

FILED: June 19, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ZRZ REALTY COMPANY,
an Oregon corporation,
for itself and as trustee of the ZIDELL REMEDIATION FUNDING TRUST,
an Oregon trust;
ZIDELL MARINE CORPORATION,
a Washington corporation;
TUBE FORGINGS OF AMERICA, INC.,
an Oregon corporation;
and PON EXPLORATION, INC.,
a Delaware corporation, fka Zidell Explorations, Inc.,
an Oregon Corporation,
Plaintiffs-Respondents, Cross-Appellants,

v.

BENEFICIAL FIRE AND CASUALTY INSURANCE COMPANY,
succeeded in interest by J.C. Penney Life Insurance Company, et. al.,
Defendants,

and

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, and CERTAIN LONDON MARKET INSURANCE COMPANIES, aka "Lloyds", including the following defendant companies: ASSICURAZIONI GENERALI S.P.A., INSURANCE COMPANY OF NORTH AMERICA (UK) LTD., COMMERCIAL UNION ASSURANCE COMPANY, PLC, EDINBURGH ASSURANCE COMPANY, LTD., OCEAN MARINE INSURANCE COMPANY, LTD., WORLD AUXILIARY INSURANCE CORPORATION, LTD., CORNHILL INSURANCE COMPANY, LTD., DOMINION INSURANCE COMPANY, LTD., EAGLE STAR INSURANCE COMPANY LTD, THE THREADNEEDLE INSURANCE COMPANY LTD., EXCESS INSURANCE COMPANY LTD., LONDON & EDINBURGH GENERAL INSURANCE COMPANY LTD., NEW ZEALAND INSURANCE COMPANY, LTD., ROAD TRANSPORT & GENERAL INSURANCE COMPANY, LTD., SOUTH BRITISH INSURANCE COMPANY, LTD., ULSTER MARINE INSURANCE COMPANY, LTD., THE UNITED SCOTTISH INSURANCE COMPANY, LTD., YORKSHIRE INSURANCE COMPANY, LTD., HANSA RE & MARINE INSURANCE COMPANY (UK) LTD., LA REUNION FRANCAISE (UK) LTD., ECONOMIC INSURANCE COMPANY LTD., NORWICH UNION FIRE INSURANCE SOCIETY, LTD., FIREMEN'S INSURANCE COMPANY OF NEWARK NEW JERSEY, SWISS UNION GENERAL INSURANCE COMPANY, LTD., LEADENHALL INSURANCE COMPANY, LTD., BISHOPGATE INSURANCE COMPANY, LTD., HOME INSURANCE COMPANY, NIPPON FIRE & MARINE INSURANCE COMPANY (UK) LTD., SWITZERLAND GENERAL INSURANCE COMPANY, LTD., RIVER THAMES INSURANCE COMPANY, LTD., ROYAL INSURANCE COMPANY LTD., BRITISH FIRE INSURANCE COMPANY, LTD., BRITISH & FOREIGN INSURANCE COMPANY, LTD., NATIONAL PROVINCIAL INSURANCE COMPANY, LTD., THE SCOTTISH LION INSURANCE COMPANY, LTD., SKANDIA MARINE INSURANCE COMPANY (UK), LTD., DRAKE INSURANCE COMPANY, LTD., SPHERE INSURANCE COMPANY, LTD., SPHERE DRAKE INSURANCE COMPANY PLC, ALLIANCE ASSURANCE COMPANY, LTD., BRITISH LAW INSURANCE COMPANY, LTD., and

CONTINENTAL ASSURANCE COMPANY OF LONDON, LTD., LIVERPOOL MARINE & GENERAL INSURANCE COMPANY, LTD., PHOENIX ASSURANCE COMPANY LTD., FINE ART & GENERAL INSURANCE COMPANY, LTD., ANGLO-FRENCH INSURANCE COMPANY, LTD., BALOISE MARINE INSURANCE COMPANY, LTD., BALTICA INSURANCE COMPANY (UK) LTD., FUJI FIRE & MARINE INSURANCE COMPANY (UK), LTD., R.W. GIBBON GROUP, LA PRESERVATRICE GROUP, SWITZERLAND GENERAL INSURANCE COMPANY (LONDON) LTD., YASUDA FIRE & MARINE INSURANCE COMPANY, LTD., IRON TRADES MUTUAL INSURANCE COMPANY, LTD., MINSTER INSURANCE COMPANY LTD., RELIANCE INSURANCE COMPANY, SIRIUS (UK) INSURANCE PLC, INDEMNITY MARINE ASSURANCE COMPANY, LTD., LONDON & HULL MARITIME INSURANCE COMPANY, LTD, AND ASSOCIATED COMPANIES, C.A. PARR AGENCIES, LTD., SUN INSURANCE OFFICE, MARINE INSURANCE COMPANY, LIMITED, and SUMITOMO MARINE & FIRE INSURANCE COMPANY, LIMITED,
Defendants-Appellants,
Cross-Respondents.

Multnomah County Circuit Court
970806226

A121145

William J. Keys, Judge. (Pretrial and trial rulings)

Ellen F. Rosenblum, Judge. (Judgment and Supplemental Judgment)

On appellants-cross-respondents' petition for reconsideration filed April 17, 2013, and respondents-cross-appellants' response to petition for reconsideration filed April 24, 2013. Opinion filed March 6, 2013, 255 Or App 524, ___ P3d ___.

Thomas W. Sondag and Lane Powell PC, and John Folawn and Folawn Alterman & Richardson LLP for petition.

Bruce L. Campbell and Miller Nash LLP for response.

Before Wollheim, Presiding Judge, and Sercombe, Judge, and Nakamoto, Judge.

WOLLHEIM, P. J.

Reconsideration allowed; former opinion clarified and adhered to as clarified.

1 WOLLHEIM, P. J.

2 Defendants (collectively, London) petition for reconsideration of our
3 decision in *ZRZ Realty v. Beneficial Fire and Casualty Ins.*, 255 Or App 524, ___ P3d
4 ___ (2013) (*ZRZ Realty VI*). We allow the petition in order to clarify our disposition as it
5 relates to the supplemental judgment for attorney fees.¹

6 The parties are well aware of the procedural history of this case, and we
7 will not recount more than is necessary for purposes of this opinion. Our most recent
8 decision, *ZRZ Realty VI*, was an effort to address those issues that were before us on
9 remand after the Supreme Court's decision in *ZRZ Realty v. Beneficial Fire and Casualty*
10 *Ins.*, 349 Or 117, 241 P3d 710 (2010) (*ZRZ Realty III*), *modified on recons*, 349 Or 657,
11 249 P3d 111 (*ZRZ Realty IV*). Among those issues were assignments of error concerning
12 attorney fees awarded to plaintiffs (collectively, Zidell) by way of a general judgment,
13 and an assignment of error concerning additional fees that Zidell was awarded, by way of
14 a supplemental judgment, for time spent preparing the initial fee petition.

15 We ultimately concluded that the trial court had erred in awarding attorney
16 fees for work performed regarding London's duty to indemnify Zidell, and we therefore
17 "remand[ed] with respect to the initial attorney fee award, which was included in the
18 general judgment, for the trial court to reconsider the apportionment and award of

¹ London also seeks reconsideration of our decision with respect to London's third assignment of error, suggesting that we misunderstood the "factual and procedural backdrop of that assignment." Respectfully, we did not misunderstand London's assignment; we disagreed with it. We decline to revisit the same arguments that we previously addressed and rejected.

1 attorney fees in light of that error." 255 Or App at 553. We then considered London's
2 tenth assignment of error, which challenged the trial court's supplemental award of
3 attorney fees for time spent preparing the initial petition. We disagreed with London's
4 contentions under that assignment of error and concluded that, "even if block billing
5 complicated the efforts of Zidell's attorneys, we cannot say that the trial court, in light of
6 all the factors it considered, abused its discretion in awarding Zidell \$268,988.15 in
7 supplemental attorney fees."

8 The final paragraph of our decision summarized our conclusions
9 concerning attorney fees:

10 "As for attorney fees, we conclude, based on London's eighth
11 assignment of error, that the initial attorney fee award in the judgment must
12 be remanded because it includes fees for work performed concerning the
13 duty to indemnify, a matter on which Zidell was not entitled to fees. On
14 remand, the trial court also can consider, in setting a reasonable attorney fee
15 award, the amounts that Zidell received for attorney fees from settling
16 insurers; but, as Zidell correctly argued in its fifth assignment of error on
17 cross-appeal, London is not necessarily entitled to a set off for those
18 amounts. We reject London's ninth assignment of error regarding the
19 billing rates used to calculate a reasonable fee award. And, finally, we
20 reject London's tenth assignment of error--its challenge to the supplemental
21 award of fees."

22 255 Or App at 559. The tag line of the opinion, which followed that paragraph, stated,
23 "On appeal and on cross-appeal, reversed in part and remanded for further proceedings."

24 In its petition for reconsideration, London asks us to clarify our disposition
25 regarding the supplemental judgment, which was not specifically mentioned in the tag
26 line. In London's view, because we reversed the general judgment as to attorney fees, we
27 necessarily reversed the supplemental judgment as well, because the two were

1 interrelated--that is, the supplemental judgment was based on the award of attorney fees
2 in the general judgment. *See* ORS 20.220(3) ("When an appeal is taken from a judgment
3 under ORS 19.205 to which an award of attorney fees or costs and disbursements relates:
4 (a) If the appellate court reverses the judgment, the award of attorney fees or costs and
5 disbursements shall be deemed reversed * * *."). London asks that we make explicit that
6 aspect of our disposition.

7 Zidell reads our decision differently. According to Zidell, our "opinion
8 makes clear that it affirmed the supplemental attorney fee award" and that, "rather than an
9 outright reversal of the initial attorney fee award, [this court] remanded the attorney fee
10 award to the trial court for reapportionment." "This distinction is significant," Zidell
11 argues, "because there is no question that, on remand, Zidell will receive a substantial
12 attorney fee award associated with establishing London's duty to defend." Thus, "given
13 that Zidell will recover a substantial award of attorney fees regardless of the proceedings
14 on remand, the trigger to the award of supplemental attorney fees will not be disturbed."

15 Although our opinion was not as explicit as it should have been on this
16 point, we did not intend to affirm the supplemental judgment. As London correctly
17 observes, the legal effect of reversing the underlying attorney fee award in the general
18 judgment was to reverse the supplemental judgment for attorney fees as well, because
19 that supplemental judgment was predicated on the initial award--*i.e.*, the appeal of the
20 initial award was an appeal "to which [the supplemental] award of attorney fees or costs

1 and disbursements relates" under ORS 20.220(3)(a).² Our tag line--"On appeal and on
2 cross-appeal, reversed in part and remanded for further proceedings"--was consistent with
3 ORS 20.220(3)(a) and did not state that the supplemental judgment was affirmed.

4 The parties' understandable confusion stems from the fact that, after
5 holding that the underlying attorney fee award was to be remanded for "the trial court to
6 reconsider the apportionment and award of attorney fees," 255 Or App at 553, we went
7 on to address other assignments of error concerning attorney fees, attempting to give the
8 trial court and the parties further guidance on those attorney fee issues likely to arise on
9 remand.³ In the process, we rejected, among other arguments, an assignment of error that
10 challenged the supplemental attorney fee award because of Zidell's attorneys' practice of
11 "block billing" their time. Our rejection of that assignment of error, however, did not
12 alter the fact that the supplemental judgment was deemed reversed by operation of law
13 when we reversed the underlying attorney fee award.⁴

² The trial court's findings and conclusions in support of the supplemental award demonstrate the interrelationship between the initial and supplemental awards:

"[Zidell's] Initial Statement presented an appropriate request for fees, and, to the extent this court's award of supplemental fees depends on [Zidell's] initial right to recover fees and the appropriateness of its Initial Statement, this court confirms [the earlier trial judge's] decision to overrule [London's] objections to [Zidell's] Initial Statement and confirms [the earlier trial judge's] decision that [Zidell is] entitled to attorney fees in this case as set forth in the Initial Award."

³ The trial judges who decided attorney fee issues in this case are no longer on the bench, and a different judge will address attorney fee issues on remand.

⁴ Our opinion couched our treatment of London's tenth assignment of error in terms of "reject[ing] London's argument," 255 Or App at 531, rather than in terms of affirming

1 As Zidell correctly points out, it will still receive a substantial award of
2 attorney fees on remand for work performed on the duty to defend. That does not mean,
3 as Zidell contends, that "the trigger to the award of supplemental attorney fees will not be
4 disturbed" for purposes of ORS 20.220(3). The "trigger" was disturbed when we
5 reversed and remanded the underlying attorney fee award. Now, the amount of attorney
6 fees to be awarded--both on the duty to defend and for time spent recovering those fees--
7 is a matter for the trial court to consider on remand. It may be that the trial court will
8 again award \$268,988.15 for the time spent preparing the initial petition for attorney fees,
9 for the same reasons that it initially awarded those fees, but, in light of ORS 20.220(3),
10 this court cannot assume as much.⁵

11 For those reasons, we allow London's petition for reconsideration, clarify
12 that the supplemental judgment was deemed reversed under ORS 20.220(3)(a), and
13 adhere to our opinion as clarified.

14 Reconsideration allowed; former opinion clarified and adhered to as
15 clarified.

the supplemental judgment. *See id.* at 558 ("We cannot say that the trial court * * * abused its discretion * * *."); *id.* at 559 ("[W]e reject London's tenth assignment of error--its challenge to the supplemental award of fees.").

⁵ It is at least conceivable that, if the court on remand were to reduce the attorney fees that Zidell can recover on its initial petition, the court would also conclude that the reasonable amount of attorney fees for the time spent preparing that initial petition should be something less than \$268,988.15. Our opinion is neither intended to require, nor to foreclose, such a result; rather, it is our intent to leave the amount of the attorney fees to the trial court's discretion.