IN THE SUPREME COURT OF THE STATE OF OREGON

RICHARD A. KOHRING AND KERSTIN KOHRING,	)	Multnomah County Circuit Court Case No. 1111-14966
Plaintiffs-Adverse Parties,	)	Supreme Court No. S060533
v.	)	MANDAMUS PROCEEDING
JAMES C. BALLARD, MD, and OREGON ORTHOPEDIC & SPORTS MEDICINE CLINIC, LLP	)	
Defendants-Relators.	)	

AMICUS BRIEF OF OREGON ASSOCIATION OF DEFENSE COUNSEL

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INTRODUCTION

Amicus Curiae Oregon Association of Defense Counsel ("OADC") appears in support of defendants-relators Ballard and Oregon Orthopedic & Sports Medicine Clinic LLP's position on mandamus and their Brief on the Merits. OADC traces the historical progression of venue statutes for Oregon corporations. OADC also addresses the legislature's intent in providing that venue lies for purposes of a tort action against an Oregon corporate defendant[1] *where* the cause of action arose, or *where* the defendant resides, ORS 14.080(1), and that where a corporation "resides" for purposes of venue is statutorily deemed to include any county *where* it "conducts regular, sustained business activity", *where* it has an office for the transaction of business, or *where* any agent authorized to receive process resides. ORS 14.080(2).

Based on the wording employed, the context of the provision, and the legislative intent of the venue framework, OADC offers a correct construction of ORS 14.080(2). The determination of where a corporation "conducts regular, sustained business activity" for purposes of venue under

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[1] ORS 14.080(2) applies to "a corporation incorporated under the laws of this state, a limited partnership or a foreign corporation authorized to do business in this state." References to "Oregon corporation" or "corporation" are meant to include all three business entities, unless specific distinction is made.

ORS 14.080(2) is based on the character of the corporation, its core business purpose, and the kind of business in which it is engaged, rather than peripheral factors such as the residence of its customers and suppliers, the scope of its advertising, or where its employees occasionally partake in education or training. OADC's construction comports with the legislative intent expressed over a century ago that defendants *not* be required to defend actions in distant counties unless the cause of action arises there. 1909 Or Laws, Ch 43, § 2.

Venue is not proper against an Oregon corporation in any county where it does not (1) conduct the regular business activity of the corporation, on a sustained basis, (2) have an office for the transaction of business, or (3) have an agent residing there who is authorized to receive service of process. ORS 14.080(2). In this case, the correct construction of ORS 14.080(2) compels the conclusion that defendant-relator Clinic does not conduct "regular sustained business activity" in Multnomah County within the meaning of ORS 14.080(2).

I. The Relevant Facts Are Not Disputed

OADC does not address the particular facts of this case other than to acknowledge that there is no dispute about the following: all of the medical care and the alleged medical negligence took place exclusively in Clackamas

County, and that is where the cause of action arose; defendant Dr. Ballard is a Clackamas County resident; defendants-relators' offices and clinic practices are exclusively in Clackamas County; and the defendants-relators have no registered agent authorized to accept service residing outside of Clackamas County. ER 5-6.[2]

II. The Debate About the Meaning of ORS 14.080(2): A New Spin Without Traction

This debate arises because plaintiffs want to sue defendants in a county other than Clackamas. Clackamas County is where the cause of action arose, where Dr. Ballard resides, and where defendant Clinic maintains the only medical clinics it operates. Plaintiffs want to stretch the meaning of the venue statute to include other counties. The debate centers on the meaning of "where the corporation * * * conducts regular, sustained business activity." Did the legislature intend "reside" to mean where the corporation actually performs its business operations and serves its customers, patients or clients? Or, with the 1983 amendments, did the legislature intend to open up venue for all Oregon corporations to counties where some of their patient, client or customer bases reside and their

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[2] OADC adopts the excerpt of record abbreviations used by defendants-relators in their Brief on the Merits, page 1, note 1.

suppliers may be found, as well as to all counties reached by corporate advertising?[3] Only the construction offered by OADC and defendants-relators is consistent with the protections intended by venue statutes, including ORS 14.080(2).

From the time venue statutes were originally enacted in Oregon, including the statute for transitory actions not specified elsewhere, through the present day, a plaintiff may choose to bring a tort action in any county *only* if none of the defendants reside in the state. *See* 1862, B. & C. Code, § 44; ORS 14.080. Otherwise, venue is limited to where it is statutorily provided.

The legislature has preserved venue protections by strictly limiting the locations where defendants may be sued. This court has enforced those protections, recognizing and upholding the defendant's *right* to change venue to the place for suit specified by statute. *Rose v. Etling*, 255 Or 395, 398, 467 P2d 633 (1970); *State ex rel Crawford v. Almeda Consol. Mines Co.*, 107 Or 18, 22, 212 P 789 (1923) ("[T]he right of a domestic corporation to insist upon its statutory exemption from being sued in a county other than

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[3] Plaintiffs raised these and other factors for consideration, all which are addressed by defendants-relators. Relators Merits Brief, pp. 9-17. OADC agrees with and incorporates defendants-relators' arguments related to the various factors and does not cover them in detail.

that in which it has its principal office or place of business, or the cause of action arose, is a personal privilege," albeit one that may be waived). To that end, the court requires that venue statutes "are to be liberally construed so as to attain the objectives of such statutes." *Rose*, 255 Or at 400.

Earlier amendments to ORS 14.080 all preserved the protection afforded Oregon corporations from being sued in any county plaintiff chooses. That protection was not altered by the 1983 amendments, by which a defendant would be deemed to "reside" in those places where the corporation conducts regular, sustained business activity, maintains an office for the transaction of business, or has an agent designated to accept service. Although the legislature abandoned a single "principal place of business" as the only corporate residence, the alternatives delineated all connote a meaningful physical presence or actual business operations in the county.

There is no support in the legislative history or the case law for a construction that permits activities other than the corporation's core business to be considered a hook for venue. The arguments plaintiffs make now did not follow on the heels of the 1983 amendments, although that would have been expected, if, as plaintiff contends, an expansive reading of "conducts regular, sustained business activity" was intended. That argument has only

appeared in recent years, and then infrequently.[4] For example, in *Howell v. Willamette Urology, P.C.*, 344 Or 124, 178 P3d 220 (2008), the defendants were a physician and professional corporation in Marion County sued in Multnomah County for wrongful death caused by medical negligence. Although many of the same factors now argued undoubtedly existed, plaintiff in that case was content to agree that both defendants resided in Marion County.

The new argument must be recognized for what it is – an argument that the 1983 amendments radically and expansively changed Oregon venue law. The argument is not the product of a reasonable construction of legislative intent. Rather it is a product of plaintiffs' desire to try their cases in locales *other* than where the defendant is located or the cause of action arose, however remote – the very risk identified and addressed by the venue statutes.

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[4] *Miller v. Pacific Trawlers, Inc.*, 204 Or App 585, 131 P3d 821 (2006) is the first reported instance of the argument being made. For reasons unknown, this Court denied the defendant's petition for writ of mandamus, and the Court of Appeals held that because mandamus was defendant's only remedy, the issue was not properly before it. 204 Or App at 591.

III. Venue Requirements Are Statutory and Not Based on Whether the Court has Personal Jurisdiction

In *Mutzig v. Hope*, 176 Or 368, 158 P2d 110 (1945), the court examined the relationship between jurisdiction and venue in an action to recover rent. The defendant appealed from the denial of a motion to vacate the default judgment entered against him. On appeal, the court rejected the defendant's arguments that the judgment was void because the trial court had no personal jurisdiction. In part, the defendant relied on arguments that jurisdiction was defective because proper venue did not lie in the trial court. The court distinguished venue from personal jurisdiction:

> "We do not mean that the court would be authorized to try the case in the wrong county unless there was a waiver, express or implied. But, as we shall show, the right to object to erroneous venue is a privilege which, if exercised, may determine what the court should or should not do, but which does not affect its jurisdiction to act."

Id. at 389-90; *Rose v. Etling*, 255 Or at 399.

IV. ORS 14.080, Former Codifications and Judicial Construction

ORS 14.080, last amended in 1983, specifies the proper venue for Oregon personal injury actions:

> "(1) All other actions[5] shall be commenced in the county in which the defendants, or one of them, reside at the commencement of the action or in the county where the cause of action arose. A party resident of more than one county shall be deemed a resident of each such county. If none of the defendants reside in this state, the action may be commenced in any county.
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> "(2) For purposes of this section, a corporation incorporated under the laws of this state, a limited partnership or a foreign corporation authorized to do business in this state shall be deemed to be a resident of any county where the corporation or limited partnership conducts regular, sustained business activity or has an office for the transaction of business or where any agent authorized to receive process resides. A foreign corporation or foreign limited partnership not authorized to transact business in this state shall be deemed not to be a resident of any county in this state."

ORS 14.080(1) and (2). Subsection (2) was first adopted in 1983. None of the few venue decisions issued by this court in the thirty years since the adoption of subsection (2) have been decided based on a construction of where a corporate defendant "resided" for purposes ORS 14.080(2).

In *State ex rel Stephens v. Londer,* 311 Or 385, 811 P2d 1375 (1991), the plaintiff filed a wrongful death action in Multnomah County. The defendant hospital moved to change venue to Washington County arguing Multnomah was not the proper county and that the place of trial should be changed for the convenience of the parties. ORS 14.110(1)(a) and (c). The

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[5] That is, actions not specifically identified in ORS 14.040, 14.050 and 14.060.

trial court granted the defendant's motion on the first ground and declined the ground of convenience. 311 Or at 387. Because the parties agreed that defendant had an office for the transaction of business in Multnomah County and it was served in that county, this Court held venue was proper in Multnomah County. The trial court had no authority to grant a change of venue based on ORS 14.110(1)(a). 311 Or at 388. The court did not address what it meant for a corporation to "reside" in a county.

Nibler v. Oregon Dept. of Transportation, 338 Or 19, 105 P3d 360 (2005), involved an auto accident in Washington County. Plaintiff argued that ORS 14.060 permitted him to choose to bring his action against the Oregon Department of Transportation and the Oregon Department of State Police in the county in which defendant resides pursuant to ORS 14.080. Plaintiff argued that because the state "resides in every county, the county of venue is his to choose." 338 Or at 26. The court held that venue in actions against the state and its subdivisions as specified in ORS 14.060 is proper "in the county where [the] claim arose." 338 Or at 27. The court did not resolve the scope of where the state resided, the issue urged by plaintiff.

In *Howell v. Willamette Urology,* 344 Or 124, the issue was where the cause of action arose for purposes of plaintiff's wrongful death claim. Plaintiff agreed that defendants, a physician and his professional

corporation, resided in Marion County, but asserted venue lay in Multnomah County, where the decedent patient died. Defendants argued that the cause of action arose in Marion County where the medical care in question took place. The court held that, based on the statutory wording, "venue for the purposes of a wrongful death action lies either in the county where at least one of the defendants resides or in the county in which the wrongful act or acts that ultimately resulted in decedent's death occurred." 344 Or at 130.

A. Looking Back: The Statute

Legislative history before 1983 is scant, and a historical perspective of the statute and the case law construing and applying it is helpful. As originally enacted in 1862, B. & C. Code, section 44, the statute for venue in transitory actions, provided:

> "In all other cases, the action shall be commenced and tried in the county in which the defendants or either of them reside or may be found at the commencement of the action; or, if none of the parties reside in this state, the same may be tried in any county which the plaintiff may designate in his complaint."

1862, B. & C. Code, § 44; *see also* Hills Code, § 44. "Where the cause of action arose" was first engrafted by judicial construction before the turn of the century. Reading the venue provision, Hill's Code section 44, L. 1862, together with the statutes for service on private corporations, Code section 55, subdivision (1), the court in *Holgate v. Oregon Pac. R. Co.*, 16 Or 123,

17 P 859 (1888), held that in transitory actions, a domestic corporation may be sued either in the county were the corporation maintains its principal place of business or in the county where the cause of action arose. 16 Or 123, 124-125, *overruled in part on other grounds* as recognized by *Mutzig v. Hope*, 176 Or at 383; *see State ex rel Ind. Sup. Co. v. Goldstein,* 221 Or 309, 313, 351 P2d 39 (1960) (citing cases and approving same construction); *State ex rel Massachusetts Bonding & Ins. Co. v. Updegraff*, 172 Or 246, 254-55, 141 P2d 251 (1943) (same).

Under *Holgate*, a plaintiff could lay venue in a claim against a corporate defendant in the county where the cause of action arose in addition to where the corporation resided. The court was careful to remind what this change did *not* do:

> "[B]ut as was said in *Parke v. Insurance Co.*, 44 Pa. St. 422, 1863WL4820 (1863), in construing a similar statute: 'That corporations should be liable to be sued in any county * * * by any plaintiff who may choose to sue them there, whether the claim originated there or not, is surely beyond the intention of the legislature.'"

Holgate, 16 Or at 126. *See also Hildebrand v. United Artisans*, 46 Or 134, 139, 79 P 347 (1905) ("The rule as to venue adopted by this court is that though a corporation, for the purpose of jurisdiction, may be engaged in business throughout the entire state, its residence, within the meaning of the

statute (B.& C. Comp. Section 44) is the county where its principal office is located * * *").

In 1909, the legislature declared an emergency and made "where the cause of action arose" part of the statute for purposes of tort litigation. The legislature stated its intent in doing so:

> "Inasmuch as there are cases in this State wherein irresponsible and dishonest persons have instituted or are about to institute actions in counties many miles distant from the place of residence of the defendants thereto on mere pretexts for the sole purpose of annoying said defendants and putting them to unjust and unnecessary expense without any means of redress in making their defense thereto, the passage of this act is necessary for the immediate preservation of the public peace, health and safety, and an emergency is therefore declared to exist, and this act shall take effect and be in full force from and after its approval by the Governor."

Or Laws 1909, Ch 43, § 2.

Thus, with the 1909 amendments any action based on an alleged tort could be commenced either in the county where the cause of action arose or where the defendants, or one of them, reside or may be found at the commencement of the action. Or Laws 1909, Ch. 43 § 1. The statute provided:

> "In all other cases the action shall be commenced and tried in the county in which the defendants or either of them reside or may be found at the commencement of the action; provided that in any action founded on an alleged tort, unless the same is instituted in the county where the cause of action arose or

> where the defendants or one of them resides, then either such action shall at any time before trial thereof be transferred, upon motion of defendants, to a county where at least one of the defendants thereto resides; or the plaintiff in such action shall file a good and sufficient bond securing to defendants the payment of any judgment that may be rendered therein in favor of said defendants and against plaintiff which bond shall be executed by at least two sureties possessing the qualifications of bail on arrest and shall be approved by the court or judge thereof; and provided further that if none of the parties defendant reside in this State the same may be tried in any county which the plaintiff may designate in his complaint."

Or Laws, 1909, Ch 43, § 1. The 1909 amendments did not effect any change concerning where a corporate defendant resided.

By 1945, the legislature had moved the transfer provision and eliminated bonding as an alternative to transferring venue in tort actions. The statute now provided:

> "In all other cases the action shall be commenced and tried in the county in which the defendants, or either of them, reside or may be found at the commencement of the action; provided that in any action founded on an alleged tort, the same may be commenced either in the county where the cause of action arose or in the county where the defendants, or one of them, resides or may be found at the commencement of the action; provided further, that if none of the defendants resides in this state the action may be tried in any county which plaintiff may designate in his complaint."

See, e.g., O.C.L.A. § 1-403. With only a few minor changes, this was the version modified by the 1983 legislature. Thus, until 1983, venue for a corporation under ORS 14.080 could only lie where a cause of action arose

or where the defendant resided, and, for venue purposes, a corporation was held to reside only where it had its principal place of business. *Holgate,* 16 Or at 124-125; *Hildebrand,* 46 Or at 139; *Crawford*, 107 Or at 22.

B. Looking Back: The Cases

A survey of the case law in the 50 years preceding the 1983 amendments discloses only three decisions having anything to do with proper venue for a corporate defendant. These cases reveal some contextual clues for the 1983 amendments. The first is *State ex rel Kleinsorge v. Reid,* 221 Or 558, 352 P2d 466 (1960). *Kleinsorge* involved a swimming accident and alleged negligence in Benton County, where the plaintiff filed his action against members of the State Board of Higher Education under ORS 14.060. The court held the action was one against the board as a public quasi-corporation, rather than an action against individual public officials, and that ORS 14.080, not ORS 14.060, controlled venue. *Id.* at 563. Where the secretary of the board maintained an office in Lane county, the court held Lane county, where the action was filed, had venue under ORS 14.080. *Id.* at 570-71.

State ex rel Massachusetts Bonding & Ins. Co.v. Updegraff, 172 Or at 246,, involved an action filed in Wheeler County on an insurance policy against a Massachusetts insurer. In compliance with state law, the corporate

defendant had designated a statutory attorney for service of process in Multnomah County, where it also had its only office or place of business within Oregon. In defendant's venue challenge, the court construed section 1-403, O.C.L.A. together with statutes regarding foreign corporations and insurance companies, and held that service of summons upon the resident agent for service is sufficient to give complete jurisdiction to any court of the state in which the venue of an action is properly laid. 172 Or at 254-255. The court held: "In our opinion, the only proper venue of transitory actions against foreign corporations is either the county where they maintain their principal place of business or that in which the cause of action arose." 172 Or at 256.

The third case is *State ex rel Willamette Nat. Lbr. Co. v. Cir. Ct. Mult. Co.,* 187 Or 591, 211 P2d 994 (1949), holding that a corporation resides *only* where it maintains its principal place of business, despite having an office for the transaction of business in another county. In *Willamette Lumber,* the issue was which of two places where a lumber company actually transacted business was its principal place of business. The plaintiff was injured in an accident at defendant's lumber mill in Linn County, but filed his action in Multnomah County, where defendant maintained an office and staff, maintained its books, did its banking and payroll, held board and corporate

meetings, among other activities. The court held the defendant's principal place of business was Linn County, as designated in the articles of incorporation and where it conducted the principal business of the corporation, its lumber mill operation. 187 Or at 614-615. On mandamus, the court reasoned:

> "The manufacture and sale of lumber is evidently the principal business of the corporation, and that business is conducted at Foster, in Linn County, where the corporation has its sawmill and an office, under the supervision of a plant manager. Its financing, and its internal affairs, are subsidiary to its principal business. There is no legal reason why the corporation may not, for its own convenience, maintain an office in Multnomah County. It may be that it is improper for it to keep its corporate records in that office, but the mere fact that it does so does not make that office its principal office or place of business. * * * Until it does so [lawfully changes its principal office or place of business], its residence, as established in good faith by its articles, remains at Foster, in Linn County, at least as long as it actually maintains an office and a place of business at that place."

Id. (citations omitted).[6]

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[6] Three additional cases referenced ORS 14.080 or its predecessors, but they involved individual defendants, or other venue statutes were held to control. *State Highway Com. v. Goodwin*, 208 Or 514, 303 P2d 216 (1956) (action in inverse condemnation properly brought in county were land was located pursuant to ORS 14.040, and State could not rely on ORS 14.080 to provide venue in Marion County where, State argued, it "could be found"); *State ex rel Blackledge v. Latourette*, 186 Or 84, 205 P2d 849 (1949) (involving action against out-of-state individual rather than corporate defendant, court rejected jurisdiction and equal protection challenges to provision in section 1-403, O.C.L.A. that venue against non-resident

V. Determining Where a Corporate Defendant Resides for Venue Purposes After 1983

A. The Statutory Construction Rules

The goal of statutory construction is to discern the legislature's intent when it adopted the amendments to ORS 14.080. Statutory construction starts with a statute's text, read in context. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993); *see Mastriano v. Board of Parole*, 342 Or 684, 691-92, 159 P3d 1151 (2007). Generally, the court gives words of common usage their plain, natural and ordinary meaning. *PGE*, 317 Or at 611. As the court stated in *England v. Thunderbird*, 315 Or 633, 638, 848 P2d 100 (1993), "[t]he best indication of legislative intent is the words of the statutes themselves."

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defendant lies in any county plaintiff may designate); *Mutzig v. Hope*, 176 Or 368, 158 P2d 110 (1945) (Action for rent held to be transitory so as to authorize commencement in county where defendant resided or, if defendant resided outside of state, any county designated in complaint; court rejected defendants challenge to default judgment, holding defendant waived objection to improper venue by failing to appear claim his right to venue elsewhere).

The court's other venue cases dating from the 1930s cases involved different venue statutes and issues.

The provision "where the corporation * * * conducts regular, sustained business activity" cannot be read in isolation or out of context. The context of a statutory provision includes other provisions of the same statute and related statutes, as well as the statutory framework within which the law was enacted. *Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 508, 98 P3d 1116 (2004); *Howell*, 344 Or at 128 (court followed the "familiar paradigm" in construing "where the cause of action arose" in ORS 14.080 (1)). The court is not permitted to insert what has been omitted or omit what has been inserted but the court may look to legislative history and give it the weight the court considers appropriate. ORS 174.010; ORS 174.020(3); *State v. Gaines*, 346 Or at 168.

B. The Wording

Defendants-relators' merits brief sets forth the plain and ordinary meanings of the words "regular, sustained business activity" and offers dictionary definitions helpful to the construction. Relators' Merits Brief 10-12. OADC adopts those definitions and arguments, and emphasizes the meaning of two other significant terms that are important to the analysis. In relevant part, the entire clause is "where the corporation . . . conducts sustained, regular business activity." "Where" does not require the assistance of a dictionary. "Where" connotes a place, a location. The verb

"conduct" has common understanding as well. WEBSTER'S THIRD INTERNATIONAL DICTIONARY (unabridged ed 2002) provides the relevant definition:

> "* * * to lead as a commander * * * to have the direction of: RUN, MANAGE, DIRECT * * *"

WEBSTER'S, 474. Read together, "where" a corporation "conducts" its "regular, sustained business activity" then, is the place or places the corporation runs, manages or directs its normal, or core, business purposes. In this case, for defendants-relators, that is providing health care services. With other corporate defendants it could be automotive services, daycare, or the full range of occupations and professions present in Oregon and operated in the corporate form of business.

C. The Legislative History

The 1983 amendments were intended to "clean up" and "partly expand" the catch-all venue statute. App 4[7] (Comments by Senator Godwin, Minutes, House Committee on Judiciary, April 18, 1983, Casette Tape 250, p 2). The legislative history reveals that the proposed bill reflected a need

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[7] References to the Appendix ("App") are to the appendix filed with the OADC *Amicus Curiae* Memorandum in Support of Petition for Alternative Writ of Mandamus, filed July 11, 2012.

identified by the Oregon State Bar Procedure and Practice Committee "that some of the case law be put into the statutes." *Id.*

That year, the Oregon Bar recommended to the legislature that it amend the venue statute for transitory actions to incorporate Oregon case law as it had developed over the years. For the first time, the proposed legislation specified a distinct provision relating to the residence of corporations and other business entities.

OADC summarized the history in its brief in support of relators' Petition for Alternative Writ of Mandamus. For ease of reference, it is repeated here.

Professor Fredric Merrill testified before the Senate Committee on Local Government and Elections about the significance of Senate Bill 198:

> "The bill deals with venue which is the subject of what county in the state a defendant maybe sued which can be a matter of considerable importance if you are the defendant in a law suit. This bill would provide for venue over the corporation in any place where it does business, which would be broader. SB 198 makes very little change in the existing law. The bill eliminates the part which states that a defendant maybe sued where he maybe [*sic*] found."

App 1 (Minutes, Senate Committee on Local Government and Elections, Feb. 9, 1983, Tape 14-A, p 2). The comments to SB 198 distributed for discussion that day explained the changes based on corporate residence:

> "Subsection (2) This subsection is consistent with existing case law, except venue for some corporations is extended to any *place* of business. A local corporation or registered foreign corporations would continue to be suable at its designated office (where the authorized agent resides) but would also be suable in any county *where it actually does business*, rather than its principal place of business (if different than the designated office)."

App 3 (Minutes, Senate Committee on Local Government and Elections, Feb. 9, 1983, Ex C) (emphasis added).

A few months after Professor Merrill's testimony, the House Committee on Judiciary considered SB 198. As proposed, the new section 2 provided:

> "(2) For purposes of this section, a corporation incorporated under the laws of this state, a limited partnership or a foreign corporation authorized to do business in this state shall be deemed to be a resident of any county where the corporation or limited partnership transacts business or has an office for the transaction of business or where any agent authorized to receive process resides. A foreign corporation not authorized to transact business in this state shall be deemed not to be a resident of any county in this state."

App 9 (House Judiciary Committee Subcommittee 2, May 3, 1983, Ex A, Frank Merrill Amendments). Senator Godwin explained the overall changes to ORS 14.080:

> "* * * [T]he bill came from the Oregon State Bar's annual meeting in September. It cleans up and partly expands Oregon's catch-all venue statute. The statute has not be [*sic*] amended since sometime in the 1800's. The Procedure and Practice Committee of the Oregon State Bar felt it was time that

> some of the case law be put into the statutes so it would be easier to determine where venue would lie on a particular action where it is not otherwise specified in Chapter 14."

App 4 (Minutes, House Committee on Judiciary, April 18, 1983, Cassette Tape 250, p 2). In response to questions about subsection (2), Senator Godwin "said the provisions of subsection (2), lines 12-15 are patterned after the federal venue statute, 28 USC, § 13.91 ¶(c)." *Id.*

Representative Hall then commented that he had talked to someone from the banking industry, who indicated they may come up with new language for the bill to get at the problem of allowing venue anywhere the corporation does business. *Id.* at p 3. Although Senator Godwin said "they do not wish to amend the bill on that issue," *id.*, by May when the bill reached the House Committee on Judiciary, amendments had in fact been proposed. The hand engrossed version of the bill showing the amendments is attached at App 9 (House Judiciary Committee Subcommittee 2, May 3, 1983, Ex A, Frank Merrill Amendments). In relevant part, as amended, section 2 provided:

> "(2) For purposes of this section, a corporation incorporated under the laws of this state, a limited partnership or a foreign corporation authorized to do business in this state shall be deemed to be a resident of any county where the corporation or limited partnership *conducts regular, sustained business*

> *activity* or has an office for the transaction of business or where any agent authorized to receive process resides. * * *." (emphasis added).
>
> Professor Merrill testified:
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> "FRANK MERRILL, Oregon State Bar, testified in support of the bill. In answer to a question from the committee, MR. MERRILL stated that a defendant that regularly conducts business in all counties, would be subject to suit in any one of those counties."

App 7 (Minutes, House Committee on Judiciary, May 3, 1983, Cassette Tapes: 288 and 289, p 2). The committee adopted the proposed amendments, *id.*, and on May 9 approved Senate Bill 198 with a do pass recommendation. App 8 (Minutes, House Committee on Judiciary, May 9, 1983, Tape 302-03, p 4).

D. Contextual Clues for the Amendments

In context, it is clear that when venue is not proper, the trial court has no discretion to deny a change of venue. ORS 14.110(1)(a); *Mutzig v. Hope*, 176 Or at 397. ORS 14.040, 14.050, and 14.080 all provide for venue in mandatory terms (*e.g.*, "shall be commenced"). Also, the legislature expressed an intent, in early versions of the statute, to protect defendants from unjust and unnecessary expenses in defending actions in counties removed from the defendant's residence or the place of the actionable conduct. 1909 Or Laws, Ch 43, § 2.

As first drafted, ORS 14.080(2) would have incorporated any county where the corporation "transacts business", a phrase that appears twice in section 2. A foreign corporation not authorized to "transact business" in Oregon was deemed not to be a resident of any county. App 9 (House Judiciary Committee Subcommittee 2, May 3, 1983, Ex A, Frank Merrill Amendments). Transaction of business in that sense clearly means the conduct of the foreign corporation's business. No authorization is required for advertising in Oregon or purchasing goods from Oregon, only for the conduct of the corporation's business in Oregon.

The change incorporating "regular, sustained business activity" into the statute quantified the level of business that would sustain proper venue. As a result, the change was designed to afford a greater protection to corporate defendants than originally proposed. Merely transacting business would not suffice; instead, only a corporation that "conducts regular, sustained business activity" in a county would be subject to suit in that county.

Professor Merrill testified that "SB 198 makes very little change in the existing law." App 1 (Minutes, Senate Committee on Local Government and Elections, Feb. 9, 1983, Tape 14-A, p 2). Senator Godwin in his comments stated that the bill "cleans up and partly expands" the catch-all

provisions. App 4 (Minutes, House Committee on Judiciary, April 18, 1983, Cassette Tape 250, p 2). The frame of reference for those statements can be found in this court's earlier cases, discussed at pages 14-16, above.

ORS 14.080(2) extended the protection afforded Oregon corporations to limited partnerships and foreign corporations authorized to do business in Oregon. *See Updegraff,* 172 Or 246 (foreign corporation that had registered an authorized agent for service and maintained a place of business in Multnomah County held entitled to rely on venue protection of Section 1-403 O.C.L.A. to change venue to Multnomah County).

ORS 14.080(2) "partly expanded" the place of residence of a corporate defendant, which was previously confined to a single location, the corporation's principal place of business. *Holgate*, 16 Or 123. With the amendment, "reside" was "deemed" to include the place where any agent authorized to receive process resides, where the corporation has an office for the transaction of business, and where it "conducts regular, sustained business activity." Context for the inclusion of the residence of an "agent" as a corporate residence for venue is found in *Kleinsorge*, 221 Or 558 (county where board secretary of public quasi-corporation maintained office was considered proper venue under ORS 14.080(2)).

This court's decision in *Willamette Lumber*, 187 Or 591, provides context for the other places specified – an office for the transaction of business and where the corporation "conducts regular, sustained business." An office for the transaction of business would encompass an office, such as the one the company maintained in Portland, where staff was employed, the corporate bookkeeping and payroll were done, and corporate meetings were held. 187 Or at 596-597. A location where the corporation conducts its regular business activity, as with the lumber mill operation in *Willamette Lumber*, akin to the business activity of a principal place of business, would also be a proper venue. This construction certainly comports with Professor Merrill's assurance to the legislature that "SB 198 makes very little change in the existing law." App 1 (Minutes, Senate Committee on Local Government and Elections, Feb. 9, 1983, Tape 14-A, p 2).

In contrast, ascribing a legislative intent to stretch venue beyond these places to encompass all conceivable peripheral connections a corporation may have to residents of other counties finds no support in Oregon legislation or jurisprudence.

VI. Construing ORS 14.080(2) to Effect the Legislature's Intent

Neither the wording and its plain meaning nor the context of the 1983 amendment signifies a massive overhaul of the concept of where a corporate

defendant resides, but that is the conclusion that the construction offered by plaintiffs requires. There is no indication that the 1983 amendments were intended to effect a sea change from existing law by subjecting defendants to venue in counties where they did not conduct their regular business activity, unless the corporation (not the plaintiff) had authorized a corporate agent for service. Rather than abandoning the concept of "residence" for corporations, the proponents of the 1983 amendments had in mind the *place* or *places* of business for an Oregon corporation, or any county where it "actually" does business, meaning the business *of* the corporation, whether providing medical services or automotive services or baseball training services or selling groceries or providing hay rides and other entertainment at a pumpkin patch.

Surely, the "clean-up" undertaken was not meant to abandon Oregon law and the protections afforded defendants, expressed in *Rose v. Etling,* 255 Or at 399, the case decided most closely in time to the 1983 amendments. Rather, the legislature understood the amendments made "very little change" in existing Oregon law.

There is no suggestion either on the face of the statute or in the legislative history that there was any intent to extend proper venue for Oregon corporations to counties with which there are only incidental

contacts. Nor is there any suggestion that a corporation's name, or advertisements, or, modernly, website and internet presence, would subject that defendant to venue in any county in the state where its advertising might reach, or from which Oregon corporations might order or purchase goods or supplies to be delivered to its place or places of business. The wording chosen and contextual clues are all to the contrary.

The court should reject the plaintiffs' unstated invitation to ignore the underlying purpose of venue protections and render meaningless any distinction between Oregon and foreign corporations for purposes of venue. Plaintiffs' remedy, if any, is with the legislature.

CONCLUSION

The correct construction of ORS 14.080(2) limits venue in tort actions against Oregon corporate defendants to the county or counties in which the defendant conducts, runs, or operates its normal and regular business activity, where it maintains an office for the transaction of business, or where it has an agent authorized for the receipt of service of process, and not elsewhere. Judge Litzenberger was right to abide by the court's order to

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vacate her order in *Voong v. Cornell*, S060693, (2dSER 3). The court should issue a writ directing that Judge Immergut vacate her order and transfer venue in the present case to Clackamas County.

DATED this 18th day of January 2013.

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Certificate of Compliance

I certify that this brief complies with the word count limitation pursuant to ORAP 5.05(2)(b); the word count is 7,156 words. I further certify that this brief is produced in a type font not smaller than 14 point in both text and footnotes pursuant to ORAP 5.05(4)(f).

In addition, I certify that this document was converted into a searchable PDF format for electronic filing and was scanned for viruses; it is submitted to the court brief bank virus-free as required by ORAP 9.17(5)(b).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the date below I served the foregoing AMICUS BRIEF OF OREGON ASSOCIATION OF DEFENSE COUNSEL on the following:

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I also certify that on the same date, I filed the foregoing AMICUS BRIEF OF OREGON ASSOCIATION OF DEFENSE COUNSEL by means of electronic filing with the State Court Administrator, Appellate Records Section, 1163 State Street, Salem OR 97301.

DATED this 28th day of January 2013.

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