IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Ryan HAMMEL
and Jamie Hammel,
Plaintiffs-Appellants,
v.
Mark McCULLOCH,
individually and
Powers McCulloch & Bennett, LLP,
an Oregon limited liability partnership,
Defendants-Respondents.

Multnomah County Circuit Court
15CV26359; A163891

Henry C. Breithaupt, Judge pro tempore.

Argued and submitted January 5, 2018.

Kelly L. Andersen argued the cause for appellants. Also on the briefs was Kelly L. Andersen, P. C.

Peter R. Mersereau argued the cause for respondents. On the brief were Thomas W. McPherson and Mersereau Shannon LLP.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Sercombe, Senior Judge.

TOOKEY, J.

Reversed and remanded.

Sercombe, S. J., dissenting.

TOOKEY, J.

This legal malpractice case has its beginnings in a Tri-Met bus striking five pedestrians in a Portland crosswalk. Plaintiffs, Ryan and Jamie Hammel, allege, among other points, that defendants, attorney Mark McCulloch and the law firm of Powers McCulloch & Bennett, LLP, were negligent in failing to pursue claims against certain entities in connection with the personal injury litigation that defendants commenced on plaintiffs' behalf as a result of being struck by the Tri-Met bus. The trial court granted summary judgment to defendants on the grounds that plaintiffs could not establish the "causation" and "damages" elements of their legal malpractice claim. Plaintiffs appeal the trial court's judgment in favor of defendants. For the reasons that follow, we reverse the grant of summary judgment to defendants and remand for further proceedings.

We review a trial court's grant of summary judgment to determine whether there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ORCP 47 C.[1] "That standard is satisfied if, viewing the relevant facts and all reasonable inferences in the light most favorable to the nonmoving party—here, plaintiff[s]—no objectively reasonable juror could return a verdict for [plaintiffs] on the matter that is the subject of the motion for summary judgment." *Hinchman v. UC Market, LLC*, 270 Or App 561, 566, 348 P3d 328 (2015) (internal quotation marks omitted); *see also Mason v. BCK Corp.*, 292 Or App 580, 587, 426 P3d 206, *rev den*, 363 Or 817 (2018) (in analyzing a motion for summary judgment, "the court determines whether there is 'some evidence' or 'any evidence' that presents a genuine issue of material fact for the jury to resolve"). We state the facts consistently with that standard.

I. FACTS

A. *History of the Underlying Litigation*

In April 2010, a Tri-Met bus struck five pedestrians in a crosswalk in Northwest Portland. Plaintiffs, as well as

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[1] Amendments to ORCP 47 promulgated by the Council on Court Procedures became effective January 1, 2018. Because those amendments do not apply to this case, we apply the 2015 version of ORCP 47. All discussion and citations to ORCP 47 refer to the 2015 version.

Robert Gittings, were injured in the bus accident, but survived their injuries. The two other individuals who were struck by the bus, Danielle Sale and Jenee Hammel, died as a result of their injuries.

Subsequently, the personal representative of the Estate of Jenee Hammel, the personal representative of the Estate of Danielle Sale, and Gittings (the products-liability claimants), filed wrongful death and personal injury claims against Tri-Met. Additionally, the products-liability claimants filed claims against the manufacturer of the bus, New Flyer, and against the manufacturers, Hadley and Rosco, of a side-view mirror that was installed on the bus.

In October 2010, plaintiffs retained defendants to represent them in connection with the injuries that they had sustained as a result of the bus striking them. After consultation with defendants, plaintiffs asserted claims against Tri-Met, but not against New Flyer, Hadley, or Rosco. Less than a month after asserting their claims against Tri-Met, plaintiffs contacted a different attorney, Michelle Burrows, who eventually replaced defendants as attorney of record in the litigation. By the time that Burrows replaced defendants, the statute of limitation had run on plaintiffs' unasserted claims against New Flyer, Hadley, and Rosco. Subsequently, plaintiffs' and the products-liability claimants' lawsuits were consolidated.

As a result of the lawsuits filed against it, Rosco entered a global settlement with the products-liability claimants in the amount of $225,000. The $225,000 was equally divided among the three products-liability claimants, with each claimant receiving $75,000. Additionally, Hadley settled with each of the products-liability claimants for $100,000.

Tri-Met and New Flyer entered a settlement with plaintiffs and the products-liability claimants. Specifically, Tri-Met and New Flyer each agreed to pay $2 million in exchange for plaintiffs and the products-liability claimants releasing their claims. The question of how the total settlement fund of $4 million would be distributed among plaintiffs and the products-liability claimants was left to plaintiffs and the products-liability claimants, and their

respective attorneys, to determine, which they subsequently did.

The $2 million global settlement proceeds received from Tri-Met were distributed as follows:

- $603,911 to the Estate of Jenee Hammel;
- $546,939 to Gittings;
- $524,150 to the Estate of Danielle Sale; and
- $325,000 to plaintiffs.

The $2 million global settlement proceeds received from New Flyer were distributed as follows:

- $721,089 to the Estate of Jenee Hammel;
- $653,061 to Gittings; and
- $625,850 to the Estate of Danielle Sale.

Thus, plaintiffs received 16.25 percent of the $2 million paid by Tri-Met, but none of the $2 million that was paid by New Flyer to the products-liability claimants. Instead, according to plaintiffs, the $2 million that was paid by New Flyer was "simply redistributed to the [products-liability claimants] in exact mathematically increased proportion to what they had received from Tri-Met." That is, "the distribution of New Flyer's $2 million was not a renegotiation by the attorneys and clients involved," but rather "a simple duplication of the Tri-Met negotiations, without [plaintiffs]."

Plaintiffs did not participate in the distribution of the $2 million global settlement received from New Flyer, the $225,000 global settlement received from Rosco, or the $100,000 settlements received from Hadley, because defendants did not file claims against New Flyer, Rosco, or Hadley.

B. *Procedural History of the Legal Malpractice Case*

After resolution of their claims against Tri-Met, plaintiffs brought an action for legal malpractice against defendants. In the operative complaint, plaintiffs allege that (1) defendants were negligent in failing to file claims against New Flyer, Rosco, and Hadley, and (2) had defendants done

so, plaintiffs would have received settlement funds from New Flyer, Rosco, and Hadley.

In the trial court, defendants moved for summary judgment on plaintiffs' legal malpractice claim. Defendants argued that plaintiffs could not prove the essential elements of "harm" and "causation" because there was no evidence that plaintiffs would have recovered "more in the global settlement if they had * * * alleg[ed] products liability claims."

In opposition to defendants' motion for summary judgment, plaintiffs argued, among other points, that if they had filed a claim against New Flyer it was "highly probable" that plaintiffs "would have received the same distribution of the $325,000 of the New Flyer funds that they had received of the Tri-Met funds." They also argued that because 16.25 percent was their "agreed-upon share" of the Tri-Met settlement funds, it was probable that plaintiffs would have received the same share of the settlement funds paid by Rosco and Hadley if defendants had filed claims against Rosco and Hadley. In opposing defendants' motion for summary judgment, plaintiffs relied on, among other evidence, (1) an October 12, 2016, declaration from Burrows (the Burrows declaration), who, as noted above, replaced defendants as plaintiffs' attorney of record in the underlying litigation, and (2) an October 13, 2016, declaration from Hala Gores (the Gores declaration), who represented the personal representative of the Estate of Jenee Hammel in the underlying litigation.

The trial court granted defendants' summary judgment motion. In a November 9, 2016, letter opinion, the trial court concluded, in pertinent part, that

> "[t]he question in this case is how, if at all, would both payors of settlement funds and persons dividing those funds behaved differently if Defendants had pursued a claim against certain products liability defendants. None of the declarations proffered by Plaintiffs serve as a valid basis for a conclusion in that regard. * * * The problem is that the question of motive and behavior of either insurance companies or the other plaintiffs can be resolved only by evidence from those parties and not by third-party commentators on what might have happened differently. The motives and

behaviors about which the declarants here would testify are either hearsay (that is, based on statements made by the other plaintiffs or insurance company representatives to the declarants), incompetent, or speculative."

On appeal, plaintiffs contend, among other points, that the record permits an inference that, if defendants had sued New Flyer, Rosco, and Hadley, "at the very least plaintiffs would have received the same $325,000 from New Flyer as they had received from Tri-Met, and they almost certainly would have received something significant from Rosco and Hadley."

Defendants contend that plaintiffs were required, but failed, to come forward with admissible evidence showing that the outcome of the global settlement negotiations would have been more favorable to them had defendants asserted the products-liability claims noted above on their behalf against New Flyer, Hadley, and Rosco. Specifically, defendants contend that plaintiffs' appeal fails because (1) plaintiffs "produced no evidence" from New Flyer, Hadley, or Rosco "suggesting that they would have been willing to increase their global settlement payments" if plaintiffs had asserted claims against them and (2) "produced no evidence from the [products-liability claimants] suggesting that they would have accepted less money in settlement if plaintiffs had pleaded products liability claims."

II. ADMISSIBILITY OF THE BURROWS DECLARATION AND THE GORES DECLARATION

In the trial court, defendants made motions to strike certain paragraphs of the Burrows declaration and the Gores declaration, including paragraph 4 of the Burrows declaration and paragraph 11 of the Gores declaration. In paragraph 4 of the Burrows declaration, Burrows states, in pertinent part:

"When Tri-Met and New Flyer settled at the same time * * *, each paying $2 million for a total of $4 million in all, [plaintiffs] received $325,000 (16.25%) of the $2 million paid by Tri-Met, but none of the identical $2 million paid by New Flyer. Instead, the New Flyer money that otherwise would have gone to [plaintiffs] was simply redistributed to the [products-liability claimants] in exact mathematically

> increased proportion to what they had received from Tri-Met. *** Significantly, the distribution of New Flyer's $2 million was not a re-negotiation by the attorneys and clients involved. Instead, it was a simple duplication of the Tri-Met negotiations, without the [plaintiffs]."

In paragraph 11 of the Gores declaration, Gores states:

> "[Plaintiffs] did not participate in the distribution of the $2,000,000 global settlement received from New Flyer, the $225,000 global settlement received from Rosco, or the $300,000 ($100,000 per individual) settlement received from Hadley, because their attorney, Mark McCulloch, did not make claims against New Flyer, Rosco and Hadley."

The trial court did not directly rule on defendants' motions to strike, but noted in its letter opinion that it did not "see any foundation for the statements in th[o]se declarations relating to the matter at issue," which the court characterized as "how, if at all, would both payors of settlement funds and persons dividing those funds behaved differently if [d]efendants had pursued a claim against" New Flyer, Hadley, and Rosco. It went on to conclude, as noted above, that "[t]he motives and behaviors about which the declarants here would testify are either hearsay[,] *** incompetent, or speculative."

On appeal, plaintiffs argue that the trial court "ignored" the Gores declaration and the Burrows declaration when ruling on defendants' motion for summary judgment. Defendants, for their part, characterize the trial court as concluding that the Burrows declaration and the Gores declaration were "without foundation, incompetent and inadmissible." Defendants argue that statements in the Gores declaration and the Burrows declaration "about what the parties to settlement negotiations in the underlying litigation might have done if plaintiffs had pled products liability claims [are] inadmissible because [they] lack[] any foundation ***, [are] purely speculative, and thus incompetent."

In light of our analysis below, we consider, in particular, whether paragraph 4 of the Burrows declaration—as excerpted above—and paragraph 11 of the Gores declaration were admissible in resolving defendants' motion for summary judgment.

ORCP 47 D provides that declarations in opposition to summary judgment

> "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is competent to testify to the matters stated therein."

We note, however, that "ORCP 47 D does not require an explicit *statement* by the affiant as to his personal knowledge and competence." *West v. Allied Signal, Inc.*, 200 Or App 182, 190, 113 P3d 983 (2005) (emphasis in original). Rather, "the rule's requirements are satisfied if, from the content of the affidavit read as a whole, an objectively reasonable person would understand that statements in the affidavit are made from the affiant's personal knowledge and are otherwise within the affiant's competence." *Id.*

We conclude that an objectively reasonable person would understand that Burrows, who represented plaintiffs and participated in discussions regarding distribution of funds under the settlement agreement between New Flyer, Tri-Met, the products-liability claimants, and plaintiffs, would have personal knowledge of, and be competent to testify to, the method the parties chose to distribute the funds described above.

We also conclude that an objectively reasonable person would understand that Gores, who represented one of the products-liability claimants, would have personal knowledge of, and be competent to testify to, why plaintiffs did not participate in the settlements with New Flyer, Rosco, and Hadley.

Accordingly, we conclude that paragraph 4 of the Burrows declaration, as excerpted above, and paragraph 11 of the Gores declaration were admissible in resolving defendants' motion for summary judgment.

III. SUMMARY JUDGMENT ANALYSIS

An action for legal malpractice is not significantly distinct from an ordinary negligence action. As we have noted, "[i]t is simply a variety of negligence in which a special relationship gives rise to a particular duty that goes

beyond the ordinary duty to avoid a foreseeable risk of harm." *Watson v. Meltzer*, 247 Or App 558, 565, 270 P3d 289 (2011), *rev den*, 352 Or 266 (2012). Accordingly, "in order to prevail in a legal malpractice action, a plaintiff must allege and prove (1) a *duty* that runs from the defendant to the plaintiff; (2) a *breach* of that duty; (3) a resulting *harm* to the plaintiff measurable in damages; and (4) *causation*, *i.e.*, a causal link between the breach of duty and the harm." *Id.* (emphases in original).

Under Oregon negligence law, the element of "causation" ordinarily refers to "causation-in-fact" or "but-for" causation. *Id.* "That is to say, in order to prevail in a negligence action, a plaintiff must establish that *but for* the negligence of the defendant, the plaintiff would not have suffered the harm that is the subject of the claim." *Id.* (emphasis in original). In the legal malpractice context, "that means that, to prevail, a plaintiff must show, not only that the attorney was negligent, but also that the result would have been different except for the negligence." *Id.* (internal quotation marks omitted); *see also Joshi v. Providence Health System*, 198 Or App 535, 538-39, 108 P3d 1195 (2005), *aff'd*, 342 Or 152, 149 P3d 1164 (2006) ("'Cause-in-fact' also has a well-defined legal meaning: it generally requires evidence of a reasonable probability that, but for the defendant's negligence, the plaintiff would not have been harmed."). "Causation may be proved by circumstantial evidence, expert testimony, or common knowledge." *Two Two v. Fujitec America, Inc.*, 355 Or 319, 332, 325 P3d 707 (2014).

With respect to defendants' failure to bring claims against New Flyer, the summary judgment record in this case would permit a reasonable juror to find that (1) at the time that plaintiffs and the products-liability claimants entered into their agreement with New Flyer and Tri-Met to settle for $4 million, neither plaintiffs nor the products-liability claimants knew what share of the New Flyer and Tri-Met settlement funds they would receive, (2) plaintiffs received 16.25 percent of the Tri-Met settlement funds, (3) plaintiffs did not receive any of the New Flyer settlement funds because they did not bring a claim against New Flyer, and (4) the distribution of the $2 million in New Flyer

settlement funds was not a renegotiation by the attorneys and clients involved, but a simple mathematical duplication of the Tri-Met negotiations, without plaintiffs.

From those facts, a reasonable juror could further find, without impermissible speculation, that defendants' failure to sue New Flyer caused harm to plaintiffs, as a reasonable juror could infer that, but for that failure, plaintiffs would have received 16.25 percent of the settlement funds paid by New Flyer. That is not the only plausible inference that could be drawn; it is, however, a reasonable and permissible one. *See State v. Miller*, 196 Or App 354, 358, 103 P3d 112 (2004), *rev den*, 338 Or 488 (2005) ("The inference need not inevitably follow from the established facts; rather, if the established facts support multiple reasonable inferences, the jury may decide which inference to draw."); *West*, 200 Or App at 192 n 4 (noting that an inference is permissible and not "impermissible speculation" when "there is an experience of logical probability that an ultimate fact will follow a stated narrative of historical fact" and in such case "the jury is given the opportunity to draw a conclusion" (internal quotation marks omitted)).

The above analysis concerning defendants' failure to bring claims against New Flyer is essentially the same with respect to defendants' failure to bring claims against Hadley and Rosco. Regarding defendants' failure to bring claims against Hadley, the summary judgment record in this case would permit a reasonable juror to find that (1) every claimant who brought a claim against Hadley in connection with the April 2010 Tri-Met accident received a settlement of $100,000, regardless of whether the claim concerned an injury, as did the claims brought by Gittings and plaintiffs, or a death, as did the claims brought by the personal representative of the Estate of Danielle Sale and the personal representative of the Estate of Jenee Hammel, (2) plaintiffs were injured in the April 2010 bus accident, and (3) plaintiffs did not participate in the settlements with Hadley because they did not sue Hadley. From those facts, a reasonable juror could further find, without impermissible speculation, that defendants' failure to sue Hadley caused harm to plaintiffs, as a reasonable juror could infer that, but-for that failure, plaintiffs would have received a $100,000 settlement from

Hadley. Again, that is not the only plausible inference that could be drawn, but it is a reasonable and permissible one.

Finally, regarding defendants' failure to bring claims against Rosco, the summary judgment record in this case would permit a reasonable juror to find that (1) every claimant who brought a claim against Rosco in connection with the April 2010 Tri-Met accident participated in the $225,000 global settlement and received an equal share of the proceeds of that settlement, regardless of whether the claim concerned an injury, as did the claims brought by Gittings and plaintiffs, or a death, as did the claims brought by the personal representative of the Estate of Danielle Sale and the personal representative of the Estate of Jenee Hammel, (2) plaintiffs were injured in the April 2010 bus accident, and (3) plaintiffs did not participate in the global settlement with Rosco because they did not sue Rosco. From those facts, a reasonable juror could further find, without impermissible speculation, that defendants' failure to sue Rosco caused harm to plaintiffs, as a reasonable juror could infer that, but-for that failure, plaintiffs would have received an equal share of the settlement funds from Rosco. Again, that is not the only plausible inference that could be drawn, but it is a reasonable and permissible one.

Defendants' arguments to the contrary are not persuasive. Defendants rely on *Watson* for the proposition that in a legal malpractice case a plaintiff's difficulty in proving its case does not "alter [the] burden of proof on the elements of harm and causation." We agree, but, as explained above, in this case, plaintiffs have provided sufficient evidence regarding those elements to survive summary judgment.

Further, we are not persuaded by defendants' argument that plaintiffs' claim fails because plaintiffs "produced no evidence from the [products-liability claimants] suggesting that they would have accepted less money in settlement if plaintiffs had pleaded products liability claims." Contrary to defendants' suggestion, a concession by the parties involved in a transaction is not the only way to prove causation. *Cf. Watson*, 247 Or App at 569 ("An express concession by another party to a transaction is not the only way to prove causation in a transactional legal malpractice case."). Here,

from the evidence in the record, a reasonable juror could find that had defendants brought products-liability claims against New Flyer, Rosco, and Hadley, plaintiffs would have received settlement funds from those entities, as did each of the products-liability claimants.

We have considered defendants' other arguments and they are unavailing.

IV. CONCLUSION

In light of our analysis above, we conclude that the evidence adduced by plaintiffs created a genuine issue of material fact on the elements of causation and harm. Consequently, the trial court erred in granting summary judgment.

Reversed and remanded.

SERCOMBE, S. J., dissenting.

The issue under review is whether plaintiffs satisfied their burden of going forward with evidence under ORCP 47 C, that, but for defendants' negligence, plaintiffs would have obtained a more favorable settlement of their asserted and unasserted claims in the two mediations. The majority concludes that plaintiffs presented sufficient evidence to discharge that burden, reversing the trial court's legal conclusions that the proffered evidence of a more favorable settlement was inadmissible and that the proof of loss was speculative. The majority determines that evidence of the terms of the settlement agreement between the parties, together with the assertions in the Burrows and Gores declarations that plaintiffs did not receive any of the New Flyer settlement funds because they did not bring a claim against New Flyer, was sufficient by itself to discharge plaintiffs' burden of proof under ORCP 47 C, and to establish a *prima facie* case that plaintiffs suffered an ascertainable loss because of defendants' negligence.

I disagree with the majority's analysis of the evidence. In my view, the evidence was insufficient to prove that the settlors would probably have settled the case more favorably to plaintiffs if defendants had filed products-liability claims on plaintiffs' behalf. There was no direct

evidence of the reasons for the actual settlement amounts or the rationale for the allocations of the entire $4 million settlement fund and the $2 million Tri-Met payment fund. Without that evidence, a factfinder cannot forecast whether different factual assumptions would drive a different settlement. I dissent from the majority's conclusion that proof of a likely, hypothetical settlement under different facts can be made without any evidence of the parties' settlement intent in making the actual deal.

Plaintiffs pleaded that, had defendants timely filed products-liability claims on their behalf, the products-liability settlors would have increased their payouts by 16.25 percent—plaintiffs' actual allocation of the Tri-Met payout—and paid that increase to plaintiffs. Alternatively, plaintiffs argued that, had the claims been made, 16.25 percent of the New Flyer, Rosco, and Hadley settlement funds that were paid would have been allocated to plaintiffs and that lesser amounts of those funds would have been paid to the other claimants. Both theories of recovery rest upon an unsupported factual premise—that the parties allocated the Tri-Met settlement fund (as opposed to allocating the entire $4 million settlement fund) based, in part, on each claimant's proportionate share of the total incurred damages, so that the 16.25 percent Tri-Met allocation to plaintiffs represented their likely share of any settlement. Plaintiffs treat the allocation of the Tri-Met payment as a template for the hypothetical distribution of other settlement funds. Plaintiffs seek damages of 16.25 percent of the actual New Flyer, Rosco, and Hadley settlement funds, or the amount of additional funds that those settlors might have paid.

In my view, there is no evidence to support that factual premise—the assumption that the parties allocated plaintiffs' share of the entire $4 million settlement fund on the basis of plaintiffs' claims against Tri-Met alone. The attorney declarations submitted by plaintiffs omit any such assertion. And the fact of that allocative intent could have been easily attested to by Burrows and Gores in their declarations (if it were true). Both of those declarants represented parties in the mediation and participated in the allocation discussions.

In fact, the evidence of the settlement agreement, and the testimony of the attorney for two of the three main claimants, suggests a different distributive intent—one where the parties allocated the $4 million fund based, in part, on the parties' proportionate shares of the total incurred damages, both to settle the pleaded claims against Tri-Met and New Flyer as well as the contribution claims by Tri-Met against New Flyer for plaintiffs' recovery, and then accounted for plaintiffs' $325,000 share as funded by Tri-Met's contribution. The allocation mediation session more likely resulted in the distribution of funds from Tri-Met and New Flyer based on the parties' share of the composite $4 million fund, rather than, as concluded by the majority, being based on the number of claimants against New Flyer.

Under ORCP 47 C, in summary judgment proceedings "[t]he adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial." *See also* OEC 307(2) ("The burden of producing evidence as to a particular issue is initially on the party with the burden of persuasion as to that issue.").

After defendants moved for summary judgment on plaintiffs' malpractice claims, plaintiffs had the burden of going forward with evidence to prove causation and damages. We reaffirmed the causation standard for legal malpractice cases in *Watson v. Meltzer*, 247 Or App 558, 565-66, 270 P3d 289 (2011), *rev den*, 352 Or 266 (2012) (quoting *Jeffries v. Mills*, 165 Or App 103, 122, 995 P2d 1180 (2000)): "'To show causation in a legal malpractice action, a plaintiff must demonstrate that she would have obtained a more favorable result' but for the negligence of the defendant." That same causation standard has been applied in cases alleging an unfavorable settlement because of attorney negligence. *See Filbin v. Fitzgerald*, 211 Cal App 4th 154, 166, 149 Cal Rptr 3d 422, 432 (2012) ("The plaintiff must also establish that[,] but for the alleged malpractice, settlement of the underlying lawsuit would have resulted in a better outcome."); *Slovensky v. Friedman*, 142 Cal App 4th 1518, 1528, 49 Cal Rptr 3d 60, 67 (2006) ("Thus, a plaintiff who alleges an inadequate

settlement in the underlying action must prove that, if not for the malpractice, she would certainly have received more money in settlement or at trial.").

Thus, the issue on review is whether plaintiffs satisfied their burden under ORCP 47 C to produce admissible evidence to show that it was more probable than not that, had the products-liability claims been made by defendants, the three products-liability settlors would have settled the dispute in a particular way that was more favorable to plaintiffs than the actual distribution of funds.

As noted, there was no evidence from any of the parties or their attorneys on the reasons why the Tri-Met fund was allocated in the manner that it was, or the likelihood that the Tri-Met allocation reflected the overall damage shares of each of the parties. The trial court concluded:

> "There is a complete lack of evidence from either the payors of settlement funds or the persons dividing the funds as to whether they would have, or even might have, behaved differently if additional plaintiffs had been involved in the claims against the products liability defendants."

The evidence of the settlement negotiations was meager. In December 2012, Rosco settled with the products-liability defendants for $225,000 with the Sale estate, the Hammel estate, and Gittings each receiving $75,000. In February 2013, Hadley settled with the three products-liability claimants for $300,000, paying the Sale estate, the Hammel estate, and Gittings each $100,000. Nothing more is known about those negotiations and settlements, beyond the terms of the executed releases.

Tri-Met, New Flyer, and the claimants mediated the amount of the Tri-Met and New Flyer settlements separately from the later claimant mediation of the amounts to be paid from the funds to claimants. According to Rick Pope, the attorney for the Sale estate, and Gittings, "[i]n June 2013, all the parties conducted a mediation with Judge Lyle Velure. *** The parties on August 11, 2013 reached agreement on a global settlement figure in payment of all claims. *** [A]ll the plaintiffs settled with all remaining defendants Tri-Met, Day and New Flyer for $4 million,

consisting of a $2 million payment from New Flyer and a $2 million payment from Tri-Met."

The amount of the $4 million settlement fund, referenced by Pope, appears to have not been affected by the number of claimants making claims against New Flyer. The majority recognizes that, "at the time that plaintiffs and the products-liability claimants entered into their agreement with New Flyer and Tri-Met to settle for $4 million, neither plaintiffs nor the products-liability claimants knew what share of the New Flyer and Tri-Met settlement funds they would receive." 296 Or App at ___. The settlement agreement among the parties recites that a "global settlement" of $4 million was reached "without any specific distribution [of the $4 million] contemplated by the parties."

Put another way, the contribution of $4 million by Tri-Met and New Flyer was made without regard to "any specific distribution" to the parties—that is,without regard to the number of potential claims that could be paid from that fund to the five claimants. Rather than showing that New Flyer would have increased its $2 million payment if additional products-liability claims had been filed, the evidence shows the contrary—that is, that the $2 million New Flyer settlement was made without regard to the number of claims made against it or otherwise to accommodate a particular distribution to the claimants.

Instead, the evidence was that other factors affected the amount of money paid in settlement by Tri-Met and New Flyer. According to Pope, the factors affecting the settlement amount agreed to by Tri-Met and New Flyer, included the $1 million cap on the total damage claims from a single occurrence against Tri-Met under the Oregon Tort Claims Act (OTCA), ORS 30.272 (2009), whether and the degree to which the injured claimants had uncapped remedies against the individual Tri-Met defendants, the potential allocation to New Flyer of excess claims against Tri-Met if New Flyer's fault was greater than 25 percent under ORS 31.610(3) (especially problematic given that the "evidence of Tri-Met's wrongdoing was so overpowering that Plaintiffs ran a substantial risk of prevailing against New Flyer on a percentage of fault less than 25 percent"), and

the capped liability of the settlors to the two wrongful death claimants.[1] Pope's testimony was the only evidence of the factors considered by the parties in arriving at a $4 million settlement.

There was no evidence that the amount of funds that either Tri-Met or New Flyer paid in settlement was determined by the number of claims against each of the them. In fact, a contrary inference is more easily drawn. Tri-Met paid the same amount in settlement as New Flyer, even though five claimants filed tort claims against Tri-Met and three claimants asserted tort claims against New Flyer.[2]

Nor can the probability of additional settlement funds from New Flyer, Hadley, and Rosco as a result of the first settlement amount mediation be inferred from the actual allocation of the settlement funds in the later allocation mediation. What Tri-Met and New Flyer presently intended when they contributed funds in the first global mediation could not have been affected by a later mediation among different parties about different issues. Thus, there was no evidence to support plaintiffs' pleaded theory of causation and damages—that New Flyer would have paid more than $2 million in settlement had plaintiffs brought products-liability claims against it.

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[1] The amount paid in settlement by Tri-Met and New Flyer potentially reflected the contribution liability of New Flyer to any amounts paid as damages by Tri-Met to plaintiffs, as well as the direct liability of the settlor to each of the claimants. The failure to bring a claim against the products-liability defendants during the two-year period of limitations may not extinguish any claim for contribution that Tri-Met could make against the products-liability defendants for excess payment of plaintiffs' claims. The right of contribution exists among joint tortfeasors "even though judgment has not been recovered against all or any of them." ORS 31.800(1). The right of contribution exists when "a tortfeasor *** has paid more than a proportional share of the common liability." ORS 31.800(2). The recovery is "limited to the amount paid by the tortfeasor in excess of the proportional share." *Id.* Contribution to settlements can be obtained from another tortfeasor whose liability for the injury or wrongful death is extinguished by the settlement. ORS 31.800(3); *see Jensen v. Alley*, 128 Or App 673, 677, 877 P2d 108 (1994) (setting forth the elements of a claim for contribution under ORS 31.800). ORCP 22 C allows the filing of a third-party complaint to obtain contribution as a matter of right within 90 days after service of the complaint. Otherwise, a third-party plaintiff must obtain consent of the parties and the court to make a later claim.

[2] In addition, all five claimants brought claims against the Tri-Met defendants under 42 USC section 1983 in federal district court. Those claims were settled with the tort claims.

The distribution of the $4 million settlement was mediated by all five claimants after the settlors fixed their settlement amounts in the first mediation. The five claimants divided the $4 million into two $2 million settlement funds. The parties agreed that Tri-Met would pay its $2 million settlement contribution to the Sale estate (in the amount of $524,150, representing 26.2 percent of the proceeds to be paid), the Hammel estate ($603,911, representing 30.2 percent), Gittings ($546,939, representing 27.4 percent), and the Hammels ($325,000, representing 16.25 percent). The claimants then allocated the New Flyer $2 million payment to be paid to the Sale estate (in the amount of $625,850, representing 31.3 percent of the proceeds to be paid), the Hammel estate ($721,089, representing 36 percent), and Gittings ($653,061, representing 32.7 percent). The New Flyer payment allocation among the Sale estate, the Hammel estate, and Gittings is the same as the Tri-Met payment allocation among just those parties. From that parity, plaintiffs imply that the settling parties would have divided the New Flyer fund differently, probably along the lines of the division of the Tri-Met fund, had all products-liability claims been brought, and that plaintiffs would have received an additional $325,000.[3]

There was insufficient evidence that a more favorable division of the $4 million payments would have occurred. Two scenarios could have occurred. The parties could have taken the $4 million in settlement funds (as well as the earlier Hadley and Rosco funds) and divided compensation among the five claimants in rough proportion to each claimant's share of the total pleaded and likely damages of all five claimants. Plaintiffs' share of the $4 million settlement would be paid from the Tri-Met fund, and the remaining three claimants would be paid from the remaining portion of the Tri-Met fund, the New Flyer fund, and the

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[3] In her declaration, Michelle Burrows, plaintiffs' successor attorney in the malpractice case, explained:

> "Significantly, the distribution of New Flyer's $2 million was not a renegotiation by the attorneys and clients involved. Instead, it was a simple duplication of the Tri-Met negotiations, without the Hammels. Thus, I can say with confidence that if McCulloch had made product liability claims against New Flyer, then Ryan and Jamie Hammel would have received $325,000 of the New Flyer money, just as they had received $325,000 of the Tri-Met money."

earlier Hadley and Rosco funds. Plaintiffs' recovery would be the same, $325,000, whether it was paid from one fund or four. That scenario is consistent with the facts.

Plaintiffs posited a different and less likely scenario—that the Tri-Met and New Flyer funds were divided to compensate the respective claimants against each settlor proportionate to their incurred damages against each particular settlor. That scenario is less consistent with the facts.

The total pleaded damages for all claimants was $33,250,000 ($10 million each for the Sale estate, the Hammel estate, and Gittings; $1,600,000 for Ryan Hammel; and $1,650,000 for Jamie Hammel). The entire recovery from all four funds for all claimants was $4,525,000 with the Sale estate obtaining $1,325,000, the Hammel estate recovering $1,500,000, Gittings receiving $1,375,000, and each of the Hammels recovering $162,500. To discern the distributive intent of the parties, it is useful to compare each party's share of the total pleaded damages (that party's proportionate compensatory need) with that party's share of the $2 million Tri-Met payment fund, and the party's share of the $4 million overall settlement fund:

Party	% of Pleaded Damages	% of Tri-Met Fund	% of Total Fund
Sale estate	30.1%	26.2%	28.7%
Hammel estate	30.1%	27.4%	33.1%
Gittings	30.1%	30.2%	30.0%
R. Hammel	4.8%	8.1%	4.1%
J. Hammel	4.9%	8.1%	4.1%

This comparison suggests that the parties' proportionate compensatory needs were considered and used in the apportionment of the total settlement fund and that plaintiffs' share of the Tri-Met payment fund was increased to allow for that proportionate compensation. The actual distribution of the Tri-Met fund over-compensated plaintiffs compared with the compensation paid to the two estates and Gittings. A comparison of each claimant's percentage of the recovery of the Tri-Met fund to that claimant's

pleaded damage percentage suggests that, except for the Gittings distribution, the Tri-Met fund was not allocated to the claimants in proportion to their incurred damages. Instead, plaintiffs received more from the Tri-Met payment fund than they would if Tri-Met were allocating its share applying the same considerations to all five claimants.

The overall settlement is more consistent with the proportion of damages pleaded in the complaints than is the Tri-Met allocation. The recovery in each individual case, as a percentage of the total recovery, is generally consistent with the pleaded damages in each individual case as a percentage of the total pleaded damages. The consistency between the pleaded and the agreed-to damages makes it more likely than not that the parties intended to distribute the $4 million payment fund consistently with the overall harm incurred by the claimants, without regard to whether the claimants had filed all actionable causes of action.

At the very least, plaintiffs' predicate fact that the $2 million Tri-Met fund was divided according to the proportions of the five damages claims asserted against Tri-Met was improbable, and the evidence was insufficient to discharge plaintiffs' burden of going forward with that evidence under ORCP 47 C. Thus, the terms of the settlement and the Pope testimony do not prove that it was likely that, had defendants filed products-liability claims, the New Flyer fund would have paid plaintiffs an ascertainable amount of money.

Plaintiffs next claim that evidence beyond the settlement terms presented issues of fact on causation and damages that precluded summary judgment for defendants. The majority relies on parts of two declarations by two attorneys who were involved in the settlement discussions. In her declaration, Burrows declared that the divided New Flyer money "otherwise would have gone to [plaintiffs]" and that, because the division of the New Flyer fund was in the same proportions as the division of the Tri-Met fund as to the Sale estate, the Hammel estate, and Gittings, "if McCulloch had made product liability claims against New Flyer, then Ryan and Jamie Hammel would have received $325,000 of the New Flyer money, just as they had received

$325,000 of the Tri-Met money." Burrows also explained that, because Ryan Hammel gave "powerful" deposition testimony (prior to the mediations) on his emotional distress damages from witnessing the death of his sister, the settling defendants "probably would paid more than the $2 million, $300,000, and $225,000 they did pay." Hala Gores, attorney for the Hammel estate, declared that plaintiffs did not participate in the distribution of the New Flyer, Hadley, or Rosco funds "because their attorney, Mark McCulloch, did not make claims against New Flyer, Rosco and Hadley." She also opined that, had Ryan and Jamie Hammel made claims against the products-liability settlors, that "New Flyer would have paid more than $2,000,000 to settle the claims against it," "Rosco would have paid more than $225,000, and Hadley would [have] paid more than $300,000 to settle the claims against [it]."

Defendants moved to strike those and other allegations in the Burrows and Gores declarations. As noted, in its letter opinion, the trial court ruled:

> "The court does not see any foundation for the statements in these declarations relating to the matter at issue here. * * * The motives and behaviors about which the declarants here would testify are either hearsay (that is, based on statements made by the other plaintiffs or insurance company representatives to the declarants), incompetent, or speculative."

That ruling was correct.[4] In testifying about the probable settlement posture of the products-liability defendants, Burrows and Gores opined as lay witnesses. Lay opinion testimony is limited to testimony that is "rationally based on the perception of the witnesses" and "helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." OEC 701; *see also* OEC 602 (witness testimony must be based on "personal knowledge of the matter"). The opinion testimony by a lay witness that the settlors would have increased the funds tendered for set-

[4] Although plaintiffs complain that the trial court "erred in ignoring [their] ORCP 47 E and other declarations and deposition testimony," they did not assign as error the evidentiary rulings just noted. Under ORAP 5.45, plaintiffs' complaints that the trial court erred in not considering the Burrows and Gores declarations cannot be "considered on appeal."

tlement or would have divided those funds differently must be "based on the perception of the witness," that is, on the perceptions of the declarant about the settlors. Here, the declarations about how the New Flyer fund would have been divided were not based on any perception of the declarant about the settlors past settlement intent.

Beyond the conclusory opinions in the declarations about hypothetical distributions, the only evidence that the settlors would have increased the settlement funds is Burrows's declaration in which she states that:

> "[i]t is my opinion that Ryan Hammel's deposition testimony was so powerful that it lifted the value of all the cases, especially of the Hammels' case, and that if McCulloch had made claims against New Flyer, Hadley, and Rosco, these defendants probably would have paid more than the $2 million, $300,000, and $225,000 they did pay. Hammel['s] 16.25% share of such increased funds would have further increased their settlements."

Burrows opines that, based on her observations of plaintiff Ryan Hammel's "powerful" deposition testimony on his emotional distress damages, the products-liability settlors would have paid an unknown amount of additional money to settle all claims. Burrows rests her opinion not on her perceptions of the motives or actions of the settlors, but on the convincing quality of the proof of Ryan's emotional distress damages. That is an insufficient foundation for the opinion under OEC 701.[5]

This same requirement of personal knowledge of settlement intent, rather than opinion evidence, was applied to a legal malpractice claim in *Bryant v. Bryan Cave, LLP*, 400 SW3d 325, 336, 341 (Mo Ct App 2013), the plaintiff alleged losses stemming from a negligently drafted antenuptial agreement. There, rejecting both lay and expert

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[5] Burrows's opinion that Ryan Hammel's deposition testimony, given before the August 2013 mediations, increased the value of his asserted and unasserted claims, compared with the value of Jamie Hammel's claim, is not supported by the facts. The parties actually settled Ryan's claims for $162,500, the same sum as agreed to be paid to settle Jamie's claims, notwithstanding Ryan's purported proof of additional, special damages. The settlements occurred several months after the deposition of Ryan Hammel. Presumably, the effect of that testimony on claims evaluation was reflected in the settlement that actually occurred.

opinion testimony that the wife would likely have agreed to different terms, the court determined that the plaintiff had not met his burden of proof on causation: "The opinion evidence *** as to whether [wife] would have agreed to the provisions at issue is inadmissible at trial, and cannot serve as a basis for satisfying [plaintiff's] evidentiary burden in a summary judgment proceeding." *Id.* at 336.

Similarly, Oregon case law confirms that evidence of causation must be based on personal knowledge, and not rest on unsupported opinion or speculation. For example, in *Davis v. County of Clackamas*, 205 Or App 387, 134 P3d 1090 (2006), the plaintiff motorcycle driver was injured in an intersection collision with another vehicle and later brought claims against the corner property owner and tenants, as well as the county, for failing to clear vegetation that impeded her view of the oncoming vehicle. *Id.* at 389. After the defendants moved for summary judgment on the issue of causation, the plaintiff submitted a police report that quoted her as saying that she did not see the approaching car because "a bush was in the way and obscured her view." *Id.* at 390. The plaintiff testified she stopped and then pulled out further to see because of the blockage. *Id.* She later equivocated. An affiant testified that, in his opinion, the bush blocked the view. *Id.* at 392.

We concluded that the police officer's testimony as to the cause of the accident was not admissible "because he did not have personal knowledge of the circumstances that caused it." *Id.* at 395. The opinion testimony was inadmissible because the affiant was not applying specialized knowledge or expertise. *Id.* The police report was inadmissible hearsay. Therefore, there was no evidence on causation and summary judgment for the defendants was proper. *Id.* at 398. Those same limitations apply to the inadmissible opinions in this case that the settlors would have paid more in settlement if more products-liability claims had been filed. Those opinions were not based on personal knowledge or expertise. As was the case in *Davis*, summary judgment for defendants was proper.

Plaintiffs' attorney in the malpractice case declared that he had retained "an unnamed qualified expert" who

is "available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by affidavit or declaration, would be a sufficient basis for denying the motion for summary judgment" under ORCP 47 E. Plaintiffs argue that the declaration suffices to preclude summary judgment for defendants. At the summary judgment hearing, plaintiffs represented that their retained expert would testify that insurance companies predictably resolve only the claims asserted against their insureds. That expert opinion will not resolve the factual question of whether these particular products-liability settlors would have paid more to the Hammels if products-liability claims had been filed. Resolution of that fact question requires personal knowledge of the actions of the settlors during the first mediation proceeding, not the application of expertise.

We reached that result in *Deberry v. Summers*, 255 Or App 152, 296 P3d 610 (2013). In that legal malpractice case, the plaintiff alleged that the defendant attorney failed to include a provision in a trust or will that would have carried out the settlor's intended distribution to the plaintiff. *Id.* at 154. The defendant had prepared a trust agreement that placed into trust a number of homes for the benefit of named individuals, including holding the Canyon Court home in trust for the plaintiff's granddaughter. *Id.* at 154-55. Later, the settlor sold the Canyon Court home, but did not change the beneficiary designation. *Id.* at 155. The defending attorney claimed that he did not have an agreement with the settlor to include a replacement home in the distribution to the plaintiff and was, therefore, entitled to summary judgment on whether he was negligent in failing to carry out the settlor's intentions. *Id.* at 156. The plaintiff countered with an ORCP 47 E declaration. *Id.*

We affirmed the trial court's allowance of summary judgment in the defendant's favor:

> "The filing of an affidavit under ORCP 47 E precludes summary judgment only where expert opinion evidence is *required* to establish a genuine issue of material fact. Expert opinion evidence is necessary and helpful to a jury's understanding of the nature and scope of a lawyer's professional duty of care to a client, *see, e.g.*, *Abraham v. T. Henry Construction, Inc.*, 230 Or App 564, 217 P3d 212 (2009),

> *aff'd*, 350 Or 29, 249 P3d 534 (2011) (affidavit submitted under ORCP 47 E to create genuine issue of material fact as to whether defendant breached a standard of care in construction). However, the existence of an agreement by defendant to prepare testamentary instruments that would ensure that plaintiff inherited any home in which she might reside at the time of Dorothy's death, including the West View Court home, is a fact question that requires personal, not expert knowledge. *See Gwin v. Lynn*, 344 Or 65, 74, 176 P3d 1249 (2008) (distinguishing between a witness's knowledge as an expert and personal knowledge of facts). Plaintiff does not assert that she has retained an expert witness who has personal knowledge that defendant made such an agreement with Dorothy. In such circumstances, the filing of a declaration under ORCP 47 E did not preclude summary judgment."

Deberry, 255 Or App at 163 (emphasis in original); *see also Hunsinger v. Graham*, 288 Or App 169, 186, 404 P3d 1004 (2017) (expert testimony cannot create a question of fact on a point where personal knowledge is necessary).

The same holds true here. The existence of an intent by the settlors to more completely compensate plaintiffs is a fact issue that requires personal, not expert knowledge. An opinion on insurance industry settlement practices is irrelevant to whether New Flyer, Rosco, and Hadley would have, in these particular circumstances, settled for more. The trial court did not err in granting summary judgment to defendants, notwithstanding the filing of an ORCP 47 E declaration.

Finally, summary judgment in favor of defendants was proper because plaintiffs failed to produce evidence that the amount of their claimed damages could be determined with reasonable certainty. As noted in *Merchants Paper Co. v. Newton*, 292 Or App 497, 506, 424 P3d 811 (2018), "[i]n every case actual damages sustained must be established by evidence upon which their existence and amount may be determined with reasonable certainty. Speculative damages are never allowed." (Quoting *Parker v. Harris Pine Mills, Inc.*, 206 Or 187, 197, 291 P2d 709 (1955).) As noted, the amount of money available to settle plaintiffs' claims was a function of a number of variables including the OTCA cap

on the liability of Tri-Met, limitations on the recovery of the estates' wrongful death claims against both Tri-Met agents and the products-liability settlors, the contribution liability and comparative fault of New Flyer, and the strength of the claimants' negligence and products-liability claims. How all of those variables would work if one of them (the number of asserted claims) changed may not be capable of calculation. The specific damages cannot be inferred from evidence of general harm. *Merchants Paper Co.*, 292 Or App at 505-06 (imputed general harm insufficient to prove damages with reasonable certainty).

In sum, plaintiffs failed their ORCP 47 C burden of going forward with admissible evidence to show that it was more probable than not that Hadley, Rosco, and New Flyer would have paid an additional ascertainable amount in settlement had plaintiffs' product-liability claims been filed or that the parties would have paid plaintiffs more from the actual settlements. Plaintiffs failed to introduce admissible evidence to show that the settlors intended to compensate plaintiffs from the $2 million Tri-Met fund in proportion to all parties' claims against Tri-Met as opposed to compensation proportionate to plaintiffs' share of the entire $4 million fund. Without proof of the parties' actions in negotiating and entering into the settlement, plaintiffs failed to prove how the settlement would have occurred if supplemental facts or actions occurred.

This lack of foundation undercuts the testimony of Burrows and Gores that the New Flyer fund would have been distributed in the same way as the Tri-Met fund if the additional tort claims had been filed. The opinions were not stated to be based on personal knowledge of the parties' intent in allocating the Tri-Met fund and are inadmissible under OEC 602 and 701.

The Burrows and Gores declarations are perhaps more significant in what they do not say, than in what those declarations state. Both declarants conclude that plaintiffs would have been paid from the New Flyer fund if they had filed claims against New Flyer. Neither declarant, however, attested to the necessary factual predicate to that conclusion—the reasons the parties agreed to the $4 million

settlement and the Tri-Met apportionment. That information was known to the declarants, because both of them represented parties to the mediations. The omission of that evidence is fatal to the continued viability of plaintiffs' claims.

In sum, the evidence of a more favorable outcome was not presented by plaintiffs. The evidence that was presented was conclusory and speculative, and insufficient to establish causation and loss. As noted by one commentator,

> "[a] claim regarding an inadequate settlement often fails because it is inherently speculative. Negligence cannot be predicated on speculation that the attorney or another attorney could have secured a more advantageous settlement or the fortuitous event that a jury instead of a judge may have returned a higher award. A client, who was a plaintiff, must establish not only that concluding such a settlement fell outside the standard of care, but also what would have been a reasonable settlement and that such sums would have been agreed to and could have and would have been paid."

Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice*, § 30.41, at 582-85 (5th ed 2000).

I dissent from the majority's conclusions that evidence of the creation of the four settlement payment funds and the allocation of those funds in different proportions to five claimants, together with conclusory and unsupported opinions in the filed declarations, is sufficient evidence by itself to prove the probability of a deal that was not made—*viz.*, the creation of four settlement funds with substantial additional proceeds from three of the settlors or the distribution of each of the funds in the same proportion as the Tri-Met fund allocation.