IN THE SUPREME COURT OF THE STATE OF OREGON

ROBERT J. BOYER, Plaintiff – Appellant - Petitioner on Review, v. SOLOMON SMITH BARNEY, a Delaware corporation; DEAN MICHAEL HOWELL; and DEAN K. MORELL, Defendants – Respondents - Respondents on Review.	TC No.: 021212721 CA No.: A125121 SC No.: S055192

Brief of *Amicus Curiae* Oregon Association of Defense Counsel

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Review of a decision of the Court of Appeals
on appeal from a judgment of the Multnomah County Circuit Court,
by the Honorable Edward J. Jones, Judge

Date of decision:	June 27, 2007
Author:	None (Affirmed by an Equally Divided Court)
Concurring:	Armstrong, J., Brewer, C.J., Schuman, Oretga, JJ., and Murphy, J. pro tempore
Dissenting:	Edmonds, Landau, Haselton, Wollheim, and Sercombe, JJ.

Thomas M. Christ, OSB No. 83406
Cosgrave Vergeer Kester LLP
805 S.W. Broadway, 8th Floor
Portland, OR 97205
(503) 323-9000

For *Amicus Curiae* Oregon Association of Defense Counsel

(Other counsel on reverse)

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I. INTRODUCTION

The Oregon Association of Defense Counsel (OADC) – a private association of Oregon lawyers who primarily represent defendants in civil cases – submits this friend-of-the-court brief in opposition to plaintiff's proposed rule of law: that the "special relationship" exception to the "economic loss" rule applies whenever the defendant has some interest, however slight, in the financial well-being of the plaintiff. *See* Petitioner on Review's Brief on the Merits (Pet Br) 1. As discussed below, the proposed rule is both ill-advised and inconsistent with this court's precedents.

II. BACKGROUND: THE ECONOMIC LOSS RULE

In *Onita Pacific Corp. v. Trustees of Bronson*, 315 Or 149, 159, 843 P2d 890 (1992), this court formulated what has come to be known as the economic-loss rule: "a negligence claim for the recovery of economic losses caused by another must be predicated on some duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care to prevent foreseeable harm." As the court explained, the "heightened" duty of care that enables recovery for negligently-inflicted financial loss arises when the plaintiff and the defendant are in a "special" relationship – meaning a relationship in which one party is charged by law with a duty to protect the economic interests of the other.

Onita, 315 Or at 160-61.[1] Later, in *Conway v. Pacific University*, 324 Or 231, 924 P2d 818 (1996), the court expounded on the special relationship exception to the general rule against liability for economic loss:

> "Another way to characterize the types of relationships in which a heightened duty of care exists is that the party who owes the duty has a *special responsibility* toward the other party. This is so because the party who was owed the duty effectively has authorized the party who owes the duty to exercise independent judgment in the former party's behalf and in the former party's interests. In doing so, the party who was owed the duty is placed in a position of reliance upon the party who owes the duty; that is, because the former has given responsibility and control over the situation at issue to the latter, the former has a right to rely upon the latter to achieve a desired outcome or resolution."

Id. at 240 (emphasis in original).

The archetypal "special" relationship is the one between attorney and client. As *Onita* explained, "[t]he law imposes a duty of care in the attorney-client relationship," which is "to act as a reasonably competent attorney in protecting the interests of the client," as opposed to protecting the attorney's own interests. 315 Or at 160. Indeed, "[t]he attorney generally does not and should not have any pecuniary interest that is adverse to the client." *Id.*

Other special relationships include the principal-agent relationship, because agents "have a duty to act with due care and in their principals' interests." *Conway*, 324 Or at 239 (citing cases). The same goes for trustees, who "also owe

[1] As used here, economic loss refers to "financial losses such as indebtedness incurred and return of monies paid, as distinguished from damages for injuries to person or property." *Onita*, 315 Or at 159 n 6.

a heightened duty to act in the best interests of their beneficiaries, as well as a duty to act in a good faith"; and for liability insurers when they undertake to defend an insured, "because the insured effectively relinquishes control over the defense to the insurer and places the insured's potential liability in the insurer's hands." *Id.* at 240 (citing cases); *see also Onita*, 315 Or at 161 (citing the same examples).

It's important to note that *relationships* create tort duties – when, as noted, the relationship is "special." Contracts don't create them. Contractual duties give rise to contractual remedies only. As explained in *Georgetown Realty v. The Home Ins. Co.*, 313 Or 97, 106, 831 P2d 7 (1992), "[i]f the plaintiff's claim is based solely on a breach of a provision in the contract, which itself spells out the party's obligation, then the remedy normally will be only in contract, with contract measures of damages and contract statutes of limitation."

Even so, the contract terms may be useful in determining the nature of the parties' relationship and whether it is special for economic loss purposes. Take, for example, *Conway*, which involved a professor's claim against a university for the financial loss he suffered when he relied upon the dean's negligent misrepresentation that poor student evaluations would not affect his prospects for attaining tenure. This court "examine[d] all aspects of the relationship between Conway and the university, including their employment contract, in order to determine whether the university had a special responsibility to exercise independent judgment on Conway's behalf." *Conway*, 324 Or at 241. But the court took care to "emphasize that, in examining the contract, * * * we do not seek

to determine whether any contractual obligations on the university's part gave rise to a tort duty to avoid making any negligent misrepresentations to Conway. Rather, we must determine whether the terms of the contract create the *type of relationship* that gives rise to such a tort duty." *Id.* (emphasis in original).

Thus, contract-imposed duties do not themselves give rise to tort liability. They only help in determining whether the parties' relationship is one to which a tort duty attaches. The duty itself arises, if at all, outside of the contract, by operation of law. *See Conway*, 324 Or at 237.[2]

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[2] In *Conway*, this court said:

> "In analyzing a relationship between contracting parties that may give rise to tort liability, it is important to note the distinction between contract and tort obligations. Obligations specified by the terms of a contract are 'based on the manifested intention of the parties to a bargaining transaction.' * * * Obligations in tort, or 'duties,' on the other hand, are 'imposed by law-apart from and independent of promises made and therefore *apart from the manifested intention of the parties* – to avoid injury to others.' * * * In other words, a contract details the specific obligations that each party owes the other and, if one party breaches a term of the contract, that breach will result in contract liability. For tort liability to be imposed, however, a tort duty must exist '*independent of the contract and without reference to the specific terms of the contract.*' * * * That duty in tort does not arise from the terms of the contract, but from the nature of the parties' relationship. * * *"

324 Or at 237 (citations omitted; emphasis in original); *see also Bennett v. Farmers Ins. Co.*, 332 Or 138, 161, 26 P3d 785 (2001) ("the law implies a tort duty only when [the parties'] relationship is of the type that, by its nature, allows one party to exercise judgment on the other party's behalf").

III. DISCUSSION

Plaintiff argues that the "special relationship" exception to the economic-loss rule should be expanded to include any relationship in which one party, while acting to further its own interests, also acts, "at least in part," to further the interests of the other party. *See* Pet Br 1. The main problem with that argument is that the exception, thus expanded, swallows the rule.

Every party to a business relationship has some concern for the interests of the other party, if only to protect its own interests. Relationships usually don't form unless both parties stand to gain something. And they usually don't last unless both do in fact gain. So neither party is completely disinterested in the other's well-being. When A contracts to sell widgets to B, he hopes that B will do well by the product, and thus buy more. And when C agrees to provide a service to D, he hopes that D will profit thereby, and thus continue the relationship.

To be sure, A and C are probably looking out for themselves, first and foremost. That's why they are in business, of course. But it can't be said that A and C have *no* interest at all in B and D's welfare. So if a modicum of interest is all it takes to create a special relationship, as plaintiff proposes, then every business relationship is special, almost by definition, and the economic-loss rule disappears into the special-relationship exception. Financial losses in commercial dealings will always be actionable in tort, even where, as here, there is no breach of contract.

The other problem with plaintiff's proposed rule is this court's precedents; they just won't support it. In *Conway*, as noted, the plaintiff and defendant "were not strangers coming to the bargaining table to negotiate a first-time contract." 324 Or at 241. Instead, "they already were in a contractual employment relationship." *Id.* And, like most employers, the defendant wanted its employee, the plaintiff, to prosper in that regard. Indeed, the employee handbook that the defendant gave to the plaintiff stated that "[t]he intent of the tenure policy and employment practices of Pacific University is to strengthen the University by providing * * * reasonable employment security for its professors." *Id.* 242-43 n 6. Thus, it can't be said that the defendant in *Conway* had *no* interest in the plaintiff's economic prosperity – that it was *not* acting, at least in part, to further the plaintiff's interests as well as its own. Even so, this court held that the special-relationship exception did not apply and, therefore, that the plaintiff could not sue in tort for his economic losses.

That ruling illustrates what is, in OADC's view, the key to the test for a special relationship. A relationship of that sort does not arise whenever one party to transaction has some concern, however slight, for the other party's financial well-being. The relationship is special only when the one party has a duty to put the other's interests *ahead of its own*, as in the attorney-client, principal-agent, and trustee-beneficiary relationships, discussed above and in *Onita*, 315 Or at 160-61, and *Conway*, 324 Or at 239. What is more, that duty must arise *outside* of any contract between the parties – that is, it must arise by operation of law. *See*

Conway, 324 Or at 237 and 243 n 7. If, instead, the duty is contract-imposed, then breach of the duty is just a breach of the contract, and contract law, not tort law, provides the sole remedy. *Id.*; *see also Georgetown Realty*, 313 Or at 106.[3]

In sum, it shouldn't matter, for economic-loss purposes, that the defendant is acting *in part* to further the financial interests of the plaintiff. That is not enough to create a special relationship and thus take the case outside of the rule. Nor should it matter that the contract requires one party to do something for the benefit of the other. Every contract requires that. In fact, every contract requires it of both parties. Otherwise there wouldn't be a contract. If either party could obtain a benefit from the other without contracting, without obligating itself in return, it surely would. So a special relationship is not created whenever a party is contractually obligated to confer some benefit upon the other, such as, in this instance, providing timely and accurate financial information. If that were all it took to create a special relationship then, again, every relationship would be special, and the economic-loss rule would lose all effect.

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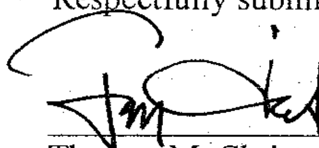
[3] In this case, of course, plaintiff relies entirely on his contract with defendants to prove a special relationship. The contract, he argues, obligated defendants to look out for his financial interests – "principally, * * * to give [him] timely information about what defendants planned to do and in fact did with respect to [his] account." Pet Br 5. And that obligation, the argument continues, created a special relationship between the parties, which, in turn, imposed additional tort duties on defendants, thus exposing them to extra-contractual liability. *Id.* at 6. In this bootstrap fashion, plaintiff tries to hold defendants liable for a contract obligation that, according to the jury, they didn't breach.

IV. CONCLUSION

The court should reject plaintiff's proposed rule of law. It should, instead, reaffirm its prior holdings that economic loss is not actionable in tort unless the parties are in a special relationship, and that a special relationship does not exist unless the defendant owes a duty, outside of any contract between the parties, to put the plaintiff's financial interests ahead of its own.

Respectfully submitted,



Thomas M. Christ
Cosgrave Vergeer Kester LLP

For *Amicus Curiae* OADC

Certificate of Service

I certify that I mailed two copies of the attached Brief to each of the following lawyers, by first class mail, with postage prepaid, on February 26, 2008:

George W. Kelly
303 W. 10th
Eugene, OR 97401

For Petitioner on Review

Bruce L. Campbell
Miller Nash LLP
111 S.W. 5th Ave., Suite 3400
Portland, OR 97204

For Respondents on Review

Robert Banks
209 S.W. Oak St., Suite 400
Portland, OR 97204

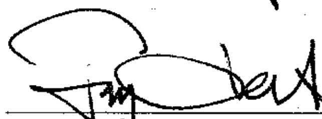
For *Amicus Curiae* Public Investors Arbitration Bar Ass'n

N. Robert Stoll
209 S.W. Oak, 5th Floor
Portland, OR 97204

For *Amicus Curiae* Oregon Trial Lawyers Ass'n

Erin Lagesen
Assistant Attorney General
1162 Court St., N.E.
Salem, OR 97301

For *Amicus Curiae* Department of Consumer and Business Services



Thomas M. Christ

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