IN THE SUPREME COURT OF THE STATE OF OREGON

ECLECTIC INVESTMENT, LLC,
Plaintiff,

v.

RICHARD PATTERSON, et al.,
Defendant.

S062247

Court of Appeals No. A150458

Jackson County Circuit Court
No. 070197L3

JACKSON COUNTY,
Cross-Claim Plaintiff-Appellant,
Petitioner on Review.

v.

BYRON MCALLISTER, JR.,
dba Greater Crater Construction Co.,
Cross-Claim Defendant-
Respondent, Respondent
on Review.

PETITIONER'S BRIEF ON THE MERITS

Review of the Court of Appeals Decision on Appeal
from the Judgment of the Circuit Court of Jackson County,
Honorable Daniel L. Harris, Judge

Date of Decision:	February 26, 2014
Author of Opinion:	Schuman, S. J.
Joining in Opinion:	Duncan, P. J. And Wollheim, J.

Names and addresses of counsel are on the next page.

Filed August 21, 2014

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QUESTIONS PRESENTED

If a contractor negligently created a physical hazard which damaged someone, must he indemnify the municipality which inspected his finished work and negligently issued a permit without making him fix the hazard?

Under *Astoria v. Astoria & Columbia River R. C*o., 67 Or 538, 136 P 645 (1913) the answer to that question is "yes". Has this court overruled *Astoria*?

PROPOSED RULE OF LAW

In an indemnity claim brought by a municipality, a permittee who negligently built a hazard is actively and primarily negligent. The municipality that inspected the work, granted the permit and somehow did nothing to correct the hazard is passively and secondarily negligent. In those situations the permittee should indemnify the municipality.

The rule announced in *Astoria v. Astoria & Columbia River R. C*o., 67 Or 538, 136 P 645 (1913) is still valid.

NATURE OF THE PROCEEDING, RELIEF SOUGHT AND TRIAL COURT JUDGMENTS

In this case Jackson County seeks indemnity from McAllister in the

amount of $23,545 for the county's defense costs incurred in earlier litigation.[1]

After a non-jury trial the trial court entered a limited judgment in favor of McAllister, and a supplemental judgment for costs. The county asks this court to reverse the trial court's judgments.

SUMMARY OF FACTS

In December of 2004 a rafting business (Eclectic) on the Rogue River hired McAllister to enlarge its parking lot. To do so, McAllister steepened to a one-to-one slope an existing bank at the edge of Eclectic's land. Stipulation 3, ER 9; App-2. The bank was solid shale. Ex 705, Deposition of Eugene Zelmer, at p. 18; App-6.

Neither Eclectic nor McAllister had a county permit. Stipulations 3-5, ER 9; App-2. McAllister's work was planned and done before the county even knew of the project. A County inspector happened to drive by and saw the finished cut. Stipulation 3, ER 9; App-2.

After a different county inspector first looked at the finished slope on December 17, 2004 he declined Eclectic's request for a permit for various minor reasons: there was no site plan, he was dissatisfied with compaction of

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[1]Petitioner is mindful of ORAP 5.15 about designation of parties. However, the facts involve a related negligence claim and trial, with a different plaintiff and different defendants. To avoid confusion petitioner has taken the liberty of using proper names in this brief.

the gravel parking lot, he noted minor erosion problems and was concerned over a small retaining wall near a structure. Stipulation 5, ER 9; App-2. After those minor issues were cleaned up Eclectic asked again for a permit on March 23, 2005, which the county issued. Stipulations 6 and 7, ER 9; App-2. The slope had not changed.

The bank could not be re-cut to a shallower slope because its top end already encroached on a neighbor's property. Ex 705, Deposition of Eugene Zelmer, at p. 16; App-5.

The following winter mud washed down that slope and damaged Eclectic's own building. Stipulation 7, ER 9, App-2. Eclectic sued McAllister, the County and others for negligence. Stipulation 7, ER 9; App-2. Eclectic alleged that McAllister cut the slope too steeply and that the County should not have issued a permit without making him fix it. Stipulation 11, ER 10; App- 3.

At trial of Eclectic's claim in 2010, this cross-claim for indemnify was severed and not litigated, but all defendants stayed on the verdict form. Eclectic's owner testified that if the County had not issued a permit she would have been alerted to the hazard of the steep slope. Stipulation 11, ER 10, App-3. Nonetheless the jury returned a verdict against Eclectic as follows:

Plaintiff Eclectic	55%
Patterson (neighbor)	30%
McAllister	4%
Jackson County	7%
Dodson (neighbor)	4%

Stipulation 8, ER 10; App-2.

Because Eclectic's contributory negligence exceeded 50% the trial court entered limited judgment for all defendants on Eclectic's claim.

On November 9, 2011, Judge Harris held a non-jury trial of Jackson County's cross-claim for indemnity, on stipulated facts and exhibits. The parties stipulated that the County's defense cost of $23,345 was a reasonable amount. Stipulation 15, ER 10; App-3. A month after the bench trial, the trial court ruled for McAllister on the indemnity claim. Limited Judgment, ER 12-16, App-7-11. He awarded routine costs in a Supplemental Judgment. ER 17.

The Court of Appeals affirmed. *Eclectic Investment, LLC v. Patterson, et al*, 261 Or App. 457, 323 P3d 473 (2014); App-12-22. This court granted review. The county now seeks reversal of the Court of Appeals decision and both trial court judgments**.**

SUMMARY OF ARGUMENT

Astoria v. Astoria & Columbia River R. Co., 67 Or 538, 136 P 645 (1913) is the controlling precedent. By a simple application of stare decisis, *Astoria* requires that McAllister indemnify Jackson County.

The Court of Appeals and the trial court erred in avoiding the rule of *Astoria* and in using a vaguer test, namely who "ought to" prevail under "the

totality of the circumstances." Both courts also erred in treating the jury's allocation of fault in the earlier trial as a meaningful "circumstance" for indemnity purposes.

ARGUMENT

The controlling precedent

In *Astoria v. Astoria & Columbia River R. Co*., 67 Or 538, 136 P 645 (1913) the city gave permission for a railroad to build a street-crossing in downtown Astoria. The city had input on the design. The city's permit required smooth aprons between the tracks and street level, but the railroad built it wrong, with an 18-inch drop from rail to streetside.

After it was built, Astoria failed to make the railroad fix the patent danger, as the city should have done under its ordinances. Pedestrian Annie Anderson fell off the crossing, was injured, and won a judgment against the city, which then sued the railroad for indemnity. The issue on appeal, in the parlance of the day, was whether the parties were "in *pari delicto*". This court held they were not and that the railroad must indemnify the city:

> **"[I]t plainly appears that the active negligence charged is against the railroad company, while passive negligence only is laid at the feet of the municipality.** All that is urged against the city is its failure properly to care for the safety of the traveling public, by not providing barriers along the street where

> the accident occurred.
>
> While the city failed to perform its full duty in not requiring the company to construct and maintain aprons sufficient to protect the public from harm, and in not seeing that proper barriers were placed along the track where injury was possible, and, for that account, was liable to Annie Anderson, yet that situation does not render the parties equally delinquent. **The efficient and primary cause of the accident was the negligence of the company, while the subsequent negligence of the city in not enforcing obedience to the terms of the ordinance was constructive rather than actual."**

Astoria, 67 Or at 548 (emphases added).

The history of *Astoria* in the Supreme Court

For 101 years *Astoria* has been Oregon's bedrock law for the basic elements of indemnity. It has been cited with full approval in this court's indemnity decisions. *E.g. Fidelity Casualty Co. Of New York v. Chapman*, 167 Or 661, 120 P2d 223 (1941); *Southern Pac. Co. V. Morris Knudsen Co., Inc*., 216 Or 398, 404, 338 P2d 665 (1959)(*Astoria* gave a "clear and succinct statement"). In *Booth Kelly Lumber Co. V. Southern Pacific Co.,* 183 F2d 902, 910 (9 Cir 1950) the Ninth Circuit called the holding of *Astoria* an "accepted and well-known common law rule."

This court has applied *Astoria* into the modern era. In *General Ins. Co. v. P.S. Lord*, 258 Or 332, 337, 482 P2d 709 (1971) this court grappled with more complex indemnity issues, but discussed and explicitly approved the *Astoria*

test:

> "The proposition was also stated that the city could recover indemnity because 'the active negligence charged is against the railroad company, while **passive negligence only is laid at the feet of the municipality**'."

General Ins., 258 Or at 335 (quoting *Astoria*)(emphasis added).

This court did go on in *General Ins.* to resolve the more complex indemnity issues of that specific case, and did build on the *Astoria* analysis. On the way it agreed with Prosser that the familiar test of active/primary versus passive/secondary is sometime insufficient, and quoted his view that "[T]he duty to indemnify will be recognized in cases where community opinion would consider that **in justice** the responsibility should rest upon one rather than the other." *General Ins.,* 258 Or at 336 (Prosser citation omitted, emphasis added). The phrase "in justice" will reappear in the Court of Appeals opinion below, in an unfortunate way.

However, nothing in *General Ins.* undercut *Astoria*'s viability for cases like the instant one. Later, this brief will discuss more fully how the opinion in *General Ins.* treated the *Astoria* rule.

In *Fulton Ins. v. White Motor Corp*., 261 Or 206, 493 P2d 138 (1972) this court again reaffirmed the test of *Astoria*, but used this language:

> "In an action for indemnity, the claimant must plead and prove that (1) he has discharged a legal obligation owed to a third party; (2) the defendant was

> also liable to the third party; and (3) as between the claimant and the defendant **the obligation ought to be discharged** by the latter."

Fulton, 261 Or at 210 (emphasis added).

The *Fulton* opinion defined what it meant by the third element of indemnity claims, namely that "the obligation ought to be discharged". It meant merely the familiar test of active/primary v. passive/secondary, as announced in *Astoria*. The phrase "ought to be" also will reappear in the Court of Appeals opinion below, and also in a less fortunate way.

This court went on to acknowledge that *Fulton* was more complex than *Astoria*, and that "traditional formulations of active and passive negligence, or primary and secondary liability, do no provide precise guidelines for deciding close cases." *Fulton*, 261 Or at 211. That language likewise will reappear in unintended ways.

In summary, the simple rule of *Astoria* has stood solid through 101 years of this court's decisions. Its ruling on its simple facts has been approved repeatedly, even as this court has struggled with harder indemnity cases. Its treatment in the Court of Appeals, though, has been increasingly unkind.

The Court of Appeals strays from the rule of *Astoria*

In its early years the Court of Appeals understood the third element of *Astoria*'s basic rule of indemnity. *Page v. Cameron*, 33 Or App 441, 443-444,

576 P2d 837 (1978)("ought to be discharged" by defendant means defendant's fault was active/primary). In *PGE v. Const. Consult. Assoc.*, 57 Or App 116, 643 P2d 1334 (1982) the Court of Appeals followed this court's *Fulton* opinion (261 Or 206), which ten years before had approved of *Astoria*.

But in 1990 the Court of Appeals first began to wander toward the fuzzier test it eventually used below. In *Scott v. Francis*, 100 Or App 392, 397, 786 P2d 1269, *modified on recons*, 104 Or App 39, 789 P2d 1111 (1990), *vac'd*, 311 Or 151, 806 P2d 129, *adopted as modified*, 107 Or App 766, 811 P2d 927 (1991), *aff'd*, 314 Or 329, 838 P2d 596 (1992) the Court of Appeals decided an unusual indemnity case between two negligent attorneys. Early in the opinion, the court acknowledged that "ought to be discharged by the debtor" meant what *Fulton* had said, namely that the indemnitor must have been actively at fault. That notion, of course, rested on *Astoria*.

However, the Court of Appeals went on to say this of this court's *Fulton* and *General Ins.* opinions: "[T]he active-passive and primary-secondary formulations do not provide precise guidelines for deciding close cases." *Scott*, 100 Or App at 396. It also said indemnity involved "the equitable distribution of fault" for which there can be "no all encompassing rule". *Scott*, 100 Or App at 396 (quoting this court's opinion in *Piehl v. The Dalles General Hospital*, 280 Or 613, 620, 571 P2d 149 (1977)).

In 2002, in *Maurmann v. Del Morrow Const., Inc.*, 182 Or App 171, 48

P3d 185 (2002), the Court of Appeals took a bigger step toward its current gut-instinct rule. In *Maurmann* the court acknowledged the *Fulton* decision *(Maurmann*, 182 Or App at 177) but said these other things of indemnity: indemnity has "broadly equitable underpinnings" *(Maurmann*, 182 Or App at 182) and is available only if warranted "in justice" *(Maurmann*, 182 Or App at 178); the active-passive test is "amorphous" and "somewhat obtuse" *(Maurmann*, 182 Or App at 178, n 4)). *Maurmann* was decided correctly, and those quoted phrases led to the right result. To decide that particular case, the court had to stack those hazier inquiries on top of the bedrock test of *Astoria,* but got to the right result anyway.

However this retreat from *Astoria*'s clarity reached its unfortunate nadir in the decisions below.

Trial Court's Limited Judgment

Though the parties agree review is for error of law, some critique of the trial court's reasoning is useful. It shows the confusion facing trial courts in indemnity cases, even before the Court of Appeals made it worse.

For example, the trial court at first described the active-passive test correctly (Limited Judgment at App-7-8), and went on to discuss *Astoria* with apparent approval. Limited Judgment at App-9. It then even quoted a Restatement in accord with *Astoria*'s basic test:

> "Finally, Restatement (Second) of Torts § 886B (1979)(e) states that indemnity should be granted where '[the] indemnitor created a dangerous condition of land or chattels as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect.' "

(Limited Judgment at App-9).

The trial court even thought that "[t]he Restatement appears at first reading to favor Jackson County's position". Limited Judgment at App-10.

But then the trial court got lost.

It said, "Generally, two tortfeasors who are both found to be negligent, are both considered active. *General Ins. Co. V. P.S. Lord Mechanical Contractors*, 258 Ore. 332, 336 (1971)." Limited Judgment at App-8. That rule was not announced in *General Ins.* on page 336 nor anywhere else. Nor was it announced in any other Oregon case. Indeed, that rule is 180 degrees wrong, and ignores this court's many opinions discussing the active-passive test, as discussed above. The notion that all tortfeasors "are both considered active" would rewrite a century of this court's decisions.

The trial court further misunderstood *General Ins.*, saying, "the County's level of fault is more active than *General Ins. Co*.'s clearly passive case of vicarious liability." Limited Judgment, App-9. That reading of *General Ins.* is puzzling. The actual holding in *General Ins.* was that the indemnity plaintiff's insured was "an active, positive and primary participant in the acts or

omissions." *General Ins.*, 258 Or at 337.

More fundamentally the trial court overlooked that *General Ins.* expressly reaffirmed *Astoria'*s application to its particular facts. *General Ins.* 258 Or at 334-35. This issue is discussed later in this brief.

And finally, the trial court turned to the jury's verdict form in the prior trial. Early in its opinion the trial court had acknowledged that, "The jury's finding of fault does not necessarily determine whether a party is actively at fault. *Maurmann v. Del Morrow Constr. Inc*., 182 Or App 171, 180-181 (2002)". Limited Judgment, App-9.

Nonetheless, the trial court foundered through a discussion of those percentages, then ruled against the county because "the county was found by the jury to be directly liable for a small portion of the damage caused" and "[t]he direct fault of the two parties is relatively equal." Limited Judgment at App-10. This issue of the jury's percentages is discussed more fully later in this brief.

If the trial court had stuck to *Astoria*, as it almost did, its ruling would have been correct. Instead it was led astray into deciding who "should" win, somehow, under some standard as ill-defined as this:

> "The question appears ultimately to be one of equity. *Fulton Ins*. asks whether the defendant *should have* discharged the obligation rather than the defendant."

Limited Judgment at App-10 (emphasis in original).

That ill-defined standard distorted *Astoria* and decades of decisions of this court. *Astoria* decided plainly who "should" win; the active builder should indemnify the passive municipality.

As discussed next, the Court of Appeals affirmed. Such confusion in the trial courts can only get worse unless this court reverses.

The Court of Appeals' current view of the law of indemnity

The Court of Appeals opinion below contains all these statements:

> "[T]he 'active' versus 'passive' distinction [is] **one factor** to consider in ultimately deciding the case based on equitable concerns. * * *
> [at App-16]
>
> [T]he **active/passive** and primary/secondary determinations are **frequently unhelpful**. * * *
> [at App-18]
>
> "[T]he distinction between 'active' or 'primary' and 'passive' or 'secondary' negligence is "**amorphous**' and '**somewhat obtuse**'.* * *
> [at App-18]
>
> "Active/passive and primary/secondary [are] **relevant but not dispositive** considerations.* * *
> [at App-18]
>
> [T]he traditional formulations of active and passive negligence, or primary and secondary liability, **do not provide precise guideline**s for deciding close cases." (Citing *Fulton Ins*., 261 Or at 211). * * *
> [at App-19]

> **We confess some uncertainty** as to the application or breadth of the primary versus secondary responsibility * * *
> [at App-19]
>
> Thus, in general, common-law indemnity is available where, **'in justice,'** either the relationship of the parties or the quality of their respective conduct warrants that one of them should bear the full responsibility for joint liability to an injured third party. * * *
> [at App-19]
>
> [The trial court considered] the **totality of the circumstances**, stating that 'the **question appears ultimately to be one of equity**' which asks '**whether the defendant should have discharged the obligation** rather than the plaintiff' * * *. We review that conclusion for errors of law, and, as noted above and explained below, we agree. * * *
> [at App-20]

Court of Appeals Opinion (entire Opinion at App-12-22; specific quotations at pages mentioned above)(emphases added).

The opinion below thus cherry-picks every scrap of appellate court language tending toward a vaguer test for indemnity. Many of those statements came in the context of more complex indemnity cases where this court had to build on top of *Astoria*'s simpler rule.

Unfortunately, though, the Court of Appeals convinced itself that the bedrock of *Astoria* had somehow eroded, that **every** indemnity case now boils down to who "should" prevail, "in justice", in the "totality of the

circumstances", and so on, even if *Astoria* says otherwise, and even if those circumstances are individually meaningless.

Astoria needed no more flexible test need to apply to its facts: a permittee who builds a faulty thing is actively and primarily negligent; a municipality that looks at the project and grants the permit, and does nothing more, is passively and secondarily negligent.

This court has not disavowed that rule of *Astoria,* as discussed above. However, the Court of Appeals suggests otherwise. On its path to skirt *Astoria*, it quotes one line of this Court's opinion in *General Ins. Co. v. P.S. Lord*, 258 Or 332, 337, 482 P2d 709 (1971):

> "The words 'passive' versus 'active' and 'secondary' versus 'primary' are not sufficiently precise to provide clear guidelines for this area."

Opinion at App-18 (quoting from *General Ins.).*

The Court of Appeals should read further. In *General Ins.* this court did not undercut the *Astoria* test but explicitly approved it:

> This kind of case in which a municipality is allowed recovery against one who is responsible for a defect on a street or sidewalk is a widely accepted category for the awarding of indemnity.

General Insurance, 258 Or at 334-335.

And for clarity, this court even reemphasized its holding in *Astoria*:

> The proposition was also stated that the city could recover indemnity because 'the active negligence

> charged is against the railroad company, while **passive negligence only is laid at the feet of the municipality**'.

General Insurance 67 Or at 335 (emphasis added).

The Court of Appeals thus goes too far in rejecting *Astoria* in favor of some vaguer standard pieced together from out-of-context language from later cases. In *Astoria* this court decided precisely who "should" prevail and has often reaffirmed that holding.

Factual similarity to *Astoria*

The rule of *Astoria* does apply here. The facts that mattered in *Astoria* are the same as those in this case.

In *Astoria*, the railroad created the physical hazard, here it was McAllister. In *Astoria*, the city took no action; it either did not discern the hazard or failed to make the railroad fix it. Here, the county's failure was identical- either it did not discern McAllister's hazard or it failed to make him fix it before giving a retroactive permit. Like the City of Astoria, Jackson County took no action, instead passively declining to change the physical status quo McAllister had created with his backhoe. Like Astoria, the county did nothing; it just scratched its head and signed a permit that allowed the hazard to continue.

If anything, this case presents stronger facts than *Astoria*. There, the city

took part in the advance design of the railroad crossing and even required specific features. It then stood by as the railroad built it wrong with an 18-inch drop, smack in Astoria's downtown. Jackson County, though, had no input in McAllister's design and never laid eyes on the project until the cutting was done and irreversible.

The most anyone can say the county did was to look at the slope and give a permit when McAllister and Eclectic asked for one. The county's granting of that permit for the preexisting project was purely passive, no more than a failure to do anything. The county gave them the permit they wanted, then left the job as it found it. That piece of paper did not design the project, nor decide on a one-to-one slope, nor drive the backhoe that pulled down the rock, all before the county's arrival. It is hard to imagine a more classic case of passive negligence.

Just as Astoria won indemnification from the railroad, Jackson County should win it from McAllister, through a simple application of *stare decisis.* The Court of Appeals and trial court, however, held otherwise. Their analyses failed in several particular respects, which the county will now discuss.

"Distinction"- respective duties

The Court of Appeals believed that this distinction rendered *Astoria* inapplicable:

> "First, the pedestrian in [*Astoria*] injured herself on a public sidewalk, where the city had a general duty to provide for safe conditions. By contrast, in this case, the injury occurred on private property and the county was held responsible for negligently performing its duty in providing permits to individual landowners."

Opinion at App-22.

That distinction is trivial.

First, the existence of a duty is not an element of an indemnity claim. It is instead an element of a negligence claim, if even that since *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1, 734 P2d 1326 (1987). By finding a duty owed by the county, the Court of Appeals again focused inaptly on the mere existence of negligence, not on its quality (active or passive).

And second, even if a comparison of the respective duties of Astoria and the county is worthwhile, that comparison favors the county. Astoria's duty was greater: to protect all citizens walking on its streets, young and old, hardy and feeble. Jackson County's only relevant duty was to protect a single landowner from its own negligence, and that of its hired contractor. The eventual damage occurred entirely on Eclectic's property, and injured only Eclectic.

It is therefore puzzling that these differing duties helped the Court of Appeals to ignore *Astoria*.

Not all negligence is active negligence

Both courts below confused the County's negligence with the **nature** of that negligence. What matters is not whether there was negligence, but whether it was active or passive. In any common law indemnity case, the starting point is that both parties were negligent:

> "[T]he payor is not barred by the fact that he was negligent in failing to discover or to remedy the defect as a result of which the harm was occasioned; in most of these cases it is because of this failure that he was liable * * *."

Restatement, Restitution § 95 (1937).

The Court of Appeals acknowledged that rule in *Irwin Yacht Sales, Inc. v. Carver Boat Corp*., 98 Or App 195, 198, 778 P2d 982 (1989)("A finding that plaintiff was to some degree at fault is not fatal to plaintiff's indemnity claim here; it is, in fact, necessary to it.")

In this case, though, the Court of Appeals confused fault with active fault:

> "[T]he county, through its inspector, was obligated to perform the inspection and permitting so as to avoid creating a foreseeable risk of harm to the landowner. *See Brennen v. City of Eugen*e, 285 Or 401, 407, 591 P2d 719 (1979)(where a licensing agent has a responsibility to follow requirements, they must perform this duty so as to avoid creating a foreseeable risk of harm to others)."

Opinion at App-21.

Under *Brennen*, a municipality is indeed liable to an injured party for

negligent licensing. The County does not challenge that rule of law, but that rule answers a wholly different question.

Brennen was not an indemnity claim between the city and the cabdriver. The word "indemnity" does not appear in *Brennen*, nor does any consideration of whether the cabdriver or Eugene was the active or passive tortfeasor. The cabdriver was not a party. Instead, the entire issue was whether plaintiff Brennen, hurt by the tortious cabdriver, could sue Eugene for negligently letting that cabdriver be uninsured.

Liability of a tortfeasor to an injured plaintiff is one thing. Indemnity between two tortfeasors is another. The liability holding of *Brennen* thus had no legitimate place in a discussion of indemnification.

Nonetheless, the Court of Appeals (as did the trial court) conflated the two issues. It denied indemnification merely because the county had been negligent.

Percentages of fault

Both courts below incorrectly gave weight to the verdict form in the underlying liability trial.

This indemnity cross-claim had been severed for a later trial, so the jury was unaware of it, but Jackson County and McAllister remained on the verdict form. The jury hit plaintiff with 55% fault, a neighbor with 30%, and spread

the remaining 15% among three defendants; McAllister and another neighbor received 4% each, and the County 7%. Most likely, the jury simply allocated the remaining 15% arbitrarily to make a total of 100%; one must speculate.

At any rate, there was not the full litigation needed for those findings to be preclusive. *North Clackamas School Dist. v. White*, 305 Or 48, 53, 750 P2d 485 (1988)(issue preclusion only if issue fully litigated and essential to prior judgment). For obvious tactical reasons McAllister and the County chose not to litigate sideways, but instead both focused on plaintiff Eclectic's contributory negligence. They never mentioned indemnity, active or passive fault, or anything pertinent to this claim, nor did anyone ask the jury to consider those issues. The jury's numbers were thus meaningless for indemnity purposes.

The Court of Appeals said as much in *Maurmann v. Del Morrow Const., Inc.*, 182 Or App 171, 48 P3d 185 (2002):

> Does the jury's apportionment of comparative fault in the first proceeding preclude B [*i.e*. party seeking indemnity] from recovering indemnity in the second proceeding? The answer * * * is "no."

Maurmann, 182 Or App at 179.

Even earlier in *Irwin Yacht Sales, Inc. v. Carver Boat Corp*., 98 Or App 195, 778 P2d 982 (1989) the Court of Appeals announced the same rule on facts nearly identical to this case. An injured boat-buyer had sued the boat's seller and manufacturer; the jury allocated fault 40% to the seller and 45% to

the manufacturer. Seller then sued manufacturer for indemnity. Because the jury's allocation had been roughly equal, the trial court dismissed seller's indemnity claim. The Court of Appeals reversed, making clear that percentage of fault is one thing, but the nature of the fault is another: "[T]he allocation of fault here did not determine whether plaintiff's fault was active or passive. That issue was not presented to the jury." *Irwin,* 98 Or App at 983-984.

Nonetheless, the trial court in this indemnity claim did rely impermissibly on those percentages, by the mischief of calling them "an important factor." Limited Judgment, at App 8.

On the strength of that "factor" and little else, the trial court found for McAllister. The Court of Appeals did not correct that error but rather embraced it, as somehow part of the "totality of the circumstances". Opinion, at App 20. A fair reading of both opinions suggests that the jury's percentages were the deciding factor.

CONCLUSION

Jackson County is not concerned here with the entire law of indemnity. Past indemnity cases have given this court thorny issues, and others may again. The answers to those indemnity cases may require even more discriminating tests, yet to be invented.

The county is concerned only with its own corner of the law of

indemnity. That corner may be a modest one, but it is occupied by all Oregon municipalities. The well-settled rule of *Astoria v. Astoria & Columbia River R. Co*., 67 Or 538, 136 P 645 (1913) has always been correct, clear and workable. It is neither "obtuse" nor "amorphous." Instead it guides municipalities and trial courts to predictable and fair outcomes.

The Court of Appeals has jettisoned the adequate test of *Astoria* in favor of an ill-defined catch-all of questionable factors and subjective impressions. Its decision below invites trial courts to base decisions on extraneous issues. The way the jury allocated fault in this case is a good example of what could be a long and unpredictable list of such factors.

This court should reverse the decisions below and remand to the trial court for entry of judgment in favor of Jackson County.

Respectfully submitted, August 21, 2014.

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CERTIFICATES OF FILING, SERVICE AND WORD-COUNT,

WORD COUNT

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and that the word-count of this brief as described in ORAP 5.05(2)(a) is 5006 words in proportionally spaced type not smaller than 14-point for both text and footnotes.

FILING

I certify that on this date, I filed Respondents' Brief and Supplemental Excerpt of Record electronically pursuant to ORAP 16.25.

SERVICE

I certify that on this date Respondents' Brief was served electronically on plaintiff's counsel, a registered eFiler, pursuant to ORAP 16.45:

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