PRESERVATION OF ISSUES FOR APPEAL[1]

I. Preservation Requirements on Appeal

A. ORAP 5.45: "No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court and is assigned as error in the opening brief in accordance with this rule, provided that the appellate court may consider an error apparent on the face of the record."

B. "Preservation rules are pragmatic as well as prudential. What is required of a party to adequately present a contention to the trial court can vary depending on the nature of the claim or argument; the touchstone in that regard, ultimately, is procedural fairness to the parties and to the trial court." *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008).

III. Reasons for Preservation Requirements

A. Judicial efficiency and fairness to the trial court

"Preservation gives a trial court the chance to consider and rule on a contention, thereby possibly avoiding an error altogether or correcting one already made, which in turn may obviate the need for an appeal." *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008).

B. Fairness to the parties

1. "Preservation also ensures fairness to an opposing party, by permitting the opposing party to respond to a contention and by otherwise not taking the opposing

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party by surprise." *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008).

C. Development of the record and aiding judicial review

1. "Finally, preservation fosters full development of the record, which aids the trial court in making a decision and the appellate court in reviewing it." *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008).

IV. General Standards for Preserving Error

A. As much as possible, objections should be clear, specific, and unequivocal

"[A] party must provide the trial court with an explanation of his or her objection that is specific enough to ensure that the court can identify its alleged error with enough clarity to permit it to consider and correct the error immediately, if correction is warranted." *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000).

B. Adequacy of objections is case-specific, considering policies underlying preservation rules.

"The purpose of the preservation doctrine is not to promote form over substance but to further those practical policy goals. To that end, in analyzing whether a party adequately has preserved an issue for our review, [the court will] examine the individual circumstances of the case at hand to determine whether the policies underlying the rule have been sufficiently served." *State v. Haynes*, 352 Or 321, 335, 284 P3d 473 (2012) (citations omitted).

V. Other General Preservation Considerations

A. Don't rely on other parties to make your record.

It is sufficient to join or incorporate arguments made by other party, but you must state your position and make your own record.

> *Oregon Auto Ins. Co. v. Baltzor*, 70 Or App 34, 39, 688 P2d 403 (1984) ("The motion for judgment of dismissal, which it assigns as error, was Baltzor's, and Oregon Auto cannot avail itself of a record that it did not make.").

B. Objections should be as clear as possible, but no "magic words" are required.

1. "[A]fter plaintiff's initial closing and defendant's closing, the court immediately began instructing the jury. That was the point at which plaintiff voiced his objection by asking, 'Rebuttal, Your Honor?' It was apparent from plaintiff's comment that he disagreed with the trial court's action in proceeding to instruct the jury without giving him the opportunity for rebuttal. The fact that plaintiff made his request politely and did not use the word 'objection' does not make his objection inadequate." *Charles v. Palomo*, 347 Or 695, 227 P3d 737 (2010).

2. "[P]arties are not required to repeat their objections after the trial court has ruled against them." *Charles v. Palomo*, 347 Or 695, 227 P3d 737 (2010).

3. "For the same reason, we disagree with the Court of Appeals' implication that, by saying "Okay," plaintiff effectively withdrew his request for rebuttal. Plaintiff made his objection known to the court when he requested rebuttal; when the court denied his request, plaintiff acknowledged the court's ruling by saying, 'Okay. * * * Thank you.' He did not withdraw his

objection merely because he courteously accepted the court's ruling rather than further express his disagreement with it." *Charles v. Palomo*, 347 Or 695, 227 P3d 737 (2010).

C. Be cautious in using shorthand.

"[T]o adequately preserve an issue for review, a short-hand reference, such as a single word or phrase, must be used in a way and context in which the other parties and the court would understand that the word or phrase refers to a particular legal or factual argument, and also would understand from that single reference the essential contours of the full argument." *State v. Haynes*, 352 Or 321, 335, 284 P.3d 473 (2012) ("[T]he state's single reference to 'flight' did not adequately put the trial court on notice that the state intended to rely on the theories of 'flight' or 'proximity' to establish admissibility.").

D. Invited Error Doctrine.

"[U]nder the invited-error doctrine, a party who was actively instrumental in bringing about an alleged error cannot be heard to complain, and the case ought not to be reversed because of it." *Ossanna v. Nike, Inc.*, 290 Or App 16, 23, 415 P.3d 55 (2018) ("In the context of instructional error, a party may invite error by acquiescing to an instruction given by the trial court.").

VI. Preservation Standards

A. As much as possible, be clear and unequivocal in making exceptions to trial court rulings.

B. Be specific enough that the trial court can identify alleged error with enough clarity to permit it to consider and correct the error immediately, if correction is warranted.

VII. Exceptions to Preservation Requirements

A. Subject Matter Jurisdiction

1. "An argument that the lower tribunal lacked jurisdiction may be raised for the first time on appeal. * * * The parties may not waive lack of subject-matter jurisdiction." *SAIF Corp. v. Shipley*, 326 Or 557, 560 n 1, 955 P2d 244 (1998) (internal citations omitted).

B. Questions of Statutory Interpretation

1. When a "statute properly is in play, and its meaning is for this court to resolve. In doing so, this court may be aided by the arguments of counsel as to the legislature's intent, but it is not bound by them." *Newport Church of Nazarene v. Hensley*, 335 Or 1, 16, 56 P3d 386 (2002).

2. "[T]he parties may not prevent a court from noticing and invoking an applicable statute by relying on only other sources of law." *Miller v. Water Wonderland Improvement Dist.*, 326 Or 306, 309 n 3, 951 P2d 720 (1998).

C. No Opportunity to Raise Error

"The trial court entered the post-judgment order without holding a hearing and without having either the state or defendant present." *State v. DeCamp*, 158 Or App 238, 241, 973 P2d 922 (1999). *See also Spivak v. Marriott*, 213 OrApp 1, 8, 159 P3d 1192 (2007) ("It would not serve [the purposes behind preservation] to require plaintiff to make an argument before the trial court that he had no reason to believe he needed to make.").

"When the court has opted to act unilaterally and finally, without the benefit of input from the parties, there is no opportunity to bring the alleged error to the court's attention

before it rules." *State v. Gutierrez*, 170 OrApp 91, 94, 11 P3d 690 (2000).

D. Futility

"One purpose of an offer of proof is to assure that appellate courts are able to determine whether the ruling was erroneous. * * * When the trial court rules that a party may not present any evidence on a defense, on the ground that the defense is unavailable as a matter of law, that purpose is fulfilled without the need for an offer of proof." *State v. Olmstead*, 310 Or 455, 461, 800 P2d 277 (1990).

Caution: Be careful that it really would be futile.

In the motions *in limine* context, the ruling has to be definitive to obviate the need for objections on evidence, to jury instructions, or verdict forms.

E. Challenging Appellate Decisions

"We note that Fred Meyer first raised the issue that *Whiffen II* was decided incorrectly in its petition to this court. Before the trial court and the Court of Appeals, which are bound to follow decisions of this court and have no ability to overrule such decisions, Fred Meyer argued instead that it should prevail under *Cargill*, *Whiffen II*, and *Dameron*, based on factual differences between the store in question and the shopping center and Fred Meyer stores at issue in those cases. Fred Meyer raises that argument in the alternative before this court." *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 47 n 6, 11 P3d 228 (2000).

VIII. Plain Error

A. Error of law.

B. Error must be apparent, *i.e.*, "the point must be obvious, not reasonably in dispute."

C. Error must appear 'on the face of the record,' *i.e.*, "the reviewing court must not need to go outside the record to identify the error or choose between competing inferences, and the facts constituting the error must be irrefutable." *State v. Turnidge*, 359 Or 507, 518, 373 P3d 138 (2016).

D. Even if the error meets that test, however, the appellate court must exercise its discretion to consider or not to consider the error, and if the court chooses to consider the error, the court must articulate its reasons for doing so." *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 381-82, 823 P2d 956 (1991).

E. Factors relevant to whether the appellate court should exercise its discretion to consider "plain error" include:

1. Competing interests of the parties;

2. The nature of the case;

3. The gravity of the error;

4. The ends of justice in a particular case;

5. How the error came to the court's attention;

6. Whether the policies behind preservation rules have been served in another way. *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382 n 6, 823 P2d 956 (1991).

F. "We ordinarily will not proceed to the question of plain error unless an appellant has explicitly asked us to do so, and for good reason – it is incumbent upon the appellant to explain

to us why an error satisfies the requisites of plain error and, further, why we should exercise our discretion to correct that error." *State v. Tilden*, 252 OrApp 581, 589, 288 P3d 567 (2012).

IX. Alternative Grounds for Affirmance

A. Respondents may raise new arguments on appeal in support of the trial court's judgment in certain circumstances.

B. "[T]o promote judicial efficiency, unpreserved alternative ground for affirmance may be raised on appeal when, among other considerations, record has been fully developed[.]" *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008) (citing *Outdoor Media Dimensions, Inc. v. State*, 331 Or 634, 659-660, 20 P3d 180 (2001)).

C. Appellate courts may affirm on any ground raised in the trial court, even if the trial court rejected or did not rely on the ground in reaching its result. *Booras v. Uyeda*, 295 Or 181, 189, 666 P2d 791 (1983).

D. Appellate courts also may affirm a trial court's ruling on grounds not raised in the trial court if certain conditions are met.

E. The "right for the wrong reason" doctrine applies when the trial court's reasoning:

1. erroneous; or

2. unnecessary in light of the alternative basis for affirmance.

F. For "right for the wrong reason" doctrine to apply, issue must be pure question of law or, if not, then:

1. The facts in the record must be sufficient for the alternative basis;

2. The trial court's ruling must be consistent with the view of the evidence for the alternative basis; and

3. The record must be materially the same as the one that would have been developed if the prevailing party had made the argument below. *Outdoor Media Dimensions, Inc. v. State*, 331 Or 634, 659-660, 20 P3d 180 (2001).

G. Examples of appellate decisions declining review of unpreserved alternative grounds for affirmance:

1. *State v. Gonzales*, 236 Or App 391, 396-97, 236 P3d 834 (2010) (declining to consider new arguments that the state raised for the first time on appeal in support of affirmance of trial court's judgment because the arguments presented factual issues and the record might have developed differently if the state had raised its alternative arguments in the trial court).

2. *Buchwalter-Drumm v. State*, 288 Or App 64, 83, 404 P3d 959 (2017) (["B]ecause the state's motion for summary judgment raised a purely legal challenge to the merits of plaintiffs' negligence claim, plaintiff had no burden to produce the kind of evidence that the state now contends plaintiff failed to produce").

X. Pretrial Preservation Issues

A. Pleadings

1. Regardless whether you represent the plaintiff or defendant, make sure that you raise all of the relevant issues in your pleadings.

2. You will not be able to raise unpled claims or defenses on appeal. *Friesen v. Fuiten*, 257 Or 221, 478 P2d 372 (1970).

3. For the defendant, it is especially important to raise certain defenses (such as lack of personal jurisdiction

and improper service) at the earliest possible moment. Otherwise, those defenses will be waived. ORCP 21G (providing waiver of certain defenses); *Dew v. City of Scappoose*, 208 Or App. 121, 134, 145 P.3d 198 (2006) ("ORCP 21 G provides that certain defenses * * * are waived unless raised in either the responsive pleading or a motion to dismiss.").

B. Pretrial Motions and Hearings

1. Make sure to record any significant pretrial hearings or arguments on pretrial motions to ensure that there is an adequate record for review on appeal.

   Example: *Richard v. Fred Meyer*, 211 Or App 421, 431, 155 P3d 811 (2007). "Without a transcript of the hearings, we have no inkling of why the trial court exercised its discretion as it did. * * * The end result is that we cannot discern if the trial court exceeded its discretion and, because it was within the ability of plaintiff, the appellant, to make an adequate record for review by requesting that the initial hearing be reported or recorded, or to submit a narrative statement regarding the second hearing, ORAP 3.05(2), plaintiff cannot prevail on appeal."

2. Put it in writing.

   "[A]n issue is preserved for [] review if it is presented clearly in a written motion, notwithstanding a party's failure to reiterate all of its arguments at a subsequent hearing." *State v. Mejia*, 287 Or App 17, 22, 401 P.3d 1222 (2017).

C. Motions to Strike Allegations

1. "[T]he denial of a pretrial motion to strike an allegation cannot be the predicate for an assignment of error on appeal unless the moving party also moves at trial to take the allegation from the jury or in some other way

gives the trial court the opportunity to correct any error in the pretrial ruling." *Mtn. Fir Lumber Co. v. Temple Distributing Co.*, 70 Or App 192, 195-96, 688 P2d 1378 (1984).

D. Summary Judgment Motions and Other Pretrial Evidentiary Proceedings

1. Make sure you put all the evidence you need into the record, or you will not be able to rely on it later. *Keller v. Armstrong World Industs., Inc.*, 342 Or 23, 147 P3d 1154 (2006); *Lehman v. Bielenberg*, 257 Or.App. 501, 507, 307 P.3d 478 (2013).

2. In addition, make sure you move to strike evidence which should not be part of the record, or else it will be available to the court at trial and on appeal. *Fowler v. Cooley*, 239 Or App 338, 346, 245 P.3d 155 (2010).

E. Motions in Limine

1. In making or opposing a motion *in limine*, be sure to make all possible arguments about the admissibility or inadmissibility of the evidence (and make any necessary offer of proof). *See Bornholf v. Aubry*, 178 Or App 625, 630, 37 P3d 1049 (2002) (declining to consider arguments about admissibility of evidence not raised in response to motion *in limine*).

2. If the trial court makes a conclusive ruling on an evidentiary issue, then you do not need to raise the issue again during trial by way of an offer or proof or objection to testimony, jury instructions, verdict forms, etc. *Davis v. O'Brien*, 320 Or 729, 891 P2d 1307 (1995).

3. If the ruling on a motion *in limine* is only tentative or contingent, you must object at trial or make an offer of proof or else waive your objection. *State v. Coleman*, 130 Or App 656, 883 P2d 266 (1994).

4. "If a party rests his or her argument on appeal on a trial court's pretrial order declining to exclude certain evidence, we ordinarily will evaluate that argument in light of the record made before the trial court when it issues the order, *not the trial record as it may have developed at some later point*." *State v. Pitt*, 352 Or 566, 575, 293 P.3d 1002 (2012) (emphasis added).

5. When in doubt, speak up again at trial.

XI. Appealable Orders and Judgments

A. Most pre-trial orders are not appealable, but some are.

B. Make sure you know the difference, because if you fail to appeal an appealable order within the 30-day period, you waive your objections to the order.

C. Examples of appealable orders include those denying intervention, *Samuels v. Hubbard*, 71 Or App 481, 692 P2d 700 (1985), and those denying a petition to compel arbitration, *Snider v. Production Chem. Mfg., Inc.*, 348 Or 257 (2010).

D. In addition, keep in mind the remedy of mandamus for non-appealable orders that cannot be resolved adequately through the normal appeal process. *See*, *e.g.*, *Nibler v. ODOT*, 338 Or 19, 105 P3d 360 (2005) (denial of motion to change venue); *State ex rel. Keisling v. Norblad*, 317 Or 615, 860 P2d 241 (1993) (grant of preliminary injunction).

E. Remember that if a limited judgment is entered before your case goes to trial, and you have a problem with that judgment, you need to appeal it right away, instead of waiting for the post-trial general judgment. Otherwise, you waive your objections to the limited judgment. *Interstate Roofing, Inc. v. Springville Corp.*, 347 Or 144, 218 P3d 113 (2009).

XII. Preservation Issues at Trial

A. General Considerations

1. Again, remember to make your own record.

2. Be as specific, clear, and unequivocal as you can in making objections.

3. Accept that you will not be able to make every possible objection, as a practical matter and as a strategic matter. No record is perfect.

B. Evidentiary Objections

1. General considerations.

a. "Evidential error is not presumed to be prejudicial." OEC 103.

b. Reversible error may not predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected (*i.e.*, prejudice is shown). OEC 103.

c. Test for prejudice: Some likelihood that error affected the verdict.

> On review, [courts] consider whether there was "little likelihood" that application of that incorrect legal standard affected the verdict." *State v. Haugen*, 361 Or 284, 303, 392 P.3d 306 (2017) (citing *State v. Davis*, 336 Or 19, 32 77 P3d 111 (2003)).

2. Admission of Evidence

a. A party opposing the admission of evidence must object or move to strike inadmissible evidence at the time when the evidence is offered. OEC 103.

b. Objection must state specific grounds for inadmissibility. OEC 103.

c. Motions in limine do not preserve error unless the trial court ruled definitively on the issue. *Purcell v. Asbestos Corp.*, 153 Or App 415, 432-33, 959 P2d 89 (1998).

e. "A party has the right to meet its opponent's evidence admitted under the trial court's rulings. After making the proper objections, a party may counter its opponent's evidence, whether correctly admitted or not, without waiving its evidentiary objection on appeal." *McCathern v. Toyota Motor Corp.*, 332 Or 59, 70, 23 P32d 320 (2000).

3. Exclusion of Evidence

a. "Ordinarily, when the trial court has excluded evidence, the proponent of the disputed evidence must make an offer of proof." *Cedartech, Inc. v. Strader*, 293 Or App 252, 261 (2018).

b. "The offer of proof requirement is not difficult to satisfy … [i]t may occur outside the presence of the jury through an examination of the witness on the stand or it may occur in narrative form through a description by counsel of the intended evidence … [but it] remains essential in order to permit an appellate court to determine whether there is reversible error." *State v. Krieger*, 291 Or App 450, 456 (2018).

c. An offer of proof must demonstrate the content of the evidence sought to be admitted.

d. Offers of proof may be made by a "question and answer" with the witness whose testimony is being excluded, or by a summary of what the proposed evidence is expected to be. *State v. Phillips*, 314 Or 460, 466, 840)P2d 666 (1992).

4. Continuing Objections

a. If the trial court allows a continuing objection, a party can rely on that for preservation. *McCathern v. Toyota Motor Corp.*, 332 Or 59 (2001).

b. But be careful about relying on continuing objections.

c. Evidentiary objections must be specific. Because evidentiary challenges often depend on context, a continuing objection may not be specific enough to preserve error.

C. Mistrial Motions

"To preserve error, a motion for a mistrial must be made timely, *i.e.*, it must be made as soon as the objectionable statement or event occurs." *State v. Barone*, 328 Or 68, 90, 969 P2d 1013 (1998).

D. Directed Verdict Motions

1. Challenges to the sufficiency of evidence cannot be raised on appeal unless raised in the trial court by motion for directed verdict.

2. Motion for directed verdict is also proper way to preserve a challenge to a claim as legally erroneous.

3. Timing for moving for directed verdict

   a. Jury Trials:

   In jury trials, motion for directed verdict must be made before the jury is instruction – at the close of your opponent's case or at the close of all evidence before the jury is instructed. ORCP 60. If you move for a directed verdict at the close of the plaintiff's case and lose, you should renew your motion at the close of all the evidence.

   b. Court Trials:

In court trials, a party must move for judgment of dismissal under ORCP 54B(2) at close of case before court's decision. *See* ORCP 53B(2); *see also Lee v. Koelher*, 200 Or App 85, 91, 112 P3d 477 (2005) ("in civil cases tried to the court without a jury, a litigant may not raise the sufficiency of the plaintiff's evidence on appeal unless he has asserted the legal insufficiency of the evidence in the trial court").

4. Put it in writing. Motion for directed verdict must be specific. Any ground not raised before the trial court cannot be raised on appeal.

   See, *e.g.*, *Greenwood Prods. v. Greenwood Forest Prods.*, 351 Or 604, 620, 273 P3d 116, 125 (2012) ("Because the trial court never had an opportunity to consider the argument, it is not, and was not, a proper basis for reversing the trial court's decision.).

5. For claims with multiple specifications of negligence or other wrongdoing, you should move for directed verdict against both the whole claim and move alternatively for directed verdict against specific allegations as invalid.

6. Other option is to seek peremptory instructions on any specifications that are legally erroneous or supported by insufficient evidence.

E. Peremptory Instructions

1. "A motion for a directed verdict is not the proper vehicle for asking the trial court to decide as a matter of law that the movant is entitled to prevail on less than all of the elements of a claim. Rather, the claimant should proceed by proper request for a suitable peremptory instruction to the jury on each of the elements on which the claimant believes it is entitled to prevail as a matter of law." *Hagan v.*

Gemstate Mfg., Inc., 328 Or 535, 544, 982 P2d 1108 (1999) (internal quotation marks and citation omitted).

Remember: Any motion for judgment notwithstanding the verdict ("JNOV") after trial will be limited to the grounds that you raised in a timely motion for directed verdict. *See MacCrone v. Edwards Ctr. Inc.*, 160 Or App 91, 104, 980 P2d 1156 (1999).

G. Jury Instructions

1. Error is often prejudicial.

"[I]f a trial court incorrectly instructs the jury on an element of a claim or defense, and—when the instructions are considered as a whole in light of the evidence and the parties' theories of the case at trial—there is some likelihood that the jury reached a legally erroneous result, a party has established that the instructional error substantially affected its rights … That is so, logic dictates, even if it cannot be definitively shown that the jury *did* base its verdict on the erroneous instruction or if a more elaborate, element-by-element verdict form might have shown that the jury *did not* base its verdict on the erroneous instruction."

Purdy v. Deere & Co., 355 Or 204, 231-232, 324 P3d 455 (2014) (emphasis in original).

2. Make sure that your jury instructions are accurate.

Jury instructions must be correct in all respects, or a trial court has no obligation to give them. *Williams v. Philip Morris, Inc.*, 344 Or 45 (2008).

3. General Rule to Preserve Issues:

You must object on the record, state with particularity why the given instructions are error (or why it is error to refuse requested instructions), and reassert objections after jury is instructed unless the trial court has directed another time for raising objections.

4. ORCP 59 H Requirements:

a. Must make exceptions:

"A party may not obtain appellate review of an asserted error by a trial court … in giving or refusing to give an instruction to a jury unless the party seeking review identified the asserted error to the trial court and made a notation of exception immediately after the court instructed the jury or at other such time as the trial court directed." ORCP 59 H(1).

b. Exceptions must be specific and on the record (put it in writing to be safe):

Notations of exceptions "must be made orally on the record or in a writing filed with the court and must identify with particularity the points on which the exception is based. In noting an exception, a party may incorporate by reference the points that the party previously made with particularity on the record regarding the statement or instruction to which the exception applies." ORCP 59 H(2.)

3. The "plain error" exception applies to permit review of "legal errors that are apparent on the record," *see* ORCP 59 H(1), but always preserve objection to be safe. *See State v. Vanornum*, 354 Or 614, 623, 317 P3d 889 (2013) (discussing same).

5. Caution: Put in in writing and in the record.

a. Be cautious of off-record arguments on jury instructions.

b. Make sure that prior drafts are included in the record.

"[T]here were approximately 18 different iterations of the proposed instructions, none of which (except the last) is part of our record. Reading those transcribed discussions [about proposed instructions] is akin to reading critical reviews of a book, without the book – or, even more, criticisms of a series of drafts without each draft." *Klutschkowski v. Peacehealth*, 245 Or App 524 (2011).

c. Include all grounds for claimed error.

An objection to a jury instruction on one ground will not preserve a claim on error on a different ground. *See*, *e.g.*, *Henderson v. Nielsen*, 127 Or App 109, 119, 871 P2d 495 (1994).

H. Defective Verdict Forms

1. Claims of error relating to the verdict form must be raised before submission of the verdict form to the jury. *State ex. Rel Sam's Texaco & Towing, Inc. v. Gallagher*, 314 Or 652, 622-63, 842 P2d 383 (1992).

2. General verdict forms v. special verdict forms.

I. Defective Verdicts

1. The time to object to a defective verdict, if it is defective, is while the jury is still on hand so that the trial court can resubmit the matter with proper instructions.

Building Structures, Inc. v. Young, 328 Or 100, 107, 968 P2d 1287 (1998).

XIII. Post-Trial Preservation Issues

A. JNOV and New Trial Motions

1. Any motion for judgment notwithstanding the verdict ("JNOV") motion after trial will be limited to the grounds raised in a timely motion for directed verdict. *See Knepper v. Brown*, 345 Or 320, 327, 195 P3d 383 (2008).

2. As a general matter, a motion for JNOV is unnecessary to preserve challenges to the sufficiency of evidence on appeal. *See*, *e.g.*, *State v. Forrester*, 203 Or App 151, 155, 125 P3d 47 (2005).

3. As a general matter, motion for new trial is unnecessary to preserve objections made at trial. *Kahn v. Waldin*, 60 Or App 365, 371, 653 P2d 1268 (1982).

4. **Warning:** A motion for JNOV that does not include an alternative motion for a new trial waives a new trial as a possible remedy in any subsequent appeal. *See Goodyear Tire v. Tualatin Tire & Auto*, 322 Or 406, 411, 908 P2d 300 (1995), *modified on other grounds*, 325 Or 46, 132 P2d 1121 (1997) ("The party that has lost the jury trial may joint a motion for a j.n.o.v, with a motion for a new trial, but [ORCP 63] imposes a price on the choice to file only the motion for a j.n.o.v. – the alternate remedy of a new trial no longer is available.").

5. Motion for new trial is required to preserve challenges to amount of general or punitive damages awards. *Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 558 n 14, 17 P3d 473 (2001) ("[A] party cannot challenge a verdict for punitive damages as excessive until *after* the jury renders its verdict. Therefore, that challenge properly is made by a motion for new trial[.]" (Citations omitted; emphasis in original.)).

6. Effect on Filing Appeal:

   a. Timely motions for new trial toll the time for filing a notice of appeal.

   b. Time to appeal is 30 days from order disposing of motion or after motion deemed denied by 55-day rule.

   c. No rolling if motion for JNOV and/or new trial is untimely.

7. Be careful with application of 55-day rule in calculating due date for appeal. *McCollum v. Kmart Corp.*, 347 Or 707, 711, 226 P3d 703 (2010) (trial court's letter opinion was not an "order" for purposes of 55-day rule). *Strawn v. Farmers Inc. Co.*, 350 Or 336, 368 (2011), *adhered to on reconsid.*, 350 Or 521 (2011) (trial court order signed in open court was effective immediately).

B. Motions for Reconsideration

1. Oregon rules do not allow motions for reconsideration.

2. Some local rules in Oregon (*e.g.*, Multnomah County) expressly prohibit motions for reconsideration.

3. Motions for reconsideration are "motions asking for trouble." *Carter v. U.S. National Bank*, 304 Or 538, 546, 747 P2d 980 (1987) (Peterson, J., concurring).

4. Arguments raised for first time in "motion for reconsideration" are not preserved. *See*, *e.g.*, *Vance v. Teplick*, 219 Or App 542, 544 (2008) ("[E]vidence that was not part of the appellate record 'will not be entertained for the first time on reconsideration.'"); *Gonzales-Aguilera v. Premo*, 274 Or App 484, 490 (2015) (declining to address petitioner's argument raised only in the motion for reconsideration).

5. Motions for reconsideration of a summary judgment do not constitute motions for a new trial, and therefore, the timing requirements of ORS 19.255(2) do not come into play. *Ass'n of Unit Owners of Timbercrest Condos. v. Warren*, 352 Or 583, 599 (2012) (holding that summary judgment is not a trial within the meaning of ORS 19.255(2) or ORCP 64).

C. Motions for Relief from Judgment – ORCP 71

1. Does not toll the time for filing appeal. Must file notice of appeal from judgment.

2. Trial court has jurisdiction to consider motions for relief from judgments even if appeal has been filed. ORCP 71B(2).

3. Must serve appellate court with motion. Appellate court generally will stay existing appellate matter to allow resolution of motion.

4. After decision on motion, must file amended notice of appeal to assign error to decision on motion.

5. To preserve arguments that the trial court erroneously granted a ORCP 71B motion based on "newly discovered evidence" because new evidence was immaterial to an alternative ground on which summary judgment would have been proper, appellant must have: (1) raised alternative ground in seeking summary judgment; and (2) reiterated that ground in opposing ORCP 71B relief. *Chang v. PacifiCorp*, 212 Or App 14, 33, 157 P3d 243 (2007) (analogizing to "affirming on an alternative basis on appeal").

D. Attorney Fees Motions

1. An attorney fee petition does not toll the time for filing an appeal.

2. Attorney fee petitions are due 14 days after entry of judgment. ORCP 68C(4)(a).

3. File notice of appeal from initial general judgment, then file second notice of appeal from any supplemental judgment awarding attorney fees.

XIV. Preservation on Appeal

A. A timely appeal preserves ability to challenge all issues except those that were immediately appealable.

A timely appeal preserves challenges to all intermediate rulings and orders except those that are immediately appealable. *See*, *e.g.*, *Snider v. Production Chem. Mfg., Inc.*, 221 Or App 593, 191 P3d 691 (2008) ("Defendant's failure to appeal from that order within 30 days resulted in the order becoming final and not subject to our review in this appeal fo the judgment.").

B. Designate the whole record

To avoid problems with the sufficiency of the record, the safest approach is to always designate the record in its entirety. *See*, *e.g.*, *In re Ibarra*, 261 Or App 598, 603, 323 P3d 539 (2014) (limited record agreed upon by the parties was insufficient and prevented appellate court review).

C. Assignments of error

1. To preserve error on appeal, appellant must identify the specific trial court rulings being challenged. ORAP 5.45(3) ("Each assignment of error must identify precisely the legal, procedural, factual, or other ruling that is being challenged.").

2. When a trial court's ruling is based on two independent and alternative grounds, the appellant must assign error to <u>both</u> grounds (at or least challenge both grounds) to be entitled to relief. *Strawn v. Farmers Ins. Co.*, 350 Or 336, 368 (2011), *adhered to on*

reconsid., 350 Or 521 (2011) (Farmers waived its right to challenge the amount of punitive damages award when opening brief on appeal challenged only one of two independent and alternative grounds for trial court's ruling).

3. Issues raised for the first time in a reply brief or at oral argument generally will be waived on appeal. *State v. Brown*, 264 Or App. 592, 599, 333 P3d 1153 (2014) ("[A] theory [first] advanced in a reply brief simply comes too late.").

D. Cross-Assignments of Error and Cross-Appeals

1. Cross-appeals and cross-assignments of error are unnecessary to argue alternative grounds for affirmance.

    a. If the alternative ground for affirmance was raised in the trial court, the respondent should identify how the alternative ground was preserved in the record to avoid waiver arguments.

2. Cross-appeal is required when a party seeks relief that would modify the judgment in some way. ORAP 5.57(2).

3. A cross-appeal is due 10 days after the due date for a notice of appeal. ORS 19.255(3).

4. Assignments of error on a cross-appeal are subject to the same appellate preservation requirements as assignments of error on appeal. ORAP 5.65.

5. Cross-assignments of error do not seek any modification of the judgment, but are claims of error that seek to challenge intermediate trial court rulings that respondent would like reversed or modified if relief were granted to the appellant. ORAP 5.57(2).

6. Cross-assignments of error subject to the same appellate preservation requirements as assignments of error. ORAP 5.57(3).

E. Seeking Attorney Fees on Appeal

1. "We continue to emphasize, however, that a party objecting to a request for attorney fees who fails to set out its objection with particularity does so at its own peril." *Berger Farms v. First Interstate Bank*, 330 Or 16, 20 n 3, 995 P2d 1159 (2000) (*rev'd on other grounds*).

2. "Far too often, appellate counsel who have rigorously briefed the substantive merits of a case offer only conclusory and patently self-interested submissions on attorney fees." *Computer Concepts, Inc. v. Brandt*, 141 Or App 275, 280, 918 P2d 430 (1996) (Haselton, J., concurring).

3. *State ex rel. English v. Multnomah County*, 231 Or App 286, 219 P3d 594 (2009). Multnomah County challenged appellate attorney fees as excessive and unreasonable. The Court of Appeals rejected arguments, noting that "the county did not submit any affidavit from a disinterested expert corroborating its generic assertion" and failed to give any detailed explanation about why the billing entries were excessive. The Court refused to "comb" the billing statements to find excessive entries and asserted that its examination of billing records showed that requested fees were reasonable.

4. *Vannatta v. Or. Gov't Ethics Comm'n*, 348 Or 117, 228 P3d 574 (2010) (Durham, J., concurring). Justice Durham would have denied $75,000 attorney fees petition in its entirety for failing to establish reasonableness of fees. Essential problem with petition was failure to identify what attorney time was spent on

successful claims. Petitioners attempted to rectify on reply, but still did not do an entry-by-entry breakdown. Durham warned that parties must segregate claims and establish reasonableness of fees in opening petition, rather than waiting for reply.