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Trial Lawyers Defending You in the Courts of Oregon
2016 • ISSUE 4
Close Corporation Shareholder Litigation
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PRESIDENT'S MESSAGE

BY MICHAEL A. LEHNER

A Future of Excitement and Opportunity

Forty-two years ago, when I was a young lawyer, we were in the infancy of a technological boom. The fax machine was a new tool in most law firms, and there was concern about how it would affect the practice of law. For instance, clients and opposing counsel would demand faster communications, we lost the luxury of the week-long turnaround of snail mail and, in turn, had instant communication. Questions were raised about whether pleadings should be filed by fax.

Michael A. Lehner

During my early years, we used IBM Selectric typewriters. There were no laptop computers, or even desktop computers. In the late 1980s or early 1990s, one could purchase a mobile phone the size and weight of a brick. Now, we have cell phones capable of performing more functions than the old UNIVAC computer that filled an entire room.

Three events have caused me to reflect about past history: the approaching 50th anniversary of OADC, my pending retirement, and an email received from a friend containing a "peek into the future" by German author Udo Gollub. Mr. Gollub reports on his recent visit to the Singularity University Summit, and the exponential growth of various forms of technology.

The largest hotel company in the world is Airbnb, and they do not own any hotels. The largest taxi company in the world is Uber, and they do not own any taxis. Traditional business models will be abandoned and the industry of the future will be software-based and conducted on the internet.

— Udo Gollub

Mr. Gollub points out that in 1998 Eastman Kodak employed 170,000 people, manufacturing 85 percent of the world's photographic film. That business was gone a few years later with the advent of digital photography. Our cell phones now produce photographs with better resolution than the finest cameras of 20 years ago.

The largest hotel company in the world is Airbnb, and they do not own any hotels. The largest taxi company in the world is Uber, and they do not own any taxis. Traditional business models will be abandoned and the industry of the future will be software-based and conducted on the internet.

Throughout my years in practice, we have seen significant changes in how legal research is done. Instead of reference books and legal treatises, we now rely on word searches through internet-based systems. One can question whether that is an improvement in quality of the final product, but it is probably an improvement with respect to speed. The old practice of reading multiple cases that may circle the issue, but aren't on all fours, I believe provided a deeper understanding of how the law develops. But then, clients may not want to pay for your depth of knowledge.

So, what does all this have to do with trial lawyers? Artificial intelligence through computer programs is on the verge of practicing law. According to Mr. Gollub, the IBM computer known as "Watson" can provide routine legal advice with 90 percent accuracy. That compares favorably to the 70 percent accuracy attributed to the human lawyer. Mr. Gollub predicts lawyers of the future must be highly qualified specialists because general practitioners will no longer be needed.

It is also predicted that within a few years the auto industry will be almost entirely electric and that most vehicles on the road will be driverless. It will no longer be necessary to own a car because we can simply summon a driverless car through a cell phone app to take us to any destination. The number of cars on the road will be reduced by 90 percent and the frequency of accidents will be greatly

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reduced. Parking lots will become obsolete and the auto insurance industry, as we know it, will have to be restructured.

Those of us who do auto and trucking defense will need to find new sources of work. Online communication via email and social media may give rise to new theories of litigation, and cybersecurity will undoubtedly spawn many disputes. The question remains whether our traditional method for resolution of disputes, the jury trial, will survive.

Mr. Gollub's report is a brief summary of ideas he discovered at the Singularity University Summit. I encourage readers to Google both Udo Gollub and Singularity University for more information. The phrase "technological singularity" refers to the development of artificial intelligence to the point that the device (computer, robot or other technology) is capable of re-designing itself or designing and creating better devices, at an increasingly faster rate, without human intervention.

Success as a lawyer over the next 30 to 40 years will require one to be cognizant of technological changes and the effects on industry and our day–to-day activities. Although problems may be created by these changes, I suspect opportunities will also be created.

OADC has kept pace with the need to specialize with our various practice groups, but we need to do more to identify and plan for societal changes that impact services lawyers provide. Insurers are now covering liability for injury or property damage caused by operation of drones. How about liability for defamation or privacy invasion occurring in social media? As long as there are disagreements, we will need a system to resolve them in a civilized and efficient way. That is what we do. Technological advances may lead to more efficient ways to solve factual and legal disputes. Next year let's dedicate our efforts toward forecasting the next 50 years of OADC. Meanwhile, I ride off into the sunset, where I will, hopefully, find a golf course.

We thank our peers for recognizing our appellate practice.

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McKenzie v. A.W. Chesterson: A "Substantial Change" in Oregon Product Liability Law?

David Cramer
Gordon & Rees

On April 20, 2016, the Oregon Court of Appeals in *McKenzie v. A.W. Chesterson Co.*[1] rejected the "bare-metal" defense in asbestos cases in Oregon. In so doing, the Court addressed an area of strict product liability law that is largely undiscussed in Oregon: When does a product undergo a "substantial change" so as to shield a manufacturer from liability? This article addresses the "substantial change" analysis in *McKenzie* and considers whether *McKenzie* represents a fundamental shift in product liability law in Oregon, as well as how readily *McKenzie* can be applied outside of the asbestos context.

David Cramer

Before *McKenzie*, the so-called "bare-metal" defense[2] allowed manufacturers of metal equipment, such as pumps, used in naval ships to avoid liability for damages caused by exposure to the asbestos-containing *component* parts manufactured by others. Often, the pumps at issue in asbestos personal injury litigation required gaskets, packing, and external insulation to operate, some of which contained asbestos.[3] In *McKenzie*, plaintiffs, husband and wife, sued the manufacturer of pumps used aboard United States Navy ships, after the husband developed mesothelioma following his career in the Navy. The parties in *McKenzie* agreed that the pumps at issue were originally shipped with asbestos components manufactured by other entities, but that by the time the plaintiff interacted with the pumps, all of the original asbestos-containing components had been replaced, perhaps multiple times, as part of routine maintenance. The defendant pump manufacturer argued, among other points, that the bare-metal defense barred liability. The defendant manufacturer reasoned that it could not be held responsible for asbestos-containing component parts used with its pumps that others had manufactured and sold to the Navy.

The Court of Appeals rejected the bare-metal defense and concluded that there was evidence that the manufacturer of the pumps knew or should have known that the pumps required asbestos-containing components and that any replacement components would also contain asbestos. Because the manufacturer did not warn of the dangers of these asbestos-containing components, a jury could find the product was defective due to the lack of warning.

Under Oregon law, a *prima facie* product liability case requires the plaintiff to prove that the product at issue contained a defect when it left the seller's hands and that it reached "the user or consumer *without substantial change* in the condition in which it is sold or leased."[4] ORS 30.915 provides an affirmative defense if a post-receipt alteration or modification causes the injury.[5] But there is still little Oregon case law addressing the kind of changes, whether pre- or post-sale,[6] that are considered "substantial."[7] *McKenzie* does not fundamentally alter this framework. The Court did consider the impact of routine maintenance, but as explained below, this discussion may have limited import outside the asbestos litigation context given the facts of *McKenzie.*

Two aspects of *McKenzie* are important for non-asbestos product liability defendants. First, the Court accepted the plaintiff's broad definition of the "product" as the pumps *and* the asbestos components,[8] finding that there was a question of fact as to whether the product reached the plaintiff "without substantial change" to the as-sold condition. Because the product was defined broadly to *include* the asbestos components, *McKenzie* does not *per se* expand a manufacturer's duty to warn beyond its own product, despite what plaintiffs may argue.

Second, relying on the Restatement (Second) of Torts § 402A, *comment d,* the Court stated that "a seller may be strictly liable for a product that is dangerous when sold, even if component parts will, through wear and tear from use or regular maintenance, be later replaced."[9] Setting

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PRODUCT LIABILITY LAW
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aside the fact that § 402A, *comment d,*[10] says nothing about maintenance, the Court's opinion raises potential arguments for plaintiffs about whether maintenance can cause a substantial change. Oregon case law, though sparse, remains clear—if the defect is caused or impacted by repairs, whether maintenance or otherwise, the "substantial change" factor is implicated. Maintenance that actually fixes or causes the defect can still be a substantial change: if a known defect is remedied prior to an injury, it cannot be the basis for a strict liability claim due to a lack of causation, and if maintenance actually causes the defective condition to appear in the first place, then defendants can rightly argue the condition was not present when it left the seller's hands.

Moreover, *McKenzie* is unlikely to have many factual analogs outside of the asbestos world. For an example of a *McKenzie*-like factual scenario, assume the following: A mechanic replaces a vehicle's brake lines and the brakes subsequently fail, causing an accident. Upon inspection, it is discovered that those new brake lines burst due to a defect. The vehicle manufacturer could potentially be liable on a failure to warn theory, despite the post-sale change in brake lines, but only if the original and replacement brake lines were identical; the manufacturer required that specific type of brake line be used for replacements, or knew that it would be; and the manufacturer knew or reasonably should have known the replacement lines were dangerous. This also assumes that the relevant "product" is defined as the entire car.

In sum, *McKenzie* does not change the requirements of a prima *facie strict* products liability case. And though *McKenzie's* commentary on *comment d* gives some guidance to Oregon courts on what does not constitute a substantial change, it says little that is new. However, plaintiffs may argue that *McKenzie* significantly expands failure to warn liability, including imposing a post-sale duty to warn on manufacturers, and defense counsel should be prepared to push back. To counter these arguments, bear in mind that the Court's definition of the product[11] ultimately determined that ORS § 30.920 would apply, and thus determined the outcome in McKenzie. The Court's broad definition of product helps to minimize the breadth of its holding regarding a manufacturer's duty to warn. So while plaintiffs may push for broader duties, *McKenzie* cannot be read as necessarily imposing a duty to warn for all component parts, or for other manufacturer's products used in conjunction with the subject product. Finally, *McKenzie's* "maintenance" pronouncement related to *comment d* to § 402A does not alter the "without substantial change" requirement of a plaintiff's *prima facie* case. And if the "maintenance" impacts the alleged defect, be sure to still raise an alteration and modification defense under ORS § 30.915.

Endnotes

1 277 Or App 728 (Apr. 20, 2016). Review denied by the Oregon Supreme Court on September 15, 2016. *See McKenzie v. A.W. Chesterson Co.,* 2016 Ore LEXIS 580 (Sept. 15, 2016).

2 *See O'Neil v. Crane Co.,* 53 Cal 4th 335, 266 P3d 987 (2012); also *Simonetta v. Viad Corp.,* 165 Wash 2d 341, 197 P3d 127 (2008) and *Braaten v. Saberhagen Holdings,* 165 Wash 2d 373, 198 P3d 493 (2008).

3 *McKenzie,* 277 Or App at 737.

4 ORS § 30.920(1)(b).

5 *See, e.g., Ensley v. Strato-Lift, Inc.,* 116 F Supp 2d 1175 (D Or 2000). A material alteration provides a defense if the alteration makes it "impossible to conclude that a defect at the time of manufacture was a cause of the injury giving rise to the suit." *Id.* at 1182. If any preexisting defect could cause an injury absent the modification, then the change is not substantial.

6 As *McKenzie, Ensley¸ Seeborg v. General Motors Corp.,* 284 Or 695 (1978), and *Powell v. Adlerhorst Int'l, Inc.,* 2015 US Dist LEXIS 151544 (D Or 2015) demonstrate, the courts have not taken great pains to distinguish between "substantial change" prior to the end user coming into contact with the product and a modification or an alteration occurring after the receipt of it.

7 *See, e.g., Powell v. Adlerhorst Int'l, Inc.,* 2015 US Dist LEXIS 151544 (D Or 2015), where a police service dog bit an officer who was not wearing a protective sleeve. The dog was originally trained by Adlerhorst and sold to the City of Sherwood, which provided further training. Judge Mosman concluded that the evidence in the record raised an "issue of fact as to whether the dog's post-sale training 'substantially changed' the dog." Id. at *16. Interestingly, though the issue was post-receipt training, ORS § 30.915 is not discussed.

8 *McKenzie,* 277 Or App at 737.

9 *Id.* at 738.

10 *Comment d* identifies the types of products that are subject to a strict liability analysis.

11 Although a plaintiff's definition of the product is generally accepted (see *Harris v. Northwest Natural Gas Co.,* 284 Or 571, 573 n.2 (1978)), defendants, like those in *McKenzie,* should consider challenging the plaintiff's definition when practicable.

Buyout Rights In Close Corporation Shareholder Litigation

Stanton Gallegos
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In 2001, the Oregon legislature enacted ORS 60.952, which gives circuit courts discretion to award shareholders in close corporations who are facing litigation a wide range of remedies if the shareholder is able to demonstrate that the corporation's directors are deadlocked in managing the corporation; those in control of the corporation are acting in a manner that is illegal, oppressive, or fraudulent; or corporate assets are being misapplied or wasted.[1] The same statute also provides close corporations and their shareholders the right to end shareholder litigation by purchasing the complaining shareholder's shares for fair value.[2] This "buy-out" option is available whenever a shareholder files a proceeding seeking relief on one of the grounds for relief set out in the statute.[3]

Stanton Gallegos

The close corporation's buy-out option provides a powerful tool not only for avoiding the often enormous expense associated with shareholder litigation, but also for solving the underlying problem, i.e., dissension among shareholders. Although many businesses are organized as close corporations,[4] this buy-out provision has received surprisingly little attention from the courts. That is changing with two recent appeals: *Graydog Internet, Inc. v. Giller,* decided by the Oregon Court of Appeals in July of this year, and *Scallon v. Scott Henry's Winery Corp.,*[5] which is currently being briefed in the Ninth Circuit. This article provides a brief summary of these cases and how they may impact the availability of this defense in future cases.

Graydog Internet, Inc. v. Giller

In *Graydog,* a close corporation filed suit against a minority shareholder seeking a declaratory judgment that the minority shareholder was an at-will employee and could be terminated.[6] The minority shareholder asserted counterclaims and filed a third-party complaint against the majority shareholder.[7] The third-party complaint asserted, among other things, claims for breach of contract based on allegations that the majority shareholder violated the corporate bylaws and acted for his personal interests.[8] The corporation responded by notifying the minority shareholder that it was exercising its option to buy out the minority shareholder and terminate the litigation. The minority shareholder argued that the buy-out defense did not apply because (i) the buy-out right only applies where a shareholder initiates a new action, not to counterclaims or third-party claims in an existing case; and (ii) he was only asserting contract claims not covered by the statute.[9]

The Court of Appeals rejected both arguments. Looking to the statutory definition of the word "proceeding" and Oregon Supreme Court case law, the Court held that the filing of counterclaims and third-party claims triggers the statutory buy-out option.[10] The Court went on to explain that limiting the buy-out's applicability to newly filed complaints would "allow feuding shareholders to strategically undermine the legislature's desire to allow the early buyout election as an alternative to protracted litigation."[11] The Court also concluded that the fact that the claims were alleged as contract claims did not preclude the corporation from exercising its buy-out rights because "nothing in the statutory language suggests that the legislature intended the availability of the buyout election ... to depend on how the plaintiff labels the claims."[12]

In sum, *Graydog* embraced a broad view of the buy-out provision, giving close corporations and their shareholders the ability to avoid costly litigation regardless of the labels used or procedural posture of the shareholder claims.

Continued on next page

BUYOUT RIGHTS
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Scallon v. Scott Henry's Winery Corp.

The second case that will impact the scope of the buy-out option is *Scallon*. There, minority shareholders in a close corporation asserted derivative claims against certain shareholders and officers of a close corporation, alleging, among other things, waste of corporate assets.[13] As in *Graydog,* the corporation promptly sought to exercise its right to buy the plaintiffs' shares in order to avoid the prospect of protracted litigation.[14] The district court refused to allow the buy-out, concluding that the buyout remedy did not apply in the context of derivative claims because derivative claims are not proceedings "by a shareholder." At the request of the corporation, the district court certified an interlocutory appeal on whether the buy-out provision applies to derivative claims.[15]

In Ninth Circuit briefing, the corporation made three primary arguments to support application of the buy-out option to derivative, as well as direct, claims. First, the corporation argued that the appropriate definition of the word "by" (as used in the phrase "proceeding by a shareholder") indicates an agent performing an action, and in a derivative action the agent performing the action—*i.e.,* initiating the proceeding—is a shareholder. The corporation also pointed to other instances where courts describe derivative cases as proceedings "by a shareholder" and to a prior decision of the Oregon Court of Appeals that applied ORS 60.952's predecessor statute to a derivative claim.[16]

Second, the corporation argued that the legislative history indicates that the buy-out defense was intended to apply in all shareholder actions, including derivative actions. The brief pointed to statements by one of the bill's primary drafters, Professor Robert Art, explaining that the statute was intended to allow close corporations to avoid the costly and otherwise destructive effects of shareholder litigation.[17]

Third and finally, the corporation argued that interpreting ORS 60.952 to exclude derivative claims would abrogate the common law rule that actions for corporate waste—one of the types of actions explicitly listed in the statute—can only be pursued as a derivative claim. If courts can award relief for waste under ORS 60.952 then either the statute applies to derivative claims for waste or the rule that waste must be brought as a derivative claim is overruled by implication. Because statutes are presumed to be consistent with the common law absent clear legislative intent, the brief argued that ORS 60.952 (and the buy-out option) must be available in derivative actions.[18]

The shareholders' opposing brief was due on October 11, 2016, and the case will be fully briefed later this fall.

Conclusion

The law in this area is developing and could have significant impact on the ability of close corporations to avoid shareholder litigation. While *Graydog* gives close corporations broad buy-out rights that can be used to avoid litigation in a broad range of circumstances, the upcoming decision in *Scallon* could have a significant impact on the reach of that defense.

Endnotes

1 ORS 60.952. The statute defines close corporations as all corporations that do not have shares that are traded in widely accessible markets, like national securities exchanges.
2 ORS 60.952(6).
3 ORS 60.952(1), (6).
4 Approximately 90 percent of corporations in the United States are not publicly traded. *See* Venky Nagar, Kathy Petroni, & Daniel Wolfenzon, Governance Problems in Close Corporations 1 (NYU Pollack Center for Law & Business Working Paper, 2008) (analyzing the number of corporation that file tax returns that are listed on major stock indexes and finding that the vast majority of all U.S. corporations are closely held corporations), *available at* http://pages.stern.nyu.edu/~dwolfenz/CC.pdf.
5 The author's firm represents the appellants in this case.
6 279 Or App 722, 381 P3d 903 (2016). The minority's status as an employee was of particular importance because a shareholder agreement provided that if a shareholder's employment ended that he would be deemed to have offered to sell all of his shares to the corporation and the other shareholder. *Id.*
7 *Id.*
8 *Id.*
9 *Id.* at *1-2.
10 *Id.* at *4.
11 *Id.* at *4.
12 *Id.* at *5-6.
13 *See Scallon v. Scott Henry's Winery Corp.,* No. 14-cv-1990-MC, 2015 WL 5772107, at *1 (D Or Sept. 30, 2015) (granting motion for certification of an interlocutory appeal).
14 *Id.*
15 *Id.* at *1-2.
16 Appellant's Opening Brief, at 8-15, 17-21, *Scallon v. Scott Henry's Winery Corp.,* No. 15.35952 (9th Cir July 11, 2016)
17 *Id.* at 15-17.
18 *Id.* at 22-23.

Reconsidering Medical Expense Write-offs Under *White v. Jubitz*

Hillary A. Taylor
Keating Jones Hughes PC

The Oregon Supreme Court has been re-examining precedents at an unprecedented rate in recent years. Indeed, in a 2015 decision overturning the *Stubblefield* rule, the Court indicated its willingness to reconsider past rulings.[1] With that in mind and the 10 year anniversary of *White v. Jubitz* approaching, this article looks at the effect *White* has had on the recovery of medical expenses in medical malpractice cases and suggests it is primed for reconsideration.

Hillary A. Taylor

Calculating past medical expenses for purposes of determining damages in a personal injury case should arguably be easy; simply add up the amounts paid. However, the holding of *White v. Jubitz* is often used as a basis for allowing plaintiffs to recover significantly more than what was paid for medical treatment by requiring that courts ignore amounts billed for medical care that is ultimately written-off.[2] In some instances, this results in a personal injury plaintiff recovering economic damages in excess of the amount that was truly reasonable for the medical services provided. It can also hamstring a defendant's ability to effectively challenge the reasonableness of certain medical charges, particularly in situations where the medical service provider never had any intention to collect the full amount appearing on a patient's bill.

The plaintiff in *White v. Jubitz* sued a bar owner after he was injured when the stool he was sitting on collapsed.[3] A jury awarded $37,600 in economic damages representing approximately the amount plaintiff's medical providers had billed, distinct from the amount Medicare paid his medical providers. The defense asked the court to limit plaintiff's recovery to the $13,400 that was actually paid to his providers, reducing the judgment by the amount written off by his medical providers. The court held plaintiff could recover the total amount of the medical providers' reasonable charges, not just the amount that Medicare paid, holding the former was recoverable because the collateral source statute precluded reduction of the judgment.[4]

Under *White,* it is often contended by medical malpractice plaintiffs that to be recoverable, a past medical expense must simply be billed, meaning that a bill of some amount is generated at some point in time. Such a "standard" for economic damages not only ignores the practical reality of what was paid, but also does not necessarily reflect the plaintiff's actual compensable loss, or the reasonable value of the medical services necessary to make the plaintiff whole. Further, the effect of *White,* although perhaps unintended, is that the defense is often precluded from offering evidence at trial of the amounts paid versus billed, including cross-examination on that subject. Some counsel even take the position that information about write-offs or amounts actually paid is not discoverable and refuse to produce it.

White is problematic because it can allow for recovery of excessive, or one might even argue, phantom economic damages, *i.e.*, those amounts a medical provider has written off that it does not and never intended to collect. Further, as has become apparent in the years since the decision, allowing recovery for full amounts billed regardless of actual payment ignores the reality of the third-party payor system. Providers contract with insurers who agree to pay a percentage of what they are billed for claims. A total amount is billed, the agreed upon percentage is paid, and the remainder is often written off. To allow blanket recovery in a negligence action of amounts written off has the potential, in certain cases, to result in a windfall, thus contravening the compensatory purpose of economic damages. Allowing recovery of an amount that plaintiff will never be responsible for paying is inconsistent with how such damages have been determined in Oregon for more than 100 years: "in estimating damages, it is proper to consider … *money necessarily paid or debts necessarily incurred* in curing the bodily injury[.]"[5] Also, reliance on the collateral source statute to preclude reduction of amounts not paid goes too far; the statute itself does not suggest that amounts *not* paid are collateral benefits.

Continued on next page

MEDICAL EXPENSE WRITE-OFFS
continued from page 8

White involved a relatively modest damages award. However, in cases involving catastrophic injuries where the past medical bills are hundreds of thousands or millions of dollars, the effect of a rule that blindly equates billed amounts to compensable economic loss can grossly inflate damages, adversely affecting settlement, the parties' expectations, and the risks attendant to an adverse verdict. All in the name of "economic" damages that no one, much less the plaintiff, was ever going to pay.

The rule regarding write-offs that has been espoused following *White* is appropriate for rethinking. There are steps that can be taken to posture the issue for appellate review. In *White,* the Supreme Court recognized that the defense had stipulated to the reasonableness of the amount of the past medical bills, making it more difficult to challenge the issue on appeal.[6] Keeping that in mind, before trial ask the court to limit admissible damages to what was actually paid and do not stipulate to the charges as reasonable or incurred if they are for amounts not paid in an effort to preserve the issue for appellate review.

Further, there are arguments that *White* does not apply universally. As explained above, in *White,* the defendant stipulated that the amount billed was reasonable. A defendant who does not make such a stipulation arguably retains its right to challenge certain "written off" amounts as unreasonable and, therefore, not recoverable as economic damages. In addition, in cases where a patient pays nothing for medical care, or the care is provided free of charge, use the facts to distinguish your case from *White* and its reliance on the collateral source statute. This argument can be particularly effective when a patient seeks care from a publicly funded provider. The plaintiff pays nothing, or the public entity writes off the entire bill. The patient received the value of the services, the treatment rendered, but then seeks to recover the entire amount "billed" or "incurred" but never paid as past medical expenses in a medical malpractice action against a medical provider. Situations like this are helpful illustrations as to why the rule that unpaid medical charges are recoverable should be reconsidered.

The idea that the collateral source rule protects against a reduction in damages for amounts that no one has ever paid, i.e., write-offs, is simply not borne out in its text. The tenth year anniversary of *White* is getting closer. With the lessons of *White* learned, it is time to start picking away at its premise and advocating for a measure of damages that more accurately reflects the economic reality of our medical system.

Endnotes

1 *See Brownstone Homes Condo Assn v. Brownstone Forest Hts,* 358 Or 223, 236, 363 P3d 467 (November 19, 2015) (stating: "[T]his court's obligation when formulating the common law is to reach what we determine to be the correct result in each case. If a party can demonstrate that we failed in that obligation and erred in deciding a case, because we were not presented with an important argument or failed to apply our usual framework for decision or adequately analyze the controlling issue, we are willing to reconsider the earlier case." (quoting *Farmers Ins. Co. v. Mowry,* 350 Or 686, 261 P3d 1(2011)).

2 *White v. Jubitz Corp.,* 347 Or 212, 215, 219 P3d 566 (2009).

3 *Id.*

4 ORS 31.580.

5 *Oliver v. North Pac. Transp. Co.,* 3 Or 84, 87 (Or Cir 1869) (emphasis added).

6 47 Or at 243-44.

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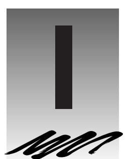
Forum Selection in Oregon After *Espinoza*

Janet M. Schroer and Sara L. Urch
Hart Wagner LLP



It is an established rule that a plaintiff has the right to seek redress in any forum where subject matter and personal jurisdiction can be established and venue is proper, and that if multiple forums are available, the plaintiff may choose from those forums available to it. But what should happen if the defendant argues that the plaintiff's chosen forum is inconvenient? In its 2016 decision, *Espinoza v. Evergreen Helicopters, Inc.,*[1] the Oregon Supreme Court addressed the issue by adopting the doctrine of *forum non conveniens.* This article outlines Oregon's newly adopted two-prong test for *forum non conveniens* and analyzes issues that defense attorneys should be aware of when dealing with disputes where a place outside of Oregon may be a more convenient forum.

Janet M. Schroer

Sara L. Urch

In *Espinoza,* a helicopter owned and operated by an Oregon corporation crashed in a remote part of Peru, leaving no survivors. Plaintiffs, personal representatives of the decedents and citizens of Peru, brought a wrongful death action against the helicopter owner[2] in Multnomah County Circuit Court. Defendants sought dismissal based on the doctrine of *forum non conveniens,* arguing Oregon was an inconvenient forum because "the overwhelming evidence" relating to plaintiffs' claims for negligence was in Peru.[3] Plaintiffs opposed defendants' motion to dismiss, arguing that the doctrine of *forum non conveniens* had never been expressly recognized in Oregon, but even if it was, the balance of factors weighed strongly in favor of litigating the case in Oregon. The trial court dismissed the matter with instructions for the parties to litigate the matter in Peru. Plaintiffs appealed and the Oregon Supreme Court remanded the case for reconsideration of the factors applicable to the *forum non conveniens* doctrine.

In issuing its decision, the *Espinoza* Court adopted the doctrine of *forum non conveniens* as part of Oregon's common law, as set forth by the *U.S. Supreme Court in Gulf Oil Corp. v. Gilbert.*[4] The Court explained that, unlike a venue change on convenience grounds,[5] which simply changes the county in which an action is heard, the doctrine of *forum non conveniens* applies when a place outside of Oregon—whether another state or another country—is a better forum.[6] In adopting the standard articulated by *Gulf Oil,* the Court concluded that a "flexible" two-stage, multi-factor approach now guides Oregon trial courts in considering motions to dismiss on *forum non conveniens* grounds.

At the first stage of the *Gulf Oil* test, the court considers whether an "adequate alternative forum" exists. An adequate alternative forum is one where the defendant is amenable to service of process, the courts have jurisdiction, and the law and the judicial system are capable of providing the plaintiff with meaningful redress, including the ability to obtain an enforceable judgment.[7]

The second stage of the *Gulf Oil* test requires the trial court to balance the private and public interests at stake. Private-interest factors may include:

- The relative ease of access to sources of proof;
- Availability of compulsory process, and the cost of obtaining attendance of unwilling witnesses;
- Possibility of view of premises; and
- The enforceability of a judgment if one is obtained.[8]

The trial court also considers public-interest factors such as:

- The administrative difficulties and burden on the court in the plaintiff's chosen forum;
- The unfairness of imposing trial and the burden of jury duty on a community with little or no connection to the controversy;
- The interest in having 'localized controversies decided at home'; and

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FORUM SELECTION
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- Choice of law issues.[9]

When, on balance, the interests "strongly favor" the alternative forum, the trial court may exercise its discretion to dismiss the complaint.[10]

It has long been disputed whether the doctrine of *forum non conveniens* should be recognized by Oregon courts. With that question now resolved by *Espinoza,* the new battleground for Oregon defense practitioners will be in applying the various public and private interest factors to the facts of a given case. Under the standard adopted by *Espinoza,* on a motion to dismiss for f*orum non conveniens,* a trial court must accept the truth of plaintiff's well-pleaded allegations and limit its factual findings to those issues outside the pleadings that need to be resolved to dispose of the *forum non conveniens* motion (for example, issues regarding witnesses' availability and the existence of compulsory process, among other issues).[11] Those issues "outside the pleadings" lead to an array of interesting questions about the doctrine's future application in Oregon.

For example, what grounds will be sufficient to urge a court to find a proposed alternative forum inadequate? *Espinoza* suggests that plaintiff's argument that the courts of Peru were inadequate due to "institutional corruption, discrimination against indigenous and poor people, and retaliation against plaintiffs who seek redress in Peru's legal system" may have constituted grounds for determination that Peru was an inadequate forum.[12] However, because those issues were not preserved, the Court's view of such an argument remains an open question.

Another interesting question will be how courts will resolve the forum issue where process in one forum cannot secure uncooperative witnesses' testimony for one party while the alternate forum presents the same problem for the other party. In other state courts, parties frequently attempt to skirt the issue by volunteering to make witnesses available. For example, in *Spider Staging Corp.,*[13] a Washington Supreme Court wrongful death case, plaintiff, a Kansas resident, fell to his death in Kansas from a scaffold built in Washington. There, the court denied defendants' motion for dismissal on *forum non conveniens* grounds in large part because plaintiff offered to make witnesses residing in Kansas available to appear in Washington. However, in *Myers v. Boeing,* another Washington Supreme Court wrongful death case (this time arising from an airplane crash involving 71 Japanese nationals[14]), plaintiffs offered to bring several Japanese witnesses to Washington for trial. Even so, the court dismissed the case with instructions for the parties to litigate in Japan, because on balance it weighed other interests—such as Japan's overriding interest in resolving a case involving so many of its citizens—more heavily.

As the above examples underscore, the *forum non conveniens* doctrine is, in the end, a balancing test. As the *Espinoza* Court explained: "If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable."[15] In other words, to be successful on a motion to dismiss under the doctrine of *forum non conveniens,* the successful defense attorney must bear in mind the various factors a court may take into consideration, while also being aware, depending upon the nature of the case, which factor a court may determine ultimately to be most significant.

Endnotes

1 *Espinoza v. Evergreen Helicopters, Inc.,* 359 Or 63 (2016) (J. Balmer).
2 The estate of the decedent helicopter pilot, an Oregon resident, was also a defendant. However, the parties disputed whether the pilot was under defendant Evergreen Helicopters, Inc.'s control at the time of the accident.
3 359 Or at 71.
4 330 US 501, 506-507, 67 S Ct 839 (1947).
5 ORS 14.110(1)(c).
6 The Court adopted the *Gulf Oil* test with one notable exception. The Court expressly rejected defendants' request to adopt a "lesser deference" rule for a foreign plaintiff's choice of forum, as adopted by the majority of jurisdictions and set forth in *Piper Aircraft Co. v. Reyno,* 454 US 235, 102 S Ct 252 (1981). Instead, the Court adopted the approach of Washington and a few other states, because the doctrine "turns not on whether that forum is convenient for the plaintiff, but on whether litigating there would be so inconvenient generally—for litigants, third parties, and the court—that the court ought to override the plaintiff's choice." 359 Or at 105; *see Myers v. Boeing Co.,* 115 Wash 2d 123, 128, 794 P2d 1272, 1280-1281 (1990).
7 359 Or at 99 (2016) (citing to *Piper Aircraft Co. v. Reyndo,* 454 US 235, 250, 254-255 & n 22, 102 S Ct 252 (1981)).
8 359 Or at 106-107 (citing to *Gulf Oil*, 330 US at 508).
9 *Id.* at 82-83 (citing to *Gulf Oil,* 330 US at 508-509).
10 *Id.*
11 *Id.,* at 77, 123-124.
12 359 Or at 74.
13 87 Wash 2d 577, 555 P2d 997 (1976).
14 *See* n 6.
15 359 Or 63 (quoting *Piper Aircraft,* 454 US at 249-50).

Constitutional Challenges to Local Government Management of Homeless Camping

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ore and more, cities are being confronted with challenges of managing their homeless populations, including dealing with the proliferation of "tent cities." The development of such "cities" often raises a conflict between a city's interest in having public property used as intended versus the homeless population's interest in carrying out their activities and living their lives on that same public property. A common manifestation of this conflict involves laws—and challenges to those laws—that restrict camping on public property. For example, Portland, which has relatively large numbers of homeless,[1] has an ordinance that makes it unlawful "for any person to 'camp'[2] in or upon any public right of way." Portland also has an ordinance which makes it unlawful to install a structure on public property (except parks) without authorization.[3] These ordinances and others like it have faced constitutional challenges in Oregon and elsewhere. Familiarity with the types and outcomes of these constitutional challenges can help defense attorneys advise local government clients in drafting and lawfully enforcing ordinances addressing homeless camping.

Chelsea Glynn

David Landrum

While drafting a no-camping law that is facially constitutional is not terribly difficult,[4] applying the law in a manner that passes constitutional muster can be extremely challenging. That is, where constitutional challenges to no-camping laws have gained traction is through claims regarding the application of such laws to the homeless. In countless instances over the past several years, members of the homeless community and advocacy groups have challenged both the facial constitutionality of no-camping laws and the manner of enforcement of such laws. The outcome of most of those challenges has turned on application and enforcement of the no-camping laws. Accordingly, this article provides a primer on the dominant as-applied constitutional challenges to no-camping laws and the lessons those challenges have to teach cities, and the lawyers who advise cities, on enforcement and potential liability.

Challenges under the Eighth Amendment

One of the primary challenges to no-camping ordinances comes in the form of claims made under the Eighth Amendment's prohibition against "cruel and unusual punishment." This argument is rooted in *Robinson v. California,* a Supreme Court decision that struck down a statute making it a crime to be addicted to narcotics. In *Robinson,* the Court reasoned that the statute punished a person's "status" of being addicted to narcotics as opposed to his conduct, and so allowed the state to criminally prosecute someone even if that person had not actually used drugs in the state.[5] Some courts have interpreted *Robinson* to mean that the Eighth Amendment prohibits the government from punishing an act that derives from a person's status or involuntary condition, and therefore that laws criminalizing the unavoidable consequence of involuntary homelessness can violate the Eighth Amendment.[6]

Robinson provides a framework for the Eighth Amendment challenge that a city may face to a no-camping ordinance. Most often, the dispositive question of whether a city's law actually violates the Constitution is highly fact specific. In other words, these types of laws generally do not violate the Eighth Amendment on their face, but may be vulnerable to a constitutional attack based on the specifics of how the city chooses to enforce the law. The Oregon

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District Court, for instance, has held that Portland's no-camping ordinance is facially constitutional because it does not criminalize a person's status as homeless.[7] However, the Oregon District Court and the Ninth Circuit Court of Appeals, among other courts, have at least acknowledged that these kinds of laws have the potential to violate the Eighth Amendment as applied.

To simplify, if a homeless plaintiff can show that he or she has no alternative but to camp or sleep in public, then a city's law prohibiting camping on public property or sleeping in public may violate the Eighth Amendment under the rationale of *Robinson*.[8] For example, the Oregon District Court has held that homeless plaintiffs stated a claim under the Eighth Amendment by alleging that the City of Portland enforced its no-camping and no-structure ordinances where the homeless population outnumbered available shelter spaces, and where the homeless could not functionally access the available shelter spaces regardless.[9]

If, on the other hand, a city can demonstrate that a homeless plaintiff, or a class of homeless plaintiffs, has alternatives to camping in public, then a law that prohibits camping arguably would not violate the Eighth Amendment as applied.[10] For example, in the case just mentioned, the Oregon District Court later denied the homeless plaintiffs' motion for summary judgment on their claim under the Eighth Amendment. In denying the motion, the Court considered evidence presented by the City that enforcement was driven by a legitimate interest in safety and sanitation; that less than 10 percent of the homeless population had received citations under these ordinances; that relatively more citations were given between 6:00 and 10:00 a.m., thus allowing homeless people to sleep in public places during conventional sleeping hours; and that not all conduct being punished by these ordinances was involuntary.[11]

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Challenges Under the Theory of Equal Protection and Right to Travel

Another major source of challenges to no-camping ordinances comes under the Equal Protection Clause of the Fourteenth Amendment, which prohibits states from denying "to any person within its jurisdiction the equal protection of the laws."[12] While homeless plaintiffs may not be able to challenge a no-camping ordinance on its face under the Equal Protection Clause, they may be able to challenge the ordinance by showing that the law is being selectively enforced only against those who are homeless.[13] Actual comparator evidence of selective enforcement is difficult to come by, considering that people who are not homeless do not typically camp in a city on public property. Still, this is an argument that cities should be aware of.

Likewise, homeless plaintiffs have claimed that no-camping ordinances infringe on their right to travel, or their freedom of movement, both of which are recognized as a right secured by the Constitution.[14] Again, whether a no-camping ordinance infringes on either of these rights depends on how it is enforced.[15] For instance, a city's enforcement of no-camping and similar laws could be so severe that it effectively deprives the homeless of all the "necessities of life," and thus marks a de facto restriction on their ability to reside in a city. Or, a city could enforce these laws in a way that is meant to purposefully exclude the homeless from certain areas of the city.

Due Process Challenges to Camp Cleanup

Finally, an inevitable element of enforcing a no-camping or a no-structure ordinance is the subsequent cleanup of camps or structures that are deemed in violation of the ordinance. The cleanup process itself can raise a host of constitutional challenges for cities under the Due Process Clause of the Fourth and Fourteenth Amendments. For example, the Oregon District Court has held that, in cleaning up campsites, cities must provide the homeless with sufficient notice before disposing of or destroying their possessions.[16]

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Conclusion

While it is difficult for a homeless plaintiff to sustain a constitutional challenge to a no-camping ordinance on its face, the case law makes it clear that as-applied challenges under the Constitution are viable. The success of an as-applied challenge, however, depends on the method of the local government's enforcement. Accordingly, cities with no-camping ordinances should evaluate how any no-camping or similar ordinances are enforced, and plan and develop careful and uniformly applied policies and procedures that will put cities in the best position to avoid and defeat constitutional challenges.

Endnotes

1 Portland is estimated to have a homeless population of about 3,800. Kristina Smock Consulting, 2015 Point-in-Time Count of Homelessness in Portland/Gresham/Multnomah County, Oregon, p. 3 (June 2015).

2 "'To camp' means to set up, or to remain in or at a campsite, for the purpose of establishing or maintaining a temporary place to live." "'Campsite' means any place where any bedding, sleeping bag, or other sleeping matter, or any stove or fire is placed, established, or maintained, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof." PCC 14A.50.020A.

3 The no-camping ordinance, and the no-structure ordinance, can be found at Portland City Code § 14A50.020 and .050.

4 *Cf. City of Portland v. Johnson,* 59 Or App 647 (1982) (holding that an earlier version of the City's no-camping ordinance was not unconstitutionally vague or overbroad because it did not infringe upon any constitutionally protected conduct).

5 *Robinson v. California,* 370 US 660 (1962). Another Supreme Court decision—*Powell v. Texas,* 392 US 514 (1968)—is somewhat of a companion to *Robinson*.

6 *See, e.g., Jones v. City of L.A.,* 444 F3d 1118, 1135–37 (9th Cir 2006), vacating as moot, 505 F3d 1006 (9th Cir 2007).

7 *Or. & Op., O'Callaghan v. City of Portland,* https://ecf.ord.uscourts.gov/doc1/15115002025 (D Or May 12, 2014) (No. 3:12-CV-00201-BR, available on PACER).

8 *See, e.g., Jones,* 444 F3d at 1135–37.

9 *Anderson v. City of Portland,* 2009 WL 2386056 at **5–9 (D Or July 31, 2009).

10 *See, e.g., Joel v. City of Orlando,* 232 F3d 1353, 1362 (11th Cir 2000).

11 *Anderson v. City of Portland,* 2011 WL 6130598 at **2–4 (D Or Dec. 7, 2011); cf. S*tate v. Barrett,* No. 14CR-10631 (Multnomah Co Cir Ct Feb. 2015) (holding that the no-camping ordinance, as applied, did not unconstitutionally punish defendant for her homeless status because she was entitled to have the jury consider a "choice of evils" defense to her charges).

12 US Const., amend. XIV, § 1.

13 *See, e.g., Anderson,* 2009 WL 2386056 at *8; *Anderson,* 2011 WL 6130598 at **4–5.

14 *City of Chicago v. Morales,* 527 US 41, 53 (1999); *Anderson,* 2009 WL 2386056 at *8.

15 *See Anderson,* 2009 WL 2386056.

16 *See, e.g., Smith v. City of Corvallis*, 2016 WL 3193190 at **5–8 (June 6, 2016).

Recent Case Notes

Sara Kobak, Schwabe Williamson & Wyatt PC
Case Notes Editor

Attorney Fees

Attorney fees under ORS 107.718(1) are limited to issues related to relief

In *CR v. Gannon,* 281 Or App 1 (2016), the Oregon Court of Appeals concluded that attorney fees are authorized under ORS 107.716(3)—the statute governing attorney fees awards in restraining-order cases—only when there is a hearing under ORS 107.718(10) in which the parties have an opportunity to be heard on issues of law or fact that are related to relief available under ORS 107.718, and the court is asked to make a determination on those issues.

In CR, petitioner sought a restraining order against respondent pursuant to ORS 107.710, which the trial court granted after an *ex parte* hearing. Respondent then requested a hearing under ORS 107.718(10) to challenge the factual basis for the restraining order. At the hearing, instead of addressing the merits, petitioner asked the trial court to dismiss her petition for the restraining order without prejudice and without awarding fees or costs to either party. The trial court dismissed the restraining order without prejudice, but it delayed ruling on the issue of fees and costs pending a petition from respondent.

Respondent subsequently petitioned for attorney fees and costs. At the hearing on the petition, the trial court concluded that ORS 107.716(3) authorizes an award of attorney fees or costs only in cases where there has been a "contested hearing" on the evidence relating to the restraining order. Because the prior hearing did not involve any presentation or findings on evidence, the trial court concluded that it had no legal basis to award fees or costs to respondent.

Respondent appealed, and the Court of Appeals affirmed the trial court's decision. After reviewing the text and context of ORS 107.716, the Court of Appeals reasoned that the key to whether attorney fees are authorized under ORS 107.716(3) is whether the issues of law or fact before the trial court in a hearing are linked to the relief provided under ORS 107.718(1). Based on the plain language and context of the statute, the Court of Appeals determined that a hearing is held pursuant to ORS 107.718(10) only when the parties have an opportunity to present issues of fact and law, and the trial court is asked to make a determination on those issues. Because the hearing in this case did not involve the merits in light of petitioner's voluntary dismissal of the petition, the Court of Appeals determined that attorney fees and costs were unavailable under ORS 107.716(3), and it affirmed the decision of the trial court. ✪

— Submitted by Brian J. Best, Rathbone Barton Olsen PC

In court-annexed arbitration, a party may challenge an arbitrator's attorney fees award in a request for a trial de novo on the merits

In *Lee v. Am. Family Mut. Ins. Co.,* 279 Or App 282 (2016), the Oregon Court of Appeals held that a party requesting a trial *de novo* under ORS 36.425 after a court-annexed arbitration also may challenge an arbitrator's attorney fees award without separately following the procedure to challenge a fees award under ORS 36.425(6).

In the underlying case, plaintiff sued her insurer for less than $50,000. Consistent with ORS 36.425, the case proceeded to mandatory, non-binding arbitration. After plaintiff prevailed at arbitration, plaintiff sought and received an award of attorney fees under ORS 742.061. Apparently believing the award for attorney fees was too low, plaintiff requested a trial *de novo,* but she did not separately file exceptions to the fees award under ORS 36.425(6). Defendant subsequently argued that plaintiff waived her challenge to the fees award by failing to follow the procedure for filing exceptions under ORS 36.425(6). The trial court agreed with defendant's waiver argument and did not revisit the arbitrator's fees award.

On appeal, the Oregon Court of Appeals concluded that a request for a trial *de novo* under ORS 36.425(2) was sufficient also to raise a challenge to an arbitrator's attorney fees award. The Court resolved the question by following the rules for statutory construction. The Court observed that ORS 36.425(2)(a) provides that, following a court-annexed arbitration, a party may request "a trial de novo of the action in the court on all issues of law and fact." The Court determined that "all issues of law and fact" was broad and included the right to challenge an award of attorney fees. The Court also concluded

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that ORS 36.425(6) applies when a party seeks to challenge only an attorney fees award, permitting an expedited track for resolution that avoids re-litigation of the whole case. The Court found support for its interpretation in the legislative history and also noted that it had previously endorsed the "two-track" interpretation of ORS 36.425 in *Deacon v. Gilbert,* 164 Or App 724 (2000). Based on its statutory interpretation, the Court held that the filing of separate exceptions to a fees award is unnecessary if a party requests a trial de novo under ORS 36.425(2). ✪

— Submitted by Greg Lockwood, Gordon & Rees

Restitution To Insurers

A defendant who causes property damage in a hit-and-run accident is liable for damages to the victim's insurer

In *State v. Anderson,* 280 Or App 572 (2016), the Court of Appeals held that ORS 811.706 authorizes restitution awards to insurers in hit-and-run cases. In *Anderson,* defendant was convicted of committing a hit-and-run accident in violation of ORS 811.700, and he was ordered to pay restitution to the victim and the victim's insurer for the stipulated amount of the property damage. Defendant appealed and challenged the court's restitution award, arguing that ORS 811.706 authorizes restitution awards only to owners of property, not to their insurance carriers. The Court of Appeals disagreed and affirmed the trial court's award.

In concluding ORS 811.706 authorizes restitution awards to insurers, the trial court relied on the statutory text referring to "any damages caused by the person as a result of the incident that created the duties in ORS 811.700." The trial court interpreted this text to include property damages that an insurer paid if such damages stemmed from the accident that gave rise to defendant's obligations under the statute. Defendant argued that the trial court's interpretation conflicted with *State v. Hval,* 174 Or App 164 (2001), and its statement that only owners of damaged property may be awarded damages pursuant to ORS 811.706.

On appeal, the Court of Appeals affirmed based on its examination of the text and context of ORS 811.706. The Court of Appeals explained that ORS 811.706 ties restitution not to the defendant's criminal conduct but, instead, to the damage to persons or property that trigger the duties to be performed by the involved driver. The Court of Appeals determined that the plain text of ORS 811.706 authorizes restitution for "any" damages that a hit-and-run defendant has caused, without limitations on who may recover restitution. The Court of Appeals also dismissed defendant's reliance on the *Hval* decision, stating that defendant placed too much significance on a single statement in the decision and that the primary issue in *Hval* was whether ORS 811.706 provided a civil remedy. ✪

— Submitted by Brian J. Best, Rathbone Barton Olsen PC

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Implied Easements

Determining the existence of an implied easement requires a multi-factor factual inquiry

In *Dayton v. Jordan,* 279 Or App 737 (2016), the Court of Appeals held that determining whether there is an implied easement is an inherently factual inquiry that involves a weighing of multiple factors. In *Dayton,* the Court of Appeals considered whether a sale of a parcel of partitioned land creates an implied easement in a road depicted on the plat. The case involved two competing all-terrain vehicle rental businesses near the Oregon Dunes National Recreation Area. The two businesses operated on adjacent land, and both properties had once been part of a larger, undivided parcel of land. The issue was whether defendant had an implied easement in a road over plaintiffs' land that allowed access to the dunes based on the depiction of the road in the partition plat that created defendant's lot.

In the trial court, plaintiffs sought to quiet title to any adverse claims by defendant and to enjoin him and his company from using the road. Defendant asserted a counterclaim seeking a declaration that he had an easement over the road "implied from reference" from the depiction of the road in the partition plat that created his lot. The trial court granted summary judgment to defendant, finding that defendant had an implied easement from reference to the plat.

On appeal, the Court of Appeals reversed. In doing so, the Court of Appeals rejected defendant's argument that when an owner partitions property and conveys lots by reference to a plat, the lot purchaser acquires by implication an easement in all roads shown on the plat. Instead, the Court of Appeals agreed with plaintiff that the trial court should have considered the factors articulated by the *Supreme Court in Cheney v. Mueller,* 259 Or 108 (1971). Under *Cheney,* the existence of an implied easement must be decided on a case-by-case basis with consideration to different factors, including: (1) whether the claimant is the conveyor or the conveyee; (2) the terms of the conveyance; (3) the consideration given for it; (4) whether the claim is made against a simultaneous conveyee; (5) the extent of necessity of the easement to the claimant; (6) whether reciprocal benefits result to the conveyor and the conveyee; (7) the manner in which the land was used prior to its conveyance; and (8) the extent to which the manner of prior use was or might have been known to the parties.

Applying that holding in this case, the Court of Appeals determined that the trial court erred by failing to consider the factors. The Court of Appeals explained that the trial court was not required to expressly make findings or discuss each factor, but it was required to consider relevant evidence of the factors. Because the trial court had failed to do so, the Court of Appeal reversed and remanded. ✪

— Submitted by Stephen Deatherage, Markowitz Herbold

Apparent Authority

An agent's actual authority is relevant to determination of whether the agent had apparent authority to perform other duties

In *Harkness v. Platten,* 359 Or 715 (2016), the Oregon Supreme Court clarified the test for apparent authority, instructing that evidence of an agent's actual authority may be relevant to whether the agent has apparent authority to perform other tasks. The case arose in the context of legal malpractice and negligent misrepresentation claims against a lawyer following a settlement in an underlying case with claims against a mortgage company for a fraudulent investment and loan scheme by one of the company's former employees.

In the underlying case, a loan officer at a mortgage company induced plaintiffs to borrow money from the company to invest in hard-money loans to building contractors, using the equity in plaintiffs' real property as collateral. The loan officer met with plaintiffs at the office for the mortgage company and prepared documentation on the company's letterhead. The initial check that plaintiffs gave to the loan officer was a cashier's check made out to the mortgage company, and the mortgage company received a commission on plaintiffs' loans. Plaintiffs testified that they understood that the loan officer was acting within the scope of her employment in all of her dealings with plaintiffs. The evidence showed, however, that the loan officer acted in-

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dependently, forging documents, failing to record liens, and running the money through her personal accounts.

Plaintiffs sued the loan officer and mortgage company for the loan agent's fraud. Plaintiff ultimately settled the case on the advice of defendant, who informed plaintiffs that they would be able to obtain additional recovery from the loan borrowers. After defendant subsequently declined to pursue additional claims against the borrowers, plaintiffs filed legal malpractice and negligent misrepresentation claims against defendant, alleging his negligence caused them to settle the underlying action for less than they would have recovered if they had proceeded to trial.

At the trial on plaintiffs' legal malpractice claim, the trial court granted defendant's motion for a directed verdict, holding that plaintiffs had presented insufficient evidence to prove their claim in the underlying case that the loan officer acted with apparent authority or within the scope of her employment. The Oregon Court of Appeals affirmed, but the Oregon Supreme Court granted review and reversed.

On review, the Oregon Supreme Court held that plaintiffs had presented sufficient evidence to avoid a directed verdict on their underlying claims. In so holding, the Supreme Court discussed at length its decisions in *Eads v. Borman,* 351 Or 729 (2012), and *Badger v. Paulson Investment Company, Inc.*, 311 Or 14 (1991), and reiterated the rule that, when a principal cloaks an agent with actual authority to perform certain tasks, such actual authority may create the "appearance of authority" to perform other related tasks. The Supreme Court further explained that a principal's representation of authority need not be made directly to a third party for the principal to be liable under a theory of apparent authority; instead, the representation of authority need only be "traceable" to the principal. In addition, when an agent has been appointed to a position that carries generally recognized duties, the reasonableness of a third party's reliance on the principal's representation must be considered in the context of what is customary and usual for the agent's position.

Turning to the evidence in the case, the Supreme Court concluded that the Court of Appeals erred by disregarding evidence of the loan officer's actual authority to perform certain tasks, which was relevant to determining whether she was apparently authorized to perform other, related tasks. The Supreme Court also concluded that the Court of Appeals had failed to consider evidence regarding the role of a loan officer for a mortgage company in the local industry. Based on similar reasoning, the Supreme Court additionally held that the evidence presented on apparent authority supported a finding of *respondeat superior* liability. ✪

— Submitted by Donna Lee, Hart Wagner

Abuse of Vulnerable Person

An employer may be liable for an employee's abuse of vulnerable persons

In *Wyers v. American Medical Response Northwest, Inc.,* 360 Or 211 (2016), the Oregon Supreme Court held that an employer may be liable for an employee's abuse of a vulnerable person under ORS 124.100. In Wyers, six plaintiffs filed suit against an ambulance company, alleging that its paramedic employee sexually abused and inappropriately touched them during ambulance transport. The company did not learn of the sexual abuse of the plaintiffs until the plaintiffs filed their lawsuits. The company, however, had received multiple complaints involving similar allegations from other patients before the alleged abuse of plaintiffs.

On review, the legal issue involved the statutory interpretation of ORS 124.100(5), which provides liability if a person "knowingly acts or fails to act" in permitting another person to engage in physical abuse "under circumstances in which a reasonable person should have known of the physical or financial abuse." Because the ambulance company was unaware of the paramedic's abuse of plaintiffs until after the filing of their lawsuit, the trial court held that the company did not "permit" the abuse and, therefore, could not be liable under ORS 124.100. The Oregon Court of Appeals reversed, and the Oregon Supreme Court affirmed the Court of Appeals.

In its opinion, the Oregon Supreme Court construed ORS 124.100, examining primarily the mental states of "knowingly acts or fails to act" and "should have known" under the statute. The Court concluded that "ORS 124.100(5) applies if an employer such as [this company] knowingly (as opposed to, say, inadvertently) schedules an employee to work on an ambulance run under circumstances in which a reasonable person should have known that the sort of abuse inflicted

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on the plaintiff would occur." Because the company had known of previous, unrelated incidents of sexual abuse by this same paramedic, the Supreme Court held that plaintiffs had created a genuine issue of material fact about whether the company "permitted" the paramedic to abuse the six plaintiffs by "knowingly" allowing that paramedic to continue treating patients. ✪

— Submitted by Robert E. Sinnott, Keating Jones Hughes PC

Insured's Duty To Cooperate

Requests for examinations under oath must be reasonable to permit an insurer to deny coverage based on an insured's failure to cooperate

In *Kachan v. Country Preferred Ins. Co.,* 279 Or App 403 (2016), the Oregon Court of Appeals held that an insurance policy provision requiring an insured to submit to an examination under oath (EUO) permits an insurer to demand an EUO only when it is reasonable for the insurer to do so in connection with a claim.

In *Kachan,* plaintiff was in an automobile accident and sought personal injury protection (PIP) payments from defendant insurer to cover his chiropractic care. The insurer requested that plaintiff submit to an independent medical examination (IME). The IME doctor found that some chiropractic care was reasonable. The insurer informed plaintiff that any treatment exceeding the IME doctor's recommendation would be presumed unreasonable and might not be compensable. Plaintiff's chiropractor and attorney disputed this assertion. Plaintiff treated more often than the IME doctor recommended, and the insurer then requested an EUO from plaintiff. The EUO request included a demand for production of documents, some of which were unrelated to the dispute over PIP benefits. The letter also warned plaintiff that failure to cooperate could jeopardize his right to coverage. Plaintiff challenged the document requests as overbroad and never submitted to the EUO.

The insurer subsequently denied plaintiff's claim based on plaintiff's failure to submit to the EUO. Plaintiff then filed an action against the insurer. The insurer moved for summary judgment, arguing that plaintiff's failure to submit to an EUO violated his duty to cooperate. The trial court granted the insurer's motion, but the Court of Appeals reversed.

On appeal, the Court of Appeals first concluded that nothing in the PIP statutes prohibits an insurer from "reasonably requiring" an insured to comply with an EUO when it is reasonable to do so under the circumstances, and when the insurer otherwise complies with the applicable requirements of the PIP statutes. In reaching its conclusion, the Court observed that requiring EUOs was not only permitted, but also enabled insurers to efficiently investigate and resolve claims.

The Court of Appeals, however, also concluded that the insurer's authority to demand an EOU is qualified by a reasonableness requirement based on the plain language of the policy. The Court rejected the insurer's argument that reasonableness under the policy referred only to time and place of the EUO, finding it was "not plausible to think that either party intended for defendant to be able to require an EUO for unreasonable reasons." The Court finally concluded that the reasonableness of an EUO request was a question of fact for the jury, and it reversed and remanded for that determination. ✪

— Submitted by Greg Lockwood, Gordon & Rees

Negligence/Third Party Criminal Conduct

A defendant may be liable in negligence for third-party criminal conduct if risk of harm was generally foreseeable

In *Piazza v. Kellim,* 360 Or 58 (2016), a majority of the Oregon Supreme Court held in a divided opinion that the plaintiff had pleaded sufficient facts to permit a reasonable juror to find that a third-party's criminal conduct was reasonably foreseeable under the circumstances.

Plaintiff's negligence claim arose out of the shooting death of an international exchange student as she waited in a queue to enter an underage nightclub in Portland's Chinatown. The student was killed when a mentally ill individual fired multiple shots into the queue with the intent of killing random teenagers. Plaintiff alleged that the nightclub and the exchange program failed to protect the student from reasonably foreseeable third-party criminal conduct. The complaint described past instances of gang,

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drug, and alcohol-related violence near the nightclub's location, and alleged that defendants' awareness of those incidents made the student's shooting death reasonably foreseeable. Defendants moved to dismiss the claims on the ground that the harm-producing force, a random shooting spree by a mentally ill person, was not reasonably foreseeable as a matter of law. The trial court granted defendants' motion on that ground, and the Court of Appeals reversed. The Supreme Court granted review and affirmed the Court of Appeals in a divided opinion.

In the majority opinion, the Supreme Court first described its limited role as a gatekeeper on questions of foreseeability and emphasized its preference for giving voice to the community's preference through a jury determination. As such, the Supreme Court declined defendants' request to articulate a bright-line rule or test on the foreseeability of third-party criminal conduct. Instead, the Supreme Court instructed that multiple factors, including the similarity, frequency, proximity, and timing of prior criminal acts, are relevant to determine whether a person in defendants' position would have reasonably foreseen the risk of criminal harm to the victim.

Next, the Supreme Court considered the appropriate level of generality to describe the risk of harm; that is, how to compare the prior incidences of violence described in plaintiff's complaint to the circumstances of the student's death, and whether the former made the latter foreseeable. The Court rejected defendants' contention that the random shooting spree here was qualitatively different from the drug, alcohol, and gang-related violence described in plaintiff's complaint. Instead, the Court instructed that its precedents required a broad level of generality in assessing the reasonable foreseeability of criminal conduct, which it described in this case as a risk of "violent assaults." Although it acknowledged that the circumstances of the student's death were unusual, the Court found that the circumstances were within the generalized risk of foreseeable harm alleged in the complaint. Chief Justice Balmer wrote a dissent, arguing that the majority's analysis overemphasized the "end result" and did not appropriately consider the manner in which the harm occurred. ✪

— Submitted by Andrew Narus, Keating Jones Hughes PC

Construction Defects

Physical damage to property was "occurrence" triggering coverage even if not possible to determine precisely how much damage occurred during insurer's policy periods

In *FountainCourt Homeowners Assoc. v. FountainCourt Development,* 360 Or 341 (2016), the Oregon Supreme Court affirmed a supplemental judgment of garnishment for a jury's award against a subcontractor's insurer. In *FountainCourt,* the plaintiff homeowner association (HOA) brought a construction-defect action against a general contractor and several subcontractors, including a siding subcontractor, for negligence in the construction of condominiums and townhomes. The HOA's negligence claims proceeded to a jury trial, and the jury found that the siding subcontractor was 22.5 percent at fault for a $2.1 million damages award.

After judgment was entered, the plaintiff HOA mailed a writ of garnishment to the siding subcontractor's insurers for the amount of the judgment against the siding subcontractor. One insurer filed an answer asserting that the HOA failed to state a claim against the insurer because some or all of the damages did not arise from "property damage" or an "occurrence" within the meaning of the policies, and because some or all of the property damage resulted before or after the policy periods.

The HOA moved for a show-cause order as to why judgment should not be entered against the insurers on the writ of garnishment. The insurer objected and requested a jury trial on the underlying coverage and its exclusion defenses. The trial court denied the request for the jury trial, reasoning that the insurer's defenses presented only issues of law. At the subsequent hearing on coverage, the trial court ruled that the HOA had proved coverage under the policies and that the insurer had failed to prove what portion of the judgment, if any, against the siding subcontractor was excluded by the policies. The Oregon Court of Appeals affirmed the trial court's judgment on the merits, although it reversed on the attorney fees award.

The Oregon Supreme Court granted the insurer's petition for review. On review, the Supreme Court first analyzed whether the trial court properly resolved the issues raised in the garnishment proceeding in a manner that comported with the Supreme Court's previous case law concerning an insurer's duty to defend and right to litigate coverage issues. The Supreme Court clarified that an insurer is not entitled to re-litigate the facts con-

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cerning the insured's liability in the garnishment hearing. The Supreme Court also concluded that the trial court correctly decided that issues concerning policy interpretation—such as what damages were caused by an "occurrence" under the policies and whether the damages in the underlying case were "property damages" under the policies—were questions of law. Because the insurer made no factual arguments relating to any policy exclusions, the Supreme Court declined to address whether an insurer would be entitled to a jury trial in a garnishment proceeding if questions of fact existed.

After resolving those issues, the Supreme Court next addressed the insurer's argument that the underlying judgment against the siding subcontractor was not for "property damage" and was not caused by an "occurrence" within the periods covered by the policies. The Supreme Court rejected those arguments, concluding that the physical damages to property at issue was "property damage" and that coverage was triggered even though the HOA could not determine precisely how much of the property damage occurred during the insurer's policy periods.

Finally, the Supreme Court addressed the issue of allocation of liability among multiple insurers in cases where it is impossible to quantify how much continuous damage took place during specific periods. While it noted that most courts have taken one of two possible approaches—the "all sums" approach or the "pro rata" approach—the Supreme Court concluded that the issue was not preserved for its review, and it declined to endorse any particular approach. ✪

— Submitted by Brad Krupicka, Lindsay Hart LLP

Employer Liability Law

General contractor may be liable under ELL if it retains the right to control the risk-producing activity

In *Yeatts v. Polygon Northwest Co.*, 360 Or 170 (2016), the Oregon Supreme Court addressed a general contractor's liability under Oregon's Employer Liability Law (ELL) for injuries suffered by an employee of a subcontractor. The trial court dismissed the case after finding that plaintiff had presented insufficient evidence to withstand summary judgment on his ELL claim, including the specification that the general contractor retained a right to control the method or manner in which the risk-producing activity was performed. The Oregon Court of Appeals affirmed, but the Supreme Court reversed. In doing so, the Supreme Court overruled the requirement from *Wilson v. P.G.E.*, 252 Or 385 (1968), that the right to control must relate to the risk-producing actions and the reserved right to control must cause the subcontractor to be less diligent.

In *Yeatts,* defendant was a general contractor that subcontracted with plaintiff's employer for framing work in the construction of a townhome. Plaintiff was injured after a guardrail gave way while plaintiff was installing sheetrock on the third floor of the project. Plaintiff was told by an employee of the general contractor to "go up there and finish something."

On review, the Supreme Court analyzed plaintiff's ELL claim against the general contractor as an "indirect employer" of plaintiff. Citing its decision in *Woodbury v. CH2M Hill, Inc.*, 335 Or 154 (2003), the Supreme Court explained that, in addition to a worker's direct employer, liability under the ELL may be imposed on an indirect employer who: "(1) is engaged with the plaintiff's direct employer in a 'common enterprise'; (2) retains the right to control the manner or method in which the risk-producing activity was performed; and (3) actually controls the manner or method in which the risk-producing activity is performed."

Applying those considerations, the Supreme Court determined that there was no "common enterprise" in this case because the record did not show sufficient intermingling of work activities. The Supreme Court also held that there was insufficient evidence of any actual control by the general contractor over plaintiff's work, even with the direction to plaintiff from the employee of the general contractor. The Supreme Court determined, however, that plaintiff presented sufficient evidence to withstand summary judgment on the question of whether the general contractor retained a right to control the manner and method in which the risk-producing activity was performed, even if the general contractor did not actually control the pertinent risk-producing activity.

In finding that the general contractor retained the right to control the risk-producing activity, the Supreme Court first observed that the subcontract agreement provided that plaintiff's direct employer would defend and indemnify the general contractor. In addition, plaintiff's direct employer was primarily responsible for safety and framing requirements. However, because the

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contract also included a provision under which the general contractor retained some right to control the framing work, including related safety measures, the Supreme Court found that plaintiff produced enough evidence to avoid summary judgment on the right to control issue. Specifically, the Supreme Court noted that the contract required plaintiff's direct employer to implement "any safety measures requested" by the general contractor. In addition, although plaintiff's direct employer had the primary responsibility for fall protection system, the contract allowed the general contractor's employees to inspect the guard rails.

In its prior decision in *Wilson v. P.G.E.,* the Supreme Court had held that retention of the right to control safety measures would give rise to liability only if the retained right to control had some relation of a risk of danger to workers, i.e., that the subcontractor would become less diligent in safety measures. In *Yeatts,* the Supreme Court overruled *Wilson,* asserting that its premise that the retained right of control would create complacency on the part of subcontractors was flawed. In addition, the Supreme Court found no support for the *Wilson* risk-relation requirement in the text of the ELL, where the statute does not require that the risk-relation must create a danger to workers causing their direct employers to be less diligent. Based on those holdings, the Supreme Court reversed and remanded for a trial under plaintiff's specification that the general contractor reserved the right of control ✪

— Submitted by Brad Krupicka, Lindsay Hart LLP

UIM CLAIMS

An insurer is ineligible for "safe harbor" protection in cases where the insurer raises affirmative defenses such as contractual compliance with policy terms

In *Kiryuta v. Country Preferred Ins. Co.,* 360 Or 1 (2016), the Oregon Supreme Court held that an insurer is ineligible for "safe harbor" protection under ORS 742.061(3) in cases where the insurer raises affirmative defenses such as contractual compliance with policy terms. Under ORS 742.061(1), a plaintiff seeking uninsured motorist ("UIM") benefits is entitled to recover his or her reasonable attorney fees if timely settlement is not made and the plaintiff's recovery exceeds the insurer's tender. ORS 742.061(3) provides "safe harbor" from an attorney fees award if, in writing and within six months of the plaintiff's proof of claim: (1) the insurer accepts coverage; (2) the only issues to be resolved are "the liability of the uninsured or underinsured motorist" and "the damages due the insured"; and (3) the insurer consents to binding arbitration. In construing ORS 742.061, the Oregon Supreme Court concluded that, even if an insurer admits coverage, the insurer loses the "safe harbor" protection of ORS 742.061(3) if the insurer also asserts an affirmative defense of contractual compliance with the terms and conditions of the policy.

In *Kiryuta,* plaintiff filed a claim against her insurer for UIM benefits after being injured in a car accident. The insurer sent a letter to plaintiff that satisfied the safe-harbor requirements of ORS 742.061(3). In answering plaintiff's arbitration claim, however, the insurer asserted affirmative defenses, including a "contractual compliance" defense alleging that any UIM benefits were "subject to all terms and conditions of the policy of insurance, including UIM/UM limits and other clauses." Plaintiff prevailed at arbitration, and the arbitrator awarded attorney fees to plaintiff notwithstanding the insurer's safe-harbor letter.

The insurer filed an objection to the fees award in the trial court. The trial court ruled that the insurer's safe-harbor letter shielded the insurer from any attorney fees award, but the Oregon Court of Appeals reversed. After granting review, the Oregon Supreme Court affirmed and held that the insurer's affirmative defenses had disqualified the insurer from safe harbor by raising issues outside of the liability of the underinsured motorist and the damages due to the plaintiff.

In its decision, the Oregon Supreme Court explained that the insurer "necessarily opened the arbitration to issues beyond motorist liability and damages due" by raising its "contractual compliance" defense asserting that plaintiff's UIM benefits were subject to "all terms and conditions" of the insurance policy. In doing so, the Supreme Court observed that the defense "did not rest solely on the UIM/UM policy limits; it alleged that plaintiff's UIM benefits were subject to 'other clauses' of the policy as well." Because the insurer's answer extended the boundaries of the case to arbitrate any "terms and conditions" of the policy, including those that could potentially result in denial of coverage, the Supreme Court held that the "safe harbor" protection under ORS 742.061(3) was unavailable, and it remanded the case to the trial court for entry of a judgment awarding reasonable attorney fees to plaintiff. ✪

— Submitted by Chad Colton, Markowitz Herbold

Petitions For Review

Sara Kobak, Schwabe Williamson & Wyatt PC
Case Notes Editor

The following is a brief summary of cases for which petitions for review have been granted by the Oregon Supreme Court. These cases have been selected for their possible significance to OADC members; however, this summary is not intended to be an exhaustive listing of the matters that are currently pending before the court. For a complete itemization of the petitions and other cases, the reader is directed to the court's Advance Sheet publication.

Personal Jurisdiction

- ***Barrett v. Union Pacific Railroad Company,* S0639914, S063929 (Mandamus Review). Argument scheduled for November 10, 2016.**

The Supreme Court granted two petitions for mandamus relief challenging decisions denying motions to dismiss for lack of personal jurisdiction. Plaintiffs in both of the consolidated cases brought claims in Oregon state court under the Federal Employers' Liability Act against the defendant railroad companies to recover for on-the-job injuries sustained outside of Oregon. In both cases, plaintiffs asserted that Oregon state courts had general personal jurisdiction over the defendants, even though both defendants were incorporated outside of Oregon and had their principal places of business outside of Oregon. The defendants both unsuccessfully moved the trial court to dismiss the respective complaints against them for lack of personal jurisdiction. After those motions were denied, the defendants then both petitioned for writs of mandamus. The Oregon Supreme Court allowed the petitions and issued alternative writs of mandamus. On review, the issue is whether, in light of the United States Supreme Court's decisions in *Daimler AG v. Bauman,* 571 US __, 134 S Ct 746, 187 L Ed 2d 624 (2014), and *Goodyear Dunlop Tires v. Brown,* 564 US 915, 131 S Ct 2846, 180 L Ed 2d 796 (2011), the Due Process Clause precludes Oregon courts from exercising general personal jurisdiction over defendants.

Employment

- ***Multnomah County Sheriff's Office v. Rod Edwards,* 277 Or App 540 (April 13, 2016). Argument scheduled for November 15, 2016.**

The Court of Appeals affirmed a final order of the Commissioner of the Bureau of Labor and Industries (BOLI), in which BOLI concluded that petitioner Multnomah County Sheriff's Office's internal promotion process failed to comply with the requirements of the veterans' preference law, ORS 408.230. On review, the issues are: (1) When an employer uses an application examination that does not result in a score, what does it mean to "devise and apply methods" of granting a veterans' preference, as required by ORS 408.230(2)(c); (2) When an employer uses an application examination that does not result in a score, does granting an interview or ranking the applicant first at the beginning of the application process satisfy the requirement to grant the veterans' preference required by ORS 408.230; (3) Did BOLI exceed its authority and the scope of ORS 408.230 by adopting a rule requiring employers to apply the veterans' preference "at each stage of the application process"; and (4) Did BOLI exceed its authority by awarding emotional distress damages?

Unlawful Practice of Architecture

- ***Twist Architecture & Design, Inc. v. Oregon Board of Architect Examiners,* 276 Or App 557 (Feb 24, 2016). Argument scheduled for January 10, 2017.**

The Court of Appeals reversed and remanded, in part, a final order of the Oregon Board of Architect Examiners imposing a civil penalty against petitioners for the unlawful practice of architecture under ORS 671.020(1) and (4), and OAR 806-010-0037(7). On review, the issues are: (1) Does the "practice of architecture" as defined in ORS 671.010 include the creation of feasibility studies that show the locations and sizes of proposed buildings and that are used to determine whether construction is possible and to attract funding; and (2) May unlicensed persons and businesses use a logo with the term "architecture" or the phrase "Licensed in the State of Oregon (Pending)" in their communications with Oregon clients and promotional materials, and does the answer to that question depend on whether the person or business is actually engaged in the practice of architecture in Oregon?

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Civil Procedure

■ ***Lang v. Rogue Valley Medical Center/ Asante,*** **276 Or App 610, 369 P3d 450 (Feb. 18, 2016). Argument scheduled for January 10, 2017.**

The Court of Appeals affirmed without opinion a general judgment dismissing the plaintiff's action with prejudice under ORCP 54 B. The first issue on review is whether a dismissal pursuant to ORCP 54 B requires: (1) a finding of willfulness, bad faith, or fault of a similar degree on the part of the disobedient party; (2) a finding of prejudice to the opposing party or to the operation of the legal system; (3) a finding of why any less onerous sanction would not be just; and (4) with respect to a failure to comply with an order related to additional allegations of a complaint, a finding of prejudice or a finding that justice would not be served if leave to add the additional allegations was given. The second issue on review is whether the historical facts are sufficient to support imposition of the sanction of dismissal under the circumstances of this case.

Tax

■ ***Boardman Acquisition, LLC v. Dep't of Revenue,*** **S063682 (Direct Review from Judgment of Tax Court dated October 20, 2015). Argument scheduled for January 13, 2017.**

This direct appeal from the Tax Court is an *ad valorem* property tax dispute arising out of the changed use of two adjacent parcels of land. On review, the issue is: When property that was under lease to a private party is returned to the control of its public entity owner, and that property was qualified for a partial exemption from property taxes under ORS 309A.068 during the period of the lease, does the amount of the property tax exemption become due and owing, or does it become a lien on the property so that a later sale of the property to a private entity requires that the exempted taxes be paid?

Waiver of Physician-Patient Privilege

■ ***Barrier v. Beaman,*** **S063974 (Mandamus Review). Argument scheduled for January 13, 2017.**

The plaintiff brought an action against the defendants (physicians and medical practice) for personal injury and medical negligence. The plaintiff appeared at a deposition taken by the defendants, during which he answered questions about his medical care and treatment by various medical providers, but allegedly did not object or assert the physician-patient privilege. Subsequently, the defendants sought to depose the other physicians who had treated the plaintiff, but the plaintiff refused to waive the physician-patient privilege. The defendants successfully moved the trial court for an order allowing the depositions. The plaintiff then petitioned for a writ of mandamus, and the Oregon Supreme Court allowed the petition and issued an alternative writ of mandamus. On review, the issue is whether, under OEC 511 (ORS 40.280), waiver of the physician-patient privilege occurs if a plaintiff in a medical malpractice case answers questions about his or her condition, without objection, at a properly noticed discovery deposition.

Public Records Law

■ ***Oregon Health and Science University v. Oregonian Publishing Co.,*** **278 Or App 189, 373 P32 1233 (May 11, 2016). Argument scheduled for March 3, 2017.**

The Court of Appeals reversed and remanded, in part, a trial court judgment enjoining the plaintiff, Oregon Health and Science University, from withholding particular information contained in public records that the defendant, Oregonian Publishing Company, requested under the Oregon Public Records Law, ORS 192.410 to 192.505. On review, the issues are: (1) Does ORS 192.496(1) exempt from disclosure any part of a public record in the form of a list that consists of the names of claimants who have filed tort claim notices and related information; (2)(a) Is information derived from a tort claim notice that the custodian

Continued on next page

of the notice only knows came from a student, but which does not identify the nature of the claim or the claimant, an "educational record" under the Family Educational and Privacy Act (FERPA), 20 USC 1232g; (b) Is that tort claim notice itself an "educational record" under FERPA; (c) Even if the tort claim notice is itself an "educational record," does that *per se* make all information derived from that record exempt as well; (3) Does ORS 192.505 apply to every public records exemption in Oregon and federal law, including ORS 192.496; (4) Did the Oregonian meet its burden of proof to establish, by either clear and convincing evidence (ORS 192.496(1)) or a preponderance of the evidence (ORS 192.502(2)), that that information is not covered by those statutes or that disclosure would not constitute an unreasonable invasion of privacy; and (5) If the Oregonian cannot meet its burden, then can the Oregonian establish, by clear and convincing evidence, that the public interest nonetheless requires disclosure in the particular instance for that information?

Unjust Enrichment

■ ***Larisa's Home Care, LLC v. Nichols-Shields,* 277 Or App 811 (April 27, 2016). Argument scheduled for March 3, 2017.**

The Court of Appeals reversed a judgment in favor of the plaintiff nursing home on the plaintiff's claim for unjust enrichment against defendant as personal representative of a former resident of the nursing home. On review, the issue is whether, in a case where a person or their agent commits Medicaid fraud such that a healthcare facility does not receive payment of non-Medicaid rates, that facility has a reasonable expectation of being paid non-Medicaid rates.

Tax

■ ***Wittemyer v. City of Portland,* 278 Or App 746 (June 8, 2016). Argument scheduled for April 4, 2017.**

The Court of Appeals affirmed a trial court's entry of a limited judgment in favor of defendant, the City of Portland, in the plaintiff's action seeking a declaration that Portland City Code 5.73.020, which imposes a tax of $35 "on the income of each income-earning resident of the City of Portland" for support of the arts in the public schools ("Arts Tax"), is a "poll or head tax" in violation of Article IX, section 1a, of the Oregon Constitution. On review, the issue is whether the Court of Appeals erred in concluding that the "Arts Tax" is not a poll or head tax under Article IX, section 1a, of the Oregon Constitution.

Talk with Plaintiff's attorney.

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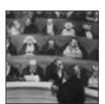
Bridging the Divide



Association News

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Calendar

2017 Annual Convention
June 15-18, 2017
Sunriver Resort, OR

All programs are subject to change
Register at www.oadc.com

New Members

OADC welcomes the following new and returning members to the association:

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The Scribe's Tips for Better Writing

By Dan Lindahl
Bullivant Houser Bailey PC

One space? Or two?

The Scribe acknowledges, with regret, that relatively few writers give much, if any, consideration to whether to insert one space or two spaces after punctuation. Most writers do what they've always done—which is probably what Miss Hazelbaker taught in seventh grade typing class—without ever revisiting the issue.

Dan Lindahl

But it's worth considering the question more deeply because there's a right answer and a wrong answer; and you're probably on the wrong side of the ledger.

The Scribe recently polled his colleagues at Bullivant Houser Bailey, receiving 71 responses. Here are the results:

Two spaces: 63 (89%)

One space: 8 (11%)

The problem is that there's a correct practice, and it's not two spaces.

Every style guide prescribes one space after punctuation. As the sometimes sassy *Typography for Lawyers* puts it: "Always one—never two. Some topics in this book will offer you choices. Not this one."

It's unclear where the two-space convention began. The online version of the *Chicago Manual of Style* says this:

> Published work these days rarely features two spaces after a period. In the era when type was set by hand, it was common to use extra space (sometimes quite a bit of it) after periods, a practice that continued into the first half of the twentieth century. And many people were taught to use that extra space in typing class. … Since there is no proof that an extra space actually improves readability, CMOS follows the industry standard of one space after a period.

Typography for Lawyers doesn't know and doesn't care about the origins of the two-space convention:

> I know that many people were taught to put two spaces between sentences. I was too. But these days, using two spaces is an obsolete habit. Some say the habit originated in the typewriter era. Others believe it began earlier. But guess what? It doesn't matter. Because either way, it's not part of today's typographic practice. If you have to use a typewriter-style font, you can use two spaces after sentences. (These are also known as monospaced fonts.) Otherwise, don't.

One space or two—does it really matter? Perhaps not a lot. Although, as Bryan Garner put it, "[t]he only harm from putting two spaces after a period is aesthetic and reputational. That's all."

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Legislative Update

By Rocky Dallum, Tonkon Torp LLP
OADC Lobbyist

Hundreds of millions of words will be written to recap the 2016 general election. Probably few of them will have addressed its effect on the civil defense practice in Oregon. Obviously, the results of the presidential election brought significant surprise and waves of emotion across the country, including in Oregon.

Rocky Dallum

Here, our statewide and legislative races came out mostly as expected and with significantly less fanfare. As we look to 2017 there is still a wake of questions, mostly related to the state budget. The biggest issue facing civil practitioners will be how courts and the Oregon Judicial Department absorb potential budget cuts over the next two years.

Leadership in Salem will remain largely unchanged following the election. Governor Kate Brown earned the right to retain her position as the state's top executive for the next two years. She will return to Salem in 2017 with strong majorities in the House of Representatives and the state Senate. The House maintained the same margin for Democrats, 35-25, but we will see plenty of new faces, as nearly a quarter of the Representatives arriving in the Capitol in January will be new. In the Senate, the Republicans gained one seat, depriving Democrats of their three-fifths supermajority by picking up the seat vacated in Southern Oregon by the unexpected death in August of Senator Alan Bates.

While the balance of power in the legislature remained unchanged, the lack of a supermajority in either chamber is significant. Voters decisively opposed Measure 97 with almost 60 percent of voters rejecting the initiative aimed at taxing C-corps with sales exceeding $25 million. Oregon faces an approximately $1.5 billion budget shortfall from current service levels, mostly due to mounting public retirement costs and state supported healthcare. Any bill intended to raise revenue requires a three-fifths supermajority vote. Democrats will need Republican support to find any significant sources of revenue.

Despite the significant coverage of the presidential race and Measure 97, the other statewide races offered a bit of interest as well this year. Representative Tobias Read won a close, three-way race for the State Treasurers' office and former Representative Dennis Richardson won a rare victory as a Republican running to fill a statewide office by earning voters' choice as the new Secretary of State.

With the state set, we look to 2017. Budget challenges and potential sources of tax revenue likely will dominate the discussions and negotiations during the legislative session. Bipartisan support for major investment in Oregon's transportation infrastructure is growing, but the mechanism for funding such an investment will also likely require increases to fuel taxes.

For OADC, the biggest question will be how the Governor and legislature allocate resources to the courts and what budget cuts might mean for efficiency in resolving cases as well as access to justice. Without new revenue, most agencies will be facing significant cuts. The Oregon Judicial Department will face challenges as legislators likely will look to prioritize schools and human services with the limited state revenues.

On the policy front, the legislature will likely take up the same type of issues in 2017 that it has in past sessions related to civil practice. Several stakeholders will again look to change Oregon's liability caps, particularly in the wake of the Supreme Court's ruling in *Horton v. OHSU* earlier this year. Insurance regulation, the duty of good-faith, and the relationship between carriers and counsel are always issues that legislators examine and OADC will monitor closely.

Over the next few months, OADC's Government Affairs Committee will be meeting with several of the legislature's practicing lawyers and judiciary committee chairs to offer OADC's knowledge as a resource on these and other topics as well as to gather information on potential issues facing the civil bar. Both the funding and functioning of our civil court system are sure to be among the issues our legislature examines in 2017.

Defense Victory!

Eric E. Meyer, Elkins, Zipse & Mitchell
Defense Victory! Editor

DEFENSE VERDICT

False arrest, racial discrimination, and defamation

Defendant obtained summary judgment in a claim for racial discrimination and then a defense verdict in a subsequent jury trial for alleged false arrest and defamation arising out of the same incident. Judge Karin J. Immergut of the Circuit Court of Multnomah County presided over the jury trial. Counsel for the defense was Hilary Boyd, Lehner & Rodrigues PC. Plaintiff's attorney was Katelyn Skinner.

Defendant, an owner of a convenience store, accused plaintiff, an African-American customer, of committing a minor theft. Plaintiff responded to the accusation by telling defendant he knew the name of a person who had committed another, larger theft of cash from defendant's store, but refused to provide that name. Defendant followed plaintiff out of the store, stood behind plaintiff's car, and called police. Plaintiff denied both committing the minor theft and making the statement regarding the other theft.

The jury found in favor of defendant on the two claims not already disposed of through summary judgment.

Housing Discrimination

A defense verdict was obtained in a case alleging housing discrimination tried before Judge Henry Kantor in the Circuit Court of Multnomah County. Counsel for the defense was Tim Heinson, Heinson & DeDobbelaere LLC.

Plaintiffs, who were moving from California to Portland, rented defendant's rental unit without seeing it first and did not plan to move in until a month after the lease was signed. The unit comprised one half of a large house, with defendant, who was 88 years old, living in the remaining part of the house.

A couple of weeks after renting the unit, one of the plaintiffs drove from California with some of his family's possessions. When he arrived, the unit was locked, so he went to defendant's side of the house to inquire about getting in. Defendant showed him around and allegedly said that the rental unit (about 600 square feet) seemed small for a family of four. Defendant also showed him defendant's fenced yard and told him that plaintiff's family could use a portion of the yard next to the rental unit. During the tour, plaintiff expressed interest in renting a finished attic area accessible through a locked door in the kitchen of the rental. Defendant told plaintiff that she did not want to rent that space to plaintiffs, as access to this space would also allow access to defendant's part of the house.

After staying for one night, plaintiff returned to California. About a week later, defendant terminated the lease because she believed that plaintiff had changed a lock leading to the attic space to which she had previously denied plaintiffs access.

Plaintiffs located alternative housing within a few weeks, then filed suit against defendant, seeking $100,000 in noneconomic damages and $4,128 in economic damages based on relocation costs. Plaintiffs contended that defendant terminated the lease because plaintiffs had two children under the age of 18. They cited as evidence defendant's alleged comment about the size of the house and her refusal to let them use the full yard. At trial defendant denied plaintiffs' allegations, insisting that she loved and welcomed children and that previous tenants had never been given permission to use her section of the yard.

Plaintiffs' lowest pre-trial settlement demand was $70,000. No offer was made on behalf of defendant. The jury found no discriminatory intent on the part of defendant and returned a defense verdict.

Continued on next page

Medical Malpractice

A defense verdict was obtained in a medical malpractice trial before Judge John Wittmayer in Multnomah County Circuit Court. Defendants were represented by Nikola Jones of Lindsay Hart, with assistance from Paul Silver of Lindsay Hart. Plaintiff was represented by Thomas D'Amore and S. Michael Rose of the D'Amore Law Group.

Plaintiff was visiting family in Idaho when he began to experience stroke-like symptoms and went to the nearest emergency department. The hospital, lacking an on-duty neurologist, called defendants, a stroke specialist physician and his practice group in Portland. Defendant physician examined plaintiff and reviewed imaging studies via a teleconference device called "Telestroke." The physician concluded that administration of tPA, a de-clotting drug, presented an unacceptable risk of bleeding in plaintiff's brain and ordered that tPA be withheld. Following this consultation, plaintiff's condition worsened and he was left with severe immobility from the stroke.

Regarding the decision not to administer tPA, plaintiff's counsel and experts argued that defendant physician was obligated under the applicable standard of care to order the drug. The defense countered that plaintiff's rapid improvement and prior stroke symptoms over the previous 30 days had not warranted administration of tPa and could have endangered plaintiff's health. The jury returned a verdict in favor of defendants.

DEFENSE RULING IN BENCH TRIAL

Claim For Contract Reformation

Defendants prevailed in a bench trial on a claim for insurance contract reformation before Judge Douglas Van Dyk in the Circuit Court of Clackamas County. Defendants were represented by F. J. Maloney, Maloney Lauersdorf Reiner PC. Joe McDonald of Smith McDonald & Vaught LLP represented the plaintiff.

The case arose from the total loss of plaintiff's house in a fire. Plaintiff had insured his house with Farmers for the ten preceding years. Following the loss, plaintiff claimed it would cost upward of $1.1 million to rebuild the house, which greatly exceeded the Farmers policy limits of $323,000.

Plaintiff sought to have the policy limits reformed based upon a number of alleged mistakes by Farmers and its agent in calculating the limits and manner of procuring the policy. Plaintiff sued Farmers for breach of contract (express and implied covenant of good faith and fair dealing), breach of oral contract (binder), deceit (fraud), negligent misrepresentation, and reformation. Plaintiff also sued Farmers' agent for breach of contract, deceit, and negligent misrepresentation.

Farmers' agent filed a motion for summary judgment, which was granted in its entirety. Farmers moved for summary judgment against all claims except that for reformation. Farmers' motion for summary judgment was likewise granted in its entirety.

With respect to the claim for reformation, the only remaining claim at the time of trial, plaintiff claimed a mutual mistake of the parties and sought to have his policy written from the $323,000 limit that was in place at the time of the fire to $1,125,000.

Following a three-day bench trial, Judge Van Dyk made the following express findings of fact: (1) plaintiff was not a credible witness; (2) each of the agents and employees of Farmers who testified at trial were credible witnesses; (3) plaintiff had been aware, before the loss, of the likelihood that his coverage limit was lower than the value of the insured property, but had not attempted to increase the limits of his insurance; (4) plaintiff had been more interested in keeping his premiums low than in having a policy of insurance sufficient to ensure complete replacement coverage in the event of a total loss; (5) Farmers and its agents had not known there was a gap between the policy limits and the value of the insured property because plaintiff had not brought to their attention the value of several improvements made to the property during the period of coverage; (6) plaintiff had intentionally ignored Farmers' renewal notices warning of the risk of being underinsured and the importance of bringing to the carrier's attention information relevant to replacement cost; and (7) at trial plaintiff attempted to mislead the Court by fabricating a 2008 email that purported to bring to Farmers' attention mistakes made in connection with the policy.

Based upon these factual findings, Judge Van Dyk ruled that even if plaintiff had proven all of the reformation elements by clear and convincing evidence, plaintiff would still have been barred from recovery pursuant to Farmers' affirmative defense of the doctrine of unclean hands.

Continued on next page

Low Verdict

Medical Causation / MVA

Defendants obtained an extremely favorable verdict in a jury trial for personal injuries arising of a motor vehicle accident tried before Judge Kathleen Dailey of the Circuit Court of Multnomah County. Defendants were represented by Gretchen Mandekor and Tania Manners, Schulte Anderson Downes Aronson & Bittner PC. Plaintiff was represented by Jim McCandlish of Griffin & McCandlish and Emery Wang.

Plaintiff alleged that the subject motor vehicle accident had rendered her preexisting Chiari malformation symptomatic, requiring brain surgery. She sought damages totaling $7,715,101, of which only $141,000 was for incurred medical expenses.

Plaintiff called six expert witnesses, including Michael Freeman, PhD, who testified that plaintiff was so fragile that even a one-mile-per-hour impact could have caused her injury. Plaintiff also called New York neurosurgeon Dr. Ezriel Kornel, who testified that the accident had rendered her Chiari malformation symptomatic, attributed her surgery to the accident, and testified that plaintiff would need additional brain surgeries in the future. On cross examination, however, Dr. Kornel conceded that his testimony regarding the need for future surgeries was "speculation."

The jury initially awarded $14,106.48 in economic damages and $0 in noneconomic damages. Judge Dailey then ordered the jury to award some figure for noneconomic damages and sent the jurors back to deliberate further. The jury then returned with a unanimous verdict for $14,106.48 in economics and $500.00 in noneconomic damages, totaling well below one percent of the figure sought by plaintiff.

Defense Verdict on Appeal of arbitration award

Medical Causation/MVA

Defendant significantly improved upon an arbitration award in an admitted-liability motor vehicle accident case tried to a jury in Washington County Circuit Court before Judge Theodore Sims. Eric Meyer of Elkins Zipse & Mitchell represented the defense. Tom Cunningham and Mike Gutzler represented the plaintiff.

Defendant struck plaintiff's vehicle while backing out of a space in a parking lot. Plaintiff, who was deaf, alleged several injuries, most significantly an anterosuperior labral tear and subacromial post-traumatic impingement in the left shoulder requiring surgery. Plaintiff claimed economic damages of $37,979 based upon treatment bills and noneconomic damages of $200,000.

Because plaintiff had originally capped her claim at $49,990, the case was originally arbitrated before retired Judge Mark Gardner, who awarded $38,466.46 in economic damages and $10,000 in noneconomic damages, for a total of $48,466.46. Defense counsel requested trial de novo.

At trial, orthopedic surgeon Paul Puziss, M.D., testified for plaintiff that the accident had caused her labral tear and need for surgery. Stephen Brenneke, M.D., testified for the defense that the labral tear was degenerative rather than traumatic and not caused by the subject accident.

The jury initially awarded economic damages of $7,874 (the exact amount recommended by defense counsel) and noneconomic damages of zero. After Judge Sims ordered the jury to award some figure for noneconomic damages, the jury resumed deliberating and returned after approximately five minutes with a revised noneconomic damages award of $1,000.

Diminished Vehicle Value

In a jury trial held before Judge Henry Kantor in the Circuit Court of Multnomah County, defendant significantly improved upon an arbitration award in an admitted-liability case based on alleged diminished vehicle value of $9,661.02 arising out of a motor vehicle accident. As the claim was brought under ORS 20.080, plaintiff's counsel had also sought an award of attorney fees. Defendant was represented by Eric Meyer of Elkins Zipse & Mitchell. Bill Berkshire of Berkshire Ginsberg LLC represented the plaintiff.

After arbitrator Paul R. Xóchihua awarded plaintiff $4,638.98 plus attorney fees in excess of four thousand dollars, defendant requested trial de novo. Plaintiff presented diminished value expert Kenneth Nix, who testified that post-accident repairs had failed to return plaintiff's car to its pre-accident value. Mr. Nix also testified, however, that before the subject accident, plaintiff's car had been worth $10,600.

Defendant called a representative of the dealership to whom plaintiff had traded in the car a year and a half after the accident. This witness testified that his business had given plaintiff a trade-in credit of $11,016, or $416 more than plaintiff's own expert had testified the car was worth before the accident.

The jury returned a defense verdict, finding that plaintiff had sustained no damages.

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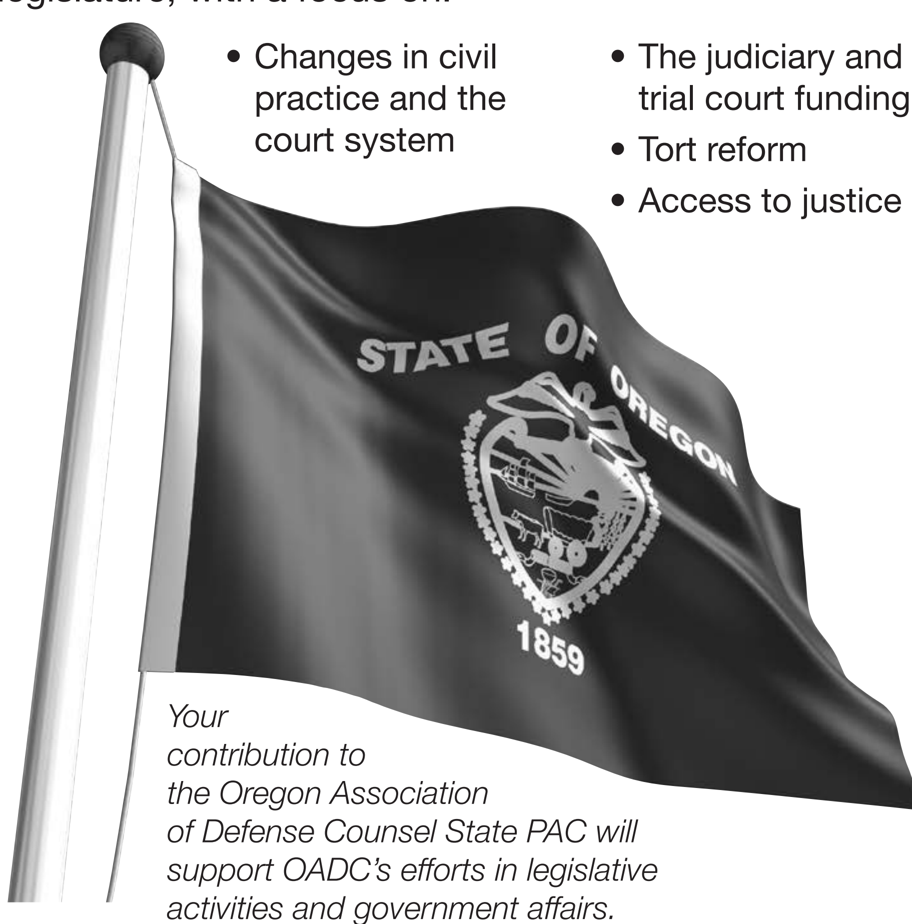
The Voice of the Civil Defense Lawyer

The Oregon Association of Defense Counsel works to protect the interests of its members before the Oregon legislature, with a focus on:

- Changes in civil practice and the court system
- The judiciary and trial court funding
- Tort reform
- Access to justice



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