IN THE SUPREME COURT FOR THE STATE OF OREGON

KEVIN RAINS and MITZI RAINS,

Plaintiffs-Respondents-Respondents on Review,

v.

STAYTON BUILDERS MART, INC.; JOHN DOE LUMBER SUPPLIER; JOHN DOE LUMBER MILL; and FIVE STAR CONSTRUCTION, INC.,

Defendants.

STAYTON BUILDERS MART, INC.,

Third-Party Plaintiff-Respondent-Respondent on Review,

v.

RSG FOREST PRODUCTS, INC., et al.

Third-Party Defendants,

and

WEYERHAUESER COMPANY,

Third-Party Defendant-Appellant-Petitioner on Review.

WEYERHAUESER COMPANY,

Fourth-Party Plaintiff,

v.

RODRIGUEZ & RAINS CONSTRUCTION, an Oregon corporation,

Fourth-Party Defendant.

Marion County Circuit Court Case No. 06C21040

Court of Appeals No. A145916

Supreme Court No. S062959

WITHERS LUMBER COMPANY,

Fourth-Party Plaintiff,

v.

SELLWOOD LUMBER CO., INC., an Oregon corporation; and WEYERHAUESER COMPANY,

Fourth-Party Defendants.

WESTERN INTERNATIONAL FOREST PRODUCTS, INC.,

Fourth-Party Plaintiff,

v.

BENITO RODRIGUEZ, KEVIN RAINS, and RODRIGUEZ & RAINS CONSTRUCTION,

Fourth-Party Defendants.

SELLWOOD LUMBER CO., INC., an Oregon corporation,

Fifth-Party Plaintiff,

v.

SWANSON BROS. LUMBER CO., INC., an Oregon corporation,

Fifth-Party Defendant.

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW STAYTON BUILDERS MART, INC.

Appeal from Judgments of the
Marion County Circuit Court,
Dennis J. Graves, Judge

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I. INTRODUCTION

The merits brief filed by Weyerhaeuser Company (Weyerhaeuser) raises five questions and proposes five corresponding rules of law. As to the first three questions and corresponding rules, Stayton Builders Mart (Stayton) adopts and incorporates what plaintiffs say about those in their merits brief. Stayton takes no position with respect to the fourth question and corresponding rule. The fifth question and corresponding rule relate to part of the damages recovered by Stayton in its common law indemnity claim against Weyerhaeuser. As to that question and corresponding proposed rule of law (1) Weyerhaeuser did not preserve its fifth question for this court's review; (2) Weyerhaeuser's corresponding proposed rule of law is not supported by any of the authorities Weyerhaeuser relies on and arises only because the Court of Appeals improperly reached an issue not raised by Weyerhaeuser before that court and then resolved that issue contrary to the legislature's intended application of ORCP 22 C and ORS 31.600-610. This court should affirm in part and reverse in part the decision of the Court of Appeals and either (1) affirm the judgments for Stayton, with the minor modification of the general judgment ordered by the Court of Appeals or, in the alternative (2) reverse the judgments for Stayton and remand the case to the trial court with appropriate instructions for resolving Stayton's indemnity claim on remand.

II. FACTS

The relevant facts are set forth in the Court of Appeals' decision, *Rains v. Stayton Builders Mart, Inc.*, 264 Or App 636, 639-42, 648-56, 336

P3d 483 (2014), *rev allowed*, 357 Or 111, 346 P3d 1212 (2015), as supplemented by those set out in plaintiffs' merits brief (which Stayton adopts and incorporates in this brief), and those set out in later sections of this brief.

III. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

As to Weyerhaeuser's first three questions and their corresponding proposed rules of law, Stayton adopts and incorporates plaintiffs' restatement of those questions and rules. Stayton takes no position with respect to Weyerhaeuser's fourth question and corresponding proposed rule of law. As to Weyerhaeuser's fifth question and corresponding proposed rule of law, Stayton offers the following restatement of the rule proposed by Weyerhaeuser: An indemnity plaintiff is entitled to recover its indemnity damages, including defense fees and costs, when, in an indemnity claim brought under ORCP 22 C and subject to ORS 31.600 to 31.610, the trial court enters a joint and several liability judgment in favor of the claimant and against the indemnity plaintiff and the indemnity defendant, and the trial court correctly determines that providing a right of indemnity to the indemnity plaintiff avoids unjust enrichment by the indemnity defendant.

IV. SUMMARY OF ARGUMENT

Again, as to Weyerhaeuser's first three questions and corresponding proposed rules of law, Stayton incorporates plaintiffs' summary of the arguments in their merits brief, and Stayton takes no position on the fourth

question and corresponding proposed rule. As to the fifth question and corresponding rule (1) Weyerhaeuser did not preserve that question for this court's review; (2) Weyerhaeuser's proposed rule of law is not supported by any of the authorities Weyerhaeuser relies on; (3) that question and corresponding proposed rule of law arise only because the Court of Appeals improperly reached an issue not raised in either Weyerhaeuser's tenth or eleventh assignments of error and then resolved the issue it improperly reached contrary to the legislature's intended application of ORCP 22 C and ORS 31.600-610. For these reasons, the court should affirm in part and reverse in part the decision of the Court of Appeals.

V. ARGUMENT[1]

1. What Happened in the Trial Court

Following the trial of plaintiffs' case against Weyerhaeuser and Stayton, the trial court took up Stayton's indemnity claim. *See Rains*, 264 Or App at 639-40, 674 (supporting statement). The trial court addressed the indemnity claim in two phases (1) it determined that Stayton was entitled to indemnity for the $2 million it agreed to pay plaintiffs in their settlement agreement and was obligated to pay plaintiffs under the judgment entered in their favor based on the jury's verdict; (2) it determined that Stayton was entitled to indemnity for the defense fees and costs it

[1] As in the other contexts, as to Weyerhaeuser's first three questions and corresponding proposed rules of law, Stayton incorporates plaintiffs' arguments in their merits brief, and Stayton takes no position on the fourth question and corresponding proposed rule.

incurred in defending against plaintiffs' claims. *Id.*; ER- 36-39 and ER- 59-68.[2]

After resolving the first phase of Stayton's indemnity claim, the trial court entered judgment for Stayton in the amount of $2 million. *Rains*, 264 Or App at 639-40, 667; ER-38-39. After resolving the second phase of Stayton's indemnity claim, the court entered judgment for Stayton for $33,795.20 in costs and $231,663.50 in attorney fees. *Id.* at 639-40, 674; ER- 66-68.

As relevant here, Weyerhaeuser argued in the trial court that Stayton was not entitled to indemnity because it had not shown that it could discharge its *full legal obligation* owed plaintiffs based on the jury's verdict, either through payment of the judgment on plaintiffs' claims or under the settlement agreement entered into between them and Stayton.[3] *See* OJIN

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[2] At that time, a proposed judgment had been presented to the trial court and the parties on plaintiffs' claims, but had not yet been entered. *See* OJIN 387 (stating Weyerhaeuser's objections to plaintiffs' proposed form of limited judgment). The court eventually entered plaintiffs' proposed form of judgment, without objection by Weyerhaeuser to language providing that Stayton and Weyerhaeuser were jointly and severally liable for plaintiffs' damages awarded by the jury. ER 40-47; OJIN 387; Tr 1818-1852.

[3] Stayton has never contended that its settlement with plaintiffs supported the part of its indemnity damages seeking the $2 million Stayton owed plaintiffs based on their judgment and in light of Stayton's settlement with plaintiffs. *See* OJIN 412 at 4 (confirming statement); Stayton's Response Brief (Red Br) at 12-13 (same). Thus, that argument by Weyerhaeuser was never germane to this part of Stayton's indemnity claim.

408 at 5-6 (stating arguments); OJIN 413 at 2-3 (same); Weyerhaeuser's Opening Brief (Blue Br) at 51-53 (same). Weyerhaeuser never took the position that, if Stayton *was not then* entitled to a judgment for $2 million,[4] but the trial court concluded that Stayton was otherwise entitled to indemnity, Stayton was not then entitled to a judgment for indemnity damages in the form of defense attorney fees and costs.

2. What Happened in the Court of Appeals

In the Court of Appeals, Weyerhaeuser's tenth assignment of error argued that the trial court erred in entering a judgment for Stayton "in the absence of any evidence that Stayton extinguished any liability of Weyerhaeuser to plaintiffs." Blue Br at 50; *see also id.* at 51-53; Gray Br at 14-15 (reflecting arguments in support of assignment of error).[5] Weyerhaeuser took the same approach in its eleventh assignment of error.

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[4] At no time – in the trial court or the Court of Appeals – did Weyerhaeuser argue that Stayton was not entitled to indemnity for that part of its damages claim seeking $2 million because it had not established that it *actually paid* that amount to plaintiffs. *See* OJIN 408 at 5-6 (confirming statement); Blue Br at 51-53 and 54 (same); Weyerhaeuser's Reply Brief (Gray Br) at 14-15 (same).

[5] On appeal, then, Weyerhaeuser abandoned its trial court argument that Stayton was required to extinguish "all of its liability" – the amount awarded by the jury to plaintiffs – rather than the maximum $2 million Stayton was obligated to pay under its settlement with plaintiffs, presumably because Weyerhaeuser realized its trial court argument was incorrect. *See Starr v. Heckathorne*, 270 Or 238, 240-41, 527 P2d 401 (1974) (confirming that any payment on plaintiffs' judgment reduces the amount of the judgment against Weyerhaeuser, a person "liable in tort [with Stayton] for the same injury."); *accord Restatement (Second) of Torts* § 85(3) comment e ("Payments made by one of the tortfeasors on account of the tort * * * diminish the claim of an injured person against all others responsible for the same harm. * * *).

Blue Br at 53-56; Gray Br at 15.

At no time did Weyerhaeuser argue in its tenth or eleventh assignments of error that the limited judgment disposed of Stayton's indemnity damages in the form of defense expenses. Nor did Weyerhaeuser ever argue that the same conclusion should follow by the trial court's inclusion in the general judgment of a reference to the limited judgment. And finally, Weyerhaeuser never argued that, if the Court of Appeals agreed with its tenth and eleventh assignments of error, then its remaining assignments of error were moot.

Consistent with arguments that Weyerhaeuser actually made in its briefs, the Court of Appeals understood – and correctly so – that Weyerhaeuser's tenth and eleventh assignments of error only addressed Stayton's limited judgment. *Rains*, 264 Or App at 666-73. Accordingly, the court correctly addressed separately the general judgment, affirming it as modified by a deduction of $1,512 which Stayton conceded on appeal should not have been included by the trial court. *Id.* at 677.

3. Weyerhaeuser's Fifth Question Was Not Preserved For This Court's Review

Weyerhaeuser never raised the fifth question for review in the trial court at all and raised it in the Court of Appeals for the first time in its petition for reconsideration. This court only reviews questions properly preserved in lower courts. ORAP 9.20 (so stating); ORAP 5.45(1) (providing that "no matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court and assigned as

error in the opening brief in accordance with this rule*[.]"); Strawn v. Farmers Ins. Co. of Oregon*, 350 Or 336, 350 n 10, 258 P3d 1199 (2011) (applying ORAP 9.20); *Kentner v. Gulf Ins. Co*., 298 Or 69, 74, 689 P2d 955 (1984) (stating that "[t]he purpose of a rehearing is not to raise new questions."). Weyerhaeuser's fifth question was not properly preserved for this court's review. The court should refuse to consider it then for that reason.

4. ORS 20.220 Does Not Support Weyerhaeuser's Fifth Question for Review and Corresponding Proposed Rule of Law

Without discussion, Weyerhaeuser cites ORS 20.220(3) in support of its fifth question for review and corresponding proposed rule of law. Weyerhaeuser's Merits Brief (Merits Br) at 55. For several reasons, that statute is inapplicable to this case.

ORS 20.220(3) provides that "[w]hen an appeal is taken from a judgment under ORS 19.205 to which an award of attorney fees or costs and disbursements relates[,i]f the appellate court reverses the judgment, the award of attorney fees or costs and disbursements shall be deemed reversed[.]" (Bracketed material added.) Determining what ORS 20.220(3) means involves application of the familiar methodology adopted in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993), as supplemented by *State v. Gaines*, 346 Or 160, 171–73, 206 P3d 1042 (2009). Specifically, as that methodology provides, to determine the statute's meaning, the court considers its text, in context, and, where appropriate, the statute's legislative history. *Id.*

The terms "award" and "relates" are not defined in ORS 20.220(3), but they are terms of common usage and, as such, are given their plain, natural, and ordinary meaning. *PGE*, 317 Or at 611. "Award" means to confer, bestow or grant something. *Webster's Third New International Dictionary*, 152 (unabridged ed 2002). "Relates" means to have reference to something else. *Id.* at 1916. Thus, the phrase "a judgment to which an award of attorney fees relates" means the act of granting attorney fees to a party based on a legal determination in a preceding judgment that creates a right to recover the fees.

In Oregon, the entry of a judgment alone does not support an award of attorney fees incurred to obtain that judgment. A statute or contract authorizing the fees recovery must also exist. *Peace River Seed Co–Op, Ltd. v. Proseeds Marketing, Inc.*, 355 Or 44, 65, 322 P3d 531 (2014). When such authority exists, a party's prosecution fees – those incurred to obtain the favorable judgment – are recoverable separately and in addition to any damages provided for in a judgment. *See, e.g.*, ORS 742.061 (providing right of insured under certain conditions to recover attorney fees if successful in damages suit against insurer); ORS 20.096 (providing right of party to contract to recover attorney fees if successful in suit on contract that provides for fees to prevailing party). In such circumstances, the award of fees "relates to" the preceding judgment.

Attorney fees incurred in defending a case brought by a third-party

are recoverable as consequential damages in certain circumstances. S*ee Huffstutter v. Lind*, 250 Or 295, 301, 442 P2d 227 (1968) ("attorney fees are generally allowable as damages in an action against a defendant where the defendant's tortious or wrongful conduct involved the plaintiff in prior litigation with a third party[.]"); *Ferguson v. Birmingham Fire Insurance Co.*, 254 Or 496, 509, 254 P2d 496 (1969) ("if [the insurer] guesses wrong on the question of coverage, it will be required to pay * * * the costs of defense.") (ellipses added); *see also Restatement (Second) of Contracts* § 351 comment c (when "a breach of contract results in claims by third persons against the injured party," the breaching party is liable for the injured party's "reasonable expenditures in the litigation, if the party in breach had reason to foresee such expenditures as the probable result of his breach at the time he made the contract."). One of those circumstances is common-law indemnity. *See Smith Radio v. Challenger Equip*., 270 Or 322, 325-26, 527 P2d 711 (1974) (consequential damages in a claim for indemnity include defense expenses); *St. Paul Fire & Marine v. Crosetti Bros.*, 256 Or 576, 579, 475 P2d 69 (1970) (same).

ORS 20.220(3) applies where a contract or statute allows a prevailing party to recover attorney fees incurred *to obtain* a favorable judgment. *See Synectic Ventures I, LLC v. EVI Corp*., 353 Or 62, 83, 294 P3d 478 (2012) (confirming statement). The statute does not apply when attorney fees are recovered as consequential damages in a judgment wholly separate from one reversed on appeal. *Cf. ZRZ Realty v. Beneficial Fire and Casualty*

Ins., 349 Or 117, 150 n 31, 241 P3d 710 (2010), *adh'd to as mod on recons*, 349 Or 657, 249 P3d 111 (2011) ("Because the part of the trial court's judgment that the Court of Appeals reversed does not relate to the awards of attorney fees, ORS 20.220(3) did not require the Court of Appeals to reverse and vacate the fee awards."). This case falls within the category of cases where ORS 20.220(3) does not apply.

How the trial court resolved the component elements of Stayton's indemnity claim confirms that conclusion. "'Judgment' means the *concluding decision of a court on one or more requests for relief* in one or more actions, as reflected in a judgment document." ORS 18.005(8) (emphasis added). *See also* ORS 18.005(16) ("'Request for relief'" means a claim, a charge in a criminal action *or any other request for a determination of the rights and liabilities of one or more parties in an action that a legal authority allows the court to decide by a judgment.*") (Emphasis added.) "Judgment document," in turn, means a writing in the form provided by ORS 18.038 that incorporates a court's judgment." ORS 18.005(9). Finally, a "limited judgment" is "[a] judgment rendered before entry of a general judgment in an action *that disposes of at least one but fewer than all requests for relief in the action* and that is rendered pursuant to a legal authority that specifically authorizes that disposition by limited judgment." ORS 18.005(13)(d) (emphasis added).

Stayton's limited judgment was the "concluding decision of the court" that "disposed of" that part of Stayton's indemnity claim seeking the money

it owed plaintiffs in light of plaintiffs' judgment and the settlement agreement between plaintiffs and Stayton. The limited judgment did not "conclude" and "dispose of" the separate part of Stayton's indemnity claim seeking damages Stayton incurred in the form of defense costs and attorney fees. Rather, the limited judgment merely *established the procedure* by which Stayton's *entitlement* to that part of its indemnity claim damages – and, if appropriate*, the amount* of those damages – would be determined. *See Montara Owners Assn. v. La Noue Development, LLC*., 357 Or 333, 356-57, ___ P3d ___ (2015) (confirming that procedure for determining entitlement and amount of attorney fees sought as damages in third-party action brought under ORCP 22 C while underlying action is pending is the procedure in ORCP 68 C(1)(a)).

Further, a "general judgment" means the judgment entered by a court *that decides all requests for relief in the* action except [a] request for relief previously decided by a limited judgment[.]" ORS 18.005(7)(a) (emphasis added). The general judgment that the trial court entered "conclusively resolved" and "disposed of" Stayton's request for indemnity damages in the form of its defense fees. That judgment was wholly separate from Stayton's limited judgment. As such, the two judgments adjudicated separately the component parts of Stayton's indemnity claim damages.

In sum, ORS 20.220(3) applies when an appellate court reverses a judgment on which attorney fees incurred to obtain the judgment were also awarded the prevailing party. The statute does not apply to attorney fees

incurred in defending a third-party's claim that are recovered as damages when the recovery of those fees is obtained through a wholly separate judgment than the one reversed by the appellate court. This case involves the circumstance where ORS 20.220(3) does not apply. Accordingly, Weyerhaeuser's reliance on ORS 20.220(3) should be rejected.

5. *Eclectic Investment* Does Not Support Weyerhaeuser's Fifth Question for Review

In a footnote, Weyerhaeuser suggests that this court's decision in *Eclectic Investment, LLC v. Patterson*, 357 Or 25, 346 P3d 468, *adh'd to as mod on recons,* 357 Or 327, ___ P3d ___ (2015), eliminates Stayton's right to indemnity. Merits Br at 56 n 12. For a number of reasons, Weyerhaeuser's argument lacks merit.

First, in *Eclectic Investment*, the court concluded that "[i]n cases in which the Oregon comparative negligence statutes apply and in which jurors allocate fault – and thereby responsibility – for payment of damages between tortfeasors, *and each tortfeasor' s liability is several only*, [a common law indemnity cross-claim] is not necessary or justified." 357 Or at 38 (emphasis and bracketed material added). Here, the trial court entered a *joint and several liability judgment*, *not a several liability judgment.* Nothing in *Eclectic Investment* suggests that common-law indemnity is no longer "necessary or justified" in that context.[6]

[6] Moreover, even where a tortfeasor' s liability is several only, as the court observed in *Eclectic Investment*, courts elsewhere still retain judicially created indemnity claims in cases, like this one, involving a manufacturer of a defective product and the product's pass through distributor. *See Eclectic Investment*, 357 Or at 37 n 7 (so stating and citing Henry Woods

Nor does the court's reconsideration decision in *Eclectic Investment* support Weyerhaeuser's argument. Admittedly, in that opinion, the court observed that "[e]ven if the [indemnity plaintiff] is correct that a claim for common-law indemnity includes a claim for attorney fees,[7]it is incorrect that an [indemnity plaintiff] has an independent claim for attorney fees *when the [indemnity] plaintiff's claim for restitution itself is not viable*." 357 Or at 331(emphasis and bracketed material added). Read in context, the statement reflects only that the indemnity plaintiff there had no "right of restitution" because its liability was several, not joint and several. And so, anything the indemnity plaintiff paid to the plaintiff could only discharge the indemnity plaintiff's own liability. This case is completely different, involving, as it does, a joint and several liability judgment. *Cf. Eclectic Investment*, 357 Or at 35 ("a claim for indemnity presumes that both tortfeasors are subject to joint liability for a plaintiff's damages.").

Moreover, in its original opinion in *Eclectic Investment,* the court said:

> "As explained by the *Restatement (Third) of Restitution* (2013), the *Restatement (Third) of Torts: Apportionment of Liability*

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and Beth Deere, *Comparative Fault*, §13:12, 268 (3d ed 1996; Supp 2013). *Accord Trujillo v. Berry*, 106 NM 86, 90, 738 P2d 1331 (Ct App 1987); *Farr v. Armstrong Rubber Co*., 288 Minn 83, 96-97, 179 NW 2d 64 (1970) (holding that the supplier of a defective product manufactured by another was entitled to seek indemnity from a manufacturer based on strict products liability). This case, then, falls squarely within that recognized exception.

[7] This statement is at odds with the court's long-standing recognition that damages in a claim for indemnity do include defense expenses. *See Smith Radio v. Challenger Equip*., 270 Or 322, 325-26, 527 P2d 711 (1974); *St. Paul Fire & Marine v. Crosetti Bros*., 256 Or 576, 579, 475 P2d 69 (1970) (supporting statement).

> (2010), and George E. Palmer, *Law of Restitution* (1978; [S]upp 2014), the theory underlying both indemnity and contribution is that of *restitution for unjust enrichment*. One tortfeasor is entitled to restitution from another if the tortfeasor seeking indemnity has provided a benefit to the other tortfeasor: '*Indemnity, a form of restitution, is founded on equitable principles*; it is allowed where one person has discharged an obligation that another should bear; *it places the final responsibility where equity would lay the ultimate burden*.' Reporter's Note, *Restatement (Third) of Restitution* § 23 comment a (quoting *Hunt v. Ernzen*, 252 NW 2d 445, 447–48 (Iowa 1977))."

357 Or at 35 (emphasis added). *Accord Piehl v. The Dalles General Hospital*, 280 Or 613, 620, 571 P2d 149 (1977) (the essential principle of common-law indemnity is the "equitable distribution of responsibility").

Here (1) Stayton's and Weyerhaeuser's liability was joint and several; (2) the trial court concluded – and Weyerhaeuser did not dispute in the Court of Appeals and does not dispute in this court – that Stayton was a pass-through distributor of Weyerhaeuser's product which a jury found defective; and (3) the trial court concluded – and Weyerhaeuser did not dispute in the Court of Appeals and does not dispute in this court – that, as between Stayton and Weyerhaeuser, to avoid Weyerhaeuser's unjust enrichment, it was equitable to require Weyerhaeuser alone to bear the economic burden of plaintiffs' suit, including the fees and costs that Stayton had to incur to defend itself when Weyerhaeuser refused to undertake Stayton's defense. None of these facts existed in *Eclectic Investment*.

In sum, the trial court and Court of Appeals correctly concluded that, but for Stayton's indemnity claim that brought Weyerhaeuser into the case, Weyerhaeuser would have been unjustly enriched if Stayton bore any of

the economic burden of defending Weyerhaeuser's defective product. To avoid that result, the trial court and Court of Appeals correctly determined that Stayton had the right to recover indemnity damages in the form of defense fees and costs, damages determined solely by the general judgment and thus determined separately from Stayton's limited judgment. Nothing in *Eclectic Investment* supports that Stayton was precluded from pursuing its indemnity claim or is not entitled to retain the benefit of the general judgment providing for the recovery of that part of the claim's damages in the form of defense fees and costs. The court should reject Weyerhaeuser's contrary suggestion.

6. The Court of Appeals Improperly Reversed Stayton's Limited Judgment

a. Introduction

The Court of Appeals held that, while Stayton brought its indemnity claim under ORCP 22 C, reliance on that procedural rule did not relieve Stayton of the obligation to prove all the "substantive elements" of its indemnity claim before being entitled to an "executable judgment." *Rains*, 264 Or App at 666-73. In reaching that conclusion, the court rejected Stayton's argument, based on *Kahn v. Weldin*, 60 Or App 365, 653 P2d 1268 (1982), *rev den*, 294 Or 682 (1983), and *Freeport Investment Co. v. R.A. Gray & Co.*, 94 Or App 648, 652–53, 767 P2d 83, *rev den*, 308 Or 33 (1989), that, in an indemnity claim brought under ORCP 22 C, the indemnity plaintiff is entitled to *a judgment* without satisfying the "discharge element" enunciated in *Fulton Ins. v. White Motor Corp.*, 261 Or 206, 210,

493 P2d 138 (1972), *overruled in part on other grounds by Waddill v. Anchor Hocking, Inc.*, 330 Or 376, 8 P3d 200 (2000). Essentially, relying on its decision in *Marton v. Ater Construction Co., LLC*, 256 Or App 554, 560, 302 P3d 1198 (2013), the Court of Appeals concluded that, to obtain an "executable judgment" in an indemnity claim brought under ORCP 22 C, an indemnity plaintiff must prove that it satisfied *Fulton*'s "discharge" element. *Rains*, 264 Or App at 670-73. Because Stayton had not done that, the Court of Appeals reversed the limited judgment.

b. The problems with the Court of Appeals' decision to reverse Stayton's limited judgment

A. The Court of Appeals impermissibly reached an issue not raised in Weyerhaeuser's tenth or eleventh assignment of error

In its tenth and eleventh assignments of error, Weyerhaeuser assigned error to the entry of *any judgment* in Stayton's favor.[8] *See* Blue Br at 50 ("The trial court erred in entering judgment in favor of third-party plaintiff Stayton against third-party defendant Weyerhaeuser on its indemnity claim"); *see id*.at 53 ("The trial court erred in entering judgment in favor of third-party plaintiff Stayton against third-party defendant Weyerhaeuser on its indemnity claim"). Weyerhaeuser did not assign error to *the form* of Stayton's limited judgment.

[8] Stayton's indemnity complaint did not seek $2 million; rather, it sought a determination that anything Stayton had to pay plaintiffs ought to be paid by Weyerhaeuser and the right to recover Stayton's defenses fees and costs. ER-18-19. The prayer of the complaint additionally sought, in relevant part, "any other relief the court deems necessary and just." ER-20.

In reversing Stayton's limited judgment, the Court of Appeals did not address the assignments of error that Weyerhaeuser actually made. Rather, the Court of Appeals rewrote those assignments of error so that it could reach the trial court's decision to enter an "executable judgment." But Weyerhaeuser was not entitled to have that issue addressed by the Court of Appeals. *See* ORAP 5.45(1) ("No matter claimed as error will be considered on appeal unless the claim of error * * * is assigned as error in the opening brief[.]"); ORAP 5.45(3) (appellant must "identify precisely the * * * ruling that is being challenged"); *see also Strawn v. Farmers Ins. Co. of Oregon*, 350 Or 336, 366, 258 P3d 1199 (2011), *cert den*, 132 S Ct 1142 (2012) ("to preserve an issue on appeal, a party must make the issue the object of a proper assignment of error and supporting argument in the party's opening brief"). This court should then reverse that part of the Court of Appeals' decision. [9]

[9] While Stayton did not file a response to Weyerhaeuser's petition for review or seek review itself, given that the court decided to accept review, the court should exercise its discretion to consider whether the Court of Appeals incorrectly reversed Stayton's limited judgment. *See* ORAP 9.20(2) ("The [Supreme Court] may consider other issues that were before the Court of Appeals"). Otherwise, Weyerhaeuser's suggestion that Stayton lost the right to that review, by not appealing plaintiffs' judgment, *see* Merits Br at 44-5 n 8 and 52 n 9 (stating argument), lacks merit, as does its reliance on *Interstate Roofing, Inc., v. Springville Corp.*, 347 Or 144, 218 P3d 133 (2009), which does not support in any way Weyerhaeuser's proposition.

B. The proper disposition of the assignments of error actually made by Weyerhaeuser is to affirm the trial court's decision to enter a judgment for Stayton on its indemnity claim

(1) The proper construction of ORCP 22 C in deciding an indemnity plaintiff's right to a judgment

This court has not previously addressed whether a third-party plaintiff seeking indemnity under ORCP 22 C is entitled to entry of *a judgment* without proving the "discharge element" for that equitable remedy, the only issue, again, that Weyerhaeuser's tenth and eleventh assignments of error properly raised. When interpreting ORCP 22 C, the court applies *PGE*'s methodology. *A.G. v. Guitron*, 351 Or 465, 471, 268 P3d 589 (2011); *Mulier v. Johnson*, 332 Or 344, 349, 29 P3d 1104 (2001). In doing that, as applicable here, the court considers prior enacted versions of ORCP 22 C, the preexisting common law when ORCP 22 C was enacted, *State v. Webb*, 324 Or 380, 390, 927 P2d 79 (1996), and any legislative history provided by the parties. *Gaines*, 346 Or at 171–72; *PGE*, 317 Or at 610-11.

ORCP 22 C allows a defendant to implead one "who * * * may be liable" to the third-party plaintiff for all or part "of the plaintiff's claim" against it. The common, ordinary meaning of the phrase "may be liable" reflects that the rule permits a defendant to join a claim against a third-party that is contingent upon the outcome of the plaintiff's claim against the defendant.

See Williams v. Ford Motor Credit Co., 627 F2d 158, 160 (8th Cir 1980) (so stating as to federal counterpart to ORCP 22 C).

ORCP 22 C was promulgated by the Council on Court Procedures in 1978. In adopting the rule, the Council incorporated almost verbatim *former* ORS 16.315(4)(a) (1975), repealed by Or Laws 1979, ch 284, § 199. *See Comment, Final Draft, Proposed Oregon Rules of Civil Procedure*, Nov 24, 1978 at 67 ("This rule is almost identical to the provisions of existing ORS * * * 16.315 * * ").

The legislative history of *former* ORS 16.315(4)(a) (1975) reflects that the statute was modeled after the federal impleader procedures described in FRCP 14.[10] Minutes, House Judicial Committee, HB 2231, Feb. 5, 1975 (statement of Lyle Velure). And, most importantly to this case, the history further reveals that the proponents of the bill were "particularly concerned * * * with product liability litigation." *Id.* Indeed, during his testimony, Lyle Velure, one of the proponents of the bill, recounted a recent product liability case in which he had been unable to "join a manufacturer because [the manufacturer] was a third party and he had to wait until the lawsuit was over and then claim indemnity against him." In Velure's opinion, "adoption of the federal system for third party practice * * * would be a step forward." *Id.*

[10] FRCP 14(a)(1) provides, in relevant part that "[a] defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it."

By its terms, FRCP 14 does not specifically provide for a particular form of judgment that a third-party plaintiff is entitled to obtain in an indemnity case. But various forms of relief were created by federal courts for such contingent claims to both accommodate the right to relief through the accelerated or contingent claim FRCP 14 (a) allows and any limitations of substantive state law involving the party's chosen claim. *See* Wright & Miller, *6 Federal Practice and Procedure* § 1451 at 481 (3d ed 2010) (so stating). Specifically, federal courts approved various forms of relief for indemnity claims brought under FRCP 14, including a conditional judgment, a declaratory judgment, or the entry of a money judgment, the execution of which was stayed until any "discharge requirement" for such a remedy was satisfied. *See, e.g., Travelers Insurance Co. v. Busy Electric Co.*, 294 F2d 139, 145 (5th Cir 1961); *Thomas v. Malco Refineries*, 214 F2d 884 (10th Cir 1954); *Burris v. American Chicle Co*., 120 F2d 218 (2d Cir 1941) (reflecting approaches); *see also Restatement (Third) of Torts: Apportionment of Liability* § 22 cmt b ("An indemnitee may, however, assert a claim for indemnity and obtain a contingent judgment in an action where the indemnitee is sued by the plaintiff as permitted by procedural rules, even though liability of the indemnitor has not yet been discharged."); *Eclectic Investment*, 357 Or at 37 (citing with approval section 22 of *Restatement (Third) of Torts: Apportionment of Liability*). In 1975, then, when *former* ORS 16.315(4)(a) (1975) was adopted, it was well-settled that FRCP 14 allowed federal courts to "accelerate" the determination of

indemnity liability between the third-party plaintiff and the third-party defendant and to grant "contingent" relief to the third-party plaintiff in the form of an "indemnity judgment."

"As a general rule, when the Oregon legislature borrows wording from a statute originating in another jurisdiction, there is a presumption that the legislature borrowed controlling case law interpreting the statute along with it." *Lindell v. Kalugin*, 353 Or 338, 355, 297 P3d 1266 (2013); *accord Pamplin v. Victoria,* 319 Or 429, 433-34, 877 P2d 1196 (1994) (like *Lindell*, applying principle to ORCP provision modeled on federal procedural rule). And, moreover, as a judicially created equitable remedy, when *former* ORS 16.315(4) (1975) was enacted, Oregon courts had wide latitude in fashioning an "indemnity judgment." *See Stan Wiley v. Berg*, 282 Or 9, 21-24, 578 P2d 384 (1978) ("It is elementary that in a suit in equity, and under a complaint with a prayer for general relief, as in this case, a court of equity will determine with which party the equities are and may then shape a decree according to the equities of the case.").

Based on the foregoing principles, in enacting former ORS 16.315(4)(a) (1975), the legislature is presumed to have intended that Oregon courts would have broad authority to accelerate the determination of contingent liability claims brought pursuant to that statute, including indemnity claims, and to grant relief to the third-party plaintiff in the form of either an "indemnity judgment," determining the third-party plaintiff's rights, including the amounts, even provisionally, that the indemnity plaintiff was

entitled to recover as damages from the third-party defendant, or an "executable judgment," accompanied by an appropriate stay of execution until the indemnity plaintiff discharged a common obligation that it and the indemnity defendant jointly and severally owed to a third party.

(2) The role of ORS 31.600 to 610 in applying ORCP 22 C to an indemnity plaintiff's right to a judgment

What the legislature intended *former* ORS 16.315(4)(a) (1975) – and then ORCP 22 C – to mean in terms of an indemnity plaintiff's right to entry of an "indemnity judgment" remained the same for 20 years until the legal landscape applicable to such claims changed in 1995 when the legislature (1) modified Oregon's comparative fault scheme, eliminating joint and several liability in most cases and, thus, limiting the availability of contribution and indemnity claims between parties whose fault is only several, *see Eclectic Investment*, 357 Or at 38; *Lasley v. Combined Transport, Inc.*, 351 Or 1, 20, 261 P3d 1215 (2011) (describing change); (2) adopted ORS 31.610(2) which provides that the court "shall enter a judgment in favor of the plaintiff against any third party defendant who is found to be liable in any degree, even if the plaintiff did not make a direct claim against the third party defendant"; and (3) gave trial courts the discretion to treat two parties, including a third-party defendant, as a single party for allocation-of-fault purposes and to enter a joint liability judgment in favor of the plaintiff accordingly. *See* ORS 31.605(4) ("For the purposes of subsection (1) of this section, the court may order that two or more persons

be considered a single person for the purpose of determining the degree of fault of the persons specified in ORS 31.600 (2).”); ORS 31.610(2) (“In any action described in subsection (1) of this section, the court shall determine the award of damages to each claimant in accordance with the percentages of fault determined by the trier of fact under ORS 31.605 and shall enter judgment against each party determined to be liable. The court shall enter a judgment in favor of the plaintiff against any third party defendant who is found to be liable in any degree, even if the plaintiff did not make a direct claim against the third party defendant”).

The legislative history for the 1995 amendments to what became ORS 31.500 to 31.610 reveals that the “treated-as-a-single-party” provision – ORS 31.605(4) – was borrowed from the Uniform Comparative Fault Act, the comments to which indicate that the provision was meant to apply where, like here, the jury is asked to consider the fault of the manufacturer and a pass-through retailer of a defective product:

> “In situations such as that of principal and agent, driver and owner of a car, *or manufacturer and retailer of a product*, the court may under appropriate circumstances find that the *two persons should be treated as a single party for purposes of allocating fault*.”

Senate Judiciary Committee, SB 601, May 10, 1995, Ex T (statement of Lawrence Wobbrock), Tab B at 50 (emphasis added). And so, while the legislature, when it first adopted f*ormer* ORS 16.315(4)(a) (1975), and later adopted ORCP 22 C, may well have contemplated – where indemnity was sought through a claim brought under ORCP 22 C – that a trial court would

not enter an *executable judgment* until the third-party plaintiff satisfied a judgment against it and the indemnity defendant in favor of an injured plaintiff, since 1995 an indemnity claim brought under ORCP 22 C is not "contingent" in the same way it was before enactment of ORS 31.605(4) and 31.610(2) because the plaintiff gets a joint and several liability judgment directly against the indemnity plaintiff and the indemnity defendant and the indemnity plaintiff's right to indemnity is necessarily established at the same time by that judgment.

In cases like this one – where a jury's allocation of fault leads to a judgment against the indemnity plaintiff and the indemnity defendant in which they are *jointly and severally liable to the plaintiff*, and the indemnity plaintiff was merely a pass-through distributor of the indemnity defendant's defective product, the requirement that the indemnity plaintiff *first discharge* part or all of a joint and several liability judgment before being entitled to indemnity is no longer necessary or appropriate. In other words, much like before 1995, when courts had the authority to "shape relief" to account for contingent liability in claims brought under ORCP 22 C, after 1995, courts had the authority to "shape relief" to account for the joint and several liability judgment entered on the plaintiff's claim under ORS 31.605(4) and 31.610(2) by either (1) entering a judgment in favor of the indemnity plaintiff, directing the indemnity defendant to discharge the parties' joint obligation and pay the indemnity plaintiff's defense fees and costs (thus eliminating the "discharge requirement" all together); or (2) if the plaintiff

demands payment of the joint obligation from the indemnity plaintiff, or the indemnity plaintiff decides to discharge the joint obligation, entering a judgment in favor of the indemnity plaintiff, directing the indemnity defendant to reimburse the indemnity plaintiff for its payment and to pay the indemnity plaintiff's defense fees and costs (thus retaining the "discharge requirement" in that limited circumstance). Either way chosen by a trial court properly supports the same legal outcome – a pass-through distributor of a defective product who brings an indemnity claim under ORCP 22 C against the manufacturer is entitled to *a judgment* against the manufacturer upon entry of a joint and several liability judgment against them without *having to first prove* any "discharge requirement."

In sum, ORCP 22 C, read in light of ORS 31.600 to 31.610, confirms the trial court's decision that Stayton was *entitled to a judgment* on its indemnity claim, the only issue Weyerhaeuser raised through its tenth and eleventh assignments of error. Thus, if the Court of Appeals had addressed, as it should have, the issue Weyerhaeuser actually raised in that court, the Court of Appeals would have affirmed Stayton's limited judgment. Because that court did not confine itself to the issue actually raised by Weyerhaeuser, this court should do that, conclude that the trial court did not err in entering Stayton's limited judgment, and affirm both of Stayton's judgments.

7. The Appropriate Disposition of This Case Even if the Court Agrees with Weyerhaeuser and the Court of Appeals' Decision to Reverse Stayton's Limited Judgment

Even if the court accepts the Court of Appeals' reversal of Stayton's limited judgment and/or agrees with Weyerhaeuser's fifth question for review, the proper disposition of Stayton's indemnity claim is not, as Weyerhaeuser suggests (without analysis), a remand to the trial court for entry of judgment in favor of Weyerhaeuser. Merits Br at 56. Rather, the proper disposition is to remand the case to the trial court with instructions to modify Stayton's limited judgment and allow Stayton to execute on that judgment and the general judgment (as modified by the Court of Appeals) when Stayton proves payment to plaintiffs of $2 million in partial satisfaction of plaintiffs' judgment or if Weyerhaeuser pays that judgment.

Assuming the Court of Appeals had authority to re-frame the tenth and eleventh assignments of error as it did, that court's conclusion was that the trial court's only error was entering the *form of the judgment* it entered. *See Rains*, 264 Or App at 669 ("it was error for the trial court to enter an executable judgment at that time") and *id*. at 673 ("the trial court erred in entering *Stayton's limited judgment*") (emphasis added). Accordingly, consistent with the proper application of ORCP 22 C, given the state of Oregon law regarding ORCP 22 C when Stayton's limited judgment was entered in 2010, and given that both the trial court and the Court of Appeals agreed that Weyerhaeuser would be unjustly enriched by plaintiffs' decision to sue Stayton alone, any remand to the trial court should be with instructions for that court to (1) modify Stayton's limited judgment to provide

that Stayton's right to execute on that judgment is stayed pending proof by Stayton of its payment of $2 million to plaintiffs in partial satisfaction of plaintiffs' judgment; and (2) enter an order lifting the stay and then enter judgment for Stayton for $2 million and its defense costs, disbursements and fees of $247,815.20 once Stayton proves its payment to plaintiffs of $2 million in partial satisfaction of plaintiffs' judgment *or, alternatively*, enter an order requiring Weyerhaeuser to pay plaintiffs' judgment and, once Weyerhaeuser does that, then enter a judgment for Stayton's defense costs, disbursements and fees of $247,815.20. *Cf. Tipperman v. Tsiatsos*, 327 Or 539, 549-50, 964 P2d 1015 (1998) (modifying the terms of a declaratory judgment); *Davis v. O'Brien*, 320 Or 729, 747-48, 891 P2d 1307 (1995) (remanding for entry of a modified judgment for plaintiff); *see also State v. Braley*, 224 Or 1, 13, 355 P2d 467 (1960) ("As an appellate court we have the inherent power to modify the judgment of a lower court.")

VI. CONCLUSION

For the foregoing reasons:

1. Plaintiffs' judgments and Stayton's judgments (as modified by the Court of Appeals with respect to the general judgment) should be affirmed; or

2. Plaintiffs' judgments and the general judgment (as modified by the Court of Appeals) should be affirmed; or

3. Plaintiffs' judgments should be affirmed, Stayton's judgments should be reversed, and the case remanded to the trial court with

instructions to (a) modify Stayton's limited judgment to state that Stayton's right to execute on that judgment is stayed pending proof by Stayton of its payment of $2 million to plaintiffs in partial satisfaction of plaintiffs' judgment; and (b) enter an order lifting the stay and then enter judgment for Stayton for $2 million and its defense costs, disbursements and fees of $247,815.20 (with interest to run from the entry dates of the original limited and general judgments), once Stayton proves its payment to plaintiffs of $2 million in partial satisfaction of plaintiffs' judgment or, alternatively, enter an order requiring Weyerhaeuser to pay plaintiffs' judgment and, once Weyerhaeuser does that, then enter a judgment for Stayton's defense costs, disbursements and fees of $247,815.20 (with interest to run from the entry date of the original general judgment).

DATED: July 2, 2015

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CERTIFICATE OF COMPLIANCE
PURSUANT TO ORAP 5.05(2)(b)(ii)

I certify that the brief complies with the "length" provisions of ORAP 5.05(2)(b)(ii) in that:

1. It contains 7,295 words, exclusive of those items excludable under ORAP 5.05(2)(a).

2. Its type face is proportionally spaced and is 14-point.

3. In preparing this certificate, I have relied on the word count of the word processing system used to prepare the brief.

DATED: July 2, 2015

/s/ Thomas W. Brown
Thomas W. Brown

CERTIFICATE OF FILING AND MAILING

I hereby certify that I electronically filed the foregoing **BRIEF ON THE MERITS OF RESPONDENT ON REVIEW STAYTON BUILDERS MART** with the State Court Administrator by using the Oregon Appellate eFiling system on the 2nd day of July, 2015.

I further certify that I electronically-served the foregoing **BRIEF ON THE MERITS OF RESPONDENT ON REVIEW STAYTON BUILDERS MART** upon the persons listed below that are registered efilers, by using the Oregon Appellate eFiling system on the 2nd day of July, 2015.

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