

IN THE SUPREME COURT  
OF THE STATE OF OREGON

JACQUELINE HAMMER,	)	Trial Court No. 05CV0875
	)	
Plaintiff/Respondent and	)	Court of Appeals No. A142677
Respondent on Review,	)	
	)	Supreme Court No. S059649
v.	)	
	)	
FRED MEYER STORES, INC., a	)	
Delaware corporation,	)	
	)	
Defendant/Appellant and	)	
Petitioner on Review.	)	

**AMICUS MEMORANDUM OF OREGON ASSOCIATION OF  
DEFENSE COUNSEL IN SUPPORT OF DEFENDANT'S PETITION  
FOR REVIEW**

Petition for review of the decision of the Court of Appeals and appeal from  
a judgment of the Circuit Court for Josephine County,  
Honorable Lindi L. Baker, Judge

Opinion Filed: April 20, 2011

Author of Opinion: Honorable David V. Brewer, Presiding Judge,  
and Wallace P. Carson, Senior Judge

Disposition of the Case by the Court of Appeals: The Court of Appeals  
affirmed the verdict at the trial court

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August, 2011

**INDEX OF CONTENTS**

	<b>Page</b>
<b>I. PRAYER FOR REVIEW . . . . .</b>	<b>1</b>
<b>II. INTEREST OF AMICUS. . . . .</b>	<b>1</b>
<b>III. BRIEF ON THE MERITS. . . . .</b>	<b>3</b>
<b>IV. QUESTION PRESENTED ON REVIEW. . . . .</b>	<b>3</b>
<b>V. ARGUMENT. . . . .</b>	<b>3</b>

## INDEX OF AUTHORITIES

### Cases:

	<b>Page</b>
<i>Charles v. Palomo</i> , 347 Or. 695, 227 P.3d 737 (2010). . . . .	7
<i>Christiansen v. Cober</i> , 206 Or. App. 719, 138 P.3d 918 (2006). . . . .	7-8
<i>Gow v. Multnomah Hotel, Inc.</i> , 191 Or. 45, 224 P.2d 552 (1950) . . . . .	5
<i>Jett v. Ford Motor Co.</i> , 335 Or. 493, 72 P.3d 71 (2003) . . . . .	8
<i>Leiseth v. Fred Meyer, Inc.</i> , 185 Or. App. 53, 57 P.3d 914 (2002) . . . . .	2, 6-7
<i>NW Natural Gas v. Chase Gardens</i> , 328 Or. 487, 982 P.2d 1117 (1999). . . . .	7

### State Statutes:

ORAP 9.070(1)(e). . . . .	2
ORCP 1 . . . . .	6
ORCP 59H . . . . .	2, 3, 4, 6-7, 8, 9

## **I. PRAYER FOR REVIEW**

The Oregon Association of Defense Counsel (OADC) respectfully joins in the Petition for Review filed by Defendant Fred Meyer Stores, Inc. The Petitioner seeks review of the opinion of the Court of Appeals dated April 20, 2011. A copy of the Court of Appeals' decision is attached to Defendant's Petition for Review, filed August 11, 2011.

## **II. INTEREST OF AMICUS**

The OADC is a non-profit association of trial lawyers who primarily concentrate on the defense of civil actions throughout the state of Oregon. This organization is interested in promoting efficient and fair procedures in trial and on appeal. This case raises the question whether the objection of the trial lawyer for the defense was sufficient to preserve the error the Defendant raised as an issue on appeal. This is an important question to members of the OADC and their clients and is likewise important to all trial lawyers.

There is concern among trial lawyers that during the stress of trial, they might fail to use the proper language to raise the issue they intend. When considering preservation of error, appellate courts should carefully consider the policies behind the rules. Trial lawyers and their clients can be placed in jeopardy by inconsistent application of the rules. Review and reconsideration is necessary here to clarify that an error is properly preserved for review when

the record reveals that the trial court and the appellant's opponent at trial understood the objection made at trial. The Court's focus should not be on the precise language used in the objection but rather on the apparent understanding of the issue demonstrated by colloquy.

Defendant's Petition for Review raises a significant issue of law concerning the proper application of ORCP 59H and its use by the appellate courts. ORAP 9.070(1)(e). Prior appellate decisions often apply ORCP 59H as if it is binding on the appellate courts, even though it has been held not to restrict the appellate courts' acceptance of review. *Leiseth v. Fred Meyer, Inc.*, 185 Or. App. 53, 56 *at fn. 1*, 57 P.3d 914, 916, *at fn. 1* (2002) (ORCP rules govern practice in trial courts but do not control preservation principles for appellate courts.) Some appellate decisions appear to apply ORCP 59H as if it is binding on them, while the correct rule, as stated in *Leiseth*, is that the appellate court should decide the preservation issue.

The issue raised by Defendant's Petition for Review arises in nearly every jury trial.

### III. BRIEF ON THE MERITS

If amicus is permitted to appear, OADC will file a brief on the merits.

### IV. QUESTION PRESENTED ON REVIEW

Did defense counsel preserve the asserted error that the trial court improperly modified the jury instruction on *res ipsa loquitur* by adding a sentence suggesting that Defendant had the burden to disprove its own negligence?

### V. ARGUMENT

The Court of Appeals held Defendant failed to preserve an error for appeal concerning the trial court's instruction to the jury on the doctrine of *res ipsa loquitur*. The Court applied ORCP 59H(2) which requires that "exceptions must be specific and on the record. The party shall state with particularity any point of exception to the trial judge."

Plaintiff's counsel requested an instruction on *res ipsa loquitur* taken from the Uniform Instructions of the Oregon State Bar, but at the last minute requested an additional instruction advising the jury that the Defendant had the burden to produce evidence to rebut the inference raised by *res ipsa loquitur*. Defense counsel had already taken exception to the uniform instruction but

objected again to the newly-added sentence. After describing the requirement for a *res ipsa* case in the uniform instruction, the new sentence was as follows: “In that case, the burden then shifts to the Defendant to put forth evidence that the negligence was not its own negligence.” In determining whether Defendant took proper exception, the Court of Appeals quoted defense counsel’s statement: “Well absolutely not. I think you just stick with the *res ipsa* instruction, and let him make his argument.” Considering only the language used by Defendant’s counsel in that statement, the Court of Appeals concluded it lacked the specificity and particularity required by ORCP 59H(2). The Court also considered the earlier statement by defense counsel regarding the “burden shifting” sentence as follows: “I think you just stick with the *res ipsa* instruction, and let him make his argument.” Again, the Court held the objection lacked sufficient particularity. The Court of Appeals concluded the objection failed to raise the particular issue argued on appeal, i.e., that the instruction erroneously shifted the burden of proof to the Defendant.

The problem with the analysis by the Court of Appeals is that it failed to consider the statements of Defendant’s counsel in context with the ongoing colloquy with the Court. That failure then led the Court to overlook and fail to apply the policies behind the rule requiring preservation.

The Court of Appeals appears to have felt the language used by Defendant's counsel to articulate his objection did not alert the Court to the argument that the instruction improperly shifted the burden of proof. When comments by the Court are considered, it becomes clear that the Court understood the issue raised by Defendant's objection.

Plaintiff's counsel explained to the Court the purpose of the added sentence: "It tells ... it says then that the burden shifts to the Defendant to produce evidence." Tr. p. 774.

The Court was then provided a copy of *Gow v. Multnomah Hotel, Inc.*, 191 Or. 45, 224 P.2d 552 (1950) cited by Plaintiff as support for the instruction that the burden is on the Defendant. After reading a portion of the case, the Court commented: "That's where you're saying that they're entitled to an instruction that says the burden then shifts to Defendant." Tr. p. 776.

Defendant's counsel then argued that the Court would have to alter the Burden of Proof Instruction to clarify the issue. Tr. pp. 776-777. The discussion then considered whether the burden shifting concept could be added to the uniform *res ipsa* instruction instead of giving the special instruction submitted by Plaintiff's attorney. To that suggestion, Defendant's counsel added: "Oh I am going to object to any language, that it doesn't matter what you put in there." Tr. p. 778. The Court demonstrated his concern with the issue: "Well I am

comfortable with the first step. [the *res ipsa* instruction] It's the second step that I'm just not comfortable with; the shifting of the burden, . . ." Tr. pp. 778-779.

Several other possible amendments to Plaintiff's proposal were discussed, at which point Defendant's counsel said: "Well absolutely not. I think you just stick with the *res ipsa* instruction, and let him make his argument." Tr. p. 779. The instruction was ultimately given, telling the jury: "The burden then shifts to the Defendant to put forth evidence that the negligence was not its own negligence."

The appellate court decides whether an assignment of error on appeal has been properly preserved in the trial court. ORCP 59H provides guidance to trial counsel, but the Oregon Rules of Civil Procedure do not apply to the appellate courts. ORCP 1; *Leiseth v. Fred Meyer, Inc.*, 185 Or. App. 53, 57 P.3d 914 (2002).

We frequently cite ORCP 59H in discussing the preservation principles applicable to proposed instructions. . . . That rule is not the source of those principles, however, but instead merely reflects them in a general way. The Oregon Rules of Civil Procedure govern procedure and practice only in the circuit courts of this state, unless the rules are expressly made applicable to other courts by rule or statute. ORCP 1. Consequently, the point of ORCP 59H is to provide guidance to trial counsel for purposes of the procedure and practice in trial courts. The Oregon Rules of Civil Procedure do not purport

to control preservation principles for appellate courts. . . . Thus, ORCP 59H serves only to reinforce appellate preservation principles and to alert trial counsel to them, rather than to dictate preservation rules for appellate courts.

185 Or. App. at 56, *fn. 1*.

The policy served by the rule that error must be preserved has been explained by the Supreme Court:

In order to decide whether an error has been preserved, it is important to consider the purpose of the rule that error be preserved in the trial court before it can be assigned as error in the appellate court. . . . The determination whether a particular issue was preserved for appeal is a practical one; it will depend on whether the policies behind the preservation requirement – judicial efficiency, full development of the record, and procedural fairness to the parties in the trial court – are met in an individual case. . . . Therefore we will review an issue advanced by a party on review as long as that party raised the issue below with enough particularity to assure that the trial court was able to identify its alleged error so as to consider and correct the error immediately if correction is warranted.

*Charles v. Palomo*, 347 Or. 695, 700, 227 P.3d 737, 740-41 (2010).

Although *Charles v. Palomo* did not involve application of ORCP 59H because the error did not concern jury instructions, the policy behind the preservation rule should be the same.

This Court discussed the same policies in *NW Natural Gas v. Chase Gardens*, 328 Or. 487, 982 P.2d 1117 (1999). The court in *Christiansen v.*

*Cober*, 206 Or. App. 719, 138 P.3d 918 (2006) explained that preservation rules are intended to make sure the trial judge had an adequate opportunity to rule on the same issue a party raises on appeal. Secondly, the rules are intended to allow the appellant's opponent a fair opportunity to address the issue in the trial court thereby avoiding a potential appeal.

These policies are also applicable to assignments of error regarding jury instructions. In *Jett v. Ford Motor Co.*, 335 Or. 493, 72 P.3d 71 (2003), the Court of Appeals held Ford failed to preserve error in jury instructions because of its failure to comply with ORCP 59H. The Supreme Court disagreed, pointing out that the purposes behind the rule are: (1) to allow opposing parties an opportunity to respond in the trial court, and (2) to allow the trial court an opportunity to rule.

In this case, Plaintiff's attorney clearly understood his requested instruction was to tell the jury the burden shifted to Defendant to produce evidence in a *res ipsa* case. The trial judge clearly understood the purpose of the instruction and was troubled by its effect. The court acknowledged on the record that she was uncertain whether an instruction concerning the shift in the burden of proof was correct. In light of the colloquy outlined above, there was no need for Defendant's counsel to further explain his objection. The only issue being considered by the court was whether a burden shifting instruction

was correct, and Defendant clearly objected to such an instruction.

Defendant's assignment of error on appeal was that it was improper to give an instruction telling the jury that the Defendant had a particular burden to produce evidence.

Because the appellate court determines whether error has been preserved and the policies which dictate whether error has been preserved appear to be satisfied here, the appellate court should accept the error for review even though the precise language used to state the objection did not meet the specificity and particularity guidelines of ORCP 59H.

Trial attorneys and their clients should not be placed in jeopardy by rigid application of ORCP 59H when the record viewed as a whole shows the trial court and opposing counsel had a fair opportunity to address the issue.

The Petition for Review should be allowed.

Respectfully submitted this 25<sup>th</sup> day of August, 2011.

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on August 25, 2011, I caused to be filed, by certified mail, return receipt requested, an original and 12 copies of the foregoing **AMICUS MEMORANDUM OF OREGON ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANT'S PETITION FOR REVIEW**, pursuant to ORAP 9.05(3)(b), on the Appellate Court Administrator, addressed to:

Appellate Court Administrator  
Appellate Courts Section  
Supreme Court Building  
1163 State Street  
Salem, OR 97301-2563

I hereby further certify that on August 25, 2011, I caused to be served by first-class mail two copies of the foregoing **AMICUS MEMORANDUM OF OREGON ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANT'S PETITION FOR REVIEW** on the following parties to this proceeding, addressed to:

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I further certify that said copies were contained in a sealed envelope with postage prepaid thereon addressed as stated above, and deposited in the U.S. Post Office at Portland, Oregon 97204 on the date stated above.

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