



OREGON LAW UPDATE

case in point...

ORCP 47 E Affidavits: Defendants Have a Way to Beat the Unbeatable

From the Desk of Jeff Eberhard: In Oregon, generally plaintiffs whose cases require an expert opinion may defeat a defendant's summary judgment motion by filing an ORCP 47 E affidavit. ORCP 47 E affidavits typically state that an expert has been retained and will testify to admissible facts or opinions that would create a question of fact. This is usually the end of the story for defendants seeking summary judgment. However, a recent case provides a glimmer of hope to defendants seeking summary judgment motions.

Claims Pointer: Insurers and their attorneys should be aware, that in order to prevail, when a plaintiff's ORCP 47 E affidavit enumerates the elements of the plaintiff's *prima facie* case, on which an unnamed expert will testify, the affidavit must also address the elements of any affirmative defense. In short, plaintiffs who fail to address defenses in their enumerated 47 E affidavits are on a slippery slope towards defeat.

Lavoie v. Power Auto, Inc., --- P.3d ----, 2013 WL 5745566 (2013).

David Lavoie's girlfriend, Lukawitz, bought her Chevrolet Cavalier from Power Auto, Inc. ("Power Auto"). The model she purchased was a "base model" that did not include most optional features, such as floor mats. Additionally, the base model did not feature a floor mat retention system as standard equipment. None of Power Auto's employees discussed the purchase of aftermarket floor mats with Lukawitz nor did they warn her that aftermarket floor mats could interfere with operation of the car. Lukawitz subsequently bought floor mats from a "big box" store, though she could not remember the name of the store or brand of the mats.

Prior to the accident, her boyfriend, David Lavoie ("Lavoie"), became aware that the floor mats could be dangerous. Specifically, that the floor mat "got caught" in between the brake and the gas, while he was driving. This caused the car to accelerate too fast. Twice, after Lavoie became aware of the danger, the floor mats were removed and reinstalled by an unknown individual.

In April 2008, while Lavoie was driving, the floor mat slid forward, causing the car to accelerate. Lavoie was unable to control the acceleration, and the car fishtailed. Lavoie suffered serious injuries which rendered him a quadriplegic. Lavoie testified that, at the time of the accident, he did not know the floor mats had been reinstalled. If Lavoie had known the mats were reinstalled, he would have taken them out.

In his first complaint Lavoie brought products liability and common law negligence claims on the theory that Power Auto sold a defective product: the vehicle with an installed floor mat. The complaint also named Remington Industries, Inc., as the manufacturer of the floor mats. Prior to Power Auto's motion for summary judgment, Lavoie learned that Power Auto did not sell the vehicle with floor mats, and that the manufacturer of the floor mats was unknown. Lavoie filed an amended complaint alleging those facts and that Power Auto was liable for failure to warn purchasers of the reasonably foreseeable danger of aftermarket floor mats or to equip the vehicles with safe floor mats or a floor mat retention system.

Power Auto filed a motion for summary judgment, arguing that the floor mats that caused the accident were not part of the vehicle sold to Lukawitz. Rather, the floor mats were an aftermarket product, entitling the defendants to the defense that the vehicle was "altered or modified." Lavoie argued that he filed an ORCP 47 E affidavit, thereby foreclosing the possibility of summary judgment, and that the record did not establish the defense as a matter of law. Power Auto filed a reply to address plaintiff's ORCP 47 E argument and to reiterate the alteration or modification defense. The trial court ruled in Power Auto's favor on the grounds that (1) the 47 E affidavit did not adequately address the alteration or modification defense and (2) every element of the defense was established by the summary judgment record.



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In the Oregon Court of Appeals, Power Auto argued that Lavoie's affidavit was insufficient because, rather than containing a general assertion that Lavoie's expert would create an issue of material fact, his affidavit specified certain issues to which his expert could establish an issue of fact. The Court noted that generally, an ORCP 47 E affidavit need not specify the issues to which an expert will testify, but when it does, it must address all of the elements to which the expert will testify, including affirmative defenses. However, the affidavit at issue failed to aver that Lavoie had an expert who would create an issue of fact regarding the defendant's affirmative defense. Lavoie argued that his expert's testimony, while directed toward the elements of his causes of action, would also necessarily create issues of fact regarding the defense.

The Court rejected Lavoie's argument by noting that there could not be an issue of fact with regard to the first element of the defense, that Power Auto consented to the installation of the mats, because both parties agreed that Power Auto did not expressly consent to addition of aftermarket floor mats or instruct the purchaser to install them.

The Court, reversed the trial court's ruling as to whether the defense of alteration or modification applied, explaining that it was unable to conclude, as a matter of law, that the defense applied. The Court reasoned that, although a reasonable jury could agree with Power Auto's argument that no warnings were necessary because the warnings could not have prevented the accident, a reasonable jury could also find that a warning, affixed to the car, would have put the individual who installed the mats back in the car on notice of the dangers posed by aftermarket floor mats. The case was remanded to trial court to allow the fact finder to assess whether the defense of alteration or modification applied to the vehicle.



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