RP 1007-1032, 1047-1050.

LMI's expert admitted on cross examination that, even if she had been involved in the investigation from the beginning, there is no information she could have gathered that would change the fact that the contamination from the primary sources (Chevron's and Longview Fibre's operations) was released prior to the policy periods, thus undermining her prior pre-trial declarations. 11/14/2013 RP 1516-1517.

LMI provided no evidence that a defense to MTCA liability was available to the Port prior to when the Port gave them notice of its claim. LMI's only evidence that the passage of time deprived them of any subrogation right for costs they might actually pay on the Port's behalf, was the unavailability of Calloway Ross. And they failed to offer any evidence that, if notified in the 1990s, they would have done anything different to pursue additional contribution from Calloway Ross, or that Calloway Ross had any additional liability or any assets to pursue.

And despite their general allegations, LMI's brief does not identify any specific evidence that was excluded at trial.[22] After the nearly three week trial, the Jury unanimously determined that LMI failed to prove any

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[22]While LMI filed a large volume of documents as an "Offer of Proof" of their late notice defense to the TPH site claims, LMI's brief contains no discussion of any offer of proof, and references only 4 documents, two of which were in fact admitted a trial and from which LMI were permitted to argue in front of the Jury. App. Br at 9, 11, 14, 39 and 42; *compare* CP 17394 *with* Ex. D-138; *compare* CP 17863 *with* Ex. DS-341. Further, the topic in the deposition testimony LMI cite (CP 17787) was discussed by that witness at trial. 11/14/2013 RP 1598-1614.

actual and substantial prejudice from the Port's late notice. CP 18648-18651.

F. Jury Instructions and Verdict Form

LMI initially purport to assign error to four jury instructions (Nos. 10, 11, 12, and 15) and the special verdict form, identified by reference to attachments. App. Br. at 3, appendix A. Yet only two of those attached are actual jury instructions. LMI did not attach the court's Jury Instructions Nos. 12 or 15. Instead they attached their proposed instructions 12 and 15. CP 18620, 18623. However, LMI did not assign error to the court's failure to give these instructions.

The court drafted the jury instructions in this case after extensive discussion and revision. It then offered the parties the opportunity to make their objections for the record. LMI's objections to the instructions at issue consisted only of:

> "The Court's number ten we object to because of adding the second paragraph and paragraphs numbered one, two and three; and we except for failure to give LMI's offered number 12, 14, 15 and 16." 11/19/2013 RP 2008:19-22.

On appeal LMI complain about the three paragraphs in instruction No. 10 to which they took exception. These paragraphs were tailored by the court to the evidence LMI had presented a trial.

LMI totally failed to object to the court's Jury Instruction No. 11, which they discuss in their brief, and they totally failed to object to the Special Verdict Form. Indeed, at no time below did LMI argue for the language they now advocate in their brief.

In terms of their objection regarding the failure to give their instructions 12 and 15, which they technically did not assign error to, LMI failed to advise this Court that the trial court incorporated the language from their proposed instruction 12 into Jury Instruction No. 10. CP 18644; 11/8/2013 RP 1944, 1946-1947. LMI did not object to that language in Instruction 10. And LMI's proposed instruction 15, which LMI argues was a description of the court's prior late notice prejudice ruling, is actually an inaccurate recitation of the court's denial of LMI's Known Loss/Occurrence Motion. App. Br. at 43, CP 18623, CP 5013-5016.

III. LEGAL ARGUMENT

A. LMI are Not Entitled to Relief from their Sanction for Discovery Abuses nor a New Trial on their Unsupported Lost Policies Defense

Even if erroneous, the trial court's sanction was at most harmless error because LMI admitted in cross examination during trial, that there was no dispute over policy wording except for one policy (MC 6027), which the Jury later decided was proved. LMI's admission became the basis for the trial court's directed verdict that the policy wording was proved. Thus, the sanction had no effect on deciding the material terms of the three primary policies that were the subject of the sanction (MC 5757, MC 5998 and MC 6016).

However, the sanction was correct and should not be disturbed. A trial court's ruling on discovery sanctions is reviewed for abuse of discretion. *Washington State Physicians Ins. Exc., and Assoc., v. Fisons Co.*, 122 Wn.2d 299, 338 (1993). A trial court abuses its discretion when

its order is manifestly unreasonable or based on untenable grounds. *Id.* at 339. Neither has happened here.

The trial court fashioned the sanction very narrowly to only preclude evidence that the policy terms were in any way inconsistent with the certificates that the Port received from the broker and believed to be copies of its policies. CP 10099. 11/7/2013 RP 658-659, 670-674. The sanction did not preclude LMI from presenting evidence or argument that the certificates were incomplete, nor did it preclude LMI from presenting evidence or argument that the policies contained terms beyond those included in the certificate. CP 10099.

LMI *simply had no evidence* of other policy terms or wording. LMI proffered no such evidence either to the Jury, or to the trial court in an offer of proof. Nor, do LMI refer to any such evidence on appeal. Without such evidence it is impossible for LMI to claim any prejudice from the sanction.

The lack of impact on the outcome of the trial notwithstanding, the trial court's ruling was correct because it addressed the egregiousness of LMI's repeated discovery misconduct and the prejudice it visited upon the Port. As set forth above, LMI's discovery misconduct began with their first responses to the Port's written discovery, continued throughout the time leading up to the first trial date, caused the trial court to postpone the first trial setting to allow the Port to complete the discovery LMI refused to cooperate with, and then continued through January 2013. LMI had already demonstrated that the trial court's $30,925.79 sanction was

ineffective as were the trial court's multiple orders compelling LMI to provide discovery. CP 12099-12101, 8382-8386, 11536-11538.

The trial court made the following findings regarding LMI's search for the responsive market information, the lack of which they had alleged was fatal to the Port's claims: 1. that LMI knew it could search the LIDS database using a computer technician, but did not do so; 2. LMI failed to meet the trial court's "serious" deadline to produce documents, which was barely a month prior to trial, and 3. LMI limited "their search to some artificial construct that they think is sufficient" in violation of the holding in *MaGana v. Hyundai Motor Am.*, 167 Wn.2d 570 (2009). 2/4/2013 RP 73-74.

Then the trial court carefully considered on the record other sanctions and determined this one to be the least severe sanction possible. The trial court considered ordering a lesser standard of proof for the Port in proving the LMI policies, but rejected it because of the confusion that would be caused by applying different standards to the LMI policies and the other defendants' policies. 2/4/2013 RP 75. The trial court also considered and rejected purely monetary sanctions in light of the amount at risk in the case. *Id.* Last, the trial court considered deeming the three LMI primary policies to be comprehensive general liability policies of the type under which coverage was found in *Weyerhaeuser Co., v. Aetna Casualty and Surety Co.*, 123 Wn.2d 891 (1994), but the trial court rejected that as too harsh of a sanction. 2/4/2013 RP 77-78.

The trial began as scheduled, but toward the end of the Port's case

in chief, it was declared a mistrial due to the Port's discovery of a box of responsive documents that had been inadvertently overlooked when the Port produced documents in discovery. 2/12/2013 RP 64; CP 11704-11705, 11707-11708, 11710-11712. The first trial was reset for November 4, 2013. CP 12772-12774. The trial court allowed LMI to conduct limited depositions in order to support LMI's motion for sanctions related to the mistrial. CP 13441-13443. After examining the resulting evidence, the trial court found no misconduct by the Port and denied LMI's request for sanctions. CP 16867-16871.

After the mistrial, the trial court analyzed LMI's motion for relief from the sanction and correctly found that LMI's request did not fit within any of the CR 60 bases for relief from an order or judgment. 5/22/2013 RP 156-158.

Sanctions serve two purposes: 1. to ameliorate prejudice to the injured party; and 2. to deter future misconduct. *National Hockey League et al., v. Metropolitan Hockey Club Inc., et al.* 427 U.S. 639, 643 (1976). (Affirming dismissal of a case as sanction for failure to cooperate with discovery to penalize the offending party and to deter others from such conduct).

The delay occasioned by the mistrial did not justify any change in the LMI sanctions. That delay did not expunge the nine months the Port spent trying to compel LMI to properly respond to discovery, and defending LMI's summary judgment motions based upon the Port's lack of the very information LMI were refusing to search for and produce.

Second, any change would simply reward LMI for their prolonged discovery abuses.

The trial court correctly found that LMI deliberately created a system intended to slow document retrieval to the point it would be useless to any and all plaintiffs:

> "Given the paucity of personnel charged with the task, and the mountain of [data] to be searched, it would take a level of luck commensurate with a lottery win for all discoverable information to have been produced within any rational time frame." CP 12770-12771.

5/22/2013 RP 171-172. The trial court was explicitly seeking to deter that conduct in the future. The mistrial had no effect on this basis for the sanction, and to have relieved LMI of the sanction would actually have been counter productive because it would have rewarded LMI for its intransigence. Thus, the court did not abuse its discretion and the sanction was appropriate even after the mistrial.

B. Port Proved it did not Expect or Intend a Release to Groundwater or the Resulting Contamination

The Occurrences. The LMI policies require that the third party property damage (resulting in the liability for which coverage is sought), be the result of an accident or occurrence. Certain of the LMI policies define an occurrence as "an accident . . .which unexpectedly and unintentionally results in . . .Property Damage. . . during the policy period." *See* e.g., Exs. P-40 at POL 011016, P-105 at POL 035480. When the term is undefined, as it is in four of the LMI policies, Washington courts have interpreted the term "occurrence" to mean any incident or

event, especially one that happens without being designed or expected. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 634 (2002), citing *Truck Ins. Exch. v. Rohde*, 49 Wn.2d 465 (1956). In order to establish an occurrence, an insured need only prove, by a preponderance of the evidence, that it subjectively did not expect or intend the property damage that is the basis for the covered liability. *Queen City Farms v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 68-72 (1994); *Overton,* 145 Wn.2d at 428. Here, the property damage that is the basis of the Port's liability is contamination to groundwater at concentrations exceeding MTCA cleanup levels. *Puget Sound Energy v. Certain Underwriters at Lloyd's,* 134 Wn. App. 228, 253-254 (2006). Therefore, to establish an occurrence under each policy, the Port was only required to prove it did not expect or intend groundwater contamination exceeding mandated cleanup levels prior to the policy periods.

In reviewing a CR 50(b) motion, the appellate court applies the same standard as the trial court. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 529, 998 P.2d 856 (2000). A motion for judgment as a matter of law may only be granted if there is no legally sufficient evidentiary basis for a reasonable jury to make the subject findings of fact. CR 50(a)(1). The court must accept the truth of the nonmoving party's evidence and draw all favorable inferences that may reasonably be evinced. 126 Wn.2d at 98-99. Here, the Port's evidence was more than sufficient for a jury to find (as it did), that the Port did not expect or intend the property damage (groundwater contamination) at

either site prior to purchasing the insurance policies at issue.

By repeatedly referring to the operations occurring on the site as the "polluting events," LMI attempt to conflate the knowledge of the industrial operations with the knowledge that those operations were placing hazardous substances in the soil and the groundwater. Much has changed over the last 50 years regarding society's understanding of how everyday activities can damage the environment. Practices such as using waste oil for dust control on gravel roads, once thought to be harmless if given any thought at all, are now no longer done because we have subsequently learned that oil dumped on the ground can actually reach the groundwater and cause damage. The Court should not let LMI improperly imprint today's understanding onto Port personnel 50 years ago in order to create the misimpression that Port expected, intended, or even understood the concept of contamination. The court's denial of LMI's motions and the Jury's unanimous verdict should not be disturbed.

MFA Claim. The Port did not operate the facilities that caused the contamination at the TWP site. 11/7/2013 RP 607. Therefore, it is undisputed that the Port did not *intend* either a release of contaminants or the resulting groundwater contamination at the site. The Jury found the Port had proved it did not expect contamination at the TWP site prior to the purchase of the policies. CP 18649-18650. The decision was supported by the Port's former Executive Director's testimony that the Port had no expectations or concerns regarding groundwater contamination prior to 1984, and its Director of Engineering's testimony

that the Port constructed a "green" maintenance building on the MFA plume of creosote. 11/7/2013 RP 629-637. 11/7/2013 RP 545-581. The Port's expert testified that the environmental regulations prohibiting unlined wastewater ditches did not go into effect until the 1970s, and that even Ecology directed wastewater to be disposed in this manner as late as the 1970s.11/12/2013 RP 1077-1078. Thus, it is reasonable to infer that even if Port management were aware of the MFA ditch in the 1960s, they would not be aware of or expect that the ditch was a source of contamination, much less contamination to groundwater. Thus, the court's orders denying LMI's CR 50 motions on this issue and the Jury's unanimous verdict should not be disturbed.

TPH Claim. To establish occurrences at the TPH Site, the Port provided the same type of testimony from Mr. O'Hollaren that was discussed above with respect to the TWP site. In addition, Mr. O'Hollaren testified that the Port was not involved in operating the tankage and underground pipelines that caused the releases, and that the Port would not typically have undertaken replacement of the Chevron pipelines in the 1950s or 1960s. 11/7/2013 RP 560-561, 572. Further, the Port's expert testified that existing contamination might not have been apparent during construction of the new pipelines. 11/12/2013 RP 1150-1152.

The Port provided direct evidence that it had no expectation of any groundwater contamination by 1980, which is circumstantial evidence that it did not have that knowledge or expectation at anytime prior to that date. Such an inference is supported by the Port's expert's testimony about the

lack of understanding regarding contamination during the 1950s and 1960s. Because the Port's evidence is more than sufficient to sustain the Jury's findings, the trial court's orders should not be disturbed.

The Exception to the Pollution Exclusions. The Port needed only prove it did not expect or intend a release of contamination to groundwater at the sites prior to the policy periods in order to fit within the sudden and accidental exception to the qualified pollution exclusions in certain of the Excess Policies. *Queen City Farms*, 126 Wn.2d 5 at 91-93. The trial court correctly denied LMI's CR 50 motions on this issue because the same evidence discussed above with respect to the occurrence requirement is more than sufficient to overcome a CR 50 motion.

The Port does not need to prove it did not expect what LMI terms the "polluting event," which they define as the operations that we now understand, but did not then understand, caused the contamination. In *Queen City Farms*, the insureds knowingly deposited contaminated materials into a landfill, but claimed they did not expect that contaminated material to be released into the environment. 126 Wn.2d at 92. The court analyzed the insurance industry's representations regarding the intent of the qualified pollution exclusion–to exclude coverage for intentional polluters–and determined that an intentional polluter is one who knowingly deposited contaminants with the intention and expectation that it would be released into the environment. Thus, the exclusion would not apply when the insured knowingly deposited contaminants but did not expect them to be released into the environment. 126 Wn.2d at 93.

That court also recognized there were likely to be situations in which the damage/discharge distinction (between the occurrence requirement and the pollution exclusion exception) may be insignificant as a practical matter. 126 Wn.2d at 89. Here, is such a case. The Port was not involved in the operations and thus, like most people at the time, the Port had no reason to know that the operations were depositing contamination at all. And the Port certainly could not be considered an intentional polluter. The evidence establishing that the Port had no expectation of groundwater contamination also proved it had no expectation of a release of contamination to the groundwater. The Port's evidence was sufficient, and the trial court's orders denying LMI's CR 50 motions should be upheld.

C. No Actual and Substantial Late Notice Prejudice

Despite LMI's conclusory statements alleging prejudice due to lost subrogation rights, altered evidence, lost ability to investigate, and deceased witnesses, LMI failed to make any showing whatsoever on certain of those assertions and on others failed to show any actual and substantial prejudice for either site. To the contrary, the sites are not cleaned up, LMI are not liable for any of the Port's past costs, and the Port has not entered into any agreements with Ecology or with other PLPs that could affect LMI's ability to defend the Port or recover any future remedial costs from other liable parties.

First, none of LMI's arguments about late notice apply to the Excess Policies. Neither the trial court nor the Jury determined that the

Port breached any provision of these policies.[23] Second, the Port's notice under the Primary Policies was not found to be 19 and 14 years late, as LMI repeatedly asserts. The trial court never determined *when* the Port had the requisite knowledge to trigger the notice requirement under the policies.[24] CP 5017-5020. The evidence at trial clearly established that in 1991, the Port did not understand there was a claim against it for which it might have insurance coverage. This is not surprising given that LMI repeatedly asserted that the Port's claims are unripe and that the Port has no legal liability at the sites.[25] Also, when the Port discovered the contamination at the TPH site in 1991, Washington courts had not yet interpreted liability policies to provide coverage for cleanup costs absent a lawsuit or formal enforcement proceedings by an environmental agency, which was not (and is still not) present at the TPH site.[26]

It is well settled that in order to avoid "a questionable windfall for

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[23] 10/4/2013 RP 87; CP 18648-18651. The Judgment determined coverage under eleven different insurance policies, only four of which were the subject of the orders to which LMI assigns error. LMI's late notice defense under the Excess Policies policies was disposed of on April 9, 2014, when the trial court granted the Port's Motion for Summary Judgment on Second Cause of Action (Declaratory Judgment) Against Excess Policies. CP 20210-20211. LMI have not appealed this order.

[24] Nor does the Port concede that its notice was late by not cross appealing the trial court's order *denying* LMI's summary judgment motion.

[25] LMI filed numerous summary judgment motions on the issue and even petitioned for an interlocutory discretionary review of the trial court's determination that the Port had legal liability for the groundwater contamination at the sites. *See*, e.g., CP 1342-1352, 6091-6110, 6360-6372, 11315-11331, 12779-12784.

[26] The *Weyerhaeuser* opinion, which finally determined that there is coverage for "cleanups conducted in cooperation with state agencies," was not issued until 1994. *Weyerhaeuser Co., v. Aetna Casualty and Surety Co.*, 123 Wn.2d 891 (1994).

the insurer at the expense of the public" an insurer must show *actual* and *substantial* prejudice from a policy breach. *Mut. of Enumclaw Ins. Co., v. USF Ins. Co.*, 164 Wn.2d 411, 422 (2008). That court held that "...in order to show prejudice, the insurer must prove that an insured's breach of a notice provision had an identifiable and material detrimental effect on its ability to defend its interests." *Id.* at 430.

In *Canron*, this Court observed that "...previous decisions reject speculation, and require evidence of concrete detriment resulting from delay, together with some specific harm to the insurer caused thereby." *Canron v. Fed. Ins. Co.*, 82 Wn. App. 480, 487 (1996). There, like here, the insurer claimed prejudice based upon the arguments that changes had occurred at the site, records had been destroyed, witnesses had become unavailable, and the insurer was unable to do its own investigations. This Court rejected all of those arguments because no evidence was introduced to identify any specific harm resulting from the site changes, to show what records had been destroyed or how the loss affected the insurer, or to show what information the unavailable witnesses might have had. *Id.* at 489. Further, the insurer did not explain what further investigation was necessary but precluded, why the investigations performed were inadequate, and the court noted that once notified, the insurer conducted no investigation of its own. *Id.* at 489-490.

MFA Claim. LMI's late notice defense to the TWP site claims was stricken when LMI failed to produce sufficient evidence to create a triable issue of fact in response to the Port's November 1, 2012 motion for

summary judgment on the topic. CP 8687-8690. *Young v. Key Pharm., Inc.* 112 Wn.2d 216, 225 (1989). LMI presented no evidence of any alleged prejudice from the Port's late notice regarding the TWP site other than to incorporate their August 2012 motion seeking summary judgment based on late notice. CP 7755-7757. LMI made only two arguments in that earlier motion, neither of which is addressed in their appellate brief.[27] The only evidence before the trial court at the time of the Port's summary judgment motion established the following: 1. that the Port acquired the MFA area of the TWP site from IP in the early 1960s (CP 1441); 2. that the Port purchased the Plant area from IP in 1999[28] (CP 1442); 3. that the Port had not been required by any agency to do, and in fact had not done, anything with respect to the site other than monitor IP's remedial activities on the site (CP 1442-1443); and 4. that Ecology issued a PLP letter to the Port for the site in 2005. (CP 1442).

In their August 27, 2012 reply, which LMI did not incorporate in their response to the Port's summary judgment motion, LMI argued that they were prejudiced by the unavailability of Mr. Foster and Mr.

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[27]The first is that prior to giving notice the Port incurred costs monitoring IP's remedial work on the Plant area. This issue is moot given the court's subsequent orders dismissing the Port's past cost claims. The second was that LMI were prevented from asserting the plume defense to MTCA liability in response to the PLP letter Ecology sent to the Port. CP 1452. In response to a different motion, the court found that the undisputed evidence proved this defense was never available to the Port. CP 5035-5038.

[28]LMI refers to this transaction as the Port's purchase of the TWP site, when in reality it was only the purchase of the wood treating plant area. LMI's characterization is misleading because it falsely suggests that the Port purchased the entire site many years after it purchased the insurance at issue in this case and with full knowledge of the environmental property damage on the site.

McNannay. CP 3685 Neither this issue nor the new allegations of prejudice identified in Appellants' brief were properly raised below and should, thus, not be considered by this Court. RAP 2.5(a); *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 922 (2011). However, even if the Court considers these new arguments, they fail anyway for lack of evidence.

LMI assert for the first time on appeal that they could have raised the third-party-not-in-privity defense or the innocent landowner defense to MTCA liability if the Port had provided notice in 2005 after receiving its PLP letter. (RCW 70.105D.040(3)(a) and RCW 70.105D.040(3)(b)(i)). LMI have made no showing that such defenses would have been effective, had they been made in 2005.[29]

Nor do LMI cite to any evidence that Mr. Foster or Mr. McNannay possessed any testimonial knowledge regarding the TWP site at all, let alone testimony that could have materially benefitted LMI's defense to coverage or liability.[30] There is no evidence in the record that these individuals had any testimony on the topic to support a finding of prejudice. Thus, the trial court correctly concluded that LMI failed to show any late notice prejudice at the TWP site, and it correctly granted the

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[29]See discussion of these MTCA defenses in Section III.E.1, below.

[30]LMI repeatedly makes allegations that these witnesses had "critical" knowledge, but the cited evidence only establishes their job titles, the fact that they were employed at the Port during a certain timeframe, and the fact that Mr. McNannay was present during the Calloway Ross tank pull on the TPH site. App. Br. at 11, 38, CP 13530-13531, 13741, 17501-17505; 11/7/2013 RP 603.

Port's motion. Accordingly, the trial court's order excluding evidence of late notice prejudice at that site under ER 401 and ER 403 was neither manifestly unreasonable nor based on untenable grounds, and should therefore not be disturbed. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671 (2010)(trial courts enjoy wide discretion in balancing probative value against its potentially prejudicial impact).

Even if the trial court's decision could be viewed as error, LMI have not preserved the issue for appeal because they do not identify what specific evidence was excluded. LMI have not discussed any offer of proof[31], nor have they identified which exhibits or testimony they would have presented or how that evidence would have impacted the verdict. The Court should not consider LMI's generalized challenge to the trial court's orders.

TPH Claim. The groundwater contamination at the TPH site remains today. 11/12/2013 RP 1047-1050. The Port has not entered into any agreed order or consent decree on the site, or any other settlement with respect to its MTCA liability. Ecology has not issued a PLP letter to the Port, yet. LMI are not required to pay for any of the costs the Port incurred prior to giving notice, and the Port has not entered into any agreement with other liable parties that impact its liability or rights to

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[31] LMI's brief cites to only one exhibit from the large volume of documents they filed, without foundation, purportedly as their "Offer of Proof" for the TWP site. LMI cite to this document for the proposition that pollutants were dumped into the MFA ditch. Not only does this letter post-date the closure of the MFA ditch, but it references a completely different ditch, which was not located on the MFA property. App. Br. at 58; CP 17383.

recover future costs. It is this complete lack of prejudice that resulted in the court's and the Jury's findings on LMI's late notice defense, not any errors made by the court.

LMI make repeated assertions that they were prejudiced by the removal of the Calloway Ross UST[32] and their inability to pursue Calloway Ross for contribution. However, the Port's expert testified that the amount of contamination from Calloway Ross' 675 gallon UST was trivial in comparison to the vastly greater amounts of contamination from the Chevron and Longview Fibre sources. 11/12/2013 RP 964-966, 1007-1008. Thus, the only relevance of the Calloway Ross UST is that its removal led to the discovery of the contamination from the other primary sources.[33]

Further, the evidence cited in LMI's brief, which consists mostly of pre-trial declarations, does not prove that any "lost" evidence deprived LMI of the ability to put forth defenses to coverage or to contest the value of the Port's future damages.

LMI relies upon a pre-trial declaration from their expert that the TPH contamination degraded and changed, making it impossible to definitively establish the dates and sources of contamination. CP 13910-

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[32] LMI's brief also claims that the Port removed other tanks at the mechanic shop (Appl. brief at p. 38), but these tanks are not part of the TPH site, or any other claim for coverage from LMI.

[33]It is also noteworthy that upon actually receiving notice from the Port, LMI waited almost two years to hire an expert, and that expert never even visited the site. 11/14/2013 RP 1501.

13918.[34] At trial, the Port's expert explained that the "finger printing" or "age dating" analysis referenced by LMI's expert was only reliable when there is a single release beneath a paved surface, and that those conditions are not present at the TPH site. 11/08/2013 RP 902-910. LMI's expert testified that the only benefit LMI would have gained from additional examination and sampling of the Calloway Ross UST, was the ability to show that the release from the UST post-dated the policy periods. 11/14/2013 RP 1482. However, the Port's expert testified that even if the release from UST never occurred, the contamination from the Longview Fibre AST and associated pipeline and loading rack, and the Chevron pipelines still exceeded state mandated levels during the policy periods. 11/12/2013 RP 1029-1030. And LMI's expert admitted during cross examination that even if she had been able to conduct all tests and review all evidence she identified as "lost," it would not have changed the fact that the significant groundwater contamination from the Chevron and Longview Fibre operations was released prior to the policy periods (thus triggering all of the LMI policies). 11/14/2013 RP 1516-1517.

On the other hand, if LMI were able to prove with the allegedly missing evidence discussed above, that the Calloway Ross UST release occurred after the policy periods, this would only prove that Calloway

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[34]The Port's expert witness created a material issue of fact during that motion practice when he provided declaration testimony that the contamination can be sampled and analyzed today and that the timing of the releases from the Calloway Ross UST were irrelevant to determining whether the groundwater contamination exceeded cleanup levels from the other primary sources. CP14758-14759.

Ross' potential allocation of liability would be minimal, making the inability to sue them for contribution irrelevant. Despite LMI's inaccurate contrary statement, both the deposition testimony LMI cite, and the trial evidence established that Calloway Ross did contribute to the remedial costs related to their former leasehold and the Port pursued Calloway Ross until it was no longer financially viable. 11/14/2013 RP 1605, 1614; CP 13723. Further, LMI cite no evidence showing that Calloway Ross had any insurer for the Port to pursue. Without any evidence that Calloway Ross actually had assets available to justify the cost of litigating against them, LMI's allegations that Calloway Ross is no longer available to sue does not even come close to proving actual prejudice. *Thompson v. Grange Ins. Ass'n.*, 34 Wn. App. 151, 163-164 (1983)(insurer did not establish that it could have recovered assets from the tortfeasor even if the statute of limitations had not expired).

LMI will never have to pay the Port's past costs, period. LMI cannot complain about cost sharing arrangements that affect only past costs. Yet, LMI cite to their *counsel's argument* as evidentiary support for alleged prejudice from past costs. App. Br. at 14; CP 8751. LMI then cite to a document created by the Port's consultant which identifies the (non-Port) operations responsible for the groundwater contamination. App. Br. at 14; CP 17394. The Jury properly considered and rejected this evidence. Ex. D-138. First, this presentation is not a legal determination that the Port would have no MTCA liability and no equitably allocated share of remedial costs for the site. Second, the Port used this document during its

negotiations with the other PLPs, and the cost sharing percentages ultimately incorporated in the agreements were still the most favorable the Port could obtain. CP 13723; 11/14/2013 RP 1600-1601.

LMI again only cite to their own argument in an October 14, 2013 pre-trial brief to support their claim they have been prejudiced by their inability to enforce indemnity agreements between the Port and its former tenants and licensees. App. Br. at 14; CP 16133-16166. And even that argument only alleges the inability to seek reimbursement of the Port's past costs (which LMI have no obligation to pay) under the indemnity provisions. The trial court properly analyzed the indemnity agreements and concluded the delay had no effect on their enforceability. CP 16863-16866; 10/23/2013 RP 50. And LMI fail to cite to any offer of proof on this issue.

LMI's allegations that they are unable to investigate and pursue other PLPs for the TPH site because of lost evidence or deceased witnesses is similarly unsupported.[35] The Jury considered and rejected LMI's argument at trial that they were prejudiced because Nate Davis had previously informed Judy Grigg that the leak from the Calloway Ross UST was recent. 11/14/2013 RP 1516. With respect to the Port's former General Manager and its Director of Engineering (Mr. McNannay and Mr. Foster), LMI do not cite to any evidence of what they may have said, or

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[35]LMI cite to argument in their pre-trial indemnity agreement brief discussed above (which has no apparent relevance), and to nearly six hundred pages of pre-trial declaration exhibits. App. Br. at 14; CP 13503-14089, 16136. LMI provide no argument or explanation as to how any of this evidence supports their position.

how that would have materially impacted their defenses to coverage or liability.[36]

Ironically, LMI uses deposition testimony about a memo from the Port's attorneys at Davis Wright to identify lost witnesses, yet that testimony reflects that the witnesses were interviewed by Davis Wright, whose role was parallel to LMI's in pursuing other PLPs. App. Br. at 38; CP 13530. There is no reason to believe that Davis Wright failed to ask any pertinent questions or that they failed to communicate or pursue any relevant information gathered from those interviews.

LMI assign error to orders that purportedly restricted evidence of late notice prejudice,[37] but LMI fail to identify any specific evidence that was actually excluded or explain how the exclusion of that evidence was in error. The "12/21/2012" order identified in LMI's fourth assignment of error was not in effect at trial, with respect to the TPH site, because it was modified by the court's November 5, 2013 order. CP 8687-8690, 16863-16866; 11/5/2013 RP 30.The "2/5/2013" order LMI cite simply denied reconsideration of the December 2012 order. CP 10123-10126. And since

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[36]LMI again cite to their own argument in a motion for reconsideration, for the proposition that key witnesses are deceased and that the Port provided no other evidence of institutional knowledge from the 1960s and 1970s. App. Br. at 15. CP 8751-8752.

[37]Although they do not provide any argument, LMI assign error to orders dated February 5, 2013 and October 16, 2013. There were 8 orders entered on February 5, 2013, only one of which was an evidentiary order. This order on the Port's motions in limine was modified after the mistrial and the renewed late notice motion practice. CP 10106-10109, 18454-18457, 16851-16853, 16863-16866. The only order entered on October 16, 2013, excluded a late filed declaration from consideration during a pre-trial motion practice. CP 16243-16244, 16245-16249. LMI do not explain how this could be an order "restricting evidence of late notice prejudice to be presented at trial".

that December 21, 2012 order was later modified, it is unclear why LMI appeals either of these orders.

LMI do not identify any orders that actually restricted evidence of late notice prejudice in their fourth assignment of error, so the Court should disregard that assignment of error.

On October 4, 16, and October 23, 2013, the trial court heard both the parties' renewed motions for summary judgment on LMI's late notice defense to coverage of the TPH site claims based upon newly discovered and produced evidence. CP 14372-14391, CP 13447-13478. The court modified its prior order, finding disputed material facts with respect to whether LMI was prejudiced in its ability to investigate the TPH site. CP 16863-16866. 10/4/2013 RP 59-61. The court's November 5, 2013 written order determined that the 1-page Accord insurance certificates purporting to show that Calloway Ross had insurance were insufficient, as a matter of law, to show prejudice to LMI (LMI do not address these certificates on appeal); it determined that no funds paid pursuant to the 1998 Chevron Agreement are recoverable; and it determined that there were questions of fact regarding whether the Port's late notice prejudiced LMI's ability to investigate the TPH site. CP 16865.

The court's November 8, 2013 order *in limine*, excluded only two categories of evidence: 1) evidence of deceased witnesses McNannay and Foster (because LMI had no evidence about what they might have said or how that lost testimony was detrimental); and 2) evidence of indemnity agreements between the Port and its tenants and licensees (because the

court determined that the delayed notice had no effect on their enforceability). CP 18454-18457.

The court also ruled that LMI would be permitted to introduce evidence that certain identified technical documents were lost or destroyed only after their expert first testified regarding the relevance of that document. *Id.* Of course, LMI could not provide that foundational testimony because their expert admitted that none of the lost evidence could change the fact that contamination existed in the groundwater prior to and during all of the policy periods (thus triggering each of the policies). 11/14/2013 RP 1516-1517.

Evidentiary rulings will only be disturbed upon an abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671 (2010)(trial courts enjoy wide discretion in balancing probative value against its potentially prejudicial impact). As discussed above, the only actual evidence that was excluded at trial, was evidence that could not prove prejudice and, thus was more prejudicial than probative. ER 403. This evidence was properly excluded, and LMI have provided no argument to explain how the court abused its discretion in excluding it.

Furthermore, as discussed above, LMI do not cite to an offer of proof or explain how the exclusion of the indemnity agreements or evidence that individuals with unknown testimony are unavailable would have changed the Jury's verdict. This is insufficient to prove that the court abused its discretion in excluding the evidence under ER 403, and it is woefully inadequate to prove they are entitled to a new trial. *Veit v.*

Burlington N. Santa Fe Corp., 171 Wn.2d 88, 99 (2011)(An error is harmless if was not prejudicial and did not affect the final outcome).

D. Jury Instructions and Verdict Form

Decisions about whether to give a certain jury instruction are reviewed for abuse of discretion. The propriety of a jury instruction is governed by the facts of the particular case, and an erroneous instruction is reversible error only if it is prejudicial. *Fergen v. Sestero*, 182 Wn.2d 794, 802-803 (2015).

LMI assign error to four given instructions and the Special Verdict Form, but only preserved for appeal their objection to one given instruction, No. 10. This Court should not consider the remainder of this assignment of error which LMI failed to adequately preserve below. *Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334 (1994); *Barnes v. Labor Hall Ass'n*, 51 Wn.2d 421 (1957)(a basis for challenging an instruction not urged at the trial cannot be urged for the first time on appeal). LMI did not object below to Jury Instruction No. 11 or the Special Verdict Form, and they did not technically assign error to the failure to give their proposed instructions 12 and 15.

However, even if LMI had preserved these issues for appeal, both Jury Instruction No. 11 and the Special Verdict Form are supported by the evidence and (as set forth above) properly state the law regarding the exception to the qualified pollution exclusions in certain of the LMI

policies.[38] *Queen City Farms v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 92 (1994). Further, LMI's proposed Instruction No. 12 was unnecessary because the language was incorporated in Jury Instruction No. 10[39], and contrary to LMI's assertion, Instruction No. 15 did not recite the Court's prior rulings on late notice. It inaccurately recited a ruling on their known loss defense.[40] CP 18620; 18644; 11/18/2013 RP 1944, 1946-1947; CP 18623, 5013-5016.

The only objection LMI preserved for appeal was their objection to the three subparts of Jury Instruction No. 10, which enumerated the allegations of late notice prejudice the Jury could consider. CP 18644. However, this objection is unfounded because the categories set forth in the instruction reflected the evidence actually presented at trial. Substantial evidence in support of a party's theory of the case is required before such a theory may be argued to the jury. *Bombardi v. Poechel's Appliance & TV Co.*, 9 Wn. App. 797, *modified on other grounds*, 10 Wn. App. 243 (1973). LMI do not identify any other allegations of prejudice that were supported by the evidence they offered at trial, and they offered

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[38]Instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. The trial court has considerable discretion in deciding how instructions will be worded and whether more specific or clarifying instructions are necessary to guard against misleading the jury. Instructions are reviewed de novo and reversed only where an error was prejudicial. *Borromeo v. Shea*, 138 Wn. App. 290, 293-294 (2007).

[39] Jury instructions must be read in light of other instructions given and considered as a whole. *Owens v. Anderson*, 58 Wn.2d 448 (1961); *Bell v. Bennett*, 56 Wn.2d 780 (1960).

[40] It is not error to refuse to give a requested instruction unless it is correct in its entirety. *State v. Baker*, 56 Wn.2d 846 (1960).

no explanation in their objection to this instruction below. The court did not err in giving Instructions 10, 11, or the Special Verdict Form, and it did not err in refusing to give proposed instructions 12 and 15. However, even if it did err, LMI have not proven that such error prejudicially affected the verdict.

E. LMI are not Entitled to Overturn the Jury Verdict Based on Pre-Trial Summary Judgment Motions

1. Known Loss Defense / Lack of an Occurrence

LMI's Known Loss/Occurrence Motion[41] basically accused the Port of committing insurance fraud. The known loss or fortuity doctrine was created by the courts to prevent an insured from purchasing insurance for an existing, known liability, and then seeking coverage for that liability. *Newmont USA Ltd., v. American Home Assurance Co.,* 795 F. Supp.2d 1150, 1162 (2011); *Public Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 805 (1994); *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 529, 998 P.2d 856 (2000). LMI asks the Court to find that the Port knew it had a liability for the groundwater contamination beneath its MFA property when it purchased the insurance policies beginning in 1977, even though that liability was not created until 1989[42]. They ask the

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[41]Defendants London Market Insurers' Motion for Partial Summary Judgment Regarding Known Loss/No Occurrence at the TWP Site. CP 1641-1656.

[42]MTCA (RCW 70.105D, et, seq) was adopted in 1989. *Olds-Olympic v. Commercial Union*, 129 Wn.2d 464, 472 (1996); *See also Alcoa,* 140 Wn.2d at 524-525 (At the time of placement between 1977 and 1983, it is unlikely parties anticipated CERCLA's imposition of retroactive liability on insured.); *Public Util. Dist. No. 1*, 124 Wn.2d at 807 (despite knowledge of potential for lawsuits from termination of nuclear power plants, insureds had no knowledge they would be subject to liability for securities violations

Court to make this determination, as a matter of law, based upon the Port's purchase of a different parcel of property fifteen years after the expiration of the last insurance policy. The trial court properly disregarded this argument.

On August 3, 2012, LMI moved for dismissal of the Port's claims for coverage of its liabilities resulting from its ownership of the MFA area based upon their assertion that the Port's environmental liability was a known loss, and that there was no occurrence under those policies because the property damage was expected or intended. CP 1641-1656. Their only factual basis for this motion was the Port's purchase of the Plant area in 1999 and the Port's awareness of the contamination on that property at the time.[43] *Id.*

The known loss defense operates like an exclusion, and as such, to defeat coverage, the insurer has the burden of proving the insured subjectively knew of the loss or knew there was a substantial probability of the liability at the time the policy incepted. *Newmont*, 795 F. Supp.2d at 1162-1163, *Public Utility Dist. No. 1 of Klickitat County*, 124 Wn.2d at 805.

The LMI policies require the property damage (that resulted in the liability for which coverage is sought) result from an occurrence that is

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because basis for liability only became apparent after court ruling that utilities did not have legal authority to enter into agreement).

[43]The Purchase and Sale Agreement for this transaction allocated all environmental liability for the wood treating plant area to IP. CP 2704-2716.

unexpected and unintended. As discussed above, well settled Washington law requires only that the insured not subjectively expect or intend the groundwater contamination prior to purchasing the policies in order to satisfy this policy provision. *Queen City*, 126 Wn.2d at 67-69; *Overton*, 145 Wn.2d at 425-426.

LMI provided no evidence that the Port was aware of the contamination or the resulting liability from its ownership of the MFA prior to 1977. The Port is not and was not at the time LMI brought this motion, seeking coverage for the liability that it faced as a result of the 1999 acquisition of the Plant area. The Port's insurance claim was for coverage of the liability it faces as a result of the groundwater contamination beneath its MFA property that it has owned since the 1960s. That liability is strict, joint and several liability for the entire site or facility.

MTCA provides that an owner of a facility is strictly liable, jointly and severally, for all remedial action costs at the entire facility. RCW 70.105D.040(1)-(2). A facility is defined as any site or area where a hazardous substance, has been deposited or otherwise come to be located. RCW 70.105D.020(5). The contamination on the MFA property is included within the TWP site because that contamination originated from the Plant area and came to be located on the MFA area through the conveyance ditch as well as through groundwater and subsurface migration. 11/12/2013 RP 1084-1086, 1107; CP 3227-3228. Despite repeatedly asserting that the Port bought the *TWP site* in 1999, LMI do not

provide evidence to dispute the fact that the TWP site includes the MFA area as well as the Plant area. Nor do they dispute that Port purchased the MFA area parcels in 1963 and 1965. During the pre-trial motion practice they did not dispute that the Port was unaware of the contamination on the MFA parcels until 1997. Instead, LMI argued that without the 1999 acquisition, the Port would not have been liable as an owner of the site because it would have qualified for the plume defense to MTCA liability. CP 2890. However, as the Port established with undisputed evidence from its own expert report as well as the declaration from LMI's expert, this defense would not have been applicable to the Port because the contamination at the MFA did not come to be located on that property *solely* through the *groundwater*.[44] CP 2744, 4543 ; RCW 70.105D.020(22)(iv).

In ruling on LMI's Known Loss/Occurrence Motion, the trial court determined that the Port knew of and expected the contamination and the resulting liability prior to the 1999 acquisition, and that the Port was not allowed to knowingly increase its liability. CP 5013-5016. The court properly denied LMI's motion in all other respects because LMI failed to prove that the 1999 acquisition increased the Port's existing joint and

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[44]Although the trial court did not believe it had enough evidence to rule on the applicability of the plume defense at the time it ruled on LMI's Known Loss Motion, after reviewing the motions for reconsideration, the court found that "both experts indicate that the contamination spread to the MFA site...by horizontal migration via surface waters, and vertically, after having first traveled to the MFA site via a surface ditch."CP 5037. Thus, it found the plume defense was inapplicable and it granted the Port's motions. CP 5035-5039, CP 5943, CP 5953.

several liability to Ecology that it faced as an owner of the MFA property. That order did not foreclose LMI from asserting in response to a future demand for payment under the Judgment, that a particular cost was incurred solely because of the Port's ownership of the wood treating plant property.

Appellants' brief asserts that the Port "vastly increased the risk to LMI by the 1999 purchase" but cites to no evidence supporting that assertion. App. Br. at 49. Instead, LMI allege that IP is obligated under a consent decree to perform all the remedial costs at the site, and that the purchase agreement governing the 1999 acquisition allocates all liability associated with that purchase to IP so that the Port will never incur any costs at the TWP site. *Id.* at 49-50. Given that LMI is not obligated to pay any of the Port's past costs, and the only evidence LMI offer regarding the Port's future liability is that it will have none at the TWP site, it is unclear how the Port's liability or LMI's risk was increased by the 1999 purchase.

Appellants' brief argues that two other MTCA defenses, the third party not-in-privity defense and the innocent landowner defense, were available to the Port. RCW 70.105D.040(3)(a)(iii) and RCW 70.105D.040(3)(b). LMI did not raise the innocent landowner defense below, and their only mention of the third party not-in-privity defense was in their motion for reconsideration, in which they merely stated that the Port "may" be entitled to that defense and that it "appears to satisfy all the elements" because there was no lease for the continued use of the MFA ditch. CP 4490-4491. LMI did not address this issue in oral argument or at

any other time prior to this appeal. This Court should not consider a defense that was not properly raised below. RAP 2.5(a); *Unigard v. Mut. of Enumclaw*, 160 Wn. App. 912, 922 (2011).

Furthermore, LMI does not cite to evidence establishing the Port would have met all the required elements of the third-party-not-in-privity defense, absent the 1999 acquisition. This defense only applies if the person asserting the defense has no contractual relationship with the polluting third party and exercised the utmost care with respect to the hazardous substance, the foreseeable acts or omissions of the third party, and the foreseeable consequences of those acts or omissions. RCW 70.105D.040(3)(a)(iii)(B). The only evidence cited in Appellant's brief proves that the defense would not have been applicable because the Port purchased the MFA parcels from IP, the polluting third party,[45] and IP continued to discharge its wastewater to the MFA parcels after the Port acquired them.[46] Exs. D-13 and D-15; 11/12/2013 RP 1076-1077.

For the same reasons discussed above, the trial court properly granted the Port's Site Wide Liability Motion and TWP Liability Motion

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[45] Such property transactions have been held to be contractual relationships barring the analogous defense under CERCLA. *See*, e.g. *United States v. CDMG Realty Co.*, 96 F.3d 706, 716 (3d Cir. N.J. 1996); 42 U.S.C. § 9601(35)(A); 42 U.S.C. § 9607(b)(3).

[46] And even if it was raised below, Appellants' brief cites to no evidence proving the Port would have met all requisite elements of the innocent landowner defense, namely that the Port performed a due diligence investigation prior to the purchases in 1963 and 1965, and that it did not, by any act or omission, cause or contribute to the release or threatened release of a hazardous substance at the facility. RCW 70.105D.040(3)(b)(i). In fact, the evidence cited in Appellant's brief establishes the opposite. It cites to letters from International Paper alleging that the Port contributed to the contamination. App. Br. at 6, 7, 58; CP 3247, 1625-1626, 17383.

(the Port assumes these are the orders referenced in Appellants' fifth assignment of error). The court's determination that the Port was strictly, jointly and severally liable for the entire TWP site because of its ownership of the MFA, and that this liability was unchanged by the 1999 acquisition, was supported by the law and the undisputed evidence discussed above. There is no legal basis for the 1999 purchase to negate the coverage for the Port's pre-existing liability as an owner of the MFA. Because MTCA imposes joint and several liability for the entire site on an owner of any portion of that site, any liability the Port faces for contamination on any part of the TWP site (including the MFA area) is a covered liability under the polices.

> "Recognizing CU's coverage obligation is consistent with the nature of the legal liability imposed by CERCLA and the MTCA: it is strict, joint and several, and retroactive. The legal responsibility to clean up the property damage that occurred at the sites during the policy period is now Weyerhaeuser's."*Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 681-682 (2000).

The trial court committed no error, and the September 28, 2012 orders granting the Port's Site Wide Liability Motion and its TWP Liability Motion should be upheld.

2. LMI are Not Entitled to a Reversal Based on a Claimed Right to a Pre Trial Presumption of Prejudice Excusing them from the Burden of Proving Actual and Substantial Prejudice

Despite the clear authority requiring them to prove they were actually and substantially prejudiced, LMI asks this court to determine that the sheer number of years since the Port's discovery of contamination

allows LMI to escape coverage. LMI's arguments are both factually and legally incorrect. Although LMI provide no argument to support their assignments of error to the orders entered on September 11, 2012, December 21, 2012, and February 5, 2013[47], October 16, 2013,[48] or November 5, 2013, their general allegations of prejudice are insufficient to overturn any of the court's orders.

Summary judgment orders are generally reviewed *de novo*. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649 (2014). However, here, LMI assigns error to the trial court's denial of their summary judgment motion (with respect to the TPH site) based upon the existence of material disputed facts which the Jury later decided in favor of the Port. CP 18648. Thus, this Court should not review the orders.

> "After a trial on the merits, we will not review a trial court's denial of a motion for summary judgment if the denial was based on the presence of material disputed facts. *Herring v. Dep't of Soc. & Health Servs.*, 81 Wn. App. 1, 14, 914 P.2d 67 (1996); *Johnson v. Rothstein*, 52 Wn. App. 303, 304, 759 P.2d 471 (1988). Accordingly, review here is based on the record made at trial, not the record made at the

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[47]LMI's 3rd assignment of error also claims that the court erred in denying LMI's motion for summary judgment/judgment as a matter of law in its order dated February 5, 2013, but provides no citation to the record. There were 6 separate orders entered on this date, only one of which relates to LMI's late notice defense and it was the court's denial of LMI's motion for consideration of its order granting *the Port's* summary judgment motion for dismissal of LMI's late notice claims. As it related to the TPH site, the Port will address the propriety of that order in the next section.

[48]LMI's 3rd assignment of error claims that the court erred in denying LMI's motion for summary judgment/judgment as a matter of law in its order dated October 16, 2013, but provides no citation to the record for this order. None of the orders entered on this date denied a motion by LMI. To the extend LMI is referring the ruling on this date that was reduced to a written order on November 5, 2013, the Port will address that ruling as it relates to the November 5 order.

> time summary judgment was denied. *Johnson*, 52 Wn. App. at 306." *Lopez v. Reynoso*, 129 Wn. App. 165, 174 (2005).

Washington law provides only two avenues for establishing late notice prejudice: by a showing of *actual* and *substantial* prejudice, or by showing that a case is so egregious that prejudice should be presumed. Unable to make a case for actual and substantial prejudice, LMI resorts to trying for presumed prejudice based solely on their unfounded argument that the Port's notice was 19 years and 14 years late at the TPH and TWP sites respectively. This attempt fails as well because the trial court made no finding about when the Port's notice was due. Without such a finding it is impossible to argue specifically how late the Port's notice was. Further, the cases LMI relies upon that presumed prejudice did so based on the status of the underlying third party claims, not simply the amount of time that had passed.

Washington cases make clear that the amount of time by which an insured's notice is late is only one factor to be considered. "...[P]rejudice will be presumed only in extreme cases...." *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 428 (2008) (quoting *Public Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 794-795 (1994)); *Canron v. Fed. Ins. Co.*, 82 Wn. App. 480, 490 (1996). In *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432 (1996), Division II of this Court observed, "Washington courts have found prejudice as a matter of law in only a few cases and then **only when a trial on the insured's liability had already occurred or was impending**." *Id.* at 438 (citing *Sears,*

Roebuck & Co. v. Hartford Accident & Indemnity Co., 50 Wn.2d 443 (1957); and *Felice v. St. Paul Fire & Marine ins. Co.* 42 Wn. App. 352 (1985), *review denied* 105 Wn.2d 1014 (1986))(emphasis supplied). *See also, Twin City Fire Ins. Co. v. King County,* 749 F. Supp. 230 (W.D. Wash., 1990), *aff'd.* 942 F.2d 794 (9th Cir., 1991)(prejudice presumed as a matter of law where insured notified insurer of claim after the case was lost, the judgment was awarded and an appeal was filed, and one day before a settlement conference). None of those extraordinary circumstances are present in this case.

The *Mutual of Enumclaw* case is instructive. In that case, the Washington Supreme Court reiterated that prejudice is presumed only in extreme cases. There, the Court refused to presume prejudice:

> "In this case, USF has not demonstrated that it was prejudiced as a matter of law. It has shown that it did not have notice of the claim against Dally until 2004, nearly four years after the initial complaint, two years after Dally's settlement with MOE and CUIC, and some time after MOE and CUIC's contribution litigation with the other insurers was complete. However, it has not shown how that delay specifically deprived it of the ability to put forth defenses to coverage or to contest the value of the damages, etc. It may well do so successfully at trial, but on the record before us we cannot say that USF has proved prejudice as a matter of law." *Mut. of Enumclaw,* 164 Wn.2d at 431.

The other cases cited by LMI are also distinguishable. For example, LMI relies upon *Unigard Insurance Company v. Leven,* 97 Wn. App 417 (1999), where prejudice was found at a MTCA site. In exchange for $40 million, Leven agreed to "hold harmless" others for environmental remediation costs in 1987. He did not notify the insurer of this

arrangement. In 1990, Leven was named personally as a PLP by Ecology, and again he did not notify his insurer. He also did not notify his insurer of a subsequent pending enforcement action by Ecology or an Agreed Order entered into with Ecology. He ultimately gave this information to his insurer in 1997, when he submitted a claim. *Unigard* found prejudice because the insurer had a strong argument that the insured was not a liable party under MTCA based on his earlier statements, and the insured then changed his testimony during the insurance coverage litigation in an apparent attempt to gain coverage. *Id.* at 430-431. *Unigard* found prejudice based on the lost opportunity by the insurer to disprove MTCA liability. *Unigard* is distinguishable because any other result would have resulted in rewarding the clear dishonest conduct by the insured. No comparable facts exist in the present matter. LMI do not even suggest that the Port ever had any defense to MTCA liability at the TPH site,[49] and as discussed above, the evidence establishes that asserting defenses to the 2005 PLP letter the Port received with respect to the TWP site would not have been successful.

LMI cite an Oregon appellate case, *Carl v. Oregon Automobile Ins. Co.*[50], for the proposition that removing and disposing of a leaking

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[49]The Port has owned most of the site since the 1920s, and the operations of the Port's tenants and licensees caused the contamination. Exs. P-67, P-83. And again, Ecology has not yet sent the Port a PLP letter for this site, so one questions to whom LMI might have asserted such a defense in 1991.

[50] *Carl v. Oregon Auto. Ins. Co./N. Pac. Ins. Co.*, 141 Or. App. 515 (1996).

underground storage tank prior to giving notice was prejudicial as a matter of law. First, Oregon law on late notice prejudice differs from Washington law, and an Oregon appellate decision is not precedential here.[51] Second, that case involved the removal and disposal of the sole source of contamination at the site, unlike here. In addition, the insured removed more than 1100 cubic yards of contaminated soil and backfilled the excavation prior to giving notice. The *Carl* court found that the removal made it impossible for the various insurers to determine which of the insurance policies was in effect at the critical times. 141 Or. App. At 521-524. At the TPH site, as discussed above, the timing of the release from the Calloway Ross UST that the Port removed, had no impact whatsoever on the timing of the releases from the other, more significant sources of contamination. Thus, any information that LMI could have gathered from conducting their own investigation of that UST would have been irrelevant to the determination of whether their policies were triggered by the primary source operations.

Appellants also identify, in a footnote, a list of additional cases where prejudice has been found as a matter of law. Many of these cases

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[51] *Compare Mut. of Enumclaw*, 164 Wn.2d 411, 430-431 (2008)(insurer must proves that an insured's breach of a notice provision had an identifiable and material detrimental effect on its ability to defend its interests), *with Carl*, 141 Or. App. 515, 520-521 (1996)(if insured fails to give immediate notice coverage turns on a two-part inquiry: (1) whether the insurer has been prejudiced and (2) if the insurer was prejudiced, whether insured acted reasonably).

were criticized or distinguished by the *Mut. of Enumclaw* case[52], and none of these cases is factually similar to the instant case. They primarily address an insured's failure to notify its insurer after being sued. Litigation is by nature short lived, and a final adjudication of the insured's rights. Thus, lack of notice until a judgment or settlement has been entered is significantly more prejudicial to the insurer's ability to mount a defense than the delayed notice of contamination when there is no pending formal enforcement action against the insured, no litigation over contribution, and the contamination for which coverage is sought has not yet been removed.

LMI's repeated attempts to have the Port's claims dismissed as premature also belies their presumed prejudice argument. LMI seeks to focus the Court on the amount of time since the contamination was discovered, yet there is simply no authority for presuming prejudice based solely upon how late the notice was, and the trial court never found the Port should have given notice immediately upon discovering the contamination.

Absent LMI's mischaracterizations and unsupported allegations, LMI's appeal boils down to their request that this Court ignore Washington law, ignore opposing declarations, ignore all the actual trial evidence (including the cross examination of their own witnesses which

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[52] *Mut. of Enumclaw Ins. Co.*, 164 Wn.2d at 427-431 (2008)(prejudice analysis in *Sears* was dicta; *Northwest Prosthetic* opinion oversimplified the law on prejudice; *Maclean* addressed arbitration of underlying claims that bound insurer, limiting avenues for judicial review).

undermined their earlier pre-trial declarations), ignore the unanimous Jury verdict, and instead impose a mandatory, unrebuttable presumption of prejudice which would relieve them of their burden to prove actual prejudice, which LMI totally failed to carry at trial.

IV. ATTORNEY FEES REQUEST

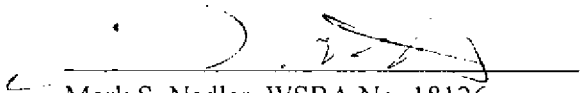
Pursuant to RAP 18.1, the Port requests the Court award its reasonable attorney's fees on appeal. *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52-53 (1991).

V. CONCLUSION

The verdict and judgment below should be affirmed and the Port should be awarded its reasonable attorney's fees on appeal.

Respectfully Submitted this 30th day of July, 2015.

THE NADLER LAW GROUP PLLC



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

Appendix A

Coverage Chart

	1977	1978	1979		1980	1981	1982	1983	1984	1985
$50,000,000										
$30,000,000				LMI Umbrella JSL 1055 06/03/79-12/31/79		LMI Umbrella 820040700 JSL1087 $30m	LMI Umbrella 820040700 JSL1087 $30m	LMI Umbrella 820040700 JSL1087 $30m	LMI 820136600 JSL 1136 $30m (12/31/83-	Umbrella 12/31/85)
$15,000,000		LMI Umbrella 212186300 212186400 JSL 1021 $14.5m (12/31/77-12/31/78)	LMI Umbrella 212248400 JSL1041 $14.5m (12/31/78-12/31/79)	06/03/79 incr. $15m	LMI Umbrella 830007500 JSL1065 (12/31/79-12/31/80)	(12/31/80 - 12/31/81)	(12/31/81-12/31/82	(12/31/82-12/31/83		
$10,000,000										
$5,000,000										
$2,500,000										
$1,000,000										
$500,000		LMI Excess AN5707 02/01/77-02/01/78			Underwriters at Lloyd's, London Primary MC5757 07/01/79-07/01/80	Underwriters at Lloyd's, London Primary MC5757 07/01/80-07/01/81	Underwriters at Lloyd's, London Primary MC5757 07/01/81-07/01/82	Underwriters at Lloyd's, London Primary MC5998 07/01/82-07/01/83	Underwriters at Lloyd's, London Primary MC6016 07/01/83-07/01/84	Underwriters at Lloyd's, London Primary MC6027 07/01/84-07/01/85
$250,000										
$100,000										
$50,000										
	1977	1978	1979		1980	1981	1982	1983	1984	1985

Appendix B

This is to Certify That

Replaced By MC6027

J. GORDON GAINES, INC.

NO FLAT CANCELLATIONS ALLOWED

314 First Avenue West
P. O. Box C-19006
Seattle, Washington 98109

FRED S. JAMES AND COMPANY
Seattle, Washington

In accordance with the authorization granted them under Contract No. by certain Underwriters at Lloyd's, Lond England (whose names and the proportions underwritten by them can be ascertained by reference to the said Contract), hereinaf called the Insurers, have effected coverage for the account of the Insured named below on the following terms and conditions.

UNDERWRITERS AT LLOYD'S, LONDON.- 100%

THIS INSURANCE IS NOT SUBJECT TO FLAT CANCELLATION. WE ARE REQUIRED BY INSURERS HEREON TO HOLD YOU RESPONSIB FOR EARNED PREMIUMS IN ALL CASES. IT IS AGREED THAT ALL PREMIUMS ARE DUE AND PAYABLE WHEN THIS INSURANCE ATTACHE

REWRITE OF
RENEWAL OF MC 5998 CROSS REFERENCE CERTIFICATE NO. MC 6016

Assured	PORT OF LONGVIEW
Mailing Address	P.O. Box 1258 Longview, Washington 98632
Location of Property Insured	Washington
Amount or Limits and Type of Ins.	Terminal Operators Broad Form Property Damage Liability as per forms attached
Commencing	July 1, 1983
and Ending	July 1, 1984
Both days at	12:01 A.M. M. Standard Time at the location of the Named Insured
as stated herein.	

	PREMIUM
	$ Minimum
	$ and
	$ Deposit
	$
Premium Total	$
	$
% Federal Tax	$
2.25% State Tax	$
.25% S. L. Fee	$
Policy Fee	$
TOTAL	$

This Certificate is registered and delivered as a Surplus Line coverage under the Insurance Code of the State of Washington enacted in 1947 and is not covered under any Guaranty Fund Law.

1. It is expressly understood by the Assured in accepting this instrument that the undersigned is not one of the Insurers hereunder and neither is nor sha be in any way or to any extent liable for any loss or claim whatever as an Insurer, but the Insurers hereunder are only those Underwriters whose name are on file as hereinbefore set forth.

2. In the event of any claim being made hereunder the Assured shall give, as quickly as possible, written notice thereof together with fullest particular possible to the undersigned.

3. If the Assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this insurance shall become void and all claims thereunder shall be forfeited.

4. This insurance is made and accepted subject to all the provisions, conditions and warranties set forth herein and in any forms or endorsements attached hereto, all of which are to be considered as incorporated herein, and any provisions or conditions appearing in any forms or endorsements attached hereto which alter the certificate provisions stated above shall supersede such certificate provisions insofar as they are inconsistent therewith.

5. This certificate of insurance shall not be assigned in whole or in part, without the written consent of the undersigned endorsed hereon.

6. This insurance may be cancelled on the customary short rate basis by the Assured at any time by written notice or by surrender of this Certificate to the undersigned. This insurance may also be cancelled, with or without the return or tender of the unearned premium, by Insurers hereon, or by the undersigned on their behalf by delivering to the Assured or by sending to the Assured by mail, certified or uncertified, at the Assured's address as shown herein, not less than ten days' written notice stating when the cancellation shall be effective, and in such case the Insurers shall refund the paid premium less the earned portion thereof on demand, subject always to the retention by the Insurers hereon of any minimum premium stipulated herein (or proportion thereof previously agreed upon) in the event of cancellation either by the Insurers or the Assured.

POL 011120

JDG:R:r

Date Issued July 22, 1983
at Seattle, Washington, U.S.A.

J. GORDON GAINES, INC.

By Jerry D. Gaines

TERMS AND CONDITIONS ON THE REVERSE SIDE HEREOF AND IN THE WORDINGS ATTACHED HERETO OR ENDORSED HEREON ARE TO BE CONSIDERED AS PART OF THIS DOCUMENT.

GH:O

Wherever herein the words "this insurance" appear they shall be interpreted to read "this certificate and/or policy" and the words "Insured" and "Assured" shall be synonymous.

It is agreed that in the event of the failure of Insurers hereon to pay any amount claimed to be due hereunder, Insurers hereon, at the request of the Insured (or Reinsured) will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.

It is further agreed that service of process in such suit may be made upon the undersigned and that in any suit instituted against any one of them on this contract, Insurers will abide by the final decision of such Court or any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of Insurers in any such suit and/or upon the request of the Insured (or Reinsured) to give a written undertaking to the Insured (or Reinsured), that they will enter a general appearance upon Insurers behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefore, Insurers hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Insured (or Reinsured) or any beneficiary hereunder arising out of this contract of insurance (or reinsurance) and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

This Insurance does not cover loss or damage directly or indirectly occasioned by, happening through, or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or martial law or confiscation or naturalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority.

Notwithstanding anything to the contrary contained herein and in consideration of the premium for which this insurance is written, it is understood and agreed that whenever an additional or return premium of $2.00 or less becomes due from or to the Insured on account of the adjustment of deposit premium, or of an alteration in coverage or rate during the term or for any other reason, the collection of such premium from the Insured will be waived or the return of such premium to the Insured will not be made, as the case may be.

J. GORDON GAINES, INC.

ENDORSEMENT

The following spaces preceded by an asterisk(*) need not be completed if this endorsement and the policy have the same inception date

ATTACHED TO AND FORMING PART OF POLICY NO.	EFFECTIVE DATE OF ENDORSEMENT	*ISSUED TO
MC 6016	7-1-83	PORT OF LONGVIEW

IT IS AGREED THAT PARAGRAPH TWO OF PAGE 1 OF FORM ATTACHED IS AMENDED TO READ AS FOLLOWS:

2. COVERING: THIS INSURANCE APPLIES IN RESPECT OF ALL THE ASSURED'S LIABILITY ARISING OUT OF ALL THEIR ACTIVITIES CONSISTING PRINCIPALLY OF BUT NOT LIMITED TO PORT OPERATIONS, WAREHOUSING AND TERMINAL OPERATIONS, PORT MAINTENANCE AND IMPROVEMENTS INCLUDING LAND FILL OPERATIONS INCIDENTIAL TO NORMAL DREDGING WORK BY THE PORT, BUT EXCLUDING LIABILITY OTHERWISE ARISING OUT OF THE OWNERSHIP OF VESSELS AND/OR WATERCRAFT, EXCEPT SELF PROPELLED VESSELS UNDER 35 FEET IN LENGTH.

ENDORSEMENT #2
JDG:R:r
7-22-83

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy, other than as above stated.

*Agency Name and Address

J. Gordon Gaines Associates, Inc.

In Witness Whereof, the Company has caused this endorsement to be signed by a duly authorized representative of the Company.

Authorized Representative

ENDORSEMENT

The following spaces preceded by an asterisk (*) need not be completed if this endorsement and the policy have the same inception date

ATTACHED TO AND FORMING Part of Policy or Certificate No	*EFFECTIVE DATE OF ENDORSEMENT	*ISSUED TO
MC 6016	7-1-83	PORT OF LONGVIEW

It is hereby understood and agreed that Paragraph 15, Property of Port-Leased, on Page 4 of Terminal Operators Property Damage Liability Coverage Part is hereby deleted.

Endorsement No. 1
JDG:R:r
7-22-83

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy or Certificate, other than as above stated.

J. GORDON GAINES, Inc.

Jerry D. Gaines

Authorized Representative

310 2M 7 80

POL 011123

TERMINAL OPERATORS PROPERTY DAMAGE LIABILITY

1. LOSS IF ANY, PAYABLE TO Assured or order in funds current in the United States of America.

2. COVERING: This insurance applies in respect of all the Assured's liability arising out of all their activities consisting principally of but not limited to PORT OPERATIONS, warehousing and terminal operations, port maintenance and improvements including land fill operations incidental to normal dredging work by the Port, but excluding liability otherwise arising out of the ownership of vessels and/or watercraft.

   It is further understood and agreed that this insurance is extended to include contingent liability of the Port of those dredging jobs let to others.

3. INSURING CLAUSE: To cover the legal and/or Assumed and/or Contractual Liability of the Assured (including liability of one Assured hereunder for loss, damage or expense to the property of any other Assured named herein and also including Contingent Liability of Assured in connection with the performance of work herein described by any sub-contractor or others) and to pay on behalf of Assured any sum or sums they may be obligated to pay;

   a) for loss, damage or expense on account of destruction or other loss or damage (whether caused by or resulting from the negligence, wrongful act, omission, fault or otherwise) including resultant loss of use and/or occupancy and/or demurrage or other consequential loss or damage, if any, to property of others;

   b) As the result of an accident or occurrence in respect to or in connection with work and/or operations and/or activities and/or the business of Assured and/or in any capacity, usual or otherwise, anywhere in the world and to pay all claims and charges in connection therewith;

   c) Including liability of the Assured for loss, damage or expense to the property of others arising out of the ownership, maintenance or use of dock trucks, lift trucks, tractors, jitneys, trailers and other stevedoring conveyances and other equipment incidental to Assured's work and/or business (not including automobiles, commercial trucks and/or their trailers) whether licensed or unlicensed, including while on public roads between areas of Port premises, and while being operated between various areas of Port premises and/or other locations used for maintenance or repair.

      This insurance does not apply to property of others in charge of or transported by or for the Assured outside the Port premises, except while being transported between Port premises.

Page One continued to Page Two

4. LIMIT OF LIABILITY: It is understood and agreed that the Assurers shall not be liable for more than $ 500,000.00 in any one casualty or any series of casualties resulting from the same cause, and it is agreed that there shall be no limit to the number of casualties or occurrences for which Assurers shall be liable hereunder.

DEDUCTIBLE: Each claim hereunder, or series of claims arising out of one single catastrophe, accident or occurrence, shall be subject to a deductible of $ 5,000.00 but notwithstanding anything herein to the contrary, legal and/or investigation expenses are to be paid in full without any deduction. Control of all matters relating to the settlement of claims shall rest with Underwriters, and the Assured shall pay any amount due under this deductible clause as requested by Underwriters.

It is agreed, however, that the above deductible shall not apply to claims occurring in connection with work performed under contract with the United States of America, its instrumentalities and/or Agents.

5. AGREEMENTS:

a) The inclusion in any contract which the Assured has already entered into or may enter into, of any Save Harmless and Indemnity Agreement with any others in connection with their work and/or operations and/or activities shall not prejudice this insurance.

b) It is understood and agreed that this policy is extended to include liability of others assumed by Assured under any oral or written contracts. Assurers acknowledge the existence of and approve all such contracts the Assured has entered into prior to the attachment of this policy.

6. NOTICE OF LOSS:

a) Upon being known to Assured's management, notice of the occurrence of any and all losses which are apt to be a claim under this policy shall be given Assurers by Assured as soon as may be practicable, and the said Assured shall deliver to Assurers as particular an account thereof as the nature of the case will admit stating the cause if known, the extent thereof, and the nature of the interest of the Assured.

b) Defense and Settlement: It is further understood and agreed that in cases where the liability of the Assured as aforesaid is investigated and/or contested with the consent of these Assurers, this policy shall be liable for and will also pay in full without any deductions, costs and expenses paid and incurred in investigating, contesting or settling liability.

c) The Assurers agree to pay the amounts incurred under Clause 6b in addition to the applicable limit of liability of this policy.

Page Two continued to Page Three

7. INSOLVENCY OR BANKRUPTCY of Assured shall not relieve the Assurers from any of their obligations hereunder.

8. EXCLUSIONS: THIS POLICY DOES NOT COVER

a) liability of the Assured to the extent that the same is insured under Automobile Property Damage Liability policies of the Assured;

b) any liability for loss of life, bodily injury or personal injury;

c) claims for loss or damage arising out of Pilot's Legal Liability;

d) claims for damage to owned, rented or leased equipment;

e) liability either direct or contingent arising out of the operation of any airport, air terminal or similar facility used for the service operation, maintenance or use of aircraft;

f) any liability for damage to property caused by the ownership or operation under Bare Boat Charter of any self-propelled vessel exceeding thirty five feet in length;

g) liability (whether contractual or non-contractual, and whether based on negligence or not) arising directly or indirectly from any nuclear incident, reaction, radiation or any radioactive contamination, whether controlled or uncontrolled, and whether the loss, damage, liability or expense be proximately or remotely caused by any of the foregoing, or be in whole or in part caused by, contributed to, or aggravated by, risks or liability otherwise insured under this policy;

h) against loss or damage caused by or resulting from

(1) Hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack, (a) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (b) by military, naval, or air forces; or (c) by an agent of any such government, power authority or forces;

(2) Any weapon of war employing atomic fission or radioactive force whether in time of peace or war;

(3) Insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

Page Three continued to Page Four

9. ERRORS AND OMISSIONS: It is agreed that this insurance shall not be prejudiced by any unintentional delay, omission or error in making reports hereunder, if prompt notice be given Assurers as soon as such delay, omission or error becomes known to the Assured.

10. SUBROGATION: It is agreed that upon payment of any loss or damage, Assurers are to be subrogated to all rights of Assured to the extent of such payments but no right of subrogation shall lie against subsidiary and/or affiliated companies, co-partnerships or corporations of Assured, nor against any partner, executive, trustee or director thereof.

    It is further agreed that Assurers waive all rights of subrogation against the United States of America, its instrumentalities and/or Agents.

11. THE ASSURED SHALL BE DIRECTLY LIABLE to Assurers for all premiums under this policy.

12. IT IS FURTHER UNDERSTOOD AND AGREED that this insurance is a primary insurance and in the event of any other insurance carried by the Assured, independently or jointly with others, being applicable, such other insurance to be considered as excess insurance.

13. IT IS ALSO AGREED that the word "Assured" wherever used includes not only the Named Assured but also any partner, executive officer, managing employee, employee, director, or trustee thereof, while acting within the scope of his duties as such.

14. CROSS LIABILITIES: It is further understood and agreed that the insurance provided by this policy shall apply separately to each named Assured hereunder in the same manner as if separate policies had been issued for each, but this shall not operate to increase Assurer's Limit of Liability for each occurrence as stated herein.

15. PROPERTY OF PORT - LEASED: It is agreed that as respects property of the Port which is leased to others for a term of twelve (12) months or more, which is under the control of the lessee and for which the lessee is responsible and may be required to insure, it is the intent of this insurance that such property be considered as though it is not the property of the Assured. Notwithstanding the above, this insurance shall not provide any coverage in respect of any mobile equipment leased from the Assured.

16. CANCELLATION: This insurance may be cancelled by the Assured by written notice or by surrender of this Certificate to the corporation issuing this document on behalf of the Assurers, stating when thereafter such cancellation shall be effective. This insurance may also be cancelled by the Assurers (or by the corporation issuing this certificate on their behalf) by mailing to the Assured at the address shown on this certificate or the last known address, written notice stating when, not less than sixty (60) days thereafter such cancellation shall be effective, and the cancellation date so stated in the notice shall become the end of the policy period. Delivery of such written notice either by the Assured or by the undersigned corporation on behalf of the Assurers shall be equivalent of mailing.

Page Four continued to Page Five

17. PREMIUM PAYMENT AND AUDIT ADJUSTMENT

A deposit premium of $_____ shall be due and payable at inception of this insurance, and at each anniversary date while this coverage is in force.

The Assured shall maintain an accurate record of all Gross Receipts and shall report to the undersigned corporation for transmittal to Assurers as soon as possible after the end of each annual period of this insurance, the total of such Gross Receipts earned during the previous annual period. Earned premium shall be computed on the following basis:

$0.39 per $100 of the first $2,500,000 of Gross Receipts
$0.35 per $100 of the next $2,500,000 of Gross Receipts
$0.30 per $100 of all Gross Receipts thereafter

If the earned premium exceeds the deposit held, the Assured shall pay the excess to the Assurer; if less, the Assurer shall return to the Assured the unearned portion paid by the Assured, but such earned premium to be retained by the Assurers shall not be less than a Minimum Premium of $_____ for each annual period.

In consideration of this insurance being written for a term in excess of one year, it is understood and agreed the Assured will submit to this corporation sixty days prior to the end of each annual period, the estimate of gross receipts for the coming year for annual review by the Assurers hereon.

SCHEDULE

1. Name and address of Assured: PORT OF LONGVIEW
P.O. Box 1258
Longview, Washington 98632

2. Term of Insurance: July 1, 1983 to July 1, 1984 both days at 12:01 A.M.

Attached to and forming part of Certificate MC 6016
of Underwriters at Lloyd's, London

Dated July 22 19 83

J. GORDON GAINES ASSOCIATES, INC.

By Jerry D. Gaines

CERTIFICATE OF SERVICE

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

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

And that I arranged for a copy of the preceding Brief of Respondent to be served on Appellant at the address below, by legal messenger:

Carl E. Forsberg
Kenneth J. Cusack
Charles E. Albertson
Forsberg & Umlauf PS
901 5th Avenue Suite 1400
Seattle, WA 98164

Philip A. Talmadge
Sidney Tribe
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126

Signed this 30th day of July, 2015 in Seattle, WA.

Elise Keim

Elise Keim

NADLER LAW GROUP PLLC

July 30, 2015 - 3:34 PM

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Objection to Cost Bill

Affidavit

Letter

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PIERCE COUNTY SUPERIOR COURT

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