

IN THE SUPREME COURT FOR THE STATE OF OREGON

**BRYN HAZELL, FRANCIS NELSON,
TOM CIVILETTI, DAVID DELK,
GARY DUELL, JOAN HORTON, and
KEN LEWIS,**

Plaintiffs-Appellants,

v.

**BILL BRADBURY, Secretary of State of
the State of Oregon,**

and

**HARDY MYERS, Attorney General of the
State of Oregon,**

Defendants-Respondents.

and

**CENTER TO PROTECT FREE SPEECH,
INC., an Oregon nonprofit corporation,
and FRED VANNATTA,**

**Intervenor-Defendants and
Cross-Claimants-Respondents**

**Supreme Court Nos.
S055474 and S055477**

**Marion County Circuit Court
No. 06C-22473**

**PLAINTIFFS-APPELLANTS
RESPONSE TO COURT'S
ORDER TO SHOW CAUSE
REGARDING
JURISDICTION**

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All Plaintiffs-Appellants file this response to the Court's order to show cause why the appeals should not be dismissed for filing in the wrong court.

I. BACKGROUND.

At the November 7, 2006, general election, the voters of Oregon enacted Measure 47 (copy attached as Exhibit A to Exhibit 1, Declaration of Linda Williams).¹ The Oregon Constitution, Article IV, § 1(4)(d), provides that an initiative enacted by vote of the people shall become effective 30 days after the date on which it is enacted. Thus, Plaintiffs-Appellants contend that Measure 47 became effective on December 7, 2006.

Measure 47 is a statute pertaining to elections and directs its own codification as ORS Chapter 259. On behalf of the Secretary, the Director of Elections (John Lindback) on November 17, 2006, sent a letter to the Chief Petitioners, which stated that the Secretary will not implement any part of Measure 47 other than Section (9)(f).² The Attorney General then notified legal representatives of the Chief Petitioners for Measure 47 that he will not implement any part of Measure 47 other than Section (9)(f) and will take no action to obtain judicial interpretation of any of the terms of Measure 47.

1. The text is also available at http://www.sos.state.or.us/elections/nov72006/guide/meas/m47_text.html.

2. Section (9)(f) states:

If, on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions or expenditures, this Act shall nevertheless be codified and shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations.

Consequently, Plaintiffs-Appellants filed suit in Marion County on December 27, 2006, in order to obtain judicial review regarding the constitutionality of Measure 47.

II. JURISDICTION LIES IN THE SUPREME COURT, PURSUANT TO ORS 250.044.

This appeal is properly before this Court, because it satisfies the jurisdictional criteria set out in ORS 250.044:

ORS 250.044. Challenging constitutionality of state measure

(1) An action that challenges the constitutionality of a measure initiated by the people or referred to the people for a vote must be commenced in the Circuit Court for Marion County if:

- (a) The action is filed by a plaintiff asserting a claim for relief that challenges the constitutionality of a state statute or an amendment to the Oregon Constitution initiated by the people or referred to the people under section 1 (1) to (4), Article IV of the Oregon Constitution;
- (b) The action is commenced on or after the date that the Secretary of State certifies that the challenged measure has been adopted by the electors and within 180 days after the effective date of the measure; and
- (c) The action may not be commenced in the Oregon Tax Court.

(2) An action under subsection (1) of this section must be within the jurisdiction of circuit courts and must present a justiciable controversy. The plaintiff in an action subject to the requirements of this section must serve a copy of the complaint on the Attorney General.

* * *

(5) If a judgment in an action subject to the requirements of this section holds that a challenged measure is invalid in whole or in part, a party to the action may appeal the judgment only by filing a notice of appeal directly with the Supreme Court within the time and in the manner specified in ORS chapter 19 for civil appeals to the Court of Appeals. Any party filing a notice of appeal under this subsection must note in the notice of appeal that the case is subject to this subsection.

ORS 250.044 was enacted in 1997. The Staff Measure Summary for SB 284³

explained it:

WHAT THE BILL DOES: Requires that an action to challenge the constitutionality of a state measure referred to or initiated by the people must be commenced in the Circuit Court of Marion County. Applies to cases brought specifically to challenge constitutionality of a measure, and not to challenges that are in response to a judicial proceeding. Applies requirement that cases be commenced only in Marion County to those actions filed after a measure's effective date but before 180 days after the effective date of the measure. Allows for direct appeal to the Supreme Court when the trial court rules against the measure. Allows for appeal to the Court of Appeals when the trial court does not rule against the measure. Allows the Court of Appeals to use its discretion to certify the appeal directly to the Supreme Court. Provides for how new appeal process shall be applied to those appeals filed before the effective date. Declares an emergency, taking effect upon passage.

ISSUES DISCUSSED:

- > potential savings in the appeals process
- > House Committee on Rules and Elections took no action except to refer it to the House Transportation
- > no opposition in the Senate

EFFECT OF COMMITTEE AMENDMENTS: No amendments.

BACKGROUND: Under current law, constitutional challenges to a measure approved by the electorate can be made in any Oregon Circuit Court. If multiple challenges are made, the parties can agree to have the cases consolidated and heard in one circuit court. Currently and under this bill, constitutional challenges to an initiative measure are allowed only after the initiative has become law.

3. This Staff Summary is available at
<http://www.leg.state.or.us/comm/sms/senate/0284ah.pdf>.

A. THE ACTION SATISFIES ORS 250.044(1) and (2).

After voter passage of Measure 47 in November of 2006, and after consultation and correspondence with the Oregon Department of Justice, the Horton Plaintiffs (Second Claim) sought a declaration that Section (9)(f) of Measure 47 was unconstitutional. Exhibit 1 to the Declaration of Linda Williams. Thus, ORS 250.044(1)(a) is satisfied.⁴

ORS 250.044(1)(b) is satisfied, as the action in Marion County Circuit Court was "commenced on or after the date that the Secretary of State certifies that the challenged measure has been adopted by the electors and within 180 days after the effective date of the measure.

ORS 250.044(1)(c) is satisfied, because the "action may not be commenced in the Oregon Tax Court."

ORS 250.044(2) is satisfied, because the action was "within the jurisdiction of circuit courts" and did "present a justiciable controversy." Further, the plaintiffs did "serve a copy of the complaint on the Attorney General," as the Attorney General was made a defendant.

4. In addition, the **Intervenor-Defendants/Cross-Claimants-Respondents** also challenged the constitutionality of Measure 47 on several grounds. These are discussed in the trial court's Letter Opinion of September 25, 2007, pp. 5-7. This Opinion was incorporated in the judgment and was appended to the Notices of Appeals under ORAP 2.10(11). Although they were called the Intervenor/Cross-Claimants below, their claim that parts or all of Measure 47 is unconstitutional is the equivalent of a plaintiff's claim that a measure is unconstitutional. This Court need not consider their claims, however, because the Horton Plaintiffs themselves made a claim of unconstitutionality regarding part of Measure 47.

B. THE ACTION SATISFIES ORS 250.044(5).

The trial court's Letter Opinion of September 25, 2007, which is expressly incorporated in the judgment and appended to the Notices of Appeals under ORAP 2.10(11),⁵ as pertinent to jurisdiction, states (p. 3):

First, as a matter of law, I find that at the time of Measure 47's passage in 2006, the Oregon Constitution precluded any limitations on CC&Es [campaign contributions and expenditures]. In *Meyer v. Bradbury*, 341 Or. 288, (2006), the Oregon Supreme Court explained that an earlier decision, *Vannatta* "held that Article I, section 8, prohibits laws restricting campaign expenditures and contributions." *Meyer*, 341 Or. at 293 n. 4. The Meyer court later expanded upon that proposition: "Under Oregon law, both campaign contributions and expenditures are forms of expression protected by [Article I, section 8], thus making legislatively imposed limitations on individual political campaign contributions and expenditures impermissible. See *Vannatta v. Keisling*, 324 Or. 514, 537 (1997). * * * (so holding)." *Meyer*, at 299. At the 2006 general election, Measure 46 was rejected, leaving the holdings in *Vannatta* and *Meyer* intact. Thus, Article I, section 8, of the Oregon Constitution still prohibits CC&E limits. This court is bound by the Oregon Supreme Court's holdings in *Vannatta* and *Meyer*.

Measure 47 obviously includes such limitations on campaign contributions and expenditures, including, *inter alia*, a contribution limit of \$500 per person in each statewide candidate race. As the ballot title for Measure 47 stated:

REVISES CAMPAIGN FINANCE LAWS: LIMITS OR PROHIBITS CONTRIBUTIONS AND EXPENDITURES; ADDS DISCLOSURE, NEW REPORTING REQUIREMENTS

RESULT OF "YES" VOTE: "Yes" vote limits or prohibits certain contributions and expenditures to candidates, political committees, political parties; limits candidate's spending to own candidacy; adds disclosure, reporting requirements.

5. This opinion is also Exhibit 2 to the Declaration of Linda Williams, also filed today.

RESULT OF "NO" VOTE: "No" vote retains current law, which does not limit contributors, contributions to, or expenditures for state or local public office candidates; maintains existing reporting requirements.

Thus, this action satisfies ORS 250.044(5), as the judgment "holds that a challenged measure is invalid in whole or in part."⁶

The Letter Opinion is necessarily a holding that Measure 47 is invalid in whole or in part, because Measure 47 obviously includes limitations on CC&Es. This conclusion is logically unavoidable. In fact, defendants specifically urged this conclusion in their Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' and Intervenors' Motions for Summary Judgment (March 9, 2007), p. 12 (emphasis added):

As demonstrated above, however, the Oregon Supreme Court has ruled generally that CC&E limits are constitutionally impermissible in this state. *Vannatta; Meyer*. **Moreover, those rulings encompass the specific CC&E limits in Measure 47.**

Defendants further argued that the reference to CC&Es in Section (9)(f) (when context is considered) **is a reference to the limitations in Measure 47 itself:**

Looking first to the text of the measure, § (9)(f) does not itself expressly declare whether a constitutional change--such as adoption of Measure 46--would be necessary to bring Measure 47 into operation. Section (1)(r), on the other hand, does seem to presume and intend that a constitutional change would be necessary.

That section describes the enactment in 1994 of "contribution limits similar to those in this Act," and explains that those limits were struck down by the Oregon Supreme Court in 1997. Section (1)(r) then provides, "This Act shall take effect at a time when the Oregon Constitution does allow the limitations contained in this Act." *Id.*

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6. Further, the notices of appeal filed by the Hazell Plaintiffs and the Horton Plaintiffs both noted that the case is subject to this subsection.

Id., p. 9. Thus, argued defendants, the reference in Section (9)(f) is to the CC&E limitations in Measure 47. Accordingly, any finding that Section (9)(f) is triggered must necessarily include a finding that the CC&Es in Measure 47 are not allowed by the Oregon Constitution.

Further, if the Measure 47 CC&Es were constitutionally valid, then there would be no basis for defendants to rely on Section (9)(f) for their decision not to enforce the Measure 47 limits (because the Measure 47 limits would be "found" by the courts to be allowed by the Oregon Constitution). And it has been, of course, defendants' position in this litigation that the CC&Es in Measure 47 are unconstitutional. Defendants' Reply Memorandum in Support of Motion for Summary Judgment (April 20, 2007), pp. 4-9. Having prevailed on this issue, defendants should not now be allowed to recharacterize the holding as something else.⁷

1. THE TRIAL COURT'S RULING ON THIS ISSUE IS A HOLDING.

The Court's statement that, "as a matter of law, I find that at the time of measure 47's passage in 2006, the Oregon Constitution precluded any limitations on CC&Es" is a holding within the meaning of ORS 250.044(5). Says BLACK'S LAW DICTIONARY (8TH ED 2004):

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7. Judicial estoppel may be applied when a litigant has benefitted from a statement or position in an earlier proceeding that is inconsistent with that same litigant's statement or position in a later proceeding. Most courts require the statement or position to have been accepted and acted upon by the court in the earlier proceeding in order for the doctrine to apply.

White v. Goth, 182 Or App 138, 141-142, 47 P3d 550, 551-552 (2002). Here, defendants successfully argued to the trial court that the limitations in Measure 47 are unconstitutional, as contrary to *Meyer* and *Vannatta*. Having succeeded with that position, defendants should be estopped from now arguing some different position. Judicial estoppel does not require that any party detrimentally rely on the position. *Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599, 612-13, 892 P2d 683 (1995).

holding, n.

1. A court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision. Cf. OBITER DICTUM. [Cases: Courts 88. C.J.S. Courts ° 139; Trade-Marks, Trade-Names, and Unfair Competition ° 187.]
2. A ruling on evidence or other questions presented at trial.
3. (usu. pl.) Legally owned property, esp. land or securities.
4. Hist. In feudal law, tenure.

The trial court's statement about the unconstitutionality of limitations on campaign contributions and expenditures is certainly a "holding," as it is a court's determination of a matter of law pivotal to its decision or a principle drawn from such decision.

A holding of a case declares the conclusion of law reached by the court as to the legal effect of the facts disclosed. BLACK'S LAW DICTIONARY 658, (5th ed 1979). 'Holding' may be contrasted with *obiter dictum*, which is a statement in a decision that is unnecessary to support the conclusion reached. *American Trailers v. Walker*, 1974 OK 89, ¶ 18, 526 P2d 1150, 1154. *Ratio decidendi* is the ground or reason of the decision and refers to a statement in a decision necessary to support the holding. BLACK'S LAW DICTIONARY 1135, (5th ed 1979).

Kuykendall v. Gulfstream Aerospace Technologies, 66 P3d 374, 377 (Okla 2002).⁸

In this case, the trial court clearly labeled "as a matter of law" its conclusion of law that monetary limits are presently unconstitutional. This statement is not *dictum*, as it is essential to the Court's determination of whether § (9)(f) is triggered and what it means. By using the

8. Disapproved on other grounds, *Sizemore v. Continental Cas. Co.*, 142 P3d 47, 2006 OK 36 (Okla 2006).

plain, usual and ordinary legal meaning to the word "holding," the Court held the campaign contribution and expenditure limitation provisions of Measure 47 unconstitutional.⁹

This holding is necessary to support the reason for the ultimate decision supporting the outcome. If the limitations on political campaign contributions and expenditures in Measure 47 were not unconstitutional, then Section (9)(f) itself would not be triggered, and the Measure 47 limitations would be enforceable law. The trial court recognized this in the Letter Opinion (p. 7): "the Supreme Court may determine that portions of Measure 47 are valid limits on CC&Es." Since Article IV, § 1(4)(d), provides that an initiative enacted by vote of the people shall become effective 30 days after the date on which it is enacted, then the limitations on campaign contributions and expenditures in Measure 47 are now lawfully in place, unless the trial court has in fact held otherwise (which it has).

9. In this first level of analysis, the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent. *State v. Person*, *supra*, 316 Or at 590; *State ex rel Juv. Dept. v. Ashley*, 312 Or 169, 174, 818 P2d 1270 (1991). In trying to ascertain the meaning of a statutory provision, and thereby to inform the court's inquiry into legislative intent, the court considers rules of construction of the statutory text that bear directly on how to read the text. Some of those rules are mandated by statute, including, for example, the statutory enjoiner "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. Others are found in the case law, including, for example, the rule that words of common usage typically should be given their plain, natural, and ordinary meaning. See *State v. Langley*, 314 Or 247, 256, 839 P2d 692 (1992) (illustrating rule); *Perez v. State Farm Mutual Ins. Co.*, 289 Or 295, 299, 613 P2d 32 (1980) (same).

PGE v. Bureau of Labor and Industries, 317 Or 606, 610-11, 859 P2d 1143 (1993).

2. THIS HOLDING IS INCORPORATED IN THE JUDGMENT.

This holding is part of the judgment. The Letter Opinion containing the holding is expressly incorporated into the judgment, which states:

The court having previously granted defendants' motion for summary judgment and having previously denied each of the other cross-motions, and the court having previously set forth its analysis and conclusions in its September 25, 2007, letter opinion, which is incorporated herein under ORS 18.082(2), * * *

Thus, all of the requirements of ORS 240.044(5) are satisfied.

III. CONCLUSION.

Because all of the requirements of ORS 240.044(5) are satisfied, this Court has jurisdiction of the appeals filed by the Hazell Plaintiffs and by the Horton Plaintiffs.

Dated: December 4, 2007

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing PLAINTIFFS-APPELLANTS RESPONSE TO COURT'S ORDER TO SHOW CAUSE REGARDING JURISDICTION by (1) e-mail and (2) first class mail to all parties listed below, deposited in the U.S. Postal Service at Portland, Oregon, with first class postage prepaid.

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