

64193-0

64193-0

FILED  
COURT OF APPEALS DIV. I  
2010 APR 23 PM 1:23  
E

No. 64193-0-I

[Consolidated with No. 64652-4-I]

COURT OF APPEALS,  
DIVISION I OF THE STATE OF WASHINGTON

---

LEDCOR INDUSTRIES (USA) INC.,

Appellant,

v.

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

Respondents.

---

SUPPLEMENTAL BRIEF OF APPELLANT

---

Richard L. Martens, WSBA # 4737  
Scott A. Samuelson, WSBA # 23363  
Attorneys for Appellant Ledcor Industries (USA) Inc.

**Martens + Associates | P.S.**  
705 Union Station  
705 Fifth Avenue South, Ste. 150  
Seattle, Washington 98104-4436  
(206) 709-2999

**ORIGINAL**

**CORPORATE DISCLOSURE**

Ledcor Industries (USA) Inc. is an employee-owned corporation.

## TABLE OF CONTENTS

CORPORATE DISCLOSURE.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	3
III. STATEMENT OF THE CASE.....	4
A. Ledcor was General Contractor for the Adelaide Mixed Use Construction Project where Starline Supplied the Windows.....	4
B. Ledcor’s Attempts to Settle with Starline are Unsuccessful.....	7
C. Starline’s Motion for Summary Judgment Against Ledcor is Granted.....	8
D. Starline’s Motion for Prevailing Party Fees Against Ledcor is Granted in its Entirety.....	9
IV. LEGAL ARGUMENT.....	16
A. The Standard of Review for Entitlement to a Fee Award is <i>de novo</i> and the Standard of Review for the Amount of a Fee Award is Abuse of Discretion.....	16
B. The Trial Court Committed an Error of Law in Ruling Zurich was Entitled to a Prevailing Party Fee Award Because an Insurer May Not Seek Subrogation from a Co-Insured.....	17

1.	Zurich is seeking subrogation from its own insured.....	17
2.	An insurer cannot seek subrogation from a co-insured.....	18
3.	The insurance contract does not allow Zurich to seek subrogation for recovery of defense fees.....	21
4.	The trial court erred in concluding Zurich was not seeking subrogation to recover its defense fees.....	22
C.	Even Assuming Starline was Entitled to a Prevailing Party Fee Award, the Trial Court Abused Its Discretion in Making an Excessive Award.....	24
D.	Ledcor Requests an Award of Fees on Appeal Under RAP 18.1 .....	27
	CONCLUSION .....	27
	CERTIFICATE OF SERVICE.....	29

**TABLE OF AUTHORITIES**

**CASES**

*Absher Construction Co. v. Kent School Dist.*,  
79 Wn. App. 841, 917 P.2d 1086 (1996).....24-25, 27

*Atwood v. Shanks*, 91 Wn. App. 404,  
958 P.3d 332 (1998).....17

*Blueberry Place Homeowners Ass’n v. Northward Homes, Inc.*,  
126 Wn. App. 352, 110 P.3d 1145 (2005).....21-22

*Chubb Ins. Co. v. DeChambre*, 349 Ill.App.3d 56,  
808 N.E.2d 37 (2004).....19-20

*Frontier Ford, Inc. v. Carabba*, 50 Wn. App. 210,  
747 P.2d 1099 (1987).....19, 21

*Harmony at Madrona Park Owners Association v. Madison  
Harmony Development, Inc.*, 143 Wn. App. 345, 177 P.3d 755  
(2008), *review denied*, 164 Wn.2d 1032 (2008) .....16

*Hough v. Stockbridge*, 152 Wn. App. 328, 216 P.3d 1077 (2009) .....16

*Metropolitan Mortgage v. Becker*, 64 Wn. App. 626,  
825 P.2d 360 (1992).....26-27

*Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411,  
191 P.3d 866 (2008).....19

*Nat’l Union Fire Ins. Co. v. Engineering-Science, Inc.*,  
673 F.Supp. 380 (N.D.Cal. 1987).....21

*Penn Life Ins. Co. v. Dep’t of Employment Sec.*,  
97 Wn.2d 412, 645 P.2d 693 (1982).....22

<i>Sherry v. Financial Indemnity Co.</i> , 160 Wn.2d 611, 160 P.3d 31 (2007).....	21
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001) .....	17
<i>Truck Insurance Exchange v. Vanport Homes</i> , 147 Wn.2d 751, 58 P.3d 276 (2002).....	23
<i>Winters v. State Farm Mutual</i> , 144 Wn.2d 869, 31 P.3d 1164 (2002).....	19

**STATUTES/COURT RULES**

RAP 18.1 .....	27
RPC 1.5.....	24

**OTHER AUTHORITY**

BLACK’S LAW DICTIONARY 1427 (6 <sup>th</sup> Ed. 1991).....	19
Couch on Insurance (Second) § 61:134 (1966).....	19

## I. INTRODUCTION

This appeal by Ledcor Industries (USA) Inc. (“Ledcor”) concerns two issues related to a prevailing party fee award made by the trial court in favor of Respondent Starline Windows, Inc. (“Starline”).<sup>1</sup>

First, the trial court erred as a matter of law in allowing Zurich (Starline’s insurer) to step into Starline’s shoes and seek subrogation against Ledcor (an additional insured under Zurich’s policy) for recovery of defense fees under the subcontract between Ledcor and Starline. Zurich never responded to Ledcor’s tender of the claims arising from Starline’s work at the Adelaide project, but accepted Starline’s tender of those same claims after Starline was sued by Ledcor. Zurich paid all of Starline’s defense fees and costs. When its primary insured (Starline) prevailed on summary judgment, Zurich sought to recover those fees from its co-insured Ledcor. Washington law does not allow an insurer to subrogate against one of its own insureds under the same policy; thus, the trial court committed reversible error as a matter of law.

---

<sup>1</sup>By correspondence from Court Administrator Richard Johnson dated March 15, 2010, the Starline appeal (Case No. 64652-4-I) and the Accurate Siding appeal (Case No. 64193-0-I) were consolidated into the Accurate Siding appeal (Case No. 64193-0-I). Because Ledcor had already filed its Opening Brief in the Accurate Siding appeal before learning of the consolidation of the two appeals, Ledcor filed a motion to file a supplemental brief to address the Starline appeal. By correspondence dated April 2, 2010 Court Administrator Richard Johnson granted Ledcor’s motion to supplement.

Second, the trial court abused its discretion in making an excessive fee award. Starline supplied the windows and sliding glass doors for the Adelaide project. Starline was a minor player in this complex, multi-tier construction defect litigation. Ledcor recognized this early on and attempted to settle with Starline for only \$2,500. Zurich, however, broke off settlement negotiations and decided that it would rather spend \$66,305.38 – nearly 30 times the amount in controversy – to defend claims made against its primary insured so that it could recover its fees from its other insured.

In addition, Zurich never paid the \$66,305.38 in fees it was awarded because Zurich appointed its in-house counsel to defend Starline against Ledcor's claims. Starline's counsel was paid a salary from Zurich. The invoices it submitted with its motion were never paid – by Zurich or anyone else.

Subrogation is an equitable doctrine applied to prevent an injustice. Here, Zurich sought and was awarded reimbursement of \$66,305.38 it never paid by resorting to the legal fiction of “standing” in Starline's shoes in order to seek subrogation against a co-insured. If this award is allowed to stand, Zurich would receive a windfall profit from its own insured.

Under the circumstances, the prevailing party fee award should be reversed or, at a minimum, greatly reduced.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred as a matter of law in ruling Starline was entitled to a prevailing party fee award.

2. The trial court abused its discretion in making an excessive prevailing party fee award to Starline.

### **Issues Relating to Assignments of Error:**

1. Whether the trial court committed an error of law in ruling Starline was entitled to a prevailing party fee award where: (a) Starline's defense fees were paid solely by Zurich; (b) Zurich sought to recover its defense fee payments by subrogating itself to Starline's interest under a construction subcontract; (c) Ledcor was an additional insured under the policy Zurich issued to Starline; and, (d) Washington law does not allow insurers to seek subrogation from a co-insured. (Assignment of Error 1).

2. Whether the trial court abused its discretion in awarding Starline 100 percent of its fee request of \$66,305.38, where the fee award is approximately 30 times greater than the amount in controversy, where Starline's counsel is a salaried in-house counsel for Zurich, where the

invoices supporting the fee request were never paid, and where – under the circumstances – Zurich would receive a windfall profit. (Assignment of Error 2).

### III. STATEMENT OF THE CASE

#### A. **Ledcor was General Contractor for the Adelaide Mixed Use Construction Project where Starline Supplied the Windows.**

Ledcor was general contractor for the Adelaide construction project in West Seattle consisting of 69 residential units and 2 commercial units. *CP 286-S*.<sup>2</sup> Adelaide was built as one project by one developer and one general contractor under one prime contract. *CP 286-S*. Following construction, the project was divided into two homeowner’s associations (“Condominium HOA” and “Townhomes HOA”).

Ledcor retained Starline to supply vinyl windows and sliding glass doors for the project pursuant to a written and signed Purchase Order Subcontract, dated October 18, 2002. *CP 29-30-S*.

Paragraph 18 of the subcontract, entitled INDEMNIFICATION, provided:

Vendor shall defend, indemnify and hold Ledcor and

---

<sup>2</sup> Citations to the Clerk’s Papers for the Starline appeal are cited as *CP I-S* because a separate set of Clerk’s Papers was obtained for the Starline appeal. Citations to Clerk’s Papers for the Accurate Siding appeal are cited as *CP-1*, with no S label.

Owner harmless against claims, damages, bodily injury or property damage arising out of Vendor's performance and to the extent caused by the negligent act(s) or omission(s) of Vendor, its employees agents and subcontractors.

*CP 30-S.* Starline was defined as "Vendor."

Paragraph 19 of the subcontract, entitled ATTORNEY'S FEES

AND COSTS, provided:

Disputes shall be resolved in accordance with the dispute resolution provisions of the Main Contract. In the event that arbitration and/or litigation is instituted to enforce or contest the provisions of this Agreement or adjudicate and question(s) arising under this Agreement, the prevailing party shall be entitled to its actual attorneys' fees and all costs incurred in connection therewith (including, without limitation, consultant and expert witness fees and expenses), in addition to costs otherwise recoverable by Statute or Court Rule in addition to any other relief granted.

*CP 30-S.*

Paragraph 22 of the subcontract, entitled FLOW DOWN, provided:

Vendor binds itself to Ledcor in the same manner and to the same extent that Ledcor is bound and obligated to Owner under Ledcor's contract with the Owner, including all addenda, modifications, and revisions thereto ("Main Contract"). All rights which the Owner may exercise or enforce against Ledcor, may be exercised or enforced by Ledcor against Vendor, including but not limited to any claim for liquidated damages. . . . *CP 30-S.*

Under the Flow Down provision in the subcontract, Starline was required under a provision in the Main Contract to name Ledcor and the

owner as additional insureds on its policy with Zurich. *CP 286-288-S.*

Indeed, Ledcor was made an additional insured under the policy Zurich issued to Starline under the following section of the policy:

**SECTION II - WHO IS AN INSURED**

...

2. Each of the following is also an insured:

...

e. Any person or organization with whom you agree, because of a written contract, to provide insurance such as is afforded under this policy, but only with respect to liability arising out of your operations, "your work" or facilities owned or used by you. . . .

*CP 297-S.* Because Starline was required to name Ledcor as an additional insured under the flow down provision in the subcontract, Ledcor became an automatic *de facto* insured under Section II of the Zurich policy. *Id.*

In 2007, the Condominium HOA and the Townhomes HOA filed separate actions against the developer, West Seattle Property, LLC ("WSP"), for violations of the Washington Condominium Act and construction defects. *CP 379-381-S.* WSP, in turn, sued Ledcor in both actions and Ledcor, in turn, sued the subcontractors it believed were responsible for the alleged defects, including Starline. *Id.* The actions were subsequently consolidated for discovery and trial. *Id.*

When claims were made against Ledcor relating to the Starline

windows and sliding glass doors, Ledcor tendered those claims to Starline and its carrier, Zurich. *CP 242-S, 261-S, 280-S.* Starline tendered the claims made against it to Zurich. *CP 279-S.*

Zurich accepted Starline's tender of Ledcor's claims under a reservation of rights and appointed counsel to defend Starline. *CP 279-S.* Zurich did not dispute Ledcor was an additional insured under its policy, but it never accepted Ledcor's tender and never participated in Ledcor's defense. *CP 280-281-S.*

**B. Ledcor's Attempts to Settle with Starline are Unsuccessful.**

Of the approximately 20 subcontractors named in the consolidated Adelaide litigation, Starline was the least significant from a liability perspective. The claims related to the windows were relatively minor. Ledcor recognized this early on and attempted to settle with Starline for a minimal amount before extensive discovery began.

Starline offered \$1,600 to settle the Townhomes claims. *CP 194-S.* Ledcor countered with a demand for \$3,200. *Id.* On January 12, 2009, before extensive deposition and motion practice had begun, Ledcor reduced its demand to \$2,500 to settle the claims against Starline. *CP 191-S, 196-97-S.*

On January 28, 2009, although the difference between Ledcor's demand and Starline's offer was only \$900, Starline suddenly withdrew its offer and stated its intention to cease settlement negotiations, file a motion for summary judgment and seek prevailing party fees. *CP 201-S*. Of the \$66,305.38 in fees and costs Starline seeks to recover on behalf of Zurich, approximately 80 percent were incurred after Starline ceased settlement negotiations. *CP 32-53-S*.

**C. Starline's Motion for Summary Judgment Against Ledcor is Granted.**

Shortly after withdrawing its offer, Starline filed a motion for summary judgment against Ledcor seeking dismissal of the claims asserted in the consolidated action. *CP 18-19-S*. Ledcor opposed the motion. Because there were so many dispositive motions on the February calendar, the trial court continued several of the motions, including Starline's motion, into May of 2009. Following oral argument in May, Starline's motion was granted. *CP 18-S*.

In January, February and March more than 40 lay and expert depositions took place, most of them attended by Starline's counsel and few of them relevant to Starline's work. *CP 233-S*. With the June 1, 2009, trial date approaching, additional motion practice and trial

preparation were conducted in April and May. *Id.* The vast majority of Starline's billings relate to work performed *after* it filed its motion for summary judgment.

**D. Starline's Motion for Prevailing Party Fees Against Ledcor is Granted in Its Entirety**

Following entry of the order dismissing Ledcor's claims against it, Starline filed its initial motion for prevailing party fees in August 2009. *CP 15-22-S.* Starline sought to recover \$66,305.38 in fees and costs on behalf of Zurich who paid all fees and costs pursuant to its defense obligation under the policy. *Id.*

Starline's motion was supported by the first declaration submitted by its counsel, Kenneth Cusack, and attached billing invoices, which purported to show Starline's "actual" fees and costs. *CP 23-53-S.* Starline submitted a one-page summary of deposition transcript costs and legal services costs, but no actual invoices from the court reporter or the legal service company were submitted and no back-up documentation of the claimed costs was provided. *Id.*

In its initial opposition, Ledcor argued Mr. Cusack's declaration was misleading and inaccurate because it stated that his "hourly rate is currently \$202.00" and the "total amount of legal fees incurred to defend

this case to resolution is \$63,330.18.” *CP 179-186-S*. In fact, Mr. Cusack is in-house counsel for Zurich and a salaried employee – he is not paid an hourly rate. *Id.* His salary is paid regardless of whether he worked on the Starline defense and there is no evidence Zurich ever paid – or intended to pay – any of the internal accounting billing invoices it submitted. *Id.*

Ledcor argued Starline’s request was excessive, among other reasons, because its billing entries included multiple entries for non-essential or unidentifiable tasks such as multiple entries of “export backlog of emails to shared drive”, “RA historical emailed pleadings for doc management purposes,” “RA Stp/Ord DSM Unique Projects and Insulpro.” *CP 180-S*.

Ledcor also moved to continue Starline’s motion in order to conduct limited discovery of Zurich and its counsel on the factual basis of its fee request. *CP 73-80-S*. The trial court granted Ledcor’s motion to continue, including ordering Zurich to produce its counsel and its claims adjuster for deposition. *CP 167-170-S*.

Ledcor deposed Starline’s attorney, Kenneth Cusack, and the Zurich claims representative who handled the Starline claim, Howard Schlenker. *CP 250-282-S*.

At his deposition, Mr. Cusack testified inconsistently with many of the statements made in his original declaration [which he subsequently withdrew]. He testified he is *not* a member of a law firm but an employee of Zurich and that *none* of the billings he submitted in evidence were ever sent to Starline or Zurich for payment. *CP 252-S, at p. 5, lns. 10-12; CP 253-S, at p. 10, lns. 16-19.* He also testified the hourly billing rate he stated in his declaration was *not* accurate. *CP 258-259-S, at pp. 32-33.* He testified his office is *not* paid for its work on an hourly rate; rather, Zurich pays all office overhead, including all administrative and clerical expenses and salaries. *CP 253-S, at p. 12, lns. 10-15.*

Mr. Cusack also testified he *never* reviewed the paralegal billing entries to determine whether they involved legal work (which may be recoverable) as opposed to clerical or administrative work (which are not recoverable). *CP 259-S, at p. 35, lns. 4-12.* Several entries involved clerical tasks like completing a paralegal assignment form and exporting emails to a shared drive. *CP 261-S, at p. 44, lns. 2-23.* Mr. Cusack made billing entries for such non-essential tasks as reviewing Ledcor's responses to SQI's discovery requests [SQI was the roofer] even though he knew that the roofing issues had nothing to do with the windows supplied by

Starline. *CP 262-S, p. 48, ln. 19 to p. 49, ln. 5.* There were multiple additional examples of non-essential work Mr. Cusack purported to bill for. *See 262-263-S, at pp. 48-50, generally.*

Further, Mr. Cusack failed to segregate reasonable and necessary time entries (*e.g.*, deposition attendance prior to January 12, 2009) from unreasonable and unnecessary entries (*e.g.*, discovery of subcontractors whose work at the project, by counsel's own admission, had no reasonable connection to his client's work) that occurred after January. *CP 250-65-S.* He also testified that he represented another subcontractor in the Adelaide litigation, MD Railings, whose work had nothing to do with the windows, which means that some of the invoices he submitted may have included time billed for work performed on behalf of MD Railings, not Starline. *CP 191-S.*

Mr. Cusack admitted the amount in controversy between Ledcor and Starline in January 2009 was only \$900.<sup>3</sup> *CP 265-S, p. 58, lns. 20-24.*

Mr. Cusack testified he believed Ledcor was an insured under

---

<sup>3</sup>At his deposition, Mr. Cusack testified that he did not recall if Ledcor ever made a demand to settle both the Townhomes claims and the Condominium claims for \$2,500. *CP -S, at p. 59, lns.19-25.* Although Mr. Cusack may not recall it, Ledcor's counsel did make an offer that would have dismissed both claims for \$2,500 during a telephone conversation with Mr. Cusack. *CP 242-S.* The offer was rejected. *Id.*

Starline's policy, but wasn't certain. *CP 253-S, p. 22.*

Finally, Mr. Cusack has *no* personal testamentary capacity regarding the reasonableness of the attorney rates Zurich "charges" for this matter. Mr. Cusack testified the multiple hourly rates for this matter were determined by "someone at the head office" (in Illinois) and he did not know who came up with the billing rates or how to find the person who made them up. *CP 253-S, p. 12.* It is his understanding the hourly rate was for overhead and expenses. *CP 253-54-S, pp. 13-14.* Some unknown individual in Illinois – who may or may not be an attorney – cannot possibly know whether the fees charged in Washington are reasonable or reasonably necessary. Regardless, Zurich failed to put forth *prima facie* admissible evidence on this issue.

At his deposition, Zurich's insurance adjuster, Howard Schlenker, conceded Zurich spent more than \$63,000 to litigate a case when only \$900 was in controversy:

Q (by Mr. Martens): You mentioned earlier that you get audited seemingly on an ongoing basis by Zurich. What would happen on an audit where you spent \$63,000 defending a case in which the amount in controversy was \$900?

...

A (by Mr. Schlenker) That could have a lot of answers. It depends on the facts of the case and the variables with it. ...

*CP 278-S, at p. 37, ln. 23 to p. 38, ln. 10.*

When asked if he agreed that if Starline had accepted the \$2,500 demand, there would have been no need for further discovery or motion practice, Mr. Schlenker answered, "I suppose that's true." *CP 276-S. at p. 30, ln. 24 to p. 32, ln. 2.* Mr. Schlenker did not know if the \$2,500 demand was communicated to their insured, Starline. *Id. at 32, lns. 3-14.*

Significantly, Mr. Schlenker testified that Starline's decision to continue litigating a *de minimus* claim was motivated by advice from Starline's counsel that the contract had a prevailing party fee provision so there was no reason to settle, even when the amount in controversy was so small. *CP 279-S, p. 41, lns. 4-10.* Without Starline's consent, Zurich made a conscious decision to increase the cost of litigation in order to potentially seek a windfall recovery of attorney's fees for itself to offset salaries it has to pay regardless. In other words, any money it recouped would go right to Zurich's bottom line quarterly profits.

After the depositions were conducted, Starline filed an Amended Motion for Prevailing Party Fees. *CP 208-225-S.*

Ledcor filed an Amended Response and Opposition to Starline's Amended Motion. *CP 226-238-S.* Ledcor argued Starline was not entitled

to a prevailing party fee award because Starline's fees were paid by its carrier, Zurich, and Zurich could not seek subrogation against its own insured. Zurich has never contested that Ledcor was an additional insured under the policy it issued to Starline.

In its Response, Ledcor argued the fee request was excessive and should be limited to \$12,818.50 because the vast majority of fees and costs incurred by Starline were incurred after it voluntarily and unreasonably chose not to accept Ledcor's \$2,500 demand in January 2009. *CP 226-238-S*. Extensive deposition, motion and trial preparation practice was conducted in February, March and April of 2009. *Id.* If Starline would have accepted Ledcor's *de minimus* \$2,500 demand on January 12, 2009, its attorney's fees (using Zurich's own inflated rates of \$195.00, \$202.00 and \$211.00 per hour) based on 82.7 hours of attorney time would be \$17,267.80. *Id.* Using Ledcor's hourly billing rate of \$155.00, Starline's attorney's fees as of January 12, 2009 would be \$12,818.50. *Id.*

The trial court awarded Starline 100 percent of its requested fee award, an amount of \$66,305.38. *CP 442-447-S*. The trial court filed a three-page letter explaining the basis of its decision. *CP 448-450-S*. The trial court rejected Ledcor's subrogation argument because it concluded:

. . . that the request for prevailing party's attorney fees is not a subrogation claim that would trigger a waiver of subrogation bar. This is not a loss which Zurich has paid on behalf of its insured for which it is seeking a subrogable recovery from a co-insured.

*Id.* The trial court did not provide any case law citations to support its reasoning. It did acknowledge, among other things, its award appears "disproportionate to the potential liability exposure of Starline." *Id.*

This appeal followed as Ledcor timely filed a Notice of Appeal.

*CP 451-468-S.*

#### IV. LEGAL ARGUMENT

**A. The Standard of Review for Entitlement to a Fee Award is *de novo* and the Standard of Review for the Amount of a Fee Award is Abuse of Discretion.**

The issue of whether Zurich is entitled to subrogate to Starline's interest under the subcontract and recover an award of prevailing party fees against its co-insured is an issue of law reviewed *de novo*. *Hough v. Stockbridge*, 152 Wn. App. 328, 347, 216 P.3d 1077 (2009); *Harmony at Madrona Park Owners Association v. Madison Harmony Development, Inc.*, 143 Wn. App. 345, 363, 177 P.3d 755 (2008), *review denied*, 164 Wn.2d 1032 (2008).

The issue of whether the trial court's prevailing party fee award

was excessive is reviewed for abuse of discretion. *Harmony, supra*, 143 Wn. App. at 363. A trial court abuses its discretion when its decision is arbitrary, unreasonable, based on untenable reasons, based on an erroneous view of the law, or when it fails to follow applicable law. *Atwood v. Shanks*, 91 Wn. App. 404, 408-409, 958 P.3d 332 (1998); *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

**B. The Trial Court Committed an Error of Law in Ruling Zurich was Entitled to a Prevailing Party Fee Award Because an Insurer May Not Seek Subrogation From a Co-Insured.**

The trial court committed an error of law in allowing Zurich to seek subrogation against a co-insured because Washington law does not allow insurers to seek subrogation from their own insureds.

**1. Zurich is seeking subrogation from its own insured.**

Zurich is standing in the shoes of Starline in order to recover defense fees it never paid from its co-insured Ledcor under the prevailing party fee provision in the subcontract between Ledcor and its primary insured Starline.

Starline does not contest Ledcor's claim that it is an insured under Zurich's policy. The subcontract, at paragraph 22, had a flow down provision, which provided that Starline was bound to Ledcor under the

same conditions that Ledcor was bound under the prime contract with the owner/developer. *CP 355-56-S*. It is undisputed Starline was required through the flow down provision incorporating the terms of the prime contract to name Ledcor as an additional insured on its policy with Zurich – just as Ledcor had to name the owner as an insured under its liability insurance policies. *CP 287-288-S*.

The Zurich policy provides that any person or entity whom Starline agreed by contract to name as an additional insured is automatically an additional insured on the policy. *CP 297-S*. Reading the policy and contract provisions together, Ledcor is an insured. *Id.* Although Zurich did not accept Ledcor's tender, Zurich has never taken the position that Ledcor was not an additional insured under its policy. Nor could it.

The relief sought in Starline's motion for prevailing party fees is reimbursement for defense fees and costs paid by Zurich on behalf of Starline as a benefit of the policy. Starline seeks the relief on behalf of Zurich against Ledcor, a co-insured under the same policy. This is subrogation pure and simple.

**2. An insurer cannot seek subrogation from a co-insured.**

When Zurich sought to substitute itself in place of Starline in order

to succeed to Starline's contractual right to recover prevailing party fees against Ledcor, it was seeking, by definition, a form of subrogation.

Subrogation has been defined as:

The substitution of one person in place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.

BLACK'S LAW DICTIONARY 1427 (6<sup>th</sup> Ed. 1991).

"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), quoting BLACK'S LAW DICTIONARY 1467 (8<sup>th</sup> Ed. 2004).

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 Mutual*, 144 Wn.2d 869, 875-76, 31 P.3d 1164 (2002). An insurer cannot subrogate a claim against a co-insured. *Id.*, see also *Frontier Ford, Inc. v. Carabba*, 50 Wn. App. 210, 212, 747 P.2d 1099 (1987)(an insurer has no right of subrogation against its own insured); see, also, Couch on Insurance (Second) § 61:134 (1966).

Other jurisdictions agree. "It is well settled that an insurer may not

subrogate against its own insured or any person or entity who has the status of a co-insured under the insurance policy.” *Chubb Ins. Co. v. DeChambre*, 349 Ill.App.3d 56, 60, 808 N.E.2d 37, 41 (2004). In *Chubb*, an additional insured moved for summary judgment against claims made by an insurer, as subrogee for its named insured. *Id.* at 59. The trial court granted the motion, dismissing the claims against the additional insured under the anti-subrogation rule. *Id.* Its ruling was affirmed on appeal on the ground that the anti-subrogation rule was intended to prevent an insurer from recovering from an insured a risk the named insured had passed along to its insurer under the policy. *Id.* at 62, 68. The anti-subrogation rule is supported by sound public policy. First, the insurer should not be able to pass its loss to its own insured, thus avoiding coverage which its named insured has purchased and paid for in the form of premiums. *Id.* Second, the insurer should not be placed in a situation where there exists a potential conflict of interest, thereby possibly affecting the insurer’s incentive to provide a vigorous defense for one of its insured. *Id.*

An insurer is barred as a matter of law from seeking subrogation from a co-insured, whom it has insured for the very liability for which it

seeks recovery. *Nat'l Union Fire Ins. Co. v. Engineering-Science, Inc.*, 673 F.Supp. 380 (N.D.Cal. 1987). In *National Union*, the court reasoned that the bulk of authority elsewhere establishes the principle that an insurer may not subrogate against a co-insured. *Id.* at 382. Because subrogation is an equitable doctrine, it will be enforced or not according to the dictates of equity and good conscience. *Frontier Ford, Inc. v. Carabba*, 50 Wn. App. 210, 212, 747 P.2d 1099 (1987).

**3. The insurance contract does not allow Zurich to seek subrogation for recovery of defense fees.**

Starline has not identified any provision in the subcontract or the insurance contract that entitles Zurich to recover its payment of Starline's defense fees from Ledcor. An insurer has no subrogation-like rights against its own insured unless provided for by contract. *Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 618, 160 P.3d 31 (2007).

The right to recover prevailing party fees belongs by contract to Starline. It is undisputed that Starline did not pay for its defense. Zurich did. Defense and indemnity are the two primary benefits a policy provides. This policy does not allow Zurich to recoup its fees from Ledcor. "The rule in Washington is that absent a contract, statute or recognized ground of equity, attorneys fees will not be awarded as part of

the cost of litigation.” *Blueberry Place Homeowners Ass’n v. Northward Homes, Inc.*, 126 Wn. App. 352, 358, 110 P.3d 1145 (2005), citing *Penn. Life Ins. Co. v. Dep’t of Employment Sec.*, 97 Wn.2d 412, 413, 645 P.2d 693 (1982). Here, it is undisputed Zurich defended Starline under the defense provisions of its policy and paid 100 percent of Starline’s defense. There is no provision in the policy allowing Zurich to recover its fees from Ledcor. Absent such a provision, Zurich is not entitled to recover its defense fees under Starline’s subcontract with Ledcor.

**4. The trial court erred in concluding Zurich was not seeking subrogation to recover its defense fees.**

The trial court erred in concluding subrogation is limited to indemnity payments. In rejecting Ledcor’s argument that Zurich was improperly seeking subrogation from a co-insured, the trial court concluded:

. . . that the request for prevailing party’s attorneys fees is not a subrogation claim that would trigger a waiver of subrogation bar. This is not a loss which Zurich has paid on behalf of its insured for which it is seeking a subrogable recovery from a co-insured.

*CP 449-50-S*. The trial court attempted to make a distinction between defense payments and indemnity payments, apparently concluding that only indemnity payments to a third party constitute a “loss” that may be

recovered by an insurer through subrogation. The trial court cites no case law to support its distinction and Ledcor is aware of none.

The payment of defense fees and the payment of indemnity are the two primary benefits of an insurance policy. *Truck Insurance Exchange v. Vanport Homes*, 147 Wn.2d 751, 761-62, 58 P.3d 276 (2002). The funds for both come from a single source – an insurance company.

Although subrogation typically involves reimbursement for payment of a loss, it is not limited to such situations. Subrogation is a broader principle that, in the appropriate circumstances, allows one entity to substitute for another entity in order to succeed to its rights against a third party. Here, Zurich is seeking to substitute with Starline to succeed to Starline's contractual right to prevailing party fees. Zurich paid those fees under its defense obligation in the policy. In seeking to recover its defense fee payments, Zurich is seeking subrogation to recover payments it was required to make under the policy. It makes no difference whether the payments are for defense or indemnity, it is still subrogation. Ledcor is aware of no other theory that would allow Zurich to step into Starline's shoes and succeed to its right to prevailing party fees.

To the extent payments made by an insurer are recoverable against

a third party by substituting to the interests of the insured, those payments are subrogable interests. There is no meaningful distinction between an insurer attempting to recover defense fees and an insurer attempting to recover indemnity payments by substituting to the interests of its insured.

**C. Even Assuming Starline was Entitled to a Prevailing Party Fee Award, the Trial Court Abused Its Discretion in Making an Excessive Award.**

Even assuming, for argument purposes, Starline was entitled to a prevailing party fee award for the benefit of Zurich (notwithstanding the absolute prohibition of an insurer subrogating against one of its own insureds), the trial court abused its discretion because its fee award was excessive and unreasonable.

Under Washington law, all requests for attorney's fees and costs must be both reasonable and reasonably necessary. *Absher Construction Co. v. Kent School Dist.*, 79 Wn. App. 841, 847-48, 917 P.2d 1086 (1996) (holding substantial reduction from the attorney hours claimed under a prevailing party fee agreement was appropriate after consideration of relevant factors). *See, also*, RPC 1.5. The burden of proving a fee request is reasonable is always on the fee applicant. *Id.* In deciding whether to award the requested fees, the trial court should consider the relationship

between the amount in dispute and the fee requested. *Id.* It should also consider the hourly rates of opposing counsel.<sup>4</sup> *Id.* The court may discount work that is duplicative or otherwise unproductive. *Id.* The trial court must make an independent determination based on a consideration of all relevant factors in order to satisfy itself the fees meet those standards. *Id.* The reasonableness of the request depends on the particular circumstances of each case. *Id.*

Here, Zurich spent nearly 30 times the amount in controversy to defend a claim it could have settled for \$2,500. This does not satisfy the first of the *Absher* factors, *supra*. The trial court admitted as much in its letter explaining the reasons for its ruling. *CP 448-450-S*.

Starline's claim for recovery of substantial paralegal billing entries is defective on its face and does not satisfy another of the *Absher* criteria.<sup>5</sup>

---

<sup>4</sup>Starline's stated hourly rate [which Zurich never paid] is \$56.00 more per hour than Ledcor's hourly rate [which is paid]. *CP 191-S*. Starline has never identified the amount of Mr. Cusack's salary.

<sup>5</sup>For a party to recover, as costs, services performed by non-lawyer personnel, the following criteria must be met: (1) the services performed by a paralegal must be legal in nature; (2) the performance must be supervised by an attorney; (3) the qualifications of the paralegal must be specified in the fee request in sufficient detail to show the person is qualified to perform those services; (4) the services must be sufficiently detailed to allow the reviewing court to determine whether the services were legal or clerical in nature; (5) the amount of time spent must be reasonable; and (6) the amount charged must be reasonable in the legal community where services were performed. *Absher, supra*, 79 Wn. App. at 845. Starline fails to meet its burden to show compliance with the criteria.

On behalf of Zurich, Starline requests reimbursement of its “actual” fees – the actual amount of fees Starline and/or its carrier have been billed for and have been, or will, be paid. But neither Starline nor Zurich have paid any “actual” attorney’s fees. Starline’s counsel is in-house counsel for Zurich. He is a salaried employee. His e-mail address is [kenneth.cusack@zurichna.com](mailto:kenneth.cusack@zurichna.com). Zurich North America lists the “Law Office of William J. O’Brien” on its website even though the “law office” is not and never has been a law firm. *CP 191-201-S*. Starline presented no proof that it or its carrier have **actually** ever been billed for any fees. There is no evidence that Zurich has paid, or intends to pay, its in-house counsel \$66,305.38 in fees and costs for the services it provided on the Adelaide litigation. Because Starline’s counsel is a salaried employee of Zurich, it is highly doubtful that Mr. Cusack’s so-called “law firm” has been paid, or will be paid, anything other than reimbursement for costs.

Rather, the trial court’s award of \$66,305.38 to Zurich for fees and costs is a windfall. Washington courts have voiced concern over allowing companies who employ salaried in-house counsel to reap windfall profits through grants of attorney’s fee award using outside hourly rates.

*Metropolitan Mortgage v. Becker*, 64 Wn. App. 626, 633, n.3, 825 P.2d

360 (1992). Starline's counsel has admitted he is not paid \$202.00 per hour for his work but rather is paid a salary. *CP 252-S, at p. 5, lns. 10-12; CP 253-S, at p. 10, lns. 16-19*. A fee award at \$202.00 per hour would give free money to Zurich.

**D. Leducor Requests an Award of Fees on Appeal Under RAP 18.1.**

RAP 18.1(a) and (b) provide that a party who has a right to recover reasonable attorney's fees and expenses on review must request an award of fees in its opening brief. Leducor hereby requests an award of fees and expenses if it prevails on this appeal under the prevailing party fee provision in its subcontract with Starline.

**CONCLUSION**

The trial court's fee award should be reversed on two separate grounds. First, the trial court committed an error of law in allowing Zurich to seek subrogation from its own insured. Second, the trial court abused its discretion in allowing Zurich to recover all of the fees it claims even though the fees were never invoiced or paid and the factors set forth in *Absher Construction* to evaluate what legal and non-legal services are recoverable were not satisfied. In addition, a windfall award to a carrier against one of its own insureds should be closely scrutinized.

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

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

By 

Richard L. Martens, WSBA # 4737  
Scott A. Samuelson, WSBA #23363  
Attorneys for Appellant Leducor  
Industries (USA) Inc.

**CERTIFICATE OF SERVICE**

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

Clerk of the Court  
Court of Appeals, Division I  
One Union Square  
600 University Street  
Seattle, Washington 98101  
[Via ABC Legal Messenger]

**Accurate Siding**  
Pablo Suarez  
Accurate Siding, Inc.  
16149 Redmond WY, 184  
Redmond, WA 98052-3834  
[Via First-Class U.S. Mail (address supplied by withdrawn counsel Stephen Jager)]

**Counsel for Fourth-Party Defendant/  
Respondent Starline Windows, Inc.**

Kenneth Cusack, Esq.  
Law Office of  
William J. O'Brien  
999 Third Avenue, Ste. 805  
Seattle, Washington 98104  
[Via ABC Legal Messenger]

**AND ALL OTHER INTERESTED PARTIES**

<b><u>Counsel for Fourth-Party Defendant Total Window &amp; More</u></b> Earl Sutherland, Esq. Reed McClure 601 Union Street, Ste. 1500 Seattle, Washington 98101	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery (ABC Legal) <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Delivery <input checked="" type="checkbox"/> E-mail with Recipient's Approval <a href="mailto:esutherland@rmlaw.com">esutherland@rmlaw.com</a> <a href="mailto:jlading@rmlaw.com">jlading@rmlaw.com</a>
---	---

<p><b><u>Counsel for Fourth-Party Defendant Northwest Sheet Metal, Inc.</u></b>  Norma S. Ninomiya, Esq.  Law Offices of  Andersen &amp; Nyburg  P.O. Box 4400  Portland, Washington 97208</p>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	<p>U.S. Mail  Hand Delivery (ABC Legal)  Facsimile  Overnight Delivery  E-mail with Recipient's Approval  <a href="mailto:norma.ninomiya@libertymutual.com">norma.ninomiya@libertymutual.com</a>  <a href="mailto:julie.lycklama@libertymutual.com">julie.lycklama@libertymutual.com</a></p>
<p><b><u>Counsel for Fourth-Party Defendant Pacific Sheet Metal, Inc.</u></b>  W. Scott Noel, Esq.  Law Offices of  Kelley J. Sweeney  1191 2<sup>nd</sup> Avenue, Ste. 500  Seattle, Washington 98101</p>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	<p>U.S. Mail  Hand Delivery (ABC Legal)  Facsimile  Overnight Delivery  E-mail with Recipient's Approval  <a href="mailto:scott.noel@libertymutual.com">scott.noel@libertymutual.com</a>  <a href="mailto:anita.buchignani@libertymutual.com">anita.buchignani@libertymutual.com</a>  <a href="mailto:Michelle.Temple@LibertyMutual.com">Michelle.Temple@LibertyMutual.com</a></p>
<p><b><u>Counsel for Fourth-Party Defendant/Judgment Debtor Metal System, Inc.</u></b>  Betsy Gillaspay, Esq.  David L. Dvorkin, Esq.  Salmi &amp; Gillaspay, PLLC  821 Kirkland Ave., Ste. 200  Kirkland, Washington 98033</p>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	<p>U.S. Mail  Hand Delivery (ABC Legal)  Facsimile  Overnight Delivery  E-mail with Recipient's Approval  <a href="mailto:bgillaspay@salmigillaspay.com">bgillaspay@salmigillaspay.com</a>  <a href="mailto:phurley@salmigillaspay.com">phurley@salmigillaspay.com</a>  <a href="mailto:lgarrett@salmigillaspay.com">lgarrett@salmigillaspay.com</a>  <a href="mailto:ddvorkin@salmigillaspay.com">ddvorkin@salmigillaspay.com</a></p>

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 April, 2010.



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