IN THE SUPREME COURT OF THE STATE OF OREGON

MONTARA OWNERS ASSOCIATION, an Oregon non-profit corporation,

Plaintiff,

v.

LA NOUE DEVELOPMENT, LLC,
an Oregon limited liability company; et al.,

Defendants.

LA NOUE DEVELOPMENT, LLC, an Oregon limited liability company,

Third-Party Plaintiff – Appellant – Respondent on Review

and

MARK LA NOUE, an individual,

Third-Party Plaintiff,

v.

SUTTLES CONSTRUCTION, INC., an Oregon corporation; GORDON HARDING, an individual, dba Gordon Harding Construction; and MCM ARCHITECTS, PC, an Oregon corporation, *et al.;*

Third-Party Defendants,

and

VASILY A. SHARABARIN, an individual, dba Advanced Construction,

Third-Party Defendant – Respondent – Petitioner on Review.

EVANS CONSTRUCTION SIDING CORP., an Oregon Corporation,

Fourth-Party Plaintiff,

v.

DAVE BURGESS CONSTRUCTION, INC., an Oregon corporation; *et al.*,

Fourth-Party Defendants.

DAVE BURGESS CONSTRUCTION, INC., an Oregon corporation,

Fifth-Party Plaintiff,

v.

RAUL HERNANDEZ and CARLOS HERNANDEZ, individuals, dba Hernandez Brothers, a partnership; *et al.*,

Fifth-Party Defendants.

LA NOUE DEVELOPMENT, LLC, an Oregon limited liability company; and MARK LA NOUE, an individual,

Plaintiffs,

v.

MCM ARCHITECTS, PC, an Oregon professional corporation,

Defendant.

Multnomah County Circuit Court Nos. 0512-13487 and 0612-13628
Court of Appeals No. A140771; Supreme Court No. S062120

Appeal from the General Judgment of the Multnomah County Circuit Court, by the Honorable Jean K. Maurer, Judge

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Respondent Sharabarin's Brief on the Merits

Date of Decision:	December 4, 2013
Author:	Wollheim, J.
Concurring:	Schuman, P.J.
Concurring separately:	Nakamoto, J.

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For Respondent on Review La Noue Development, LLC

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I. INTRODUCTION

The petition for review filed by third-party defendant Vasily Sharabarin presents two issues that often arise in construction-defect litigation. The first issue concerns ORS 30.140, the anti-indemnity statute. Subsection (1) of that statute invalidates any agreement by a subcontractor to indemnify the general contractor for injury or damage caused by the general, even in part. But subsection (2) of the statute permits an agreement by the sub to indemnify the general for injury or damage caused by the sub. The issue is: What is the effect of an agreement that does what subsection (2) allows *and* what subsection (1) disallows – that is, an agreement that requires the sub to indemnify the general for *all* injury or damage, whether caused by the sub, the general, or both? Is it enforceable in part, or not at all?

The second issue concerns the long-standing rule that a plaintiff in a construction-defect case cannot recover the cost of repairing the defects if that would result in "economic waste," but can only recover the difference between the structure's value with the defects and its value without them. The issue is: Which party bears the burden of proof on the waste question – the party seeking damages, *i.e.*, the plaintiff, or the party seeking to avoid them, *i.e.*, the defendant? In other words, does the defendant have the burden to prove that repair would be wasteful, or must the plaintiff prove that it wouldn't be? And, if there is some evidence of

economic waste, who has the burden to prove damages under the measure of damages (*i.e.*, diminution in value) that applies in economic-waste cases?

The cross-petition filed by third-party plaintiff La Noue Development, LLC (La Noue) raises two other issues that come up less often in construction defect cases: What is the proper measure of damages for breach of contract in a case of this sort? And are attorney fees incurred in defense of a claim recoverable as contract damages in the same lawsuit in which they are incurred?

II. FACTS AND PROCEEDINGS

As the Court of Appeals noted, "[t]he dispute here is a familiar one: a construction defect action by a homeowners association against the developer and general contractor, who then filed third-party complaints against the multiple subcontractors." *Montara Owners Assn. v. La Noue Development, LLC*, 259 Or App 657, 660, 317 P3d 257 (2013). From there, the case proceeded in the usual fashion. The developer and general contractor, La Noue, settled with the homeowners, and then with most of the subs. The case then continued on against the remaining subs, including Sharabarin, who installed the siding and trim on four of the 35 townhouses that are the subject of the action. La Noue claimed that Sharabarin breached the subcontract by failing to perform in a workmanlike

manner and in accordance with industry standards.[1] It also alleged that Sharabarin had agreed, in the subcontract, to indemnify it against the homeowners' claims. *Montara*, 259 Or App at 661.

Before trial, the court summarily dismissed the indemnity claim, ruling that the indemnity clause in the subcontract was void under ORS 30.140. At trial, the court instructed the jury that the proper measure of damages on the breach of contract claim is the "cost of repair" of the work "unless that remedy generates undue economic waste," in which case the proper measure of damages is the "difference in the value" of the townhomes as built and as they should have been built. The court also rejected La Noue's request to award as consequential damages on its third-party complaint the attorney fees La Noue incurred in defending itself against the homeowners on the complaint in chief. The court concluded that, under ORCP 68, fees are recoverable as damages only when they are incurred in an action prior to the action in which they are sought.

The jury found in favor of La Noue on its breach of contract claim and awarded $43,711 in damages. La Noue appealed, seeking a new trial. *Montara*, 259 Or App at 662-63.

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[1] The contract claim was based on the allegations in paragraph 47 of the first-amended third-party complaint, where, as part of its negligence claim, La Noue alleged that Sharabarin failed to perform his "work in a workmanlike manner and in accordance with industry and manufacturer standards," as described in the homeowners' complaint, and that the homeowners and La Noue were damaged as a result. *See* Tr 413, 418-19.

The Court of Appeals reversed and remanded for a new trial. The court held, first, that the trial court erred in dismissing the indemnity claim, even though it was based on a provision in the subcontract that, the parties agree, did exactly what ORS 30.140(1) prohibits: required Sharabarin to indemnify La Noue for injury or damage caused by La Noue, at least in part. *Montara*, 259 Or App at 677.[2] The court said that the clause was enforceable to the extent that it also did what ORS 30.140(2) allows: required Sharabarin to indemnify La Noue for injury or damage caused by Sharabarin. *Id.* at 682.

The court also held that the "economic waste" instruction, although a correct statement of the law, should not have been given without evidence of the diminished value of the townhomes, which, the court said, was Sharabarin's burden to produce. *Id.* at 669-70. In a separate, concurring opinion, one judge agreed with that holding, but not necessarily the reasoning for it. *See id.* at 684 (Nakamoto, J., concurring).

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[2] The provision reads:

> "[Sharabarin] specifically and expressly agrees to indemnify and save harmless [La Noue], its officers, agents and employees, from and against any and all suits, claims, actions, losses, costs, penalties and damages, of whatsoever kind or nature, including attorney's fees, arising out of, in connection with, or incident to [Sharabarin's] performance of the subcontract, whether or not caused in part by [La Noue], [its] employees or agents, but excepting that caused by the sole negligence of [La Noue], [its] employees or agents."

Finally, the court upheld the trial court's denial of La Noue's request to recover the attorney fees it incurred in this very action as consequential damages on the contract claim. The court said that, under ORCP 68, those fees were recoverable, if at all, in post-verdict proceedings. *Id.* at 683.

III. FIRST QUESTION PRESENTED

A. Question

What is the effect of a provision in a construction contract that requires a sub to indemnify the general against a claim for any injury or damage, including injury or damages caused in part by the general?

B. Proposed Rule

A provision in a construction contract that requires a sub to indemnify the general against a claim for any injury or damage, including injury or damage caused in part by the general is "void" under ORS 30.140(1). It doesn't matter that ORS 30.140(2) would have allowed a provision that required the sub to indemnify the general for injury or damage caused only by the sub and not also the general. An indemnity clause is enforceable – *i.e.*, is not void – only if the clause does what the law allows and not also what it disallows. The courts cannot re-write an overbroad clause for the benefit of the overreaching party.

C. Discussion

It's fair to say that most, if not all, construction subcontracts use forms written by the general, which is why the contracts invariably include a clause that requires the sub to indemnify the general for any injury or damage related to the sub's work. Historically, those clauses were quite broad; they often required the sub to indemnify the general for the general's own fault. In that fashion, generals used their superior bargaining power to shift their liability to the subs and, along with it, the cost of insuring against that risk. Eventually, the subs complained to the legislature about this, and it responded with a statute that regulates indemnity clauses in construction contracts.

The statute, ORS 30.140, has changed over time, as this court recounted in *Walsh Construction Co. v. Mutual of Enumclaw*, 338 Or 1, 104 P3d 1146 (2005). When it was enacted in 1973, the statute permitted indemnity clauses in construction contracts but "capped" the obligation at the limit of any insurance "secured by the indemnitee." Or Laws 1973, ch 570, §§ 1 and 2. In 1987, the statute was amended to prohibit, even within the insurance limits, clauses requiring a sub to indemnify the general for injury or damage caused by the "sole negligence" of the general. Or Laws 1987, ch 774, § 25.[3]

[3] The statute actually refers to the "indemnitor" and the "indemnitee," not to the sub and the general. But, in practice, it is always the sub that has to indemnify the general.

In 1995, the legislature amended the statute again, at the behest of subs who thought the sole-negligence standard didn't go far enough; they were still being forced to hold generals harmless from claims for injury or damage caused partly, or even mostly, by the general. *See Walsh Construction Co. v. Mutual of Enumclaw*, 189 Or App 400, 409-10, 76 P3d 164 (2003), *aff'd*, 338 Or 1, 104 P3d 1146 (2005) (discussing legislative history of 1995 legislation). The 1995 version of the statute – the version in force today – voids agreements to indemnify a general against injury or damage "caused in whole *or in part*" by the general:

> "(1) Except to the extent provided under subsection (2) of this section, any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole *or in part* by the negligence of the indemnitee is void."

Or Laws 1995, ch 704, § 1 (emphasis added). In subsection (2), however, the statute preserved the general's right to seek indemnity for injury or damage "to the extent that" it is caused by the sub:

> "(2) This section does not affect any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property *to the extent that* the death or bodily injury to persons or damage to property arises out of the fault of the indemnitor, or the fault of the indemnitor's agents, representatives or subcontractors."

Id. (Emphasis added.)

There is no dispute that the indemnity provision in the subcontract here does exactly what ORS 34.140(1) prohibits: it requires Sharabarin to indemnify La Noue for losses caused in part by La Noue itself. Thus, as La Noue concedes, looking only at ORS 34.140(1), the provision is void and unenforceable and the trial court did not err in summarily dismissing La Noue's indemnity claim, which was based on that provision. But, La Noue argues, the provision is authorized by ORS 34.140(2) and, therefore, the provision survives, notwithstanding ORS 34.140(1). As explained below, La Noue is mistaken on both counts: the provision is not authorized by ORS 34.140(2) and, even if it were, it would still be unenforceable because of its noncompliance with ORS 34.140(1).

(1) The indemnity provision is not authorized by ORS 34.140(2)

Subsection (2) of ORS 30.140 provides that "[t]his section" – meaning all of ORS 34.140, including, most importantly, subsection (1)[4] – "does not affect any provision in a construction agreement that requires a person * * * to indemnify another against liability for damages arising out of death or bodily injury to persons or damage to property *to the extent that* the death or bodily injury to

[4] The term "section" refers to the "session law sections," which are eventually compiled into the Oregon Revised Statutes. *See* Oregon Revised Statutes, Vol. 1, vii (2013) (ORS numbers are assigned to codified session law sections"). Here, then, the term "section" refers to section 1 of chapter 704 of the 1995 Oregon Laws.

persons or damage to property arises out of the fault the indemnitor * * *." (Emphasis added.) In other words, subsection (2) provides that subsection (1) does not "affect," and thus does not invalidate, a provision that requires indemnity *to a specific extent*. The question here is whether the indemnity provision in the subcontract requires indemnity only to *that* extent.

The answer clearly is "no" – the provision requires indemnity to a *greater* extent. As noted, subsection (2) permits a provision that requires indemnity to the extent of the fault of the indemnitor – here, Sharabarin – or its agents, representatives, or subcontractors. The provision here requires indemnity beyond that. It requires indemnity to the extent of the fault of Sharabarin (or its agents etc.) *and* La Noue. The provision requires Sharabarin to "indemnify" and save La Noue "harmless" from claims "arising out of, in connection with, or incident to" Sharabarin's work "whether or not caused in part by" La Noue. This provision, then, is not a provision of the type described in subsection (2) – a provision that requires indemnity only to the extent of the fault of the indemnitor and its agent. Therefore, this provision is not one that the "section" – meaning ORS 30.140 – "does not affect." It follows that this provision is invalidated by ORS 30.140(1), and the trial court did not err in summarily dismissing La Noue's indemnity claim.

(2) Even if authorized by ORS 34.140(2), the indemnity provision is invalidated by ORS 34.140(1)

As explained above, ORS 30.140(1) invalidates any provision in a construction contract that requires a sub to indemnify the general for property damage caused by the fault of the general, even in part. Meanwhile, subsection (2) provides that the prohibition in subsection (1) does not apply to a provision that requires a sub to indemnify the general for property damage caused by the fault of the sub. Consistent with these two subsections, a construction contract may require that a sub indemnify the general for property damage caused by the fault of the sub *and not also the general*. But it can't require more than that. In particular, it can't require that the sub indemnify the general for claims for property damage caused by the fault of the sub and also the general or by the fault of the general and some third party. A "provision" which does that is "void" under ORS 30.140(1). It doesn't matter, for these purposes, that the provision does what subsection (2) *permits* – requires the sub to insure the general for the *sub's* negligence – if it also does what subsection (1) *prohibits* – requires the sub to indemnify the general for the *general's* negligence at least in part. ORS 30.140(1) plainly states that the entire "provision" is "void," not merely unenforceable, in part, if it does what that subsection prohibits. The provision is enforceable, *i.e.*, it is not "void," only if the provision does what is allowed and not also what is disallowed.

To illustrate this point, consider a law that says any contract provision that requires one person to indemnify another for any claim arising out of an auto accident is void. A provision that requires A to indemnify B for *all* claims – thus including both auto claims and non-auto claims – goes too far and is void. In that situation, the entire provision is void – all of it, not just some of it. It doesn't matter that the contract *could have been* written to require A to indemnify B for non-auto claims only. The contract *wasn't* written that way. As it was written, and as it was agreed to by the parties, the contract requires what the law forbids, and the courts have no authority to re-write it for the benefit of B at the expense of A. Void means void. Period.

The same goes for the indemnity provision at issue here. Even if it does what ORS 30.140(2) allows – by requiring Sharabarin to indemnify La Noue for claims caused by the fault of Sharabarin – it also does what ORS 30.140(1) disallows – by requiring Sharabarin to indemnify La Noue for claims caused in part by the fault of La Noue.[5] The provision thus violates ORS 30.140, and the court has no authority to re-write it for La Noue's benefit and make it ORS 30.140-compliant. In construing a contract, "the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to omit what

[5] Subsections (1) and (2) must, of course, be construed together and, if possible, to be consistent with one another. The only way to do that is to construe subsection (2) to permit indemnity for property damage that is caused by the fault, at least in part, of the sub *but not also* the fault, even in part, of the general.

has been inserted or to insert what has been omitted." ORS 42.240. In this case, then, the trial court properly declared that the indemnity clause is void as written and, therefore, cannot support a claim against Sharabarin.

The contrary interpretation by the Court of Appeals is not only inconsistent with the language of ORS 30.140, as discussed above, it's also inconsistent with the statute's history, which this court examined in *Walsh*. Over the years, *Walsh* noted, the legislature has repeatedly amended the statute at the request of subs to broaden their protection against indemnity claims by generals, who use their superior bargaining positions to draft provisions that purport to offload their liability and the cost of insuring against it. The interpretation adopted by the Court of Appeals allows generals to continue this one-sided drafting practice. To be sure, under the Court of Appeals interpretation, the provision would only be enforceable, in part. But there would be nothing to stop generals from continuing to draft overbroad provisions in the hopes that the subs who sign onto it won't know any better – *i.e.*, won't catch on to its over breadth. Under the Court of Appeals interpretation, there is no downside to overreaching because the courts will step in to rewrite a noncompliant provision for the benefit of the general and at the expense of the sub, contrary to the ordinary methodology for construing contracts. In that regard, then, the Court of Appeals decision in this case is a big step backwards. It upholds, at least in part, an indemnity clause of the type that led to

the 1995 amendments – one that forces Sharabarin to indemnify La Noue against any claim for injury or damage unless caused *solely* by La Noue.

(3) The "evidence" is irrelevent

In the Court of Appeals, La Noue's fallback argument was that, no matter what the indemnity provision says, La Noue can still seek indemnity from Sharabarin for claims for property damage caused by the fault of Sharabarin and not also the fault of La Noue, based on what the evidence shows at trial. App Br 35.

La Noue is confused. ORS 30.140 regulates indemnity provisions, not indemnity claims. It renders "void," not merely voidable, "any provision" in a construction contract that requires one person, usually a sub, to indemnify another, usually the general, for liability caused by the other, even in part. A provision with that requirement is void from the start and for all times and all purposes. It is not, as La Noue seems to believe, invalid at one moment and valid the next, depending on whether a claim has been brought against the general and, if so, whether that claim is based on the fault of the general or of the sub. The statute governs what can be written into construction contracts. Thus, as soon as the contract is written, as soon as the ink is dry, one should be able to determine whether it is void or not. At that moment, the contract either complies with ORS 30.140, or it doesn't

comply. It either includes a provision of the type the statute prohibits, or it doesn't. And so it's either void, or it's not, right from the start and for all time. There is no need to wait for a claim to arise to make that determination. If the provision, on its face, requires the sub to indemnify the general for claims based on the general's negligence – which is what the provision here requires, as La Noue itself concedes – then the provision is void and a court could say so right then and there, even if no claim is pending. It would not matter that, sometime thereafter, a claim is made against the general that is not based on the general's negligence. The indemnity provision would still be void under ORS 30.140(1), because it would still say what that statute prohibits, and the sub could obtain a ruling to that effect if the general ever sought to enforce the provision.

And so it goes with the subcontract here. As La Noue concedes, the contract's indemnity provision requires Sharabarin to indemnify La Noue for claims based on the fault of La Noue, at least in part. That requirement, being contrary to the statute, made the entire provision void *ab initio* – that is, void right from the start. It didn't somehow become enforceable in part when the homeowner's association filed its lawsuit against La Noue. The indemnity provision didn't change then. It still said what it said, and what it said was something that the statute doesn't permit to be said in a construction contract. The provision didn't somehow morph with the lawsuit into a requirement that ORS

30.140 would allow – a requirement that Sharabarin indemnify La Noue only for claims based on the fault of Sharabarin and not also La Noue. Thus, the provision was still void and, being void, could not support La Noue's indemnity claim against Sharabarin.

Even if the indemnity provision is not void on its face and thus unenforceable at all times for any and all claims, it is still void as applied to the homeowners' claims against La Noue. Those claims did not allege that Sharabarin was negligent in applying siding to the four buildings he worked on; they alleged, instead, that *La Noue* was negligent in failing to properly manage the construction project. *See* Fourth Amended Complaint, ¶¶ 35-37. If La Noue had been held liable in that suit – if the claims had not settled but instead proceeded to trial and a verdict against La Noue – it would have been because of *La Noue's* negligence, not Sharabarin's. Thus, if not void on its face, the indemnity provision in the subcontract is void as applied to this case, given the allegations in the homeowners' claims against La Noue.

IV. SECOND QUESTION PRESENTED

A. Question

In a construction-defect case, which party has the burden of proving or disproving that repairing the damage would result in "economic waste"? Does the

plaintiff have the burden, if it wants damages measured by the cost of repair? And, if there is some evidence from which the jury could conclude that repairs would be wasteful, does the plaintiff also have the burden to prove that it is entitled to damages under the measure of damages (*i.e.*, diminution in value) that applies in economic-waste cases?

B. Proposed Rule

The plaintiff has the burden to prove that repairs would not be wasteful, if it wants to recover damages for the cost of repair. And, if there is evidence of waste, the plaintiff also has the burden of providing the then-appropriate measure of damages: diminution in value.

C. Discussion

The trial court instructed the jurors that, if they found that Sharabarin had breached its contract with La Noue by performing shoddy work, the correct measure of damages was the cost of repair "unless that remedy generates undue economic waste," in which case the proper measure of damages is diminished value – the difference between the value of the property as is and the value of the property as it should have been. The Court of Appeals said this instruction – what the parties referred to at trial as Instruction No. 26 – correctly states the law.

Montara, 259 Or App at 666-68. And it does, as explained later in this brief. Even so, the court held that the trial court erred in giving the instruction, because the record contains no evidence of diminished value and, in that court's view, Sharabarin had the burden of producing such evidence to justify the instruction. In fact, the burden to produce evidence in support of any relevant measure of damages should, as usual, be on the party seeking damages – in this case, La Noue. That point, too, is explained below. But, first, there is a threshold question: Did La Noue preserve the alleged error? As explained below, it didn't.

(1) Preservation

After the instructions were given, the trial court asked the parties whether they had any exceptions to them. Here, in its entirety, is La Noue's exception to Instruction No. 26, the damages instruction:

> "THE COURT: Okay. Go ahead and have a seat. And we'll begin with exceptions for the plaintiff.
>
> "MS. GORMAN: Just want the number?
>
> "THE COURT: Anything you think you need to put on the record to protect the record.
>
> "MS. GORMAN: I don't –
>
> "* * * * *

> "MS. GORMAN: Exception to No. 29. I don't believe that immateriality of – materiality of breach instruction was necessary, *and exception to jury instruction No. 26 on damages*.
>
> "THE COURT: Okay. Thank you. * * *"

ER 44 (emphasis added).

In taking this exception, La Noue's counsel did nothing more than tell the court that she opposed the instruction. She didn't explain *why* she opposed it. In particular, she didn't say that the instruction, even if a correct statement of law, was not justified by the evidence presented, which is the reason why the Court of Appeals concluded that the trial court erred in giving the instruction. The exception did not inform the trial judge or opposing counsel that the instruction was erroneous for that reason, or any other, and thus did not give either of them an opportunity to fix the problem, if there was one.

The problem the Court of Appeals identified was fixable then. If La Noue had explained the alleged error, Sharabarin could have moved the trial court for leave to introduce the evidence that the Court of Appeals later said was necessary to support the instruction. La Noue's failure to offer a reason for its exception denied Sharabarin that opportunity. Likewise, it denied the trial court the opportunity to withdraw or modify the instruction.

La Noue's exception was plainly inadequate under ORCP 59 H, which, after amendment in 2004, provides that any error in the giving of an instruction is not

preserved for appellate review unless the appellant takes an exception immediately after the court instructs the jury, ORCP 59 H(1), and, more importantly, explains "with particularity" the grounds for the exception. ORCP 59 H(2).[6] The particularity requirement serves "the core preservation principles that apply under [Oregon] case law [and] the policies they serve," which "ensure that trial courts have an opportunity to understand and correct their own possible errors and that the parties are not taken by surprise, misled, or denied opportunities to meet an argument." *State v. Vanornum*, 354 Or 614, 632, 617 P3d 889 (2013) (citations and internal quotation marks omitted).

La Noue's exception did not explain "with particularity" the alleged error in Instruction No. 26. It didn't explain the error *at all*. The exception did not include, even in summary form, the arguments La Noue later raised on appeal, including the one the Court of Appeals accepted – that there was no evidence to

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[6] Rule 59 H reads in full:

> "**H(1) Statement of issues or instructions given or refused.** A party may not obtain review on appeal of an asserted error by a trial court in submitting or refusing to submit a statement of issues to a jury pursuant to subsection C(2) of this rule or in giving or refusing to give an instruction to a jury unless the party who seeks to appeal identified the asserted error to the trial court and made a notation of exception immediately after the court instructed the jury.
>
> "**H(2) Exceptions must be specific and on the record.** A party shall state with particularity any point of exception to the trial judge. A party shall make a notation of exception either orally on the record or in a writing filed with the court."

support the giving of the instruction. The exception contained nothing but an un-explained objection. It did nothing more than inform the trial judge and Sharabarin's counsel that La Noue opposed the instruction for reasons it was not going to express at that time.

That doesn't satisfy Rule 59 H, as explained in *Delaney v. Taco Time Int'l*, 297 Or 10, 681 P2d 114 (1984), which involved an earlier version of ORCP 59 H, before its 2004 amendment. At that time, the rule did not have two subsections, as it does now, but it still had the particularity requirement: "Any point of exception shall be particularly stated[.]"[7] The defendant excepted in the same way La Noue did here – referring to the instruction by number only, without elaboration:

> "THE COURT: Go ahead, take your exceptions.
>
> "DEFENSE COUNSEL: Okay, Judge. The only one I had is the plaintiff's No. 13 * * *."

Delaney, 297 Or at 18.

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[7] At that time, ORCP 59 H read in relevant part:

> "No statement of issues submitted to the jury pursuant to subsection C.(2) of this rule and *no instruction given to a jury shall be subject to review upon appeal unless its error, if any, was pointed out to the judge who gave it* and unless a notation of an exception is made immediately after the court instructs the jury. *Any point of exception shall be particularly stated and taken down by the reporter* or delivered in writing to the judge. It shall be unnecessary to note an exception in court to any other ruling made. * * *."

This court said the exception was inadequate because it "was not particularly stated" and did not serve the purpose of the exception requirement, which "is to inform the trial court that the instruction may be erroneous and to give the court an opportunity to make corrections." *Id.* at 18-19.

In light of the above cases, it should be clear that La Noue did not preserve the alleged error in the giving of Instruction No. 26 simply by reciting that number in the list of the instructions it had some problem with. Recitation-only exceptions do not satisfy the particularity requirement of ORCP 59 H.

In ruling otherwise, the court did not mention ORCP 59 H. Instead, the court said, in a footnote, that "[u]nder the unique circumstances in this case, we conclude that the correctness of the jury instruction was sufficiently raised and neither the trial court nor Sharabarin will be surprised by this court's consideration of the jury instruction issue on appeal." *Montara*, 259 Or App at 664 n 7.

In fact, Sharabarin *is* surprised – very surprised – that the court would blink at what appears to be a plain application of well-settled preservation rules. If the court concluded that Sharabarin and the trial judge were somehow aware at trial that, in the event of an appeal, La Noue might challenge the economic-waste instruction, it's right. La Noue's exception alerted them to that much. But *only* that much. There is nothing in the record to support the conclusion that Sharabarin and the trial judge were somehow aware that La Noue would challenge the

instruction *on the grounds that it did*. The only mention of the instruction is the exception quoted above. How could the trial court and Sharabarin possibly know, based solely on La Noue's statement that it "except[ed] to jury instruction No. 26 on damages," that La Noue would challenge the instruction for lack of evidence to support the instruction?

Sharabarin is also confused by the court's reference to the "unique circumstances in this case." In fact, there is nothing unique about them. This case presents a typical, if not garden variety, instance of an inadequate exception to a jury instruction. That is something that happens all the time, as the cases cited above make clear. In any event, there is no exception to ORCP 59 H's requirements, even for "unique circumstances." Whatever the circumstances of this case, La Noue did not comply with the "particularity" requirement of ORCP 59 H(2).

In a recent decision, this court held that, notwithstanding ORCP 59 H(1), a party could obtain appellate review of an instruction, at least under the "plain error" doctrine, even if the party did not except to the instruction after it was given. *Vanornum*, 354 Or at 628-29. The court explained that the drafter of the rule, the Council on Court Procedures, did not intend for it to control appellate review in general or plain-error review in particular. *Id.* at 623-28. Such review, the court said, should be governed, instead, by the court's "preservation jurisprudence," *id.*

at 631, meaning, apparently, the principles announced in the court's pre-ORCP 59 H case law, to the extent there is any difference between those principles and the dictates of the rule.[8]

When it comes to the particularized-exceptions requirement, there really isn't any difference. This court has always held that, plain error aside, instructions

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[8] Presumably, the court's "jurisprudence" is not limited to court-made rules of appellate practice, but also includes judicial interpretations of relevant statutes, because there have always been relevant statutes. As *Vanornum* itself notes, ORCP 59 H replaced a statute, *former* ORS 17.510 (1979), which provided that "no instruction given to a jury in the circuit court shall be subject to review upon appeal unless its error, if any, was pointed out to the judge who gave it[.]" There was no requirement that the error be explained *with particularity*, but that is what "pointed out" implies. In any event, the error still had to be explained – to some extent. Thus, in *Miller v. Lillard*, 228 Or 202, 208, 364 P2d 766 (1961), the court declined to consider the alleged error in an instruction on punitive damages, because the defendant didn't say why he objected to that instruction, only that he objected to all instructions proffered by the plaintiff. "It will be noticed," the court said, "that the exception makes no mention of the error alleged in the instruction." *Miller*, 228 Or at 208. Relying on *former* ORS 17.510, the court said: "The general rule is that exceptions to the charge of the court must point out specifically and definitely indicate the alleged defects in an offending instruction." *Id.*; *see also State v.Torrey*, 32 Or App 439, 446, 574 P2d 1138 (1978) (citing *former* ORS 17.510 in declining to review instruction to which the defendant raised "merely a general objection").

Before the ORS, OCLA § 5-701 required an exception to a "decision" of the trial court, including a decision "in the charge to the jury," to preserve ruling for appellate review. And, before the OCLA, OCA § 2-701 said the same thing. Similar provisions existed in prior compilations of laws back to statehood, and some of them are cited occasionally in the Supreme Court's rulings on preservation. Those rulings must be part of the court's "preservation jurisprudence," as that term is used in *Vanornum*.

are not reviewable without an exception. *See, e.g.*, *Friel v. Lewis*, 197 Or 440, 443, 253 P2d 647 (1953) ("[I]t is well settled that this court will not reverse for error in instructions not pointed out to the trial court[.]"); *Mercer v. Risberg*, 182 Or 526, 532, 188 P2d 632 (1948) ("This is a court of review. It will not do to urge here for the first time objections to instructions."); *Schoellhamer v. Rometsch*, 26 Or 394, 404, 33 P 344 (1894) ("If the instruction was not clear * * * it was because it was ambiguous or defective in fullness, and counsel should have requested an instruction on that question, and not having done so, error cannot be assigned on the instruction as given."). And it has always held that an exception to an instruction must explain – with sufficient particularity to be informative – why the instruction should not have been given. *See, e.g.*, *Mays v. Huling Buick Co.*, 246 Or 203, 204, 424 P2d 679 (1967) (rejecting challenge to instruction because the exception "did not tell the court what was wrong with the instruction"); *Ross v. Cuthbert*, 239 Or 429, 438, 397 P2d 529 (1965) ("the exception should be as specific and penetrating as the stress of trial permits."); *Northwest Door Co. v. Lewis Inv. Co.*, 92 Or 186, 208, 180 P 495 (1919) ("[T]he underlying principle [for exceptions] is that the judge is entitled to know specifically what the party is objecting to, with a view to enabling him to correct the mistake, if one exists."). The court has declined to review instructions where the exception lacked an explanation of the alleged error – where the exception "does no more than tell the

trial judge that counsel does not agree with the court," *Wulff v. Sprouse-Reitz Co., Inc.*, 262 Or 293, 299, 498 P2d 766 (1972), which is all that can be said about La Noue's exception. The court has been particularly critical of exceptions that, like La Noue's, simply object to an instruction by number, *e.g.*, *Cook v. Retzlaff*, 163 Or 683, 684, 686, 99 P2d 22 (1940); *Delaney*, 297 Or at 17-19, or, even worse, object by number to *every* instruction, *e.g.*, *Michelin Tire Co. v. Williams*, 135 Or 158, 160, 293 P 938 (1931) (*per curiam*).

All of these instruction-specific holdings are consistent, of course, with the overarching rule of preservation, applicable to objections of all sorts: "[A] party must provide the trial court with an explanation of his or her objection that is *specific enough* to ensure that the court can identify its alleged error with enough clarity to permit it to consider and correct the error immediately." *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000) (emphasis added).

In sum, under this court's preservation jurisprudence, as under ORCP 59 H, La Noue failed to preserve the alleged error in Instruction No. 26. Accordingly, the Court of Appeals should not have reviewed the alleged error, let alone reversed the trial court's judgment on that ground. Instead, it should have rejected La Noue's assignment of error based on that instruction. The court's failure to do so is not just a problem for this case, but also for cases to follow. The preservation-of-error requirement is one of the most important aspects of trial practice – and

also one of the most confusing. It sometimes seems to practitioners that the appellate courts do not consistently apply the preservation rules, reaching an error in one case, but not in another, for reasons that are not apparent and thus appear arbitrary. *See Lutz v. State By and Through Carey*, 130 Or App 278, 285-86, 881 P2d 171 (1994) (Haselton, J., concurring) (referring to the "personal and professional frustrations of a recent past member of the trial and appellate bars, who agonized over confusing, seemingly arcane and arbitrary principles of preservation and reviewability"). The Court of Appeals decision in this case, if not corrected, will worsen the problem, because the decision seems to ignore, without explanation, the long-standing and undisputed requirements for preserving error in the giving of an instruction on the record.[9]

(2) La Noue had the burden of production

There is no question about the measure of damages in a case of this sort. In *Beik v. American Plaza Co.*, 280 Or 547, 555, 572 P2d 305 (1977), this court said:

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[9] La Noue asserts that it challenged the instruction earlier in the proceedings – specifically, that it argued that there is no evidence in the record from which the jury could have calculated damages based on diminution in value. But it appears (to Sharabarin at least) that the issue was raised, if at all, during off-the-record discussions. *See* Tr 3138 ("The Court: * * * The record should reflect that all of the lawyers are back, and we've been having an off-the-record discussion * * *."); *see also* ORS 19.365(2) (record on appeal includes the trial court file, exhibits, and the record of oral proceedings); *King City Realty, Inc. v. Sunpace Corp.*, 291 Or 573, 582, 633 P2d 784 (1981) (the appellant bears the burden of providing a record sufficient to demonstrate that error occurred).

"The rule in Oregon is that the cost of replacement or repair is the correct measure of damage for defects in work *unless that remedy generates undue economic waste*." (Emphasis added.) If repairs would be wasteful, the court continued, the correct measure of damages is diminution in value – the difference between the value of the construction as it is and the value as it should be. *Id.*; *see also Schmauch v. Johnston*, 274 Or 441, 446-47, 547 P2d 119 (1976); *Newlee v. Heyting*, 167 Or 288, 293, 117 P2d 829 (1941); *McComb v. Cogswell*, 140 Or 676, 679, 15 P2d 716 (1932). The court supported that holding with this passage from a leading treatise on damages:

> "In whatever way the issue arises, the generally approved standards for measuring the owner's loss from defects in the work are two: First, *in cases where the defect is one that can be repaired or cured without undue expense*, so as to make the building conform to the agreed plan, then the owner recovers such amount as he has reasonably expended, or will reasonably have to spend, to remedy the defect. Second, *if, on the other hand, the defect in material or construction is one that cannot be remedied without an expenditure for reconstruction disproportionate to the end to be attained*, or without endangering unduly other parts of the building, then the damages will be measured not by the cost of remedying the defect, but by the difference between the value of the building as it is and what it would have been worth if it had been built in conformity with the contract. * * *."

Beik, 280 Or at 556 n 3, *quoting* McCormick, *Damages* 648-49, §168 (1935) (emphasis added). The same passage was quoted with approval in an earlier case, *Schmauch*, 274 Or at 446-47.

While the measure of damages is clear, the burden of proof is less so. Does the defendant have the burden to prove that repairs would generate, in *Beik*'s words, "economic waste," or, in McCormick's, "an expenditure for reconstruction disproportionate to the end attained"? Or does the claimant, the party seeking repair-cost damages, have the burden to prove the opposite – that repairs would not be wasteful? And if there is some proof of waste or disproportionate expenditure, which party has the burden of proving the alternative measure of damages – diminution in value?

The one case directly on point is *McComb*, which appears to place the burden on the claimant. In that case, the plaintiff contractor agreed to erect some buildings for the defendant property owners but didn't complete them according to the plans. When the plaintiff sued to collect the balance of the purchase price, the defendants counterclaimed for the cost to reconstruct the buildings on a breach of contract theory. This court held, first, that the plaintiff was not entitled to recover on his claim. But it also held that the defendants were not entitled to recover on their counterclaim, because their proof fell short on the issue of damages:

> "On the other hand, defendants have failed to establish, by competent evidence, the amount of their damages. The only evidence of the damage sustained is that given by defendants' expert witness, Brooner, as to what it would cost to replace or reconstruct according to contract. Under the pleadings and facts in this case, the measure of damages is not what it would cost to tear out and replace or rebuild according to the plans and specifications, but the difference between

> the value of the building as constructed and what its value would have been had it been built according to the plans and specifications."

140 Or at 679. The court remanded for entry of a judgment of a dismissal. *Id.*

This court also put the burden of proving diminution of value on the claimant in *Millers Mutual Fire Ins. Co. v. Wildish Construction Co.*, 306 Or 102, 758 P2d 836 (1988). In that case, an insurer sued a construction company for damages caused to its insured's home by the company's nearby blasting operations. The homeowners, who were joined as defendants because they had refused to assign their claim to the insurer, filed a cross-claim against the construction company for injuring their property. When the insurer and the construction company settled, the case proceeded to trial on the homeowners' tort claim against the construction company. This court held that the "value of the [] house at the time of its alleged destruction" – not the cost to repair the damages – "is the proper measure of damages" and that the homeowners were not entitled to recover on their cross-claim because they had only offered evidence of the cost to repair. *Wildish Construction*, 306 Or at 126.

McComb and *Wildish Construction* thus appear to hold that the claimant – the party seeking damages – has the burden of proving diminution in value, when that, not repair cost, is the proper measure of damages.

That is as it should be. As a general rule, the plaintiff has the burden of proof on damages. *See North Pacific Lbr. v. Moore*, 275 Or 359, 366, 551 P2d 431

(1976) (party seeking monetary damages must "establish the fact of damage and evidence from which a satisfactory conclusion as to the amount of damage can be reached"). That means the plaintiff has the burden to produce evidence to support an award of damages, however they are measured. *See Drulard v. LeTourneau*, 286 Or 159, 172, 593 P2d 1118 (1979) ("Plaintiffs offered no evidence of damages measured by th[e] proper standard and, therefore, failed to carry their burden of proof of damages"). In cases where there is an alternative measure of damages, depending on facts to be found by the jury, the burden should be on the plaintiff to produce evidence to support an award under the alternative measure, if the plaintiff wants to recover despite an adverse finding on the factual question. It should not be the defendant's burden to prove the plaintiff's damages under either alternative.

It's no different than the burden of production in a case in which there is just one proper measure of damages – repair costs, for example. The defendant in that case is entitled to an instruction on that measure of damages – an instruction that the damages are limited to repair costs – even if there is no evidence of such costs. It shouldn't be the defendant's burden in that case to produce evidence of those costs in order to obtain an instruction that, consistent with the law, limits the damages to repair costs only. It shouldn't be the defendant's burden to prove that part of the plaintiff's case, in order to obtain the instruction. The defendant should

get the instruction regardless, and if there is no evidence of repair costs, the plaintiff will not recover.

Similarly, in this case, even in the absence of any evidence of diminished value, Sharabarin was still entitled to an instruction that, in the event the jurors found economic waste, La Noue could not recover the damages for the cost of repairs, but only for diminished value. The law limits La Noue's recovery to that extent. If La Noue wanted to recover damages thus limited, after a finding of economic waste, it was obligated to produce some evidence of diminished value. Moreover, if La Noue didn't want the damages to be limited in that way, then it should have also put on evidence that the cost to repair was the appropriate measure of damages – *i.e.*, that the repairs would not result in economic waste.

It follows that Sharabarin should not have had to prove anything. To the extent he did, his only burden should have been to produce evidence to support an economic-waste finding. Which he did.[10]

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[10] Some of this evidence came from La Noue's own expert, Mark Lawless, who testified that, although the siders and the framers who worked on the project deviated from the architectural plans and manufacturer specifications in a variety of ways, some of the breaches were only technical. *See* Tr 1105-33, 1211-15, 1289-96, 1301-02, 1511-44, 1556 (discussing nailing, flashing, and other deviations); *see also* Tr 2298-2355, 2388, 2392-2425, 2544-47, 2549 (testimony from the framer's expert, who said that many of the alleged defects were merely technical deviations). According to Lawless, it would cost approximately $2 million to repair the defects attributable to Sharabarin's work on four of the 35 buildings, Tr 1387-88, 1410-14; Ex 147, roughly half of the $4 million it cost to build them, Tr 623, and nearly 20 percent of the $11.2 million cost of all of the

(3) La Noue is precluded from arguing that Sharabarin had the burden

Even if La Noue is right about who bears the burden of proving the diminution in value in a case involving economic waste, that argument doesn't get La Noue anywhere because, in a separate instruction, the court told the jury that La Noue bore the burden of proof on damages – more specifically, that "[t]he plaintiff must prove damages by a preponderance of the evidence." Tr 3268. La Noue did not except to the burden of proof instruction. *See generally* Tr 3274-3281. Nor did it assign error to the instruction on appeal. The instruction, then, became the law of the case. *See Fulton Ins. v. White Motor Corp.*, 261 Or 206, 223 n 5, 493 P2d 138 (1972) (when neither party objects to a jury instruction, it becomes the law of the case, even if the instruction incorrectly states the law).

In light of the burden of proof instruction, La Noue cannot now complain that Sharabarin failed to satisfy his burden to offer evidence to support a diminution-in-value-based damages finding.

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buildings, Tr 2621. Based on this evidence, a jury could have found that (1) most of the alleged defects were technical, insubstantial, or immaterial; (2) the cost to repair the technical and nontechnical defects to buildings Sharabarin worked on was disproportionate to the end to be attained, given the nature and extent of the damage to the buildings and the cost to build them in the first place; and (3) undertaking repairs would unduly endanger other parts of the building.

(4) La Noue was not prejudiced by the instruction

In any event, La Noue was not prejudiced by the giving of the instruction, even if there was no evidence of diminution in value. And, without prejudice, the error was not grounds for reversal. As explained in *State v. Thompson*, 328 Or 248, 266, 971 P2d 879, *cert den*, 527 US 1042 (1999), "[f]or an instruction to constitute reversible error, it must have prejudiced the aggrieved party when the instructions are considered as a whole."

The mere fact that an instruction is unsupported by evidence does not mean that it is prejudicial. Such an instruction is just an abstract statement of law. The jurors won't do anything with it, if it doesn't relate to the evidence before them. They'll just ignore it. In this case, the Court of Appeals concluded that the economic-waste instruction was prejudicial because it "permitted" the jury to speculate "about the loss in value of the buildings." *Montara*, 259 Or App at 670. But that conclusion ignores the trial court's other instructions, which admonished the jurors not to decide the case "on guesswork, conjecture, or speculation" and instructed that damages must be proven by evidence. Tr 3258, 3268. In light of those instructions, which the jurors presumably followed, the only speculation in this case is the Court of Appeals' assumption that the jurors guessed at the damages and that La Noue was prejudiced thereby.

V. THIRD QUESTION PRESENTED

A. Question

What is the proper measure of damages on a contract claim for construction defects?

B. Proposed Rule

The proper measure of damages on a contract claim for construction defects – the benefit-of-the-bargain measure of damages – is the cost of repair, unless that remedy would "generate undue economic waste," in which case the proper measure of damages is diminution in value – the difference between the value of the structure as is and the value as promised. In an appropriate case, the plaintiff also may be able to recover consequential damages, which may include "economic losses," in addition to the traditional benefit-of-the-bargain damages. But that doesn't mean that the jury should not be instructed on the benefit-of-the-bargain measure, too.

C. Discussion

The court need not reach this question because, as explained above, La Noue did not preserve the alleged error in the "economic waste" instruction. In any

event, as explained below, the instruction was an accurate statement of how to determine breach-of-contract damages in a construction-defect case.

The basic rule of damages in a claim for breach of contract is that the plaintiff is entitled to recover its expectation damages, also known as "benefit of the bargain" or "loss of bargain damages." *Logan v. D.W. Sivers Co.*, 343 Or 339, 353-54, 169 P3d 1255 (2007). "[I]n an appropriate case," however, "the victim of a breach of contract may recover not only her loss of bargain damages, but also consequential damages," *id.*, which include "gains prevented as well as losses sustained, as may reasonably be supposed to have been within the contemplation of both parties at the time of the making of the contract as the proximate and natural consequence of a breach by defendant." *Senior Estates v. Bauman Homes*, 272 Or 577, 583-84, 539 P2d 142 (1975).

The proper measure of benefit-of-the-bargain damages on a contract claim in a construction-defect case is the cost of repairing the defect – of rebuilding the structure the way it should have been built. But that measure applies only if "repair is the prudent remedy" under the circumstances. *Turner v. Jackson*, 139 Or 539, 560, 11 P2d 1048 (1932). And repair would be imprudent if it would create "economic waste" – that is, if the cost of rebuilding is "disproportionate to the end to be attained," or if the defect cannot be fixed "without endangering unduly other parts of the building." *Beik*, 280 Or at 555-56 (citing with approval to McCormick,

Damages 647, 650, § 168 (1935)); *see also Schmauch*, 274 Or at 446-47 (also citing McCormick); *Newlee*, 167 Or at 293; *McComb*, 140 Or at 679; *Chamberlin v. Hibbard*, 26 Or 428, 435, 38 P 437 (1894). In the disproportionate-cost or unduly-endangering situation, the proper measure of damages is the difference between the value of the building as properly constructed and the value of the building as actually constructed. *Beik*, 280 Or at 555. The court did not err, then, in instructing the jury on the benefit-of-the bargain measure of damages.

La Noue contends that the economic-waste rule does not apply to its claim for consequential damages – to its claim for damages for the "economic losses" it incurred in settling the claims that the homeowners brought against it.[11] Even if

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[11] La Noue proposed the following special "economic loss" instruction based on the definition of "economic damages" in ORS 31.710(2)(a), which, by its terms, applies to actions "arising out of bodily injury":

> "La Noue seek[s] to recover economic damages. Economic damages are the objectively verifiable monetary losses that La Noue has incurred or will probably incur. In determining the amount of economic damages, if any, consider the following:
> "(1) The amount La Noue paid to the Montara Owners Association;
> "(2) La Noue's attorneys' fees; and
> "(3) La Noue's expert witness fees and other costs."

La Noue's Proposed Jury Instructions, p 8. That proposed instruction did not accurately state the law on consequential damages, as described above. In any case, La Noue did not assign error to the trial court's failure to give its "economic damages" instruction – or any other damages instruction that would have captured the elements of a consequential damages claim.

that's true, which it's not,[12] the rule still applies to La Noue's claim for benefit-of-the-bargain damages.[13] Accordingly, the trial court didn't err in giving the instruction.

VI. FOURTH QUESTION PRESENTED

A. Question

Can a third-party plaintiff recover damages from the third-party defendant for the attorney fees the third-party plaintiff incurred in defending against the first-party claim?

B. Proposed Rule

A third-party plaintiff can recover damages from the third-party defendant for the attorney fees the third-party plaintiff incurred in defending against the first-

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[12] What La Noue agreed to pay the homeowners to settle the claims against it is merely what it agreed to pay the homeowners. It is not what La Noue would have been liable to pay, if the homeowners' claims had gone forward. If the claims had gone forward, La Noue would have been liable for the cost of repairing the subs' work, but only if repairs would not have been "wasteful." The economic waste doctrine would have limited La Noue's liability to the homeowners and, therefore, should limit the amount La Noue can claim as consequential damages.

[13] During opening statements, La Noue asked the jury to "award damages * * * [for] the cost to redo their work and to repair their damage." Tr 463. La Noue then proceeded to put on evidence of the cost to repair and the extent to which the repair costs were attributable to Sharabarin's work. *See generally* Tr 667, 882, 918, 1378-88, 1410-14, 3182; Ex 147.

party claim – but not in the same action in which the fees were incurred, only in a later proceeding.

C. Discussion

In the proceedings below, La Noue sought to recover the attorney fees that its insurer paid to the law firm that defended La Noue against the homeowners' claims. La Noue argued that those fees are part of the "consequential damages" it incurred as a result of Sharabarin's breach of contract and, therefore, that its claim for those fees should be presented to the jury for its consideration. The trial court disagreed and did not submit the fee issue to the jury. Tr 325, 448-52, 1013-23, 1028-29. After the trial, the court reaffirmed that ruling, ER 6, which La Noue then challenged on appeal. According to La Noue, "[t]he trial court erred in finding that attorneys [*sic*] fees [incurred in defense of the homeowners' claim] were not recoverable as consequential damages for the jury's consideration." App Br 49. The Court of Appeals disagreed, ruling that "La Noue could not recover attorney fees as part of the consequential damages on the breach of contract claim." *Montara*, 259 Or App at 683.

In the proceedings below, La Noue argued that "attorney fees are generally allowable as damages in an action against a defendant where the defendant's wrongful conduct involved the plaintiff in separate litigation with a third party."

App Br 49. In this case, however, there is no "separate litigation." The fees that La Noue wanted to recover as damages in this action were the fees that La Noue incurred *in this action*. To be precise, the fees that La Noue sought to recover on the third-party claim were the fees that it (actually, its insurer) incurred in defending the claim in chief. Because the fees sought to be recovered were incurred in the same action in which they were sought, they were not recoverable as consequential damages, according to ORCP 68. That rule "governs the pleading, proof and award of attorney fees *in all cases*, regardless of the source of the right to recovery of such fees, *except* when * * * [s]uch items are claimed as damages *arising prior to the action* * * *." ORCP 68 C(1) (emphasis added).

As noted, La Noue did not seek damages for attorney fees arising *prior to* this action, but rather *in* this action – which began when the homeowners sued La Noue and continued through La Noue's third-party claim against Sharabarin.

La Noue argued below that the proceedings on the homeowners' claims and the proceedings on the third-party claims constitute two separate actions for ORCP 68 purposes. But that argument ignores ORCP 22 C, which provides that the filing of a third-party claim does not commence a new "action," but simply extends the

existing "action," unless the court enters an order severing the claim.[14]

La Noue also argued below that there is no "rational" reason for Rule 68's rule that fees incurred in an action are not recoverable as damages in the same action. App Br 50. But, of course, rules don't need to be rational to be enforceable. In any event, for whatever it might be worth, this rule does have a perfectly good rationale: fees incurred in an action are not recoverable as damages in the same action because, in many cases, if not most, the fees will still be accruing when the damages are awarded. The claimant's in-action fees don't stop with submission of the case to the jury, but continue on through the post-submission proceedings – through the exceptions, the return of verdict, the post-trial motions, *etc*. In that respect, it's not possible for the jury's verdict to capture all of the fees recoverable in the case. There would have to be a later action and a

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[14] ORCP 22 C(1) provides:

> "After commencement of *the action*, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim[.] * * * Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to *the action* who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant."

(Emphasis added.) *See also* ORCP 67 B ("When more than one claim for relief is presented in *an action*, whether as a claim, counterclaim, crossclaim, or third party claim * * *, the court may render a limited judgment as to one or more but fewer than all of the claims or parties.") (emphasis added).

second verdict in order to provide complete relief. Rule 68 appears to recognize that reality in requiring that fee claims be adjudicated post-trial "except when * * * claimed as damages arising prior to the action."[15]

This court should apply ORCP 68 as it is written and thus should conclude, as the lower courts did, that the fees La Noue incurred in defending the claim in chief were not recoverable as consequential damages in the trial of the third-party claim.

VII. CONCLUSION

For the foregoing reasons, the court should reverse the decision of the Court of Appeals and affirm the judgment of the trial court.

Respectfully submitted,

/s/ Julie A. Smith

Thomas M. Christ
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For Petitioner on Review

[15] In its comment to the rule, the Council on Court Procedures explained that, because "the rule is designed to prove a procedure for claiming and proving attorney fees which are an incident of the action, *pre-existing* attorney fees which are actually claimed as damages are excluded." *See* Council on Court Procedures, Oregon Rules of Civil Procedure and Amendments, December 13, 1980, at 22 (emphasis added).

Certificate of Compliance with ORAP 9.05(3)(a)

Brief length

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/s/ Julie A. Smith

_____

Julie A. Smith

Certificate of Service

I certify that I electronically filed the attached Brief with the State Court Administrator by using the Oregon Appellate eFiling system on the 8th day of July 2014.

I further certify that I mailed a copy of the attached Brief to the following lawyers, at the addresses indicated, by first class mail, with postage prepaid, on the 8th day of July 2014:

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