

FILED: March 6, 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 "Lloyd's," 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., FIREMAN'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

On remand from the Oregon Supreme Court, ZRZ Realty v. Beneficial Fire and Casualty Ins., 349 Or 117, 241 P3d 710 (2010).

William J. Keys, Judge. (Pre-trial and trial rulings)

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

Submitted on remand June 18, 2012.

Thomas W. Sondag and Lane Powell PC, and John Folawn and Kirklin Folawn LLP for appellants-cross-respondents.

Dean D. DeChaine, William H. Walters, Bruce L. Campbell, Michelle E. Barton, and Miller Nash LLP, and Robert M. Horkovich, Edward J. Stein, and Anderson Kill & Olick, P.C., for respondents-cross-appellants.

Gregory L. Baird and Gordon & Polsker, LLP, for *amicus curiae* Complex Insurance Claims Litigation Association.

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

WOLLHEIM, P. J.

On appeal and on cross-appeal, reversed in part and remanded for further proceedings.

1 WOLLHEIM, P. J.

2 This case comes to us on remand after the Supreme Court affirmed in part
3 and reversed in part our decision in *ZRZ Realty v. Beneficial Fire and Casualty Ins.*, 222
4 Or App 453, 194 P3d 167 (2008) (*ZRZ Realty I*), *modified on recons*, 225 Or App 257,
5 201 P3d 912 (2009) (*ZRZ Realty II*), *aff'd in part and rev'd in part*, 349 Or 117, 241 P3d
6 710 (2010) (*ZRZ Realty III*), *modified on recons*, 349 Or 657, 249 P3d 111 (2011) (*ZRZ*
7 *Realty IV*). In our original decision, *ZRZ Realty I*, we addressed, among other issues,
8 whether plaintiffs (collectively Zidell) or defendants (collectively London) had the
9 burden to prove whether environmental damage resulting from the operation of Zidell's
10 business was expected or intended for purposes of various insurance policies issued by
11 London. We held that the trial court had correctly allocated that burden to London as to
12 certain policies, *i.e.*, the "implied fortuity policies" that, by their terms, provided coverage
13 without regard to whether resulting property damage was expected or intended; but, we
14 held that the trial court had erred in allocating that burden to London on "express fortuity
15 policies," *i.e.*, policies that expressly limited coverage to property damage that was not
16 expected or intended. We reversed the judgment (including an attorney fee award) in
17 favor of Zidell and also vacated a supplemental judgment that awarded Zidell additional
18 attorney fees. *ZRZ Realty I*, 222 Or App at 497. On reconsideration, we modified our
19 opinion but adhered to our disposition, again remanding the case for retrial as to all
20 policies. *ZRZ Realty II*, 225 Or App at 262-65. In light of our disposition, we did not
21 reach some of the parties' assignments of error on appeal and cross-appeal, including
22 most of the parties' assignments concerning attorney fees. *ZRZ Realty I*, 222 Or App at

1 478, 480, 495-97; *ZRZ Realty II*, 225 Or App at 264-65.

2 The Supreme Court subsequently affirmed our decision as it pertained to
3 the allocation of the burden of proof, but concluded that our remand was too broad. The
4 Supreme Court reasoned that "[t]he remand should have been limited, at least initially, to
5 the question whether, for the purposes of the express fortuity policies, Zidell either
6 expected or intended that a series of contaminants resulting from the operation of its
7 business would damage the environment." *ZRZ Realty III*, 349 Or at 147. The court also
8 held that we had erred in reversing the attorney fee award in the judgment and in vacating
9 the attorney fee award in the supplemental judgment, because the issue to be retried--
10 whether Zidell expected or intended the damage resulting from its business activity for
11 purposes of express fortuity policies--"would have no effect on either the trial court's
12 ruling that London had a duty to defend Zidell in DEQ's enforcement action or the trial
13 court's conclusion that ORS 742.061 authorized Zidell to recover attorney fees it incurred
14 in this action in establishing and enforcing London's duty to defend." *Id.* at 150.

15 After reversing our decision in those respects, the court sent the case back
16 to us for consideration of the assignments of error that we previously did not reach. The
17 court described the remand this way:

18 "Because we conclude that the Court of Appeals erred in reversing and
19 vacating the fee awards, it follows that we must remand this case initially to
20 the Court of Appeals to permit it to consider those assignments of error.
21 On remand before the Court of Appeals, the parties are also free to ask the
22 court to consider, if appropriate, those assignments of error that the court
23 did not reach because it remanded the case for a new trial on both the
24 express and implied fortuity policies. Because at least some of those issues
25 must go back to the Court of Appeals for its resolution before the case

1 returns to the trial court, we remand this case initially to the Court of
2 Appeals."

3 *ZRZ Realty III*, 349 Or at 150-51.

4 The remand, however, did not reach this court immediately, because the
5 Supreme Court issued two more opinions--one on reconsideration that clarified that the
6 trial court was not foreclosed from taking live testimony on remand, *ZRZ Realty IV*, 349
7 Or 657, and another dealing with Zidell's petition for an award of attorney fees for
8 prevailing on appeal, 351 Or 255, 266 P3d 61 (2011) (*ZRZ Realty V*).

9 In June 2012, we received the remand judgment from the Supreme Court
10 and invited further briefing from the parties on what issues remain to be decided by this
11 court. Having reviewed the original briefs, the various appellate decisions in this case,
12 and the parties' most recent submissions, we conclude that the following assignments of
13 error merit further discussion on remand: on appeal, London's second assignment
14 (dismissal of claims as a matter of law), third assignment (inconsistencies in the trial
15 court's findings and conclusions), fourth assignment (expected losses under certain
16 bumbershoot policies), and eighth, ninth, and tenth assignments (each pertaining to
17 attorney fees); and, on cross-appeal, Zidell's first assignment (allocation of indemnity
18 costs), second assignment (defense costs under ship dismantling policies), and fourth and
19 fifth assignments (both concerning attorney fees). And, for the reasons that follow, we
20 now affirm the trial court's rulings concerning the implied fortuity policies; vacate the
21 initial attorney fee award because it includes fees for time spent on issues other than the
22 duty to defend; reject London's argument concerning the supplemental fee award; and

1 decline to reach the allocation question, which will benefit from a better- developed
2 record below.

3 I. BACKGROUND

4 The facts underlying this appeal are set out in the Supreme Court's opinion,
5 which we repeat here to provide context for the various assignments of error.

6 "Plaintiffs (collectively Zidell) are a group of related companies that
7 began acquiring and dismantling decommissioned navy and merchant
8 marine ships after World War II. Zidell towed the decommissioned ships
9 to a site along the Willamette River in Portland (the Moody Avenue site)
10 where it dismantled the ships for scrap, generally while the ships were tied
11 to a dock at the site. Dismantling the ships resulted in the release of
12 pollutants found in, among other places, the ships' paint, batteries, motors,
13 and fuel tanks. The pollutants included polychlorinated biphenyls,
14 petroleum products in the form of fuel, lubricating, and hydraulic oils, and
15 a variety of metals, such as arsenic, cadmium, chromium, lead, mercury,
16 and zinc. Some of the pollutants were released directly into the river;
17 others contaminated the land on which Zidell operated its business and,
18 from there, leached into the groundwater and the river.

19 "Over the years, Zidell purchased different types of insurance from a
20 variety of insurers. Only two insurers, Certain Underwriters at Lloyd's of
21 London and Certain London Market Insurance Companies, remain in this
22 litigation; the others have settled. The interests of the two remaining
23 insurers are, for the purposes of this appeal, identical, and we refer to them
24 collectively as London. From 1956 to 1983, Zidell purchased three types of
25 insurance policies from London that are at issue in this litigation:
26 comprehensive general liability policies, a form of marine excess coverage
27 known as bumbershoot policies, and another form of marine insurance
28 known as protection and indemnity policies. In setting out the facts, we
29 discuss the comprehensive general liability policies and refer to the other
30 policies where appropriate.

31 "The comprehensive general liability policies consisted of primary
32 and excess policies that provided coverage for damage to property but
33 contained an owned property exclusion. *See Schnitzer Investment Corp. v.*
34 *Certain Underwriters*, 341 Or 128, 138-39, 137 P3d 1282 (2006)
35 (discussing effect of owned property exclusion on coverage for
36 environmental contamination). From 1956 to 1965, London issued a series

1 of comprehensive general liability policies that the parties refer to as the
2 'implied fortuity policies.'^[1] By their terms, those policies provided
3 coverage without regard to whether the property damage that resulted from
4 Zidell's business activities was either expected or intended. One policy, for
5 example, provided coverage for 'any and all liability imposed by law
6 against the Assured for loss of or damage to or destruction of the property
7 of others * * * arising from any cause whatsoever out of the operation' of
8 Zidell's business.

9 "Despite that broad grant of coverage, the trial court read a limitation
10 into the implied fortuity policies. Specifically, the trial court ruled that 'the
11 general principle that only 'fortuitous' losses will be covered will be deemed
12 a condition of each such policy, consistent with the holding in *A-1*
13 *Sandblasting & Steamcleaning Co. v. Baiden*, 293 Or 17, 643 P2d 1260
14 (1982).' As the trial court explained, that principle

15 ""limits coverage to those losses that were not expected or intended
16 for policies between 1957 and January 1, 1968. From January 1,
17 1968 until July 1, 1983, the implied fortuity doctrine limits coverage
18 to those losses that were not intended.'

19 "Both parties accept the limitation that the trial court read into the
20 agreements that they entered into before January 1, 1968.

21 "Starting in 1966, London began issuing comprehensive general
22 liability policies to Zidell that the parties refer to as the 'express fortuity
23 policies.' Those policies provided coverage only for damages that were
24 both unexpected and unintended. For example, in one of those policies,
25 London agreed to pay Zidell 'all sums which the Assured shall be obligated
26 to pay by reason of the liability [i]mposed upon the Assured by law * * *
27 for damages * * * on account of * * * [p]roperty damage * * * caused by or
28 arising out of [an] occurrence.' The policy defined 'occurrence' as an
29 'accident or a happening or event or a continuous or repeated exposure to
30 conditions which unexpectedly and unintentionally results in * * * property
31 damage * * * during the policy period.'

¹ "The trial court found that, in addition to the pre-1966 comprehensive general liability policies, London issued protection and indemnity policies from 1957 through 1983 and bumbershoot policies from 1970 through 1977, none of which required that property damage be unexpected and unintended. The court read a fortuity requirement into those policies, as well as into the pre-1966 comprehensive general liability policies." *ZRZ Realty III*, 349 Or at 124 n 2.

1 "In 1994, the Oregon Department of Environmental Quality (DEQ)
2 issued a notice to Zidell stating that it was potentially responsible for
3 cleaning up the environmental contamination resulting from its business at
4 the Moody Avenue site. Zidell chose to participate in a voluntary clean-up
5 program that DEQ offered and also requested that London, pursuant to the
6 various policies that it had issued over the years, defend Zidell and
7 indemnify it for the costs of remediating any environmental damage that
8 had resulted from Zidell's business. When London denied that it had any
9 obligation to defend or indemnify Zidell, Zidell brought this action,
10 alleging breach of contract and also seeking a declaration of London's
11 obligations under its policies.

12 "Before trial, the court ruled on summary judgment that London had
13 a duty to defend Zidell in response to DEQ's notice that Zidell was
14 potentially responsible for cleaning up the environmental damage resulting
15 from its business. The court also ruled, on summary judgment, that London
16 bore the burden of proving that Zidell either expected or intended the
17 environmental damages that resulted from the operation of its business.
18 The court explained that its ruling applied to both the express and the
19 implied fortuity policies.

20 "With those ground rules in place, the case proceeded to trial on the
21 question of indemnity. Among other things, the parties and the trial court
22 sought to identify the specific contaminants that, as a result of Zidell's
23 business, had damaged the environment over the period of time in which
24 London had insured Zidell. The trial court also sought to determine,
25 regarding each pollutant, whether Zidell had either expected or intended the
26 resulting damage. For example, the trial court found that Zidell had never
27 intended any damage to the environment from removing anti-fouling paint
28 (paint used to discourage the growth of organisms on the ships' hulls) but
29 that 'Zidell management expected damage to sediments from [arsenic found
30 in] anti-fouling paint beginning in 1972.' Because 90 percent of the arsenic
31 found at the site came from removing the anti-fouling paint, the trial court
32 sought to allocate London and Zidell's respective responsibility for the cost
33 of remediating the damage accordingly.

34 "At the conclusion of the trial, the court issued lengthy findings of
35 fact and conclusions of law, which it incorporated in the judgment. In
36 essence, the court found that, for a number of years, Zidell neither expected
37 nor intended that its business operations would result in environmental
38 damage; however, the court found that, beginning in the 1970s, Zidell
39 expected that some of the substances released as a result of dismantling the
40 ships would damage the soil and also the sediment in the river. As a result

1 of those and other findings, the trial court held that London's policies
2 required it to indemnify Zidell for part of the remediation costs."

3 *ZRZ Realty III*, 349 Or at 122-26 (footnotes omitted).

4 The trial court's judgment, entered in April 2003, awarded attorney fees to
5 Zidell in excess of \$1.3 million. The court later entered a supplemental judgment that
6 awarded Zidell an additional \$268,988.15 in attorney fees.

7 London appealed the judgment and supplemental judgment, raising ten
8 assignments of error, and Zidell cross-appealed, raising five of its own assignments of
9 error. As previously described, in *ZRZ Realty I* we reversed and remanded the judgment
10 and vacated the supplemental judgment for attorney fees; we then modified that decision
11 on reconsideration in *ZRZ Realty II*. The Supreme Court, in *ZRZ Realty III*, reversed in
12 part our decision and remanded the case to us to consider issues that, because of our
13 broad remand, we had not addressed. We now undertake that task and, in the course of
14 our analysis, will describe in more detail the aspects of previous opinions that relate to
15 issues now before this court.

16 II. ANALYSIS

17 A. Coverage-related Issues

18 1. London's Assignments of Error²

19 a. Second Assignment: Dismissal as a Matter of Law

20 In its second assignment of error, London asserts that the trial court should
21 have granted its motion to dismiss Zidell's claims pertaining to damage to river

² London also raises assignments of error concerning attorney fees, which we discuss separately.

1 sediments, because "the nature of Zidell's knowing and intentional acts were so sure to
2 cause harm that harm must be said to have been expected or intended." In *ZRZ Realty I*,
3 we rejected that argument on two independent grounds. We first explained that the trial
4 court's error in allocating the burden of proof--the subject of London's first assignment of
5 error--had infected the trial in a way that affected our review of the second assignment of
6 error:

7 "As discussed above, the trial court's pretrial ruling assigned the
8 burden of proof to London on the question whether the damage was
9 unexpected and unintended and effectively determined that Zidell was not
10 required to prove that the damage was unexpected and unintended as part of
11 its *prima facie* case. That pretrial ruling, which the court adhered to with
12 respect to London's ORCP 54 B(2) motion, doomed that motion for
13 judgment as a matter of law; if the unexpected and unintended issue was
14 not part of plaintiff's *prima facie* case, London would not have been entitled
15 to prevail as a matter of law based on Zidell's evidence alone. Our reversal
16 of the trial court's ruling as to the burden of proof complicates--if not
17 obviates--our review of London's second assignment of error. As the
18 parties discussed below, it is possible that Zidell would have tried the case
19 differently had the burden been assigned to it rather than London. For that
20 reason alone, it would be improper to conclude on appeal that the trial court
21 should have granted a motion regarding Zidell's failure to make the wrong
22 *prima facie* case."

23 *ZRZ Realty I*, 222 Or App at 478.

24 Nonetheless, we went on to address and reject on its merits London's
25 argument regarding the sufficiency of the evidence:

26 "In any event, we disagree with London's argument that the trial
27 court was required, on the record before it, to conclude that the damage for
28 which Zidell sought coverage was, as a matter of law, expected or intended.
29 The gravamen of London's argument under its second assignment of error
30 is that Zidell indisputably knew that *some* harm would result from its
31 activities, such as dumping oil, discharging paint that was by its very design
32 toxic to marine life, and violating state and federal clean water laws.
33 Although we agree that there is evidence in the record from which a trier of

1 fact could have determined that Zidell expected and intended the damage
2 for which it sought coverage, that is not the question before us. Nor is the
3 question before us whether Zidell *should* have expected or intended
4 environmental damage from its activities. Rather, as the Supreme Court
5 has explained in the context of expected and intended harm, the question is
6 whether Zidell had the *subjective intent* to cause injury and harm to the
7 property at the Moody Avenue site. *Allstate Ins. Co. v. Stone*, 319 Or 275,
8 279, 876 P2d 313 (1994) (explaining that the court has rejected the
9 'objective "natural and ordinary" consequences approach to applying
10 exclusions for intentionally-inflicted harms'); *see also Nielsen [v. St. Paul*
11 *Companies*, 283 Or 277, 281, 583 P2d 549 (1978)]. ('[T]he acts must have
12 been committed *for the purpose of inflicting the injury and harm* before
13 either a policy provision excluding intentional harm applies or the public
14 policy against insurability attaches.').

15 "An insured's subjective intent to inflict harm can be established as a
16 matter of law if the insured 'engaged in an act so certain to cause a
17 particular kind of harm that the court will say that the insured intended the
18 harm.' *Fox v. Country Mutual Ins. Co.*, 327 Or 500, 514, 964 P2d 997
19 (1998) (citing *Snyder v. Nelson/Leatherby Ins.*, 278 Or 409, 413, 564 P2d
20 681 (1977)). 'In other words, the court should only infer that the insured
21 had a subjective intent to cause harm or injury as a matter of law when such
22 subjective intent is the *only* reasonable inference that may be drawn from
23 the insured's conduct.' *Allstate Ins. Co.*, 319 Or at 279; *see also Nielsen*,
24 283 Or at 281 ('There are some intentional acts the nature of which is such
25 that it must necessarily be concluded that there was an intention to injure.').
26 London argues that Zidell's acts fall into that category.

27 "We are not persuaded that any of Zidell's acts were, by their very
28 nature, sufficient to establish *as a matter of law* that Zidell acted with the
29 purpose of causing harm. The Supreme Court and this court have found
30 intent to injure, as a matter of law, only where such an intent was inherent
31 in the insured's conduct. *See, e.g., Mutual of Enumclaw v. Merrill*, 102 Or
32 App 408, 411-12, 794 P2d 818, *rev den*, 310 Or 475 (1990) (intent to injure
33 inferred as a matter of law where the insured sexually molested his minor
34 granddaughter); *Falkenstein's Meat Co. v. Maryland Casualty Co.*, 91 Or
35 App 276, 280, 754 P2d 621 (1988) (tort of deceit, by its nature, 'is an action
36 from which the intention to do harm must necessarily be inferred').
37 Otherwise, the matter of intent is a question for the trier of fact, even where
38 the consequences of the insured's actions seem all but certain. *See, e.g., A-1*
39 *Sandblasting*, 293 Or at 26 ('The choice to paint the bridge by methods and
40 under conditions expected to cause some compensable harm was
41 intentional, as the insurer asserts, but it was not the kind of purposeful

1 infliction of injury that excludes recovery of indemnity * * *'); *Snyder*, 278
2 Or at 415-16 (where the insured intentionally rammed the injured party's
3 car, there was 'a permissible but not necessary inference to draw from [the
4 insured's] actions and [therefore] a legitimate question of fact as to whether
5 [the insured] intended the injuries and damage'); *City of Burns v.*
6 *Northwestern Mutual*, 248 Or 364, 370-72, 434 P2d 465 (1967) (intent not
7 inferred as a matter of law where the city moved the decedent's grave
8 without securing his wife's consent as required by statute). Zidell's acts of
9 disposing of toxic substances are more analogous to the latter cases than to
10 those in which intent is inferred as a matter of law.

11 "We are not persuaded that the *only* inference available to the trier of
12 fact was that Zidell purposefully caused damage, or that Zidell engaged in
13 acts so certain to cause harm that intent to injure must be inferred as a
14 matter of law. We therefore reject London's second assignment of error."

15 *ZRZ Realty I*, 222 Or App at 478-80 (emphasis in original).

16 London then petitioned for reconsideration of our opinion, including our
17 treatment of the second assignment of error. We allowed the petition for reconsideration
18 and, in a subsequent opinion, explained:

19 "In its petition for reconsideration, London submits that this court's
20 analysis of whether the harm was expected *or* intended 'arguably conflates
21 those two separate inquiries.' London acknowledges that, as a result of the
22 court's independent basis for rejecting the assignment of error (different
23 allocation of the burden of proof), the court may well adhere to its previous
24 decision; '[r]egardless, London is concerned that statements made by the
25 Court after reaching the foregoing conclusion may lend themselves to
26 further "wrangling" on remand.'

27 "Given our alternative and independent reason for rejecting London's
28 assignment of error regarding its ORCP 54 B motion, and in the interest of
29 avoiding any confusion on remand, we agree with London that our
30 subsequent discussion of the evidence in the record was unnecessary and
31 should be deleted. Accordingly, we modify our original opinion to delete
32 the discussion of London's second assignment of error that begins with the
33 sentence, 'In any event, we disagree with London's argument that the trial
34 court was required, on the record before it, to conclude that the damage for

1 which Zidell sought coverage was, as a matter of law, expected or
2 intended.' [ZRX Realty I,] 222 Or App at 478."³

3 ZRX Realty II, 225 Or App at 262-63 (emphasis in original).

4 Thus, after reconsideration, our resolution of London's second assignment
5 of error rested on the fact that London erroneously had been assigned the burden of proof
6 with regard to certain policies, and that the error infected Zidell's presentation of its
7 *prima facie* case in a way that made it improper to conclude, as a matter of law, that
8 Zidell had not carried its burden below. We did not distinguish, for purposes of
9 addressing the second assignment of error, between the express fortuity policies (on
10 which Zidell had the burden of proof) and implied fortuity policies (on which London
11 had the burden); rather, we assumed that the trial court's error regarding the burden of
12 proof required a retrial as to all policies.

13 In ZRX Realty III, the Supreme Court affirmed our allocation of the burden
14 of proof on the express and implied fortuity policies, but concluded that our blanket
15 remand was erroneous. The Supreme Court explained that, in the context of a bench trial,
16 there was no reason why the court's retrial should not be limited, at least initially, to the
17 express fortuity policies. *Id.* at 147. The court then remanded the case to this court and
18 allowed the parties to ask us "to consider, if appropriate, those assignments of error that
19 the court did not reach because it remanded the case for a new trial on both the express
20 and implied fortuity policies." *Id.* at 151.

21 On remand, London now asks us to address its second assignment of error.

³ To be clear, our deletion continued to the end of our discussion of the second assignment of error at ZRX Realty I, 222 Or App at 480.

1 London concedes that the second assignment is not among those that this court "did not
2 reach" because of our broad remand; rather, London acknowledges that we rejected its
3 second assignment but asks us to reconsider that holding in light of the more limited
4 remand ordered by the Supreme Court. According to London, it was not unhappy with a
5 retrial on all policies, as we held in *ZRZ Realty I*, and therefore "was properly
6 circumspect in its reconsideration request" of the second assignment of error in *ZRZ
7 Realty II*. But, London argues, "the Supreme Court has now decided that *there will be no
8 retrial* on the implied fortuity policies. Accordingly, [the Court of Appeals] should
9 decide whether, as a matter of law, Zidell expected the damage for which it seeks
10 coverage under those [implied fortuity] policies." (Emphasis by London.)

11 We agree with London that, in light of *ZRZ Realty III*, our treatment of its
12 second assignment of error merits further consideration. The Supreme Court disagreed
13 with one of the implicit premises of our holding as to the second assignment of error--
14 namely, that the erroneous allocation of the burden of proof on the express fortuity
15 policies necessarily affected the trial of the "unexpected and unintended" damage issue
16 under the implied fortuity policies. Our prior reasoning--*i.e.*, "it would be improper to
17 conclude on appeal that the trial court should have granted a motion regarding Zidell's
18 failure to make the wrong *prima facie* case," 222 Or App at 478--logically extends to
19 those policies on which the court misallocated the burden of proof: the *express* fortuity
20 policies. Accordingly, we elect to reconsider London's arguments that it was entitled to
21 judgment as a matter of law on the *implied* fortuity policies, on which the court correctly
22 allocated the burden of proof.

1 As for the merits of the second assignment, London argues that the
2 evidence established, as a matter of law, that Zidell expected and intended the damage for
3 which it sought coverage. We analyzed the question of "intent" at length in *ZRZ Realty I*,
4 but later withdrew that part of the opinion (ironically) to "avoid[] confusion on remand."
5 *ZRZ Realty II*, 225 Or App at 262-63. Now that there will be no retrial as to the implied
6 fortuity policies, we readopt our previous analysis concerning the evidence of "intent,"
7 which is set out above, ___ Or App at ___ (slip op at 8-10) (quoting *ZRZ Realty I*, 222 Or
8 App at 478-80), and again conclude that the record gives rise to competing inferences as
9 to whether Zidell intended the damage for which it seeks coverage.

10 Nor are we persuaded that the only inference available to the trier of fact
11 was that Zidell "expected" the damage for which it seeks coverage. The trial court ruled
12 that a person "expects" a result if the person "act[s] with awareness that the result is
13 substantially certain to follow." Suffice it to say that, viewing the record as a whole, a
14 factfinder could draw competing inferences regarding Zidell's degree of awareness of
15 damage to river sediment and groundwater that would result from its activities. The
16 question was one for the trier of fact, and the court did not err in denying London's
17 motion to dismiss the claims as a matter of law with regard to the implied fortuity
18 policies.

19 b. Third Assignment: Inconsistent Findings and Conclusions

20 In its third assignment of error, London argues that the trial court failed to
21 enter a judgment consistent with its factual findings concerning post-1960 policies.
22 Specifically, London argues that the trial court found as fact that Zidell (1) knew by 1956

1 that its operations were discharging paint chips into river sediments and (2) knew by
2 1961 that anti-fouling paint was "toxic to marine life." Yet, the court ultimately
3 concluded that Zidell had coverage up until 1972 for damage to sediments and soil--a
4 legal conclusion that, according to London, is patently inconsistent with the court's other
5 findings.

6 In *ZRZ Realty I*, we expressly declined to reach the third assignment of
7 error. 222 Or App at 480. On remand, in light of *ZRZ Realty III*, we now reach and
8 reject London's third assignment of error on the merits.

9 Contrary to London's argument, the court's findings regarding the discharge
10 of paint chips into sediment and the toxicity of anti-fouling paint to marine life are not
11 irreconcilable with the court's ultimate finding that "Zidell management expected damage
12 to sediments and soil from substances contained in anti-fouling paint beginning in 1972."
13 The trial court distinguished toxicity to marine life--for instance, harm to barnacles that
14 attach themselves to the hulls of ship--from damage to the soil and river sediment from
15 substances contained in that paint; it is the latter damage for which Zidell would be liable
16 to DEQ for cleanup costs, and for which Zidell seeks coverage.⁴ Once again, the record
17 created an issue for the trier of fact as to what sediment and soil damage Zidell expected

⁴ In stating its legal conclusions, the court explained that knowledge about harm to human or marine life was only part of the relevant inquiry for finding expected damage to river sediments: "The following is the standard for finding expected damage to river sediments: First, that the substance gets on the water. Second, that it sinks. Third, that it is harmful to human or marine life. Fourth, that it is harmful to human and marine life in the medium that it enters the water. * * * Zidell knows of and expects damage when Zidell management in charge of the area knew that damage was substantially certain to follow."

1 or intended, and the trial court's findings simply reflect the fact that it refused to draw
2 certain inferences about Zidell's level of awareness of the damage for which it seeks
3 coverage. The trial court's findings of fact are not inconsistent with its judgment.

4 c. Fourth Assignment: Expected Losses Under Bumbershoots

5 In its fourth assignment of error, London argues that the trial court erred in
6 ruling that bumbershoot policies for 1970 and 1971 covered *expected* losses, so long as
7 those losses were *unintended*.⁵ That interpretation of the policies, London submits, was
8 incorrect under federal maritime law and Oregon law, both of which limit coverage to
9 losses that are unintended and unexpected.

10 In *ZRZ Realty I*, we addressed London's argument on its fourth assignment
11 of error notwithstanding our remand for a new trial, because the interpretation of the
12 policies "present[ed] an issue likely to arise on remand." 222 Or App at 481. On the
13 merits, we held that "the trial court did not err in declining to impose an implicit
14 requirement that losses under the bumbershoot policies be unexpected as well as
15 unintended." *Id.* at 486. However, in response to London's petition for reconsideration,
16 we ultimately withdrew our conclusion regarding the correctness of the trial court's ruling
17 regarding the bumbershoot policies:

18 "Rather, we express no opinion on that issue, and, to the extent that
19 the issue arises on remand, nothing in this opinion is intended to preclude
20 London or Zidell from arguing about the legal effect of the trial court's
21 earlier definition of 'expects' or 'intends,' or to preclude London from

⁵ In England, umbrellas are known as bumbershoots. Hence, the marine insurance policy that provides "umbrella" coverage is known as a bumbershoot policy. *See ZRZ Realty I*, 222 Or App at 481 n 16.

1 arguing that, in light of those definitions, the bumbershoots do not cover
2 damages that Zidell knew were 'substantially certain' to occur."

3 *ZRZ Realty II*, 225 Or App at 265.

4 Now, on remand from the Supreme Court, London asks us to address the
5 issue that we reserved in *ZRZ Realty II*: whether the trial court ruled correctly that
6 damage that was "expected but unintended" was covered by the bumbershoot policies.
7 We decline to revisit the fourth assignment of error, however, because our rejection of
8 London's second and third assignments of error regarding the trial court's findings and
9 conclusions, coupled with the Supreme Court's holding that retrial should be limited to
10 the express fortuity policies (which the bumbershoot policies are not), appear to obviate
11 the need to resolve whether the bumbershoot policies cover "expected" damage. The
12 bumbershoot policies at issue cover 1970 and 1971.⁶ The trial court ruled that London
13 had not proved that Zidell expected any of the damage for which it sought coverage until
14 1972--after the coverage period for the bumbershoot policies. *See* ___ Or App at ___
15 (slip op at 13-15) (discussing London's third assignment of error). We therefore see no
16 reason to further address whether the bumbershoot policies were impliedly limited to
17 "expected" damages, because Zidell would nevertheless have coverage under those
18 policies in light of the trial court's findings and conclusions, which this court and the

⁶ London's fourth assignment of error refers to the court's ruling as to all marine insurance policies issued after 1968, but London subsequently clarified that its "[f]ourth [a]ssignment of [e]rror challenged the trial court's conclusion that two 'bumbershoot' policies, issued in 1970 and 1971, provide coverage of losses Zidell expected."

1 Supreme Court have affirmed as they pertain to the implied fortuity policies.⁷

2 Accordingly, we do not revisit the merits of London's fourth assignment of error.

3 2. *Zidell's Assignments of Error*

4 a. First Assignment: Allocation

5 In its first assignment of error on cross-appeal, Zidell argues that the trial
6 court erred in adopting a "straight-time-on-the-risk" approach to allocating indemnity
7 costs, rather than the "all sums" approach that Zidell had urged. Zidell argues that,
8 shortly after the notice of appeal was filed, the legislature in 2003 adopted the "all sums"
9 rule in amendments to the Cleanup Assistance Act, ORS 465.480(3)(a)--a legislative
10 change that applies to claims arising before or after the effective date of the amendments
11 unless "a final judgment, after exhaustion of all appeals, was entered before [July 1,
12 2004]." Or Laws 2003, ch 799, §§ 5(1), (2). Moreover, Zidell argues that the trial court's
13 approach is inconsistent with this court's decision in *Cascade Corp. v. American Home*
14 *Assurance Co.*, 206 Or App 1, 135 P3d 450 (2006), *rev dismissed*, 342 Or 645 (2007).

15 In *ZRZ Realty I*, we declined to reach the assignment concerning allocation
16 because the trial court on remand would have an opportunity to reconsider the allocation
17 question in light of subsequent changes to the law and was in the best position to pass
18 upon the question in the first instance. We adhere to that conclusion on remand. As the

⁷ In its opening brief, London requested that, with respect to its fourth assignment, we remand to the trial court to amend its findings to reflect that the marine policies only provide coverage for unexpected and unintended losses, and that they are "therefore subject to the rulings disposing of the foregoing assignments." Our rulings on the "foregoing assignments"--London's first through third assignments of error--would not provide London with any further relief.

1 Supreme Court explained in *ZRZ Realty III*, "if the trial court reaches a different
2 conclusion on remand as to when Zidell expected or intended property damage for the
3 purposes of the express fortuity policies, then the court also will presumably have to
4 adjust the findings allocating responsibility for remediating the damage between London
5 and Zidell." 349 Or at 148. And, even assuming that the trial court were to make the
6 same findings on remand as it did initially, we do not understand the Supreme Court's
7 opinion or this court's opinion to preclude the trial court from reconsidering the allocation
8 question in light of amendments to the Cleanup Assistance Act or *Cascade Corp.*--an
9 issue that neither this court nor the Supreme Court addressed on appeal. *ZRZ Realty III*,
10 349 Or at 148 ("If, on either the existing or a supplemented record, the trial court makes
11 the same findings on remand that the trial court did initially, then it *presumably* can
12 reenter the judgment, with any appropriate adjustment for attorney fees." (Emphasis
13 added.)). Because we conclude that, in light of the statutory changes and developments
14 in case law, any review of this issue would benefit from a better-developed record below,
15 we decline to address Zidell's first assignment of error.⁸ The trial court can address
16 Zidell's argument on remand.

17 b. Second Assignment: Ship Dismantling Policies

18 In its second assignment, Zidell argues that the trial court erred in ruling
19 that certain ship dismantling policies do not require London to pay defense costs. The

⁸ London asserts a cross-assignment of error in the event that we were to reverse the trial court's ruling regarding allocation. Because we do not reach the allocation issue, we likewise decline to address London's cross-assignment.

1 policy language at issue provides:

2 "3. It is further agreed that if by reason of interest in the Vessel
3 [Zidell] shall become liable to pay and shall pay any sum or sums in respect
4 of any liability, claim, demand, damages, and/or expenses arising from or
5 occasioned by * * *:

6 "Loss of or damage to any harbour, dock (graving or
7 otherwise), slipway, way, gridiron, pontoon, pier, quay, jetty, stage,
8 buoy, telegraph cable or other fixed or moveable thing whatsoever,
9 or to any goods or property in or on the same howsoever caused:

10 " * * * * *

11 "[London] will pay [Zidell] such proportion of such sum or sums paid, or
12 which may be required to indemnify [Zidell] for such loss, as their
13 respective subscriptions bear to the insured value of the Vessel hereby
14 insured, provided always that the liability under this clause, together with
15 any liability there may be under Clause 4, in respect of any one accident or
16 series of accidents arising out of the same event, shall be limited to the sum
17 hereby insured, but when the liability of [Zidell] has been contested with
18 the consent in writing of [London], [London] will also pay a like proportion
19 of the costs which [Zidell] shall thereby incur or be compelled to pay.

20 "4. This insurance also to pay the expenses, after deduction of the
21 proceeds of the salvage, not recoverable under Clause 3, of the removal of
22 the wreck of the insured Vessel from any place owned, leased or occupied
23 by [Zidell]. [London's] liability under this clause is subject to the
24 limitations in amount provided in Clause 3. The provisions of that clause
25 regarding the payment of legal costs shall also apply hereto."

26 In the trial court, Zidell argued that, although "[t]he ship dismantling
27 policies do not provide for a duty to defend separate from policy limits, as in traditional
28 [comprehensive general liability] coverage," the policy language nevertheless requires
29 London to pay Zidell's defense costs up to the policy limits. In response, London argued
30 that, under the final sentence of Clause 3, defense costs are recoverable only when
31 liability "has been contested with the consent in writing of [London]"--a condition that

1 Zidell failed to satisfy. In a reply memorandum, Zidell addressed London's objection "to
2 paying defense costs under the ship dismantling policies based on a condition that Zidell's
3 liability must be 'contested with the consent in writing of [London]," but Zidell did not
4 argue that the "contested with consent" language was inapplicable to defense costs up to
5 policy limits. Rather, Zidell argued that the condition should not preclude recovery
6 because (1) despite entering into a consent decree with DEQ, Zidell was contesting
7 liability; and (2) the failure to obtain London's consent was excused or waived by
8 London's disclaimer of coverage.

9 The trial court agreed with London's interpretation of the policy language
10 and rejected Zidell's reply. The trial court concluded:

11 "The policies have valid and fair conditions that must be met prior to
12 payment of any defense costs. There has to be contested liability, and it has
13 to be with the written consent of the insurer. These are not regular duty to
14 defend policies. This is a choice that can be decided by the insurer. The
15 language is neither vague nor ambiguous. [London] may choose to defend
16 or not to defend. Here the London Underwriters subscribing to the ship
17 dismantling policies did not choose to defend."

18 On appeal, Zidell argues that the trial court erred in relying on the final
19 sentence of Clause 3, suggesting, for the first time, that the "contest with consent"
20 language is "directed to a specific type of situation":

21 "It can happen that a claim is brought against a policyholder and that for
22 economic or other reasons London would prefer to simply pay the claim
23 rather than incur the costs of defending against it. What the clause in
24 question provides is that, in such a circumstance, if the policyholder still
25 wants to contest its liability, then London will pay the associated costs of
26 defense only if London agrees to do so. In other words, the trial court is
27 correct that London 'may choose to defend or not to defend,' but only
28 (contrary to the trial court) in the special circumstance where London wants
29 to pay the claim and the policyholder wants instead to defend against it."

1 In *ZRZ Realty I*, we stated that "[t]he argument that Zidell makes on appeal
2 is different from the argument made to the trial court, and given that the case must be
3 remanded for a new trial on both claims, we decline to address that argument for the first
4 time on appeal." 222 Or App at 496. Now, in light of the more limited remand ordered
5 in *ZRZ Realty III*, Zidell asks us to decide its second assignment of error on the merits.

6 Although Zidell's specific argument has morphed on appeal--a factor that,
7 in light of our broad remand, counseled against offering any opinion on the issue in *ZRZ*
8 *Realty I*--we are nonetheless persuaded that the parties and the trial court were adequately
9 alerted to the issue of contractual interpretation that Zidell now raises, namely, whether
10 the language in Clause 3 establishes an obligation to pay defense costs up to policy limits.
11 For that reason, we agree with Zidell that, notwithstanding the evolution of its reasoning,
12 preservation principles are not an impediment to our review. *See State v. Haugen*, 349 Or
13 174, 190, 243 P3d 31 (2010) ("A party ordinarily may preserve an issue for review
14 merely by raising an issue at trial; alternatively (and preferably), a party may preserve an
15 issue by raising the issue, identifying a source for the party's position, and advancing a
16 particular argument." (Citing *State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988))). We
17 therefore turn to the merits.

18 Even in light of Zidell's newly proffered interpretation, we agree with the
19 trial court that the language of Clause 3 "is neither vague nor ambiguous." Under Clause
20 3, if Zidell "shall become liable to pay and shall pay any sum or sums in respect of any
21 liability, claim, demand, damages, and/or expenses arising from or occasioned by * * *
22 [l]oss of or damage to any [itemized thing]," then London "will pay * * * such proportion

1 of sum or sums so paid, or which may be required to indemnify [Zidell] for such loss[.]"
2 Clause 3 continues by stating that any liability under Clauses 3 and 4 "in respect of any
3 one accident or series of accidents arising out of the same event, shall be limited to the
4 sum hereby insured, *but when the liability of the Assured has been contested with the*
5 *consent in writing of the Underwriters, the Underwriters will also pay a like proportion*
6 *of the costs which the Assured shall thereby incur or be compelled to pay."* (Emphasis
7 added.)

8 Read in isolation, the "will also pay" language could mean, as Zidell
9 contends, that "costs" are a subset of other covered liabilities in Clause 3, and that, when
10 liability is contested with London's consent, London will pay those costs without regard
11 to otherwise applicable policy limits. In context, however, it is evident that "costs"
12 incurred to contest liability are separate from "expenses." Clause 4, which is set out
13 above, distinguishes between "expenses * * * not recoverable under Clause 3" and
14 "payment of legal costs" under Clause 3. Clause 1 of the policy is similarly worded,
15 distinguishing between liability as a consequence of collision, which London will pay
16 based on a proportionate formula, and "cases in which the liability of the Vessel has been
17 contested, or proceedings have been taken to limit liability with the consent in writing of
18 the Underwriters"; in the latter case, London "will also pay a like proportion of the costs
19 which the Assured shall thereby incur or be compelled to pay."

20 Zidell's explanation--that the "will also pay" language applies only in
21 circumstances in which London prefers to pay the claim but the policyholder wants to
22 defend--would impose an implausible limitation on the language of the policy. As

1 London points out, it is difficult to conceive of a reason why London would want to pay
2 the claim *without* incurring defense costs but would nevertheless consent to pay them.
3 Given the parties' respective commercial interests, the only plausible interpretation of the
4 policy is the one that the trial court applied: London will pay Zidell's defense costs
5 "when the liability of [Zidell] has been contested with the consent in writing of the
6 Underwriters."⁹

7 Alternatively, Zidell argues that "London should be held to have waived its
8 right to rely on the 'consent provision'" because "an insurer should not be able to rely on
9 such a right while at the same time denying that it owes its policyholder any policy
10 obligation whatsoever." We are not persuaded, however, that London's position on
11 coverage somehow operates as a waiver of its contractual rights concerning defense
12 costs, and we reject the alternative argument without further discussion.

13 For the reasons stated above, we conclude that the trial court did not err in
14 ruling that Zidell failed to satisfy the unambiguous predicate for coverage of defense

⁹ We note that Zidell has not provided any authorities that would support its interpretation of the policy language. Courts, as far as we can tell, have treated similar "will also pay" language in marine insurance policies as creating an entitlement to defense costs that is distinct from the indemnity obligation. *E.g.*, *Gulf Mississippi Marine Corp. v. Continental Ins. Co.*, 566 F2d 956, 956 (5th Cir 1978) (affirming district court ruling that insurer "was not liable under the indemnity policy held by plaintiff for the costs incurred in defending a claim without the consent of defendants"; policy at issue stated, "in cases where the liability of the Vessel has been contested or proceedings have been taken to limit liability, with the consent in writing, of a majority (in amount) of the Underwriters on the hull and machinery, we will also pay a like proportion of the costs which the Assured shall thereby incur or be compelled to pay"); *St. Paul Fire & Marine Ins. Co. v. Royal Ins. Co. of Am.*, 1994 US Dist LEXIS 5737, *11 (SDNY 1994) ("[T]he policy clearly states that Royal will 'also pay' defense costs, which indicates that defense costs will be paid in addition to the \$110,000 paid for indemnification").

1 costs under the ship dismantling policies. Accordingly, we reject Zidell's second
2 assignment of error on cross-appeal.

3 B. *Attorney Fee Issues*

4 All of the parties' remaining assignments of error concern the trial court's
5 rulings regarding attorney fees. Because some of those assignments involve overlapping
6 issues, we have grouped them by subject matter rather than by assignment of error. We
7 review the trial court's rulings regarding Zidell's entitlement to attorney fees for errors of
8 law, and its determinations regarding a reasonable amount of such an award for an abuse
9 of discretion. *E.g., Barber v. Green*, 248 Or App 404, 273 P3d 294 (2012).

10 1. *Recovery of Attorney Fees Related to Indemnity Issues*

11 In its eighth assignment, London argues that Zidell's attorney fee recovery
12 under ORS 742.061 should have been limited to those attorney fees that Zidell incurred
13 in establishing London's duty to defend under the insurance policies. Instead, London
14 argues, the trial court permitted Zidell to recover attorney fees for work that its attorneys
15 performed to "obtain a declaration of coverage for events that may or may not occur"--
16 that is, on the prospective indemnity issue. *See McGraw v. Gwinner*, 282 Or 393, 400,
17 578 P2d 1250 (1978) (an insured must obtain a money judgment against an insurer to
18 recover attorney fees under statutory predecessor of ORS 742.061; obtaining a
19 declaration of future coverage does not, by itself, trigger the right to attorney fees).

20 Zidell's response is twofold. At one point Zidell contends, without much
21 elaboration, that "the trial court did not award any attorney fees for work done
22 specifically with regard to London's duty to indemnify." The trial court record suggests

1 otherwise. At a hearing on entitlement to attorney fees, Zidell took the position that "we
2 are entitled to all costs for this court proceeding to date and continuing," but conceded
3 that it might not be able to recover for work performed on certain tort claims it brought
4 against London. The court ruled that Zidell was entitled to attorney fees "for the defense
5 cost portion of the case" from the tender of the DEQ action in July 1994 until the date of
6 the trial court's summary judgment ruling on the duty to defend (July 23, 1999). The
7 court then took up "the question of what about the attorney fees *on the declaratory*
8 *judgment action up until that same time.*" (Emphasis added.)

9 Citing *McGraw*, London argued that the declaratory judgment claim
10 involved both indemnity and duty-to-defend issues, and that, as to the indemnity issues,
11 Zidell had not obtained a money judgment that would entitle it to attorney fees.¹⁰ After
12 exploring that issue with the parties, the court ruled as follows:

13 "THE COURT: Here's [the] bottom line and here's the starting
14 point: London will pay attorney fees up until my decision about defense
15 costs.

16 "[ZIDELL]: For what?

17 "[LONDON]: About the duty to defend or beyond that?

18 "THE COURT: Attorney fees with the exception of [certain
19 previously described exclusions regarding tort claims] * * *."

20 Later, the court adhered to that ruling:

¹⁰ Zidell explained that, when the parties went to trial, the breach-of-contract claim was also being tried on indemnity for existing damages, as well as for past defense costs, but conceded that Zidell "didn't win on the indemnity action."

1 "THE COURT: I don't care if [Zidell] lost it or not. If they have an
2 issue on the summary judgment dealing with the declaratory judgment
3 action, they get it whether they won it or lost it because they are still the
4 prevailing party, if we want to define it that way, at least on defense costs.
5 And at least on the limited guidance of [*Cornell, Howland, Hayes & M.,*
6 *Inc. v. Continental Cas. Co.*, 465 F2d 22 (9th Cir 1972)], I'm going to say
7 they get their declaratory judgment costs up until that point."

8 As a consequence, Zidell's statement of attorney fees and the court's ultimate award
9 included time spent on the declaratory judgment action prior to July 23, 1999, without
10 regard to whether that time was spent on matters concerning the duty to defend or the
11 duty to indemnify.¹¹ Thus, we reject Zidell's suggestion that the attorney fee award does
12 not include time spent specifically on indemnification issues.

13 Zidell's second response--and the bulk of its argument--is that ORS 742.061
14 "should be interpreted broadly" to include attorney fees regarding the indemnification
15 issues. In fact, Zidell argues that, under ORS 742.061, it is entitled to an award of
16 attorney fees for time spent on those declaratory judgment issues *after* the court's
17 summary judgment ruling--fees that the trial court declined to award and that are the
18 subject of Zidell's fourth assignment of error on cross-appeal. The crux of Zidell's
19 contention, both in response to London's assignment of error and in support of its own
20 assignment on cross-appeal, is that, once an insured obtains recovery that exceeds the
21 insurer's tender, ORS 742.061 entitles the insured to recover all of its attorney fees

¹¹ At the court's request, the parties stipulated to an amount of attorney fees based on the court's earlier rulings. The parties agreed that they had stipulated to "the amount to be awarded" and not to the "validity of the claims or objections." The attorney fee award expressly states that "[t]he fact that the parties stipulated to these amounts shall not prejudice any party's right to appeal this Award and Order."

1 incurred in litigating the policy, including coverage issues.

2 The Supreme Court, it turns out, has already considered and rejected the
3 same argument--in the context of Zidell's petition for attorney fees in that court. In *ZRZ*
4 *Realty V*, the court explained that Zidell was not entitled to appellate attorney fees for
5 work related to the duty to indemnify:

6 "Zidell advances a second argument that it raised in the trial court
7 (and the trial court rejected) and that it cross-assigned as error in the Court
8 of Appeals (and the Court of Appeals did not reach). Zidell reasons that, if
9 it recovers more than London tendered on one matter (the duty to defend),
10 then ORS 742.061 permits it to recover the fees that it incurred both on that
11 matter and also on other, separate matters. That is true, Zidell reasons, even
12 though it has no independent right to recover fees under ORS 742.061 for
13 those matters.

14 "Zidell cites one case in support of its argument, *Hartford v.*
15 *Aetna/Mt. Hood Radio*, 270 Or 226, 527 P2d 406 (1974). In that case, the
16 insurer brought a declaratory judgment action to determine its
17 responsibility for a loss (damage to the insured's property), and the insured
18 counterclaimed for monetary damages for failure to pay the full amount of
19 the loss. *Id.* at 228, 235-37. This court held on the declaratory judgment
20 claim that the insurer was responsible for the loss and on the counterclaim
21 that the insurer owed more than it had tendered. *Id.* at 235, 237. This court
22 also awarded the insured fees. *Id.* at 236. As the court later explained in
23 *McGraw*, because the insured in *Hartford* had recovered more on its
24 counterclaim than the insurer had tendered, the insured could recover the
25 attorney fees it incurred both in responding to the insurer's declaratory
26 judgment action and in pursuing the counterclaim. *See McGraw*, 282 Or at
27 399-400 (explaining *Hartford*).

28 "The decision in *Hartford* does not advance Zidell's argument in this
29 case. In *Hartford*, both the insurer's declaratory judgment claim and the
30 insured's counterclaim involved the same issue--the insured's obligation to
31 pay the insured for damage to its property. Unlike this case, that decision
32 did not involve a situation in which the insured had established a right to
33 recover fees on one matter (the duty to defend) but had not established a
34 right to recover fees on another, separate matter (the duty to indemnify).
35 There may be cases in which the issues are sufficiently related that an
36 entitlement to fees on one issue will warrant awarding fees for work on

1 related issues. This is not one of those cases, however. As we explained in
2 our previous decision, the matter on which Zidell seeks fees (the duty to
3 indemnify) is independent of the matter on which it is entitled to recover
4 fees (the duty to defend). In these circumstances, we agree with the trial
5 court that, at this stage of the litigation, Zidell may recover only those fees
6 that are related to the duty to defend."

7 *ZRZ Realty V*, 351 Or at 266-67.

8 In light of the court's reasoning in *ZRZ Realty V*, we conclude that Zidell
9 cannot recover attorney fees for work on the duty to indemnify, because it has not yet
10 shown an independent entitlement to attorney fees on that matter. *Id.* at 267. Thus, the
11 trial court correctly declined to award Zidell attorney fees for post-summary judgment
12 work on the duty to indemnify, but the trial court erred in not imposing that same
13 limitation on recovery for work performed before its summary judgment ruling. That is,
14 Zidell has not established an independent right to recover attorney fees related to the duty
15 to indemnify, which, at this stage of the litigation, precludes recovery under ORS
16 742.061 for work performed before or after July 23, 1999. We therefore remand with
17 respect to the initial attorney fee award, which was included in the general judgment, for
18 the trial court to reconsider the apportionment and award of attorney fees in light of that
19 error.¹²

20 2. *Attorney Fee Rates*

21 In its ninth assignment of error, London argues that Zidell received a

¹² London also argues that the court erred in awarding Zidell its "fees for issues common to all insurers, even those who did not owe Zidell a duty to defend." On remand, the court should reconsider that aspect of the attorney fee award in light of the fact that Zidell may recover only those attorney fees related to the duty to defend.

1 windfall because the court awarded attorney fees in an amount that exceeds what Zidell is
2 obligated to pay under its fee agreement. Specifically, London asserts that Zidell agreed
3 to pay its attorneys based on a fixed hourly rate plus a percentage of any net recovery
4 arising out of claims against third parties. Yet, when Zidell sought attorney fees, it urged
5 the trial court to award fees in an amount equal to the market rates that its attorneys might
6 have billed rather than the rates they had actually billed Zidell. That higher rate was
7 justified, according to Zidell, because the contingent fees had not been calculated or paid
8 to Zidell's attorneys. In London's view, the court's award at that higher rate gave "Zidell
9 a recovery far greater than the amount Zidell agreed to compensate its attorneys. There is
10 no evidence that Zidell will be required to pay its attorneys the difference." *See*
11 *Associated Oregon Veterans v. DVA*, 308 Or 476, 481, 782 P2d 418 (1989) (holding,
12 under a provision of a contract awarding a "reasonable fee," that the prevailing party was
13 "not entitled to more than it spent on attorney fees").

14 Suffice it to say that, under the circumstances of this case, we are not
15 persuaded that the trial court awarded an amount that exceeds Zidell's obligation to its
16 attorneys or that the court abused its discretion or somehow committed an error of law in
17 determining a reasonable rate for the work performed by Zidell's attorneys. The lodestar
18 method that the trial court used is a commonly applied and permissible approach for
19 determining the reasonableness of a fee award, even when the insured has retained
20 counsel on a contingency-fee basis. *See, e.g., Strawn v. Farmers Ins. Co.*, ___ Or ___,
21 ___ P3d ___ (Feb 22, 2013) (slip op at 8) (observing, in the context of a contingency-fee
22 recovery by an insured, that "two basic methods of calculation are generally available.

1 One is the so-called 'lodestar' method, by which the attorney is awarded a fee based on a
2 reasonable hourly rate, multiplied by a reasonable number of hours devoted to work on
3 the case, with certain adjustments potentially made to that amount for factors such as the
4 risk of loss and the quality of the attorney's work"); *id.* at ___ (slip op at 13 n 7)
5 (concluding that ORS 20.075, "although not mandating either a lodestar or percent-of-
6 fund methodology, does not foreclose either"); *see also Strawn v. Farmers Ins. Co.*, 233
7 Or App 401, 416, 226 P3d 86 (2010), ("[A]n award of 'reasonable' attorney fees does not
8 preclude the use of a multiplier or other fee enhancement * * *. Such an enhancement
9 may be applied at the beginning of the calculation process by increasing counsel's
10 standard or basic hourly rate to a 'reasonable hourly rate' for the work done given the
11 nature of the case * * * or the enhancement may be applied later in the calculation
12 process by increasing a lodestar amount of fees * * *."). We reject London's ninth
13 assignment regarding attorney fee rates without further discussion.

14 3. *London's Credit for Amounts Paid by Settling Defendants*

15 By the time that attorney fee issues were litigated, the London insurers
16 were the last adverse parties still litigating against Zidell. In response to Zidell's
17 statement of attorney fees, London argued that, because various insurers shared the
18 obligation to defend Zidell and then settled with Zidell during the course of litigation,
19 some of the money recovered from those settling insurers should be allocated to attorney
20 fees, thereby reducing the amount of attorney fees that Zidell could recover from London.
21 The trial court agreed with London, and the parties then stipulated to the amount of a
22 credit, reserving the right to appeal the court's earlier ruling. The trial court's order states:

1 "With respect to [London's] objection that [the London defendants]
2 are entitled to a credit to be set off against their statutory liability for
3 [Zidell's] attorney fees due to settlements reached by [Zidell] with other
4 defendants prior to the filing of [Zidell's] Statement, this Court holds that
5 the [London defendants] are entitled to some credit, but has not determined
6 the amount in view of the stipulation [as to the amount to be awarded to
7 Zidell as attorney fees, in light of the court's various rulings]."

8 Zidell now argues on cross-appeal, as it did below, that London is "fully
9 responsible for Zidell's reasonable attorney fees" and that a set off for fees incurred by
10 settling defendants "conflicts with both the language and the legislative purposes of the
11 attorney fees statute, ORS 742.061." London responds that, unless there is some
12 settlement credit, Zidell's approach would yield a windfall as opposed to a "reasonable
13 amount" of attorney fees under ORS 742.061. Both sides are correct, to a point.

14 At the same time that this case was moving through the appellate courts,
15 London was litigating an equitable contribution action against some of the settling
16 insurers. *See Certain Underwriters v. Mass. Bonding and Ins. Co.*, 235 Or App 99, 104-
17 06, 230 P3d 103 (2010), *modified on recons*, 245 Or App 101, 260 P3d 830 (2011)
18 (describing parallel courses of underlying coverage case and contribution case). One of
19 the issues in the contribution action was whether London and the settling insurers owed a
20 common obligation to Zidell under ORS 742.061, thereby making it inequitable for those
21 settling insurers to escape liability for attorney fees. In the course of addressing that
22 issue, we explained that liability for attorney fees under ORS 742.061 is different from
23 the duty to defend: "Unlike the duty to defend, which is a shared obligation that arises
24 independent of completed litigation, liability for attorney fees under ORS 742.061 is a
25 statutory obligation that arises only after the insured prevails at trial." 245 Or App at

1 107.

2 That observation concerning ORS 742.061 informs our analysis here as
3 well. Under the statute, Zidell is entitled to attorney fees from London because its
4 recovery exceeded London's highest tender--a separate obligation from whatever duties
5 might have been owed to Zidell by the settling insurers. For that reason, we agree with
6 Zidell that, strictly speaking, London is not entitled to a particular credit for amounts that
7 Zidell might have received as settlements from other insurers.

8 That said, we agree with London that ORS 742.061 requires that any
9 attorney fee recovery be reasonable. *See Strawn*, ___ Or at ___ (slip op at 7) (stating
10 that, for purposes of ORS 742.061, "the touchstone for the amount of the award is * * *
11 reasonableness"). In determining the reasonableness of a fee, the trial court shall
12 consider "[s]uch other factors as the court may consider appropriate under the
13 circumstances of the case." ORS 20.075(1)(h), (2). In the particular circumstances of
14 this case, the potential for a windfall--that is, double payment of the same attorney fees--
15 is a factor that the court can consider in setting a reasonable attorney fee.

16 As previously noted, the parties stipulated, in light of the court's prior
17 rulings, to an amount of attorney fees. Because we have remanded the attorney fee award
18 for further consideration in light of the erroneous inclusion of fees related to the duty to
19 indemnify (London's eighth assignment of error), the parties will have an opportunity to
20 revisit their stipulated amount, which also included some credit for the settling insurers,
21 and the trial court will have an opportunity to consider the reasonableness of the new
22 attorney fee award in light of any potential windfall to Zidell.

1 4. *Recovery for Time Spent Correcting Billing Statements*

2 In its tenth assignment of error, London contends that the trial court erred in
3 awarding Zidell attorney fees "for time its attorneys spent correcting their improper
4 billing statements." Zidell's attorneys "block billed" their time; they failed to allocate
5 time between work devoted to particular defendant insurers or to particular tasks.
6 Consequently, London argues, Zidell was required to review painstakingly those billing
7 statements and recreate a division of labor before submitting its attorney fee petition.
8 The problem, according to London, is that it bore the brunt of the block-billing mistake
9 by Zidell's attorneys, because Zidell later sought and was awarded, by way of a
10 supplemental judgment, attorney fees for the time spent preparing the initial petition.

11 Zidell, for its part, argues that we should not second guess the trial court's
12 determination of what was reasonable regarding the preparation of the attorney fee
13 petition, which took into account a number of factors. We agree with Zidell. The trial
14 court, in its findings and conclusions regarding the supplemental fee request, explained:

15 "[London's objections] to plaintiff's Initial Statement were
16 aggressively pursued and, in response, aggressively resisted. The
17 contentiousness of the attorney fee issues and their complexity required
18 [Zidell's] use of a number of attorneys and paralegal staff.

19 "* * * * *

20 "In reaching its decision on the Supplemental Statement, the court
21 considered the factors set forth in ORS 20.075, and, in particular,
22 considered the extensive time and labor required in connection with the
23 Initial Statement, the novelty and difficulty of the questions involved in the
24 attorney fee issue under these circumstances, the skill required of the
25 attorneys preparing and presenting the Initial Statement, the amount
26 involved and results obtained, the length of the attorneys' professional
27 relationship with the client considering when the underlying claims were

1 first initiated, the experience, reputation, and ability of the attorneys
2 involved, and the nature of the fee relationship between [Zidell and its]
3 attorneys."

4 In applying those factors and reaching the conclusion that it did, the trial
5 court implicitly rejected London's argument that Zidell's block billings inflated the
6 amount of fees reasonably and necessarily incurred in preparing the petition. There is
7 evidence in the record to support that implicit determination, particularly concerning the
8 complexity of this case, and, specifically, the attorney fee process. As Zidell points out,
9 the trial court, in January 2002, conducted two days of hearings on issues related to
10 entitlement to attorney fees, and made various rulings as to what was, and was not,
11 recoverable. Zidell was required to conform its attorney fee request under ORCP 68 to
12 those rulings, which, the trial court found, caused difficulty "sorting out what issues and
13 related work were appropriate for an award of fees." In short, even if block billing
14 complicated the efforts of Zidell's attorneys, we cannot say that the trial court, in light of
15 all the factors it considered, abused its discretion in awarding Zidell \$268,988.15 in
16 supplemental attorney fees.

17 III. CONCLUSION

18 To summarize: We now reject London's second and third assignments of
19 error as they pertain to the implied fortuity policies. We decline to revisit London's
20 fourth assignment of error regarding the bumbershoot policies because, in the current
21 posture, a decision as to whether those policies cover "expected but unintended" damage
22 would have no effect on the rights of the parties. We also decline to reach Zidell's first
23 assignment of error on cross-appeal, because the questions posed by that assignment

1 would benefit from a better-developed record on remand. We reject on the merits Zidell's
2 second assignment of error on cross-appeal, which concerns defense costs under ship
3 dismantling policies.

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

14 On appeal and on cross-appeal, reversed in part and remanded for further
15 proceedings.