

FILED
COURT OF APPEALS

10 JUL 26 PM 1:36

STATE OF WASHINGTON

BY JW
CLERK

402131-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

COMMUNITY ASSOCIATION UNDERWRITERS
OF AMERICA, INC. ("CAU")
a/s/o Harbour Commons, A Condominium,

Appellant

v.

HAROLD E. KALLES and DEBORAH L. KALLES, husband and wife, DEREK
KALLES and "Jane Doe" Kalles (if married); and MICHAEL QUINN and "Jane Doe"
Quinn, (if married); and LEASE POLICE, INC., a Washington Corporation,

Respondent

BRIEF OF RESPONDENTS

Alfred E. Donohue, WSBA #32774
WILSON SMITH COCHRAN DICKERSON
The Financial Center, Suite 1700
1215 Fourth Avenue
Seattle, Washington 98161-1007
Telephone: 206.623.4100
FAX: 206.623.9273
Electronic mail: donohue@wscd.com

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 4

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 4

IV. STATEMENT OF THE CASE 5

 A. Underlying Facts of Litigation..... 5

 1. CAU Policy 5

 2. Lease Between the Elkins and Lease Police 7

 3. The Fire and CAU’s Plans to Subrogate..... 7

 B. Procedure Below 9

V. SUMMARY OF ARGUMENT 10

VI. ARGUMENT..... 12

 A. Standard of Review..... 12

 B. CAU is precluded from pursuing subrogation against Lease Police because Lease Police is a coinsured under the CAU policy. 12

 a. The coinsured anti-subrogation rule is not limited to residential leases. 18

 b. The fact that the Board obtained the CAU policy as trustee for the Elkins does not affect the application of the coinsured anti-subrogation rule. 19

 c. CAU’s expectations are immaterial. 22

 d. CAU cannot ask the Court to remand to allow discovery because it did not file a CR 56(f) motion..... 22

 C. The trial court properly awarded Lease Police its attorney fees... 24

D. Pursuant to RAP 18.1, Lease Police requests an award of its attorney fees on appeal..... 28

VII. CONCLUSION 28

TABLE OF CONTENTS

Cases

<i>American Best Food, Inc. v. Alea London</i> 168 Wn.2d 398, 229 P.3d 693 (March 18, 2010)	27
<i>Axess Int'l, Ltd. v. Intercargo Ins. Co.</i> 117 Wn.2d 37, 811 P.2d 673 (1991).....	24
<i>Butzberger v. Foster</i> 151 Wn.2d 396, 89 P.3d 689 (2004).....	25, 28
<i>Cascade Trailer Court v. Beeson</i> 50 Wn. App. 678, 749 P.2d 761 (1988).....1, 10, 13, 14, 15, 16, 17, 18,19, 21, 22	
<i>Guile v. Ballard Community Hospital</i> 70 Wn. App. 18, 25, 851 P.2d 689 (1993).....	23
<i>Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.</i> 150 Wn. App. 1, 16, 206 P.3d 1255 (2009).....	12
<i>Leingang v. Pierce County Med. Bur., Inc.</i> 131 Wn.2d 133, 147, 930 P.2d 288 (1997).....	24, 26
<i>Mahler v. Szucs</i> 135 Wn.2d 398, 407, 957 P.2d 632 (1998).....	12
<i>Mutual of Enumclaw v. USF Ins. Co.,</i> 164 Wn.2d 411, 423, 191 P.3d 866, 874 (2008).....	12
<i>Olympic Steamship Co. v. Centennial Insurance Co.</i> 117 Wn.2d 37, 811 P.2d 673 (1991)..... 3, 4, 5, 10, 11, 24, 25, 26, 27, 28	
<i>Rizzuto v. Morris</i> 22 Wn. App. 951, 592 P.2d 688 (1979).....	16, 18
<i>Snohomish County Fire Dist. No. 1 v. Snohomish County</i> 128 Wn. App. 418, 115 P.3d 1057 (2005).....	12

Sutton v. Johndahl
532 P.2d 478 (Okla Ct. App. 1975). 14

Woo v. Fireman’s Fund Ins. Co.
161 Wn.2d 43, 71–71, 164 P.3d 454 (2007). 27

Rules

RAP 18.1 11, 28

I. INTRODUCTION

In November 2007, Lease Police executed an agreement with owners Paul and Kathy Elkins to lease a unit in the Harbour Commons Condominiums. (CP 19–23) In January 2009, a fire apparently originating in that unit damaged a portion of the condominium. CAU paid for the loss under the fire insurance policy it issued to the Association and then filed this subrogation action, seeking reimbursement from Lease Police for the cost of repair damage to the building.

Washington law prohibits an insurer from subrogating against its own insured, including parties who are considered coinsureds. A coinsured includes a tenant who reasonably understood—based upon the terms of the lease—that the insurance was purchased for his or her benefit.¹ Thus, the intent of the parties to the Lease is what determines whether Lease Police is a coinsured under the Association’s fire policy.² Here, the intent of the parties is clear based upon several provisions in the Lease:

- The Lease required that Lease Police maintain a general liability insurance policy, but did not require that Lease Police obtain separate fire insurance. (CP 21, ¶ 27)

¹ *Cascade Trailer Court v. Beeson*, 50 Wn. App. 678, 749 P.2d 761 (1988).

² *Beeson*, 50 Wn. App. at 686 (holding that whether a tenant is a coinsured is a matter of “the parties’ reasonable expectations”).

- The Lease required Lease Police to comply with the Declaration and Association rules and regulations. (CP 20, ¶ 21)
- The Lease specifically prohibited Lease Police from engaging in any activity that will impair the Association's ability to obtain and maintain fire insurance. (CP 20, ¶ 17)
- The Lease specifically stated that, if the premises are damaged by fire, Lease Police is not required to repair such damage. (CP 20, ¶ 15)
- The lease specifically required Lease Police to pay the Association dues. (CP 19, ¶ 7)

These facts clearly show that Lease Police is a coinsured under the Association's fire insurance policy.

Although not necessary for concluding that Lease Police is a coinsured, the Association's own Declaration and Covenants, Conditions, Restrictions, and Reservations (hereinafter "Declaration") contemplate that tenants such as Lease Police are protected by the insurance obtained by the Condominium Board as trustee for the unit owners:

- The Declaration requires that the Board "shall acquire and shall pay for out of the common expense fund . . . Policies of insurance or bonds providing coverage for fire and other hazard, liability for personal injury and property damage." (CP 54)
- The Declaration requires that the Association obtain fire insurance "with the Board named an insured as trustee for the benefit of owners . . ." (CP 66)
- Under the Declaration purchasing fire insurance is solely the responsibility of the Association and the unit owners

have a duty to not interfere with the Association's ability to obtain and maintain fire insurance. (CP 60, ¶ 6)

- The Declaration specifically anticipates that units may be leased and gives the Board final approval on uses. (CP 58)
- The Declaration allows the Association to receive rental income directly from tenants in the event a landlord fails to pay dues or assessments to the Board. (CP 65, ¶ 13)
- The Declaration requires that, "to the extent deemed practicable and desirable," the Board "shall" obtain insurance that waives contribution or subrogation by the Association's insurance carrier against individual unit owners or tenants. (CP 68)

Thus, the Association knew that both the owners of the units and their tenants would be relying on the fire insurance it secured.

The Lease between Lease Police and the landlord contemplated that Lease Police would be covered by the Association's fire insurance policy issued by CAU. Although not necessary for the Court's analysis, the Harbour Commons Declaration also supports that conclusion. Therefore, Lease Police is a coinsured under the CAU policy and CAU cannot seek subrogation from Lease Police. Lease Police asks that this Court affirm the trial Court's dismissal of CAU's lawsuit.

The trial court also correctly concluded Lease Police was entitled to an award of its attorney fees under *Olympic Steamship* for successfully litigating its coinsured status.

II. ASSIGNMENTS OF ERROR

A. Appellant Community Association of Underwriters of America, Inc. (“CAU”) has assigned error to the trial court’s grant of summary judgment to Respondents (referred to collectively herein as “Lease Police”), dismissing CAU’s claims as a matter of law because Lease Police qualifies as a coinsured under the policy of insurance issued by CAU to the Harbour Commons Condominium Association Board as trustee for the condominium unit owners (“the Elkins”) and CAU is, therefore, barred from bringing a subrogation claim against Lease Police.

B. CAU assigns error to the trial court’s grant of attorney fees to Lease Police based upon *Olympic Steamship Co. v. Centennial Insurance Co.*³

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the trial court properly conclude Lease Police was a coinsured under the CAU policy obtained for the Elkins by the Condominium Board as their trustee and, therefore, subject to the protection of the anti-subrogation rule, when the Lease between the Elkins and Lease Police did not require Lease Police to obtain its own insurance policy and did not expressly limit the benefit of the Elkins’ insurance to the Elkins?

³ 117 Wn.2d 37, 811 P.2d 673 (1991).

B. Did the trial court properly award Lease Police its attorney fees pursuant to *Olympic Steamship* when the issue Lease Police successfully litigated against CAU was Lease Police's status as a coinsured under the CAU policy?

IV. STATEMENT OF THE CASE

A. Underlying Facts of Litigation

1. CAU Policy

CAU issued a policy of insurance covering the Harbour Commons Condominium building. (CP 2, ¶ 2.6)

The Condominium Association was required by the Harbour Commons Declaration to obtain the insurance policy. Specifically, the Declaration requires that the Board “for the benefit of the condominium and the owners . . . shall acquire and shall pay for out of the common expense fund . . . [p]olicies of insurance or bonds providing coverage for fire and other hazard, liability for personal property and property damage.” (CP 54, ¶ 3) The Declarations also require the Board to obtain fire insurance for the full replacement value of not only the common areas and limited common areas, but the condominium units as well. (CP 66 ¶ 1.a) The Declaration states the Board is to be the “named as insured as trustee for the benefit of owners and mortgagees[.]” (*Id.*) “To the extent deemed practicable and desirable by the Board,” the insurance shall contain a

waiver by the insurer of any subrogation right “either against the owner or lessee of any condominium unit.” (CP 68, ¶ 4.d) In addition, the Declaration prohibits each unit owner from doing anything that will increase the rate of insurance or that will result in the cancellation of the insurance. (CP 60, ¶ 6)

The common fund from which the insurance premiums are paid is collected by the Board from the unit owners. Each fiscal year, the Board determines how much money is needed for the common expense fund and then charges the unit owners, who are then obligated to make monthly payments to the treasurer of the Association. (CP 61 – 62)

The Condominium Declaration contemplates that unit owners might lease their units, stating that the units shall be used for commercial or retail purposes “on an ownership, rental, or lease basis.” (CP 58, ¶ 1) If a unit owner fails to timely make his or her monthly payment to the treasurer, “the Board may collect and the lessee shall pay over to the Board so much of the rent for such condominium unit as is required by pay any amounts due” the Board, plus interests and costs. (CP 65, ¶ 13) Moreover, the “lessee shall not have the right to question payment over to the Board[.]” (*Id.*)

2. Lease Between the Elkins and Lease Police

Lease Police leased Unit F in the Harbour Commons Condominiums. (CP 19 – 23) Respondents Harold and Deborah Kalles, Derek Kalles, and Michael Quinn had purchased Lease Police, Inc., from Paul and Kathy Elkins and the Lease was part of that purchase agreement.

The Lease did not require Lease Police to obtain property insurance for the leased premises. Rather, Lease Police was required to carry only a general liability insurance policy. (CP 21) The Lease also contemplated that a fire might occur during the Lease term and allowed Lease Police to surrender the property at the end of the term in a fire damaged condition. (CP 20) Consistent with the Elkins' duties under the Condominium Declarations as unit owners, the Lease prohibited Lease Police from engaging in any activity that would affect the rate of fire insurance obtained by the Harbour Condominium Association. (CP 20, ¶ 17) The Elkins also passed on their obligation to pay the monthly assessments on the unit, stating "Lessee shall pay to lessor the amount equal to the monthly HOA dues as directed by the lessor." (CP 19, ¶ 7)

3. The Fire and CAU's Plans to Subrogate

In 2006, when he was still the owner and president of Lease Police, Paul Elkins remodeled the unit where the office was located. Employees of his company performed all the work, including electrical work, without

a permit. (CP 40) Following the remodel, the unit was always cold in the fall and winter months. (*Id.*) To address the problem, Paul Elkins asked the maintenance supervisor to place a space heater in the reception area. (*Id.*) The heater remained in the same spot until the date of the fire. (*Id.*)

On January 15, 2009, a fire occurred at the Harbour Commons, rendering both Unit E (another unit owned by the Elkins) and Unit F uninhabitable. (CP 25 – 37) The Gig Harbor Fire Department and the Pierce County Fire Department investigated the fire and both departments determined the fire was accidental in origin. (CP 28, 36) However, neither department could determine the cause of the fire. (*Id.*)

On the day the fire occurred, CAU's attorney sent a letter to Lease Police stating CAU expected to make payment on the claim and that it would "look to any responsible party or parties for recovery" of the money it paid. (CP 220) He also stated that preliminary investigation indicated "Lease Police, Inc., may be found to have been responsible for this incident, arising from the fire originating from the malfunction or misuse of a space heater located within" the Lease Police facility. (*Id.*) Before CAU filed its subrogation action against Lease Police, counsel for Lease Police wrote to CAU's attorney explaining that, because Lease Police was a coinsured under the CAU policy, CAU was barred from pursuing a subrogation against it. (CP 223 – 27) That letter included a detailed

explanation of Lease Police's position regarding that issue. CAU's attorney responded without explanation or legal support, stating that he believed Lease Police's counsel was "mistaken as to the law, the facts, and the relevant parties' intentions." (CP 229) He indicated CAU planned to file the subrogation action. Lease Police's counsel asked that CAU's attorney "point out our mistakes of fact, law and intentions," but CAU's counsel declined to do so. (CP 231, 233).

CAU filed this action on September 25, 2009, alleging Lease Police caused the fire and seeking reimbursement of its insurance payments to repair the building. (CP 1 – 4)

B. Procedure Below

In November 2009, Lease Police filed a motion for summary judgment, requesting that the trial court dismiss CAU's claims as a matter of law because Lease Police was a coinsured under the CAU policy and CAU was, therefore, precluded from pursuing a subrogation claim against it. (CP 5 – 15) CAU did not request the opportunity to conduct additional discovery and instead filed a response to the motion. (CP 90 – 98) The court granted the motion on December 18, 2009. (CP 200 – 201) CAU filed its notice of appeal on January 13, 2010. (CP 202 – 205)

On January 26, 2010, Lease Police filed a motion for attorney fees, based upon *Olympic Steamship, Inc. v. Centennial Insurance Co.*,⁴ and subsequent case law. (CP 206 – 14) The court granted that motion on February 5, 2010. (CP 255 – 56)

V. SUMMARY OF ARGUMENT

Under Washington law, a tenant is protected from a subrogation action by the landlord's insurer if two conditions in the lease are met – (1) the lease does not require the tenant to carry its own insurance and (2) the lease does not expressly state the landlord's insurance does not protect the tenant.⁵ Both conditions are met here. The Lease signed by the Elkins and Lease Police did not require Lease Police to carry property insurance, nor did it provide that the insurance obtained for the Elkins by the Condominium Board as the Elkins' trustee would not protect Lease Police. Thus, the trial court properly concluded the anti-subrogation rule barred CAU's claims. It is neither relevant nor material that the present matter involves a commercial lease or that the insurance policy was obtained for the Elkins by the Condominium Board as their trustee. Lease Police is a coinsured under the CAU policy and CAU presented no evidence to the contrary in response to Lease Police's summary judgment motion. Indeed,

⁴ 117 Wn.2d 37.

⁵ *Cascade Trailer Court v. Beeson*, 50 Wn. App. 678, 749 P.2d 761 (1998).

there could be no such evidence because the only relevant document is the Lease between Lease Police and the Elkins. To the extent the Board's reasonable expectations with regard to Lease Police's status as a coinsured under the CAU might be relevant—a matter Lease Police does not concede—those expectations are set forth in the Declarations. The Declarations, which specifically contemplate units will be leased, does not require that the unit owners obligate their tenants to carry insurance on the property, nor does it include any provision stating that the tenants are not protected by the insurance obtained by the Board for the unit owners' benefit. Thus, as with the Lease, it must be presumed that the insurance obtained by the Board also benefitted the tenants. As a result, Lease Police must be considered a coinsured under that policy and CAU's subrogation action is barred.

Under *Olympic Steamship*, a party is entitled to attorney fees if it successfully litigates its status as an insured. The rule is not limited to those situations where the insured is seeking payment from the insurance company. Rather, it extends to situations such as the present one where the insurance company has paid a claim and seeks to recover its payment from the insured. The trial court, therefore, properly awarded Lease Police its attorney fees. In addition, pursuant to RAP 18.1, Lease Police is entitled to an award of its attorney fees on appeal.

VI. ARGUMENT

A. Standard of Review

The standard of review for a summary judgment order is *de novo*.⁶

The standard of review for an award of attorney fees is also *de novo*.⁷

B. CAU is precluded from pursuing subrogation against Lease Police because Lease Police is a coinsured under the CAU policy.

Subrogation is a basic principle whereby an insurance company, having paid for a loss, seeks to recover its payment from the party it contends was responsible for the loss. The insurer stands in the shoes of its insured and is entitled to only those rights and remedies the insured may have against the third party.⁸ An equally basic principle is that an insurance company may not pursue a subrogation claim against its own insured because, “by definition, subrogation exists only with respect to the rights of the insurer against third persons to whom the insurer owes no duty.”⁹ This principle is often referred to as the anti-subrogation rule.

The protection of the anti-subrogation rule extends beyond those parties named as insureds under the insurance policy at issue. The rule has

⁶ *Snohomish County Fire Dist. No. 1 v. Snohomish County*, 128 Wn. App. 418, 422, 115 P.3d 1057 (2005).

⁷ *Ledcor Indus. (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 16, 206 P.3d 1255 (2009).

⁸ *Mutual of Enumclaw v. USF Ins. Co.*, 164 Wn.2d 411, 423, 191 P.3d 866, 874 (2008).

⁹ *Mahler v. Szucs*, 135 Wn.2d 398, 407, 957 P.2d 632 (1998).

specifically been extended to apply when the party allegedly responsible for a loss is a tenant of the party insured by the policy.¹⁰ CAU does not dispute that the Court of Appeals adopted this rule in *Cascade Trailer Court v. Beeson*.¹¹ Rather, CAU attempts to distinguish the present matter from *Beeson*. Those attempts fail, however, because the fundamental principle set forth in *Beeson* unquestionably applies here.

In *Beeson*, one of three tenants negligently caused a fire that destroyed the rented premises. The landlord's insurer paid for the loss and then pursued a subrogation claim against the tenants. In cross-motions for summary judgment, the parties disputed whether there was a written lease for the property. The landlord claimed there was such a lease and that it included a requirement that the tenants "[n]ot intentionally or negligently destroy . . . any part of the premises . . ."¹² The landlord also claimed the lease required the tenants to "vacate said premises in as good order and condition they are now in, excepting the reasonable wear and tear thereof."¹³

The trial court adopted a rule that a lessor's insurer could not subrogate against a tenant absent an express agreement to the contrary and

¹⁰ *Cascade Trailer Court v. Beeson*, 50 Wn. App. 678, 749 P.2d 761 (1998).

¹¹ 50 Wn. App. 678.

¹² 50 Wn. App. at 679.

¹³ *Id.*

granted the tenants' motion for summary judgment.¹⁴ In reviewing the trial court's decision, the Court of Appeals analyzed how other courts had handled the issue and decided to adopt the rule that an insurer may not subrogate against a tenant if the tenant is considered a coinsured under the landlord's policy. Thus, the primary question for the Court of Appeals was whether the tenants in the case before it were coinsureds under their landlord's policy.

In determining whether the tenants were coinsureds under the landlord's policy, the court adopted the reasonable expectations rationale originally applied by the Oklahoma Court of Appeals in *Sutton v. Johndahl*.¹⁵ Under that test, it is the reasonable expectations of the tenant, not the insurance company, that govern. The *Beeson* court put it very succinctly, holding that "[w]here the landlord has secured fire insurance covering the leased premises, the tenant can reasonably expect the insurance to cover him as well, unless the parties have specifically agreed otherwise."¹⁶ Although there was an issue of fact in *Beeson* regarding whether there was a written lease, the court held that fact was material only if the terms of the written lease the landlord contended had been signed "indicate an express agreement by the parties to limit the benefit of

¹⁴ *Id.* at 680.

¹⁵ 532 P.2d 478 (Okla. Ct. App. 1975).

¹⁶ 50 Wn. App. at 686.

fire insurance to the landlord.”¹⁷ The court held neither clause relied upon by the landlord would negate the tenants’ reasonable expectation that the insurance extended to them:

We hold that the fact that the disputed lease provided the tenants would not negligently destroy the premises does not indicate the parties intended to limit the benefit of insurance to the landlord. A tenant could sign the written lease at issue and reasonably never contemplate that if the premises were destroyed by a fire he negligently caused, his landlord’s insurer could collect damages from him.¹⁸

The landlord was “presumed to carry its insurance for the tenant’s benefit because the lease did not contain an express provision to the contrary.”¹⁹ The coinsured issue was therefore resolved entirely by the terms of the lease the landlord claimed the tenants had signed.

In the present matter, it is undisputed that the Lease between Lease Police and the Elkins did not require Lease Police to carry property insurance on the leased premises. It is also undisputed that the Elkins provided property insurance via the policy the Board was required to obtain as trustee for them. Thus, pursuant to *Beeson*, it must be presumed that Lease Police reasonably expected the policy covering the Elkins to cover it as well. In addition, pursuant to *Beeson*, it must be presumed the insurance obtained for the Elkins by the Board as their trustee was carried

¹⁷ *Id.* at 687.

¹⁸ *Id.*

¹⁹ *Id.* at 687 – 88.

for Lease Police's benefit. CAU did not present any evidence to the contrary in response to Lease Police's summary judgment motion.

CAU argues the final phrase of the surrender provision means Lease Police was not allowed to surrender the premises in a fire damaged condition if the fire was Lease Police's negligence. That clause allowed Lease Police to surrender the premises at the end of the term in the same condition as at the beginning of the term except for "reasonable wear and tear and damage by fire, the elements, casualty, or other cause not due to the misuse or neglect of" Lease Police.²⁰ (CP 20, ¶ 15) CAU misinterprets the provision. By listing fire as a separate contingency, the clause must be read to mean that all fire is excepted, but other damage is excepted only if was not caused by the misuse or neglect of Lease Police.

In addition, even if the surrender clause were read to require Lease Police to repair any fire damage it may have negligently caused, the fact that the Lease did not require Lease Police to carry its own fire insurance reflects the parties' intent that any such fire damage would be covered by the Elkins' policy. Moreover, in *Beeson* the court concluded that a

²⁰ *Rizzuto v. Morris*, 22 Wn. App. 951, 592 P.2d 688 (1979) (clause allowing insured to surrender premises in fire damaged condition supported conclusion tenant was coinsured under landlord's policy and landlord's insurer was precluded from subrogating against tenant).

substantially similar surrender clause was irrelevant to determining whether the tenant was a coinsured.²¹

CAU asserts there was no evidence of Lease Police's reasonable expectations.²² However, that assertion is a thinly veiled attempt to turn the *Beeson* analysis on its head and require Lease Police to affirmatively show the parties agreed Lease Police should be a coinsured. The *Beeson* rule mandates the opposite approach—if the lease does not require the tenant to carry insurance, the tenant reasonably expects the insurance provided by the landlord to protect it as well. Under *Beeson*, the insurance carried by the landlord is presumed to be carried for the tenant's benefit, unless the lease includes a specific provision to the contrary. Thus, under *Beeson*, the Lease is the only document that need be reviewed to determine whether Lease Police was a coinsured under the CAU policy. The Lease did not require Lease Police to carry property insurance, nor did it contain any provisions stating that Lease Police would not be protected by the property insurance carried by the Elkins. Accordingly, Lease Police is a coinsured under the CAU policy and CAU may not subrogate against it.

²¹ *Beeson*, 50 Wn. App. at 679.

²² Appellant's Opening Brief at 21.

None of CAU's other attempts to escape the reach of *Beeson* withstand scrutiny.

a. The coinsured anti-subrogation rule is not limited to residential leases.

CAU argues *Beeson* does not apply because it dealt with a residential lease and the present matter involves a commercial lease. But CAU offers no explanation as to why the *Beeson* reasoning should not apply in a commercial setting. And in reaching its conclusion that a landlord's insurer may not subrogate against a tenant, the *Beeson* court relied on *Rizzuto v. Morris*,²³ a case involving a commercial lease.

Rizzuto involved a fire at premises the lessee had used as a retail furniture store. The fire had been negligently caused by one of the lessee's employees. After paying on the loss, the landlord's insurer filed a subrogation action against the lessee. In holding that the insurer was barred from pursuing subrogation against the lessee, the court concluded that the duty was on the landlord to identify the need for a separate policy:

if the lessors did not expect to cover the lessee under their policy, **they should have expressly notified the lessee of the need for a second policy to cover its interest.** Since they failed to do so, they have no cause of action against the lessee for the fire damage, and the **insurance company has no right of subrogation.**²⁴

²³ 22 Wn. App. 951, 592 P.2d 688 (1979).

²⁴ 22 Wn. App. at 958 (emphasis added).

Likewise, if the Elkins did not expect the policy obtained for them by the Board as their trustee to extend equally to Lease Police, they should have required Lease Police to obtain its own policy.²⁵ They did not. Therefore, Lease Police is protected from CAU's subrogation claim. That this matter involves a commercial lease is of no import.

b. The fact that the Board obtained the CAU policy as trustee for the Elkins does not affect the application of the coinsured anti-subrogation rule.

Beeson makes it clear that the focus of the inquiry regarding a tenant's coinsured status is the reasonable expectations of the tenant. Where, as here, there is a written lease, those expectations may be gleaned from that document. Under the Lease, the only conclusion that can be reached is that, because Lease Police was not required to carry its own property insurance, it expected to be protected by insurance obtained by the Elkins.²⁶

The Elkins obtained their insurance through the Condominium Board, which was required to procure such policy "as trustee for the benefit of owners." (CP 66, ¶ 1.a) CAU argues that, because the Elkins did

²⁵ CAU implies at page 17 of its Opening Brief that Lease Police obtained its own insurance. However, there is no evidence in the record regarding any insurance obtained by Lease Police. Therefore, any such contention is unsupported by the record and should not be considered.

²⁶ To the extent that the Elkins' intent is relevant, the lease with Lease Police also evidences their intent that the CAU policy extend to Lease Police.

not personally obtain the insurance policy, the coinsured rule cannot apply here. However, there is no logical basis for such a conclusion.

At most, the fact that the Board obtained the policy as trustee for the Elkins could mean the Board's expectations should be examined when determining if Lease Police is a coinsured under the policy. If so, the undisputed facts show the Board expected that tenants of unit owners would be protected by the insurance it procured for the unit owners as their trustee. CAU presented no evidence showing the Board had any other reasonable expectation.

Pursuant to the terms of the Condominium Declaration, the Board expected that units would be leased. In addition, there is nothing in the Declaration obligating unit owners to require their tenants to carry property insurance. The Declaration even contemplates that the insurance obtained by the Board will contain a waiver by the insurer of any subrogation right against the owner and lessee of any condominium unit if the Board deemed it appropriate. (CP 68, ¶ 4.d) Under Washington law, a subrogation waiver is unnecessary with regard to either the unit owner or the tenant. Therefore, it is not relevant or material for purposes of the present matter whether the Board actually obtained such a waiver. Rather, the existence of the provision in the Declaration shows the Board was

aware the units would be leased and intended to protect tenants from subrogation.

Additional support for the Board's reasonable expectation that the insurance it obtained as trustee for the Elkins would protect the Elkins' tenant is found in the fact that the insurance policy was paid for by the Association's common expense fund. The Declaration granted the Board express authority to collect the monthly fees for the fund from a lessee if the unit owner failed to timely pay. Not only did the Declaration allow such collection, it precluded lessees from questioning the collection efforts. Thus, the Board paid for the insurance at issue with funds it knew it could collect from lessees if necessary. While the source of the funds for the insurance premium is not the critical question when determining whether a tenant is a coinsured,²⁷ in the present matter, the source of the funds supports the conclusion that the Board reasonably expected tenants would be protected by the property insurance covering the unit. CAU's failure to present any evidence to the contrary supports the trial court's conclusion that Lease Police was a coinsured under the CAU policy and was, therefore, protected by the anti-subrogation rule.

²⁷ *Beeson*, 50 Wn. App. at 686.

c. CAU's expectations are immaterial.

To the extent CAU attempts to argue its own expectations are to be considered in the coinsured analysis—that assertion fails. In any coinsured situation, the insurer is necessarily outside of the analysis. For example, in *Beeson*, the landlord was the named insured and the insurance company had no relationship with the tenants. Indeed, the fact that the tenant is not an express party to the insurance policy is the very basis for the need to analyze whether the tenants were coinsureds under the policy. Likewise, in the present matter, Lease Police has no express contract with CAU. Rather, the question is whether Lease Police reasonably expected the insurance policy obtained by the Board as trustee for the Elkins protected Lease Police. What CAU expected or intended is irrelevant.²⁸

d. CAU cannot ask the Court to remand to allow discovery because it did not file a CR 56(f) motion.

CAU requests that this Court reverse the trial court's summary judgment order and remand the matter for discovery.²⁹ As previously discussed, CAU also claims Lease Police failed to present any evidence of its reasonable expectations with regard to insurance coverage. These requests and arguments imply that discovery was necessary before the trial court could properly decide the issues before it. However, CAU did not

²⁸ CAU has also referenced the Policy in its briefing. But CAU did not produce the policy and the policy language is therefore not part of the record on appeal.

²⁹ Appellant's Opening Brief at 2.

file a CR 56(f) motion seeking additional time to conduct discovery, nor did it argue below that the trial court could not properly decide the summary judgment motion on the record before it. Indeed, CAU made no attempt to argue that any material issues of fact existed. Rather, based upon the undisputed facts, CAU asserted that the coinsured anti-subrogation rule did not bar its claim against Lease Police. CAU is, therefore, precluded from asking this Court to find summary judgment was premature based upon a purported need for discovery.³⁰

Even if CAU had properly argued before the trial court that discovery was necessary, its argument would have failed. The record is complete. It contains the Lease between Lease Police and Elkins, the only document necessary to determine whether Lease Police reasonably expected it would be protected by the insurance obtained for the Elkins through the Board as their trustee. To the extent the Board's reasonable expectations are relevant, which Lease Police contends they are not, the Declaration sets forth all that is necessary to establish those expectations. CAU presented no evidence to support a claim that the Board had any expectations other than those set forth in the Declarations. Thus, there was

³⁰ *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993) (to allow an appellant to assert a need for discovery as a basis for reversing a summary judgment order without having properly requested a continuance from the trial court pursuant to CR 56(f) "would constitute an unwarranted encroachment on the trial court's discretion to dismiss case which fail to raise genuine issues for trial.").

nothing else for the trial court to consider when it properly granted Lease Police's summary judgment motion dismissing CAU's claims as a matter of law.

C. The trial court properly awarded Lease Police its attorney fees.

In *Olympic Steamship Co., Inc. v. Centennial Insurance Co.*,³¹ the Supreme Court held that, "[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees, regardless of whether the duty to defend is at issue."³² Such coverage disputes include instances where the insurer claims that the defendant is not an insured under the policy:

"Coverage disputes include cases in which the issue of coverage is disputed and cases in which the 'extent of the benefit provided by an insurance contract' is at issue."
Coverage questions generally concern who is insured,
the type of risk insured against, or whether the insurance contract exists. By contrast, claim disputes raise factual questions about the extent of the insured's damages.³³

This is exactly what occurred in this lawsuit when CAU refused to accept that Lease Police was an insured under its policy and instead sued Lease Police to recover payments made under its property insurance.

³¹ *Axess Int'l, Ltd. v. Intercargo Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

³² 117 Wn.2d at 54.

³³ 107 Wn. App. 713, 721, 30 P.3d 1 (2001) (footnotes omitted; emphasis added) (quoting *Leingang v. Pierce County Med. Bur., Inc.*, 131 Wn.2d 133, 147, 930 P.2d 288 (1997))

Cases interpreting *Olympic Steamship* and applying its rule uniformly confirm that a party successfully litigating its insured status under an insurance policy is entitled to an award of attorney fees.³⁴ For example, *Butzberger v. Foster*³⁵ was a suit brought by the estate of Butzberger, who was killed when he stopped to assist Foster after Foster had rolled his pickup that was insured by Allstate. One of the issues in that case was whether Butzberger was an insured for purposes of UIM coverage under Foster's Allstate policy. The Supreme Court concluded he was and that his estate was entitled to attorney fees for successfully litigating the issue.³⁶

CAU argues the *Olympic Steamship* rule applies only if (1) the successful litigant and the insurer share unequal bargaining position, (2) the successful litigant and the insurer are both named parties to the insurance policy, and (3) the matter involves the payment of a claim.³⁷ However, while those factors may have been present in *Olympic Steamship*, there is nothing in the subsequent case law that limits the *Olympic Steamship* rule to cases where all those factors are present. With regard to the first two factors, in *Butzberger*, as here, the successful litigant was not named as an insured under the insurance policy. Thus,

³⁴ *Id.*

³⁵ 151 Wn.2d 396, 89 P.3d 689 (2004).

³⁶ 151 Wn.2d at 411 and 414.

³⁷ Appellant's Opening Brief at 25 – 26.

there was no disproportionate bargaining power between the insurer and the litigant because they did not actually bargain. In addition, the party seeking *Olympic Steamship* fees was not a party to the insurance policy. Nevertheless, the *Olympic Steamship* rule applied.

Regarding the third factor CAU alleges must be present, the cases do not hold that *Olympic Steamship* applies only when prompt payment of a claim is at issue. For example, *Leingang v. Pierce County Medical Bureau, Inc.*,³⁸ the insurer paid the insured's medical bills and there was no question regarding the promptness of those payments. Rather, at issue in the litigation was the insurer's contention, based upon a policy exclusion, that it was entitled to recover its payments from the insured when he received automobile insurance proceeds. The Supreme Court held *Olympic Steamship* fees were properly awarded to the insured when he successfully litigated the coverage issue. The present matter presents a similar situation. CAU paid the claim and now seeks to recover that payment from Lease Police, which successfully established it was a coinsured under the policy and, therefore, protected from subrogation. Because Lease Police successfully litigated the coverage question, *Olympic Steamship* applies and the trial court properly awarded Lease Police its fees.

³⁸ 131 Wn.2d 133, 930 P.2d 288 (1997).

Lease Police's attorneys explained to CAU before it filed the subrogation action that the anti-subrogation rule barred the action. However, CAU still chose to go forward with the action. It cannot now claim it should be exempt from the same rule that applies to any other insurer who chooses to litigate a coverage issue in Washington.

CAU also argues that, because this matter presents an issue of first impression in Washington, an award of fees is not warranted. However, the fact that the particular coverage question at issue has not been previously litigated does not preclude an award of attorney fees. The recent case of *American Best Food, Inc. v. Alea London*³⁹ involved a coverage issue that had never been addressed in Washington.⁴⁰ That fact did not prevent the Court of Appeals from holding the insured was entitled to an award of attorney fees under *Olympic Steamship* for successfully litigating the issue.⁴¹ Likewise, in the present matter, although the Washington appellate courts have not specifically addressed the question of whether a tenant of a condominium owner is a coinsured for purposes

³⁹ 168 Wn.2d 398, 229 P.3d 693 (March 18, 2010).

⁴⁰ In fact, it is often the case that the precise issue has not yet been litigated in coverage cases. But the novelty of the coverage question does not eliminate the right to recover fees. See, e.g., *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 71-71, 164 P.3d 454 (2007).

⁴¹ 138 Wn. App. 674, 158 P.3d 119 (2007) *aff'd in part, rev'd in part and remanded*, 168 Wn.2d 398. The Supreme Court affirmed the Court of Appeals' decision regarding the coverage issue, but did not specifically address the attorney fee award.

of the anti-subrogation rule, an award of attorney fees was proper under *Olympic Steamship*.

D. Pursuant to RAP 18.1, Lease Police requests an award of its attorney fees on appeal.

As discussed in the preceding section, the trial court properly awarded Lease Police its attorney fees under *Olympic Steamship* and the cases applying and interpreting that rule. The rule applies equally to Lease Police's attorney fees on appeal.⁴² Therefore, pursuant to RAP 18.1, Lease Police requests an award of its fees on appeal.

VII. CONCLUSION

For the reasons set forth above, Lease Police respectfully requests that the trial court decisions dismissing CAU's action as a matter of law and awarding Lease Police its attorney fees be AFFIRMED.

Respectfully submitted this 23rd day of July, 2010.

WILSON SMITH COCHRAN DICKERSON

By: _____

Counsel for Respondent
Alfred E. Donohue, WSBA No. 32774
WILSON SMITH COCHRAN DICKERSON
1700 Financial Center, 1215 Fourth Avenue
Seattle, WA 98161-1007
Telephone: 206.623-4100 / FAX: 206.623.9273
Electronic mail: donohue@wscd.com

⁴² *Butzberger*, 151 Wn.2d at 313.

FILED
COURT OF APPEALS

10 JUL 26 PM 1:36

DECLARATION OF SERVICE

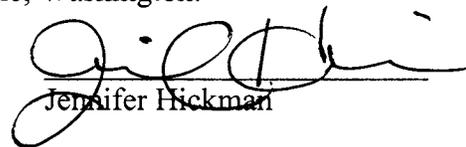
STATE OF WASHINGTON

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served the foregoing document by ABC Legal Messenger and U.S. Mail on:

James Anderson, III
Huppert Law Firm, PLLC
2722 Colby Avenue Suite 535
Everett, WA 98201

Daniel J. de Luca
Nelson Levine de Luca & Horst, LLC
518 Township Line Road, Suite 300
Blue Bell, PA 19422

DATED 7.23.10, at Seattle, Washington.


Jennifer Hickman