IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

John Doe and Jane Doe, *et al.*	)	
	)	Division 10
Plaintiffs/	)	
Judgment Creditors,	)	Consolidated Cases:
v.	)	0516-CV-23636
	)	07-EXEC-39290
Johnson County Park & Recreation	)	0716-CV-24114-01
District and Pete Malone,	)	
	)	
Defendants /	)	
Judgment Debtors.	)	
v.	)	
	)	
Lexington Insurance Company,	)	
	)	
Garnishee.	)	

FINAL JUDGMENT AND ORDER GRANTING ATTORNEY'S FEES

NOW on this 2nd day of November, 2011, the Court takes up and considers "Plaintiff's Application for Award of Attorneys' Fees", and "Plaintiffs Motion for Award of a Multiplier as to Attorneys' Fees in Light of Recent Discovery and Affidavits in Support." The Court has previously held in a separate ORDER of May 3, 2011, that Plaintiffs are entitled to an award of attorneys' fees under K.S.A. § 40-256. Having reviewed Plaintiffs' Application for Award of Attorneys' Fees, Plaintiffs' Motion for Award of Multiplier, and the Affidavits in Support, as well as various submissions in opposition presented by Lexington, the Court makes the following findings of fact and conclusions of law with respect to a reasonable fee award in this case:

I. INTRODUCTION

This case arises from a tragic circumstance in which a young girl was subjected to repeated incidents of sexual abuse by her swimming coach. Those events led to several

lawsuits, the involvement of numerous lawyers, multiple settlements, disputes over insurance coverage, multiple hearings, the necessity of a discovery master, acrimonious dialogue on a regular basis between counsel, and a forest of paper.

The actual abuse to this young girl occurred more than half a decade ago, but litigation has continued until the present regarding previously unresolved issues. In a general sense, the last major issue to resolve was whether or not the Lexington Insurance Company is liable to pay damages that flow from a judgment taken by Plaintiffs consistent with rights guaranteed under Chapter 537.065. That issue came to a head in the form of competing summary judgment motions in front of the Honorable Stephen Nixon. On the 30th day of December, 2010, Judge Nixon entered Summary Judgment in this case on All Claims in favor of the Plaintiffs / Judgment Creditors Douglas, Judy and Megan Cooper ("Plaintiffs" or "Judgment Creditors[1]") and against Garnishee Lexington Insurance Company ("Lexington"). Specifically, the Court found that insurance policies issued by Lexington to its insureds, Johnson County Park & Recreation District ("JCPRD") and Pete Malone ("Malone"), provided coverage for JCPRD and Malone's operation of the swim team Megan Cooper participated on when she suffered those years of sexual abuse. The Court held that these Lexington policies can be garnished by the Plaintiffs to satisfy the May 29, 2007 Judgment entered in their favor against JCPRD and Malone, which is a covered loss under Lexington's policies. The Court held that Kansas

[1] Megan Cooper was referred to in underlying case as "Minor Doe." Since then, she has reached the age of majority and the Court has ruled that her proper name should be used in Court pleadings. Due to Ms. Cooper's status as a minor, her parents prosecuted the claims on her behalf. While collectively referred to as "Plaintiffs" or "Judgment Creditors" for ease of reference in Order (as the Judgments at issue referred to Plaintiffs in the plural), the only damage award was for injuries to Megan Cooper. Ms. Cooper's parents received no separate award for their damages.

contract law applied to the parties' contractual insurance coverage dispute, and that there was no genuine issue of material fact regarding Lexington's coverage for the claims made against JCPRD and Malone in the underlying lawsuit as a matter of law. As of January 1, 2011, Judge Nixon became County Counselor of Jackson County, Missouri, and Judge Charles Atwell became Presiding Judge. With this change, Judge Atwell, who had not been involved in this case in any way prior to this date, became assigned to this consolidated action.

When a judgment is rendered against an insurance company that has failed to pay a covered loss, Kansas law provides that the Court "shall" award the plaintiff a reasonable attorneys' fee as a part of recovered costs when it appears from the evidence that the insurance company's refusal to pay is "without just cause or excuse." *See* K.S.A. § 40-256. On January 31, 2011, Plaintiffs filed their "Application for Award of Attorneys' Fees to be Recovered as Part of Costs." Lexington had also filed a post-judgment motion, "Defendant Lexington Insurance Company's Motion to Amend the Summary Judgment Order." The Court viewed Defendant's motion as the equivalent of a new trial motion under Rule 78.01, which must be ruled upon within 90 days of a final judgment, or it is deemed denied. However, "an appealable judgment disposes of all issues in a case, leaving nothing for future determination." *Boyles v. Knowles,* 905 S.W.2d. 86, 88 (Mo. Banc 1995). *See also* Rule 74.01(b), R.S.Mo. Sec. 512.020. Though the Judgment had been entered, the Judgment was not final because it did not dispose of this question of whether attorneys' fees were recoverable in this action, and if so, what amount of fees would be proper. Further, an issue remained as to the offsets to which Lexington could legitimately be credited against the Judgment entered by Judge Nixon.

The Court then reviewed the necessary pleadings in order to consider these issues. In consideration of this matter the Court conducted hearings with the parties, as well as numerous telephone conferences. Additionally, a conference was held at the offices of Lexington's local counsel, Husch Blackwell Sanders, where Court personnel, including Judge Atwell, and all local counsel attended in person while Lexington's Head Counsel attended via video link. The primary purpose of this conference was to discuss issues of the application of the Kansas Attorneys' Fees Statute, regarding both general applicability as well as the specific application to the facts of this action. Further, Parties were occasionally requested to submit briefs, documents, or other pleadings in regards to the outstanding issues.

On May 3, 2011, the Court entered an Order denying Lexington's motion to amend. This Order also resolved the issue of offsets. The Court, in that Order, also found noted that the Judgment was not yet final as it left certain issues unresolved. Lexington then filed a Notice of Appeal with the Missouri Court of Appeals, Western District. Plaintiffs filed a motion to dismiss that appeal, which was in turn opposed by Lexington. Shortly thereafter that appeal was dismissed by the Court of Appeals.

On June 22, 2011, the Court entered another Order, this time providing notice of intent to sustain Plaintiff's motion for attorneys' fees. The Court then set hearing on this matter for August 19, 2011, at which the parties argued their position as to what a proper award for attorneys' fees would be. The Court took submissions based on these presentations and set a date for final briefs to be submitted of September 23, 2011. Lastly, a number of final briefs regarding the propriety of attorney's fees awards and amounts

were submitted to the Court, along with certain related pleadings, including Plaintiffs' motion for multiplier. All were filed within the time required.

II. FINDINGS OF FACT

1. This Judgment incorporates by reference all findings of the earlier Judgments in the above-captioned consolidated cases.

2. Plaintiffs / Judgment Creditors originally brought their action against Judgment Debtors JCPRD and Malone and others in 2005, for injuries Plaintiff Meagan Cooper received from repeated acts of sexual abuse from 2001 to 2003 while she was a participant on a swim team operated by JCPRD and Malone. Plaintiffs brought suit against JCPRD, Malone, various other swim clubs, coaches, and organizations, and the national governing body for amateur swimming, United States Swimming. *See generally* August 25, 2005 Petition.

3. Lexington had issued two Commercial General Liability ("CGL") policies relevant to the underlying proceedings, and also issued multiple layers of following-form excess policies. Lexington has stipulated that if coverage is found under a CGL policy, there is also coverage under the following form excess policies, and it is undisputed that these policies "are more than adequate to pay the full amount of the underlying Judgment, together with accrued interest and costs." *See* 12/30/10 Summary Judgment on All Claims, at 6. For purposes of this Order, the Court will focus on Lexington CGL Policy No. 014-0165, which covered the policy years 2001-2002, as there is sufficient coverage under that policy (with its stipulated following form excess policies) to satisfy the judgment. *See* Lexington Policy No. 014-0165 (attached to Application for Award of Attorneys' Fees, at Exhibit H).

4. Under Lexington's Policy No. 014-0165, there are three separate categories of "insureds," with differing levels of coverage. Specifically, the Policy provides for coverage for "Named Insureds" (defined as United States Swimming and United States Swimming Local Swimming Committees), "Additional Named Insureds" (defined as any "member club" or "member" of United States Swimming), and "Additional Insureds" (defined as the owners or lessors of premises for the other insureds). *See* 7/21/09 Partial Summary Judgment in Favor of Judgment Creditors (Plaintiffs) Regarding Certain Defenses of Garnishee Lexington as to Coverage, at 15-19; Lexington's Policy No. 014-0165 (attached at Exhibit H to Application), at Endorsement # 1.

5. JCPRD and Malone were at all relevant times "Additional Named Insureds" under the policy, as a "member club" and "member" of United States Swimming, respectively. *See* 12/30/10 Summary Judgment on All Claims, at 7-8.

6. Lexington's CGL Policy No. 014-0165 (Exhibit H to Application) has a sexual misconduct exclusion (Endorsement #9) which reads as follows:

> This insurance does not apply to any **Additional Insured** for **Bodily Injury**…claims arising out of sexual abuse or sexual molestation, including but not limited to, any sexual involvement, sexual conduct, or sexual contact, regardless of consent to a person who is a minor or who is legally incompetent.

See Lexington's CGL Policy No. 014-0165 (Exhibit H to Application) (bold in original); *see also* 7/21/09 Partial Summary Judgment in Favor of Judgment Creditors (Plaintiffs) Regarding Certain Defenses of Garnishee Lexington as to Coverage, at 15-16.

7. As the Court has already determined, it is clear "by its very language" that "the exclusion (which only applies to 'Additional Insureds') is inapplicable" to JCPRD

and Malone, who were at all times "Additional **Named** Insureds" under Lexington's policy. *See* 7/21/09 Partial Summary Judgment in Favor of Judgment Creditors (Plaintiffs) Regarding Certain Defenses of Garnishee Lexington as to Coverage, at 15. Therefore, while this exclusion might arguably bar coverage for the owners and lessors of premises ("Additional Insureds" under the policy), there is nothing in the exclusion which would bar coverage for swim clubs and member coaches ("Additional Named Insureds" under the policy). *Id.* Indeed, in this coverage litigation, Lexington "abandoned this argument" and "its own witness has indicated that the exclusion would not apply." *Id.* at 16.

8. During the underlying litigation, Lexington relied on this non-applicable sexual misconduct exclusion as a primary reason to deny coverage for JCPRD and Malone, and denied any obligation to defend them in the underlying litigation.

9. "Lexington's policies provided coverage for JCPRD and Malone with respect to the claims made against them in the underlying lawsuit." *See* 12/30/10 Judgment Against Lexington, at 15.

10. In addition to coverage and indemnity, "[i]t is undisputed that those policies provide that Lexington 'has the right and duty to defend any suit against [JCPRD and Malone] seeking damages…even if any of the allegations of the suit are groundless, false or fraudulent." *Id.*

11. "Lexington's designated corporate representative, Eric Peterson, testified that he received the underlying Petition which included JCPRD and Malone as defendants in August of 2005." *Id.*

12. "Mr. Peterson testified that Lexington's 'defense obligations were triggered by Lexington as to any of the defendants in that complaint that qualified as insureds' under Lexington's policies as of Lexington's receipt of the complaint in August of 2005." *Id.*

13. "[D]espite the fact that coverage existed under Lexington's policies, and Lexington had a duty to defend under those policies, it is undisputed that Lexington never provided any defense to JCPRD or Malone in the underlying litigation, or paid any defense costs on their behalf." *See* 12/30/10 Judgment Against Lexington, p. 16.

14. Lexington's agent and corporate representative Eric Peterson testified that he had determined in 2005 that "the swim clubs and coaches ["Additional Named Insureds" such as JCPRD and Malone] are not covered under the CGLs for those allegations based on the sexual molestation and abuse exclusion." *See* E. Peterson Transcript, Vol. III, at 110 (attached at Exhibit V to Plaintiffs' Reply In Support of Attorney Fee Application). Likewise, Sarah Preston, Lexington's corporate representative, testified that Lexington had made a "no coverage" determination in 2005 "based on the sexual misconduct exclusion." *See* Preston Transcript, at 331-332 (Exhibit W to Plaintiffs' Reply in Support of Attorney Fee Application). During the underlying litigation, Lexington and its agents "repeatedly disclaimed any coverage existed for JCPRD and Malone under its CGL Policies" as a result of its reliance on this inapplicable sexual misconduct exclusion. *See* 12/30/10 Summary Judgment on All Claims, at 20.

15. Lexington's designated corporate representative acknowledged that "our duty is to the Insureds and [to] treat them the same." *See* 4/15/09 Deposition of Sarah Preston, at 42 (excerpts attached as Exhibit 7 to Plaintiffs' Brief Regarding Payments

Made By Lexington). In fulfilling its duties to its insureds, Lexington's corporate representative agreed that "you want to treat all Insureds who have the same status under your policies the same" and "you don't want to prefer one Insured's interest over the interest of another Insured's." *Id.*

16. While Lexington "repeatedly disclaimed any coverage existed" under its CGL Policy No. 014-0165 for JCPRD and Malone because "it had already determined there was no coverage for coaches and swim clubs" under its CGL Policies "back in 2005" (12/30/10 Summary Judgment on All Claims, at 19, n. 5), Lexington, in fact, paid $550,000 in settlement of the claims of other defendant coaches and swim clubs ("Additional Named Insureds") in the underlying litigation from this CGL Policy No. 014-0165. *See* 7/29/09 Deposition of Eric Peterson, at 792 and 831-832 (excerpts attached as Exhibit 2 to Plaintiffs' Brief Regarding Payments Made By Lexington); 9/29/09 Hearing Transcript, at 146 (wherein counsel for Lexington admitted that it paid $550,000 out of the primary policy to settle claims of "all of the swim clubs" other than JCPRD and Malone); 4/12/11 Hearing Transcript, at 208, 211, and 222 (wherein counsel for Lexington admitted in response to the Court's questioning that these payments were not made from policies which were "differently worded," but rather was "all the same policy" at issue in this case); *see also* Lexington's Check Registers and Lexington's CGL Claims History (Exhibits 4 and 5 to Plaintiffs' Brief Regarding Payments Made By Lexington, respectively) (documenting payment of $550,000 of "paid indemnity" from the CGL Policy for this settlement); 7/28/09 Deposition of Eric Peterson, at 334 (excerpts attached as Exhibit 6 to Plaintiffs' Brief Regarding Payments Made By Lexington)

(testifying that CGL Policy No. 014-0165 "is the one that was used in this K.C. Doe case").

17. Lexington also paid some defense costs incurred by swim club defendants and coaches from its GL Policy during the underlying litigation. *See* Payments to Blackwell Sanders (counsel for defendant Tsunami Swim Team) and Franke, Schultz & Mullen (counsel for defendant coach Thor Larson). *See* Lexington's Check Registers (Exhibits 8 and 9 to Plaintiffs' Brief Regarding Payments Made By Lexington) (payments noted as a "GL Claims Expenses – KC Doe" and listed as "GL/KC Doe" on memo line); *see also* 7/28/09 Deposition of Eric Peterson, at 334 (excerpts attached as Exhibit 6 to Plaintiffs' Brief Regarding Payments Made By Lexington) (testifying that CGL Policy No. 014-0165 "is the one that was used in this K.C. Doe case").

18. Lexington paid $550,000 from its CGL Policy No. 014-0165 to settle claims on behalf of swim clubs and coaches in the underlying litigation, however, Lexington "still made the deliberate decision not to provide a defense to JCPRD and Malone" based on its determination that "coverage was excluded for sexual misconduct claims." *See* 12/30/10 Summary Judgment on All Claims, at 27, n. 9. "[I]t is undisputed that prior to the trial on damages in the underlying case, Lexington debated whether to provide a defense to JCPRD and Malone, but decided not to," on the ground that "they are not insured for any acts arising out of or as a result of Sexual Misconduct." *Id.* at 20.

19. After a two-day trial, the Court entered a Judgment against JCPRD and Malone on May 29, 2007 in the amount of $5,040,000.00, plus interest and costs.

20. Lexington has not paid the May 29, 2007 Judgment.

21. Subsequent to the entry of that Judgment, Plaintiffs brought the present garnishment proceedings against Lexington.

22. This was an extremely hard-fought litigation which has lasted for five years. The vigorous defense mounted by Lexington to this coverage included litigation of this matter in this Court, in the courts of Johnson County, Kansas, in the Court of Appeals for the Western District of Missouri on multiple occasions, the Missouri Supreme Court, and the United States District Court for the Western District of Missouri. The Court notes that the volume of litigation in this Court alone takes up thirty-four separate case volumes on Case.net.

23. The litigation of this matter was intense enough to necessitate the use of a Special Discovery Master, Fred Wilkins. Mr. Wilkins has previously served as the Partner at a large area law firm, President of the Kansas City Bar Association, a member of the Appellate Judicial Nominating Commission, and is generally a well-known and regarded attorney of the highest skill and experience.

24. During the course of these garnishment proceedings Lexington raised various defenses to coverage to the Judgment, defenses that were not raised in the underlying proceeding, where Lexington paid defense costs and indemnity out of the very same policy for other similarly-situated insureds. These after-the-fact defenses to coverage have previously been found by the Court to fail as a matter of law. *See* 7/21/09 Partial Summary Judgment in Favor of the Judgment Creditors (Plaintiffs) Regarding Certain Defenses of Garnishee Lexington as to Coverage.

25. The Court also notes that this has been a vigorous and contentious litigation, and has at times crossed the line or propriety, resulting in sanctions against

Lexington. In that instance Lexington had given false representations regarding discovery matters, including payments made. The Court noted "many" such instances had occurred, thus resulting in the sanction. *See* 11/18/2010 Amended Order Adopting the Factual Findings of the Special Master's Report on Sanctions, at 2.

26. In the defense of this matter, Lexington has repeatedly misstated the terms of its policies to the Court, including the very language of the sexual misconduct exclusion that Lexington relied on to deny coverage in the underlying proceeding. For example, in its briefing to the Court, Lexington represented that the sexual misconduct exclusion in its CGL Policy No. 014-0165 excluded coverage for "Additional **Named** Insureds," even though it only excluded coverage for "Additional Insureds," as discussed above. *See* Lexington's 5/2/08 Suggestions in Support of Motion for Summary Judgment, at 16; *compare with* Lexington's Policy No. 014-0165 (attached to Application for Award of Attorneys' Fees, at Exhibit H).

27. Moreover, Special Master Fred Wilkins described some of Lexington's tactics in this coverage litigation as having been "disingenuous in the extreme," and has made "arguments that no competent counsel could justify," and these views were adopted by the Court. *See* 11/18/10 Amended Order Adopting the Factual Findings of the Special Master's Report on Sanctions, at 2. In the process, the Court has determined that Lexington deliberately concealed evidence of the payments it made from its CGL Policies: "The history of Lexington's obstructionism with respect to documentation of payments it made from the wasting policies at issue in these proceedings leads inevitably to the conclusion that Lexington has been attempting to hide the existence of these payments from the Judgment Creditors." *See* 11/18/10 Amended Order Adopting the

Factual Findings of the Special Master' Report on Sanctions, at 4-5. The payments that Lexington was hiding included payments Lexington made to defend and settle the claims of other swim clubs and coaches in the underlying litigation from the same policy that Lexington denied had coverage for JCPRD and Malone.

28. Based on the evidence, the Court finds that Lexington's refusal to provide a defense and indemnity to JCPRD and Malone during the underlying litigation was without just cause or excuse. Of particular weight in this matter are the facts surrounding Lexington's coverage of other similarly situated insureds based on the same policy and the same underlying litigation. *See* Findings 14-16.

29. Furthermore, based on the evidence, the Court finds that Lexington's refusal to pay the May 29, 2007 Judgment that was entered against JCPRD and Malone was without just cause or excuse.

30. Therefore, the Court finds that an award to Plaintiffs of their reasonable attorneys' fees is appropriate pursuant to K.S.A. § 40-256.

31. On August 19, 2011, the Court conducted a hearing regarding the proper amount of any award of attorneys' fees. At this hearing Lexington spent a great deal of time arguing vehemently against Plaintiffs' Counsel's suggested fee recovery based in large part upon the theory that Plaintiffs' Counsel was claiming an excessive output of hours, comparing the figures for hours claimed to have been expended by Plaintiffs' Counsel with figures that they claimed to have expended on this matter themselves. Both express and implied in this argument was the claim that Plaintiff's counsel had been either inefficient in their expenditures of time on this case or else that they had been dishonest regarding those figures. Lexington's only other assault on Plaintiffs' Counsel's

suggested amount of recovery was an argument against the propriety of the hourly rates offered by Plaintiff's Counsel. However, to rebut the proposed hourly rates Lexington only offered their own rates and the rates charged by attorneys engaged in similar work, primarily insurance defense. They offered no real argument as to what proper fees might be for similarly situated Plaintiff's attorneys.

32. Subsequent to the August 19, 2011, hearing regarding proper fees, the Plaintiff moved for the Court to Order Lexington to reveal the number of hours that had been expended by the defense for the years 2009 to present. During Lexington's presentation on August 19, they had argued that the hours Plaintiff's counsel had claimed to have expended were excessive. Further, they had argued that their own expenditures were close to half the amount cited by Plaintiffs' Counsel. Plaintiff's attempts to verify this claim having been rebuffed, they filed their motion seeking intervention by the Court. The Court granted this motion, Ordering Lexington to reveal this information and produce documentation regarding hours expended. After the Court entered this Order, it was revealed that, for whatever reason, the information presented by Lexington had been incorrect, and that all defense counsel had, in fact, expended more hours than the Plaintiff's counsel during that period of time. As a result, the primary argument that Lexington had proposed to argue against Plaintiffs' Counsel's suggestion of a proper attorneys' fee award turned out to have been completely unfounded. Lexington wrote to the Court explaining this inconsistency as a mistake made in regards to the hours expended by local counsel on behalf of Defendants. As such it was necessary for

Lexington to withdraw all exhibits and testimony related to these matters to the extent possible to do so.[2]

33. In determining the reasonable value of legal services, the Court considers, among other things, the following factors:

a. The time and labor required to prosecute this action was extraordinary;

b. The prosecution of this case was extremely difficult, and required counsel to litigate virtually every question of fact or law, often on multiple occasions, in multiple forums;

c. The skill needed to litigate this case was necessarily high;

d. The experience, reputation and ability of Plaintiffs' counsel is outstanding;

e. Plaintiffs' counsel prosecuted this action based on a contingency fee, with a high degree of risk, in contrast to the fees received by Lexington's counsel;

f. The time required by the demands of this case restricted the ability of Plaintiffs' counsel to accept other work; and

g. The amounts involved and the results obtained for Megan Cooper are extraordinary.

34. The hours expended by Plaintiffs and by Lexington are comparable, and are reasonable in light of the extent of the litigation involved.

[2] While the Court finds Defense Counsel's arguments based on false information to be egregious in the extreme, and to represent at the very least very poor lawyering, it should also be noted that not all of Defense Counsel should be impugned by these actions. Lexington has been represented by different counsel at different times in this litigation. It appears that the concerns expressed by Mr. Wilkins and Judge Nixon recited above arose before Mr. Anderson and his firm's representation of Lexington. Of particular note is the part played by local Counsel for Lexington during this Court's direct involvement with the case

35. Finally, the Court finds that Lexington is entitled to an offset against the Judgment in the amount of $2,030,899.87. The Court has reached this conclusion by analyzing the offsets claimed by Lexington and those agreed to by Plaintiffs. Due to existing confidentiality agreements, the Court has agreed to not include its analysis of how it reached this decision in any document that would ultimately be available to the public. Instead, the Court will file a separate sealed memorandum with the file that explains which offsets were included to reach this final figure.

III. CONCLUSIONS OF LAW

The Court hereby incorporates all Conclusions of Law made in prior Judgments in the above-captioned consolidated cases. The Court has ruled that Kansas law will apply to the insurance contract coverage dispute between Plaintiffs and Lexington. *See* 12/30/10 Summary Judgment on All Claims, n. 3; *see also* July 21, 2009 Partial Summary Judgment. "Under Kansas law, the prevailing party in a lawsuit may recover attorneys' fees where such is specifically authorized by statute or contract." *Neustrom v. Union Pac. R.R.*, 156 F.3d 1057, 1067 (10th Cir.1998) (internal quotation marks omitted). Recovery of attorneys' fees as costs is authorized by Kansas statute when an insurance company fails to pay the amount of an insured loss without just cause or excuse:

> That in all actions … in which judgment is rendered against any insurance company …, if it appear from the evidence that such company … has refused without just cause or excuse to pay the full amount of such loss, the court rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action, including proceeding upon appeal, to be recovered and collected as a part of the costs[.]

(since 1/1/2011), Husch Blackwell Sanders, who comported themselves excellently throughout the proceedings.

K.S.A. § 40-256. "Whether an insurance company's refusal to pay is without just cause or excuse is determined by the facts and circumstances in each case." *Johnson v. Westhoff Sand Co., Inc.*, 31 Kan. App. 2d 259, 274 (Kan. App. 2003).[3]

The statute is mandatory, providing that the Court "shall" award attorneys' fees if it determines that an insurer has refused to pay the full amount of the loss without just cause or excuse. K.S.A. § 40-256. Thus, "[o]nly when there is a good faith legal controversy as to the insured's claim will the statutory award of attorney's fee be denied." *Dodson International Parts, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburg*, --- S.W.3d ---, 2010 WL 4823272, *16 (Mo. App. W.D. Nov. 30, 2010) (upholding award of attorneys' fees and litigation expenses under K.S.A. § 40-256)

Judge Nixon held as a matter of law that Lexington "Lexington's policies provided coverage for JCPRD and Malone with respect to the claims made against them in the underlying lawsuit." *See* 12/30/10 Judgment Against Lexington, p. 15. Judge Nixon found that, "[d]espite the fact that coverage existed under Lexington's policies, and Lexington had a duty to defend under those policies, it is undisputed that Lexington never provided any defense to JCPRD or Malone in the underlying litigation, or paid any defense costs on their behalf." *Id.* at 16.

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[3] The court in *Johnson v. Westhoff Sand* (Kansas Supreme Court) awarded fees under K.S.A. 40-256. This Court has held that *Johnson v. Westhoff Sand* is "directly on point." *See* 12/30/10 Summary Judgment on All Claims at 16-21. Lexington's efforts to distinguish itself from the *Westhoff Sand* case have been specifically rejected by this Court. *Id.* As this Court previously noted, the facts of the present case are much stronger in favor of coverage than the *Westhoff Sand* facts. *See* 12/30/10 Summary Judgment on All Claims, at 21. The court in the *Westhoff Sand* case found the failure of the insurer to defend was "without just cause and excuse," and that an award of reasonable attorneys' fees was appropriate under K.S.A. § 40-265. *See Westhoff Sand*, 62 P.2d at 273-274. *Westhoff Sand* compels the award of fees in this case.

The issue of whether Lexington had just cause or excuse for its failure to defend JCPRD and Malone, must be determined based on the facts as of the time the petition against JCPRD and Malone was filed, which was the date Lexington's defense obligations were triggered. *See Spruill Motors, Inc. v. Universal Underwriters Ins. Co.*, 212 Kan. 681, 681, 512 P.2d 403 (1973). "The issue of whether an insurance company failed to defend its insured or pay a claim without just cause or excuse under K.S.A. 40-256 (now K.S.A.1972 Supp. 40-256) must be determined under the facts, circumstances, and law existing at the time the action against its insured was filed." *Id.* 212 Kan at 681, 512 P.2d at 404. (emphasis added). *See also Wolf v. Mutual Ben.*, 366 P.2d 219 (Kan. 1961) (Whether there is just cause is determined by "circumstances existing when payments are withheld or liability declined"). As noted by Judge Nixon and conceded by Lexington, "Lexington's 'defense obligations were triggered by Lexington as to any of the defendants in that complaint that qualified as insureds' under Lexington's policies as of Lexington's receipt of the complaint in August of 2005." *See* 12/30/10 Judgment Against Lexington, p. 15

As Judge Nixon found in the Court's 12/30/10 Judgment, Lexington considered providing a defense and indemnity to its insureds JCPRD and Malone in the underlying litigation "but decided not to" based on an exclusion which this Court has determined as a matter of law on its face did not apply. 12/30/10 Judgment, at 20; *see also* 7/21/09 Partial Summary Judgment in Favor of Judgment Creditors (Plaintiffs) Regarding Certain Defenses of Garnishee Lexington as to Coverage, at 15. The caselaw makes clear that an award of attorneys' fees is appropriate unless there was a "bona fide" dispute of material fact related to coverage, or if the law regarding coverage was unsettled – the insurer was

faced with a novel issue of law related to coverage or a split in authority. *See, e.g.*, *Carroll v. State Farm Mut. Auto. Ins. Co.,* 88-1260 C, 1989 WL 9335 (D. Kan. Jan. 19, 1989) (citing cases). Here, Judge Nixon has already determined that "there is no genuine issue as to any material fact related to Lexington's coverage" (12/30/10 Judgment, at 7), so the only issue remaining was whether Lexington was relying on some novel issue of law, or there was a split in authority. Neither is the case. Indeed, in its Response to Plaintiffs' Application for Award of Fees ("Response"), Lexington does not even attempt to argue that it had some novel or unsettled legal grounds for denying coverage.

"Circumstances are to be judged as they would appear to a reasonably prudent man having a duty to investigate in good faith and to determine the true facts of the controversy." *Watson v. Jones*, 227 Kan 862, 871 (Kan. 1980). "The possibility of coverage must be determined by a good faith analysis of all information known to the insured or all information reasonably ascertainable by inquiry and investigation." *Spruill Motors, Inc. v. Universal Underwriters Ins. Co.*, 212 Kan. 681, 686 (Kan. 1973). Lexington makes no effort to justify its reliance on a patently inapplicable sexual misconduct exclusion in deciding not to defend and indemnify its insureds JCPRD and Malone. The language of the exclusion Lexington relied on in denying a defense to JCPRD and Malone was neither vague nor ambiguous: it simply did not apply. This is the very definition of denying coverage "without just cause or excuse," which means that an award of attorneys' fees is mandatory under K.S.A. § 40-256.[4]

[4] In *Dodson*, after a bench trial on coverage, the court determined that the insurer had no just cause or excuse for failing to indemnify or defend its insureds based on a policy exclusion. Fees were awarded under K.S.A. 40-256 even though the policy exclusion the insurer relied on was held to be ambiguous. In contrast, this Court has determined as a matter of law the exclusion relied upon by Lexington "by its very language… is inapplicable" to JCPRD and Malone…" *See* 7/21/09 Partial Summary Judgment in Favor of Judgment Creditors Regarding Certain Defenses

Because the issue of whether an insurer's failure to defend was with just cause or excuse is to be determined when Lexington's defense obligations were triggered in 2005, it is not necessary for the Court to consider any of the after-the fact defenses raised by Lexington. However, even the arguments that Lexington has put forth after the fact do not rise to the level of "just cause or excuse." Indeed, all of these after-the fact defenses were rejected by this Court as a matter of law through summary judgment.

Nevertheless, Lexington seeks to focus the Court on these arguments put forth after the fact. How Lexington frames its arguments is telling. Lexington argues that its' "reasons for contesting coverage **in the garnishment actions** were not frivolous or patently without reasonable foundation." *See* Lexington's Response to Plaintiffs' Application for Award of Attorneys' Fees, at 22 (emphasis added). Since the focus of an inquiry as to whether Lexington had "just cause or excuse" is on the "circumstances existing when payments are withheld or liability declined," not at some point after the fact in litigation, these after-thought arguments should be disregarded. *Wolf*, 188 Kan. at 706. After the fact excuses should not be considered because "[a]ll the good faith…in the world after suit is filed will not immunize a company from the consequences of an unjustified refusal…." *Smith v. Blackwell*, 791 P.2d 158 (Kan. App. 1989). Notwithstanding, these arguments have been ruled against Lexington as a matter of law, and not one of the Court's rulings has involved a "novel" or "unsettled" issue of law. Moreover, Lexington has not even argued that any novel or unsettled issue of law was or is at issue in this case.

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of Garnishee Lexington as to Coverage, at 15. Unlike *Dodson*, there is no ambiguity in the exclusion Lexington relied on in denying coverage. It is undisputed the exclusion does not apply. *Dodson* also compels an award of fees in this case.

Courts have found that the determination of whether an insurer has failed to provide a defense and indemnity without just cause or excuse "is not difficult" when the insurer has taken "a strained position" with respect to "how it interpreted the policy it wrote." *Bingham's Estate v. Nationwide Life Ins. Co.*, 7 Kan. App. 2d 72, 80 (Kan. App. 1981), *aff'd as modified*, 231 Kan. 289 (Kan. 1982). Here, Lexington's position would certainly amount to such a "strained position" as it was, in fact, directly contrary to the language of its policy.

Finally, in considering the proper value of attorneys' fees to be awarded, the Plaintiffs recite their hours expended and the applicable rates. *See* Hearing on Amount of Reasonable Fee, 8/19/2011, exhibit 1. The total fee as recited by Plaintiffs is $3,875,634.05, for a combined total of 10,439.86 hours expended by attorneys and paralegals. The rates recited range from a high of $600 an hour for the most experienced shareholders to a low of $95 an hour for the least expensive paralegal. The blended rate for all attorneys and paralegals, as suggested by Plaintiffs, is $371.23 per hour. The Court believes that the number of hours put forth by Plaintiffs is reasonable based upon the breadth and complexity of this litigation. The Court also believes that the hourly rates requested by Plaintiffs represent the high end of hourly rate work charged by large firms in the Kansas City area. However, these rates would not be dissimilar to rates granted in Class Actions, and would not exceed the hourly rate of return on a variety of successful litigation where contingency fee arrangements are used.

Therefore, the Court approves the fees as suggested by Plaintiffs. Further, because of the duration of this litigation, the difficulty of the litigation, as well as the at times unreasonable positions taken and tactics used by defendants, the Court awards a

multiplier of 1.2, for a total attorneys' fee award of FOUR MILLION, SIX HUNDRED FIFTY THOUSAND, SEVEN HUNDRED SIXTY DOLLARS AND EIGHTY-SIX CENTS ($4,650,760.86).

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

(1) Judgment has been entered in this cause in favor of Plaintiffs in the amount of FIVE MILLION, FORTY THOUSAND DOLLARS ($5,040,000.00), in Judge Nixon's Summary Judgment of 12/30/2011.

(2) Lexington is granted offsets to this Judgment in the amount of TWO MILLION, THIRTY THOUSAND, EIGHT HUNDRED NINETY-NINE DOLLARS AND EIGHTY SEVEN CENTS ($2,030,899.87).

(3) Plaintiffs are therefore entitled to a Final Judgment in the amount of THREE MILLION, NINE THOUSAND, ONE HUNDRED DOLLARS AND THIRTEEN CENTS ($3,009,100.13), plus interest;

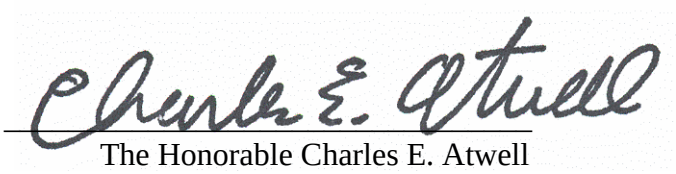
(4) Plaintiffs are also awarded their expenses in the amount of ONE HUNDRED FIFTY EIGHT THOUSAND, THREE HUNDRED EIGHTY-EIGHT DOLLARS AND TWENTY FOUR CENTS ($158,388.24);

(5) Additionally, reasonable attorneys' fees are awarded to Plaintiffs in the amount of FOUR MILLION, SIX HUNDRED FIFTY THOUSAND, SEVEN HUNDRED SIXTY DOLLARS AND EIGHTY-SIX CENTS ($4,650,760.86); and

(6) All other Costs are assessed against Lexington.

IT IS SO ORDERED.

Dated: 12-2-2011



The Honorable Charles E. Atwell

Certificate of Service

This is to certify that a copy of
The foregoing was delivered by mail or fax to
the following on this 2nd day of
December, 2011, by:

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