IN THE SUPREME COURT OF THE STATE OF OREGON

BROWNSTONE HOMES CONDOMINIUM ASSOCATION, 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.

Multnomah County Circuit Court
No. 0606-06804

Court of Appeals No. A145740

Supreme Court No. S061273

PLAINTIFF'S BRIEF ON THE MERITS

Review of a Decision of the Court of Appeals
Affirming a Post-Judgment Order
Of the Multnomah County Circuit Court
Peter R. Chamberlain, Judge pro tempore

Date of Decision: February 27, 2013
Author: Haselton, C.J.
Concurring: Armstrong, P.J., and Duncan, J.

[counsel information on inside cover] September 2013

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I. INTRODUCTION

In this construction defect case, plaintiff (Brownstone) settled with A&T Siding, Inc. (A&T) through a settlement agreement (the agreement) providing for a stipulated judgment against A&T (the judgment), a covenant not to execute against A&T's assets (the covenant), and an assignment to Brownstone of A&T's rights to seek payment of the judgment from Capitol Specialty Insurance Co. (Capitol), one of A&T's liability insurers (the assignment). The Court of Appeals, as relevant now, held that Capitol did not owe anything on A&T's behalf because:

1. Capitol's policy covered "sums that [A&T] becomes legally obligated to pay as damages because of * * * property damage to which this insurance applies." In light of the covenant's unconditional language and *Stubblefield v. St. Paul Fire and Marine Insurance Co.*, 267 Or 397, 517 P2d 262 (1973) – which the court held was made applicable to ORS 18.352 by *State Farm Fire & Cas. v. Reuter*, 299 Or 155, 700 P2d 236 (1985) – Capitol was not obligated to pay any part of the judgment on A&T's behalf;

2. ORS 31.825, which preserves causes of action against insurers when they are assigned to judgment creditors in tort cases, did not apply because the assignment was agreed to and effective before the judgment was entered.

Brownstone Homes Condo. Assoc. v. Brownstone Forest Hts., 255 Or App 390, 298 P3d 1228 (2013) (*Brownstone*).

The lower courts misconstrued ORS 18.352 and ORS 31.825. Alternatively, if those courts correctly construed each statute, this court should overrule *Stubblefield*. For either reason, the judgment for Capitol should be reversed.

II. QUESTIONS PRESENTED

1. Does *Stubblefield* – through *Reuter* – apply to a garnishment action under ORS 18.352?

2. Does ORS 31.825 require that a judgment debtor's assignment of a claim against its liability insurer that caused the judgment to be entered be agreed to or effective only after entry of the judgment?

3. If the Court of Appeals correctly construed ORS 18.352 and ORS 31.825, should this court overrule *Stubblefield* and hold that, notwithstanding an unconditional covenant not to execute against a judgment debtor's assets, when a liability insurer breaches its duty to defend and the insured, acting in its own defense, reasonably agrees to a judgment as part of a settlement, the insurer is liable for the amount of the judgment (up to policy limits) if the insured's conduct and resulting damages that led to the judgment were otherwise covered under the insured's liability insurance policy?

III. PROPOSED RULES

1. *Stubblefield* does not apply to a garnishment action under ORS 18.352. That statute gives a judgment creditor the same rights against a judgment debtor's liability insurer that the judgment debtor would have had if it had paid the judgment. Accordingly, notwithstanding a covenant that relieves the judgment debtor from personally paying the judgment, if a judgment debtor's liability policy covers the conduct and resulting damages resolved in the judgment, and the judgment debtor has

not breached the policy in ways that forfeit coverage, the policy is subject to garnishment under ORS 18.352.

2. ORS 31.825 does not require that a judgment be entered before an assignment of a claim against the judgment debtor's liability insurer that caused the judgment to be entered is agreed to or otherwise becomes effective. The statute only requires that a judgment and the assignment of rights resulting from the judgment both exist.

3. Notwithstanding an unconditional covenant not to execute against an insured judgment debtor's assets, when a liability insurer breaches its duty to defend and the insured, acting in its own defense, reasonably agrees to a judgment as part of a settlement, the insurer is liable for the amount of the judgment (up to policy limits) if the insured's conduct and resulting damages that led to the judgment were covered under the insured's liability insurance policy.

IV. SUMMARY OF PROCEEDINGS

Following execution of the agreement and entry of the judgment, Brownstone served a writ of garnishment on Capitol seeking, among other things: (1) "[a]ll property of [A&T]"; and (2) "[a]ll debts that you owe [A&T.]". ER 35 (bracketed material added). After Capitol responded that it owed nothing, Brownstone obtained an order for a hearing under ORS 18.782. CR 144.

Brownstone then filed allegations under ORS 18.780(1) that Capitol had breached its duties to defend and to indemnify A&T and that Capitol

was liable for $1.1 million, the unsatisfied balance of the judgment. CR 147. In response, Capitol alleged, *inter alia*, that "[Brownstone] failed to allege any damages recoverable under Oregon law." CR 148 (bracketed material added).

Capitol moved for summary judgment based on *Stubblefield*. CR 155.[1] The trial court granted Capitol's motion. CR 170; ER 38.

V. SUMMARY OF MATERIAL FACTS

Brownstone filed a complaint for construction defects against the developer and general contractor responsible for construction of the Brownstone Condominiums (the condominiums). CR 1. Brownstone amended its complaint to add tort claims against A&T. CR 65; ER 1.

Eventually, Brownstone and A&T agreed to settle. In relevant part, their agreement provided:

> "3.1 In consideration of the Payments set forth below, each of the Settling Parties[2] hereby agrees to release each and every other Settling Party and the paying insurers from all past, present and future claims (including personal injury claims) demands and claims for relief including all expenses, costs and attorney fees and for damages of every kind whatsoever nature or basis, known as well as unknown, anticipate or unanticipated (collectively 'Claims') arising out of or related to, or in any way caused by the facts and circumstances alleged in the Lawsuit, or arising from or relating to the design and/or construction

[1] Capitol filed a second motion, arguing that it did not breach its duty to defend A&T and that the policy did not cover the judgment for reasons apart from *Stubblefield*. CR 156. The trial court declined to address that motion. CR 170; ER 38.

[2] The "Settling Parties" were Brownstone and A&T.

of the [condominiums]." Other than the claims reserved in paragraph 3.2 below, the Settling Parties intend this Agreement to be a full, final and complete settlement, adjustment and compromise of any and all Claims based upon the allegations contained in the Lawsuit, or which could have been brought under the facts alleged in the Lawsuit, including all crossclaims and counterclaims, and claims for indemnity and contribution, and related insurance claims involving [Zurich]. In addition, the Settling Parties intend this agreement to be a final settlement, adjustment and compromise of any and all Claims arising from or relating to the design and/or construction of the [condominiums].

"3.2 This Agreement, and any releases herein, applies only to the Settling Parties and [Zurich] and is not intended as a release of any claims by or between [Brownstone and Capitol] as A&T's insurance carrier.

"* * * * *

"7.1 A&T hereby expressly assigns to [Brownstone] any claims it has against [Capitol] arising in any way out of the design and/or construction of the [condominiums], including without limitation any and all claims for breach of contract, subrogation, indemnity, contribution and/or defense.

"7.2 In the case of [Capitol], the assigned claims shall include any and all claims arising out of or related to its policies and claims practices relating to the defense, investigation, and failure to settle the Lawsuit or contribute to settlement of the Lawsuit, and shall include, without limitation, claims for breach of contract, torts, bad faith, negligence, breach of fiduciary duties and breach of the Oregon Consumer Protection Act.

"* * * * *

"8.1 A&T agrees to stipulate to a judgment[3] against it and in favor of [Brownstone] in the amount of $2 million.

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[3] The judgment was entered on November 13, 2008, after the settlement agreement was executed by Brownstone and A&T. CR 134; ER 26.

> $900,000 of the stipulated judgment shall be satisfied by the settlement payments referenced in this Agreement[4] and shall be further satisfied by any settlement amounts that [Brownstone] receives from any assigned claims.
>
> "8.2 [Brownstone] agrees that in no event will it execute upon or permit the execution of the stipulated judgment against A&T or its assets or [Zurich. Brownstone] shall be entitled to seek recovery of the unexecuted portion of the judgment against [Capitol].

CR 157, Ex 1; ER 30 (bracketed material added).

VI. SUMMARY OF ARGUMENTS

A. First Proposed Rule

Brownstone relied on ORS 18.352, which allows a judgment creditor to proceed directly against a judgment debtor's liability insurance policy. ORS 18.352's text, read in light of the statute's context and consideration of subsequently enacted statutes involving similar subjects, shows that the legislature intends that ORS 18.352 gives Brownstone the same rights A&T would have had against Capitol had A&T paid the judgment.

The lower courts never determined that the judgment was based on conduct and damages not covered by Capitol's policy or that A&T breached that policy in some way that forfeited coverage. Rather, the lower courts concluded that, based on *Stubblefield* and *Reuter*, the covenant precluded Brownstone's right of recovery under ORS 18.352. That conclusion was incorrect. *Stubblefield* does not apply to a garnishment action under ORS 18.352.

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[4] That amount was paid by Zurich. CR 136.

B. Second Proposed Rule

ORS 31.825 applies if: (1) a defendant in a tort action; (2) against whom a judgment has been rendered; (3) gives an assignment of any cause of action against the defendant's insurer as a result of the judgment to the plaintiff in whose favor the judgment has been entered. When those requirements are met, the statute says, the "assignment and any covenant or release shall not extinguish the cause of action against the insurer unless the assignment specifically so provides."

The lower courts concluded that ORS 31.825 was inapplicable because the judgment was entered after the assignment was agreed to through execution of the agreement. The trial court additionally concluded that ORS 31.825 was inapplicable because A&T's claims against Capitol were not "as a result of a judgment," which the trial court construed to refer only to an "excess judgment." Both conclusions were incorrect. For ORS 31.825 to apply, a judgment does not need to precede an assignment and assigned "causes of action" are not just those in "excess cases."

C. Third Proposed Rule

Stubblefield was wrong when it was decided because it failed to consider – or considered incorrectly – each of the following: (1) the purpose of insurance is not just to protect the insured, but also to protect the public; (2) an insured remains "legally obligated to pay" an unsatisfied judgment even though the judgment creditor has promised not to execute on it; (3) the phrase "legally obligated to pay as damages" – when not defined in

a liability insurance policy – is ambiguous; (4) an insurer that has abandoned its insured and left it to fend for itself in a suit should not be given a windfall from the insured's inadvertent release of the insurer when the insured attempts to reasonably settle the suit; (5) a court's task in construing a settlement agreement is to give effect to the intent of the parties; and (6) courts should encourage and implement reasonable settlements.

Moreover, in *Stubblefield*, the court did not apply properly its own rules for interpreting contracts and insurance policies and did not recognize the court's longstanding policy favoring settlements. Nor did the court recognize that the result in *Stubblefield* was inconsistent with *Groce v. Fidelity General Ins. Co.*, 252 Or 296, 448 P2d 554 (1968). And, finally, statutory changes since *Stubblefield* was decided, and the evolution of the common law as reflected by cases decided elsewhere, support that *Stubblefield* should no longer be followed.

VII. ARGUMENT

A. The Lower Courts Misconstrued ORS 18.352

1. ORS 18.352[5]

ORS 18.352 provides:

> "Whenever a judgment debtor has a policy of insurance covering liability, or indemnity for any injury or damage to

[5] ORS 18.352 was enacted in 1915. Or Laws 1915, ch 175. Other than minor word changes and renumbering over the years, the statute has remained substantively the same for nearly 100 years.

> person or property, which injury or damage constituted the cause of action in which the judgment was rendered, the amount covered by the policy of insurance shall be subject to attachment upon the execution issued upon the judgment."

2. Applicable principles of statutory interpretation

In construing ORS 18.352, the court applies the methodology adopted in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). The court's goal is to determine the legislature's intent. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). That task begins by "examin[ing] the text and context * * * and then proceed[s] to any relevant legislative history that the parties have offered, giving that history such weight, if any, as it appears to merit." *State v. Bailey*, 346 Or 551, 556, 213 P3d 1240 (2009).[6]

The most persuasive evidence of the legislature's intent is the words the legislature used. *Gaines*, 346 Or at 171. Additionally, "text should not be read in isolation but must be considered in context," *Stevens v. Czerniak*, 336 Or 392, 401, 84 P3d 140 (2004) (citations omitted), which includes other provisions of a statute and statutes on a similar subject, *PGE*, 317 Or at 611, prior construction of the same or related statutes, *Keller v. Armstrong World Industries, Inc.*, 342 Or 23, 35, 147 P3d 1154 (2006); *Stephens v. Bohlman*, 314 Or 344, 350, 838 P2d 600 (1992), and the historical context of the relevant enactments. *Goodyear Tire & Rubber*

[6] Here, other than for ORS 31.825, whose legislative history is discussed later, Brownstone has not located any available or otherwise helpful legislative history for ORS 18.352, or for ORS 701.073 and ORS 742.031 also discussed later.

Co. v. Tualatin Tire & Auto, 322 Or 406, 415, 908 P2d 300 (1995). Finally, when the court considers several related statutes, it adopts a construction "as will give effect to all." ORS 174.010. *See also Davis v. Wasco IED*, 286 Or 261, 272, 593 P2d 1152 (1979) (court "construe[s] together statutes on the same subject as consistent with and in harmony with each other.")

3. *Stubblefield*

In *Stubblefield*, the plaintiff sued his wife's doctor for alienation of affection and criminal conversation. The doctor was insured, but his insurer refused to defend him. The plaintiff and the doctor eventually settled. The doctor agreed that the plaintiff would obtain a judgment against him in the amount of $50,000. The doctor then agreed to pay $5,000 to the plaintiff and assigned to the plaintiff his claim against the insurer for all amounts in excess of $5,000. In exchange, the plaintiff entered into a covenant not to execute on the judgment for any amount over $5,000. The plaintiff, relying on the assignment, then sued the doctor's insurer.

The trial court concluded that the insurer had no obligation to pay. This court affirmed, explaining its conclusion in the following – very abbreviated – way:

> "The insurance policy provided that 'the Company will indemnify the Insured for all sums which the Insured shall be *legally obligated to pay* as damages and expenses * * * on account of * * * Personal Injuries * * *.' (Emphasis added[.]) * * * [T]he result of the separate 'Covenant Not to Execute' was that the amount which the insured in this case was 'legally obligated' to pay to plaintiff as damages for such personal injuries was the sum of $5,000. *The insured agreed, however, to pay that amount to plaintiff himself and that amount was expressly excluded from*

> *the assignment and was reserved to the insured. It follows that by the terms of the assignment in this case plaintiff acquired no rights which are enforceable by it against defendant*."

267 Or at 400-01(first emphasis in original; bracketed material and second emphasis added).

4. The court's prior relevant cases[7]

This court's decisions construing ORS 18.352 are grounded on two principles. First, the statute gives a judgment creditor the same rights against an insurer that an insured judgment debtor would have if he had paid the judgment. Second, garnishing a judgment debtor's liability policy to pay a judgment is permitted if the insured's conduct and resulting damages resolved in the judgment were covered by the policy.

In *Reuter*, 299 Or 155, this court confirmed those principles. There, the court concluded that, if the plaintiff (Bullen) obtained a judgment against the insured (Reuter) under the allegations of her complaint, two avenues would be open to Bullen to try and recover the amount of the judgment: she could garnish Reuter's insurer (State Farm) under ORS 23.230 (now ORS 18.352), or she could sue State Farm under

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[7] Strictly speaking, subsequent legislation – which, here, involves ORS 742.031, ORS 701.073, and ORS 31.825, all enacted after ORS 18.352 was enacted – are not part of ORS 18.352's "context." *Stull v. Hoke*, 326 Or 72, 79–80, 948 P2d 722 (1997). However, the later enacted statutes are relevant to the question of what ORS 18.352 means in light of the court's obligation to give meaning and effect to all statutes addressing similar subjects. *See Davis v. Wasco IED*, 286 Or 261, 272, 593 P2d 1152 (1979) (reflecting principle). Accordingly, Brownstone includes discussion of those statutes, and their construction by this court, in analyzing the meaning of ORS 18.352.

ORS 736.320 (now ORS 742.031).[8] In either way Bullen chose to proceed, she had the same rights as Reuter had to coverage for the judgment:

> "Whether Bullen would proceed against State Farm under ORS 736.320 or under ORS 23.230, either as garnishor or subrogee, Bullen's rights against State Farm are no greater than those of Reuter. As garnishor she stands in the shoes of the judgment debtor. As subrogee she stands in the shoes of the subrogor."

299 Or at 166. *See also id.* at 164-65 ("A garnishment [under ORS 23.230] gives the judgment creditor plaintiff no greater rights against the garnishee than the judgment debtor defendant has [and] the intent and purpose of [ORS 736.320] is to subrogate the rights of the injured party to the rights of the assured *upon the contingencies named* and *to*

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[8] ORS 742.031, enacted in 1927, Or Laws 1927, ch 216, §1, provides, in relevant part:

> "A policy of insurance against loss or damage resulting from accident to or injury suffered by [a person] and for which the person insured is liable, * * * shall contain within such policy a provision substantially as follows: 'Bankruptcy or insolvency of the insured shall not relieve the insurer of any of its obligations hereunder. If any person or his legal representative shall obtain final judgment against the insured because of any such injuries, and execution thereon is returned unsatisfied by reason of bankruptcy, insolvency or any other cause, or if such judgment is not satisfied within 30 days after it is rendered, then such person or his legal representatives may proceed against the insurer to recover the amount of such judgment, either at law or in equity, but not exceeding the limit of this policy applicable thereto."

(Bracketed material and ellipses added.)

give the injured party all the rights which the insured would have if he had paid the judgment, or if bankruptcy or insolvency had not intervened, including the right to recover costs and interest irrespective of the limits of liability contained in the policy.'") (quoting *Jarvis v. Indemnity Ins. Co.*, 227 Or 508, 363 P2d 740 (1961)) (bracketed material and emphasis added); *id*. at 167 (noting that Bullen was "subject to the claims or defenses that the insurer has against the one from whom she derives her claim.")

Other cases from this court addressing ORS 18.352 and ORS 742.031 reflect the same principles revealed in *Reuter*. *See Jarvis*, 227 Or at 512 (the garnishor "*must rely upon the judgment against [the judgment debtor] as a basis for [an] action against the insurer*" and must prove "that the *former judgment was based upon evidence which identified it as one within the coverage of the insurer's obligations.")* (bracketed material and emphasis added); *Hecht v. James and Farmers Mut. Ins. Co.*, 218 Or 251, 253, 345 P2d 246 (1959) ("ORS 736.320 fixes the liability of the insurance company after judgment" and "[a]ttachment proceedings against the insurer to enforce the judgment are authorized under ORS 23.230"); *Allegretto v. Or. Auto Ins. Co.*, 140 Or 538, 543-44, 13 P2d 647 (1932), *overruled on other grounds, Bailey v. Universal Underwriters, Ins.*, 258 Or 201, 474 P2d 746, 482 P2d 158 (1971) ("We test the rights of the plaintiff

by *whether or not [the judgment debtor], upon satisfaction of the judgment against him*, could have recovered upon the policy[.]") (bracketed material and emphasis added). So do secondary authorities commenting on ORS 742.031. *See* Charles G. Howard, *Note and Comment: Right of Injured Party To Sue – Statute Relating to Obligation of Insurance Companies In The Event of Insolvency or Bankruptcy*, 9 Or L Rev 57, 64 (1929-30) (observing that the only condition precedent to application of what is now ORS 742.031 "is a judgment by the injured party against an assured and non-payment" of that judgment for any reason).

Groce, which predated *Stubblefield*, also construed ORS 742.031. That case, while consistent with the principles reflected in the court's other cases construing that statute, developed additional principles applicable to construction of ORS 18.352.

In *Groce*, the plaintiffs obtained a judgment against Stayton, an insolvent insured, circumstances covered by ORS 742.031. While the defendant (Fidelity General) paid its policy limits, that payment did not fully satisfy the judgment. The plaintiffs obtained written assignments from Stayton of his cause of action against Fidelity General for wrongful failure to settle. The consideration given for the assignments was the plaintiffs'

agreement to satisfy their judgments against Stayton if *any recovery* was obtained from Fidelity General.

On appeal, Fidelity General argued that Stayton had mitigated his damage through his assignment and that the plaintiffs should be permitted to recover no more than the minimum that would release Stayton – $1.00. Recognizing that "[i]f the assignments had been worded differently, this problem could have been avoided," 252 Or at 310, this court nevertheless rejected Fidelity General's argument, noting:

> "*We believe, however, that the intent of each assignment is clear. The effect of following the defendant's argument would be to defeat the purpose of these assignments*. An injured plaintiff would be reluctant to accept an assignment unless it provided that the insured would be released only upon [f]ull recovery from the insurer. And, if the insured could assign only on those terms, he might feel compelled to bring the litigation himself in order to see that his interests were properly protected. *The result for the insurer would be the same, but the insured and the plaintiff would be remitted to * * *a 'needlessly complicated and unjust procedure.'*"

Id. at 310-11 (emphasis added) (quoting *Gray v. Nationwide Mut. Ins. Co*., 422 Pa 500, 511 n 7, 223 A2d 8, 13 n 7 (1966)).

Finally, while this court has not addressed ORS 701.073[9] specifically in its prior cases construing ORS 18.352 and ORS 742.031, it has

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[9] ORS 701.073, enacted in 1971, Or Laws 1971, ch 740, §12, provides:

> "A contractor who possesses a license as required under this chapter shall have in effect public liability, personal injury and property damage insurance covering the work of the contractor that is subject to this chapter, including the covering of liability

observed in other contexts that "[t]he purpose of [ORS] Chapter 701 is to protect the party for whom the construction work is performed." *Hellbusch v. Rheinholdt*, 275 Or 307, 313, 550 P2d 1199 (1976) (bracketed material added). One of those protections is the insurance requirement in ORS 701.073.[10]

5. Analysis

ORS 18.352's two requirements are: (1) a judgment rendered in a case for injury or damage to person or property[11]; and (2) a policy of

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> for products and completed operations according to the terms of the policy and subject to applicable policy exclusions, for an amount not less than the applicable amount set forth in ORS 701.081 or 701.084."

[10] At several times, the legislature has increased the limits of the required insurance coverage, *see, e.g.*, Or Laws 1983, ch 616, § 11; Or Laws 1989, ch 625, § 4; Or Laws 1999, ch 325, § 4, confirming the legislature's ongoing commitment to protect the public from damages caused by contractors. In 2007, the legislature reaffirmed this commitment in another way through amendments clarifying that the coverage requirements extend to "products" and "completed operations" in addition to projects under construction. Or Laws 2007, ch 648, §§ 19-20; *see also* Tape Recording, House Committee on Consumer Protection, HB 2654, Feb 26, 2007, Tape 33, Side A (statement of Joel Ario, Administrator, Insurance Division, Department of Consumer and Business Services) (amendments needed to clarify that coverage must extend to completed projects for the 10-year statutory repose period and to projects such as houses that otherwise might be deemed "products" and thereby excluded); Tape Recording, Senate Committee on Business, Transportation and Workforce Development, HB 2654, May 23, 2007, Tape 120, Side B (statement of Mark Long, Administrator, Building Codes Division, Department of Consumer and Business Services) (confirming that HB 2654 would protect the public from problems related to construction defect claims and litigation).

[11] This court has not considered whether a stipulated judgment is a "judgment rendered," but other courts have and answer that question "yes." *See Gagne v. Norton*, 189 Conn 29, 31, 453 A2d 1162, 1164 (1983) ("a

insurance "covering the judgment debtor's liability * * for injury or damage to a person or property." When those requirements are met, the statute says, the "amount covered by the policy of insurance shall be subject to attachment upon the execution issued upon the judgment."

Here, there is no question about ORS 18.352's first requirement – the judgment resolved a property damage claim by Brownstone against A&T. And there is also no question that the lower courts did not reach the statute's second requirement – rather, by applying *Stubblefield* – through *Reuter* – those courts denied Brownstone's right of recovery under ORS 18.352 *solely* on a ground that *avoided* considering that requirement. For a number of reasons, that decision by the lower courts was incorrect.

First, ORS 18.352's text is inconsistent with the lower courts' approach to the statute's second requirement. The text supports that only a judgment determines "the amount covered by the policy of insurance." In other words, that phrase – when read in light of the rest of the statute's language, as it must be, *PGE*, 317 Or at 611 – supports that it refers only to the dollar amount of the judgment that otherwise falls within a policy "covering liability * * for injury or damage to a person or property" that gave rise to the judgment, an amount that, here, is $2 million. And given that the

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valid judgment or decree entered by agreement or consent operates as *res judicata* to the same extent as a judgment or decree rendered after answer and contest"); *John Siebel Assoc. v. Keele*, 188 Cal App 3d 560, 565, 233 Cal Rptr 231, 233 (2 Dist 1986) (same). *See also Oregon Mill & Grain Co. v. Hyde*, 87 Or 163, 165, 169 P 791 (1918) (confirming use of stipulated judgments in Oregon at the time ORS 18.352 was enacted).

text is the best indication of what a statute means, *Gaines*, 346 Or at 171, importing *Stubblefield* into ORS 18.352 – through *Reuter* – as the lower courts did, impermissibly rewrites ORS 18.352 by making its application determined by something other than a judgment – here, the covenant. *See Davis v. Campbell*, 327 Or 584, 589, 965 P3d 1017 (1998) (following ORS 174.010's prohibition against inserting words in statutes).

Second, this court's prior cases confirm what ORS 18.352's plain text says – recovery by the judgment creditor properly *depends only* on whether the claims asserted by and resolved *in the judgment* are covered by the judgment debtor's liability insurance policy. *See, e.g., Jarvis*, 227 Or at 512 (confirming view)*; Allegretto*, 140 Or at 543-44 (same). And those cases further confirm that the court has never construed ORS 18.352 – which does not require the judgment debtor to pay the judgment – to say that the reason for non-payment is relevant to the statute's second requirement.

Third, *Stubblefield* does not support the lower courts' approach to ORS 18.352's second requirement. That case never considered Brownstone's arguments for how ORS 18.352 is properly construed. *See* 267 Or at 401 (supporting statement).[12] Indeed, *Stubblefield* was decided

[12] Neither did *Lancaster v. Royal Ins. Co. of America*, 302 Or 62, 726 P2d 371 (1986). There, the court observed that "both parties appear to agree that the application of the [policy] provision required by [ORS 742.031] hinges on whether Martin was legally obligated to pay damages," an issue the parties accepted in that case was determined solely by documents executed as part of their settlement. 302 Or at 70-71 (bracketed material added). *See also id.* at 71 n 5 (noting that no argument was made that *former* ORS 743.783 [now ORS 742.031] applied

almost 60 years after ORS 18.352 was enacted. While the legislature is presumed to be aware of the common law when it enacts a statute, *Klamath Irrigation District v. United States*, 348 Or 15, 23, 227 P3d 1145 (2010), there is no basis for this court to conclude that, in1915, when ORS 18.352 was first adopted, the legislature was aware that the question *Stubblefield* addressed – what rights a judgment creditor obtained by assignment in light of a contemporaneous covenant not to execute against the judgment debtor's assets – had anything to do with ORS 18.352's second requirement (which, of course, does not depend on or require an assignment). Nor is there any basis for this court to conclude that the legislature then endorsed the common law rule *later adopted* in *Stubblefield* (a rule that, as noted later, is now nearly universally rejected elsewhere, particularly in cases like this one).

Fourth, the lower courts' reliance on *Reuter* in addressing ORS 18.352's second requirement was misplaced. In that case, this court concluded that Reuter's conviction established conclusively that he either "expected or intended to injure Bullen," a circumstance that State Farm unquestionably did not cover, and that, because Bullen had no greater rights to coverage from State Farm than Reuter had, State Farm was not obligated to cover Bullen's judgment against Reuter. *See* 299 Or at 167 ("With the finding in the criminal case, Reuter became subject to the

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"regardless of the nature and legal effect of Martin's assignments of rights to plaintiff and plaintiff's covenant not to execute against Martin.").

collateral estoppel claim that State Farm here asserts. Bullen's derivative status collaterally estops her."). *Stubblefield*, unlike *Reuter*, did not involve issue preclusion, and neither does this case.

Moreover, *Reuter* did not discuss *Stubblefield*, let alone say anything that would support *Stubblefield*'s application to ORS 18.352. Indeed, what *Stubblefield* says supports the opposite conclusion – the court recognized that the rule it was adopting there *would not apply* to a proceeding brought under ORS 18.352. *Cf. Stubblefield*, 267 Or at 401 (noting that case did not involve an action under *former* ORS 736.320 [now ORS 742.031] which the court has read consistently with ORS 18.352).

Finally, in construing ORS 18.352's second requirement, the lower courts misconstrued *Reuter*'s "stand in the shoes of the judgment debtor" and "the judgment creditor is subject to the same claims and defenses applicable to the judgment debtor" references.[13] *See Brownstone*, 255 Or App at 395-97 (discussing references). Properly understood, both references reflect exactly the same principles that this court's other relevant cases reflect: the judgment debtor's liability coverage applies unless *the judgment* is based on uncovered conduct by the judgment debtor, uncovered damages, or the judgment debtor breaches a policy term or condition that forfeits coverage. *See Reuter,* 299 Or at 164-167 (discussing cases supporting statement, particularly *Casey v. N.W.*

[13] 299 Or at 166-67.

Security Ins. Co., 260 Or 485, 491 P2d 208 (1971), *Bonney v. Jones*, 249 Or 578, 439 P2d 881 (1968), and *Allegretto*).

Fifth, as noted, in *Groce,* when applying ORS 742.031*,* this court made clear that a judgment creditor's rights against a judgment debtor's liability insurer cannot be defeated by "inartfully worded assignments." 252 Or at 310-11. Here, Brownstone and A&T unquestionably intended that Capitol would pay the judgment, if A&T's liability and Brownstone's damages caused by A&T were otherwise covered by Capitol's policy. Importing *Stubblefield* into ORS 18.352 – through *Reuter* – as the lower courts did in their approach to ORS 18.352's second requirement is inconsistent with *Groce*.

Sixth, as noted, this court has the responsibility to harmonize statutes addressing similar subjects. *Davis v. Wasco IED*, 286 Or 261, 272, 593 P2d 1152 (1979). ORS 18.352 is not harmonized with ORS 31.825[14] if an assignment given in exchange for a covenant is held to *extinguish* a right of recovery even though it does not "specifically so provide" as ORS 31.825 expressly requires. Nor is ORS 18.352 harmonized with ORS

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[14] 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."

701.073 if a judgment creditor injured by the faulty work of a contractor is denied that statute's protection solely based on a court's wholly unintended interpretation of a settlement agreement.

In sum, ORS 18.352 has just two requirements: (1) a judgment for property damage; and (2) an insurance policy covering that judgment. The second requirement permits Brownstone to garnish Capitol's policy so long as it covered A&T's liability for the property damage and resulting damages alleged by Brownstone and resolved in the judgment. By importing *Stubblefield* into ORS 18.352 – through *Reuter* – the lower courts misconstrued ORS 18.352.

B. To the Extent *Stubblefield* Applies to an Action Under ORS 18.532, *Stubblefield* Was Abrogated By ORS 31.825

1. Additional relevant principles of statutory construction

The construction principles discussed above apply equally to ORS 31.825. Others do, too. As noted, context – a part of the first level of the statute's analysis – also includes the common law backdrop against which a statute was enacted. *Klamath Irrigation District*, 348 Or at 23. And legislative history, as a tool for construing a statute, is "more useful" or "less useful," depending on the history's source and context. *See Errand v. Cascade Rolling Mills*, 320 Or 509, 539 n 4, 889 P2d 544 (1995) ("In general, an examination of legislative history is most useful when it is able to uncover the manifest general legislative intent behind an enactment. By contrast, an examination of legislative history is most fraught with the

potential for misconstruction, misattribution of the beliefs of a single legislator or witness to the body as a whole, or abuse in the form of 'padding the record' when the views of only a small number of persons on a narrow question can be found.") (Graber, J., dissenting); *see also Gaines*, 346 Or at 172–73 n 9 (noting with approval Justice Graber's observations in *Errand* that relying on "'the beliefs of a single legislator or witness'" is "'fraught with the potential for misconstruction'").

2. Analysis

ORS 31.825 has three requirements: (1) a defendant in a tort action; (2) against whom a judgment has been rendered;[15] (3) gives an assignment of any cause of action against the defendant's insurer as a result of the judgment to the plaintiff in whose favor the judgment has been entered. When those requirements are met, the statute then says, the "assignment and any covenant or release shall not extinguish the cause of action against the insurer unless the assignment specifically so provides."

Here: (1) A&T was a defendant in a tort action (a construction defect suit); (2) a judgment was entered against A&T, Capitol's insured (the judgment); (3) A&T assigned it claims – "its causes of action" – against Capitol to Brownstone (the assignment); and (4) the agreement made clear that Brownstone and A&T did not intend to extinguish those assigned claims. Nevertheless, the lower courts concluded that ORS 31.825 did not

[15] As discussed later, the legislature clearly understood that ORS 31.825 applied to stipulated judgments.

apply because the judgment was entered *after* the agreement was executed, *Brownstone*, 255 Or App at 397-400, and the trial court further concluded that A&T's claims against Capitol were not "as a result of a judgment" because that phrase refers only to an "excess judgment." Both conclusions were incorrect.

a. The legislature did not intend that a judgment had to precede an assignment

The lower courts construed the phrase in ORS 31.825 that "a person against whom a judgment has been rendered may assign" any cause of action in ORS 31.825 to mean that the statute is limited to cases in which the judgment *precedes* the assignment. *Brownstone*, 255 Or App at 397-400. For several reasons, that construction was wrong.

First, again, the text of ORS 31.825 best reflects the statute's intended meaning. *Gaines*, 346 Or at 17. The statute's text does not say that, for the statute to apply, any "assignment and any covenant or release" must be agreed to or executed *after* the "judgment is rendered." Thus, reading the text that way – as the lower courts did – impermissibly rewrites ORS 31.825. *See US West Communications v. City of Eugene*, 336 Or 181, 188, 81 P3d 702 (2003) (confirming that court may not rewrite statutes to insert what the legislature has omitted).

Second, while "[t]he use of a particular verb tense in a statute can be a significant indicator of the legislature's intention," *Martin v. City of Albany*, 320 Or 175, 181, 880 P2d 926 (1994), that is not always the case, and it is

not the case here. The phrase "a person against whom a judgment has been rendered may assign" any cause of action might suggest the conclusion that the judgment has to precede an assignment, but it does not compel that conclusion as would, say, the phrase "a person against whom a judgment has been rendered may *thereafter* assign any cause of action." And so, the phrase "a person against whom a judgment has been rendered may assign" any cause of action can reasonably be read to mean that there are two required events (a judgment and an assignment of rights created by the judgment), whenever they occur.

Third, as noted, in construing the phrase "a person against whom a judgment has been rendered may assign" a cause of action, the court considers, as context, the common law backdrop against which that language was enacted. *Klamath Irrigation District,* 348 Or at 23; *see also Marciano v. Board of Parole*, 342 Or 684, 693, 159 P3d 1151 (2007) (court assumes that the legislature enacts statutes in light of existing judicial decisions that are relevant to those statutes). When ORS 31.825 was passed in 1989, this court had held just three years earlier in *Lancaster v. Royal Ins. Co. of America*, 302 Or 62, 67, 726 P2d 371 (1986), that "[w]hether the assignment was made of a judgment in existence or a judgment to come into existence is not determinative of whether or not the insured's assignee may maintain an action against the insurance company. Rather, the language of the covenant is determinative." Accordingly, the phrase "a person against whom a judgment has been rendered may

assign" a cause of action cannot be read, as it was by the lower courts, to reflect the legislature's intended departure from *Lancaster*.

Fourth, the legislative history to ORS 31.825 confirms what the statute's text and context show. One of the bill's proponents, J. Michael Alexander, told the legislature that the bill was necessary because "recent cases, including *Oregon Mutual Insurance Co. v. Gibson*, 88 Or App 574, 746 P2d 245 (1987) [have] made it very difficult for a plaintiff to recover an excess judgment and also release the insured defendant from the litigation." Senate Judiciary Committee, SB 519, March 28, 1989, Ex D (bracketed material added). *See also id*. (observation by Alexander that "under Oregon case law, including the *Gibson* case, such release of liability also releases the insurance company, making these assignments almost impossible to effectuate."); Senate Judiciary Committee, SB 519, Tape 81, Side B, March 27, 1989 (comment by Alexander that hearing that the bill's approach made sense given that "the assignments have just gotten kind of tricky and [are] almost impossible now under some of the cases because you can't release the defendant insured," the "courts have said that if [a settling defendant] has no liability, he has no claim against his insurance company" and "we can't release [the settling defendant] any more under the case law.") (bracketed material added).

Ignoring completely what Alexander said, the Court of Appeals instead relied solely on testimony from another proponent of SB 519, Stephen Piucci. *Brownstone*, 255 Or App at 398-99. A client of Piucci's,

Arthur Clark, had an injury suit against a defendant with $100,000 in liability coverage. Facing the prospect of an excess judgment, the defendant was "forced into bankruptcy" precluding Clark, according to Piucci, from obtaining any assignment against the defendant's insurer. Had the proposed bill been in effect, Piucci said, the insurance company could not have "driven its insured into bankruptcy" and Clark would not have been limited to the $100,000 liability coverage limit. Senate Judiciary Committee, SB 519, March 27, 1989, Ex F. *See also* Senate Judiciary Committee, Tape 81, Side B and Tape 82, Side A, March 27, 1989 (comment by Piucci that the public policy reflected in SB 519 was to "promote the reasonable and expeditious settlement of insurance claims").

During his testimony, Piucci was asked by the committee's legal counsel, Catherine Webber, whether, under the proposed bill, the existence of a judgment in the underlying suit was a "precursor" to getting the assignment. Senate Judiciary Committee, Tape 82, Side A, March 27, 1989. Piucci said "that's correct." *Id.*

Contrary to what the lower courts concluded, Piucci's answer to Webber's question is not confirmation that the legislature intended that entry of a judgment had to precede an assignment for SB 519 to apply. Piucci was a witness, not a legislator, and he was answering an ambiguous question posed by Webber, who also was not a legislator. As such, what Piucci said was not entitled to the weight given to it by the Court of Appeals. S*ee Gaines*, 346 Or at 172–73 n 9 (supporting observation);

State v. Guzek, 322 Or 245, 261, 906 P2d 272 (1995) (cautioning against relying on statements of non-legislator witnesses). In any event, all that Piucci's answer reasonably confirms is his personal understanding that the bill would apply only when *both* a judgment and an assignment of rights resulting from that judgment exist – that his, as Piucci understood the bill, there must be a judgment for there to be any rights resulting from the judgment to assign.

Moreover, the legislative history after Piucci's testimony is consistent with that view of Piucci's answer. SB 519 was considered by the House Judiciary Sub-Committee on Judiciary on May 26, 1989. The "Staff Measure Summary" prepared for that hearing, consistent with what Alexander and other proponents of the bill had told the legislature earlier, reflects that the measure was offered as a response to *Gibson*, should "reduce litigation" and should "eliminate a trap for the unwary." House Judiciary Sub-Committee on Civil Judicial Administration, May 26, 1989, Ex Q . The "Staff Measure Summary" did not reflect in any way that a judgment must precede an assignment for the bill to apply.

In sum, a key purpose behind SB 519 was to eliminate the "traps" that *Stubblefield* set, and that were triggered again in cases that followed it, including *Gibson*. Through eliminating those "traps," the legislature sought to reduce litigation and facilitate settlements. Accordingly, the text, context and legislative history for ORS 31.825 all support that the legislature never intended to substitute one "trap" that frustrates settlements involving

stipulated judgments and fails to reduce litigation (getting a judgment entered *before* the assignment is executed or otherwise effective) for another "trap" that led to the exact same results (providing a covenant not to execute that foreclosed any recovery from a judgment debtor's liability insurer). The lower courts erred in concluding otherwise.

b. ORS 31.825 is not limited to "excess cases"

As noted**,** the trial court also concluded that ORS 31.825 applied only to "excess cases"[16] because, so that court reasoned, only those cases involve a "cause of action that a defendant has against his insurer as a result of the judgment." For several reasons, that conclusion was incorrect.

First, again, the text of ORS 31.825 is the best indicator of whether the statute has such a limited application. *Gaines*, 346 Or at 17. ORS 31.825 does not say the statute is confined to "excess cases." Accordingly, the trial court's construction impermissibly rewrote the statute. *See* ORS 174.010 (court is not to insert language in statute that legislature did not include).

Second, the legislative history supports Brownstone's view of what the text of ORS 31.825 says. Admittedly, SB 519 was presented as a way to address certain problems that had arisen in "excess cases" where assignments were involved. But the bill's legislative history as a whole

[16] "Excess cases" refers to a claim by an insured against a liability insurer that has undertaken the defense of its insured for failure to use reasonable care to settle a third-party's claim against the insured within the insured's liability policy limits. *Georgetown Realty v. The Home Ins. Co.*, 313 Or 97, 100 and n 1, 831 P2d 7 (1992).

supports that SB 519 was deemed necessary because court decisions – including, but not limited to, *Gibson* (which is not an "excess case")[17] – had created those problems by applying *Stubblefield*.[18] That is, the legislative history as a whole supports that the problems the legislature sought to eliminate – "problems with settlements of claims involving assignments, covenants and releases," "increased litigation" and "traps for the unwary" – existed in all the contexts that *Stubblefield* had been applied by Oregon courts. Thus, the legislative history supports that the legislature did not intend to narrowly limit ORS 31.825 to "excess cases." See *South Beach Marina, Inc. v. Dept. of Rev.*, 301 Or 524, 531, 724 P2d 788 (1986) ("Statutes ordinarily are drafted in order to address some known or identifiable problem, but the chosen solution may not always be narrowly confined to the precise problem. The legislature may and often does

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[17] In *Gibson*, the plaintiffs were injured in a dune buggy accident. They sued the defendant driver, who was insured. The plaintiffs and the defendant settled. The defendant agreed that the plaintiffs would enter judgment against him for $1.5 million. The defendant's insurer agreed to pay $1 million to the plaintiffs. The defendant then assigned to the plaintiffs his claims *against his insurance agents* for "failure to procure adequate insurance." 88 Or App at 576. In exchange, the plaintiffs entered into covenants not to execute on the judgment beyond the $1 million that the defendant's insurer agreed to pay. *Id.* The plaintiffs then sued the insurance agents on the claims for failure to procure adequate insurance. *Id*.

[18] Indeed, a defendant in a tort action can have a cause of action against his insurer as a result of a judgment entered against him because the insurer wrongfully refused to defend him – as Brownstone claims occurred here. Accordingly, that is also a context where, when *Stubblefield* is applied, the problems ORS 31.825 sought to eliminate also arise.

choose broader language that applies to a wider range of circumstances than the precise problem that triggered legislative attention.").

In sum, ORS 31.825's text, context and legislative history show that the statute is not confined to "excess cases." Rather, the statute applies to the assignment of every "cause of action," including Brownstone's "cause of action" for Capitol's failure to defend A&T or pay the judgment. The trial court erred in concluding otherwise.

C. If The Lower Courts Correctly Construed ORS 18.352 and 31.825, The Court Should Overrule *Stubblefield*

1. Governing principles for overruling a common law decision

This court will overrule its prior cases involving common law rules when: (1) the prior case was inadequately considered or wrong when it was decided; and (2) the surrounding statutory law or regulations have altered some essential legal element assumed in the prior case. *G.L. v. Kaiser Foundation Hospitals, Inc.,* 306 Or 54, 59, 757 P2d 1347 (1988); *see also Farmers Ins. Co. of Oregon v. Mowry,* 350 Or 686, 698 n 5, 261 P3d 1 (2011) (noting that "[p]articularly in cases involving common-law rules, an earlier precedent may have not have been 'wrong' when it was decided, but changes in other statutes and the evolution of the common law may lead this court to conclude that the earlier case should no longer be followed.") (citing *Winn v. Gilroy*, 296 Or 718, 733–34, 681 P2d 776 (1984), as example); *Association of Unit Owners of Timbercrest Condominiums v. Warren*, 352 Or 583, 598, 288 P3d 958 (2012) ("Particularly when we

'failed to apply our usual framework for decision or adequately analyze the controlling issue,' we must be open to reconsidering earlier case law.") (quoting *Mowry*, 350 Or at 698); *State v Partain*, 349 Or 10, 21-22, 239 P3d 232 (2010) (reconsidering prior decision where post-decision legislative enactments illustrate the "legislature's systematic rejection of the policy and value judgments" underlying court's prior decision and confirms that the relevant "legal landscape * * * has changed in a way that undermines the essential premise" for the prior holding) (ellipses added).

2. Analysis

a. Stubblefield was inadequately considered and wrong when it was decided

In *Stubblefield*, this court held that where an insurance policy provides that the insurer will indemnify its insured "for all sums which the insured shall be legally obligated to pay as damages" for personal injuries, and the insured settles with a plaintiff who suffered personal injuries otherwise covered by the policy, the insurer is not obligated to indemnify the insured if the settlement agreement includes an unconditional "covenant not to execute." 267 Or at 400-01. In other words, so the court concluded, the covenant renders the insured *not* "legally obligated to pay" the plaintiff, thereby releasing the insurer from its coverage obligation, even if the covenant or other parts of a settlement agreement say that the parties do not intend that to happen.

Stubblefield failed to consider a number of issues that this court has declared to be important in other contexts and that other courts have found decisive in declining to follow *Stubblefield*. They are: (1) the purpose of insurance is not just to protect the insured, but, more importantly, to protect the public; (2) an insured remains "legally obligated to pay" an unsatisfied judgment even though the judgment creditor has promised not to execute on it; (3) the phrase "legally obligated to pay as damages" – when not defined in a liability insurance policy – is ambiguous; (4) an insurer that has abandoned its insured and left it to fend for itself should not be given a windfall from the insured's inadvertent release of the insurer when the insured attempts to reasonably settle the claim; (5) a court's task in construing a settlement agreement is to give effect to the intent of the parties; and (6) courts should encourage and implement reasonable settlements. Consideration of each of these issues shows, in part, why *Stubblefield* should be overruled.

(1) The purpose of insurance is not just to protect the insured; it is also to protect the public

Insurance does not just protect the insured party; it also protects the public. To ensure that protection, the legislature has enacted many statutes requiring liability insurance as a precondition to engaging in various activities and occupations: *e.g.*, operating a motor vehicle (ORS 806.010), providing pest control services (ORS 634.116), dispensing liquor (ORS 471.168), operating an ocean charter vessel (ORS 830.440),

landscaping (ORS 671.565), operating racing meets (ORS 462.110), acting as a dental hygienist (ORS 680.200), and acting as a building code inspector (ORS 455.457).

While the insured defendant in *Stubblefield*, a doctor, was not required by statute to be insured, the court did not explicitly limit the scope of its decision to medical malpractice insurance. As a result, here, *Stubblefield* was applied to a construction contractor, who was required by ORS 701.073 to carry public liability insurance, defeating the statute's purpose of protecting the public from losses caused by faulty construction.

The view that insurance is intended to protect the public has led courts elsewhere to reject *Stubblefield's* result. *Dowse v. Southern Guar. Ins. Co.,* 263 Ga App 435, 588 SE 2d 234 (2003), *aff'd*, 278 Ga 674, 605 SE 2d 27 (2004), a case involving very similar facts to this case, illustrates the point. There, the plaintiffs (the Dowses) sued Cutter, Inc. for defective construction and installation of an exterior insulation and finishing system on their home. The defendant (SGIC) declined to defend or indemnify Cutter, Inc. Eventually, Cutter, Inc. and Ulysses Cutter, Sr. (Cutter), individually, entered into a settlement with the Dowses that included a covenant not to execute against Cutter, Inc. or Cutter and an agreement to seek recovery only against SGIC.

The Dowses subsequently filed a garnishment action against SGIC. SGIC moved for summary judgment, arguing that its policy required it to pay only those sums which Cutter, Inc. would be legally obligated to pay,

and that since Cutter, Inc., by the terms of the settlement agreement, was not legally obligated to pay anything, SGIC, which stood in Cutter, Inc.'s shoes in the garnishment action, was not legally obligated to pay anything either.

The Georgia Court of Appeals rejected that argument, noting that there is "the strong public policy favoring the availability to injured persons of the liability insurance of those whose negligence is the cause of their plight." 263 Ga App at 552, 588 SE 2d at 239 (internal citations and footnotes omitted). *See also Quan Xing Hee v. Government of Guam*, 2009 WL 5218028, * 10 (Supreme Court of the Territory of Guam 2009) (stating, in following the result reached in *Dowse*, that doing so was "consistent with Guam's direct action and mandatory insurance statutes, which reflect a policy of protecting the rights of injured parties and the general public.")

Here, *Stubblefield*'s application has the perverse effect of denying the public (Brownstone's condominium owners) potential access to insurance coverage that they had the right to expect would be available to them in light of ORS 701.073. The court did not consider that important factor in *Stubblefield.* Had it, the court would have decided *Stubblefield* differently.

(2) A covenant not to execute does not negate a judgment against the insured; until the judgment is satisfied, the insured remains "legally obligated" to pay the judgment

Stubblefield also did not consider whether, as long as the judgment against the doctor in that case remained unsatisfied, he was "legally obligated to pay" the judgment. Other courts rejecting *Stubblefield* have considered that issue.

In *Guillen ex rel. Guillen v. Potomac Ins. Co. of Illinois*, 203 Ill 2d 141,785 NE 2d 1 (2003), another case similar to this one, the plaintiff (Guillen) sued her former landlords, Ezequiel and Maria Ortiz (the Ortizes) for their personal injuries. The defendant (Potomac), the Ortizes' insurer, denied any obligation to defend or indemnify the Ortizes. Eventually, Guillen and the Ortizes entered into a settlement agreement providing that the Ortizes would pay Guillen $600,000 subject to the condition that the amount of the settlement would "be satisfied solely through the assignment" to Guillen of the Ortizes' right to payment from Potomac. 203 Ill 2d at 144, 785 NE 2d at 4.

Guillen, as assignee of the Ortizes rights, sued Potomac seeking a declaration that it was obligated to pay Guillen. Potomac moved for summary judgment arguing, in relevant part, that it was not required to pay because Potomac's policy obligated it to pay "those sums that the insured becomes legally obligated to pay as damages" and the Ortizes were never "legally obligated" to pay anything under the terms of their settlement agreement with Guillen. 203 Ill 2d at 146, 785 NE 2d at 4.

The Illinois Supreme Court rejected Potomac's argument, noting:

> "When confronted by a settlement agreement consisting of a stipulated judgment, an assignment and a covenant not to execute, insurers have maintained, as Potomac does here, that the covenant not to execute effectively extinguishes the insured's legal obligation to pay since the insured 'has no compelling obligation to pay any sum to the injured party.' *Freeman v. Schmidt Real Estate & Insurance, Inc*., 755 F2d 135, 138 (8th Cir 1985). The majority of courts, however, have rejected this argument.
>
> "The construction of the 'legally obligated to pay' language adopted by the majority of courts is a technical, rather than practical, one. *Courts accepting the conclusion that the insured remains 'legally obligated to pay' when the settlement consists of a judgment, covenant not to execute, and an assignment hold that a covenant not to execute is a contract and not a release. The insured still remains liable in tort and a breach of contract action lies if the injured party seeks to collect on the judgment. Thus, under this construction, the insured is still 'legally obligated' to the injured plaintiff, and the insured retains the right to indemnification from the insurer.*

203 Ill 2d at 160, 785 NE 2d at 12-13 (emphasis added; internal citations not involving quoted material omitted). *See also J & J Farmer Leasing, Inc. v. Citizens Ins. Co. of America*, 472 Mich 353, 696 NW 2d 681, 684 (2005) ("[A] covenant not to sue is merely an agreement not to sue on an existing claim. It does not extinguish a claim or cause of action."); *Stateline Steel Erectors, Inc. v. Shields*, 150 NH 332, 335, 837 A2d 285, 290 (2003) ("[A] covenant not to sue does not relinquish a right of claim, or extinguish a cause of action. A covenant not to sue recognizes the continuation of the obligation or liability; the party making the covenant not to sue agrees only not to assert any right or claim based upon the obligation."); *Kobbeman v. Oleson*, 574 NW 2d 633, 636 (SD 1998) (a covenant not to execute is

"merely a contract * * * such that the underlying tort liability remains and a breach of contract action lies in favor of the insured if the injured party seeks to collect his judgment*.");* Justin A. Harris, *Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants Not to Execute in Insurance Litigation,* 47 Drake L Rev 853, 856-60 (1999) (noting that the trend leans "overwhelmingly" to the rule that the insured remains "legally obligated to pay" when a settlement consists of a stipulated judgment, an assignment, and a covenant not to execute).

Similarly, in *Red Giant Oil Co. v. Lawlor*, 528 NW 2d 524 (Iowa 1995), a case also factually similar to this case, the plaintiff (Red Giant) sued Coyle for negligent work on the plaintiff's property. Coyle's insurer (LeMars) denied coverage.[19] Coyle agreed to stipulate to a judgment for the full amount sought by Red Giant and also agreed to assign claims Coyle had against LeMars in exchange for a covenant not to execute the judgment against him. Red Giant accepted Coyle's proposal.

Red Giant then sued LeMars. The trial court dismissed Red Giant's case. The Iowa Supreme Court reversed, observing, in relevant part:

> "[T]he original covenant not to execute was merely an agreement by Red Giant and was not a release. Coyle's

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[19] LeMars' policy provided, in relevant part:

> "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."

528 NW 2d at 528.

> underlying tort liability therefore remains. Coyle would have a breach of contract remedy if Red Giant tried to collect on the judgment against him. Coyle is therefore still 'legally obligated' to Red Giant, and LeMars must still make good on its policy promise to pay, if there is coverage."

528 NW 2d at 532-33 (citations omitted).

Finally, the Georgia Supreme Court reached a similar conclusion in its decision in *Dowse*. There, the court said:

> "The settlement agreement provides that the Dowses would not seek to recover or collect from Cutter, individually, or from Cutter, Inc., '**except** [the Dowses] may seek to recover any funds available to [Cutter, Sr., and Cutter, Inc.,] as indemnity under [SGIC's insurance policy] ... it being the express intent of all parties hereto to enter into an agreement providing [the Dowses] shall limit their recovery to whatever [they] may recover under the [SGIC policy] ... whether as assignee of the benefits of this policy or as judgment creditor of [the insureds].' *Thus, it is clear that the Dowses specifically reserved their claims against Cutter, Inc., to the extent that coverage is provided under the SGIC policy. Accordingly, there has not been a full and complete release of Cutter, Inc., as claimed by SGIC, and its argument to the contrary fails*."

278 Ga at 675, 605 SE 2d at 28 (bold and bracketed material in original; emphasis added).

Here, the judgment remains unsatisfied. The covenant does not preclude Brownstone from executing on the judgment; it merely exposes Brownstone to breach of contract liability if it attempts to do so – a liability that Brownstone could properly seek to avoid by showing that the object of the agreement (Brownstone's right to collect the proceeds of Capitol's policy) was frustrated. *See Tindula v. Bauman*, 271 Or 383, 385, 532 P2d 785 (1975) (supporting statement, citing *Restatement (First) of Contracts*

§ 288, comment a (1932)).[20] Consequently, as courts elsewhere have concluded, this court should have concluded in *Stubblefield* that the doctor there remained "legally obligated to pay" the judgment notwithstanding the covenant not to execute.

(3) The phrase "legally obligated to pay," if not defined in an insurance policy, is ambiguous and subject to construction in favor of the insured

Stubblefield also did not consider the meaning of the phrase "legally obligated to pay" in the doctor's insurance policy. The phrase could mean obligated to pay pursuant to a judgment for money damages. Or it could mean obligated to pay pursuant to a settlement agreement. Or it could mean obligated to pay pursuant to a licensing agency rule — as is the case here. And given all those possible reasonable meanings, the phrase is ambiguous. *See Hoffman Construction Co. v. Fred S. James & Co.,* 313 Or 464, 470, 836 P2d 703 (1992) (a term in an insurance policy is ambiguous if two or more plausible interpretations of that term remain reasonable after the "interpretations are examined in the light of, among other things, the particular context in which that term is used in the policy and the broader context of the policy as a whole.")

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[20] Nor, for that matter, does the covenant remove A&T's legal obligation to pay the judgment insofar as its construction contractor's license is concerned. *See* ORS 701.098(4)(a)(E) (providing that Construction Contractors Board may revoke, suspend or refuse to issue or reissue a license of a contractor that has not paid an outstanding judgment).

That is exactly what other courts rejecting *Stubblefield* have concluded about the phrase "legally obligated to pay." In *Red Giant Oil Co.*, 528 NW 2d 524, the court observed:

> "Our interpretation of the 'legally obligated to pay' language in the policy is consistent with insurance policy rules of construction. The policy does not define 'legally obligated to pay.' At best, this language is ambiguous. Because it is ambiguous, we construe it in favor of the insured."

Id. at 533 (citation omitted). *Accord Quan Xing Hee*, 2009 WL 5218028 at * 10 ("Because we find that the term 'legally obligated to pay' is not clear on its face or defined by the National Union insurance policy, we construe the ambiguity in favor of the insured. Therefore, we adopt the construction of the settlement agreement followed by a majority of jurisdictions, which treats the covenant not to execute as a contract and not as a release of liability on the part of the insured."); *see also Egger v. Gulf Ins. Co*., 588 Pa 287, 903 A2d 1219, 1225–26 (2006) (concluding that "term 'by reason of liability imposed by law' [in excess insurance policy was ambiguous because it] could mean, for example: (1) only after a judgment has been entered; (2) only after all appeals are exhausted and verdict stands; (3) only after efforts to execute judgment have begun; (4) the occurrence upon which the liability is based; or (5) only after the tender of primary coverage.") (bracketed material added).

Had *Stubblefield* employed – as it should have – the methodology for construing insurance policies, most currently reflected in *Hoffman Construction*, the court would have asked whether the phrase "legally

obligated to pay as damages" – undefined as it was in the doctor's policy – was capable of more than one reasonable meaning when viewed in the context of the doctor's policy as a whole. Consistent with the answer reached by courts elsewhere asking that question in the context of identical language, the court would have answered that question "yes." And that answer would have led the court to further conclude, consistent with *Hoffman Construction* and courts elsewhere, that the phrase had to be read against the doctor's insurer and in favor of the doctor.

(4) A court's task in construing a settlement agreement is to give effect to the intent of the parties by considering their agreement as a whole

In construing contracts, this court seeks to implement the intent of the parties by considering the contract terms in the context of the contract as a whole. *James v. Clackamas County*, 353 Or 431, 441-42, 299 P3d 526 (2013) (citing *Anderson v. Jensen Racing, Inc.*, 324 Or 570, 575-76, 931 P2d 763 (1997)). *Accord Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997) (court considers contract terms in the context of the parties' entire settlement agreement); *see also Harder Mech. Contractors, Inc. v. Fairfield Erectors, Inc.*, 278 Or 613, 618-19, 564 P2d 1356 (1977) (confirming that whether a party waives a legal right in an agreement is determined by considering the agreement as a whole and the circumstances surrounding execution of the agreement). Yet, in *Stubblefield*, the court did not consider the covenant there in the context of

the parties' entire settlement agreement, but focused on the covenant alone. 267 Or at 400-01.

Courts elsewhere that reject *Stubblefield*, relying on the same rules this court relies on for construing contracts, have sought to determine intent from considering the contract as a whole. In *Dowse,* for example, the court observed*:*

> "Policy considerations also support our joining the many courts which 'look with disfavor on the idea that a covenant not to enforce against one party automatically releases that party's insurance carrier.' First, holding that SGIC is not released from its obligations under Capitol's policy by the Dowses' settlement agreement with Cutter, Inc. forwards the important goal of enforcing the intentions of the parties to the agreement. As our Supreme Court has said, 'The fundamental rule, the rule which swallows up almost all others in construing a paper, is to give that meaning which will best carry into effect the intent of the parties.' In this case, our holding enforces the parties' clear intention that SGIC not be released."

263 Ga App at 442, 588 SE 2d at 239 (internal citations omitted).

Here, Brownstone and A&T intended that the agreement would compensate Brownstone for property damage caused by A&T allowing Brownstone to collect from A&T's insurers, including Capitol, to the extent their policies provided coverage. Had *Stubblefield* employed – as it should have – the court's methodology for construing contracts, the court would have asked whether the parties in *Stubblefield* had the same intent. And, consistent with the answer reached by courts elsewhere asking that question in construing similarly structured settlement agreements, the court would have answered that question "yes."

(5) *Stubblefield* failed to consider the court's policy of favoring settlements and their implementation

Settlement agreements are favored by the law, *Davis v. Brown*, 280 Or 561, 571 P2d 912 (1977) (so stating); *Butson v. Misz*, 81 Or 607, 612, 160 P 530 (1916) (same), a principle also reflected in *Groce*. Yet, that principle was never considered in *Stubblefield*. Again, courts elsewhere rejecting *Stubblefield* have done so based on that principle. In *Midwestern Indem. Co. v. Laikin*, 119 F Supp 2d 831, 854 (SD Ind 2000), for example, the court observed:

> "[A]n insured who has been forced by his insurer to pay for his own defense and to face huge personal liability would be in a no-win, or perhaps a 'no-settlement,' situation. If the covenant not to execute lets the insurer off the hook completely, the insured and the injured parties would not be able to allocate between themselves the risks created by uncertainty over insurance coverage. The injured parties would have no incentive to settle their tort claims until after the coverage issue was resolved, perhaps years later."

Accord Campione v. Wilson, 422 Mass 185, 661 NE 2d 658, 663 (1996) ("It is appropriate to give effect to agreements which have led to a carefully negotiated and detailed settlement, in which the plaintiffs have voluntarily assumed the burden of proving any claims that [the tortfeasor] might have against [its liability insurer] * * *.") (bracketed material added).

While *Stubblefield* does not necessarily prevent settlements completely, it can render them futile, if not illusory. Since *Stubblefield* was decided, Oregon lawyers have had to resort to convoluted and artificial

settlement agreements to try and avoid *Stubblefield*'s reach.[21] Many of their efforts have not been successful. And some practitioners, this case being an example, have simply fallen into the "*Stubblefield* trap."

Rather than encouraging and implementing settlements, *Stubblefield* has the opposite effect – it yields costly litigation that, when unsuccessful, also deprives the settling parties of the judgment creditor's intended potential source of payment (leaving the creditor unpaid or having to pursue even more litigation – a costly and uncertain malpractice claim against the creditor's own attorney). Had the court considered these consequences on settlements in *Stubblefield*, it would have concluded, as other courts have, that the consequences are inconsistent with the principle of encouraging and implementing settlements.

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[21] *See, e.g., Lancaster*, 302 Or 62; *Collins v. Fitzwater*, 277 Or 401, 560 P2d 1074 (1977); *Brownstone*, 255 Or App 390; *Terrain Tamers v. Insurance Marketing Corp.*, 210 Or App 534, 152 P3d 915 (2007)*; Goddard v. Farmers Ins. Co. of Oregon*, 202 Or App 79, 120 P3d 1260 (2005), *opinion adhered to as modified on reconsideration*, 203 Or App 744,126 P3d 682 (2006), *aff'd as modified*, 344 Or 232,179 P3d 645 (2008); *Holloway v. Republic Indemnity Co. of America*, 201 Or App 376,119 P3d 239 (2005), *rev'd on other grounds*, 341 Or 642,147 P3d 329 (2006); *Warren v. Farmers Ins. Co. of Oregon*, 115 Or App 319, 838 P2d 620 (1992); *Far West Federal Bank v. Transamerica Title Ins.*, 99 Or App 340, 781 P2d 1259 (1989), *rev den*, 309 Or 441 (1990); *Oregon Mutual Ins. Co. v. Gibson*, 88 Or App 574, 746 P2d 245 (1987). *See also A&T Siding, Inc. v. Capitol Specially Ins. Corp*., 2012 WL 707100 (D Or, Mar 12, 2012*); A & T Siding, Inc. v. Capitol Specially Ins. Corp*., 2011 WL 3651777 (D Or, Aug 18, 2011) (submitted for decision to Ninth Circuit Court of Appeals on July 10, 2013).

(6) An insurer that has abandoned its insured is in no position to challenge an insured's decision to settle in a way that protects the insured, particularly when the challenge, if successful, results in a windfall for the insurer

This case involves an insurer who refused to defend or indemnify its insured even though, as Brownstone claims, there was coverage under Capitol's policy for the property damage Brownstone suffered. *Stubblefield* did not consider that factor. Other courts have in rejecting *Stubblefield's* result.

Metcalf v. Hartford Accident & Indemnity Co., 176 Neb 468, 126 NW 2d 471 (1964), illustrates the point. There, the plaintiff (Metcalf) sued the driver of a car (Holder) that collided with Metcalf. The defendant (Hartford) refused to defend Holder. As part of a settlement, Holder consented to an entry of judgment against him and Metcalf agreed not to attempt collection from any assets of Holder's other than any insurance policies that covered him for the collision.

Metcalf then garnished Hartford seeking payment of the judgment. Hartford defended arguing, in part, that its policy obligated it to pay "all sums which the insured shall become legally obligated to pay as damage" and the judgment and the agreement between Metcalf and Holder created no obligation to pay by Holder and, therefore, no obligation to pay by Hartford. 176 Neb at 474, 126 NW 2d at 475.

The Nebraska Supreme Court rejected Hartford's argument, concluding that the judgment created a legal liability within the meaning of the policy. The court said:

> "[Hartford] is obligated under its insurance policy to defend the suit brought against Holder, an additional insured. This it refused to do. Holder was thereupon required to engage an attorney and provide his own defense. With [Hartford] denying liability, Holder was entitled to use all reasonable means of avoiding personal liability. It was to Holder's personal interest to consent to the $4500 judgment and accept an agreement from [Metcalf] not to execute on Holder's property other than any rights to indemnity he might have in the designated insurance policies. The matter is of no consequence to [Hartford] if its claim of nonliability is correct." Since its claim of nonliability has no validity, and it having declined to defend the action when called upon to do so, [Hartford] is in no position to attack the judgment in the absence of fraud, collusion or bad faith."

176 Neb at 475, 126 NW 2d at 475-76 (bracketed material added).

In *Guillen*, the court followed *Metcalf*'s reasoning. There, the court said:

> "The rationale supporting this technical construction of the 'legally obligated to pay' language is that 'an insurer who has abandoned the insured by refusing to defend a claim should not be allowed to 'hide behind' the policy language.' *Gainsco [Insurance Co. v. Amoco Production Co*., 53 P3d 1051, 1060–61 (Wyo 2002)]. Further, some courts have observed that if the 'legally obligated to pay' language were construed in favor of the insurers, it would defeat the very purpose of the settlement agreement entered into by the insured. And, since the insured has the right to protect itself after the insurer breaches its duty to defend, public policy generally supports giving a technical construction to the 'legally obligated to pay' language. Thus, the prevailing view is that a liberal construction of the words 'legally obligated to pay' in favor of the insured is appropriate, once the insurer has breached its duty to defend.
>
> "We agree with the majority view regarding the construction given the 'legally obligated to pay' language. *Once the insurer*

> *has breached its duty to defend, it is in no position to demand that the insured be held to a strict accounting under the policy language. Fairness requires that the insured, having been wrongfully abandoned by the insurer, be afforded a liberal construction of the 'legally obligated to pay' language*."

203 Ill 2d at 161, 785 NE 2d at 13 (emphasis and bracketed material added; internal citations not involving quoted material omitted). *Accord Black v. Goodwin, Loomis & Britton, Inc.*, 239 Conn 144, 154-56, 681 A2d 293, 299-300 (1996) (reaching same conclusion where insurer refused to defend and insured entered into stipulated judgment with injured party and assigned any claims to injured party that insured had against its insurer); *see also Pruyn v. Agricultural Ins. Co*., 36 Cal App 4th 500, 522, 42 Cal Rptr 2d 295, 308 (Cal App 2 Dist 1995) (when an insurer who agrees to pay damages which an insured becomes "legally obligated to pay" wrongfully denies coverage or defense, the insured may negotiate a settlement with the plaintiff, including a stipulated judgment and a covenant not to execute, without forfeiting right to coverage); *Whatley v. City of Dallas*, 758 SW 2d 301, 309 (Tex App – Dallas 1988), *writ denied* (1989) ("As a rule, a claimant who covenants not to enforce any judgment he might obtain against an insured individually does not release the insurer who has wrongfully refused to defend its insured from liability within policy limits.");[22] *Griggs v. Bertram*, 88 NJ 347, 369, 443 A 2d 163, 175 (1982)

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[22] The court in *Whatley* further explained the rationale for the rule it adopted the following way:

> "Inasmuch as the judgment creditor has the right to enforce his judgment against both the insured and the insurer independently, agreeing not to enforce it against the insured

(stating that "[a]n insured tortfeasor should be able to reach an agreement relieving it of liability when its carrier wrongfully declines to defend. In this way an insured is able to retain the protection of its insurance, while the injured party obtains a potential remedy against the insurer who has wrongfully removed itself from the suit.").[23]

Moreover, if Brownstone is correct that Capitol had a duty to defend A&T and to pay the judgment,[24] and the Court of Appeals' decision is affirmed, Capitol will gain a windfall as a result of an innocent, inadvertent drafting error in the agreement. As this court has stated in another context, that result would be "unjust." *See Van v. Fox*, 278 Or 439, 453, 564 P2d 695 (1977) (allowing specific performance of a joint venture agreement

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> does not affect his right to enforce it against the insurer. *The policy basis for the rule is that it reasonably allows the insured who is wrongfully left to defend himself to secure protection against his own individual liability and hold his defense costs to a minimum.*"

758 SW 2d at 309-10 (emphasis added).

[23] Indeed, before *Stubblefield*, that rationale had been recognized by this court in the related context of consent-to-settle provisions in insurance policies. *See Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Or 110, 116, 341 P2d 110 (1959) ("A valid excuse is established, which releases the insured from complying with the provisions of the policy against settlement of a claim without the insurer's consent and those requiring that the claim be reduced to judgment, when the insurer denies liability under the contract and refuses to defend its assured."); *Jaloff v. United Auto Indemnity Exchange*, 121 Or 187, 198-200, 253 P 883 (1927) (same).

[24] Would Capitol mount such a militant, not to say expensive, defense on procedural grounds if it truly believed there it did not have a duty to defend A&T pay the judgment?

because, to do otherwise, "would not only be unfair to plaintiffs but would also provide the defendants, who have breached this contract, with an unjust windfall.").

This court never considered these important issues in *Stubblefield*. Had it, like courts elsewhere, the court would have concluded that the doctor's insurer was obligated to pay the balance of the judgment.

(7) *Stubblefield* is inconsistent with *Groce*

Finally, *Stubblefield* never considered the principle that the court found significant in *Groce* – settling parties' clearly intended rights against a liability insurer, that otherwise exist and obligate an insurer to pay a judgment, cannot be defeated by insurers' relying on "inartfully worded assignments." As noted, in *Stubblefield*, the parties clearly intended that the doctor's liability insurer would be the source of payment of the judgment, notwithstanding the covenant's language. Thus, *Stubblefield* is inconsistent with *Groce*.

b. The surrounding statutory law has altered some essential legal element assumed in *Stubblefield*

The legislature, in enacting ORS 31.825, sought to abrogate *Stubblefield's* central analytical premise – if a judgment debtor assigns its claims against its liability insurer, in exchange for an unconditional covenant not to execute against the judgment debtor's assets, the insurer has no obligation to pay the judgment. That is, through ORS 31.825, the legislature has now expressed its disapproval of that premise directing that,

notwithstanding such a covenant, the assignment should be enforced against an insurer unless its terms state otherwise. *Stubblefield* frustrates that existing legislative policy.

Also, in enacting ORS 701.073, the legislature has sought to protect the public from losses caused by faulty construction through ensuring that the contractor's liability insurance would be the source of that protection if it otherwise covered the contractor's conduct and the resulting loss. But *Stubblefield* protects insurers from paying judgments that settling parties clearly intended would be paid by otherwise available liability insurance. And so, as applicable here, *Stubblefield* leaves Brownstone -- the "public" that ORS 701.073 was intended to protect -- without Capitol's policy as a potential source of payment of over $1 million. *Stubblefield* thus frustrates the existing legislative policy embodied in ORS 701.073.

In sum, almost all courts elsewhere that have considered *Stubblefield* have now rejected its analysis or result.[25] Accordingly, if this court concludes that the lower courts properly construed ORS 18.352 and 31.825, the court should overrule *Stubblefield* and establish the common law rule that, notwithstanding an unconditional covenant not to execute

[25] Included for the court's convenience, as an appendix to this brief, is a compilation by state of court decisions that have rejected *Stubblefield*'s analysis or result. As far as Brownstone has been able to determine, while a number of states have not addressed *Stubblefield*, for those that have, only the North Carolina intermediate appellate court presently aligns itself fully with the decision. *See North Carolina Farm Bureau Mut. Ins. Co. v. Smith*, 743 SE 2d 647, 649 (NC App 2013) (supporting statement).

against a judgment debtor's assets, when a liability insurer breaches its duty to defend and the insured, acting in its own defense, reasonably settles the claim, the insurer is liable for the amount of the settlement (up to policy limits) if the insured's conduct and resulting damages that led to the judgment were otherwise covered under the insured's liability policy.[26]

VII. CONCLUSION

The lower courts' decisions should be reversed and the case remanded to the trial court to determine whether Brownstone is entitled to garnish Capitol's policy to satisfy the judgment.

Dated this 13th day of September, 2013.

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Of Attorneys for Petitioner on Review

[26] A rule, in fact, that is consistent with the one adopted by the Court of Appeals in *Northwest Pump v. American States Ins. Co.*, 144 Or App 222, 226, 925 P2d 1241 (1996), admittedly without considering *Stubblefield*.

APPENDIX

Alabama

Liberty Mut. Ins. Co. v. Wheelwright Trucking Co., Inc., 851 So 2d 466, 489 (Ala 2002)

Alaska

Great Divide Ins. Co. v. Carpenter ex rel. Reed, 79 P3d 599, 608 (Ak 2003)

Arizona

State Farm Mut. Auto. Ins. Co. v. Paynter, 122 Ariz 198, 203, 593 P2d 948, 953 (App 1979).

California

Pruyn v. Agricultural Ins. Co., 36 Cal App 4th 500, 522, 42 Cal Rptr 2d 295, 308 (Cal App 2 Dist 1995)

Colorado

Nunn v. Mid-Century Ins. Co., 244 P3d 116, 122 (Colo 2010)

Connecticut

Black v. Goodwin, Loomis & Britton, Inc., 239 Conn 144, 156, 681 A2d 293, 300 (1996)

Florida

Steil v. Florida Physicians' Ins. Reciprocal, 448 So 2d 589, 591 (Fla Dist Ct App 1984)

Georgia

Dowse v. S. Guar. Ins. Co., 263 Ga App 435, 439, 588 SE2d 234, 237 (2003), *aff'd*, 278 Ga 674, 605 SE 2d 27 (2004).

Hawaii

McLellan v. Atchison Ins. Agency, Inc., 81 Haw 62, 67-68, 912 P2d 559, 565 (Haw App 1996)

Illinois

Guillen ex rel. Guillen v. Potomac Ins. Co. of Illinois, 203 Ill 2d 141,161, 785 NE2d 1,13 (2003)

Indiana

Am. Family Mut. Ins. Co. v. Kivela, 408 NE 2d 805, 813 (Ind App 1980)

Iowa

Red Giant Oil Co. v. Lawlor, 528 NW 2d 524, 529 (Iowa 1995)

Kansas

Glenn v. Fleming, 247 Kan 296, 318, 799 P2d 79, 92 (1990)

Kentucky

Associated Ins. Serv., Inc. v. Garcia, 307 SW 3d 58, 65 (Ky 2010)

Louisiana

Sumrall v. Bickham, 887 So 2d 73, 78 (La App), *writ denied*, 891 So 2d 696 (La 2005)

Maine

Patrons Oxford Ins. Co. v. Harris, 905 A2d 819, 827 n 7 (Me 2006)

Massachusetts

Campione v. Wilson, 422 Mass 185,192-93, 661 NE2d 658, 663 (1996)

Michigan

Alyas v. Gillard, 180 Mich App 154,161, 446 NW 2d 610, 613 (1989)

Minnesota

Jorgensen v. Knutson, 662 NW 2d 893, 904 (Minn 2003)

Nebraska

Metcalf v. Hartford Accident & Indemnity Company, 176 Neb 468, 474-75, 126 NW 2d 471, 475-76 (1964).

New Hampshire

Stateline Steel Erectors, Inc. v. Shields, 150 NH 332, 335, 837 A2d 285, 288 (2003)

New Jersey

Griggs v. Bertram, 88 NJ 347, 370, 443 A2d 163,174 (1982)

New York

Westchester Fire Ins. Co. v. Utica First Ins. Co., 40 AD 3d 978, 980-81, 839 NYS 2d 91, 94 (2007)

North Dakota

Wangler v. Lerol, 670 NW 2d 830, 837 (ND 2003)

Pennsylvania

Alfiero v. Berks Mut. Leasing Co., 347 Pa Super 86, 90, 500 A 2d 169,171 (1985), *appeal denied* (Sept 9, 1986)

Rhode Island

DeMarco v. Travelers Ins. Co., 26 A3d 585, 623-24 (RI 2011)

South Carolina

*Fowler v. Hunter***,** 388 SC 355, 362, 697 SE 2d 531, 535 (2010)

South Dakota

Kobbeman v. Oleson, 574 NW 2d 633, 637 (SD 1998)

Tennessee

Tip's Package Store, Inc. v. Commercial Ins. Managers, Inc., 86 SW 3d 543, 555 (Tenn App 2001)

Texas

Whatley v. City of Dallas, 758 SW 2d 301, 309 (Tex App – Dallas 1988), *writ denied* (1989)

Utah

Gibbs M. Smith, Inc. v. U.S. Fid. & Guar. Co., 949 P2d 337, 344 (Utah 1997)

Virginia

Aetna v. Price, 206 Va 749, 760-61,146 SE 2d 220, 227-28 (1966).

Washington

Kagele v. Aetna Life and Casualty Co., 40 Wash App 194,198-200, 698 P2d 90, 93-94, *rev den*, 103 Wash 2d 1042 (1985)

Wyoming

Gainsco Ins. Co. v. Amoco Prod. Co., 53 P3d 1051, 1060-61 (Wyo 2002)

CERTIFICATE OF COMPLIANCE
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I certify that the brief complies with the "length" provisions of ORAP 5.05(2)(b)(ii) in that:

1. It contains 11,847 words, exclusive of those items excludable under ORAP 5.05(2)(a).

2. Its type face is proportionally spaced and is 14-point.

3. In preparing this certificate, I have relied on the word count of the word processing system used to prepare the brief.

DATED: September 13, 2013

/s/ Thomas W. Brown
Thomas W. Brown

CERTIFICATE OF FILING AND MAILING

I hereby certify that I electronically filed the foregoing **PLAINTIFF'S BRIEF ON THE MERITS** with the State Court Administrator by using the Oregon Appellate efiling system on the 13th day of September, 2013.

I further certify that I electronically-served the foregoing **PLAINTIFF'S BRIEF ON THE MERITS** upon the persons listed below that are registered efilers, by using the Oregon Appellate eFiling system on the 13th day of September, 2013.

Any person listed below that is not a registered efiler was served by depositing in the United States Post Office, at Portland, Oregon on 13th day of September, 2013, a true and correct copy, in a sealed envelope with the postage pre-paid, addressed to the said person(s) at the address(es) shown below:

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