

# OREGON LAW UPDATE

## Can You Defeat a Summary Judgment Without Disclosing Your Expert?

case in point...

**From the desk of Jeff Eberhard:** Unlike almost all other states, Oregon has no pretrial expert discovery. In more complex cases, one side may file a summary judgment motion on an issue which would be an area that an expert would address at trial. To defeat the summary judgment motion, the responding party may need present an opinion to create an issue of material fact. Must they disclose the identity of their expert and its opinion, or can a party simply say they have an expert?

**Claims Pointer:** An ORCP 47 E “expert” affidavit is an effective tool for defeating a summary judgment motion in light of Oregon’s lack of expert discovery. This rule provides that motions for summary judgment are not to be used as discovery devices to obtain either the names of potential expert witnesses or their anticipated testimony as to facts or opinions. The rule authorizes attorneys to submit, in good faith, an affidavit stating that an unnamed qualified expert has been retained and will testify to admissible facts or opinions creating a question of fact; and provides that such an affidavit “will be deemed sufficient to controvert the allegations of the moving party” and will be an “adequate basis for the court to deny the motion.” If the affidavit creates an issue of material fact on the allegations of the moving party, then the judge can deny the motion.

*Two Two v. Fujitec Am., Inc.*, CC 090100985, 2014 WL 1873694 (Or. May 8, 2014)

Plaintiffs Linda Two Two and Patricia Fodge (collectively, “Two Two”) worked at a building where defendant Fujitec America, Inc. (“Fujitec”) had performed modernization and maintenance on the building’s elevators. In two separate incidents in 2008, the elevator in the building dropped unexpectedly and stopped abruptly causing personal injuries. Two Two filed a negligence claim against Fujitec alleging that Fujitec had negligently designed, installed, and maintained the elevator and that Fujitec’s negligence was the direct and proximate cause of Two Two’s injuries. Two Two also alleged that their injuries were of a type that would not have occurred absent someone’s negligence and that the negligence that caused their injuries was more probably than not attributable to Fujitec, a claim known to all first year attorneys by its latin name: *res ipsa loquitor*.

Fujitec sought summary judgment on the negligence claim. Fujitec supported its motion with various documents, including affidavits from employees stating that Fujitec’s modernization work and continued maintenance of the elevator conformed to or exceeded industry standards and that elevators can drop “through no fault or negligence of anyone, including, simply because of the age of the elevators.”

Plaintiffs responded to the summary judgment motion by submitting additional documentation

that arguably demonstrated that the elevator had a longstanding history of mechanical problems, and an affidavit prepared by their attorney pursuant to ORCP 47 E. That affidavit stated, in part:

“Since the time of the filing of [Two Two’s] [c] omplaint [Two Two has] retained a qualified elevator expert whom they intend to rely on at trial to support their claims that [Fujitec] was negligent in [its] service and maintenance of the elevators in the 911 building. [Two Two’s] expert has actually rendered an opinion or provided facts which, if revealed by affidavit or declaration, would be a sufficient basis for denying the motion for summary judgment.” (Emphasis added).

In reply, Fujitec contended that plaintiffs’ ORCP 47 E affidavit was insufficient to defeat its summary judgment motion because the affidavit only addressed Fujitec’s negligence in the service and maintenance of the elevator, but did not address the element of causation. The trial court agreed and granted Fujitec’s summary judgment motion because the ORCP 47 E affidavit did not state that Fujitec’s negligence caused the harm, which was an essential element to Two Two’s claim. The Court of Appeals affirmed the trial court’s ruling.

The Supreme Court, in reversing the Court of Appeals, stated that Two Two’s ORCP 47 E affidavit did in fact create a genuine issue of material fact despite being “issue specific.” This is because, in context and read in the light most favorable to the



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non-moving party Two Two, a reasonable person could understand the affidavit to mean that the expert would opine on all issues necessary to defeat Fujitec's summary judgment motion against plaintiffs' negligence claims. First, the affidavit states that plaintiffs had retained a qualified expert to support their "claims" of negligence, not just to support a particular element of their negligence claims. In addition, the affidavit states that plaintiffs' expert has "rendered an opinion or provided facts which, if revealed by affidavit or declaration, would be a sufficient basis for denying the motion for summary judgment." From that sentence, a reasonable person could understand that the expert's testimony would create a question of fact on all issues in the negligence claim for which expert testimony would be necessary, including the element of causation.



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