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.	Supreme Court No. S061273 Court of Appeals No. A145740 Multnomah County Circuit Court No. 0606-06804

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERON REVIEW

Brief on the Merits in Support of Petitioner on 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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STATEMENT OF THE CASE

INTRODUCTION

It is the business of insurance companies to charge premiums to consumers in exchange for the promise to indemnify and defend those consumers against liability claims. When the insurance company fails to make good on those promises, the consumer may bring a cause of action to hold the insurance company accountable. This is a case about whether ORS 31.825 should be read to create a fortuitous escape hatch so that an insurance company that fails to make good on its promises can nonetheless avoid such causes of action. The Court of Appeals ruled that the statute should be read to provide such an escape hatch. *Brownstone Homes Condo. Assoc. v. Brownstone Forest Hts.*, 255 Or App 390, 298 P3d 1228 (2013). For the reasons discussed below the Court of Appeals erred.

SUMMARY OF ARGUMENT IN SUPPORT[1]

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

[1] Though it incorporates some additional arguments, this Amicus Brief on the Merits substantially restates the position OTLA set forth in its Brief in Support of the Petition for Review.

plaintiff of A&T's right to seek payment of the judgment from Capitol Specialty Insurance Co. (Capitol), A&T's liability insurer. The parties entered that agreement 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 the liability of the insurer turns on its failure to pay "sums which the insured [is] legally obligated to pay." However, the insured assigns its cause of action against the insurer in exchange for a discharge of the insured's legal obligation to pay. *Id.* It follows that because the assignment relieves the insured of an obligation to pay anything, the assignments effectively extinguishes any liability on the part of the insurer. *Id.*

In 1989, the Oregon Legislature expressed its discontent with the anti-assignment rule from *Stubblefield*. The legislature 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) ("Staff Measure Summary, SB 519"). Accordingly, 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.* That 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. 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."

Under a plain reading of that statute, A&T's assignment of its cause of action against Capitol to plaintiff should not have extinguished that cause of action.

However, Capitol argued that A&T's assignment did in fact extinguish the claim. Capitol claimed that the phrasing of the first sentence of ORS 31.825 required a technical sequencing of 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, Capitol argued that plaintiff failed to properly sequence the assignment and the statutory protections were not available. The Court of Appeals agreed.

No legislative history indicates an intent that practitioners should adhere to such sequencing or that such sequencing was needed to serve some greater legislative policy. Indeed, the technical sequencing is contrary to the legislative intent behind ORS 31.825 to "eliminate a trap for the unwary." Staff Measure Summary, SB 519. Nonetheless, the fortuity of a party's sequencing choice in the assignment was read to create a boon for a promise-breaking insurer.

Also, the legislative history likely did not discuss the need for such sequencing because it is legally impossible. The common law has long recognized that one cannot assign a legal right, such as a cause of action, before it comes into existence. When an individual purports to assign a right that will or may arise in the future, the common law directs that it should be understood as nothing more than a contractual promise to assign the right when it arises.

The legal right to bring a claim against an insurer "as a result of the judgment" (the text used in ORS 31.825) 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 legally 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 technical sequencing "trap [for] the unwary" insured or, conversely, sequencing good fortune to promise-breaking insurance companies. On the contrary, the statutory text merely reflects the legal 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.

Here, it was not possible for A&T to assign its right to sue Capitol *before* entry of the judgment no matter the phrasing or timing of the covenant agreement in which A&T promised to assign that right. So, even though A&T executed the covenant *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 PROPOSED RULE

A. *The decision below incorrectly applies the law of assignments.*

Whether plaintiffs can sequence themselves out of the protections of ORS 31.825 is a matter of statutory interpretation.[2] The term "assign" used in the

[2] 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 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

statute is a legal term of art recognized in the common law. *Tharp v. PSRB*, 338 Or 413,423, 110 P3d 103 (2005) (stating that a term of art is used in the context of the professional discipline from which it arises and has a well-established meaning in that discipline) *McIntire v. Forbes*, 322 Or 426, 431, 909 P2d 846 (1996) (stating that first-level *PGE* analysis "includes reference to well-established legal meanings for terms that the legislature has used"); *See also Klamath Irrigation District v. United States*, 348 Or 15, 23, 227 P3d 1145 (2010) (statutory context includes preexisting common law).

As a term of art, 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). *See also* Black's Law Dictionary at 108 (defining assign as "to transfer, make over, or set over to another"). 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); *see 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

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may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty. *Gaines*, 346 Or at 172.

cmt b. Therefore, 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").

Even the Oregon Court of Appeals previously has 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. A cause of action accrues when the plaintiff suffers the relevant cognizable harm. *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). As a matter of simple logic an insured's legal right to bring a claim against an insurer "as a result of the judgment," as ORS 31.825 so describes, can only arise when the insured is harmed by the judgment, *i.e.*, after the judgment is rendered. Indeed, the contrary view, that a right to bring a claim "as a result of the judgment" could occur before the judgment is even rendered, strains reason. Moreover, every jurisdiction (that *Amicus* was able to identify) that has addressed the accrual of similar claims by insureds against insurers has held that the cause of action accrues when the judgment against the insured is final.[3]

[3] *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

When it is properly understood that an assignment cannot legally occur until after the judgment is rendered, the first sentence of ORS 31.825 no longer does what the Court of Appeals interpreted it to do.[4] 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 an insured actually *could* assign the cause of action that

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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. 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).

[4] OTLA submits that plaintiff preserved this argument about the timing of assignments as a matter of law in its briefing and at oral argument. But even if it did not, 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.").

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 an assignment can occur only after the right to bring such an action arises – after the judgment is rendered – even if the covenant promising to assign the cause is executed on a prior date.

A&T did not possess a legal right to sue its insurer until the judgment was rendered. 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[.]"

B. *The interpretation of* Amicus *conforms to the legislative intent behind ORS 31.825.*

The Court of Appeals interpreted the statute in a manner that created an unnecessary trap for settling parties and an unnecessary malpractice trap for their attorneys. As such, the interpretation is contrary to the intent of the legislature to "eliminate a trap for the unwary" when enacting ORS 31.825. Staff Measure

Summary, SB 519. The statute was supposed to make the process simple, not create technical barriers to successful settlement agreements.

Second, the statute was intended "to reduce litigation." Staff Measure Summary, SB 519. Yet, the rule from below will motivate parties to take their cases against insureds through verdict rather than risk extinguishing claims against the insurance company through settlement with the insureds.

Third, the basic intent of ORS 31.825 was 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.* The interpretation of ORS 31.825 below did the opposite and extinguished the cause of action through an "act of assignment."

Finally, ORS 31.825 was meant to do away with *Stubblefield*, not preserve a *Stubblefield* escape hatch. OTLA brought SB 519, which eventually passed as ORS 31.825, to the attention of the legislature, in direct response to *Stubblefield* because that rule prevented settlements, created needless traps to litigants, and increased litigation. *See, e.g.*, Senate Judiciary Committee, SB 519, March 27, 1989, Ex D ("[U]nder Oregon case law * * * [a] release of liability also releases the insurance company, making* * * assignments almost impossible to effectuate"); Senate Judiciary Committee, SB 519, Tape 81, Side B, March 27, 1989 (expressing same problem); Senate Judiciary Committee, Tape 81, Side B and Tape 82, Side A, March 27, 1989 (statement by Steve Piucci that the public

policy reflected in SB 519 was to "promote the reasonable and expeditious settlement of insurance claims"); Staff Measure Summary, SB 519 (noting that the bill "should reduce litigation and should eliminate a trap for the unwary."). ORS 31.825 was intended to do away with *Stubblefield*. The interpretation below of ORS 31.825 reinvigorates *Stubblefield*, and therein should be reversed.

C. *The interpretation of ORS 31.825 below fails to the adequately recognize the contractual context.*

The Court of Appeals read the settlement contract in a way to extinguish the assignment. That reading fails to recognize that the primary focus of contract interpretation is to determine the intent of the parties. *Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997). Here, the parties plainly did not intend to extinguish the claim. The preservation of the claim was a primary motivator to the negotiation and the ultimate decision to enter the settlement covenant. Under *Yogman*, this Court should interpret the contract to preserve the claim. Restatement (Second) § 321(2) provides the path to do so in that it allows this court to interpret the assignment terms of the contract "only as a promise to assign the right when it arises," which is after the judgment was rendered. *Id*. Under that interpretation, the assignment timing should be read to meet the requirements of ORS 31.825, even if it is legally possible to assign a right before it arises.

D. Stubblefield *No Longer Serves a Legitimate Purpose*

To the extent that the Court decides that the terms of ORS 31.825 leaves a foothold for *Stubblefield* to continue as determined below, that case nonetheless should be overruled. The rule in *Stubblefield* is a rule of the common law. ORS 31.825 indicates that the policies of our state does not favor extinguishing claims based on in-artful assignments, creating technical traps for the unwary, or creating barriers to settlement. Staff Measure Summary, SB 519. In short, through the passage of ORS 31.825, the Oregon people through their representatives decided to "allow [an insured] to assign a[n insurance] claim to the plaintiff without extinguishing the cause of action by the act of assignment." *Id.*

When *Stubblefield* was decided, this Court did not have the benefit of those insights into those policy preferences of the Oregon Legislature. Now that it does, this Court should recognize that *Stubblefield* is contrary to Oregon's policy and overrule it no matter if the construction of ORS 31.825 inadvertently left some room for its continued existence.

Indeed, even without the policy guidance of ORS 31.825, *Stubblefield* should be overruled. As pointed out in plaintiff's Petition for Review, the *Stubblefield* rule is contrary to the common law rule in many other jurisdictions. PFR at 13. Also, it ignores principles of contract interpretation and the intent of the contracting parties, by interpreting the settlement contract to extinguish, rather

than preserve, these claims. Finally, it increases litigation by creating an unnecessary trap to dissuade settlement. *Stubblefield* should be overruled.

CONCLUSION

For the reasons stated in this amicus brief, and in the reasons discussed in the briefing of the plaintiff, OTLA urges the court to reverse the decision of the Court of Appeals.

DATED this 16th day of September, 2013.

Respectfully submitted,

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WITH BRIEF LENGTH AND
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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 3,551 words.

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