

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH**

DANE HADACHEK, NATHANIEL
HELLEWELL & LONDON MOODY,

Plaintiffs,

v.

THE STATE OF OREGON,

Defendant.

Case No. 25CV18224

**PLAINTIFFS' MOTION FOR LEAVE
TO FILE SUR-REPLY TO
DEFENDANT'S REPLY TO SUMMARY
JUDGMENT OPPOSITION**

Hon. Melvin Oden-Orr

MOTION

Plaintiffs move for an order allowing Plaintiffs to file a sur-reply to Defendant's reply to Plaintiffs' opposition to Defendant's motion for summary judgment. Oral argument is not requested. Good cause exists for granting leave to file a sur-reply because Defendant's reply (1) includes a declaration that violates the Oregon Rules of Civil Procedure, and (2) asks the Court to take judicial notice of facts for the first time. A sur-reply is required to prevent prejudice to Plaintiffs because without one, Plaintiffs will be forced to expend significant time at oral argument on Defendant's motion for summary judgment explaining critical defects in Defendant's supporting documents, one of which this Court should disregard in ruling on the summary judgment motion. A written sur-reply is required to effectively raise those defects to the Court. A copy of Plaintiffs' proposed sur-reply is attached as Exhibit 1.

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Dated: August 24, 2026

Respectfully submitted,

LAW WORKS LLC

By: /s/ Lake Perriguey

Lake James H. Perriguey, Esquire
(OSB 983213)
Attorney for Plaintiffs Dane Hadachek, Nathaniel
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THE CLOPPER LAW FIRM PC

By: 
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Eric Clopper, Esquire (CA SBN 346031)
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**[PROPOSED] SUR-REPLY IN SUPPORT
OF PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

*Exhibit 1 to Plaintiffs' Motion for Leave to File
a Sur-Reply*

INTRODUCTION

On July 2, 2026, Defendant moved for summary judgment and filed a supporting declaration. *See* Declaration of Kate E. Morrow ("Morrow Declaration"). On August 4, 2026, Plaintiffs filed their opposition to Defendant's motion alongside their four supporting declarations. *See* Declarations of Eric Clopper, Christopher J. Cold, Mathias A. Masem, and Robert Van Howe. On August 18, 2026, Defendant filed its reply to Plaintiffs' opposition. Simultaneously, Defendant filed the Declaration of Sadie Forzley ("Forzley Declaration" or "Declaration") in support of its original summary judgment motion.

The Declaration should be disregarded on three grounds: (1) it invokes ORCP 47 E, which is available only to a party *opposing* summary judgment; (2) outside 47 E, it fails every requirement of ORCP 47 D; and (3) it is untimely because it should have been submitted with Defendant's summary judgment motion, or at least before Plaintiffs' opposition. Plaintiffs also respond to Defendant's first-time request for judicial notice.

In all events, the Declaration concedes that the biological-differences question is one of fact and that it is disputed, which forecloses summary judgment. ORCP 47 C. Plaintiffs will

address all other substantive and procedural defects with Defendant's reply at oral argument on Defendant's motion for summary judgment.

ARGUMENT

A. The Forzley Declaration invokes a rule reserved for parties opposing summary judgment.

Oregon Rule of Civil Procedure 47 governs summary judgment. The Forzley Declaration tracks rule 47 E.¹ Its operative paragraph states that counsel has "retained an unnamed qualified expert who is available and willing to testify to admissible facts or opinions creating a question of fact." Forzley Decl. ¶ 2. That language is lifted from the rule.² But 47 E is available, by its terms, only to "a party, in opposing a motion for summary judgment." Rule 47 C buttresses that conclusion: "[t]he adverse [i.e., non-moving] party may satisfy the burden of producing evidence with an affidavit or a declaration under section E of this rule."

¹ ORCP 47 E provides, in relevant part (emphasis added):

If a party, *in opposing* a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit or a declaration of the party's attorney stating that an unnamed, qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact will be deemed sufficient to controvert the allegations *of the moving party* and an adequate basis for the court *to deny* the motion. The affidavit or declaration must be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney, who is available and willing to testify, and who has actually rendered an opinion or provided facts that, if revealed by affidavit or declaration, would be a sufficient basis *for denying* the motion for summary judgment.

² The Declaration's text appears to have been copy-pasted directly from 47 E, resulting in the following scrivener's error (emphasis added):

I have retained an unnamed qualified expert who is available and willing to testify to admissible facts or opinions creating a question of fact *will be [sic]* deemed sufficient to controvert the allegations made by Plaintiffs and their experts in their response to Defendant's motion for summary judgment.

Forzley Decl. ¶ 2.

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3 The State is the moving party. It cannot “controvert the allegations of the moving
4 party,” and the only relief 47 E authorizes—denial of the motion—is the opposite of what the
5 State seeks. Oregon courts enforce ORCP 47 literally. *See, e.g., Due-Donohue v. Beal*, 191 Or.
6 App. 98 (2003) (finding “party’s attorney” in rule 47 E does not include a non-attorney
7 appearing pro se). So the Court should disregard the Forzley Declaration as an improper
8 invocation of 47 E by the moving party.

9 **B. Outside ORCP 47 E, the Declaration fails every requirement of ORCP 47 D.**

10 Because the State cannot invoke rule 47 E, rule 47 D governs, and the Forzley
11 Declaration fails each requirement. Rule 47 D provides that “[e]xcept as provided by section
12 E of this rule,” supporting and opposing declarations for a summary judgment motion “must
13 be made on personal knowledge, must set forth such facts as would be admissible in evidence,
14 and must show affirmatively that the affiant or declarant is competent to testify to the matters
15 stated therein.” Counsel is not competent to testify to the medical and anatomical subjects on
16 which the expert referenced in the Forzley Declaration would opine. And the Declaration fails
17 to set forth admissible facts or “show affirmatively” that the State’s expert is competent to
18 testify. So the Declaration is deficient under 47 D.

19 The State thus faces a dilemma. If the declaration is a valid 47 E filing, the State is by
20 definition opposing summary judgment, and the rule’s own consequence is denial of summary
21 judgment. If the declaration is not a valid 47 E filing, rule 47 D applies and the declaration is
22 defective and must be stricken from the record or ignored.
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C. The Declaration is untimely new evidence submitted with a reply.

Rule 47 C fixes the sequence of summary judgment filings: the motion and “all supporting documents” are filed first; then the adverse party has 20 days to respond and submit supporting documents; then the movant has five days to reply, with no mention of supporting documents. The State moved for summary judgment on July 2 and filed its only supporting document, the Morrow Declaration, on that date. Plaintiffs opposed the motion on August 4 and submitted their supporting documents. Defendant then filed its reply and the Forzley Declaration, which is captioned, “IN SUPPORT OF DEFENDANT’S MOTION FOR SUMMARY JUDGMENT” (rather than “in support of Defendant’s Reply”), on August 18, 47 days after the summary judgment motion and 14 days after Plaintiffs’ opposition. The only “supporting document[]” filed with Defendant’s summary judgment motion was the Morrow Declaration, which was silent on a retained expert.

The Declaration thus subverts the prescribed sequence for summary judgment filings, depriving Plaintiffs of an opportunity to respond. That subversion prejudices Plaintiffs because Defendant has insisted throughout summary judgment that “the merits questions [in this case] are pure questions of law and the facts are immaterial.” Def’s MSJ at 8. Defendant has reversed course on reply by submitting a (defective) factual declaration thereby causing Plaintiffs unfair surprise. *See also Nolan v. Jackson Nat’l Life Ins. Co.*, 155 Or. App. 420, 428 (1998) (finding trial courts may disregard untimely supporting documents even without prejudice to opposing party). The Court should disregard the Forzley Declaration as untimely.

D. The Court should decline Defendant's request for judicial notice because judicial notice is unavailable for legal conclusions and facts subject to reasonable dispute.

For the first time on reply, Defendant asks this Court to take judicial notice that “specific biological differences exist between the clitoris, labia majora, and labia minora and the penis and male foreskin.” Def.’s Reply at 9 n.4. The Court should decline to do so. Oregon Evidence Code 201(b) permits judicial notice only of a fact “not subject to reasonable dispute.” Three physicians have submitted declarations addressing the anatomy, embryology, histology, and function of the male and female prepuce and expressing a lack of specific biological differences with regard to genital cutting. Cold Decl. ¶¶ 5–21; Masem Decl. ¶¶ 13–29; Van Howe Decl. ¶¶ 8–20. So whatever else may be said, the matter Defendant asks this Court to notice is subject to reasonable dispute and Defendant’s request for judicial notice should be declined.

Moreover, even if the Court took judicial notice, what Defendant’s supporting materials actually establish is that dictionaries define “clitoris” and “penis” differently. That is a fact about lexicography. It is not an adjudicative fact about whether any relevant anatomical differences exist to justify discriminatory legal treatment of males versus females.

E. In all events, the Declaration concedes there is a disputed factual question, so summary judgment is unavailable.

Even taken on its own terms, the Declaration defeats Defendant’s summary judgment motion. ORCP 47 E requires that the retained expert “has actually rendered an opinion or provided facts that, if revealed by affidavit or declaration, would be a sufficient basis for denying the motion for summary judgment.” A movant’s sworn statement that its own retained expert stands ready to “creat[e] a question of fact,” Forzley Decl. ¶ 2, on the biological-

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3 differences question is an acknowledgment that the question is one of fact—not of law—and
4 that it is disputed. The presence of disputed material facts requires denial of Defendant’s
5 Motion for Summary Judgment. ORCP 47 C.

6 CONCLUSION

7 Plaintiffs respectfully request that the Court strike or disregard the Declaration of Sadie
8 Forzley in ruling on Defendant’s motion for summary judgment, decline Defendant’s request
9 for judicial notice, and deny Defendant’s motion for summary judgment because Plaintiffs
10 present undisputed evidence showing a lack of relevant biological differences to justify the sex
11 classifications in ORS 163.207 and 431A.600.
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13 Dated: August 24, 2026

Respectfully submitted,

15 **LAW WORKS LLC**

16 By: /s/ Lake Perriguey

17 Lake James H. Perriguey, Esquire
18 (OSB 983213)
19 Attorney for Plaintiffs Dane Hadachek, Nathaniel
20 Hellewell, and Landon Moody

21 **THE CLOPPER LAW FIRM PC**

22 By: 

23 Eric Clopper, Esquire (CA SBN 346031)
24 Attorney for Plaintiffs Dane Hadachek, Nathaniel
25 Hellewell, and Landon Moody
26 *Admitted pro hac vice*

CERTIFICATE OF SERVICE

I certify that on August 24, 2026, I served the foregoing PLAINTIFFS' SUR-REPLY
IN SUPPORT OF THEIR OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT upon the parties hereto by the method indicated below, and addressed to the
following:

SERVED by Odyssey
Sadie.Forzley@doj.oregon.gov
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