

FILED: August 13, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

KEVIN RAINS and MITZI RAINS,
Plaintiffs-Respondents,

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,

v.

RSG FOREST PRODUCTS, INC., et al.,
Third-Party Defendants,

and

WEYERHAEUSER COMPANY,
Third-Party Defendant-Appellant.

WEYERHAEUSER COMPANY,
Fourth-Party Plaintiff,

v.

RODRIGUEZ & RAINS CONSTRUCTION, an Oregon corporation,
Fourth-Party Defendant.

WITHERS LUMBER COMPANY,
Fourth-Party Plaintiff,

v.

SELLWOOD LUMBER CO., INC., an Oregon corporation; and WEYERHAEUSER
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.

Marion County Circuit Court
06C21040

A145916

Dennis J. Graves, Judge.

Argued and submitted on May 01, 2013.

Michael T. Stone argued the cause and filed the briefs for appellant.

Maureen Leonard argued the cause for respondents Kevin and Mitzi Rains. With her on the brief were Brian Whitehead and J. Randolph Pickett.

Thomas W. Brown argued the cause for respondent Stayton Builders Mart, Inc. With him on the brief were Nicholas E. Wheeler, Julie A. Smith, and Cosgrave Vergeer Kester LLP.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

ORTEGA, P. J.

Plaintiffs' limited judgment reversed and remanded for application of ORS 31.710(1) to plaintiffs' strict products liability claim, otherwise affirmed; Stayton Builders Mart's limited judgment for indemnity reversed; general judgment reversed and remanded with instructions to reduce the judgment by \$1,512, otherwise affirmed.

1 that sold the defective board to Stayton. Mitzi filed a claim for loss of consortium against
2 those same parties. Sometime later, Stayton filed a third-party complaint against
3 Weyerhaeuser for common-law indemnity and contribution, alleging that Weyerhaeuser
4 had provided the defective board to Stayton.² Shortly before trial, plaintiffs entered into a
5 partial settlement agreement with Stayton that dismissed plaintiffs' negligence claims
6 against Stayton and limited Stayton's financial exposure on the strict products liability
7 claim, but left Stayton in the litigation as a defendant.

8 The case proceeded to trial and the jury returned a verdict against Stayton
9 and Weyerhaeuser. In addition, the jury applied the comparative fault statute, ORS
10 31.600(2), and designated Stayton 30 percent at fault, Weyerhaeuser 45 percent at fault,
11 and Kevin 25 percent at fault. The jury awarded Kevin \$5,237,700 in economic damages
12 and \$3,125,000 in noneconomic damages, and Mitzi \$1,012,500 in noneconomic
13 damages. After reducing the judgment to account for Kevin's comparative fault, the trial
14 court entered a limited judgment for plaintiffs in the sum of \$7,031,400.

15 In a subsequent hearing, the trial court ruled in favor of Stayton on its
16 indemnity claim and entered a limited judgment for Stayton against Weyerhaeuser for
17 \$2,000,000. Later, the court entered a general judgment against Weyerhaeuser awarding
18 Stayton its defense costs in the amount of \$265,458.70. Weyerhaeuser appeals the

² Stayton also named several other lumber companies in its third-party complaint. Several of those parties filed what they labeled "fourth-party" complaints, and the defendant to one of those actions filed a "fifth-party complaint." Other than Weyerhaeuser, all of the third-, fourth-, and fifth-party defendants were eventually dismissed from the action, and they are not parties to this appeal.

1 limited judgments and the general judgment.

2 On appeal, Weyerhaeuser raises thirteen assignments of error. We reject
3 three assignments--numbered eight, nine, and eleven--without discussion. The first four
4 assignments relate to the partial settlement agreement between plaintiffs and Stayton.

5 For the reasons explained below, we reject Weyerhaeuser's first and second assignments
6 of error, and conclude that its third and fourth assignments were not preserved.

7 Weyerhaeuser's fifth and sixth assignments challenge the verdict form used at trial. We
8 conclude that the fifth assignment was not preserved, and reject the sixth assignment on
9 the merits. Weyerhaeuser's seventh assignment contends that the trial court should have
10 reduced each plaintiff's noneconomic damages award to \$500,000 under ORS 31.710.

11 We agree that the trial court should have applied the statutory cap to Kevin's strict
12 products liability claim, and reverse plaintiffs' limited judgment for correction of that
13 error. However, we conclude that the trial court correctly determined that the cap, as
14 applied to Mitzi's loss of consortium claim, would violate Article I, section 17, of the
15 Oregon Constitution, and affirm the judgment on that issue. In its tenth assignment,

16 Weyerhaeuser contends that the court erroneously entered a judgment for Stayton on its
17 indemnity claim because Stayton failed to prove that it had discharged Weyerhaeuser's
18 liability to plaintiffs. We agree, and reverse Stayton's limited judgment. Finally, in its
19 twelfth and thirteenth assignments of error, Weyerhaeuser contends that the trial court
20 erred by awarding Stayton its defense expenses. Stayton concedes that \$1,512 of appeal-
21 related fees should not have been awarded by the trial court. We accept that concession,

1 and reverse the general judgment for correction of that error, but otherwise reject
2 Weyerhaeuser's twelfth and thirteenth assignments of error.

3 II. ANALYSIS

4 We divide our discussion of Weyerhaeuser's assignments of error into five
5 groups and discuss any additional relevant facts as necessary within each group. First,
6 we address assignments one through four, which involve the partial settlement between
7 plaintiffs and Stayton. Second, we address assignments five and six, which challenge the
8 verdict form used by the court. Third, we address assignment seven relating to the
9 \$500,000 cap on noneconomic damages. Fourth, we address Weyerhaeuser's tenth
10 assignment, which relates to the validity of the limited judgment on Stayton's indemnity
11 claim. And finally, we address the twelfth and thirteenth assignments involving the trial
12 court's award of defense costs to Stayton.³

13 A. *The agreement: first through fourth assignments of error*

14 Weyerhaeuser's first through fourth assignments relate to the partial
15 settlement agreement between Stayton and plaintiffs. We begin with the relevant text of

³ Weyerhaeuser requests *de novo* review of its tenth through thirteenth assignments of error. Stayton disputes that common-law indemnity--the claim that is at issue in those assignments of error--is an equitable proceeding, such that we would have discretion to exercise *de novo* review. See ORS 19.415(3) (granting discretion to review certain equitable proceedings *de novo*). We need not resolve the parties' disagreement on that issue because, even assuming that we have discretion to exercise *de novo* review as to those assignments, we do not find this an "exceptional" case requiring such review. See ORAP 5.40(8)(c).

1 that agreement.⁴ The agreement provided that if the parties did not mutually resolve their
2 claims against Weyerhaeuser and proceeded to trial:

3 "1. In the event of a verdict, net of plaintiffs' comparative fault, in
4 favor of plaintiffs against Stayton Builders Mart in an amount less than
5 \$1.5 million, or in the event of a defense verdict, Stayton Builders Mart will
6 pay plaintiffs the sum of \$1.5 million. Stayton Builders Mart will be free to
7 collect any amount it is awarded in its contribution or indemnity claims
8 from third-party defendant.

9 "2. In the event of a net verdict in excess of \$1.5 million, Stayton
10 Builders Mart will pay the amount of the verdict up to \$2 million. Any
11 excess over \$2 million that is recovered by Stayton Builders Mart on its
12 indemnity or contribution claims against third-party defendant
13 Weyerhaeuser, if any, shall be paid to the plaintiffs.

14 "3. In exchange for the defendant entering into this High-Low
15 Agreement, the plaintiffs agree to dismiss their negligence claims against
16 Stayton Builders Mart, Inc.

17 "4. Both plaintiffs and Stayton Builders Mart agree not to appeal
18 the jury verdict on plaintiffs' claim against Stayton Builders Mart. Stayton
19 Builders Mart retains the right to appeal the jury verdict on its third-party
20 indemnity and contribution claims.

21 "5. Stayton Builders Mart agrees to pursue its indemnity claim
22 based upon strict liability against third-party defendant through trial to
23 verdict.

24 "6. In the event of an appeal by third-party defendant that could
25 affect Stayton Builders Mart's obligations under this Agreement, Stayton
26 Builders Mart and its insurer will pay the sum of \$1.5 million within 60
27 days after the jury verdict. The potential obligation of Stayton Builders

⁴ Weyerhaeuser, as part of its second assignment of error, argues that plaintiffs and Stayton failed to disclose all terms of the agreement, in violation of ORS 31.815(2)'s requirement that, when a covenant not to sue is given, the claimant shall give notice of all terms of the covenant to all persons against whom the claimant makes claims. We reject Weyerhaeuser's contention that it was not informed of all terms of the agreement, and thus, for purposes of this appeal, accept the written terms of the agreement as the entire agreement.

1 Mart and its insurer for the remaining \$500,000 will then be determined by
2 the ultimate outcome of the appeals process, pursuant to the terms of this
3 Agreement."

4 As a preliminary matter, the parties dispute whether the agreement should
5 be labeled a "Mary Carter agreement"⁵ or a "high-low agreement."⁶ As its terms
6 demonstrate, the agreement has aspects consistent with each label. In the end, however,
7 the precise label is not material in this case; it is the substance of the agreement that
8 drives our analysis. Accordingly, we simply refer to it as "the agreement."⁷

9 After Stayton and plaintiffs entered into the agreement, Weyerhaeuser
10 moved to dismiss Stayton from the action as a defendant, arguing that there was no
11 longer a justiciable controversy between plaintiffs and Stayton because the agreement
12 eliminated any adversity between them. The trial court's denial of that motion is the

⁵ In *Grillo v. Burke's Paint Co.*, 275 Or 421, 425 n 1, 551 P2d 449 (1976), the Supreme Court noted that the term "Mary Carter agreement" arose from the case of *Booth v. Mary Carter Paint Co.*, 202 So 2d 8 (Fla 1967), and

"now appears to be used rather generally to apply to any agreement between the plaintiff and some (but less than all) defendants whereby the parties place limitations on the financial responsibility of the agreeing defendants, the amount of which is variable and usually in some inverse ratio to the amount of recovery which the plaintiff is able to make against the non-agreeing defendant or defendants."

⁶ A high-low agreement, according to *Black's Law Dictionary* 797 (9th ed 2009), is "[a] settlement in which a defendant agrees to pay the plaintiff a minimum recovery in return for the plaintiff's agreement to accept a maximum amount regardless of the outcome of the trial."

⁷ At times in this opinion, we use the labels that the parties have given the agreement. Our use of those labels is merely for ease of reference to the parties' arguments or the authority relied upon by the parties and should not be taken as something more.

1 subject of Weyerhaeuser's first assignment of error.

2 As relevant to the parties' arguments, whether a justiciable controversy
3 exists depends on whether (1) "the interests of the parties to the action are adverse" and
4 (2) "the court's decision in the matter will have some practical effect on the rights of the
5 parties to the controversy." *Brumnett v. PSRB*, 315 Or 402, 405, 848 P2d 1194 (1993).

6 Weyerhaeuser argues, as it did to the trial court, that the agreement
7 eliminated all adversity between plaintiffs and Stayton. Specifically, Weyerhaeuser
8 contends that, under the terms of the agreement, Stayton's only chance of recovering the
9 money that it agreed to pay plaintiffs was if (1) the jury found Stayton and Weyerhaeuser
10 liable for at least \$1.5 million and (2) Stayton successfully recovered in indemnity from
11 Weyerhaeuser. Stated simply, Weyerhaeuser contends that "Stayton's sole interest was in
12 the jury finding both Weyerhaeuser and it to be liable, which would position it to recover
13 all its damages in indemnity from Weyerhaeuser." Weyerhaeuser further complains that
14 any attempt by Stayton to "defend itself at trial would only have increased Stayton's
15 liability and decreased its opportunity to avoid all damages, as such efforts could have
16 benefited Weyerhaeuser." Accordingly, Weyerhaeuser complains that the interests of
17 plaintiffs and Stayton were "fully aligned" at trial, which should have led to the dismissal
18 of Stayton.

19 Plaintiffs counter that the agreement was only a partial settlement and that
20 it did not extinguish all adversity between plaintiffs and Stayton. In particular, plaintiffs
21 point out that the agreement established a potential range of liability for Stayton between

1 \$1.5 and \$2 million, which they argue made their interests adverse enough to survive
2 Weyerhaeuser's challenge to justiciability. The trial court agreed with plaintiffs on this
3 point, and so do we.

4 At the outset, we acknowledge that agreements such as the one at issue here
5 have the potential to distort the adversarial process. The Supreme Court, in *Grillo v.*
6 *Burke's Paint Co.*, 275 Or 421, 426, 551 P2d 449 (1976), recognized that "Mary Carter
7 agreements have been criticized as distorting the relationship between plaintiffs and
8 defendants, resulting in a non-adversary and possibly collusive proceeding between the
9 plaintiff and one defendant which may adversely affect the non-settling defendant's right
10 to a fair trial."⁸ *Cf. Elbaor v. Smith*, 845 SW2d 240 (Tex 1992) (declaring Mary Carter
11 agreements void in certain instances as "violative of sound public policy"); *see generally*
12 John E. Benedict, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 Colum L Rev
13 368 (1987) (concluding that such agreements distort tort litigation by prejudicing

⁸ In *Bocci v. Key Pharmaceuticals, Inc.*, 158 Or App 521, 974 P2d 758 (1999),
vac'd, 332 Or 39, 22 P3d 758 (2001), this court had the occasion to debate the ill effects
of Mary Carter agreements on the adversarial process. *Bocci*, however, was a case
affirmed by an equally divided court, and thus, has no precedential value. *See Perez v.*
Bay Area Hospital, 315 Or 474, 478 n 5, 846 P2d 405 (1993) (noting that affirmance by
an equally divided court is not entitled to precedential weight). After pointing out the
many potential ills of Mary Carter agreements, the dissent in *Bocci* concluded that the
Mary Carter agreement in that case completely realigned the interests of the plaintiff and
the settling defendant, such that "their alignment as plaintiff and defendant was
completely illusory." 158 Or App at 556 (Landau, J., dissenting). The concurrence
disagreed, noting that the Mary Carter agreement in that case limited the settling
defendant's liability to between \$200,000 and \$1,000,000, and did not establish the
settling defendant's liability. Thus, in the view of the concurrence, some adversity
remained between the parties. *Id.* at 529 (Riggs, J., concurring).

1 nonsettling defendants at trial, undermining the equitable apportionment of damages
2 among tortfeasors, and contravening legal ethics). Nevertheless, despite acknowledging
3 the problems with such agreements, the Supreme Court joined the majority of
4 jurisdictions and declined to declare such agreements void; instead, the court recognized
5 that the problems could be addressed by instituting safeguards, such as disclosing the
6 agreement to the parties, the court, and the factfinder, such that the factfinder could
7 evaluate the agreement's effect on the adversarial process. *Grillo*, 275 Or at 426-27.

8 We also acknowledge that Stayton, as a result of the agreement, had an
9 interest in the jury finding both it and Weyerhaeuser liable for at least \$1.5 million. That
10 is so because, if the jury had returned a defense verdict, Stayton would have been liable
11 to plaintiffs for \$1.5 million under the agreement and would have been precluded from
12 recovering in indemnity because Weyerhaeuser would not have been found to be liable to
13 plaintiffs. *See Marton v. Ater Construction Co., LLC*, 256 Or App 554, 560, 302 P3d
14 1198 (2013) (explaining that one of the elements of a common-law indemnity claim is
15 that "the [indemnity-]defendant was also liable to the third party").

16 Nevertheless, the potential ills created by such agreements did not, as a
17 matter of law, extinguish all adversity between plaintiffs and Stayton. Instead, whether
18 adversity continued to exist depended on the terms of the agreement, as illustrated by two
19 of our prior decisions.

20 In *Stephens v. Bohlman*, 138 Or App 381, 384-85, 909 P2d 208, *rev*
21 *dismissed*, 324 Or 177 (1996), we explained that adversity is extinguished and a case is

1 no longer justiciable when a party has "no interest" in the outcome of the case because it
2 could "neither gain nor lose anything as a result of the trial." In that case, the plaintiff
3 brought a medical malpractice action against a physician and a hospital. The plaintiff and
4 the hospital entered into a settlement agreement whereby the hospital agreed to pay the
5 plaintiff \$90,000 and remain in the case as a defendant "as though they had not reached a
6 settlement." *Id.* at 384. In return, the plaintiff agreed not to execute on any judgment
7 against the hospital and released the hospital from any liability in excess of \$90,000. *Id.*
8 We concluded that that agreement had extinguished all adversity between the plaintiff
9 and the hospital and that the trial court had erred in failing to dismiss the hospital before
10 the trial began. *Id.* at 385-86. We explained that the hospital's payment of \$90,000

11 "was absolute; nothing in the agreement entitles it to recover any portion or
12 to pay any additional amount no matter what the outcome of the lawsuit
13 against defendant. Thus, [the] hospital's only purpose for appearing at the
14 trial was to fulfill its contractual obligation to plaintiff because it had no
15 interest in the outcome."

16 *Id.* at 384. Accordingly, we concluded that the hospital had nothing at stake in the
17 outcome of the case, and the trial court erred in not dismissing the hospital as a party.⁹
18 *Id.* at 385-86.

19 In *Dew v. City of Scappoose*, 208 Or App 121, 143, 145 P3d 198 (2006),
20 *rev den*, 342 Or 416 (2007), we concluded that "[m]erely because a party is fully
21 indemnified against potential liability, it does not follow that the party has nothing at

⁹ Ultimately, we determined that the error was not reversible error because it did not substantially prejudice the physician in the conduct of his case. *Stephens*, 138 Or App at 386-87.

1 stake in an action against it, nor does it render such an action moot." In that case, the
2 plaintiff filed an action against the City of Scappoose and one of its city councilors
3 relating to her termination from employment with the city. In particular, she brought two
4 claims against the councilor, one under 42 USC section 1983 and the other for intentional
5 economic interference. *Id.* at 126. Eventually, the plaintiff entered into a settlement
6 agreement with the councilor in which the plaintiff agreed to dismiss the intentional
7 interference claim and not to enforce any judgment against him on the section 1983 claim
8 in excess of his insurance policy limits, or in an amount not collectible directly from the
9 city. The agreement also provided that it was not intended to release the councilor as a
10 defendant in the lawsuit on the section 1983 claim, or hinder his ability to defend himself.
11 *Id.* at 127-28, 143. The trial court dismissed the section 1983 claim on mootness
12 grounds, concluding that the agreement left the councilor with no personal exposure, thus
13 making the remaining claim against him no longer justiciable. *Id.* at 128.

14 We reversed, explaining that, even though the agreement effectively
15 insulated the councilor from any personal financial exposure, "the question of his liability
16 remains an open one." *Id.* at 143. Accordingly, we concluded that the outcome of the
17 trial would have a practical effect on the councilor's rights "because it will determine
18 whether he is personally liable. Because [his] personal liability to [the] plaintiff has yet
19 to be determined, the parties remain in an adversarial relationship and the issue is not
20 moot." *Id.* In reaching that conclusion, we noted that *Stephens* differed because the
21 plaintiff in that case "specifically discharged the defendant hospital from any further

1 liability beyond the \$90,000 that the hospital had already paid." *Id.*

2 We acknowledge that this case differs from *Dew* because the agreement in
3 that case did not give the councilor an affirmative incentive to facilitate a determination
4 that both he and the city were liable for the plaintiff's section 1983 claim; here, the
5 agreement provided such an incentive to Stayton. Nevertheless, we conclude that,
6 although the agreement in this case may have realigned the parties' interests and strategy
7 at trial, it did not foreclose all adversity between plaintiffs and Stayton. That is, we
8 cannot say that Stayton had nothing at stake in the outcome of the case. Most
9 importantly, the agreement did not absolutely establish Stayton's potential financial
10 exposure. Instead, it set up a range of liability for Stayton that, at least on some level,
11 maintained an adversarial position between the parties. The remaining adversity was that
12 every dollar above \$1.5 million that the jury awarded to plaintiff against Stayton, up to a
13 maximum of \$2 million, equaled an additional dollar that Stayton had to pay to plaintiffs.
14 The mere possibility that Stayton would later prevail on its indemnity claim and fully
15 recover all of that additional money from Weyerhaeuser did not extinguish the adversity
16 that remained at the time of trial. *See Dew*, 209 Or App at 143 (an agreement that
17 effectively insulates a party from personally having to pay any judgment does not
18 extinguish adversity). Accordingly, in the circumstances of this case, adversity remained
19 between Stayton and plaintiffs.

20 Weyerhaeuser's second through fourth assignments of error challenge the
21 trial court's denial of Weyerhaeuser's request to admit the agreement into evidence. At a

1 pretrial hearing, Weyerhaeuser argued that the agreement should be admitted into
2 evidence because

3 "Weyerhaeuser would like to make use of the Mary Carter Agreement
4 during the course of the presentment of evidence. We believe the jury has a
5 right to know of this agreement. They have a right to know the terms of
6 this agreement. They also have a right to know that it's insurance that's
7 paying these terms as opposed to Stayton Builders Mart, a small, local
8 lumber yard."

9 Weyerhaeuser then acknowledged that, under OEC 411,¹⁰ evidence of liability insurance
10 is not relevant to the issue of whether a person acted negligently or otherwise wrongfully,
11 but proceeded to argue that

12 "[t]he concern is that in typical cases where a defendant has
13 insurance, a plaintiff would use that against the defendant and essentially
14 show the jury, well, don't worry about this defendant, whether they can pay.
15 They have got insurance. And that heightens the likelihood that a jury
16 would find negligence. In this case, it's different.

17 "In this case, the jury will be left with the impression that this small,
18 local lumber yard is potentially on the hook for a very large settlement. And
19 they might think differently as to how to deal with the apportionment of
20 damages if they were under that false impression.

¹⁰ OEC 411 provides:

"(1) Except where lack of liability insurance is an element of an offense, evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.

"(2) Subsection (1) of this section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proving agency, ownership or control, or bias, prejudice or motive of a witness."

1 "The true impression is that the money is being paid by a very large
2 insurance company in Ohio, and the jury has a right to know that. And it is
3 not within the exclusion as detailed in [the] Oregon Rules of Evidence."

4 The trial court ruled that "[b]ased upon the ruling in *Bocci*, the court would
5 be consistent with that ruling and say that the terms of the agreement and the fact that
6 insurance is involved would not be admissible at trial."¹¹

7 In its second assignment of error, Weyerhaeuser contends that the trial
8 court erred by denying Weyerhaeuser's request to admit the agreement into evidence.
9 Weyerhaeuser first argues that Mary Carter agreements are, as a matter of law,
10 admissible into evidence upon the request of any nonsettling defendant. In particular,
11 Weyerhaeuser relies on the Supreme Court's statement in *Grillo* that

12 "[h]aving reviewed [cases from other jurisdictions discussing the
13 validity of Mary Carter agreements], we conclude that the [Mary Carter
14 agreement] in the instant case is valid and enforceable, but that it would
15 have been subject to pretrial discovery and, upon request of defendant,
16 would have been admissible in evidence."

17 275 Or at 427. Weyerhaeuser maintains that the Supreme Court's holding in *Grillo*
18 unambiguously requires Mary Carter agreements to be admitted into evidence at the
19 request of the nonsettling defendant. In doing so, Weyerhaeuser argues that such

¹¹ As we previously noted, *Bocci* has no precedential value to this case. ___ Or App at ___ (slip op at 8 n 8). The concurrence in *Bocci* concluded that the trial court did not err in denying admission of the Mary Carter agreement because the agreement contained liability insurance information, *see* OEC 411, and that, given the inadmissible material in the agreement and the defendant's failure to offer the agreement without the offending material, the trial court could exclude the agreement from evidence. 158 Or App at 536 (Riggs, J., concurring). The dissent would have allowed the agreement into evidence because of the Supreme Court's holding in *Grillo*, and thought it improper to resolve the issue on the basis of the insurance information because that issue had not been raised at trial. *Id.* at 560 (Landau, J., dissenting).

1 agreements must be admitted without concern for whether admission of the agreement, or
2 parts of it, would otherwise be precluded by the Oregon Evidence Code.

3 Plaintiffs counter that Weyerhaeuser offered the agreement to inform the
4 jury that any financial obligation incurred by Stayton at trial would be paid by Stayton's
5 insurer and that such a purpose--to demonstrate that Stayton had insurance coverage and
6 to influence the jury's potential allocation of fault and its damage award--was
7 impermissible under OEC 411. Plaintiffs acknowledge that "[t]he jury was entitled to
8 know that plaintiffs and Stayton had entered into a partial settlement in which Stayton's
9 liability would be based on the outcome of trial," but asserts that the jury was not entitled
10 to know that Stayton's insurer would pay Stayton's obligation to plaintiffs.

11 Ultimately, we conclude that the trial court did not err. As an initial matter,
12 we disagree that the court in *Grillo* explicitly held that all Mary Carter agreements must
13 be admitted into evidence without any analysis of relevance and admissibility under the
14 Oregon Evidence Code. The court did not have occasion to consider that question.
15 Rather, the court reviewed the trial court's denial of a nonsettling defendant's motion for
16 new trial based on the nonsettling defendant's post-trial determination that the plaintiff
17 and the settling defendant had entered into a Mary Carter agreement immediately before
18 trial. In reviewing that issue, the court examined the various criticisms of Mary Carter
19 agreements and ultimately agreed with the jurisdictions that refuse to "condemn the
20 agreements as invalid per se." 275 Or at 426. The court, in so concluding, simply noted
21 that Mary Carter agreements are subject to pretrial discovery and are admissible upon

1 request of the defendant. *Id.* at 427. Ultimately, the court resolved the case on the
2 principle that a new trial was not justified because the evidence (of the Mary Carter
3 agreement) could have been discovered before trial with the exercise of due diligence.
4 *Id.* at 427-28. Given the way that the issue in *Grillo* was presented, discussed, and
5 resolved, the statement that Mary Carter agreements are subject to discovery and
6 admissible at trial is unremarkable, and we do not understand it to mean that all such
7 agreements must be admitted in their entirety even if they contain material that is deemed
8 irrelevant or inadmissible under the Oregon Evidence Code.

9 Given that conclusion, it was appropriate for the trial court to evaluate
10 Weyerhaeuser's request to admit the entire agreement between plaintiffs and Stayton in
11 light of relevant provisions of the evidence code. *See* OEC 101(2) (the Oregon Evidence
12 Code generally applies in civil actions). Weyerhaeuser makes a limited attempt to argue
13 that "insurance was not being offered to show negligence or wrongful conduct, but to
14 show prejudice and that small local lumber yard Stayton would not be on the hook to pay
15 a judgment on their own." For two reasons, we agree with plaintiffs that the trial court
16 did not err in excluding the agreement on the basis that it contained evidence of insurance
17 in violation of OEC 411.

18 First, Weyerhaeuser's argument at the pretrial hearing was that the
19 agreement should be admitted into evidence despite OEC 411 for the purpose of
20 demonstrating that Stayton had insurance and would not be "on the hook for a very large
21 settlement." As the Conference Committee Commentary to the Oregon Evidence Code

1 states, OEC 411 exists because "[t]he inference of fault from the fact of insurance
2 coverage is at best tenuous, and its converse equally so. More important, no doubt, is the
3 feeling that knowledge of the presence or absence of insurance may induce juries to
4 decide cases on improper grounds." Laird C. Kirkpatrick, *Oregon Evidence* § 411.02
5 (6th ed 2013). Weyerhaeuser offered the evidence of insurance for an improper purpose-
6 -to induce the jury to use the existence of insurance to influence its allocation of fault and
7 damages. The trial court did not err by excluding the agreement on the basis that such an
8 offer was improper under OEC 411.

9 Second, Weyerhaeuser concedes that it did not attempt to introduce the
10 agreement with the insurance information redacted. Where a party attacks the exclusion
11 of an exhibit that contains some irrelevant material, that party has "the burden of excising
12 the irrelevant portions of the exhibit to preserve the claimed error." *Fazzolari v. Portland*
13 *School Dist. No. 1J*, 78 Or App 608, 614, 717 P2d 1210 (1986), *aff'd on other grounds*,
14 303 Or 1, 734 P2d 1326 (1987). Accordingly, the court's decision to exclude the entire
15 agreement, as offered, was not error.

16 We next consider Weyerhaeuser's third and fourth assignments of error. In
17 its third assignment, Weyerhaeuser contends that, if the trial court properly concluded
18 that the agreement could not be entered into evidence because of the insurance
19 references, the trial court should have, at the very least, informed the jury about the other
20 terms of the agreement so that the jury had a full understanding of it. In its fourth
21 assignment of error, Weyerhaeuser argues that it should have been allowed to use the

1 agreement, or evidence of its terms, to establish bias, interest, or motive of witnesses at
2 trial. In particular, Weyerhaeuser asserts that the court should have allowed it to use the
3 agreement in its cross-examination of Roberts, a key witness for Stayton whose
4 testimony supported a finding that the broken board came from Weyerhaeuser.

5 Plaintiffs insist that Weyerhaeuser failed to preserve its third and fourth
6 assignments of error. As to the third, plaintiffs point out that Weyerhaeuser never offered
7 the agreement into evidence without the offending insurance references--as
8 Weyerhaeuser does not dispute--and that, in fact, the court instructed the jury that the
9 agreement existed and that the jury could consider it to evaluate the credibility or
10 believability of witnesses who testified. As to the fourth assignment, plaintiffs maintain
11 that it was not preserved because Weyerhaeuser never attempted to cross-examine
12 Roberts about the agreement--and indeed, Weyerhaeuser concedes that it never attempted
13 to raise the agreement during cross-examination of Roberts or any other witness.

14 Nevertheless, Weyerhaeuser takes the view that its third and fourth
15 assignments of error are preserved because it was clear from the trial court's ruling at the
16 pretrial hearing that neither the agreement nor its terms were admissible "for any
17 purpose." As such, Weyerhaeuser relies on the principle that "when the trial court
18 excludes an entire class of evidence by declaring, in advance, that it is inadmissible as a
19 matter of law, the ruling renders a further offer futile." *State v. Olmstead*, 310 Or 455,
20 461, 800 P2d 277 (1990).

21 We reject Weyerhaeuser's argument that that principle applies in this

1 instance. Rather, the record, particularly when considered in light of the purposes of the
2 preservation rules, supports the conclusion that Weyerhaeuser had to raise the specific
3 points that it now makes in its third and fourth assignments of error in order to preserve
4 them for our review.

5 One purpose of the preservation rules is to allow the adversary to present its
6 position and to permit the court to understand and avoid or correct the error. *Peiffer v.*
7 *Hoyt*, 339 Or 649, 656-57, 125 P3d 734 (2005). Similarly, a focus of the preservation
8 requirement "is whether a party has given opponents and the trial court enough
9 information to be able to understand the contention and to fairly respond to it."
10 *State v. Walker*, 350 Or 540, 552, 258 P3d 1228 (2011).

11 Neither of those purposes was served as to Weyerhaeuser's third and fourth
12 assignments of error. At the pretrial hearing, Weyerhaeuser argued that the agreement as
13 a whole should be entered into evidence, including the insurance references, for the
14 express purpose of informing the jury that the money Stayton had agreed to pay to
15 plaintiffs would be paid by a "very large insurance company in Ohio." Although
16 Weyerhaeuser also made general reference to OEC 411 and the admission of insurance
17 information for purposes of showing prejudice, that reference, considered in context, did
18 not reasonably put plaintiffs, Stayton, or the trial court on notice that Weyerhaeuser was
19 alternatively asking the court to inform the jury about the terms of the agreement in the
20 way that it now argues it was precluded from doing at trial. The same goes for
21 Weyerhaeuser's contention regarding cross-examination. Nothing at the pretrial hearing

1 would have informed the court or other parties that Weyerhaeuser was requesting a ruling
2 on whether it could use terms of the agreement, or the existence of the agreement, to
3 cross-examine witnesses. Instead, Weyerhaeuser's argument at the pretrial hearing can be
4 fairly characterized only as a request to enter the entire agreement into evidence to inform
5 the jury of its existence and to inform the jury that Stayton had liability insurance.

6 Furthermore, the trial court's charge to the jury both before and after the
7 presentation of evidence undermines Weyerhaeuser's contention that the trial court's
8 pretrial ruling unequivocally excluded any use of the agreement or its terms during trial.
9 Prior to opening statements, the trial court informed the jury that Stayton and plaintiffs
10 had entered into a settlement agreement, but Stayton remained a party to the action, and
11 that the jury "may only consider the fact of the settlement as it might bear on the issues of
12 credibility or believability of the witnesses who testify." The trial court similarly
13 instructed the jury before it began its deliberations.¹²

14 In these circumstances, it was incumbent on Weyerhaeuser to seek to use
15 the agreement or certain terms to establish bias, interest, or motive beyond its general
16 request that the agreement be entered into evidence as a whole to show that Stayton was
17 adequately insured. The third and fourth assignments of error are unpreserved.

18 B. *The verdict form: fifth and sixth assignments of error*

19 Weyerhaeuser's fifth and sixth assignments of error relate to the verdict
20 form used by the court. First, Weyerhaeuser contends that, pursuant to the comparative

¹² Weyerhaeuser did not object to those jury instructions.

1 fault statute, ORS 31.600, Five Star should have been included on the verdict form so that
2 the jury could apportion fault to it. In particular, Weyerhaeuser relies on ORS 31.600(2),
3 which states in part, "The trier of fact shall compare the fault of the claimant with the
4 fault of any party against whom recovery is sought * * * [.]" Weyerhaeuser argues that
5 because plaintiffs sought recovery from Five Star in their complaint, the jury should have
6 been given an opportunity to assign a fault percentage to it--even though Five Star
7 defaulted and no evidence was presented at trial as to Five Star's potential fault.

8 In response, plaintiffs first contend that Weyerhaeuser failed to preserve its
9 fifth assignment of error, and we agree. In support of preservation, Weyerhaeuser asserts
10 that it sought to have Five Star on the verdict form "both by submitting a proposed
11 verdict form before trial, and by verbally confirming, before the verdict form was
12 provided to the jury, that the court had rejected its request to include Five Star on the
13 verdict form."

14 The record demonstrates that after instructing the jury, the trial court read to
15 the jury the verdict form that it ultimately used. After the jury was excused for that day,
16 the court asked the parties whether they had any objections. Stayton objected to the
17 verdict form. The court explained that

18 "the court chose the verdict form for the reason that it spent approximately
19 three hours last night and this morning with counsel, including during the
20 noon hour, and counsel were not able to agree on the language in a special
21 verdict form, in particular in regard to the specific questions concerning
22 product liability, product liability verdict in this case.

1 "And so for that reason the trial judge * * * said we'll stick with the
2 Uniform Instructions until someone in the appellate courts tell us that those
3 are incorrect for use in a products liability case."

4 Stayton explained that it did not believe that the verdict form was
5 appropriate for a strict products liability case because the verdict form was not adapted to
6 the issues in such a case, such as the condition of the product and whether it was
7 unreasonably dangerous when it left the manufacturer's "hands." Weyerhaeuser then
8 joined in Stayton's objection, asking

9 "that the verdict form[] that is submitted by Weyerhaeuser be made a part
10 of the court file. It's very similar to the one that Stayton * * * actually
11 submitted, and we join with all of the concerns that they express now, as
12 well as back when it was originally being contemplated."

13 Weyerhaeuser continued with further explanation as to why the verdict form did not
14 match with strict products liability law, and then transitioned to its last objection:

15 "Also with the original verdict form that was submitted we requested
16 that Five Star be added. I understand that was taken off by the court, and
17 that plaintiffs' counsel stipulated back in chambers that by removing it from
18 the verdict form that it would not be a waiver of any argument
19 Weyerhaeuser may make at a later date, offset from any sums obtained
20 from Five Star Construction."

21 In short, the record does not establish that Weyerhaeuser properly preserved
22 the argument it now makes on appeal. As we explained in relation to Weyerhaeuser's
23 third and fourth assignments, one purpose of the preservation requirement is to allow the
24 adversary to present its position and to permit the court to understand and avoid or
25 correct the error, *Peiffer*, 339 Or at 656-57, and another is to give "opponents and the trial
26 court enough information to be able to understand the contention and to fairly respond to
27 it." *Walker*, 350 Or at 552. Although the parties and the court may have had a lengthy

1 off-the-record discussion about the proper verdict form that included discussion of
2 whether Five Star should be on the form because of ORS 31.600(2), the record on appeal
3 contains nothing that demonstrates that Weyerhaeuser made such an argument to the trial
4 court. All we are left with is evidence that Weyerhaeuser submitted a verdict form that
5 had a place to allocate fault to Five Star. We cannot say that, in doing so, Weyerhaeuser
6 provided the court with an explanation of its objection that was specific enough to ensure
7 that the court could identify its alleged error with enough clarity to permit it to consider
8 and correct the error immediately, if correction was warranted. *See State v. Wyatt*, 331
9 Or 335, 343, 15 P3d 22 (2000).

10 In its sixth assignment of error, Weyerhaeuser declares that the verdict form
11 used by the court likely confused the jury because it allowed the jury to assign liability on
12 the basis of negligence, as opposed to strict products liability. Weyerhaeuser maintains
13 that, given the difference in proof between claims for negligence and strict liability, the
14 verdict form used was prejudicial.

15 The verdict form, as pertinent, stated:

16 "We, the jury, find:

17 "1a. Was * * * Stayton * * * at fault in one or more of the ways
18 the plaintiffs claim?

19 "ANSWER: _____ (Yes or No)

20 " * * * * *

21 "1b. Was * * * Stayton['s] * * * fault a cause of damages to the
22 plaintiffs?

23 "ANSWER: _____ (Yes or No)

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"2a. Was * * * Weyerhaeuser * * * at fault in one or more of the ways claimed?

"ANSWER: _____ (Yes or No)

" * * * * *

"2b. Was * * * Weyerhaeuser['s] * * * fault a cause of damages to the plaintiffs?

"ANSWER: _____ (Yes or No)

" * * * * *

"3a. Was plaintiff Kevin Rains at fault in one or more of the ways claimed by * * * Stayton * * * and * * * Weyerhaeuser * * * ?

"ANSWER: _____ (Yes or No)

" * * * * *

"3b. Was plaintiff Kevin Rains' fault a cause of damages to the plaintiffs?

"ANSWER: _____ (Yes or No)"¹³

Weyerhaeuser asserts that, instead of generically asking the jury if defendants were "at fault," the form should have tracked the elements of a claim for strict products liability and required the jury to indicate whether it found that (1) the defendants were sellers or manufacturers, (2) the product was in defective condition, (3) the product, in its defective condition, was unreasonably dangerous, and (4) the product reached the

¹³ The verdict form also instructed the jury, depending on the answer to each question, to which question it should next proceed. It also asked the jury to assign a percentage of fault to each of the parties and to designate the amount of damages to plaintiffs.

1 user without substantial change in the condition in which it was sold.

2 Weyerhaeuser acknowledges that the trial court properly instructed the jury
3 with regard to the law of strict products liability. Weyerhaeuser asserts, however, that
4 when the instructions and the verdict form were considered together, the jury likely was
5 confused, warranting reversal in this case. In particular, as noted, Weyerhaeuser
6 contends that the verdict form was inconsistent with the law on strict products liability
7 and may have confused the jury in regard to that claim.

8 Plaintiffs counter that there is no legal requirement that the verdict form ask
9 the factfinder to answer a question on every element of a claim. Instead, plaintiffs
10 contend that the trial court instructed the jury on "fault" in the context of Kevin's strict
11 products liability claim and the comparative fault statute. Accordingly, plaintiffs assert
12 that, when the jury instructions and the verdict form are considered together, there is no
13 risk that the jury misunderstood its charge to determine liability based on strict products
14 liability law. That is so because the jury, which is presumed to follow the court's
15 instructions, would have understood that "fault" as used on the verdict form meant that a
16 party was liable under the elements of strict products liability.

17 We agree with plaintiffs. When the verdict form is considered in
18 conjunction with the jury instructions, it is not likely that the verdict form "created an
19 erroneous impression of the law in the minds of the jurors" that "affected the outcome of
20 the case." *Nolan v. Mt. Bachelor, Inc.*, 317 Or 328, 336-37, 856 P2d 305 (1993) (internal
21 quotation marks omitted).

1 The elements of a strict products liability claim provided in ORS 30.920,
2 are as follows:

3 "(1) One who sells or leases any product in a defective condition
4 unreasonably dangerous to the user or consumer or to the property of the
5 user or consumer is subject to liability for physical harm or damage to
6 property caused by that condition, if:

7 "(a) The seller or lessor is engaged in the business of selling or
8 leasing such a product; and

9 "(b) The product is expected to and does reach the user or consumer
10 without substantial change in the condition in which it is sold or leased."

11 The trial court instructed the jury as to the meaning of "defective condition"
12 and "unreasonably dangerous to the user or consumer." The court also instructed the jury
13 "on the law of strict liability for a defective product," and that instruction touched on all
14 the elements of a strict products liability claim. Also relevant is that the court instructed
15 the jury on comparative fault. Weyerhaeuser does not take issue with the court's
16 instructions on strict liability, so the heart of its argument is that, even though the jury
17 was correctly instructed as to what had to be proved to establish strict products liability,
18 use of the phrase "at fault" on the verdict form would have "probably created an
19 erroneous impression of the law in the minds of the jurors which affected the outcome of
20 the case." *Nolan*, 317 Or at 336-37 (internal quotation marks omitted).

21 As plaintiffs note, we generally presume that jurors follow jury instructions.
22 *Bazzaz v. Howe*, 262 Or App 519, 526, 325 P3d 775 (2014). Given the content of the
23 jury instructions, which exhaustively instructed the jury on the elements of a strict
24 products liability claim and application of the comparative fault statute, we cannot agree

1 with Weyerhaeuser that the court's use of a verdict form that required the jurors only to
2 determine whether the parties were at fault was in error.

3 C. *Noneconomic damages: seventh assignment of error*

4 Weyerhaeuser's seventh assignment challenges the trial court's denial of its
5 motion to reduce each plaintiff's noneconomic damages under ORS 31.710(1). ORS
6 31.710(1) caps noneconomic damages at \$500,000 in most civil actions "arising out of
7 bodily injury[.]" The trial court denied Weyerhaeuser's motion to apply the statutory cap,
8 agreeing with plaintiffs that application of the cap in this case would violate Article I,
9 section 17, of the Oregon Constitution.¹⁴ Weyerhaeuser contends that ORS 31.710(1), as
10 applied to Kevin's strict products liability claim and Mitzi's loss of consortium claim,
11 does not violate Article I, section 17.

12 In the most recent Supreme Court case addressing ORS 31.710 and Article
13 I, section 17, the court explained:

14 "Article I, section 17, guarantees a jury trial in civil actions for
15 which the common law provided a jury trial when the Oregon Constitution
16 was adopted in 1857 and in cases of like nature. In any such case, the trial
17 of all issues of fact must be by jury. The determination of damages in a
18 personal injury case is a question of fact. * * * The legislature may not
19 interfere with the full effect of a jury's assessment of noneconomic
20 damages, at least as to civil cases in which the right to jury trial was
21 customary in 1857[.]"

22 *Klutschkowski v. PeaceHealth*, 354 Or 150, 177, 311 P3d 461 (2013) (quoting *Lakin v.*
23 *Senco Products, Inc.*, 329 Or 62, 78, 987 P2d 463 (1999)) (ellipses and brackets in

¹⁴ Article I, section 17, provides: "In all civil cases the right of Trial by Jury shall remain inviolate."

1 *Klutschkowski*). As the court indicated in *Klutschkowski*, under its precedent in *Smothers*
2 *v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001), and *Hughes v. PeaceHealth*,
3 344 Or 142, 178 P3d 225 (2008), the state of the common law in 1857 bears on whether
4 Article I, section 17, limits the legislature's authority to alter a cause of action or reduce
5 the amount of a jury award. 354 Or at 168. Accordingly, Weyerhaeuser's seventh
6 assignment of error requires us to examine the state of the common law in 1857, as it
7 relates to the claims brought by plaintiffs. *Id.* at 169.

8 We begin with Kevin's claim for strict products liability. Weyerhaeuser
9 maintains that Article I, section 17, is not implicated in this case because an action for
10 strict products liability was not recognized in Oregon until 1967 in the case of *Heaton v.*
11 *Ford Motor Co.*, 248 Or 467, 435 P2d 806 (1967), later codified by the legislature in
12 1979 as ORS 30.920. Or Laws 1979, ch 866, § 2. Weyerhaeuser acknowledges that an
13 action for common-law negligence against a manufacturer of defective products existed
14 in 1857, but differentiates such a claim from Kevin's strict products liability claim in
15 several ways.

16 First, Weyerhaeuser asserts that, in ORS 30.920, the legislature created a
17 cause of action that is separate and independent from a common-law negligence action
18 for defective products. Second, Weyerhaeuser explains that the types of proof required to
19 establish each claim are different. According to Weyerhaeuser, a plaintiff can establish
20 strict products liability by demonstrating the existence of a product defect that rendered
21 the product unreasonably dangerous to persons or property, while a negligence claim

1 based on a product defect requires proof that the product defect resulted from the
2 manufacturer's negligence. Third, Weyerhaeuser explains that strict liability applies to all
3 sellers and lessors in the product's chain of distribution; in contrast, the plaintiff must
4 prove the negligence of each defendant from whom he seeks to recover under a common-
5 law negligence theory. Finally, Weyerhaeuser claims that some damages that are
6 recoverable in negligence--such as economic losses--are not recoverable in strict products
7 liability, citing *State ex rel Western Seed v. Campbell*, 250 Or 262, 442 P2d 215 (1968),
8 and *City of Medford v. Budge-McHugh Supply Co.*, 91 Or App 213, 754 P2d 607, *rev*
9 *den*, 306 Or 661 (1988).

10 Plaintiffs take a different approach, arguing that strict products liability has
11 origins in the common law, such that it is a case "of like nature" to those to which a right
12 to a jury trial was customary in 1857. Plaintiffs rely on a statement in *State v. 1920*
13 *Studebaker Touring Car et al.*, 120 Or 254, 263, 251 P 701 (1926), that

14 "the constitutional right of trial by jury is not to be narrowly construed, and
15 is not limited strictly to those cases in which it had existed before the
16 adoption of the Constitution, but is to be extended to cases of like nature as
17 they may hereafter arise."

18 Plaintiffs posit that "cases of like nature" include actions for money damages that have
19 common-law origins, as well as any modern variation of the common-law action. In line
20 with that view, plaintiffs claim that the Supreme Court in *Stout v. Madden & Williams*,
21 208 Or 294, 300 P2d 461 (1956), traced the history of personal-injury claims based on
22 defective products, and acknowledged that, as early as 1852, American courts recognized
23 a claim without the need for privity between the manufacturer and the injured party. In

1 addition, plaintiffs point to the Supreme Court's adoption of the *Restatement (Second) of*
2 *Torts* section 402A (1965), in *Heaton*, 248 Or at 471-72, and contend that the
3 *Restatement*, which was explicitly codified in ORS 30.920(3), derived from the common
4 law.

5 Restating the parties' positions in more simple terms, they differ as to the
6 meaning of the statement in the Supreme Court's prior cases that the cap would violate
7 Article I, section 17, in "cases of like nature" to those causes of action that existed in
8 1857. Both parties acknowledge that, as of 1857, a party could recover in negligence for
9 injuries sustained as a result of a product defect. For plaintiffs, that is enough--Kevin's
10 strict products liability claim is simply a "right of action now clothed in statutory garb,
11 but with common law origins." Weyerhaeuser counters that, given the substantial
12 differences between the elements of a strict products liability claim and the common-law
13 negligence product liability claim that existed in 1857, the legislative alteration of the
14 amount of recoverable damages in a strict products liability claim does not run afoul of
15 Article I, section 17.

16 Resolving this dispute is difficult given the state of the law. *See*
17 *Klutschkowski*, 354 Or at 169 n 11 (acknowledging, but declining to address, the
18 plaintiffs' argument that Article I, section 10, of the Oregon Constitution should protect
19 common-law causes of action "not only as they existed in 1857 but also as those causes
20 of action have evolved over time"); *id.* at 178-96 (Landau, J., concurring) (noting tension
21 between cases addressing Article I, section 17, in relation to ORS 31.710, and the same

1 constitutional provision when deciding whether a party has a right to a jury trial, *e.g.*,
2 *Foster v. Miramontes*, 352 Or 401, 287 P3d 1045 (2012)). We ultimately conclude that
3 Weyerhaeuser has the better argument because a claim under ORS 30.920 has very little
4 in common with the type of product liability negligence claim that existed in 1857--even
5 if the "origins" of a claim under ORS 30.920 are arguably found in the common law.

6 In resolving the issue, we find *Hughes*, 344 Or at 142, most instructive.
7 There, the Supreme Court examined whether, as applied to the plaintiff's wrongful death
8 action, the statutory cap on noneconomic damages violated Article I, section 17. The
9 plaintiff argued that her action, although first established by statute in 1862, was "like" an
10 ordinary common-law personal injury action and therefore entitled to a jury
11 determination of damages without any cap. 344 Or at 155. The court disagreed, noting
12 that "in 1857, there was no clear common-law tradition with respect to the necessary
13 elements of a wrongful death action, or who might bring such an action, or what sorts of
14 damages would be recoverable, should such a cause of action be recognized." *Id.* at 156.
15 Central to the court's decision in that case was that the amount of damages allowed in a
16 wrongful death action, as a statute-based action enacted after 1857, had always been
17 subject to legislative adjustment. *Id.* ("[T]here was no common-law rule defining the
18 damages for wrongful death at all, much less one that identified the amount that would
19 compensate a plaintiff for injuries resulting from the wrongful act.").

20 As explained below, we conclude that in 1857, there was no common-law
21 tradition with respect to a strict products liability claim that could provide the basis for a

1 conclusion that the legislature is prohibited by Article I, section 17, from altering the
2 measure of damages available for such an action.

3 As a starting point, actions for strict products liability are governed by
4 statute, not the common law. *Griffith v. Blatt*, 334 Or 456, 465-66, 51 P3d 1256 (2002)
5 ("Oregon statutes, not the common law, govern plaintiff's strict liability claim and [the
6 defendant's] defenses."). The relevant statute, ORS 30.920, provides the elements of a
7 strict products liability claim:

8 "(1) One who sells or leases any product in a defective condition
9 unreasonably dangerous to the user or consumer or to the property of the
10 user or consumer is subject to liability for physical harm or damage to
11 property caused by that condition, if:

12 "(a) The seller or lessor is engaged in the business of selling or
13 leasing such a product; and

14 "(b) The product is expected to and does reach the user or consumer
15 without substantial change in the condition in which it is sold or leased."

16 ORS 30.920(2) provides that subsection (1) applies even when "[t]he seller or lessor has
17 exercised all possible care" and the injured party has no contractual relationship with the
18 seller or lessor.

19 The common law, as it existed in 1857, did not recognize the type of action
20 that is now codified in ORS 30.920. Although the recognition of negligence actions
21 based on product defects generally predated the Oregon Constitution, *see Winterbottom v.*
22 *Wright*, 152 Eng Rep 402 (1842), the general rule that developed during the mid-
23 nineteenth century in the United States was that "the original seller of goods was not
24 liable for damages caused by their defects to anyone except his immediate buyer, or one

1 in privity with him." W. Page Keeton ed., *Prosser and Keeton on the Law of Torts* § 96,
2 681 (5th ed 1984). Almost immediately, exceptions to that general rule were carved out,
3 including an exception that originated in the case of *Thomas v. Winchester*, 6 NY 397
4 (1852), which "held the seller liable to a third person for negligence in the preparation or
5 sale of an article 'imminently' or 'inherently' dangerous to human safety." Keeton, *Prosser*
6 *and Keeton on the Law of Torts* § 96 at 682. Nevertheless, the general rule, and the
7 exceptions to that rule that developed in the nineteenth century, were all based in the
8 common law of negligence.

9 In addition, the concept of strict liability for product defects did not develop
10 in the law until the early twentieth century. Keeton, *Prosser and Keeton on the Law of*
11 *Torts* § 97 at 690. The first acknowledged case that "discarded the requirement of privity
12 of contract" in product liability negligence actions was a Washington case, but even that
13 case was based on the legal theory of implied warranty. *Mazetti v. Armour & Co.*, 75
14 Wash 622, 135 P 633 (1913). In fact, the leap from negligence to strict liability in tort for
15 manufacturers did not occur until *Greenman v. Yuba Power Products, Inc.*, 59 Cal 2d 57,
16 377 P2d 897 (1963), which was "immediately relied upon for the adoption of strict
17 liability in tort throughout the country."¹⁵ Keeton, *Prosser and Keeton on the Law of*

¹⁵ The policy justifications that developed to support strict liability in tort

"can be condensed into about three ideas: (1) The costs of damaging events due to defectively dangerous products can best be borne by the enterprisers who make and sell these products. * * * (2) The cause of accident prevention can be promoted by the adoption of strict liability and the elimination of the necessity for proving negligence," and (3) even when

1 *Torts* § 98 at 694; *see Heaton*, 248 Or at 470 (adopting tort theory of strict liability in
2 Oregon).

3 Given that information, and acknowledging that Weyerhaeuser is correct
4 that a strict products liability claim under ORS 30.920 differs in significant ways from a
5 common-law negligence claim for a product defect, we cannot conclude that the
6 legislature lacked authority, despite Article I, section 17, to define the right to recover for
7 strict products liability actions, to decide who could recover, and to establish the nature of
8 the damages that are recoverable. *See Hughes*, 344 Or at 156. Accordingly, the trial
9 court erred in concluding that ORS 31.710(1) did not apply to Kevin's strict products
10 liability claim, and we reverse and remand plaintiffs' limited judgment for correction of
11 that error.

12 Next, we address the cap on noneconomic damages as applied to Mitzi's
13 loss of consortium claim. There is little dispute that a common-law claim for loss of
14 consortium predates 1857. Keeton, *Prosser and Keeton on the Law of Torts* § 125 at 931
15 (explaining that, by 1619, a husband could recover loss of consortium damages from a
16 tortfeasor who had injured his wife). However, Weyerhaeuser points to *Sheard v.*
17 *Oregon Electric Ry. Co.*, 137 Or 341, 2 P2d 916 (1931), which, in concert with prior
18 decisions, held that at common law, a married woman could not sustain an action for the

fault or negligence is present, it is difficult to prove "and because of the costs of litigation, proof of the existence of fault or negligence in the sale of a defective product should no longer be required."

Keeton, *Prosser and Keeton on the Law of Torts* § 98 at 692-93.

1 loss of consortium of her husband--even though a husband could sustain the same claim.
2 In reliance on that case, and others like it, Weyerhaeuser contends that a wife's loss of
3 consortium claim arising out of injury to her husband is not a claim that was recognized
4 in 1857, and therefore, application of ORS 31.710 would not violate Article I, section 17.

5 As the Supreme Court explained in *Sheard*,

6 "The reason why at common law a husband could recover for loss of
7 consortium, but his wife could not, is historical in character. In the bygone
8 generations when the customs, conduct, and belief of the English people
9 were crystallizing themselves into the rules of human conduct which are
10 now known as the common law, a woman was not regarded socially or
11 civilly as the equal of her husband. * * * Marriage operated as a suspension
12 for most purposes of the legal existence of the wife."

13 137 Or at 345. Thus, as far as it goes, Weyerhaeuser is correct as to the state of the law
14 in 1857. Nevertheless, as we explain below, we conclude that Article I, section 17,
15 precludes application of ORS 31.710 to Mitzi's claim in this case.

16 ORS 31.710 violates Article I, section 17, in those classes of cases in which
17 a jury trial was customary in 1857, or in cases of "like nature." *See Klutschkowski*, 354
18 Or at 177. In this case, that issue turns on the effect of the legal fiction that existed in
19 1857 that a married woman, because of her status, lacked legal standing to sustain a claim
20 for loss of consortium. Simply stated, we conclude that, even though a woman's married
21 status "operated as a suspension * * * on the legal existence of the wife," *Sheard*, 137 Or
22 at 345, a married woman's loss of consortium claim is in the "class of cases" recognized
23 at common law. That is, the injury sustained in this case--loss of consortium related to a
24 spouse's injury--was recognized in 1857, and that is enough under our controlling

1 precedent to conclude that Article I, section 17, prohibits the application of ORS
2 31.710(1) to Mitzi's loss of consortium claim. *See Klutschkowski*, 354 Or at 176
3 (examining whether the common law recognized a right to recover for the injuries
4 sustained in a medical-malpractice case).

5 D. *Stayton's indemnity claim: tenth assignment*

6 In its tenth assignment of error, Weyerhaeuser challenges the trial court's
7 entry of the limited judgment for Stayton on its indemnity claim, arguing that Stayton
8 produced no evidence that it had "bought peace" for Weyerhaeuser by extinguishing any
9 of Weyerhaeuser's liability to plaintiffs.

10 To establish a common-law indemnity claim, the indemnity plaintiff must
11 plead and prove:

12 "(1) [it] has discharged a legal obligation owed to a third party; (2) the
13 defendant was also liable to the third party; and (3) as between the
14 [plaintiff] and the defendant, the obligation ought to be discharged by the
15 [defendant]."

16 *Fulton Ins. v. White Motor Corp.*, 261 Or 206, 210, 493 P2d 138 (1972), *overruled in*
17 *part on other grounds by Waddill v. Anchor Hocking, Inc.*, 330 Or 376, 8 P3d 200 (2000).

18 To prove the "discharge a legal obligation" element, the indemnity plaintiff must show
19 that it has discharged an obligation owed to the third party so as to extinguish its own and
20 the indemnity defendant's liability. *Savelich Logging v. Preston Mill Co.*, 265 Or 456,
21 460, 509 P2d 1179 (1973). The issue in this case turns on what it means to "discharge an
22 obligation owed to a third party" and whether Stayton did so.

23 The parties do not dispute the state of the record as it relates to this

1 assignment. Stayton entered into the agreement with plaintiffs, which limited Stayton's
2 financial exposure to plaintiffs, but kept Stayton in the action as a defendant through trial.
3 The jury returned a verdict against Stayton and Weyerhaeuser. Stayton and
4 Weyerhaeuser had agreed that the court would determine Stayton's indemnity claim after
5 the jury trial, and the court decided that issue in Stayton's favor. Accordingly, the court
6 entered a limited judgment for plaintiffs against Stayton and Weyerhaeuser on May 28,
7 2010, and on that same day, entered a limited judgment for Stayton against Weyerhaeuser
8 for indemnity in the amount of \$2 million. Stayton acknowledges that, at the time the
9 court entered the indemnity judgment, Stayton had presented no evidence that it had
10 made any payment to plaintiffs on their judgment or under the terms of the agreement.
11 Stayton also acknowledges that nothing in the agreement explicitly addressed
12 Weyerhaeuser's liability to plaintiffs.

13 Weyerhaeuser contends that Stayton could have proved that it had
14 discharged a legal obligation owed to a third party if it had introduced evidence that it (1)
15 had actually paid plaintiffs' judgment against Stayton, which would have, in turn,
16 extinguished some of Weyerhaeuser's liability to plaintiffs, or (2) "bought peace" for
17 Weyerhaeuser in the settlement agreement through a release by plaintiffs of at least some
18 portion of Weyerhaeuser's liability to them.

19 Stayton disagrees, contending that actual discharge of its obligation to
20 plaintiffs is not required to prove a common-law indemnity claim and that the trial court
21 was therefore authorized to enter the limited judgment for Stayton. In so arguing,

1 Stayton contends that

2 "[t]he agreement set the amount that Stayton would owe plaintiffs
3 depending on the jury's verdict. The agreement did not purport to discharge
4 anyone's liability because any payment by Stayton made pursuant to its
5 terms would be made pursuant to a judgment which, of course, plaintiffs
6 eventually obtained against Stayton and Weyerhaeuser."

7 We understand Stayton to be asserting that the limited judgment entered for plaintiffs was
8 the source of Stayton's obligation to plaintiffs, not the agreement, and, in that
9 circumstance, whether the settlement agreement "bought peace" for Weyerhaeuser is
10 irrelevant. Instead, Stayton maintains that ORCP 22, as understood and, applied in two
11 of our previous cases, *Kahn v. Weldin*, 60 Or App 365, 653 P2d 1268 (1982), *rev den*,
12 294 Or 682 (1983), and *Freeport Investment Co. v. R. A. Gray & Co.*, 94 Or App 648,
13 652-53, 767 P2d 83, *rev den*, 308 Or 33 (1989), contemplates entry of a judgment before
14 any payment is actually made by a fellow debtor on a *judgment*. Stayton maintains that
15 we recognized in those cases that "[t]he discharge requirement * * * was abrogated by
16 ORCP 22 C(1)" and a third-party indemnity plaintiff is "entitled to judgment" on an
17 indemnity claim even when it had not yet discharged any joint legal obligation to the
18 original plaintiff. In other words, Stayton contends that it need not have made any actual
19 payment to plaintiffs in order for the court to have properly entered judgment on its
20 indemnity claim, as long as it had established that eventual payment to plaintiffs pursuant
21 to the judgment would reduce Weyerhaeuser's obligation to plaintiffs.

22 As we explain below, we disagree with Stayton's view of the law.

23 Although we acknowledge that ORCP 22 C may have an effect on the appropriate timing

1 of entry of an indemnity judgment in a case like this, we ultimately conclude that the rule
2 does not "abrogate" the discharge element or allow the trial court to enter an executable
3 judgment without proof of actual discharge. Instead, ORCP 22 C might have allowed the
4 court to enter a *conditional* judgment for Stayton after it concluded that Weyerhaeuser
5 should indemnify Stayton, but that did not happen in this case.

6 Regardless, we conclude that the "discharge a legal obligation" element in
7 the circumstances presented in this case required Stayton to prove either (1) it had
8 actually paid plaintiffs pursuant to the limited judgment against Stayton and
9 Weyerhaeuser or (2) its settlement agreement with plaintiffs "bought peace" for
10 Weyerhaeuser. Because Stayton acknowledges that, at the time that the trial court
11 entered the judgment for Stayton, neither (1) nor (2) had occurred, it was error for the
12 trial court to enter an executable judgment at that time. It may have been appropriate for
13 the court to enter a conditional judgment for Stayton, subject to execution upon proof of
14 actual discharge by Stayton of Weyerhaeuser's liability to plaintiffs, but there is no
15 indication that that is what happened here.

16 We begin with Stayton's contention that the court could enter the indemnity
17 judgment without proof that Stayton had discharged any of Weyerhaeuser's legal
18 obligation to plaintiffs. First, it relies on *Kahn* and *Freeport* to advance the argument that
19 the court could enter an indemnity judgment without evidence that, at that time, Stayton
20 had discharged any obligation owed to plaintiffs. In doing so, Stayton argues that, when
21 an indemnity claim is brought pursuant to ORCP 22 C, "discharge" is not required before

1 the trial court can enter a judgment for indemnity.

2 The Supreme Court in *Savelich* recognized that, barring some other form of
3 release of liability, actual payment of a judgment is necessary to discharge a liability so
4 as to entitle the indemnity plaintiff to indemnity from the indemnity defendant. 265 Or at
5 466. In *Savelich*, the court first concluded that a settlement agreement entered into
6 between the indemnity plaintiff and the plaintiff in the underlying action had not released
7 whatever claims the plaintiff might have had against the indemnity defendant. *Id.*
8 Accordingly, the indemnity plaintiff had failed to satisfy the discharge element through
9 the execution of the settlement agreement with the plaintiff. The court then noted that the
10 indemnity plaintiff had not "made any payment which reduces their potential liability[,]"
11 and concluded that the indemnity plaintiff had not discharged any liability to the plaintiff
12 so as to allow indemnity. *Id.*

13 That understanding of the discharge element--that actual payment is
14 required before an indemnity plaintiff has a right to indemnity--has not since been called
15 into question by any Oregon cases and is consistent with the treatment of the issue in the
16 *Restatement (Third) of Torts* § 22 comment b (2000) (explaining that an indemnitee may
17 extinguish the liability of the indemnitor "by a settlement with the plaintiff that by its
18 terms or by application of law discharges the indemnitor from liability or by satisfaction
19 of judgment that by operation of law discharges the indemnitor from liability"). In
20 addition, contrary to Stayton's assertions, nothing in the law leads to the conclusion that
21 ORCP 22 C has abrogated that requirement.

1 ORCP 22 C(1) provides, in relevant part:

2 "After commencement of the action, a defending party, as a third
3 party plaintiff, may cause a summons and complaint to be served upon a
4 person not a party to the action who is or may be liable to the third party
5 plaintiff for all or part of the plaintiff's claim against the third party
6 plaintiff[.]"

7 As we have stated, ORCP 22 C is a rule of procedure and has not altered the substantive
8 law of common-law indemnity. *Marton*, 256 Or App at 561-62. Neither *Freeport* nor
9 *Kahn* held differently.

10 In *Kahn*, the Kahns had sued the Weldins and other parties, including
11 Kirsten Corporation for a debt owed. 60 Or App at 367. As a result of that litigation, the
12 trial court entered judgment in favor of the Kahns on all claims against all defendants;
13 that judgment was not appealed. *Id.* However, Kirsten Corporation had brought a cross-
14 claim for indemnity and contribution against the Weldins and the court had entered
15 judgment denying that cross-claim from which Kirsten appealed. *Id.* On appeal, the
16 Weldins argued that Kirsten had failed to plead and prove its indemnity cross-claim
17 because it had not paid the judgment to the Kahns, thus it had not discharged the legal
18 obligation. *Id.* at 371.

19 This court noted that the purpose of the third-party pleading rule, ORCP
20 22, was to "promote the expeditious and economical adjudication in a single action of the
21 entire subject matter arising from a set of facts, including claims contingent on the
22 determination of other issues in the case." *Id.* Accordingly, we stated, "To require a
23 defendant who raises an indemnity cross-claim to plead and prove actual discharge of a

1 judgment before the judgment is entered against the defendant raising it would
2 contravene the purpose and destroy the usefulness of the cross-claim rule." *Id.* The *Kahn*
3 court concluded, therefore, that the indemnity claim was properly presented to the trial
4 court, was decided in the trial court's judgment, and was properly before the court on
5 appeal. *Id.* at 371-72.

6 In our view, *Kahn* stands for a proposition that we recently restated in
7 *Marton*: "ORCP 22 is a *procedural* rule that affects the timing--not the elements--of
8 third party claims."¹⁶ 256 Or App at 561 (emphasis in original). As we explained, "[i]n
9 other words, ORCP 22 allows parties to accelerate the determination of contingent
10 liability; it does not provide an independent source of liability or alter the nature of the
11 underlying claims in a third-party case." *Id.* at 562. Given that understanding, *Kahn* does
12 not support Stayton's position that ORCP 22 C "abrogated" the discharge element, thus
13 allowing the court to *enter* an executable judgment without evidence that Stayton had
14 satisfied the first element of a common-law indemnity claim.

15 *Freeport* is similarly unavailing to Stayton. In that case, the plaintiff in an
16 earlier action, *Klimp*, had sued *Freeport* for breach of contract related to construction
17 defects. 94 Or App at 650. In that action, *Freeport* had brought a third-party claim
18 against *Gray* that would result in *Gray*'s indemnification of *Freeport* for any recovery that

¹⁶ The *Restatement* at § 22 comment b recognizes this distinction, stating that "[a]n 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."

1 Klimp might obtain against Freeport. The trial court in the original action concluded that
2 the building was deficient and that the defects in the building were the result of Gray's
3 breach of contract with Freeport. *Id.* at 650-51. Nevertheless, the court refused to award
4 Freeport damages from Gray in indemnity, at least in part because it determined that
5 Freeport had not discharged any legal obligation to the Klimps. *Id.* at 651. Freeport did
6 not appeal from that ruling; instead, it brought a separate action for breach of contract.
7 The trial court granted summary judgment for Gray in that separate action on *res judicata*
8 grounds and Freeport appealed. *Id.*

9 As part of that appeal, Freeport argued that, under ORCP 22 C, its third-
10 party breach of contract claim was improperly brought and was not capable of being
11 decided in the prior action. We noted that ORCP 22 C abrogated the requirement of
12 separate actions, explaining that ORCP 22 C was patterned after the federal impleader
13 rule, FRCP 14(a), which was "designed to decide contingent liability as well as primary
14 liability and the third-party claim can accelerate determination of the liability, if any,
15 between the third-party plaintiff and the third-party defendant." 94 Or App at 652-53
16 (internal quotation marks omitted). The court continued, quoting a federal Eighth Circuit
17 Court of Appeals case, that "[a]s a prerequisite to that contingency, a court may grant a
18 conditional judgment against the third-party defendant that does not become enforceable
19 until the third-party plaintiff is otherwise determined to be entitled to judgment or
20 payment of the judgment." *Id.* (quoting *Williams v. Ford Motor Credit Co.*, 627 F2d
21 158, 160 (8th Cir 1980)).

1 Based on that understanding of the law, we stated that "[u]nder ORCP 22
2 C, Freeport's third-party claim accelerated the determination of Gray's liability. Because
3 the court made findings favorable to Freeport on its breach of contract claim, and its
4 damages were ascertained on the findings made, Freeport was entitled to a judgment
5 against Gray in the prior action." *Id.* at 653.

6 Stayton maintains that, under *Freeport*, (1) "the discharge requirement * *
7 * was abrogated by ORCP 22 C(1)" and (2) Freeport was "entitled to judgment" on the
8 third-party indemnity claim that it had brought in the prior action, even though it had not
9 yet discharged any legal obligation on the underlying judgment. *Freeport* does not stand
10 for the former proposition. The court in *Freeport* never stated that ORCP 22 C abrogated
11 the "discharge requirement"; it simply held that the requirement of separate actions had
12 been abrogated. Moreover, as we have since reaffirmed, ORCP 22 C is a procedural rule
13 that did not alter the substance of a common-law indemnity claim. *Marton*, 256 Or App
14 at 561.

15 The court's statement that Freeport was "entitled to judgment" ultimately
16 does not go as far as Stayton's contention that the "discharge requirement" was not
17 required in this case for the trial court to enter the indemnity judgment. Stayton's
18 understanding of the court's statement that Freeport was "entitled to judgment" ignores
19 the context of that statement. We reached that conclusion after acknowledging that
20 federal impleader is designed to accelerate the determination of liability and that "a court
21 may grant a conditional judgment against the third-party defendant that does not become

1 enforceable until the third-party plaintiff is otherwise determined to be entitled to
2 judgment or payment of the judgment." *Freeport*, 94 Or App at 653. Given the context
3 of the court's statement, we understand it to mean that Freeport would have been entitled
4 to a conditional judgment against Gray in the earlier action and that that conditional
5 judgment would not have been enforceable until Freeport was determined to be entitled
6 to judgment--presumably by demonstrating that it had satisfied the elements of its
7 common-law indemnity claim. Accordingly, we do not understand *Freeport* to have
8 altered the substance of a common-law indemnity claim to abrogate the "discharge
9 requirement."¹⁷

10 Instead, *Freeport* concluded that ORCP 22 C is intended to "accelerate the
11 determination of liability" for third-party claims and further suggests that the rule allows
12 a court to "grant a conditional judgment against the third-party defendant" that is not
13 immediately enforceable. Even assuming that ORCP 22 C authorized the trial court to
14 enter a conditional judgment in this case, that is not what happened here. Instead, the
15 court entered an executable judgment without evidence that Stayton had satisfied the first
16 element of its common-law indemnity claim. Accordingly, the trial court erred in
17 entering Stayton's limited judgment.

18 E. *Stayton's defense expenses: twelfth and thirteenth assignments of error*

¹⁷ We reject without discussion Stayton's second argument that it was entitled to the limited judgment for \$2 million merely because it incurred some defense expenses. In addressing Weyerhaeuser's twelfth and thirteenth assignments of error, we examine the validity of the general judgment awarding Stayton its defense costs.

1 Finally, in its twelfth and thirteenth assignments, Weyerhaeuser challenges
2 the trial court's general judgment that awarded Stayton's defense expenses against
3 Weyerhaeuser in indemnity. Following trial, and after the trial court had entered the
4 limited judgment on Stayton's indemnity claim, the trial court determined that
5 Weyerhaeuser should indemnify Stayton for the expenses that Stayton had incurred in
6 defending plaintiffs' claims.

7 Weyerhaeuser's argument in its twelfth assignment of error is narrow. It
8 asserts that Stayton failed to prove two prerequisites for obtaining indemnity for its
9 defense expenses. First, according to Weyerhaeuser, the court could award defense costs
10 in indemnity only if Weyerhaeuser had "wrongfully" refused to defend Stayton from
11 plaintiffs' claims. Second, Weyerhaeuser contends that Stayton's tender of defense was
12 untimely, which Weyerhaeuser asserts precludes an award of defense expenses to
13 Stayton. Stayton counters that the law does not contain a "wrongful refusal" requirement,
14 nor is there a specific requirement in the law that an indemnity plaintiff "timely tender"
15 its defense in a case like this one. Stayton also disputes whether its tender was in fact
16 untimely.

17 We agree with Stayton that the authority on which Weyerhaeuser relies
18 does not establish that defense expenses are recoverable in indemnity only if the
19 indemnity defendant wrongfully refused to defend the indemnity plaintiff in the action
20 brought by the original plaintiff. Weyerhaeuser simply points us to *C.I.T*
21 *Group/Equipment Financing, Inc. v. Young*, 99 Or App 270, 782 P2d 169 (1989), *rev*

1 *den*, 309 Or 521 (1990), presumably for the proposition that it now raises. In that case,
2 we stated that "[l]egal expenses may also be recovered from an indemnitor for wrongful
3 refusal to defend an indemnitee." *Id.* at 272. Taken in context, however, that statement
4 was intended to say no more than wrongful refusal to defend *may* give rise to recovery
5 from an indemnitor. Accordingly, the court in *Young* did not establish that a party can
6 recover defense costs in indemnity only if the indemnitor wrongfully refused to defend
7 the indemnitee. And, we are aware of no other case that has established such a legal
8 prerequisite to recovering defense expenses in all indemnity cases seeking defense costs.
9 *See PGE v. Const. Consult. Assoc.*, 57 Or App 116, 120, 643 P2d 1334 (1982) (holding
10 that in an indemnity action seeking defense costs "[i]t is sufficient that the indemnitee
11 plead and prove that it was sued, reasonably incurred costs in defending and that, as
12 between it and the putative indemnitor, the indemnitor should bear the burden of the
13 defense").

14 We also agree with Stayton that the trial court did not err in awarding
15 defense costs even though Stayton tendered its defense to Weyerhaeuser 18 months after
16 it served its third-party complaint. Based on the authorities presented by Weyerhaeuser
17 to the trial court in support of its contention, none of which bear on whether a timely
18 tender affects the trial court's ability to award defense costs in the circumstances
19 presented in this case, we cannot say that the trial court erred in awarding defense costs
20 because of the timing of Stayton's tender of defense.

21 In its final assignment of error, Weyerhaeuser asserts that the trial court

1 erred in awarding Stayton defense expenses incurred while prosecuting its indemnity
2 claim. On appeal, Weyerhaeuser argues that the "recovery of attorney fees on an
3 indemnity claim is limited to fees incurred in defense of the claim from which the
4 claimant is seeking indemnity, and not fees incurred in connection with litigation over the
5 entitlement to indemnification." Accordingly, Weyerhaeuser asserts that the trial court
6 erred "in awarding the entire amount of Stayton's requested defense expenses, ignoring
7 any distinction between expenses incurred relative to Stayton's defense of plaintiffs'
8 claims as opposed to its prosecution of the indemnity claims."

9 The most glaring problem with Weyerhaeuser's assignment of error is that
10 its argument is not preserved--at least with respect to the majority of the expenses
11 awarded. Several months after trial, Stayton sought defense costs in the amount of
12 \$248,327.20, which represented costs incurred from the date Stayton served its third-
13 party complaint on Weyerhaeuser through a date six weeks after the jury verdict.
14 Weyerhaeuser objected, arguing several points, none of which included the argument
15 Weyerhaeuser now makes in this assignment.¹⁸ Subsequently, the court held a hearing at

¹⁸ Specifically, Weyerhaeuser first argued that Stayton was not entitled to recover fees and costs incurred prior to its tender of defense because the tender was untimely. Second, Weyerhaeuser argued that Stayton was not entitled to recover costs related to its prosecution of third-party claims against parties that were not Weyerhaeuser. Third, Weyerhaeuser maintained that Stayton was not entitled to costs incurred after it entered into the agreement with plaintiffs because, according to Weyerhaeuser, "those expenses were not incurred to defend [Stayton] from plaintiffs' claims." That is, because there was no longer a justiciable controversy between Stayton and plaintiffs, Weyerhaeuser should not have to pay for expenses incurred after that date. Fourth, Weyerhaeuser objected to specific costs, such as deposition-related costs, overhead expenses, and electronic research costs, as not recoverable under ORCP 68. Finally, Weyerhaeuser objected to

1 which Weyerhaeuser advanced additional authorities in support of its written objections,
2 but again did not advance the argument it now makes. The trial court later issued an
3 extensive letter opinion that rejected each of the arguments that Weyerhaeuser made in its
4 objection and awarded Stayton the full amount of expenses requested.

5 In the meantime, after the hearing but before the trial court issued its letter
6 opinion on the original request, Stayton filed a supplemental request, seeking expenses of
7 \$17,657.12 that it had incurred since the date that it filed its original request.
8 Weyerhaeuser objected to the supplemental request, reiterating some of the objections it
9 made to Stayton's original request and for the first time raising the argument that it now
10 makes on appeal--that any expenses sought related to prosecution of its indemnity claim
11 cannot be recovered. However, Weyerhaeuser's argument in that vein was explicitly
12 limited to an objection to the supplemental request and was also limited to challenging
13 expenses based on the argument that Stayton had settled the claims for which it seeks
14 indemnity when it entered into the agreement with plaintiffs. Alternatively,
15 Weyerhaeuser argued that it should not be obligated to pay for expenses related to
16 Weyerhaeuser's appeal or for "post-verdict" disputes between Stayton and plaintiffs
17 arising out of the settlement agreement. Specifically, Weyerhaeuser objected to \$4,003
18 in expenses related to the appeal and settlement agreement disputes.

any recovery by Stayton of costs and fees incurred to defend itself from the "portions of plaintiffs' claims that were directed at [Stayton's] conduct." Weyerhaeuser specifically noted any costs related to plaintiffs' negligence claim against Stayton, and any costs related to allegations that it had altered the defective board prior to distribution.

1 Given that history, we conclude that Weyerhaeuser has preserved its
2 challenge, on the basis it now raises, only to \$4,003 in expenses sought by Stayton in its
3 supplemental request. For one, the argument that Weyerhaeuser makes on appeal was
4 not presented to the trial court for it to consider when evaluating Stayton's original
5 request. And second, Weyerhaeuser's argument was explicitly linked to expenses sought
6 in Stayton's supplemental request.

7 Stayton concedes, as it did in the trial court, that the trial court should not
8 have awarded \$1,512 in appeal-related fees and that the general judgment should be
9 reversed and remanded for a reduction in that amount. We accept Stayton's concession
10 on that point, and reverse and remand the general judgment for a reduction of \$1,512.

11 However, we reject Weyerhaeuser's other argument, that the trial court
12 erred in awarding \$2,491 in expenses related to "post-verdict" disputes between Stayton
13 and plaintiffs. In short, Weyerhaeuser has not provided any argument as to why the
14 expenses that it apparently identified below as objectionable could not be awarded by the
15 trial court as expenses "incurred in defense of the claim from which the claimant is
16 seeking indemnity." Weyerhaeuser's conclusory statement of proposed law, without any
17 attempt to develop the argument, or any attempt to explain how the facts might apply to
18 such an argument, precludes meaningful review of that issue. *See Beall Transport*
19 *Equipment Co. v. Southern Pacific*, 186 Or App 696, 700 n 2, 64 P3d 1193, *adh'd to as*
20 *clarified on recons*, 187 Or App 472, 68 P3d 259 (2003) ("[I]t is not this court's function
21 to speculate as to what a party's argument might be. Nor is it our proper function to make

1 or develop a party's argument when that party has not endeavored to do so itself.").

2 III. CONCLUSION

3 In summary, we reverse and remand the limited judgment entered for
4 plaintiffs against Stayton and Weyerhaeuser for the trial court to apply the statutory cap
5 on noneconomic damages to Kevin's strict products liability claim; we reverse the limited
6 judgment entered for Stayton on its indemnity claim; and we reverse and remand the
7 general judgment for the trial court to reduce the judgment by \$1,512.

8 Plaintiffs' limited judgment reversed and remanded for application of ORS
9 31.710(1) to plaintiffs' strict products liability claim, otherwise affirmed; Stayton
10 Builders Mart's limited judgment for indemnity reversed; general judgment reversed and
11 remanded with instructions to reduce the judgment by \$1,512, otherwise affirmed.