IN THE SUPREME COURT OF THE STATE OF OREGON

MONTARA OWNERS ASSOCIATION, an Oregon non-profit corporation,

Plaintiff,

v.

LA NOUE DEVELOPMENT, LLC,
an Oregon limited liability company; et al.,

Defendants.

LA NOUE DEVELOPMENT, LLC, an Oregon limited liability company,

Third-Party Plaintiff – Appellant – Respondent on Review

and

MARK LA NOUE, an individual,

Third-Party Plaintiff,

v.

SUTTLES CONSTRUCTION, INC., an Oregon corporation; GORDON HARDING, an individual, dba Gordon Harding Construction; and MCM ARCHITECTS, PC, an Oregon corporation, *et al.;*

Third-Party Defendants,

and

VASILY A. SHARABARIN, an individual, dba Advanced Construction,

Third-Party Defendant – Respondent – Petitioner on Review.

September 2014

EVANS CONSTRUCTION SIDING CORP., an Oregon Corporation,

Fourth-Party Plaintiff,

v.

DAVE BURGESS CONSTRUCTION, INC., an Oregon corporation; *et al.*,

Fourth-Party Defendants.

DAVE BURGESS CONSTRUCTION, INC., an Oregon corporation,

Fifth-Party Plaintiff,

v.

RAUL HERNANDEZ and CARLOS HERNANDEZ, individuals, dba Hernandez Brothers, a partnership; *et al.*,

Fifth-Party Defendants.

LA NOUE DEVELOPMENT, LLC, an Oregon limited liability company; and MARK LA NOUE, an individual,

Plaintiffs,

v.

MCM ARCHITECTS, PC, an Oregon professional corporation,

Defendant.

Multnomah County Circuit Court Nos. 0512-13487 and 0612-13628
Court of Appeals No. A140771; Supreme Court No. S062120

Appeal from the General Judgment of the Multnomah County Circuit Court, by the Honorable Jean K. Maurer, Judge

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Respondent Sharabarin's Reply Brief

Date of Decision:	December 4, 2013
Author:	Wollheim, J.
Concurring:	Schuman, P.J.
Concurring separately:	Nakamoto, J.

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I. INTRODUCTION

This brief addresses an issue raised in La Noue's brief on the merits, but not discussed in Sharabarin's brief: whether La Noue is entitled to a new trial even if, as Sharabarin contends, La Noue did not preserve the alleged error in the economic-waste instruction.

II. MATERIAL FACTS AND PROCEEDINGS

The trial court instructed the jurors that if Sharabarin breached its contract with La Noue by performing shoddy work, the proper measure of damages was the cost of repair, "unless that remedy generates undue economic waste," in which case the damages should be measured by diminished value – the difference between the value of the property as it is and the value of the property as it should have been. Tr 3265-66. The Court of Appeals said this instruction is a correct statement of law, but, even so, should not have been given without evidence of diminished value, which, the court went on to say, was Sharabarin's burden to produce. *Montara Owners Assn. v. La Noue Development, LLC*, 259 Or App 657, 666-70, 317 P3d 257 (2013). Finding no such evidence, the court remanded the case for a new trial on the breach of contract claim. *Id.* at 670.

In his brief on the merits, Sharabarin explains that, in fact, La Noue had the burden of proof on the economic-waste issue, *see* Sharabarin's Merits Br 26-31,

and, in any event, that the Court of Appeals should not have reviewed the instruction because there is no record of La Noue having preserved the alleged error by proper exception. *See id.* at 17-26. At trial, in excepting to the instruction, La Noue's counsel did not argue that it lacked an evidentiary basis. All she told the trial judge and Sharabarin's counsel was that her client opposed the instruction. She didn't say why. ER 44 (Tr 3275).

La Noue's brief on the merits responds that the alleged error was somehow preserved by arguments La Noue raised after the verdict.[1] Alternatively, the brief suggests that La Noue is entitled to a new trial even without record of a proper exception because, La Noue says, there might have been a proper *off-record* exception. La Noue suggests that an exception was taken before the instructions were given, but the record of it was somehow lost or destroyed through no fault of La Noue. And that, La Noue says, entitles it to a new trial under ORS 19.420(3). La Noue Merits Br 17-18. For the reasons that follow, La Noue is mistaken about the effect of that statute on this case.

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[1] La Noue explains that its post-trial motion for a new trial told Sharabarin and the judge that the economic-waste instruction had "misled" the jury "[b]ecause there was absolutely no evidence in this case of economic waste." La Noue Merits Br 16 (citing Supp ER 14). But La Noue doesn't explain how that *after-trial* statement could have alerted Sharabarin and the judge *during trial* that La Noue objected to the instruction for want of evidence of waste. Nor does it explain how post-trial comments of this sort could have given Sharabarin and the judge an opportunity to avoid the alleged error (and thus avoid a new trial) by introducing the missing evidence or modifying or withdrawing the proposed instruction.

III. ARGUMENT

ORS 19.420(3) authorizes the court to order a new trial in the event of "loss or destruction" of the record:

> "Whenever it appears that an appeal cannot be prosecuted, by reason of the loss or destruction, through no fault of the appellant, of the reporter's notes or audio records, or of the exhibits or other matter necessary to the prosecution of the appeal, the judgment appealed from may be reversed and a new trial ordered as justice may require."

In *Smith v. Custom Micro, Inc.*, 311 Or 375, 811 P2d 1371 (1991), this court identified the following requirements for relief under ORS 19.420(3), which, at that time, was numbered ORS 19.130(3):

- A part of the record must have been "lost or destroyed."
- That part must be "necessary to prosecution of the appeal."
- The "loss or destruction must have been through no fault of the appellant."
- The appellant "must show due diligence in attempting to find and supply a record for purposes of appeal."
- The appellant "must make at least a *prima facie* showing of error, or unfairness in the trial, or that there has been a miscarriage of justice."

311 Or at 378-79 (citations and internal quotation marks omitted).

The *Smith* requirements are discussed below in slightly different order. And, as explained there, most of them are unsatisfied in this case.

A. No Proof that the Record was "Lost or Destroyed"

As noted, La Noue contends that it excepted to the economic-waste instruction during the trial, but that the record of the exception was somehow lost or destroyed. There is no proof of that. The record includes a transcript of the trial, prepared from the court's audio recordings. And there is no evidence that any of the recordings was lost or destroyed.

La Noue contends that the transcript itself reveals a lost or destroyed tape. It relies in particular on pages 3136-38 of the transcript, which show that, one day during the trial, just before the parties adjourned for lunch, the judge told the lawyers that, later that afternoon, "[w]e'll work on the jury instructions" – she didn't say which ones – "to the extent that we can." More precisely, she said that they would discuss the instructions "after we break at 3:30, okay?" The transcript does not include the afternoon proceedings, including those after 3:30. It resumes, instead, late the next morning, at 11:54 a.m., with the judge announcing "that all of the lawyers are back, *and we've been having an off-the-record discussion* * * *." *Id.* (emphasis added). This proves, La Noue says, that a recording of the proceedings the prior afternoon, when the instructions were supposed to have been discussed, and when La Noue allegedly excepted to the economic-waste instruction, was lost or destroyed. Actually, the most that it proves is that those

proceedings were not in fact recorded, but instead were conducted "off-the-record," just like the proceedings that continued the next morning.

That shouldn't surprise anyone. Work sessions on instructions are often conducted off-record because such proceedings are usually informal and have a lot of back and forth discussion and shuffling of papers among counsel and the bench, which makes for a hard-to-follow transcript, and because the parties are required by rule, if not also case law, to re-state their exceptions after the instructions are given, as discussed in Sharabarin's prior brief and later in this one. In any event, there is no basis for a finding that some parts of this trial was recorded and then lost or destroyed. The only plausible finding is that some parts, including a late afternoon discussion of instructions, were not recorded in the first place

That situation is not within the scope of ORS 19.420(3). The statute applies to the "loss or destruction" of the record. It doesn't apply when no record is made to begin with.[2]

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[2] The transcript includes a notation that at various times, Microphone 4, the one used mostly by La Noue's counsel, Ms. Gorman, because of her position at counsels' table, was "not functioning." Tr 3084. But the note doesn't say exactly how it was malfunctioning and whether it prevented Ms. Gorman's voice from being recorded at any particular time. In fact, her voice was recorded throughout the trial, because her comments are reported throughout the transcript, including right before the afternoon discussion on instructions that La Noue suggests was recorded and lost. *See* Tr 3136-37. In any event, the problem with Microphone 4, whatever it was, doesn't explain why there is no record of comments by the judge or the other lawyers during those proceedings, if they were in fact recorded. The only plausible explanation is, again, that they weren't recorded.

B. La Noue is Not Blameless

La Noue asserts that it is not to blame for the lack of a record of the discussion of instructions at which it allegedly objected to the economic-waste instruction. But that assertion is based on the assumption that the court's recorder somehow stopped working during that discussion, only to resume the next morning. As noted above, that assumption is untenable. It's more likely that the parties consented to proceed off the record, just as, back in the day, counsel would sometimes go into chambers to discuss instructions and not invite the court reporter along.

The party seeking to disturb a judgment because of an alleged has an obligation to assure that a record is made or relevant proceedings, *see Purdy v. Deere and Co.*, 355 Or 204, 225-26, 324 P3d 455(2014) (quoting *Shoup v. Wal–Mart Stores, Inc.*, 335 Or 164, 174, 61 P3d 928 (2003)), which, nowadays, includes making sure that the recorder is on. That isn't hard to do. Oregon courtrooms are now equipped with a large digital clock with bright red numbers that usually sits on the bailiff's desk and starts to run when the recorder is turned on. Remembering to check the clock is no different than remembering, years ago, to take the reporter into chambers when you wanted a record of the proceedings there. There is no reason to believe that La Noue took that precaution here.

C. La Noue Has Not Been Diligent

This "lost" record issue would have come up much sooner, if La Noue had not been dilatory. At the latest, it should have arisen just after the trial, in May 2008, when La Noue filed its motion for new trial. In that motion, La Noue argued, among other things, that a new trial was necessary under ORCP 64 B(6) because of an "[e]rror in law occurring at trial and objected to or excepted to by the party making the application" – namely, the giving of the economic-waste instruction. That was the first moment when La Noue was called upon to determine whether there was a complete record of its alleged objection to the instruction. As this court explained in *Bennett v. Farmers Ins. Co. of Oregon*, 332 Or 138, 153, 26 P3d 785 (2001), the trial court cannot grant new trial based on instructional error unless the aggrieved party has taken the necessary steps under to preserve the error for review. La Noue acknowledged that requirement in the motion itself (at page 24).

La Noue's next opportunity to discover the supposedly "lost or destroyed" record came a year and a half later, on October 14, 2009, when the transcriber filed the transcript in this case. At that time, La Noue should have noticed the unreported proceedings and taken steps to deal with the problem, either by motion

to correct the record, *see* ORS 19.370(5), due 15 days later, or by agreed narrative statement. *See* ORS 19.380.[3]

The following year, La Noue filed its opening brief in the Court of Appeals and assigned error to the giving of the economic-waste instruction. Under the rules of appellate procedure, La Noue was required to set forth, in a separate heading under that assignment, the portions of the record where the alleged error was preserved. ORAP 5.45(4)(a)(ii). At this time, La Noue could not have failed to notice that the record on appeal does not include the part of the trial during which it now claims to have preserved its exception to this instruction. Even so, La Noue did nothing to address the problem then, perhaps hoping that it would pass unnoticed by Sharabarin and the court.

It turns out, Sharabarin *did* notice. His brief, filed seven months later, in September 2010, pointed out the absence of an exception to the instruction. Sharabarin's Aw Br at 13. "Only then," La Noue later claimed in a motion to remand under ORS 19.420(3), did it "become aware that [Sharabarin] intended to argue that La Noue's objection to the economic waste instruction had not been preserved at trial." That just doesn't wash. As noted, La Noue should have known from the start that in order to obtain a new trial based on the alleged error in this

[3] Actually, La Noue had a still-earlier opportunity to notice the unreported exception. On February 4, 2009, the transcriber wrote to the parties, inviting them to read and correct the *draft* transcript before she filed and served it. *See* Edling Dec., Ex. 3, p. 13.

instruction, either from the trial court or the Court of Appeals, it would have to demonstrate that the record contains a timely and sufficient exception. The preservation of error rules are too well known to have been so overlooked. Even so, La Noue waited until years after the trial, when the memories of the participants had long since faded, to try to create a record of the unreported proceedings.[4]

[4] On November 16, 2010, three years after the month-long trial, La Noue's counsel sent a letter to the trial judge, asking whether she "has any recollection" of La Noue taking an exception to the economic-waste instruction and, if so, to assist La Noue in making a record of the exception for appeal purposes. *See* Declaration of Emilie E. Edling, Ex 3, p 5. At a later hearing, the judge denied La Noue's request for an order to that effect. *Id.* at p 23.

Meanwhile, La Noue's counsel asked trial counsel for Sharabarin and co-defendant Suttles Construction, Inc., whether they could recall discussion of the economic-waste instruction at trial notwithstanding the passage of time. Not surprisingly, they could not. *Id.* at ¶ 3(f). La Noue's counsel then submitted a declaration which said – also not a surprise – that *she* recalled the discussion and also that she had taken a proper exception. Decl. of Leta L. Gorman, ¶ 3.

Of course, a lawyer's declaration is no substitute for a properly created record. In *Huntley v. Reed*, 276 Or 591, 556 P2d 122 (1976), the trial judge gave an instruction to the jury during its deliberations, without the parties or the court reporter present. This court held that it was a reversible error to instruct the jury in counsels' absence. In an effort to show that the instruction was correct and, therefore, that the error was harmless, the respondent relied on the trial judge's subsequent recollection of what he had said. The court was unimpressed. "No one's memory," it said, "should be the basis of the record of instructions given to a jury." *Id.* at 594. Likewise, no one's memory should be the basis of the record of an exception to an instruction – certainly not the memory of a lawyer for the party that needs to prove the exception.

In sum, this court should conclude that La Noue has *not* shown diligence in attempting to supply a record for appeal of the economic-waste instruction, but instead has shown carelessness and inattention.

D. The Unreported Proceeding Is Not the Obstacle to La Noue's Appeal

This is where La Noue's reliance on ORS 19.420(3) falls apart completely. La Noue assumes that the absence of a record of the afternoon discussion of instructions is the sole impediment to its appeal of the economic-waste instruction because, without that record, La Noue can't prove that it took an exception to that instruction *at that time*. In fact, the problem with La Noue's appeal is what's *in* the record, not what might be *out* of it. And what's in the record is an insufficient exception to the instruction *later in the trial*.

After the instructions were given, the trial court asked the parties whether they had any exceptions, starting with La Noue. ER 44 (Tr 3274-75). Whatever might have transpired before, whether on or off the record, La Noue was obligated *then* to take a proper exception to the economic-waste instruction in order to preserve any error in the giving of it. And, as explained in Sharabarin's brief on the merits, La Noue's exception at that time was insufficient, because it did nothing more than state that La Noue objected to the instruction – or parts of it (La

Noue now concedes that parts of it were unobjectionable) – for unexplained reasons:

> "THE COURT: Okay. Go ahead and have a seat. And we'll begin with exceptions for the plaintiff.
>
> "MS. GORMAN: Just want the number?
>
> "THE COURT: Anything you think you need to put on the record to protect the record.
>
> "MS. GORMAN: I don't –
>
> "* * * * *
>
> "MS. GORMAN: Exception to No. 29. I don't believe that immateriality of – materiality of breach instruction was necessary, and exception to jury instruction No. 26 on damages."
>
> "THE COURT: Okay. Thank you. Mr. Brown."

ER 44 (Tr 3274-75).

This numbers-only exception did not satisfy the particularity requirement that has been a part of this court's preservation jurisprudence for several decades. *See* Sharabarin's Merits Br 24-25. Nor does it satisfy the overarching requirement that exceptions explain to the trial court why its ruling is in error, so that the problem can be corrected. *See id.* at 25.

It doesn't matter that, at some earlier point in the proceedings, La Noue *might* have explained its concerns about "No. 26" in greater detail, whether on or off the record. Things often change in the course of a trial: strategy, evidence, arguments, proposed instructions. (Indeed, the economic-waste instruction at issue

here was itself modified after it was submitted. *See* Tr 3144 ("THE COURT: * * * "I'll give 26, again, as modified to direct the jury to 368.").) As a result, objections often change too. Some are even withdrawn. Thus, at the end of a trial, when the court calls for exceptions to the instructions that were given, the parties are required to take them then, no matter what arguments they might have made earlier. How else is the court to know whether a party still has misgivings about a proposed instruction, especially one that has been modified? *See Klutschkowski v. PeaceHealth*, 354 Or 150, 164, 311 P3d 461 (2013) (sharing Court of Appeals' concern that prior exception might not alert trial court to still-germane objections to modified instruction).

The rules of civil procedure include just such a post-charge requirement. ORCP 59 H(1) provides that a party may not obtain appellate review of alleged error in the giving of an instruction unless the party takes an exception "immediately after" the court instructs the jury. Of course, Rule 59 H does not actually control appellate review of trial court rulings. As discussed in Sharabarin's brief on the merits (at 22), this court recently held that review is controlled by its "preservation jurisprudence," not by the ORCP. *State v. Vanornum*, 354 Or 614, 631, 617 P3d 889 (2013). The court noted that the Council on Court Procedures, which promulgated Rule 59 H, disclaimed any attempt to control appellate review. *Id.* at 624-26. Nevertheless, in these

circumstances, there is – or should be – no difference between the Council's rule and judge-made law. Under either authority, when the trial court invites post-charge exceptions to instructions, especially modified instructions, a party must take a proper exception *then* in order to preserve the error in the giving of an instruction, no matter what arguments the party might have presented earlier. Any other holding would defeat the purposes of preservation generally – to "ensure that trial courts have an opportunity to understand and correct their own possible errors and that the parties are not taken by surprise, misled, or denied opportunities to meet an argument." *Id.* at 632 (citations and internal quotation marks omitted).

To be sure, the complaining party can sometimes except to an instruction by referring to prior arguments, if the reference itself is sufficient – if it adequately explains the party's opposition to the instruction. In *PeaceHealth*, for example, the defendant's one-word exception to the giving of an instruction – defense counsel responded, "No," when asked whether an instruction should be given, 354 Or at 162-63 – was held to have preserved the alleged error, because the trial court told the parties that it understood their position on the instruction from prior arguments and that it was "tak[ing] as given all the exceptions that you * * * have already made." *Id.* at 163. Nothing like that happened here. La Noue's counsel excepted to the economic-waste instruction by number only, without reference to any prior arguments. That happened even after she asked the court whether it "[j]ust

want[ed] the [instruction] number" and the court cautioned her that she should state "[a]nything you think you need to put on the record to protect the record." ER 44 (Tr 3274).

In the end, the absence of a record of one afternoon's proceedings during trial is not what defeats La Noue's appeal of the economic-waste instruction. What defeats the appeal is La Noue's failure to take a proper exception *after* the instruction was given and the trial court called for exceptions. To put it another way, even if the afternoon proceedings had been reported, and even if La Noue objected to the instruction at that time, its assignment of error would still fail because of the failure to properly except when called upon later.

IV. CONCLUSION

For reasons set forth above and in Sharabarin's brief on the merits, the court should conclude that the record does not show that La Noue preserved the alleged error in the economic-waste instruction and that ORS 19.420(3) does not fix that problem. The court should thus hold that the Court of Appeals erred in considering the alleged error.

Respectfully submitted,

/s/ Thomas M. Christ

Thomas M. Christ
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For Petitioner on Review

Certificate of Compliance with ORAP 9.05(3)(a)

Brief length

I certify that this brief complies with the 14,000 word limit for Supreme Court briefs in ORAP 9.05(2)(b), and that the word count of this brief as described in ORAP 5.05(2)(a) is 3,573 words.

Type size

I further 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).

/s/ Thomas M. Christ

_____

Thomas M. Christ

Certificate of Service

I certify that I electronically filed the attached Brief with the State Court Administrator, using the Oregon Appellate eFiling System on September 30, 2014.

I further certify that I served the attached Brief on the following person using the Oregon Appellate eFiling System on September 30, 2014:

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Finally, I further certify that I served the attached Brief on the following persons through the Post Office, by mailing a copy of the Motion to each of them, by first-class mail, with postage pre-paid, on September, 2014:

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