IN THE SUPREME COURT OF THE STATE OF OREGON

TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, an Oregon municipal corporation,
Plaintiff-Appellant,
Petitioner on Review,

v.

JOSEPH Y. AIZAWA, et al.,
Defendants,

and

DEBORAH L. NOBLE-IRONS, nka Deborah L. Noble,
Defendant-Respondent,
Respondent on Review.

CA No. A155714

S064112

PETITIONER ON REVIEW'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals on appeal
from a judgment of the Circuit Court for Multnomah County,
Honorable Jerry Hodson, Judge

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INDEX OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. PRELIMINARY ORAP 9.17(2)(b) MATTERS

A. Legal Question Presented

Does ORS 35.300(2) – which provides in relevant part that, when an offer of compromise in a condemnation action is accepted and the offer is silent as to fees and costs, the court "shall give judgment to the defendant * * * for costs and disbursements, attorney fees and expenses that are determined by the court to have been incurred before service of the offer on the defendant" – allow the entry of a judgment for attorney fees, expenses, and costs and disbursements incurred after service of the offer?

B. Proposed Rule of Law

When a property owner accepts an offer of compromise in a condemnation action, and the offer does not specifically include amounts for costs, disbursements, attorney fees, and expenses, ORS 35.300(2) directs the court to give judgment to the property owner for only those attorney fees, expenses, costs, and disbursements that the court determines have been incurred before service of the offer of compromise. The judgment may not contain an award of such fees and costs incurred after that date.

C. Nature of the Action

This is a condemnation action brought by petitioner (plaintiff below) Tri-County Metropolitan Transportation District of Oregon (TriMet). Respondent Deborah L. Noble-Irons, now known as Deborah L. Noble (Noble), was one of the defendants. TriMet and Noble resolved, through an offer of compromise, the issue of just compensation and damages for the property interests TriMet had acquired. The offer, however, left unresolved the question of attorney fees and costs. The parties agreed that Noble was entitled to fees and costs she incurred before TriMet

served the offer, but litigated whether Noble also was entitled to recover fees and costs incurred after service of the offer for prosecuting her fee petitions. That was the sole issue on appeal and presents the sole question on review.

D. Relief Sought

In the trial court, TriMet sought to limit Noble's award of attorney fees and costs to those she incurred before TriMet served the offer of compromise. The trial court rejected TriMet's arguments and awarded Noble not only pre-offer attorney fees and costs but post-offer fees and costs as well. TriMet appealed, and the Court of Appeals affirmed. *Tri-County Metropolitan Transportation District of Oregon v. Aizawa*, 277 Or App 504, 371 P3d 1250 (2016). TriMet now seeks from this Court a decision reversing both the decision of the Court of Appeals and the supplemental judgment of the trial court awarding post-offer attorney fees and costs.

E. Nature of the Judgment

The trial court entered a Stipulated Limited Judgment on May 22, 2013, memorializing the agreed value ($22,000) of TriMet's acquisition. (ER 5-8.) The limited judgment permitted Noble to petition for attorney fees and cost pursuant to ORCP 68 and ORS 35.300. (ER 7.) She filed three petitions. One was for pre-offer work; the other two were for post-offer work. (*See* ER 18-19 (describing various petitions).) Those petitions produced two supplemental judgments. The first was the Supplemental Judgment awarding Noble $13,796.33 for attorney fees and costs incurred before service of the offer of compromise. (Supp ER 47-48.) TriMet did not appeal from the Supplemental Judgment.

The other was the Second Supplemental Judgment awarding Noble $9,537.28 in attorney fees and costs incurred after service of the offer of

compromise for her efforts to obtain those fees and costs. (ER 26-31.) That judgment was entered on October 31, 2016. (ER 26.) (The Second Supplemental Judgment was entered twice. The trial court, however, vacated the second entry (November 8, 2013), leaving only the October 31, 2013, version in place. (*See* Opening Brief at 1-2.)) TriMet filed its notice of appeal from the Second Supplemental Judgment on November 26, 2013.

F. Concise Summary of Facts

In its petition for review, TriMet accepted the Court of Appeals' detailed statement of the undisputed procedural facts framing the issue on review and refers the Court to that account for a fuller version of what happened below. *See Aizawa*, 277 Or App at 507-09. Reduced to their essence, those facts are as follows:

As part of the construction of the Portland-Milwaukie Light Rail Project, TriMet needed part of the common area of the American Plaza Condominium development near downtown Portland. Noble, along with more than 60 others, was determined to have a fractional ownership interest in the common area. In its complaint, TriMet alleged that Noble's ownership interest had a value of $1,040. Noble disagreed and filed an answer. Later, after negotiation, TriMet served an offer of compromise offering $22,000 as just compensation and providing that "recoverable costs and disbursements, attorney fees and expenses shall be awarded pursuant to ORS 35.300(2)." (ER 1.)

Noble accepted the offer and then filed statements of attorney fees and costs that sought awards for both fees and costs awarded (1) before service of the offer and (2) after service of the offer related to her efforts to recover attorney fees and costs (so-called "fees-on-fees"). *See, e.g., Aizawa*, 277 Or App at 506, 508-09, 11-14 (using that term). She did not seek to recover post-offer attorney fees and costs

unrelated to prosecuting her fee petitions. (*See* ER 18 (Noble's trial counsel: "[T]he effort that I expended after the offer of compromise in connection with the main case is too late. * * * we are just focusing on * * * the fees on fees.").) As noted, the trial court agreed with Noble on the fees-on-fees issue, although the trial judge stated at the outset of his ruling that "I have to admit that it's one that could go either way[,]" and "I would be interested to find out ultimately what happens." (ER 22.) This appeal followed.

G. Summary of the Argument

ORS 35.300(2) tells a trial court, in a condemnation action like this one – when the defendant accepts an offer of compromise that is silent as to attorney fees and costs – what amounts the court shall give by judgment. As to the amount for attorney fees and costs, they are those "determined by the court to have been incurred **before service of the offer**." *Id.* (emphasis added). The trial court in this case, however, looked past both the temporal restriction and the mandate as to what shall be given by judgment, and awarded Noble fees and costs incurred after TriMet had served its offer of compromise.

Simply reading the plain words of subsection (2) in straightforward manner should be enough to show that the trial court erred. Statutory construction does not have to be a long and complicated endeavor. Indeed, sometimes the Court should not have to construe a statute at all but, instead, only apply it. To TriMet, this is such a case. Two adverse decisions later, however, and this merits brief unfortunately has become both a long and complicated endeavor.

In the Court of Appeals, TriMet emphasized that ORS 35.300(2) not only provides a bar date for attorney fees and costs but goes further and directs what the trial court must put in the judgment. The Court of Appeals, however, did not

address that argument. Instead, it repackaged TriMet's contention as arguing the mere authorization of pre-offer fees and costs impliedly prohibited an award of those incurred thereafter. That argument, to the panel, invokes the maxim that the inclusion of one omits the other, a rule of construction that has fallen into disfavor. But, if this case is to be decided on maxims, then TriMet has provided the Court below with a number of them that support a plain reading of the statute's terms.

As a matter of context, there is potentially a lot of it. The eminent domain statutes provide special procedures for condemnation actions. TriMet takes the Court through those and, in the end, is confident that nothing about the rest of ORS Chapter 35 casts any doubt about the plain meaning of ORS 35.300(2).

And then there is ORCP 68. Whether or not a long line of Court of Appeals' decisions interpreting that rule to provide a substantive right to fees-on-fees in fee-bearing cases were decided providently or improvidently (this Court has yet to weigh in), ORS 35.300(2) is a more specific statute and applies in a specific context. Subsection (2), not a construction of Rule 68, should govern.

Lastly is the legislative history surrounding the enactment of ORS 35.300(2) in 2009. TriMet would liked to have been able to argue that the wells of the House and Senate were filled with statements like "We say what we mean and mean what we say." But it cannot. As is most often the case, the legislative history here does nothing to blunt the impact of the statute's text read in context. Yet, what history does exist favors TriMet's view, because the commentary enforces the notion that those involved repeatedly remarked about defendants such as Noble receiving fees and costs incurred before service of the offer and an intent that the statute operate like offers of judgment under ORCP 54 E.

The decision of the Court of Appeals and the Second Supplemental Judgment entered by the trial court should be reversed.

II. ARGUMENT

A. Text

ORS 35.300(2) provides:

> "If an offer of compromise under this section does not specifically include amounts for costs and disbursements, attorney fees and expenses, upon acceptance of the offer the court **shall give judgment** to the defendant for the amount offered as just compensation for the property and as compensable damages to remaining property of the defendant and, in addition, for costs and disbursements, attorney fees and expenses that are determined by the court to have been **incurred before service of the offer** on the defendant."

(Emphasis added.)[1] (TriMet has appended to this brief as an appendix excerpts from ORS Chapter 35, taken from the legislature's website but converted to 14-point font. The excerpts are more inclusive than the statutes cited herein, although not every statute in the chapter has been included.)

As noted above, the offer of compromise in this case did not specifically include amounts for costs and disbursements, attorney fees, and expenses. Noble nevertheless accepted the offer, triggering application of subsection (2). Once applicable, ORS 35.300(2) directed that the trial court "shall give judgment" to her for two amounts. *See, e.g., Doyle v. City of Medford*, 347 Or 564, 570-71, 227 P3d 683 (2010) ("Ordinarily, use of the word 'shall' implies that the legislature intended to create an obligation * * *."). First was the amount offered as "just compensation for the property and as compensable damages to the remaining

[1] Expenses are the "costs of appraisals and fees for experts incurred in preparing and conducting the defense to the action." ORS 35.335(2); *see also* ORS 35.300(6) (adopting that definition for purposes of ORS 35.300).

property[.]" The trial court did that in the $22,000 Stipulated Limited Judgment. TriMet had no issue with that judgment.

Second was the amount "for costs and disbursements, attorney fees and expenses that are determined by the court to have been incurred before service of the offer on the defendant." The trial court did that in the $13,796.33 Supplemental Judgment. TriMet had no issue with that judgment either.

But, the trial court also provided by way of judgment – the Second Supplemental Judgment – a third amount: the attorney fees and costs Noble incurred **after** service of the offer for prosecuting her claim for fees and costs. TriMet did, and does, take issue with that final judgment. In TriMet's view, the third amount of the award the trial court gave to Noble by judgment simply cannot be squared with the plain command set out by the words of ORS 35.300(2). The statute says what shall be given in judgment, and the Second Supplemental Judgment gave Noble more than the statute allows. At least at the level of text, if the inquiry is in fact more complicated than that, then TriMet must apologize because it is unable to discern the nuances of the analysis.

The straightforward nature of the text of ORS 35.300(2), again in TriMet's view, appears borne out by the discussion of the statute's words by others in the earlier stages of this litigation – whether by argument or opinion. The trial court, for example, stated from the bench that "[m]y reasoning, ultimately, is that I don't think the language of statute that's relied upon [by TriMet's counsel] was intended to apply under the circumstances that we're talking about." (ER 22 (bracketed text added).) And, later, in its letter ruling, the trial court stated that "the recovery of such fees was implicitly contemplated in the crafting of ORS 35.300." (ER 25.) What the trial court did find persuasive was case law construing ORCP 68 and, to

at least some extent, a "public policy perspective." (ER 23.) Those considerations, however, are not text-based arguments.

As for Noble's counsel on appeal, they acknowledged that, "in a literal sense" (Answering Brief at 2, 9, and 13 n11), the fees-on-fees were incurred after service of the offer – how could they not? – but directed their text-based advocacy on the statutory directive that fees and costs, under ORS 35.300(2), "are determined by the court" – who else would? (Answering Brief at 7.) Because courts determine fees and costs pursuant to ORCP 68 – in almost all cases, including this one – and because the Court of Appeals has construed that rule to allow fees-on-fees, the argument went, the statute supports post-offer fees. (*Id*.) But, similarly to the trial court's analysis, that argument has very little to say about the words the legislature chose to use and, instead, is focused upon contextual considerations.

Finally, there is the Court of Appeals' decision. The panel did not begin its analytical discussion with the text of ORS 35.300(2), or the statute at all. Instead, it began "with a review of the process for obtaining attorney fees under ORCP 68." *Aizawa*, 277 Or App at 510.) Three pages later, the Court offered the following:

> "[T]he text of ORS 35.300(2) authorizes the recovery of attorney fees up until a certain time, but does not expressly preclude a court from awarding fees on fees under ORCP 68. TriMet's argument, that the express authorization to award defendant attorney fees incurred before the offer should operate as an implicit preclusion of fees on fees, is a classic *expressio unius est exclusio alterius* argument. *See Colby v. Gunson*, 224 Or App 666, 671, 199 P3d 350 (2008) (*expressio unius est exclusio alterius* is a maxim of statutory construction that means "the expression of one is the exclusion of others"). Although an authorization in a statute is sometimes read as a limitation if the context suggests that statutory intent, we have disavowed that maxim as a primary rule of statutory construction. *Id.* ("[T]he *expressio unius* guide to legislative intent corroborates, rather than supplies, meaning to a statute."). In this case, there is nothing in the context of ORS 35.300(2) to suggest that ORS 35.300(2) precludes fees on fees

> and, thus, it would not be appropriate to presume that preclusive effect from the text of ORS 35.300(2) alone."

Aizawa, 277 Or App at 312-13.

But TriMet did not argue either that ORS 35.300(2) contained a mere "authorization" to award pre-offer fees or that the statutory mandate about what amounts shall be given by judgment is "an implicit preclusion" of post-offer fees-on-fees. Instead, TriMet argued, based on the words of the statute:

> The statute not only says when a party is entitled to an award of attorney fees and provides a temporal restriction for such fees, but also affirmatively directs the trial court to enter – not just any judgment, or a judgment consistent with judicial construction of ORCP 68 – but a judgment reflecting the trial court's specific determination of the attorney fees incurred *before service of the offer* * * *."

(Opening Brief at 8-9 (italics in original).) TriMet restated that argument, in one form or another, some seven times in its opening and reply briefs in the Court of Appeals. (*See* Petition for Review at 9.)

The Court of Appeals, however, did not address the argument TriMet actually made. Instead, the court addressed an argument that it had recast, one that, in its new form and according to the court, echoed the Latin maxim *expressio unius est exclusio alterius*. And, as it happens, the maxim is one that the Court of Appeals has largely disavowed.

A few preliminary comments respecting *expressio unius*. First, TriMet agrees that the maxim appears to be one of the first-level "rules of construction of the statutory text that bear directly on how to read the text" under *Portland General Electric Co. v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). *See, e.g., Fisher Broadcasting, Inc. v. Dept. of Revenue*, 321 Or 341, 353, 898 P2d 1333 (1995) (applying "*inclusio unius est exclusio alterius*" at first

level); Hon. Jack L. Landau, *Interpreting Oregon Law* § 244 (Oregon State Bar 2009) (including maxim in discussion of step-one text and context analysis).

Second, TriMet did not ask either the trial court or the Court of Appeals to apply the maxim.

Third, TriMet frankly does not know whether its textual argument – properly construed – actually implicates the logic behind the maxim. As this Court has stated: "*Expessio unius* arguments are most powerful when there is reason to conclude that a list of enumerated terms was intended to be exhaustive." *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 453, 353 P3d 581 (2015) (citing, as did the panel, to the Court of Appeals' decision in *Colby*). Here, it is not the "list" of amounts that shall be given by judgment that lie at the heart of the interpretive inquiry but, instead, the meaning of a temporal restriction placed on one of two categorical amounts.

Perhaps, however, in considering whether *expressio unius* is in play, the Court may wish to view the "enumerated terms" in the following way:

the amount offered for just compensation;

the amount offered as compensable damages to remaining property;

the amount for costs and disbursements incurred before service;

the amount for attorney fees incurred before service; and

the amount for expenses incurred before service?

If that is the correct way to parse the statute (and perhaps it is not), then one of this Court's recent observations could become relevant: "the longer the list of enumerated items and the greater the specificity with which they are stated, the stronger the inference that the legislature intended the list to be exhaustive."

Crimson Trace Corp. v. Davis Wright Tremaine LLP, 355 Or 476, 497, 326 P3d 1181 (2014). That list sounds pretty exhaustive, particularly when coupled with the direction that those amounts are not just "authorize[d]" – to quote the Court of Appeals – but mandated to be given by judgment.[2]

In the end, TriMet has not until now thought of its textual argument as anything but a plain reading of the words in ORS 35.300(2). And, for the reasons set out above, the *expressio unius* maxim – which on its best day is "simply one of inference", *Crimson Trace*, 355 Or at 497 – presents as a wobbly lens for viewing either what the legislature's words mean or TriMet argued. Indeed, if textual maxims are to come into play at all, then following seem much more on point:

> Do not insert what has been omitted (ORS 174.010) – Has not the Court of Appeals' construction effectively added to the end of ORS 35.300(2) ", except for fees-on-fees" or words to like effect?
>
> Do not omit what has been inserted (ORS 174.010) – Has not the Court of Appeals' construction effectively eliminated from ORS 35.300(2) the words "to have been incurred before service of the offer[?]"
>
> If possible, give effect to all of a statute's several provisions or particulars (ORS 174.010) – How has the Court of Appeals' construction given any effect whatsoever to the temporal qualification the legislature thought important enough to put in the statute?

This Court for at least two good reasons "is obligated to take a statute as we find it," *Wyers v. American Medical Response Northwest, Inc.*, 360 Or 211, 221, 377 P3d 570 (2016), and pays "careful attention to 'the exact wording of the statute,'" *Matter of Compensation of Muliro*, 359 Or 736, 745, 380 P3d 270 (2016)

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[2] The Court also noted in *Crimson Trace* that "whether something is stated in one portion of the statute, but excluded in another; the fact that the legislature took the trouble to include a provision in one part of the statute strongly supports the inference that any exclusion elsewhere in the statute is intentional." 355 Or at 498. TriMet addresses the other subsections of ORS 35.300 in the contextual analysis that follows.

(citation omitted). First, "'there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes[.]'" *Alfieri v. Solomon*, 358 Or 383, 392, 365 P3d 99 (2015) (quoting from *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009)). Second, "only that wording received the consideration and approval of a majority of the members of the Legislative Assembly" and "'* * * it is not the intent of individual legislators that governs, but the intent of the legislature as formally enacted into law.'" *Oregon Occupational Safety & Health Div. v. CBI Services, Inc.*, 356 Or 577, 588, 341 P3d 701 (2014) (citation omitted).

Put differently, words matter. Here, in light of all the foregoing, TriMet cannot waiver from the view that the text of ORS 35.300(2) – fairly, plainly, and objectively considered – admits of but one plausible construction: neither fee-on-fees nor any other post-offer fees, costs, expenses, or disbursements are available by judgment to a defendant who accepts a condemner's offer of compromise.

B. Context

TriMet sees three relevant categories of contextual considerations. *See, e.g., Matter of J.C.N.-V.*, 359 Or 559, 579, 380 P3d 248 (2016) ("A statute's context includes other provisions of the same statute as well as the common law and statutory framework within which the statute was enacted."). First are the other parts of the eminent domain laws relating to the recovery of attorney fees and costs. Second is ORCP 54 E (because it was part of the legislative discussion surrounding the enactment of ORS 35.300(2)). Third is ORCP 68 and the way in which the Court of Appeals has interpreted that rule. TriMet addresses each in order.

1. The Rest of ORS Chapter 35

The legislature has addressed the subject of attorney fees and costs in the context of condemnation cases comprehensively, which is not unimportant as a matter of context. That focus, moreover is not surprising because, elsewhere in Chapter 35, the legislature has stated that, "[e]xcept for procedures provided in ORS chapter 368 [county roads], any action for the condemnation of property under the power of eminent domain shall be conducted according to this chapter." ORS 35.375 (bracketed text added); *see also* ORS 35.205 ("This chapter may be cited as the General Condemnation Procedure Act."); *Washington County v. Querbach*, 275 Or App 897, 904, 366 P3d 390 (2015) (noting that "[t]he **special procedures** governing condemnation actions are located in ORS chapter 35." (Emphasis added.), *rev den*, 359 Or 667 (2016).[3]

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[3] *Querbach* went much farther than that generalized statement, drilling down to the bedrock of the interplay between condemnation statutes and procedural codes in Oregon – the Deady Code and an 1869 decision from this Court. 275 Or App at 909-11. One of the issues before the Court of Appeals was the effect, if any, of the filing requirements of ORCP 9 on the offer of compromise statutes in Chapter 35:

> "In sum, the statutory scheme of ORS chapter 35 – which contains condemnation settlement procedures that have superseded generally applicable settlement procedures for more than a century and a half – and the conflicts between ORCP 9 and ORS 35.300 lead us to conclude that ORS 35.300 contains the exclusive filing requirements for pretrial offers of compromise in condemnation actions."

Querbach, 275 Or App at 912. Also relevant is the fact that the court compared offers of compromise in condemnation actions to offers of judgment under ORCP 54 E – "the parties, in essence, have formed a settlement contract" – but still held, after considering the same legislative history TriMet discusses below, that "the condemnation procedure concerning offers of compromise and their effect on attorney fees and costs is different from and supersedes the general civil procedure requirements related to settlement offers under ORCP 9 and ORCP 54." 275 Or App at 905, 911. The decision, which ultimately held that a defendant who rejected an offer of compromise but did worse at trial was not entitled to fees and costs after service of the offer under ORS 35.346(7)(a), 277 Or App at 918, is worth this Court's attention.

In any event, with respect to offers of compromise, those must "indicate whether the offer includes any amount for costs and disbursements, attorney fees and expenses and, if so, the amounts * * *." ORS 35.300(1). The statutes address the various potential outcomes as follows:

OFFER SILENT AS TO FEES/COSTS – OFFER ACCEPTED: The defendant is entitled to fees and costs "that are determined by the court to have been incurred before service of the offer on the defendant." ORS 35.300(2) – that is the statute at issue here. (Temporal restriction for defendant – before service.)

OFFER SPECIFIC AS TO FEES/COSTS – OFFER ACCEPTED FOR JUST COMPENSATION AND DAMAGES BUT NOT FOR FEES/COSTS: "[T]he defendant is entitled to an award for costs and disbursements, attorney fees and expenses incurred by the defendant before service of the offer on the defendant." ORS 35.300(3). (Temporal restriction for defendant – before service.)

OFFER REJECTED – LESS FAVORABLE JUDGMENT:

> "(a) The defendant may not recover prevailing party fees or costs and disbursements, attorney fees and expenses that were incurred on and after service of the offer;
>
> "(b) Unless the parties agree otherwise, the court shall give judgment to the defendant for costs and disbursements, attorney fees and expenses that were incurred by the defendant before service of the offer; and
>
> "(c) The court shall give judgment to the condemner for the condemner's costs and disbursements, other than prevailing party fees, incurred by the condemner on and after service of the offer."

ORS 35.300(4). (Temporal restriction for defendant – before service (but also specifies no after-service costs, disbursements, attorney fees, expenses, or prevailing party fees); temporal and substantive restrictions for condemner – after

service and only costs and disbursements without attorney fees or prevailing party fee).)[4]

Unsurprisingly, there is nothing mandatory about offers of compromise. But they are not the only offers in condemnation cases. There is also a compulsory one – the "written offer" – a condemner must make upon the owner / interest holder at least 40 days before filing a condemnation action "to purchase the property or interest, and to pay just compensation therefor and for any compensable damages to remaining property." ORS 35.346(1). If the written offer doesn't work out; there is no later offer of compromise; and a trial or arbitration follows, then the fees and costs work out this way:

WRITTEN OFFER REJECTED – MORE FAVORABLE JUDGMENT <u>OR</u> BAD FAITH WRITTEN OFFER: "[T]he court or arbitrator shall award the defendant costs and disbursements including reasonable attorney fees and reasonable expenses * * *." ORS 35.346(7)(a)-(b). (No temporal restriction for defendant).

GOOD FAITH WRITTEN OFFER REJECTED – LESS FAVORABLE JUDGMENT: The defendant is awarded no costs, disbursements, attorney fees,

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[4] As for how to determine whether the defendant has bettered an offer of compromise that specifically includes amounts for costs and disbursements,

> "the court shall first determine the amount of costs and disbursements, attorney fees and expenses incurred by the defendant before service of the offer on the defendant. The court shall add that amount to the amounts awarded under the judgment as just compensation for the property and as compensable damages to remaining property of the defendant. If the sum of those amounts is equal to or less than the total amount specified in the offer of compromise, the defendant has not obtained a judgment more favorable than the offer of compromise."

ORS 35.300(5). More on subsection (5) later.

or expenses. ORS 35.346(7) (authorizing such awards in specified cases "and no other"). Instead, the condemner is entitled to costs and disbursements, but not attorney fees or expenses. ORS 35.346(9) (such awards to be made "in all cases other than those in which defendant is entitled to costs and disbursements under subsection (7) of this section."). (Substantive restrictions, set out above, for condemner.)

Moreover and in addition to the context of offers, whether they be written or ones of compromise, the legislature also has provided for fees/costs awards when the condemner simply gives up and when the defendant prevails on appeal:

CONDEMNER ABANDONS ACTION: "[T]he court shall enter judgment in favor of the defendant for costs and disbursements in the action and for reasonable attorney fees and reasonable expenses as determined by the court. ORS 35.335(3). (No temporal restriction for defendant.)

DEFENDANT PREVAILS ON APPEAL: "[T]he costs and disbursements of the defendant, including a reasonable attorney fee to be fixed by the court, shall be taxed by the clerk and recovered from the condemner." ORS 35.355. (No temporal restriction for defendant.)

So what does all that context mean with regard to the legislature's intent? TriMet submits that nothing about the context takes away from the clear import of the words the legislature used. To the contrary and as set out below, the contextual evidence serves to confirm TriMet's understanding of what the legislature thought it was achieving. (TriMet acknowledges that the analysis – both above and below – is somewhat cumbersome, but that is the statutory framework in which ORS 35.300(2) exists. As noted above, this Court (and the parties) have no choice but to take the statute as they find it.)

To begin with, the Court should consider most of the statutes cited above as essentially a contextual wash. They simply provide for an award or no award (some with, some without, substantive restrictions) regarding attorney fees and/or costs but do not seek to limit any award temporally: ORS 35.346(7); ORS 35.346(7)(a); ORS 35.346(7)(b); ORS 35.335(3); and ORS 35.355. To grossly over-generalize, those statutes could be said to show that the legislature knows how to enact substantive but non-time-specific fee/cost awards when it wants to. That, in turn, could mean that the enactment of time-specific provisions shows a deliberate legislative intent for those time periods to be respected. While such an argument would advance TriMet's position, it candidly does not seem to be one capable of bearing much interpretive weight.

Then there are ORS 35.300(2) – the statute at issue here – and ORS 35.300(3) – subsection (2)'s counterpart for when the defendant believes the offer of compensation and damages is good enough but that the condemner has lowballed the fees and costs. The same temporal restriction applies: "before service of the offer." Here, the contextual pull is stronger. ORS 35.300 is nothing if not an attempt to promote settlement; that is, to incentivize conduct from both sides so that juries will not have to sit through days or weeks of riveting appraiser testimony and valuation evidence.

So assume that a condemner makes a fair offer for compensation/damages and an even better offer for fees/costs, but the defendant wants to hit an attorney-fees home run. He accepts the former but not the latter, and litigates the amount of pre-service fees and costs. We know that the condemner's offer was "even better" because the trial court later awards the defendant less for pre-service fees/costs than the condemner had offered. Under Noble's proffered interpretation and the

Court of Appeals' construction, the defendant still would be able to petition for all of his post-service fees and costs. That, respectfully, does not make sense and, because it doesn't, suggests that the legislature wrote what it meant in both subsections (2) and (3) of ORS 35.300.

Finally, there is ORS 35.300(4), which applies when the defendant wants to hit a compensation/damages home run, rejects the offer of compromise, but comes up short. In that circumstance, the statute does three things. One is that, absent some different agreement between the parties, it commands the trial court to give judgment to the defendant for fees/costs on the same terms as ORS 35.300(2): "before service of the offer." ORS 35.300(4)(b). Another is that, this time, the condemner also gets a favorable entry on the judgment(s) – but only for those costs and disbursements (not attorney fees or a prevailing party fee) "incurred * * * after service of the offer[.]" ORS 35.300(4)(c). The third is to provide: "[t]he defendant may not recover prevailing party fees or costs and disbursements, attorney fees and expenses that were incurred on and after service of the offer." ORS 35.300(4)(a).

It is that last thing upon which both Noble and the Court of Appeals seized for contextual support. (*See* Answering Brief at 12 ("This language demonstrates that [the] legislature knows how to include an explicit prohibition on fee recovery."); *Aizawa*, 277 Or App at 514 ("We are reluctant to supply the explicit preclusion of post-offer fees under ORS 35.300(4) as an implicit preclusion of **those same fees** pursuant to ORS 35.300(2)." (Emphasis added).).

But there is a serious problem with that argument, one that the boldface text above highlights: the "fees" identified in ORS 35.300(4)(a) are not, in fact, "those same fees" identified in ORS 35.300(2). Subsection (2) covers "costs and

disbursements, attorney fees and expenses." Subsection (4)(a), on the other hand, covers not only "costs and disbursements, attorney fees and expenses" but "**prevailing party fees**" (emphasis added) as well.

Which makes perfect sense. Subsection (2) applies before the jury's verdict; subsection (4) applies after. Manifestly, the legislature wanted to make sure that a defendant who does not beat an offer of compromise cannot somehow claim entitlement to a prevailing party fee – an after-service event – but also wanted to allow such a defendant to recover pre-service fees and costs (absent some other agreement between the parties). It did so for the latter in ORS 35.300(4)(b) but, for the former, it needed another paragraph: ORS 35.300(4)(a).

So, not only does ORS 35.300(4) **not** support the Court of Appeal's statutory construction, it counsels actively against it. That is, the legislature knew it wanted defendants in accepted-offer or improvidently-rejected-offer cases to receive only pre-service awards. And, when the potential existed for the award of something post-service for such defendants – by the possible application of statutory prevailing party fee provisions (something that can happen in this context only after an offer of compromise has been served and the jury's verdict been returned) it acted affirmatively to prevent such an occurrence.

So the question really should be, if the legislature took the time to write an entire paragraph to pretermit a defendant in those circumstances from receiving a post-service prevailing party fee in the hundreds of dollars, why would it have thought that same defendant should receive post-service attorney fees and costs running almost certainly into the thousands or tens of thousands of dollars? And why, if it thought that post-offer fees and costs would be in play, did the legislature

direct that only pre-offer fees and costs would be used to determine whether a defendant bettered the offer? ORS 35.300(5).

2. ORCP 54 E

ORCP 54 E(1) allows a party against whom a claim is made to serve an offer of judgment on the party making a claim. If the claiming party accepts the offer, and the offer does not state that it includes costs and disbursements or attorney fees, then "the party asserting the claim shall submit any claim for costs and disbursements or attorney fees to the court as provided in Rule 68." ORCP 54 E(2). However, if the claiming party rejects the offer and fails to obtain a more favorable judgment,

> "the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover from the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer."

ORCP 54 E(3).

The wording "incurred after the date of the offer" came from the Council on Court Procedures in 1980, and the relevant commentary for the addition states that it "also makes clear that a more favorable judgment bars not only all costs and disbursements, but attorney fees 'incurred after the date of the offer.'" *See* http://counciloncourtprocedures.org/Content/Promulgations/1980_promulgations at 135-36. The legislature did not make changes to the promulgated rule during the 1981 legislative session. *See* Oregon Laws 1981 at A-27 (table of amended or repealed ORCP); *cf. State v. Vanornum*, 354 Or 614, 633, 317 P3d 889 (2013) (Landau, J., concurring: "In brief, some [Rules of Civil Procedure] are statutes, and some are not. It depends on whether they were affirmatively enacted into law by the legislature." (Bracketed text added.)).

TriMet includes ORCP 54 E as part of the context for ORS 35.300(2) for two reasons. First, it includes a temporal restriction on the recovery of attorney fees and costs. Not only that, but in TriMet's view it is a functional equivalent of ORS 35.300(2), but queues from the word "after" rather than "before." (So, an unmet ORCP 54 E offer means that only pre-offer fees and costs are recoverable. *See, e.g., Delcastillo v. Norris*, 197 Or App 134, 104 P3d 1158 (affirming trial court's "awarding only costs originating prior to defendant's offer of judgment" in that circumstance), *rev den*, 113 P3d 434 (2005). Correspondingly, an accepted or unmet offer under ORS 35.300 should mean that only pre-offer fees and costs should be awarded. Whether the trigger is affirmatively "before" or negatively "after" should not matter (at least absent any indications of a contrary intent).

Second, and more importantly, TriMet includes this analysis because, as the discussion of legislative history that follows makes clear, the legislature very much thought that it was modeling ORS 35.300 on ORCP 54 E. And, for many of the same reasons already set out, TriMet believes that the defendants who in hindsight should have accepted a Rule 54 E offer of judgment are not as a matter of the text of that rule entitled to either fees-on-fees or any other post-offer fees or costs. However, absent an appellate decision construing the rule in that context, the discussion ultimately only begs the question. And, if there is any Oregon appellate authority on that issue, TriMet has been unable to locate it.

But what TriMet was able to find are cases from other jurisdictions interpreting their statutes and rules for offers of judgments. And those cases hold, with remarkable but unsurprising uniformity, that when an offer contains wording that sounds a lot like the wording in ORS 35.300(2), fees-on-fees are not recoverable. The following is a sampling from nearby courts:

> *Guerrero v. Cummings*, 70 F3d 1111, 1112-13 (9th Cir 1995), *cert den*, 518 US 1018 (1996). The defendant made an offer of judgment pursuant to FRCP 68 that included "attorney fees and costs incurred by this plaintiff prior to the date of this offer in an amount to be set by the court." *Id*. at 1112-13. The Ninth Circuit affirmed the decision not to award fees-on-fees, reasoning that "the plain language of the settlement offers limits attorney's fees to those accrued prior to the date of the offers[.]" *Id*. at 1113. Acceptance of an offer with such clear terms "clearly and unambiguously waived attorney's fees incurred thereafter." *Id*.
>
> *Johnson v. State, Department of Transportation*, 177 Wash App 684, 313 P3d 1197 (2013), *rev den,* 179 Wash 2d 1025 (2014). The Washington offer of judgment statute was nearly identical to the corresponding federal rule. *Id*. at 692 n 5. In affirming the decision not to award fees on fees, the Washington Court of Appeals expressly adopted the reasoning of the Ninth Circuit in *Guerrero* that the terms of the offer waived any post-offer fees. *Id*. at 696.
>
> *Marquez v. Harper Sch. Dist. No. 66*, 2012 WL 2469545 (D Or June 26, 2012), *aff'd in part, rev'd in part on other grounds*, 546 Fed App'x 659 (9th Cir 2013). The offer of judgment in that case was limited to "'properly recoverable costs and reasonable attorney fees accrued through the date of this offer.'" Magistrate Judge Sullivan denied any fees-on-fees: "The mere fact that a post-offer fee motion and cost bill would be required as an express condition of the offer does not render the language of the offer ambiguous." *Id.* at * 14. (Which is starting to sound a lot like Noble's argument here.)[5]

The Court of Appeals did not address Rule 54 E in its decision. For Noble's part, she argued that cases like those cited above are "irrelevant" (Answering Brief at 21) "because none interpreted an offer compromise with equivalent language to the one at issue here" (*id.* at 20). But as noted above and will be discussed below, the legislature seemed to think ORCP 54 E was relevant and maybe even important. And how other courts have looked at analogous (even if not identical) wording in the contractual context of offers of judgment (particularly in decisions

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[5] For the additional cases TriMet provided to the Court of Appeals, see Opening Brief at 14, and for a more recent decision from our District Court (Judge Hernandez), see *Nopper v. IGD Hospitality, Inc.*,____F Supp 3d____, 2016 WL 5844157 * 5 (D Or April 18, 2016) ("The offer unambiguously refers to the date the offer was made, and thus, only fees up to that date were included in the offer.").

before ORS 35.300(2) was enacted in 2009 – and TriMet cited to four of them) has the potential for at least some interpretive value. That potential more than warranted TriMet's discussion of ORCP 54 E below, and warrants it again in this brief.

3. ORCP 68

Sometime around the mid-1980's in Malheur County, a Mr. and Mrs. Jeppe breached their contract with Forrest W. and Elizabeth Ann Johnson to the tune of $24,108.18. The contract had an attorney fees provision. After Judge Yraguen found for the Johnsons on summary judgment, he took evidence and heard argument as to attorney fees, and awarded them $6,000. $1,450 of that was supported by a detailed statement (14.5 hours at $100 an hour) and was for work "incurred to the date of the judgment;" the rest ($4,550) was for "'expenses relative to the enforcement of the judgment[, which were] expected to be substantial[.]'" *Johnson v. Jeppe*, 77 Or App 685, 687, 713 P2d 1090 (1986) (bracketed text added).

The latter part of the award would not stand. And that, in part, was because six years before the Court of Appeals so ruled, the Council on Court Procedures promulgated ORCP 68. That rule, which governs the procedure for seeking attorney fees and costs, defined "attorney fees" as "the reasonable and necessary value of legal services related to the prosecution or defense of an action." *See* http://counciloncourtprocedures.org/Content/Legislative_History_of_Rules/ORCP_68_promulgations_all_years.pdf at 2; ORCP 68 A(1). The comment to the rule offers no assistance as to any potential deeper meaning: "It also defines attorney fees." *Id*. at 7.

In 1981, the legislature amended section A(1) in part, deleting "and necessary" from the definition. Or Laws 1981, ch 898, § 7. So, attorney fees were then defined as "the reasonable value of legal services related to the prosecution or defense of an action." In the intervening 30-plus years between then and now, ORCP 68 has been amended – both by the Council and the Legislative Assembly – but the definition of attorney fees has remained unchanged.

Judge Rossman, writing for the Court of Appeals in *Johnson*, relied upon that definition as follows:

> "The mechanism for awarding attorney fees pursuant to contract and to most statutes is set forth in ORCP 68, which defines attorney fees as 'the reasonable value of legal services related to the prosecution or defense of an action.' ORCP 68 A(1). **The enforcement of a judgment and final collection of money due are 'legal services related to the prosecution or defense of an action' and may be considered in awarding attorney fees.** The difficulty lies in determining the 'reasonable value' of these services before they are rendered. Among the factors a court may consider are the amount of time expected to be required, the amount of money damages involved and the fee customarily charged in the community for similar services.[ ]"

77 Or App at 688 (footnote omitted; emphasis added). And so was born "fees-on-fees" in Oregon.[6]

And it has led a full life. As the panel in this case, before citing a half-dozen prior Court of Appeals' decisions, noted:

> "When ORCP 68 applies, [ ] our precedent instructs us that 'the recovery of attorney fees, costs, and expenses to which a prevailing party is entitled by statute is related to the prosecution or defense of the action. As much as the collection of judgment, the recovery of

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[6] The court in *Johnson* determined that the $1,450 part of the award was supportable by "substantial, competent evidence," but the post-judgment part of the claim laid upon "pure speculation." 77 Or App at 688-89. Accordingly, the court remanded the judgment to be modified to award only $1,450 in attorney fees. *Id*. at 689. Judge Warren concurred. As a policy matter, he "would not allow attorney fees for services before they have been rendered" as the evidence for such an allowance "will necessarily be speculative." *Id.*

> those items is an entitlement that the statute confers on the party as an incident of the action."

Aizawa, 277 Or App at 510-11 (footnote and citation omitted).[7]

As TriMet noted in its petition review (at 8), it either is or perhaps should be the cause for concern that the Court of Appeals has carved a substantive right to attorney fees out of a procedural rule:

> "We have recognized a limited exception to the general rule that ORCP 68 does not operate as an independent source of substantive authority for an award of attorney fees. When a source of law independent from ORCP 68 authorizes a party to recover attorney fees, and ORCP 68 applies to the case, we have construed ORCP 68 to provide substantive authority for an award of the attorney fees incurred in seeking to recover attorney fees that the party is already entitled to."

Aizawa, 277 Or App at 510. And that concern, frankly, should exist whether Rule 68 is seen as an administrative "rule-rule" or a legislative "statute-rule" in light of the analysis of the concurrence in *Vanornum*.[8]

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[7] TriMet has been unable to find any instances in which this Court has analyzed or specifically embraced the idea of fees-on-fees, but there are at least several reported decisions in which the Court has applied it. *See, e.g., Strawn v. Farmers Ins. Co. of Oregon*, 353 Or 210, 234, 297 P3d 439 (2013) (awarding uncontested fees for "objections to the original attorney fee petition"); *Strunk v. Public Employees Retirement Board*, 343 Or 226, 241 n 6, 169 P3d 1242 (2007) (refusing to consider billing entries relating to "creation of the lawyers' respective fee petitions" under common fund doctrine).

[8] As this Court stated recently in *Montara Owners Assn. v. La Noue Development, LLC*, 357 Or 333, 353 P3d 563 (2015):

> "ORCP 68 was not intended to affect any substantive right of a party to attorney fees as consequential damages for a breach of contract. *See* ORCP 68 C(1) (distinguishing procedure for 'the pleading, proof, and award of attorney fees' from 'the source of the right to recover such fees'); Council on Court Procedures, Oregon Rules of Civil Procedure and Amendments, Rule 68 comment, at 21 (Dec. 13, 1980) ('[T]he rule *simply provides a procedure* for assessing such fees no matter what source is relied upon as providing the right to such fees.' (Emphasis added.))."

357 Or at 359.

But TriMet did not below and does not here challenge the way in which the Court of Appeals historically has treated the rule: ORCP 68 permits the recovery of fees-on-fees. That principle, setting aside its provenance, has plenty of generic intuitive appeal. But it is not just fees-on-fees that Rule 68 A(1) permits. It also permits recovery of fees and costs for the "enforcement of a judgment and final collection of money due" – the issue in *Johnson*. 77 Or App at 688. It should also apply to efforts to renew a judgment or anything else that might happen after a case is "over." And that is because all of those things would be "related to the prosecution or defense of an action." ORCP 68 A(1).

Those words, that definition, highlights the flaw in the Court of Appeals' construction of ORS 35.300(2). As noted above, Noble's trial counsel was careful to segregate out from his fees-on-fees request "the effort that I expended after the offer of compromise in connection with the main case" because that "is too late." (ER 18.) But, if the Court of Appeals' decision is correct, he should not have done that. He should have asked for the 0.3 hours he spent on April 15, 2013, to "Review TriMet's motion to set aside dismissal" (Supp ER 37) and the two-tenths to "Review limited judgments regarding other owners" (*id.* at 38) on May 6th, and everything else that came after TriMet served its offer of compromise. Because all those efforts, taking the billing statement at its word (as TriMet does and this Court should), were in relation to his defense of the action on behalf of Noble.

Yes, this was a fees-on-fees case. But the construction that the Court of Appeals has given to ORS 35.300(2) implicates much more than that. And it raises an exceedingly important interpretive question: if the Legislative Assembly really meant by writing the words "the court shall give judgment to the defendant for [attorney fees and costs] incurred before service of the offer" to mean "any

attorney fees and costs incurred related to the defense of the action" then why try to qualify the award at all?

As a final matter, the parties below and the Court of Appeals in its decision spent considerable time analyzing that court's prior Rule 68 fees-on-fees cases. TriMet does not believe that those cases are particularly instructive. Again, while not endorsing those decisions, neither has TriMet challenged them. The question here is, accepting those cases and given how Rule 68 has been interpreted, did the legislature intend something different for ORS 35.300(2)? That said, TriMet provides below brief discussions of some of those decisions.

***Strawn v. Farmers Ins. Co. of Oregon*, 233 Or App 401, 425, 226 P3d 86 (2010).** The statute at issue, ORS 742.061(1), provided that "a reasonable amount * * * as attorney fees shall be taxed as part of the costs of the action and any appeal thereon." The Court of Appeals held that fees on fees were permitted "because the process of litigating the fee petition for appellate work is properly considered part of the appeal." 233 Or App at 425. Nothing about the statute suggested a temporal restriction.

***Crandon Capital Partners v. Shelk*, 219 Or App 16, 42, 181 P3d 773 (2008)**. *Crandon* was a shareholder derivative action with the right to recover attorney fees coming not from a statute but, instead, the common law substantial benefit doctrine – a doctrine this Court fleshed-out from "shareholder derivative cases from other jurisdictions, particularly Delaware." *See* 219 Or App at 27 (generally) and 42 (discussing basis for fee claim). In that context, it appears (or at least was argued) that the doctrine prevents the recovery of fees after a tender offer is accepted, or the desired corporate change occurs, on the theory that any later-generated fees benefit only counsel and not the shareholders. *Id.* at 42. The Court

of Appeals in that case allowed fees on fees based on its earlier interpretation of Rule 68. *Id.* at 43.

The Court of Appeals in this case likened the common law rule to ORS 35.300(2): "Like the substantial benefit doctrine in *Crandon*, the text of ORS 35.300(2) authorizes the recovery of attorney fees up until a certain time, but does not expressly preclude a court from awarding fees under ORCP 68." *Aizawa*, 277 Or App at 512. But one would not expect linguistic precision from a common-law concept developed over the course of decades and across jurisdictions. And it certainly is not a doctrine that has evolved across the nation with concerns about the potential impact of myriad rules of civil procedure. In the end, whether the courts should apply rules as previously construed in a particular common-law context and whether they should do so in the face of an express legislative directive are two very different questions.

***Emerald People's Utility District v. PacifiCorp*, 104 Or App 504, 507, 801 P2d 141 (1990), *rev den*, 311 Or 222 (1991)**. *Emerald PUD* was a condemnation action. The defendant won at trial and was awarded, among other things, fees-on-fees. The Court of Appeals' decision does not indicate the statutory authority for the base attorney fees award. (Presumably it was ORS 35.346(7), which had been on the books for a long time and would seem to apply. *See* Or Laws 1973, ch 617, § 2. Again, that statute contains no temporal restrictions.) In any event, the condemner argued that fees-on-fees were not "part of the 'prosecution of an action,'" an argument the court rejected based on the reasoning of *Johnson*. *Emerald PUD*, 104 Or App at 507. Like *Strawn*, because the case implicated no question as to when the fees were incurred, it does little if anything to help answer the question on review.

C. Legislative History

As noted immediately above in the discussion of *Emerald PUD*, what is now ORS 35.346(7) was enacted in the early 1970's. Back then, subsection (7)(a) provided for fees and costs to a prevailing defendant at trial as follows:

> "If the amount of just compensation assessed by the verdict in the trial exceeds the highest written offer in settlement submitted by condemner to those defendants appearing in the action at least 30 days prior to commencement of said trial."

Or Laws 1973, ch 617, § 2.

30 years later, the United States Supreme Court decided *Kelo v. City of New London*, 545 US 469, 125 S Ct 2655, 162 L Ed 2d 439 (2005), which determined that acquisition of property by a public condemner for reconveyance to a private entity was a "public use" in some circumstances under the just compensation clause of the Fifth Amendment to the United States Constitution. Ballot Measure 39 (2006) was Oregonians in Action's response to that decision. The measure, which voters adopted, added a new statute to ORS Chapter 35 providing that, with some exceptions, "a public body * * * may not condemn private real property * * * if at the time of the condemnation the public body intends to convey fee title * * * or a lesser interest than fee title, to another private party." ORS 35.015(1).

But Measure 39 also changed a few of the words in ORS 35.346(7)(a):

> "If the amount of just compensation assessed by the verdict in the trial exceeds the [*highest*] **initial** written offer in settlement submitted by condemner to those defendants appearing in the action [*at least 30 days prior to commencement of said trial*] **pursuant to subsection (1) of this section**[.]"

http://sos.oregon.gov/elections/Documents/pamphlet/2006/general-election-measures.pdf (deleted text in brackets and italics; new text in boldface). Subsection (1) is the mandatory initial written offer, discussed above (*supra* at 15), that a condemner must make on an owner at least 40 days before

commencing a condemnation action. So whereas before the defendant had to beat the last offer made within 30 days of trial, Measure 39 pushed that all the way back to the initial written offer made well before the litigation even begins. *See generally Portland General Electric Co. v. Mead*, 235 Or App 673, 677-78, 234 P3d 1048 (2010) (discussing Measure 39).

The change apparently did not work well. Portland City Commissioner Nick Fish described the problem this way:

> "The law [before Measure 37] placed the risk of going forward to trial disproportionately on the property owner. I believe the law was correctly perceived as giving an unfair advantage to the government, by allowing the government to 'low-ball the owner right up to a month before trial. * * *
>
> "Today, the government is required to make an initial written offer from the property it seeks to acquire before filing suit. If the property owner obtains a more favorable result, the government is required to pay all of the owner's costs, expenses and attorney fees. * * *
>
> "In the City's experience the effect of the current law has been to discourage settlement, promote litigation, and drive up the cost of necessary public projects. This is poor public policy. The law ought to give both parties in a condemnation action incentive to settle on the question of just compensation."

Exhibit 15, Senate Judiciary Committee, SB 794, April 16, 2009, at 1-2 (letter from Commissioner Nick Fish).

The solution was Senate Bill 794 (2009), but it got off to a shaky start. David Hunnicutt, President of Oregonians in Action (OIA), argued that the bill as originally drafted would have essentially returned Oregon law to what it was before Measure 37 *and* allow offers of compromise as late as 10 days before trial. Exhibit 5, Senate Judiciary Committee, SB 794, April 16, 2009, at 2 (letter from Dave Hunnicutt). So, whether voluntarily or with legislative prodding, OIA and

the bill's proponents (the City of Portland and the League of Oregon Cities) sat down to forge a compromise. *Id.*

The compromise came in the form of the dash-2 amendments to SB 794. As for what would become ORS 35.300(2), they provided as follows:

> "(2) Unless an offer of compromise under this section specifically includes amounts for expenses, attorney fees and other costs, upon acceptance of the offer the court shall give judgment to the defendant for the amount of the offer and, in addition, for the costs and disbursements, attorney fees and expenses as defined in ORS 35.335 that are determined by the court to have been incurred before the date of the offer."

Exhibit 1, Senate Judiciary Committee, SB 794, April 16, 2009, at 1 (dash-2 amendments). In other words, all of the essential elements for resolving the textual considerations in this case – "court shall give judgment," "incurred before," and "offer" (but using date of the offer instead of service of the offer) – by that time were already in place. The Senate Judiciary committee adopted the dash-2 amendments and recommended "do pass" on April 30, 2009, and the full Senate passed the bill 30-0 less than a week later.

In the House Judiciary Committee, there were additional amendments offered and, on June 2nd, accepted. With respect to ORS 35.300(2), the amendments changed the A-Engrossed version of SB 794 as follows:

> "(2) [*Unless*] **If** an offer of compromise under this section [*specifically includes*] **does not specifically include** amounts for **costs and disbursements** [*expenses*], attorney fees and [*other costs*] **expenses**, upon acceptance of the offer the court shall give judgment to the defendant for the amount **offered as just compensation for the property and as compensable damages to the remaining property of the defendant** [*of the offer*] and, in addition, for [*the*] costs and disbursements, attorney fees and expenses [*as defined in ORS 35.335*] that are determined by the court to have been incurred before [*the date*] **service** of the offer **on the defendant**."

Exhibit 4, House Judiciary Committee, SB 794, May 19, 2009, at 1 (dash-4 amendments). Apart from making more specific what the first amount of the

judgment shall be and placing the cut-off at service rather than "the date" of the offer, subsection (2) remained as the Senate had passed it. The amended version of engrossed SB 794 version was passed out of House Judiciary Committee and, on June 10th, the full House adopted the bill 55-0. The Senate concurred with the House amendments on June 12th.

Nothing about the drafting history of ORS 35.300(2) suggests anything at variance with the plain wording of the statute. Nor, as demonstrated below, does anything about the commentary surrounding its enactment encourage a different understanding. Instead, those comments show that the people involved with the process shared a common understanding that offers of compromise in the condemnation context should work like offers of judgment under the Rules of Civil Procedure and that the terminal date for attorney fees and costs was the date the offer was served.

For example, Portland's Chief Deputy City Attorney, Harry Auerbach, testified in support of the bill and compared what has been codified at ORS 35.300(2) to an offer of judgment:

> "we not asking for this bill to actually do anything that is unusual in civil litigation. All we are really trying to do is incorporate a version of what is already in existence generally in civil case through the rules of civil procedure for offers of compromise and to the specific context of eminent domain litigation. So it is a process that already exists in other contexts, we are just trying to tailor something that is applicable to this special kind of proceeding."

Testimony of Harry Auerbach, House Judiciary Committee, May 19, 2009 at 1:39:50 (https://olis.leg.state.or.us/liz/2009R1/Committees/HJUD/2009-05-19-13-00).

The City of Medford also submitted written testimony in support of SB 794. Exhibit 4, Senate Judiciary Committee, SB 794, April 16, 2009. The City's written

submission quoted extensively from ORCP 54 and stated that "SB 794 directs that condemnation offers be governed by similar guidelines and rules established in ORCP 54." Finally, the Oregon Department of Transportation submitted written testimony further discussing how ORS 35.300(2) would operate like an offer of judgment.

> "SB 794-A also would allow ODOT to make an offer of compromise after filing a condemnation action at least 10 days prior to trial. The Oregon Rules of Civil Procedure provide for this in most civil actions, but some argue that those rules do not apply in condemnation cases. * * * If the owner accepts, the Department would pay the settlement amount and the attorney fees and costs up to that date."

Exhibit 16, House Judiciary Committee, SB 794, May 19, 2009 (correspondence from Amy Joyce, ODOT Highway Division).

ODOT's understanding that accepted offers meant fees and costs "up to" the date of service of the offer was not an isolated one. David Hunnicutt stated that "if they [the property owner] accept that offer, they will be entitled to all of the fees and costs and expenses that they have incurred prior to the time that the offer was made. So the property owner * * * our concern was making sure that the property owner was made whole throughout the entire course of the proceedings. That is the case here." Testimony of David J. Hunnicutt, House Judiciary Committee, May 19, 2009 at 1:41:40 (brackets added). And add to that the written comments of Commissioner Fish: "[i]f the owner accepts the offer, the government would pay the owner's costs, expenses and attorney fees incurred as of the date of the offer." Exhibit 15, House Judiciary Committee, SB 794, May 19, 2009 (letter from Commissioner Nick Fish.

As noted in TriMet's petition for review, the Court of Appeals did not address the legislative history of ORS 35.300(2). TriMet believes that, although the foregoing shows that there was no smoking gun to be found relative to the

question on review, neither was there complete silence on the issue. *See, e.g, Wyers v. American Medical Response Northwest, Inc.*, 360 Or 211, 227, 377 P3d 570 (2016) ("Inferring legislative intent on the basis of a lack of comment in the legislative history is problematic for several reasons."). And what there is supports, and does not detract from, TriMet's position.

D. Final Considerations

Not that it matters, but TriMet genuinely believes there can be no serious doubt as to what the result should be when ORS 35.300(2) is run through the *PGE/Gaines* gauntlet. At the same time, TriMet cannot deny that, in a state that has embraced the idea of fees-on-fees for going on four decades, confronting a statute like this one can be a little jarring.

For some, it may just seem unfair. (*See, e.g.*, Answering Brief at 17 (TriMet's interpretation "would produce a strange, irrational, and inequitable result: the ORCP 68 fee-recovery process would operate effectively as a setoff that reduces the property owner's recovery of just compensation * * *.")) However, if attorney fees are part of the constitutional just compensation calculus in eminent domain, then TriMet is unaware of those authorities. But still, these are cases in which "the government initiates the proceedings and then brings its considerable leverage and vast resources to bear on private citizens * * *." (Answering Brief at 16.)

For others, like the trial judge below, they might question the statute at a policy level: "Frankly, from a public policy perspective, which isn't the only basis for my decision, otherwise any time the condemner wanted to, they could put the other side to the test and make them incur fees in seeking to obtain their fees." (ER 23.) But as this Court stated more than century ago, "[w]ith the wisdom or

folly of the legislation in the question, we have nothing to do." *Corvallis & E.R. Co. v. Benson*, 61 Or 359, 383, 121 P 418 (1912). Instead, "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein." ORS 174.010.

Putting those considerations aside, even if we were to have that debate, TriMet submits that the results would not be as clear-cut as Noble would have the Court believe. To begin with, her concerns about a clarion call for condemners to low-ball fee proposals or object to fee petitions simply to run up the other side's fees (of course, incurring their own fees in the process – a self-inflicted wound without the potential for recoupment) rests upon the doubtful idea that governments want to mess with their people just because they can. (Indeed, in this case, TriMet did not challenge anything about Noble's fee petition (hours, rate, reasonableness) apart from entitlement post offer and a clerical error. (ER 11-14.))[9]

And even if it were the case that governments that take property also act vindictively, courts are not inert in that regard. They have inherent powers and a potent weapon in ORCP 17 to police renegade governmental litigators. There is also the Oregon State Bar.

And whatever value concerns like Noble's might justifiably have would need to balance against what TriMet will call the harm that such a construction would cause. There would be at least some damage, in TriMet's view, to the respective roles the legislative and judicial branches play in the enactment and

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[9] And, an incentives-based argument runs both ways. What better way to cap-off a hard fought, two day mediation with ODOT than to spend the next two weeks – ORCP 68 C(4)(a) has a 14-day time limit – futzing with the fee petition? Of course, the same could be said for **every** fees-on-fees scenario. But it's not. So why should the discourse be any different when government is on the other side?

interpretation of statutes. The *PGE/Gaines* paradigm did not evolve by accident. And, even though only fees-on-fees are at issue here, affirming the Court of Appeals' decision undoubtedly would effect an entire rewriting of ORS 35.300(2). Anything fees or costs post-offer relating to the defense of the action – read: everything in an attorney's bill – would be subject to a supplemental judgment. And, finally, if ORS 35.300(2) allows post-offer fees and costs, then would not the same result almost necessarily have to obtain for ORCP 54 E?

In the end, Noble is asking to Court to pull too much weight. If in fact Oregonians in Action or anyone else believes that the idea property owners should be "made whole throughout the entire course of the proceedings" (Testimony of David J. Hunnicutt, House Judiciary Committee, May 19, 2009 at 1:41:40) means fees-on-fees should be recoverable in settled condemnation actions, then they or it need to ask the legislature to amend the statute. The one that is there now doesn't allow them.

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III. CONCLUSION AND REQUEST FOR RELIEF

For all the foregoing reasons, TriMet respectfully asks this Court to construe ORS 35.300(2), reverse the decision of the Court of Appeals, and reverse the Second Supplemental Judgment of the circuit court.

Dated this 23rd day of November, 2016.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

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 11,466 words.

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

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 23, 2016, I caused to be electronically filed the foregoing PETITIONER ON REVIEW'S BRIEF ON THE MERITS with the State Court Administrator, Appellate Courts Records Section through the eFiling system and served on the parties or attorneys for parties identified herein, in the manner and on the date set forth below:

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