IN THE SUPREME COURT OF THE STATE OF OREGON,

KEVIN RAINS and MITZI RAINS,
Plaintiffs-Respondents
Petitioners on Review,

v.

STAYTON BUILDERS MART, INC., JOHN DOE LUMBER SUPPLIER, JOHN DOE LUMBER MILL and FIVE STAR CONTRUCTIONS, INC.,
Defendants.

STAYTON BUILDERS MART, INC.,
Third-Party Plaintiff-Respondent,

v.

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

and

WEYERHAEUSER COMPANY,
Third-Party Defendant-Appellant
Respondent on Review.

WEYERHAEUSER COMPANY,
Fourth-Party Plaintiff,

v.

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

JULY 2015

RESPONDENTS' BRIEF ON THE MERITS OF KEVIN AND MITZI RAINS

WITHERS LUMBER COMPANY,
Fourth-Party Plaintiff,

v.

SELLWOOD LUMBER CO., INC.; and WEYERHAEUSER COMPANY,
Fourth-Party Defendants.

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

v.

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

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

v.

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

Marion County Circuit Court
06C21040

Court of Appeals
A145916

S062959

RESPONDENTS' BRIEF ON THE MERITS OF KEVIN RAINS AND MITZI RAINS

On review from the decision of the Court of Appeals
On appeal from the Marion County Circuit Court

Limited Judgment and Money Awards entered May 28, 2010
The Honorable Dennis Graves, Circuit Court Judge

Court of Appeals Opinion filed: August 13, 2014
Reconsideration denied by Order: December 10, 2014
Author of opinion: Ortega, P.J.
Concurring judges: Sercombe, J. and Hadlock, J.

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REVISED QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

1. Did the High-Low Agreement (the Agreement) between plaintiffs and product distributor Stayton Builders Mart (Stayton), which set upper and lower limits on Stayton's liability, render plaintiffs' strict product defect claim against Stayton non-justiciable?

No. Parties may narrow the issues in dispute without losing the ability to litigate the issues that remain.

2a. Did the lower courts properly deny admission of the Agreement into evidence when Weyerhaeuser Company's (Weyerhaeuser) purpose was to inject Stayton's insurance into the case in order to influence the jury's damage awards?

Yes. The trial court properly denied admission of the Agreement on this basis. Weyerhaeuser's argument that the jury should know that "the money is being paid by a very large insurance company in Ohio" in order to influence how the jury will "deal with the apportionment of damages" was an improper reason for admitting the Agreement, and was properly denied by the trial court.

2b. Should this court now reverse the judgment below for failure to admit the Agreement into evidence when Weyerhaeuser never objected to any prejudicial tactics during trial, never attempted to cross-examine any

witness about the terms of the Agreement, and never made an offer of proof that would have informed the trial court of Weyerhaeuser's reason why the Agreement was relevant to the issue of bias?

No. This court should not reverse the judgment for unpreserved error. Moreover, there would have been no error in excluding the Agreement for the new reasons Weyerhaeuser asserts on appeal.

3. Should this court review the trial court's rejection of Weyerhaeuser's proposed verdict when Weyerhaeuser provides no record of its proffer and argument or the trial court's ruling, and the proposed verdict was legally erroneous?

No. This court should not reverse the judgment for unpreserved error. Moreover, there was no error in rejecting Weyerhaeuser's faulty proposed verdict.

4. Did the lower courts properly uphold the judgment for Ms. Rains' full noneconomic damage award for loss of consortium without reduction under ORS 31.710?

Yes. The courts below properly decided that Ms. Rains' loss of consortium damages were constitutionally protected and could not be reduced to the statutory limit set forth in ORS 31.710.

SUMMARY OF ARGUMENT

Weyerhaeuser told the jury that if it found Weyerhaeuser liable for plaintiffs' harms, "Weyerhaeuser will live with whatever you do if you get there. We're not trying to hide from anything or run from our responsibilities." Tr 1622. Yet, after losing the trial in April 2010, Weyerhaeuser has mounted two appeals and, on review here, is asking the court to throw out the judgments for several reasons it never raised in the trial court. Weyerhaeuser tells a story now about prejudicial and collusive trial tactics allegedly brought about by the partial settlement agreement between plaintiffs and Stayton, but at trial it never objected that any such prejudice was taking place.

Only one of Weyerhaeuser's claimed errors arises from a decision Weyerhaeuser properly contested and preserved in the trial court – that justiciability remained between plaintiffs and Stayton after their partial settlement agreement. This was a legally correct decision and should be affirmed. Weyerhaeuser's failure to raise and preserve its other claimed errors forecloses appellate review. The trial court judgments for plaintiffs should be affirmed.

STATEMENT OF FACTS

1. Evidence supporting the claims

On February 10, 2005, plaintiff Kevin Rains was seriously injured in a fall during the construction of a pole barn in Polk County (the barn). Tr 1147. He fell because the 2 X 6 14-foot board on which he was working broke. Tr 1148-1149. Through eyewitnesses and experts, plaintiffs proved at trial that there was a knot in the board that caused it to break. Tr 343-344; Tr 1157; Tr 476, 487; Tr 1050-1052, 1061-1064. The board was graded number 2 or better. Tr 749. If properly graded, this made it suitable for the structural and weight-bearing use plaintiff made of it. Tr 814-816. With the knot, however, it was not a number 2 board. Tr 824. The fall caused Mr. Rains' paralysis. Tr 433-434; 436-438.

Plaintiffs proved that the defective board came from Stayton. Tr 358, 383-384; Tr 742-743; Exs 3, 4 (invoices for Five Star's purchase from Stayton); Tr 1158-1160.

Stayton proved that the defective board came from Weyerhaeuser. Tr. Tr 1006-1013; Exs. 301-306 (orders and shipment records for lumber); Tr 1255-1269; Exs. 307-313 (inventory reports and sales receipts for Weyerhaeuser lumber sold to Five Star). Stayton did not have computer records for these transactions. Tr 1253. But Stayton produced from storage

the actual paper files and sales receipts relevant to the defective board. Tr 1253-1254. And other witnesses for Weyerhaeuser, Stayton and plaintiffs who examined the barn identified where Weyerhaeuser boards were used in the barn's construction. Tr. 1308. Ex 9 (showing Weyerhaeuser-stamped boards on purlins and roof of barn). In particular, there were Weyerhaeuser-stamped boards on the eave purlin on the east side, where the accident occurred, as well as on the west side. Tr 1537-1539; Exs. 316, 317 (photos of Weyerhaeuser boards at accident location).

2. The claims and pre-trial events

On November 9, 2006 Kevin Rains and his wife Mitzi Rains sued Stayton alleging negligence and strict product liability claims. Plaintiffs also brought an Employer Liability Law (ELL) claim against Five Star Construction (Five Star), the business that hired Kevin Rains and his partner, Benito Rodriguez, to build the barn. Tr 741. Plaintiffs obtained a default judgment against Five Star, which was entered on September 22, 2008. ER-11-14.

Stayton's answer raised the affirmative defense (among others) of Kevin Rains' comparative fault. CR # 38.

In September 2008, Stayton filed a third-party complaint seeking indemnity and contribution from Weyerhaeuser, alleging, in relevant part,

that Stayton received the defective board from Weyerhaeuser and sold it in its original condition without any change or modification. ER 17, ¶¶ 4, 6.

In March 2009, Weyerhaeuser moved for summary judgment against Stayton's indemnity claim. CR#193 (Weyerhaeuser's motion for summary judgment, Motions 1 & 2). Stayton defended and prevailed. CR #214 (Stayton's Response); CR#308 (Order denying motion for summary judgment against Stayton, entered August 27, 2009). In fact, Stayton relied on expert evidence provided by plaintiffs concerning the factual issues Weyerhaeuser put in dispute: that Weyerhaeuser milled the board, that the knot size was possible with the log sizes Weyerhaeuser milled, and that the board did not meet the grading standard for which Weyerhaeuser marketed it. CR #242 (Plaintiffs' Response).

On March 1, 2010, Weyerhaeuser filed its answer to Stayton's operative third-party complaint. SER 1-3. Weyerhaeuser denied liability. SER 2, ¶¶ 2-6. It also incorporated Stayton's affirmative defenses against plaintiffs, including Kevin Rains' comparative fault. SER 2, ¶ 7.

In early March 2010, about four weeks before trial, Stayton again requested of Weyerhaeuser that it take over Stayton's defense and indemnify it, but Weyerhaeuser refused. Tr 1873-1874.

3. Plaintiffs and Stayton entered into a High-Low Agreement.

Approximately a week before trial, the parties mediated the case. At the mediation, Stayton and plaintiffs entered into the Agreement. ER (Supreme Court) 11-13. The Agreement limited Stayton's liability on the disputed product defect claim to an amount between $1.5 million or $2 million, depending on the amount of the verdict net of Kevin Rains' comparative fault. ER (Supreme Court) -11-12, ¶¶ 1, 2. In accordance with the Agreement, plaintiffs dismissed their negligence claim against Stayton. ER (Supreme Court) 12, ¶ 3; Tr 239.

Before trial, plaintiffs and Stayton disclosed the Agreement to the trial court and Weyerhaeuser. On the first day of trial, before the Agreement was discussed, Weyerhaeuser renewed its motion for summary judgment against Stayton (Tr 241), which the trial court denied. Tr 243. During this discussion, counsel for Stayton described Stayton's position in the litigation:

> "Stayton Builders Mart in this case, and always has been in this case, if you will, a pass-through, in the sense that we did purchase the lumber from Weyerhaeuser, we did sell that same lumber to the project, and that our claim against Weyerhaeuser is for indemnity for that reason under law. So that was our position at the time of summary judgment, and remains our position."

Tr 242.

4. The trial court denied Weyerhaeuser's motion to dismiss Stayton.

The parties then discussed the Agreement. Weyerhaeuser asked the court to dismiss Stayton from the case for lack of a justiciable controversy between plaintiffs and Stayton. Weyerhaeuser argued:

> "Because they had entered into a Mary Carter Agreement with the plaintiffs, it's Weyerhaeuser's position that there is no longer a justiciable controversy between those parties; that instead, we believe that they are essentially working in concert. Stayton Builders Mart has agreed to pay $1.5 million in this case.
>
> And if a plaintiffs' verdict is received, then Stayton Builders Mart is going to be paid $1.5 million. They stand to gain $1.5 million by the verdict in this case. Because of that damage setting, we believe that dismissal is appropriate."

Tr 244.

The court denied the motion:

> "And I do find that there is a justiciable controversy issue in this case, given the terms of the Mary Carter Agreement and the potential $500,000 that plaintiffs seek to recover in this case over and above the amount that Stayton Builders Mart has agreed to pay."

Tr 247.

5. The trial court denied Weyerhaeuser's motion to admit the unredacted Agreement into evidence.

Weyerhaeuser then requested that the Agreement be admitted during trial so the jury could know its terms. Weyerhaeuser made this argument in support of its position:

> "The third point that was raised was that Weyerhaeuser would like to make use of the Mary Carter Agreement during the course of the presentment of evidence. We believe 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.
>
> The Oregon Rule of Evidence, I believe it's 811 dealing with the presentment of insurance information, details that you can only discuss insurance – you cannot discuss insurance in front of a jury when it's being used to show liability or negligence. But there are exceptions to that. Exceptions include a discussion of prejudice and other such things.
>
> The concern is that in typical cases where a defendant has insurance, a plaintiff would use that against the defendant and essentially show the jury, well, don't worry about this defendant, whether they can pay. They have got insurance. And that heightens the likelihood that a jury would find negligence. In this case, it's different.
>
> In this case, the jury would be left with the impression that this small, local lumber yard is potentially on the hook for a very large settlement. And they might think differently as to how to deal with the apportionment of damages if they were under that false impression.
>
> The true impression is that the money is being paid by a very large insurance company in Ohio, and the jury has a right to know that. And it is not within the exclusion as detailed in Oregon Rules of Evidence."

Tr 245-246.

The trial court denied Weyerhaeuser's request to admit the Agreement into evidence, stating:

> "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 258.

The trial court instructed the jury about the Agreement at the beginning of trial and again at the end of trial. Tr 269-270; 1676-1677. Both times, the jury was told it could consider the agreement to evaluate the "credibility or believability of the witnesses[.]" Tr 269-270; Tr 1676-1677. Weyerhaeuser did not challenge the adequacy of these instructions at trial or in the Court of Appeals.

6. During trial Weyerhaeuser did not object to several things it now claims as prejudicial or erroneous.

The plaintiffs tried their case for strict product liability, proving that Weyerhaeuser sold the board to Stayton, the board was defective when it left Weyerhaeuser's mill, Stayton sold the board to Five Star, and Kevin Rains was injured because of a defect in the board that caused his fall. Stayton proved that it bought the board from Weyerhaeuser, and did not alter the board while it was in Stayton's possession. Weyerhaeuser proved that Kevin Rains was negligent for failing to wear fall protection.

The jury returned a verdict finding Kevin Rains 25% at fault, Stayton 30% at fault and Weyerhaeuser 45% at fault. ER (Supreme Court) 17-19. With Weyerhaeuser's agreement (Tr 1842-1857), the court entered judgment

for $6,272,025.00 for Mr. Rains and $759,375.00 for Ms. Rains against Stayton and Weyerhaeuser jointly. ER (Supreme Court) 20-23.

During the trial Weyerhaeuser did not object to anything plaintiffs and Stayton did as collusive, did not attempt to examine any witness about the Agreement, and did not offer any evidence, instruction or argument concerning the fault of Five Star.

ARGUMENT

RESPONSE TO FIRST QUESTION

The lower courts correctly denied Weyerhaeuser's motion to dismiss plaintiffs' claims against Stayton for lack of justiciability.

A. Plaintiffs and Stayton retained a justiciable controversy between them after their partial settlement agreement.

1. The terms Weyerhaeuser attacks were not part of the Agreement.

The Agreement required dismissal of the negligence claim and continued the litigation of the strict product defect claim with Stayton's financial risk confined to the range of $1.5 million to $2 million depending on the outcome. Plaintiffs litigated the product defect claim to verdict, successfully proving the claim against both Stayton and Weyerhaeuser.

The Agreement provided:

> "1. In the event of a verdict, net of plaintiffs' comparative fault, in favor of plaintiffs against Stayton Builders Mart in an amount less than $1.5 million, or in the event of a defense

> verdict, Stayton Builders Mart will pay plaintiffs the sum of $1.5 million. * * *.
>
> "2. In the event of a net verdict in excess of $1.5 million, Stayton Builders' Mart will pay the amount of the verdict up to $2 million. * * *."

ER (Supreme Court) 11-12 (High-Low Settlement Agreement).

The Agreement did **not** contain any provision by which Stayton would gain financially from a higher damages award against Weyerhaeuser, the non-settling defendant.

In *Hodesh v. Korelitz*, 123 Ohio St 3d 72, 75, 914 NE 2d 186, 190 (2009), a case Weyerhaeuser cites, the court explained that to find a "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." This is a feature of "Mary Carter" agreements, but there was no such feature in the Agreement here.

2. Justiciability remained after the Agreement

A justiciable controversy exists when "the interests of the parties to the action are adverse" and "the court's decision in the matter will have some practical effect on the rights of the parties to the controversy." *Brumnett v. Psychiatric Sec. Review Bd.*, 315 Or 402, 405, 848 P2d 1194 (1993). The second element is not in dispute here. Clearly, the outcome at

trial had a practical effect on the rights of Stayton and plaintiffs – it determined how much Stayton would pay plaintiffs.

As to the first element, the interests of plaintiffs and Stayton remained adverse. The parties did not settle the issue of Stayton's liability to plaintiffs nor did they resolve plaintiffs' damages or the amount Stayton would pay for plaintiffs' damages. Instead, the parties agreed to set Stayton's financial obligation within certain ranges. The Agreement (1) guaranteed plaintiffs a minimum recovery even with a defense verdict, (2) provided for an additional sum of up to $500,000 more from Stayton if plaintiffs achieved a net verdict against Stayton in excess of $1.5 million, and (3) capped Stayton's liability at $2 million regardless of any higher damages award for plaintiffs at trial.

In rejecting Weyerhaeuser's lack of justiciability argument, the Court of Appeals observed that "[t]he remaining adversity was that every dollar above $1.5 million that the jury awarded to plaintiff against Stayton, up to a maximum of $2 million, equaled an additional dollar that Stayton had to pay to plaintiffs." *Rains v. Stayton Builders Mart, Inc.*, 264 Or App 636, 647-648, 336 P3d 483 (2014). The court's observation was accurate. Stayton's obligation potentially **increased** based on the amount of the jury's net damage award against Stayton. The agreement did not create an incentive

for Stayton to increase plaintiffs' damages. Rather, Stayton had up to $500,000 at stake depending on plaintiffs' net damages award against Stayton. With this significant amount at stake, there remained a justiciable controversy between plaintiffs and Stayton. *Compare Stephens v. Bohlman*, 138 Or App 381, 384-385, 909 P2d 208, *rev dismissed*, 324 Or 177, 925 P2d 907 (1996) (distinguishing complete settlement that rendered plaintiff's claim against settling defendant non-justiciable), *with* the Mary Carter agreement in *Grillo v. Burke's Paint Co., Inc.*, 275 Or 421, 424-425, 551 P2d 449 (1976), (where $16,000 was at stake for settling defendant.).

In *Dew v. City of Scappoose*, 208 Or App 121, 145 P3d 198 (2006) (Landau, J.), *rev den*, 342 Or 416, 154 P3d 722 (2007), a decision with which Weyerhaeuser and its *amici* agree (Weyerhaeuser Brief on the Merits, at 30, n 7; Amicus Brief on the Merits, at 5), the Court of Appeals recognized that justiciability continued between parties who agreed that defendant could avoid all personal liability for the plaintiff's judgment and the plaintiff would collect only from the defendant's insurer. The court rejected a claim that such an agreement rendered the plaintiff's claim against the defendant no longer justiciable, stating:

> "Merely because a party is fully indemnified against potential liability, it does not follow that the party has nothing at stake in an action against it, nor does it render such an action moot. Indeed, if it did, anyone with sufficient liability insurance

> would be essentially immune from suit. The outcome of the trial will have a practical effect on [settling defendant's] rights because it will determine whether he is personally liable. Because [settling defendant's] personal liability to plaintiff has yet to be determined, the parties remain in an adversarial relationship and this issue is not moot."

208 Or App at 143.

Similarly here the Agreement did not determine either Stayton's liability to plaintiffs or the final amount it must pay. These issues were resolved by the verdict at trial. Accordingly, after the Agreement, plaintiffs and Stayton remained in an adversarial relationship.

B. The agreement was a proper partial settlement.

With the Agreement, two of the three parties had reduced, but not eliminated, the risks of trial. Plaintiffs had reduced the risk of recovering nothing, with Stayton's guarantee of at least $1.5 million, and retained the option of recovering up to $500,000 more from Stayton depending on plaintiffs' damages recovery against Stayton. Stayton's risk, formerly unknown but potentially large given Mr. Rains' serious injuries, was narrowed to a range of $1.5 to $2 million, an amount that did not exceed its insurance coverage. Stayton remained as a defendant – properly so – because it had $500,000 at stake and its ultimate liability to plaintiffs depended on the outcome of trial.

Parties are permitted to stipulate to the issues they wish to litigate. A defendant may admit fault and litigate damages, as Stayton might have done here. Parties may litigate damages to verdict and use a high-low agreement to set the final amount to be paid. In this way, the parties confine a defendant's obligation and a plaintiff's recovery within certain parameters, depending on the verdict. The controversy remains genuine even if the stakes have changed. Here, the narrowing of issues between plaintiffs and Stayton by the Agreement did not render the controversy non-justiciable.

Other courts have recognized that high-low agreements are lawful and do not raise the concerns associated with Mary Carter agreements. *Hodesh v. Korelitz,* 123 Ohio St 3d 72, 76 (high-low agreement in which settling defendant retained a financial interest in a lower verdict was not collusive and did not need to be disclosed to the jury); *Freed v. Salas,* 286 Mich App 300, 315-322, 780 NW2d 844 (2009) (agreement simply capped settling defendant's liability to plaintiff based on the damages verdict; the alignment of the parties was not created by the agreement, but by the facts of the case); *Monti v. Wenkert,* 287 Conn 101, 126-128, 947 A2d 261 (2008) (finding agreement not a Mary Carter agreement "because it did not contain the liability shifting provision characteristic of those agreements").

Plaintiff and Stayton entered a high-low agreement and no jurisdiction has held that such an agreement is prohibited.

This court declined to hold that a Mary Carter agreement was invalid per se in *Grillo,* 275 Or at 426-427. Plaintiffs have identified four jurisdictions that follow the minority view that Mary Carter agreements are *per se* invalid and prohibited. *Dosdourian v. Carsten*, 624 So 2d 241, 246 (Fla.1993); *Cox v. Kelsey–Hayes Co*., 1978 OK 148, 594 P2d 354, 360 (1978); *Elbaor v. Smith*, 845 SW2d 240, 250 (Tex 1992); *Lum v. Stinnet*, 87 Nev 402, 488 P2d 347, 351 (1971). But that is not this court's view of such an agreement. And, in any event, not one of those jurisdictions has extended that prohibition to high-low agreements. In fact, a Florida intermediate appellate court expressly refused to do so in *Cardona v. Metro Dade Transit Agency*, 680 So 2d 1098 (Fla Dist Ct App 1996). Likewise, the Nevada Supreme Court when it initially prohibited Mary Carter-type agreements, particularly noted that high-low-like agreements that cap damages exposure are distinguishable. *Lum v. Stinnett,* 87 Nev at 409, n. 5 (distinguishing valid high-low agreement).

In *Cardona,* the court concluded:

> "'An agreement where the defendant and plaintiff agree to a minimum and maximum amount of a judgment notwithstanding the jury verdict is a common form of settlement. It does not diminish the liability of one party by proportionately increasing

> the liability of another party.' [*27th Avenue Gulf Service Center v. Smellie,* 510 So 2d 996, 998 (Fla 3d DCA 1987)]. This court has approved high-low agreements recognizing that they do not carry the onus attached to Mary Carter Agreements."

680 So 2d at 1099. More recently in *Gulf Indus., Inc. v. Nair*, 953 So 2d 590, 591-596 (Fla Dist Ct App 2007), the court again rejected an argument extending Florida's prohibition of "Mary Carter" agreements to high-low agreements, noting the preservation of adversity in that type of agreement:

> "[T]he $1,000,000 range between the high and low limits of the agreement suggests that [the settling defendant] had a genuine incentive to defend itself against fault[.] Based on these considerations, we find that the high-low agreement was not prohibited."

Gulf Indus., 953 So 2d at 593.

In sum, there are only four states that support Weyerhaeuser's general proposition that Mary Carter agreements should be prohibited, a view this court has previously rejected, and correctly so. But, even in those four states, courts have rejected what Weyerhaeuser suggests here -- extending that prohibition to a high-low agreement.

C. There was no misalignment of parties that caused prejudice to Weyerhaeuser.

1. The Agreement did not change Stayton's interests or alignment at trial.

Weyerhaeuser compares the Agreement to the one involved in *Bocci v. Key Pharmaceuticals, Inc.*, 158 Or App 521, 974 P2d 758 (1999), *vac'd*

and remanded, 332 Or 39, 22 P3d 758 (2001). Weyerhaeuser claims that the Agreement motivated Stayton to pursue a large damages award for plaintiff "because, under the terms of the agreement, such a favorable outcome for the plaintiff reduces or eliminates the settling defendant's liability." Brief on the Merits, at 30. This is incorrect. The Agreement did not allow Stayton to recover anything from plaintiffs or Weyerhaeuser. The Agreement did not say that a higher damages award would reduce or eliminate Stayton's liability to plaintiffs; rather, it increased Stayton's liability to plaintiffs.

Weyerhaeuser also argues that the Agreement created an unfair collusive relationship between plaintiffs and Stayton. Weyerhaeuser Brief on the Merits, at 15-19, 35-36. In fact, the "alignment" of plaintiffs and Stayton was not the product of the Agreement; it was the consequence of the claims in the case.

Plaintiffs sued Stayton for selling a defective board. ER-6-10. This required plaintiffs to prove that Stayton sold the board for the barn, the board was defective, the defect caused Mr. Rains' harms, and Mr. Rains was not, or was only minimally, at fault for his own harms.

Stayton – not plaintiffs -- sued Weyerhaeuser as a third-party plaintiff seeking indemnity. ER (Supreme Court) 9-10. This required Stayton to

prove that it got the defective board from Weyerhaeuser, that Stayton did not alter the condition of the board while in its possession, and, as a pass-through seller, its legal obligation to plaintiffs ought to be discharged by Weyerhaeuser. Stayton's indemnity claim also required that it was liable to plaintiffs. *See Fulton Ins. v. White Motor Corp.*, 261 Or 206, 210, 493 P2d 138 (1972) (stating elements of common law indemnity claim). In addition, under ORS 31.600(3) Stayton had the burden to prove that Weyerhaeuser's fault was a contributing cause to plaintiffs' injuries.[1] These were all points of "alignment" with plaintiffs – who were able to seek judgment against Weyerhaeuser once Stayton brought it into the litigation[2] – and these "alignments" existed without change both before and after the Agreement.

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[1] ORS 31.600(3) provides:

> A defendant who files a third party complaint against a person alleged to be at fault in the matter, or who alleges that a person who has settled with the claimant is at fault in the matter, has the burden of proof in establishing:
>
> > (a) The fault of the third party defendant or the fault of the person who settled with the claimant; and
> >
> > (b) That the fault of the third party defendant or the person who settled with the claimant was a contributing cause to the injury or death under the law applicable in the matter.

[2] ORS 31.600(2) provides in relevant part:

Indeed, in Weyerhaeuser's view, the real source of Stayton's "motive" was its indemnity claim. Appellant's Brief, p. 15 ("**As a consequence of its indemnity claim against Weyerhaeuser,** Stayton had absolutely no incentive to defend itself or otherwise obtain a verdict against it that was less than $2 million.") (Emphasis added.) But Weyerhaeuser did not seek to sever Stayton's claim. Instead, Weyerhaeuser agreed that the facts relevant to the indemnity claim would be presented at trial for the court's later ruling on Stayton's indemnity claim. Tr 1722-24, *see also* Appellant's Brief, p. 10 (so stating). Weyerhaeuser also chose to reject Stayton's tender of defense. Tr 1886-1887. This choice meant that Stayton was required to stay in the case, defend itself in the way it felt best, and litigate its indemnity claim, all of which Stayton did.. The agreement did not change Stayton's interest in ensuring that Weyerhaeuser indemnify it for Stayton's financial obligations to plaintiffs.

2. The jury understood the interests of the parties.

> (2) 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. The failure of a claimant to make a direct claim against a third party defendant does not affect the requirement that the fault of the third party defendant be considered by the trier of fact under this subsection. * * *

The jury **was** informed at the beginning of trial that Stayton desired to ensure that Weyerhaeuser should pay for plaintiffs' damages, because of its indemnity claim. The court instructed about the settlement and the parties' trial relationship as follows:

> "And as I read, for some of you at least, earlier, I want to reread something to you in regard to settlement between two of the parties in this case. I need to inform you that a settlement agreement has been reached between plaintiffs and Stayton Builders Mart. Stayton Builders Mart was the seller of the piece of wood.
>
> The law makes retailers, like Stayton Builders Mart, of a dangerously defective product liable, along with the manufacturer who made the product. And Stayton Builders Mart has entered into a settlement with plaintiffs on that basis.
>
> However, Stayton Builders Mart remains a party to this lawsuit under the terms of the settlement agreement. Because the law also provides that in the event the jury finds in favor of the plaintiffs in this case, the retailer, Stayton Builders Mart, may assert that the manufacturer, Weyerhaeuser, should in fairness be responsible for the full amount of plaintiffs' damages caused by a defectively manufactured product.
>
> Stayton Builders Mart is making that claim against Weyerhaeuser Company in this case. The settlement agreement contains a schedule of repayment to Stayton Builders Mart by the plaintiffs if the plaintiffs and Stayton Builders Mart are awarded a verdict against Weyerhaeuser. So that is that relationship that you need to be aware of.
>
> But the jury that is selected in this case is instructed that it may only consider the fact of the settlement as it might bear on the issues of credibility or believability of the witnesses who testify. And it is not to be considered in any way in determining the amount of the verdict or damages, if any, that

> the jury should award at the end of the case against both defendants."

Tr 269-270. [3]

Juries are often asked to resolve disputes among several parties with separate interests. *Bocci,* 158 Or App at 532, (Riggs, J. concurring) ("Juries are regularly asked to make actual decisions concerning liability where numerous defendants are pointing fingers at each other in an effort to establish that they are not responsible for an injury. Juries are regularly asked to decide the merits of defendants' cross-claims against one another.") In a similar line-up of parties, *Mackey v. Irisari*, 191 W Va 355, 364, 445 SE 2d 742 (1994), held that even a genuine Mary Carter agreement, *i.e.*, one that creates a financial benefit for the settling defendant based on plaintiff's recovery from the non-settling defendant, may not need to be disclosed where the nature of the parties' relationship is clear to the jury from the claims at issue. ("Dr. Ho was brought into the action by a third-party contribution claim filed by Dr. Irisari. The plaintiff never sued Dr. Ho. Therefore, Dr. Ho's and Dr. Irisari's relationship was adversarial from the

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[3] This description of the Agreement incorrectly told the jury that "[t]he 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." SER-24-25. The court's second instruction at the end of the evidence did not include this error. Tr 1676-1677, SER 29-30. Weyerhaeuser does not argue that this mistake caused it any prejudice.

very beginning of the lawsuit, and the jury should have been aware of the adversarial nature between Dr. Ho and Dr. Irisari. Dr. Ho has failed to show how the 'Mary Carter' settlement agreement realigned loyalties so as to prejudice him.").

3. Weyerhaeuser did not object to trial tactics it now regards as prejudicial.

Weyerhaeuser asserts that because of the Agreement, plaintiffs and Stayton engaged in unfair collusion during trial. Weyerhaeuser Brief on the Merits, at 15-19, 35-36. But Weyerhaeuser never voiced any objection at trial to tactics it now claims were collusive and prejudicial.

In the dissenting opinion in *Bocci*, Judge Landau listed trial maneuvers between settling parties using a "Mary Carter" agreement that had the potential to "distort the adversarial process" to the non-settling defendant's disadvantage. 158 Or App at 550. The list includes the Mary Carter defendant's sharing discovery materials with the plaintiff, using peremptory challenges during voir dire for plaintiff's benefit, permitting plaintiff to question the Mary Carter defendant with leading questions as a hostile witness, allowing both plaintiff and the Mary Carter defendant to cross-examine the non-settling defendant's witnesses, and allowing plaintiff the benefit of the Mary Carter defendant's arguments in support of plaintiff's

case. *See also Note: It's a Mistake to Tolerate the Mary Carter Agreement*, 87 Colum L Rev 368, 372-374 (1987).

In this case, however, after the Agreement, Stayton released its four experts to Weyerhaeuser, who called them at trial to defend on liability. Tr 1884. Stayton also presented its own verdict form and objected to plaintiffs' proposed verdict, an objection joined in by Weyerhaeuser. Tr 1689-1690.

Weyerhaeuser claims that during voir dire, Stayton exercised its three peremptory challenges in plaintiffs' favor. Weyerhaeuser Brief on the Merits, at 15. However, there is no transcript of voir dire as required to substantiate the claim. This claim of prejudice must be rejected.

Weyerhaeuser also complains about other choices Stayton made at trial (*Id.*, at 15), but Stayton's trial choices were consistent with its own interest in proving its indemnity claim. Weyerhaeuser selects phrases from Stayton's closing argument (*Id.*, at 16-17), but these too were consistent with Stayton's own interests in light of its indemnity claim against Weyerhaeuser. Moreover, when read as a whole and in context, Stayton's closing argument was appropriate. In fact, it drew no objection from Weyerhaeuser.

As to Stayton and Weyerhaeuser's joint defense, one party's change in strategy does not moot the controversy. As a result of the Agreement, Stayton no longer had the need, if it ever did, to defend Weyerhaeuser's

product. Stayton chose to focus on its pass-through role and leave Weyerhaeuser to defend its defective board, a choice Stayton could have made at any time, with or without the agreement. This did not alter the live controversies among the parties. Nor did it mislead the jury about the interests of the parties in the case.

Weyerhaeuser was fully able to present witnesses, cross-examine witnesses, including experts, and make its arguments to the jury, including its views of Stayton's "real" motives in the case. There was no impropriety at trial that materially affected Weyerhaeuser's right to a fair trial. For all these reasons, Weyerhaeuser's claim that the Agreement no longer made plaintiffs' strict liability claim against Stayton justiciable must be rejected.

RESPONSE TO SECOND QUESTION

The lower courts correctly rejected Weyerhaeuser's attempt to introduce evidence of the partial settlement agreement between plaintiffs and Stayton.

A. Weyerhaeuser's reasons for introducing insurance evidence were improper and correctly rejected.

ORS 40.205(1) (OEC 411) prohibits evidence that a party is insured "upon the issue whether the person acted negligently or otherwise wrongfully." Subsection (2) of the rule does not require exclusion of insurance evidence "when offered for another purpose, such as proving * * * bias, prejudice or motive of a witness."

Weyerhaeuser sought admission of an unredacted version of the Agreement *because it mentioned insurance.* Weyerhaeuser argued that it should be able to use Stayton's insurance information to influence how much the jury would award in damages against Stayton. Weyerhaeuser's counsel told the trial court:

> In this case, the jury will be left with the impression that this small, local lumber yard is potentially on the hook for a very large settlement. And they might think differently as to how to deal with the apportionment of damages if they were under that false impression.
>
> The true impression is that the money is being paid by a very large insurance company in Ohio, and the jury has a right to know that.

Tr 246.

The Court of Appeals decided that, "Weyerhaeuser offered the evidence of insurance for an improper purpose – to induce the jury to use the existence of insurance to influence its allocation of fault and damages." *Rains,* 264 Or App at 651. Further, Weyerhaeuser's decision not to offer a redacted version of the Agreement also required affirmance of the trial court's decision. 264 Or App at 651-652.

The lower courts were correct to keep out insurance evidence. Weyerhaeuser offered evidence that Stayton was insured solely to show that Stayton could afford to pay a large damages verdict. Weyerhaeuser thought

knowledge of Stayton's insurance would influence the jury to "think differently as to how to deal with the apportionment of damages if they were under that false impression." Tr 246.

Weyerhaeuser now claims that evidence of Stayton's insurance was relevant to Stayton's bias, motive or prejudice. Weyerhaeuser Brief on the Merits, at 40-41. Weyerhaeuser offers no explanation why having insurance makes a party biased, or motivated to capitulate, or side with one party over another. No such explanation exists.

Evidence of a party's assets is not relevant to an award of compensatory damages. *Brooks v. Bergholm,* 256 Or 1, 3-5, 470 P2d 154 (1970) (so stating). The amount of damages should be based on the evidence of plaintiff's harm, not the financial resources of the defendant. Most defendants would resist the use of insurance to inflate a plaintiff's damages award. Indeed, the trial court gave the uniform instruction on this point and Weyerhaeuser did not object to this legal principle. Tr 1670 ("Whether any party has insurance or the ability to pay has no bearing on the issues that you are to decide."). Weyerhaeuser had and continues to have an improper reason for why the unredacted Agreement should have been admitted by the trial court. The trial court and the Court of Appeals

correctly rejected Weyerhaeuser's argument for admitting the unredacted Agreement.

B. The reasons Weyerhaeuser asserts now – never presented to the trial court -- are also insufficient to require reversal.

ORS 40.190 (OEC 408) provides that evidence of a settlement or partial settlement is not admissible unless it is offered for a purpose having independent relevance, such as proving bias or prejudice of a witness.[4] In *Holger v. Irish*, 316 Or 402, 851 P2d 1122 (1993) this court applied OEC 408 and required exclusion of evidence of a settlement because its admission had not been based on any permissible reason. 316 Or at 414.

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[4] ORS 40.190 (OEC 408) provides in relevant part:

> (1)(a) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.
>
> (b) Evidence of conduct or statements made in compromise negotiations is likewise not admissible.
>
> * * * * *
>
> (2(b) Subsection (1) of this section also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

In *Grillo,* the court addressed a Mary Carter agreement that apparently did not contain reference to insurance or other objectionable material. 275 Or at 424 (setting forth provisions of agreement). The court summarized other authorities that refused to invalidate Mary Carter agreements *per se* and noted that the agreement would have been subject to pretrial discovery and would have been admissible in evidence, if requested. 275 Or at 427. But the court did not have to resolve the question whether the agreement must be admitted even if it contained material that violated the Oregon Evidence Code. Accordingly, *Grillo* cannot be interpreted to make partial settlements admissible for reasons that plainly conflict with the evidence code.

In this court, Weyerhaeuser claims that exclusion of the Agreement prevented it from showing the jury Stayton's "real" motives for reaching the Agreement. Weyerhaeuser Brief on the Merits, at 18. Weyerhaeuser argues that without the Agreement it 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."

Weyerhaeuser Brief on the Merits, at 18-19.

Weyerhaeuser never articulated these reasons for admission in the trial court. Weyerhaeuser's complete argument in support of admissibility of the Agreement is set forth above at p. 9.

In any event, such an argument is factually incorrect. The Agreement did not include the terms Weyerhaeuser claims. The Agreement did not allow Stayton to recover its payment, attorney fees and costs from Weyerhaeuser. It would have been error for the lower courts to allow admission of the Agreement on this faulty basis.

C. Weyerhaeuser never attempted to cross-examine a witness using the Agreement.

Weyerhaeuser never told the trial court that it desired to use the agreement in its cross-examination of Stayton witness Roger Roberts, or any other witness. Weyerhaeuser asserts that the court's pretrial ruling foreclosed any further use of the Agreement in evidence. Weyerhaeuser Brief on the Merits, at 42-44. However, the trial court's pretrial ruling did not relieve Weyerhaeuser of its obligation to notify the trial court that it wished to cross-examine a witness about the Agreement, and explain how it believed the Agreement was relevant to the witness's bias or prejudice.

The preservation rule regarding excluded evidence requires an offer of proof to show the evidence and its relevance. ORS 40.025(1).[5] In *State v. Babson,* 355 Or 383, 414, 326 P3d 559 (2014), the court explained, "one purpose behind the offer of proof requirement is that it gives the [trial] court an opportunity to reconsider its ruling and correct any error." (Internal quotations omitted); *see also Marshall v. Korpa,* 118 Or App 144, 149, 846 P2d 445, *rev den,* 316 Or 528, 854 P2d 940 (1993) (pretrial ruling excluding FDA reports did not relieve party from making offer of proof to use the evidence for a particular purpose with a witness). In *Babson*, the court decided that a second offer of proof on a similar subject was required to preserve defendant's claim of error. Without it, the court stated, there was

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[5] ORS 40.025(1) (OEC 103(1)(b)) provides in relevant part:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> * * * * *
>
> (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

no way to know whether the testimony should have been excluded, or whether exclusion was prejudicial. 355 Or at 414. The same is true here.[6]

No one knows how Weyerhaeuser would have made use of the Agreement in its cross-examination of Mr. Roberts. If it intended to ask about insurance, the trial court could have excluded the evidence consistent with its pretrial ruling. If Weyerhaeuser intended to use some other provision for some other purpose, the question would have been a new one for the trial court. In either case, Weyerhaeuser had to give the trial court an opportunity to rule on the issue. *Shields v. Campbell*, 277 Or 71, 77, 559 P2d 1275 (1977) ("A party owes the trial court the obligation of a sound, clear and articulate motion, objection or exception, so as to permit the trial judge a chance to consider the legal contention or to correct an error already made."); *Schmidt v. Pine Tree Dev. Co.*, 291 Or 462, 465, 631 P2d 1373 (1981) (a litigant who has not asked the trial court to rule on an issue cannot show that the court committed error.). Weyerhaeuser never did that here, and its claim of error was properly rejected by the Court of Appeals.

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[6] Weyerhaeuser's reliance on *State v. Walker*, 350 Or 540, 258 P3d 1228 (2011) and *Charles v. Palomo*, 347 Or 695, 227 P3d 737 (2010) misses the mark. Those cases concerned the adequacy of objections timely raised. Here, Weyerhaeuser never asserted an interest in using the Agreement to cross-examine a witness until its opening brief on appeal.

Weyerhaeuser still offers no explanation about how it would link particular provisions of the Agreement to witness bias or prejudice. Neither the existence of insurance nor the settlement amount by itself implicates these concerns. There is nothing here for the court to review and Weyerhaeuser's claim of error should be rejected.

RESPONSE TO THIRD QUESTION

> The Court of Appeals correctly decided that Weyerhaeuser did not preserve the question whether Five Star should have been on the verdict form for allocation of fault.

A. There is no record for this court to review.

Late in the trial, Weyerhaeuser submitted a proposed verdict form that included Five Star. The conference regarding jury instructions and the form of verdict was not recorded. What arguments, if any, Weyerhaeuser advanced in support of its verdict, and what ruling the trial court made, if any, are thus not part of the record.

That said, the record *does* show that after the jury was instructed and excused, Weyerhaeuser's sole reference to Five Star on the verdict was this:

> "Also with the original verdict form that was submitted we requested that Five Star be added. I understand that was taken off by the court[.]"

Tr 1691, lns 16-18.

The Court of Appeals correctly decided that "the record on appeal contains nothing that demonstrates that Weyerhaeuser made such an argument to the trial court." 264 Or App at 656. The Court of Appeals rejected Weyerhaeuser's claim of error as unpreserved. 264 Or App at 655-656. Weyerhaeuser claims that it preserved its reasons why Five Star should be on the verdict form. Weyerhaeuser Brief on the Merits at 46. But it offers no new information about where in the record it did so.

B. The "plain error" doctrine does not aid Weyerhaeuser.

Weyerhaeuser now turns to plain error to gain this court's review of the issue. This should be rejected for several reasons. First, in *State v. Wyatt,* 331 Or 335, 346, 15 P3d 22 (2000), this court decided that the Supreme Court cannot review unpreserved issues that qualify as errors apparent on the face of the record, when, as here, the lack of preservation was raised and decided in the Court of Appeals. Weyerhaeuser did not assert plain error in the Court of Appeals and is not permitted to do so here for the first time. *See also Tarwater v. Cupp,* 304 Or 639, 644-45, 644 n 5, 748 P2d 125 (1988) (a petitioner in this court cannot shift or change position on review and argue or raise an issue that was not before the Court of Appeals).

Further, plain error review requires two things that Weyerhaeuser does not argue and cannot support. First, Weyerhaeuser cannot show that refusing its proposed verdict was plain error, that is, "obvious and not reasonably in dispute, and apparent on the record without requiring the court to choose among competing inferences." *State v. Vanornum*, 354 Or 614, 629, 317 P3d 889 (2013). Second, Weyerhaeuser offers no reason why this court should exercise discretion to review the claimed error, a decision made with "utmost caution" only after meeting the considerations this court has set forth. 354 Or at 630; *Ailes v. Portland Meadows,* 312 Or 376, 382 and n 6, 823 P2d 956 (1991).

C. Rejecting Weyerhaeuser's verdict was the correct decision.

The trial court did not err in rejecting Weyerhaeuser's belated verdict form. It is certainly disputable – in fact highly doubtful -- that ORS 31.600(2) would have required the inclusion of Five Star. ORS 31.600(2) requires that the jury apportion fault among "the claimant," "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." (Emphasis added) (Statute set forth above at note 2). At trial, no party "sought" "recovery" against Five Star. Plaintiffs' claim against Five Star had been resolved by a default judgment obtained one and

one-half years before trial. ER-11-14 (Limited judgments in favor of Kevin and Mitzi Rains against Five Star).[7]

As to Weyerhaeuser, a defendant wishing to include another entity in the litigation must plead and prove that party's or person's fault. ORS 31.600(3) ("A defendant * * * who alleges that a person who has settled with the claimant is at fault in the matter, has the burden of proof in establishing * * * the fault of the person who settled with the claimant; and * * * [t]hat the fault of the * * * person who settled with the claimant was a contributing cause to the injury") (Statute set forth at note 1); *Lasley v. Combined Transport, Inc.*, 351 Or 1, 26, 261 P3d 1215 (2011) ("[A] defendant who wishes to have the jury consider the unpleaded negligence of a codefendant in making that comparison is required to plead the facts establishing that negligence."). Neither Weyerhaeuser nor Stayton made any allegations against Five Star. SER 1 (Weyerhaeuser's Answer to Stayton's Third Amended Third-Party Complaint); ER 15 (Stayton's Third Amended Third-Party Complaint). Weyerhaeuser offered no evidence at trial (nor did anyone else) that Five Star was negligent or caused plaintiffs' harms.

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[7] These final judgments also precluded any further litigation between plaintiffs and Five Star. *Rennie v. Freeway Transport*, 294 Or 319, 323, 656 P2d 919 (1982) (plaintiff precluded from bringing second action against same party based on same facts when first action is resolved by final judgment).

Finally, ORS 31.605(1)(b) requires that each person's degree of fault "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." (Emphasis added). At trial, the jury was never asked to consider Five Star's fault. There was no evidence presented to the jury about Five Star's negligence (or even that there was a default judgment against Five Star). Weyerhaeuser's proposed jury instructions make no mention of Five Star. SER-4-20; *see e.g.,* SER-17 (Weyerhaeuser's proposed instruction No. 31 asked the jury to compare the fault of "one or both defendants."). Nor did Weyerhaeuser object to instructions the court gave that made no mention of Five Star. Even Weyerhaeuser's proposed verdict form did not ask whether Five Star had any responsibility for plaintiffs' injuries. ER-26-28. After listing eight questions about the fault and causative role of Kevin Rains, Stayton and Weyerhaeuser, Question 9 of the proposed verdict simply added a line for Five Star as a fourth entity against whom the jury could apportion a percentage of fault. ER-28.

Thus, even in the absence of Weyerhaeuser's preservation obstacles, and its failure to meet the statutory terms by which Five Star might have been considered for allocation of fault, its form of verdict was flawed. It would have been error to allow the jury to consider a percentage of fault for

Five Star without a predicate determination that Five Star was at fault and caused plaintiffs' harms.

D. Weyerhaeuser's latest unpreserved argument should also be rejected.

Perhaps recognizing these problems, Weyerhaeuser raises a new theory for the first time in this court that Five Star was a "settling" party within the meaning of ORS 31.600(2). The plain error doctrine requires that the error must appear on the face of the record. *State v. Serrano*, 355 Or 172, 179, 324 P3d 1274 (2014) (apparent on the face of the record means that "the reviewing court must not need to go outside the record to identify the error or choose between competing inferences, and the facts constituting the error must be irrefutable." (internal quotations omitted)). Yet, Weyerhaeuser identifies nothing in the record in this case supporting its purported plain error.

In a *separate* proceeding after this case was on appeal, Weyerhaeuser moved to set aside the judgment because of an agreement between plaintiffs and Five Star about pursuing litigation against Five Star's insurer. That appeal was resolved against Weyerhaeuser and is now final. *Rains v. Stayton Builders Mart, Inc.*, 258 Or App 652, 310 P3d 1195 (2013).

This court cannot go outside the record in this case to resolve this unpreserved claim. [8]

Moreover, Weyerhaeuser ignores – and, in any case, cannot meet -- the considerations required before the appellate court can choose to review plain error. *State v. Varnornum*, 354 Or at 630 (listing considerations before deciding to review plain error); *Ailes v. Portland Meadows*, 312 Or at 382 and n 6 (factors include: "the competing interests of the parties; the nature of the case; the gravity of the error; the ends of justice in the particular case; how the error came to the court's attention; and whether the policies behind the general rule requiring preservation of error have been served in the case in another way, i.e., whether the trial court was, in some manner, presented with both sides of the issue and given an opportunity to correct any error.").

This newest variation on the theme of why Five Star should have been included on the verdict does not repair Weyerhaeuser's more fundamental

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[8] Weyerhaeuser makes several unsupported assertions that plaintiffs disputed with evidence and argument in that separate proceeding. Weyerhaeuser Brief on the Merits, at 11, n 3, 47-48, 51. In that separate proceeding, plaintiffs showed that the agreement with Five Star was designed to retain, not settle, Five Star's liability to plaintiffs so that Five Star could pursue payment of plaintiffs' default judgment through litigation against its insurer and agent. Plaintiffs also provided evidence and argument that the agreement was not subject to the disclosure rule of ORS 31.815, that plaintiffs' counsel did not engage in "deceptive conduct" (*Id.*, at 48), that Weyerhaeuser was or should have been aware of the agreement, and that Weyerhaeuser faced no prejudice as a result of the agreement.

problems already addressed above: (1) There is no record that Weyerhaeuser made *any* arguments to the trial court in support of its verdict. (2) The trial court's decision to exclude Five Star was legally correct, because Weyerhaeuser did not plead or prove any wrongdoing by Five Star. And, finally, (3) Weyerhaeuser's verdict was faulty because it did not ask the jury to decide Five Star's fault and causative role.

Weyerhaeuser was aware of plaintiffs' default judgment against Five Star and tried the case without a single mention that Five Star had any responsibility for plaintiffs' harms.[9] It cannot now claim trial court "error" when Weyerhaeuser was fully aware of Five Star and freely chose to ignore it at trial.

E. Weyerhaeuser can show no prejudice

Weyerhaeuser was not prejudiced by the omission of Five Star from the verdict because there was no evidence to support a finding of fault or causation against Five Star. There was no instruction to direct the jury's consideration of Five Star's role in plaintiffs' harms. There is no basis to

[9] Weyerhaeuser acknowledged in its Trial Memorandum that "Five Star is not an active party for the purposes of trial." CR # 364, p. 3, lns 8-9.

conclude that omitting Five Star from the verdict had any effect at all on the outcome of trial.[10]

RESPONSE TO FOURTH QUESTION

The Court of Appeals correctly decided that a loss of consortium claim was protected by the rights to jury trial.

A. Weyerhaeuser does not challenge the common law origins of loss of consortium, or the extension of constitutional protections to both spouses.

Weyerhaeuser makes a new argument in this court that it did not present to the Court of Appeals. Weyerhaeuser now argues that Ms. Rains' loss of consortium claim was "based on" Mr. Rains' product liability claim, which Weyerhaeuser regards as a "wholly statutory" claim that can be capped after verdict despite jury trial rights. Weyerhaeuser Brief on the

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[10] Weyerhaeuser asserts that a reversal of the judgments would require outright dismissal rather than retrial because plaintiffs did not file a direct claim against Weyerhaeuser. This is incorrect. The comparative fault statutes allowed plaintiffs to proceed to judgment against Weyerhaeuser. ORS 31.610 ("The court shall enter a judgment in favor of the plaintiff against any third party defendant who is found to be liable in any degree, even if the plaintiff did not make a direct claim against the third party defendant.") After the evidence was received against Weyerhaeuser without objection, the evidence, rather than the allegations of the complaint, determined plaintiffs' claims. *Richards v. Dahl*, 289 Or 747, 753, 618 P2d 418 (1980). Moreover, ORCP 23B provides that the pleadings are amended to conform to the evidence. *Whinston v. Kaiser Foundation Hosp.*, 309 Or 350, 355, 788 P2d 428 (1990), *rev'd on other grounds, Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 61 P3d 928 (2003) ("a pleading for all practical and legal purposes is automatically amended whenever an issue not raised by the pleading is tried by consent.").

Merits at 52-53. This new argument should be rejected. In any event, for all the reasons previously argued in plaintiffs' Brief on the Merits, the rights to jury trial protect Ms. Rains claim from statutory reduction as provided in ORS 31.710.[11] Ms. Rains' loss of consortium claim is a civil action at law for money damages and as such is entitled to jury trial guarantees.

The Court of Appeals correctly decided that a loss of consortium claim was well-established at common law long before 1857 or 1910. 264 Or App at 665. Indeed, as early as 1619, the common law in England had developed a right of action in a husband allowing him to recover for injuries to his wife. *See* W. Page Keaton, et al., *Prosser and Keaton on the Law of Torts*, 125 at 931 5th Ed (1984), *citing Hyde v. Scyssor*, 79 Eng Rep 83 (1620); *Foot v. Card*, 58 Conn 1, 18 A 1027, 1028 (1889) ("from time immemorial" the law has recognized husband's claim for compensation for loss of wife's conjugal affection and society).

The Court of Appeals correctly rejected Weyerhaeuser's argument below that the right to jury trial should not apply to a wife's consortium

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[11] ORS 31.710(1) provides:

> Except for claims subject to ORS 30.260 to 30.300 and ORS chapter 656, in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage of any one person including claims for loss of care, comfort, companionship and society and loss of consortium, the amount awarded for noneconomic damages shall not exceed $ 500,000.

claim because of the historical fiction that a married women had no legal existence independent from her husband. *Sheard v. Oregon E. R. Co.,*137 Or 341, 345-346, 2 P2d 916 (1931) (explaining the "rationale:" "Marriage operated as a suspension for most purposes of the legal existence of the wife. In those days husband and wife were regarded as one--and he was that one."). The Court of Appeals refused to revive a discarded inequity to eliminate Ms. Rains' right to a judgment that gives effect to the jury's verdict. The Court correctly recognized that a wife's claim for loss of consortium is in the "'class of cases' recognized at common law" and entitled to the protection of the jury trial guarantee. 264 Or App at 666.

Weyerhaeuser does not challenge the common law origins of the claim for loss of consortium, or the recognition of constitutional protection regardless of which spouse brings the claim. Weyerhaeuser's only argument now, not asserted in the Court of Appeals, is that if the cap statute can constitutionally be applied to Mr. Rains' claim, it must also be applied to Ms. Rains' claim because Ms. Rains' claim is "based on" Mr. Rains' claim. Weyerhaeuser Brief on the Merits at 53-54.

B. Loss of consortium is an independent claim with its own constitutional protections.

Weyerhaeuser relies on *Ross v. Cuthbert,* 239 Or 429, 397 P2d 529 (1964), which decided that if contributory fault bars the plaintiff's claim, the

spouse does not have a viable loss of consortium claim. *Ross* does not aid Weyerhaeuser or offer anything of relevance to the constitutional analysis.

Not only is a loss of consortium claim of ancient common law origins, it is also an independent claim, not derivative of the injured spouse's personal injury claim. In *Wolff v. Du Puis*, 233 Or 317, 378 P2d 707 (1963), *overruled on other grounds, Bahler v. Fletcher,* 257 Or 1, 474 P2d 329 (1970), this court rejected the argument that a loss of consortium claim was:

> "a derivative action; i.e., that the cause of action is a parasitic one, drawing whatever vitality it may have from the right of the injured spouse to recover against the wrongdoer. While the question has never been squarely presented to this court, we believe the rule to be otherwise."

233 Or at 319.

In deciding that a husband's claim for loss of consortium was not bound by the judgment in the injured wife's separate personal injury action, the *Wolff* court explained that a loss of consortium claim at common law was "an independent and not a derivative right," "independent of any right the victim of the personal injury may have had." 233 Or at 320. The court concluded:

> "We hold that the cause of action for loss of consortium in favor of the spouse of an injured person is an independent action which stands on its own footing."

233 or at 320. *See also Snodgrass v. General Tel. Co*., 275 Or 79, 82, 549 P2d 1120 (1976) (wife's cause of action for loss of consortium was "separate and independent of the husband's action for personal injuries;" wife was not an indispensable party required to be joined in husband's personal injury action).

In *Womach v. St. Joseph*, 201 Mo 467, 100 SW 443 (1907) the court described the two claims as follows:

> "[T]he two causes of action are so distinct that they cannot be joined, that the damages to each constitute a different subject-matter of litigation, that the title to the damages rests in different parties and that one party may not release the damages due the other."

201 Mo at 488.

In *Naber v. Thompson*, 274 Or 309, 311-313, 546 P2d 467 (1976), the court decided that a spouse could bring a loss of consortium claim even though his wife was precluded by the guest passenger statute from bringing her own personal injury claim against the negligent driver in whose car she was a passenger. This was so, according to the court, because the loss of consortium claim "is an independent action, not based on the wife's right to recover[.]" 274 Or at 313 (describing ruling of New York courts).

The point here for purposes of the rights to jury trial is that a loss of consortium claim is an independent cause of action that was well-established

at common law by the time of the adoption of the Oregon Constitution. It is entitled to the full protection of the jury trial guarantees.

In addition to the above arguments, plaintiffs rely on *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463 (1999) (deciding that statutory cap could not apply to jury's verdict for wife's loss of consortium damages) and incorporate plaintiffs' Brief on the Merits addressing the rights to jury trial, Article I, section 17 and Article VII (Amended), section 3, in support of Mr. Rains full damage award on his product liability claim.

CONCLUSION

The judgments entered in the trial court should be affirmed.

Respectfully submitted this 2nd day of July 2015.

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CERTIFICATE OF COMPLIANCE

I certify that this brief, including footnotes, is in Times New Roman 14 point font. The word count of this brief is 10,507 words, including footnotes, and is in compliance with ORAP 9.17(3)(c) and ORAP 5.05(2)(b)(3)(a) which limit a respondent's brief on the merits to 14,000 words.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the date stated below I filed the foregoing RESPONDENTS' BRIEF ON THE MERITS OF KEVIN AND MITZI RAINS by efiling to:

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I further certify that I served a true copy of the same document by the eFiling system and by email to the following:

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