No. 32122-3-III

Consolidated with

No. 31687-4-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

HSC REAL ESTATE, INC., a Washington corporation,

Appellant,

v.

VMSI, LLC, a Washington limited liability company,

Respondent.

BRIEF OF APPELLANT HSC REAL ESTATE, INC.

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 2

A. Issues Pertaining to Assignment of Error No. 1. 2

1. Whether Fireman's Fund is improperly subrogating through its named insured, VMSI, and against its additional insured, HSC 2

2. Whether an insurer must be a party to an action with its insured for the court to find it is subrogating against its own insured 3

B. Issues Pertaining to Assignment of Error No. 2 3

1. Whether the superior court erred in skipping a lodestar analysis to decide that a particular hourly rate for VMSI's attorneys and a particular number of hours were "reasonable" 3

2. Whether the superior court made sufficient findings of fact supported by substantial evidence to support its conclusion that $225.00 per hour was the reasonable hourly rate for VMSI's assigned insurance defense counsel when the hourly rate actually charged was substantially less 3

3. Whether the superior court made sufficient findings of fact supported by substantial evidence to support its conclusion that VMSI's assigned insurance defense counsel reasonably incurred 236.1 hours in defense of HSC's cross-claims 3

IV. STATEMENT OF THE CASE 4

A. The Claims at Issue Arise from a Written Management Contract Between HSC and VMSI. 4

B. Fireman's Fund Insurance Company is Improperly Subrogating Against Its Own Insured 6

1. VMSI initially conceals the role of Fireman's Fund 6

2. HSC obtains discovery demonstrating that Fireman's Fund fully funded and controlled the litigation on behalf of VMSI 8

C. VMSI Submits a Renewed Motion for Award of Prevailing Party Fees and Costs and for Entry of Judgment. 10

V. SUMMARY OF ARGUMENT 11

VI. ARGUMENT. 13

A. Standard of Review 13

B. The Superior Court Erred in Awarding Any Fees and Costs Because Fireman's Fund is Seeking Subrogation Against Its Own Insured HSC 14

C. The Superior Court's Findings of Fact and Conclusions of Law are Inadequate for This Court's Review 16

1. The superior court failed to apply a lodestar analysis to VMSI's request for fees and costs 18

2. The absence of findings of fact and conclusions of law necessary to the Court's review requires vacation of the award and remand for redetermination 21

D. The Contract Entitles HSC to an Award of Attorney's Fees and Costs on Appeal 28

VII. CONCLUSION 29

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

Absher Construction Co. v. Kent Sch. Dist. No. 415,
79 Wn.App. 841, 917 P.2d 1086 (1995).....17, 22

Berryman v. Metcalf,
177 Wn. App. 644, 312 P.3d 745 (2013).....14, 21, 26-27

C-C Bottlers, Ltd. v. J.M. Leasing, Inc.,
78 Wn. App. 384, 896 P.2d 1309 (1995).....22

Chuong Van Pham v. City of Seattle,
159 Wn.2d 527, 151 P.3d 976 (2007)),
review denied, 179 Wn.2d 1026, 320 P.3d 718 (2014).....14

Community Ass'n Underwriters of Am., Inc. v. Kalles,
146 Wn. App. 30, 259 P.3d 1154 (2011).....15

Crest, Inc. v. Costco,
128 Wn. App. 760, 115 P.3d 349 (2005).....13, 17

Fisher Props., Inc. v. Arden-Mayfair, Inc.,
106 Wn.2d 826, 726 P.2d 8 (1986) 13, 20

Highland School Dist. No. 203 v. Racy,
149 Wn. App. 307, 202 P.3d 1024 (2009).....21

Mahler v. Szucs,
135 Wn.2d 398, 957 P.2d 632 (1998).....13, 14, 16 - 21

Mayer v. City of Seattle,
102 Wn. App. 66, 10 P.3d 408 (2000),
review denied, 142 Wn.2d 1029, 21 P.3d 1150 (2001).....27

McRory v. Northern Ins. Co. of N.Y.,
138 Wn.2d 550, 980 P.2d 736 (1999).....14

Nordstrom, Inc. v. Tampourlos,
107 Wn.2d 735, 733 P.2d 208 (1987).....18

Schmidt v. Cornerstone Investments, Inc.,
115 Wn.2d 148, 795 P.2d 1143 (1990).....18

Scott Fetzer Co. v. Weeks,
114 Wn.2d 109, 786 P.2d 265 (1990).....18-19

Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.,
170 Wn. App. 666, 285 P.3d 892 (2012).....13

OTHER STATE CASES

Stetina v. State Farm Mut. Auto. Ins. Co.,
196 Neb. 441, 243 N.W.2d 341 (1976).....15

WASHINGTON STATE RULES

RAP 18.1(b).....28

RAP 18.1(j).....29

OTHER AUTHORITIES

COUCH, GEORGE J., INSURANCE (2d Ed. 1983).....15

I. INTRODUCTION

This is the second appeal in this case. The first appeal, currently pending under cause number 31867-4, is from the superior court's order granting respondent VMSI, LLC's cross-motion for summary judgment dismissal of HSC's cross-claims. HSC timely appealed that order. At about the time HSC filed its reply brief on the earlier appeal, the superior court entered an order granting in part VMSI's motion for an award of prevailing party fees and costs against HSC and entered judgment on that award. While the fee and cost order and judgment will be vacated if HSC prevails on its appeal of the order on summary judgment, the superior court committed an independent errors of law in granting VMSI's motion for fees and costs. VMSI's insurer, Fireman's Fund Insurance Company ("Fireman's Fund"), controls the litigation and is improperly seeking, and was awarded, subrogation against its own insured, HSC, on the same policy of insurance issued to VMSI. Fireman's Fund admits HSC is an additional insured on that policy.

Because the superior court's award of prevailing party fees and costs to VMSI effectively grants the two parties' common insurer, Fireman's Fund, subrogation against its own insured, the order and

judgment were the result of an error of law subject to de novo review. It should be reversed as the trial court's ruling is contrary to settled public policy of this state.

In the alternative, even if it were proper for the superior court to award any fees and costs against HSC, the amount of the fees and costs was disputed and the superior court failed to enter findings of fact and conclusions of law necessary to this Court's review, rendering the amount of the award arbitrary and an abuse of discretion. Therefore, this Court should vacate the order and remand for entry of necessary findings of fact and conclusions of law.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in granting VMSI's renewed motion for an award of prevailing party fees and costs and entry of judgment because it allowed Fireman's Fund Insurance Company subrogation against its own insured, HSC.

2. The superior court abused its discretion in awarding VMSI prevailing party attorneys' fees totaling $53,122.50.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Issues Pertaining to Assignment of Error No. 1.

1. Whether Fireman's Fund is improperly subrogating through

its named insured, VMSI, and against its additional insured, HSC on the same insurance policy.

2. Whether an insurer must be an independent party to an action with its insured in order for the court to find it is subrogating against its own insured. (Finding of Fact No. 9; Conclusion of Law Nos. 2, 3, 4, & 5).

B. Issues Pertaining to Assignment of Error No. 2.

1. Whether the superior court erred in skipping a lodestar analysis to decide that a particular hourly rate for VMSI's attorneys and a particular number of hours incurred were "reasonable."

2. Whether the superior court made sufficient findings of fact supported by substantial evidence to support its conclusion that $225.00 per hour was the reasonable hourly rate for VMSI's assigned insurance defense counsel when the hourly rate actually charged was substantially less. (Finding of Fact Nos. 11, 16, & 21; Conclusion of Law Nos. 2 & 5).

3. Whether the superior court made sufficient findings of fact supported by substantial evidence to support its conclusion that VMSI's assigned insurance defense counsel reasonably incurred 236.1 hours in defense of HSC's cross-claims. (Finding of Fact Nos. 16 & 21; Conclusion of Law Nos. 2 & 5).

IV. STATEMENT OF THE CASE

Because the two appeals have been consolidated for consideration on the merits, HSC will dispense with a recitation of the factual details of the underlying plaintiff's case brought by Ms. Dana Widrig, a resident of The Villas at Meadow Springs ("The Villas") apartment complex in Richland, Washington, who was the victim of a home invasion and sexual assault in her unit in the early morning hours of December 5, 2010. Those underlying facts are fully set forth in HSC's prior briefing under cause no. 31687-4-III.

There are only two broad issues before the Court on HSC's present appeal. The first is the propriety of the superior court's award of any prevailing party fees and costs to VMSI when the litigation was under the complete control of VMSI's insurer, Fireman's Fund, which in contravention of the public policy of Washington sought to subrogate against its additional insured on the same policy, HSC. The second issue, which the Court need not reach if HSC prevails on the first issue, is whether the trial court abused its discretion in awarding $53,122.50 in prevailing party fees, ostensibly to VMSI. HSC submits the following facts pertinent to these discrete issues.

A. The Claims at Issue Arise From a Written Management

Contract Between HSC and VMSI.

The contractual claims at issue are based upon a written agreement between HSC Real Estate, Inc., as "Agent" and VMSI, LLC, as "Owner" dated October 25, 2004, for the management of The Villas as Meadow Springs ("The Villas") apartments in Richland, Washington. CP 277-82.

Upon receipt of the summons and complaint, HSC tendered defense and indemnity to VMSI and its insurers under the terms of the agreement. *See* CP 299. When the tender was not accepted by VMSI or its insurers, HSC filed a mandatory cross-claim asserting breach of both the insurance provision of Section 10 and the defense and indemnity provision of Section 11. CP 12-15. In response, VMSI then asserted a provisional cross-claim for equitable indemnity against HSC, "[i]f VMSI is liable for any loss or damages as a result of the acts of HSC or Riverstone or its employees." CP 17. Because plaintiff's claims were settled without liability ever being established against either VMSI or HSC, the parties agreed on the earlier appeal that VMSI's cross-claim was mooted.

Significantly, neither the indemnity provision nor the prevailing party provision of the parties' contract authorizes an award of fees expended by VMSI on its defense of plaintiff's claims against it. *See* CP

281-82, ¶¶ 12 & 20. At most, VMSI is only entitled to its counsel's time spent on its defense of HSC's cross-claim. *See id.* at ¶ 20. The contract here simply does not provide indemnification to VMSI for defense of plaintiff's claims, and VMSI has never argued that it does. The prevailing party provision set forth in the Management Agreement is limited to an "action brought to enforce or to interpret the terms and provisions of this Agreement." *Id.*

B. Fireman's Fund Insurance Company is Improperly Subrogating Against Its Own Insured.

1. VMSI initially conceals the role of Fireman's Fund.

After entry of the order on summary judgment already appealed and briefed in this case, VMSI's appointed counsel moved for an award of prevailing party fees and costs and for entry of judgment against HSC. CP 20-21. This initial request was for an award of ALL of the fees and costs incurred on behalf of VMSI in the entire case, including defense of plaintiff Dana Widrig's claims. The claim totaled $138,685.15, less the flat-fee amount of $14,688, for a net sum of $123,997.15. *See* CP 23. There was no reference to any deductible or self-insured retention owing or paid by VMSI. *See generally*, CP 20-24.

Counsel's declaration stated that this was an insurance defense

case financed by Fireman's Fund. CP 22. VMSI's counsel stated his typical charge for insurance defense cases is $195 per hour. CP 23. Curiously, rather than submit copies of the actual billing statements, VMSI's counsel submitted only spreadsheets allegedly created from the billings – all reflecting the requested attorney billing rate of $250 per hour. CP 30-52. So there was no information submitted on the actual billing rate on this case – other than the asserted flat-fee agreement with Fireman's Fund for $14,688. CP 22-24.

Because VMSI's counsel did not submit copies of the billing statements and referenced a fee agreement with Fireman's Fund that was not in the record, HSC sought discovery limited to VMSI's claimed fees and costs. CP 84-88. Counsel for VMSI refused to provide it. CP 92-94. HSC brought this to the attention of the superior court in its opposition to VMSI's fees request. CP 60-61; CP 66-67.

At the hearing on VMSI's first motion on May 7, 2013, the superior court concluded that the actual billing statements were not privileged and must be produced along with other discovery requested by HSC. CP 252; CP 270-71, ¶ 4. The superior court also required VMSI's counsel to segregate the fees incurred in defense of plaintiff Dana Widrig's claims from those incurred in defense of HSC's cross-claims. *See id.*

Ultimately, VMSI's first motion was denied with leave to renew the motion after the required discovery was provided to HSC. VMSI subsequently produced the required segregation of its fees and costs between defense of plaintiff's claims and defense of HSC's cross-claims. *See ids.*

VMSI substantially, but not fully, complied with the superior court's order, by producing redacted copies of its billing statements, a partial segregation of fees, and counsel William Cameron to testify at deposition regarding the fees and costs. *See* CP 284-301; CP 399-413.

2. HSC obtains discovery demonstrating that Fireman's Fund fully funded and controlled the litigation on behalf of VMSI.

In response to the denial of its initial motion for prevailing party fees and costs, VMSI eventually produced redacted copies of its billing statements for the case. *See* CP 156-232. It is in these records that the hand of Fireman's Fund is first apparent when VMSI's counsel billed telephone calls with Fireman's Fund's coverage counsel Jodi McDougall after moving for summary judgment dismissal of plaintiff's claims and HSC's cross-claims. *See* CP 192.[1] Later, there are discussions (redacted)

[1] These are billed under L240, which is the ABA billing code for dispositive motions.

with Ms. McDougall and her partner at Cozen O'Connor, Melissa White, which become more frequent *after* the settlement and dismissal of plaintiff's claims. *See* CP 197, 200, 204-05, 209, 212-13, 215, 219-26, and 229-30.

Counsel for VMSI also appeared for the deposition required by the superior court. That deposition revealed that counsel had no actual knowledge of the flat-fee agreement between his firm and Fireman's Fund. CP 287-88. He had no knowledge whether his client, VMSI, had a deductible or insured retention on its Fireman's Fund policy. CP 287. It was his understanding that Fireman's Fund had handled VMSI's response to HSC's tender to VMSI under the parties' contract, rather than counsel for VMSI. CP 290. And, despite counsel's frequent communications with Ms. McDougall and Ms. White at Cozen O'Connor, he testified to being ignorant of their actual roles, whether coverage counsel or something else. CP 294. To him, they were simply "Fireman's Fund's attorneys." *Id.*

In sum, the evidence of record reflects that VMSI paid nothing toward its own defense in the case, and Fireman's Fund fully and completely controlled the litigation on VMSI's behalf from beginning to end, not just through its appointed defense counsel, but through coverage counsel acting on its own behalf at the law firm of Cozen O'Connor.

C. VMSI Submits a Renewed Motion for Award of Prevailing Party Fees and Costs and for Entry of Judgment.

On June 4, 2013, VMSI filed a renewed motion for entry of judgment for fees and costs. CP 149-52. Here, VMSI asserts that it did segregate its fees incurred defending against HSC's cross-claim from the fees incurred defending the Widrig claims. *See id.* There is no reference to a lodestar calculation. *See id.* Counsel's declaration requests a fee of $250 per hour, but provides no reference to the actual billing rate in effect for the case. *See* CP 153-55. However, the actual attorney billing rate of $185 per hour is indicated in the billing statements attached to the declaration. CP 156-226. Later billings commencing in April 2013 show a rate of $190 per hour. CP 229-32. VMSI did not request a multiplier on the lodestar, but simply asserted $250 per hour as a "reasonable" rate. CP 149-52.

The only basis in the record cited by VMSI regarding its request for a rate of $250 per hour is in the declaration of HSC's counsel Richard Martens submitted in February 2013. *See* CP 154, ¶ 8, *citing* Martens decl. (CP 93, ¶ 8 in Consol. No. 31687-4). Mr. Martens' prior request was based on a lodestar of $168 per hour, on which he requested a multiplier of approximately 1.5 to $250 per hour. (*See* CP 93, ¶ 8 in Consol. No.

31687-4). That request was rendered moot when HSC's motion for summary judgment was denied.

VMSI ultimately asked the superior court to find that 288.7 hours of attorney time were reasonably incurred in defense of HSC's cross-claims, including 106 hours alone (approximately 37%) on the multiple motions for prevailing party fees and costs. CP 241.

HSC responded to VMSI's renewed motion by asserting a lodestar analysis, arguing the presumptively reasonable billing rate for VMSI's counsel is $185 per hour and the reasonable hours incurred in defense of HSC's claims totaled 42.7 hours. CP 257-62.

After being reset by the court due to a conflict in the court's schedule, the hearing on VMSI's motion was held on August 2, 2013. The superior court took the matter under advisement, and an order was finally issued over two and one-half months later on November 27, 2013. CP 415-20. Judgment was entered on December 10, 2013. CP 436-41. This appeal, the second in the case, timely followed.

V. SUMMARY OF ARGUMENT

The arguments on this appeal are fairly straightforward. First, no award of fees and costs was proper because Fireman's Fund is seeking subrogation against HSC – its own insured – through its named insured on

the same policy, VMSI. Well-settled Washington law precludes an insurer from subrogating against its own insured for a loss incurred on the same policy on which the target subrogee is an insured. Therefore, on this basis alone, judgment against HSC should be reversed.

Second, even assuming ***some*** award of fees and costs was proper, the superior court's award is not supported by findings of fact and conclusions of law sufficient for this Court to review. Nor are the findings that were entered supported by substantial evidence. For example, the evidence before the superior court indicated a lodestar fee for VMSI's counsel of $185 per hour. After stating that this case was neither "particularly complex or difficult to defend," the superior court decided to award VMSI's fees at a rate of $225 per hour. Thus, the choice of $225 per hour was simply arbitrary and not supported by the findings or evidence in the record.

Similarly, the superior court made no findings to support its conclusion that 236.1 hours in attorney time was "reasonably incurred" in defense of HSC's cross-claim when the case was decided by summary judgment based on the court's the interpretation and construction of the parties' contract without resort to extrinsic evidence. Rather, the court started with VMSI's request for 288.7 hours and worked backward

deducting certain categories of time, such as for travel, totaling 52.6 hours, and then finding the balance of 236.1 "reasonable" without any analysis of those fees whatsoever on the record. Thus, the superior court's award of attorneys' fees and costs was an abuse of discretion and should be reversed and remanded for entry of proper findings.

VI. ARGUMENT

A. Standard of Review.

Determination of the existence of an absolute bar to a motion for fees and costs is a matter of law. *See Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.*, 170 Wn. App. 666, 681, 285 P.3d 892 (2012) ("We review a party's entitlement to attorney fees as a question of law, de novo."). Absent a legal prohibition such as the anti-subrogation rule, in Washington attorney fees may only be awarded when authorized by a private agreement, a statute, or a recognized ground in equity. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986). The law requires that "The party seeking fees bears the burden of proving the reasonableness of the fees." *Mahler,* 135 Wn.2d at 433-34, *infra.*

The decision on the amount of an attorney's fee award is left to the sound discretion of the trial court. *Crest, Inc. v. Costco*, 128 Wn. App. 760, 772-73, 115 P.3d 349 (2005). The court necessarily abuses its

discretion if exercised on untenable grounds or for untenable reasons. *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013) (*citing Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007)), *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014).

B. The Superior Court Erred in Awarding Any Fees and Costs Because Fireman's Fund is Seeking Subrogation Against Its Own Insured HSC.

In rejecting HSC's argument that Fireman's Fund was subrogating against its own insured, the superior court stated that, "[s]ince Fireman's Fund is not a party to that contract or this action, the court does not find HSC's argument persuasive or supported by the case law cited." CP 416. This was a plain error of law contrary to binding authority of the Washington Supreme Court.

First, it is simply unheard of for a defending/subrogating insurer to be a party to the action (cf. CR 14(c)) or to a management contract between the named insured and an additional insured. If that were a requirement to finding that the litigant's insurer was seeking subrogation, the court could almost never make such a finding.

Second, there was no reason for the subrogating insurer to be a party because in a subrogation action, the insured remains the real party in interest. *See McRory v. Northern Ins. Co. of N.Y.*, 138 Wn.2d 550, 557 fn.

6, 980 P.2d 736 (1999) ("In subrogation actions, the insured remains the real party in interest."), *citing Mahler*, 135 Wn.2d at 413-15, 957 P.2d 632. Here, VMSI was the real party in interest with Fireman's Fund having a subrogated interest in any recovery against the co-insured HSC. *See id.* Since VMSI paid nothing for its defense, the entire amount sought is subrogated to Fireman's Fund.

The rule is well-settled in Washington that an insurer is absolutely barred from seeking subrogation against its own insured. As the Washington Supreme Court succinctly stated some fifteen years ago in *Mahler*: "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 parties to whom the insurer owes no duty." *Mahler*, 135 Wn.2d at 419, *quoting Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341, 346 (1976), *and* 16 GEORGE J. COUCH, INSURANCE, § 61:136, at 195-96, (2d Ed. 1983); *see Community Ass'n Underwriters of Am., Inc. v. Kalles*, 146 Wn. App. 30, 259 P.3d 1154 (2011) (same). This statement of the applicable law in *Mahler* is as true today as it was fifteen years ago. Fireman's Fund cannot seek recovery of its fees, costs, and expenses against its own insured on the same policy, HSC.

There is no question that Fireman's Fund insured, defended, and indemnified both VMSI and HSC for the same loss on the same policy of insurance. *See* CP 331-33. Fireman's Fund's coverage counsel made that affirmative representation under penalty of perjury in the declaration she submitted to the superior court in support of VMSI's opposition to HSC's renewed motion for summary judgment. *See id.* ("FFIC has been providing defenses without reservation to each of its insureds - VMSI, LLC and HSC Real Estate, Inc."). Thus, HSC is not and never has been a "third party to whom the insurer (Fireman's Fund) owes no duty." *Mahler*, 135 Wn.2d at 419.

Furthermore, VMSI's counsel was hired by Fireman's Fund to defend VMSI and was already fully paid by Fireman's Fund as evidenced by counsel's declaration and attached billing records. *See* CP 153-232.

Accordingly, well-settled case law, reflecting long-established public policy in Washington against an insurance company subrogating against its own insured is an absolute bar to the award of attorney fees and costs made by the superior court. In ruling otherwise, the trial court committed error requiring reversal by this Court.

C. The Superior Court's Findings of Fact and Conclusions of Law are Inadequate for This Court's Review.

In the absence of a predetermined method set forth in the contract itself, the proper method for the calculation of a reasonable fee award is the lodestar method. *Mahler*, 135 Wn.2d at 433. Under the lodestar method, the trial court multiplies a reasonable hourly rate by the reasonable number of hours spent on the lawsuit. *Id.* at 434. This method dictates that fees are calculated by establishing a lodestar fee and then adjusting it up or down based on other external factors. *Id.*

In deciding on a reasonableness of a fee, "the court may use the 'factors' approach." *Absher Construction Co. v. Kent Sch. Dist. No. 415*, 79 Wn.App. 841, 847, 917 P.2d 1086 (1995) (citation omitted). Other "factors" include the amount customarily charged for similar work, the time and labor involved, the novelty and difficulty of the questions involved, the skill requisite to perform, and the terms of the fee agreement between the lawyer and the client. *Crest, Inc.*, 128 Wn. App. at 774, n. 17. "[A]ttorney fees should be awarded only for those services related to the causes of action which allow for fees." *Absher Construction Company,* 79 Wn.App. at 847. In addition, fees incurred on "unsuccessful claims, duplicated effort, or otherwise unproductive time" should be either ***not*** awarded or discounted. *Id.* at 847.

The court should ***not*** "merely rely [] on the billing records of the

plaintiff's attorney, [but] should make an independent decision as to what represents a reasonable amount for attorney fees. The amount actually spent by the [party requested a fee award] may be relevant, but it is in no way dispositive." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987). Rather, after determining the number of hours reasonably expended in the litigation, the court "must then discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time." *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 170, 795 P.2d 1143 (1990).

1. The superior court failed to apply a lodestar analysis to VMSI's request for fees and costs.

As the Washington Supreme Court has advised, "courts should be guided in calculating fee awards by the lodestar method in determining an award of attorney fees as costs." *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998), *citing Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 786 P.2d 265 (1990). As the *Mahler* court explained, "[t]he lodestar methodology affords trial courts a clear and simple formula for deciding the reasonableness of attorney fees in civil cases and gives appellate courts a clear record upon which to decide if a fee decision was appropriately made." *Id.* And, "[u]nder this methodology, the party seeking fees bears

the burden of proving the reasonableness of the fees." *Mahler*, 135 Wn.2d at 433-34, *citing Fetzer*, 122 Wn.2d at 151.

Given this requirement, the superior court could have done one of two things to determine the "reasonableness of the hourly rate of counsel at the time the lawyer actually billed the client for the services." *Mahler*, 135 Wn.2d at 435. First, it could have divided $14,688 by the total hours billed, some 674.1 hours, more or less. *See* CP 52 (total 568.1 hours though first motion for fees); CP 241 (additional 106 hours on second motion for fees). Admittedly, an hourly rate of $21.79 (674.1/$14,688) is unreasonable for most any attorney in Washington and certainly for VMSI's counsel. Alternatively, the superior court could have used the rate on the billing statements of $185 per hour. See CP 156-232. While higher than the $168 per hour charged by HSC's counsel, the rate of $185 would not be unreasonable. But the superior court applied none of the rates supported by the record, whether $21.79, $168, or $185.

While this case is indisputably an insurance defense case, for which VMSI's counsel normally would charge $185 per hour, absent another agreement such as their flat-fee agreement here, the superior court chose what it considered the low end of the rates VMSI's counsel represented it charges for non-insurance defense work. CP 416. It made

no finding as to why this rate was more appropriate than the $185 per hour actually reflected in the billings and, in effect, granted a multiplier of 1.243 on counsel's regular rate for the case. *See id.* Yet, its only finding concerning the rate appears to preclude a multiplier, stating: "VMSI has not presented evidence to establish that this was a particularly difficult or complicated case to defend by VMSI." CP 416.

Unfortunately, in this case, VMSI's counsel did not use a lodestar analysis to support the fee request in either the original motion or the renewed motion for fees. *See* CP 20-24, 149-55, 292 at p. 29 ("I didn't use a lodestar rate. I used your rate."). HSC raised this issue to the superior court on both the original and renewed motions for fees. *See* CP 65-66, 254-66. But, like VMSI, the superior court also declined to used a lodestar analysis, and simply picked a fee it deemed "reasonable" without any reference to "the hourly rate of counsel at the time the lawyer actually billed the client for the services." *Mahler*, 135 Wn.2d at 434, *citing Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 798 P.2d 799 (1990) (outside civil rights context, contemporaneous rates actually billed rather than current rates or contemporaneous rates adjusted for inflation will be employed.).

While application of a lodestar analysis has not been held

mandatory by the Washington Supreme Court, there is good reason the court in *Mahler* advised its use. As this Court has advised more recently, "[a] trial judge who strays from this formula will typically have a difficult time establishing that an award of attorneys' fees is actually reasonable." *Highland School Dist. No. 203 v. Racy*, 149 Wn. App. 307, 202 P.3d 1024 (2009) (affirming award of fees as sanctions for frivolous filing without use of lodestar analysis) (Korsmo, J.). Such is the case here, where following the lodestar framework should have resulted in findings of fact indicating what evidence the superior court considered and how it evaluated that evidence in reaching its conclusions that 236.1 hours were reasonably billed at a reasonable rate of $225 per hour. Instead, the superior court failed to enter the findings of fact and conclusions of law necessary to allow this Court to review and determine whether the award was reasonable, rather than simply arbitrary. As a result, the superior court abused its discretion in its fee and cost award. *See, e.g., Berryman v. Metcalf*, 177 Wn. App. 644, 548-59, 312 P.3d 745 (2013).

2. The absence of findings of fact and conclusions of law necessary to the Court's review requires vacation of the award and remand for redetermination.

After VMSI's first submission requesting an award of prevailing party fees and costs was rejected, it filed a new request, purportedly to

comply with the superior court's prior ruling, on June 3, 2013. Ostensibly this included a segregation of fees between those incurred in defense of plaintiff's claims and those incurred in defense of HSC's cross-claims. This was, of course, required by the trial court.

As this Court held in *C-C Bottlers, Ltd. v. J.M. Leasing, Inc.*, 78 Wn. App. 384, 896 P.2d 1309 (Div. III. 1995), "the prevailing party should be awarded attorney fees only for the legal work completed on the portion of the claim permitting such an award . . . Allowing recovery of fees for actions which do not authorize attorney fees would also give the prevailing party an unfair and unbargained for benefit." *Id.* at 388 (citations omitted.). "Fees should be awarded only for services related to causes of action which allow for fees." *Absher Const. Co.*, 79 Wn. App. at 847.

The segregation of fees included "a number of hours" that VMSI's counsel concluded involved defense of both HSC's claims and plaintiff's claims. CP 154, ¶ 5. "Since there is now no way to segregate one from the other, I have allotted 50 percent of the time spent on those entries that relate to both." *Id.* VMSI never gave a total for these 50/50 hours, but HSC's counsel's review tallied a total of 77.6 such allegedly mixed hours. *See* CP 271, ¶ 7. HSC inferred, then, that VMSI was seeking one-half of the 77.6 hours, or 38.8 hours, of the "unsegregable" time be awarded

against HSC. But it is unclear whether that is what VMSI requested and, as discussed more fully below, there is no finding by the superior court regarding it.

Contrary to counsel's statement, there is no finding that the mixed fees could ***not*** be segregated. Instead, VMSI's counsel simply failed to properly segregate time spent on plaintiff's tort claims from time spent on HSC's cross-claims when making billing entries. Certainly, the plaintiff's tort claims were not so intertwined with HSC's contract claims such that the time could not be entered or described separately in an itemized billing.

The record reflects that, after supplementing its fee request by declaration filed on July 3, 2013, VMSI requested $72,175 in attorney's fees based on a total of 288.7 hours at a rate of $250 per hour. CP 241, ¶ 6. It did not attempt to justify the expenditure of 288.7 hours on a cross-claim that was resolved on summary judgment based on evidence comprised of little more than the contract itself. Nor did attempt to justify the request for $250 per hour except by reference to an earlier declaration of HSC's counsel.

Consequently, HSC's was obliged to conduct its own analysis of the billing statements and entries to reach a total number of hours of 299.8

hours (an 11.1 hour increase to the benefit of VMSI). CP 271, ¶ 7, citing CP 302-17. For reasons explained below, the "mixed" entries to which VMSI applied a speculative 50/50 split were totaled and subtracted without deducting for the split. Working from this analysis, the total includes 257.1 hours that are not properly recoverable as reasonably incurred in defense of HSC's cross-claims, including the following fees that are not allowable under applicable Washington law:

- 154.9 hours, including 24 hours of unauthorized travel time, spent on VMSI's unsuccessful motion for summary judgment argued on October 26, 2012 as wasted, unproductive, duplicated time/effort, unnecessarily expended, and excessive (CP 302-17);
- 40 hours spent on travel time as unauthorized (comprising 24 hours spent prior to October 26, 2012, 8 hours spent on VMSI's fee motions, and 8 hours spent on HSC cross-claim related matters) (CP 319);
- 8.1 hours based on lack of specificity, preventing effective segregation, duplicated time/effort, wasted time/effort, unnecessarily expended, and/or unproductive time objections (CP 327);

- 2.9 hours based on the objection that they are solely related to plaintiff's claims which have not been deducted notwithstanding the Court's direction (CP 329); and,
- 75.2 hours spent on the fee motions or matters arising out of VMSI's failure to properly present its fee request, and other unnecessary matters such as unauthorized, duplicated or wasted time/effort, and/or unnecessarily expended, not including 8 hours travel time (CP 325).

While VMSI undoubtedly had to spend *some* time in responding to HSC's cross-claims, HSC argued to the superior court and provided detailed support in the record that the bulk of counsel's time was spent on the defense of plaintiff's claims with a large portion of the rest of the time spent on unsuccessful endeavors, duplicated effort, or otherwise unproductive activity which are simply not recoverable. CP 245-329.

The superior court failed to address the bulk of HSC's objections and concerns, concluding that, "[w]ith the following exceptions, the court finds that the hours VMSI asserts its attorneys spent defending this claim are adequately documented and reasonable." CP 417. Those "exceptions" were: (1) VMSI claims for travel time (40 hours), (2) duplicative time spent on the motions for fees and costs (9.7 hours), and (3) 2.9 hours

VMSI conceded were related solely to plaintiff's claim. CP 417-18. These totaled 52.6 hours, which the superior court deducted from VMSI's request of 288.7 hours to reach the final award of 236.1 attorney hours. CP 417-18; CP 424.

The superior court did not address on the record any of HSC's challenges to the remaining the 236.1 hours the court found reasonable, nor did it making any findings indicating that it conducted any independent analysis of the reasonableness of those hours. It simply concluded that they were "reasonable." CP 425.

As Division 1 recently concluded in reviewing a very similar record:

> While the trial court did enter findings and conclusions in the present case, they are conclusory. There is no indication that the trial judge actively and independently confronted the question of what was a reasonable fee. We do not know if the trial court considered any of Farmers' objections to the hourly rate, the number of hours billed, or the multiplier. The court simply accepted, unquestioningly, the fee affidavits from counsel.

Berryman v. Metcalf, 177 Wn. App. 644, 658, 312 P.3d 745 (2013), *review denied,* 179 Wn.2d 1026, 320 P.3d 718 (2014). As the *Berryman* court explained, "the findings must do more than give lip service to the

word 'reasonable.' The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis." *Id.* In considering objections similar to HSC's very specific and detailed objections to VMSI's fee request in this case, the *Berryman* court concluded:

> Here, the finding that the hours and rates charged were reasonable cannot by itself support the lodestar of $140,000, particularly in view of Farmers' very specific objections that certain blocks of time billed were duplicative or unnecessary. A trial court's failure to address such concerns is reversible error.

Berryman, 177 Wn. App. at 658-59. "Because the trial court made no findings regarding the specific challenged items, the record does not allow for a proper review of these issues." *Id, quoting Mayer v. City of Seattle*, 102 Wn. App. 66, 82-83, 10 P.3d 408 (2000), *review denied*, 142 Wn.2d 1029, 21 P.3d 1150 (2001).

Similarly, in the present case there is no finding of the actual hourly rate of VMSI's counsel, no analysis explaining why $225 per hour was a reasonable hourly rate for this insurance defense case when the billing records indicated $185 per hour for this case and counsel asserted he typically charged $195 per hour for other insurance defense cases, no

finding regarding the propriety of an arbitrary 50-50 split, no finding on whether 77.6 of the claimed hours could not be segregated, no finding on a multiplier, and no findings on other specific objections raised by HSC, as discussed *supra*.

In sum, the abject lack of findings necessary to facilitate this Court's review to determine whether the superior court properly exercised its discretion in awarding VMSI the amount of fees and costs is reversible error. At a minimum, if fees and costs are allowable not withstanding the anti-subrogation rule, this Court should remand to the superior court for entry of proper findings and conclusions, preferably based upon a lodestar analysis.

D. The Contract Entitles HSC to an Award of Attorney's Fees and Costs on Appeal.

Section 20 of the parties' management agreement provides that the prevailing party in any action to enforce or to interpret the terms and provisions of the agreement "shall be entitled to recover the reasonable costs and expenses of such litigation, including, but not limited to, the reasonable fees and expenses of attorneys. . ." CP 282. Therefore, in accordance with RAP 18.1(b), HSC requests an award of its attorney's fees and costs incurred on the present appeal or a direction to the trial

court to determine those fees and costs after remand in accordance with RAP 18.1(j).

VII. CONCLUSION

This Court should reverse and vacate the order and judgment entered by the superior court awarding prevailing party fees and costs to VMSI because Washington's anti-subrogation rule is a complete bar to VMSI's request, to which the parties' joint insurer, Fireman's Fund, holds a subrogated interest.

In the alternative, this Court should reverse and remand to the superior court with direction for entry of proper findings of fact and conclusions of law based upon application of a lodestar analysis.

RESPECTFULLY SUBMITTED this 21st day of April, 2014.

Martens + Associates | P.S.

By_____
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CERTIFICATE OF SERVICE

I certify that on the day and date indicated below, I caused the foregoing to be filed with the court and served on behalf of Appellant HSC Real Estate, Inc., on the following counsel as indicated below:

Counsel for Respondent VMSI, LLC William A. Cameron, Esq. Lee Smart P.S. 1800 One Convention Place 701 Pike Street Seattle, Washington 98101-3929	☐ ☐ ☑ ☐ ☐	U.S. Mail Telefax Hand Delivery Overnight Delivery E-mail with Recipient's Approval

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

SIGNED THIS 21st day of April 2014 at Seattle, Washington.

Matthew Morgan
Paralegal for Martens + Associates | P.S.