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

May 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.

BRIEF ON THE MERITS FOR 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.

Names and Addresses of Counsel on Next Page

May 2015

Michael T. Garone, OSB No. 802341 W. Michael Gillette, OSB No. 660458 Sara Kobak, OSB No. 023495 Jordan R. Silk, OSB No. 105031 Schwabe, Williamson & Wyatt, P.C. 1211 SW Fifth Avenue, Suite 1900 Portland, Oregon 97204 Telephone: 503-222-9981 Attorneys for Petitioner-on-Review Weyerhaeuser Company Keith Garza, OSB No. 940773 Law Office of Keith M. Garza P.O. Box 68106 Oak Grove, Oregon 97268 Telephone: 503-344-4766 Attorney for *Amici Curiae* Associated Oregon Industries and Oregon Business Association	Maureen Leonard, OSB No. 823165 Attorney at Law P O Box 42210 Portland, Oregon 97205 Telephone: 503-224-0212 Brian R. Whitehead, OSB No. 833452 Law offices of Brian Whitehead, P.C. 1610 12th Street SE Salem, Oregon 97302 Telephone: 503-364-8505 J. Randolph Pickett, OSB No. 721974 Pickett Dummigan LLP 621 SW Morrison, Suite 900 Portland, Oregon 97205 Telephone: 503-226-3638 Attorneys for Plaintiffs-Respondents/ Respondents-on-Review Kevin And Mitzi Rains Thomas W. Brown, OSB No. 801779 Nicholas E. Wheeler, OSB No. 044491 Julie A. Smith, OSB No. 983450 Cosgrave Vergeer & Kester LLP 888 SW Fifth Avenue, Suite 500 Portland, Oregon 97204 Telephone: 503-323-9000 Attorneys for Third-Party Plaintiff- Respondent/Respondent-on-Review Stayton Builders Mart, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OREGON CASES

OTHER CASES

STATUTES

Other Authorities

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

I. First Question Presented and Proposed Rule of Law

Question: When a Mary Carter agreement includes financial incentives that cause a settling defendant's strongest pecuniary interest at trial to be obtaining a verdict for the plaintiffs with a large damages award against itself and the other defendants, does the agreement destroy the adversity between the settling defendant and the plaintiffs that is necessary to have a justiciable controversy under Oregon law?

Rule of Law: Yes. A justiciable controversy exists only when there is a genuine dispute between two parties with adverse legal interests. When two formerly adverse parties enter into a Mary Carter agreement that realigns their interests such that the parties now have shared financial interests in obtaining the same outcome at trial, the parties' interests are no longer adverse, and no justiciable controversy exists between them. The existence of a hypothetical contingency that the jury's verdict could affect the settling defendant's liability is insufficient to render the case justiciable, particularly when the settling defendant faces a far smaller risk of liability if the settling defendant maximizes the plaintiffs' recovery at trial. When a Mary Carter agreement eliminates genuine adversity between the settling defendant and the plaintiffs, the plaintiffs' claims against the settling defendant must be dismissed as moot, and

the settling defendant may not appear as a defendant at a trial on the plaintiffs' claims. A trial court's denial of such a motion to dismiss is prejudicial error, requiring reversal of the judgment and remand for a judgment of dismissal.

II. Second Question Presented and Proposed Rule of Law

Question: Does Oregon law require a trial court to admit evidence about the terms of a Mary Carter agreement, including terms referring to insurance, when such evidence is relevant to show the nature of the settling defendant's interest in securing a favorable verdict for the plaintiffs, as well as to show the settling defendant's bias and motive for entering into the agreement?

Rule of Law: Yes. In cases in which a justiciable controversy exists notwithstanding a Mary Carter agreement, evidence about the terms of the agreement, including insurance terms, is admissible for any relevant purposes other than showing that the settling defendant acted negligently or wrongfully, such as to prove the bias, prejudice, or motive of the settling defendant. If a non-settling defendant seeks admission of the terms of a Mary Carter agreement for use in the presentment of evidence at trial, a trial court commits prejudicial error in ruling that the terms of the agreement are inadmissible for any purpose, and a new trial is required.

III. Third Question Presented and Proposed Rule of Law

Question: Under Oregon law, does a trial court commit prejudicial error by submitting a verdict form that fails to include all parties identified under ORS 31.600(2) as parties that must be included in a jury's apportionment of comparative fault for damages?

Rule of Law: Yes. ORS 31.600(2) requires the trier of fact to compare the fault of the plaintiff with "the fault of any party against whom recovery is sought, the fault of third party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled." A trial court commits prejudicial error in omitting a party identified under ORS 31.600(2) from the comparative-fault apportionment on a verdict form.

IV. Fourth Question Presented and Proposed Rule of Law

Question: When the damages limit under ORS 31.710(1) applies to a noneconomic-damages award for a strict-product-liability claim under ORS 30.920, does the limit under ORS 31.710(1) also apply to a noneconomic-damages award for a loss-of-consortium claim that is based on a strict-product-liability claim under ORS 30.920?

Rule of Law: Yes. When a loss-of-consortium claim is based on a cause of action that is subject to the noneconomic-damages limit under ORS 31.710(1), the loss-of-consortium claim also is subject to the damages limit

under ORS 31.710(1). Because ORS 31.710(1) applies to a statutory strict-product-liability claim under ORS 30.920, ORS 31.710(1) also applies to a loss-of-consortium claim based on such a claim.

V. Fifth Question Presented and Proposed Rule of Law

Question: Under Oregon law, when a judgment granting an indemnity claim is reversed on appeal on the ground that the party has failed to prove its entitlement to indemnity, must a separate judgment awarding defense costs in indemnity also be reversed because the party is not entitled to indemnity?

Rule of Law: Yes. If a party is not entitled to prevail on an indemnity claim because the party failed to prove the requirements for indemnity, the party also is not entitled to recover defense costs in indemnity. If a judgment granting an indemnity claim is reversed for failure to prove entitlement to indemnity, a separate judgment granting defense costs in indemnity also must be reversed.

STATEMENT OF THE CASE

Plaintiffs/respondents-on-review Kevin and Mitzi Rains ("plaintiffs") filed this action after Kevin Rains ("Rains") was seriously injured in 2005 when he was walking on a board 16 feet above the ground without fall-protection gear during a construction project, and he fell after the board broke under his weight. In their complaint, plaintiffs alleged that the board broke because the board was

defective and failed to satisfy the standards for its alleged lumber grade. (ER-1-6.) In addition to a claim against defendant Five Star Construction, Inc. ("Five Star"), the general contractor for the project, plaintiffs asserted claims against defendant/ respondent-on-review Stayton Builder's Mart ("Stayton"), alleging that Stayton had supplied the defective board. (*Id*.) Stayton in turn filed third-party claims against eight different lumber companies that potentially could have manufactured the board, including third-party defendant/petitioner-on-review Weyerhaeuser Company ("Weyerhaeuser"). (ER-7-10.) Eventually, the trial court dismissed Stayton's claims against seven of the lumber companies for various reasons, leaving only Weyerhaeuser as a third-party defendant. Plaintiffs elected not to amend their complaint and made no direct claims against Weyerhaeuser.

Roughly two years after filing their initial complaint, plaintiffs obtained an $18 million default judgment against defendant Five Star. (TCF-09/22/2008, Five Star Judgment.) A jury trial was scheduled on plaintiffs' remaining claims against Stayton, with agreement that the court would decide Stayton's third-party claims against Weyerhaeuser based on the evidence at trial after the jury determined liability, damages, and comparative fault for plaintiffs' claims. Days before the start of trial—after many months of preparing a joint defense with Weyerhaeuser against plaintiffs' claims—Stayton entered into a Mary

Carter agreement with plaintiffs. (ER-11-13.) Weyerhaeuser moved to dismiss Stayton as a defendant in plaintiffs' case, but the trial court denied the motion and ruled that "the terms of the agreement and the fact that insurance is involved would not be admissible at trial" for any purpose. (Tr-244, 257-58.)

The case then proceeded to trial on Rains's strict-product-liability claim under ORS 30.920, which also included a loss-of-consortium claim by Mitzi Rains. (ER-1-6.) After a two-week trial, the jury returned a favorable verdict for plaintiffs, finding both Stayton and Weyerhaeuser at fault and awarding substantial damages. (ER-16-23.) After reducing the damages to account for Rains's comparative fault, the trial court entered a limited judgment awarding $6,272,025 to Rains and $759,375 to Mitzi Rains against both Stayton and Weyerhaeuser. (*Id*.) The trial court subsequently entered judgments in favor of Stayton on its third-party indemnity claim against Weyerhaeuser, awarding Stayton $2,000,000 in indemnity for Stayton's liability to plaintiffs under the Mary Carter agreement and $265,458 in indemnity for Stayton's defense costs. (ER-14-15; TCF-05/26/2010, Stayton Limited Judgment; TCF-01/06/2011, Stayton General Judgment.)

Weyerhaeuser appealed. On appeal, the Court of Appeals affirmed the judgment in favor of plaintiffs, except to reverse and remand for reduction of Kevin Rains's (but not Mitzi Rains's) noneconomic damages award to comply

with the damages limit under ORS 31.710. *Rains v. Stayton Builders Mart, Inc.*, 264 Or App 636, 678, 336 P3d 483 (2014). As to Stayton, the Court of Appeals reversed the judgment on Stayton's indemnity claim for $2,000,000, but largely affirmed the judgment on Stayton's indemnity claim for its defense costs, making only a slight reduction to $263,946. *Id.* Weyerhaeuser and plaintiffs both petitioned this Court for review, and this Court granted the petitions. Stayton did not petition for review or otherwise make any contingent request for review under ORAP 9.10(1).

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

I. Plaintiff Is Injured When He Falls During a Construction Project

The accident at issue in this case occurred during the construction of a pole barn in February 2005. (ER-6-7.) Rains and his then-business partner were constructing the barn as subcontractors for Five Star. (Tr-322-23, Tr-741.) The accident happened as Rains was walking from one pole to another pole with a chainsaw on top of a two-by-six-inch board. (Tr-1148-49, Tr-1230.) The board was 14 feet long, crossing an exposed span between the two poles at a height of 16 feet above the ground. (*Id*.) Although he had the gear at the jobsite, Rains was not wearing any fall-protection gear at the time that he was walking on the board. (Tr-1232.) The board broke under Rains's weight,

causing Rains to fall to the ground and to suffer severe injuries to his lower back that resulted in paraplegia. (Tr-1148-49, ER-1-6.)

Shortly after the accident, Rains's business partner cut the board into pieces and used the wood for blocks in the barn construction. (Tr-325-26, Tr-371.) Before doing so, he carefully examined the board. (Tr-370-71, Tr-379.) According to his testimony, the board involved in the accident contained a large knot roughly five inches in diameter in the center of the board. (Tr-376-79, Tr-381.) The theory underlying plaintiffs' claims was that the board was supposed to be a number two or better lumber grade, but the board fell short of those standards and was defective because of the knot. (ER-3.)

As a result of the board's destruction, no party ever was able to inspect the board to identify its manufacturer. There also were no records identifying the manufacturer. Five Star ordered and purchased all lumber for the project, but a fire destroyed its records before Weyerhaeuser was brought into the case. (Tr-741, Tr-750.) Rains reported that Stayton delivered the lumber to the project site, and the owner of Stayton testified that all lumber that it sold to Five Star for the project came from Weyerhaeuser. (Tr-1201, Tr-1285.) An audit of the barn, however, showed that a significant portion of the lumber actually was manufactured by companies other than Weyerhaeuser. (*See, e.g.,* Tr-1284-86.) Weyerhaeuser also produced evidence that Weyerhaeuser's lumber mill that

supposedly manufactured the board was incapable of milling logs large enough to produce the size of knot that the board allegedly contained. (*See, e.g.,* Tr-1321-22, Tr-1376.) Before the Mary Carter agreement, those facts served to align Stayton with Weyerhaeuser in defense against plaintiffs' claims because, if the jury accepted that Stayton delivered only boards from Weyerhaeuser and that Weyerhaeuser could not have manufactured the board involved in the accident because of its knot size, then the jury would have to conclude that Stayton was not the supplier of the board.

II. Stayton and Weyerhaeuser Prepare a Joint Defense Against Plaintiffs' Claims until Stayton Enters a Mary Carter Agreement with Plaintiffs Immediately Before Trial

In November 2006, plaintiffs filed their initial complaint seeking damages for the accident, with Rains asserting an employer liability claim under ORS 654.305 against Five Star, and a negligence claim and a strict-product-liability claim under ORS 30.920 against Stayton, John Doe Lumber Supplier, and John Doe Lumber Mill. (TCF-11/08/2006, Complaint.) Rains's strict-product-liability claim against Stayton also included a loss-of-consortium claim by his wife, Mitzi Rains. (ER-3.) In May 2008, Stayton in turn filed a third-party complaint seeking contribution and indemnity from various lumber manufacturers including Weyerhaeuser. (TCF-05/16/2008, Third-Party Complaint.) After the trial court dismissed Stayton's claims against the other

third-party defendants, plaintiffs elected not to amend their complaint to add any direct claims against Weyerhaeuser[1] and, instead, filed a separate action against Weyerhaeuser based on the same accident.[2]

The case ultimately was set for a jury trial in April 2010 after plaintiffs obtained a default judgment against Five Star. (TCF-09/22/2008, Five Star Judgment.) From the time that Weyerhaeuser entered the case, Weyerhaeuser and Stayton worked closely together under a joint defense agreement to prepare a united defense against plaintiffs' claims. (Tr-1885-88.) Just five days before the start of trial, however, Stayton entered into a Mary Carter agreement with plaintiffs. After entering that agreement, Stayton's strategy changed from defending against plaintiffs' claims to seeking a favorable verdict for plaintiffs with a money award of at least $1.5 million in damages against both Stayton

---

[1] Stayton's relevant computer records were largely destroyed by the time it filed its third-party action. (Tr-1280-81.) As result, most third-party defendants were dismissed because Stayton had no record of purchasing lumber from them. The trial court denied summary judgment to Weyerhaeuser because some records existed that Weyerhaeuser had sold lumber to Stayton during the time period at issue. (TCF-08/25/2009, Order—Summary Judgment.)

[2] After Stayton filed its third-party complaint against Weyerhaeuser, plaintiffs moved to amend their complaint to add direct claims against Weyerhaeuser, but then withdrew their motion. (*See* TCF-05/28/2009, Motion to Amend; TCF-06/16/2009, Ltr Withdraw Motion to Amend.) Plaintiffs then filed a separate action against Weyerhaeuser based on the same accident. That action is being held in abeyance pending the outcome of this case. *See Rains v. Weyerhaeuser,* Marion County Case No. 09C15962; *see also* OEC 201 (permitting judicial notice of facts capable of accurate and ready determination).

and Weyerhaeuser because, under the terms of the agreement, such a favorable outcome for plaintiffs would allow Stayton to avoid any actual liability. Stayton's counsel documented this change of strategy in his billing entries, describing his time to "[f]inalize trial preparation under new strategy of obtaining a verdict against insured and Weyerhaeuser for in excess of $1.5 million." (TCF-06/11/2011, Stayton Statement of Atty Fees and Costs.)[3]

Under the Mary Carter agreement, Stayton and its insurer agreed to pay a minimum of $1.5 million to plaintiffs regardless of the outcome at trial, and plaintiffs agreed to limit Stayton's maximum liability to $2 million. (ER-10-11.) Plaintiffs also agreed to dismiss the negligence claim against Stayton,

---

[3] In addition to their Mary Carter agreement with Stayton, plaintiffs also entered into an undisclosed settlement agreement with Five Star. Under that agreement, Five Star agreed to be represented by plaintiffs' counsel to pursue claims against Five Star's insurer relating to plaintiffs' original claims in this action and to hold those claims "in trust" for plaintiffs. *See Rains v. Stayton Builders Mart, Inc.*, 258 Or App 652, 656, 310 P3d 1195 (2013) (describing agreement); *5 Star, Inc. v. Atlantic Casualty Ins. Co.,* 269 Or App 51, 54, 344 P3d 467 (2015) (same). At trial, although Five Star's owner testified as a third-party witness—and although ORS 31.815(2) clearly obligated plaintiffs to disclose the settlement—plaintiffs never told Weyerhaeuser about the agreement or their counsel's concurrent representation of Five Star at the time of trial. *Rains,* 258 Or App at 656. Instead, Weyerhaeuser learned of the agreement only in January 2012, more than 12 months after entry of the judgments and several months after Weyerhaeuser had already filed its opening brief in the Court of Appeals. *Id.* Weyerhaeuser promptly moved under ORCP 71 to set aside the judgments for fraud, but the trial court and Court of Appeals both held that the motion was untimely, even though it was undisputed that Weyerhaeuser learned of the fraud only after the time period for moving to set aside a judgment under ORCP 71. *Id.* at 662-63.

leaving only the strict-product-liability claims. (ER-11.) As to those claims, Stayton agreed to remain as a nominal defendant at trial and to pursue its third-party indemnity claim against Weyerhaeuser. (*Id*.) If the jury found for plaintiffs and awarded $1.5 million or more in damages against defendants, the Mary Carter agreement allowed Stayton to fully recoup its settlement payment by entitling Stayton to keep its recovery from Weyerhaeuser in indemnity up to Stayton's liability limit of $2 million, with recovery over $2 million going to plaintiffs. (ER-11-12.) In contrast, if the jury awarded less than $1.5 million in damages against defendants, Stayton and its insurer still would be obligated to pay $1.5 million to plaintiffs, and they would be entitled to recoup only the verdict amount in indemnity. (*Id*.) And if the jury returned a defense verdict, Stayton would have no ability to recoup its settlement payment at all. (*Id*.)

III. The Trial Court Allows Stayton to Remain as a Nominal Defendant at Trial, and Stayton Actively Assists Plaintiffs to Obtain a Verdict with Large Damages against Itself and Weyerhaeuser

Before the start of trial, plaintiffs and Stayton provided a copy of their Mary Carter agreement to both Weyerhaeuser and the trial court. (ER-11-13.) Consistent with the terms of the agreement, plaintiffs withdrew the negligence claim against Stayton, and Stayton withdrew its third-party contribution claim against Weyerhaeuser. (Tr-239.) Weyerhaeuser then asked the trial court to dismiss Stayton from the case on the ground that a justiciable controversy no

longer existed between plaintiffs and Stayton in light of the agreement. (Tr-244.) In support of its motion, Weyerhaeuser pointed out that Stayton "stand[s] to gain $1.5 million by the verdict in this case" and argued that Stayton would be "essentially working in concert" with plaintiffs at trial notwithstanding its nominal position as a defendant. (Tr-244.)

In response to Weyerhaeuser's motion, plaintiffs argued that a justiciable controversy still remained under the agreement because "[t]here is a sum of $500,000 at stake between Stayton Builders and plaintiffs…[.]" (Tr-246-47.) For its part, Stayton acknowledged that it no longer had an interest in defending against plaintiffs' claims, stating "Stayton Builders Mart [could be] making a huge mistake and paying $1.5 million when, you know, the jury here ends up with a defense verdict for both defendants, I mean, you know, then that would have been a bad decision" to enter the Mary Carter agreement. (Tr-257.) Stayton nevertheless argued that a justiciable controversy existed between Stayton and plaintiffs because of the theoretical possibility that Stayton would be unable to recover in indemnity if "Weyerhaeuser [were] going bankrupt tomorrow," which Stayton admitted "we all know, sure, that's highly unlikely." (Tr-250.) The trial court denied Weyerhaeuser's motion. (Tr-257.)

Weyerhaeuser next asked the trial court to rule on the admissibility of the Mary Carter agreement at trial, explaining that it wished to introduce the terms

of the agreement during the presentment of evidence:

> "Weyerhaeuser would like to make use of the Mary Carter agreement during the course of the presentment of evidence. We believe that the jury has a right to know of this agreement. They have a right to know the terms of this agreement. They also have a right to know that it's insurance that's paying these terms as opposed to Stayton Builders Mart, a small, local lumber yard."

(Tr-245.) As to the admissibility of insurance references in the agreement, Weyerhaeuser further elaborated that the jury should know that the settlement money for the Mary Carter agreement came from Stayton's insurance company, which was relevant in these circumstances for reasons unrelated to Stayton's liability and negligence. (Tr-245-46.) After hearing arguments from plaintiffs and Stayton, the trial court made an unequivocal ruling that neither the terms of the Mary Carter agreement, nor evidence that Stayton's insurer agreed to pay the amount owed to plaintiffs under the agreement, would be admissible for any purpose during the course of the trial:

> "[Counsel for Weyerhaeuser]: I think the final point was just ***whether that agreement was going to be admissible for any purpose during the course of trial***.
>
> "*****
>
> "[Trial court]: Thank you. Based upon the ruling in *Bocci*, the Court would be consistent with that ruling and say that ***the terms of the agreement and the fact that insurance is involved would not be admissible at trial.***"

(Tr-257-58 (emphases added).)

Based on those rulings, the case proceeded to trial with Stayton appearing ostensibly in the role of a defendant. At trial, however, Stayton made no effort to defend itself or to limit its liability in any way and, instead, actively assisted plaintiffs with advancing their claims. During voir dire, Stayton was able to exercise its three peremptory challenges in plaintiffs' favor. Stayton declined to cross-examine five of plaintiffs' expert witnesses, and it withdrew an objection to a tape of a sixth expert witness. (*See* Tr-455, 499; Tr-718; Tr-973; Tr-991; Tr-1072; Tr-1118.) Stayton also used its examination of witnesses to actively promote plaintiffs' theory of the case that the board came from Stayton and was manufactured by Weyerhaeuser. (*See, e.g.*, Tr-1201 (cross-examining Rains to elicit testimony about lumber delivery from Stayton); Tr-622 (cross-examining plaintiffs' expert to elicit testimony about relationship between lumber grades and board strength); Tr-835 (cross-examining plaintiffs' expert witness to elicit testimony on lumber grades); Tr-1032 (cross-examining plaintiffs' son to ask if "[Rains] seemed to have done the best that he could with his situation"); Tr-1484 (asking Weyerhaeuser's expert if "in nature all different kinds of knots and limb sizes can grow on trees"); *see also, e.g.*, Tr-575-79; Tr-509-15; Tr-1114; Tr-1485-86; Tr-1521-22.) Because it was prohibited from introducing the terms of the agreement, Weyerhaeuser was unable to use the Mary Carter

agreement in cross-examining Stayton's owner to show bias in his testimony or to otherwise show the nature of Stayton's financial interests and motives under the agreement.

In its closing argument, Stayton argued that the jury should hold Stayton and Weyerhaeuser liable for plaintiffs' strict-product-liability claims, repeatedly asserting that the board was defective and that Stayton and Weyerhaeuser were liable.[4] (*See, e.g.*, Tr-1597-99 ("We're liable because we're a seller, period. Same for the manufacturer. And the product was in [a] defective condition unreasonably dangerous to the plaintiff when the product left the defendant's hands.").) Stayton represented to the jury that it had entered a settlement with plaintiffs to accept responsibility for plaintiffs' injuries, stating "Weyerhaeuser could have stepped up to the plate" and arguing that Weyerhaeuser's denial of liability was excuses "like, you know, the dog ate the homework, or that didn't happen, I was sick…" (Tr-1598-1600.) In urging the jury to find liability on the product-defect claim, Stayton argued that an ordinary user of a board would be "walking on it with or without fall protection" at heights and that Rains was not responsible for causing the accident. (Tr-1602-04; *see* Tr-1610 (arguing

[4] The transcript of Stayton's closing agreement from trial is included in full in Weyerhaeuser's excerpts of record at ER-26-50.

Rains "had nothing to do with the board itself breaking, the board being unable to hold 220 pounds that it's designed to hold and that it's supposed to hold").)

Stayton also implored the jury to compensate plaintiffs with significant damages against both defendants, asserting that Stayton and Weyerhaeuser "have an ability to recoup [damages] through their pricing structure, through their continuing business and so on" and that "Rains does not have an ability to recoup." (Tr-1609; Tr-1597 (same).) Stayton further argued that the jury should not fault Rains for failing to wear fall protection while walking on a board at a height of 16 feet above the ground, claiming that "others in the industry do it exactly the same way [Rains] does" and that his conduct was reasonable. (Tr-1609.) Stayton also urged the jury to disbelieve the testimony of Weyerhaeuser's experts on the board and the impossibility of the alleged knot size in boards from the mill that allegedly produced the board, claiming that "plaintiff doesn't have the same ability that Weyerhaeuser does, to bring in the academicians, or something, bring in all that" and urging that the "tobacco companies were doing the same thing" in relying on expert testimony to defend against claims. (Tr-1605-06.)

For their part, plaintiffs' closing argument relied heavily on Stayton's support of plaintiffs to bolster their claims, asserting that Stayton "accepted responsibility" (Tr-1553) and "[t]he reason we've been in trial for the last two

weeks is because Weyerhaeuser does not accept responsibility" (Tr-1554). Plaintiffs argued that Stayton's motive for settling with plaintiffs was Stayton's recognition of defendants' fault for the accident. (*See, e.g.,* Tr-1554 (arguing "Stayton…has stepped up to the plate and said…This board broke. Mr. Rains was hurt. We accept responsibility."). Tr-1574.) Plaintiffs repeatedly urged the jury to allocate fault primarily to Weyerhaeuser, asserting that "this [accident] is Weyerhaeuser's responsibility" and that "this case is really all about" Weyerhaeuser's fault. (Tr-1574, 1577, 1655; Tr-1667 (arguing Stayton admitted "it was their board" and "[t]hey are saying we really think the responsibility is on Weyerhaeuser").)

Because Weyerhaeuser was prohibited from introducing the terms of the Mary Carter agreement at trial, the jury heard only plaintiffs' and Stayton's arguments that Stayton had altruistic motives for entering the settlement and that Stayton acted out of a desire to accept responsibility for plaintiffs' injuries. Weyerhaeuser was unable to inform the jury that Stayton's real motive for entering the Mary Carter agreement—acknowledged by Stayton's counsel outside of the presence of the jury before trial—was "to give Stayton Builders Mart individually … protection so that Stayton Builders Mart is not personally liable beyond its insurance policy limits." (Tr-256.) Weyerhaeuser also was unable to inform the jury that Stayton stood to benefit financially from a large

damages award for plaintiffs because such a verdict would position Stayton to fully recover its settlement payment to plaintiffs, as well as attorney fees and costs. Although the trial court provided a general instruction telling the jury that Stayton and plaintiffs had entered into a settlement,[5] the trial court provided no information to the jury about the terms of the Mary Carter agreement, nor did it explain Stayton's interests under the agreement. (Tr-257-58.)

After deliberations, the jury returned a verdict for plaintiffs on their strict-product-liability claim, finding both Stayton and Weyerhaeuser at fault. (ER-16-23.) The jury awarded Rains $5,237,700 in economic damages and $3,125,000 in noneconomic damages, and it awarded Mitzi Rains $1,012,500 in noneconomic damages for her loss-of-consortium claim. (*Id.*) For comparative

---

[5] In instructing the jury about the Mary Carter agreement, the trial court stated:

> "As I told you at the beginning of the trial, Stayton Builders Mart has settled with the Rains. You have not heard, and will not hear the terms of that settlement. It is important that you not consider the settlement when reaching your verdict with respect to liability or damages of any party. It is not to be considered in any way in determining the nature of the verdict as to any party. You are to consider the fact of the settlement only as it might bear on the issue of credibility or believability of the witnesses who have testified on behalf of Stayton Builders Mart and plaintiffs."

(Tr-1676-77.) At the start of trial, the trial court gave only a vague and unclear explanation of the agreement, stating: "The settlement agreement contains a schedule of repayment to Stayton Builders Mart by the plaintiff if the plaintiffs and Stayton Builders Mart are awarded a verdict against Weyerhaeuser. So there is that relationship that you need to be aware of." (Tr-269.)

fault apportionment, the jury found Rains as 25 percent at fault, Stayton as 30 percent at fault, and Weyerhaeuser as 45 percent at fault. (*Id.*) Five Star did not appear for comparative-fault allocation under ORS 31.600 because the trial court denied Weyerhaeuser's request to include Five Star on the verdict form for that purpose. (Tr-1691.) The trial court also denied Weyerhaeuser's motion to apply the damages limit under ORS 31.710(1) to plaintiffs' awards for noneconomic damages. (Tr-1833-35.) After a hearing, the trial court then granted Stayton's indemnity claim against Weyerhaeuser, awarding $2 million in indemnity for Stayton to recover the full amount of its settlement liability under the Mary Carter agreement and $265,458.70 in indemnity for Stayton's defense costs. (ER-14-15; TCF-05/26/2010, Stayton Limited Judgment; TCF-01/06/2011, Stayton General Judgment.)

IV. The Court of Appeals Decision

Weyerhaeuser appealed, raising thirteen assignments of error.[6] Among other trial court rulings, Weyerhaeuser challenged: (1) the denial of its motion to dismiss Stayton from the case based on the Mary Carter agreement; (2) the exclusion of the Mary Carter agreement from evidence at trial; (3) the exclusion of Five Star for comparative-fault allocation on the verdict form; (4) the denial

[6] Consistent with the terms of the Mary Carter Agreement, Stayton did not appeal plaintiffs' judgment against it, and that judgment is now final as to Stayton. (ER-16-23.)

of its motion to apply ORS 31.710(1) to limit plaintiffs' noneconomic-damages awards; and (5) the grant of Stayton's indemnity claim.

In its decision, the Court of Appeals rejected most of Weyerhaeuser's challenges to plaintiffs' judgment, agreeing only that the trial court erred in not applying ORS 31.710(1) to Rains's strict-product-liability claim (but affirming the trial court's decision not to apply ORS 31.710(1) to Mitzi Rains's loss-of-consortium claim based on Rains's strict-product-liability claim). *Rains,* 264 Or App at 660-66. As to the judgment for Stayton, the Court of Appeals concluded that Stayton failed to prove its indemnity claim because Stayton never discharged its obligations to plaintiffs under the Mary Carter agreement and did not "buy peace" for Weyerhaeuser. *Id.* at 666-73. After reversing Stayton's indemnity claim, however, the Court failed to reverse the judgment for defense costs in indemnity. Weyerhaeuser sought reconsideration, but the Court of Appeals denied the petition. Weyerhaeuser then petitioned for review.

SUMMARY OF ARGUMENT

I. After Stayton and plaintiffs entered into a Mary Carter agreement providing an affirmative financial incentive for Stayton to pursue a verdict for plaintiffs with a large damages award against both defendants, plaintiffs' claims against Stayton should have been dismissed as moot. As a result of the Mary

Carter agreement, Stayton's and plaintiffs' interests were aligned to pursue the same outcome at trial, and no justiciable controversy existed between them.

II. Even if dismissal had not been required, it was prejudicial error to prohibit Weyerhaeuser from introducing the Mary Carter agreement for any purpose during the presentment of evidence. Weyerhaeuser should have been permitted to introduce evidence about the terms of the Mary Carter agreement, including its insurance terms, to show bias in the testimony of Stayton's witness and to show Stayton's interests and motives under the agreement. Moreover, even if the insurance terms were inadmissible, the trial court erred in ruling that Weyerhaeuser would not be permitted to introduce any terms of the agreement for any purpose during trial.

III. It also was error to deny Weyerhaeuser's request to include Five Star on the verdict form for purposes of apportioning comparative fault for damages under ORS 31.600(2). Because Five Star was a "party against whom recovery is sought," as well as a "person with whom the claimant has settled," under ORS 31.600(2), the jury should have been permitted to consider it in apportioning comparative fault.

IV. In addition, it was error not to reduce Mitzi Rains's noneconomic-damages award to the limit under ORS 31.710(1). As the Court of Appeals correctly recognized, the Oregon Constitution does not preclude application of

ORS 31.710(1) to a statutory strict-product-liability claim under ORS 30.920. The tort claim alleged in Mitzi Rains's loss-of-consortium claim was a strict-product-liability claim under ORS 30.920, and her noneconomic damages were subject to the same limit under ORS 31.710(1) to which her husband's damages were subject.

V. Finally, the judgment awarding Stayton's defense costs should have been reversed when the Court of Appeals reversed Stayton's indemnity claim. Stayton did not seek review of the Court of Appeals' holding that Stayton failed to satisfy the requirements for a claim for indemnity, and Stayton is not entitled to recover its defense costs if it is not entitled to indemnity. The judgments in favor of plaintiffs and Stayton must be reversed.

ARGUMENT

I. When a Mary Carter Agreement Eliminates Adversity between the Plaintiffs and a Settling Defendant, Oregon Law Prohibits the Settling Defendant from Appearing as a Defendant on the Plaintiffs' Claims at Trial

The Court of Appeals erred as a matter of law in holding that a justiciable controversy still remained between Stayton and plaintiffs after those parties entered into their Mary Carter agreement. In reaching that holding, the Court of Appeals recognized that the agreement provided an "affirmative incentive" for Stayton to advocate for the jury to return a verdict for plaintiffs with at least

$1.5 million in damages against both Stayton and Weyerhaeuser. *Rains* 264 Or App at 645-47. Despite that recognition, the Court concluded that a justiciable controversy existed between Stayton and plaintiffs because "the agreement did not absolutely establish Stayton's potential financial exposure" and it was not a certainty that Stayton would prevail on its indemnity claim. *Id*. at 647-48. In so reasoning, however, the Court of Appeals missed the point that Stayton's interest under the Mary Carter agreement was maximizing plaintiffs' recovery at trial because a high damages award for plaintiffs would position Stayton to fully recover its $1.5 million minimum settlement payment from Weyerhaeuser. Because the Mary Carter agreement realigned Stayton's interests such that Stayton and plaintiffs shared a common interest in the same outcome at trial, a justiciable controversy no longer existed between those settling parties, and Stayton should not have appeared as a defendant at trial. The Court of Appeals' contrary conclusion was error and must be reversed.

A. Overview of Mary Carter Agreements

The term "Mary Carter agreement" derives from the decision in *Booth v. Mary Carter Paint Co.,* 202 So2d 8 (Fla App 1967). Although such agreements vary in their specific terms, a Mary Carter agreement generally is defined as a settlement agreement between a plaintiff and less than all defendants in which: (1) the settling defendant guarantees a minimum recovery for the plaintiff and

agrees to participate as a defendant at trial; and (2) in exchange, the plaintiff agrees to a maximum limit on the settling defendant's liability notwithstanding the verdict, often with financial incentives for the settling defendant to increase the plaintiff's recovery against the other defendants. *See, e.g.*, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 Colum L Rev 368, 371-72 (1987) (stating same); *see also, e.g., Dosdourian v. Carsten*, 624 So 2d 241, 243 (Fla 1993) (stating same general terms and noting traditional feature of secrecy).

In *Grillo v. Burke's Paint Co., Inc.*, 275 Or 421, 426-27, 551 P2d 449 (1976), this Court recognized that Mary Carter agreements "have been criticized as distorting the relationship between plaintiffs and defendants, resulting in a non-adversary and possibly collusive proceeding between the plaintiff and one defendant which may adversely affect the non-settling defendant's right to a fair trial." Other courts share the same concerns. *See, e.g., Bocci v. Key Pharms., Inc.*, 158 Or App 521, 552-54, 974 P2d 758 (1999) (*en banc*) (affirmed by equally divided court) (Landau, J., dissenting) (listing decisions and stating "[i]is well-nigh universally recognized that Mary Carter agreements are dangerous"), *vac'd on other grounds*, 332 Or 39 (2001). Among other things, Mary Carter agreements have a high risk of skewing the adversary process and increasing allocation of fault for non-settling defendants in cases where the settling defendant, although ostensibly appearing in the role

of a defendant at trial, actually is most interested in advancing the plaintiff's case. As one commentator explained:

> The real attraction to a Mary Carter arrangement is the ability to enlist support from the settling defendant and disguise him [or her] as an adversary, when he [or she] is actually a member of the plaintiff's camp. The nonsettling defendant finds himself [or herself] at trial with an adversary in his [or her] own camp: a co-defendant who stands to profit by a large plaintiff's judgment. The guarantee clause of the Mary Carter agreement insures that the interests of the settling defendant are actually only adverse to those of their co-defendants, not to the plaintiff."

Pat Shockley, *The Use of Mary Carter Agreements in Illinois*, 18 S Ill U LJ 223, 229 (1993); *see also, e.g., Hodesh v. Korelitz*, 914 NE2d 186, 190 (Ohio 2009) ("[o]ne of the major dangers of Mary Carter agreements lies in the distortion of the relationship between the settling defendant and the plaintiff, which allows the settling defendant to remain nominally a defendant to the action while secretly conspiring to aid the plaintiff's case" (internal citation and quotation marks omitted)); *Elbaor v. Smith*, 845 SW2d 240, 249 (Tex 1993) (stating Mary Carter agreements often "present to the jury a sham of adversity between the plaintiff and one codefendant, while these parties are actually allied for the purpose of securing a substantial judgment for the plaintiff" (internal citation and quotation marks omitted)).

Because of the high risk of unfair trials with Mary Carter agreements—including even ones without financial incentives for the settling defendant to

increase the plaintiffs' verdict—some courts have held that such agreements are void as against public policy. *See, e.g., Dosdourian*, 624 So2d at 247-48 (holding same and stating even "[s]imple inaction on the part of one defendant can adversely affect the codefendant"); *Cox v. Kelsey-Hayes Co*., 594 P2d 354, 359 (Okla 1978) ("[i]n no circumstances should a defendant who will profit from a large plaintiff's verdict be allowed to remain in the suit as an ostensible defendant"); *Elbaor,* 845 SW2d at 249 ("Mary Carter agreement is simply an unwise and champertous device"). A majority of courts, even if not prohibiting Mary Carter agreements entirely, at least require that such agreements are disclosed and scrutinized to confirm that a justiciable controversy still exists between the settling defendant and the plaintiff, and to ensure that the non-settling defendant receives a fair trial. *See, e.g., Simpson v. Matthews*, 790 NE2d 401, 405 (Ill App 2003) ("Illinois also has shown concern in preserving the adversarial relationship between parties when faced with Mary Carter-type settlements"); *Hodesh*, 914 NE2d at 190 (in deciding validity of Mary Carter agreement, "we look for a provision that decreases the settling defendant's liability in proportion to an increase in the nonsettling defendant's liability" because such provisions promote collusion between the settling parties); *see also Bocci*, 158 Or App at 553-54 (Landau, J., dissenting) (observing majority of courts require disclosure of agreement, and listing decisions holding same).

In *Grillo*, 275 Or at 427, this Court declined to hold that Mary Carter agreements are *per se* invalid as a matter of Oregon law and, instead, directed that such agreements must be evaluated on a case-by-case basis. In providing guidance about such evaluation in this case, this Court should make clear that a justiciable controversy—that is, an "actual and substantial controversy between parties having adverse legal interests," *Brown v. Or. State Bar,* 293 Or 446, 449, 648 P2d 1289 (1982)—does not exist under Oregon law when a settling defendant's strongest pecuniary interest under a Mary Carter agreement is to maximize the recovery for the plaintiff at trial. In such circumstances, the settling defendant no longer is adverse to the plaintiff, and the settling defendant should not appear as a defendant on the plaintiffs' claims at trial. That rule protects the court, the jury, and non-settling parties from being required to participate in sham and collusive proceedings in which no genuine dispute exists between settling parties. *See Dosdourian*, 624 So2d at 247 (observing "[t]he integrity of our justice system is placed in question when a jury charged to determine the liability and damages of the parties is deprived of the knowledge that there is, in fact, no actual dispute between two out of three of the parties" (internal citation and quotation marks omitted)). That rule also is required by the strict adherence to justiciability requirements mandated by Oregon law.

B. Oregon Law Requires Dismissal of a Settling Defendant When a Mary Carter Agreement Realigns the Interests of the Plaintiffs and the Settling Defendants Such that Both Parties Seek the Same Outcome at Trial

This Court repeatedly has instructed that Oregon courts may not exercise jurisdiction in cases lacking a justiciable controversy. *See, e.g., Brown,* 293 Or at 449 (stating same). To be justiciable, "[t]he controversy must be definite and concrete, touching the legal relations of the parties having adverse interests." *Cummings Constr. v. School Dist. No. 9,* 242 Or 106, 110, 408 P2d 80 (1965); *see also Brumnett v. PSRB*, 315 Or 402, 405, 848 P2d 1194 (1993) (holding justiciable controversy exists only when "interests of the parties to the action are adverse" and "court's decision in the matter will have some practical effect on the rights of the parties to the controversy"). When two parties share a common interest in obtaining the same outcome in a judicial proceeding, a justiciable controversy does not exist because the parties lack the necessary adversity. *See, e.g., Or. Med. Ass'n v. Rawls*, 276 Or 1101, 1105, 557 P2d 664 (1976) (holding no justiciable controversy existed between plaintiffs and defendant when they share interest in same outcome). Parties cannot avoid that result by agreement or stipulation. *See Barcik v. Kubiaczyk*, 321 Or 174, 186, 895 P2d 765 (1995) ("justiciability may not be conferred by stipulation or consent of the parties in the absence of an actual justiciable controversy");

Yancy v. Shatzer, 337 Or 345, 350, 97 P3d 1161 (2004) ("the constitutional grant of governmental power to the judiciary is limited by the justiciability requirement").

In the context of a Mary Carter agreement, no justiciable controversy exists between a settling defendant and a plaintiff when the agreement realigns the interests of the settling defendant such that its pecuniary interest at trial is pursuing a large damages award for the plaintiff because, under the terms of the agreement, such a favorable outcome for the plaintiff reduces or eliminates the settling defendant's liability. The reasoning from the dissenting opinion in *Bocci* illustrates that point.[7]

---

[7] In its decision, the Court of Appeals did not discuss the competing opinions in *Bocci* in any detail and, instead, relied on two other decisions from the Court of Appeals. *See Rains*, 264 Or App at 646-47 (discussing same). In *Stephens v. Bohlman,* 138 Or App 381, 909 P2d 208, *rev dismissed*, 324 Or 177 (1996), the settling defendant agreed to make a settlement payment to the plaintiff and still remain in the case, in exchange for the plaintiff's promise not to execute on any judgment against the defendant. *Id*. at 384. The Court of Appeals concluded that the agreement extinguished any justiciable controversy between the settling parties because the settling defendant had no interest in the trial outcome. *Id*. at 385. In contrast, in *Dew v. City of Scappoose*, 208 Or App 121, 145 P3d 198 (2006), *rev den*, 342 Or 416, 154 P3d 722 (2007), the agreement provided that the plaintiff would not enforce any judgment above the settling defendant's insurance limits, and the settling defendant agreed to cooperate with any enforcement action on the judgment. *Id.* at 127. Notably, however, the settling defendant denied any liability. *Id.* at 143-44. Given the fact the defendant's liability remained contested, the Court of Appeals concluded that the parties remained in an adversarial relationship, even if the defendant was insulated from any judgment above insurance limits. *Id*.

In *Bocci,* 158 Or App 521, the plaintiff asserted claims against a drug manufacturer and a treating physician after the plaintiff suffered brain injuries from a toxic drug interaction. Before trial, the physician defendant and his insurer entered into a Mary Carter agreement with the plaintiff under which the physician paid the plaintiff $200,000 and loaned an additional $800,000 in exchange for the plaintiff's promise to limit recovery from the physician to $1 million regardless of the outcome at trial. *Id*. at 527. If the plaintiff obtained more than $3 million at trial from the other defendants, the agreement required the plaintiff to repay the $800,000 loan. *Id.* at 527-28.

On appeal, the main concurrence would have held that the agreement did not render the plaintiff's claims against the physician as nonjusticiable because the jury's verdict would determine the amount of the physician's liability to the plaintiff between $200,000 and $1 million. *Id*. at 529 (Riggs, J., concurring). The dissenting opinion by then-Judge Landau vigorously disagreed. *Id*. at 556-58 (Landau, J., dissenting). In doing so, the dissent observed that the plaintiff and the physician shared a common interest under the Mary Carter agreement to maximize the drug manufacturer's liability because the physician's liability to the plaintiff was capped, and the physician stood to get the return of $800,000 of his settlement payment if the manufacturer's liability exceeded $3 million. *Id*. Because the settling parties sought the same outcome at trial, the dissent

would have held that no justiciable controversy existed between them, and that the plaintiff's claims against the physician should have been dismissed as moot. *Id*. at 558. The dissenting opinion also would have concluded that the failure to dismiss the physician was prejudicial to the non-settling defendant because of the procedural advantages to the plaintiff flowing from that misalignment. *Id.*

The reasoning from the dissenting opinion in *Bocci* should be followed here. When, as in *Bocci* or in this case, a Mary Carter agreement realigns the interests of the settling defendant so that the settling defendant and the plaintiffs have shared financial interests in the goal of securing a large damages award for the plaintiffs at trial, the settling defendant no longer has adversity with the plaintiffs, and no justiciable controversy exists between the settling parties. Allowing a settling defendant nevertheless to remain as a nominal defendant at a trial seriously distorts the adversarial process and results in prejudice to the non-settling defendant, with the plaintiffs and the settling defendant able to use the position as a nominal defendant for procedural and evidentiary advantages and to make the non-settling defendant appear unreasonable in comparison. *See, e.g*., Shockley, *The Use of Mary Carter Agreements in Illinois*, 18 S Ill LJ at 229-230 (discussing examples of same, like offering stipulations to damages, using cross-examination to elicit testimony favorable to plaintiff, using position as defendant to give advantages to plaintiff, and jury confusion over motives of

settling defendant to detriment of non-settling defendant). Those distortions happened at this trial, to the extreme prejudice of Weyerhaeuser.

C. The Failure to Dismiss Stayton from the Case After Stayton and Plaintiffs Entered a Mary Carter Agreement Was Prejudicial Error Requiring Reversal of Plaintiffs' Judgment

The trial court committed prejudicial error in failing to dismiss plaintiffs' claims against Stayton after the disclosure of their Mary Carter agreement. Before entering the agreement immediately before trial, Stayton was aligned with Weyerhaeuser in defending against plaintiffs' claim, with both defendants having strong interests in proving that the board was not supplied by Stayton or manufactured by Weyerhaeuser. That changed when Stayton entered the Mary Carter agreement. Under the agreement, Stayton's only hope of recovering its $1.5 million minimum settlement payment was to facilitate a verdict for plaintiffs with a large damages award against both defendants. And that is exactly how Stayton pursued its interests at trial.

The terms of the Mary Carter agreement between plaintiffs and Stayton were designed to motivate Stayton to assist plaintiffs at trial and to ensure that Weyerhaeuser, not Stayton, would pay any damages to plaintiffs. To reduce Stayton's risk of financial exposure without indemnity, plaintiffs agreed to limit their claims to only strict-product-liability claims for which indemnity was available to Stayton. Plaintiffs also agreed that Stayton would be permitted to

recover its full settlement payment as long as plaintiffs obtained at least $1.5 million in damages by entitling Stayton to keep its recovery in indemnity up to the full amount that it owed to plaintiffs under the agreement. Although Stayton theoretically risked additional exposure for $500,000 if the jury's verdict exceeded $1.5 million and Stayton failed to recover in indemnity, that theoretical risk had no practical effect on Stayton's interests and did not create any genuine adversity between Stayton and plaintiffs.

If Stayton wanted to recoup its minimum $1.5 million payment under the Mary Carter agreement, Stayton's focus at trial needed to be securing a large verdict for plaintiffs against itself and Weyerhaeuser. Any effort by Stayton to limit the jury's verdict at trial would be self-defeating because such an effort would only risk Stayton's recovery of its minimum $1.5 million settlement payment. Stayton was assured that its liability could not exceed its insurance limits, and the theoretical risk of $500,000 in additional liability if indemnity was denied was heavily outweighed by the benefits of Stayton recovering its $1.5 million settlement payment if plaintiffs obtained a damages award against defendants. Regardless of whether plaintiffs and Stayton designed their Mary Carter agreement so that it hypothetically could impact Stayton's liability, no genuine adversity existed because Stayton's strongest pecuniary interest under the agreement clearly was to seek a verdict for plaintiffs with a high damages

award so that Stayton could recover its $1.5 million minimum settlement payment, along with its attorney fees and costs. *Cf. Bocci*, 158 Or App at 557 (Landau, J., dissenting) ("[W]hether or not a jury verdict hypothetically could have affected [settling defendant's] liability, the fact remains that plaintiff and [defendant] were not adverse, and the justiciability of plaintiff's claims against [defendant] fail on that ground alone."); *cf. also Kollman v. Cell Tech Int'l, Inc.*, 250 Or App 163, 166-67, 279 P3d 324 (2012) (Brewer, J.), *rev den,* 353 Or 410, 298 P3d 1226 (2013) (concluding no justiciable controversy existed respecting issue on appeal in which defendant attempted to assume the posture of a "*de facto* plaintiff" to pursue appeal, explaining"[i]n this case, the point is one of principle, not semantics, because before, during, and even after trial [defendant] in truth acted as a defendant").

Stayton's misalignment at trial was highly prejudicial to Weyerhaeuser. With Stayton permitted to participate as a nominal defendant despite its lack of adversity with plaintiffs, Stayton and plaintiffs were able to manipulate the judicial process to advance plaintiffs' claims. During voir dire, Stayton was able to exercise its three peremptory strikes in plaintiffs' favor. During the trial proceedings, Stayton made no effort to defend itself, and used its examination of witnesses to promote plaintiffs' theory of the case. Stayton also urged the jury to find liability and award high damages against both defendants. (*See* Br

at 19-20.) With Weyerhaeuser being unable to introduce the terms of the Mary Carter agreement or use it during the course of the trial, Stayton and plaintiffs were able to argue to the jury that Stayton "accepted responsibility" and that Weyerhaeuser was unreasonable for defending itself against plaintiffs' claims for a board that Weyerhaeuser did not believe that it manufactured. (*See, e.g.*, Tr-1597-98.) Weyerhaeuser was unable to inform the jury about Stayton's true interests, and the jury was left with the misleading portrayal that Stayton was a defendant on plaintiffs' claims and was selflessly promoting plaintiffs' position out of recognition for its merits.

It was prejudicial error for the trial court to permit Stayton to remain as a defendant despite the lack of a justiciable controversy between Stayton and plaintiffs. The Court of Appeals erred in concluding otherwise, and reversal is required. Given Weyerhaeuser's position in this action as only a third-party defendant, with no direct claims against it by plaintiffs, and the fact that the trial on plaintiffs' claims against Stayton, upon which the judgment against Weyerhaeuser is based, should never have occurred, the Court should reverse plaintiffs' judgment against Weyerhaeuser and remand for entry of a judgment of dismissal with prejudice of plaintiffs' claims.

II. Mary Carter Agreements, Including Insurance References in Such Agreements, Are Admissible in Evidence under Oregon Law

The Court of Appeals also erred in holding that the trial court did not commit prejudicial error in prohibiting Weyerhaeuser from introducing the terms of the Mary Carter agreement during the course of trial. Relying on the concurrence in *Bocci*, the trial court ruled that both "the terms of the agreement and the fact that insurance is involved would not be admissible at trial" for any purpose. (Tr-257-58.) In affirming that ruling, the Court of Appeals wrongly held that the Mary Carter agreement was inadmissible at trial because Stayton and plaintiffs laced insurance references in the agreement. *Rains*, 264 Or App at 650. The Court of Appeals also wrongly held that Weyerhaeuser failed to preserve its request to use the agreement during the presentment of evidence. *Id.* at 650-51. Weyerhaeuser was entitled to introduce the terms of the Mary Carter agreement at trial, including its insurance terms, and the trial court's exclusion of the agreement was prejudicial error. Reversal is required.

A. Mary Carter Agreements Are Relevant and Admissible to Show Interests, Motives, and Bias of the Settling Parties

In *Grillo*, 275 Or at 426-27, this Court recognized that courts generally require Mary Carter agreements to "be admissible into evidence on request of any non-settling defendant," and it instructed that such agreements also "are admissible in evidence" under Oregon law. The reason for that rule is clear.

Unless a jury is informed about the existence and specific terms of a Mary Carter agreement, there is a high risk that the jury will be deceived about the interests and nature of relationships between the parties at trial. *See, e.g., Packaging Corp. of Am. v. DeRycke,* 49 So 3d 286, 291-92 (Fla App 2010) (even if agreement had no financial incentives for settling defendant, prejudicial error not to disclose agreement to jury and noting risks of Mary Carter agreements misleading jurors and promoting collusion); *Hatfield v. Continental Imports, Inc*., 610 A2d 446, 452 (Pa 1992) (holding "where an agreement clearly allies two or more parties against another, such that a clear potential for bias exists which would not otherwise be apparent to the factfinder, that part of the agreement, or at least the existence of the reason for potential bias, must be conveyed to the factfinder"); *Carter v. Tom's Truck Repair,* 857 SW2d 172, 178 (Mo 1993) ("the surest cure for the ill effects of a Mary Carter agreement is disclosure of its terms to the court and the jury"); *Ratteree v. Bartlett*, 707 P2d 1963 (Kan 1985) (stating same); *Ward v. Ochoa*, 284 So 2d 385, 387 (Fla 1973) (Mary Carter agreements must be disclosed at request of non-settling defendant, as "[s]ecret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion").

A non-settling defendant also is entitled to introduce the terms of a Mary Carter agreement to show the bias, motives, and interests of the settling parties.

See State v. Hubbard, 297 Or 789, 801-02, 688 P2d 1311 (1984) (prejudicial error to exclude bias evidence). Although the existence of a settlement between a plaintiff and another defendant usually is irrelevant, *see Holger v. Irish*, 316 Or 402, 414, 851 P2d 1122 (1993) (holding same), that is not true for Mary Carter agreements when the settling defendant remains a party in the trial. As the dissent in *Bocci* explained, "Mary Carter agreements *always* are independently relevant, given the fact that they are direct evidence of the settling defendant's substantial interest in seeing the plaintiff prevail, notwithstanding that [settling] defendant's alignment as a nominal defendant." 158 Or App at 559 (Landau, J., dissenting) (original emphasis)). Other courts agree, holding that Mary Carter agreements are relevant and admissible to prove bias. *See, e.g., Pierce v. Commonwealth Edison,* 428 NE2d 174, 177 (Ill App 1981) ("Where litigants are prohibited from presenting evidence of bias induced by extrajudicial agreements, reversible error results"); *Hergarty v. Campbell Soup Co*., 335 NW2d 758, 764-65 (Neb 1983) (noting "prejudicial error to prohibit inquiry into the existence of a 'Mary Carter' agreement").

B. The Mary Carter Agreement Should Have Been Admitted at Trial to Permit the Jury to Understand the Nature of Stayton's Interests and Bias as a Result of the Agreement

In reaching a different conclusion in this case, the Court of Appeals held that the Mary Carter agreement was rendered inadmissible because of insurance

references in the agreement. *Rains*, 264 Or App at 649-52. Contrary to that holding, however, the only purpose for which OEC 411 forbids admission of insurance evidence is to show that the insured "acted negligently or otherwise wrongfully." OEC 411(1). The rule expressly states that the prohibition in OEC 411(1) does not bar insurance evidence offered for other purposes. *See* OEC 411(2) (same). Addressing the admissibility of a Mary Carter agreement with insurance references, the dissent in *Bocci* would have held that the Mary Carter agreement was admissible in full, including any insurance references. *See* 158 Or App at 560-61 (Landau, J., dissenting). As the dissent explained:

> "[I]t is fairly debatable whether the mention of insurance in this context is so clearly inappropriate as the concurrence assumes. OEC 411(1) provides that evidence of liability insurance is not admissible 'upon the issue whether the person acted negligently or otherwise wrongfully.' That is not the purpose for which the Mary Carter agreement was offered. It was instead offered as evidence of bias and pecuniary interest in the outcome, and OEC 411(2) expressly permits evidence of insurance to show 'bias, prejudice or motive of a witness.'"

Id.; *see also Hergarty,* 335 NW2d at 764-65 (stating rule on admissibility of insurance "was never intended to override the equally positive and salutary principle that a party has the right to cross-examine the witnesses produced by his adversary touching every relation tending to show their interest or bias").

The dissent's reasoning in *Bocci* should be followed here. Weyerhaeuser did not offer the Mary Carter agreement, including its insurance references

(which were inserted by Stayton and plaintiffs), for any impermissible purpose. The prohibition on admission of insurance evidence to prove wrongdoing in OEC 411(1) was not at issue with Stayton admitting fault during trial. Instead, Weyerhaeuser offered the agreement to show the precise nature of Stayton's pecuniary interest in the trial, to reveal its bias, and to elucidate its motives for aligning itself with plaintiffs and entering the Mary Carter agreement rather than contesting plaintiffs' case. Before trial, Stayton's counsel reported that Stayton entered the agreement "to give Stayton Builders Mart individually … protection so that Stayton Builders Mart is not personally liable beyond its insurance policy limits." (Tr-256.) Because the trial court disallowed evidence about the terms of the Mary Carter agreement, Weyerhaeuser was unable to question Stayton's owner about that motive or otherwise inform the jury about Stayton's interests under the agreement. With Weyerhaeuser's hands tied, plaintiffs and Stayton were able to argue without contradiction that Stayton's motive for entering the settlement was to "accept responsibility" based on its agreement with the merits of plaintiffs' positions, giving credibility to plaintiffs' claims that Weyerhaeuser was the manufacturer of the board despite contrary evidence. (Tr-1598, 1554.) The Mary Carter agreement, including insurance terms in that agreement, was relevant and admissible to show the nature of Stayton's and plaintiffs' interests under the agreement. In affirming

the exclusion of the agreement on the ground that it included references to insurance, the Court of Appeals erred as a matter of law.

C. After the Trial Court Ruled Unequivocally that the Terms of Mary Carter Agreement Could Not Be Introduced for Any Purpose at Trial, Weyerhaeuser Was Not Required to Object Further by Seeking to Admit a Redacted Version of the Agreement or by Renewing its Motion during Trial

Even if insurance terms in the Mary Carter agreement were inadmissible, the Court of Appeals erred in concluding that Weyerhaeuser failed to preserve arguments that it should have been permitted to introduce evidence relating to other terms of the agreement during the course of trial. *Rains*, 264 Or App at 653-54. In rejecting Weyerhaeuser's arguments on preservation grounds, the Court of Appeals faulted Weyerhaeuser for not seeking to admit a redacted version of the Mary Carter agreement after the trial court expressly ruled that the terms of the agreement were inadmissible for any purpose at trial. *Id*. at 653. The Court of Appeals also faulted Weyerhaeuser for not specifically explaining that it intended to use the agreement during cross-examination to show witness bias. *Id*. Contrary to those rulings, however, the record shows that Weyerhaeuser adequately raised its arguments before the trial court.

Before trial, Weyerhaeuser asked the trial court to rule on whether the Mary Carter agreement would be admissible at trial. In doing so, Weyerhaeuser stated that it wished to introduce the agreement in full to inform the jury about

its terms and effect on the parties. *See* Tr 245 ("We believe that the jury has the right to know of this agreement. They have a right to know of the terms of the agreement."). Weyerhaeuser also specifically argued that the insurance terms were admissible and relevant to show that the settlement money for the Mary Carter agreement came from Stayton's insurance company. (Tr-245-46.) At the end of the argument, Weyerhaeuser's counsel asked the trial court to clarify whether the agreement "was going to be admissible for any purpose during the course of the trial." (Tr-257.) The trial court responded that both "the terms of the agreement and the fact that insurance is involved would not be admissible at trial." (Tr. 257-58.) Consistent with its ruling, the trial court later instructed the jury that "[y]ou have not heard, and will not hear the terms of that [Mary Carter] settlement." (Tr-1676.)

This Court repeatedly has instructed that a party need not press further objections or seek reconsideration after a trial court has made a clear ruling on a matter. *See, e.g.*, *State v. Walker,* 350 Or 540, 550, 258 P3d 1228 (2011) ("Once a court has ruled, a party is generally not obligated to renew his or her contentions in order to preserve them for the purposes of appeal."); *Charles v. Palomo*, 347 Or 695, 701-02, 227 P3d 737 (2010) (holding same). Applying that rule here, Weyerhaeuser was not required to seek admission of a redacted version of the Mary Carter agreement after the trial court ruled that the terms of

the agreement were inadmissible for any purpose at trial. Weyerhaeuser also was not required to explain more specifically how it intended to use the agreement during trial, or to renew its motion during the course of the trial. *Walker*, 350 Or at 549-50 (to preserve error, a party must provide enough information to allow trial court to rule, but need not make specific or detailed arguments). Weyerhaeuser clearly informed the trial court that it wished to introduce the agreement during trial and that the jury should be informed of its terms to understand the nature of the parties' interests.

The prohibition on any introduction of the terms of the agreement during trial was highly prejudicial, preventing the jury from learning Stayton's true position in the case and its true interests in the outcome of the trial. Even if this Court determines that a justiciable controversy remained between plaintiffs and Stayton after the Mary Carter agreement, this Court should reverse plaintiffs' judgment against Weyerhaeuser. Because plaintiffs filed no direct claims against Weyerhaeuser, and Stayton has no standing to participate in any further proceedings,[8] the case should be remanded for entry of a judgment of dismissal with prejudice of plaintiffs' claims.

---

[8] Because Stayton did not appeal plaintiffs' judgment against it or seek review of the reversal of its indemnity claim, plaintiffs' judgment against Stayton is final, as is the dismissal of Stayton's indemnity claim against Weyerhaeuser. *See Interstate Roofing, Inc. v. Springville Corp.,* 347 Or 144, 163, 218 P3d 133

III. A Jury Must Be Permitted to Apportion the Comparative Fault of All Parties Identified for Fault Comparison in ORS 31.600(2)

The Court of Appeals also erred in holding that a trial court did not commit prejudicial error in denying Weyerhaeuser's request to include Five Star on the verdict form for the jury's apportionment of comparative fault. In reaching that holding, Court of Appeals again relied on preservation, deciding that Weyerhaeuser failed to create a sufficient record of its arguments on the issue. *Rains*, 264 Or App at 656. Contrary to the Court of Appeals' decision, the issue was preserved. It also was plain error to omit Five Star from the verdict form in light of plaintiffs' undisclosed settlement with Five Star at the time of trial. The omission of Five Star from the apportionment of comparative fault was prejudicial error, and reversal is required.

A. Weyerhaeuser Adequately Preserved Its Arguments that Five Star Should Have Been Listed on the Verdict Form for Comparative Fault Allocation under ORS 31.600

This Court repeatedly has explained that preservation requirements are pragmatic, looking at whether a party appraised the trial court of the issue and the basis of the position. *See Charles*, 347 Or at 701 (stating same); *State v. Hitz,* 307 Or 183, 188, 766 P2d 373 (1988) (raising issue at trial "ordinarily is

---

(2009) (limited judgment finally resolved claims, and no jurisdiction existed over claims absent timely appeal). As a result, all claims involving Stayton have been finally concluded, and Stayton has no standing to participate in any remand proceedings.

essential," identifying source "less so," and making particular argument "least" important). Here, the record is clear that Weyerhaeuser adequately appraised the trial court and the other parties of its position that Five Star should be included on the verdict form for comparative fault apportionment, even if the record does not contain specific discussion about ORS 31.600(2).

During trial, Weyerhaeuser submitted a verdict form with Five Star included in the comparative fault apportionment, and the parties discussed the verdict form in chambers off the record. *Rains*, 264 Or App at 655-56 (stating same); *see also* ER-23-25 (proposed verdict form). Before the verdict form was submitted to the jury, Weyerhaeuser confirmed on the record that the trial court had declined to include Five Star on the form for purposes of comparative fault apportionment. Tr-1691. Although the Court of Appeals found that the issue was unpreserved because the record does not reveal whether Weyerhaeuser cited ORS 31.600(2) in support of its verdict form, such a specific citation was unnecessary to raise and preserve the issue. Given the fact that ORS 31.600(2) governs which parties must be included for comparison of fault for damages in tort actions, the trial court and the other parties had adequate notice of the basis for Weyerhaeuser's request to add Five Star to the verdict form for apportioning fault, even if Weyerhaeuser did not specifically cite the statute on the record after the off-the-record conferences. The issue is preserved.

It also was plain error to omit Five Star from the verdict form in view of Five Star's settlement with plaintiffs. *See Ailes v. Portland Meadows, Inc*., 312 Or 376, 381-82, 823 P2d 956 (1991) (for appellate court to consider plain error, "error must be one 'of law'; that it must be 'apparent,' *i.e*., the point must be obvious, not reasonably in dispute; and that it must appear 'on the face of the record'"). In January 2012—20 months after the conclusion of the trial—Weyerhaeuser learned that plaintiffs had entered into an undisclosed settlement with Five Star roughly three years earlier in January 2009. (TCF-2/23/2012, Amended Dec of Grant Stockton.) Although ORS 31.815 required plaintiffs to disclose their settlement with Five Star to all parties, plaintiffs failed to do so, and Weyerhaeuser learned of the settlement only after filing its opening brief with the Court of Appeals. (*Id*.) Weyerhaeuser raised the error in its reply brief in the Court of Appeals (Reply Br at 10 n 8), but the Court of Appeals declined to address it. *See Rains*, 264 Or App 656-57 (addressing verdict issues).

Given the fact that plaintiffs concealed their settlement with Five Star, Weyerhaeuser cannot be faulted for not raising Five Star's status as a settled party at an earlier time because it had no opportunity to do so. *Cf., e.g, State v. Gutierrez*, 170 Or App 91, 94-95, 11 P3d 690 (2009) (no action needed to preserve error for appellate review when no opportunity to bring alleged error to trial court's attention). The error also is not reasonably in dispute, and it

appears on the face of the record. *See Ailes*, 312 Or at 381-82 (stating those requirements). Although this Court exercises its discretion to consider plain error with caution in light of the policies requiring preservation and raising of error, *see id.* at 382, those considerations do not apply when the preservation issues arise because a party engaged in deceptive conduct to the detriment of the other parties. This Court should consider the error.

B. ORS 31.600 Required the Jury to Apportion the Comparative Fault of Five Star for Plaintiffs' Damages Because Five Star Is a Party Against Whom Recovery Was Sought and With Whom Plaintiff Had Settled

As a defaulted party against whom plaintiffs had an unsatisfied judgment —and as a party with whom plaintiffs had settled before trial—Five Star should have been included on the verdict form for apportionment of fault for damages. ORS 31.600 *et seq*. governs apportionment of comparative fault for tort claims in Oregon. In defining the parties that must be included for purposes of the fault comparison, ORS 31.600(2) provides, in part:

> "The trier of fact ***shall*** compare the fault of the claimant with the ***fault of any party against whom recovery is sought***, the fault of third party defendants who are liable in tort to the claimant, and ***the fault of any person with whom the claimant has settled***. … Except for persons who have settled with the claimant, there shall be no comparison of fault with any person:
>
> "(a) Who is immune from liability to the claimant;
>
> "(b) Who is not subject to the jurisdiction of the court; or

> "(c) Who is not subject to action because the claim is barred by a statute of limitation or statute of ultimate repose."

ORS 31.600(2) (emphasis added). ORS 31.605(1)(b) provides that the degree of fault of each person identified under ORS 31.600(2) "shall be expressed as a percentage of the total fault attributable to all persons considered by the trier of fact pursuant to ORS 31.600."

1. Five Star Was a Party Against Whom Recovery Was Sought

The trial court first erred in omitting Five Star from the verdict form for comparative-fault apportionment because Five Star was a party against whom recovery was sought. The question whether ORS 31.600(2) includes a defaulted party as a party that must be included in the jury's apportionment of fault is question of statutory construction. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993) (in interpreting statutes, court considers text and context). Unlike its predecessor statute—which permitted the trier of fact to consider only the fault attributable "to all parties represented in the action," *former* ORS 18.480 (1993)—ORS 31.600(2) requires the trier of fact to compare the fault of the plaintiff more broadly with the fault of "any party against whom recovery is sought." *See* ORS 31.605(1)(b) (comparison of fault of all parties identified in ORS 31.600(2));

see also Or Laws 1995, ch 696, § 4. As a result, ORS 31.600(2) no longer limits the comparison of fault to only parties that have made an appearance in the trial proceedings and, instead, requires the jury's comparative fault apportionment to include parties that are unrepresented in the trial. *Cf. Brown v. Washington County,* 163 Or App 362, 379-80, 987 P2d 1254 (1999), *rev denied*, 331 Or 191, 18 P3d 1098 (2000) (under predecessor statute restricting comparative fault apportionment to only parties "represented in the action," a defaulted party was not included because not "represented in the action").

Applying ORS 31.600(2) to this case, the express terms of the statute required the trial court to include Five Star on the verdict form for the jury's apportionment of comparative fault. ORS 31.605(2) requires comparison of fault among all parties against whom a plaintiff seeks recovery. Because Five Star was a named defendant, and because plaintiffs have unsatisfied default judgments against Five Star, Five Star was a "party against whom recovery is sought." It is irrelevant that Five Star defaulted and was not represented at trial because ORS 31.600 does not restrict the jury's comparative fault determination to only the fault of parties represented in the action. The trial court's denial of Weyerhaeuser's verdict form with Five Star was legal error.

2. Five Star Was a Person with Whom Plaintiffs Had Settled

Alternatively, ORS 31.600(2) required Five Star to be included on the verdict form for comparative-fault apportionment because Five Star was a person with whom plaintiff had settled before trial. ORS 31.600(2) requires the comparison of fault for apportionment of damages to include "the fault of any person with whom the claimant has settled." In this case, it is undisputed that plaintiffs had an undisclosed settlement with Five Star in advance of trial, and it is not reasonably in dispute that all settling parties must be included in the fault apportionment. *See Ailes*, 312 Or at 381-82 (plain-error doctrine applies when error apparent on record and not reasonably in dispute). The omission of Five Star on the verdict form was plain error in light of the undisclosed settlement.

3. The Omission of Five Star from the Comparative-Fault Apportionment on the Verdict Form Was Prejudicial Error

The omission of Five Star from the comparative-fault apportionment also was prejudicial to Weyerhaeuser. As the general contractor for the project and the party responsible for purchasing the lumber that allegedly resulted in his accident, Five Star clearly played a role in Rains's injury. Five Star's president was called as a witness at trial, and he testified about the project and lumber purchases. (Tr-738-58.) The absence of this potentially-responsible party on the verdict form skewed the jury's determination of fault as there were fewer

parties to which liability could be allocated. Omitting Five Star from the verdict form almost certainly resulted in more liability being assessed against Weyerhaeuser than would have occurred had Five Star been on the verdict form. Since the omission of Five Star from the verdict form was prejudicial error, plaintiffs' judgment against Weyerhaeuser must be reversed. Because plaintiffs filed no direct claims against Weyerhaeuser, and Stayton has no standing to participate in any further proceedings, the case should be remanded for entry of a judgment of dismissal with prejudice of plaintiffs' claims.[9]

IV. Plaintiff Mitzi Rains's Loss-of-Consortium Claim Was Based on a Strict-Product-Liability Claim under ORS 30.920 and Is Subject to the Limit on Noneconomic Damages under ORS 31.710

The Court of Appeals also erred in holding that the noneconomic-damages limit under ORS 31.710(1) may not be applied constitutionally to a loss-of-consortium claim that arises out of a strict-product-liability claim under ORS 30.920. The Court of Appeals correctly held that the damages limit under ORS 31.710(1) may be applied to a strict-product-liability claim under ORS 30.920 because such a claim is a wholly statutory claim that creates liability based on conduct that did not form the basis of a tort claim at common law. *See*

[9] As noted, because Stayton did not appeal plaintiffs' judgment against it or seek review of the Court of Appeals' reversal of its third-party indemnity claim against Weyerhaeuser. As a result, all claims involving Stayton have been finally concluded, and Stayton has no standing to participate in any remand proceedings.

Rains, 264 Or App at 663-65 (concluding same). Despite that correct holding, however, the Court of Appeals concluded that the damages limit under ORS 31.710(1) could not be applied to Mitzi Rains's loss-of-consortium claim, reasoning that her claim was in the "class of cases" existing at common law. *Id.* at 665-66. In so reasoning, however, the Court of Appeals failed to appreciate that Mitzi Rains's loss-of-consortium claim based on the same tort as Rains's strict-product-liability claim.[10]

Plaintiffs' strict-product-liability claims were the only claims submitted to the jury. Mitzi Rains's loss-of-consortium claim asserted that Weyerhaeuser was legally liable to her because—and *only* because—Weyerhaeuser allegedly placed a dangerously defective product in the stream of commerce that injured her husband. (ER-3.) Because that alleged conduct was not legally tortious at common law, a strict-product-liability claim under ORS 30.920 is subject to the

---

[10] In opposing review, plaintiffs argued that Weyerhaeuser challenged the trial court's denial of its motion to apply ORS 31.610(1) to Mitzi Rains's damages award only on the ground that there was no cause of action for a wife's loss of consortium arising out of negligent injury to her husband in 1857. (Pl Resp at 19-20) Not so. Weyerhaeuser argued that the limit under ORS 31.710 applied to strict-product-liability claims, and it is undisputed that plaintiff Mitzi Rains's only loss-of-consortium claim was based on a strict-product-liability theory. (*See, e.g.*, App Br 40-45.) The fact that Weyerhaeuser additionally argued that ORS 31.710(1) applied to Mitzi Rains's loss-of-consortium claim because such loss-of-consortium claims did not exist at common law in 1857 (*see* App Br at 45), does not mean that Weyerhaeuser waived its more basic argument that ORS 31.710 applies to ***all*** strict-product-liability claims.

damages limit under ORS 31.710(1), whether that claim is asserted by the injured party or by that party's spouse. *See Stout v. Madden*, 208 Or 294, 300-01, 300 P2d 461 (1956), *overruled on other grounds by, Kuhns Standard Oil Co.,* 257 Or 482, 478 P2d 396 (1970) (at common law, "a manufacturer [was] *never* liable for negligence to a remote vendee *or other person* with whom [the manufacturer] had no contractual relation" (emphases added)); *cf. Ross v. Cuthbert*, 239 Or 429, 432, 397 P2d 529 (1964) (loss of consortium claims are "measured by and subject to" limit on injured spouse's recovery such as injured spouse's comparative fault). Just as Rains's strict-product-liability claim is subject to the limit on noneconomic damages under ORS 31.710, Mitzi Rains's loss-of-consortium claim also is subject to the limit on noneconomic damages under ORS 31.710. The Court of Appeals' contrary conclusion was error, and plaintiffs' judgment must be reversed and remanded for application of ORS 31.710 to Mitzi Rains's noneconomic damages.

V. A Party Is Not Entitled to Recover Its Defense Costs in Indemnity if the Party Has Not Proved a Right to Indemnity

Finally, the Court of Appeals erred by failing to reverse the judgment awarding defense costs in indemnity to Stayton after the Court of Appeals reversed the judgment granting Stayton's indemnity claim. The Court of Appeals correctly concluded that Stayton was not entitled to indemnity from

Weyerhaeuser because Stayton failed to prove that it had discharged any legal obligation owing to a third party. *Rain*s, 264 Or App at 667-73. That decision is now final, as Stayton did not petition this Court for review of that decision or make any contingent request for review under ORAP 9.10(1).

In light of its reversal of Stayton's indemnity claim, the Court of Appeals erred in failing to reverse the trial court's judgment awarding Stayton's defense costs.[11] *See* ORS 20.220(3)(a) (when an appellate court reverses a judgment to which an award of attorney fees relates, "the award of attorney fees shall be deemed reversed"). Stayton's award of defense costs was based on Stayton's claim for indemnity. Indeed, the judgment granting Stayton's indemnity claim—which was reversed by the Court of Appeals' decision—was the same judgment awarding Stayton's defense costs, with the amount to be specified in a supplemental judgment. After Stayton's indemnity claim was reversed because Stayton failed to prove that it discharged any legal obligation owed jointly to a third party, Stayton had no indemnity claim to support its recovery of defense

[11] In opposing review, Stayton argued that Weyerhaeuser failed to preserve its challenge to the Court of Appeals' failure to reverse the judgment for Stayton awarding defense costs because Weyerhaeuser raised the argument for the first time on reconsideration. (Stayton Resp at 1-4.) Stayton's argument has no merit because the issue arose only after the Court of Appeals issued its decision reversing the indemnity claim, but upholding the award of attorneys' fees and costs based on that claim. Stayton cites no authority supporting the proposition that a party is required to anticipate an issue and raise objections before the issue arises. Weyerhaeuser's claim of error is adequately preserved.

costs from Weyerhaeuser.[12] The Court of Appeals' failure to reverse the judgment on defense costs was error, and the judgment awarding Stayton's defense costs must be reversed.

CONCLUSION

For the reasons stated, Weyerhaeuser asks this Court to reverse the judgments for plaintiffs and Stayton, and to remand for entry of a judgment of dismissal or new trial on plaintiffs' claims, and for entry of a judgment of dismissal on Stayton's third-party indemnity claim.

Dated this 21st day of May, 2015.

SCHWABE WILLIAMSON & WYATT P.C.

/s/ Michael T. Garone

Michael T. Garone, OSB No. 802341
W. Michael Gillette, OSB No. 660458
Sara Kobak, OSB No. 023495
Jordan R. Silk, OSB No. 105031
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW Fifth Avenue, Suite 1900
Portland, Oregon 97204
Telephone: 503-222-9981

Attorneys for Cross-Petitioner-on-Review
Weyerhaeuser Company

[12] At the time when the Court of Appeals' decision was issued, this Court had not yet announced its decision in *Eclectic Investments, LLC v. Patterson*, 357 Or 25, 346 P3d 468 (2015), holding that common-law indemnity is unavailable in cases subject to comparative fault allocation under ORS 31.610. Under that holding, Stayton has no entitlement to indemnity even if Stayton had fulfilled its payment obligations under the Mary Carter agreement.

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; and (2) the word-count of this brief, as described in ORAP 5.05(2)(a), is 13,432 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 21st day of May, 2015.

/s/ Sara Kobak
Sara Kobak, OSB No. 023495
Attorneys for Petitioner-on-Review
Weyerhaeuser Company

CERTIFICATE OF FILING AND SERVICE

I certify that on May 21, 2015, I filed the original of this BRIEF ON THE MERITS FOR WEYERHAEUSER COMPANY with the State Appellate Court Administrator by the eFiling system. I further certify that on May 21, 2015, I served this BRIEF ON THE MERITS FOR 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:

Brian Whitehead, OSB No. 833452
Law Offices of Brian Whitehead, P.C.
1610 12th Street SE
Salem, Oregon 97302
Telephone: 503-364-8505
(MAIL COPY)

Thomas W. Brown, OSB No. 801779
Nicholas E. Wheeler, OSB No. 044491
Julie A. Smith, OSB No. 983450
Cosgrave Vergeer & Kester LLP
888 SW Fifth Avenue, Suite 500
Portland, Oregon 97204
Telephone: 503-323-9000

J. Randolph Pickett, OSB No. 721974
Pickett Dummigan LLP
621 SW Morrison, Suite 900
Portland, Oregon 97205
Telephone: 503-226-3638

Maureen Leonard, OSB No. 823165
Attorney at Law
P O Box 42210
Portland, Oregon 97205
Telephone: 503-224-0212

Keith Garza, OSB No. 940773
Law Office of Keith M. Garza
P.O. Box 68106
Oak Grove, Oregon 97268
Telephone: 503-344-4766

By: /s/ Sara Kobak
Sara Kobak, OSB No. 023495
Attorneys for Petitioner-on-Review
Weyerhaeuser Company