

FILED: February 17, 1999
IN THE COURT OF APPEALS OF THE STATE OF OREGON
PAUL R. BOCCI, JR., guardian ad
litem for Paul R. Bocci, III, an
incapacitated individual,
Plaintiff,

v.

KEY PHARMACEUTICALS, INC., a foreign
corporation, SCHERING-PLOUGH
CORPORATION, a foreign corporation, and
SCHERING CORPORATION, a foreign
corporation,
Defendants,
and

MILES, INC., an Indiana corporation,
MILES, INC., PHARMACEUTICAL DIVISION,
an Indiana corporation, LEGACY HEALTH SYSTEM,
an Oregon corporation, LEGACY IMMEDIATE CARE
CLINIC, FREDERICK D. EDWARDS, M.D.,
and THE EUGENE CLINIC, a partnership,
Defendants.

FREDERICK D. EDWARDS, M.D.,
Cross-Claim Plaintiff - Respondent,
v.

KEY PHARMACEUTICALS, INC., a foreign
corporation, SCHERING-PLOUGH
CORPORATION, a foreign corporation, and
SCHERING CORPORATION, a foreign
corporation,

Cross-Claim Defendants - Appellants.

(A9210-07050; CA A86556)

En Banc

Appeal from Circuit Court, Multnomah County.

William C. Snouffer, Judge.

Argued and submitted June 16, 1997; resubmitted en banc December 9,
1998.

William F. Gary argued the cause for appellants. With him on the briefs
were

Sharon A. Rudnick, James E. Mountain, Jr., and Harrang Long Gary
Rudnick,

P.C.

Mary Spillane argued the cause for respondent. On the brief were
Margaret A.

Sundberg, and Williams, Kastner & Gibbs LLP, and Daniel M. Holland,
Ronald

B.

Terzenbach and Loomis & Holland.

Before Deits, Chief Judge, Warren, Edmonds, Landau, Haselton, Armstrong
and

Wollheim, Judges, and Riggs, Judge pro tempore.

PER CURIAM

Affirmed by an equally divided court.

Riggs, J. pro tempore, concurring.

Edmonds, J., dissenting.

Landau, J., dissenting.

RIGGS, J. pro tempore, concurring.

Defendant Key Pharmaceuticals, Inc. (Key)(1) appeals from a jury verdict in favor of defendant/cross-claim plaintiff Dr. Frederick Edwards (Edwards), that awarded a total of \$23 million in compensatory and punitive damages.

Key manufactures the prescription drug Theo-Dur, an asthma medication containing theophylline. This action was brought on behalf of Paul Bocci, III (Bocci), a long-time user of Theo-Dur, against Key for negligence and strict products liability after he suffered permanent brain damage as a result of theophylline toxicity. A claim was also brought against Edwards for medical malpractice for failing to diagnose and treat Bocci for theophylline toxicity. Edwards cross-claimed against Key for negligence and fraud, alleging that Key failed to advise physicians appropriately concerning theophylline toxicity caused by Theo-Dur. At trial, Bocci's claim against Edwards was dismissed, and the jury returned verdicts in favor of Bocci and Edwards against Key. After trial, Key settled with Bocci.(2) Key appeals from the judgment in favor of Edwards.

Because Edwards prevailed by jury verdict below, we state the facts in the light most favorable to him. Baker v. English, 324 Or 585, 587, 932 P2d 57 (1997).

The drug theophylline is a bronchodilator that has been used to treat asthma for many decades. Theophylline has a narrow therapeutic range: In order to prevent asthma symptoms, the serum levels of the drug in the blood generally must be at least 10 micrograms per milliliter (mcg/ml), but serum levels above 20 mcg/ml can be toxic. Saturation kinetics play a part in the way in which this drug may be metabolized; when the level of the drug in the body increases but the liver's ability to metabolize it does not increase, or when the amount of the drug entering the body stays the same but the liver's ability to metabolize it decreases for some reason, saturation can occur. This causes the serum levels of theophylline in the blood to increase. The ability of a body to metabolize theophylline may be affected by many things, such as smoking or the presence of a virus. Interactions between theophylline

and other drugs may cause a body to metabolize theophylline at a slower rate, thus increasing the serum levels of theophylline in the blood and leading to theophylline toxicity. Theophylline toxicity can cause nausea, vomiting, headaches, diarrhea, tachycardia, seizures, and death. Before the 1970s, theophylline therapy was difficult because a great deal of monitoring and adjustment of dosage was necessary to keep stable the amount of the drug in a patient's blood at any given time. In the 1970s, Key introduced a new theophylline product, Theo-Dur, a timed-release capsule that it claimed had zero-order absorption. Zero-order absorption occurs when a drug is constantly absorbed by the system and eliminated at the same rate, thus keeping the serum levels of the drug in the blood stable. Key promoted Theo-Dur as being safer than other theophylline products; because of its zero-rate absorption, Key claimed, the risk of "toxic peaks" could be avoided. Key aggressively promoted Theo-Dur to physicians through sales representatives, journal advertising, and direct-mail campaigns. Promotional materials also urged patients, physicians and pharmacists not to accept generic or brand-name substitute theophylline products, as switching from Theo-Dur could cause "excessive toxicity." In 1987, the Food and Drug Administration (FDA) informed Key that it must cease claiming that Theo-Dur was superior to other theophylline products due to zero-order absorption, because the claim was not sufficiently supported by clinical data. In 1989, the FDA again found that Key was making false and misleading claims that Theo-Dur was superior to other theophylline products. In October 1987, Key became aware of several medical journal articles reporting a drug interaction causing theophylline toxicity when both theophylline and ciprofloxacin, a newly available antibiotic often used to treat respiratory tract infections common among asthmatics, were administered. A Key internal memorandum dated October 30, 1987, stated: "Ciprofloxacin produces a 30-113% decrease in theophylline clearance. These effects are significant enough to cause a patient that is stabilized on theophylline to potentially become toxic." In March 1988, Key proposed to the FDA that a warning be added to its Theo-Dur package insert concerning the interaction between theophylline and ciprofloxacin. Key's application for the

labeling change, however, was not submitted in proper form, and it was not until March 1989 that the labeling change was approved. The labeling change was not reflected in the 1990 volume of the Physician's Desk Reference (PDR), although it was included in a May 1990 PDR supplement. Information such as a warning about theophylline-ciprofloxacin interaction is generally imparted to the medical community by drug manufacturers through "Dear Doctor" and "Dear Pharmacist" letters or statograms, through promotional materials sent to physicians, or through representatives of pharmaceutical companies (detailers) who call on physicians. The Code of Federal Regulations (CFR) allows for distribution of such warnings to physicians before revised labeling is approved by the FDA. The CFRs also allow a pharmaceutical company to change its labeling without preauthorization from the FDA in order to add warnings, precautions, or information concerning adverse reactions. Between October 1987, when Key became aware of the theophylline-ciprofloxacin interaction, and Bocci's injury in October 1990, Key took no steps to inform physicians or patients of this potential toxicity problem, although it knew of several cases of serious toxicity and one death caused by the interaction of theophylline and ciprofloxacin. During this period, Key continued to promote Theo-Dur as the only theophylline product that "protects against toxicity." Bocci began taking Theo-Dur when he was seven years old. On October 21, 1990, when Bocci was 20 years old, he went to a medical clinic for treatment of a skin rash and was treated by Dr. Davis. Bocci indicated to Davis that he was not taking any medications, although he was taking 900 milligrams of Theo-Dur a day. Davis prescribed ciprofloxacin for the skin rash. Bocci took both ciprofloxacin and Theo-Dur from October 21 to October 26, 1990. On October 27, 1990, Bocci went to an urgent care clinic, The Eugene Clinic, with symptoms including nausea, vomiting and diarrhea. He was seen by Dr. Edwards. Edwards discovered that Bocci had been on a stable dose of Theo-Dur for a long time, and, although he considered a diagnosis of theophylline toxicity,

he did not diagnose that condition. Edwards did not consult the PDR or the PDR supplement. Edwards did not think that a patient on a stable dose of Theo-Dur could experience severe theophylline toxicity that could lead to brain damage unless the patient had taken an overdose, because Theo-Dur had been marketed and promoted to him as a "safe" drug. The detailer who had promoted the drug to Edwards and the Eugene Clinic in 1989 and 1990 testified that he would tell physicians that Theo-Dur had zero-order absorption and that it was safe. Edwards testified that he did not make a connection between a patient on a stable dose of a safe drug such as Theo-Dur and a serious toxicity problem. He therefore diagnosed gastroenteritis, treated Bocci with anti-nausea medication and intravenous fluids, and then sent him home. Several hours later, Bocci had violent seizures and was taken to a hospital emergency room. Anticonvulsant medications were administered but failed to control the seizures, and the physicians attending him had difficulty diagnosing the cause of the seizures. Late that evening, after learning that Bocci had been taking asthma medication, they tested for theophylline toxicity and discovered that Bocci's theophylline level was 63 mcg/ml, well into the toxic range. The theophylline was removed from Bocci's blood through dialysis and the seizures ceased. However, Bocci suffered permanent brain damage as a result of the seizures. A number of physicians testified about their knowledge and understanding of Theo-Dur as of October 1990, when Bocci sustained his injury. Those physicians did not know about the theophylline-ciprofloxacin interaction and did not know that patients stabilized on standard doses of Theo-Dur could experience toxicity problems causing severe seizures such as those experienced by Bocci. Those physicians did not know that blood levels of theophylline should be obtained on patients using theophylline products if the patients experienced nausea and vomiting. On Bocci's claims, the jury returned a verdict finding that Key was 65 percent at fault and Bocci was 35 percent at fault. On Edwards' cross-claims, the jury found that Key was negligent and that Key's negligence caused Edwards' damages and found that Key had made fraudulent misrepresentations to

Edwards that caused him damage. The jury further found that Key caused
100

percent of Edwards' damages. The jury also found clear and convincing
evidence that Key had acted with wanton disregard for the health and
safety

of others and had knowingly withheld from or misrepresented to the FDA
or

prescribing physicians information known to be material and relevant to
theophylline toxicity, in violation of applicable FDA regulations. The
court

entered a judgment in Bocci's favor including compensatory damages of
\$5,621,648.20(3) and punitive damages of \$35 million, and in Edwards'
favor

for compensatory damages of \$500,000 and \$22.5 million in punitive
damages.

On appeal, the only issues before us concern the verdict and damage
award in

Edwards' favor.

Mary Carter Agreement

A number of Key's assignments of error relate to a "Covenant
Not-to-Enforce-Judgment and Separate Loan Agreement" entered into by
Bocci,

Edwards, and Edwards' insurer. This type of agreement is commonly known
as a

"Mary Carter agreement," and we will use that term when discussing
it.(4)

Through this agreement, which contemplated a lawsuit by Bocci against
Edwards

and other defendants, Edwards guaranteed Bocci a minimum recovery of at
least

one million dollars and, at the same time, limited any recovery against
Edwards to one million dollars. The agreement contained the following
terms:

In consideration for \$200,000, Bocci agreed not to enforce any judgment
against Edwards based on the events of October 27, 1990; Edwards loaned
Bocci

an additional \$800,000, the repayment of which depended on Bocci's
recovery,

if any, from other defendants. In the event that Bocci recovered
against no

other defendants, no repayment of the loan was required. In the event
that

Bocci recovered an amount in excess of \$3 million from other
defendants,

full

repayment of the \$800,000 loan was required.(5) The existence of this
agreement was known to Key before trial.

As an initial matter, we note that most of Key's arguments pertaining
to the

Mary Carter agreement focus on whether Edwards' participation in the
case as

a defendant allowed Bocci an unfair procedural advantage. As noted, see
note

2, above, no issues relating to Bocci's recovery against Key are
currently

before this court, because Key settled with Bocci after the appeal was

commenced. After careful review of the briefs, however, we conclude that Key's arguments concerning the Mary Carter agreement remain viable on appeal because, if Key is correct, the procedural advantages that it has identified relating to the Mary Carter agreement might indirectly have benefitted Edwards in his cross-claim as well as benefiting Bocci in his claim. Although Key's primary argument was that the Mary Carter agreement provided Edwards a motive to maximize Bocci's recovery against Key, as discussed below, other advantages relating to the way the case was presented to the jury, the way witnesses were examined, and similar matters, could have benefitted Edwards as well as Bocci. Key asserts on appeal that the trial court erred in denying its pretrial motions concerning the Mary Carter agreement. Key argued in those motions that Edwards should be dismissed from the case because the agreement settled Bocci's claim against Edwards, or alternatively, that the agreement should be declared void or that Edwards should be realigned as a plaintiff rather than a defendant. On appeal, Key argues that the Mary Carter agreement should have been declared void, as a violation of public policy. In *Grillo v. Burke's Paint Co.*, 275 Or 421, 427, 551 P2d 449 (1976), the court rejected the notion that Mary Carter agreements are per se invalid under Oregon law. Moreover, ORS 18.455, which recognizes covenants not to enforce judgments, demonstrates that Mary Carter agreements do not violate the public policy of Oregon. The trial court did not err in denying Key's motion to declare the agreement void on the basis of public policy. Key next argues that Bocci's claim against Edwards should have been dismissed before trial on the ground that the Mary Carter agreement had fully settled those claims and, thus, no justiciable controversy existed between those parties. Key argues, in essence, that Bocci's claim against Edwards became moot when they entered into the Mary Carter agreement. We disagree. While the

agreement had the effect of limiting Edwards' liability for Bocci's injury to an amount between \$200,000 and one million dollars, it did not establish Edwards' liability. As the agreement itself states, one of its purposes was to permit Edwards to establish that he was not liable for Bocci's injury, while limiting his financial exposure and allowing him an opportunity to cross-claim against Key. A justiciable controversy exists when "the interests of the parties to the action are adverse," and "the court's decision in the matter will have some practical effect on the rights of the parties to the controversy." *Brumnett v. PSRB*, 315 Or 402, 405-06, 848 P2d 1194 (1993). Bocci's and Edwards' interests were sufficiently adverse to survive the first prong of that test: Bocci asserted that Edwards was negligent, and Edwards asserted that he was not negligent. How much Edwards would pay Bocci depended on whether, or to what extent, the jury determined Edwards to be negligent. That both Bocci and Edwards had an interest in establishing that Key was at fault does not destroy that adversity. A decision would have "some practical effect," in that it would determine whether Edwards would pay Bocci \$200,000, one million dollars, or some amount in between. That conclusion is consistent with our holding in *Stephens v. Bohlman*, 138 Or App 381, 909 P2d 208, rev den 324 Or 18 (1996). In *Stephens*, one of the defendants settled with the plaintiff for a flat sum, but agreed to remain in the case as a defendant. Distinguishing that kind of arrangement from a *Mary Carter* agreement, we concluded that no justiciable controversy existed between the plaintiff and the settling defendant because the settling defendant "had no interest in the outcome of the case against [the non-settling] defendant because it could neither gain nor lose anything as a result of the trial." *Id.* at 385. We distinguished the agreement in *Stephens* from the "true" *Mary Carter* agreement at issue in *Grillo*, noting that in *Grillo*, while "the settling defendant's interest in the case became adverse to that of the other defendant, the settling defendant clearly retained an

interest in the outcome" due to the repayment provisions of the agreement.

Id

. (emphasis added). This case involves a "true" Mary Carter agreement like the one at issue in Grillo, and not a settlement agreement of the type at issue in Stephens. The trial court properly denied Key's pretrial motion to dismiss Edwards as a defendant. The dissent's position--that no justiciable controversy existed between Bocci and Edwards after they entered into the agreement--is untenable. ___ Or App at ___ (Landau, J., dissenting slip op at ___). As an initial matter, neither defendants nor the dissent explain why the resolution of this question would justify overturning a verdict in Edwards' favor on an entirely different claim. In any event, were the dissent's analysis of this issue correct, it would lead to an inevitable conclusion that Grillo and Stephens were incorrectly decided. While the dissent narrowly frames the issue as whether the trial court in this case erred by failing to dismiss Edwards from the case, such a holding would have the much wider implication that no justiciable controversy ever exists between a plaintiff and a defendant who are parties to a Mary Carter agreement. Thus, if the dissent were correct, Mary Carter agreements would not be valid and enforceable under Oregon law, despite what we have said in Stephens, and despite what the Supreme Court has said in Grillo. In any case, any error in failing to dismiss Edwards as a defendant before trial was not prejudicial. Bocci's claim against Edwards was dismissed before the case was submitted to the jury, and Edwards would have remained a party in any event due to his claim against Key. Defendants offer no explanation of why the trial court's failure to dismiss Bocci's claim against Edwards would justify setting aside Edwards' verdict against Key, and we can think of none. See Stephens, 138 Or App at 386 (where settling defendant was dismissed before the case was submitted to the jury, error in failing to dismiss settling defendant before trial was harmless, given that the same evidence would have been admitted had that defendant been dismissed earlier).

Key argues alternatively that the trial court should have realigned Edwards as a plaintiff, citing authority from other jurisdictions. The gist of Key's argument is that Edwards' participation as a defendant created an unfair procedural advantage. Key notes that Edwards' testimony (unsurprisingly) indicated that Key's failure to warn, rather than Edwards' failure to diagnose, was the cause of Bocci's injuries, and further points out that Bocci's attorney did not cross-examine Edwards vigorously to try to establish that Edwards was negligent. Key implies that the jury was misled by this alignment of the parties, to Key's disadvantage. Key's arguments would be equally applicable to any case in which a plaintiff enters into a covenant not to enforce a judgment with a defendant who remains party to a lawsuit. ORS 18.455, however, specifically recognizes the validity and enforceability of such covenants(6) and does not preclude defendants who enter into such agreements with plaintiffs from participating as defendants in a lawsuit. As to Key's argument that the jury was likely to be misled if Edwards was not realigned as a plaintiff, we are unconvinced that juries are so naive as to assume that parties' interests in a civil case are defined solely by whether they are labeled "defendants" or "plaintiffs." Key had ample opportunity to--and in fact did--argue extensively to the jury about Edwards' and Bocci's mutual interest in verdicts against Key. Juries are regularly asked to make factual decisions concerning liability where numerous defendants are pointing fingers at each other in an effort to establish that they are not responsible for an injury. Juries are regularly asked to decide the merits of defendants' cross-claims against one another. Juries, when properly instructed, can assess the interests of the parties, whether those parties are labeled as plaintiffs or defendants. That conclusion brings us to Key's next assignment of error, that the trial court abused its discretion in its instructions to the jury concerning the Mary Carter agreement. The trial court gave the jury the following preliminary instruction regarding the Mary Carter agreement: "I do need to inform you that settlement agreement has been reached between

the plaintiff and Dr. Edwards. Dr. Edwards, nevertheless, remains a party to this lawsuit under the terms of the settlement agreement and he will be offering evidence that he was not negligent in his involvement in this case and he also has filed what we call a cross-claim. He is making a claim himself against Key Pharmaceuticals.

"The settlement agreement contains a schedule for repayment, however, to Dr. Edwards by the plaintiff if the plaintiff is awarded a verdict against the defendant Key Pharmaceuticals Company. So there is that relationship that you need to be aware of, but the jury that is selected in this case is to consider the fact of the settlement only as it might bear on the issue of credibility or believability of the witnesses who testify, and it is not to be considered in any way in determining the amount of the verdict or damages, if any, that the jury should award at the end of the case."

Key argues on appeal that the jury instruction should have informed the jury of the specific terms of the agreement, so that it could have pointed out to the jury the covert cooperation between Edwards and Bocci. In the trial court, however, Key argued that the statement that Edwards remained in the case to establish that he was not negligent was "absolutely ludicrous," that Edwards had no financial stake in the outcome of the case, and that the reason Edwards was a party was "so that his insurance carrier can recoup some of the money that they have agreed to pay towards the million dollar guarantee." (7) We consider only the arguments that Key adequately preserved in the trial court. ORAP 5.45.

Key sought to have the court instruct the jury that Edwards had no financial stake in the outcome of Bocci's claim. As discussed above, Edwards had a financial stake in the outcome of that claim. Key sought to have the court inform the jury about Edwards' insurance coverage. Giving such an instruction would have been error, because "the injection of insurance into the trial of a case where it is irrelevant is ground for reversal." *Waterway Terminals v. P. S. Lord*, 242 Or 1, 37, 406 P2d 556 (1965). See also OEC 411 (limits on admissibility of evidence concerning liability insurance). Edwards' malpractice insurance situation had no independent relevance in this case and

almost certainly would have been prejudicial to Edwards in the jury's deliberation of liability as between Bocci and Edwards. The court did not err in giving the preliminary instruction quoted above. The instruction gave a general overview of the Mary Carter agreement that accurately, if briefly, summarized the document. Particularly in the light of the fact that Key does not point to any specific error in the trial court's later, more in-depth instruction concerning the Mary Carter agreement, see note 7 above, we are unable to see how the court erred in giving the preliminary instruction. Key next argues that the trial court erred in limiting what it could say about the Mary Carter agreement during its opening statement. Key makes no specific arguments concerning this assignment of error, and it is unclear from the excerpt of the record provided by Key exactly what Key wished to tell the jury about the agreement, except that the agreement "created a fund for litigation." However, the real problem with Key's argument is that this issue was raised before trial, and the court did not make a ruling on what Key could or could not tell the jury during opening argument. Key's counsel asked for guidance as to what he could say about the agreement, and the court stated that "for the moment, I don't have an answer to your question," although the court did suggest that counsel should not go into too much detail about the Mary Carter agreement in its opening. Trial courts have a great deal of discretion to control how parties make their arguments. See generally Troutman v. Erlandson, 279 Or 595, 605, 569 P2d 575 (1977). The trial court's suggestion to Key's attorney that he should not go into too much detail about the agreement during opening arguments was not an abuse of discretion, in light of the court's substantive decision about the admissibility of the terms of the agreement, discussed below. Key's central argument concerning the Mary Carter agreement is that the trial court erred in refusing to allow Key to introduce the agreement itself into evidence. In Grillo, 275 Or at 427, the court stated that such agreements are valid and enforceable, but went on to note that the agreement in that case

"would have been subject to pretrial discovery and, upon request of defendant, would have been admissible into evidence." Key relies on that statement in support of its contention that the trial court was required to admit the agreement into evidence, rather than simply to describe the relevant portions of the agreement to the jury. The trial court did not ignore the above-quoted statement from the Grillo case. Rather, the court recognized that tension existed between that dictum from Grillo and a more recent case, *Holger v. Irish*, 316 Or 402, 851 P2d 1122 (1993). In Grillo, the plaintiff and a defendant entered into a Mary Carter agreement that was similar in substance to the one at issue here. The nonsettling defendant, however, did not discover the existence of the agreement until after the trial.(8) The question in Grillo was whether the defendant was entitled to a new trial based on newly discovered evidence. 275 Or at 423. The court concluded that the defendant was not entitled to a new trial because, although it did not know specifically of the Mary Carter agreement, it knew that the other defendant, who was a party to that agreement, intended to settle with the plaintiff, and in fact knew that the defendant had advanced money to the plaintiff. *Id.* at 427-28. Thus, the court concluded that the defendant who was not party to the agreement had not exercised due diligence and was not entitled to a new trial. *Id.* at 429. *Holger*, by contrast, concerned the propriety of informing a jury about a plaintiff's settlement with a defendant that had resulted in the dismissal of that defendant from the case before trial. The trial court told the jury of the settlement, on the ground that the jury would "wonder why the [settling defendant was] not involved in the case." *Holger*, 316 Or at 413. The Supreme Court held that telling the jury of the settlement was error, because "in the usual case, it is not proper to inform the jury concerning a plaintiff's remedies or potential remedies against persons who are not parties in the dispute that the jury is to decide, unless that information has independent relevance." *Id.* at 414. We agree with the trial court that some tension exists between Grillo and

Holger. Grillo declares, albeit in dictum, that a Mary Carter agreement would have been admissible into evidence. Holger indicates that a jury generally should not be informed of settlements unless the information has independent relevance. The trial court attempted to accommodate those competing interests by allowing the jury to know as much about the Mary Carter agreement as had "independent relevance." See also OEC 408, 411 (evidence concerning settlements and liability insurance not admissible to demonstrate liability but may be admissible for other purposes, such as proving bias or prejudice of a witness). We agree with the trial court that the dictum in Grillo should not be read expansively to mean that irrelevant or prejudicial material contained in a Mary Carter agreement always must be admitted into evidence. The more reasonable reading of Grillo, and a reading that is easily reconcilable with Holger, is that the existence and terms of a Mary Carter agreement may be relevant, but that the agreement's admissibility is subject to the strictures otherwise placed on relevant evidence. Although on appeal Key appears to be arguing that the entire agreement should have been admitted into evidence, in the trial court Key argued that the agreement should be admitted into evidence in a redacted form, deleting portions that Key believed were "self-serving," i.e., recitals that Bocci and Edwards agreed that Key failed to reasonably warn physicians concerning Theo-Dur's toxicity, that Edwards and Bocci agreed that Key was primarily responsible for Bocci's injury, and that Edwards was not admitting any liability by entering into the agreement. Key did not, however, propose to redact the information concerning Edwards' liability insurance from the agreement. As noted above, admission of evidence pertaining to Edwards' liability insurance would have been error. Key argues on appeal that Bocci and Edwards had the "burden to object to the portions containing inadmissible evidence such as the amount of the settlement and insurance." That is incorrect. Where a party attacks the exclusion of an exhibit that contains some irrelevant material, that party has "the burden of excising the irrelevant portions of the exhibit to preserve the claimed error." Fazzolari v. Portland School Dist. No. 1J, 78 Or App 608, 614, 717 P2d 1210 (1986), aff'd on other grounds 306 Or 1 (1987). See also State v. Thomas, 149 Or App

557, 561, 945 P2d 1056 (1997) (if any part of an offer of proof was properly excluded, there is no reversible error); Smith v. White, 231 Or 425, 435, 372 P2d 483 (1962) ("Where there is a single offer of proof which includes matter that is objectionable, the entire offer may be rejected."). Given the nature of Key's offer of proof, the trial court did not err in failing to admit the Mary Carter agreement, as redacted by Key, into evidence. Key also argues that the trial court erred in limiting its cross-examination of Edwards about the Mary Carter agreement. On cross-examination, counsel for Key asked Edwards whether, in view of the Mary Carter agreement, he had any financial exposure in this case. Edwards replied that he did. Despite that answer, Key's counsel asked: "And you do not have such exposure in this case, at all, do you, sir?" The court sustained the objection to that question. Key's counsel then asked the court if he could "explore that," and the court said that he could not. On appeal, Key argues that the extent of Edwards' financial exposure under the Mary Carter agreement was relevant to demonstrate Edwards' bias. Because Key did not make an offer of proof concerning that issue, we are able to infer from the record only that Key was not allowed to bring out on cross-examination the actual amount of the settlement and loan as set forth in the Mary Carter agreement, and Edwards' insurer's participation in the agreement.(9) OEC 609 provides, in part:

"(1) The credibility of a witness may be attacked by evidence that the witness engaged in conduct or made statements showing bias or interest.

* *

*

"(2) If a witness fully admits the facts claimed to show the bias or interest

of the witness, additional evidence of that bias or interest shall not be

admitted. * * *."

Impeachment for bias or interest may be appropriate in a situation such as

this, where Edwards not only had an interest in proving his own claim against

Key, but the Mary Carter agreement gave him an interest in maximizing Bocci's

recovery against Key as well. However, for several reasons, we reject Key's

arguments that the trial court committed reversible error by limiting the cross-examination of Edwards.

A court has discretion to limit the cross-examination of a witness for bias, particularly in situations in which the information sought would be prejudicial. The information Key sought from Edwards on cross-examination apparently was the exact amount that Edwards' malpractice insurer would pay should Bocci recover particular sums from Key. The potential for prejudice was significant because the information Key was trying to elicit could have distracted or confused the jury, which had been properly instructed not to consider that settlement when determining damages. Moreover, Key makes no argument that the insurance information was relevant to demonstrating Edwards' bias. Cf. *Holger*, 316 Or at 415 (even a legally correct instruction concerning the effect of settlement could be error if it could distract jury from appropriate analysis); *Johnson v. Hansen*, 237 Or 1, 4, 389 P2d 330 (1964) ("In the ordinary case, the presence or absence of insurance is not only irrelevant, but the unnecessary injection of the subject into the trial is prejudicial.").

The need for evidence demonstrating bias must be weighed against the danger of unfair prejudice. OEC 403. Key has failed to articulate how the cross-examination it wished to undertake would have demonstrated further bias than was already apparent from the nature of the Mary Carter agreement itself. Given the questions asked, it is clear that Key was attempting to show that Edwards' malpractice insurer, rather than Edwards himself, had the only financial exposure in the case. Key does not explain how that fact somehow made Edwards more biased against Key and in favor of Bocci than would have been the case if Edwards had no malpractice insurance. In fact, the opposite would be true: If Edwards rather than his insurer were potentially responsible for paying for the harm to Bocci, he would have all the more reason to be taking the position that Key caused Bocci's harm. Given the doubtful relevance of this evidence, the trial court did not err in excluding the evidence in light of the danger of unfair prejudice.

For essentially the same reason, any error in failing to allow Key to pursue

its cross-examination on this point undoubtedly was harmless error. As noted above, the jury knew of the existence of the Mary Carter agreement and knew that Bocci's recovery against Key could affect how much Edwards would pay Bocci. Aside from the fact that the information that Key was apparently trying to solicit did not demonstrate bias, any possible bias would relate to Bocci's claim; it would not relate to Edwards' own claim against Key. The existence of Edwards' claim against Key told the jury what it needed to know about Edwards' "bias" in this case, at least as it pertains to Edwards' own claims against Key which are the only claims at issue on appeal. To the extent that this evidence could be said to have any marginal relevance whatsoever, it would be relevant only to Edwards' bias in favor of Bocci's claims, not to Edwards' bias in favor of his own claims. Evidential error is not presumed to be prejudicial. OEC 103(1). We are unable to conclude that the trial court's limitation on Key's cross-examination of Edwards, if error at all, was reversible error as to Edwards' claim against Key. The trial court did not err in limiting Key's cross-examination concerning the amount of the settlement and Edwards' malpractice insurer's participation in the Mary Carter agreement.

Jury Deliberations

After the verdict was received, the trial court notified the parties by letter that a copy of the current issue of Prevention magazine was found in the jury room and that it contained an article entitled "Get Off the Asthma Tightrope." The author of that article advocated asthma control via inhaled steroids as safer than oral medications such as theophylline. The article did not discuss Theo-Dur or drug interactions. Key moved to have the court recall the jurors and examine each one under oath concerning that magazine. The court denied Key's motion, as well as Key's motion to set aside the verdict and motion for a new trial. The trial court held that Key had failed to make an adequate showing of juror misconduct. The court found that, even if one or more of the jurors had read the article in question, no misconduct had occurred, and there was nothing in the article that was pivotal to a fair

resolution of the case: "The Prevention article could not possibly have affected the outcome of the case."

On appeal, Key argues that the trial court abused its discretion in refusing to recall the jury to interrogate them about the magazine and in denying its motion for a new trial. For the following reasons, we disagree that the court abused its discretion.

UTCR 3.120 provides, in part:

"(2) After a sufficient showing to the court and on order of the court, a party may have contact with a juror in the presence of the court and opposing parties when:

"* * * * *

"(b) there is a reasonable ground to believe that a juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment."

"There is a strong policy in Oregon to protect jury verdicts from attack, and courts are hesitant to interrogate jurors after they have reached a verdict in order to probe for potential misconduct." *Koennecke v. State of Oregon*, 122 Or App 100, 103, 857 P2d 148 (1993). See also *Erstgaard v. Beard*, 310 Or 486, 498, 800 P2d 759 (1990) (same). In the present case, not only is there no evidence of actual jury misconduct, but there is virtually no potential for misconduct. The jurors were not instructed to avoid bringing reading materials into the jury room and were not forbidden to read articles such as an article on asthma in the current issue of a popular magazine. The court did not abuse its discretion in denying Key's motion to interrogate the jurors. The same is true for the court's denial of Key's motion for a new trial. "Only the clearest kind of juror misconduct can trigger the trial court's right to exercise its discretion and order a new trial." *Erstgaard*, 310 Or at 497. A comparison of the present case and *Erstgaard* is instructive. In *Erstgaard*, a malpractice action, juror Barrett stated during voir dire that she had been treated by defendant Dr. Allen, that she had stopped seeing Allen due to a change in insurance, and that she could be objective in

deciding the case. *Id.* at 490. After trial, several other jurors complained that Barrett had stated that Allen had saved her niece's life, and had stated that finding the doctor negligent would ruin the doctor's reputation. *Id.* at 492-93. The Oregon Supreme Court found that the trial court had abused its discretion in granting a new trial under those circumstances:

"In the relatively few cases in which this court has either permitted or required a new trial for juror misconduct that occurred during the deliberating process, we have found none in which the misconduct consisted solely of juror argument. All the cases have involved specific acts by jurors designed (and later claimed, either explicitly or implicitly) by the particular offending jurors to give them special knowledge concerning one of the disputed facts in the case then under consideration. See, e.g., *Sanders v. Curry County*, 253 Or 578, 456 P2d 493 (1969) (unauthorized inspection of premises); *Wolfe v. Union Pacific R. Co.* [230 Or 119, 368 P2d 622 (1962)] (unauthorized visit to accident scene); *Thomas v. Dad's Root Beer, Etc.*, 225 Or 166, 356 P2d 418, 357 P2d 418 (1960) (view of accident scene and unauthorized experiment); *Eckel v. Breeze*, 221 Or 572, 577, 352 P2d 460 (1960) (view of scene); *Schneider v. Moe*, 151 Or 353, 50 P2d 577 (1935) (view of accident scene). Barrett's actions were different. She did not obtain new information relating to Allen's care for the plaintiff child. She simply disclosed the basis of her pre-existing bias. That is argument, not superior knowledge of a pivotal fact concerning some issue in the case actually being decided by the jury." *Id.* at 497-98.

The present case presents significantly fewer reasons for granting a new trial. In *Erstgaard*, the court recognized that juror Barrett's remarks were inappropriate, and "of doubtful merit." *Id.* at 497. Here, all that can be said is that a juror may have carried a current issue of a popular magazine into the jury room. No misconduct has been demonstrated. The magazine contained an article by a doctor who advocated treating asthma by careful monitoring of breath flow and the use of inhaled steroids. That article, even if read by any of the jurors, could not have provided "superior knowledge of

a pivotal fact concerning some issue in the case actually being decided by the jury." Id. at 498. The trial court did not abuse its discretion in denying a new trial.(10)

Motion for Directed Verdict

Key next argues that the trial court erred in failing to direct a verdict in its favor on Edwards' negligence and fraud cross-claims. We consider only those arguments that Key preserved in the trial court and presented properly on appeal. ORAP 5.45.(11)

Key acknowledges that, under *Oksenholt v. Lederle Labs*, 294 Or 213, 215, 656 P2d 293 (1982), a physician can "maintain an action for misrepresentation and negligence against a prescription drug manufacturer that misrepresents information about its drug to the doctor[.]" In *Oksenholt*, the plaintiff, a physician, relied on information provided by the defendant drug manufacturer and prescribed a drug that caused a patient to go blind. Key seeks to distinguish *Oksenholt* on the ground that the physician in that case actually prescribed the drug involved, whereas Edwards did not prescribe *Theo-Dur* to Bocci. Nothing in *Oksenholt* indicates that such a distinction would defeat a physician's claim such as this, where the physician alleges that the manufacturer's negligence and fraud caused the physician to misdiagnose a condition caused by the manufacturer's drug.