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IN THE SUPREME COURT OF THE STATE OF OREGON

TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, an Oregon municipal corporation, Plaintiff-Appellant, Petitioner on Review, v. JOSEPH Y. AIZAWA, et al., Defendants, and DEBORAH L. NOBLE-IRONS, nka Deborah L. Noble, Defendant-Respondent Respondent on Review.	Multnomah County Circuit Court Case No. 1108-10129 Court of Appeals No. A155714 Supreme Court No. S064112

RESPONDENT'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Multnomah County, Honorable Jerry Hodson, Judge

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STATEMENT OF THE CASE

Petitioner on Review Tri-County Metropolitan Transportation District of Oregon's (Tri-Met's) statement of the case misframes the issue before this court. Tri-Met posits that the issue for this court to decide is whether the statute at issue—ORS 35.300(2)—allows a private property owner in a condemnation case to recover attorney fees incurred after service of an offer of compromise that is eventually accepted. Framing the issue in that way obscures the fact that the only amounts at stake in this case are the attorney fees that were necessary for respondent on review Debra L. Noble ("Noble") to establish the amount of her attorney fees incurred in defending against the condemnation claim brought against her up to the point of Tri-Met's offer of compromise (an amount that Tri-Met could have included in its offer but chose not to). The court of appeals and the parties refer to this category of attorney fees as "fees on fees," and they are the only fees at issue here. With that in mind, Noble submits, in part, her own statement of the case which paints a more accurate picture of the issue before this Court.

A. LEGAL QUESTION PRESENTED

Does ORS 35.300(2)—which addresses the situation where a condemning authority makes an offer of compromise that does not include an amount to cover the property owner's attorney fees and the property owner accepts that offer—prohibit a trial court from awarding the property owner's attorney fees expended

to establish the amount of fees to which the property owner is statutorily entitled (*i.e.*, fees on fees)?

B. PROPOSED RULE OF LAW

ORS 35.300(2) does not prohibit a trial court from awarding fees on fees to a property owner who accepts an offer of compromise pursuant to that statute.

C. NATURE OF THE ACTION

Noble accepts Tri-Met's statement regarding the nature of the action other than to point out that the only fees at issue are Noble's attorney fees incurred in establishing the amount of her attorney fees (*i.e.*, fees on fees).

D. RELIEF SOUGHT

Again, Noble generally accepts Tri-Met's statement of the relief sought except that Tri-Met fails to make clear that the only fees at issue are Noble's fees on fees.

E. NATURE OF THE JUDGMENT

Noble accepts Tri-Met's statement regarding the nature of the judgment.

F. CONCISE SUMMARY OF THE FACTS

Noble accepts the Court of Appeals' statement of the facts, as well as Tri-Met's summary in its merits brief.

G. SUMMARY OF THE ARGUMENT

Oregon courts have long recognized that, as part of seeking attorney fees pursuant to Oregon Rule of Civil Procedure ("ORCP") 68, parties with the right

to recover attorney fees are also entitled to recover their reasonable attorney fees incurred in preparing fee petitions and litigating the amount of fees to which they are entitled. With that precedent as background, the Oregon legislature enacted ORS 35.300(2), which expressly addresses the situation where a condemning authority makes an offer of compromise for the reasonable value of the property being condemned but does not include in the offer an amount for the property owner's attorney fees. Under the statute, where a property owner accepts such an offer, the trial court is required to determine the property owner's reasonable attorney fees for work performed up until the condemning authority made its offer. But ORS 35.300(2) does not expressly prohibit an award of fees on fees, and it leaves to the ORCP 68 process the determination of the reasonable fees to which a party is entitled, a process under which recovery of fees on fees has long been allowed. Thus, on the face of the statute and in light of the legislature's decision to leave the determination of fees to the ORCP 68 process, Tri-Met's argument fails.

To the extent the text of the statute and the use of ORCP 68 do not make the legislature's intent clear, the context of ORS 35.300(2) provides clarity. In at least one other attorney fee provision in the condemnation statutes, ORS 35.300(4), the legislature used expressly prohibitory language. Specifically, when a property owner rejects an offer of compromise and ultimately obtains a less favorable judgment, the property owner "may not recover *** attorney fees

*** that were incurred on and after service of the offer." ORS 35.300(4)(a). Given the legislature's presumptive awareness of the fees on fees rule when it enacted ORS 35.300(2) coupled with the fact that the legislature plainly knew how to prohibit an award of any fees incurred after service of an offer of compromise but did not include such a prohibition in ORS 35.300(2), the legislature's intent is clear: where the form of a condemning authority's offer of compromise puts a property owner such as Noble to the task of litigating the amount of attorney fees to which she is statutorily entitled, the trial court may award the property owner's fees on fees as part of an award of reasonable attorney fees under ORCP 68.

It bears pointing out that this result is consistent with the general purpose behind the condemnation statutes. The statutes are intended to make whole property owners whose property is condemned for a public purpose. It is perfectly within the capability of a condemning authority to work with property owners in advance of making an offer of compromise in order to determine the property owner's reasonable attorney fees, and then to include those fees in the offer of compromise. But when a condemning authority such as Tri-Met chooses not to include the fees in the offer of compromise, it forces the property owner to incur additional fees to seek a determination from the trial court on the amount of fees to which the property owner is entitled under ORS 35.300(2). Surely, the legislature—in enacting statutes intended to make property owners whole—did

not intend the property owners to bear the cost of establishing the reasonable attorney fees to which they are statutorily entitled.

ARGUMENT

This Court's framework for construing statutes is well-established. The court's goal is to ascertain the legislature's intent. *State v. Gaines*, 346 Or 160, 164-73, 206 P3d 1042 (2009); ORS 174.020(1)(a) ("In the construction of a statute, a court shall pursue the intention of the legislature if possible."). The best evidence of intent is the statute's "text and context." *Id.* at 171. Context includes other provisions of the same statute, other related statutes, and prior court decisions interpreting the same and related statutes. *E.g., Jones v. General Motors Corp.*, 325 Or 404, 411-12, 939 P2d 608 (1997). The court may also consider legislative history and give it, in the court's discretion, the appropriate weight. *Gaines*, 346 Or at 164-73. Applying that methodology here, the Court of Appeals correctly ruled that ORS 35.300(2) does not prohibit an award of fees on fees to Noble and other parties in the same circumstance because (1) ORCP 68 has long been interpreted to allow an award of fees on fees, and that is the process under which fees are determined for purposes of ORS 35.300(2); (2) the text of ORS 35.300(2) does not prohibit such an award and thus does nothing to disturb the established interpretation of ORCP 68 authorizing fees on fees; and (3) context confirms the result because the prohibition on an award of fees incurred after service of an offer of compromise in ORS 35.300(4) shows that the

legislature knew how to expressly prohibit an award of fees on fees, and its failure to use similar prohibitory language in other parts of the same statute establishes that the legislature did not intend to prohibit an award in cases such as this one.

A. Attorney Fees Under ORS 35.300(2) are Awarded Pursuant to ORCP 68.

As a starting point, although this Court has not specifically addressed the topic, it has long been the rule in Oregon that, where fees are awarded pursuant to the procedure set forth in ORCP 68, it is appropriate for the trial court to award a party its fees on fees as part of the court's determination of an award of reasonable attorney fees. As the Court of Appeals explained it, where a trial court awards fees to a party under ORCP 68, that party is also "derivatively entitled to recover [its] 'fees on fees.'" *Crandon Capital Partners v. Shelk*, 219 Or App 16, 43, 181 P3d 773 (2008). "[T]here is longstanding precedent in Oregon that a party may recover its attorney fees incurred as part of the [ORCP 68] fee application and litigation process." *Id.* That precedent reaches back nearly 30 years to the Court of Appeals' decision in *Johnson v. Jeppe*, 77 Or App 685, 688, 713 P2d 1090 (1986), where the Court of Appeals held that fees expended in "[t]he enforcement of a judgment and final collection of money due are 'legal services related to the prosecution or defense of an action'" and thus are recoverable under ORCP 68. 77 Or App at 688 (quoting ORCP 68A(1)'s definition of "attorney fees").

There is no doubt that the legislature intended for ORCP 68 to govern the process for determining and awarding fees under ORS 35.300(2). The legislature did not lay out a distinct process for filing and determining fee petitions in condemnation cases; it simply directed the trial court to make the determination. Given that the legislature did not specify a particular procedure, ORCP 68C necessarily applies because it is "th[e] section [that] governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recover such fees."[1] ORCP 68C(1).

Here, because Tri-Met's offer failed to specifically include an amount for Noble's fees, Noble was required to utilize the ORCP 68 procedure to recover her fees. That, in turn, triggered her derivative right to recover fees on fees as incident to her fees incurred to defend against Tri-Met's condemnation action up through the time of the offer of compromise.

Tri-Met does not challenge the proposition that fees on fees generally are recoverable as part of the ORCP 68 fee recovery process. Indeed, Tri-Met concedes that it did not challenge that fundamental proposition either in the trial court or in the Court of Appeals. Merits Brief at 26 ("Tri-Met did not below and does not here challenge the way in which the Court of Appeals historically has treated the rule: ORCP 68 permits the recovery of fees on fees."). Neither does

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[1] ORCP 68 contains three exceptions where its procedure does not apply. *See* ORCP 68C(1)(a)-(c). None are relevant here.

Tri-Met challenge the notion that fee awards under ORS 35.300(2) are governed by ORCP 68. *Id.* Instead, Tri-Met asserts that, under the Court of Appeals' interpretation of ORS 35.300(2), Noble could have sought and recovered not just fees on fees, but also fees for work done on the merits of the case after service of the compromise offer. *Id.* In other words, according to Tri-Met, an interpretation of ORS 35.300(2) that allows a party such as Noble to recover her fees on fees negates the clear language in the statute that purports to limit fees to those incurred before the offer of compromise. That argument is an outgrowth of the same refrain that Tri-Met comes back to time and again in its brief, namely that the text of ORS 35.300(2) prohibits an award of fees on fees because those fees are necessarily incurred after an offer of compromise. And that argument fails, for reasons discussed in greater detail below.

B. The Text of ORS 35.300(2) Does Not Expressly Prohibit an Award of Fees on Fees.

Given that Tri-Met does not assail either the proposition that fees on fees are available as part of the ORCP 68 fee recovery process or the proposition that ORCP 68 governs the procedure for awarding fees under ORS 35.300(2), it is next important to take note of what ORS 35.300(2) does not say. Specifically, the text of ORS 35.300(2) does not expressly prohibit the trial court from awarding fees on fees. Instead, it contains only an affirmative command that the

trial court enter a judgment awarding fees incurred before service of an offer of compromise:

> If an offer of compromise under this section does not specifically include amounts for costs and disbursements, attorney fees and expenses, upon acceptance of the offer the court shall give judgment to the defendant for the amount offered as just compensation for the property and as compensable damages to remaining property of the defendant and, in addition, for costs and disbursements, attorney fees and expenses that are determined by the court to have been incurred before service of the offer on the defendant.

ORS 35.300(2).

Tri-Met claims that the text of the statute clearly prohibits an award of fees on fees because the work for recovering fees on fees necessarily takes place after service of an offer of compromise and the statute says that the court "shall" give judgment for attorney fees incurred before service of the offer. Merits Brief at 7. But at most, the text upon which Tri-Met relies reaches a non-determinative outcome in terms of legislative intent. True enough, a trial court is required to award a property owner such as Noble her attorney fees incurred before the service of the compromise offer, and to enter a judgment accordingly. Indeed, the trial court in this case did those things: It determined Noble's reasonable attorney fees incurred before service of the offer of compromise and entered a judgment for that amount. ORS 35.300(2), however, contains no express prohibition on an award of a property owner's fees on fees in that circumstance,

and thus nothing in the statute's text required the trial court to refuse entry of a supplemental judgment awarding Noble's fees on fees here.

To be sure, the language of ORS 35.300(2) creates a substantive right for property owners to recover their attorney fees incurred before the offer of compromise. But as described earlier in this brief (and as the Court of Appeals pointed out), ORCP 68 has been construed for nearly thirty years to authorize an award of fees on fees as derivative of the substantive right to recover attorney fees. The result is that we have a statute that creates a substantive right to recover fees incurred prior to a compromise offer but that does not expressly prohibit an award of fees on fees, coupled with a rule that is construed to provide for recovery of fees on fees whenever a statute creates a substantive fee recovery right. For Tri-Met to suggest as it does that this state of affairs amounts to a clear textual mandate prohibiting Noble's fees on fees award defies reason. Indeed, the opposite is true. The legislature could easily have put prohibitory language in ORS 35.300(2) to restrict the trial court's ability to award fees on fees (as it did in ORS 35.300(4), discussed in more detail below). But it did not. And it chose not to despite the existence of a line of cases authorizing fees on fees under the ORCP 68 procedure. Far from suggesting the legislature intended to prohibit fees on fees, this state of affairs reflects an intent to allow them.

Tri-Met continues its textual argument by quibbling with the Court of Appeals' discussion of the *expressio unius est exclusion alterius* maxim of

statutory construction. Tri-Met's Merits Brief at 8-9. Tri-Met complains that the Court of Appeals must not have understood Tri-Met's argument because Tri-Met did not rely on that maxim of construction but instead relied upon "a plain reading" of ORS 35.300(2). That argument misses the point. The Court of Appeals indeed was addressing Tri-Met's textual argument by demonstrating that the statute's textual direction to the trial court to enter a judgment for fees incurred before the service of a compromise offer does not likewise equate to a prohibition on entry of a supplemental judgment for fees incurred in the attorney fee recovery process. Its point was a valid one: Tri-Met urges a construction that treats the inclusion of a right to certain fees as an exclusion of a right to other fees, a classic application of the disfavored *expressio unius* maxim.

Turning to other textual maxims of construction in an effort to bolster its position, Tri-Met next suggests that to read ORS 35.300(2) as not prohibiting an award of fees on fees runs afoul of ORS 174.010's directive that courts not omit what has been inserted or insert what has been omitted from the express language of the statute. But for all the reasons stated earlier, the Court of Appeals' interpretation violates neither of those maxims. Simply stated, the statute on its face says nothing more than that the trial court must enter a judgment for fees incurred before the service of a compromise offer. Tri-Met's own argument thus is contrary to ORS 174.010 because it requires the court to insert prohibitory language that the legislature itself chose not to include.

In sum, the text of ORS 35.300(2) is indeed clear, just not in the way Tri-Met says it is. The statute creates a substantive right for a property owner such as Noble to recover her fees incurred up to service of the offer of compromise, and ORCP 68 gives such property owners a right to recover fees on fees as incident to that substantive right. The text of ORS 35.300(2) in no way prohibits such an award, and, thus, entering a supplemental judgment for fees on fees does not violate the statute's express language.

C. Context Confirms the Legislature's Intent That ORS 35.300(2) Not Prohibit an Award of Fees on Fees.

Context also establishes that the legislature did not intend to prohibit a fees on fees award for property owners who receive an offer of compromise that does not include an amount for attorney fees. This is so for at least two reasons.

First, and as noted above, context includes cases addressing the same or related statutes that were in existence at the time the legislature enacted the statute in question. *E.g., Jones,* 325 Or at 411-12. As Tri-Met itself notes, ORS 35.300(2) was enacted in 2009 in the wake of Ballot Measure 39. By that time, nearly three decades had passed since ORCP 68 was adopted as the civil procedure rule governing the recovery of attorney fees, and the Court of Appeals had already recognized on several occasions the derivative entitlement to seek fees on fees which flows from application of that rule. *E.g., Crandon Capital Partners v. Shelk,* 219 Or App 16, 181 P3d 773 (2008); *Emerald People's Utility*

Dist. v. PacifiCorp, 104 Or App 504, 801 P2d 141 (1990). It follows that when the legislature enacted ORS 35.300(2), it would have been well aware of the Court of Appeals' decisions recognizing that parties could recover fees on fees as part of the ORCP 68 process. Yet it did not expressly prohibit such an award in ORS 35.300(2), thus leaving it to the trial court's determination whether to award fees on fees in appropriate circumstances.

At the same time, and in stark contrast, the legislature enacted ORS 35.300(4), which applies when a property owner rejects an offer of compromise and proceeds to trial. In those circumstances, if the property owner does not obtain a more favorable judgment, the trial court—just like under ORS 35.300(2)—affirmatively "shall give judgment to the [property owner] for *** attorney fees *** that were incurred by the [property owner] before service of the offer." ORS 35.300(4)(b). However, the legislature also included subsection (a), which expressly prohibits any award of further fees: "[the property owner] may not recover *** attorney fees *** that were incurred on and after service of the offer." ORS 35.300(4)(a).

Use of particular terms in one section of a statute but not in another is a strong indication that the legislature's omission of those terms was purposeful. *Springfield Utility Board v. Emerald PUD,* 339 Or 631, 641-46, 125 P3d 740 (2005). Indeed, Tri-Met itself acknowledges that "whether something is stated in one portion of the statute, but excluded in another; the fact that the legislature

took the trouble to include a provision in one part of the statute strongly supports the inference that any exclusion elsewhere in the statute is intentional." Merits Brief at 11 n2 (quoting *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476, 498, 326 P3d 1181 (2014)). Here, the legislature chose to expressly prohibit recovery of attorney fees incurred post-offer-of-compromise in ORS 35.300(4), but did not include a similar prohibition in ORS 35.300(2). We must presume that omission in ORS 35.300(2) was purposeful and signifies the legislature's intent that, while the trial court must award the property owner's fees incurred up to service of the offer of compromise, it is not prohibited from awarding fees on fees as part of the ORCP 68 process in order to compensate the property owner for being put through the paces of litigating over the amount of her substantive fee award.

It is also telling that both subsection (2) and (4) of ORS 35.300 use similar language requiring the trial court to enter a judgment for the property owner's fees incurred up to the date of service of the compromise offer. *Compare* ORS 35.300(2) ("[T]he court shall give judgment to the defendant for *** the attorney fees and expenses that are determined by the court to have been incurred before service of the offer on the defendant.") *with* ORS 35.300(4)(b) ("[T]he court shall give judgment to the defendant for *** attorney fees and expenses that were incurred by the defendant before service of the offer."). If, as Tri-Met argues, the foregoing language in ORS 35.300(2) (which again does not expressly prohibit

anything) should be construed to prohibit an award of fees on fees, then why would the legislature—in using similar language in subsection (4)—have also needed to include subsection 4(a), which expressly prohibits an award of any fees incurred after service of the offer of compromise?

The answer is that the legislature knew how to use language to expressly prohibit any award of fees incurred after service of an offer of compromise, but it chose to include such a prohibition only in ORS 35.300(4). Its intention, thus, was to exclude any post-offer fees, including fees on fees, only in the circumstances described in subsection (4), namely where a property owner rejects an offer of compromise, goes to trial, and does not improve on the earlier offer.

And that result, frankly, makes perfect sense. Under subsection (4), if the property owner rejects the offer but fails to obtain a more-favorable judgment, it is the property owner who is deciding to carry on the litigation despite the condemning authority's offer of compromise. In that circumstance, if the property owner is unsuccessful in obtaining a better result at trial, it is understandable that the legislature would place a strict limit on the property owner's fee recovery right by limiting it to only those fees incurred before service of the offer of compromise and expressly prohibiting recovery of *any* subsequent fees. Similar logic undercuts Tri-Met's interpretation of ORS 35.300(2): why would the legislature punish a property owner like Noble for accepting an offer of compromise that by its terms forces her to use the ORCP 68 fee petition

process to recover her fees by making the fees incurred in that process unrecoverable? Tri-Met's interpretation of the statute would produce a strange, irrational, and inequitable result: the ORCP 68 fee recovery process would effectively operate as a setoff that reduces the property owner's recovery of just compensation, and the condemning authority would have little, if any incentive to make an offer of any amount of fees, much less a good-faith offer. Under ORS 35.300(2), by omitting a specified amount for fees from its offer, the condemning authority would force the property owner either to recover no fees or to incur additional fees in the ORCP 68 fee-recovery process that Tri-Met's interpretation would render unrecoverable.[2]

Tri-Met's contrary arguments about context do not hold water. Tri-Met begins with a laborious and convoluted discussion of all the different scenarios under which offers of compromise may be made and fees may be awarded pursuant to the condemnation statutes, and arrives at the conclusion that "nothing about the context takes away from the clear import of the words the legislature used." Merits Brief at 16. In other words, Tri-Met returns immediately to its

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[2] Similarly, applying Tri-Met's interpretation, under ORS 35.300(1), the condemning authority would be able to make an offer that is acceptable for just compensation but that fails to cover all of the property owner's fees, thereby forcing the property owner into a "lose-lose" situation: (1) accept the entire offer, thereby suffering the loss of those fees not covered by the offer and reducing the just compensation, or (2) refuse that portion of the offer for fees, thereby necessarily incurring additional fees in the ORCP 68 fee-recovery process that Tri-Met's interpretation would render unrecoverable.

same refrain that the text of ORS 35.300(2) itself restricts a trial court's ability to award fees on fees, an assertion that is incorrect for all the reasons stated earlier.

Tri-Met then poses the hypothetical, under ORS 35.300(3), of a scenario where a property owner receives an offer of compromise that includes an amount for attorney fees, and the property owner accepts the compromise as to fair value but disputes the attorney fee amount and winds up receiving less than the offered fees. Tri-Met asserts that under Noble's interpretation of the statutory language, such a property owner would be entitled to an award of fees on fees, a result that—in Tri-Met's view—would not make sense. Merits Brief at 17-18. Here, however, Tri-Met is confusing distinct concepts. Under both ORS 35.300(2) and (3), the trial court is required to award attorney fees incurred before service of an offer of compromise but is not expressly prohibited from awarding fees on fees. That does not automatically mean that every property owner accepting the fair value amount of an offer of compromise but rejecting the offer as to the amount of attorney fees (*i.e.,* the circumstances under which ORS 35.300(3) applies) will ultimately receive an award of fees on fees. There are endless possibilities that could arise under ORS 35.300(3). In some cases, the property owner will reject the offered fee amount and will fare better in the ORCP 68 process. But even then, how much better will vary. In other cases, the property owner will reject the offered fee amount and will fare worse in the ORCP 68 process, but again how much worse will vary.

The important point is that the legislature did not put an express prohibition on fees on fees in ORS 35.300(3) (just as it did not put such a prohibition in subsection (2)), but instead leaves that determination to the trial court as part of the ORCP 68 process. In all scenarios, a trial court must consider what fees are reasonable under the circumstances, including whether to award fees on fees, and in what amount. Thus, under Tri-Met's hypothetical, a property owner who did not beat the fee offer very well might file a fee petition in the trial court requesting fees on fees. Doing so is not prohibited by ORS 35.300(3). But the trial court is constrained to only award those fees which were reasonably incurred. Tri-Met's argument that an award of fees on fees does not make sense under its hypothetical is just the type of argument that Tri-Met would be free to make to the trial court in opposing such a fee petition.

Tri-Met next attempts to explain away the presence of the express prohibition on post-offer fees in ORS 35.300(4)(a) by pointing out how that subsection also prohibits prevailing party fees (which are not mentioned in ORS 35.300(2)). Merits Brief at 18-19. According to Tri-Met, this shows that the legislature included subsection (4)(a) in order to make clear that a property owner who rejects an offer of compromise and does not obtain a better result at trial is not entitled to receive a prevailing party fee. While it is true that ORS 35.300(4)(a) plainly prohibits a prevailing party fee, that self-evident proposition does nothing to explain away that fact that the legislature also expressly

precluded all post-offer attorney fees in subsection (4)(a) but included no such express prohibition in subsection (2). For all the reasons discussed above, we must presume that the legislature intentionally omitted the express prohibition on post-offer fees from ORS 35.300(2), thus leaving it to the trial court to award fees on fees, consistent with longstanding precedent, in appropriate circumstances.

Tri-Met next contends that ORCP 54E should be considered as context because the legislature made reference to the ORCP 54E offer of compromise rule in its discussions leading up to enactment of ORS 35.300(2). Tri-Met then refers to ORCP 54E(3) in an effort to bolster its argument that the legislature must have intended for ORS 35.300(2) to be read to include a prohibition on the recovery of all post-offer attorney fees. This argument, however, does not withstand scrutiny.

Tri-Met correctly notes that, under ORCP 54E(3), where the recipient of an offer of compromise rejects the offer and then fails to obtain a more favorable judgment at trial, that party "shall not recover *** attorney fees incurred after the date of the offer." ORCP 54E(3). Clearly, the companion scenario to ORCP 54E(3) in the condemnation statutes is ORS 35.300(4) which, as discussed at length above, contains a similar express prohibition on post-offer fees. But at the risk of stating the obvious, at issue here is subsection (2) of ORS 35.300, which does not contain such prohibitory language.

On the other hand, ORCP 54E(2) bears a greater resemblance to ORS 35.300(2). That section provides that, where an offer of compromise does not include an amount for attorney fees and the offeree accepts the offer, the offeree "shall submit any claim for *** attorney fees to the court as provided in Rule 68." ORCP 54E(2). Remarkably, Tri-Met quotes this same language in its brief but then proceeds to argue its position based on subsection (3) of ORCP 54E. That makes no sense. To the extent ORCP 54E provides any relevant context, the relevant portion of that rule is subsection (2). That subsection—like ORS 35.300(2)—addresses what happens when an offer of compromise does not include an amount for attorney fees. And like ORS 35.300(2), ORCP 54E(2) does not expressly prohibit post-offer fees, but instead leaves it to the trial court to determine pursuant to ORCP 68. In short then, an apples-to-apples comparison reveals that the legislature intentionally chose to leave open the possibility of an award of fees on fees in cases where a property owner accepts an offer of compromise that does not include an amount for attorney fees, (thereby requiring the property owner to utilize the ORCP 68 fee recovery process) as would also

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be the case for an offeree under ORCP 54E(2). Tri-Met's contrary argument fails.[3]

In sum, the context surrounding ORS 35.300(2) show that the legislature knew how to expressly proscribe all post-offer fees by the use of clear prohibitory language in ORS 35.300(4). That it did not use similar prohibitory language in subsection (2) is telling, particularly given the long-standing precedent allowing for recovery of fees on fees as part of the ORCP 68 process. The Court of Appeals thus correctly ruled in favor of Noble, and this Court should affirm.

D. Legislative History Also Supports the Property Owner's Right to Recover ORCP 68 Fees on Fees.

Although the legislative history surrounding ORS 35.300(2)'s enactment does not mention the fees on fees issue, it nonetheless supports Noble's position in that it reflects the legislature's intent for the statute to (1) facilitate fair and efficient settlements that make property owners whole and relieve the financial burden imposed on them in condemnation actions; and (2) provide for the recovery of fees in the same manner as in the ordinary course of civil litigation—

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[3] Tri-Met also cites to several cases from other jurisdictions where courts applying offer of judgment rules refused to award fees on fees. As is evident from Tri-Met's discussion, those cases did not involve an issue of statutory interpretation, much less one that addresses the meaning of a statute with wording similar to ORS 35.300(2). Moreover, those cases turned on the specific language used in the offers of compromise that were at issue in those cases. The result in this case does not turn on the language in Tri-Met's offer of compromise, but rather on an issue of statutory construction. Thus, the cases upon which Tri-Met relies are inapposite.

i.e., a party with a right to recover fees has a corresponding right to recover the additional fees incurred in recovering those fees under ORCP 68.

ORS 35.300 came about as a result of SB 794, a 2009 bill that sought to clarify Ballot Measure 39, which was passed in 2006. As explained in the comments to the legislature of two of SB 794's main proponents (the City of Portland and Oregonians in Action), the statute was designed to prompt early settlement of condemnation actions through sensible fee-recovery provisions. App 4[4] (SB 794 "encourage[s] both parties to settle condemnation cases as quickly as possible, by encouraging the condemning authority to make a fair offer quickly and by allowing the property owner to accept that offer knowing that all costs, fees, and expenses they have incurred to date will be recoverable"); App 5 (SB 794 gives "property owners and the government . . . equal incentive to agree on fair value and settle these cases"). Both SB 794 proponents also highlighted the impact of a condemnation action on property owners and the corresponding need for just compensation. App 3 (condemnation is "a very blunt instrument [that] deprives private citizens of what is typically their most valuable asset" and causes "tremendous financial and emotional burden upon them") (emphasis in original); App 5 (condemnation "requires that the property owner be fairly compensated").

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[4]Citations to "App" in this section of the brief refer to the Appendix to Noble's Answering Brief in the Court of Appeals.

Those comments echoed testimony at the Senate Judiciary Committee's SB 794 public hearing held on April 16, 2009. While advocating for passage of the bill, Harry Auerbach, Chief Deputy City Attorney for the City of Portland, characterized the property owner as only an "innocent bystander" in a condemnation action whose property is needed for a public purpose and called a statutory scheme "not entirely fair" if it forces a property owner to "absorb their own attorney fees."[5] He testified that ORS 35.300 was necessary to protect property owners from incurring costs and fees they could not recover.[6]

At the SB 794 public hearing before the House Judiciary Committee on May 13, 2009, Martha Pellegrino, testifying for the City of Portland, described the intent of the bill as to provide the parties "equal incentive to avoid litigation and pursue fair and expeditious settlement."[7] David Hunnicutt, President of Oregonians in Action, explained that he supported the bill because the property owner is "made whole throughout the entire course of the [condemnation] proceeding."[8] Hunnicutt noted that the only exception is where the property owner rejects an offer, goes to trial and obtains a less-favorable judgment: "In that case, the property owner is on the hook for the attorney fees they've incurred

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[5] Audio Recording, Senate Judiciary Committee, SB 794, Apr 16, 2009, at 0:03:00, http://oregon.granicus.com/MediaPlayer.php?clip_id=5432.
[6] *Id.* at 0:08:10.
[7] Audio Recording, House Judiciary Committee, SB 794, May 19, 2009, at 1:35:30, http://oregon.granicus.com/MediaPlayer.php?clip_id=5044.
[8] *Id.* at 1:41:50.

post-offer."[9] Auerbach testified that SB 794 does not reflect an intent to "do anything that is unusual in civil litigation": "The amount of the fees will be determined in the normal course. We're not trying to change the method for determining attorney fees as they are in any other civil case."[10]

What emerges from the legislative history is recognition of the reality in condemnation actions, namely that the government initiates the proceedings and then brings its considerable leverage and vast resources to bear on private citizens who own property that the government wishes to take for public use. Given the significant financial and emotional burden that those proceedings impose on property owners, the legislative history reflects an intent that offers of compromise under ORS 35.300 be fair and make property owners whole, consistent with the constitutional notion of just compensation in exchange for the taking of private property. Or. Const. Art. I, § 18 ("Private property shall not be taken for public use . . . without just compensation[.]"). A stated part of this legislative aim is that property owners not absorb their own fees in condemnation actions. Hence, the legislative history contemplates that property owners recover their fees in defense of condemnation actions in accordance with the normal course of civil litigation, wherein the right to recover fees includes an accompanying right to recover the additional fees incurred in the ORCP 68 fee-

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[9] *Id.*

[10] *Id.* at 1:39:50, 1:43:25.

recovery process. Noble's interpretation of the statute is consistent with this legislative history.

Tri-Met's own discussion of legislative history, while interesting, ultimately concludes with a return to its same refrain that the text of ORS 35.300(2) is clear and that nothing in the legislative history changes anything. There is no need to further address Tri-Met's position in that regard, which fails for all the reasons set forth above.

CONCLUSION

The Court of Appeals correctly concluded that ORS 35.300(2) does not prohibit an award of fees on fees to a property owner who accepts an offer of compromise that does not include an amount for attorney fees, thus requiring the property owner to petition for attorney fees using the ORCP 68 process. As such, the Court of Appeals correctly affirmed the trial court's decision to award Noble her fees on fees. For all the reasons stated in Noble's Court of Appeals brief, and in this brief, this Court should affirm.

January 4, 2017.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on this date, I caused the foregoing: RESPONDENT'S ANSWERING BRIEF ON THE MERITS to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system.

At the same time and in the same manner I served the foregoing on the following attorneys and individuals:

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