

## CASE NOTE:

### Oregon Supreme Court Affirms Rule That an "Issue Specific" ORCP 47 E Affidavit Precludes Summary Judgment Only as to Specified Issues

By Chris Parker, Associate

In *Two Two v. Fujitec Am., Inc.*, \_\_\_ Or \_\_\_, \_\_\_ P3d \_\_\_ (May 8, 2014), the Oregon Supreme Court addressed whether an ORCP 47 E affidavit submitted in opposition to a motion for summary judgment defeated claims for negligence and strict product liability. The plaintiffs alleged they were injured in separate incidents of an elevator dropping unexpectedly and stopping abruptly. The defendant previously performed modernization work on the elevator and was allegedly responsible for its maintenance. The defendant moved for summary judgment, arguing it was not negligent and that elevators can drop through no fault of anyone. The defendant also argued the product liability claim failed because there was no evidence demonstrating that it manufactured or supplied the component parts at issue.

In opposition to the motion, the plaintiffs submitted an ORCP 47 E affidavit, stating that they had retained an unspecified expert who would support their allegations that the defendant was negligent. The trial court held this affidavit was insufficient to create a question of fact on the issue of whether the defendant's negligence was a cause of plaintiffs' injuries, and granted summary judgment on the negligence claim. The trial court also granted summary judgment against plaintiffs' product liability claims. The Court of Appeals affirmed. *Two Two v. Fujitec Am., Inc.*, 256 Or App 784, 305 P3d 132 (2013).

On appeal, the defendant argued that since plaintiffs' ORCP 47 E affidavit specifically identified the issue on which the plaintiffs' expert would testify (*i.e.*, whether the defendant was negligent), the affidavit could not create a question of fact on the issue of causation, which was necessary to defeat the motion. The Supreme Court accepted the defendant's legal argument and affirmed the rule that when an ORCP 47 E affidavit specifically identifies the issues on which the expert will testify, the affidavit will defeat summary judgment only as to those specified issues, but that other evidence is required to defeat summary judgment on any other issue raised in the motion.

While the Supreme Court affirmed the rule, it reversed the trial court, holding the language of plaintiffs' ORCP 47 E affidavit was broad enough to create a question of fact on all issues necessary to survive summary judgment on the negligence claim, including causation. The court explained that summary judgment was also improper because the causation element could be inferred from the evidence that the defendant was negligent, coupled with the evidence the elevator dropped unexpectedly. The court therefore remanded plaintiffs' negligence claim to the circuit court for further proceedings. On the product liability claims, the Supreme Court affirmed the summary judgment because no evidence demonstrated that the defendant manufactured or supplied the component parts at issue.