IN THE SUPREME COURT OF THE STATE OF OREGON

KEVIN RAINS AND MITZI RAINS,
Plaintiffs-Respondents/
Respondents on Review,

v.

STAYTON BUILDERS MART, INC.; JOHN DOE LUMBER SUPPLIER; JOHN DOE LUMBER MILL; AND FIVE STAR CONSTRUCTION, INC.,
Defendants.

STAYTON BUILDERS MART, INC.,
Third-Party Plaintiff-Respondent/
Respondent on Review,

v.

RSG FOREST PRODUCTS, INC., *et al*.,
Third-Party Defendants,

and

WEYERHAEUSER COMPANY,
Third-Party Defendant-Appellant/
Petitioner on Review.

WEYERHAEUSER COMPANY,
Fourth-Party Plaintiff,

v.

RODRIGUEZ & RAINS CONSTRUCTION, an Oregon corporation,
Fourth-Party Defendant.

WITHERS LUMBER COMPANY,
Fourth-Party Plaintiff,

v.

SELLWOOD LUMBER CO., INC., an Oregon corporation; and

Marion County Circuit Court
Case No. 06C21040

Court of Appeal A145916

Supreme Court No. S062959

July 2015

WEYERHAEUSER COMPANY,
Fourth-Party Defendants.

WESTERN INTERNATIONAL FOREST PRODUCTS, INC.,
Fourth-Party Plaintiff,

v.

BENITO RODRIGUEZ, KEVIN RAINS, AND RODRIGUEZ & RAINS CONSTRUCTION,
Fourth-Party Defendants.

SELLWOOD LUMBER CO., INC.,
an Oregon corporation,
Fifth-Party Plaintiff,

v.

SWANSON BROS. LUMBER CO., INC.,
an Oregon corporation,
Fifth-Party Defendant.

REPLY BRIEF ON MERITS OF WEYERHAEUSER COMPANY

On Petition for Review of the Opinion of the Court of Appeals
On Appeal from the Judgments of the Circuit Court for Marion County,
Honorable Dennis J. Graves, Circuit Court Judge

Court of Appeals Opinion Filed: August 13, 2014
Reconsideration Denied: December 10, 2014
Author of Opinion: Ortega, P.J.
Concurring Judges: Sercombe, Hadlock, J.J.

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July 2015

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PETITIONER'S REPLY ON THE MERITS

I. Oregon Law Required Dismissal of Plaintiffs' Claims against Stayton Because Plaintiffs and Stayton No Longer Were Adverse as a Result of the Mary Carter Agreement

Oregon law requires dismissal of claims when a justiciable controversy no longer exists between the parties. *See Brown v. Or. State Bar,* 293 Or 446, 449, 648 P2d 1289 (1982) (courts may not exercise jurisdiction in the absence of a justiciable controversy or "an actual and substantial controversy between parties having adverse legal interests"). That rule required dismissal of plaintiffs' claims against Stayton in this case. After entering the Mary Carter agreement, no justiciable controversy existed between plaintiffs and Stayton because their interests no longer were adverse and, instead, both parties sought the same outcome at trial. *See Or. Med. Ass'n v. Rawls*, 276 Or 1101, 1105, 557 P2d 664 (1976) (no justiciable controversy existed when plaintiff's and defendant's interests were not adverse and both parties sought same outcome). Permitting Stayton to participate as a defendant at trial, even though Stayton's interests were aligned with plaintiffs, was prejudicial error.

A. No Adversity Existed between Plaintiffs and Stayton after Those Parties Entered the Mary Carter Agreement

Plaintiffs do not dispute that a Mary Carter agreement destroys adversity between the settling parties in cases where the agreement causes the settling defendant's primary interest at trial to be securing a favorable verdict for the

plaintiffs. Instead, plaintiffs deny that the Mary Carter agreement in this case affected Stayton's interests or its alignment as a defendant on plaintiffs' claims. (Resp Merits Br at 12-18.)[1] According to plaintiffs, the Mary Carter agreement merely limited Stayton's potential liability and provided no financial incentive for Stayton to advocate for a jury verdict with a high damages award in favor of plaintiffs. (*Id*.) But both the terms of the agreement and Stayton's conduct at trial contradict plaintiffs' attempt to recast Stayton's financial interests under the agreement.

As the Court of Appeals correctly recognized, Stayton's interests at trial dramatically changed after it promised to pay plaintiffs at least $1.5 million in exchange for Rains's dismissal of his negligence claim against Stayton and both plaintiffs' promises to allow Stayton to keep recovery of its settlement payment from Weyerhaeuser in indemnity. *See Rains v. Stayton Builders Mart, Inc.*, 264 Or App 636, 645, 647, 336 P3d 483 (2014) (acknowledging agreement caused Stayton to have "an interest in the jury finding both it and Weyerhaeuser liable for at least $1.5 million"). Before the agreement, Stayton's primary interests at

[1] Plaintiffs dispute that their agreement qualifies as a Mary Carter agreement. (Resp Merits Br at 12.) As this Court observed in *Grillo v. Burke's Paint Co.*, 275 Or 421, 425, 551 P2d 449 (1976), however, Mary Carter agreements "take on various forms" in different cases. *See also, e.g., Jett v. Ford Motors Co.*, 192 Or App 113, 116 n 3, 84 P3d 219 (2004) (describing settlement agreements requiring settling defendants to remain in case as Mary Carter agreements).

trial were defeating plaintiffs' claims and proving Rains's comparative fault for the accident. Although Stayton sought indemnity from Weyerhaeuser in the event that Stayton lost to plaintiffs, that indemnity claim created no adversity between Stayton and Weyerhaeuser as to plaintiffs' claims. Because Stayton maintained that it supplied only boards from Weyerhaeuser, both Stayton and Weyerhaeuser were interested in having the jury understand that Weyerhaeuser could not have manufactured the board because the mill at issue was incapable of milling logs large enough to produce a board with a knot of the size alleged in this case. Both Stayton and Weyerhaeuser also were interested in proving Rains's comparative fault for walking across an exposed board at a significant height without safety protection. Stayton was to try its indemnity claim to the court only if plaintiffs prevailed on their claims, and its claim gave no reason for Stayton to seek a liability verdict or large damages award for plaintiffs.

After entering the Mary Carter agreement, however, Stayton became the holder of a $1.5 million stake in plaintiffs' claims. Although plaintiffs stress that the agreement provided that Stayton could be held liable for up to $500,000 above its $1.5 million minimum payment (Resp Merits Br at 12-15), that term created no adversity between plaintiffs and Stayton. Weighing the benefit of recovering its $1.5 million payment against a hypothetical risk of $500,000 in potential additional liability, the only rational economic choice for Stayton was

clear: Stayton needed to bolster plaintiffs' case and assist plaintiffs in securing a large verdict against both defendants so that Stayton could fully recover its settlement costs. Trying to defend against plaintiffs' claims or limit plaintiffs' damages would only risk Stayton's chance to recover its $1.5 million minimum payment—and taking such a risk would make no economic sense when the Mary Carter agreement expressly authorized Stayton to recoup any settlement liability owed as a result of a jury verdict over $1.5 million.

Because the Mary Carter agreement gave Stayton a compelling financial interest to advance plaintiffs' case, this case differs significantly from the cases that plaintiffs cite in claiming the existence of a justiciable controversy. In *Dew v. City of Scappoose*, 208 Or App 121, 145 P3d 198 (2006), *rev den*, 342 Or 416, 154 P3d 722 (2007), for example, the Court of Appeals examined whether adversity was destroyed by a settlement agreement providing that the plaintiff would not enforce any judgment above the settling defendant's insurance limits if the settling defendant promised to discontinue public attacks on the plaintiff's character and to cooperate with any enforcement action on the judgment. *Id.* at 127. Notably, however, the agreement set only a ceiling on the defendant's potential liability, and it expressly provided that the settling defendant denied liability and was free to contest the plaintiff's claims at trial. *Id.* at 143-44. Given the fact the defendant contested liability and would owe nothing if he

defeated the plaintiff's claims, the Court of Appeals concluded that the parties remained in an adversarial relationship, even if their agreement insulated the defendant from any judgment above his insurance limits. *Id*. Unlike the Mary Carter agreement in this case, the settlement agreement in *Dew* only limited the maximum amount of potential liability and provided no incentive for the defendant to advance the plaintiffs' claims.

The other cases cited by plaintiffs are similarly inapposite. Relying on their characterization of the Mary Carter agreement as a "high-low agreement" with no financial incentives for Stayton to advance plaintiffs' case, plaintiffs claim that "[o]ther courts have recognized that high-low agreements are lawful and do not raise the concerns associated with Mary Carter agreements." (Resp Merits Br at 16.) In fact, other courts—including the ones that plaintiffs cite—stress that "high-low" agreements raise many of the same concerns about distortion of the adversarial process and justiciability as traditional Mary Carter agreements. *See, e.g., Monti v. Wenkert*, 947 A2d 261, 275-77 (Conn 2008) (stating same); *Hodesh v. Korelitz*, 914 NE2d 186, 190-11 (Ohio 2009) (same). Indeed, in each case cited by plaintiffs, the courts held that the agreements at issue were lawful or did not destroy adversity primarily because the agreements did not contains financial incentives for the settling defendant to assist the plaintiff in recovering at trial or otherwise change the alignment of the parties.

See Monti, 947 A2d at 275-78 (same); *Hodesh*, 914 NE2d at 190-11 (same); *Freed v. Salas*, 780 NW2d 844, 855 (Mich App 2009) (same); *Cardona v. Metro Dade Transit*, 680 So2d 1098, 1099 (Fla App 1996) (same); *Gulf Indus., Inc. v. Nair*, 953 So2d 590, 593-94 (Fl App 2007) (same).

In sharp contrast to those cases, the agreement in this case included a strong incentive for Stayton to advance plaintiffs' claims: Stayton stood to recover its $1.5 million minimum settlement payment only if the jury returned a verdict for at least $1.5 million against both defendants. Throughout the trial—while ostensibly appearing as a defendant against plaintiffs' claims—Stayton acted consistently with its interest in obtaining a favorable verdict for plaintiffs. (*See* Pet Merits Br at 15-19 (citing examples of same).) Other jurisdictions may permit a defendant to participate as a defendant at trial even when the interests of the defendant and the plaintiff no longer are adverse. *See, e.g.*, *Alcala Co. v. Superior Ct*., 57 Cal Rptr 2d 349, 356 (Cal App 4th 1996) (discussing same and stating "[t]hat settling parties are no longer involved in an actual controversy and their interests are no longer adverse [as a result of a Mary Carter agreement], however, is not sufficient to preclude settling defendants from participating in trial"). Oregon law, however, does not authorize such a result. *Brown*, 293 Or at 449 (justiciable controversy requires "actual and substantial controversy between parties having adverse legal interests"). After entering the

agreement, Stayton and plaintiffs no longer were adverse, and no justiciable controversy existed between them. Dismissal was required.

B. The Failure to Dismiss Stayton Was Not Harmless Error

In seeking to avoid reversal, plaintiffs also argue that any legal error in permitting Stayton to participate as a defendant against plaintiffs' claims at trial was harmless as to Weyerhaeuser. (Resp Merits Br at 21-26.) In making that argument, however, plaintiffs ignore that they elected not to assert direct claims against Weyerhaeuser in this action, with Weyerhaeuser appearing solely as a result of Stayton's third-party complaint. (ER-1-10.) In view of that posture, Weyerhaeuser's potential for liability in this action would have ended if the trial court had dismissed plaintiffs' claims against Stayton at the outset of trial as it should have done. At that point, plaintiffs would have been required either to proceed with their separate action against Weyerhaeuser or to obtain leave from the trial court to assert direct claims against Weyerhaeuser under ORCP 22 C.[2] In either event, Stayton would not have been able to bolster plaintiffs' case by appearing at trial as a defendant on plaintiffs' claims. *See Bocci v. Key Pharms., Inc.*, 158 Or App 521, 558, 974 P2d 758 (1999) (*en banc*) (affirmed

[2] As noted (*see* Pet Merits Br at 10 n 2), plaintiffs filed a separate action against Weyerhaeuser based on the same accident that is being held in abeyance pending the outcome of this case. *See Rains v. Weyerhaeuser*, Marion County Case No. 09C15962; *see* OEC 201 (permitting judicial notice of facts capable of accurate and ready determination).

by equally divided court) (Landau, J., dissenting), *vac'd on other grounds*, 332 Or 39 (2001) (discussing harm flowing from misalignment of defendant).

Plaintiffs also are wrong in claiming that Stayton's misalignment at trial resulted in no prejudice to Weyerhaeuser because the trial court adequately explained Stayton's interests under the agreement to the jury. The trial court prohibited Weyerhaeuser from introducing the specific terms of the agreement. (Tr-257-58.) Although the trial court provided a general instruction stating that Stayton and plaintiffs had entered a settlement, it instructed that the jury "will not hear the terms of that settlement" (Tr-1676-77), and it gave only a vague explanation of Stayton's financial interests under the agreement. (*See* Tr-269 (instruction on same).) With Weyerhaeuser unable to introduce the terms of the agreement to the jury, Stayton and plaintiffs were able to argue that Stayton entered the agreement for altruistic motives and that Weyerhaeuser was unreasonable for defending against plaintiffs' claims. (*See* Pet Merits Br at 16-19; ER-24-50.) Stayton also was able to use its status as a defendant to fill in gaps in plaintiffs' case and to advance plaintiffs' position. (*See, e.g.*, Pet Merits Br at 15-16 (citing examples of same).) The trial court's jury instructions did not render the failure to dismiss Stayton as harmless. *See Bocci*, 158 Or App at 559 (Landau, J., dissenting) (abbreviated summary of Mary Carter agreement insufficient).

Finally, contrary to plaintiffs' argument (Resp Merit Br at 19-20, 24-26), Stayton's trial tactics cannot be explained as simply an effort to prove Stayton's indemnity claim. Plaintiffs try to argue otherwise by observing that the indemnity claim required Stayton to be liable to plaintiffs (*see id.* at 20), but Stayton would have no need to seek indemnity if the jury returned a defense verdict. Stayton's collusion with plaintiffs at trial was fueled by its interests under the Mary Carter agreement, not its indemnity claim. Although plaintiffs argue that Weyerhaeuser should have objected to Stayton's questioning of witnesses and closing argument (Resp Merits Br at 24-26), plaintiffs identify no legal or evidentiary objections that Weyerhaeuser could have raised. Indeed, plaintiffs simultaneously argue that Weyerhaeuser had no basis for objecting because Stayton was free to pursue its strategy as it wished at trial. (*Id*.) The failure to dismiss Stayton was prejudicial, requiring reversal of the judgment against Weyerhaeuser and remand for entry of a judgment of dismissal.

II. Oregon Law Required Admission of the Mary Carter Agreement at Trial at Weyerhaeuser's Request, and Exclusion of the Agreement Was Prejudicial Error

Even if this Court concludes that a justiciable controversy still existed between plaintiffs and Stayton, Oregon law required the admission of the Mary Carter agreement in evidence at the request of Weyerhaeuser. *Grillo v. Burke's Paint Co.*, 275 Or 421, 427, 551 P2d 449 (1976). In ruling that both "the terms

of the agreement and the fact that insurance is involved would not be admissible at trial" for any purpose, the trial court committed prejudicial error. (Tr-258.)

A. Weyerhaeuser Was Entitled to Introduce the Terms of the Mary Carter Agreement, Including Insurance References, to Prove Stayton's Bias and Interests

Plaintiffs do not dispute that the trial court prohibited Weyerhaeuser from introducing the terms of the Mary Carter agreement for any purpose at trial. Instead, plaintiffs claim that Weyerhaeuser sought admission of the agreement only for the improper purpose of showing that Stayton was insured to influence the jury's apportionment of fault and damages. (Resp Merits Br at 27-29.) In disputing Weyerhaeuser's assertion that it sought admission of the insurance terms to show Stayton's bias and motives for entering the agreement, plaintiffs contend that evidence of insurance never has relevance to proving that "a party [is] biased, or motivated to capitulate, or side with one party over another." (*Id.* at 28.) Plaintiffs are wrong.

Before trial—outside of the presence of the jury—Stayton's counsel acknowledged that Stayton's motive for entering the Mary Carter agreement was "to give Stayton Builders Mart individually … protection so that Stayton Builders Mart is not personally liable beyond its insurance policy limits." (Tr-256.) In seeking to admit the Mary Carter agreement in its entirety, including insurance references that plaintiffs and Stayton inserted into the agreement,

Weyerhaeuser first argued that the jury was entitled to know the terms of the agreement. (Tr-245.) As to the insurance terms specifically, Weyerhaeuser further argued that the jury should know that Stayton agreed to settle within its insurance limits. (Tr-245-46.) In making that argument, Weyerhaeuser was not suggesting—as plaintiffs contend (Resp Merits Br at 28)—that insurance was relevant to Stayton's liability. Instead, Weyerhaeuser sought to introduce the insurance terms to show that Stayton's motive for entering the agreement was to avoid exposure over its insurance limits—not to "step up to the plate" in recognition of its fault, as both plaintiffs and Stayton represented to the jury. (*See, e.g.*, Tr-1598-1600, Tr-1574 (arguing same).) With the jury being advised of Stayton's settlement, Weyerhaeuser also sought to avoid the risk of the jury finding liability and allocating fault to Weyerhaeuser solely to protect Stayton from having to bear its $1.5 million minimum payment alone. (Tr-245-46.) Neither of Weyerhaeuser's purposes for admitting the insurance terms was improper. *See Bocci*, 158 Or App at 560-61 (Landau, J., dissenting) (noting OEC 411(2) "permits evidence of insurance to show 'bias, prejudice or motive of a witness'"). Weyerhaeuser should have been permitted to admit the full agreement in evidence, and exclusion of that agreement was prejudicial error.

B. Weyerhaeuser Adequately Preserved Its Arguments and Showed Prejudice from the Exclusion of the Mary Carter Agreement at Trial

In addition to arguing that Weyerhaeuser sought to admit the Mary Carter agreement for an improper purpose, plaintiffs also claim that Weyerhaeuser failed to adequately preserve its arguments about the admissibility of the Mary Carter agreement at trial. (Resp Merits Br at 26-34.) According to plaintiffs, to preserve its challenge to the exclusion of the agreement, Weyerhaeuser was required to make a more specific offer of proof to show the relevance of the agreement to bias. (*Id*. at 31-33.) No support exists for plaintiffs' position.

Before trial, Weyerhaeuser expressly sought a ruling on the admissibility of the Mary Carter agreement. (Tr-245-46.) The trial court unequivocally ruled that the Mary Carter agreement was not admissible for any purpose at trial. (Tr. 257-58.) The trial court subsequently made clear that it meant what it said in its pretrial ruling, specifically instructing the jury that it "will not hear the terms of that settlement" between Stayton and plaintiffs. (Tr-1676-77.)

Although plaintiffs argue otherwise, Weyerhaeuser was not required to make any additional offer of proof to prove the relevance of the agreement or to establish prejudice from its exclusion. Weyerhaeuser offered evidence of the specific terms of the agreement into the record, including Stayton's promise to pay at least $1.5 million in exchange for plaintiffs' promise to allow Stayton to

keep up to $2 million of any recovery from Weyerhaeuser in indemnity. Those terms clearly were relevant to show Stayton's bias and interest in advancing plaintiffs' claims at trial. *See, e.g.*, *State v. Hubbard*, 297 Or 789, 796, 688 P2d 1311 (1984) (evidence is relevant to show bias if it has "mere tendency to show the bias or interest of the witness"); *cf. also, e.g.*, *Hatfield v. Continental Imports, Inc*., 610 A2d 446, 452 (Pa 1992) (Mary Carter agreements must be disclosed to factfinder when potential for bias). The record is clear that Weyerhaeuser's inability to introduce the agreement—or rebut arguments that Stayton had only altruistic motives for settlement—prejudiced Weyerhaeuser. (*See* Pet Merits Br at 40-41 (describing same).) Plaintiffs' judgment against Weyerhaeuser must be reversed and remanded for entry of a judgment of dismissal.

III. Defendant Five Star Should Be Included on a Verdict Form for Purposes of Apportioning Comparative Fault under ORS 31.600, and Its Exclusion Was Prejudicial Error

Because defendant Five Star was a "party against whom recovery is sought" and a "person with whom the claimant has settled," ORS 31.600(2), Five Star should have appeared on the verdict form for apportionment of fault. Although plaintiffs again try to avoid review with preservation arguments (Resp Merits Br at 34-36), the record shows that Weyerhaeuser adequately alerted both the trial court and other parties of the basis for its request to include Five

Star. (Tr-1691; *see* Pet Merits Br at 45-47 (describing record).) Plaintiffs' then-undisclosed settlement with Five Star also required inclusion of Five Star.[3] Contrary to plaintiffs' arguments (Resp Merits Br at 37-39), Weyerhaeuser was not obligated to plead any allegations against Five Star to request its inclusion on the verdict form because Weyerhaeuser did not seek to rely on allegations outside of plaintiffs' complaint. *See Lasley v. Combined Transport, Inc*., 351 Or 1, 26, 261 P3d 1215 (2011) (stating rule). Finally, although plaintiffs try to deny that the omission was prejudicial, it is difficult to posit that Five Star's omission did not affect the jury's allocation of fault given the evidence that Five Star was responsible for the jobsite and for buying the board at issue. Because the omission of Five Star was legal error that likely affected the jury's verdict, plaintiffs' judgment against Weyerhaeuser must be reversed and remanded for entry of a judgment of dismissal.

IV. Plaintiff Mitzi Rains's Loss-of-Consortium Claim Was Subject to the Limit on Noneconomic Damages under ORS 31.710

Plaintiffs' judgment against Weyerhaeuser also must be reversed and

[3] Contrary to plaintiffs' assertions (Resp Merits Br at 35), Weyerhaeuser raised the "plain error" doctrine only in relation to its argument that Five Star should have been included on the verdict form based on its settlement with plaintiffs. (Pet Merits Br at 49-51.) Although plaintiffs deny engagement in deception, plaintiffs do not—and cannot—dispute that they failed to inform Weyerhaeuser of their settlement with Five Star notwithstanding ORS 31.815(2) and the fact that plaintiffs called Five Star's owner as a witness. (Resp Merits Br at 40 n 8.)

remanded for reduction of Mitzi Rains's noneconomic-damages award under ORS 31.710. In the first count of the complaint, plaintiffs asserted a strict-product-liability claim under ORS 30.920, with Kevin Rains seeking to recover for personal injury and Mitzi Rains seeking to recover for loss of consortium. (ER-1-6.) Although plaintiffs again dispute preservation (Resp Merits Br at 42-43), Weyerhaeuser argued to the Court of Appeals that both plaintiffs' claims were subject to the limit on noneconomic damages under ORS 31.710 because plaintiffs asserted a statutory claim unlike any claims existing when the Oregon Constitution was adopted. (C/A App Br at 41-44.) Although Weyerhaeuser additionally contended that ORS 31.710 also applied to Mitzi Rains's loss-of-consortium claim because her recovery for loss of consortium would not have been permitted at common law in 1857 (*see* C/A App Br at 45), Weyerhaeuser never abandoned its more basic argument that ORS 31.710 applies to all strict-product-liability claims. The judgment against Weyerhaeuser must be reversed and remanded for application of ORS 31.710 to Mitzi Rains's award.

V. Reversal of Stayton's Indemnity Claim Required Reversal of Its Award of Defense Costs in Indemnity

Finally, Stayton's judgment with a money award for its defense costs in indemnity must be reversed. The Court of Appeal properly reversed Stayton's judgment granting its indemnity claim because Stayton failed to prove that it

"bought peace" for Weyerhaeuser or discharged any legal obligation owed jointly to plaintiffs. *Rain*s, 264 Or App at 667-73.[4] Although Stayton tries to argue that its award for defense costs did not rely on the judgment granting its indemnity claim (Stayton Resp Br at 7-12), Stayton does not explain why it would be entitled to recover its defense costs in indemnity when Stayton failed to prove any right to indemnity. Moreover, in arguing that ORS 22.220(3) does not apply, Stayton entirely ignores that the judgment reversed by the Court of Appeals ***was*** the judgment that granted Stayton's indemnity claim for defense costs, with the amount to be determined by the later judgment that the Court of Appeals failed to reverse. (ER-14-15.)

After Stayton's indemnity claim was reversed because Stayton failed to prove that it was entitled to recover in indemnity, Stayton had no indemnity claim to support recovery of its defense costs in indemnity from Weyerhaeuser.

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[4] After failing to petition for review or to make a contingent request for review under ORAP 9.10(1), Stayton seeks review of the Court of Appeals decision on its entitlement to indemnity for the first time in its respondent's brief on the merits. (Stayton Resp Br at 15-27.) For the reasons stated in its motion to strike, Weyerhaeuser asks this Court to decline Stayton's untimely request for review. On the merits, Stayton's argument fails for the reasons stated in the Court of Appeals and Weyerhaeuser's briefs to the Court of Appeals. *See Rain*s, 264 Or App at 667-73 (same). In light of *Eclectic Investments, LLC v. Patterson*, 357 Or 25, 346 P3d 468, *adh'd to on recons*, 357 Or 327 (2015), Stayton had no right to common-law indemnity in any event because plaintiffs' claim was subject to apportionment of fault under ORS 31.600, the judgment states the apportionment of fault, and Stayton and Weyerhaeuser never were treated as a single person for purpose of allocating fault under ORS 31.605(4).

Eclectic Investments, LLC v. Patterson, 357 Or 327, 331, __ P3d __ (2015) (claim for defense costs in indemnity had no "life of its own" when indemnity claim not viable). The judgment granting the money award of Stayton's defense costs in indemnity must be reversed.

CONCLUSION

For the reasons stated in this reply brief and its brief on the merits, this Court should grant Weyerhaeuser's requested relief.

Dated this 30th day of July, 2015.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i)(E); and (2) the word-count of this brief, as described in ORAP 5.05(2)(a), is 3,982 words. I also certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated this 30th day of July, 2015.

/s/ Sara Kobak
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CERTIFICATE OF FILING AND SERVICE

I certify that on July 30, 2015, I filed the original of this REPLY BRIEF ON MERITS OF WEYERHAEUSER COMPANY with the State Appellate Court Administrator by the eFiling system. I further certify that on July 30, 2015, I served this REPLY BRIEF ON MERITS OF WEYERHAEUSER COMPANY on the following parties by the eFiling system, if applicable, and by sending two copies by the United States Postal Service, first-class mail to parties not served by the eFiling system, at these addresses:

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