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No. 64193-0-I

(Consolidated with No. 64652-4-I)

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
SEATTLE

LEDCOR INDUSTRIES (USA) INC.

Appellant

v.

ACCURATE SIDING, INC. and STARLINE WINDOWS, INC.

Respondents.

BRIEF OF RESPONDENT STARLINE WINDOWS, INC.

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Case No. 64193-0-I

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I. INTRODUCTION

This appeal concerns the trial court's award of prevailing party attorney fees in favor of Starline Windows, Inc. ("Starline") and against Ledcor Industries (USA), Inc. ("Ledcor"). Ledcor raises two points on appeal. First, Ledcor argues that the award of prevailing party attorney fees to Starline, is actually an impermissible subrogation claim by Starline's insurer, Zurich. Second, Ledcor argues that the fees awarded to Starline are excessive.

Ledcor was the general contractor on the Adelaide project. Ledcor subcontracted with Starline for Starline to supply vinyl window and door products. The subcontract provided that if litigation arose between the parties over disputes of contract performance, the prevailing party was entitled to its attorney fees and costs.

Litigation did arise between the parties. Ledcor sued Starline, alleging breach of contract and various other causes of action. The litigation was a complex, multi-party, construction defect case. The homeowners associations for the two parts of the Adelaide project sued the developer, who sued Ledcor, who sued its subcontractors and suppliers. The two cases were consolidated for trial. Discovery commenced, including the depositions of the plaintiffs' experts, the

developer's experts, Ledcor's experts, and several lay witnesses, including Ledcor's employees and/or former employees. [*Supp. CP* ___, *Sub. # 357*].

None of the experts deposed, including Ledcor's own expert, testified that Starline's windows suffered from any defects. Ledcor's expert prepared an allocation of fault/damages, and testified that he did not allocate any fault or damages to Starline. Ledcor's employees and former employees testified that they were unaware of any defects in Starline's products. In short, by the end of January of 2008, at the conclusion of the depositions, there was no evidence that Starline's products suffered from any defects. At that point, Starline withdrew its prior settlement offers, and filed a motion for summary judgment. [*Supp. CP* ___, *Sub. # 357*].

Starline prevailed on its motion for summary judgment, and prevailed against Ledcor's motion for reconsideration. Starline also prevailed against Ledcor's claims, which had been bifurcated by the court, that Starline's contractual duty to defend Ledcor had been triggered, and that Starline had breached its alleged contractual duty to name Ledcor as an Additional Insured under any of its policies. Starline filed a motion for summary judgment regarding those issues. Ledcor did

not file any opposition. The trial court granted Starline's motion. Starline thereafter moved for prevailing party attorney fees pursuant to its subcontract. *[CP 212-S-213-S]*.

After reviewing the briefing submitted by Starline and Ledcor, the trial court determined that the fees incurred by Starline were reasonable, and that the fee request by Starline pursuant to its subcontract, was not a subrogation claim by Zurich under its policy.

II. STATEMENT OF THE CASE

Starline's first offer to Ledcor to settle this claim was in October of 2008.¹ *[CP 194-S]*. Starline offered to pay Ledcor \$1,600 to settle the Townhome portion of the suit, and requested that Ledcor dismiss Starline from the Condo Tower portion of the suit. Starline re-opened that offer on January 9, 2009. *[CP 194-S]*.

Ledcor responded on January 11, 2009 by demanding \$3,200 for the Townhomes only, and deferring a decision on the Condo Tower portion of the suit. *[CP 194-S]*. On January 12, 2009, Starline

¹ Starline objected in the trial court to the introduction of settlement negotiations that were protected by ER 408 and/or by statute. The trial court's decision awarding Starline's attorney fees ruled that such communications were relevant to the issue of attorney fee awards. Starline disagrees with that ruling, but has not cross-appealed that issue.

responded, in part, by stating that its prior offer of \$1,600 was generous, given the evidence known at that time. Starline also reminded Ledcor that although the expense of defending Starline further would exceed Starline's \$1,600 offer, the parties did have a prevailing party attorney fee provision in their subcontract. *[CP 196-S]*. Ledcor responded that same day by offering to "split the difference" at \$2,500, but again for the Townhomes only. *[CP 196-S]*.

On January 28, 2009, after the depositions of Starline, Ledcor, and the experts (including Ledcor's own expert), were completed, *[CP 45-S]*, Starline withdrew all previous offers. *[CP 200-201-S]*. Shortly thereafter, Starline filed its motion for summary judgment.

Starline ultimately prevailed on its motion for summary judgment, and successfully opposed Ledcor's motion to reconsider, as well as prevailing on the bifurcated issues of Starline's contractual duty to defend and contractual duty to name Ledcor as an Additional Insured on Starline's insurance policy. *[CP 212-S-213-S]*.

Starline then moved for its attorney fees and costs pursuant to its subcontract. After significant briefing, including a continuance to allow Ledcor to depose Zurich's adjuster for the Starline claim, and Starline's defense counsel, the trial court granted Starline's motion, awarding all of

the fees and costs requested by Starline. [CP 442-S-450-S]. Zurich, one of Starline's insurance carriers, was never a party to the litigation, including the motion for attorney fees. Zurich has never been determined to be the real party in interest, nor did Ledcor ever move the trial court for such a determination.

As Ledcor points out at Page 8 of its brief, the hearing on Starline's motion for summary judgment was delayed because of the court's schedule. As Ledcor also concedes, that interim period was the time when the majority of Starline's attorney fees were incurred. Ledcor could have mitigated its exposure for attorney fees by simply dismissing all of its claims against Starline, rather than futilely opposing Starline's summary judgment motion and keeping Starline in the litigation. However, Ledcor chose not to do so.

III. LEGAL ARGUMENT

A. Starline's Motion for Prevailing Party Attorney Fees Was Not a Subrogation Claim by Zurich.

Ledcor continually tries to characterize Starline's motion for prevailing party attorney fees pursuant to its subcontract with Ledcor, as a subrogation claim by Zurich. Ledcor's characterization is factually erroneous and without any basis in law.

Starline is the party that Ledcor sued and Starline is the party that prevailed against Ledcor. Zurich has never been a party to this action. It was not Zurich who filed a motion for summary judgment and a motion for prevailing party attorney fees in this action, it was Starline.

Ledcor's argument that Starline's claim for prevailing party attorney fees is a subrogation claim, and is therefore barred by the anti-subrogation rule, is without any legal support. Ledcor correctly cites Washington law for the definition of subrogation. Under that definition, subrogation is “[t]he principle under which an insurer that has **paid a loss under an insurance policy** is entitled to all the rights and remedies belonging to the insured with respect to any loss covered by the policy.” *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 423, 191 P.3d 866 (2008). [Emphasis added]. Zurich has not paid a loss under the policy. In fact, its insured, Starline, was dismissed on summary judgment. Zurich has not paid any loss on behalf of Starline, and it is therefore not seeking to recover a loss from Ledcor.

In *Chubb Ins. Co. v. DeChambre*, 349 Ill.App.3d 56, 60 808 N.E. 2d 37, 41, (2004) another case cited by Ledcor, the court observed

that "[T]he doctrine of subrogation is a creature of chancery and is a method whereby one who has involuntarily paid a debt or claim of another succeeds to the rights of the other with respect to the claim paid." A claim for prevailing party attorney fees does not fit within that definition, or within any definition of subrogation provided in cases cited by Ledcor. Ledcor has cited no Washington case, indeed no case at all, holding that prevailing party attorney fee claims are subrogation claims.

This is underscored by Ledcor's citation to the trial court below of Zurich's insurance policy with Starline. Ledcor correctly pointed out that defense costs are not **damages** under the policy. [*CP 235-S-236-S*]. Under the policy language cited by Ledcor, defense costs are not losses paid under the policy. If they are not losses paid under the policy they do not qualify as a subrogation claim, by definition. If defense costs do not qualify as a subrogation claim, then the anti-subrogation rule upon which Ledcor relies, is inapplicable.

In its brief, at Page 23, Ledcor baldly asserts that "subrogation is not limited to reimbursement for payment of a loss", and that "it makes no difference whether payments are for defense or indemnity, it is still

subrogation.” Ledcor cites no authority for its assertions. Providing a defense to its own insured is not comparable to an insurer paying a loss to a third party on behalf of its insured. Ledcor has cited no authority that they are comparable.

Ledcor's assertion that Zurich is the real party in interest here is also unsupported. Zurich is clearly not a named party in this litigation. No motion has been made by anyone, and no order entered by the trial court, naming Zurich as the real party in interest. Starline is pursuing an award of prevailing party attorney fees based upon its subcontract with Ledcor. It is not a claim being made by Zurich under its policy. The position of Zurich as a third-party provider of Starline's defense costs is not relevant to whether Starline is entitled to prevailing party attorney fees under its contract with Ledcor. As the U.S. Circuit Court of Appeals for the Seventh Circuit observed "...the wages of staff counsel do not matter; the court should make an award representing the cost the victorious litigant would have incurred to buy legal services in the market, no matter how the litigant actually acquired those services." *Central States, Southeast & Southwest Areas Pension Fund v. Central Cartage Co. & Central Transport, Inc.*, 76 F.3d 114, 117, (7th Cir.), cert.

denied, 519 U.S. 811 (1996).

As part of its subrogation argument, Ledcor asserts that “Zurich did not dispute that Ledcor was an additional insured under its policy,....” [*Ledcor’s brief at page 7*]. Ledcor cites CP 280-281-S as evidence supporting that assertion. However, that citation does not support Ledcor’s argument. The citation is to a portion of the deposition of the Zurich adjuster, Howard Schlenker. There is nothing in that exchange where Zurich agreed that Ledcor was an Additional Insured under the Starline’s Zurich policy. Ledcor’s assertion is simply untrue.

The trial court never determined that Ledcor is an Additional Insured under Starline’s Zurich policy and that issue is not before this Court on appeal. By way of comparison, Ledcor did assert in the trial court, during Starline’s summary judgment proceeding, that AIG acknowledged that Ledcor was an Additional Insured under Starline’s AIG policy. [*Supp. CP ___, Sub #443, 415*]. Ledcor has offered no evidence supporting its assertion that Zurich conceded that Ledcor was an Additional Insured under Starline’s Zurich policy.

Likewise, Ledcor has not cited any authority for its proposition that the “flow down” provision in Starline’s subcontract automatically made Ledcor an Additional Insured under Starline’s Zurich policy. If

Ledcor is not an Additional Insured under Starline's Zurich policy, Ledcor's subrogation argument is baseless.

B. The Trial Court's Award of Prevailing Party Attorney Fees Was Not Excessive.

1. Washington has adopted the lodestar method for awarding prevailing party attorney fees.

Ledcor complains that Starline's defense counsel is staff counsel to Zurich, and as staff counsel, does not actually bill either Zurich or Starline for its attorney fees and costs. Ledcor then argues that any award of attorney fees is thus a "windfall" to Zurich. This issue has already been addressed by Washington, in a case cited by Ledcor.

The question of whether staff counsel is eligible for an award of prevailing party attorney fees has been settled since at least 1992. In *Metropolitan Mortgage & Security Co. v. Becker*, 64 Wn.App. 626, 825 P.2d 360 (1992) the Court of Appeals rejected the arguments that awarding fees to in-house counsel would be a windfall for the corporation, and that in-house counsel's fee award should be based on in-house counsel's salary rather than the lodestar method. In Washington, the lodestar method of determining an attorney fee award is

equally applicable to in-house counsel as it is to all other counsel. The Seventh Circuit agrees. *Central States, supra*.

Also in accord is California. In rejecting the "cost plus" approach in favor of the lodestar method in determining attorney fee awards for in-house counsel, the California Supreme Court observed that:

the market value approach has the virtue of being predictable for the parties to administer. By contrast, the cost-plus approach, in addition to being cumbersome, intrusive, and costly to apply, may distort the incentives for settlement and reward inefficiency.

The court went on to say that:

We do not want a [trial] court, in setting an attorney's fee, [to] become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It ... is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps dwarfing the case in chief. Indeed, such wholly ancillary litigation on the question of salaries and costs and the internal economics of a law office could lead to an increase rather than a diminution of the costs of fee awards....

Requiring trial courts in all instances to determine reasonable attorney fees based on actual costs and overhead rather than an objective standard of reasonableness, i.e., the prevailing market value of comparable legal services, is neither appropriate nor practical; it "would be an unwarranted burden and bad public policy."

The Lodestar method has long been the rule in Washington for determining attorney fee awards. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983). Washington has specifically declined to adopt a different rule for fee awards to in-house counsel.

2. Starline's Attorney Fees Are Reasonable.

The lodestar method, i.e. multiplying the reasonable number of hours expended by a reasonable hourly rate, is the starting point for determining a reasonable fee award. *Absher Construction Co., v. Kent School Distr. No. 415*, 79 Wn.App. 841, 846-47, 917 P.2d 1086 (1996). From there, the court may make adjustments up or down, depending on circumstances relevant to each specific case. *Absher, supra*. However, if the court decreases the requested fees by a substantial amount, it must indicate on the record how it arrived at the final award and why the discounts were applied. *Absher, supra*, at 849.

Starline submitted ample evidence that its hourly rate is reasonable for the type of work performed, in the Seattle area, given the experience level of defense counsel. [*CP 308-S, 348-S-353-S, 386-S-407-S*]. The trial court had substantial evidence upon which to approve the hourly rate for Starline's attorney.

Ledcor next claims that some of the time spent by defense counsel or paralegals was improper for a variety of reasons. Ledcor made the same allegations to the trial court, as is evidenced by Ledcor's

citation to the Clerk's Papers. Starline responded to Ledcor's claims in the trial court, pointing out that Ledcor mischaracterized defense counsel's deposition testimony or declaration, or simply made incorrect factual statements. [CP308-S-311-S]. Ledcor did not identify then, nor does it identify now, any specific entries or dollar amounts that it thinks are not recoverable.

Ledcor's final argument that Starline's fees are unreasonable is that the fees are far in excess of the amount in controversy. Ledcor relies upon *Absher*. However, *Absher* is different on its facts.

In *Absher* the Court of Appeals reduced the defendant's request for appellate fees by 30%. The defendant school district had been sued for \$205,000. It prevailed on a motion for summary judgment and was awarded \$34,648 in prevailing party attorney fees by the trial court.

The plaintiff appealed and the defendant prevailed on appeal. The defendant then requested an additional \$36,911 in appellate fees. The Court of Appeals did not disturb the trial court's award of fees. However it did discount the appellate fees by 30%. In doing so, the court observed that the case came to it as an appeal from a grant of summary judgment. As such the review was limited to the record presented in the trial court, and the only issue on review was whether the respondent was entitled to summary judgment as a matter of law. In such circumstances, it would only be the exceptional case where the

reasonable fees incurred to defend a summary judgment on appeal should exceed the reasonable fees incurred to secure the summary judgment in the trial court. In addition, the court noted that the defendant school district would benefit from the decision in parallel or ancillary litigation. It would therefore not be reasonable for the plaintiff to bear the full expense of the defendant's fees. The situation in *Absher* is not present here.

In the trial court, Leducor also cited *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993). Leducor does not cite *Fetzer* in its opening brief. *Fetzer* is not applicable on its facts. [CP 220-S at footnote 20, and CP 221-S].

Here, Leducor's recalcitrance forced Starline to incur significant defense costs. Leducor refused to settle in October of 2008 and it refused again to settle in January of 2009. In a case where Leducor must have known that its own expert and its own employees would testify that the Starline products were not defective, Leducor refused to dismiss its claims against Starline, and refused to accept a nominal settlement. Instead, Leducor forced Starline to participate in the depositions of the experts for the homeowner associations, the experts for the developer, Leducor's own expert, Leducor's employees, and Starline's 30(b)(6) designee. The sum total of that entire discovery was that Leducor had no

evidence to support any claim against Starline, which the trial court ultimately found when it granted Starline's summary judgment motion.

Under Ledcor's theory, it is entitled to attempt to extract relatively modest settlement money from Starline in a circumstance where Starline has no liability. If Starline then successfully defends against those claims instead of agreeing to a settlement, then under Ledcor's theory, Starline is not entitled to its prevailing party attorney fees as provided in its contract. Neither *Absher* nor *Fetzer* stand for that proposition. Ledcor cites no authority for its argument.

IV. CONCLUSION

There was substantial evidence to support the trial court's order awarding Starline its attorney fees and costs. The trial court had substantial evidence supporting the hourly rate charged, and substantial evidence supporting the time expended. Despite Ledcor's general complaints about certain task descriptions, Ledcor failed to identify any specific time entries it was contesting. The trial court did not abuse its discretion in awarding the amount of attorney fees it did.

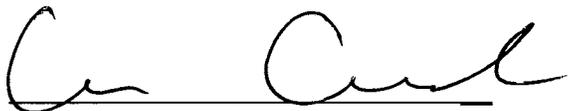
Ledcor's main complaints on appeal, i.e. that the attorney fee award to Starline is actually a subrogation claim by Zurich, and that it is impermissible for staff counsel to be awarded prevailing party attorney fees, are without basis in law. Ledcor cites no authority for its novel proposition that prevailing party attorney fees awarded to Starline

pursuant to its subcontract with Ledcor, constitute a subrogation claim by Zurich. Ledcor is merely trying to escape its contractual obligation to Starline. Ledcor's argument that staff counsel should not be awarded prevailing party attorney fees is contrary to well-settled Washington law.

Starline requests that this Court affirm the trial court's order awarding prevailing party attorney fees to Starline, and that it award Starline its fees and costs on appeal under RAP 18.1.

DATED this 23rd day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that on the 23rd day of June, 2010, I caused to be served a true and accurate copy of the foregoing Brief of Respondent Starline Windows, Inc. on the Court of Appeals and Counsel/Parties in the manner indicated:

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