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No. 64193-0-I

[Consolidated with No. 64652-4-I]

COURT OF APPEALS,  
DIVISION I OF THE STATE OF WASHINGTON

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LEDCOR INDUSTRIES (USA) INC.,

Appellant,

v.

ACCURATE SIDING, INC.; and, STARLINE WINDOWS, INC.,

Respondents.

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REPLY BRIEF OF APPELLANT

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Appellant Ledcor replies to Starline's Brief of Respondent.

## I. SUMMARY OF ARGUMENT

### A. **The Anti-Subrogation Rule Applies and Bars an Insurer from Seeking Subrogation from a Co-Insured.**

The first issue raised by Ledcor in its appeal is whether the anti-subrogation rule applies and precludes an insurer from seeking recovery from a co-insured. Starline offers three arguments why it believes the rule does not apply. None of its arguments are persuasive.

First, Starline argues Ledcor is not an additional insured under the Zurich policies. Starline is wrong. Starline judicially admitted Ledcor was an additional insured under the Zurich policies to the trial court. In addition, Ledcor proved it was an additional insured in its opening brief.

Second, Starline argues Zurich is not a party to the litigation and thus cannot seek subrogation. Again, Starline is wrong. Because Zurich controlled the litigation and paid for all of Starline's fees and costs, it is the real party in interest. Furthermore, the subrogation doctrine allows Zurich to step into Starline's shoes and recover the defense fees and costs it paid on behalf of Starline without being a named party – precisely what it is attempting to accomplish in this case.

Third, Starline argues recovery of defense fees is not a "loss"

recoverable in subrogation, yet Starline paid no fees at all and any recovery under the prevailing party fee provision of the purchase order subcontract goes directly to Zurich. Starline interprets the subrogation doctrine far too narrowly. Subrogation is a liberally applied equitable doctrine, which allows an insurer to recover amounts it paid to or on behalf of its insured from a third party. It does not matter whether those payments are characterized as a loss, damage, claim, debt, or benefit.

Each of Starline's three arguments addresses why it thinks the anti-subrogation rule does not apply. Starline implicitly (and correctly) assumes that, if the rule applies, it bars Zurich from seeking subrogation from a co-insured. Therefore, by Starline's own tacit admission, if the Court finds the anti-subrogation rule applies, Zurich is barred from seeking fees from Ledcor.

**B. The Trial Court's Fee Award was Excessive.**

The second issue raised by Ledcor in its appeal is whether the fee award was excessive. In response, Starline argues the fee award was reasonable because it followed the lodestar method and a fee award is not prohibited to salaried in-house counsel. *Respondent's Brief, p. 12.*

Although the lodestar method may be the starting point for a fee award

calculation, a fee award calculated solely by the lodestar method is not *per se* reasonable and a fee award to a salaried in-house insurance counsel should be closely monitored to avoid a windfall to the insurer.

The “invoices” created by Zurich and submitted by Starline do not satisfy the factors set forth in *Absher Construction v. Kent School District*, 79 Wn. App. 841, 917 P.2d 1086 (1995) (e.g., the fees expended should not exceed the amount in controversy, unnecessary and duplicative work should be discounted, and administrative work by paralegals is not recoverable). Here, the fee award was 30 times the amount in controversy. In addition, there were multiple paralegal entries for non-legal work and numerous entries for duplicative and unnecessary work.

Finally, the fee award will result in a windfall to an insurance company which never paid the hourly fees it seeks to recover. The *Absher* factors require Starline’s fee award be greatly reduced on remand if it is allowed at all.

## II. ARGUMENT

- A. **The Anti-Subrogation Rule Precludes Zurich’s Subrogation Claim Against Ledcor, a Co-Insured Under Its Policies.**
1. **Starline is judicially estopped from denying Ledcor is an additional insured under the Zurich policies.**

Starline is judicially estopped from denying Ledcor is an additional insured under the policies Zurich issued to Starline. Judicial estoppel precludes a party from gaining an advantage by taking one position and then seeking a second advantage by subsequently taking an incompatible position. *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001). The purposes of the doctrine are to preserve respect for judicial proceedings and avoid inconsistency. *Id.* Where a party benefitted from a prior inconsistent position or its prior position was adopted by the court, judicial estoppel applies. *Id. at 904.*

On appeal, Starline, for the first time, takes the position Ledcor is not an additional insured under the Zurich policies. *Respondent's Brief at p. 9.* In the trial court, Starline took the exact opposite position, which resulted in a ruling in its favor. Starline filed a supplemental brief seeking to dismiss Ledcor's breach of insurance obligations claims by representing to the trial court:

By naming Ledcor as an Additional Insured on its CGL policies, Starline fulfilled any contractual obligation it may have had. Ledcor's dispute is with Starline's carriers. Ledcor is in the same position as any other insured whose carrier denies coverage for a claim, or reserves its rights on a claim. Starline never agreed to insulate Ledcor from typical insurer/insured disputes. *Suppl. CP 2428-2441.*

Relying on Starline's representation that Ledcor had been named as an additional insured on Starline's CGL policies, the trial court dismissed Ledcor's insurance claims. *CP 1-4S*. Because Starline benefitted from its prior position, it is estopped from changing its position now. Moreover, for the sake of argument, even if judicial estoppel does not apply, Ledcor proved it is an additional insured in its opening brief under the WHO IS AN INSURED portion of the policy. *CP 297-S*.

**2. By controlling and financing the litigation, Zurich is the real party in interest and subrogation allows Zurich, a non-party, to step into Starline's shoes and seek subrogation for its payment of Starline's fees.**

Starline's second argument is Zurich cannot seek subrogation because it is not a party to this lawsuit. *Respondent's Brief at p. 8*. Starline submits no legal authority to support its statement and its argument is disingenuous at best.

Case law from other jurisdictions illustrates Zurich is the real party in interest, even though it is not a named party. *Ohio Cent. R.R. Sys. v. Mason Law Firm Co., L.P.A.*, 182 Ohio App.3d 814, 825-26, 915 N.E.2d 397 (2009), held "where an insurance company pays the entire amount of a judgment, pursuant to a policy issued to an insured tortfeasor, and thereby becomes subrogated to that claim, the insurance company is the sole real

party in interest in a subsequent action brought to recover the amount of that loss.” *See also Leyden v. Square Arch Realty Corp.*, 164 Misc.2d 769, 626 N.Y.S.2d 352 (1995) (explaining the insurer is the real party in interest to an owner’s claims against a contractor when the insurer assumes the owner’s defense in the underlying claim).

In *Prosperity Realty, Inc. v. Haco-Canon*, 724 F.Supp. 254 (S.D. New York 1989), a third party defendant moved to substitute the insurer for the insured-owner.<sup>1</sup> The defendant argued the insurer controlled the litigation on the insured’s behalf and thus should be the named plaintiff. The court found it unnecessary to substitute the insurer as the named party because “as a practical matter ... the insurance company will control the prosecution no matter in whose name it is brought.” *Id.* at 257, *citing C. Wright & A. Miller, Federal Practice and Procedure* § 1546 at 656.

Zurich would be considered an opposing party even though it was not a named party under CR 13(a), which requires compulsory counterclaims to be brought against opposing parties if the claim arises out of the same transaction. Where an insurer was not named as a party, the

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<sup>1</sup> New York law is similar to Washington law regarding the interpretation of insurance policies. New York law is also persuasive in analyzing the anti-subrogation issue because “no jurisdiction has developed the anti-subrogation rule as much as New York.” *See* 4 Bruner & O’Connor Construction Law § 11:101 (2006).

court acknowledged the insurer-subrogee was an “opposing party” under CR 13(a) because the insurer controlled the litigation and was very closely identified with the named opposing party. *Avemco Insurance Co. v. Cessna Aircraft Co.*, 11 F.3d 998 (10th Cir. 1993). Likewise, the Second Circuit held an unnamed party may still constitute an opposing party in cases where the unnamed party is functionally identical to the named party. *See Banco Nacional de Cuba v. First National City Bank of New York*, 478 F.2d 191, 193 (2d Cir. 1973). In *Banco*, the court determined the parties were “one and the same for the purposes of [the] litigation.” *Id.*

In this case, Starline paid none of its own defense fees and costs. Zurich controlled the litigation and paid for 100 percent of Starline’s defense fees and costs. Zurich never sent any invoices to Starline. Any payment of prevailing party fees by Ledcor will necessarily go to Zurich – there is no place else for the money to go. Thus, Zurich must be considered the real party in interest even though it is unnamed.

The Washington Court of Appeals has held an insurer is the real party in interest when it is “the moving force behind the suit” and “in control of the action.” *See Carle v. Earth Stove, Inc.*, 35 Wn. App. 904, 670 P.2d 1086 (1983). In *Carle*, the plaintiffs sued the defendant stove

manufacturer to recover for fire damage allegedly caused by a defective stove. The defendant stove manufacturer prevailed and was awarded attorney fees in excess of \$15,000.00 against the plaintiff. The defendant sought to add the plaintiff's insurer (who had paid the fire damages and was seeking subrogation from the defendant) as a party following entry of judgment in order to recover the judgment for fees. The trial court declined to add the plaintiff's insurer to the action. The Court of Appeals reversed this decision, holding the plaintiff's insurer should have been added after judgment had been entered against the plaintiff because, as a practical matter, the plaintiff's insurer was a party to the suit. *Id.* at 907. Similarly, even though Zurich is not a named party, it is, nevertheless, "as a practical matter [,] a party to the suit." *Id.*

Both Zurich's claims representative and in-house counsel testified they controlled the litigation on behalf of Starline. Howard Schlenker, the claims adjuster for Zurich, testified he made the decision to offer Ledcor a sum of money to settle and that, if a settlement was reached, he would transmit the settlement funds to Zurich's in-house counsel. *CP 276, 279.* Mr. Schlenker testified he "would be the one to tell counsel to go ahead and make a demand and to do things like send settlement offers." *CP 279.*

He did not “recall” whether he contacted the client, Starline, regarding settlement offers and demands that had been made. *Id.*

Kenneth Cusack, Esq., Zurich’s in-house counsel, testified he took instructions from Mr. Schlenker. For example, on Mr. Schlenker’s instructions, Mr. Cusack wrote and signed a letter to Ledcor’s counsel withdrawing a previous settlement offer of \$1,600.00. *CP 278.* Mr. Cusack testified his authority to extend the \$1,600.00 settlement offer came directly from Mr. Schlenker, not from Starline:

Q. Did you have any authority from the client?

A. No, the authority was from the adjuster to settle. *CP 257.*

Thus, Zurich is the only entity with a direct interest in recovery of the fee award. Mr. Cusack supported this proposition when describing the billing procedure for Zurich:

Q. And do you know why Zurich requires you to keep time on your cases?

A. I know some of the reasons.

Q. Tell me the reasons you do know.

A. We have billing requirements, annual billing requirements per attorney, so they track that. There are occasions – well, my understanding is that time attorneys and paralegals bill to a claim file is charged against the claim file. There are situations where our client, the insured, has other carriers

that are triggered. If they accept a tender of defense they can either hire their own counsel to be co-counsel with me or they can just use me and share my expense with Zurich. In that case Zurich uses those billing statements to give them their share. **In a situation like this where Zurich pursues prevailing party attorney fee, they use the bills for that.** CP 253.

...

Q. I take it, then, that you have never been involved in a situation where a case that you have worked on, Zurich has tried to recoup your fees and costs from its insured?

...

A. I think so. This is the first case that Zurich has tried to recoup fees that I have generated.

**Q. And they are trying to get the fees from Ledcor, not from Starline, right?**

**A. Correct.**

CP 256 (*emphasis supplied*). Zurich was looking out for its own pecuniary interests when it drove up the cost of litigation to increase the amount of its prevailing party fee award. Starline played no role whatsoever in that process.

By appointing its own in-house counsel, controlling the litigation, and paying all of Starline's defense fees and costs, Zurich is the real defendant for purposes of seeking a fee award. *See Bennett v. Troy Record Co.*, 25 A.D.2d 799, 269 N.Y.S.2d 213 (1966) (which held "the relationship between a defendant and an insurance company is so closely

related as to the subject matter of the lawsuit that as a matter of fact, if not in law, the insurance company is the real and actual defendant, the real party in interest”); *Springer v. West*, 769 So.2d 1068 (Florida Ct. App. 2000) (which explained “it is the insurer whose money is at stake that is the real party in interest and who is defending in the name of its insured. That is why the insurer controls the defense, even to the extent of naming the lawyer”); *Virginia Electric & Power Co. v. Westinghouse*, 485 F.2d 78 (4<sup>th</sup> Cir. 1973) (which held an insured may maintain an action to recover for an entire loss without joinder of its insurer, which has a subrogation claim, because it is not an indispensable party).

Given the testimony of Zurich’s claims representative and in-house counsel, Zurich admits it is the real party in interest even though it is not a named party. For purposes of a fee award in this litigation, Starline and Zurich are “one and the same.” The subrogation doctrine allows Zurich to step into Starline’s shoes and recover what it paid to Starline without being a named party.

**3. Subrogation encompasses Zurich’s attempt to recover its defense fee payments to Starline from a third party.**

Starline next argues Zurich cannot seek subrogation because subrogation only applies when an insurer has paid a “loss” to a third party

under a policy, and the payment of defense fees is not a “loss.”

*Respondent’s Brief at p. 6.* However, subrogation is much broader than Starline claims. It is not limited to an indemnity payment by an insurer to a third party on behalf of its insured. Further, Zurich’s policy provides a right of subrogation for payments made on behalf of its insured. *CP 295.*

Traditional subrogation is “an equitable doctrine involving three parties, permitting one who has *paid benefits* to one party to collect from another.” *Winters v. State Farm*, 144 Wn.2d 869, 875, 31 P.3d 1164 (2002) (*emphasis added*). Zurich paid benefits on behalf of its insured and is seeking to collect those benefits from a third party. One of the primary benefits of an insurance policy is the insured’s right to have its insurer provide and pay for a defense. *Truck Ins. Exch. v. VanPort Homes*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002).

The essential purpose of subrogation is to provide for an equitable allocation of payment responsibility; it seeks to impose the ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, should bear it. *Mahler v. Szucs*, 135 Wn.2d 398, 411, 957 P.2d 632 (1998). Subrogation allows an insurer to step into the shoes of an insured to recover what it paid to the insured from a third party.

*Touchet Valley Grain Growers v. Opp & Seibold General Constr.*, 119 Wn.2d 334, 341, 831 P.2d 724 (1992). Subrogation occurs when one person is substituted in the place of another with reference to a lawful claim. *See State Farm v. Weiss*, 194 P.3d 1063, 1066 (Colo. App. 2008).

Regardless of whether Zurich's payment of Starline's defense fees and costs is characterized as a loss, claim, damage, debt, payment, or benefit, it falls within the broad purview of the subrogation doctrine. A "loss" is defined as "the amount of a claim on an insurer by an insured." WEBSTER'S II New Riverside University Dictionary (1984). A "claim" is defined as "money demanded in accordance with an insurance policy or formal arrangement." *Id.* A "debt" is defined as:

A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future. In a still more general sense, that which is due from one person to another whether money, goods or services.

BLACK'S LAW DICTIONARY (6<sup>th</sup> Ed. 1991). A claim, according to the Washington State Supreme Court, includes prevailing party fees. *McGuire v. Bates*, \_\_\_ P.3d \_\_\_, WL 2616010 (July 1, 2010). Attorney's fees incurred in defending construction defect claims are an element of damages. *Jacob's Meadow v. Plateau 44 II, LLC*, 139 Wn. App. 743, 760, 162 P.3d 1153 (2007).

Subrogation applies to each of the above terms and it also applies to payments made by the insurer. Zurich's policy allowed subrogation for "any person or organization to or for whom we make *payment*." CP 295 (*emphasis supplied*). In a policy drafted by Zurich, it chose to use the broad term "payment" because it did not want to exclude attorney fees and costs from its subrogation rights. Defense costs incurred by a liability insurer may be considered a "payment" within the meaning of a policy provision, making the insurer subrogated to all of the insured's rights or recovery in the event of a "payment" under the policy. *See Couch on Insurance* § 223:12 (2005).

In a negligence action where the defendant's insurer successfully defended against the plaintiff's claims, the insurer sought subrogation to recover the defense costs it had paid. *Neal v. Neal*, 219 Mich. App. 490, 494-96, 557 N.W.2d 133 (1996). The plaintiff opposed an award of defense costs by arguing subrogation only applied to the payment of the claim under the policy and had nothing to do with the costs of defense. *Id.* The court, however, held defense costs incurred by the insurer were payments, and the insurer could recover those payments from the plaintiff under the doctrine of subrogation. *Id.*

The subrogation doctrine allows Zurich to step into Starline's shoes and seek recovery of the payments made on behalf of Starline from a third party, Ledcor, under the construction contract between Ledcor and Starline. However, because Zurich paid Starline's defense fees and costs under the same policy it insured Ledcor, if the anti-subrogation rule applies, it bars Zurich's subrogation claims against Ledcor.

**4. Whether the anti-subrogation rules applies where a plaintiff co-insured asserted claims against a defendant insured, the defendant insured prevailed, and the defendant's insurer seeks to recover its defense fee payments from a co-insured is a matter of first impression in Washington.**

The anti-subrogation rule has been recognized and applied in Washington. *See Frontier Ford v. Carraba*, 50 Wn. App. 210, 121, 747 P.2d 1099 (1987). It is a matter of first impression in Washington whether the anti-subrogation rule applies in a setting where a plaintiff co-insured asserted claims against a defendant insured, the defendant insured prevailed, and the defendant's insurer attempted to recover defense fees from the plaintiff co-insured. Subrogation is a flexible and elastic equitable doctrine, and the mere fact the doctrine of subrogation has not been previously invoked in a particular situation is not a bar to its applicability. *Neal*, 219 Mich.App. at 496. "Subrogation is always

liberally allowed in the interests of justice and equity.”<sup>2</sup> *J.D. O’Malley v. Lewis*, 176 Wash. 194, 201, 28 P.2d 283 (1934).

In this case, Ledcor, a co-insured, asserted claims against Starline, and Starline prevailed in defending against Ledcor’s claims. Zurich, their common insurer, then stepped into Starline’s shoes to seek recovery of the fees and costs it paid out to defend its insured from its co-insured’s claims.

A nearly identical scenario was recently before the Colorado Court of Appeals; the same issues were raised, but not resolved. *Boulder Plaza Residential, LLC v. Summit Flooring, LLC*, 198 P.3d 1213 (Colo. App. 2008). In *Boulder Plaza*, a condominium developer brought an action against a general contractor and a subcontractor for construction defects. *Id.* at 1214-15. The developer settled with the general contractor and took an assignment of the contractor’s claims against the subcontractor. The developer went to trial against the subcontractor and lost. Thereafter, the subcontractor filed a motion for prevailing party fees against the developer under the prevailing party fee provision in its subcontract. The motion

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<sup>2</sup> Subrogation is a legal fiction, which allows an entity who pays the debt of another to substitute or subrogate to the rights and remedies of the other. It applies in many types of cases, including cases involving multiple claims upon the same property, suretyships, joint debtors, parties to bills and notes, administration of estates, and contracts of insurance. *Mahler v. Szucs*, 135 Wn.2d 398, 412, 957 P.2d 632 (1998).

was granted and fees were awarded. *Id.*

The developer appealed the fee award. It made two arguments: (1) the anti-subrogation rule applied to bar recovery of a fee award because the general contractor was an additional insured under the subcontractor's policy; and (2) although not a named party, the insurer was the real party in interest. *Boulder Plaza, supra*, 198 P.3d at 1216. The Colorado Court of Appeals, however, declined to address those arguments, holding the anti-subrogation rule did not apply because the developer was not an insured under the policy.<sup>3</sup> *Id.* According to the Court, the assignment from the contractor to the developer did not include an assignment of the contractor's policy. *Id.*

Unlike the developer in *Boulder Plaza*, *Ledcor is*, in fact, an insured under the same policy under which Zurich paid all of Starline's defense fees and costs. The missing piece in *Boulder Plaza* is not missing here. As such, the context is ripe for application of the anti-subrogation

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<sup>3</sup> The Court of Appeals stated:

Here, even if we assume, as [the developer] contends, that the anti-subrogation rule may be asserted by a co-insured which asserted claims against an insured [*citation omitted*], and that [the insurer's] status as a non-party is irrelevant because it is the real party in interest, the anti-subrogation rule does not apply because [the developer] is not an insured party.

rule.

**5. The anti-subrogation rule applies and bars Zurich's subrogation claim against Ledcor, a co-insured.**

Under the circumstances of this case, the anti-subrogation rule applies and bars Zurich's subrogation claim against Ledcor, a co-insured under its policy. Starline implicitly concedes that, if the anti-subrogation rule applies, it bars recovery of defense fees and costs from Ledcor.

There are sound reasons to apply the anti-subrogation rule in this setting because it prevents an insurer from passing a payment back to an insured and guards against conflicts of interest. Under the anti-subrogation rule, "no right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty." *Mahler v. Szucs*, 135 Wn.2d 398, 419, 957 P.2d 632 (1998), citing *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341, 346 (1976). The purpose of the anti-subrogation rule is twofold: "(1) it prevents the insurer from passing the loss back to the insured, an act that would avoid the coverage that the insured had purchased; and (2) it guards against conflicts of interest that might affect the insurer's incentive to provide a vigorous defense for its insured." *See*

*DeHerrera v. American Family Mutual Ins. Co.*, 219 P.3d 346, 351 (Colo. App. 2009).

Applying the anti-subrogation rules here serves both purposes. First, Starline purchased the policy in part to cover Ledcor as an additional insured as it was contractually obligated to. If Starline did not name Ledcor as an additional insured on its CGL policies, it would not have been awarded the subcontract for the doors and windows at the project.

Second, Zurich has a conflict of interest because whenever an insurer seeks to recover money it has paid on behalf of an insured from a co-insured under the same policy, there is an inherent conflict of interest. Zurich is placing its own pecuniary interests ahead of the interests of a co-insured. An insurer cannot place its own interests ahead of the interests of its insured. *See Tank v. State Farm*, 105 Wn.2d 381, 387, 755 P.2d 1133 (1986). Subrogation “is prohibited when it creates a conflict of interest between the insurer and the insured.” *State Farm v. Weiss*, 194 P.3d 1063, 1068 (Colo. App. 2008).

As previously stated, Starline’s claim against Ledcor in this action is necessarily Zurich’s claim. That claim, if brought in Zurich’s name, would be categorized as a subrogation claim, despite Starline’s assertions

to the contrary, and the anti-subrogation rule would apply to prevent a conflict of interest and prohibit suit against Ledcor, a co-insured. If Zurich cannot collect the fees it expended in defending Starline, neither can Starline, its subrogee. “In situations where the insurer is the real party in interest, the anti-subrogation rule precludes an insured from interposing a claim directly against a coinsured.” *Rook v. 60 Key Centre, Inc.*, 242 A.D.2d 872, 873, 662 N.Y.S.2d 670 (1997). Because the anti-subrogation rule precludes Zurich from suing Ledcor directly to recover its fees, Zurich should not be allowed to do so by standing in Starline’s shoes. Therefore, this Court should rule the anti-subrogation rule does apply, and, accordingly, reverse the fee award.

**B. Starline Failed to Prove the Trial Court’s Fee Award was Reasonable.**

The second issue raised by Ledcor in its appeal is the trial court’s fee award was excessive because it was 30 times greater than the amount in controversy and will result in a windfall to Zurich, which never paid the invoices its salaried in-house counsel created. Starline argues the fee award was reasonable because the trial court followed the lodestar method, citing *Absher Construction Co. v. Kent Sch. Dist.*, 79 Wn. App. 841, 917 P.2d 1086 (1996). *Respondent’s Brief*, p. 12. An award calculated under

the lodestar method, however, is only the starting point for determining a reasonable fee award and does not necessarily result in one. *Absher Construction*, 79 Wn. App. at 847.

Starline also argues using a market rate hourly fee is appropriate for its salaried in-house counsel. It submits a full page quote from a California case it contends supports its position. *Respondent's Brief*, p. 11. However, Starline neither identifies the name of the California case nor provides a citation for the case, so it is impossible for Ledcor or the Court of Appeals to know whether the case does in fact support Starline's position. On page 10 of its Brief, Starline cites a Washington case for the proposition that fee awards to in-house counsel are not prohibited, *Metropolitan Mortgage v. Becker*, 64 Wn. App. 626, 825 P.2d 360 (1992). However, the Court of Appeals in *Metropolitan Mortgage* also recognized: "Courts have shown concern over preventing the employer of in-house counsel to reap windfall benefits. . ." *Id.* at 633, n.3.

Additionally, the *Metropolitan Mortgage* case cited *Continental Insurance Co. v. U.S. Fidelity & Guarantee Co.*, an Alaska Supreme Court case which held the cost of an insurer's in-house counsel is not an attorney's fee that can be recovered under a prevailing party fee provision.

*Metropolitan Mortgage*, 64 Wn. App. at 632, citing *Continental Insurance*, 552 P.2d 1122 (Alaska 1976), overruled on other grounds. As the Alaska Supreme Court stated in *Continental Insurance*:

Salaries paid to in-house counsel are a cost of doing business which an enterprise will bear regardless of whether a particular suit is brought. The purpose of our rules regarding attorney's fees is to partially compensate a prevailing party for the costs incurred as a result of a particular litigation, not to pay the salaries of those who are regular employees of an enterprise. *Id.* at 1128.

The rationale for denying an in-house fee award in *Continental Insurance* applies equally well to denying one to Zurich. It is not the purpose of a prevailing party fee award to pay the salaries of a wealthy insurance company's employees, especially in this case where the insurer failed to defend one of its insureds.

Starline next argues Ledcor fails to identify any billing entries it believes are unrecoverable. *Respondent's Brief*, p. 13. That is patently untrue. In its opening Brief, Ledcor identified multiple individual entries and categories of entries that, under the factors identified in *Absher Construction*, are unrecoverable. *See Appellant's Brief*, pp. 10-13, 24-27.

Starline also argues that the *Absher* case is distinguishable because it involved an award of fees on appeal. *Respondent's Brief*, pp. 13-14.

This is a distinction without a difference. Whether it is in a trial court setting or an appellate setting, attorney's fees must be reasonable and the *Absher* factors also apply when a trial court is determining a reasonable fee award. Those factors include the requirements that: (1) paralegal work be legal, not administrative, in nature; (2) consideration be given to the relationship between the amount in controversy and the amount expended; and, (3) unnecessary or duplicative work be discounted. Starline's fee request should have been discounted because the invoices contained numerous entries for administrative paralegal work, as well as duplicative and unnecessary work by counsel. Further, the relationship between the amount expended and the amount in controversy was 30 to 1.

Finally, the fee award is unreasonable because the trial court abused its discretion in awarding Starline 100 percent of its fees and costs when the same court previously declined to make a similar fee award in favor of Ledcor against Accurate Siding. *See Brief of Appellant in Accurate Siding appeal, p. 22.*<sup>4</sup> In determining the Accurate Siding fee

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<sup>4</sup> Ledcor cited the companion cases of *American Civil Liberties Union of Washington v. Blaine School District No. 503*, 86 Wn. App. 688, 937 P.2d 536 (1999) ["*ACLU 1*"] and *American Civil Liberties Union of Washington v. Blaine School District No. 503*, 95 Wn. App. 106, 975 P.2d 536 (1999) ["*ACLU 2*"], to illustrate how a trial court can abuse its discretion by using two different methods in similar settings to make fee awards, which is exactly what the trial court did in making the Accurate Siding and Starline fee awards.

award, the trial court multiplied Ledcor's total fees and costs by the percentage liability of Accurate Siding, which was 3.4 percent. If the trial court had followed a similar approach with Starline, the percentage would have been even lower and Starline's fee award would have been minimal.

### **CONCLUSION**

This Court should reverse the trial court's fee award on either or both of two separate grounds.

First, this is a subrogation claim where Zurich seeks to step into Starline's shoes and succeed to Starline's right to recover prevailing party fees under a purchase order subcontract between Starline and Ledcor. If Ledcor was not a co-insured under the policy Zurich issued to Starline, Zurich might be able to seek subrogation. However, because Ledcor is a co-insured of Zurich under the same policy that provided a defense to Starline, the anti-subrogation rule applies and bars Zurich's subrogation claim against Ledcor.

Second, the trial court's fee award was excessive because it was 30 times greater than the amount in controversy and it will result in a windfall to Zurich, which never paid any of the billing invoices its salaried in-house counsel created to support the fee award.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of July, 2010.

**Martens + Associates | P.S.**

A handwritten signature in black ink, appearing to be 'R. Martens', written over a horizontal line.

By \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23<sup>rd</sup> day of July, 2010, I caused to be served true and correct copies of the foregoing Reply Brief of Appellant on the court and counsel as follows:

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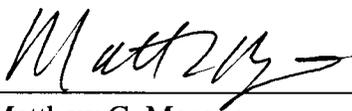
**AND ALL OTHER INTERESTED PARTIES**

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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 23<sup>rd</sup> day of July, 2010.

  
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