

RESOLUTION No. 37518

Authorize City Attorney to appeal final judgment in *Penoyer Law Office, LLC and Michael Wise & Associates v. State of Oregon ex rel. Dept. of Transportation and City of Portland*, Multnomah County Circuit Court Case No. 18CV52454 (Resolution)

WHEREAS, on August 21, 2018, the State of Oregon (“State”) and the City of Portland (“City”) settled an auto-accident lawsuit during an appellate mediation with plaintiffs Colin Christopher and Emily Fuerstenau, who were represented by the law firm of Schwabe Williamson & Wyatt (“Schwabe”); and,

WHEREAS, following the settlement, the City received demands from attorney Susan Eggum on behalf of attorneys David Penoyer and Michael Wise, who asserted an attorney lien on behalf of Mr. Penoyer and Mr. Wise based on their representation of Mr. Christopher and Ms. Fuerstenau at the trial level of litigation; and,

WHEREAS, Mr. Penoyer and Mr. Wise asserted that Mr. Christopher and Ms. Fuerstenau had never terminated their representation agreement and that Schwabe had concealed the settlement from them; and,

WHEREAS, Mr. Penoyer and Mr. Wise asserted that ORS 87.475(4), which provides that “If more than one attorney appears of record for a litigant, the satisfaction of the lien created by ORS 87.445 (Attorney’s lien upon actions and judgments) by any one of the attorneys is conclusive evidence that the lien is fully satisfied,” did not apply to their lien demand; and,

WHEREAS, on November 15, 2018, Mr. Penoyer and Mr. Wise filed an action against the State and City demanding that the State and City pay 40% of their settlement with Mr. Christopher and Ms. Fuerstenau to Mr. Penoyer and Mr. Wise to satisfy the attorney lien; and,

WHEREAS, the City tendered the defense of the litigation to Schwabe in accordance with the settlement agreement that the City entered with Mr. Christopher and Ms. Fuerstenau at the August 21, 2018 mediation; and,

WHEREAS, Schwabe accepted the City’s tender of defense in part and hired outside counsel to represent the City and State during the litigation; and,

WHEREAS, on May 13, 2020, the Court issued an opinion and order on cross-motions for summary judgment, ruling that Mr. Penoyer and Mr. Wise were entitled to 40% of the settlement proceeds previously tendered to Mr. Christopher and Ms. Fuerstenau; and

WHEREAS, on October 8, 2020, the Court held a hearing on the plaintiffs’ petition for attorney fees against the City and State; and,

WHEREAS, the Court’s supplemental judgment awarding attorney fees remains

pending; and,

WHEREAS, at this time, Schwabe has not agreed to indemnify the City for that potential attorney fee award; and,

WHEREAS, the City wishes to challenge the Court's ruling on the May 13, 2020 motions on the grounds that the Court's decision misapplied the relevant attorney lien statutes; and,

WHEREAS, if the Court's decision is allowed to stand, it may complicate future settlements by the City because the settling parties will have to ensure that all attorneys who had represented plaintiffs at any time have their interests fully satisfied by the settlement, regardless of whether those attorneys are the current attorneys of record; and

WHEREAS, if the Court's decision is allowed to stand, the City may be obligated to pay an attorney fee award as determined by the Court, unless Schwabe agrees to indemnify the City for that fee award; and,

WHEREAS, outside counsel representing the City filed a Notice of Appeal on behalf of the City on May 15, 2020, while the City was still engaged in negotiation with Schwabe to determine if Schwabe would indemnify the City for an attorney fee award; and,

WHEREAS, the City Attorney has decided that it is in the best interests of the City to have an appeal in this case be handled by the City Attorney's Office rather than by outside counsel; and

WHEREAS, Portland City Code 3.10.030(G)(5) allows the City Attorney to seek retroactive approval from the City Council to pursue an appeal if the City Attorney could not timely receive approval from the City Council before a Notice of Appeal was filed;

NOW, THEREFORE, BE IT RESOLVED, the City Attorney is authorized to take the steps necessary to appeal the Multnomah County Circuit Court's final judgment and any related supplemental judgment in *Penoyer Law Office, LLC and Michael Wise & Associates v. State of Oregon ex rel. Dept. of Transportation and City of Portland*, Multnomah County Circuit Court Case No. 18CV52454, to the Oregon Court of Appeals and any other higher court and, in furtherance of such appeal, to make any stipulation, agreement, or admission as in her judgment may be in the interest of the City.

Adopted by the Council: December 2, 2020

Mayor Ted Wheeler
Prepared by: Daniel A. Simon
Date Prepared: November 10, 2020

Mary Hull Caballero

Auditor of the City of Portland

By *Keelan McClymont*
Deputy

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 Agenda No.
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 Title

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INTRODUCED BY Commissioner/Auditor: Mayor Ted Wheeler	CLERK USE: DATE FILED <u>November 23, 2020</u>
COMMISSIONER APPROVAL Mayor—Finance & Administration – Wheeler	<div style="text-align: center;"> Mary Hull Caballero Auditor of the City of Portland </div> By: <u>Keelan McClymont</u> <small>Digitally signed by Keelan McClymont Date: 2020.11.23 13:57:13 -08'00'</small> Deputy
Position 1/Utilities - Fritz	
Position 2/Works - Ryan	
Position 3/Affairs - Hardesty	
Position 4/Safety - Eudaly	
BUREAU APPROVAL Bureau: City Attorney Bureau Head: <u>YoungWoo Joh</u> <small>Digitally signed by YoungWoo Joh Date: 2020.11.10 17:09:52 -08'00'</small>	
Prepared by: Dan Simon Date Prepared: 11/10/2020	
Impact Statement Completed <input checked="" type="checkbox"/> Amends Budget <input type="checkbox"/>	
Portland Policy Document If "Yes" requires City Policy paragraph stated in document. Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	
City Auditor Office Approval: required for Code Ordinances	
City Attorney Approval: required for contract, code, easement, franchise, charter, Comp Plan	
Council Meeting Date December 2, 2020	

AGENDA
TIME CERTAIN <input type="checkbox"/> Start time: _____ Total amount of time needed: _____ (for presentation, testimony and discussion)
CONSENT <input type="checkbox"/>
REGULAR <input checked="" type="checkbox"/> Total amount of time needed: <u>15</u> (for presentation, testimony and discussion)

FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS:		
		YEAS	NAYS
1. Fritz	1. Fritz	✓	
2. Ryan	2. Ryan	✓	
3. Hardesty	3. Hardesty	✓	
4. Eudaly	4. Eudaly		
Wheeler	Wheeler	✓	