IN THE SUPREME COURT OF THE STATE OF OREGON

FARMERS INSURANCE COMPANY OF OREGON, an Oregon Corporation,

Plaintiff-Relator,

vs.

STANTON McHALE,

Defendant-Adverse Party,

JEFFREY T. HARPER, DENNIS HARPER, and DIRRELL W. HARPER,

Defendants.

Supreme Court Case No. S056034

Linn County Circuit Court Case No. 07-0076

MANDAMUS PROCEEDING

OREGON ASSOCIATION OF DEFENSE COUNSEL'S *AMICUS* MEMORANDUM IN SUPPORT OF PETITION FOR ALTERNATIVE WRIT OF MANDAMUS

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June, 2008

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INTRODUCTION

The Oregon Association of Defense Counsel (OADC) joins the Oregon Trial Lawyers Association (OTLA), Farmers Insurance Company, and the injured party Stanton McHale in urging the Oregon Supreme Court to issue an alternative writ of mandamus: (a) to enjoin enforcement of Linn County General Order of May 2, 2007, which barred reference to juror names in the courtroom; (b) to reverse the order in this case dated April 28, 2008, which rendered juror names secret from the litigants and their attorneys during jury selection; and, in the alternative, (c) to require the circuit court to show cause why the circuit court has not itself enjoined its general order and reversed its specific order.

On the merits, OADC concurs in the arguments of OTLA and the parties. OADC would suggest a sterner enforcement of the constitutional right to an open court. Or Const Art I §10. OADC would urge reluctance to "split the baby" with the compromise practice of other courts.

ARGUMENTS

A. Oregon's Constitutional Mandate

Ordinarily, the mandate of Oregon's constitution might be the last inquiry when a case presents lesser inquiries about court rules or statutes.[1] Whatever the proper sequence in this case, the constitutional mandate is the ultimate motivation that makes this case so extraordinary. The constitutional mandate makes graver the examination of

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[1] *See, e.g., State v. Harberts*, 331 Or 72, 81, 11 P3d 641 (2000). The court may address the constitutional issue first where the constitution may result in more complete relief. *Id.*

court rules and statutes. For those reasons, the questions in this case are addressed in reverse order.

To deny the litigants the names of their prospective jurors during jury selection puts at issue Article I, Section 10 of the Oregon Constitution. In relevant part, it provides, " No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay ... ." No less important, Article I, Section 17, provides, "In all civil cases the right of Trial by Jury shall remain inviolate." Addressing the earlier provision, this court has recognized that:

> Section 10 is written in absolute terms; there are no explicit qualifications to its command that justice shall be administered openly. In order to be constitutional, a proceeding must either not be secret or not "administer justice" within the meaning of section 10.

Oregonian Publishing Co. v. O'Leary, 303 Or 297, 302, 736 P2d 173 (1987). Section 10 is not a mandate that invites a court to balance competing considerations or to permit compromised approaches. The mandate of "open courts," for example, does not permit a practice in which the public must "rely on the court itself to learn in what manner justice was administered." A transcript to a secret proceeding, released after-the-fact, will not suffice. *Id*.

Similarly, Sections 10 and 17 should not permit a practice in which litigants must rely the answers of an anonymous person, known only by number, about their qualifications to serve as a juror. Under ORS 10.030, a prospective juror must be a citizen of the United States and live in the county in which summoned for service. The prospective juror cannot be related to the fourth degree with any party. Nor can the

prospective juror be related to a party as a doctor or patient, landlord or tenant, debtor or creditor, business partner, or employee. ORCP 57D(1)(c) & (d). Nor can the prospective juror have any interest in the outcome or questions involved. ORCP 57D(1)(f). In a perfect world, the prospective juror is alert, listens carefully, is not forgetful, answers honestly, and is aware of all the potential relationships. In a less perfect world, the name of the prospective juror lets the party employ the party's knowledge of the community or information about the adversary's relationships to ask questions of the juror that probe beyond a superficial, careless, incomplete, or disingenuous answer. Giving litigants the name of a prospective juror lets the litigant assure that the juror *is* qualified to serve. Just as the public need not take the court's word for what transpired behind closed doors, the litigants need not take a faceless person's word for whether the person is related, affiliated, or qualified to serve in the dispositive role as a juror. *See Oregonian Publishing Co. v. O'Leary*, 303 Or 297. The prospective juror's *name* is the fundamental requisite that must be known to the litigant's lawyer who is engaged in jury selection.

The point is underscored by the litigant's right to peremptory challenges or challenges for cause. *See* ORCP 57D(1)(g) or ORCP 57D(2). Without the prospective juror's name, the litigant's lawyer is less likely to discover a person's financial interest in a business affected by the litigation or less likely to know a person's involvement in group or association with strong attitudes about the subject matter. Without the prospective juror's name and without the follow-up information that a lawyer can draw from questions that began with that name, the trial judge cannot do the judge's job of

evaluating whether the person's affiliation or opinions substantially impair the person's performance of a juror's duty to decide the case fairly and impartially on the evidence. *See State v. Barone*, 328 Or 68, 74, 969 P2d 1013 (1998) (judge's duty). Without the names, the lawyer is less able to elicit information that is useful to the exercise of peremptory challenges. Together, peremptory challenges and challenges for cause would help assure a qualified and impartial jury. They would help assure that the right to a jury remains "inviolate." Or Const, Art I, § 17. But, without the potential jurors' names, the litigants and the trial judge become handicapped. The appointment of the finders of fact becomes shrouded behind a translucent veil of secrecy. A sensitive part of the proceedings in "court" becomes "secret," and justice is not administered "openly", contrary to Article I, Section 10. Denial of the names to the litigants and denial of use of the names in the courtroom should be found to violate Sections 10 and 17 of Article I of the Oregon Constitution.

B. Judicial Review Thwarted

The constitution's mandate for open courts should not admit easy exceptions, but, if any were to be permitted, then voir dire anonymity should be narrowly tailored and justified only by specific findings that a particular case makes juror safety a bona fide consideration. *See, e.g., United States v. Shyrock*, 342 F3d 948 (9th Cir 2003). In other settings, this court has required a trial court to make specific findings of fact, in order that this court can perform its function of judicial review. *See, e.g., Mattiza v. Foster*, 311 Or 1, 10-11, 803 P2d 723 (1990) (findings necessary for bad faith sanction under

ORS 20.105 in order that appellate court may review). A general order rendering secret the names of prospective jurors in all cases criminal and civil throughout a county lacks both findings to justify a constitutional infringement and to suggest the slightest risk to any juror. This record contains nothing but colloquy about second-hand accounts that jurors may prefer anonymity. Vague preferences are a far cry from findings about risk or threats. The orders in this proceeding are insufficient to permit review to determine whether secrecy might ever be warranted. On their face, the general order and the specific order should be deemed invalid.

C. No Statutory Authority

Although the trial court referenced ORS 10.205,[2] the statute is no justification for anonymity in jury selection. The statute has existed for more than 30 years. 1985 Or Laws, Ch 703, § 12. According to its own text, the potential for the use of numbers, rather than names, is limited to the process of summoning people from master data lists and selecting them for the jury pools or venire panels. *See* ORS 10.205; *see also* ORS 10.215 to ORS 10.265, ORS 132.020 and ORCP 57B (cross-referenced within ORS 10.205). The limitation of ORS 10.205 to the procedures before a venire panel reaches the courtroom is evidence in the last clause in the statute. It provides that the judge may authorize the use of numbers, rather than names, for the limited purposes of the cross-referenced statutes "when to do so would promote the *efficiency* of the selection process, but the selection must be done *randomly*." (Emphasis added.) Voir dire in the

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[2] Petition for Writ, Ex 1 (general order).

court room is *not* random. The "selection" to which the statute refers is the random selection of people from source lists. The scope of the statute does not extend to the use of numbers during voir dire – to jury selection – in the courtroom.

If legislative history were permissible now without statutory ambiguity,[3] or if any uncertainty remained in ORS 10.205 after review of text and context, then legislative history would only confirm the limited scope of the statute. The 1985 legislation, House Bill 2545, addressed the process of summoning people for jury service. Concern centered on the diversity or composition of jury pools. *See, e.g.,* Hearings Before the House Committee on Judiciary on HB 2545, Minutes at 11-12 (April 12, 1985) (testimony of proponents); Hearing and Work Session of the Senate Judiciary Committee on HB 2545, Minutes at 13-19 (June 14, 1985) (testimony of State Court Administrator Bill Linden). Nothing in legislative history addressed the voir dire process in the courtroom. No drafter of ORS 10.205 contemplated that litigants could be denied the names of prospective jurors. Worthy as it is, the Linn County Circuit Court can find no authority in ORS 10.205 for a blanket rule for anonymous juries in all cases.

D. An Unauthorized Supplementary Local Rule

To be sure, the trial court has authority to do whatever is necessary to enforce order in the proceedings before the court. ORS 1.240(1). But a judge's general authority does not extend to declaring secrecy summarily in all cases. To enter a general order of juror anonymity in all Linn County Circuit Court cases is a local rule. Yet, no circuit

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[3] *See* ORS 174.020(1)(b) (may be offered; may be given whatever weight it deserves).

court may make or enforce any local rule except as provided UTCR 1.030, UTCR 1.050, and UTCR 1.060. UTCR 1.040. Specifically, UTCR 1.050(1)(b) requires that:

> A court must incorporate into its SLR any local practice, procedure, form, or other requirement ("local practice") with which the court expects or requires parties and attorneys to comply.

This mandate is the least of all things that the trial court must have done. It would have assured review of jury anonymity by the Chief Justice. That review likely would have avoided the interruption of this trial and the need for the parties' request for mandamus.[4] Because the general and specific orders in this case violate court rules, the orders must be found invalid.

E. Intangible Concerns

This court's consideration should also include intangible concerns. In the trial court, the injured McHale argued that psychology studies suggested that anonymity affected behavior and decisions. (Def McHale's Response to Ptf's Motion for the Prod'n of Juror List Info, pp 5-7 (February 4, 2008) *quoting* P Zimbardo *The Lucifer Effect: Understanding How Good People Turn Evil*, 303-05 (2007)). The drafters of Oregon's Constitution needed no studies. They knew they wanted open courts for obvious reasons. Open courts discourage mischief and preserve public confidence. Open courts are founded on personal accountability. Each participant in the process subscribes their name to the earnestness of the process. Witnesses, judges, lawyers, and jurors may all be

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[4] Defendant McHale filed in the circuit court a Response to Plaintiff's Motion For the Production of Juror List Information, supporting the request for prospective jurors' names. (February 4, 2008). OADC is advised that McHale will respond to the mandamus petition similarly in support.

protected by immunity or a courtroom deputy, but they each lend their name in a testament to the validity of the process. Just as a juror or a witness takes an oath, the person's name engages them personally. The juror's name is their spoken signature.

CONCLUSION

It takes little exaggeration to imagine a one-way mirror-window between a jury box and the courtroom. The judge might just as well remove the judge's name plate and sit wearing a mask. Proponents could still observe that we would be a long way from a star chamber, but there would be no doubt that we had crossed a line into impermissible secrecy. Oregon's mandates for open courts and jury trials are no less offended when juror names are hidden from litigants and forbidden in the courtroom. The Oregon Association of Defense Counsel joins OTLA and both litigants to respectfully request that an alternative writ issue immediately.

DATED this 5th day of September, 2008.

LUVAAS COBB
Of Attorneys for *Amicus Curiae*
Oregon Association of Defense Counsel

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing OREGON ASSOCIATION OF DEFENSE COUNSEL'S *AMICUS* MEMORANDUM IN SUPPORT OF PETITION FOR ALTERNATIVE WRIT OF MANDAMUS on:

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by the following indicated method or methods:

__X__ By **mailing** a full, true, and correct copy thereof in a sealed, first-class postage prepaid envelope, addressed to the attorney(s) as shown above, at the last known office address of the attorney(s), and deposited with the United States Postal Service at Eugene, Oregon, on the date set forth below.

____ By **faxing** a full, true, and correct copy thereof to the attorney(s) at the fax number(s) shown above, which is the last known fax number for the attorney's office, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed, according to the attached transmission report(s).

DATED this 30 day of September, 2008.

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By: _____
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