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68903-7

NO. 68903-7-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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LAUREL STREET HOUSING, LLC,

Plaintiff/Respondent,

v.

SAFECO INSURANCE COMPANY OF AMERICA,  
a member of Liberty Mutual, Surety Bond No. 6350742,

Defendant/Appellant.

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Whatcom County Superior Court No. 11-2-00913-7,  
the Honorable Ira Uhrig presiding

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BRIEF OF APPELLANT

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STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION I  
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## I. INTRODUCTION

Six months after its tax credit development project was substantially completed, Laurel Street Housing, LLC (“Laurel Street”) discovered leaks in the underground parking garage. The contractor, Ebenal General, Inc. (“Ebenal”), initially attempted to repair the leaks under what it believed was its warranty obligation. A year later, in July 2008, Ebenal informed Laurel Street that it was not responsible for the leaks and would do no further repair work. Laurel Street and Ebenal arbitrated their dispute and an affirmative award was entered in favor of Laurel Street. Ebenal’s liability insurance carrier paid the arbitration award in full.

Laurel Street then sued Safeco Insurance Company of America (“Safeco”), which had issued performance and payment bonds for the project on behalf of Ebenal. Laurel Street sought to recover “damages” that the arbitrator had denied, as well as its attorneys’ and expert fees in the arbitration. Safeco was not a party to the Laurel Street/Ebenal arbitration. By the time Laurel Street filed this lawsuit, the performance bond’s two year limitations period had long since expired, and Laurel Street had not satisfied conditions precedent for filing suit. Despite these deficiencies, the trial court granted summary judgment to Laurel Street and awarded attorneys’ fees and costs to Laurel Street, both the attorneys’ and expert fees incurred in the Laurel Street/Ebenal arbitration and

attorneys' fees in the suit against Safeco, without independently determining that the fees requested were reasonable.

## **II. ASSIGNMENTS OF ERROR**

A. The trial court erred in granting summary judgment to Laurel Street and denying Safeco's cross motion for summary judgment because this lawsuit was untimely in seeking to recover against the bond more than two years after Ebenal ceased work and/or defaulted on the Project.

### *Issues Pertaining to Assignment of Error:*

1. May a trial court ignore uncontroverted evidence that a "Contractor Default" occurred more than two years prior to this lawsuit and refuse to uphold a contractual limitations period?
2. Would any reasonable finder of fact determine that after refusing to do any further work on the project, Ebenal continued work on the project by participating in discussions in an attempt to resolve the dispute?
3. Did the trial court resolve a possible factual dispute over when Ebenal "ceased work" in favor of Laurel Street, the moving party, in order to avoid the contractual limitations period?

B. The trial court erred in granting summary judgment to Laurel Street and denying Safeco's cross motion for summary judgment because Laurel

Street failed to comply with paragraph 3 of the bond, which was a condition precedent to Safeco's bond obligations.

*Issues Pertaining to Assignment of Error:*

1. Was there a disputed issue of material fact as to whether Laurel Street failed to attempt to arrange for a conference with Ebenal and Safeco, and thus failed to comply with the condition precedent under paragraph 3.1 of the bond?
2. Did the trial court resolve a factual dispute over whether Laurel Street failed to attempt to arrange for a conference in favor of Laurel Street, the moving party?
3. Was Laurel Street required to formally terminate its contract with Ebenal as a condition precedent to Safeco's bond obligations?

C. The trial court erred in granting summary judgment to Laurel Street on Laurel Street's bad faith claim because there were disputed issues of material fact as to whether Safeco conducted a reasonable investigation of the bond claim and whether the attorney's and experts fees incurred in the Laurel Street/Ebenal arbitration are recoverable from Safeco.

*Issues Pertaining to Assignment of Error:*

1. Under the circumstances of Laurel Street's claim against the bond, did Safeco have a duty to visit the construction site and

- conduct an investigation of the merits of Laurel Street's claims against Ebenal?
2. Did Safeco's mistaken belief as to the merits of Laurel Street's claim against Ebenal require a conclusion that Safeco acted in bad faith?
  3. Did the trial court resolve a factual dispute over whether Safeco acted in bad faith in favor of Laurel Street, the moving party?
- D. The trial court erred in granting summary judgment because Laurel Street's claims are barred by the waiver of subrogation provision in the contract between Laurel Street and Ebenal.

*Issues Pertaining to Assignment of Error:*

1. Were Laurel Street's damages from Ebenal's breach covered and paid by Ebenal's all-risk insurance policy?
  2. Did the bond or *Olympic Steamship* provide any basis for the court to award attorneys' fees incurred in the Laurel Street/Ebenal arbitration?
- E. The trial court erred in failing to apply collateral estoppel to portions of Laurel Street's claim for damages when those claims had already been adjudicated in the Laurel Street/Ebenal arbitration.

*Issues Pertaining to Assignment of Error:*

1. Was the issue of damages from Ebenal's "negligence and/or breach of contract" fully litigated in the arbitration?
  2. Did the arbitration end in an award on the merits?
  3. Was Laurel Street either the real party in interest in the arbitration or in privity with Bellingham Housing Authority?
  4. Were the parties to the arbitration afforded a full and fair opportunity to litigate their claim in a neutral forum?
- F. The trial court erred in its award of attorneys' fees and failed to independently determine the reasonableness of the fees awarded.

*Issues Pertaining to Assignment of Error:*

1. Was Laurel Street entitled to an award of attorneys' fee incurred in this litigation?
2. Did Laurel Street provide any evidence of the reasonableness of the number of hours its attorneys spent in this litigation?
3. Did the court enter adequate findings and conclusions regarding the reasonableness of the number of hours spent by Laurel Street's attorneys in this litigation?

**III. STATEMENT OF THE CASE**

On August 15, 2005, Laurel Street executed a contract with Ebenal for the construction of the Laurel Village Apartments, a tax credit

development project in Bellingham (“the Project”). CP 103-26, 173. Safeco issued a performance bond in the amount of \$5,940,000 on behalf of Ebenal on the same day (“the Bond”). CP 228.

The Bond provides that:

Any proceeding, legal or equitable, under this Bond . . . shall be instituted within two years after Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligation under this Bond, whichever occurs first.

CP 229 (¶ 9).

Ebenal achieved substantial completion of Buildings B and C for the Project on December 15, 2006 and of Building A on January 29, 2007. CP 47-48, 97-98. The City of Bellingham issued certificates of occupancy on the same dates as the substantial completion dates. CP 50-52. Laurel Street had the right to occupy any portion of the Project that was substantially completed, as long as the occupancy did not “materially interfere” with Ebenal’s performance of “Minor Corrective Work.” CP 124 (¶ 8.1.6). As of February 6, 2007, Laurel Street had fully leased the Project. CP 55. Ebenal was required to achieve final completion within 30 days of the date of substantial completion. CP 123 (¶ 3.10.5), 124 (¶ 8.1.5).

On June 4, 2007, Ebenal submitted the final invoice for its work, requesting \$337,152.74, the five percent retainage under the contract.

CP 98, 128-56. On June 5, 2007, Laurel Street paid \$287,260.33 and retained the balance to account for subcontractors who had not yet submitted lien releases. CP 57, 59-60, 98. Laurel Street paid an additional \$13,778.21 to Ebenal on July 20, 2007. CP 60. Without explanation, Laurel Street did not render full payment despite repeated reminders from Ebenal.<sup>1</sup> On July 11, 2007, in order to obtain a permanent loan for the Project from Washington Community Reinvestment Association, Laurel Street certified that the Project was completed. CP 62-65. Specifically, Laurel Street certified that “[n]o damage has occurred to the Property which has not been repaired or restored to the satisfaction of Lender,” and that “[a]s of the Loan Purchase Date, the Property and improvements thereon shall have been constructed, improved, and altered . . . .” CP 62 (¶¶ 4 & 9). In other words, the Project was complete.

Two days after certifying that the Project was complete, Laurel Street provided notice to Ebenal that “joint sealing product is seeping through the ceiling joists of the parking garage and dripping onto several vehicles and causing damage to the vehicle paint” and that Ebenal’s

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<sup>1</sup> Laurel Street made no more payments until May 22, 2009, when it paid a “final” payment of \$5,000. CP 60, 98. The “final” payment resulted in an underpayment of Ebenal’s final invoice in the amount of \$31,114.20. CP 98.

“immediate attention and correction” was required. CP 98, 158. Laurel Street did not send the notice to Safeco. CP 158.

Ebenal responded to Laurel Street’s notice by investigating and repairing the water leaks because it believed that the work may have been covered by its workmanship warranty, and it wanted to preserve its business relationship with Laurel Street. CP 98. The leaks soon became too extensive to fix, however, and Ebenal concluded that the leaks were caused by defects in the waterproofing product chosen by the architect for the Project, not Ebenal’s workmanship. CP 98-99. On July 28, 2008, Ebenal sent a letter to Laurel Street and asserted that it was not responsible for the leaks. CP 99, 160-61. Ebenal did no further work on the Project after July 28, 2008. CP 99.

On April 6, 2009, Laurel Street sent to Ebenal and Safeco a notice that it was considering declaring a “Contractor Default” regarding the water leaks in the garage and requested a conference with Ebenal and Safeco. CP 240-42.<sup>2</sup> In its April 6 letter, Laurel Street asserted that “Ebenal is partly or wholly responsible for the leaks and damage because it selected and installed an improper product, the Kryton T-1 system,

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<sup>2</sup> Under paragraph 3.1 of the Bond, Safeco’s bond obligations did not arise unless, *inter alia*, Laurel Street notified Ebenal and Safeco that it was “considering declaring a Contractor Default” and “attempted to arrange a conference . . . to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract.” CP 229.

and/or improperly applied the product.” CP 241. Laurel Street further stated:

[Laurel Street] put Ebenal on notice of the defective conditions found at the Project relating to the Kryton T-1 system. Ebenal investigated the leaks and attempted repairs, which failed. ***Later, in a letter dated July 29, 2008, Ebenal denied that the leaks were related to its workmanship and indicated that it would take no further action with regard to fulfilling its warranty obligations.*** Ebenal did, however, continue to engage in discussions with [Laurel Street] regarding resolution of the issues.

CP 241 (emphasis added). Laurel Street sent similar letters to the architect for the Project, Zervas Group Architects, and the manufacturer of the waterproofing product, Kryton International, asserting that they were responsible for the garage leaks. CP 67-70.<sup>3</sup>

Safeco did not receive the April 6 letter until April 14, CP 93, 260, 264, and responded by letter dated April 17. CP 93, 95. Safeco asked Laurel Street to:

furnish us with copies of contracts, executed copy of bond, inspector notes, RFI's, responses to RFI's, plans and specifications, notices of deficiencies, expert reports, non-expert internal reports, accountings, statutory notices, correspondence with any entity involved in the dispute and any other information you deem relevant.

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<sup>3</sup> In its letter to Zervas, Laurel Street wrote that “Zervas is partly or wholly responsible for the leaks and damage because it approved an improper product, the Kryton T-1 system, and/or failed to guard against defects in the installation of the product.” CP 67. In its letter to Kryton Street, Laurel Street stated that “the Kryton product is partially or wholly to blame for the leaks and damage because the Kryton T-1 system is defective and not suitable for its intended purpose,” and asserted its warranty rights. CP 70.

CP 95. Safeco informed Laurel Street that “until such time as we receive the requested information we will be unable to proceed with evaluating your claim.” CP 95.

In addition, Safeco responded to the request to meet and confer by stating that it “will agree to meet at a mutually agreeable time and place.”

CP 95. On Thursday, April 16, 2009, counsel for Safeco called Laurel Street’s attorney, Stacey Fitzpatrick, to discuss Laurel Street’s April 6 letter and to schedule the requested conference. CP 82-83. Ms. Fitzpatrick said she did not think it would be necessary to schedule a conference between Laurel Street, Ebenal, and Safeco because they were talking with Ebenal and its liability insurance carrier. CP 83. Safeco’s counsel followed up with a phone call on Tuesday, April 21, 2009 to Laurel Street’s other attorney, Edward Coulson. CP 83. Safeco’s counsel conveyed to Mr. Coulson his conversation with Ms. Fitzpatrick and asked whether there was anything that Safeco needed to do in response to the April 6 letter, and specifically whether a meeting between Laurel Street, Ebenal, and Safeco was needed. Mr. Coulson reiterated that Laurel Street was working with Ebenal and its liability insurance carrier, that a meeting was not necessary, and that Safeco need do nothing further at that time. Mr. Coulson said that he would let Safeco’s counsel know if Safeco needed to take any further action. CP 83. Safeco’s counsel understood

that Laurel Street's request for a conference under paragraph 3.1 of the Performance Bond had been withdrawn. CP 83. Laurel Street never proposed a date for a conference with Safeco.

Laurel Street, Ebenal, and Zervas Group met at least once, on April 27, 2009, in response to the April 6 letters from Laurel Street. CP 99-100, 249.<sup>4</sup> The parties discussed the cause of the leaks, who was responsible, and the possible solutions to the problem, but they were unable to reach an agreement on those issues. CP 99. Safeco was not invited to or included in that meeting, but was informed by Ebenal in mid-May 2009 that Zervas Group had submitted a plan to fix the garage leaks and it was likely the plan would be approved. CP 86.

Laurel Street did not communicate further with Safeco until its letter dated June 15, 2009, which purported to declare Ebenal in default. CP 251-52, 266-68. Laurel Street stated that "[t]hough Ebenal has shown a good faith effort to work towards resolution of the issues, the fact remains that Ebenal's work is defective" and "Ebenal has not committed to any plan to repair the cause of the continuing leaks in the garage." CP 268. Laurel Street also sent a notice of claim against Zervas Group and request for mediation. CP 72-76. Laurel Street maintained that Zervas Group was

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<sup>4</sup> This meeting rebuts Laurel Street's later assertion that "Ebenal was unwilling to respond to the request for a conference." CP 273.

responsible for the leaks and damages “because it approved an improper product . . . and/or failed to guard against defects in the installation of the product.” CP 73.

Laurel Street’s contract with Ebenal addressed the manner in which Laurel Street could terminate the contract: “[T]he Owner, *upon certification by the Architect that sufficient cause exists to justify such action*, may . . . terminate employment of the Contractor . . . .” CP 120 (§ 14.2.2) (emphasis added); *see also* CP 108 (§ 6.1). Laurel Street never formally terminated the contract. *See* CP 229 (§ 3.2).

Safeco responded to Laurel Street’s June 15 letter on June 18, correcting misstatements by Laurel Street,<sup>5</sup> and again asked Laurel Street to provide information and documentation of Laurel Street’s claim. CP 270-71. Although Safeco suggested that the demand against the bond was untimely, it expressed its “willing[ness] to meet in an attempt to facilitate a dialogue among the parties” and asked Laurel Street to “provide both Ebenal and Safeco . . . with several dates and times when your clients are available to discuss this situation and we will attempt to coordinate with Ebenal.” CP 271.

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<sup>5</sup> Laurel Street asserted that it had “attempted to arrange . . . a conference with Ebenal and Safeco” and that “Ebenal and Safeco failed to hold the conference within 15 days of receipt of the letters.” CP 267.

On September 8, 2009, Safeco received a copy of a letter dated September 4, 2009 regarding Ebenal's liability insurance coverage for Laurel Street's claim. CP 87, 89-91. The letter, sent by attorney Frank Chmelik to Ebenal, stated that Zurich American Insurance Company was providing defense coverage to Ebenal. CP 89. Mr. Chmelik concluded that even if Ebenal was held liable for Laurel Street's claim, its builder's risk insurance policies would cover the loss. CP 89.

Laurel Street did not respond to Safeco's June 18 letter until five months later, on November 20, 2009, at which time it began to provide the documents and information requested by Safeco. CP 273-75. After reviewing Laurel Street's information, Safeco sent a letter to Laurel Street on December 29, 2009. CP 277. Safeco restated its understanding of the events regarding the dispute, including the fact that Ebenal had "tendered this claim to both of its general liability carriers, Zurich American and Arch Insurance Company," and concluded:

Based on the above information, it does not appear that [Laurel Street] has a proper claim against the bond. First, it appears this matter is one that should be directed to the general liability insurance carriers and not the performance bond. The performance bond assures or guarantees performance of the construction of the project. In this case, Ebenal has performed, the contract is complete and the warranty period expired.

Second, it appears the BHA and the Architect selected, and the architect approved, a product other than what was originally specified.

Third, the product was installed by a subcontractor and the subcontractor's carrier has been put on notice of the alleged failure.

Finally, the product was installed with a manufacturer's representative on site and the BHA was provided a warranty. Therefore, one remedy may be to make a warranty claim with the manufacturer.

In any event, the remedies appear to lie with the subcontractor, the manufacturer, and/or their respective liability carriers, but not with Ebenal or the surety.

\* \* \*

This correspondence and all prior or subsequent communications . . . are made with the express reservation of rights and defenses which Safeco . . . has or may have . . . , includ[ing], without limitation, defenses that may be available under any applicable notice and suit limitation provisions.

CP 277-78.

On July 14, 2010, Laurel Street settled its claims against Zervas Group relating to the water leaks in exchange for \$150,000. CP 300. On January 7, 2011, Laurel Street agreed to release its claims against Kryton in exchange for Kryton's cooperation in Laurel Street's claims against Ebenal. CP 78. Laurel Street's and Ebenal's dispute was arbitrated in May 2011. Safeco was not a party to the arbitration. The arbitrator concluded that Laurel Street "established by a preponderance of the evidence that these leaks were caused by the negligence of and/or breach of contract by Ebenal." CP 298.

In the arbitration, Laurel Street put on evidence of the cost to repair the garage. CP 167, 174, 176. The arbitrator determined that Laurel

Street was not entitled to recover damages for portions of the garage that did not leak, reducing the award for the cost of repair by 18.9 percent. CP 298-99. Laurel Street also requested damages for design and repair monitoring. CP 175-76. Again, the arbitrator determined that Laurel Street was not entitled to recover for duplicative work or for portions of the garage that did not leak and accordingly reduced Laurel Street's award of damages. CP 299-300. The arbitrator further reduced Laurel Street's award by a portion of the \$150,000 settlement between Laurel Street and Zervas Group. CP 300. Laurel Street was awarded a total of \$603,343, representing the total cost of repair to the garage, the design and monitoring of the repair work, and the damage to the tenants' automobiles. CP 300. Laurel Street did not seek to recover its attorneys' fees incurred in the arbitration, as the contract had no fee provision, and the arbitrator awarded no fees. Ebenal paid the entire arbitration award through funds provided by its liability insurer, Zurich American Insurance Company. CP 80-81.

Laurel Street did not file this lawsuit until April 6, 2011, the month before the Laurel Street/Ebenal arbitration hearing. Laurel Street's complaint sought damages against Safeco for the cost of repairing the defects, cost of repairing property damage, legal fees, consultant fees, and loss of use. CP 314-18. Before the cross motions for summary judgment

in April 2012, there was little activity in this case. Each party prepared, served, and responded to a set of interrogatories and requests for production of documents. No depositions were taken. There were no discovery disputes. CP 391. Laurel Street's attorneys were already very familiar with the Project and the dispute with Ebenal, having just completed the arbitration against Ebenal. Laurel Street's attorneys had written several letters to Safeco setting forth their theory of the case prior to filing this litigation, which Laurel Street submitted as evidence in its motion for summary judgment. CP 240-42, 251-52, 273-75, 280-81, 295-96.

On May 24, 2012, the trial court granted Laurel Street's motion for summary judgment on its claims of breach of contract and bad faith failure to investigate, and denied Safeco's cross motion for summary judgment. As part of its order and later judgment, the court awarded Laurel Street \$331,505.76 in attorneys' fees and costs incurred before this case, primarily for its claims against Ebenal and the Laurel Street/Ebenal arbitration. CP 6-7, 11. Laurel Street later moved for an award of another \$113,352.25 in fees allegedly incurred in this litigation. CP 339.

Despite its familiarity with the facts and legal theories of the case, Laurel Street's attorneys claimed to have spent a total of 385.35 hours in this litigation, including 164.7 hours for the summary judgment pleadings.

CP 357-81; 391. Its summary judgment pleadings consisted of its motion, declarations of Todd Nelson, David Bergmann, Jacob Rosenblum, and Edward Coulson, reply in support of its motion for summary judgment, and response to Safeco's cross motion for summary judgment. In contrast, Safeco spent a total of 126.3 hours in this litigation, including 88.6 hours for the summary judgment pleadings. CP 394. Safeco's summary judgment pleadings consisted of its response to Laurel Street's motion and Safeco's cross motion for summary judgment, the declarations of Nina M. Durante, Bruce S. Echigoshima, Thomas K. Windus, and Kevin B. Hansen, and Safeco's reply in support of its cross motion for judgment. In sum, despite its prior, extensive knowledge of this dispute and a nearly identical amount of discovery and pleadings, Laurel Street spent more than three times as many hours on this litigation than Safeco, and nearly twice the number of hours on the summary judgment motions. The trial court awarded all of the fees and costs sought by Laurel Street. CP 408.

#### **IV. SUMMARY OF ARGUMENT**

Laurel Street arbitrated its claims against the contractor arising from the Project and recovered all of its damages awarded in the arbitration from the contractor's insurance company. Laurel Street then sought to recover from Safeco and the Bond the portion of its claims rejected by the

arbitrator and its legal fees and costs incurred in litigating the merits of its claims against the contractor.

Laurel Street is not entitled to recover more from Safeco. Black letter law limits a surety's liability to that of its principal, and Laurel Street has already litigated and recovered the full amount to which it is entitled. Even if there were additional amounts that might have been due from the contractor in the arbitration, Laurel Street is barred by collateral estoppel from renewing those claims in a different forum.

The Bond itself bars Laurel Street from further recovery. It limits the time for bringing claims to two years from the earlier of the contractor's default or the date the contractor ceases work on the project. The uncontroverted evidence demonstrated that the contractor's default occurred when it installed an unsuitable product in 2006. Laurel Street was aware of the default no later than July 2007, but made no contact with Safeco until nearly two years later. It did not bring this lawsuit until April 2011. In July 2008, after investigation and some effort to repair the Project, the contractor told Laurel Street that it did not consider the breach to be its fault and refused to do further work. Whether measured by the date of the breach or the date the contractor stopped working, Laurel Street did not act until long after the two year limitations period for bond claims had expired.

Even when bringing its claim, Laurel Street failed to comply with express conditions precedent in the Bond. Laurel Street failed to formally terminate the contractor before bringing suit, despite the clear requirement of the Bond, and detailed provisions in its construction contract about what steps were required before terminating the contractor. Neither did Laurel Street make an effort to meet its obligation to confer with both Safeco and the contractor before declaring a default.

Laurel Street claimed “bad faith” by Safeco in determining “coverage” under the Bond. Neither bad faith nor coverage is the issue here. The two year limitations period in the Bond applies whether a claim is covered, uncovered, meritorious or meritless. So too, do the conditions precedent apply to any claim. The waiver of subrogation clause of the underlying contract mandated recovery from available insurance, even if the claim would otherwise be covered by the Bond. The trial court should not have found “bad faith” nor awarded fees against Safeco under *Olympic Steamship*.

The damages sought here consisted of amounts actually denied at arbitration and amounts not recoverable according to the underlying construction contract – legal and expert fees. At its base, this case is merely an effort to end-run both the finality of arbitration and the American Rule that requires parties to bear their own legal fees. The trial

court was wrong to grant summary judgment to Laurel Street. Instead, it should have granted summary judgment to Safeco.

## V. ARGUMENT

### A. Standard of review.

The Court reviews *de novo* an order granting summary judgment, “taking all facts and inferences in the light most favorable to the nonmoving party.” *Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012). Summary judgment is proper only if the moving party shows that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). On cross-motions for summary judgment, the failure of one party “to satisfy the burden on his own motion does not imply that the opposing party has satisfied *his* burden and should be granted summary judgment.” *McKee v. Gilbert*, 62 Ore. App. 312, 661 P.2d 97 (1983); *see also Estate of Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 776-77, 27 P.3d 1233 (2001) (“The reversal of an order granting summary judgment to one party does not necessarily mean that the other party's motion for summary judgment must be granted.”).

**B. The trial court erred by failing to dismiss this lawsuit because it was filed more than two years after Ebenal defaulted and/or ceased work on the Project.**

This lawsuit is barred by the limitations period in the Bond, which requires a lawsuit to be filed within two years after a “Contractor Default” or after the Contractor “ceased working,” whichever occurs first. CP 229 (¶ 9). The trial court granted Laurel Street’s motion for summary judgment and denied Safeco’s cross-motion despite uncontroverted evidence that both the “Contractor Default” and the cessation of work occurred more than two years before Laurel Street filed this lawsuit.

**1. It is uncontroverted that the “Contractor Default” occurred more than two years before this lawsuit.**

“Contractor Default” is defined in the Bond as “failure of the Contractor, which has neither been remedied nor waived, to perform or otherwise comply with the terms of the Construction Contract.” CP 230 (¶ 12.3). There is no dispute that the “Contractor Default” on the Project occurred more than two years prior to this lawsuit.

According to Laurel Street, Ebenal failed to comply with the terms of the Construction Contract “because it selected and installed an improper product, the Kryton T-1 system, and/or improperly applied the product.” CP 267. In its June 2009 letter, Laurel Street claimed that “[t]he leaks . . . and resulting property damage connected with Ebenal’s improper selection and/or application of the Kryton system constitute breach of . . . the

Agreement.” CP 267. At arbitration, Laurel Street again asserted that Ebenal breached the contract by deficiently installing the waterproofing system and by proposing an inappropriate system. CP 167-71. Laurel Street’s proposed arbitration conclusions of law stated that “Ebenal failed to install the Kryton product per the manufacturer’s and architect’s directions, and thereby breached its contract” and “Ebenal made a formal submittal for and thereby warranted the suitability of the Kryton product, and thereby breached its contract.” CP 176. “Contractor Default” is a breach of the contract between Ebenal and Laurel Street – the failure to perform or otherwise comply with its terms. The breaches described in Laurel Street’s demand letters and arbitration materials all occurred prior to substantial completion of the Project – in other words, before January 2007.

A breach of contract claim accrues when the breach occurred. *1000 Virginia Ltd. P’ship v. Vertecs*, 158 Wn.2d 566, 576, 146 P.3d 423 (2006) (“[T]his court has consistently held that accrual of a contract action occurs on breach.”). Here, the garage waterproofing, consisting of the selection and installation of the Kryton product, occurred before substantial completion on January 29, 2007. To the extent the discovery rule applies because the product selection and/or application was a latent defect, Laurel Street’s claim accrued no later than July 13, 2007, when it notified

Ebenal of concrete corrosion and leaks in the garage and the resulting damage to tenants' vehicles.<sup>6</sup> If the claim did not accrue until the expiration of the warranty period under the contract,<sup>7</sup> the limitations period began to run on January 29, 2008. Thus, at the very latest, Laurel Street was required to institute a suit against the Bond on or before January 29, 2010. Laurel Street waited until April 2011 to file this lawsuit, well after the two year limitations period in the Bond.

In its response to Safeco's cross motion for summary judgment, Laurel Street completely ignored Safeco's argument that the lawsuit was untimely because it was filed more than two years after Ebenal's default, focusing instead on the date that Ebenal "ceased working" on the Project. CP 25-30. Under the Bond, the limitations period began on *the earlier of* default or cessation of work. CP 229 (§ 9).

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<sup>6</sup> *Vertecs*, 158 Wn.2d at 581 ("The discovery rule requires that when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered."); *id.* at 587 ("The discovery rule does not alter the statute of limitations. It is ... a rule for determining when a cause of action accrues and the statute of limitations commences to run.").

<sup>7</sup> Paragraph 12.2.2.1 of the General Conditions states that:

In addition to the Contractor's obligations under Paragraph 3.5, if, within one year after the date of Substantial Completion of the Work . . . , any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so . . . .

CP 119. Paragraph 12.2.2.3 provides that "[t]he one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Paragraph 12.2." CP 119.

When resisting a motion for summary judgment, “the nonmoving party must set forth specific facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue as to a material fact.” *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). “When a nonmoving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established.” *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989). Safeco put forward evidence that Ebenal’s default occurred, and thus Laurel Street’s claim against the Bond accrued, before January 29, 2008. Laurel Street did not attempt to controvert these facts, and could hardly have done so, as they were based on Laurel Street’s own representations as to Ebenal’s breach of the contract. For the purposes of Safeco’s cross motion, it was established that the Contractor Default under the bond occurred before January 29, 2008. The limitations period for claiming against the Bond is triggered by the event that “occurs first.” CP 229 (§ 9). This lawsuit was filed more than two years after January 29, 2008, and thus should have been dismissed.

**2. No reasonable finder of fact would find that Ebenal continued working on the Project after July 28, 2008; the trial court improperly resolved any factual disputes regarding when Ebenal “ceased working” on the Project in favor of Laurel Street.**

Laurel Street’s lawsuit was also untimely and should have been dismissed because it was filed more than two years after Ebenal ceased working on the Project. Ebenal did no work on the Project after July 28, 2008, CP 99-100, 160-61. The last possible deadline for filing a lawsuit under the Bond was July 29, 2010. Meeting to resolve a dispute after an unequivocal rejection of liability for the underlying claim is not “work” on the Project. In an analogous context, the mechanics’ and materialmen’s lien statute imposes a 90 day deadline “after the person has ceased to furnish labor, professional services, materials, or equipment” for filing a notice of claim of lien. RCW 60.04.091. Warranty work done after a contractor achieves substantial completion does not constitute work so as to extend the deadline for filing a lien claim. *Wells v. Scott*, 75 Wn.2d 922, 925, 454 P.2d 378 (1969).

Laurel Street asserted that Ebenal did not “cease[ ] working” until after April 2009, CP 30, offering no authority for its proposition that Ebenal’s later discussions and proposal to resolve the dispute constituted “work” on the Project. In its response to Safeco’s cross motion, Laurel Street confused completion of the work on the Project with Ebenal’s

cessation of work, exemplified by its reliance on *Mattingly v. Palmer Ridge Homes, LLC*, 157 Wn. App. 376, 238 P.3d 505 (2010). In *Mattingly*, the court of appeals reversed the trial court's ruling that the contractual limitations period was triggered by substantial completion of the project because it began to run upon "completion of the project or cessation of work." 157 Wn. App. at 383. The court of appeals interpreted "completion of the project" as the completion of all the punch list items, and remanded "for further proceedings to determine the date of completion for the punch list items or, if incomplete, the date that work on the punch list items ceased." *Id.* at 393.

Although the *Mattingly* court did not *directly* address "cessation of work," the following sequence of events and dates strongly supports the conclusion that a meeting to attempt to resolve a dispute does not constitute "work": (1) the contractor substantially completed the home on March 30, 2007, *Mattingly*, 157 Wn. App. 384; (2) the contractor "worked with the [homeowners] to arrange various repairs" from May through October 2007, *id.* at 385; (3) the homeowners hired a civil engineer to inspect their home in December 2007, *id.*; (4) the homeowners "asserted the existence of a construction defect in February 2008," *id.* at 386; (5) the homeowners and contractor jointly inspected the home in May 2008, *id.*; (6) the contractor "offered to remedy some of the defects" in August 2008,

*id.*; and (7) the homeowners filed their lawsuit on October 17, 2008. *Id.* The joint inspection of the home and the offer to remedy defects occurred well within the one-year limitations period. If that constituted “work” under the contract, the court of appeals would have ruled that the homeowners’ lawsuit was timely, rather than remanding back for a factual determination of when the punch list work was completed or work on the project ceased. Laurel Street was correct that *Mattingly* is “instructive,” CP 25, but its instruction is that Laurel Street’s lawsuit was untimely. There is simply no authority for Laurel Street’s position that a meeting and an offer to resolve a dispute constitutes “work” on a construction project. Ebenal made clear it was performing no further work under the contract in July 2008.

Similarly, *Honeywell, Inc. v. Babcock*, 68 Wn.2d 239, 412 P.2d 511 (1966) does not support Laurel Street. In *Honeywell*, the payment bond’s limitations period began to run when the general contractor “ceased work” on the project. The project was substantially complete on July 29, 1963, and the subcontractor performed punch list work on October 15, 1963. The subcontractor filed suit on August 18, 1964, more than a year after substantial completion but within a year of the punch list work. The Supreme Court attributed work done by the subcontractor to the general contractor because it “was responsible to the owner for the satisfactory

and full completion of the subcontractors' work," and thus its "work" included the punch list work done by the subcontractor. *Id.* at 243-44. The *Honeywell* Court relied on the dictionary definition of "cease" as "to leave off: bring to an end: Discontinue, Terminate.'" *Id.* at 243 (*quoting* WEBSTER'S THIRD NEW INT'L DICTIONARY). In the present case, Laurel Street provided no evidence of work done by Ebenal or any of Ebenal's subcontractors after July 28, 2008. The undisputed facts are that on July 28, 2008, Ebenal asserted that it had no further obligations under its contract with Laurel Street and did no further work on the Project after that date. CP 99 (¶ 6), 100 (¶ 10), 160-61. Clearly, these actions constituted "leaving off" and "discontinuing" work.<sup>8</sup> Because Ebenal ceased working in July 2008, Laurel Street's lawsuit was untimely and the trial court erred by granting summary judgment in favor of Laurel Street.

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<sup>8</sup> Laurel Street curiously contended that Ebenal continued working on the Project after July 28, 2008 because David Ebenal's letter of that date "provides a clear admission by Ebenal that it contemplated additional discussion and work was necessary to resolve the leaks in the parking garage," and Ebenal's reservation of the right to charge for labor and materials "demonstrates it did not believe its work was complete." CP 29. Laurel Street's characterization of the July 28 letter, even if accurate, would not provide any proof that Ebenal continued working on the Project. Nonetheless, Laurel Street mischaracterized the letter – Ebenal asserted that it was not responsible for the leaks and that Laurel Street should instead look to the architect or the manufacturer of the waterproofing product. When reserving its rights for additional payment, Ebenal specifically referred to costs incurred "to date" – not future costs for further work to be performed. CP 161. Laurel Street failed to rebut David Ebenal's declaration that after July 2008, Ebenal did no work on the Project. CP 99.

In granting summary judgment to Laurel Street, the trial court ignored the undisputed facts regarding the date of Ebenal's default and disregarded David Ebenal's declaration of when Ebenal ceased work on the Project, improperly resolving any and all factual disputes in Laurel Street's favor. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011) ("In reviewing a motion for summary judgment, all facts and reasonable inferences are reviewed in the light most favorable to the nonmoving party."). This was clear error.

**C. The trial court erred by failing to dismiss this lawsuit because Laurel Street did not comply with paragraph 3 of the Bond as a condition precedent to Safeco's obligations under the Bond.**

In addition to Laurel Street's failure to comply with the Bond's limitations period, it failed to comply with the conditions precedent for asserting a claim under the Bond. The particular provisions of the Bond at issue here have been litigated across the country. "[C]ompliance with the conditions precedent is necessary in order to invoke the surety's obligation under the performance bond and failure to do is fatal to the obligee's claim for coverage." *Stonington Water St. Assoc. v. Hodess Bldg. Co.*, 792 F. Supp. 2d 253, 263-64 (D. Conn. 2011), *aff'd*, 472 Fed. Appx. 71 (2<sup>nd</sup> Cir. 2012) (holding that failure to formally terminate the contractor-principal under paragraph 3.2 precluded a claim under the bond); *Bank of Brewton, Inc. v. Int'l Fid. Ins. Co.*, 827 So. 2d 747, 752-54 (Ala. 2002) (affirming

summary judgment for surety for failure to comply with all prerequisites of paragraph 3 of the bond).

Under paragraph 3.1, Safeco's obligations did not arise unless and until:

The Owner has notified the Contractor and the Surety . . . that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract.

CP 229. Here, Laurel Street provided notice and requested a conference, but withdrew its request and did not attempt to arrange a conference with Ebenal and Safeco. CP 83. Laurel Street tries to shift its contractual duty to Safeco by asserting that Safeco did not attempt to meet for a conference. Safeco advised Laurel Street repeatedly of its willingness to meet. Instead, Laurel Street chose to meet with Ebenal, the architect, and the manufacturer of the waterproofing product, but not Safeco, to attempt to resolve its claims. Laurel Street affirmatively told Safeco that such a conference was not needed because it was working with Ebenal's insurer. CP 83.

Even if Laurel Street met the conditions of paragraph 3.1, it was also required to formally terminate Ebenal under paragraph 3.2. Safeco's bond obligations did not arise unless "[t]he Owner has declared a Contractor

Default *and formally terminated the Contractor's right to complete the contract.*" CP 229 (§ 3.2) (emphasis added). Laurel Street's contract with Ebenal was incorporated in the Bond, CP 229 (§ 1), and specified that Laurel Street could "formally terminate[] the Contractor's right to complete the contract" only "*upon certification by the Architect that sufficient cause exists to justify such action.*" CP 120 (§ 14.2.2) (emphasis added); *see also* CP 108 (§ 6.1). Laurel Street obtained no such certification and thus never formally terminated the contract. CP 266-68.

By withdrawing its request and failing to attempt to arrange a conference with Ebenal and Safeco, and by failing to formally terminate the contract with Ebenal, Laurel Street did not fulfill the conditions precedent to Safeco's obligations under the Bond.

Laurel Street may have raised an issue of disputed fact regarding whether it complied with paragraph 3.1, which required Laurel Street to attempt to arrange a conference. *Compare* CP 82-83 *with* CP 23. This might have been sufficient to defeat summary judgment on whether Laurel Street complied with this condition precedent, but certainly provided no basis for the court to grant Laurel Street's motion for summary judgment. The trial court improperly resolved the dispute in Laurel Street's favor on whether it met the conditions precedent in paragraph 3.1. *Dowler*, 172 Wn.2d at 484. Even with the disputed fact, however, the trial court should

have granted Safeco's cross motion. Under paragraph 3, *all* of the conditions must be met before Safeco's obligations arose. Because Laurel Street failed to satisfy paragraph 3.2, this lawsuit should have been dismissed.

**D. The trial court erred by granting summary judgment on Laurel Street's bad faith claim.**

To prove bad faith on the part of Safeco, Laurel Street was required to prove that Safeco's denial of the claim was not just wrong. It must prove the denial "was unreasonable, frivolous, or unfounded." *Am. States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 470, 78 P.3d 1266 (2003). "Whether an insurer acted in bad faith is a question of fact." *Id.* "If . . . reasonable minds could differ that the insurer's conduct was reasonable, or if there are material issues of fact with respect to the reasonableness of the insurer's action, then summary judgment is not appropriate." *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486, 78 P.3d 1274 (2003). The trial court improperly resolved all disputed facts in Laurel Street's favor regarding the reasonableness of Safeco's investigation and denial of the claim. *See, e.g., Morris v. McNicol*, 83 Wn.2d 491, 495, 519 P.2d 7 (1974) ("[R]easonableness in the instant case is a material fact question which cannot be resolved by summary judgment proceeding.").

Laurel Street's bad faith claim is based solely on its assertion that Safeco was required to "visit[ ] the construction site, [where] it would have discovered that Ebenal was at fault for the damage caused to the property saving all parties involved a great cost and expense."<sup>9</sup> CP 211. There is no specific legal requirement of a site visit under the Bond or Washington law. The reasonableness of Safeco's investigation and denial of the claim can only be determined "in light of all the facts and circumstances of the case." *Indus. Indemn. Co. v. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520 (1990); *see also Paulfrey v. Blue Chip Stamps*, 150 Cal. App. 3d 187, 196, 197 Cal Rptr. 501 (1983). The final building constructed by Ebenal reached substantial completion on January 29, 2007, more than two years before Safeco received notice from Laurel Street that it was considering declaring Ebenal to be in default, by letter dated April 6, 2009.

Safeco was required to investigate Laurel Street's claim within 30 days after notification of the claim. WAC 284-30-370. Laurel Street was required to "provide reasonable assistance to [Safeco] in order to facilitate compliance with [the 30-day limit]." *Id.* Safeco asked Laurel Street to provide information and documents supporting its claim within three days

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<sup>9</sup> As phrased by Laurel Street, this presents a claim squarely covered by Ebenal's all-risk insurance policy, which covered "damage caused to the property." CP 125, 152-53.

of receiving the claim, on April 17, 2009. CP 95. Laurel Street provided no information or documents until more than seven months later. CP 273-75. After Ebenal was notified by Laurel Street in July 2007 that joint sealing product was seeping through the ceiling joists, it investigated the leaks and eventually concluded that the problem was with the waterproofing product chosen by the architect. Laurel Street offered no evidence to support its contention that Safeco could have readily determined the cause of the leaks had it conducted a site visit. Laurel Street's arguments, assertions, and speculations are not evidence.<sup>10</sup>

In the meantime, Laurel Street pursued a claim under Ebenal's "all-risk" insurance policy.<sup>11</sup> Laurel Street's attorneys' advised that Safeco need not take any action because they were talking with Ebenal and Ebenal's insurance company. CP 82-83. The chief operating officer of Laurel Street's managing member, David Bergmann, specifically acknowledged to Ebenal that the dispute over the garage leaks was not a performance bond issue and that Safeco "should not be brought into the

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<sup>10</sup> A site visit clearly would have revealed only the existence of the leaks, not their cause – Laurel Street blamed the architect, the manufacturer, and Ebenal, asserting that each was "partly or wholly responsible for the leaks." CP 67-70, 241.

<sup>11</sup> The contract required Ebenal to "purchase and maintain . . . property insurance written on a builder's risk 'all-risk' or equivalent policy form in the amount of the initial Contract Sum." CP 125 (¶ 11.4.1). Laurel Street did not take the position that Safeco's performance bond was at issue until April 2009, more than two years after Ebenal achieved substantial completion on the Project. CP 100.

mix.” CP 100. Ebenal’s attorney informed Safeco that Laurel Street’s claims were covered by Ebenal’s all-risk insurance policy. CP 89. This opinion was correct. The insurance covered all of the damages caused by Ebenal’s breach of the contract – the arbitration award was paid in full by Zurich American Insurance Company. CP 80-81.

Upon belatedly receiving Laurel Street’s documentation, Safeco immediately investigated the claim and determined that there was no liability on the Bond. Given that the limitations period had expired and the damage to the property covered by Ebenal’s general liability insurance, Safeco had no obligation to visit the construction site and investigate the details of Laurel Street’s claim. “A reasonable investigator need not investigate that which it considers irrelevant.” *Pediatricians, Inc. v. Provident Life & Accident Ins. Co.*, 965 F.2d 1164, 1172 (1<sup>st</sup> Cir. 1992). Under paragraph 4.4 of the Bond, the Surety has the option of either (1) “[a]fter investigation, determin[ing] the amount for which it may be liable to the Owner and . . . tender payment therefor to the Owner,” or (2) “[d]eny[ing] liability in whole or in part and notify the Owner citing reasons therefor.” CP 229. Denial of liability was not merely a determination that the Bond did not cover the claim. Whether “covered” or not, Laurel Street made an untimely claim. Damage covered by insurance was to be paid by the insurer, and here it was.

Laurel Street suggested that the arbitration decision in its favor “reinforces the fact that Safeco failed to conduct a reasonably adequate investigation.” CP 211. It does not follow, however, that Safeco’s mistaken belief as to the merits of Laurel Street’s claim against Ebenal entails a determination of bad faith. Even were this merely a coverage question, “an incorrect denial of coverage does not constitute an unfair trade practice if the insurer had ‘reasonable justification’ for denying coverage.” *Starczewski v. Unigard Ins. Grp.*, 61 Wn. App. 267, 273, 810 P.2d 58 (1991) (*quoting Kallevig*, 114 Wn.2d at 917). Denying a claim “based on a reasonable interpretation of the policy . . . was not bad faith as a matter of law.” *Miller v. Indiana Ins. Co.*, 31 Wn. App. 475, 479, 642 P.2d 769 (1982). The partial rejection of Laurel Street’s damage claim in the arbitration shows that the merits were not wholly with Laurel Street. Safeco (as did others) correctly interpreted the Bond regarding Laurel Street’s ability to recover on Ebenal’s insurance under the construction contract. CP 118 (§ 11.4.7); CP 82-83, 89, 100.

That the trial court erred by resolving factual disputes about the reasonableness of Safeco’s conduct is bolstered by the fact that none of the cases relied upon by Laurel Street in its summary judgment motion, CP 209-10, involved a summary judgment on the issue of bad faith that was affirmed. *See Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d

269, 961 P.2d 933 (1998) (reversing summary judgment to insurer); *Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990) (affirming jury verdict on bad faith issue); *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 659 P.2d 509 (1983) (reversing judgment on Consumer Protection Act claim); *Torina Fine Homes, Inc. v. Mut. of Enumclaw Ins. Co.*, 118 Wn. App. 12, 74 P.3d 648 (2003) (reversing summary judgment to insured); *Truck Ins. Exch. v. Century Indem. Co.*, 76 Wn. App. 527, 887 P.2d 455 (1995) (reversing summary judgment to insurer); *Whistman v. W. Am. of Ohio Cas. Grp.*, 38 Wn. App. 580, 686 P.2d 1086 (1984) (reversing summary judgment to insurer); *Safeco Ins. Co. v. JMG Restaurants*, 37 Wn. App. 1, 680 P.2d 409 (1984) (affirming jury verdict); *Weber v. Biddle*, 4 Wn. App. 519, 483 P.2d 155 (1971) (affirming jury verdict).

Laurel Street asserted it was entitled to an award of attorney's fees and costs against Safeco on its bad faith claim, citing *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) and *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007). These cases do not support Laurel Street's assertion. In this litigation, Laurel Street sought to recover \$331,505.76 in attorneys' and expert fees and costs incurred in connection with its dispute and arbitration with Ebenal.

The Bond does not provide for attorneys' fees, and fees and costs are awardable under *Olympic Steamship* only when they are incurred in a coverage dispute with an insurer, not a claims dispute. In this case, the fees and costs sought by Laurel Street as "damages" were incurred in connection with the merits of its claims against Ebenal, not in any coverage dispute with Safeco. See *Price v. Farmers Ins. Co.*, 133 Wn.2d 490, 497-98, 946 P.2d 388 (1997). Laurel Street seeks damages from Safeco that it had no right to recover from Ebenal.

**E. The trial court erred in granting summary judgment because Laurel Street's claims are barred by the waiver of subrogation provision in the contract between Laurel Street and Ebenal.**

Safeco's liability on the Bond is limited to that of its principal, Ebenal, on the contract with Laurel Street, and Safeco can raise any defenses available to Ebenal. *Contractors Equip. Maint. Co. v. Bechtel Hanford, Inc.*, 514 F.3d 899, 904 (9<sup>th</sup> Cir. 2008); *Turner v. Wexler*, 14 Wn. App. 143, 148, 538 P.2d 877 (1975); *Anstalt v. F.I.A. Ins. Co.*, 749 F.2d 175, 178 (3<sup>rd</sup> Cir. 1984). In the contract, Ebenal and Laurel Street agreed that for damages covered by Ebenal's all risk insurance, Laurel Street would not pursue further claims against Ebenal. Article 11.4.7 of the General Conditions provides that:

The Owner and Contractor waive all rights against . . . each other . . . for damages caused by fire or other causes of loss to the

extent covered by property insurance obtained pursuant to this Paragraph 11.4 . . . .

CP 118. The Supplementary General Conditions required Ebenal to “purchase and maintain . . . property insurance written on a builder’s risk ‘all-risk’ or equivalent policy form in the amount of the initial Contract Sum.” CP 125 (¶ 11.4.1). The Supplementary General Conditions further provide that:

Neither Owner nor Contractor shall be liable to the other party . . . for any loss or damage to any building, structure or tangible personal property of the other occurring in or about the Work, if such loss or damage is covered by insurance benefiting the party suffering such loss or damage . . . .

CP 126 (¶ 11.6.2).

In this case, Laurel Street did not take the position that Safeco’s performance bond was at issue until April 2009, more than two years after Ebenal achieved substantial completion on the Project. CP 100. Before that, Laurel Street acknowledged to Ebenal that the dispute was not a performance bond issue. *Id.* That Laurel Street understood that its claim was covered by Ebenal’s “all-risk” insurance policy is underscored by its attorneys’ communications with Safeco’s counsel that Safeco need not take any further action because they were talking with Ebenal and Ebenal’s insurance company. CP 82-83. Ebenal’s all-risk insurance policy covered the damages, the arbitration award, which determined the

“Total Cost of Repair,” CP 300, was paid in full by Zurich American Insurance Company. There was no further liability for Ebenal or Safeco.<sup>12</sup>

This lawsuit is, in reality, nothing more than a backdoor attempt for Laurel Street to collect its attorneys’ fees and costs from its dispute with Ebenal. Laurel Street could not collect fees because its contract with Ebenal contained no attorney fee provision.

Washington follows the American Rule, requiring each party to bear its attorneys’ fees unless one of the recognized exceptions applies. The Bond itself does not authorize attorneys’ fees. It refers to “legal costs,” CP 229 (§ 6.2), but “legal costs” as used in the AIA Form A-312 does not mean “attorneys’ fees.” *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 75-78 (2<sup>nd</sup> Cir. 2004). Nor is this case merely a “coverage” dispute for which fees may be granted. Even if the Bond covered Laurel Street’s claim, there was no amount to pay on the Bond because Laurel Street had recovered the full amount of the damages under the construction contract in the prior arbitration. It was not entitled to

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<sup>12</sup> This result is supported by RCW 19.72.107(2)(a)(ii), which provides that “[a] surety bond shall not be liable for damages based upon or arising out of any . . . [t]ortious injury . . . to . . . [a]ny real or personal property.” The arbitration decision that the garage leaks “were caused by the negligence of and/or breach of contract by Ebenal,” CP 298, appears designed to ensure that Laurel Street obtain coverage under the all-risk insurance policy, and Laurel Street did, in fact, obtain such coverage. CP 80-81. Even if the waiver of subrogation is not applicable to Safeco, Safeco stands in the shoes of Ebenal and Laurel Street is barred from bringing claims for damages that the arbitrator rejected in the Laurel Street/Ebenal arbitration. *See* Part V.F below.

attorneys' fees under the construction contract; it claimed none, and the arbitrator awarded none. *Olympic Steamship* does not support fees where the dispute is about the amount of recovery under a bond. *See Kroeger v. First Nat'l Ins. Co.*, 80 Wn. App. 207, 209, 908 P.2d 371 (1995). Nor, even in coverage situations, is a claimant entitled to fees where the claimant fails to follow the bond's conditions. "We cannot authorize the imposition of attorney fees, however, when an insured has undisputedly failed to comply with express coverage terms, and the noncompliance may extinguish the insurer's liability under the policy" even where the court determines the claimant is entitled to coverage. *Public Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 814, 881 P.2d 1020 (1994). There is no question that Laurel Street failed to comply with all of the conditions of paragraph 3 of the Bond.

**F. Even if Safeco were liable on the bond, the trial court erred by failing to collaterally estop Laurel Street from re-litigating the issues that were raised and decided during the arbitration.**

Laurel Street is barred from bringing claims for damages that were made in the prior arbitration against Ebenal, Safeco's principal, and which the arbitrator rejected. The trial court erred both by failing to apply collateral estoppel to bar re-litigation of the claim and by granting summary judgment on the merits of the claim.

Collateral estoppel applies because (1) the issue decided in the prior adjudication is identical to the one presented here; (2) the prior adjudication ended in a final judgment on the merits; (3) Laurel Street was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine does not work an injustice. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 562, 852 P.2d 295 (1993).

In its arbitration with Ebenal, Laurel Street asked for the following damages:<sup>13</sup>

Repair Cost	\$798,000.00
Design and Repair Monitoring	\$51,964.60

Of those amounts requested, the arbitrator awarded Laurel Street only the following:

Repair Cost	\$648,074.00
Design and Repair Monitoring	\$35,351.00

CP 300. Before the trial court, Laurel Street asserted that it was entitled to the following amounts, subject to certain setoffs,<sup>14</sup> that the arbitrator had already ruled on:

Repair Cost	\$764,665.09
Design Professional Costs	\$119,551.40

<sup>13</sup> Based on Laurel Street's proposed Findings of Fact and Conclusions of Law in the arbitration. CP 174 (¶ 17), 175 (¶¶ 22, 23).

<sup>14</sup> Laurel Street claimed a total of \$1,215,722.25 in damages before the trial court, and adjusted its request for amounts received in settlement with Zervas Group and the arbitration award.

CP 213. Thus, Laurel Street requested another \$200,791.49 for repair and design professional costs, despite the arbitration decision establishing the amount of Laurel Street's damages from Ebenal's breach. Nonetheless, the trial court awarded all of these additional damages sought by Laurel Street against Safeco. CP 11.

Laurel Street's claim for more money arising from Ebenal's breach is barred:

(1) The issue of damages from Ebenal's "negligence and/or breach of contract" was fully litigated in the arbitration – the arbitrator considered Laurel Street's claims for repair (remediation) and design and monitoring costs and made an award based on the evidence presented.

(2) The arbitration ended in an award on the merits, which Ebenal's insurer paid in full.

(3) Laurel Street contracted with Ebenal through Bellingham Housing Authority "as its manager." CP 201. There can be no question that Laurel Street was either the real party in interest in the arbitration or in privity with Bellingham Housing Authority.

(4) The parties to the arbitration were afforded a full and fair opportunity to litigate their claim in a neutral forum. The parties engaged in discovery, exchanged extensive briefing, and had four days of arbitration with live witness testimony. CP 101; *Nielson v. Spanaway*

*Gen. Med. Clinic*, 135 Wn.2d 255, 264-65, 956 P.2d 312 (1998) (“determining whether application of the doctrine of collateral estoppel would work an injustice, we focus on whether the parties to the earlier adjudication were afforded a full and fair opportunity to litigate their claim in a neutral forum”).

Safeco’s liability on the bond is limited to that of its principal, Ebenal, except for additional costs that “result[ ] for the actions or failure to act of the Surety.” CP 229 (¶¶ 6.1, 6.2). None of the additional repair or design professional costs sought by Laurel Street resulted from Safeco’s action or inaction. When paying the arbitration award, the letter accompanying the check stated that the check was submitted “to fully resolve this matter.” CP 80. The trial court awarded damages to Laurel Street that it failed to prove at arbitration and for which Safeco has no liability. This amounts to a collateral attack on the arbitration and undercuts its finality.<sup>15</sup>

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<sup>15</sup> The trial court’s judgment also appears to undercut its own finality: “Due to the fact that additional latent deficiencies in Ebenal’s construction are being discovered during the remediation, Laurel Street’s damages continue to increase.” CP 412. It is not clear what the court intended by this – will it retain jurisdiction to award future damages? If so, this would further demonstrate its disregard for any limitations period on claims against the Bond.

**G. The trial court erred in awarding attorneys' fees to Laurel Street. It also failed to independently determine a reasonable fee award and to enter written findings and conclusions.**

A party seeking an award of attorneys' fees bears the burden of proving its entitlement to and the reasonableness of the fees. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). Both the number of hours and the hourly rate must be reasonable, and the trial court "should not simply accept unquestioningly fee affidavits from counsel." *Id.* at 435. Trial courts must independently decide what represents a reasonable amount of attorney fees; they may not merely rely on the billing records of the prevailing party's attorney. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). Trial courts must also create an adequate record for review of fee award decisions. *Mahler*, 135 Wn.2d at 435. Where the amount of attorneys' fees and costs is disputed, the trial court must enter written findings of fact and conclusions of law. *Id.*

Here, as noted above in Part V.E, there was no basis for an award of attorneys' fees. Even if there were such a basis, the trial court in this case did nothing more than rely on the amount claimed by Laurel Street's attorneys – its failure to enter sufficient written findings and conclusions demonstrates its failure to independently decide a reasonable attorney fee award. Had the court conducted a review, it would have noted that Laurel Street provided evidence only of the reasonableness of its attorneys'

hourly rates; Laurel Street provided no evidence of the reasonableness of the number of hours it spent in this litigation. CP 351-55. Laurel Street's evidence of the reasonableness of its litigation costs related to some other case involving a "Bank" and "Defendant Khami" and his "counterclaims." CP 354. Even then, the costs did not add up as asserted. *Id.*

Laurel Street's attorneys and Safeco's attorneys engaged in the same basic tasks in this litigation. Both parties engaged in a limited amount of discovery, with no depositions, and both parties filed motions for summary judgment, with responses and replies. Both parties filed four declarations with attachments in support of the motions for summary judgment. Both parties had two attorneys attend the May 18, 2012 hearing on the cross motions for summary judgment. Despite these similarities, Laurel Street's attorneys spent 3.05 times more hours than Safeco's attorneys overall in this litigation – 385.35 hours to 126.3 hours. With respect to the summary judgment decision, Laurel Street's attorneys spent 1.86 times more hours than Safeco's attorneys – 164.7 hours to 88.6 hours.

A "particularly good indicator of how much time is necessary" in a lawsuit "is how much time the other side's lawyers spent." *Democratic Party of Wash. v. Reed*, 388 F.3d 1281, 1287 (9<sup>th</sup> Cir. 2004). "If the time claimed by the prevailing party is of a substantially greater magnitude than what the other side spent, that often indicates that too much time is

claimed.” *Id.* In this case, Laurel Street’s attorneys spent substantially more hours than Safeco’s attorneys through the same time period. The fact that the total number of hours spent by Laurel Street’s attorneys are so dissimilar for a similar amount of work strongly supports the unreasonableness of the hours claimed by Laurel Street. *See id.*

The trial court clearly erred. Had it independently evaluated Laurel Street’s fee request, it would have substantially reduced the amount awarded to Laurel Street. Unfortunately, the trial court compounded its error by failing to enter adequate written findings and conclusions, which would have preserved a record for this Court’s review of its decision.

## **VI. CONCLUSION**

For the foregoing reasons, Safeco respectfully requests that the Court reverse the trial court’s decisions in all respects. The Court should remand with directions to the trial court to dismiss Laurel Street’s claims based on the contractual limitations period and/or the failure to satisfy the conditions precedent to Safeco’s bond obligations. Alternatively, the Court should remand for further proceedings to resolve disputed issues regarding Safeco’s response to Laurel Street’s claim against the bond and possible disputed facts regarding when Ebenal ceased work on the Project. Even were the Court to affirm the trial court’s decisions regarding Safeco’s liability on the bond, the Court should not permit Laurel Street to

recover amounts that were disallowed in the Laurel Street/Ebenal arbitration and not recoverable under the construction contract or the Bond.

DATED this 31<sup>st</sup> day of October, 2012

LIVENGOOD, FITZGERALD  
& ALSKOG, PLLC



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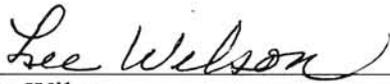
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### DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on October 31, 2012, I caused service of the foregoing to the following counsel of record:

<i>Attorneys for Plaintiff:</i> Edward R. Coulson Jacob D. Rosenblum Schweet Rieke & Linde, PLLC 575 S. Michigan Street Seattle, WA 98108 Tel: 206-275-1010 Fax: 206-381-0101	<input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile – 206-381-0101 <input type="checkbox"/> via Overnight Mail
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**Dated:** October 31, 2012

  
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Lee Wilson