

Filed: January 30, 2025

IN THE SUPREME COURT OF THE STATE OF OREGON

ARNOLD R. HUSKEY,

Petitioner on Review,

v.

OREGON DEPARTMENT OF CORRECTIONS, COLETTE PETERS, GUY
HALL, GARRETT LANEY, and JOHN and JANE DOE(S) 1-10, individually
and in their official capacities,

Respondents on Review.

(CC 22CV21140) (CA A180196) (SC S070771)

En Banc

On review from the Court of Appeals.*

Argued and submitted November 7, 2024.

Edward A. Piper, Angeli Law Group LLC, Portland, argued the cause and filed the
briefs for petitioner on review.

Robert M. Wilsey, Assistant Attorney General, Salem, argued the cause and filed
the brief for respondents on review. Also on the brief were Ellen Rosenblum, Attorney
General, and Benjamin Gutman, Solicitor General.

Kelly Simon, ACLU Foundation of Oregon, Portland, filed the brief for *amicus*
curiae American Civil Liberties Union and American Civil Liberties Union of Oregon.

JAMES, J.

The decision of the Court of Appeals is affirmed in part and reversed in part. The
judgment of the circuit court is affirmed in part and reversed in part, and the case is
remanded to the circuit court for further proceedings.

*Appeal from Marion County Circuit Court,
Errius Johnson, Judge.
329 Or App 397, 542 P3d 66 (2023).

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioner on Review.

☐ No costs allowed.

☒ Costs allowed, payable by: Respondents on Review.

☐ Costs allowed, to abide the outcome on remand, payable by:

1 JAMES, J.

2 In a civil action brought in the State of Oregon, where the plaintiff alleges
3 economic damages in the form of future lost employment income, must the plaintiff plead
4 an "enforceable right" to that future employment to survive a motion to dismiss for
5 failure to state a claim brought under ORCP 21 A(1)(h)? The trial court and the Court of
6 Appeals answered that question in the affirmative. *Huskey v. Dept. of Corrections*, 329
7 Or App 397, 542 P3d 66 (2023). We allowed review,¹ and hold the answer is no.

¹ Before the Court of Appeals, plaintiff raised four assignments of error, only the first of which we take up here. The second assignment of error concerned the trial court's denial of plaintiff's motion to add an allegation of punitive damages. The Court of Appeals affirmed, and we affirm the Court of Appeals on that issue. The fourth assignment of error concerned whether the trial court had violated state and federal constitutional jury rights by dismissing plaintiff's complaint. The Court of Appeals affirmed the trial court without discussion, and we also affirm the Court of Appeals on that issue.

Plaintiff's third assignment of error challenged the trial court's dismissal of his declaratory judgment claim. Before the Court of Appeals, the department conceded that remand was required because "a declaratory judgment action cannot be dismissed under ORCP 21 A(1)(h)." *Huskey*, 329 Or App at 402. The Court of Appeals properly accepted that concession, but relied on its precedent in *Doe v. Medford School Dist.* 549C, 232 Or App 38, 221 P3d 787 (2009), for the proposition that,

"[w]hen the dismissal of a declaratory judgment action was clearly based on a determination of the merits of the claim, * * * our practice has been to review that determination as a matter of law and then remand for the issuance of a judgment that declares the rights of the parties in accordance with our review of the merits."

Huskey, 329 Or App at 402 (quoting *Doe*, 232 Or App at 46). Accordingly, the Court of Appeals vacated the judgment of dismissal and remanded for issuance of a judgment that "declares the rights of the parties, including our determination that plaintiff has no legally enforceable right to economic damages for lost income." *Id.* In light of that reasoning,

1 Accordingly, we affirm in part, and reverse in part, the judgment of the trial court and the
2 decision of the Court of Appeals.

3 I. FACTS

4 The facts as alleged are straightforward, and we accept them as true for
5 purposes of our review. *See, e.g., Bundy v. Nustar GP, LLC*, 371 Or 220, 224, 533 P3d
6 21 (2023). Plaintiff is an adult in custody (AIC) at an Oregon correctional institution.
7 Plaintiff sued the Oregon Department of Corrections and others (collectively, "the
8 department") for breach of contract and civil rights violations, seeking, among other
9 forms of relief, economic damages based on lost future wages and employment
10 opportunities.

11 Years prior, plaintiff had sued the department, resulting in a settlement
12 agreement in which the department purportedly orally agreed to not retaliate against him.
13 That settlement agreement is the contract underlying this breach of contract action. In
14 this case, plaintiff alleged that the department had breached its oral promise of
15 nonretaliation by using negative video footage of plaintiff, without his permission, in
16 department training videos. Plaintiff pleaded that, as a result of that negative portrayal,
17 he suffered \$11,640 in economic damages due to lost income under a theory that the
18 department had denied him job assignments, training, and other income-generating

when considered together with our reasoning and disposition relating to plaintiff's first
assignment of error, we do not perceive a need to remand the third assignment of error to
the Court of Appeals. Instead, we reverse the Court of Appeals on that assignment and
remand this entire case back to the trial court.

opportunities.

The department moved to dismiss under ORCP 21 A(1)(h), arguing that the plaintiff "fail[ed] to allege facts showing that plaintiff suffered economic damages."

According to the department, Article I, section 41(3), of the Oregon Constitution, which states that "no inmate has a legally enforceable right to a job or to otherwise participate in work, * * * or to compensation for work or labor performed while an inmate," rendered plaintiff unable to plead economic damages, because he had no right to employment. The trial court agreed and dismissed plaintiff's complaint on those grounds.

The Court of Appeals agreed and affirmed, reasoning that, "[i]f an AIC has no legally enforceable right to work assignments or training opportunities, then it follows that an AIC may not sue for breach of contract for lost income associated with the loss of such opportunities." *Huskey*, 329 Or App at 400. We then allowed plaintiff's petition for review.

On review, the parties and *amici curiae* raise many complex constitutional arguments about the meaning of Article I, section 41(3) and its interplay with another constitutional provision, Article I, section 34(2) (prohibiting involuntary servitude; adopted by the people in 2022). Although this court appreciates the excellent briefing provided by the parties and *amici* on those constitutional issues, we need not decide them, because, as we explain, this case presents a straight-forward question of pleading damages.

II. ANALYSIS

A. Preservation

1 We begin by addressing an issue of preservation, related to the damages
2 question framed above. Throughout the litigation, the parties have focused heavily on
3 issues of constitutional interpretation -- understandably so, given the department's
4 reliance on Article I, section 43. Our resolution today, which eschews the majority of
5 those constitutional questions for a common-law damages analysis, admittedly tracks
6 more closely to arguments raised by *amici*, rather than the parties themselves. At oral
7 argument, the department questioned whether that subconstitutional argument was
8 properly preserved.

9 We conclude that it was. Upon a trial court's grant of a party's motion to
10 dismiss under ORCP 21, the issue on appeal is whether the trial court erred in granting
11 dismissal -- which typically concerns whether the arguments and sources of law adduced
12 by the moving party, and relied upon by the trial court, legally required dismissal of the
13 claim. When the issue on appeal is that the trial court erred in *denying* dismissal of a
14 claim, the moving party must show that they preserved the error. In that context we look
15 to our traditional preservation principles. *See State v. Hitz*, 307 Or 183, 188, 766 P2d 373
16 (1988) ("We have previously drawn attention to the distinctions between raising an issue
17 at trial, identifying a source for a claimed position, and making a particular argument.
18 * * * The first ordinarily is essential, the second less so, the third least." (Emphasis in
19 original.)). However, when the issue on appeal is whether the trial court erred in *granting*
20 dismissal of a claim, the nonmoving party generally can preserve that error with little
21 beyond simply opposing dismissal

22 Here, plaintiff, who appeared *pro se* before the trial court, opposed

1 dismissal. He consistently argued that he had properly pleaded damages, and, further, he
2 disputed that Article I, section 41(3) -- relied upon by the moving party and the trial court
3 -- required the dismissal of his breach of contract claim. In his response to the motion to
4 dismiss before the trial court, plaintiff wrote that, even if Article I, section 41(3), denied
5 him a right to employment, "[the department] do[es] not dispute that [p]laintiff * * * did
6 in fact work." He then wrote:

7 "Plaintiff has [pleaded] in his complaint, as well as submitted facts
8 and evidence demonstrating indisputable proof of *earned monetary income*
9 from his prison work assignment. Plaintiff has further [pleaded] allegations
10 that [the department's] acts, actions intentionally breached the contract and
11 caused [plaintiff] *loss of income and past and future impairment of earning*
12 *capacity* sufficient to put the issue of fact before the jury."

13 (Emphases in original.)

14 Our resolution of this case, although based on subconstitutional arguments
15 of *amici*, addresses that core issue -- that is, whether Article I, section 41(3) required the
16 dismissal of plaintiff's complaint. As we recently held in *State v. Skotland*, 372 Or 319,
17 329, 549 P3d 534, 539 (2024), preservation is a doctrine rooted in practicality that serves
18 fairness and efficiency -- affording both opposing parties and trial courts a meaningful
19 opportunity to engage an argument on its merits. There, we noted that, "[s]ometimes, the
20 winds of preservation can be gauged by looking to the weathervane of trial court surprise:
21 Would the trial court be taken aback to find itself reversed on *this issue, for this reason?*"
22 *Id.* (emphasis in original). Here, considering the issue and the arguments below, we do
23 not perceive that the trial court would be surprised by our reasoning in reversing its
24 decision today.

1 B. Merits

2 Turning to the merits, generally, to state a claim for breach of contract, a
3 plaintiff must, at a minimum, plead facts with sufficient particularity as to allege the
4 existence of a contract, its relevant terms, and a breach by defendant that resulted in
5 damage to plaintiff. Alleging damages is an essential pleading requirement of a breach of
6 contract claim, and a plaintiff is required to plead a specific amount for damages for each
7 claim of relief. ORCP 18 B.

8 A motion to dismiss under ORCP 21 A(1)(h) attacks the sufficiency of the
9 complaint. When reviewing a complaint in that posture, we "accept as true all well-
10 pleaded allegations of fact in the complaint and give plaintiff[] the benefit of all favorable
11 inferences that may be drawn from the facts alleged." *Gafur v. Legacy Good Samaritan*
12 *Hospital*, 344 Or 525, 528-29, 185 P3d 446 (2008). Whether the facts alleged are
13 sufficient to state a claim for relief is a question of law. *See Rowlett v. Fagan*, 358 Or
14 639, 651, 369 P3d 1132 (2016) ("[T]he legal viability of any particular claim under
15 Oregon law * * * is strictly a matter of law.").

16 In this case, plaintiff alleged lost future income as well as impairment of his
17 future employment opportunities. ORS 31.705(1)(a) defines economic damages as
18 including, among other things, "objectively verifiable monetary losses including * * *
19 loss of income and past and future impairment of earning capacity * * *." Accordingly,
20 by the clear statutory definition, plaintiff pleaded economic damages, and he did so in a
21 specific amount -- \$11,640 -- in compliance with ORCP 18 B.

22 Nevertheless, both the trial court and the Court of Appeals concluded that

1 plaintiff had not properly pleaded damages because, as the Court of Appeals reasoned:

2 "the constitution bars plaintiff from pursuing a claim of [this] nature. * * *
3 Here, as already explained, the constitution precludes plaintiff from
4 establishing that he suffered economic damages in the form of lost income.
5 Therefore, based on plaintiff's allegations, we conclude that he cannot seek
6 noneconomic damages for adverse treatment associated with visits and
7 housing and emotional or mental harm."

8 *Huskey*, 329 Or App at 400-01.

9 However, Article I, section 41(3) does not say that an inmate cannot pursue
10 a claim wherein damages are calculated by looking to lost future economic benefits. The
11 operative language of Article I, section 41(3), reads as follows:

12 "[N]o inmate has a legally enforceable right to a job or to otherwise
13 participate in work, on-the-job training or educational programs or to
14 compensation for work or labor performed while an inmate of any state,
15 county or city corrections facility or institution."

16 Even accepting, for purposes of argument, the department's construction of Article I,
17 section 41(3) as unaffected by Article I, section 34(2), all Article I, section 41(3) states is
18 that inmates have no "right" to employment.² But we have, on multiple occasions,
19 rejected the contention that a lack of a "right" to future employment is fatal to a claim
20 alleging economic damages based on future earnings. In *Tadsen v. Praegitzer Industries,*
21 *Inc.*, 324 Or 465, 470-71, 928 P2d 980 (1996), for example, we considered an action for
22 unlawful employment practices, concluding as follows:

23 "We next consider whether the fact that employment is 'at-will' prevents

² To be clear, we are not deciding whether Article I, section 41(3), could properly be construed, in light of the subsequent enactment of Article I, section 34(2), to deny AICs such as plaintiff a right to compensation for work performed. That is the crux of the constitutional issue litigated by the parties, which we need not resolve.

1 recovery of [future earnings] in all cases.

2 "Before the Court of Appeals, defendant argued that, notwithstanding a
3 discriminatory discharge and its actual causal relationship to a loss of future
4 earnings, an at-will employee cannot recover damages for that loss because,
5 independent of the unlawful firing, the employee has no 'right' to, or
6 assurance of, any future employment with the employer. * * *

7 "We decline to hold that an at-will employee never can prove the requisite
8 facts for an award of front pay. The fact that at-will employment may be
9 terminated for any nondiscriminatory purpose does not necessarily mean
10 that the likely duration of that employment is incapable of proof to the
11 required degree of certainty. *At-will employment may be a factor that bears*
12 *on whether the proof is sufficient in a particular case, but the right to*
13 *terminate someone's employment does not establish as a matter of law that*
14 *an employee cannot prove the existence of front pay damages."*

15 *Id.* (emphasis added).

16 We reiterated that principle 17 years later in *Cocchiara v. Lithia Motors,*
17 *Inc.*, 353 Or 282, 294-95, 297 P3d 1277 (2013). There, in the context of a claim for
18 fraudulent misrepresentation, we held:

19 "[B]oth defendant and the Court of Appeals relied on [an earlier Court of
20 Appeals case] for the proposition that the at-will nature of the corporate job
21 precluded plaintiff from recovering lost wages for that job. However, this
22 court has rejected a similar proposition in [*Tadsen*.] * * * *Similarly, in this*
23 *case, the fact that the corporate job was terminable at will, standing alone,*
24 *does not create a conclusive presumption that plaintiff cannot prove*
25 *damages related to the loss of that job.* Instead, as in *Tadsen*, plaintiff may
26 seek to prove what he would have earned in the corporate job and how long
27 he likely would have remained in that job had he been hired as promised
28 and allowed to start work. Although it may be easier for a plaintiff to prove
29 the likely duration of employment in a wrongful discharge case, where the
30 employee has a history of employment with the employer, a plaintiff is
31 entitled to attempt to make such a showing outside the wrongful discharge
32 context."

33 *Id.* (emphasis added).

34 The reasoning of *Tadsen* and *Cocchiara* applies equally here. For purposes

1 of pleading economic damages, the provision in Article I, section 41(3) -- that "no inmate
2 has a legally enforceable right to a job or to otherwise participate in work" -- places AICs
3 in no different a position than that of the at-will employment status of most Oregonians.
4 The existence or extent of any "right" to future employment is not a barrier to pleading
5 economic damages based on lost future income.

6 An ORCP 21 motion to dismiss, which evaluates the adequacy of pleadings
7 and legal claims, is not the proper vehicle to evaluate the strength or sufficiency of the
8 evidence in support of those legal claims. Challenges to the sufficiency of proof are
9 properly suited to a motion for summary judgment, or a trial. As we have repeatedly
10 cautioned, "[i]ssues of fact cannot be tried on a motion for judgment on the pleadings."
11 *Salem Sand v. City of Salem*, 260 Or 630, 636, 492 P2d 271 (1971) (citing *Scott & Payne*
12 *v. Potomac Ins. Co.*, 217 Or 323, 341 P2d 1083 (1959) and *Smith v. Aplanalp et al.*, 126
13 Or 213, 267 P 1070 (1938)).

14 Here, whatever issue Article I, section 43 might pose for the damages
15 element of petitioner's breach of contract claim, it is, fundamentally, not a pleading issue
16 at all -- it is an issue of proof and causation. Paraphrasing *Tadsen*, Article I, section 43,
17 may be a factor that bears on whether plaintiff ultimately can prove, by a preponderance
18 of the evidence, that the department's alleged retaliation against him caused his loss of
19 future income, but the lack of a right to employment does not establish, as a matter of
20 law, that plaintiff cannot prove economic damages in the form of future lost wages.
21 Stated even more simply, any lack of a right to employment does not mean that plaintiff's
22 complaint did not state ultimate facts sufficient to constitute a claim.

1 For those reasons, we hold that the trial court erred when it granted the
2 department's motion under ORCP 21 to dismiss plaintiff's complaint.

3 The decision of the Court of Appeals is affirmed in part and reversed in
4 part. The judgment of the circuit court is affirmed in part and reversed in part, and the
5 case is remanded to the circuit court for further proceedings.