IN THE SUPREME COURT OF THE
STATE OF OREGON

Kimberli RANSOM,
Plaintiff-Relator,
v.
RADIOLOGY SPECIALISTS
OF THE NORTHWEST,
a professional corporation,
Defendant-Adverse Party,
and
LEGACY HEALTH,
an Oregon corporation,
Defendant.

(CC 15CV08484) (SC S064309)

Original proceeding in mandamus.*

Argued and submitted June 23, 2017.

Rhett G. Fraser, Huegli Fraser P.C., Portland, argued the cause and filed the brief for relator. Also on the brief was James D. Huegli.

Janet M. Schroer, Hart Wagner LLP, Portland, argued the cause and filed the brief for adverse party.

Lindsey H. Hughes, Keating Jones Hughes, P.C., Portland, filed the brief for *amicus curiae* Oregon Association of Defense Counsel.

Kathryn H, Clarke, Portland, filed the brief for *amicus curiae* Oregon Trial Lawyers Association.

Before Walters, Chief Justice, and Balmer, Kistler, Nakamoto, Flynn, and Duncan, Justices, and Landau, Senior Justice, Justice pro tempore.**

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* On petition for writ of mandamus from an order of the Multnomah County Circuit Court, Kenneth Walker, Judge.

** Nelson, J., did not participate in the consideration or decision of this case.

WALTERS, C.J.

A peremptory writ of mandamus shall issue.

Landau, S.J., concurred and filed an opinion.

Nakamoto, J., dissented and filed an opinion, in which Balmer and Duncan, JJ., joined.

WALTERS, C. J.

Plaintiff, the relator and petitioner in this original mandamus proceeding, filed a medical negligence action alleging that two radiologists employed by Radiology Specialists of the Northwest (defendant) were negligent in reading her imaging studies when they examined them in 2013. In 2016, during discovery in that underlying action, plaintiff took the depositions of the radiologists. The radiologists testified to the findings that they had made after examining plaintiff's imaging studies, but, when plaintiff showed the radiologists the studies, they testified that they had no independent memory of reviewing them. When plaintiff then asked the radiologists to tell her what they could now see in those studies, defense counsel instructed the radiologists not to answer. Defense counsel took the position that those questions called for "expert testimony" that is not discoverable under ORCP 36 B. Defense counsel also argued that those questions impermissibly invaded the attorney client privilege set out in OEC 503. Plaintiff filed a motion to compel discovery and sought an order allowing her to ask the radiologists about their current "knowledge and ability to read and interpret" the imaging studies. The trial court denied plaintiff's motion, and she petitioned this court for a writ of mandamus requiring the trial court to grant her motion, or, in the alternative, show cause why it had not done so. This court issued the writ; the trial court declined to change its ruling.

For the reasons that follow, we conclude that the questions that plaintiff asked the radiologists about what they saw in plaintiff's imaging studies in 2016 were relevant under ORCP 36 B; they were reasonably calculated to lead to admissible evidence about the radiologists' treatment of plaintiff in 2013 and what they perceived and knew at that time. We also conclude that those questions do not call for impermissible "expert testimony" and do not invade the attorney client privilege. Consequently, a peremptory writ of mandamus shall issue.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts necessary to our analysis are uncontested. In April 2015, plaintiff filed a complaint against

defendant[1] and alleged that, in 2013, it employed two radiologists—Dr. Bageac and Dr. Divine—who read her computerized tomography scan (CT scan), bone scans, and plain x-ray films. Plaintiff alleged that the radiologists misread those imaging studies, that their misreading led to an error in staging petitioner's cancer as Stage II rather than Stage IV, and that defendant is liable for the negligence of the radiologists.

In discovery, plaintiff obtained the reports that the radiologists had dictated in 2013 as they read plaintiff's imaging studies, as well as the studies themselves. Subsequently, in 2016, plaintiff deposed the two radiologists. Plaintiff asked each of them about their educational backgrounds and experience, showed them the reports that they had dictated in 2013, and asked them questions about the procedures that they had used and the findings that they had made. Defense counsel permitted the radiologists to answer those questions. For instance, counsel did not object when plaintiff asked Bageac about his finding that "[t]wo focal areas of increased tracer uptake are seen in the right humerus." Bageac answered that that finding means that "within the right humerus there are two areas of concentrated tracer, more than the big round, to the bone." Defense counsel did not, however, permit the radiologists to answer plaintiff's questions about the imaging studies themselves. For instance, when plaintiff's counsel showed Bageac the bone scan that was the subject of his findings and asked what the two white dots on the scan represent, defense counsel instructed Bageac not to answer the question unless he had an independent memory of interpreting the bone scan in 2013. Bageac did not answer plaintiff's question. Plaintiff then asked Bageac whether he knows what a focal area of increased tracer uptake in the right humerus looks like. When Bageac acknowledged that he does, plaintiff asked whether her 2013 bone scan reflects two focal areas of increased tracer uptake in the right humerus. Defense counsel again instructed Bageac not to answer unless he had a specific memory of reviewing the bone scan in 2013, and, again, Bageac did not answer the question.

[1] Plaintiff also named Legacy Health as a defendant.

The deposition of Bageac and the other radiologist whom plaintiff deposed—Divine—continued in the same way. Defense counsel permitted the radiologists to testify to what they had reported about the imaging studies in 2013 but not to what they saw in those studies at the time of their depositions in 2016. For instance, plaintiff's counsel questioned Bageac about a bright spot in one of the scans as follows:

> "[Plaintiff's counsel]: Okay. Do you recognize in No. 1 the bright spot in the middle of this picture?
>
> "[Defense counsel]: Do you have an independent memory of reviewing this study as you sit here today?
>
> "The witness: No.
>
> "[Defense counsel]: Would answering [plaintiff's] question require you to use your expertise, your education and your training and background, as you sit here today, to interpret this study?
>
> "[Plaintiff's counsel]: I'll stipulate that it would.
>
> "[Defense counsel]: Okay. Then object and instruct not to answer, unless you have a memory."

Counsel explained that the basis for her instructions not to answer those questions and questions along the same lines[2] was that, in counsel's view, the questions impermissibly sought expert testimony not discoverable pursuant to ORCP 36 B or called for information protected by the attorney-client privilege.

Plaintiff disagreed, and, after she completed the depositions of the two radiologists, she moved the trial court for an order "allowing her to ask [the radiologists] about their knowledge and ability to read and interpret" plaintiff's 2013 scans and films. Defendant opposed the motion and attached declarations from the radiologists. Bageac stated that he had interpreted plaintiff's nuclear medicine bone study in 2013, and Divine stated that he had interpreted

[2] Defense counsel consistently instructed the radiologists not to answer any questions that called for them to state what they could see, in 2016, on the imaging studies that they had reviewed in 2013. For instance, when plaintiff asked Divine, "do you see arrows that are pointing to black spots," counsel instructed him not to answer.

a CT scan of plaintiff's chest, abdomen, and pelvis in 2013. Both radiologists stated that they had "no present recollection" of their interpretations or the images they had interpreted. Further, both stated:

> "Since I have no memory of my *** review and interpretation [of the images,] *** my answers would necessarily be based on a fresh examination of the images, and, as such, upon newly formed or created opinions.
>
> "If I am required to answer questions about the images, my answers would necessarily be informed, and affected by, each of the following factors which were not present at the time of my original review:
>
> "a) The knowledge that the plaintiff's breast cancer was initially staged as Stage II and later staged as Stage IV;
>
> "b) The knowledge that a lawsuit has been filed against my former group based in part on my interpretation of the[the studies at issue]; and
>
> "c) Information obtained from my attorneys in defense of this case."

After oral argument, the trial court entered an order denying plaintiff's motion. Plaintiff filed a petition for an alternative writ of mandamus, which this court allowed. The trial court declined to change its ruling, and the parties filed briefs in this court presenting the following arguments.

II. THE PARTIES' ARGUMENTS

Plaintiff argues that ORCP 36 B grants her authority to ask the radiologists about their present knowledge and ability to read and interpret her 2013 imaging studies. She begins her argument with the text of ORCP 36 B(1), which provides:

> "For all forms of discovery, parties may inquire regarding any matter, not privileged, that is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information

> sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Plaintiff contends that ORCP 36 B entitles her to inquire into all relevant matters that are not privileged and that her questions to the radiologists are permitted by that rule and not barred by OEC 503, which governs the attorney-client privilege. Plaintiff contends that she must be allowed a reasonable opportunity to learn about and test the radiologists' expertise as it affected her treatment, and she asserts that she does not seek to discover communications between the radiologists and their counsel.

Defendant acknowledges that the text of ORCP 36 B permits broad discovery. Nevertheless, defendant submits, there are three reasons that the radiologists may refuse to answer plaintiff's questions. First, defendant argues, because the radiologists have no present recollection of reading plaintiff's imaging studies, plaintiff's questions would compel them to formulate a current review and interpretation of those studies and thereby require their "expert testimony." "Expert testimony," defendant asserts, is not discoverable pursuant to "Oregon's well-established discovery rules," set out in two of this court's cases—*Stevens v. Czerniak*, 336 Or 392, 84 P3d 140 (2004), and *Gwin v. Lynn*, 344 Or 65, 176 P3d 1249 (2008). According to defendant, *Stevens* establishes that, when the legislature promulgated ORCP 36 B, it made a deliberate decision not to permit "expert discovery." However, in *Gwin*, this court permitted the deposition of an expert witness who had participated in the events at issue. The upshot, defendant contends, is that plaintiff may depose the radiologists, but she may depose them only as "percipient" or "fact" witnesses and may not ask for their "expert testimony." Defendant submits that the testimony that plaintiff seeks to compel from the radiologists is "expert testimony" because it "requires current application of their expert knowledge and training."

Defendant's second argument is that, because the radiologists do not have independent memories of interpreting plaintiff's imaging studies, plaintiff's questions call for testimony that necessarily implicates hindsight,

supplemented by information gained since the original reading of those studies. As a result, defendant contends, plaintiff's questions are not relevant or reasonably calculated to lead to admissible evidence and are not within the scope of discovery set out in ORCP 36 B.

Defendant's third and final argument is that the radiologists' testimony is protected by the attorney-client privilege. Defendant contends that the radiologists' current reading of plaintiff's imaging studies would be "affected by" information provided by defense counsel and would therefore implicate OEC 503, the rule governing attorney-client communications.

We take each of those arguments in turn, but we think it helpful to note, at the outset, that defendant's arguments about the reach of ORCP 36 B are interrelated. Our determination that plaintiff's questions are relevant to the radiologists' participation in her care underlies, in many ways, our determination that plaintiff's questions do not constitute "expert testimony" barred by ORCP 36 B.

III. ANALYSIS

A. *Defendant's Argument that Oregon Law Precludes "Expert Discovery"*

Defendant's first argument is that, together, two of this court's cases—*Stevens* and *Gwin*—preclude the discovery that plaintiff seeks. Because those two cases are central to our analysis, we discuss them in some detail.

Stevens was a post-conviction proceeding in which the rules of civil procedure applied. 336 Or at 400. The petitioner's counsel had informed the trial court that he intended to offer expert testimony at trial on three issues: "(1) the adequacy of petitioner's legal representation below; (2) whether the conduct of prior counsel conformed to bar disciplinary rules and ethical requirements; and (3) battered women's syndrome." *Id.* at 394 n 1. The trial court ordered the petitioner to disclose the names of the experts he intended to call and the substance of their testimony. *Id.* at 394-95. The petitioner contended, and the defendant did not dispute, that the trial court lacked authority to make that order. *Id.* at 398. This court agreed. *Id.* at 404-05.

As a threshold matter, this court observed that, "in a civil action, a party has no obligation to disclose information to another party in advance of trial unless the rules of civil procedure or some other source of law requires the disclosure." *Id.* at 400. Consequently, the court turned to the Oregon Rules of Civil Procedure, in particular ORCP 36 B, to determine whether they granted the trial court authority to order the petitioner to disclose his experts' names and the substance of their testimony. *Id.* The court acknowledged that the text of that rule, "if read in isolation, could be interpreted to permit expert discovery if it is (1) relevant and (2) not privileged." *Id.* at 401. However, relying on two contextual clues, the court explained that that text also could be understood differently. *Id.* at 401-02.

First, the court observed that, when the Council on Court Procedures formulated ORCP 36 in 1979, it originally included a subsection (4). *Id.* That subsection expressly required a party to disclose, upon request, "'the name and address of any person [that the] party reasonably expects to call as an expert witness at trial and the subject matter upon which the expert is expected to testify.'" *Id.* (citing Or Laws 1979, ch 284, § 23) (brackets in *Stevens*). However, the Legislative Assembly amended ORCP 36 and deleted that provision. *Id.* Second, the court considered the fact that "ORCP 36 essentially tracks FRCP 26(b)" but "omits the specific authorization for expert discovery that FRCP 26(b) includes." *Id.* at 402. The court explained:

> "FRCP 26(b)(1) defines the 'scope of discovery' in much the same terms as ORCP 36 B(1). FRCP 26(b)(4) then specifically authorizes expert discovery. Although ORCP 36 and FRCP 26(b) contain similar definitions of the scope of discovery, ORCP 36 omits the specific authorization for expert discovery that FRCP 26(b) includes. The presence of a specific provision authorizing expert discovery in FRCP 26 and the omission of a similar provision in ORCP 36 suggest that Oregon intended to depart from the federal model and not authorize expert discovery."

Id. (footnote omitted).

From those clues, the court hypothesized that the legislature had deleted ORCP 36 B(4) because it disagreed with the decision of the Council on Court Procedures "to

authorize expert discovery." *Id.* at 403. The court acknowledged that there could be an alternative explanation for the deletion: that the legislature had concluded "that specific authorization for expert discovery was unnecessary in light of ORCP 36 B(1), which provides for discovery of any relevant matter that is not privileged." *Id.* However, given its assumption "that, if the legislature had intended to depart from Oregon's longstanding practice of not allowing expert discovery, it would have said so specifically," the court considered that inference to be a weak one. *Id.*

The court determined that the text and context of ORCP 36 B did not resolve the question before it, and it looked to the proceedings in the legislature for additional indications of that body's intent. *Id.* The court described what had transpired as follows:

> "Before the legislature, Frank Pozzi appeared on behalf of the council members who had opposed permitting expert discovery. He focused on the increased costs that expert discovery brings and on the peer pressure against testifying that can occur when a party discloses his or her expert's name. Pozzi reasoned that the current system, which he described as not permitting expert discovery, was an efficient and fair way to try civil cases. Garr King testified on behalf of the committee members who had supported expert discovery; he maintained that disclosure allows the parties to prepare their cases more thoroughly. After both sides explored that debate over several hearings, a majority of the joint committee found the opponents' arguments persuasive and voted to delete the section authorizing expert discovery. "

Id. at 404 (citations omitted). Thereafter, the court explained, the joint committee affirmatively deleted ORCP 36 B(4) and a majority of both houses voted in the favor of the bill, making a "policy choice to continue the practice of not authorizing expert discovery in civil actions in state courts." *Id.* In *Stevens*, the court held that that legislative history demonstrated that ORCP 36 B did not authorize the trial court to require the petitioner to disclose his experts' names and the substance of their testimony. *Id.* at 404-05.

Defendant cites *Stevens* for the broad statements made in the course of its discussion—that is, that Oregon

has a "longstanding practice of not allowing expert discovery" and that the legislature made a "policy choice to continue the practice of not authorizing expert discovery in civil actions in state courts." *Id.* at 403-04. As noted, defendant does not contend that, because the radiologists are expert witnesses, *Stevens* bars plaintiff from deposing them. Rather, defendant recognizes that, in *Gwin*, this court interpreted ORCP 36 B to permit the deposition of expert witnesses who have directly participated in the matters at issue in an action. 344 Or at 67. We therefore turn to *Gwin* and review the court's analysis there.

In *Gwin*, the defendant in a legal negligence action unsuccessfully sought an order permitting him to depose an attorney, Evers, whom the plaintiffs had retained and designated in court filings as an expert who would testify for them at trial. *Id.* at 68-69. The plaintiffs resisted the deposition, arguing that, as interpreted in *Stevens*, ORCP 36 B does not allow discovery of the names of experts who will be called to testify at trial or the substance of their testimony. *Id.* at 69. The defendant acknowledged that the trial court had denied his request to depose Evers on the specific ground that the plaintiffs intended to call her as an expert. *Id.* at 71. The defendant also acknowledged that, "in legal malpractice actions, expert testimony usually is permitted to establish the applicable standard of care." *Id.* However, the defendant argued that, regardless of whether Evers would provide an expert opinion about the applicable standard of care and whether the defendant's actions in representing Gwin met that standard, Evers also had another role in the case: Evers had been personally and directly involved with the plaintiffs' mitigation efforts, and, in that role, had knowledge of factual matters at issue in the case. *Id.* The defendant indicated that he would limit his questions to ones about the mitigation efforts that Evers had made. *Id.* at 70.

This court issued a peremptory writ of mandamus commanding the trial court to withdraw its order and permit the deposition to proceed. *Id.* at 75. This court reasoned as follows:

> "On its face, ORCP 36 B(1) would appear to extend a right to depose or otherwise to obtain discovery from all

> potential witnesses (whose testimony is not privileged), including expert witnesses. However, as this court has held, legislative context and history establish ineluctably that the scope of the rule was not intended to extend to expert witnesses. *Stevens*, 336 Or at 400-05. Still, nothing in the wording of the rule, the decision in *Stevens*, or in any other case of which we are aware, suggests that a witness who has been personally or directly involved in events relevant to a case may not be deposed as to facts of which the witness has personal knowledge, simply because that person will be, as to other matters, an expert witness at trial."

Id. at 72 (footnote omitted).

Thus, this court distinguished between Evers' two roles and the sources of information from which she was expected to testify: her role as a "fact" witness who has "obtained through one or more of [her] senses evidence relevant to a civil trial and pertaining to a material issue in that trial" and her role as an "expert" witness. *Id.* at 67 n 1. To qualify as a "fact" witness, the court explained, the witness must not have "obtained the evidence principally for the purpose of rendering an expert opinion in that trial." *Id.* The court permitted the defendant to question Evers as a "fact" witness about her "direct involvement in" or "observation of and derivative knowledge of the relevant events," but precluded the defendant from questioning Evers as an "expert" witness about facts that "either were or will be presented to her primarily for the purpose of forming and rendering an expert opinion." *Id.* at 73.

The basis for the distinction drawn in *Gwin* becomes apparent when we delve a bit more into the legislative history from which the court reasoned in *Stevens*. As discussed above, "ORCP 36 essentially tracks FRCP 26(b)" but "omits the specific authorization for expert discovery that FRCP 26(b) includes." *Stevens*, 336 Or at 402. That omission, the court determined in *Stevens*, suggests that "Oregon intended to depart from the federal model and not authorize expert discovery." *Id.* Significantly, the federal rule did not address itself to the expert whose information was acquired because the expert was an actor with respect to occurrences that are the subject matter of the lawsuit. Advisory Committee Notes to 1970 Amendment to Rule 26(b). Rather, the drafters of

the federal rule intended that such an expert "be treated as an ordinary witness." *Id.*

The Council on Court Procedures was aware of that distinction when it drafted subsection (4) of ORCP 36 B. The genesis of that provision was a proposal by Richard Bodyfelt for mandatory exchange of expert reports. Minutes, Council on Court Procedures, Feb 18, 1978, 2. Fred Merrill, a University of Oregon law professor and the Executive Director of the Council, prepared a memorandum for the Council that provided an extensive review of the problem of discovery of information held by an opponent's expert. Fred Merrill, "Discovery of Experts: Rule 26(b)(4) and the Bodyfelt Proposal," Memorandum submitted to Council on Court Procedures (1978); *see* Minutes, Council on Court Procedures, Feb 18, 1978, 2 (noting that vote on Bodyfelt proposal deferred until Merrill had an opportunity to research the matter). In that memorandum, Merrill discussed FRCP 26(b)(4) and explained that it regulated three classes of experts: for experts expected to be called at trial, an opposing party could learn the identity of the expert and, by interrogatory, learn the substance of their testimony; for experts retained but not expected to be called at trial, an opposing party could obtain discovery only by showing exceptional circumstances; and for experts informally consulted but not expected to be called at trial, an opposing party could obtain no discovery at all. Memorandum at 9; *see also* FRCP 26(b)(4) (1970) (discussing rule for discovery of experts retained for litigation and expected to testify, and rule for discovery of experts retained but not expected to testify); Advisory Committee Notes to 1970 Amendment to Rule 26(b) (explaining that discovery of consulted but not retained expert is not permitted). Merrill explained that the federal rule did not regulate discovery for experts who were actors or viewers of occurrences that give rise to the action. *See* Memorandum at 9 (discussing commentary to FRCP 26(b)); *see also* Advisory Committee Notes to 1970 Amendment to Rule 26(b) (explaining FRCP 26(b)(4)). Thus, the Merrill memorandum explained the federal rule as regulating nonparticipating experts who acquire or develop facts or opinions in anticipation of litigation or for trial, and as not addressing participating experts who are

actors in the action. After receipt of the Merrill memorandum, the Council decided not to adopt the Bodyfelt proposal and, instead, drafted subsection (4) of ORCP 36 B, which the legislature later deleted. 336 Or at 402.

Stevens can be understood as recognizing a legislative intent to bar parties from discovering the identities of expert witnesses who fall into the classes of expert witnesses addressed in the federal rule and the Merrill memorandum—expert witnesses who acquired or developed facts or opinions in anticipation of litigation or for trial—and the substance of their opinions. However, as this court concluded in *Gwin*, *Stevens* cannot be understood as recognizing a legislative intent to bar discovery from the class of expert witnesses that the federal rule treated as "ordinary witnesses"—expert witnesses who acquired or developed facts or opinions as actors in the events at issue. Before that time, it was not uncommon for plaintiffs to depose expert witnesses whose conduct was at issue in an action. *See, e.g.*, *Hansen v. Bussman*, 274 Or 757, 763-64, 549 P2d 1265 (1976) (plaintiff disposed physician when conduct was at issue in negligence action); *Ritter v. Sivils*, 206 Or 410, 424, 293 P2d 211 (1956) (same); *Malila v. Meacham*, 187 Or 330, 343, 211 P2d 747 (1949) (same); *Carruthers v. Phillips*, 169 Or 636, 640, 131 P2d 193 (1942) (same); *Felske v. Worland*, 63 Or App 442, 444, 664 P2d 427 (1983) (same).

In this case, defendant recognizes that the legislature did not intend to bar plaintiff from deposing the radiologists. Although defendant argues that Oregon does not permit expert discovery, it does not contend that, because the radiologists have knowledge and skill that would qualify them as experts under OEC 702,[3] plaintiff is barred from deposing them. Defendant acknowledges that, because the radiologists participated in plaintiff's care, plaintiff is entitled to depose them. Defendant also does not argue that any questions that call for the radiologists' opinions are beyond the scope of permitted discovery as seeking "expert

[3] OEC 702 provides:

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

testimony."[4] Defendant agrees that plaintiff may ask the radiologists questions about opinions that they formed when they participated in plaintiff's care and concurs with the Appellate Division of the New Jersey Superior Court that,

> "[w]hatever the limits of discovery, there certainly should be included a full explanation of why defendants performed certain acts or did not perform them. Their findings and actual course of treatments, their diagnoses and their opinions as to the proper course of treatment, are legitimate subjects of inquiry. The opinions, of course, must relate to the treatment rendered [to the] plaintiff."

Rogotzki v. Schept, 91 NJ Super 135, 154, 219 A2d 426, 436 (1966). Rather, the more nuanced argument that defendant presses is that plaintiff may not ask the radiologists questions that require "current application of their expert knowledge and training." Without explicitly stating its argument in these terms, defendant seems to contend that, because the radiologists do not remember their past observations and are asked to make current ones, they are no longer testifying as participant experts; instead, they are testifying as nonparticipant experts. Such questioning, defendant contends, is prohibited by Oregon's rule against expert discovery.

We agree with defendant that, if the radiologists had not participated in plaintiff's care, plaintiff would be precluded from deposing them and therefore could not ask them any questions at all. And we also agree that the fact that plaintiff is entitled to depose the radiologists does not give plaintiff authority to ask them questions that she would be prohibited from asking a radiologist who had not participated in her care. But we do not agree that the line between permitted and precluded questions depends on whether plaintiff asks the radiologists about what they saw and did in the past, or, instead, for the "current application of their expert knowledge and training." It is not expert knowledge and training that differentiates an expert who can be deposed (a participating expert) from one who cannot

[4] The Oregon Evidence Code permits both expert and lay witnesses to testify in the form of an opinion. OEC 701; OEC 702. However, when a lay witness testifies to an opinion, the opinion must be rationally based on the witness's perception. OEC 701(1). An expert, on the other hand, may base an opinion either on the expert's perceptions or on facts or data "made known to the expert at or before" the witness testifies in court. OEC 703.

(a nonparticipating expert). Both have expertise; both may qualify as experts under OEC 702. And it is not the current application of expertise that is dispositive. As explained in *Gwin*, and reflected in the legislative history that underlies *Stevens*, an expert who acquires or develops facts or opinions as a participant in the events at issue may be questioned about those events as an ordinary witness. Thus, under ORCP 36 B, a participating expert can be asked any questions relevant to his or her direct involvement in the events at issue. The fact that a participating expert *also* has expert qualifications does not alter or restrict the scope of the questions that he or she may be asked about his or her participation. In contrast, an expert witness who acquires or develops facts or opinions in anticipation of litigation or for trial—a nonparticipating expert—cannot be asked any questions at all about those matters. A party cannot turn a participating expert into a nonparticipating expert and ask a participating expert about matters in which the participating expert was not directly involved. Thus, in *Gwin*, the court permitted the defendant to depose Evers about the events in which she participated. 344 Or at 73. Evers was an attorney, and the court did not bar the defendant from asking her questions that would require her to apply her expert knowledge and training. Instead, the questions that it placed off limits were questions that pertained to events in which Evers did not participate, but about which she had been informed for the purpose rendering an expert opinion at trial. *Id.*

In this case, we conclude that plaintiff was entitled to ask, and the radiologists were required to answer, questions about the radiologists' treatment of plaintiff and their review of her imaging studies in 2013, and, as we will explain, questions about what the radiologists could see in those studies in 2016.[5] In contrast, plaintiff would not be entitled to ask, and the radiologists would not be required to answer, any questions whatsoever about matters in which the radiologists did not participate. For example, plaintiff would not be entitled to ask Bageac about matters that plaintiff related and supplied to him, such as information about a third physician's treatment of plaintiff and studies on which that physician

[5] We do not address whether any other questions that plaintiff may have posed or intends to pose in the future are within the permitted scope of discovery.

based her treatment. Plaintiff would not be entitled to ask Bageac about what that third physician should have seen in those studies or whether the third physician performed in accordance with the applicable standard of care.

In reaching that conclusion, we return to the text of ORCP 36 B and the fact that, in promulgating that rule, the legislature set out the scope of discovery in civil actions, and, by its terms, chose to permit parties to obtain all relevant, unprivileged information. In interpreting that rule to permit plaintiff to question the radiologists about plaintiff's 2013 imaging studies, we align ourselves with other courts that permit a plaintiff to question a physician whose conduct is at issue in a medical negligence action about the physician's conduct, even if such questions call for their opinion or require current application of their expert knowledge and training. *See Anderson v. Florence*, 288 Minn 351, 352, 181 NW2d 873, 874 (1970) (holding that plaintiff, during discovery, could question defendant physician even if questions called for expression of medical opinion); *Rogotzki*, 91 NJ Super at 153, 219 A2d at 436 (same). In *Anderson*, the Supreme Court of Minnesota discussed how the traditional reasons for not allowing a party to elicit expert testimony from an opposing party's expert witness do not justify limits on questions to an allegedly negligent physician where the expert testimony sought relates to the care provided by that physician. The court explained that the argument that eliciting such testimony equates to "taking property without payment of compensation *** loses its force when applied to the expert opinion of an adverse party himself[:]"

> "In that situation, the concept of fairness embodied in the discovery rules *** clearly comprehends that the parties to an action who are eyewitnesses to and participants in the event giving rise to the action fully disclose to each other all matters relevant to the issues in dispute and available to them without regard to how the information was acquired, whether by special training or rendering professional service."

288 Minn at 357, 181 NW2d at 877. And, the court explained, the "unfairness argument"

> "has been discredited in recent cases. The courts assert that the question of unfairness to individuals should not

> be controlling, since the inquiry is directed to one who has been a participant in the occurrence and withholding relevant testimony by litigants obstructs the administration of justice."

Id. at 360-61, 181 NW2d at 879; *see also Oleksiw v. Weidener*, 2 Ohio St 2d 147, 150, 207 NE2d 375, 377 (1965) (stating that participating physician had a duty to testify if his testimony will "provide facts which will aid the court in arriving at a just decision" and that "[a]ny loss to the sporting aspect of adversary proceedings would be outweighed by the benefit to the judicial system").

We are convinced that ORCP 36 B compels the same result. We therefore proceed to defendant's second argument—that plaintiff's questions seek irrelevant information and therefore should be prohibited.

B. *Defendant's Argument that Plaintiff Seeks Irrelevant Information*

Defendant's second argument is that the radiologists may not be compelled to testify to their current knowledge and ability to read plaintiff's imaging studies because their responses to plaintiff's questions would necessarily implicate hindsight, supplemented by information gained since the original reading of those studies. Defendant argues that the radiologists must be judged, not on what hindsight may reveal should have been done in the light of subsequently occurring conditions, but on the facts existing at the time they acted. *See Foxton v. Woodmansee*, 236 Or 271, 278-79, 386 P2d 659 (1963), *reh'g den*, 236 Or 282, 388 P2d 275 (1964) (stating standard of care). Therefore, defendant contends, questions that call for their current observations and knowledge seek information that is not relevant or reasonably calculated to lead to admissible evidence.[6]

[6] We note that, as plaintiff states in her brief in this court, defendant objected in the trial court and instructed the radiologists not to answer "on the basis that such questions impermissibly sought expert opinion, which is not discoverable pursuant to ORCP 36, and for the separate and distinct reason that some of plaintiff's questions called for information that is protected by the attorney-client privilege." It is therefore possible that defendant did not preserve in the trial court the argument that it urges. However, because plaintiff does not press that issue, and because we reject defendant's argument on the merits, we need not further explore the preservation issue here.

Defendant is correct that, in evaluating whether a physician was negligent, the physician must be judged based on the facts existing at the time the physician acted. *Id.* However, defendant is not correct that that makes questions that implicate hindsight a basis for instructing a deponent not to answer a question or makes answers to those questions irrelevant.

ORCP 39 D(3) permits a party to instruct a deponent not to answer a question only in limited circumstances:

> "Evidence shall be taken subject to [an] objection, except that a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only:
>
> "(a) when necessary to present or preserve a motion under section E of this rule; [7]
>
> "(b) to enforce a limitation on examination ordered by the court; or
>
> "(c) to preserve a privilege or constitutional or statutory right."

ORCP 39 D(3) (footnote added). Defendant's objection that the radiologists' answers would be affected by hindsight is not one of those circumstances. Thus, even if defendant's objection could be a basis for excluding the radiologists' testimony at trial, it is not a permissible basis for instructing the radiologists not to answer plaintiff's questions during their depositions.

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[7] ORCP 39 E(1) provides:

> "Motion for court assistance. At any time during the taking of a deposition, upon motion and a showing by a party or a deponent that the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36. The motion shall be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only on order of the court in which the action is pending. Upon demand of the moving party or deponent, the parties shall suspend the taking of the deposition for the time necessary to make a motion under this subsection."

Perhaps even more importantly, the questions that plaintiff asked the radiologists in this case sought information reasonably calculated to lead to admissible evidence. Plaintiff asked the radiologists about scans and films that existed at the time of plaintiff's care and that the radiologists had reviewed when they participated in her care. For instance, plaintiff asked Bageac about plaintiff's 2013 bone scan and what he could see in it at the time of his deposition. Although Bageac could not specifically remember examining that scan in 2013, his lack of memory does not make his present observations irrelevant. The scan is, as *Foxton* requires, one of the "'pertinent facts then in existence.'" 236 Or at 278 (citing *Staloch v. Holm*, 100 Minn 276, 279, 111 NW 264, 265 (1907)). Bageac's present-day ability to describe what he can see in that scan and his knowledge about the significance of what it shows may provide relevant information about what he perceived and knew in 2013. Although Bageac had additional information in 2016 that he did not have in 2013, his perceptions, knowledge, and abilities in 2016 still bear on his perceptions, knowledge, abilities and actions in 2013. Defendant does not convince us that the trial court correctly denied plaintiff's motion to compel. We now proceed to defendant's third and final argument, which concerns the attorney-client privilege.

C. *Defendant's Argument that Plaintiff's Questions Interfere with the Attorney-Client Privilege*

Defendant argues that the radiologists' testimony is privileged because a current reading of plaintiff's scans and films would be "affected by" information that defense counsel provided to the radiologists. In their declarations, the radiologists averred that, if they were required to answer questions about the 2013 scans and films, their answers necessarily would be informed and "affected by" the fact that plaintiff's breast cancer was initially staged as Stage II and later staged as Stage IV, by the knowledge that a lawsuit had been filed, and by "[i]nformation obtained from my attorneys in defense of this case." Defendant argues that the "information received from their counsel is privileged and therefore cannot be disclosed."

Plaintiff does not disagree with the latter statement. However, plaintiff contends that she does not seek disclosure of information that the radiologists received from their counsel; instead, she seeks information about what the radiologists now see in plaintiff's imaging studies.

OEC 503(2) gives a client a privilege to refuse to disclose confidential "communications" between the client and the client's lawyer. It provides in relevant part:

> "(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> "(a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer; [or]
>
> "(b) Between the client's lawyer and the lawyer's representative[.]"

OEC 503(2)(a)-(b). Neither defendant nor *amicus* Oregon Association of Defense Counsel cites a case that holds that the attorney-client privilege also grants a privilege to refuse to disclose information that, as defendant argues, may be "affected by" such communications.

As plaintiff explains, the ramifications of such a rule would be far-reaching. Many attorneys appropriately talk with their clients before they are deposed to educate them about the law and to take steps to make it more likely that they will understand the questions that may be posed so that clients can truthfully and accurately answer them, and thereby seek to "affect" their clients' testimony. We are not persuaded that OEC 503 is intended to preclude all deposition questions that follow. In this case, plaintiff asked the radiologists questions such as, "what do the two white spots on the scan represent?" Perhaps, as the radiologists averred, the answers to such questions could be "affected by" discussions with their attorneys, but such questions do not call for disclosure of attorney-client communications. Thus, OEC 503 does not provide a basis for the trial court's order denying plaintiff's motion to compel discovery.

IV. CONCLUSION

We conclude that plaintiff's questions about the radiologists' current "knowledge and ability to read and interpret" plaintiff's imaging studies are relevant, do not exceed the scope of discovery permitted by Oregon law, and do not interfere with the attorney-client privilege. Accordingly, we hold that a peremptory writ of mandamus should issue directing the circuit court to enter an order allowing plaintiff to ask such questions.

A peremptory writ of mandamus shall issue.

LANDAU, S. J., concurring.

I agree with the majority that there is no basis for the trial court's decision to limit the questioning of the radiologists. Nothing in the text of ORCP 36 supports it; in fact, the text of the rule requires the contrary result. Nor does *Stevens v. Czerniak*, 336 Or 392, 84 P3d 140 (2004), compel such a limit on deposition questioning.

I write separately to raise the question whether *Stevens* was correctly decided in the first place. With heartfelt respect for my colleagues who decided that case, I don't understand how it squares with basic principles of statutory construction. In my view, *Stevens* was wrongly decided, and the court should reconsider it.

ORCP 36 B provides that,

> "[u]nless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> "B(1) *In general*. For all forms of discovery, parties may inquire regarding any matter, not privileged, that is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]"

So, in a nutshell, ORCP 36 B provides that parties can ask about "any matter, not privileged," that is "relevant" to a claim or defense unless the rules themselves specify a limitation.

The rules do provide some such limitations. For instance, ORCP 36 B(2) spells out limitations concerning discovery of insurance agreements or policies. And ORCP 36 B(3) enumerates limitations on discovery of trial preparation materials.

Nothing in the Oregon Rules of Civil Procedure, however, imposes any limitation on discovery of expert witnesses. Under the plain and unambiguous terms of ORCP 36 B(1), discovery of experts is permitted as long as it regards "any matter, not privileged," that is "relevant" to a claim or defense. It's really that simple.

In *Stevens*, the court acknowledged that the text of ORCP 36 B(1) appears to countenance expert discovery so long as it's relevant and not privileged. 336 Or at 401. The court nevertheless held that the rule, "in context," is better read to preclude expert discovery. *Id.* That "context" consisted of two bits of enactment history.

First, the court noted that the version of ORCP 36 that the Council on Court Procedures originally submitted included a provision expressly requiring, on request, the disclosure of the name of a party's expert and the substance of the expert's expected testimony. *Id.* at 401-02. The court noted that the legislature, in adopting the rule, deleted that provision. *Id.*

Second, in a related vein, the court observed that ORCP 36 was patterned after Federal Rules of Civil Procedure 26, "with one major exception." *Id.* at 402. The court explained that, while the federal rule explicitly authorizes expert discovery, the state rule that the legislature adopted did not. *Id.* "The presence of a specific provision authorizing expert discovery in FRCP 26 and the omission of a similar provision in ORCP 36," the court reasoned, "suggest that Oregon intended to depart from the federal model and not authorize expert discovery." *Id.*

The court also observed that the legislative history of the adoption of the rule included testimony complaining about the costs of expert discovery. *Id.* at 404. That led the court to infer that the legislature's deletion of the Council's proposed expert discovery provision was intentional and based on a policy choice not to permit it. *Id.*

I accept for the purposes of argument that, as the court suggested in *Stevens*, the legislature purposely omitted the Council's suggested provision authorizing expert discovery. What the court in *Stevens* overlooked, though, is the fact that the removal of the expert-discovery provision left ORCP 36 B(1) perfectly intact. And that rule states that discovery is permitted "regarding any matter, not privileged," unless some other rule imposes a limit. As I've already noted, no other rule imposes a limit on expert discovery.

The court itself in *Stevens* created such a limitation, but not based on anything that the Oregon Rules of Civil Procedure actually say. It bears some emphasis that the court didn't derive its expert-witness limitation from the wording of ORCP 36 B or any other provision of the Oregon Rules of Civil Procedure. Instead, it fashioned the additional limitation on ORCP 36 B(1) based solely on the legislative history of the rule, which revealed what the legislature had chosen *not* to enact.

Doing that contradicts the plain wording of ORCP 36 B(1) itself, which says that it is subject only to limitations *in the rules*, not limitations that the courts create on their own. Aside from that, the court's reasoning ignores fundamental, long-settled rules of statutory construction—rules that preclude courts from giving legal effect to legislative intentions that don't find support in the text of enacted legislation.

The idea that courts are constrained to interpret only enacted legislative text is reflected in the legislature's own rules, which date back to the Deady Code of 1862. Those rules provide that our role in construing statutes is to take them as we find them, "not to insert what has been omitted, or to omit what has been inserted[.]" ORS 174.010; *see also, e.g.*, *Wyers v. American Medical Response Northwest, Inc.*, 360 Or 211, 221, 377 P3d 570 (2016) ("We are obligated to take a statute as we find it.")

That rule more recently was given constitutional significance in *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009), in which the court explained that

> "[o]nly the text of a statute receives the consideration and approval of a majority of the members of the legislature, as

> required to have the effect of law. Or Const, Art IV, § 25. The formal requirements of lawmaking produce the best source from which to discern the legislature's intent, for it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law:
>
> > "'[N]ot only is it essential that the will of the law-makers be expressed, but it is also essential that it be expressed in due form of law; since nothing is law simply and solely because the legislators will that it shall be, unless they have expressed their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential.'
>
> "Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 130 (1868)."

Legislative history, the court emphasized, may be consulted to inform the meaning of the words actually enacted into law. *Id.* at 172. But it does not have the effect of creating law by itself. If the legislature's intentions as revealed in the legislative history do not find expression in the text of the law, that legislative history is of "no weight" at all. *Id.* at 173.

The idea that the legislature's intentions must find expression in "due form of law" has been applied by this court in quite a number of decisions. The Oregon Supreme Court, in fact, has repeatedly concluded that, even if the legislative history indicates a contrary intention, courts are bound to follow the text of the law actually enacted. As the court explained in *Monaco v. U.S. Fidelity & Guar.*, 275 Or 183, 188, 550 P2d 422 (1976), "[w]hatever the legislative history of an act may indicate, it is for the legislature to translate its intent into operational language. This court cannot correct clear and unambiguous language for the legislature so as to better serve what the court feels was, or should have been, the legislature's intent." *See also Bauder v. Farmers Ins. Co.*, 301 Or 715, 721-22, 725 P2d 350 (1986) (quoting *Monaco*); *Staiger v. Burkhart*, 299 Or 49, 53, 698 P2d 487 (1985) (same); *State v. Martin*, 298 Or 264, 268, 691 P2d 908 (1984) (same).

In this case, the legislative history may well indicate that the legislature believed it was foreclosing expert witness discovery. But the legislature never translated that intent into operational language. To the contrary, the only statutory language that it enacted was ORCP 36 B(1), which permits discovery of "any matter, not privileged" that is relevant to a claim or defense. *Stevens* never explained—and I'm at a loss to understand—how a rule that permits discovery of "any matter, not privileged," can be construed to refer to "any matter *other than expert testimony*, not privileged."

To be sure, I may fairly be accused of taking a rather "textual" approach to statutory construction. That is because, as I have just described, this court's case law has long adopted just such an approach. Certainly, there are other possible ways to go about interpreting statutes. If the court wishes to entertain them, all well and good. But it can't do so without upending quite a bit of precedent.

I'm also well aware that it has widely been assumed by the bench and bar that Oregon law doesn't permit expert discovery, as the dissent correctly observes. But a widely shared assumption doesn't drive the court's interpretation of statutes. Fairly reading the words that the legislature has enacted into law does.

Personally, I don't have strong feelings about whether Oregon should permit expert discovery. There are perfectly valid arguments for and against the practice of expert discovery. I do have strong feelings about the way the court interprets this state's statutes and the extent to which it remains faithful to the rules that it has articulated for doing so. *Stevens* was not decided in accordance with those rules and should be reconsidered. In the meantime, if the Council on Court Procedures and the legislature wish to impose limitations on expert discovery, they should take steps to say so in the terms of the Oregon Rules of Civil Procedure.

NAKAMOTO, J., dissenting.

This mandamus proceeding concerns the application of Oregon's widely recognized bar on expert discovery

to doctors who were actors in events relevant to plaintiff's medical malpractice action. Plaintiff's position is that the bar on expert discovery applies solely to a party's retained experts. Unsurprisingly, this court revisits a decision it issued a decade ago in *Gwin v. Lynn*, 344 Or 65, 176 P3d 1249 (2008), which also involved the deposition of an expert who was an actor in events relevant to that civil action. Despite *Gwin*, a majority of the court now concludes that the doctors have the status of "ordinary" witnesses, which it equates with witnesses, expert or not, "who acquired or developed facts or opinions as actors in the events at issue." *Ransom v. Radiology Specialists*, 363 Or 552, ___, ___ P3d ___ (2018). The majority further concludes that, as ordinary witnesses, the doctors must answer all questions at their depositions within the scope of ORCP 36 B(1), even if those questions would require them to form and convey new expert opinions. *Id.* at __. Because the majority's rationale fails to account for Oregon practice and the legislative history of ORCP 36 B, misapplies *Gwin* and *Stevens v. Czerniak*, 336 Or 392, 84 P3d 140 (2004), and alters settled notions of what Oregon law permits with respect to the discovery of experts, I respectfully dissent.

I. BACKGROUND

The relevant facts are procedural. In 2013, Dr. Levine read plaintiff's computerized tomography (CT) scans and Dr. Bageac read plaintiff's nuclear medicine bone study and x-rays. Plaintiff alleged that each of them had misread the diagnostic images, resulting in the erroneous staging of her breast cancer at stage II, often effectively treated, rather than at stage IV, when the cancer has spread to other areas of the body. Plaintiff alleged that their conduct fell below the standard of care, which led to unnecessary medical procedures and other treatment.

At plaintiff's depositions of the two doctors, defense counsel drew a distinction between questions posed by plaintiff that sought to elicit information about historical facts and opinions and the doctors' general knowledge, on the one hand, and those that sought new opinions that the doctors would form by interpreting the images as part of the depositions, on the other. The disputed questioning at the

depositions involved plaintiff's questions seeking the doctors' current opinions about the radiological images.

During the deposition of Divine, for example, the record reflects that plaintiff asked and the doctor answered questions about the report he had prepared in 2013 concerning the CT study, explaining terms he had used in his report. Plaintiff asked, and the doctor answered, questions regarding the circumstances in 2013, such as whether a specific image was available then, and what information the doctor had received about plaintiff before reading the CT study. The doctor also answered questions eliciting information about his general knowledge as a radiologist. For example, plaintiff asked whether the doctor had learned anything new since the lawsuit was filed that would cause him to believe that he would read the CT study differently than in 2013, and the doctor answered that he had not specifically learned anything new or different. The doctor was asked and explained why contrast dye would be used in the CT study and answered other questions regarding his general knowledge, such as the significance of finding "a black dot in the middle of the bony structure" in a CT scan. Defense counsel, however, consistently objected and instructed the witness not to answer when plaintiff presented the doctor with exhibits consisting of plaintiff's CT scans that he had read in 2013 and sought to have him read and interpret them anew at the deposition.

Bageac's deposition followed the same pattern. For example, plaintiff's counsel asked, and the witness answered, a number of questions concerning his general approach to looking at a nuclear bone scan and the use of tracer in a nuclear bone study; whether he had known that plaintiff had cancer when he read her radiological images; what parts of his 2013 report indicated; why he had recommended x-rays of plaintiff's humerus; and whether a benign lesion could show up on an x-ray. But defense counsel asserted objections and instructed Bageac not to answer when plaintiff asked him to interpret plaintiff's 2013 radiological images at his deposition. As an example, when plaintiff's counsel asked him "what these two white dots are" on a copy of one of the images he had read in 2013, defense counsel responded, "Object and instruct not answer, unless

you have an independent memory as you sit here today of interpreting this bone scan."

After the doctors' depositions, plaintiff filed a motion to compel responses regarding the doctors' current reading of the radiological images. In support of her motion, plaintiff noted that "Oregon's prohibition on trial expert discovery is a minority rule amongst Oregon's sister states" and argued that the questions that she had posed to the doctors were relevant to issues in the case and that federal rules of civil procedure concerning expert discovery are "concerned only with nonparty experts." She contended in her motion that "[t]here is no privilege or authority which allows defendant to refuse to answer [plaintiff's] questions."

Defendant opposed the motion. Defendant established, through declarations from the doctors, that they had no present recollection of interpreting the relevant radiological images they had variously read in 2013. The doctors averred that answers to the questions plaintiff had posed "would necessarily be based on a fresh examination of the images and, as such, upon newly formed or created opinions," and that answers would "necessarily be informed, and affected by," a number of factors, including "[i]nformation obtained from my attorneys in defense of the case" and "knowledge that *** plaintiff's breast cancer was initially staged as Stage II and later staged to Stage IV."

Among three primary arguments, defendant asserted Oregon's bar on expert discovery. Defendant noted that, although the doctors were involved in the alleged medical malpractice, they may hold expert opinions and offer expert testimony. *See Tiedemann v. Radiation Therapy Consultants*, 299 Or 238, 242-44, 701 P2d 440 (1985) (explaining that the affiant, although a physician and a defendant in the malpractice action, established the requisite qualifications to testify as an expert under OEC 702 and provided "expert testimony on the key issues in the case" that went unrebutted). And citing both *Stevens* and *Gwin*, defendant argued that plaintiff sought impermissible expert discovery through her questions. After a hearing, the trial court denied the motion as to the answers sought from both doctors.

In this court, the parties take positions like those that they took in the trial court. Plaintiff again contends that defendant had no basis to prohibit her from exploring the doctors' expertise at their depositions and that a "treating physician whose conduct is at issue is not an expert witness contemplated within the prohibitions of ORCP 36." Thus, as it was in the trial court, the heart of the discovery dispute is the extent to which the expert-discovery bar applies during depositions of experts who were involved in events relevant to the civil action.

II. DISCUSSION

A. *An Overview of ORCP 36 B*

The rule that contains general provisions governing discovery is ORCP 36. Section B of the rule, with three subsections, governs the scope of discovery. Subsection (1) provides the general scope of discovery in civil actions; subsection (2) addresses discovery concerning insurance agreements or policies; and subsection (3) covers trial preparation materials. Plaintiff asserts that ORCP 36 B(1) controls in this case. It provides:

> "For all forms of discovery, parties may inquire regarding any matter, not privileged, that is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

In brief, the legislature deleted a proposed fourth subsection of ORCP 36 B when the Oregon Rules of Civil Procedure were first promulgated.[1] In 1977, the legislature established the Council on Court Procedures. 1977 Or Laws, ch 890, § 1. As provided in ORS 1.735(1), the Council was charged with promulgating "rules governing pleading,

[1] I fill out the legislative history of ORCP 36 B below, 363 Or at __, when I discuss this court's decision in *Stevens*.

practice and procedure *** in all civil proceedings in all courts of the state which shall not abridge, enlarge or modify the substantive rights of any litigant." In 1978, the Council promulgated what it described as "unique Oregon Rules of Civil Procedure." 5 *Legislative History Relating to Promulgation of Oregon Rules of Civil Procedure* 2 (1979). The Council explained that it had "sought to promulgate the best rules which could be developed for practice in Oregon courts." *Id.* The Council "heavily relied" on existing rules, but when they were inadequate, the Council looked to the Federal Rules of Civil Procedure, procedural rules in other states, or developed "entirely new rules." *Id.* As originally promulgated by the Council on Court Procedures in 1978, ORCP 36 B(4) would have permitted limited discovery of expert witnesses to be called at trial. But in 1979, the legislature rejected ORCP 36 B(4), enacting a statute that omitted its specific provision for expert discovery. *Stevens*, 336 Or at 401-02.

Preservation of Oregon practice was an important aspect of the 1979 Legislative Assembly's decision to reject limited expert discovery, and the legislature's rejection of ORCP 36 B(4) cemented the bar on expert discovery. In May 1980, as the Council on Court Procedures was reviewing possible amendments to the Oregon Rules of Civil Procedure that had gone into effect, the Council recognized that ORCP 36 B did not cover expert discovery:

> "The Council discussed the question of use of Rule 36 B. to authorize interrogatories relating to expert witnesses. It was pointed out that: (a) Rule 36 B. does not create interrogatories or any other discovery device but merely defines scope of discovery for these devices authorized elsewhere in the rules and that there is no rule authorizing interrogatories in the ORCP; and, (b) *the matter of discovery of experts is not covered by ORCP 36*."

Minutes, Council on Court Procedures, May 10, 1980, at 3-4 in Oregon Council of Court Procedures, 3 Oregon Rules of Civil Procedure and Amendments: 1979-81 Biennium (emphasis added). For those reasons, Oregon's longstanding practice barring expert discovery ought to inform this court's decision.

B. *Oregon's No-Expert-Discovery Practice*

Since ORCP 36 B was enacted, interested parties have debated whether that rule and its scope of discovery in ORCP 36 B(1) should be interpreted as broadly as its federal counterpart. But even the proponents of such an interpretation have acknowledged that the general practice in Oregon has been to the contrary—that is, the bench and bar have operated on the assumption that discovery of experts was disapproved in total when ORCP 36 B was enacted. *See*, *e.g.*, J. D. Droddy, *The Case for Discovery of Expert Witnesses Under Existing Oregon Law*, 27 Willamette LJ 1, 1 (1991) (noting that, at the time, there was "a common belief among most lawyers and judges in this state that pretrial discovery of the identity, knowledge, and opinions of expert witnesses is not permitted under Oregon law"); Michael B. Wise and Douglas C. Alexander II, *Discovery of Experts: A Call for Change in Oregon*, 20 Willamette LJ 223, 251 (1984) (stating that under present Oregon practice, attorneys would argue that the legislature considered, but rejected, proposals to allow expert discovery and, thus, no discovery of experts is permitted). *See also* David B. Markowitz and Lynn R. Nakamoto, *Does Oregon Prohibit Depositions of Experts*, 14 Litig J 6 (OSB Litigation Section March 1996) (noting the prevailing understanding that depositions of experts are prohibited in total) (cited in Oregon State Bar, I Civil Litigation Manual § 16.33 (Supp 1999)).

The longstanding practice and general understanding that expert discovery is not permitted in Oregon is confirmed by a later effort in the 1980s to introduce expert discovery through a change to ORCP 36. In the latter half of the 1980s, the Oregon State Bar Procedure and Practice Committee studied whether to change Oregon's discovery rules in two areas, one of which was discovery of experts. John Paul Graff, *The Debate Over the Discovery of Experts and the Use of Written Interrogatories*, 50 No. 3 Oregon State Bar Bulletin 5 (1989). Graff, the past chairman of that committee, recounted that subcommittees were formed, and, although the subcommittee regarding expert discovery recommended that "Oregon's rules of civil procedure should be changed to provide for limited expert discovery except in

medical, dental and podiatric malpractice cases," the full committee rejected the proposed rule changes on the ground that there was no need "at all" for expert discovery. *Id*. The vote had been close, and Graff was writing to introduce the proposed expert discovery and interrogatory rules to members of the Bar at large to seek their views, to help the committee "in deciding whether or not to recommend the proposed rules, or ones similar to them, to the Council on Court Procedures." *Id*.

The Bar subcommittee's 1989 proposed rule regarding expert discovery, again designated as ORCP 36 B(4), provided:

> "(a) Upon written request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney stating the subject matter on which each expert whom the other party reasonably expects to call as a witness at trial is expected to testify, the substance of the facts and opinion to which is expected to testify, and a summary of the grounds for each opinion.
>
> "(b) No other or further discovery of experts, including the names and addresses of experts, shall be permitted except upon stipulation between or among disclosing parties, or except as may otherwise be expressly provided in these rules.
>
> "(c) The party upon whom a request has been served under subsection B.(4)(a) hereof shall deliver the statement within 30 days after service of the request; provided, however, that no statement is required to be delivered before the expiration of 120 days from the date of filing of the complaint or other initial pleading in the case. Upon motion for good cause shown, the court may lengthen or shorten any of the time requirements specified in this subsection ***.
>
> "(d) A party is under a duty seasonably to:
>
> "(i) Supplement a statement [under certain circumstances];
>
> "(ii) Amend a prior statement [under certain circumstances].
>
> "(e) When a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to provide a statement within the time

> required in subsection B.(4)(c) of this rule, the party shall not be precluded from introducing evidence through the expert solely on grounds of non-compliance with subsection B.(4)(c). In such case, upon motion or on its own initiative, the court may make whatever order may be just, at or prior to trial.
>
> "(f) Any party who has requested a statement under this rule may move to determine the sufficiency of the statement ***."

Graff, 50 No. 3 Oregon State Bar Bulletin at 6-7.

Along with publication of the proposed rule, two prominent members of the bar submitted articles. Although they took opposite positions on the rule, both noted the no-expert-discovery practice in Oregon.

David Brewer—then practicing with a Eugene law firm and later a member of this court—wrote in favor of changing discovery practice. David Brewer, *An Overdue Change*, 50 No. 3 Oregon State Bar Bulletin 6 (1989). He wrote that "only Oregon practice does not permit routine expert discovery" and that a change would at least "eliminate one reason for forum shopping between Oregon's state and federal courts." *Id*. He also proposed that the committee's draft rule be modified "to absolutely exempt medical, dental and podiatric negligence cases from its reach" to obviate the plaintiff's medical malpractice bar's strong opposition to "routine expert discovery." *Id*. at 8.

Charles Burt, then a plaintiff's trial attorney with a firm in Salem, wrote to oppose the proposed change to expert discovery. Charles Burt, *An Unnecessary Burden*, 50 No. 3 Oregon State Bar Bulletin 7 (1989). He argued that "the change in discovery to provide for the routine disclosure of all expert witnesses" was unnecessary. He argued that, in an ordinary auto case, as an example, "every doctor who has ever treated the plaintiff is known to the defense counsel by depositions and by way of demand for medical records," and so "there can hardly be a surprise as to who the expert is" or, given the prevalence of reports, "what the expert will say." *Id*. He also argued that the rule change would increase costs and time spent on discovery, dampen the availability of expert witnesses, who would have to deal

with discovery disclosures, and favor clients with access to resources. *Id.* at 9.

The expert discovery rule that was proposed in 1989 applied on its face to all testifying experts, including, as Burt observed, treating physicians. Like the disclosure provision promulgated by the Council on Court Procedures that the legislature had rejected a decade earlier, the proposed 1989 rule allowing discovery of the substance of an expert's expected testimony was never enacted, leaving the no-expert-discovery practice in Oregon intact.

C. Stevens v. Czerniak

Fifteen years later, in *Stevens*, this court confirmed what Oregon lawyers had long understood was the state of the law regarding expert discovery. In that mandamus proceeding, this court considered whether the trial court had impermissibly ordered the petitioner, who in the underlying case was seeking post-conviction relief, to provide pretrial disclosure of his expert witnesses' names and anticipated testimony. 336 Or at 394.

The court in *Stevens* described, in general terms, ORCP 36 B(4) as the Council had promulgated it: The rule "required the parties, upon request, to disclose their experts' names and addresses and the subject matter upon which the parties expected their experts to testify." 336 Or at 403-04. The court described the highlights of testimony from two of the witnesses who testified before the Joint House-Senate Committee on the Judiciary, an attorney member of the Council who was in favor of subsection B(4) and another attorney who was opposed. *Id.* at 404. The court noted that, after "both sides explored that debate over several hearings, a majority of the joint committee found the opponents' arguments persuasive." *Id.*

The majority's opinion rests in large part on its view that "*Stevens* can be understood as recognizing a legislative intent to bar parties from discovering the identities of expert witnesses who fall into the three classes of expert witnesses addressed in the federal rule and the Merrill memorandum—expert witnesses who acquired or developed facts or opinions in anticipation of litigation or for trial—and

the substance of their opinions." *Ransom*, 363 Or at ___. Yet that understanding of what the 1979 Legislative Assembly intended is unsupported by the *Stevens* opinion itself and is incorrect considering the legislative history of ORCP 36 B.

The court in *Stevens* never concluded that the legislature had recognized a bar on discovery of only one class of expert witness, that is, retained experts or, similar to retained experts, in-house employee experts, as described in the federal discovery rule. Rather, the *Stevens* court recognized that Oregon practice barring expert discovery—not disapproval of expert discovery as framed in FRCP 26(b)(4), as the majority assumes, *see Ransom*, 363 Or at ___—was the defining factor in the legislature's decision to take out ORCP 36 B(4) as promulgated by the Council on Court Procedures.[2] It bears emphasizing that this court's key conclusions in *Stevens* were that (1) "*the legislature neither understood nor intended that ORCP 36 B(1) would authorize discovery of nonprivileged expert testimony*"—contrary to plaintiff's argument in this court and the majority's holding—and (2) the form of ORCP 36 B that was adopted reflected a legislative "policy choice to *continue the practice of not authorizing expert discovery* in civil actions in state courts." *Stevens*, 336 Or at 404 (emphasis added).

Indeed, the history of the Council's work on ORCP 36 B(4) illustrates how far the Council's rule was from FRCP 26(a)(4) when it was submitted to the legislature. A September 1978 tentative draft of ORCP 36 B(4) provided, in subsection (a):

> "Subject to the provisions of Rule 44, upon request of any party, any other party shall deliver a written statement

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[2] In *Stevens*, the court was discussing statutory context for ORCP 36 B(1) when it explained:

> "Another contextual clue [the other being the 1979 statute amending ORCP 36 B as promulgated] points in the same direction. ORCP essentially tracks FRCP 26(b), with one major exception. *** FRCP 26(b)(1) defines the 'scope of discovery' in much the same terms as ORCP 36 B(1). FRCP 26(b)(4) then specifically authorizes expert discovery. *** The presence of a specific provision authorizing expert discovery in FRCP 26 and the omission of a similar provision in ORCP 36 suggest that Oregon intended to depart from the federal model and not authorize expert discovery."

Stevens, 336 Or at 402 (citations and footnote omitted).

> signed by the other party or the other party's attorney, giving the name of any person the other party reasonably expects to call as an expert witness at trial, and stating the areas in which it is claimed the witness is qualified to testify as an expert, the facts by reason of which it is claimed the witness is an expert, and the subject matter upon which the expert is expected to testify. The statement shall be accompanied by a written report prepared by the expert which shall set forth the substance of the facts and opinions to which the expert will testify and a summary of the grounds for each opinion. If such expert witness relies in forming an opinion, in whole or in part, upon facts, data or opinions contained in a document or made known to such expert witness by or through another person, the party may also discover with respect thereto as provided in this subsection. The report and statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to trial, or unless the request is made less than 30 days prior to trial."

5 Legislative History Relating to Promulgation, Proposed Oregon Rules of Civil Procedure, Tentative Draft (Sept 15, 1978) at 84-85. The "Background Note" to that subsection explained that ORCP 36 B(4) "is a new provision drafted by the Council" and "deals only with experts to be called at trial and leaves regulation of discovery from experts employed, retained or consulted by an opponent but not to be called at trial to existing rules relating to privilege and fairness as developed by statute or cases." *Id.* at 88.

That tentative draft was based on the rule that Professor Merrill had recommended to the Council on Court Procedures in his memorandum titled "Discovery of Experts: Rule 26(b)(4) and the Bodyfelt Proposal" in 2 Legislative History Relating to Promulgation of Oregon Rules of Civil Procedure ("Merrill Memorandum"). Merrill explained that his recommended rule was based on the "Bodyfelt rule, with some modifications," and described it as the "better approach to regulation of discovery of experts." Merrill Memorandum at 22. The heart of the Bodyfelt proposal was to have testifying experts provide written statements, and then, if

necessary, the experts could be deposed. Merrill also opined that what he called the "Graham proposal" from Professor Michael H. Graham of the University of Illinois Law School was an improvement over FRCP 26(b)(4); the Graham proposal included authorization for discovery from testifying expert witnesses, not limited to any specific discovery device. *Id.* at 19-20, 22. In Merrill's view, Graham's work indicated that the expert discovery rule should "avoid limiting the scope of discovery where there is a high and demonstrated need." *Id.* at 22. Merrill explained that "[t]here is such a high need for discovery of experts to be called at trial," as opposed to "non-trial expert witnesses." *Id.* He also explained that the draft rule he recommended was in part based on Graham's proposal. *Id.* at 23.

But the September 1978 tentative draft was not promulgated by the Council. As Merrill later explained in a summary of Rules 36 to 46 that he presented to the legislature in March 1979, once the Council received public comment on the draft of ORCP 36 B(4),

> "the Council determined that this rule might create, rather than solve, problems and promulgated only a rule requiring a party to identify proposed expert witnesses. Any actual discovery from those witnesses would remain as it was before under existing case law defining the scope of discovery."

Exhibit A, Joint House-Senate Committee on the Judiciary, HB 3131, Mar 8, 1979 (Summary of Rules 36-46).

Instead, in December 1978, the Council adopted a narrow version of ORCP 36 B(4). As promulgated, ORCP 36 B(4)(a) read:

> "Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and address of any person the other party reasonably expects to call as an expert witness at trial and the subject matter upon which the expert is expected to testify. The statement shall be delivered within a reasonable time after the request is made and not less than 30 days prior to the commencement of trial unless the identity of a person to be called as an expert witness at the trial is not determined until less than 30 days prior to

> trial, or unless the request is made less than 30 days prior to trial."

Council on Court Procedures, Amendments to ORCP 26 Promulgated by Council of Court Procedures 1980 to 2016: 1978 Original Promulgation, ORCP 36, http://counciloncourtprocedures.org/Content/Legislative_History_of_Rules/ORCP_36_promulgations_all_years.pdf (accessed Aug 8, 2018). It is apparent that the legislature was not presented with a rule that looked like FRCP 26(b)(4), which then permitted a party to "require one who intends to use the expert to state the substance of the testimony that the expert is expected to give," but a "court may order further discovery." Federal Rules of Civil Procedure, Rule 26, Notes of Advisory Committee on Rules - 1970 Amendment, https://www.law.cornell.edu/rules/frcp/rule_26 (accessed Aug 8, 2018).

But even as spare as it was, ORCP 36 B(4)'s identification requirement sparked controversy—and, as the *Stevens* decision indicates, much testimony and discussion before the Joint House-Senate Committee on the Judiciary. The committee heard repeatedly that discovery of testifying experts was not the practice in Oregon. A Portland lawyer explained that ORCP 36 B(4) as promulgated was a "departure from present law, in that there is no duty to disclose the names of expert witnesses." Exhibit B, Joint House-Senate Committee on the Judiciary, HB 3131, Mar 8, 1979, (Comments Concerning the Proposed Oregon Rules of Civil Procedure by Donald N. Atchison).

Linn County Circuit Court Judge Wendell H. Tompkins, a member of the Council on Court Procedures, also testified before the committee. He explained that under Oregon procedure, "the litigants are not entitled to depose the opposing expert with respect to his expert opinion. The proposed rule does not change that at all." Tape Recording, Joint House-Senate Committee on the Judiciary, HB 3131, Mar 8, 1979, Tape 2, Side A (statement of Judge Wendell H. Tomkins). In response to a question by Senator Vernon Cook regarding potential "gamesmanship" as a result of the disclosure of experts, Judge Tompkins said that he did not see the question that Senator Cook had posed as "being

a substantial problem in state circuit courts because as a general proposition, you can't depose an expert anyway." *Id.* When Senator Cook later stated that he would think that, logically, if there were discovery, then a party should be able to "pull in the other side's expert witnesses and find out what they are going to say," Judge Tompkins responded that, although that was the predominant practice in the country, "it hasn't been the rule in Oregon for a long time." He added, "It hasn't worked too badly." *Id.* (statements of Sen. Vernon Cook and Judge Wendell H. Tompkins).

In sum, the major premise of the majority opinion—that the legislature intended to strike down what was essentially a federal rule that permitted discovery only of retained expert witnesses and to bar discovery of their expert opinions, and not those of participating experts—is not supported by *Stevens* or the legislative history of ORCP 36 B(4). Instead, the Council put forward a narrow disclosure rule that was directed at all testifying experts, and the legislature rejected it. The fact that the legislature that reviewed ORCP 36 B was aware that Oregon courts generally did not permit discovery of expert witnesses and made a considered decision to uphold that practice by removing ORCP 36 B(4) as promulgated by the Council, in addition to this court's recognition of Oregon's no-expert-discovery practice in *Stevens*, should be matters of consequence in our consideration of the present question.

D. Gwin v. Lynn

Arguably, *Stevens* did not determine whether an expert who also participated in some of the events at issue in the case could be questioned in a discovery deposition about the substance of his or her expert opinions. In *Gwin*, four years after deciding *Stevens*, this court clarified that a witness who is an expert as to some matters and a fact witness as to other matters may be deposed as to the historical facts of his or her direct involvement in or observation of relevant events. *Gwin*, 344 Or at 67. However, the basic bar on expert discovery in Oregon—that a witness's opinions as an expert are not subject to discovery—was not modified in *Gwin* and remains untouched, as members of the bar have correctly understood to be the case. *See, e.g.*, II *Oregon*

Civil Pleading and Practice § 27.5-7 (2012) (observing that *Stevens* "resolved any ambiguity in Oregon about the disclosure of an expert's identity or opinions").

Gwin, a legal malpractice action, involved an expert who was both an Oregon certified public accountant and a lawyer. The plaintiff had hired the expert to mitigate damages from the defendant's alleged legal malpractice, 344 Or at 68, and then sought to present the expert's testimony at trial, including her opinion that the plaintiff would have to incur further expenses to mitigate her damages and that the Oregon State Bar's Professional Liability Fund could have reduced the damages by appointing "repair counsel" to help the plaintiff at an earlier point. *Id.* at 69.

The defendant sought to depose the expert about her personal involvement in efforts to mitigate the damage that the defendant's alleged malpractice had caused. *Id.* at 68-69. At a hearing on the defendant's motion to compel the lawyer's participation, the defendant clarified that he did not wish to inquire into the lawyer's expert opinions but only into the "facts" of which she had "personal knowledge" because of her involvement in mitigating the plaintiffs' damages. *Id*. at 70. After the trial court denied the motion to compel, the defendant sought a writ of mandamus directing the trial court to vacate its order, arguing that, even if the lawyer would provide an expert opinion about, for example, the applicable standard of care, her knowledge of "factual matters at issue in the case" ought to be discoverable. *Id*. at 71.

This court agreed with the defendant and issued a peremptory writ. This court first noted that, as the court had held in *Stevens*, the right under ORCP 36 B(1) to obtain discovery from all potential witnesses does not extend to expert witnesses. *Id.* at 72 ("[L]egislative context and history establish ineluctably that the scope of the rule was not intended to extend to expert witnesses.").

The *Gwin* court then stated:

> "Still, nothing in the wording of [ORCP 36 B], the decision in *Stevens*, or in any other case of which we are aware, suggests that a witness who has been personally or directly

> involved in events relevant to a case may not be deposed as to facts of which the witness has personal knowledge, simply because that person will be, as to other matters, an expert witness at trial."

Id. at 72. As that passage suggests, the extent of the discovery allowed in *Gwin* turned on the distinction between historical facts, which the expert knew due to her participation in relevant events, and the opinions that she might express at trial based on her expertise.

Emphasizing that distinction, the court thereafter considered and rejected various arguments that the plaintiffs had raised in opposition to the notion that their expert might be deposed as to her personal involvement in the underlying events. To an argument that the defendant's real intent was to cross-examine the lawyer about her opinions as an expert, the court responded that it was persuaded that the defendant only sought to examine the lawyer "concerning her personal involvement in those events and facts that are within her personal knowledge as a result of that involvement." *Id.*

As for the plaintiff's contention that the evidence rules relating to expert opinions suggested that experts might have to disclose facts underpinning their opinions in *voir dire* but not in discovery, this court responded that the cited rules could not be read to "prohibit deposing the witness concerning events that pertain to the witness's direct involvement in or observation of the relevant facts that are personally known by the witness and that were not gathered primarily for the purpose of rendering an expert opinion." *Id.* at 74.

And on a point directly relevant to this case, the court in *Gwin* rejected the plaintiffs' argument that the defendant would attempt to test the expert lawyer's expertise by "taking apart the facts on which the expert bases her opinion." The court explained that "the 'facts' that [the] defendant want[ed] from [the expert] pertain[ed] to her direct involvement in or her observation of and derivative knowledge of the relevant events." *Id.* at 73. In the end, the court issued a peremptory writ directing the trial court to allow the defendant to depose the lawyer, but it specified

that "[a]ny such deposition must *** be limited to evidence that [the lawyer] can provide as a fact witness, and must observe the prohibition against pretrial deposition of expert witnesses with respect to their anticipated expert testimony." *Id*. at 75.

Ultimately, the court in *Gwin* held that the general prohibition on expert discovery recognized in *Stevens* stands, but that a party may depose an expert as to (and only as to) factual matters within the expert's personal knowledge. To the extent that that is not evident from the opinion's use of the term "fact witness," it is made clear by the court's descriptions of the material sought by the defendants as, not "opinions," but "the facts that [the witness] has personal knowledge of," *Gwin,* 344 Or at 70; "factual matters at issue," *id.* at 71; "facts of which the witness has personal knowledge," *id.* at 72; "facts *** pertain[ing] to her direct involvement in or her observation of and derivative knowledge of the relevant events," *id.* at 73; and "facts that pertain to the witness's direct involvement in or observation of the relevant events," *id*. at 74.

The point is also made by the facts in *Gwin*. There, the evidence that the defendant sought from the plaintiff's expert, and to which the court concluded that the defendant was entitled, was factual—rather than opinion—evidence. It is described in the opinion as "the actual amounts [that the witness] has collected from [the plaintiff], the percentage of work that she has done for [the plaintiff] that she can fairly say was directed at mitigation of damages, whether or not [the plaintiff's] house was ever refinanced, and which state employees she contacted on behalf of [the plaintiff] in order to get additional patients for [the plaintiff's] home care business." *Id.* at 71.

Moreover, this court drew a distinction between fact questions and opinion questions. In responding to the plaintiff's argument that, by deposing her expert concerning the historical facts concerning her work to mitigate damages, the defendant "would inevitably stray into the prohibited area of expert opinion," this court explained that it was possible to distinguish between questions about facts and questions that sought expert opinions:

> "Indeed, it seems clear to us that one can distinguish questions that, for example, call for answers about [the witness's] actions as a factual participant in the effort to mitigate damages, including her legal work for [the plaintiff], from those that call for *answers about her expert opinions*. And it also is true that, in any instance in which the lawyer defending the deposition believes that a question trespasses on [the witness's] expertise or otherwise is impermissible, the lawyer specifically is authorized by ORCP 39 D(3) to prevent the deponent from answering."

Gwin, 344 Or at 73 (emphasis added). As permitted and encouraged in *Gwin*, defendant's lawyer in this case drew the line between questions calling for historical facts (including expert opinions that the doctors had formed in 2013) and questions directed at obtaining newly formed expert opinions from the doctors during their depositions.

Thus, I disagree with the majority's conclusion that "it is not the current application of expertise that is dispositive." *Ransom*, 363 Or at ___.

In reaching that conclusion, the majority relies on *Gwin* for the propositions that (1) "an expert who acquires or develops facts or opinions as a participant in the events at issue may be questioned about those events as an ordinary witness"; (2) "under ORCP 36 B, a participating expert can be asked any questions relevant to his or her direct involvement in the events at issue"; and (3) whether "a participating expert *also* has expert qualifications does not alter or restrict the scope of the questions that he or she may be asked about his or her participation." *Ransom*, 363 Or at __ (emphasis in original). The majority's reading of *Gwin*, however, is in some respects wrong and in other respects merely imprecise in a way that obfuscates the opinion's actual point.

First, *Gwin* does not support the distinction the majority draws between "participating" and "nonparticipating" expert witnesses, based on the sources of their evidence. Although the *Gwin* opinion does contain a statement to the effect that, for purposes of the opinion, a "fact" witness is a person who has "obtained" relevant facts through their own senses, 344 Or at 67 n 1 (as opposed to obtaining facts "principally for the purpose of rendering an expert opinion in the

trial," *id.* at 75), that description refers to historical facts, and this court would permit the opponent to ask the witness deposition questions only about those historical facts. Neither does *Gwin* focus, as the majority appears to suggest, on whether the "facts" being sought were directly perceived by the witness or else presented to him or her for the purposes of rendering an opinion. Instead, discoverability turns not on the source of the facts underpinning the evidence sought from the expert, but on the content of the testimony that is sought, *i.e.*, whether it would impart the witness's current scientific, technical, or otherwise specialized knowledge or opinion to assist the trier of fact or whether the witness would relate historical facts given "the witness's direct involvement in or observation of the relevant events that are personally known by the witness." *Id.* at 74. But the most significant problem with the majority's explanation of *Gwin* is that it obscures what should be an obvious point of the opinion—that a party may only depose an expert as to factual matters within the expert's personal knowledge.

To the extent that the doctors were involved in events that are relevant to plaintiff's case, plaintiff is entitled to question them about matters within their personal knowledge concerning how or why they proceeded in the manner that they did—including their own observations, findings, diagnoses, and opinions at the time. Those matters are historical "facts" in this context, and they are proper subjects for deposition under *Gwin*. In this case, plaintiff did inquire, and the doctors answered questions regarding, those matters.

But the doctors' current observations and opinions of radiological scans that will be presented to them, even if they are the same scans that they allegedly misread in 2013, are (or would be) the very epitome of expert opinion testimony—the expert's application of his specialized knowledge to diagnostic images that are presented for the purpose of eliciting an opinion as to what they portray. And because that is so, the relevant rule is the one that this court acknowledged in *Stevens* as a policy choice that the legislature had made in 1979: discovery of experts is not authorized in civil actions in this state. 336 Or at 404.

The majority also relies on case law from other jurisdictions. *Ransom*, 363 Or at __. But it is notable that the cases the majority cites rely on civil procedure rules that have not been interpreted as categorically barring discovery of experts, except as to factual matters within their personal knowledge based on involvement in the relevant events. If Oregon is an outlier in this matter, it is because that is what Oregon practice and Oregon's discovery rule—as interpreted by this court in two opinions that plaintiff does not seek to overturn—demand.[3]

I recognize that, in a world that generally permits liberal discovery of the opposing party's case, it appears anomalous to place any limits on plaintiff's discovery of the doctors when she alleges that they were responsible for her injury. In federal practice, for example, FRCP 26(a)(2) now requires a party to disclose "the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705" and, unless a written report under FRCP 26(a)(2)(B) is required, to provide "the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, 705" and "a summary of the facts and opinions to which the witness is expected to testify." FRCP 26(a)(2)(C). And, a party "may depose any person who has been identified as an expert whose opinions may be presented at trial," FRCP 26(b)(4)(A), meaning any testifying expert, retained or not. It is especially difficult when, in similar circumstances, other jurisdictions have concluded that a percipient expert's current opinions are fair game for discovery, as noted by the majority. But the drift of judicial decisions made under entirely different statutes should not impel this court to set aside settled notions of Oregon's bar on expert discovery.

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[3] Charles Burt made a similar observation in 1989 when he wrote opposing changes to ORCP 36 B to permit expert discovery:

> "The argument that Oregon stands alone in its rule on the routine discovery of experts cannot be advanced as a reason for Oregon to change its rule. It might be more properly said that of all the jurisdictions, Oregon is the only one who has retained enough common sense to put an end to the unending discovery which seems to be the modern trend."

Burt, 50 No. 3 Oregon State Bar Bulletin at 7.

III. CONCLUSION

In my view, most members of the trial bench and bar would understand that, in presenting a radiologist with x-rays, CT scans, or other radiological images and then requesting his or her current professional assessment of what they show, the requesting party would be asking for the radiologist's current observations and opinions as an expert. Given the longstanding bar on expert discovery in Oregon and this court's decisions in *Stevens* and *Gwin*, discussed above, the expectation would be that any such request for the radiologist's current expert observations and opinions would be denied.

Nevertheless, the majority insists that Oregon's well-recognized bar on expert discovery is inapplicable in the present circumstances, because the information being sought ultimately will be used to prove the nature of the perceptions and actions of the two doctors at the time of their participation in plaintiff's care and whether that care conformed to the required standard. The majority's recognition of such an exception and its application of ORCP 36 B(1), when there is nothing in *Gwin* or the longstanding interpretation of ORCP 36 B announced in *Stevens* that persuasively supports it, will be perceived as a departure from settled law—and one that is not driven by any true inquiry into the legislature's intent or that otherwise adds any new information that justifies undermining this court's precedents without expressly overruling them.[4]

Accordingly, I respectfully dissent.

Balmer and Duncan, JJ., join in this dissent.

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[4] As a result of (1) the majority's rationale and holding in this case, (2) the low bar for logical relevance of evidence, and (3) the reach of ORCP 36 B(1), I foresee that the majority's decision will lead to routine discovery of—and discovery disputes concerning—experts who were actors in events relevant to the action, such as a plaintiff's treating doctor. For the same reasons, I question the majority's assertion that plaintiff would not be entitled to ask Bageac about, for example, "matters that plaintiff related and supplied to him, such as information about a third physician's treatment of plaintiff and studies on which that physician based her treatment." *Ransom*, 363 Or at ___. The majority holds that plaintiff is entitled to ask questions "to obtain all relevant, unprivileged information." *Id.* at ___. It would come as no surprise if plaintiff's lawyer were able to articulate the relevance of questions about such information, and, in any event, irrelevance is normally not a basis for instructing a witness not to answer deposition questions.