FILED January 24, 2022 04:35 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON ex rel. Ellen F. Rosenblum, in her official capacity as Attorney General of the State of Oregon, Plaintiff-Petitioner on Review,

v.

LIVING ESSENTIALS, LLC a Michigan limited liability company, and INNOVATION VENTURES, LLC, a Michigan limited liability company, Defendants-Respondents on Review,

Multnomah County Circuit Court No. 14CV09149
Court of Appeals No. A163980
Supreme Court No. S068857

BRIEF OF *AMICUS CURIAE* OREGON CONSUMER JUSTICE

On Appeal from a judgment of the Multnomah County Circuit Court, The Honorable Kelly Skye

Court of Appeals Opinion Filed: June 17,2020

Author of Opinion: DeVore, J.

Concurring: Lagesen, P.J. and James, J.

Chris Mertens, OSB No. 092230
MERTENS LAW, LLC
4411 NE Tillamook St.
Portland, OR 97213
Tel: (503) 836-7673
Chris@MertensCSBLaw.com

Attorneys for *Amicus Curiae* Oregon Consumer Justice

Jona J. Maukonen, OSB No. 043540
Carson L. Whitehead, OSB No. 105404
OREGON DEPARTMENT OF JUSTICE
1162 Court St. NE
Salem, OR 97301-4096
Tel: (503) 378-4402
jona.j.maukonen@doj.state.or.us
carson.l.whitehead@doj.state.or.us

Attorneys for Plaintiff-Petitioner on Review

January 2022

Nadia H. Dahab, OSB No. 125630
SUGERMAN DAHAB
707 SW Washington Street, Ste. 600
Portland, OR 97205
Tel: (503) 228-6474
nadia@sugermandahab.com

Attorneys for *Amicus Curiae* Oregon Trial Lawyers Association

John W. Stephens, OSB No. 773583
ESLER STEPHENS & BUCKLEY
121 SW Morrison Street, Ste. 700
Portland, OR 97204
Tel: (503) 223-1510
stephens@eslerstephens.com

Attorneys for *Amicus Curiae* Oregon Trial Lawyers Association

Rachel Lee, OSB No. 102944
STOEL RIVES LLP
760 SW Ninth Ave., Ste. 3000
Portland, OR 97205
Rachel.lee@stoel.com

Attorneys for Defendant-Respondent on Review Living Essentials, LLC

Michael J. Sandmire, OSB No. 904410
BUCHALTER ATER WYNNE
1331 NW Lovejoy Ste. 900
Portland, OR 97209
msandmire@buchalter.com

Attorneys for Defendant-Respondent on Review Living Essentials, LLC

January 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. BACKGROUND 2

III. SUMMARY OF ARGUMENT 5

IV. THE COURT OF APPEALS ERRED IN FINDING LEGISLATIVE INTENT TO IMPLY A MATERIALITY ELEMENT INTO PROVSIONS OF THE UTPA WHERE THIS ELEMENT CLEARLY AND INTENTIONALLY DOES NOT EXIST 8

A. A Correct Interpretation of the Applicable Text and Context of the UTPA Indicates that the Applicable Provisions Unambiguously Do Not Contain a Materiality Requirement 9

1. The legislature knows how to include a materiality element in a statute when it wants to do so. 10

2. This Court's decision in *Searcy* controls and was erroneously disregarded by the Court of Appeals. 14

3. The Court of Appeals' reliance on *Pearson* to support its conclusion was misplaced. 16

4. This Court has recognized that the implied inclusion of elements of common law fraud into the UTPA where they do not exist is contrary to legislative intent. 18

B. Legislative History 20

1. Accurate legislative history of the UTPA 21

2. The Court of Appeals' inaccurate legislative history 23

3. Court of Appeals' error in looking to UDTPA and Lanham Act's legislative history 25

4. The UDTPA and the Lanham Act support no implied materiality requirement in ORS 646.608. 26

C. It Is Not Necessary to Look Beyond the Legislative History. 31

V. IF ALLOWED TO STAND, *LIVING ESSENTIALS* WILL DENY RELIEF TO MANY OREGON CONSUMERS AND CAUSE CONFUSION IN OUR COURTS 33

VI. CONCLUSION...38

APPENDIX 40

TABLE OF AUTHORITIES

Cases

Denson v. Ron Tonkin Gran Turismo, Inc.,
279 Or 85, 566 P2d 1177 (1977) 24, 25, 33

Friedman v. Rogers,
440 US 1, 99 S Ct 887, 59 L Ed 2d 100 (1979) 32

Gordon v. Rosenblum,
361 Or 352, 393 P3d 1122 (2017) 11

Halperin v. Pitts,
352 Or 482, 287 P3d 1069 (2012) 11, 14

Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.,
456 US 844, 102 S Ct 2182, 72 L Ed 2d 606 (1982) 25, 26

Johnson & Johnson,
275 Or App 23, 362 P3d 1197 (2015), *rev den*, 358 Or 611 (2016) 3

Pearson v. Philip Morris, Inc.,
358 Or 88, 361 P3d 3 (2015) 4, 16, 17, 18, 19, 33, 34, 35, 36

PGE v. Bureau of Labor and Industries,
317 Or 606, 859 P2d 1143 (1993) 6, 8, 10

Raudebaugh v. Action Pest Control, Inc.,
59 Or App 166, 650 P2d 1006 (1982) 20

Sanders v. Francis,
277 Or 593, 561 P2d 1003 (1977) 19

Searcy v. Bend Garage Co.,
286 Or 11, 592 P2d 558 (1979) 6, 10, 14, 15, 16

State v. Cloutier,
351 Or 68, 261 P3d 1234 (2011) 14

State ex rel. Redden v. Disc. Fabrics, Inc.,
289 Or 375, 615 P2d 1034 (1980) 18, 19, 31

State ex rel. Rosenblum v. Living Essentials, LLC,
313 Or App 176, 497 P3d 730 (2021) ....passim

State v. Gaines,
346 Or 160, 206 P3d 1042 (2009) 1, 8, 14, 20, 21, 31

Twist Architecture & Design, Inc. v. Or. Board of Architect Examiners, 361 Or 507, 395 P3d 574 (2017) 32

Union Pac. R.R. Co. v. Bean,
167 Or 535, 119 P2d 575 (1941) 20

Walther v. SAIF Corp.,
312 Or 147, 817 P2d 292 (1991) 15

Weigel v. Ron Tonkin Chevrolet Co.,
298 Or 127, 690 P2d 488 (1984) 33

Wolverton v. Stanwood,
278 Or 709, 565 P2d 755 (1977) 18, 33

Younger v. Portland,
305 Or 346, 752 P2d 262 (1988) 20

Statutes

Lanham Act, 15 USC § 1125(a) 25, 26, 27
Or Laws 1971, ch 744, § 7 21
Or Laws 1971, ch 744, § 11 .... 21, 31
Or Laws 1971, ch 744, § 13 21
Or Laws 1977, ch 195, § 1 22
Or Laws 2009, ch 215, § 1 11
Or Laws 2009, ch 215, § 2 11
ORS 86.726 24
ORS 98.854(1) 25
ORS 128.801 to .898 12
ORS 128.871 12
ORS 174.010 .... 4, 6, 10, 11, 12, 17, 20, 31
ORS 180.486(d) 24
ORS 336.184(3)(a)(C) 24
ORS 646.551 to .557 13
ORS 646.553 12
ORS 646.557 .... 12, 13
ORS 646.605(9)(b) 11
ORS 646.605(11)(d) 11, 13
ORS 646.607(2) 24
ORS 646.607(6) 24
ORS 646.607(7) 24
ORS 646.607(9) 24
ORS 646.607(10) 24
ORS 646.607(11) 24
ORS 646.607(12) 11
ORS 646.608 .... passim
ORS 646.608(1) .... passim
ORS 646.608(1) (1971) 29, 30
ORS 646.608(1)(a)-(j) 26, 29
ORS 646.608(1)(a)-(r) 21
ORS 646.608(1)(b) .... passim
ORS 646.608(1)(e) .... passim
ORS 646.608(1)(f) 15
ORS 646.608(1)(g) 15, 29
ORS 646.608(1)(t) 10, 11, 12, 13, 16, 21, 22

ORS 646.608(1)(u)....12
ORS 646.608(1)(x)....24
ORS 646.608(1)(bbb)....13
ORS 646.608(1)(cc)....12
ORS 646.608(1)(dd)....12
ORS 646.608(1)(hh)....24
ORS 646.608(1)(ii)....12
ORS 646.608(1)(rr)....24
ORS 646.608(1)(vv)....24
ORS 646.608(1)(xx)....24
ORS 646.608(1)(ccc)....25
ORS 646.608(1)(ddd)....25
ORS 646.608(1)(ggg)....13
ORS 646.608(1)(hhh)....13
ORS 646.608(1)(jjj)....25
ORS 646.608(1)(LLL)....13
ORS 646.608(1)(mmm)....13
ORS 646.608(1)(qqq)....13
ORS 646.608(1)(ttt)....13
ORS 646.608(2)....15, 16
ORS 646.608(4)....12
ORS 646.632....2, 19, 21, 29, 31
ORS 646.642(3)....19, 31
ORS 646.638....21, 30
ORS 646.638(1)....17, 19, 21, 33, 34, 35
ORS 646.638(1) (1971)....26, 27, 29, 30, 31
ORS 646.648(3)(d)....13
ORS 646A.034....12
ORS 646A.360....24
ORS 646A.362....24
ORS 646A.365....25
ORS 646A.430 to .450....13
ORS 646A.448(1)(b)....13
ORS 646A.530(1)....25
ORS 646A.618....24
ORS 646A.800(2)....24
ORS 646A.808....24
Uniform Deceptive Trade Practices Act....passim
Unlawful Trade Practices Act, ORS 646.605, *et seq*....passim

Rules

OAR 137-020-0020....13
OAR 137-020-0050....13
OAR 137-020-0150....13
OAR 137-020-0201(4)....13
OAR 137-020-0250(3)....13
OAR 137-020-0805(3)....13

Other Authorities

54 Trademark Rep 897 (1964)....27, 28

HB 3171 (2021) 14
Richard F. Doyle, Jr., *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 Yale L J 485 (Jan. 1967) 28, 30
SB 208 (2021) 13
Subcommittee Notes, HB 3037 (1971)...25
Written Testimony, H Comm on Business and Consumer Affairs, SB 269, May 10, 1977, Ex. A 22, 40

I. INTRODUCTION

For the reasons that follow, *amicus curiae* Oregon Consumer Justice (OCJ) respectfully urges this Court to reverse the decision below, *State ex rel. Rosenblum v. Living Essentials, LLC*, 313 Or App 176, 497 P3d 730 (2021), and hold that no implied materiality element needs to be proved to establish that a defendant violated ORS 646.608(1)(b) or (1)(e) of Oregon's Unlawful Trade Practices Act (UTPA) (ORS 646.605, *et seq.*).

The Court of Appeals' erroneous and consequential holding that a plaintiff (whether the state or an individual consumer) must prove that a defendant's unlawful conduct would materially affect consumers' buying decisions—where this element does not exist in these provisions—is contrary to a plain reading of the text and context of the statutory provisions at issue. Although the Court need go no further, relevant legislative history of the UTPA also supports the lack of ambiguity in the text and context on this issue. *See State v. Gaines*, 346 Or 160, 173, 206 P3d 1042 (2009)("Legislative history may be used to confirm seemingly plain meaning and even to illuminate it [.]").

If allowed to stand, this erroneous holding by the Court of Appeals will significantly erode the primary remedial purpose of the UTPA to comprehensively protect Oregon consumers and to provide relief for harms caused by the broad range of unlawful conduct proscribed by the UTPA.

Violations of the statute will be significantly more difficult and costly to prove, which will allow supposedly "insignificant" falsehoods about a business's products or services to proliferate unabated, and will foster inequity, uncertainty, instability, and confusion—both in Oregon's marketplace and in our courts.

II. BACKGROUND

Plaintiff-Appellant, the State of Oregon, brought a complaint against defendants pursuant to its authority under ORS 646.632 (authorizing officials to bring action in the name of the state) alleging violations of the UTPA for false or misleading promotional claims about 5-hour ENERGY® (hereinafter "5-HE") products. *Living Essentials*, 313 Or App at 179. The state alleged claims under ORS 646.608(1)(e) and (1)(b).[1] Specifically, the state brought claims based on

---

[1] ORS 646.608(1)(b) and (e) provide that a person engages in an unlawful trade practice if, in the course of the person's business, vocation, or occupation, the person:

> "(b) [c]auses likelihood of confusion of or misunderstanding as to the source, sponsorship, approval, or certification of * * * goods or services; or
>
> "* * * * *
>
> "(e) [r]represents that * * * goods or services have * * * characteristics, ingredients, uses, benefits, quantities or qualities that the * * * goods or services do not have."

misrepresentations that 5-HE provided consumers with energy, alertness, and focus without jitteriness or crashing, and false representations that doctors endorsed 5-HE. *Id.* at 179-80.

Following a bench trial on these claims, the court rendered a verdict for defendants on all counts. *Id.* at 180-82. The trial court concluded that to prove defendants' unlawful practices under ORS 646.608(1)(b) (causing likelihood of confusion or misunderstanding) and ORS 646.608(1)(e) (misrepresentations about certain features), the state was required to prove that the unlawful practices were "material to consumer purchasing decisions." *Living Essentials* at 182 (relying on *Johnson & Johnson*, 275 Or App 23, 33-34, 362 P3d 1197 (2015), *rev den*, 358 Or 611 (2016)).

Erroneously believing the state was required to prove that the alleged misrepresentations about defendants' products were objectively "material to consumer purchasing decisions," the trial court then reframed this question to be whether the misrepresentations were "a significant factor in consumer purchasing decisions." *Id*. at 182-83. In answering this question in the negative—that the misrepresentations were not objectively "significant" enough—the court was persuaded by the opinion evidence defendants proffered about their own products showing that "most consumers were [defendants'] repeat customers who were satisfied with their experience with the product;

[and] that consumer buying was influenced by a multitude of factors, including product effectiveness, taste, convenience, and price." *Id*. at 183.

On appeal, the state assigned error to the trial court's conclusion that ORS 646.608(1)(b) and (e) require proof that defendants' trade practices materially influenced consumer decisions. *Living Essentials* at 183.

Despite first acknowledging that (1) a plain reading of ORS 646.608(1)(b) and (e)—as with many of ORS 646.608(1)'s prohibitions—shows there is no materiality element in those provisions, and (2) ORS 174.010 prohibits courts from inserting what has been omitted from a statute, the Court of Appeals nonetheless decided that a materiality requirement should be read into these provisions—and by extension all of ORS 646.608(1)—where it does not exist in the text.

The Court of Appeals incorrectly compared its insertion of an implied materiality requirement to this Court's explanation in *Pearson* that, in a private cause of action, reliance is one means of proving an ascertainable loss was caused by a defendant's UTPA violation. *Id.* at 186-87 (*citing Pearson v. Philip Morris, Inc.*, 358 Or 88, 124-27, 361 P3d 3 (2015)).

The Court of Appeals moved still farther away from the statutory text by looking to some of the UTPA's legislative history related to the Uniform Deceptive Trade Practices Act (UDTPA) and the Lanham Act, largely relying

on a law review article that, as discussed below, does not survive closer scrutiny, particularly in relation to Oregon's enactment.

Finally, the Court of Appeals raised the specter of a constitutional argument that defendants had made to the trial court, and concluded that the mere risk of unconstitutionality was sufficient to allow it to read the unwritten materiality requirement into ORS 646.608. In fact, the Court of Appeals implied it was "saving" ORS 646.608 from potential unconstitutionality, because "[w]ithout a materiality requirement, the effect of [ORS 646.608] would be to punish commercial speech that has no potential to mislead a reasonable consumer." *Living Essentials* at 194-96. The Court of Appeals failed to adequately explain how ORS 646.608(1)(b) or (e) could operate to punish speech without any potential to be misleading to Oregon consumers, where the subparagraphs expressly include such an impact as an element of the violation. *See, e.g.*, ORS 646.608(1)(b) ("[c]auses likelihood of confusion of or misunderstanding"); ORS 646.608(1)(e) (makes false representation as to characteristics of good or service).

III. SUMMARY OF ARGUMENT

A correct textual analysis of the UTPA provisions at issue indicates no express or implied legislative intent to include a "material to consumer purchasing decisions" element to prove that a defendant violated ORS

646.608(1)(b) or (e), or any of the other subsections of ORS 646.608(1) that plainly and intentionally do not include this element.

The Court of Appeals acknowledged, but then disregarded, the interpretive imperative to not insert what is omitted. ORS 174.010. By prematurely moving on from a proper textual analysis of the UTPA provisions at issue in favor of its implied legislative intent theory, the Court of Appeals also erred by ignoring the textual interpretation maxim that in assessing legislative intent it is presumed "[t]he legislature knows how to include qualifying language in a statute when it wants to do so." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 614, 859 P2d 1143 (1993). A correct application of these maxims to the UTPA provisions at issue in *Living Essentials* further indicates that they do not contain any implied materiality requirement.

Relatedly, as to context, the Court of Appeals dismissed as irrelevant a controlling and relevant decision by this Court holding that materiality is not required to prove a violation of ORS 646.608(1) when that element is absent in the text of the provision. *See Searcy v. Bend Garage Co.*, 286 Or 11, 592 P2d 558 (1979). *Searcy* controls as to this issue, was well reasoned, and invalidates the Court of Appeals' reasoning in *Living Essentials*. The Court of Appeals' application of this Court's *Pearson* decision where the need to show reliance (a

term not in the statutory text) to prove causation of loss in some private UTPA cases was a false equivalence that lends no support to the Court of Appeals' conclusion.

The legislative history confirms what the text and context show: the legislature knew what it was doing when it omitted any materiality requirement and that no such element was intended to be inserted by implication in ORS 646.608(1)(b) or (e), or any of the other subsections of ORS 646.608(1) that plainly and intentionally do not include a materiality element.

A closer look at the Court of Appeals' legislative history analysis in *Living Essentials* shows its reliance on a law review article that was short-sighted in its assessment. On the other hand, a more robust and relevant review of the legislative history supports the conclusion provided by the unambiguous text and the supporting context: no implied element of "materiality" to "consumer purchasing decisions" is required to be proved for claims under ORS 646.608(1)(b) and (e), or any other provision of the statute in which materiality has been plainly and intentionally omitted from the text by the legislature.

The Court of Appeals' reading of an implied materiality element into ORS 646.608(1) where it does not exist is inconsistent with a plain reading of the text and the context of the UTPA provisions at issue. Although there is no ambiguity from the textual and contextual assessment as to this conclusion, a

correct review of the legislative history also supports that there is no implied materiality element.

If allowed to stand, the *Living Essentials* decision will erode the legislative intent to provide a comprehensive statute to protect Oregon consumers by making it significantly more difficult and costly for consumers to obtain relief for harms caused by a business's unlawful conduct, encouraging a race to the bottom in the advertising marketplace, and fostering uncertainty in both the marketplace and in our courts.

Accordingly, this Court should reverse the opinion of the Court of Appeals and remand the case to the trial court by simply holding what is obvious and in line with its precedent: there is no implied materiality element in any of the subsections of ORS 646.608(1) where it plainly and intentionally does not exist.

IV. THE COURT OF APPEALS ERRED IN FINDING LEGISLATIVE INTENT TO IMPLYA MATERIALITY ELEMENT INTO PROVSIONS OF THE UTPA WHERE THIS ELEMENT CLEARLY AND INTENTIONALLY DOES NOT EXIST

Proper statutory interpretation begins with an examination of the text and the context of the statute. *Gaines*, 346 Or at 171 (*citing PGE*, 317 Or at 610-11). Text and context remain primary, and must be given primary weight. *Id*. at 171-72. The Court may also consider legislative history proffered to it after

examining text and context, even if the text and context are not ambiguous, especially when the proffered legislative history supports the lack of ambiguity confirmed by the text and context of the legislative history. *Id.* at 172. Then, only "[i]f the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.* Here, the text, context, and legislative history leave no room for ambiguity: the legislature did not intend, either expressly or impliedly, to include a materiality element in ORS 646.608(1)(b) or (e), or any other ORS 646.608(1) provision where such an element plainly and intentionally does not exist.

A. A Correct Interpretation of the Applicable Text and Context of the UTPA Indicates that the Applicable Provisions Unambiguously Do Not Contain a Materiality Requirement.

The text of ORS 646.608(1)(b) and (e) are clear and unambiguous—neither provision contains a materiality element that a plaintiff needs to prove to establish liability for a defendant's violations of those provisions, let alone an element requiring that the prohibited conduct be "material to consumer purchasing decisions." Nor is there any language in these provisions that could reasonably be interpreted to mean or imply a materiality requirement. As the Court of Appeals correctly acknowledged, neither of the relevant ORS 646.608 provisions "explicitly refers to practices that are 'material to consumer

purchasing decisions.'" *Living Essentials*, 313 Or App at 186. The Court of Appeals also professed to be "not unmindful" that courts are "'not to insert what has been omitted.'" *Id.* (*quoting* ORS 174.010). The court nevertheless embarked on a contradictory path of misguided context and legislative history analysis to do just that.

1. The legislature knows how to include a materiality element in a statute when it wants to do so.

"The legislature knows how to include qualifying language in a statute when it wants to do so." *PGE*, 317 Or at 614. As a correct reading of *Searcy* shows (*see infra*), the legislature knows how to insert a materiality element into the text of the UTPA when it wants to and feels such a limitation is prudent. The legislature did so when it included a materiality element in ORS 646.608(1)(t). At the time *Searcy* was published in 1979, the UTPA was in its infancy and ORS 646.608(1)(t) was the only subsection of that provision in which the legislature chose to include a materiality element. In the years since, as the marketplace to be regulated has evolved, the legislature made myriad amendments to the UTPA in order to effectuate its principal purpose as a remedial statute to comprehensively protect Oregon consumers by delineating specific prohibited conduct.

In addition to ORS 646.608(1)(t), the legislature intentionally chose to include materiality requirements in other specific provisions of the UTPA it has subsequently enacted,[2] but not to others, further demonstrating that the legislature knows how and when to require materiality—when that is its intent. *See also* ORS 174.010 ("where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all").[3]

A materiality requirement cannot be inserted by implication into ORS 646.608(1) (as the Court of Appeals did in *Living Essentials*) if all of the specific provisions of ORS 646.608(1) are to be given their specific, intended

---

[2] *See, e.g.*, ORS 646.605(9)(b) ("Unconscionable tactics" include actions by which a person "[k]nowingly permits a customer to enter into a transaction from which the customer will derive no material benefit"); ORS 646.605(11)(d) (a loan is made "in close connection with the sale of a manufactured dwelling" if "[t]he seller directly and materially assists the borrower in obtaining the loan"); ORS 646.607(12) (UTPA violation for a person to publish a statement regarding the person's use of a consumer's information and then to use the information "in a manner that is materially inconsistent" with the representation).

[3] Related statutes may be relevant even if enacted after the statutory provision at issue. *Gordon v. Rosenblum*, 361 Or 352, 365 n 4, 393 P3d 1122 (2017) ("ORS 646.605(9)(d) was enacted in 2009, 32 years after the first three examples. Or. Laws 2009, ch. 215, §§ 1, 2. It is still relevant to our analysis 'for the purposes of demonstrating consistency (or inconsistency) in word usage over time as indirect evidence' of the legislature's original intent. *Halperin v. Pitts*, 352 Or. 482, 490, 287 P.3d 1069 (2012).").

effects. *See* ORS 174.010. For example, as effectively ignored by the Court of Appeals, ORS 646.608(1)(t) expressly requires proof of a "known material defect or material nonconformity." Reading an implied materiality requirement into all of ORS 646.608's provisions (as the Court of Appeals did) would be duplicative of subsection (1)(t), which was adopted to regulate a specific type of conduct in the marketplace (defects) and has its own textual limitations that the legislature carefully and intentionally crafted, and would thus be contrary to the legislative intent as gathered from context. In addition, the legislature intentionally chose to include an express materiality element in other specific provisions of the UTPA, further demonstrating that the legislature knows how and when to require materiality—when that is its intent.[4] Indeed the legislature indirectly included express materiality requirements in no fewer than nine other ORS 646.608(1) subparts, by referencing statutes that contain a wide variety of specific materiality requirements.[5] ORS 646.608(1)(u) and (4) also empower

---

[4] *See,* note 3, *supra*.

[5] *See, e.g.*, ORS 646.608(1)(cc) (prohibits violations of ORS 646A.030 to .040, while ORS 646A.034 requires health spa contracts to provide for cancellation if the health spa materially changes the services promised in the initial contract), (dd) (prohibits violations of ORS 128.801 to .898, while ORS 128.871 permits the Attorney General to deny or revoke registration of charitable trusts for "material misrepresentation" in an application or for a "material violation" of ORS 128.801 to .898), (ii) (prohibits violations of ORS 646.553 or 646.557,

the Attorney General to proscribe "other unfair or deceptive conduct in trade or commerce" as UTPA violations by regulation, with seven such regulations containing express materiality requirements.[6]

Perhaps equally important evidence of legislative intent, the other 49 ORS 646.608(1) subparts that follow subsection (1)(t) expressly *do not* include a materiality requirement. And, if there remained any doubt that the legislature has acted, and continues to act, carefully and deliberately with respect to UTPA materiality requirements (and the absence thereof), HB 3171 (2021) and SB 208 (2021) propose to move ORS 646.605(11)(d)'s express materiality requirement into ORS 646.608(1)(bbb) by its incorporation of violations of ORS 646.648(3)(d).

---

while ORS 646.551(1)(b)(C)(ii) defines "[b]usiness opportunity" under ORS 646.551 to .557 with reference to "any material term or aspect of the franchise agreement"), (ggg) (prohibits violations of ORS 646A.430 to .450, while ORS 646A.448(1)(b) prohibits a vehicle protection product warranty from "[i]ntentionally omit[ting] a material statement that would be considered misleading if omitted"), (hhh), (LLL), (mmm), (qqq), (ttt).

[6] OAR 137-020-0805(3) (mortgage loan servicer may not "[m]isrepresent[] to a borrower any material information regarding a loan modification"); OAR 137-020-0201(4); OAR 137-020-0015 (materiality requirements related to "[f]ree" offers and "[r]ebate" offers); OAR 137-020-0250(3) (loan broker advertisements must disclose "[a]ny material restrictions regarding obtaining a loan"); OAR 137-020-0020; OAR 137-020-0050; OAR 137-020-0150.

This context shows that the Court of Appeals' insertion of an implied materiality element into ORS 646.608(1)(b) and (e) (and by extension all of the ORS 646.608(1) prohibitions), where it intentionally does not exist, destroys the legislative intent to purposefully not limit these provisions to only conduct that may be found "significant" enough to consumer purchasing decisions. Contrary to the reasoning of the Court of Appeals, this is not a commonsense limitation implied by the legislature—it is a dramatic limitation on these provisions that was intentionally not included by the legislature to allow the UTPA to provide comprehensive protection to Oregon consumers by covering a broad range of deceptive conduct in the marketplace.

2. This Court's decision in *Searcy* controls and was erroneously disregarded by the Court of Appeals.

As the first step to determine legislative intent when interpreting a statute, along with the text of the statute, a court must also consider the context of the statute. *Gaines*, 346 Or at 172. Context includes looking to provisions of the same or a related statute, as well as prior opinions interpreting the relevant statutory language. *Living Essentials*, 313 Or App at 184 (citing cases). Prior caselaw interpreting statutory text is an important consideration in analyzing statutory context. *Halperin v. Pitts*, 352 Or 482, 491, 287 P3d 1069 (2012) (*citing State v. Cloutier*, 351 Or 68, 100, 261 P3d 1234 (2011)). In fact, prior

interpretations of statutory text that are necessary to this Court's decisions become "part of the statute as if written into it at the time of enactment." *Walther v. SAIF Corp.*, 312 Or 147, 149, 817 P2d 292 (1991).

The Court of Appeals' holding in *Living Essentials* is irreconcilable with this Court's controlling opinion in *Searcy*, 286 Or at 16-17. The Court of Appeals misapplied *Searcy*, 286 Or at 16-17, when it discussed and dismissed the case as irrelevant in a footnote. *Living Essentials*, 313 Or App at 188 n. 7. The plaintiff in *Searcy* alleged that a car dealership violated two UTPA provisions, ORS 646.608(1)(f) ("[r]epresents that real estate or goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or second-hand") and ORS 646.608(1)(g) ("[r]epresents that real estate, goods or services are of a particular standard, quality, or grade, or that real estate or goods are of a particular style or model, if they are of another"), by selling as new a car that had been damaged while being driven 4,000 miles as a demonstrator vehicle. 286 Or at 14, 18. The defendant contended that an "instruction should have been given to indicate that a representation or failure to disclose had to involve a material fact." *Id.* at 16. Instead, the trial court gave an instruction taken directly from ORS 646.608(2)'s definition: "a representation may be any manifestation of any assertion by word or conduct, including but not limited to a failure to disclose a fact." *Id.* After noting that

"[m]any of the enumerated unlawful trade practices involve representations" and citing, among others, one of the subparts at issue in this action (ORS 646.608(1)(e)), this Court rejected the defendant's materiality requirement because "in the section defining 'representation' the legislature did not require that a concealed fact be material." *Id.* at 17.

In this case, the Court of Appeals reasoned that "*Searcy* did not purport to interpret the elements of a claim under any of those paragraphs; its holding was limited to the definition of the term 'representation' under ORS 646.608(2) and does not otherwise inform our analysis." 313 Or App at 188 n 7. However, *Searcy* necessarily rejected any unwritten materiality requirement for the ORS 646.608(1) subparts involving representations, other than ORS 646.608(1)(t). That this Court correctly rejected that argument based on ORS 646.608(2) does not prevent *Searcy* from being direct and controlling authority for this case. *Cf. Living Essentials* at 197 ("An allegation that an unlawful practice * * * involves misrepresentation * * * requires proof that the unlawful practice is one that would materially affect consumers' buying decisions.").

3. The Court of Appeals' reliance on *Pearson* to support its conclusion was misplaced.

The Court of Appeals also employed a false equivalence when it compared its implied materiality theory with this Court's decision in *Pearson*.

The Court of Appeals used the *Pearson* Court's explanation about the need for reliance to establish ascertainable loss in certain private actions under ORS 646.638(1) as justification to avoid ORS 174.010's dictate not to insert what is omitted. This was in error. In *Pearson*, this Court explained that "[a]lthough reliance is not, in and of itself, an element of a UTPA claim, it is a natural theory to establish the causation of the loss (*i.e.*, the 'injury' in a UTPA claim) for a purchaser seeking a refund based on having purchased a product believing it had a represented characteristic that it did not have."[7] 358 Or at 126. This Court's holding in *Pearson* that reliance was *not an element* of a UTPA claim, but rather a natural *theory* to prove causation of the ascertainable loss element in *some* cases in a private cause of action under ORS 646.638(1), is not akin to the Court of Appeals' reading a non-existent materiality element into all of the

---

[7] The *Pearson* concurrence further clarified that although evidence of a plaintiff's subjective reliance on a defendant's misrepresentations (they would not have chosen to purchase the product but for the misrepresentations) is necessary when their ascertainable loss causational theory is a "refund of the purchase price." Reliance on a defendant's misrepresentations (including the subjective reasons for the plaintiff's purchasing decision) is not necessary to prove causation under a "diminished value" loss theory because, *inter alia*, ORS 646.638(1) "does not require that a consumer's *purchase* be the 'result of' an unlawful trade practice; it requires that a consumer's ascertainable *loss* be the 'result of' an unlawful trade practice." *Pearson*, 358 Or at 144 (Walters, J., concurring) (emphases in original).

ORS 646.608(1) subsections. Rather, the Court of Appeals holding would require this additional new element must then be proven by every plaintiff seeking relief from the unlawful conduct proscribed by these subsections. The Court of Appeals' holding is a dramatic and impermissible rewriting of the statute, inserting what is not there, and in no way supported by the Court's reasoning in *Pearson*.

4. This Court has recognized that the implied inclusion of elements of common law fraud into the UTPA where they do not exist is contrary to legislative intent.

"The elements of common law fraud are distinct and separate from the elements of a cause of action under the Unlawful Trade Practice Act and a violation of the Act is much more easily shown." *Wolverton v. Stanwood*, 278 Or 709, 713, 565 P2d 755 (1977). The elements of common law fraud are:

> "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the [h]earer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury."

State ex rel. Redden v. Disc. Fabrics, Inc., 289 Or 375, 384, 615 P2d 1034 (1980). "A review of the UTPA reveals that not all of these elements are required in order to recover under the act. For example, the element of reliance

is notably different." *Id.* (describing *Sanders v. Francis*, 277 Or 593, 598-99, 561 P2d 1003 (1977), as holding that "whether reliance was a necessary element depended upon the type of violation alleged and that reliance was not required in nondisclosure cases"); *id.* ("the element of scienter as required in an action for common law fraud is not required by the UTPA").

Significantly, *Redden* went on to state that, "[i]n any event, no such requirement that a loss be the 'result' of wilful conduct exists when, as in this case, suit is brought by the state under ORS 646.632 and when a civil penalty is sought under ORS 646.642(3)." *Id.* The Court of Appeals' opinion here would nonetheless impose an even more onerous (objective) reliance requirement on the state, "requir[ing] proof that the unlawful practice is one that would materially affect consumers' buying decisions." *Living Essentials*, 313 Or App at 197.

The Court of Appeals' implied materiality requirement is indistinguishable in effect from the reliance requirement this Court rejected in *Redden*. *Cf. Pearson*, 358 Or at 143-44 (Walters, J., concurring) ("The UTPA does not require that a consumer's *purchase* be the 'result of' an unlawful trade practice [subjective reliance]; it requires that a consumer's ascertainable *loss* be the 'result of' an unlawful trade practice." (emphases in original)).

And while not binding,[8] the Court of Appeals' decision in *Living Essentials* was flatly inconsistent with its own prior opinion refusing to add common law fraud elements to the UTPA:

> "When the legislature enacted the UTPA, it specifically provided in ORS 646.608(1) and (2) the type of representations that are covered by the law. We have no authority to add to those requirements by inserting requirements of the common law. In construing a statute, courts must ascertain and declare what is, in terms or in substance, contained therein and cannot insert what has been omitted or omit what has been inserted. ORS 174.010. *Union Pac. R.R. Co. v. Bean*, 167 Or. 535, 119 P.2d 575 (1941)."

Raudebaugh v. Action Pest Control, Inc., 59 Or App 166, 171-72, 650 P2d 1006 (1982) (footnote omitted).

As it has done consistently in the past, this Court should reject the Court of Appeals' attempt in *Living Essentials* to add elements of common law fraud to parts of the UTPA where the legislature intentionally chose not to do so.

B. Legislative History

The Court may look to legislative history to decipher legislative intent, without having to identify any ambiguity in the text of the statute. *Gaines*, 346 Or at 172. Text and context are primary. *Id.* at 171. However, legislative history

---

[8] *Younger v. Portland*, 305 Or 346, 350 n 5, 752 P2d 262 (1988) (prior constructions by Court of Appeals "not binding on [the supreme court] or the Court of Appeals, unless the Court of Appeals chooses to be bound by them").

can be used to confirm even the apparent plain meaning. *See id.* at 172 n 8. Here, the legislative history is instructive.

1. Accurate legislative history of the UTPA

The list of violations in ORS 646.608(1)(a)-(r) became a part of the UTPA with the 1971 amendment. Or Laws 1971, ch 744, § 7. That amendment also first introduced the Attorney General's power to bring an action under ORS 646.632, as well as a private right of action under ORS 646.638. Or Laws 1971, ch 744, §§ 11, 13. Nowhere in the legislative records of that amendment is there any mention of an intent to include a materiality requirement in ORS 646.608(1)(a)-(r).[9] In fact, the 1977 amendment to the UTPA suggests that the legislature purposely intended to omit a materiality requirement in ORS 646.608(1).

As noted above, one of the violations of ORS 646.608(1) that contains a materiality requirement is found in ORS 646.608(1)(t), which was included in the 1977 amendment to the UTPA. It declares a practice unlawful if: "Concurrent with tender or delivery of any real estate, goods or services fails to

---

[9] Except under ORS 646.638(1), addressed in more detail *infra*, "[a]ny person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property real or personal, as a result of the wilful [violation of the UTPA] may bring an individual action * * *."

disclose any known *material* defect or *material* nonconformity." Or Laws 1977, ch 195, § 1 (emphases added). In his memorandum submitted to the House Committee on Business and Consumer Affairs on May 10, 1977, Paul Romain, the Chief Counsel of the Consumer Protection Division of the DOJ, provided reasoning and history for why the word "material" was included in the bill:

> "The next important part of the Bill is found in paragraph (t) of subsection (1) of section 2, dealing with failure to disclose any known material defect or material nonconformity. The area that this paragraph will most likely affect is used automobile defects to allow a buyer to purchase something with as much information about that product as possible. *The original Bill had, as an unlawful practice, the failure to disclose any defect. We later decided that this was too strong and too unfair a burden to place on the merchant sales*."

Written Testimony, H Comm on Business and Consumer Affairs, SB 269, May 10, 1977, Ex. A (attached hereto in App. p. 2-3) (emphasis added).

In other words, when the legislature enacted ORS 646.608 it understood that if the word "material" was not included in the statute, it would not be a requirement to establish a violation of ORS 646.608. When the legislature subsequently enacted ORS 646.608(1)(t), it purposely inserted the word "material" knowing that the absence of that word would mean materiality was not otherwise required to establish a violation of ORS 646.608. This demonstrates that the Court of Appeals erred when it concluded that the

legislature intended to include a materiality requirement for violations of ORS 646.608, when it purposefully did not include this element; and the Court of Appeals' conclusion goes against the intent of the legislature.

2. The Court of Appeals' inaccurate legislative history

The Court of Appeals provided its own legislative history in an attempt to explain its decision to insert the materiality requirement into ORS 646.608(1)(b) and (e). Following the court's reasoning further reveals its misinterpretation of the UTPA's legislative history.

The Court of Appeals' interpretation of ORS 646.608 as impliedly requiring a materiality element is contrary to the legislative purpose to provide expansive protection for Oregon consumers. The court recognized this interpretive imperative: "Oregon's UTPA * * * was enacted as a comprehensive statute for the protection of consumers from unlawful trade practices." *Living Essentials*, 313 Or App at 185. Regardless, the appellate court applied its own incomplete pronouncement of the overall legislative purpose: "UTPA and cases * * * recognize that the UTPA is intended to protect consumers *in their purchasing decisions*." *Id.* at 194 (emphasis added). The court concluded that immaterial misrepresentations are not actionable because they do not fulfill their incorrectly narrowed purpose of protecting only purchasing decisions, ultimately holding that an allegation involving likelihood of confusion or a

misrepresentation "requires proof that the unlawful practice is one that would materially affect consumers' buying decisions." *Id.* at 197.

The court's error was in applying the purpose of the UTPA too narrowly to exclude all claims that do not materially affect the consumer's purchasing decisions. In fact, the "legislative history of the Oregon Unlawful Trade Practices Act supports the view that it is to be *interpreted liberally* as a protection to consumers." *Denson v. Ron Tonkin Gran Turismo, Inc.*, 279 Or 85, 90 n.4, 566 P2d 1177 (1977) (emphasis added).

Protecting consumers in their purchasing decisions is *one* purpose of the UTPA, but it cannot be said that it is the *only* purpose. If this Court were to adopt the Court of Appeals' narrow interpretation, it would invalidate multiple provisions of the UTPA that do not have any effect on consumers' purchasing decisions.[10]

---

[10] *See, e.g.,* ORS 646.607(2) (failing to give refunds for undelivered goods); ORS 646.607(6) (unlawful debt collection); ORS 646.607(7), ORS 86.726 (foreclosing on residential trust deed); ORS 646.607(9), ORS 646A.618 (credit freeze from data breach); ORS 646.607(10), ORS 646A.808 (soliciting personal information); ORS 646.607(11), ORS 336.184(3)(a)(C) (illegally gathering student information); ORS 646.608(1)(x) (manufacturing mercury fever thermometers); ORS 646.608(1)(hh), ORS 646A.360 (unsolicited fax); ORS 646.608(1)(rr), ORS 646A.800(2) (late fee for cable service may not exceed $6); ORS 646.608(1)(vv), ORS 646A.362 (opting out of sweepstakes promotion); ORS 646.608(1)(xx), ORS 180.486(d) (giving free samples of

3. Court of Appeals' error in looking to UDTPA and Lanham Act's legislative history

The Court of Appeals began its legislative history analysis by looking at *Denson*. The *Denson* court showed that the enumerated violations of ORS 646.608 were derived from the UDTPA, but it found that interpretations of the UDTPA "are of limited value in discerning the legislative intent behind the [UTPA]" because the "policy underpinnings of [the UTPA] (protection of consumers) differ somewhat from the Uniform Act (protection of businesses)." *Id.* at 90 n 4. The Court of Appeals recognized that the UDTPA's legislative history was of limited value in interpreting the UTPA but proceeded to rely on it nevertheless. It then went a step further and looked to the source of the UDTPA, the Lanham Act, 15 USC § 1125(a). Like the UDTPA, the Lanham Act is a trademark statute intended to protect businesses from unfair competition, as opposed to the UTPA, which is intended to protect consumers. *Compare* Subcommittee Notes, HB 3037 (1971) ("The bill is aimed at protecting individual consumers and is not designed to particularly aid commercial purchasers."), *with Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 US

---

smokeless tobacco to minors); ORS 646.608(1)(ccc), ORS 646A.365 (requesting consumer to deposit a check for a portion of the check amount); ORS 646.608(1)(ddd), ORS 98.854(1) (towing company may not tow a vehicle without a clear and conspicuous sign); ORS 646.608(1)(jjj), ORS 646A.530(1) (selling recalled children's products).

844, 861, 102 S Ct 2182, 72 L Ed 2d 606 (1982) ("the purpose of the Lanham Act was to codify and unify the common law of unfair competition and trademark protection"). Because the trademark statutes serve a purpose distinct from that of the UTPA, the Court of Appeals should not have relied on UDTPA and the Lanham Act for guidance in interpreting the UTPA.

4. The UDTPA and the Lanham Act support no implied materiality requirement in ORS 646.608.

Even assuming *arguendo* that it was proper for the Court of Appeals to look to the Lanham Act, it leads to the same conclusion that the drafters of the UTPA did *not* intend to impose a materiality requirement onto ORS 646.608, because the legislature modified the prior materiality requirements into "ascertainable loss" under ORS 646.638(1). The Court of Appeals' reasoning was as follows:

(1) ORS 646.608(1)(a)-(j) adopted its language from the UDTPA, which is analogous to the Lanham Act. *Living Essentials*, 313 Or App at 191-92.

(2) The Lanham Act requires a showing of "likelihood of damage," which can only be achieved by showing that the deception is likely to make a difference in the purchasing decision—i.e., is material. *Id.* at 193 n.15 (emphasis omitted).

(3) The UDTPA has no such "likelihood of damage" requirement in the language of the statute, but such requirement can be inferred from the Lanham Act. *Id.* at 193.

(4) Therefore, the court can likewise infer the "likelihood of damage" requirement into the UTPA. *Id.* at 194.

The court's reasoning fails because the UDTPA actually does contain the same "likelihood of damage" language as the Lanham Act, and therefore there is no need to infer it into the UDTPA. *See* 54 Trademark Rep 897, 903 (1964). The UTPA adopted the "likelihood of damage" requirement and modified it to become "ascertainable loss," and inserted it into ORS 646.638(1).

The appellate court's reached their erroneous conclusion by relying on a law review article that suggests the UDTPA did not adopt the "likelihood of damage" language from the Lanham Act, while still intending to apply that meaning:

> "As one commentator has noted, despite the *unqualified language* of the false advertising sections of the UDTPA decisions under analogous § 43(a) of the federal Lanham Trademark Act suggest that a person who invokes these false advertising provisions will have to show that the defendant's advertisement is a false representation of "fact," that it actually deceives or has the tendency to deceive a substantial segment of its audience, *that the deception is likely to make a difference in the purchasing decision*, and that

> the particular plaintiff has been, or is likely to be injured by the deception."

Living Essentials, 313 Or App at 193 (first emphasis added) (*quoting* Richard F. Doyle, Jr., *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 Yale L J 485, 489 (Jan. 1967)). Looking at the actual text of the UDTPA, it is apparent that Professor Doyle simply failed to read the UDTPA thoroughly. Section 2 of the UDTPA lists the violations, including the ones alleged in this case:

> "(a) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:
>
> "* * * * *
>
> "(2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services; [or]
>
> "* * * * *
>
> "(7) represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another[.]"

54 Trademark Rep at 899-901. The UDTPA then provides a separate "remedies" section (section 3), which requires "likelihood of damage," eliminating the need to infer it in section 2:

> "(a) A person *likely to be damaged* by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of

> monetary damage, loss of profits, or intent to deceive is not required. Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source."

Id. at 903 (emphasis added).

Turning now to the UTPA, it is apparent that the UTPA not only adopted its violation section from the UDTPA (ORS 646.608(1)(a)-(j)), but also adopted UDTPA's format by placing its remedies in a separate section. *Compare UDPTA section 3 with UTPA sections 632 and 638.* The 1971 version of the UTPA provided the following in its violations section:

> "(1) A person engages in a practice hereby declared to be unlawful when in the course of his business, vocation or occupation he:
>
> "* * * * *
>
> "(b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services.
>
> "* * * * *
>
> "(g) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if the real estate, goods or services are of another."

ORS 646.608(1) (1971). Then it provided the following in its remedies section:

> "Any person who purchases or leases goods or services *and thereby suffers any ascertainable loss of money or property* real or personal, as a result of the wilful use

> or employment by another person of a method, act, or practice declared unlawful by ORS 646.608, may bring an individual action in an appropriate court to recover actual damages or $200, whichever is greater. The court or the jury, as the case may be, may award punitive damages and the court may provide such equitable relief as it deems necessary or proper."

ORS 646.638(1) (1971) (emphasis added).

It was erroneous for Professor Doyle to read the "likelihood of damage" into the violation section of the UDTPA, because the drafters of the UDTPA did consider such requirement, and decided to include that language in the remedies section (section 3) of the UDTPA. Likewise, the Court of Appeals made the same error in reading "likelihood of damage" in to the UTPA, because the drafters of the UTPA adopted the UDTPA's formatting, and included a modified version of the "likelihood of damage" requirement (i.e., suffering ascertainable loss) in the remedies section of the UTPA, ORS 646.638(1).

Upon reviewing the actual legislative history of the UTPA, it is clear that the drafters knew about the "likelihood of damage" requirement in the UDTPA, followed its formatting, and decided to revise and insert the "likelihood of damage" language in the remedies section of the UTPA—ORS 646.638. In doing so, it also made the following revisions. First, instead of "likelihood of damage," a plaintiff in a UTPA claim must prove that plaintiff *did* suffer ascertainable loss as a result of the enumerated violations. ORS 646.638(1).

Second, showing of ascertainable loss arising from the UTPA violation is only required in a private right of action. In the same 1971 amendment to the UTPA, the legislature incorporated the state's right of action, which did not include any "ascertainable loss" or "likelihood of damage" requirement. *See* Or Laws 1971, ch 744, § 11; *Redden*, 289 Or at 384 ("no such requirement that a loss be the 'result' of wilful conduct exists when, as in this case, suit is brought by the state under ORS 646.632 and when a civil penalty is sought under ORS 646.642(3)"). Therefore, inserting a "materiality" requirement to ORS 646.608, when the legislative history suggests it has already been considered and dealt with, was inappropriate, and tantamount to "inserting what has been omitted" in violation of ORS 174.010.

C. It Is Not Necessary to Look Beyond the Legislative History.

"If the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Gaines*, 346 Or at 164-65. There is no remaining uncertainty. There is no implied materiality element in ORS 646.608. Thus, the Court of Appeals' analysis of statutory canons, particularly that as to the specter of potential unconstitutionality, was unwarranted.

The Court of Appeals' fleeting yet dispositive use of the constitutional issue canon, without actually engaging in the complete constitutional analysis, improperly overrides the legislature's intent based only on a attenuated fear that the UTPA could somehow unconstitutionally "punish commercial speech that has no potential to mislead a reasonable consumer." *Living Essentials*, 313 Or App at 196. This statement was in error, as there must be a potentially confusing or misleading, or in fact false, statement in order for the deceptive practice to be subject to the UTPA under ORS 646.608(1)(b) or (e).

Furthermore, if a statement has the potential to mislead Oregon consumers, it is actionable and not protected speech. *See Twist Architecture & Design, Inc. v. Or. Board of Architect Examiners*, 361 Or 507, 523, 395 P3d 574 (2017) (finding that speech with the chance of misleading Oregon consumers is not constitutionally protected speech); *Friedman v. Rogers*, 440 US 1, 9, 99 S Ct 887, 59 L Ed 2d 100 (1979) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

Thus, the constitutional challenge is properly denied, and implied materiality is not necessary to save ORS 646.608 from even potential constitutional concern.

V. IF ALLOWED TO STAND, *LIVING ESSENTIALS* WILL DENY RELIEF TO MANY OREGON CONSUMERS AND CAUSE CONFUSION IN OUR COURTS.

The UTPA must be construed liberally to effectuate the legislative intent that it be a comprehensive statute that protects all Oregon consumers from unlawful trade practices. *Pearson*, 358 Or at 115; *Denson*, 279 Or at 90 n.4. The UTPA's private cause of action provision is "designed to encourage private enforcement of the prescribed standards of trade and commerce in aid of the act's public policies as much as to provide relief to the injured party." *Weigel v. Ron Tonkin Chevrolet Co.*, 298 Or 127, 134, 690 P2d 488 (1984). This Court has also explained that "the elements of common law fraud are distinct and separate from the elements of a cause of action under the [UTPA] and a violation of the [UTPA] is much more easily shown." *Wolverton*, 278 Or at 713.

Living Essentials' broad holding demanding that every plaintiff—whether the state or an individual Oregon consumer—must now additionally prove that a business's unlawful conduct is objectively "material to consumer purchasing decisions" violates these principles by making it significantly more difficult and costly for a consumer to plead, prove, and obtain relief for the harm they suffered as a result of a defendant's violations of ORS 646.608(1).

Justice Walters' *Pearson* concurrence explained what a private plaintiff must show to establish ORS 646.638(1)'s ascertainable loss of money or property element. Justice Walters highlights how having to prove *Living Essentials*' objective materiality element will deny many individual consumers relief by making a UTPA violation much more difficult to prove. The *Pearson* concurrence also shows the discord and absurdity of requiring a private plaintiff to prove two incongruous elements in the same case.

Explaining ascertainable loss in the form of a "refund of the purchase price," now Chief Justice Walters explained that a plaintiff "who can show that he or she would not have purchased a product but for the seller's misrepresentations about that product, may seek return of the money paid for the product irrespective of its market value." *Pearson*, 358 Or at 142-43 (Walters, J., concurring). This illustrates one way a plaintiff can prove an ascertainable loss as required by ORS 646.608(1) under a purchase price refund theory—that the alleged misrepresentations were subjectively relevant to *their* purchasing decision. However, pursuant to *Living Essentials*' objective materiality requirement, this same plaintiff will still be denied a remedy unless they can also prove that enough *other* consumers also find the misrepresentations relevant to *their* purchasing decisions. Besides highlighting the different methods to prove these two materiality elements, one being

subjective (and requiring only the plaintiff's testimony) and one objective (requiring the testimony of many others), *Pearson* instructs that the significance of a defendant's lie is irrelevant if it is meaningful to just one Oregon consumer—the plaintiff—who declares that the lie is material to *their* purchasing decision. Conversely, *Living Essentials* instructs that a defendant's lie is irrelevant if it is immaterial to enough *other peoples'* purchasing decisions, and the fact that it was material to plaintiff is of no consequence. *Living Essentials*' holding will result in the denial of relief under the UTPA to many Oregon consumers who can show that, but for a defendant's deception about its products or services they would not have purchased them, but are unable to show that enough other consumers would feel the same.

The explanation of what is required (or more importantly what is not required) to prove "diminished value" loss in the *Pearson* concurrence further highlights the problems caused by having to prove both ORS 646.638(1)'s private ascertainable loss requirement and *Living Essentials*' objective materiality requirement. Unlike when establishing causation of a "refund" loss, a plaintiff need not prove a defendant's misrepresentations were relevant to their decision to purchase that product to prove a "diminished value" loss:

> "People buy products after weighing numerous characteristics, benefits, and qualities. They may make their final decisions based on more than one of a

> product's features, or they may not be able to articulate why, in the end, they laid their money down. But when people make purchases, they nevertheless expect to receive products that have all of the represented features, not only those features that were subjectively determinative in the purchasing decision. When a plaintiff establishes that he or she purchased a product that was not as represented and that he or she suffered diminished value as a result, the purchaser demonstrates ascertainable loss sufficient to permit a claim under the UTPA."

Id. at 144 (Walters, J., concurring).

As this passage makes clear, in these circumstances a plaintiff is not required to prove that misrepresentations about the product they purchased (*i.e.*, in violation of ORS 646.608(1)(e)) was in any way material to *their* decision to purchase that product, because indeed they were not. Yet according to *Living Essentials*, the plaintiff would nonetheless still have to prove that the misrepresentations about those same characteristics would be material and relevant enough to *other* consumers' decisions to purchase that product. Combining *Living Essentials*' requirement to prove objective materiality with what is required to prove diminished value loss *begs* the question*:* why should it matter if a defendant's misrepresentations would have influenced other consumers' purchasing decisions when it is irrelevant whether those same misrepresentations influenced the plaintiff's purchase? Diminished value loss in a diminished value case only requires proof that the plaintiff ended up with a

product that is worth less than what the defendant falsely represented it to be. If *Living Essentials* stands, this same plaintiff will be denied relief unless they can *also* prove that the defendant's misrepresentations are significant to other consumers' purchasing decisions—but not the plaintiff's own. Otherwise, the plaintiff will be denied a remedy despite suffering a loss recognized by the UTPA.

Beyond denying relief to many Oregon consumers by making it more difficult for a plaintiff to prove a UTPA violation, because *Living Essentials*' holding conflicts with this Court's UTPA precedent, it will also cause confusion in our courts. Further legal confusion will be caused by the vague standard supplied by the Court of Appeals in regard to what a plaintiff must prove. What exactly is "material" or "significant" to consumer purchasing decisions? Is a majority of consumers required say the misrepresentation would affect their decision? How many consumers is sufficient to make a fact objectively material to consumer purchasing decisions?

Requiring a plaintiff to prove this objective materiality element will have another chilling effect on consumers' ability to obtain relief for violations of the UTPA. Proving this additional implied materiality element will not only be more difficult for harmed Oregon consumers—it will be costly. The Court only need look to what occurred in the trial court below in *Living Essentials* for

confirmation of this reality. The reasons the trial court, as the fact finder, decided that the defendants' misrepresentations were not "a significant factor in consumer purchasing decisions" was because it was more persuaded by the defendants' expert evidence regarding their own customers' satisfaction and the reasons for their purchases than it was by the state's expert testimony. *Living Essentials*, 313 Or App at 182-83. Although the state's budget is certainly not unlimited, a typical Oregon consumer cannot afford to pay any experts or to commission surveys. Without the ability to gather sufficient evidence to satisfy their evidentiary burden to prove that the defendant's misrepresentations were a "significant factor in consumer purchasing decisions," consumers will not make it past summary judgment. The doors to the courthouse will effectively be closed to many Oregon consumers seeking relief for a defendant's violations of the UTPA, and the UTPA will no longer be a comprehensive statute that protects Oregon consumers from unlawful trade practices, as the legislature intended.

VI. CONCLUSION

For the foregoing reasons, OCJ urges this Court to reverse the courts below, hold that there is no implied "material to consumer purchasing

decisions" element in ORS 646.608, and remand this case to the trial court for further proceedings.

DATED this 24th day of January, 2022.

Respectfully submitted,

MERTENS LAW LLC

By: s/ Chris Mertens
By: Chris Mertens, OSB No. 092230
MERTENS LAW, LLC
4411 NE Tillamook St.
Portland, OR 97213
Tel: (503) 836-7673
Chris@MertensCSBLaw.com

Attorney for *Amicus Curiae* Oregon Consumer Justice

APPENDIX

Written Testimony, H Comm on Business and Consumer Affairs, SB 269, May 10, 1977, Ex. A

EXHIBIT A
5-11-77
SB 269 5 pages
Business & Consumer
Affairs Committee

DEPARTMENT OF JUSTICE

Memorandum

TO: House Committee on Business and Consumer Affairs

DATE: May 10, 1977

FROM: Paul Romain, Chief Counsel
Consumer Protection Division

SUBJECT: Senate Bill 269

Senate Bill 269, which passed the Senate 26-1, is the combined agreed-upon work product of business and consumer interests. All who worked on the Bill feel that it is a good, workable compromise.

The major portion of the Bill amends the Unlawful Trade Practices Act. The following are highlights of those amendments:

1. The initial substantive change in the Unlawful Trade Practices Act is found in subsection (1) of section 1 of Senate Bill 269. The definition of "trade and commerce" is amended to include rentals and leasings of property. We believe that the intent of the original legislation on consumer protection in 1971 was to cover all forms of distributions of property and services. Early in 1976, the Court of Appeals, in Haegar v. Johnson, narrowly construed the Unlawful Trade Practices Act. If a court receives the question of whether or not rentals are covered under the present law, there is a good chance that with a strict interpretation, rentals and leasings will not be covered. A large amount of consumer complaints deal with leasings, particularly in the automobile and furniture area.

   It is important to point out that this rental and leasing

section does not include commercial leasing. The law, according to the Haegar case, covers only personal, family and household goods, services and real estate. The law also does not include all things covered under the residential landlord-tenant law. Subsection (7) of section 1 provides that anything covered by the residential landlord-tenants law is excluded. There is landlord-tenant law already on the books, and since the Consumer Protection Division of the Department of Justice normally does not act in the area of residential landlord-tenant, extension of jurisdiction over residential landlord-tenant is not needed at this time.

2. The next major amendment comes in paragraph (s) of subsection (1) of section 2 of the Bill. This paragraph makes clear the the Unlawful Trade Practices Act covers statements concerning the offering price or costs of goods, real estate and services. The Consumer Protection Division might already have jurisdiction over this area but, with Haegar case, it is possible that strict construction would strike this jurisdiction. Since the area is the hub of consumer protection, we want to ensure that the Division has coverage over this most important element.

3. The next important part of the Bill is found in paragraph (t) of subsection (1) of section 2, dealing with failure to disclose any known material defect or material nonconformity. The area that this paragraph will most likely affect is used automobile sales. It is a good idea to require disclosure of material

defects to allow a buyer to purchase something with as much information about that product as possible. The original Bill had, as an unlawful practice, the failure to disclose any defect. We later decided that this was too strong and too unfair a burden to place on the merchant.

4. The newest concept in the Unlawful Trade Practices Act is found in section 4. This involves unconscionable tactics. The term "unconscionable tactics" is defined in section 1 of the Bill. Because the term is so new, and because we do not know how it will work, we decided to place enforcement of this section under the Consumer Protection Division only. That is why we have a separate section 4.

There are two means of enforcement of the Unlawful Trade Practices Act. The private right of action, which is seen in ORS 646.638, section 9 of this Bill, and enforcement by the public sector, or the Attorney General or District Attorneys. The private sector would not be able to enforce the unconscionable tactics section.

As defined, unconscionable tactics are those forms of fraudulent activity that cannot be placed into one of the neat and tightly construed unfair trade practitces defined in ORS 646.608.

5. The Consumer Protection Division of the Department of Justice felt that some merchants were being hounded by frivolous

lawsuits under the private action section, found in section 9 of this Bill. Under existing law, only the complainant is entitled to attorney fees, so bringing an action puts no burden on the complainant. Often it costs $300 to open a defense file, so the merchant often settles. Subsection (3) of ORS 646.638 is designed to give the merchant some clout if the action is frivolous. It will not discourage legitimate consumer suits, but will act as a disincentive to frivolous actions.

6. Subsection (2) of ORS 646.638 was added by the Senate in Senate Bill 218, and is repeated here for convenience.

7. Section 11, and specifically subsection (4) of that section, addresses the following problem:

Assume that a consumer goes into a merchant and buys a washer and dryer. The merchant then sells that paper or contract to a finance company. The finance company notifies the consumer that they now have the contract and, also, that the consumer can borrow more from the finance company if he so desires. The consumer then goes to the finance company to borrow more and comes out withe the entire obligation -- the washer, dryer and new loan -- on a loan.

What happens? All holder in due course protection that the consumer had on his washer and dryer end. Normally, if the washer and dryer break, the consumer can stop paying to the

merchant. The merchant, in selling the product, says that this washer and dryer will work, and the consumer's obligation to pay is conditioned upon those items working. If the merchant sells the contract to a finance company, the consumer can also stop paying money to the finance company. But, if the holder, or finance company, converts or flips the contracts into a loan situation, the consumer's rights end. This section, subsection (4), extends those holder in due course rights to a situation where the holder converts sales contracts to a loan. It limits the rights to the length of time that the rights would exist if the contract were not converted to a loan.

The Bill is supported by business and consumer groups alike. It is a good, workable compromise, and I urge its passage.

mw

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 5.05. The word count of this brief is 9,556.

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and the footnotes.

DATED this 24th day of January, 2022.

MERTENS LAW LLC

By: s/ Chris Mertens

By: Chris Mertens, OSB No. 092230
MERTENS LAW, LLC
4411 NE Tillamook St.
Portland, OR 97213
Tel: (503) 836-7673
Chris@MertensCSBLaw.com

CERTIFICATE OF FILING AND SERVICE

I certify that on this date I e-filed the foregoing **BRIEF OF *AMICUS CURIAE* OREGON CONSUMER JUSTICE** and by doing so caused a true copy to be served electronically on

Rachel Lee, OSB No. 102944
STOEL RIVES LLP
760 SW Ninth Ave., Ste. 3000
Portland, OR 97205
Rachel.lee@stoel.com

Michael J. Sandmire, OSB No. 904410
BUCHALTER ATER WYNNE
1331 NW Lovejoy Ste. 900
Portland, OR 97209
msandmire@buchalter.com

Jona J. Maukonen, OSB No. 043540
Carson L. Whitehead, OSB No. 105404
OREGON DEPARTMENT OF JUSTICE
1162 Court St NE
Salem, Oregon 97301-4096
jona.j.maukonen@doj.state.or.us
carson.l.whitehead@doj.state.or.us

Nadia H. Dahab, OSB No. 125630
SUGERMAN DAHAB
707 SW Washington Street, Ste. 600
Portland, OR 97205
nadia@sugermandahab.com

DATED this 24th day of January, 2022.

MERTENS LAW LLC

By:s/ Chris Mertens
By: Chris Mertens, OSB 092230
MERTENS LAW, LLC
4411 NE Tillamook St
Portland, OR 97213
Chris@MertensCSBLaw.com