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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SCHNITZER STEEL INDUSTRIES,
INC., an Oregon corporation and MMGL
CORP., a Washington corporation,

Plaintiffs - Appellees,

v.

CONTINENTAL CASUALTY
COMPANY, an Illinois corporation and
TRANSPORTATION INSURANCE
COMPANY, an Illinois corporation,

Defendants - Appellants.

No. 14-35793

D.C. No. 3:10-cv-01174-MO

MEMORANDUM*

SCHNITZER STEEL INDUSTRIES,
INC., an Oregon corporation and MMGL
CORP., a Washington corporation,

Plaintiffs - Appellees,

v.

CONTINENTAL CASUALTY
COMPANY, an Illinois corporation and
TRANSPORTATION INSURANCE
COMPANY, an Illinois corporation,

No. 15-35101

D.C. No. 3:10-cv-01174-MO

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Defendants - Appellants.

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, Chief District Judge, Presiding

Argued and Submitted May 2, 2016
Portland, Oregon

Before: GOODWIN, TALLMAN, and HURWITZ, Circuit Judges.

Continental Casualty Co. and Transportation Insurance Co. (collectively, “Continental”) appeal from the district court’s denial of judgment as a matter of law and award of attorney fees in favor of Schnitzer Steel Industries, Inc. and MMGL Corp. (collectively, “Schnitzer”). In this diversity action, Schnitzer alleges that Continental breached its contractual obligation by failing to pay Schnitzer’s reasonable and necessary defense costs in litigation concerning the Portland Harbor Superfund Site. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

The district court did not err by denying Continental’s renewed motion for judgment as a matter of law because the jury could reasonably have found from the evidence that no reasonable effort to locate competent non-local counsel willing to represent Schnitzer at local rates could have been successful. *See Martin v. Cal. Dep’t of Veterans Affairs*, 560 F.3d 1042, 1046 (9th Cir. 2009) (standard of review; district court should grant a renewed motion for judgment as a matter of law only

“if the evidence permits only one conclusion and that conclusion is contrary to the jury’s verdict”).

The district court did not err by awarding prejudgment interest to Schnitzer under Oregon Revised Statutes § 82.010(1)(a) because the jury decided issues of fact establishing that Continental owed “sums certain at dates certain.” *Strader v. Grange Mut. Ins. Co.*, 39 P.3d 903, 909 (Or. Ct. App. 2002) (citation and internal quotation marks omitted); *see also In re Merrill Lynch Relocation Mgmt., Inc.*, 812 F.2d 1116, 1119 (9th Cir. 1987) (standard of review). Damages therefore were “ascertainable” for purposes of calculating prejudgment interest, as required by *Public Market Co. of Portland v. City of Portland*, 138 P.2d 916, 918 (Or. 1943). *See Strader*, 39 P.3d at 909.

The district court did not err by awarding Schnitzer declaratory relief. *See Wagner v. Prof’l Eng’rs in Cal. Gov’t*, 354 F.3d 1036, 1040 (9th Cir. 2004) (standard of review). First, even if Federal Rule of Civil Procedure 52(a) required the district court to make findings of fact, any error was harmless because the jury’s findings supported the declaratory judgment. *See Fed. Trade Comm’n v. Enforma Nat. Prods. Inc.*, 362 F.3d 1204, 1212 (9th Cir. 2004) (“A failure to comply with Rule 52(a) does not require reversal unless a full understanding of the question is not possible without the aid of separate findings.”). Second, the

judgment did not improperly deny Continental discretion over future costs; rather, it ordered Continental to pay reasonable defense costs consistent with the jury's findings. Finally, to the extent that the judgment had the practical effect of awarding injunctive relief, the district court may award such relief where, as here, a party was "aware of the possibility and had an opportunity to be heard."

Penthouse Int'l, Ltd. v. Barnes, 792 F.2d 943, 950 (9th Cir. 1986).

The district court did not err in awarding attorney fees to Schnitzer under Oregon Revised Statutes § 742.061. *See In re Merrill Lynch Relocation Mgmt., Inc.*, 812 F.2d at 1119 (standard of review). Because § 742.061 requires an award of fees to an insured when "recovery exceeds the amount of any tender made by the defendant in such an action," it constitutes substantive law. Or. Rev. Stat. § 742.061(1); *see Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991) (states' fee-shifting rules constitute substantive law when they "embody a substantive policy, such as a statute which permits a prevailing party in certain classes of litigation to recover fees"). Consequently, the district court was bound under the *Erie* doctrine to apply § 742.061. *See In re Merrill Lynch Relocation Mgmt., Inc.*, 812 F.2d at 1120-21 (absent conflict with federal rules, statutes, or policies, a federal court sitting in diversity is bound to apply state substantive law).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>				
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Answering Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Reply Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
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TOTAL:				\$ <input type="text"/>	TOTAL:				\$ <input type="text"/>

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk