IN THE SUPREME COURT OF THE STATE OF OREGON

LINDA TWO TWO an individual; and PATRICIA FODGE, an individual,
Plaintiffs-Appellants,
Petitioners on Review,

v.

FUJITEC AMERICA, INC., a Delaware Corporation,
Defendant-Respondent,
Respondents on Review

and

CENTRIC ELEVATORS CORPORATION OF OREGON, INC, an Oregon corporation,
Defendant.

Supreme Court No. S061536

Court of Appeals No. A145591

Multnomah County Circuit Court No. 090100985

BRIEF OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION

On Petition for Review of the Decision of the Court of Appeals
On Appeal from a Judgment of the Multnomah County Circuit Court
The Honorable Nena Cook, Judge pro tempore

Opinion filed: May 30, 2013
Author of Opinion: Honorable Darleen Ortega
Honorable Timothy J. Sercombe and Honorable Erika Hadlock

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SUMMARY OF ARGUMENT

The Court of Appeals and trial court should have afforded plaintiff the benefit of all reasonable inferences from the summary judgment record. This includes recognizing the jury's ability to infer causation when a negligently maintained and serviced elevator drops unexpectedly and dramatically enough to cause injury. It also includes broadly construing the language of an affidavit that describes the scope of available expert testimony. Finally, the favorable inferences include that Fujutec supplied component products as part of its contract to modernize the elevator in which the plaintiffs were injured. The Court of Appeals failed to recognize that one who supplies and installs component parts in conjunction with a renovation (or "modernization") is still a "seller" of products subject to strict liability for unreasonably dangerous conditions of the products.

ARGUMENT

OTLA writes to offer the Court a framework for analyzing several issues raised by this appeal that have not been addressed previously by this Court.

I. Causation was established.

For purposes of this appeal from a summary judgment, there was no dispute that plaintiffs established a genuine issue of material fact regarding their allegation that Fujitec negligently serviced and maintained the elevator in which plaintiffs

were injured. *Two Two v. Fujitec Am., Inc.*, 256 Or App 784, 790 (2013). There also should have been no dispute that plaintiffs can present sufficient evidence for the jury to find that this negligence caused their injuries. The Court of Appeals mistakenly viewed the question of causation in this case as one requiring expert testimony and mistakenly construed the affidavit of plaintiffs' counsel as representing that plaintiffs' expert would not address the question of causation. 256 Or App at 791, 793.

A. The factual evidence permits an inference of causation.

To quote the standard this Court has often repeated, summary judgment may be properly granted only "when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. ORCP 47 C. There is no genuine issue as to any material fact if 'based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.'" *Schaff v. Ray's Land & Sea Food Co.*, 334 Or 94, 99 (2002) (Internal citation omitted). Both "the evidence and all reasonable inferences that may be drawn from the evidence" must be viewed in favor of the adverse party. *Id.*

Applying that standard, the record in this case demonstrates a genuine issue of material fact regarding causation. It is well established that "[c]ircumstantial

evidence, expert testimony, or common knowledge may provide a basis from which the causal sequence may be inferred." *Trees v. Ordonez*, 354 Or 197, 220 (2013) ((quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41, 269-70 (5th ed 1984)). In *Trees*, this Court emphasized that the jury should be allowed to decide the question of causation because there was evidence – the fact the plaintiff's esophagus was perforated following a surgery that left protruding screws in the area of the esophagus – "from which a reasonable jury could infer that it is more probable than not that defendant's alleged negligence caused plaintiff's injuries." *Id.* at 220. The evidence here permits the same inference. A jury could find that through 2007 Fujitec was negligently servicing and maintaining an elevator that twice in 2008 dropped unexpectedly and abruptly enough to cause injury. Or App at 787, 790. Nothing more is required to permit a reasonable inference that the malfunction was probably caused by defendant's negligence.

Of course it is possible that the relationship between Fujitec's negligence and the elevator malfunction was merely coincidental. But that is the inference least favorable to plaintiffs. It should be a matter of common knowledge that normally functioning elevators don't cause injury in this way. So the combination of negligent maintenance with repeated malfunctions of the same type – both

during the years of Fujitec's negligent maintenance and twice shortly after – is a basis to infer a causal sequence.

Although plaintiffs view this permissible inference as an application of *res ipsa loquitur*, the label does not change the analysis in this case. Determining whether a jury could find causation established by *res ipsa* is still a matter of deciding whether the jury could permissibly draw that inference from the evidence. *See McKee Electric Co. v. Carson Oil Co.*, 301 Or 339, 353 (1986) ("a party who depends upon the doctrine of *res ipsa loquitur* must establish facts from which the good sense of the jury can draw a conclusion that the alleged wrongdoer was negligent and in that manner caused the injury") (internal citations omitted.) And even when relying on *res ipsa*, plaintiffs are not required to establish that there was no other possible cause, only that the defendant's negligence was the more probable cause. *McKee Electric*, 301 Or at 353 ("[a]ll that is needed is evidence from which reasonable persons can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not"); *Cowlthorp v. Branford*, 279 Or 273, 276 (1977) (Plaintiff not required to discount other possible causes before the jury is permitted to infer that defendant's negligence was more probably the cause.) The factual record, here, permitted the inference that defendant's negligence was the more probable cause.

B. Plaintiffs' counsel's affidavit was independently sufficient to defeat summary judgment.

The Court of Appeals also failed to give the appropriate consideration to the affidavit that plaintiffs submitted pursuant to ORCP 47E. That rule provides:

> "Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit or a declaration of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion. The affidavit or declaration shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney who is available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by affidavit or declaration, would be a sufficient basis for denying the motion for summary judgment."

Although the Court of Appeals has repeatedly interpreted the requirements of the rule, this Court has yet to do so. Therefore, it is appropriate to start at the beginning.

1. A party relying on an expert opinion may defeat summary judgment through an ORCP 47E affidavit.

ORCP 47 E authorizes a party to defeat summary judgment using an affidavit or declaration of its attorney in lieu of disclosing its expert's identity and opinions whenever the party "is required to provide the opinion of an expert to establish a genuine issue of material fact." Although this language could suggest

that use of the rule is limited to cases that may only be proven with expert testimony, such as many professional negligence cases,[1] that construction would not be consistent with the purpose of the rule.

The purpose of allowing counsel affidavits is set out in the first sentence of ORCP 47 E: "Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions." The concern is not limited to cases in which a party must rely on expert testimony. It applies equally to cases in which the party may intend to prove an element through a combination of expert and non-expert evidence. Causation is a classic example of an element that may be proven in a variety of ways, including expert testimony. *See Trees v. Ordonez,* 354 Or at 220 (causation may be inferred from "[c]ircumstantial evidence, expert testimony, or common knowledge.")

However, absent ORCP 47E, a party intending to rely in part on expert testimony to prove an element of the case would face a dilemma: disclose the expert's identity and opinions or withhold that information and risk a ruling that the factual evidence, alone, is insufficient to establish a genuine issue of material fact. ORCP 47E resolves that dilemma. If the summary judgment court is going to view the factual evidence as insufficient to defeat summary judgment then the

[1] *See, e.g., Trees v Ordonez,* 354 Or at 207 ("In most medical malpractice cases, expert testimony is required to establish the standard of care.")

additional expert evidence would be "required" in order "to establish a genuine issue of material fact." Thus, ORCP 47E allows every party to submit an attorney affidavit in lieu of disclosing expert testimony. If that additional proof is unnecessary to defeat summary judgment, the affidavit can be ignored. But if the court views that additional proof as necessary – something difficult to determine in advance – ORCP 47 E provides that the affidavit will "be a sufficient basis for denying the motion for summary judgment."

Here, the Court of Appeals held that the circumstantial evidence and common knowledge were not enough to permit an inference that the elevator drops were caused by Fujitec's negligent maintenance. If that holding is correct, then plaintiff's identified expert testimony was "required" to create a genuine issue of material fact.

2. An affidavit meeting the requirements of ORCP 47E must be construed in the light most favorable to the non-moving party.

An affidavit from counsel for the adverse party "will be deemed sufficient to controvert the allegations of the moving party" if it specifies "that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact." ORCP 47E. As the Court of Appeals has elsewhere emphasized the language of the rule "makes clear that the actual opinion or facts to which the expert eventually will testify need not be revealed at the time of summary judgment proceedings." *Whalen v. Am. Med.*

Response Northwest, Inc., 256 Or App 278, 291 (2013). That interpretation is compelled by the language of the rule.

Yet the Court of Appeals has adopted, and repeatedly emphasized, one major exception: "If the affidavit specifies the issues on which the expert will testify, however, the trial court will presume that those are the only issues on which the expert's testimony will create genuine issues of material fact." 256 Or App at 789 (quoting *Piskorski v. Ron Tonkin Toyota, Inc.*, 179 Or App 713, 718 (2002)). It was on the basis of this exception that the Court of Appeals refused to accept the affidavit of plaintiffs' counsel as sufficient to defeat summary judgment.

However, both the exception and the manner in which the court applied it in this case are contrary to the well-established standard for reviewing a summary judgment record. An ORCP 47E affidavit takes the place in the summary judgment record of evidence from the actual expert. Like all parts of the summary judgment record, the affidavit – and "all reasonable inferences that may be drawn" from it – must be "viewed in a manner most favorable to the adverse party." *Schaff*, 334 Or at 99. By narrowly construing the language chosen by plaintiffs' counsel to describe the expert's role in the case and by presuming that the expert would offer only testimony limited to that narrowly construed role, the Court of Appeals failed to give plaintiffs the benefits of all reasonable inferences and failed to view the affidavit in the manner most favorable to plaintiffs.

The difference between construing an adverse party's ORCP 47E affidavit in the manner employed by the Court of Appeals and construing it in the manner most favorable to the adverse party is clearly illustrated by the court's construction of the affidavit in this case. As described in the decision below, the affidavit submitted by plaintiffs' counsel recited:

> "Since the time of the filing of [p]laintiffs' [c]omplaint [p]laintiffs have retained a qualified elevator expert whom they intend to rely on at trial to support their claims that Defendant Fujitec was negligent in [its] service and maintenance of the elevators in the 911 building. Plaintiffs expert has actually rendered an opinion or provided facts which, if revealed by affidavit or declaration, would be a sufficient basis for denying the motion for summary judgment." 256 Or at 790.

Nowhere does the affidavit recite that the expert will <u>not</u> present testimony relevant to causation. On the contrary, the affidavit recites without qualification that the expert's opinion "if revealed by affidavit or declaration, would be a sufficient basis for denying the motion for summary judgment." This statement reasonably leads to the inference that the expert would offer testimony relevant to both negligence and causation. Yet the Court of Appeals ignored the inference favorable to plaintiffs and, instead, presumed that the representation was untrue, *i.e.* presumed that the expert's testimony would <u>not</u> be a sufficient basis for denying the motion for summary judgment.

The court's rationale for rejecting the more favorable inference is its construction of the language of the affidavit's preceding sentence: that plaintiffs

retained the expert to "support their claims that Defendant Fujitec was negligent in [its] service and maintenance ***." Even if it were reasonable to interpret this statement as overriding the inference that the expert would address causation, it is by no means the only reasonable interpretation. Another reasonable interpretation is that the expert was "retained" to support the plaintiffs' negligence "claims" – which could include all aspects relevant to proof of those claims. This more favorable interpretation is the one the Court of Appeals was required to afford the affidavit on summary judgment.

However, the problems with the Court of Appeals' approach to construing ORCP 47E affidavits go beyond the application in this case. By requiring that representations regarding available expert testimony be made in "good faith," the rule seemingly contemplates that some affidavits will include the kind of limiting language that gives rise to the Court of Appeals' presumption of a narrow scope of expert testimony. For example, an attorney whose expert will in fact address only one issue in the case may submit an affidavit reflecting as much.

Yet the mere act of presenting the affidavit in good faith can create extra obstacles to defeating summary judgment. Under the "presumption" approach taken by the Court of Appeals, any language describing the scope of expert testimony will give rise to a presumption that the language describes the full extent of the available expert testimony. For some affidavits that may be the only

reasonable inference. But since the Court of Appeals does not ask if it is the only reasonable inference, the attorney's choice of language becomes the dispositive factor in whether the affidavit defeats summary judgment.

Within this framework, the only safe way to avoid unintended inferences is for the affidavit to describe in great specificity the topics that the expert's testimony will address. But this is precisely the type of disclosure that ORCP 47E seeks to protect against. ("Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions.") This Court should make clear that, as with all other parts of a summary judgment record, an ORCP 47E affidavit – and all reasonable inferences that may be drawn from it – must be "viewed in a manner most favorable to the adverse party" when determining whether there is a genuine issue as to a material fact.

II. A renovation (or modernization) contractor that supplies and installs component parts in the course of performing the contract is a seller of products.

The Court of Appeals rejected the claim of strict liability because it concluded that the "evidence only supports the allegation that Fujitec provided a service by installing, per GSA's conditions and specifications, component parts manufactured and supplied by other parties." 256 Or App at 796.

Plaintiffs' brief explains why this characterization too narrowly construes the evidence. For example, the evidence supplied by Fujitec in moving for summary judgment includes a letter from the GSA thanking Fujitec for providing "the best possible products at the best possible cost-effective price" as part of the elevator upgrade project at the 911 Federal Building. (Def's Ex 3).

OTLA writes on this issue to emphasize why the Court of Appeals has also characterized the legal standard too narrowly. A business that primarily installs component parts manufactured by others onto existing products still may be both a seller of the component parts and a manufacturer of the final product for purposes of strict liability.

Strict liability for a dangerous product in Oregon is governed by ORS 30.920, which provides as pertinent:

> "(1) One who sells or leases any product in a defective condition unreasonably dangerous to the user or consumer or to the property of the user or consumer is subject to liability for physical harm or damage to property caused by that condition, if:
>
> "(a) The seller or lessor is engaged in the business of selling or leasing such a product; and
>
> "(b) The product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold or leased."

The statute is a codification of Oregon's common law doctrine of strict product liability, which this Court has followed since adopting the Restatement (Second) of

Torts, §402A (1965) in *Heaton v. Ford Motor Co.*, 248 Or 467, 470 (1967). *McCathern v. Toyota Motor Corporation*, 332 Or 59, 72, 74 (2001). In codifying the doctrine, the Oregon legislature tracked the language of Restatement section 402A[2] and specifically provided that ORS 30.920 is to be construed in accordance with comments a through m of section 402A. ORS 30.920(3).

The court below determined that Fujitec could not be subject to strict liability for plaintiffs' injuries, under ORS 30.920, because it was only "installing, per GSA's conditions and specifications, component parts manufactured and supplied by other parties." *Id.* at 796. But none of those factors preclude application of ORS 30.920.

A. One who supplies a product in conjunction with installing the product is still a seller of the product.

Several key requirements appear in ORS 30.920(1): first, liability is created only for harm caused by a defective, unreasonably dangerous condition of a

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[2] Restatement (Second) of Torts, §402A(1) provides:

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

"(a) the seller is engaged in the business of selling such a product, and

"(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." *Quoted in Roach v. Kononen*, 269 Or 457, 460 n3 (1974).

product; second liability is created against "one who sells or leases" the defective product; and third, the "seller or lessor" must be "engaged in the business of selling or leasing such a product." None of those requirements precludes holding an entity like Fujitec strictly liable for harm caused by a defective, unreasonably dangerous condition of a product.

While the products liability statutes do not specifically define what it means to be a "seller ** engaged in the business of selling *** such a product," the adoption of the Restatement comments provides some guidance. Comment f provides several pertinent guidelines, including:

> "The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. * * *.
>
> "The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business." (emphasis added).

The highlighted language suggests that, as long as Fujitec could be considered the "seller" of a dangerously defective product, it is irrelevant that it may have sold the product as a "component part" in the course of what was primarily an installation service. As long as the seller engages in a business activity that includes the sale of products, "[i]t is not necessary that the seller be engaged solely in the business of selling such products."

Although this Court has not addressed the meaning of a product "seller" since ORS 30.920 became the law, this Court previously adopted this approach. In *Hoover v. Montgomery Ward & Co.*, 270 Or 498, 501 (1974), this Court made clear that one whose business involves "sale-service hybrid" transactions will still be subject to strict liability if the product supplied in that transaction is defective.

The plaintiff in *Hoover* brought a claim for strict liability against the defendant, which sold and installed a new tire on the plaintiff's car prior to the accident in which she was injured. This Court used the phrase "sale-service hybrid" in discussing – and agreeing with – a series of out-of state cases in which one who sold and installed (or applied) a defective product was subject to strict liability for harm caused by the defect.

> "In *Newmark v. Gimbel's Incorporated*, 54 NJ 585, 258 A2d 697 (1969), the New Jersey Supreme Court held a beauty shop strictly liable under an implied warranty of fitness when defective permanent wave lotion was applied to a patron's hair. The court reasoned that if the lotion had been sold over the counter there would have been strict liability. There was no logical reason to hold otherwise merely because the defective lotion was applied in a service context, especially when the cost of the service included the price of the lotion." 270 Or at 501.

The plaintiff in *Hoover* could not take advantage of this rule because, as the Court explained, the plaintiff did not contend that the tire itself was defective. Rather, her theory was that the installation was defective. 270 Or at 500. But installation was the service. The Court emphasized, "In Newmark, as in all sale-

service hybrid cases, it is clear that the product, as opposed to the service, was defective." 270 Or at 501.

However, the Court quoted favorably the proposition that:

> "When the contract between plaintiff and defendant is commercial in character, the courts are willing to extend liability without fault to the hybrid sale-service transaction, provided that a defective product is supplied to the plaintiff or used by the defendant in the course of performing the service." 270 Or at 502 (quoting Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 Hastings J 111, 116 (1972)).

Moreover, when businesses make their money through sale-service hybrid transactions, it is irrelevant that supply of the product may be inextricably linked to the service. In *Fulbright v. Klamath Gas Co.*, 271 Or 449, 459-60 (1975), this Court held that the plaintiff could state a product liability claim relating to a defective potato vine burner that the defendant supplied free of charge to promote the sales of the propane gas used by the burner. The defendant was subject to strict liability because "the sale of the propane gas cannot logically be separated from the loan of the vine burner in which the gas was to be used."

Thus, whether following the language of ORS 30.920 or this Court's §402A cases, the relevant question for plaintiffs' strict liability claim was whether Fujitec's modernization business necessarily involved the supply of component parts that were defective and caused injury the plaintiffs, not whether Fujitec supplied those products separately from its installation of the products.

B. One who sells a product specifically requested by the purchaser is still strictly liable for dangerously defective conditions of the product.

The Court of Appeals also refused to view Fujitec as a seller of the component parts because it acted "per GSA's conditions and specifications." But that is not a basis on which an entity that sells such products as part of its business can avoid strict liability. Every sale of a product is, on some level, a contract to purchase the specific product. The seller is not absolved of liability for selling an unreasonably dangerous product simply because a purchaser has carefully researched and considered her product selection.

This Court rejected a similar proposition in *Griffith v. Blatt*, 334 Or 456, 468 (2002). The plaintiff in Griffith alleged that her pharmacist was strictly liable for selling a prescribed lotion without warning that improper use would make it toxic,[3] and the pharmacist sought to avoid liability under the "learned intermediary doctrine" – a doctrine that precludes strict liability for pharmacists who sell a product without adequate warning if someone else in the chain (here the

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[3] Comment h to §402A provides in part that if a seller of a product

> "has reason to anticipate that danger may result from a particular use * * * [the seller] may be required to give adequate warning of the danger (see Comment j), and a product sold without such warning is in a defective condition."

Griffith, 334 Or at 467 (quoting comment h).

prescribing physician) received adequate warnings from the manufacturer of the drug.

In rejecting the defense, this Court emphasized that the search for exceptions to strict products liability "begins and ends" with the language of the products liability statutes and that ORS 30.920 contains no exception for products with a "learned intermediary" in the sales chain. *Id.* at 465, 467. The statute also contains no exception for products with a "knowledgeable purchaser" in the sales chain. If the suggestion is that the purchaser bears some responsibility for its choice of product, then this would be a matter for comparative fault or a claim of third-party liability, not an avoidance of strict liability. *But see Sandford v. Chevrolet Div. of General Motors*, 292 Or 590, 610 (1982) (a plaintiff's fault that may be compared with a defendant's fault in selling a defective product does not include "such unobservant, inattentive, ignorant, or awkward failure of the injured party to discover the defect or to guard against it as is taken into account in finding the particular product dangerously defective").

C. One whose business includes selling products "manufactured and supplied by other parties" is still subject to strict liability for dangerously defective conditions of those products.

Finally, the Court of Appeals refused to view Fujitec as a seller of the component parts because the parts were "manufactured and supplied by other parties." However, strict liability under ORS 30.920 is not limited to the original

seller of a product but extends to any "seller" of the product, as long as the subsequent seller is engaged in selling the product in the course of its business activity. As comment f to §402A explains, strict liability applies not just to the original, wholesale, seller but to subsequent sellers and distributors of the product. Thus, if Fujitec supplied the GSA with defective component parts as part of the "modernization" project, it is irrelevant that those products were manufactured by and supplied to Fujitec by other parties.

D. One who sells refurbished old products is still subject to strict liability for dangerously defective conditions of the refurbished product.

Plaintiff's arguments below suggested that the defective product could be the refurbished elevator, itself. In *Markle v. Mulholland's, Inc.*, this Court allowed the plaintiff to pursue a claim of strict liability under §402A against a defendant that re-capped and sold to plaintiff a used tire that blew out, on the theory that "the tire did not perform in accordance with a purchaser's reasonable expectations." 265 Or 259, 261, 262 (1973).[4] Thus, assuming Fujitec could be considered the "seller" of the modernized elevator, the fact it refurbished an old elevator to create the modernized elevator would pose no obstacle to strict liability.

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[4] As a matter of common law, this Court held that the considerations underlying strict liability do not justify imposing strict liability to sellers of used products generally. *Tillman v. Vance Equip. Co.*, 286 Or 747, 757 (1979). However, ORS 30.920 contains no such exception. It applies to the sale of "any product" by a seller "engaged in the business of selling or leasing such product."

CONCLUSION

This Court should clarify that ORCP 47E affidavits are no exception to the requirement that the nonmoving party must be afforded all reasonable inferences and should also clarify that one who supplies and installs component parts in the in conjunction with a renovation (or "modernization") can still be a "seller" subject to strict liability.

DATED: December 13, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(h) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 4867 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2013, I served the forgoing Brief of Amicus Curiae by electronic mail via the court's electronic filing system on

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