

OREGON LAW UPDATE

case in point...

"An Act of the Imagination" and ORCP 47E Affidavits

From the desk of Joshua P. Hayward: The Oregon Rules of Civil Procedure (ORCP) do not allow expert discovery. This is colloquially known as "trial by ambush." When opposing a motion for summary judgment, plaintiffs are allowed to offer an affidavit that states that they have retained an expert and that the expert will provide facts or opinions that will create a question of fact. The party offering the affidavit does not need to reveal the identity of the expert or the expert's opinions. Often, this type of affidavit can defeat a motion for summary judgment.

Claims Pointer: ORCP 47E allows a party that is opposing summary judgment to submit an affidavit or declaration stating that the party has retained an expert who will provide facts or opinions that will create a question of fact. However, an ORCP 47E affidavit can only defeat summary judgment when expert testimony is required to establish a genuine issue of material fact. In this case, the Court of Appeals considered whether expert testimony was necessary in a trip and fall case in which her theory of the case depended on a negligent creation of a hazard.

Hinchman v. UC Market, LLC, 270 Or App 561 (2015).

Karen Hinchman entered the UC Market ("UC") on a windy morning by walking over a lightweight floor mat immediately in front of the entrance, outside of the store. The floor mat was not secured to the ground. While Hinchman was inside, the wind caused the floor mat to double over on itself. As she exited the store, Hinchman tripped over the mat, fell, and was injured. Plaintiff sued UC for negligence on the theory that UC had failed "to ensure the floor mat stayed flat on the floor by use of glue or otherwise."

UC moved for summary judgment, arguing that Hinchman could present no evidence that UC violated its standard of care to make a hazard safe. In other words, Hinchman could not prove that UC knew or should have known that the mat had folded or that it was prone to folding. Hinchman presented evidence, including a surveillance video, records of wind speeds on the day of the accident, and an ORCP 47E affidavit, which stated that she had retained an expert that would present facts and opinions sufficient to create a question of fact for the jury. The trial court concluded that the ORCP 47E affidavit was insufficient to defeat summary judgment because expert testimony would not be helpful or necessary to prove negligence.

Hinchman contended in a hearing related to the ORCP 47E affidavit that expert testimony was necessary to prove her case because her theory was not (as defendant contended) that UC knew or should have known that the mat was a hazard, but rather that UC was negligent in the selection, use, or failure to secure the mat. Hinchman argued that her expert's testimony was necessary

because the expert could establish the duty of care relating to the selection and placement of the mat. The trial court nonetheless granted summary judgment in favor of UC. Hinchman appealed.

The Court of Appeals reversed the trial court. The Court explained that expert testimony is "required" not only when an issue is not within the knowledge of the jury, but also when an issue is "susceptible to proof through expert testimony, given the plaintiff's particular theory of her claim." The Court stated that determining whether a particular theory of a case requires expert testimony "will sometimes require an act of imagination by the summary judgment court." In other words, the trial court is required to assume that an expert identified in an affidavit will testify on every possible issue on which a party seeks summary judgment.

The Court of Appeals held that in this case, it did not take much imagination to reach the conclusion that because Hinchman established that the mat was lightweight, outdoors, and unsecured, expert testimony was "required" to establish the standard of care that UC should have exercised in the selection, placement, and failure to secure the mat. The Court of Appeals reversed the trial court's summary judgment ruling and remanded the case for further proceedings.

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