

IN THE SUPREME COURT OF THE STATE OF OREGON

DONNA JO CONINGSBY,

Petitioner-Appellant,
Petitioner on Review,

v.

STATE SUPERINTENDENT OF
PUBLIC INSTRUCTION, an Office
of the Oregon Department of
Education,

Respondent-Respondent,
Respondent on Review.

Washington County Circuit
Court No. C144492CV

CA A160227

SC S063785

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW,
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Washington County
Honorable ANDREW R. ERWIN, Judge

Dismissed by Order of the Appellate Commissioner dated October 14, 2015

Reconsideration denied by Order of the Hon. Rick T. Haselton, Chief Judge,
Court of Appeals, dated November 23, 2015

Continued...

7/16

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**BRIEF ON THE MERITS OF RESPONDENT ON REVIEW,
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

ORS 19.255(2)(a) extends the timeline for appeal from a final judgment pending the resolution of a motion for new trial made pursuant to ORCP 64. In *Assoc. Unit Owners of Timbercrest Condo. v. Warren*, 352 Or 583, 288 P3d 859 (2012) (*Timbercrest*), this court held that a summary judgment proceeding in a civil case is not a “trial” for purposes of ORCP 64 and ORS 19.255(2). Does the rule announced in *Timbercrest* apply when the summary judgment proceeding occurred in relation to a petition to the circuit court for judicial review of an order in other than a contested case?

Proposed Rule of Law

The rule announced in *Timbercrest* applies to appeals from judgments issued in circuit court proceedings for judicial review of orders in other than contested cases. Just as in any other civil case, a circuit court reviewing an agency’s order in other than a contested case may grant a motion for summary judgment only if there is no dispute as to material fact and the moving party is entitled to judgment as a matter of law. Just as in any other civil case, a grant of summary judgment on a petition for judicial review necessarily means that the circuit court has determined that there is no reason to take the matter to trial.

Accordingly, just as in any other civil case, when the judgment on appeal was entered after the circuit court granted a motion for summary judgment, the non-prevailing party's motion for a new trial will not extend that party's deadline to appeal.

STATEMENT OF THE CASE

Nature of the Action

This is a proceeding for judicial review of an order in other than a contested case under the Oregon Administrative Procedures Act, ORS Chapter 183. The circuit court granted respondent on review State Superintendent of Public Instruction's motion for summary judgment and entered a final judgment dismissing petitioner on review Donna Coningsby's claims. Petitioner now seeks reversal of the Court of Appeals order dismissing her appeal as untimely.

Procedural History

Petitioner filed a complaint with the Oregon Department of Education, alleging that the Beaverton School District had violated the Individuals with Disabilities Education Act (IDEA). Pet APP 1-2. Specifically, petitioner alleged that, under the IDEA, the school district was required to pay for consultations between her son's physician and the school district, for which she had been charged by the physician. Pet APP 2. Respondent issued a final order rejecting petitioner's complaint. Pet APP 1-10. Petitioner filed a request for reconsideration of the final order, which respondent denied. Pet APP 11.

Petitioner then filed a petition for judicial review of the final order in Washington County Circuit Court, pursuant to ORS 183.484(1). SER 1-13.¹ Respondent moved for summary judgment, arguing that respondent was entitled to judgment as a matter of law. SER 14. The hearing on the motion for summary judgment was set for the same date as the hearing on the merits of petitioner's complaint. Pet ER 8. On the morning of the hearing, petitioner filed both a response to respondent's motion and a cross-motion for summary judgment. Pet ER 17-18. At the hearing, the parties agreed that the court should address the summary judgment motions first. Pet ER 17, 21. The circuit court declined to entertain petitioner's cross-motion because it was untimely, but did consider petitioner's objections to respondent's motion. Pet ER 22. After hearing argument on respondent's motion, the circuit court observed that "nobody has presented me with any disputed fact that has to be resolved. Everybody is presenting me with information regarding how I had to look at the facts that we all agree about, but there isn't a material - - issue of material fact between the parties here." Pet ER 60. The court then concluded that summary

¹ Because the Court of Appeals dismissed petitioner's appeal before any briefing had been done on the merits, the trial court's file was not transmitted to Appellate Records. So that this court will have a complete record of the procedural history of the case, respondent has prepared a Supplemental Excerpt of Record, which includes documents not contained in petitioner's Excerpt of Record and Appendix.

judgment for respondent was appropriate. Pet ER 63. The court did not hear any testimony from witnesses and did not receive any exhibits.

Immediately following the ruling on respondent's motion for summary judgment, the circuit court notified the parties that the case was scheduled for dismissal. Pet ER 65. Upon receiving the notice, petitioner filed an objection to the pending dismissal, in which she challenged the merits of the circuit court's decision on respondent's motion for summary judgment. Pet ER 66-98. On July 7, 2015, the circuit court entered a final judgment of dismissal with prejudice in favor of respondent, implicitly rejecting petitioner's objections. Pet APP 13. Ten days later, petitioner filed a motion to set aside the judgment and for a new trial, citing ORCP 64 as authority for her motion. SER 15-35.² The court denied the motion on July 28, 2015. SER 15.

Petitioner filed a notice of appeal from the circuit court's July 7 judgment on August 27, 2015; 51 days after the court entered the final judgment. SER 35-37. In her notice, petitioner explained that her appeal was nevertheless timely because it was filed within 30 days of the denial of her motion for a new trial. SER 36. Respondent, relying on an OJIN entry that suggested the new-trial motion had itself been untimely, moved to dismiss the appeal. SER 38-39.

² Although OJIN shows that the motion was filed on July 29, the Appellate Commissioner found, and respondent does not dispute, that the motion was date-stamped as having been filed on July 17.

The Appellate Commissioner rejected respondent's argument that the new-trial motion was untimely. SER 40. The Appellate Commissioner nevertheless dismissed the appeal, explaining that, under this court's decision in *Timbercrest*, the new-trial motion was inapplicable to a proceeding decided on summary judgment and, therefore, did not extend petitioner's time in which to file her notice of appeal. SER 41.

Petitioner sought reconsideration, and the Chief Judge of the Court of Appeals affirmed the Appellate Commissioner's order. SER 42. Petitioner then sought review by this court, arguing that the APA's provision for an evidentiary hearing on judicial review of an order in an other than contested case necessarily implies that a petitioner whose petition is dismissed before a full hearing is entitled to move for a new hearing under ORCP 64, and that motion tolls the time for filing a notice of appeal. Pet for Rev 9-12. This court granted review to resolve the issue of the application of *Timbercrest* to a proceeding initiated under ORS 183.484.

Summary of Argument

The Court of Appeals correctly dismissed petitioner's appeal as untimely, because a motion for a new trial after a grant of summary judgment does not extend the time to file an appeal. In *Timbercrest*, this court held that a summary judgment proceeding in a civil case is not a "trial" for purposes of ORS 19.255(2)(a), which extends the timeline for appeal from a final judgment

pending the resolution of a motion for new trial made pursuant to ORCP 64.

Although *Timbercrest* was not a proceeding for judicial review under ORS 183.484, the procedural posture of this case is identical to the posture of *Timbercrest* when it came before this court: petitioner is challenging a general judgment of dismissal entered after the court granted respondent's motion for summary judgment. Accordingly, *Timbercrest* is on point and controls the outcome of this proceeding.

Contrary to petitioner's suggestion, ORS 183.484 does not *require* an evidentiary hearing and, in any event, does not support a motion for a "new" evidentiary hearing even in cases resolved through summary judgment.

Although this court has held that, under ORS 183.484, the circuit court is the venue in which the record is developed for a challenge to an order in other than a contested case, it has never held that the record may be developed only through a full evidentiary hearing. Just as in any other civil proceeding, if the facts are undisputed, the legal issues raised by a petition for judicial review of an order in other than a contested case may be resolved without trial. Because petitioner's claims were resolved on summary judgment, there was no basis for her motion for a new trial and, therefore, her motion for a new trial did not extend the 30-day deadline for her notice of appeal.

ARGUMENT

Petitioner seeks review of an order by the Court of Appeals dismissing her appeal from a circuit court judgment in a judicial review proceeding brought under ORS 183.484. On review, petitioner argues that the Court of Appeals erred by dismissing her appeal because, under ORS 19.255(2), the statutory deadline for filing her notice of appeal was extended when she filed a motion for a new trial. The sole issue before this court is whether a motion for a new trial filed after summary judgment has been entered in a proceeding for judicial review serves to extend the deadline in which to appeal from the judgment. The answer is “No.”

- 1. Before there can be a motion for new trial, there first must have been a trial; a hearing on a motion for summary judgment is not a trial.**

ORS 19.255 provides, in relevant part,

(1) Except as provided in subsections (2) and (3) of this section, a notice of appeal must be served and filed within 30 days after the judgment appealed from is entered in the register.

(2) *If a motion for a new trial is filed and served within the time allowed by ORCP 64, or a motion for judgment notwithstanding the verdict is filed and served within the time allowed by ORCP 63, a notice of appeal must be served and filed:*

(a) Within 30 days after the order disposing of the motion is entered in the register, or within 30 days after the motion is deemed denied under ORCP 63 D or 64 F, whichever is first[.]

(Emphasis added).³

In *Timbercrest*, this court examined the application of ORS 19.255(2) to a plaintiff's appeal from a general judgment entered after the circuit court had granted the defendant's motion for summary judgment. 352 Or at 585. The question on review was whether the plaintiff's pre-judgment petition for reconsideration of the circuit court's grant of the defendant's motion for summary judgment should be treated as a motion for a new trial for purposes of ORCP 64 and ORS 19.255(2). Controlling precedent suggested that it should be. 352 Or at 591-94. After engaging in a rigorous analysis of ORS 19.255, ORCP 47, and ORCP 64, this court disavowed its earlier decisions and held that a summary judgment proceeding is not a "trial" for purposes of ORCP 64 and, therefore, a petition for reconsideration of an order granting summary judgment

³ ORCP 64 provides, as relevant:

A New trial defined. A new trial is a re-examination of an issue of fact in the same court after judgment.

* * * * *

C New trial in case tried without a jury. In an action tried without a jury, a former judgment may be set aside and a new trial granted on motion of the party aggrieved on any grounds set forth in section B of this rule where applicable. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

could not function as a motion for a “new” trial. 352 Or at 594-98. The direct consequence of that holding is that, when a general judgment has been entered after summary judgment has been granted, a motion designated as a motion for new trial under ORCP 64 is a nullity and has no effect on the 30-day deadline for filing a notice of appeal set out in ORS 19.255(1).

When dismissing petitioner’s appeal, the Court of Appeals cited this court’s decision in *Timbercrest* as controlling. SER 42. In a footnote, the Court of Appeals acknowledged that, in her motion for reconsideration of the Appellate Commissioner’s decision, petitioner had challenged many aspects of the circuit court’s ruling and had alleged that the circuit court had erred. Nevertheless, the Court of Appeals explained, it lacked jurisdiction to reach petitioner’s claims because her notice of appeal was untimely.

Had this been an appeal from a general judgment in a non-administrative civil case that was disposed of without trial, there would be no disputing that the Court of Appeals’ dismissal of petitioner’s appeal was appropriate, because *Timbercrest* squarely controls in those circumstances. The question presented by this case is whether *Timbercrest* also controls in an APA proceeding for judicial review of an order in other than a contested case. Specifically, the question is whether the circuit court’s consideration of a motion for summary judgment in an APA case is a “trial” for purposes of ORCP 64 and, by extension, ORS 19.255(2). As explained below, for purposes of ORCP 64,

there is no difference between a ruling on summary judgment in a non-administrative civil case and a ruling on summary judgment in a proceeding for judicial review brought under ORS 183.484.

2. A petition for judicial review of an agency's order in other than a contested case may be resolved by summary judgment.

Under the Oregon Administrative Procedures Act (APA), ORS 183.310 to 183.550, a state agency may issue an order either in a contested case or in circumstances “other than” a contested case. *Oregon Env. Council v. Oregon State Bd. of Ed.*, 307 Or 30, 36, 761 P2d 1322 (1988). An order in a contested case is a proceeding before an agency as defined in ORS 183.310(2)(a). An order in other than a contested case is, by default, any order that does not meet the statutory criteria for an order in a contested case. Here, the parties agree that that the challenged order was issued in other than a contested case.

When an agency issues an order in a contested case, the APA binds an agency to certain procedures that must be followed to create the record and reach a decision. *Oregon Env. Council*, 307 Or at 37. Judicial review of an order in a contested case takes place in the Court of Appeals and is confined to the record created by the agency before issuing the order. *Id.*; ORS 183.482. Judicial review of an order in other than a contested case does not take place in the Court of Appeals but, rather, in the circuit court. ORS 183.484.

Apart from dictating the venue for judicial review, the APA does not contain specific procedures an agency must follow when issuing an order in other than a contested case, or that the circuit court must follow on judicial review of the order. *See Norden v. Water Resources Department*, 329 Or 641, 647, 996 P2d 958 (2000) (“[N]othing in the APA directs an agency in other than a contested case proceeding to make a record or make findings of fact before issuing its order.”).⁴ Nevertheless, ORS 183.484 “contemplates a record for review in all circumstances.” *Norden*, 329 Or at 647. Consequently, “[t]he absence of a requirement that the agency in other than a contested case proceeding make a record or findings of fact before issuing its order means that the first opportunity that a party may have to present evidence is before the circuit court.” *Id.* Thus, “[o]n judicial review of an order in other than a contested case proceeding, ORS 183.484 affords the parties *the opportunity to develop a record* like the one that parties are entitled to develop at an earlier stage in a contested case proceeding.” *Id.* at 649 (emphasis added).

Although this court has determined that the parties in a proceeding for judicial review in the circuit court must be allowed to develop the evidentiary record in the circuit court, it has not dictated any particular procedures the

⁴ Indeed, it would be difficult to delineate procedures an agency must follow before issuing an order in other than a contested case, given the many different circumstances that might result in such an order.

circuit court and the parties must follow in developing that record. *See Oregon Env. Council*, 307 Or at 38 n 10 (“Our decision here does not require that we dictate the procedure to be followed when this or any other cases is reviewed in the circuit court. The issue may or may not prove difficult for the parties once they are before that forum.”). ORS 183.484 is also unhelpful, providing only that, upon the filing of a petition for circuit court review of an order in other than a contested case, “review shall proceed and be conducted by the court without a jury.”⁵ Because neither this court nor the APA has designated procedures for the circuit court to follow in a proceeding for judicial review, the circuit courts and the parties have relied on the Oregon Rules of Civil Procedure (ORCP) for guidance. *See* ORCP 1 A (“These rules govern procedure and practice in all circuit courts of this state * * * for all civil actions and special proceedings whether cognizable as cases at law, in equity, or of statutory origin *except where a different procedure is specified by statute or rule.*”) (Emphasis added). Specifically, parties and courts have followed the procedures set out for disposal of claims through summary judgment pursuant to ORCP 47. On the occasions that the grant of summary judgment has been challenged on

⁵ In *Oregon Env. Council*, this court observed that the version of the statute in effect at the time, which provided that the court’s review would be “without a jury as a suit in equity,” was ambiguous “and has remained so to this day.” 307 Or at 38. The removal of the phrase “as a suit in equity” has not provided any further clarification as to the procedures to be followed.

appeal, the Court of Appeals has in each instance tacitly accepted that a proceeding brought under ORS 183.484 may be resolved through summary judgment and, therefore, has addressed only the merits of the circuit court's ruling. *See, e.g., Bridgeview Vineyards, Inc. v. State Land Bd.*, 258 Or App 351, 309 P3d 1103 (2013) (disputed issues of fact precluded summary judgment on APA claim); *Coquille School District 8 v. Castillo*, 212 Or App 596, 159 P3d 338 (2007) (circuit court did not err in granting summary judgment in APA case in which parties had opportunity to develop record and there were no factual disputes); *G.A.S.P. v. Environmental Quality Commission*, 198 Or App 182, 108 P3d 05, *rev den*, 339 Or 230 (2005) (circuit court erred in granting summary judgment in APA case when petitioners were precluded from offering evidence beyond the record that was before the agency at the time it issued the challenged order); and *Powell v. Bunn*, 185 Or App 334, 59 P3d 559 (2002), *rev den*, 336 Or 60 (2003) (voicing concerns about the proper standard of review for a summary judgment motion in an APA proceeding, but ultimately affirming circuit court's grant of summary judgment to defendant).

This appears to be the first time the issue has been placed before this court, but there is no principled reason to hold that a petition for judicial review of an order in other than contested case cannot be resolved by summary judgment. As the Court of Appeals explained in *Coquille School District*, all *Norden* requires “is that the parties have an *opportunity* to develop the record in

the trial court.” 212 Or App at 602 (emphasis in original); *see also G.A.S.P.*, 198 Or App at 196-97 (circuit court erred in granting summary judgment without affording plaintiffs the opportunity to create a record). Moreover, resolving a challenge to an order without a full evidentiary hearing is not in itself antithetical to the APA. The same thing can happen in a contested case proceeding. Under the Model Rules of Procedure for Contested Cases, an Administrative Law Judge “shall grant [a] motion for summary determination if: (a) * * * there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.” OAR 137-003-0580(6).

In sum, the Oregon Rules of Civil Procedure apply to a petition for judicial review of an order in other than a contested case under ORS 183.484. Thus, in a proceeding brought under ORS 183.484, a party may move for summary judgment as provided in ORCP 47. In opposition to the motion, the non-moving party may offer any evidence, including evidence outside the record that was before the agency at the time it issued the challenged order, to demonstrate the existence of a disputed issue of fact that would preclude summary judgment. If the circuit court determines that there are no genuine disputes of material fact, and that the moving party is entitled to judgment as a matter of law, the circuit court shall grant the motion for summary judgment.

Thus, in form and effect, summary judgment in a proceeding brought under ORS 183.484 is no different than summary judgment in any other civil case.

3. The hearing on respondent’s motion for summary judgment was not a trial.

On review, petitioner does not appear to dispute that the rules of civil procedure apply to a proceeding for judicial review under ORS 183.484.⁶ She suggests, however, that the APA’s “substantial evidence” standard for review of the factual bases of an agency’s action is incompatible with ORCP 47’s dictate that summary judgment shall be granted only when there are no disputed issues of fact and, therefore, that summary judgment is inappropriate in a proceeding for judicial review under ORS 183.484. Pet Br 12-13. Petitioner further contends that, even if summary judgment may be an option in a proceedings under ORS 183.484, the circuit court’s judgment of dismissal in *this* case was not really the result of a ruling on summary judgment but, rather, was issued after the circuit court “expanded its inquiry beyond summary judgment to that more akin to a petition for judicial review hearing.” Pet Br 9. In support of her arguments, petitioner cites various actions and rulings by the circuit court that petitioner contends converted the hearing on the agency’s motion for summary judgment into a full evidentiary hearing or trial. Specifically, petitioner states

⁶ To be sure, to take such a position would be inconsistent with petitioner’s reliance on ORCP 64 to excuse her otherwise untimely notice of appeal.

that the circuit court improperly placed the burden of proof on petitioner, made factual findings that were not supported by the record, and substituted its judgment for that of the agency. Pet Br 13-21.

Petitioner’s arguments miss the mark. Although her allegations regarding the circuit court’s allocation of the burden of proof and resolution of arguably disputed facts in the summary judgment record may very well support a challenge to the *merits* of the circuit court’s ruling on the agency’s motion for summary judgment, the alleged errors did not transform the summary judgment proceedings into a “trial” as contemplated by ORCP 64 and ORS 19.255(2). If she believed that the circuit court had improperly dismissed the case without holding a trial, she should have filed an appeal—not a motion for a new trial.⁷

Finally, petitioner argues that, even if the circuit court resolved the issues in her petition for judicial review without a trial, she was entitled to seek a “new” trial under ORCP 64, because ORS 183.484 contemplates that an

⁷ Petitioner also misses the mark when pointing to the circuit court’s notice of pending dismissal as proof that the judgment in her case was the result of a “trial.” Pet 21. On its face, the notice is a form notice, issued whenever the circuit court is preparing to dismiss a case. The notice lists several generic reasons for dismissal of pending proceedings: “the case has been settled, the trial has been completed, or no action has been taken.” Pet ER 65. In petitioner’s case, the notice was amended to include, as “additional information”: “MSJ GRANTED, ORDER AND CLOSING DOCS TO BE FILED.” Pet ER 65 (uppercase in original). Thus, not only is the notice not proof that there was a trial on petitioner’s case, it confirms that the petition for judicial review was resolved without a trial.

evidentiary hearing must occur at some point. Citing this court’s decision in *Alt v. City of Salem*, 306 Or 80, 756 P2d 637 (1988), petitioner suggests that the better rule would be that, in any proceeding where there is a possibility of a trial, “there can be a motion for a new trial[.]” regardless of whether the matter had gone to trial before it was resolved. Pet Br 23-24.

Petitioner’s reliance on *Alt* is misplaced. In *Alt*, this court addressed the application of ORCP 64 to a circuit court proceeding for a writ of review brought pursuant to ORS Chapter 34. 306 Or at 82. After observing that, in a writ of review proceeding, the circuit court may not take evidence or pass upon questions of fact, this court concluded “there is no trial in a writ of review proceeding and there cannot be a new trial in writ of review proceedings.” *Id.* at 84-85. Thus, the petitioner’s motion for a new trial after the circuit court denied his petition for the writ “was either a nullity or a motion for relief from judgment [and] it did not create a new deadline for filing the notice of appeal[.]” *Id.* at 85. Although it is true that no trial was “possible” in *Alt*, there is nothing in *Alt* to support petitioner’s suggestion that a party may move for a new trial—and thus extend the deadline for appeal—whenever a matter is resolved short of trial.⁸ Moreover, the holding in *Alt* is entirely consistent with

⁸ By petitioner’s logic, a party could move for a new trial after a complaint has been dismissed on the pleadings, thus defeating the purpose of pretrial dispositive motions.

this court's holding in *Timbercrest*—indeed, *Alt* was the only prior case cited in *Timbercrest* that was not abrogated by *Timbercrest*. 352 Or at 599.

Petitioner appears to acknowledge that her rule is inconsistent with this court's decision in *Timbercrest*, but attempts to distinguish *Timbercrest* by reasoning that, “[i]n that case, the motion under review was a motion for reconsideration of summary judgment where the outcome of the case turned on the outcome of the summary judgment ruling.” Pet Br 22. In her case, by contrast, petitioner remonstrates that the summary judgment was “at best, a partial summary judgment ruling,” because the circuit court failed to address one of petitioner's three claims for relief. Pet Br 22. Petitioner again confuses the merits of her appeal with its procedural posture. Even assuming the circuit court erred when it granted respondent's motion for summary judgment, for all the reasons asserted by petitioner, it does not change the fact that the circuit court entered a general judgment of dismissal after granting respondent's motion. Thus, in petitioner's own words, “the outcome of the case turned on the outcome of the summary judgment ruling.”

CONCLUSION

Timbercrest held that a motion for a new trial pursuant to ORCP 64 is appropriate only when there has been a trial, and a hearing on a motion for summary judgment made pursuant to ORCP 47 is not a trial. Petitioner has not argued the *Timbercrest* was wrongly decided, and she has tried only to

distinguish the proceedings in her case from those in *Timbercrest*. There is no principled basis to distinguish the proceedings in this case from those in *Timbercrest*. The Court of Appeals correctly determined that petitioner's appeal was untimely, and this court should affirm the Court of Appeals' order dismissing petitioner's appeal.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 5, 2016, I directed the original Brief on the Merits of Respondent on Review, State Superintendent of Public Instruction to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Donna Jo Coningsby, *Pro Se* petitioner on review; and as the legal advisor of Ms. Coningsby, Thomas M. Christ will be receiving a courtesy copy; by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

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 4,698 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Cecil A. Reniche-Smith

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