IN THE SUPREME COURT OF THE STATE OF OREGON

WEST HILLS DEVELOPMENT COMPANY, an Oregon corporation,
Plaintiff – Respondent – Respondent on Review,

v.

CHARTIS CLAIMS, INC., et al.,
Defendants,

and

OREGON AUTOMOBILE INSURANCE COMPANY, an Oregon company,
Defendant – Appellant – Petitioner on Review.

OREGON AUTOMOBILE INSURANCE COMPANY, an Oregon company,
Third-Party Plaintiff,

v.

QUANTA SPECIALTY LINES INSURANCE COMPANY,
Third-Party Defendant.

Circuit Court No. C107384CV
Court of Appeals No. A152556
Supreme Court No. S063823

OREGON TRIAL LAWYERS ASSOCIATION'S *AMICUS CURIAE* BRIEF

Petition for Review of a Decision of the Court of Appeals
on Appeal from a Judgment of the Washington County Circuit Court,
by the Honorable D. Charles Bailey, Judge

Decision Filed: August 19, 2015
Author: DeVore, J.
Concurring: Ortega, P.J., and Garrett, J.

July 2016

Nadia H. Dahab, OSB No. 125630
STOLL STOLL BERNE LOKTING & SHLACHTER PC
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Email: ndahab@stollberne.com

Attorney for Amicus Curiae Oregon Trial Lawyers Association

Michael E. Farnell, OSB No. 922996
Emily Sarah Miller, OSB No. 034348
PARSONS FARNELL & GREIN, LLP
1030 SW Morrison Street
Portland, OR 97205
Telephone: (503) 222-1812
Email: mfarnell@pfglaw.com
emiller@pfglaw.com

Peter J. Viteznik, OSB No. 944540
KILMER VOORHEES & LAURICK PC
732 NW 19th Avenue
Portland, OR 97209
Telephone: (503) 224-0055
Email: pviteznik@kilmerlaw.com

Attorneys for Plaintiff-Respondent/Respondent on Review West Hills Development Company

Thomas M. Christ, OSB No. 834064
COSGRAVE VERGEER KESTER LLP
888 SW 5th Avenue, 5th Floor
Portland, OR 97204
Telephone: (503) 323-9000
Email: tchrist@cosgravelaw.com

Attorneys for Defendant-Appellant/Petitioner on Review Oregon Automobile Insurance Company

Linda B. Clapham, OSB No. 092248
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
Telephone: (206) 622-8020
Email: clapham@carneylaw.com

Attorneys for Amicus Curiae PCI and NAMIC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

The Oregon Trial Lawyers Association ("OTLA") files this amicus brief in support of Respondent on Review. OTLA files this brief to support the rule that, in limited circumstances, extrinsic evidence of facts tending solely to establish that the underlying claim is covered by the insurance policy should be considered by the insurer when determining whether it has a duty to defend.

This Court has long held that, as a general rule, when determining whether it has a duty to defend an insured, an insurer should consider only two documents: the underlying complaint, and the insurance policy. *Ledford v. Gutoski*, 319 Or 397, 403, 877 P2d 80 (1994). In some circumstances, however, an insurer's duty to investigate, together with its implied duty to act in good faith, should give rise to an exception to that general rule, in which the insurer must consider extrinsic evidence of certain facts outside the face of the complaint to determine whether it must defend. Those circumstances exist where the extrinsic evidence tends to establish facts solely related to coverage—for example, the "insured" status of the third-party plaintiff—and where the evidence is known or reasonably ascertainable by the insurer at the time of its defense.

II. STATEMENT OF FACTS

For the purpose of this brief, OTLA accepts the statement of facts and the plaintiff's allegations, which were initially considered in the context of Oregon

Automobile Insurance Company's ("Oregon Auto") motion for summary judgment, set forth in the Court of Appeals opinion. *See West Hills Dev. Co. v. Chartis Claims, Inc.*, 273 Or App 155, 359 P3d 339 (2015).[1]

III. ARGUMENT

The circumstances of this case require this Court to decide two questions: (1) whether, and to what extent, an insurer should consider evidence outside the face of the complaint to determine whether it has a duty to defend; and (2) whether, and again, to what extent, an insurer must investigate the claims it receives to identify that extrinsic evidence. To resolve those questions, the Court must consider and construe three essential components of a contract for insurance: the insurer's duty to defend, its duty to investigate, and its implied duty to act in good faith.

As explained below, this Court has long held that, as a general rule, when determining whether it has a duty to defend an insured, an insurer is limited to considering two documents: the underlying complaint, and the insurance policy. This Court has further held, in a separate but related context, that insurers "operate under a duty of inquiry." *Zimmerman v. Allstate Prop. & Cas. Ins. Co.*, 354 Or 271, 281, 311 P3d 497 (2013) (internal quotation marks omitted).

---

[1] For ease of discussion, OTLA refers to the parties in the underlying Arbor Terrace litigation as "plaintiff" and "defendant." We refer to the parties to the litigation giving rise to this appeal—Oregon Automobile Insurance Company and West Hills Development Company—as the "insurer" and the "insured," respectively.

An insurer's duty of inquiry requires that it reasonably investigate the claims that it receives.

In some circumstances, the insurer's duty to investigate, which flows from its implied duty to act in good faith, should give rise to an exception to the general duty-to-defend rule, pursuant to which the insurer must investigate and consider certain facts outside the face of the complaint to determine whether it has a duty to defend. Those circumstances exist where the facts bear solely on coverage—for example, the "insured" status of the third-party plaintiff—and where the facts are known or reasonably ascertainable by the insurer at the time of its defense.

A. The Duty to Defend

The duty to defend, and how that duty is triggered, lies at the core of this dispute. This Court has long recognized that the duty to defend is a bargained-for component of an insurance policy. *Isenhart v. Gen. Cas. Co. of Am.*, 233 Or 49, 51, 54, 377 P2d 26 (1962). As part of the bargained-for exchange, the benefit to the insured is the insurer's undertaking the defense of any claims against the insured that are potentially covered by the policy. The benefit to the insurer, by contrast, is the certainty that comes with controlling the defense, influencing a potential settlement, and retaining the right to contest coverage. The duty to defend is distinct from, and indeed broader than, the duty to indemnify. *Ledford v. Gutoski*, 319 Or 397, 403, 877 P2d 80 (1994); 14 Couch

on Insurance § 200.3 (3d ed 2016). Unlike the duty to indemnify, which is based on the insured's actual liability arising from covered circumstances, the duty to defend is based on the mere *potential* for coverage within the policy's limits. *Blohm v. Glens Falls Ins. Co.*, 231 Or 410, 417, 373 P2d 412 (1962) (citing *MacDonald v. United States Pac. Ins. Co.*, 210 Or 395, 311 P2d 425 (1957)). An insurer breaches its duty to defend when, for instance, it fails to defend the insured because it incorrectly believes that the underlying claim falls outside of those policy limits.

This Court's cases defining the boundaries of the duty to defend date at least back to *MacDonald v. United States Pacific Insurance Co.*, where this Court compared the allegations of the underlying claim to the "clear wording of the [insurance] policy" at issue and concluded that a coverage exclusion in the policy applied to preclude coverage completely. *See* 210 Or at 410 ("There was no issue presented in the pleadings in that litigation which could have brought the case within the coverage of the policy."). The Court affirmed the "well-settled" principle that an insurer's duty to defend "is to be determined by the allegations of the complaint," *id.* at 400; the duty to defend arises where "a suit is brought against the insured alleging acts which are within the coverage of the policy of the insurer[, regardless] whether the suits are or are not false and fraudulent." *Id.* at 410.

A few years later, in *Isenhart v. General Casualty Co.*, 233 Or 49, 53, 377 P2d 26 (1962), the Court held that a clause in an insurance policy "purporting to indemnify the insured for damages recovered against him as a consequence of his intentional conduct inflicting injury on another" is void as against public policy. In doing so, the Court also held, in response to the plaintiff's attempt to present evidence outside of the complaint that the underlying conduct was not intentional, that

> "[t]here is some authority for the view that in determining whether it has a duty to defend the insurer must look beyond the allegations of the complaint filed against the insured and if the actual facts are such as to bring the case within the coverage of the policy, the insurer must accept tender of the defense. The contrary view has been adopted in this state. In accordance with the weight of authority, we have held that the obligation of the insurer to defend is to be determined by the allegations of the complaint filed against the insured. * * * * If a contrary rule were adopted, requiring the insurer to take note of facts other than those alleged, the insurer frequently would be required to speculate upon whether the facts alleged could be proved."

Id. at 54.[2]

Later cases faithfully applied the rules of *MacDonald* and *Isenhart*. In *Ferguson v. Birmingham Fire Insurance Co.*, 254 Or 496, 460 P2d 342 (1969), for example, the insured, who was the administrator of Ferguson's estate, had been sued for trespass because one of Ferguson's employees had cut down trees on someone else's property. Although the complaint alleged a claim for willful

---

[2] As discussed below, this rule no longer is consistent with the "weight of authority."

trespass, it did not allege that Ferguson knew of the trespass or exercised any physical control over the employee. *Id.* at 500. The insurance policy at issue extended the duty to defend to "any suit against the insured alleging * * * property damage," but excluded suits for property damage caused by the intentional conduct of the insured or to property over which the insured maintained physical control. *Id.*

This Court applied its earlier settled rule that "the obligation of the insurer to defend is to be determined by the allegations of the complaint filed against the insured." *Id.* at 505 (citing *Isenhart*, 233 Or 49). It also applied two related rules. First, it noted that an insurer's "knowledge of facts not alleged in the complaint is irrelevant in determining the existence of the duty to defend." *Id.* Thus, the insurer could not speculate as to certain facts—*e.g.*, the employee's state of mind—as a means to defeat coverage. Second, the court noted that the duty to defend will also arise when the complaint charges the insured not only with excluded misconduct, but also with conduct covered under the policy. *Id.* at 506. Therefore, even though the complaint in *Ferguson* alleged a claim for willful trespass, which constituted excluded misconduct under the policy, the complaint could also have created liability for non-willful trespass, which was covered by the policy. *Id.* at 507 (citing ORS 105.810, which provides damages for both willful and non-willful trespass). The insurer therefore had a duty to defend.

Petitioner correctly identifies *Ledford v. Gutoski* as this Court's seminal case comprehensively addressing the duty to defend. In *Ledford*, the underlying complaint alleged a claim for malicious prosecution involving a subjective intent to cause harm or injury. 319 Or 397, 399, 87 P2d 80 (1994). When the insured tendered the defense to its insurer, the insurer rejected the tender on the ground that the insured's policy did not extend to damages or injuries resulting from the intentional conduct of the insured. *Id.*

On review, this Court set out, in full, its settled rules:

> "Whether an insurer has a duty to defend an action against its insured depends on two documents: the complaint and the insurance policy. An insurer has a duty to defend an action against its insured if the claim against the insured stated in the complaint could, without amendment, impose liability for conduct covered by the policy.
>
> "In evaluating whether an insurer has a duty to defend, the court looks only at the facts alleged in the complaint to determine whether they provide a basis for recovery that would be covered by the policy:
>
> > 'If the facts alleged in the complaint against the insured do not fall within the coverage of the policy, the insurer should not have the obligation to defend. If a contrary rule were adopted, requiring the insurer to take note of facts other than those alleged, the insurer frequently would be required to speculate upon whether the facts alleged could be proved. We do not think this is a reasonable interpretation of the bargain to defend. It is more reasonable to assume that the parties bargained for the insurer's participation in the lawsuit only if the action brought by the third party, if successful, would impose liability upon the insurer to indemnity the insured.'

> "An insurer should be able to determine from the face of the complaint whether to accept or reject the tender of the defense of the action.
>
> "The insurer has a duty to defend if the complaint provides *any* basis for which the insurer provides coverage. Even if the complaint alleges some conduct outside the coverage of the policy, the insurer may still have a duty to defend if certain allegations of the complaint, without amendment, could impose liability for conduct covered by the policy. Any ambiguity in the complaint with respect to whether the allegations could be covered is resolved in favor of the insured."

Id. at 399-400 (internal citations omitted).

Under *Ledford* and earlier cases, then, the general rule in Oregon limits insurers to considering two documents in determining whether it has a duty to defend: the complaint, and the insurance policy. The rule generally precludes consideration of facts outside of those two documents—*e.g.*, extrinsic evidence offered by either party—to determine whether the conduct alleged against the insured is covered within the scope of the policy. OTLA agrees with that general rule, and does not seek to have this Court reconsider *Ledford* or the authorities on which that case relies.

B. The Duty to Investigate

This case demonstrates, however, that the general rule of *Ledford* should not always end the analysis. The insurer's duty to investigate, which flows from its duty to act in good faith, may on occasion require the insurer to look beyond the complaint and the insurance policy to determine whether it has a

duty to defend. This Court should hold, as OTLA explains below, that when an insurer receives a request for tender, it must conduct a reasonable investigation of the claims underlying that request. Extrinsic evidence of certain facts reasonably ascertainable by the insurer through such an investigation should, in limited circumstances, be considered in determining whether the insurer must defend an insured.

This Court has previously held, albeit in the context of determining the sufficiency of a proof of loss, that "insurers 'operate under a duty of inquiry.' " *Zimmerman v. Allstate Prop. & Cas. Ins. Co.*, 354 Or at 281 (quoting *Parks v. Farmers Ins. Co.*, 347 Or 374, 381, 227 P3d 1127 (2009)). Thus, where "a submission, by itself, is ambiguous or insufficient to allow the insurer to estimate its obligations, it nevertheless will be deemed sufficient if it provides enough information to allow the insurer 'to investigate and clarify uncertain claims.' " *Id.* (quoting *Dockins v. State Farm Ins. Co.*, 329 Or 20, 29, 985 P2d 796 (1999)). The duty of inquiry generally stems from the implied duty of good faith, which inheres in every contract for insurance. Couch on Insurance § 198:27 (3d ed 2016); *see also Uptown Heights Assocs. Ltd. P'ship v. Seafirst Corp.*, 320 Or 638, 645, 891 P2d 639 (1995) ("[E]very contract contains an implied duty of good faith.").

Other state courts have similarly held that an insurer has a duty to conduct a reasonable investigation into the facts underlying a claim. *See, e.g.*,

G&G Servs., Inc. v. Agora Syndicate, Inc., 128 NM 434, 993 P2d 751 (1999); *Koski v. Allstate Ins. Co.*, 456 Mich 439, 445 n 5, 572 NW2d 636 (1998) ("An insurer's duty to defend * * * includes the duty to investigate and analyze whether the third party's claim against the insured should be covered."); *Monroe Guar. Ins. Co. v. Monroe*, 677 NE2d 620, 624 (Ct. App. Ind. 1997) (We "hold that as a matter of law the insurer has a duty to conduct a reasonable investigation into the facts underlying the complaint before it may refuse to defend the complaint."); *Mapes Indus., Inc. v. United States Fidelity & Guar. Co.*, 252 Neb 154, 560 NW2d 814 (1997).

The insurer's duty to investigate is closely "intertwined with" its duty to defend. Couch on Insurance § 198:29. Where the allegations of the underlying complaint are incomplete or ambiguous, or where the insurer knows of or may reasonably ascertain facts outside of the complaint that might create a potential for coverage, the insurer must conduct a reasonable investigation to determine whether its duty to defend has been triggered. *See, e.g., Woo v. Fireman's Fund Ins. Co.*, 161 Wash 2d 43, 53, 164 P3d 454 (2007); *Hartford Cas. Ins. Co. v. Merchs. & Farmers Bank*, 928 So 2d 1006, 1012 (Ala 2005); *Colonial Oil Indus. v. Underwriters Subscribing to Policy Nos. TO315046708 & TO31504671*, 268 Ga 561, 562, 491 SE2d 337 (1997); *Nat'l Indem. Co. v. Flesher*, 469 P2d 360, 366 (Alaska 1970). In doing so, the insurer must look beyond both the face of the complaint and the terms of the policy. When

exercised in good faith, the duty to investigate protects the insured against the possibility that an insurer might ignore the true facts underlying a complaint and thereby escape its obligation to defend.

With respect to the insurer's duty to investigate, then, the Court of Appeals reasoning in this case is consistent with earlier cases from this Court, and is consistent with other state courts to have considered the question explicitly. Here, in concluding that Oregon Auto owed a duty to defend, the Court of Appeals noted that, after West Hills had tendered its defense, Oregon Auto, "upon reasonable inquiry"—by, for example, "a telephone call to its named insured"—could readily have verified the status of the insured with respect to the underlying claim and insurance policy. *West Hills Dev. Co.*, 273 Or App at 164. Such an inquiry is consistent with an insurer's obligation to conduct a reasonable, good-faith investigation into an insured's request for tender.

C. Extrinsic Evidence of Facts Related to Questions of Coverage May Be Considered to Establish, But Not to Defeat, the Duty to Defend

The insurer's duty to investigate is particularly crucial today, as insurance policies and risk-sharing agreements have become increasingly complex. This case, and at least one other case to have come before it, reflect the importance of the duty to investigate and the reasons why insurers should consider extrinsic evidence of certain facts—specifically, facts related solely to

the question of coverage, as opposed to liability—when determining whether it must defend an insured.

The Court of Appeals decision in *Fred Shearer & Sons, Inc. v. Gemini Insurance Co.*, 237 Or App 468, 240 P3d 67 (2010), is illustrative. In *Fred Shearer*, the underlying plaintiffs had sued their general contractor, alleging, among other things, its failure to properly mix and apply a stucco product on the exterior of the plaintiffs' home. *Id.* at 470. The general contractor then sued Shearer, the subcontractor who had installed the product. *Id.* Shearer tendered its defense to Gemini Insurance Company, which insured the product distributor, on the theory that Gemini's policy with the distributor extended coverage to "vendors" of the stucco product. *Id.* Gemini rejected tender, however, pointing out that the complaint and the policy did not establish that Shearer was a "vendor" of the distributor's product. *Id.* at 472. The question for the Court of Appeals, then, was whether the underlying complaint, considered on its own, must make clear the status of the insured with respect to the insurer in order for the duty to defend to arise. *Id.* at 474. The court held that it does not, and that "actual facts" relating to the "insured" status of the third-party plaintiff should be considered in determining the duty to defend. *Id.* at 478 (citing *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F3d 523, 531 (5th Cir. 2004); *Burd v. Sussex Mut. Ins. Co.*, 56 NJ 383, 388, 267 A2d 7 (1970)).

The rule applied in *Fred Shearer* makes logical and practical sense, and, for several reasons, this Court should adopt it here. First, it is consistent with, and perhaps compelled by, an insurer's duty to conduct a reasonable, good-faith investigation of the claims that it receives. In that regard, a rule prohibiting the use of extrinsic evidence after an insurer, upon its reasonable investigation, knows or should know of such evidence, would upset the bargain struck between the insurer and the insured. An insurer should not be permitted to escape its duty to defend by ignoring certain facts, often of which it already is aware, and instead rely on incomplete or potentially incorrect allegations in the underlying complaint, all for the sake of an old rule not designed to apply in such a scenario.

Second, as the Court of Appeals pointed out in *Fred Shearer*, certain facts bearing solely on coverage—for example, facts relating to the "insured" status of the insured party—may not be relevant to the merits of the underlying dispute. Thus, the plaintiff asserting the underlying claims may have no reason to include those facts in his or her complaint and, indeed, may not think to do so. The insurer should not be permitted to benefit from the incomplete or incorrect allegations of an uninformed or unsophisticated plaintiff.

Third, the rule is consistent with the "notice" rationale that this Court has "consistently emphasize[d] * * * when asked to determine whether an insurer has a duty to defend." *Marleau v. Truck Ins. Exch.*, 333 Or 82, 91, 37 P3d 148

(2001). As long as the facts are either reasonably ascertainable to the insurer or provided by the insured with sufficient time for the insurer to prepare its defense, any concern for adequate notice has been satisfied.

Finally, the rule is consistent with the authority from other state courts to have considered the question. *See, e.g.*, *Olson v. Farrar*, 338 Wis 2d 215, 231-32, 809 NW2d 1 (2012) (holding that extrinsic evidence is relevant solely to the question of coverage); *Burd*, 56 NJ at 388 (same). Indeed, a majority of state courts now consider some form of extrinsic evidence in resolving whether the insurer has a duty to defend.

To be sure, a rule permitting consideration of extrinsic evidence of *any* facts must have its limits. Given this Court's broader rule that ambiguities with respect to the insurance policy or the duty-to-defend determination should be resolved in favor of the insured, any rule permitting the use of extrinsic evidence should likewise operate only in favor of the insured. Thus, while an insurer may consider evidence of facts tending to *establish* coverage, an insurer may not consider evidence of facts tending to *defeat* coverage. *See Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co.*, 274 Conn 457, 465-67, 876 A2d 1139 (2005) (describing a one-way rule in which insurers must consider extrinsic evidence to establish the duty to defend but may not consider extrinsic evidence to defeat its duty to defend); *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wash 2d 751, 761, 58 P3d 276 (2002) (same); *Dep't of Transp. & Pub.*

Facilities v. State Farm Fire & Cas. Co., 939 P2d 788, 792 n 1 (Alaska 1997) (same); *Fitzpatrick v. Am. Honda Motor Co., Inc.*, 78 NY2d 61, 63, 575 NE2d 90 (Ct App 1991) (same); *Brohawn v. Transam Ins. Co.*, 276 Md 396, 408-09, 347 A.2d 842 (Ct App 1975) (same). Additionally, consistent with the rules stated in *Ledford* and earlier cases, an insurer should not consider evidence bearing on the merits of the underlying claims; the evidence should tend *solely* to establish facts bearing solely on whether the underlying claim falls potentially within the scope of the policy's coverage—*e.g.*, facts bearing on the "insured" status of the third-party plaintiff.

* * * * *

In determining the duty to defend, this Court consistently has made clear that the *potential* for liability is the relevant standard. This Court has further made clear, in a related context, that insurers "operate under a duty of inquiry." To fully satisfy its obligations under the insurance contract, then, an insurer may be required, in limited circumstances, to look beyond the allegations of the complaint and the terms of the policy to determine whether it must defend an insured. OTLA urges this Court to adopt a rule compelling insurers to reasonably investigate the claims it receives and, if necessary, consider extrinsic evidence of facts tending to establish that the underlying claim is covered under the policy. Such a rule is compelled by an insurer's obligations under the contract for insurance, and would thereby help to maintain the balance struck

between insurers and policyholders, particularly where the allegations of the underlying complaint are not likely to address the question.

D. Oregon Auto Breached Its Duty to Defend

Applying those rules to this case, Oregon Auto breached its duty to defend West Hills. As the Court of Appeals explained, the underlying complaint sufficiently alleged—or was potentially ambiguous with respect to—conduct for which L&T, the primary insured, was responsible. The complaint alleged, for instance, that the deficiencies in construction included,

> **"Insufficient weatherproofing.** There is insufficient weatherproofing in some areas, such as at roof-to-wall transitions, *and at the wood posts supporting the soffits*, which terminate on concrete grade topping without weatherproofing protection, all of violate Article 2306.6 of the 1998 OSSC."

ER 40 (emphasis added). The complaint further alleged that necessary remedial measures included "[r]e-clad columns with moisture tolerant assemblies." ER 41. When West Hills tendered the defense to L&T's insurer, it notified Oregon Auto that "[t]he Complaint implicates work performed by your insured" and, more specifically, that "your insured installed the front porch columns." ER 31.[3] Those facts, which bear solely on the status of the third-party plaintiff as an "insured" under the policy, create the potential for liability within the scope

---

[3] Oregon Auto contends that "columns," "wood posts supporting the soffits," and "front porch columns" are not necessarily the same thing. That does not change the outcome here. They very well could be (and likely are), and, for the purposes of determining the duty to defend, any ambiguities in the complaint should be resolved in favor of West Hills. *See Ledford*, 319 Or at 400 (so stating).

of L&T's policy, and therefore gave rise to Oregon Auto's duty to defend West Hills as an "Additional Insured." *See* ER 30 (naming West Hills Development Co. as an additional insured "with respect to liability arising out of [L&T's] ongoing operations for [West Hills]"). To the extent that the existence of the duty remained unclear, Oregon Auto could reasonably have ascertained—by, for example, "a telephone call to its named insured"—facts tending to establish its duty to defend.

E. Actual Notice of a Claim Is Also Sufficient to Trigger the Duty to Defend

In its brief, Oregon Auto repeatedly points out that West Hills did not retender to Oregon Auto any of the amended complaints that were filed in the underlying litigation. *See* Pet. BOM at 5 n 1. Oregon Auto does not contest, however, and the trial court found, that Oregon Auto received, and therefore had actual notice of, those complaints, because the same adjuster managed the claim files for both West Hills and its subcontractor, L&T. The amended complaints unambiguously create a potential for liability with respect to L&T's improperly constructed porch columns. SER 63.

Because Oregon Auto operates under a duty to investigate, *see Zimmerman*, 354 Or at 281, its actual knowledge of the amended complaints, independent of any extrinsic evidence that West Hills offered, was also sufficient to trigger its duty to defend. In *Lusch v. Aetna Casualty & Surety Co.*, 272 Or 593, 597, 538 P2d 902 (1975), this Court explicitly considered

whether the notice that the insured had provided to its insurer was sufficiently timely to give rise to a duty to defend. On that point, the Court held that "[i]f notice from any source was sufficiently timely so that the insurer could adequately investigate and protect itself, thereby suffering no prejudice, the insurer is bound to fulfill its policy obligations." *Id.* at 599. The Court further held, however, that the notice could come "from whatever source" and, absent prejudice, would be considered sufficient. *Id.* at 601.

Applying *Zimmerman* and *Lusch* to this case, with respect to Oregon Auto's duty to defend, it was unnecessary for West Hills to repeat tender to Oregon Auto in light of the amended complaints. Oregon Auto had actual notice of the content of those complaints, and obtained that notice with sufficient time to investigate and prepare its defense.

IV. CONCLUSION

This Court should hold that an insurer must consider extrinsic evidence of facts known or reasonably ascertainable by the insurer and tending solely to establish that the underlying claim is covered by the insurance policy when determining whether it has a duty to defend.

DATED this 14th day of July, 2016.

STOLL STOLL BERNE LOKTING & SHLACHTER PC

By: /s/ Nadia H. Dahab
Nadia H. Dahab, OSB No. 125630

209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: ndahab@stollberne.com

Attorney for Amicus Curiae
Oregon Trial Lawyers Association

CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 4,592 words.

I 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 in ORAP 5.05(2)(d).

/s/ Nadia H. Dahab
Nadia H. Dahab

Attorneys for Amicus Curiae
Oregon Trial Lawyers Association

CERTIFICATE OF FILING AND SERVICE

I certify that on July 14, 2016, I filed the original of this **OREGON TRIAL LAWYERS ASSOCIATION'S *AMICUS CURIAE* BRIEF** with the State Court Administrator in pdf, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

Participants in this case who are registered eFilers will be served via the electronic mail function of the eFiling system.

I further certify that on July 14, 2016, I served a true and correct copy of said document on the party or parties listed below, via first class mail, postage prepaid, and addressed as follows if they are not already registered under the Oregon Appellate Court eFiling system:

Michael E. Farnell
Emily Sarah Miller
PARSONS FARNELL & GREIN, LLP
1030 SW Morrison Street
Portland, OR 97205
Email: mfarnell@pfglaw.com
emiller@pfglaw.com

Peter J. Viteznik
KILMER VOORHEES & LAURICK PC
732 NW 19th Avenue
Portland, OR 97209
Email: pviteznik@kilmerlaw.com

Attorneys for Plaintiff-Respondent/Respondent on Review West Hills Development Company

Thomas M. Christ
COSGRAVE VERGEER KESTER LLP
888 SW 5th Avenue, 5th Floor
Portland, OR 97204
Email: tchrist@cosgravelaw.com

Attorneys for Defendant-Appellant/Petitioner on Review Oregon Automobile Insurance Company

Linda B. Clapham
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
Email: Clapham@carneylaw.com

Attorneys for Amicus Curiae PCI and NAMIC

STOLL STOLL BERNE LOKTING & SHLACHTER PC

By: /s/ Nadia H. Dahab
Nadia H. Dahab, OSB No. 125630

209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: ndahab@stollberne.com

Attorney for Amicus Curiae Oregon Trial Lawyers Association