IN THE SUPREME COURT OF THE STATE OF OREGON

BROWNSTONE HOMES CONDOMINIUM ASSOCIATION, an Oregon non-profit corporation, Plaintiff-Appellant, Petitioner on Review, v. BROWNSTONE FOREST HEIGHTS, LLC, an Oregon limited liability company, et al., Defendants, and CAPITOL SPECIALTY INSURANCE CO., Garnishee-Respondent, Respondent on Review.	61273 Supreme Court No. S061273 Court of Appeals No. A145740 Multnomah County Circuit Court No. 0606-06804

BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

Brief in Support of the Petition for Review
of the Decision of the Court of Appeals
February 27, 2013
Opinion before Haselton, C.J.,
Armstrong, P.J., and Duncan, J
In an Appeal from the Judgment of the Circuit Court
for Multnomah County, Honorable Peter Chamberlain, Judge *pro tempore*

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May 2013

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PRAYER FOR REVIEW

The Oregon Trial Lawyers Association ("OTLA") urges the court to grant review in *Brownstone Homes Condo. Assoc. v. Brownstone Forest Hts.*, 255 Or App 390, _ P3d _ (2013) *(Brownstone)*. OTLA intends to file a brief on the merits if review is granted.

SUMMARY OF ARGUMENT IN SUPPORT

The Court of Appeals' decision in *Brownstone*, 255 Or App 390, is erroneous and warrants review. This case involves insurance coverage for a construction defect. Plaintiff settled with A&T Siding, Inc. (A&T), a third-party defendant, through an agreement providing for a stipulated judgment against A&T (the judgment), a covenant not to execute (the covenant) against A&T's assets, and an assignment to plaintiff of A&T's right to seek payment of the judgment from Capitol Specialty Insurance Co. (Capitol), A&T's liability insurer. The entire agreement was entered into before the entry of the stipulated judgment.

Decades ago, it would have been difficult for plaintiff to obtain the above assignment. In *Stubblefield v. St. Paul Fire & Marine*, 267 Or 397, 400, 517 P2d 262 (1973), this court recognized that such an assignment effectively discharges the insured's legal obligation to pay the judgment. It follows that because an insurer only has an obligation to pay "sums which the insured [is] legally obligated

to pay," such an assignment extinguishes the obligation of the insurer to pay the judgment. *Id.*

In 1989, the Oregon Legislature expressed its discontent with that rule as expressed in *Stubblefield* and other cases. It wished to encourage such assignments "to reduce litigation" and to make them technically simple to "eliminate a trap for the unwary." Staff Measure Summary, House Judiciary Committee, SB 519, May 26, 1989, Ex Q (prepared by Committee Counsel Bill Taylor). The legislature enacted ORS 31.825 to "allow a defendant to assign a[n insurance] claim to the plaintiff without extinguishing the cause of action by the act of assignment." *Id.* ORS 31.825 provides:

> "A defendant in a tort action against whom a judgment has been rendered may assign any cause of action that defendant has against the defendant's insurer as a result of the judgment to the plaintiff in whose favor the judgment has been entered. That assignment and any release or covenant given for the assignment shall not extinguish the cause of action against the insurer unless the assignment specifically so provides."

(Emphasis added).

Under that statute, A&T's cause of action against Capitol was not extinguished by the assignment to plaintiff of A&T's right to seek payment of the judgment from Capitol. However, Capitol argued, and the Court of Appeals agreed, that the phrasing of the first sentence of ORS 31.825 required a special sequence to the assignment. In particular, the insured must assign the cause of action *after* the entry of judgment for the protections of the statute to apply.

Because A&T executed the agreement that purported to assign the right to sue Capitol before the entry of the judgment, the court held that plaintiff failed to properly sequence the assignment and the statutory protections were not available. The assignment extinguished the claim against Capitol.

The Court of Appeals did not identify any legislative history indicating that such sequencing serves any purpose. OTLA has not been able to identify any in its research either. Indeed, the special sequencing is contrary to the legislative intent behind ORS 31.825 to "eliminate a trap for the unwary." Staff Measure Summary, SB 519.

The legislature likely did not discuss the importance of such sequencing because it is not required. The common law has long recognized that one cannot assign a legal right, such as a cause of action, before it comes into existence. Accordingly, any purported assignment of a right that will arise in the future is nothing more than a contractual promise to assign that right when it arises.

The legal right to bring a claim against an insurer "as a result of the judgment" accrues when that judgment is rendered. Only then does the insured possess a present right to bring the claim against the insurer, and only then can the insured transfer that right through an assignment. So, notwithstanding the pre-judgment timing of a covenant that purports to assign a claim against an insurer "as

a result of the judgment," the effective timing of the assignment, as a matter of law, will always be *after* the judgment is rendered.

ORS 31.825 does not create a special sequencing rule to "trap * * * the unwary." On the contrary, the statutory text merely reflects the reality that a party can only assign a right it possesses, and a party does not possess a claim against its insurer "as a result of the judgment" until that "judgment has been rendered." It was not possible for A&T to assign its right to sue Capitol *before* entry of the judgment. Accordingly, even though A&T executed the assignment *before* the entry of the judgment, the assignment was not effective until *after* the entry of the judgment. Plaintiff and A&T met the requirements of ORS 31.825, and plaintiff should enjoy the protections of the statute.

PROPOSED RULE OF LAW

The protections of ORS 31.825 still apply when the purported assignment of the cause of action occurs through a pre-judgment covenant.

Argument in support of first proposed rule

Whether plaintiffs can sequence themselves out of the protections of ORS 31.825 is a matter of statutory interpretation.[1] The term "assign" used in the

[1] When determining the meaning of a statute, the main goal is to ascertain the intent of the legislature under the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). A court begins by

statute is a legal term of art recognized in the common law that describes the act of transferring a legal right from one party to another. *See* Black's Law Dictionary at 108 (defining assign as "to transfer, make over, or set over to another"); *See also Klamath Irrigation District v. United States*, 348 Or 15, 23, 227 P3d 1145 (2010) (statutory context includes preexisting common law).

More particularly, a "legal assignment" is a manifestation of intent by the owner of a present right to make a present transfer of the right. *See* J. Calamari & J. Perillo, *The Law of Contracts* § 18–3 (2d ed. 1977). A party cannot make a present assignment of a right that has not yet arisen. Restatement (Second) of Contracts § 321(2) (1981) (so stating); Restatement, Contracts § 166(1) (1932) (same); *Vaughn v. First Transit, Inc.*, 346 Or 128, 135-36, 206 P3d 181 (2009) (when a statute uses a term of art from the common law, the relevant Restatement may provide guidance on the term's meaning). Said differently, "[t]here cannot be an effective assignment of a right not yet in existence[.]" Restatement (Second) of Contracts § 321(2) (1981) § 321 cmt b.

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examining the statutory text in context, along with any legislative history offered by the parties. *Gaines*, 346 Or at 171-72. "[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes *Id.* at 171 (quoting *State ex rel Cox v. Wilson*, 277 Or 747, 750, 562 P2d 172 (1977)). The court considers statutory rules of construction in determining how to read the text. Context includes other provisions of the same statute and other related statutes. *PGE*, 317 Or at 611. If the legislature's intent remains unclear after examining the text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty. *Gaines*, 346 Or at 172.

A "purported assignment of a right expected to arise [but] not [yet] in existence operates only as a promise to assign the right when it arises and [as a grant of] power [to the promisee] to enforce" that promise. *Id.* § 321(2); *Saint John Marine Co. v. United States*, 92 F3d 39, 47 (2d Cir 1996) (so recognizing); *Amber Res. Co. v. United States*, 538 F 3d 1358, 1379 (Fed. Cir. 2008) (same); *Brewer Envtl. Indus., LLC v. Matson Terminals, Inc.*, 2011 WL 1637323 (D Haw Apr 28, 2011) (same); Restatement (Second) of Contracts, § 321, cmt. d (1981) (one who is given a purported assignment of a future right still has "enforceable rights against the assignor [but] only to the extent that contractual remedies are available").

Indeed, the Oregon Court of Appeals previously recognized the rule against the assignment of a future right in *Springfield Int'l Rest., Inc. v. Sharley*, 44 Or App 133, 140, 605 P2d 1188, 1192 (1980). In that case, the court explained that "an assignment in the sense of a present, immediate transfer of rights, *i.e.*, an executed transaction, [is different from a] promise to assign in the future or conditional promise to assign, *i.e.*, an executory transaction." The court emphasized that a particular distinction between the two is that "[a] contract to assign a right in the future is not an assignment[.]" *Id.* (quoting Restatement, Contracts, s 166(1) (1932)."

In this case, A&T only could assign a cause of action to plaintiff at the time it had a legal right to bring that cause of action. Though this court has not directly addressed the issue, an insured's legal right to bring a claim based on a judgment against the insured arises when that "judgment ha[s] been rendered," ORS 31.825. That is when the insured suffers the cognizable harm of exposure to the judgment. *Stevens v. Bispham,* 316 Or 221, 228, 851 P2d 556, 560 (1993) (a cause of action accrues when the plaintiff suffers a legally cognizable harm and knew or should have known that the harm was caused). Every jurisdiction that has addressed the issue (that Amicus was able to identify) has held that the cause of action against an insurer for negligently causing exposure to a judgment accrues at the time the judgment is final. [2]

[2] *See e.g. Taylor v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz 174, 177-78, 913 P 2d 1092, 1095-96 (1996) (cause of action against insurer for excess judgment accrues when judgment is final); *Romano v. American Casualty Co.*, 834 F2d 968, 969-970 (11th Cir.1987) (same); *Torrez v. State Farm Mut. Auto. Ins. Co.*, 705 F2d 1192, 1202 (10th Cir1982) (same); *Larraburu Bros., Inc. v. Royal Indem. Co.*, 604 F2d 1208, 1215 (9th Cir1979) (same); *American Mut. Liab. Ins. Co. v. Cooper*, 61 F2d 446, 448 (5th Cir1932), *cert. denied*, 289 US 736, 53 S Ct 595, 77 L Ed 1483 (1933)(same); *Boyd Bros. Transp. Co., Inc. v. Fireman's Fund Ins. Cos.*, 540 F Supp 579, 582 (MD Ala 1982), *aff'd*, 729 F2d 1407 (11th Cir1984) (same); *Lexington Ins. Co. v. Royal Ins. Co.*, 886 F Supp 837 (ND Fla1995) (same); *Vanderloop v. Progressive Casualty Ins. Co.*, 769 F Supp 1172, 1175 (D Colo 1991)(same); *Wessing v. American Indem. Co.*, 127 F Supp 775, 781 (WD Mo.1955)(same); *Oliver B. Cannon & Son, Inc. v. Fidelity & Casualty Co.*, 484 F Supp 1375, 1389 (D Del 1980)(same); *Hartford Accident & Indem. Co. v. Cosby*, 173 So 2d 585, 589-90 (Ala 1965); *Nationwide Ins. Co. v. Superior Court*, 128 Cal App 3d 711, 180 Cal Rptr 464, 467 (1982) (same); *Woolett v. American Employers Ins. Co.*, 77 Cal App 3d 619, 143 Cal Rptr 799, 801 (1978) (same); *State ex rel.*

When the timing of the assignment is appropriately understood, the first sentence of ORS 31.825 no longer does what the Court of Appeals interpreted it to do.[3] The statute provides:

> "A defendant in a tort action *against whom a judgment has been rendered may assign any cause of action that defendant has* against the defendant's insurer *as a result of the judgment* to the plaintiff in whose favor the judgment has been entered."

(Emphasis added). Contrary to the interpretation of the Court of Appeals, the text does not contemplate that a party actually *could* assign the cause of action that it has "as a result of the judgment" before the "judgment has been rendered." On the contrary, the text merely reflects the reality that as a matter of law such assignment

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American Home Ins. Co. v. Seay, 355 So 2d 822, 824-25 (Fla App 1978), *cert. denied*, 361 So 2d 835 (1978) (same); *Amdahl v. Stonewall Ins. Co.*, 484 NW 2d 811, 813-14 (Minn App 1992) (same); *Linkenhoger v. American Fidelity & Casualty Co.*, 152 Tex 534, 260 SW 2d 884, 887 (1953) (same), *overruled in part on other grounds, Street v. Honorable Second. Ct.App.,* 756 SW 2d 299 (Tex 1988) (same); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 840 P 2d 130, 140 n 20 (Utah App1992), *cert denied*, 853 P 2d 897 (1992)(same); *Bush v. Safeco Ins. Co.,* 23 Wash App 327, 596 P2d 1357, 1358 (1979) (same); *Jenkins v. J.C. Penney Casualty Ins. Co.,* 167 W Va 597, 280 S E 2d 252, 259 (1981) (same), *overruled in part on other grounds, State ex rel. State Farm Fire & Casualty Coverage v. Madden,* 192 W Va 155, 451 SE 2d 721 (1984) (same); *see also* Shernoff, Gage & Levine, Insurance Bad Faith Litigation § 20.07[4][a] (1984); McCarthy, Punitive Damages in Bad Faith Cases § 5.13 (5th ed 1990).

[3] OTLA acknowledges that the parties below did not substantially address the timing of assignments as a matter of law in their briefing on the application of ORS 31.826. However, this court may freely address the issue in its interpretation of the statute. *Stull v. Hoke,* 326 Or 72, 77, 948 P 2d 722, 724 (1997) ("In construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties.").

can occur (be effective) only after the judgment that gives rise to the cause of action is rendered, even if the assignment is executed on a prior date.

A&T did not possess a legal right to sue its insurer until the judgment was rendered. Therefore, A&T's "assignment" of its cause of action in the pre-judgment agreement was of "a right expected to arise [but] not [yet] in existence[.]" Restatement (Second) § 321(2). Consequently, it was not an assignment at all and "operate[d] only as a promise *to assign the right when it ar*[*ose.*]" *Id*. (emphasis added). Pursuant to ORS 31.825, "[t]hat assignment and any release or covenant given for the assignment shall not extinguish the cause of action against the insurer[.]"

This Court Should Grant Review

This is an important case for this Court for several reasons. As an initial matter, the appropriate interpretation of a statute is always a prerogative of this Court.

Also, the Court of Appeals interpreted the statute in a manner that created a malpractice trap. Indeed, if the opinion of the Court of Appeals stands, no one will be surprised to find a legal malpractice claim filed as a consequence. However, such a result is plainly contrary to the intent of the legislature to "eliminate a trap for the unwary" when enacting ORS 31.825. Staff Measure Summary, SB 519.

That statute was supposed to make the process simple and not require special wording or timing in settlement agreements.

Relatedly, the opinion below likely will create reservations in parties entering into these agreements in other cases. Those parties may elect to take their cases to verdict rather than run the risk of what occurred here. That result also is contrary to the legislative intent behind ORS 31.825 "to reduce litigation." Staff Measure Summary, SB 519.

It should also be noted that the opinion below arguably made law with regard to the timing of assignments. And, as described above that law is contrary to the long held common law on the issue. The effect that may have on secured on cases answering questions with regard to assignments may be of consequence.

This is a case that matters, and this Court should grant review.

CONCLUSION

For the reasons stated in this amicus memorandum, and in the original petition for review, OTLA urges the court to grant review and reverse the decision of the Court of Appeals.

DATED this 7th day of May, 2013.

Respectfully submitted,

/S/ Travis Eiva .
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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 2,442 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)(f).

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on this date I served the foregoing BRIEF IN SUPPORT OF REVIEW OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION on:

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