IN THE SUPREME COURT OF THE STATE OF OREGON

FOUNTAINCOURT HOMEOWNERS' ASSOCIATION and FOUNTAINCOURT CONDOMINIUM OWNERS' ASSOCIATION,

Plaintiffs,

v.

FOUNTAINCOURT DEVELOPMENT, LLC, et al,

Defendants.

FOUNTAINCOURT DEVELOPMENT, LLC, *et al*,

Third-Party Plaintiffs,

V.

ADVANCED SURFACE INNOVATIONS, INC., an Oregon corporation, et al,

Third-Party Defendants.

VOSS FRAMING, INC., assignee for FountainCourt Homeowners; Association, assignee for FountainCourt Condominium Owners' Association, on behalf of FountainCourt Development, LLC, on behalf of Matrix Development Corporation, and on behalf of Legend Homes Corporation,

Washington County Circuit Case No. Court No. C075333CV

CA No. A 147420

SC No. S062691

Fourth-Party Plaintiff,

v.

DANA CHRISTOPHER and RED HILLS CONSTRUCTION, INC.,

Fourth-Party Defendants.

FOUNTAINCOURT HOMEOWNERS' ASSOCIATION and FOUNTAINCOURT CONDOMINIUM OWNERS' ASSOCIATION,
Garnishors-Respondents,

Respondents on Review

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Garnishee-Appellant.

Petitioner on Review

OREGON TRIAL LAWYERS ASSOCIATION'S *AMICI CURIAE* BRIEF ON THE MERITS

Petition for Review of the Decision of the Court of Appeals from a Judgment of the Circuit Court of Washington County, Honorable Judge Marco A. Hernandez

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Affirmed with Opinion: August 6, 2014 before Armstrong, Presiding Judge, and Duncan, J, and Brewer, J. pro tempore

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INTRODUCTION

The Oregon Trial Lawyers Association (OTLA) appears as amicus curiae for the benefit of this Court, and in support of Respondent on Review. OTLA writes to address solely the issue of attorney fees. In all other respects, the reasoning and analysis of the Court of Appeals' opinion in this matter is sound and should not be disturbed by this Court.

On the issue of attorney fees however, the Court of Appeals loses track of the rationale behind Oregon Rule of Civil Procedure (ORCP) 68(C). That rule is one of notice. The Court of Appeals incorrectly focuses on technical compliance while disregarding the established factual record which shows that all parties and the trial court fully understood that attorney fees were at issue. Further, the Court of Appeals held that a post-judgment amendment was improper, yet failed to acknowledge that the situation was created at the invitation of appellant American Family. Such invited error cannot be allowed to prevail as it will encourage future litigants to manufacture the circumstances they later claim as a basis for reversal on appeal.

STANDARD OF REVIEW

This case presents two related issues governed by differing standards of review. The first is whether FountainCount's filings in this case were

sufficient to create an entitlement to attorney fees under statute. That is reviewed as a question of law. *Lumbermen's v. Dakota Ventures*, 157 Or App 370, 374, 971 P2d 430 (1998).

The second is whether the trial court erred in permitting FountainCourt to amend its motion to claim attorney fees. ORCP 23 A liberalized the process of amending pleadings and provides that leave to amend "shall be freely given when justice so requires." A trial court is granted broad discretion in making that determination. *Contractors, Inc. v. Form-Eze Systems, Inc.*, 68 Or App 124, 129, 681 P2d 148, *rev. den.* 297 Or 824, 687 P2d 797 (1984). A reviewing court reviews only for abuse of discretion. *Benj. Franklin Fed. Sav. & Loan Ass'n v. Phillips*, 88 Or App 354, 355, 745 P2d 437 (1987).

ARGUMENT

ORCP 68(C)(2)(a) and ORCP 68(C)(2)(b) serve a notice function. They ensure that parties are not blindsided by attorney fees, and fully comprehend the financial risks of a legal action at an early opportunity. *Walker v. Grote*, 106 Or App 214, 217, 806 P2d 725 (1991) ("The purpose of the rule is to provide an opposing party with notice that he or she may be held liable for attorney fees and to provide that party an opportunity to contest the availability of fees before proceeding to a trial on the merits.");

Heidtke v. Int'l Brotherhood of Boilermakers, 104 Or App 473, 477, 801 P2d 899 (1990) (holding same).

As the purpose of ORCP 68(C)(2) is notice, it is a statute of practicality, not technicality. The statute's requirements must be read contemporaneously with ORCP 12 B, which mandates that a court "disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." *See Attaway, Inc. v. Saffer*, 95 Or App 481, 486, 770 P2d 596, *rev. dismissed* 308 Or 184, 777 P2d 406 (1989).

Because the attorney fees rule is to be read in conjunction with ORCP 12 B, Oregon courts have liberally looked beyond defects so long as notice – the purpose of the rule – was achieved.

> "It is not necessary to specify the statutory basis of a request for fees when the facts asserted would provide a basis for an award of fees, the parties have fairly been alerted that attorney fees would be sought and no prejudice would result."

Page and Page, 103 Or App 431, 434, 797 P2d 408 (1990); *Lumbermen's,* 157 Or App at 375 ("Thus, we look to whether plaintiff was fairly alerted to the fact that attorney fees would be sought [by defendant] and whether the defect in the pleading prejudiced plaintiff."); *In the Marriage of St. Sauver*, 196 Or App 175, 189–90, 100 P3d 1076 (2004) ("Misidentification of the proper attorney fee provision will be treated as harmless error when the facts

asserted provide a basis for attorney fees and the affected party is given adequate notice that fees will be sought.").

Only when an opposing party was prejudiced through a lack of notice have deficiencies in meeting the technicalities of ORCP 68(C)(2) been deemed incurable. *See CIT Group v. Kendall*, 151 Or App 231, 234-35, 948 P2d 332 (1997) (ORCP 12 B does not excuse failure to serve an adverse party as required by ORCP 68 C(4)); *McNeely v. Hiatt,* 138 Or Ap. 434, 443, 909 P2d 191, *on recons.* 142 Or App 522, 920 P2d 1150, *rev. den.* 324 Or 394, 927 P2d 600 (1996) (award of attorney fees improper where party failed to provide any notice of intent to seek attorney fees).

In this case, there can be no doubt that the purpose of ORCP 68(C)(2) was fulfilled. FountainCourt made it clear in its Pre-Hearing Memorandum to American Family and the trial court that it was seeking attorney fees pursuant to ORS 742.061. *See* TCF 510 at 18-19. The transcript of the garnishment hearing is clear that all parties knew attorney fees were at issue. Tr. 5545-50.

The Court of Appeals relied, in part, on this Court's opinion in *Mulier v. Johnson*, 332 Or 344, 350, 29 P3d 1104 (2001) for the proposition that a statement regarding attorney fees in a memorandum was insufficient compliance with the rule. That reliance was misplaced. The litigant in

Mulier never attempted to remedy the defect by amending the pleading to properly assert a claim for attorney fees. Here, in contrast, FountainCourt moved to amend and the court gave permission for such an amendment, and that amendment was in fact made. The amended pleading was submitted to the court weeks before the supplemental judgment was entered.

But even if it were applicable to this case, *Mulier* was wrongly decided and should be disavowed by this Court. *Mulier* was a decision by a bare four-justice court that elevated the technicalities of ORCP 68(C) above the intent of the rule – notice.

Mulier places form above substance and transforms the issue of attorney fees into a talismanic ritual of inserting the precise words in the precisely captioned document. But whether the claim for fees occurred in a document captioned "Motion" or "Memorandum" is not the inquiry. Rather, the inquiry is whether noncompliance with ORCP 68 C(2) affects a party's substantial rights by depriving them of notice. If the answer to that question is no, insertion of a claim for fees in a memorandum rather than a motion is a technical defect alone, and one that a court has discretion to excuse. *Mulier's* conclusion to the contrary was wrongly decided and should be abandoned.

Finally, the Court of Appeals mistakenly held that post-judgment amendment of the pleadings was improper:

> "ORCP 23 B allows post-judgment amendment of the pleadings * * * It does not, on its face, allow the amendment of a pleading *to create* an issue to be tried *after* the entry of the applicable judgment. * * * Nor does ORCP 23 B say anything about amending a *motion*."

FountainCourt Homeowners' Ass'n v. FountainCourt Dev., LLC, 264 Or App 468, 494, 334 P3d 973, *review allowed*, 357 Or 111, 346 P3d 1212 (2014).[1]

In reaching that conclusion, the Court of Appeals ignores how this case unfolded at the trial level. At the garnishment hearing, prior to entry of judgment, American Family asked the trial court to defer briefing on entitlement to fees until after the court ruled on the merits. Tr. 5549.

American Family cannot both request that the trial court consider the attorney fee issue after issuing a judgment on the merits, then assert on appeal that the trial court lacked statutory authority to permit an amendment of the pleadings regarding attorney fees after the judgment. Any such claims by American Family are barred by invited error. That doctrine provides that,

[1] Nothing in the rules of civil procedure, nor common law, support the notion that a trial court lacks authority to allow an amendment to a motion. The ORCPs are rich with language about liberally construing pleadings, and that leave to amend pleadings being freely given. It would be odd indeed that courts would be actively encouraged to grant amendments to pleadings, yet be denied the ability to grant leave to amend a motion.

if an appellant "was actively instrumental in bringing about" the error, then the appellant "cannot be heard to complain, and the case ought not to be reversed because of it." *Anderson v. Oregon Railroad Co.*, 45 Or 211, 216–17, 77 P 119 (1904).

The purpose of the doctrine is to "ensure that parties do not 'blame the court' for their intentional or strategic trial choices that later prove unwise and then, to the trial court's surprise, use the error that they invited to obtain a new trial." *State v. Ferguson*, 201 Or App 261, 269, 119 P3d 794 (2005), *rev. den.*, 340 Or 34, 129 P3d 183 (2006). That is precisely what American Family did before the Court of Appeals.

And that is precisely why the trial court, correctly, did not permit American Family to benefit from the error it invited. As the trial court noted:

> "[A]t no time did [American Family] object to the inclusion of attorney fees being the same as costs until after the trial had concluded. In fact, at the hearing [American Family] alluded to purposely waiting until after the trial to object apparently so [FountainCourt] could not move to amend its original motion. No party should benefit from waiting in the woods to ambush."

FountainCourt, 264 Or App at, 479.

The Court of Appeals' opinion in this case regarding attorney fees cannot be allowed to stand. Not only does it incorrectly focus on technicality at the expense of the purpose behind the rule, it opens to door to parties manufacturing the circumstances they later claim as a basis for

reversal on appeal. The trial court was in the best position to evaluate whether American Family had done just that, waiting "in the woods to ambush," and that's exactly what it concluded. The Court of Appeals disregarded this conclusion by the trial court, and in so doing opened the door for future litigants to game the system.

CONCLUSION

For the foregoing reasons amicus curiae OTLA encourages this Court to reverse the decision of the Court of Appeals with respect to attorney fees in this matter.

Respectfully submitted,

/s/ Bronson James

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 18, 2015, I directed the original Brief of Amicus Curiae Oregon Trial Lawyers Association to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon all parties registered with the ECF system. Those parties not registered with the ECF system are served via U.S. Mail at the following addresses:

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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 1,633 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).

Respectfully submitted,

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