THE VERDICT™

OADC Oregon Association of Defense Counsel

Trial Lawyers Defending You in the Courts of Oregon

2020 • ISSUE 2

Nondisclosure Agreements in Oregon

Defending Aiding-and-Abetting Claims

Complying with ORS 742.013

2020 OADC Practice Group Leaders

COMMERCIAL	**Chad Colton,** Chair Markowitz Herbold 1211 SW 5th Ave., #3000 Portland, OR 97204 | 503.295.3085 chadcolton@markowitzherbold.com	**Bill Edgar,** Vice Chair Greenspoon Marder 1211 SW 5th Ave., #2850 Portland, OR 97204 | 503.878.8036 bill.edgar@gmlaw.com	**Daniel Lis,** Publications Buchalter 1331 NW Lovejoy St., #900 Portland, OR 97209 | 503.226.8407 dlis@buchalter.com	**Daniel Larsen,** Board Liaison Buchalter 1331 NW Lovejoy St., #900 Portland, OR 97209 | 503.226.1191 dlarsen@buchalter.com
CONSTRUCTION	**Graham Miller,** Chair Wood Smith Henning & Berman 12755 SW 69th Ave., #100 Portland, OR 97223 | 971.256.4011 gmiller@wshblaw.com	**Jamison McCune,** Vice Chair Bodyfelt Mount 319 SW Washington St., #1200 Portland, OR 97204 | 503.243.1022 mccune@bodyfeltmount.com	**Andrew Gust,** Publications Betts Patterson & Mines 111 SW 5th Ave., #3650 Portland, OR 97204 | 503.961.6536 agust@bpmlaw.com	**Allen Eraut,** Board Liaison Rizzo Mattingly Bosworth 1300 SW 6th Ave., #330 Portland, OR 97201 | 503.229.1819 aeraut@rizzopc.com
COVERAGE	**Jacqueline Mitchson,** Chair Bullivant Houser Bailey One SW Columbia St., #800 Portland, OR 97204 | 503.228.6351 jackie.mitchson@bullivant.com	**Chris Parker,** Vice Chair Davis Rothwell Earle & Xóchihua 200 SW Market St., #1800 Portland, OR 97201 | 503.222.4422 cparker@davisrothwell.com	**Christina Anh Ho,** Publications Thenell Law Group 12909 SW 68th Pkwy, #320 Portland, OR 97223 | 503.372-6450 christina@thenelllawgroup.com	**Lloyd Bernstein,** Board Liaison Bullivant Houser Bailey One SW Columbia St., #800 Portland, OR 97204 | 503.228.6351 lloyd.bernstein@bullivant.com
EMPLOYMENT	**Naomi Johnson,** Chair Bullard Law 200 Market St., #1900 Portland, OR 97201 | 503.224.8851 njohnson@bullardlaw.com	**Melissa Healy,** Vice Chair Stoel Rives 760 SW 9th Ave., #3000 Portland, OR 97205 | 503.294.9263 melissa.healy@stoel.com	**Christine Sargent,** Publications Littler Mendelson 121 SW Morrison, #900 Portland, OR 97204 | 503.221.0309 csargent@littler.com	**Kjersten Turpen,** Board Liaison K&L Gates One SW Columbia St., #1900 Portland, OR 97204 / 503.226.5786 kjersten.turpen@klgates.com
GOVERNMENT LIABILITY	**David Landrum,** Chair Multnomah County Attorney's Office 501 SW Hawthorne Blvd., #500 Portland, OR 97214 503.988.3138 ext. 87338 david.landrum@multco.us	**Blake Fry,** Vice Chair Mersereau Shannon 111 SW Columbia, #1100 Portland, OR 97201 | 503.595.8034 bfry@mershanlaw.com	**Ryan Christopher Bailey,** Publications Portland Office of City Attorney 1221 SW 4th Ave., #430 Portland OR 97204 | 503.823.9968 ryan.bailey@portlandoregon.gov	**Brian Scott,** Board Liaison American Family Insurance Group 11850 SW 67th Ave., #160 Portland, OR 97223 | 503.403.1880 bscott@amfam.com
NEW LAWYERS	**Megan Cook,** Chair Bullivant Houser Bailey One SW Columbia St., #800 Portland, OR 97204 | 503.499.4402 megan.cook@bullivant.com	**Jessica Wilcox,** Vice Chair Bullard Law 200 SW Market St, #1900 Portland, OR 97201 / 503.248.1134 jwilcox@bullardlaw.com	**Helaina Chinn,** Publications Bodyfelt Mount 319 SW Washington St., #1200 Portland, OR 97204 | 503.243.1022 chinn@bodyfeltmount.com	**Donna Lee,** Board Liaison Hart Wagner 1000 SW Broadway, 20th Floor Portland, OR 97205 / 503.222.4499 dll@hartwagner.com
PRACTICE MANAGEMENT	**Kirsten Curtis,** Chair Thenell Law Group 12909 SW 68th Pkwy., #290 Portland, OR 97223 | 503.372.6450 kirsten@thenelllawgroup.com	**John Bachofner,** Vice Chair Jordan Ramis 1499 SE Tech Center Pl. #380 Vancouver, WA 98683 360.567.3900 john.bachofner@jordanramis.com	**Michael Jacobs,** Publications Hart Wagner 1000 SW Broadway, 20th Floor Portland, OR 97205 | 503.222.4499 mgj@hartwagner.com	**Heather Bowman,** Board Liaison Oregon State Bar Professional Liability Fund 16037 SW Upper Boones Ferry Rd. Tigard, OR 97281 | 503.639.6911 heatherb@osbplf.org
PRODUCT LIABILITY	**Daniel Nichols,** Chair Redgrave Portland, OR 97229 | 415.650.6176 dnichols@redgravellp.com	**Tessan Wess,** Vice Chair Lewis Brisbois 888 SW 5th Ave., #900 Portland, OR 97204 | 971.334.7005 tessan.wess@lewisbrisbois.com	**David Cramer,** Publications MB Law Group 117 SW Taylor St., #200 Portland, OR 97204 | 503.382.4211 dcramer@mblglaw.com	**Peter Tuenge,** Board Liaison Keating Jones Hughes 200 SW Market St, #900 Portland, OR 97201 / 503.222.9955 ptuenge@keatingjones.com
PROFESSIONAL LIABILITY	**Scott Schauermann,** Chair Hitt Hiller Monfils Williams 411 SW 2nd Ave., #400 Portland, OR 97204 | 503.595.5385 sschauermann@hittandhiller.com	**Shayna Rogers,** Vice Chair Garrett Hemann Robertson 1011 Commercial St. NE Salem, OR 97301 | 503.581.1501 srogers@ghrlawyers.com	**Kelly Huedepohl,** Publications Keating Jones Hughes PC 200 SW Market St., #900 Portland OR 97201 | 503 222-9955 khuedepohl@keatingjones.com	**Grant Stockton,** Board Liaison Brisbee & Stockton PO Box 567 Hillsboro, OR 97123 | 503.648.6677 gds@brisbeeandstockton.com
TRANSPORTATION	**Greg Lockwood,** Chair Gordon Rees Scully Mansukhani 121 SW Morrison St., #1575 Portland, OR 97204 | 503.227.8269 wglockwood@gordonrees.com	**Christopher Piekarski,** Vice Chair Allstate Staff Counsel 1000 SW Broadway, #1080 Portland, OR 97205 | 503.553.0360 chris.piekarski@allstate.com	**Elana Charles,** Publications Lindsay Hart 1300 SW 5th Ave., #3400 Portland, OR 97201 | 503.226.7677 echarles@lindsayhart.com	**Timothy Heinson,** Board Liaison Heinson & DeDobblelaere 19530 SE Sunnyside Rd. Damascus, OR 97089 | 503.479.6223 tim@heinsonlaw.com
TRIAL PRACTICE	**Abby Miller,** Chair Hodgkinson Street Mepham 1620 SW Taylor, #350 Portland, OR 97205 | 503.222.1143 akm@hs-legal.com	**Sheila Cieslik,** Vice Chair American Family Insurance 11850 SW 67th Ave., #160 Portland, OR 97223 | 503.403.1880 scieslik@amfam.com	**Joel Petersen,** Publications Hodgkinson Street Mepham 1620 SW Taylor, #350 Portland, OR 97205 | 503.222.1143 jcp@hs-legal.com	**Tom Armosino,** Board Liaison Frohnmayer Deatherage 2592 E Barnett Rd. Medford, OR 97504 | 541.858.3378 armosino@fdfirm.com
WOMEN IN LAW	**Alice Newlin,** Chair Lindsay Hart 1300 SW 5th Ave., #3400 Portland, OR 97201 | 503.226.7677 anewlin@lindsayhart.com	**Michelle Smigel,** Co-Vice Chair 503.758.5466 michelle@skyinsuranceagency.com **Kate Wilkinson,** Co-Vice Chair 971.321.3788 kate.wilkinson@standard.com	**Pamela Paluga,** Publications Abbott Law Group 215 SW Washington St., #300 Portland, OR 97204 | 503.595.9510 ppaluga@abbott-law.com	**Katie Smith,** Board Liaison Lorber Greenfield & Polito 610 SW Alder St., #315 Portland, OR 97205 | 503.416.4785 ksmith@lorberlaw.com

Features

Departments

PRESIDENT'S MESSAGE

A Call for OADC Members to Assist Courthouses in Procuring Masks

Lloyd Bernstein, Bullivant Houser Bailey

"If life were predictable it would cease to be life, and be without flavor."[1]

We have all been profoundly impacted by the COVID-19 pandemic in too many unique and different ways to even attempt to unpack here. The one impact we all share in common is the impact on the practice of law – which, as we all know, has been turned upside down since my opening message discussing the future of OADC. Well folks, the "future" is here and, of course, it is nothing like anyone anticipated when we started the year. Nevertheless, life's unpredictability has presented OADC with an opportunity to step up and truly demonstrate to the community one of its core values – helping to protect the civil justice system.

LLOYD BERNSTEIN

As Oregon moves towards reopening courthouses, the judicial system is faced with the difficult challenge of making them a safe environment for the legal community and visiting members of the public. Our court system simply cannot operate effectively if those accessing the court system – including lawyers – are anxious for their own safety when they walk up the courthouse steps. If the ability to access our courthouses remains paralyzed during the return to some kind of normalcy, it seems our justice system could overload and potentially collapse from the inevitable backlog.

As we are reminded anytime we (reluctantly) turn to the news, one of the simplest approaches to enhance safety is to encourage people to wear face masks. To encourage the wearing of face masks, Chief Justice Walters wants our courthouses to have enough masks on hand for anyone who might have forgotten theirs at home or otherwise wants one. To that end, Chief Justice Walters has reached out to the Oregon legal community and is asking us to pull together to help our court system by either donating masks or making masks that can be used in courthouses around the state. We quite literally need thousands, and the Judicial Department has limited ability to obtain extra masks. There are simply not enough masks available.

With the encouragement of the Chief Justice, OADC has volunteered to step up and lead the charge in procuring courthouse masks. If every OADC member could donate just one mask (or more) it would be a tremendous help. We have been assured that the masks do not need to be the N-95 variety. Simple disposable or washable masks are great.[2] You can even make masks for donation per the CDC instructions.[3] The Judicial Department has assured us homemade masks would be very much welcomed and recommends that any homemade

CONTINUED ON NEXT PAGE

PRESIDENT'S MESSAGE
continued from previous page

masks be wrapped individually for distribution.

OADC has agreed to be the point of collection for the legal community. OADC is also reaching out to the other state and local Bar organizations in this effort to collect masks for the courthouses. The Oregon Judicial Department Marshal's Office will collect the masks from OADC and then distribute them to the counties in need. Anything and everything that you can do to help advance this good cause would be greatly appreciated.

I look forward to the time when we can all once again gather in person and fully enjoy another core value of OADC – the good company of our members. Until that time, let's remember to be respectful, practice law safely, and continue to lean on one another to get through these tough times. And to that end, please find a way to donate masks for our courthouses – let's make sure OADC meets the challenge of the day. Let this be our "flavor" in helping to protect our justice system!

If you have any questions about the collection process, have masks to donate, or can make masks to contribute, please contact:

Geoff Horning, Executive Director
Oregon Association of Defense Counsel
147 SE 102nd Ave
Portland, OR 97216
P: 503-253-0527
info@oadc.com

Thank you and stay safe.

Endnotes

1. Eleanor Roosevelt.
2. Shop online here: https://www.amazon.com/Best-Sellers-Industrial-Scientific-Medical-Face-Masks/zgbs/industrial/8404646011.
3. *See* https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-to-make-cloth-face-covering.html.

#MeToo and Nondisclosure Agreements in Oregon—Are They Still Viable?

Pamela J. Paluga
Abbott Law Group

In the wake of the #MeToo movement, nondisclosure agreements (NDAs) have come under increasing criticism as a means for sexual offenders to continue their behavior with impunity and without social repercussions. Quite simply, when victims of sexual harassment and assault cannot talk about what happened to them, the perpetrators of that conduct remain free to victimize others. Bill Cosby, Harvey Weinstein, Bill O'Reilly, and Roger Ailes were all called to task in the court of public opinion for using NDAs to silence women from coming forward with sexual assault claims.


PAMELA J. PALUGA

Yet, as employment defense practitioners know, there are times when an NDA is a useful and appropriate tool for preventing truly spurious allegations from reaching the public and decimating people's lives and careers. Moreover, even some women's advocacy groups and women's rights lawyers, including Gloria Allred, argue that eliminating NDAs will take away a victim's settlement leverage and may also subject victims to having details made public that they would prefer to remain private. There is an inevitable tension between the need to stop future sexual harassment/assault and the need to give victims of that conduct as much settlement leverage and privacy as possible.

The Oregon Workplace Fairness Act limits NDAs

The 2019 Oregon Workplace Fairness Act, SB 726 (2019), attempts to straddle these conflicting goals by prohibiting employers from entering into an agreement with an employee or prospective employee that contains a nondisclosure provision, a nondisparagement provision, or any other provision that has the purpose or effect of preventing an employee or prospective employee from disclosing or discussing conduct that constitutes discrimination, harassment, or sexual assault under Oregon law. The Act does, however, allow employers to enter into such agreements if requested by the "aggrieved" employee and if the agreement itself gives the employee seven days within which to exercise the option of revoking the agreement.

The Act was signed into law by Governor Kate Brown on June 11, 2019 and applies to every employer with one or more Oregon employees. Some provisions of the Act took effect on September 29, 2019, and others will take effect on October 1, 2020. The prohibition against NDAs and similar provisions in agreements takes effect on October 1, 2020. As of that date, an employee who claims an employer has violated the Act may sue the former employer or file a claim with the Bureau of Labor and Industries (BOLI) and may also seek to recover attorney fees.

It is important to note that the Act's prohibitions on NDAs and similar provisions apply not just to sexual assault, discrimination, or harassment that occurs in the workplace, but also to conduct occurring outside the workplace, and includes off-premises work-related events coordinated by or through the employer. In addition, the Act applies to coworker and employer conduct. And while an employer can encourage employees involved in an investigation to keep any matters discussed confidential, an employer may not require or direct that the employee keep them confidential.

The five-year statute of limitations

The Act expands the limitation period for filing claims for sexual assault, discrimination, and harassment from one to five years. A claim brought under the Act is also subject to a five-year limitation period. The new five-year statute of limitations applies to conduct occurring on or after September 29, 2019, and to violations of the Act occurring on or after October 1, 2020.

Employers must now have a written anti-discrimination policy

Whereas it has always been good practice for an employer to have an anti-discrimination policy, under the Act, a written policy is now required. The policy must:

- Provide a process for employees to report prohibited conduct;

CONTINUED ON NEXT PAGE

continued from previous page

- Identify who is responsible for receiving reports;
- Describe the five-year limitation period;
- State that an employer may not require or coerce an employee to enter into a nondisclosure or nondisparagement agreement;
- Explain that an employee may voluntarily request a nondisclosure or nondisparagement agreement and that any such agreement comes with the right to rescind the agreement within seven days; and
- Advise employers and employees to document any incidents of discrimination, harassment, and sexual assault.

The written policy must be given to all new employees upon hire, posted in the workplace, and provided to any employee who complains about discrimination, harassment, or sexual assault in the workplace. BOLI says it will have guidelines ready for employers in June 2020.

Severance packages of perpetrator employees are voidable under the Act

The Act also allows employers to void separation or severance provisions in agreements with a "perpetrator employee" if the employer investigates a claim of misconduct in good faith and determines that the allegations are well-founded. The employer can also include nondisclosure and no re-hire provisions in agreements with the perpetrator employee if supported by a good faith investigation, even if the perpetrator did not ask for an NDA. In this situation, the NDA does not have to include a seven-day revocation period.

Of course, the right of employers to void these agreements does not mean that disgruntled "perpetrator employees" will not sue their employers for breach of contract, challenging the good faith investigation and determination and/or the validity of the claims themselves. Such lawsuits would also likely drag the victims into litigation involuntarily, making them re-live situations they would prefer to forget. For these reasons, some employers may simply choose to pay the severance to avoid the potential lawsuit and ensuing conflict.

Suggestions going forward

The increased time to bring suit will likely mean that employers will need to review and possibly change their current document-retention policies. Having a written document-retention policy, as well as following and enforcing it, would be an important first step in heading off a spoliation claim down the line.

If they have not already done so, employment counsel should offer to review their clients' current employment, severance/separation, and arbitration agreements to make sure they comply with the Act and to confirm that their document-retention policies are sufficient. Employment counsel should also ensure that their clients' anti-discrimination policies are consistent with the Act. Lastly, manager/employee training would certainly be beneficial given the new prohibitions and proscriptions set forth in the Act.

Defending Non-Employers Against Aiding-and-Abetting Claims Under ORS 659A.030(1)(g)

Robert Double III
Buchalter Ater Wynne

For 67 years, the text of ORS 659A.030(1)(g)—which creates aiding-and-abetting liability for employment-related actions prohibited under Chapter 659A—has remained unchanged. Yet despite the statute's longevity, the Oregon Court of Appeals and the Oregon Supreme Court have yet to weigh in on a fundamental question of liability, namely, to whom does the statute apply? Does the law create liability only for a plaintiff's employer and co-workers, or does it extend further?


ROBERT DOUBLE III

This soon will change through a trio of cases pending before the Court of Appeals.[1] The question is one of statutory interpretation, centered on the wording of subsection (1)(g) itself, which makes it an unlawful employment practice for "any person,[2] whether an employer or an employee, to aid, abet, incite, compel, or coerce the doing of any acts forbidden under this chapter or the attempt to do so." The answer will turn on how the court interprets the phrase "whether an employer or an employee"—*i.e.,* does the phrase modify the term "any person," or is it merely exemplary?

The court's resolution of these cases will have practical implications for defending non-employer, non-employee defendants. Given the existing body of case law, which endorses a narrow reading of the statute, attorneys need not wait for these decisions to attack subsection (1)(g) claims. At the same time, we should be preparing our clients for the possibility of adverse rulings and future claims based on expanded liability.

> To date, all courts that have addressed the issue have found that subsection (1)(g) applies only to a plaintiff's employer or fellow employee, but there nevertheless is a possibility that the Court of Appeals will interpret the statute to apply more broadly.

State of the law

The District Court of Oregon has already addressed the scope of liability under subsection (1)(g) on several occasions, each time holding that liability is limited to a plaintiff's employer or co-worker.

In the first of a series of cases, the court—in *Duke v. F.M.K. Construction Services, Inc.*—relied on the plain language of subsection (1)(g) and found that "the statute was intended only to regulate the conduct of those working for the plaintiff's own employer."[3] The court reached the same conclusion in *Larmanger v. Kaiser Foundation Health Plan of Northwest,* holding that "[ORS] 659A.030(1)(g) is clear and unambiguous on its face."[4] It further elaborated in *McIntire v. Sage Software, Inc.* that the statute "immediately qualif[ies] ['any person'] with the words 'whether an employer or an employee[,]'" meaning that the statute "does not allow a claim for aiding and abetting against an entity that is neither the plaintiff's employer nor an employee of plaintiff's employer."[5] And the court reiterated these conclusions in *Malcomson v. Daimler N. Am. Corp.*[6]

Oregon's circuit courts have followed the district court's lead thus far, including in the three cases currently on appeal.[7]

Practical implications of expanded liability

To date, all courts that have addressed the issue have found that subsection (1)(g) applies only to a plaintiff's employer or fellow employee, but there nevertheless is a possibility that the Court of Appeals will interpret the statute to apply more broadly. This could have the effect of expanding liability for employment-related actions well beyond the employment relationship. The list of unexpected defendants could include, for example, a customer whose complaint to an employee's manager results in that employee's termination. Even if such defendant is not found liable, a more expansive reading of the statute would allow plaintiffs to move

CONTINUED ON NEXT PAGE

beyond the pleadings stage in many cases, thereby costing defendants more money and potentially extracting higher settlements.

Tips for defending clients

Non-employer, non-employee defendants currently facing a subsection (1)(g) claim should seek dismissal based on the existing body of case law. The scope of the statute is, of course, a legal issue, but application of the statute to a given case may require further factual development before a defendant can secure dismissal. For the defendant who plainly is not alleged to be a plaintiff's employer or co-worker, this would come at the motion-to-dismiss stage. Where, by contrast, the parties' relationship is in dispute, a defendant may be forced to wait until summary judgment or even until trial to obtain a determination of the nature of the relationship and, in turn, the applicability of the statute. Alternatively, non-employer, non-employee defendants may consider seeking a stay of the action against them until the Court of Appeals issues its anticipated rulings and provides some clarity. If successful, this would avoid the cost of briefing an issue that will soon be decided.

Attorneys may also take steps to protect their clients from future claims, regardless of the outcome of the pending appeals. Attorneys should continue to use best practices when structuring their clients' relationships with entities that could expose them to future liability under subsection (1)(g). This includes the use of indemnification clauses in any relevant agreements. Simple steps like this can help blunt the impact of future lawsuits, whether under an expanded reading of the statute or otherwise.

Conclusion

Although federal and state courts currently agree that liability under subsection (1)(g) is limited to a plaintiff's employer or co-worker, that scope could soon be expanded by the Oregon Court of Appeals. Those attorneys who are defending clients against pending subsection (1)(g) claims should watch closely for the Court of Appeals' rulings, as they will greatly impact the ability of non-employer and non-employee defendants to succeed on early dispositive motions. In the meantime, defense counsel should continue to seek to limit liability (or the impact of liability) where possible, including through the use of indemnification provisions.

Endnotes

1. The three cases currently on appeal are: *Hernandez v. Catholic Health Initiatives,* Multnomah County Circuit Court Case No 17CV11777/Court of Appeals Case No A166808; *Charlton v. Staub & Sons Petroleum, Inc.,* Deschutes County Circuit Court Case No 17CV34375/Court of Appeals Case No A167004; and *Miller v. Tillamook Cty. Health Dept.,* Tillamook County Circuit Court Case No 18CV59146/ Court of Appeals Case No A171169.
2. "Person" is defined as "[o]ne or more individuals, partnerships, associations, labor organizations, limited liability companies, joint stock companies, corporations, legal representatives, trustees, trustees in bankruptcy or receivers." ORS 659A.001(9)(a).
3. 739 F Supp 2d 1296, 1306 (D Or 2010).
4. 805 F Supp 2d 1050, 1056 (D Or 2011).
5. No 3:15-cv-00769-JE, 2015 WL 9274301, at *3 (D Or Sept 28, 2015).
6. No 3:15-cv-02407-SB, 2016 WL 5867056, at *5-6 (D Or Aug 3, 2016).
7. Order, *Hernandez,* No 17CV11777 (Nov 21, 2017); Minute Order, *Charlton,* No 17CV34375 (Jan 10, 2018); Letter Opinion, *Miller,* No 18CV59146 (Apr 17, 2019).

Do It the Old-Fashioned Way: Complying with ORS 742.013

By Christina Ho
Thenell Law Group

When an individual bringing an insurance claim makes a material misrepresentation, that misrepresentation may provide a basis for rescission. Sometimes, material misrepresentations are made during the presentation of the claim or the investigation process. Other times, such misrepresentations are made during the application process and are contained in the application for the insurance policy before a claim is ever made. In the latter situation, Oregon imposes special requirements on an insurer that wants to rely on the misrepresentation as a basis for rescinding the insurance contract. If those requirements are not met, the insurer must pay the claim notwithstanding the fact that its insured made a material misrepresentation in obtaining the policy.


CHRISTINA HO

The governing statute, ORS 742.013, provides that misrepresentations, omissions, concealments of fact, and incorrect statements in an insurance application will not prevent recovery under the policy unless three requirements are met: (1) the application is *"indorsed upon or attached* to the insurance policy when issued"; (2) the statements or omissions are material and relied upon by the insurer; and (3) the statements or omissions are either fraudulent or "material either to the acceptance of the risk or to the hazard assumed by the insurer." (Emphasis added.)

As the text of the statute makes clear, an insurer can fulfill the first requirement of ORS 742.013 by attaching the application to the policy or indorsing it upon the policy. The purpose of the requirement, according to the Court of Appeals, is to "prevent problems of proof that could arise if an insurer were permitted to deny a claim on the basis of an alleged oral misrepresentation" and ensure that "the policyholder is provided with everything that the insurer relies upon in issuing the policy."[1]

The term "attach" is relatively straightforward (although, in today's online world, it is unclear whether email attachments will suffice). The meaning of the term "indorsed upon" is unsettled. According to *Brock v. State Farm Mut. Auto. Ins. Co.*, 195 Or App 519, 526 (2004), to "indorse" the application upon the policy means that "the material information from the application must be inscribed or otherwise reproduced on the policy itself." The Court of Appeals did not specify what "reproduced on the policy itself" meant and whether other methods of reproducing the information, such as incorporation by reference, would suffice. Unfortunately, Oregon's appellate courts have not provided further guidance on the subject. As such, there remains room for interpretation regarding what constitutes "indorsing" the application upon the policy.

Incorporation by reference as a means of indorsing the application upon the policy

Incorporation by reference is a generally accepted contractual concept and has been utilized by insurers as such. Some policies contain language that purports to incorporate the application into the policy. These may state, for example, that the insured's policy "consists of the policy contract, insurance application, and the declarations page and all endorsements to the policy," and/or that the agreement between the parties is contained in "the policy contract, the insurance application (which is made a part of this policy as if attached hereto), the declarations page, and all endorsements to this policy." Some insurers have argued that the application is "indorsed upon" the policy, for purposes of ORS 742.013, by virtue of such language incorporating the application into the policy.

Electronic access to the application and insurance policy as a means of indorsing the application upon the policy

In today's paperless world, many insurers now provide their policyholders access to policy documents online, which can include electronic access to both the application and the policy. An insurer could argue that, by providing electronic access to both the policy and the application by way of an online portal, the requirements of ORS 742.013 have been met. While

CONTINUED ON NEXT PAGE

other jurisdictions have addressed the use of hyperlinks as a valid method for integrating terms into a contract, Oregon courts have yet to rule on the issue at the appellate level.[2]

Judicial guidance is needed, but until then, the best way to avoid a failure-to-meet-ORS 742.013 argument is to play it safe

While there are good arguments that both of the above situations should satisfy ORS 742.013(1)(a), there is no conclusive Oregon case law. For those with a coverage practice, clarity is needed, especially because the majority of policy documents are now provided electronically.

The reality, however, is that insurance companies rarely provide a copy of the application to the insured, let alone attach it to the policy. To be clear, failure to adhere to ORS 742.013 is costing insurers. The practical effect is that even egregious misrepresentations made in the application process are covered unless there is another ground for denial of the claim.

What can be done to avoid an insured's argument that ORS 742.013 was not met? Do it the old-fashioned way: Mail a copy of the application, along with the policy, to the policyholder after the policy is written. This must be done pre-claim. It is undisputed that physical attachment of the application to the policy meets the requirements of ORS 742.013(1)(a). Therefore, this approach will eliminate the ambiguity regarding what constitutes "indorsing" the application upon the policy.

Endnotes

1. *Ives v. INA Life Co.*, 101 Or App 429, 433, *rev den*, 310 Or 393 (1990).
2. *See Nguyen v. Barnes & Noble Inc.*, 763 F3d 1171, 1178 (9th Cir 2014); *Hubbert v. Dell Corp.*, 359 Ill App 3d 976, 835 NE2d 113 (2005).

Recent Case Notes

Sara Kobak, Schwabe Williamson & Wyatt
Case Notes Editor

Landlord-Tenant

Tenant good-faith requirement met despite conduct motivated by avoidance of rent

In *Eddy v. Anderson,* 366 Or 176, 458 P3d 678 (Feb. 21, 2020), the Oregon Supreme Court held that the "good faith" standard imposed by the Oregon Residential Landlord and Tenant Act (ORLTA) means "honesty in fact in the conduct or transaction concerned."

Residential landlords began this case by filing a breach-of-contract action against former tenants to recover unpaid rent, among other damages. The tenants responded with counterclaims alleging, in part, that the landlords failed to maintain the rental premises in a habitable condition in violation of ORS 90.320 of the ORLTA.

The history of the tenancy included complaints about the condition of the property. Shortly after taking possession, the tenants provided the landlords with a written list of requested repairs. This list included repairing a backed-up bathroom drain. The landlords repaired the drain. Several months later, the tenants again complained that the drain was clogged. The landlords again fixed the drain and provided a tool for the tenants to fix future drain problems. Subsequently, the tenants paid their rent late and less than the amount owed. Along with their partial rent payment, the tenants asked the landlords for lowered rent due to repair issues. The landlords demanded full payment of unpaid past rent, utility bills, and move-in charges before any renegotiation of the rent amount.

Several months later, the tenants wrote the landlords and left them a telephone message, informing the landlords that the bathroom drain was clogged again and complaining that the problem had reoccurred six or seven times. The landlords responded to the tenants' communications, but denied the frequency of their prior complaints about the clogged drain. The tenants then ceased paying rent, and the landlords filed an eviction action. After the tenants agreed to vacate the premises, the landlords sued for breach of contract to recover the unpaid rent. In response, the tenants asserted a counterclaim under ORS 90.360(2) for damages based on the landlords' alleged failure to maintain the premises in a habitable condition.

After a trial, the trial court dismissed the tenants' counterclaim under ORS 90.360(2), reasoning that the tenants did not comply with their statutory good-faith obligation because they failed to provide the landlords with adequate written notice of the uninhabitable conditions and had acted with unclean hands.

On appeal, the Oregon Court of Appeals affirmed the dismissal of the counterclaim on different grounds. Citing the requirement of "good faith" under ORS 90.130, the Court of Appeals held that the tenants were not entitled to bring their counterclaim because the counterclaim was asserted to justify the unpaid rent rather than to ameliorate the uninhabitable conditions.

The Oregon Supreme Court disagreed with both courts and reversed the judgment of dismissal. In reversing, the Supreme Court explained that the "good faith" standard under ORS 90.130 is not dependent on motivations, but on whether the tenants acted with "honesty in fact." Applying that definition, the Supreme Court held that the tenants met the statutory "good faith" requirement so long as "they subjectively believed that the counterclaim had merit, and so long as they did not knowingly fail to comply with any prerequisite for asserting their claim."

■ ***Submitted by Michael G. Jacobs***
Hart Wagner

Employment

Value of a benefit may not be asserted as an affirmative defense to defeat a wage claim, but it may be asserted as an equitable counterclaim for *quantum meruit*

In *Jones v. Four Corners Rod & Gun Club,* 366 Or 100, 456 P3d 616 (Jan. 30, 2020), the Oregon Supreme Court held that an employer's unlawful withholding of wages in violation of ORS 652.610(3) precludes the employer from asserting the value of a lodging benefit as an affirmative defense to defeat an employee's wage claim and recover attorney fees as the prevailing party on such a claim. In such circumstances, however, the defendant

CONTINUED ON NEXT PAGE

RECENT CASE NOTES
continued from previous page

employer still may raise recoupment as an equitable counterclaim to recover the value of the lodging benefit.

In this case, the employee agreed to work in exchange for lodging and related benefits. In violation of ORS 652.610(3), the employer did not obtain written authorization before deducting the value of the lodging from the employee's wages, nor did the employer keep necessary wage records. After the employment relationship broke down, the employee sued the employer for unpaid minimum wages and attorney fees under ORS 652.200 and ORS 652.615.

In response to the employee's wage claim, the employer asserted "setoff" as both an affirmative defense and counterclaim to recover the value of the lodging benefits. The employer also claimed entitlement to statutory attorney fees under ORS 653.055(4), alleging it should be designated prevailing party on the employee's wage claim because the value of the lodging benefit exceeded the employee's minimum wages and therefore offset the employee's recovery.

The court held that the employer's unlawful withholdings of wages prevented it from raising the value of the lodging benefit as an affirmative defense, but it was entitled to assert a separate equitable counterclaim to recover that value. Consequently, the employee was the prevailing party on his wage claim and entitled to statutory attorney fees for that claim, and the employer recovered the value of the lodging benefits on an equitable counterclaim without attorney fees.

Based on the "qualitatively different" case outcome that would result if the employer succeeded on an affirmative defense for setoff, the court reasoned that it would contradict legislative intent to allow the employer to raise such an

CONTINUED ON NEXT PAGE

RECENT CASE NOTES
continued from previous page

affirmative defense. Unlike a successful counterclaim, which only affects the net money award in the judgment, a successful affirmative defense defeats the employee's wage claim and reverses the parties' obligations with respect to attorney fees. In addition, the wage statutes, designed to protect the employee, would become "largely meaningless" if the employer was allowed to unlawfully withhold wages to provide lodging benefits, then use those same benefits to avoid liability from the employee's wage claim. The court also characterized the employer's claim as one for "recoupment" and evaluated the text and broader context of ORS 652.610(5) to conclude that the legislature excluded recoupments from the wage statute's remedial framework.

After concluding that the value of the lodging benefit could not be asserted as an affirmative defense to the wage claim, the court explained that the employer still may assert recoupment as a counterclaim, and ORS 652.610(5) explicitly allows lawful counterclaims. Noting it has applied the equitable doctrine of *quantum meruit* to comparable circumstances, the court held that the facts satisfied the prima facie requirements for relief and the employer's counterclaim was permissible. Because the value of the lodging exceeded the employee's wages owed, and the employee had no notice of the excess amount, the court equitably reduced the employer's recovery to match the employee's wages.

■ ***Submitted by Helaina Chinn***
Bodyfelt Mount

Scientific Evidence

Expert medical testimony admissible despite lack of consensus in medical field to support causation

In *Miller v. Elisea,* 302 Or App 188, 459 P3d 887 (Feb. 12, 2020), plaintiffs appealed a judgment dismissing their personal injury claim after the trial court granted defendant's motion to exclude testimony from plaintiffs'

CONTINUED ON NEXT PAGE

RECENT CASE NOTES
continued from previous page

expert witness. The trial court excluded testimony from plaintiffs' experts on the grounds that it did not constitute scientific evidence because plaintiffs had not shown that there was a consensus in the medical community that physical trauma can cause fibromyalgia. The Oregon Court of Appeals reversed, holding that a lack of consensus in the medical field about a theory of causation is not disqualifying.

Plaintiff was in a minor car crash. The airbags did not deploy, and plaintiff denied impact to any of her body parts. Emergency services did not respond. Plaintiff was ambulatory at the accident scene, and her husband picked her up at the scene. The following day, however, plaintiff reported severe back pain and nausea to an urgent care clinician who diagnosed her with a lumbar strain and cervicalgia. Over the next several months, plaintiff received care from physical therapists, chiropractors, acupuncturists, a physiatrist, and her primary care provider. Nine months after the accident, plaintiff's primary care provider diagnosed her with fibromyalgia.

At trial, defendant filed a motion to exclude evidence supporting a causal link between plaintiff's fibromyalgia and the car accident, arguing that the *Brown* factors weighed against the admissibility of scientific evidence supporting plaintiffs' theory. *State v. Brown,* 297 Or 404, 687 P2d 751 (1984). In response, plaintiffs submitted declarations from two physicians, Drs. Michael Freeman, MedDr, PhD, MPH, DC, and rheumatologist Paul Brown, MD. Defendant's motion was granted.

On appeal, the Oregon Court of Appeals held that whether there is consensus in the medical community concerning a theory of medical causation is relevant to the determination of the scientific validity of evidence; however, an absence of such a consensus is not disqualifying. The court reasoned that plaintiffs' experts supported their theory that physical trauma can cause fibromyalgia with evidence from their own clinical experience, peer-reviewed medical literature, and studies describing a possible neurological mechanism of causation. The court found that the evidence adduced by plaintiff was scientifically valid under the *Brown* factors and that the trial court erred in excluding the testimony of Drs. Brown and Freeman.

■ ***Submitted by Dan Murphy***
Keating Jones Hughes

Defamation

Evidence of potentially defamatory statement and of wrongful conduct supports reversal of summary judgment of defamatory and wrongful interference claims

In *NV Transport, Inc. v. V&Y Horizon, Inc.,* 302 Or App 707, 462 P3d 278 (March 11, 2020), the Oregon Court of Appeals addressed the evidence necessary to defeat summary judgment on claims of intentional interference with economic relations and defamation *per se.*

Plaintiff employed defendant as a drayage dispatcher. During his employment for plaintiff, defendant diverted portions of plaintiff's business to his own company. After learning of defendant's actions, plaintiff terminated defendant and then brought claims for defamation and intentional interference with economic relations against both defendant and his company.

Defendants subsequently moved for summary judgment on those claims, asserting that plaintiff failed to present evidence on all elements of the claims. The trial court agreed and granted summary judgment in favor of defendants. As to the interference claims, the trial court concluded that plaintiff failed to show wrongful interference as to each contract or relationship. As to the defamation claim, the trial court explained that the record lacked evidence of communications that were defamatory *per se.*

On appeal, the Oregon Court of Appeals reversed. As to the defamation *per se* claim, the evidence in the record indicated that defendant told plaintiff's customers in an email that he was leaving his employment with plaintiff because of "diametrically different" views on ethics and best-business practices. Defendants argued that the statement was not defamatory because it was literally true that defendant and plaintiff had diametrically different views on business practices and ethics. In rejecting that argument, the Court of Appeals pointed out that the determination as to whether a statement is defamatory depends not just on the literal meaning of the words, but also on how a recipient would understand the statement. The court found that a recipient of the statement could reasonably interpret the statement as implying that plaintiff was unethical or dishonest, not just that defendant and plaintiff saw ethics and business practices differently. As a result, the court determined that a question of fact existed as to whether the statement, viewed in its context, impugned plaintiff's business reputation. The court clarified that, with respect to defamation, "[i]t is the role of the factfinder to determine whether, in the context in which the statement was made, the recipient would perceive that [negative] implication and whether it is

CONTINUED ON NEXT PAGE

RECENT CASE NOTES
continued from previous page

true or false." The court also determined that there were factual issues about whether defendants engaged in wrongful conduct, including misrepresentations and disparagement, to interfere with plaintiff's business relations.

■ ***Submitted by David W. Cramer***
MB Law Group

Employer Liability

District court dismisses complaint for failure to allege facts supporting deliberate intention exception to worker's compensation exclusive remedy rule

In *Miller v. Goodyear Tire & Rubber Company,* 2020 WL 265198 (Jan. 18, 2020), the Oregon district court granted defendant Goodyear's motion to dismiss under FRCP 12(b)(6). Plaintiff, an employee of Goodyear, was injured when a tire he was repairing exploded. Plaintiff sued Goodyear, alleging that the employer was liable under theories of negligence, strict product liability, and intentional misconduct. Following the briefing, plaintiff conceded that its claims for negligence and strict products liability were barred by the exclusive-remedy rule in Oregon's workers' compensation laws, as shown by Oregon Court of Appeals' recent decision in *Nancy Doty, Inc. v. Wildcat Haven, Inc.,* 297 Or App 95, 439 P3d 1018 (2019). Plaintiff asserted that his third claim for intentional misconduct should survive, however, because the worker's compensation exclusive-remedy rule has an exception when the employer deliberately intends to injure the employee.

Plaintiff alleged that, although Goodyear had a policy regarding the use of tire cages to prevent injuries to employees like plaintiff, the managers knew of a similar prior incident and did nothing to enforce the use of tire safety cages. Plaintiff alleged that Goodyear, through its managers, required employees to work on dangerous tires. Those same managers also observed employees failing to use required safety equipment. Plaintiff alleged that the managers' failure to correct this dangerous behavior, provide training, and post specific warnings, was enough to show the company's intent to cause serious injury or death to plaintiff. Goodyear moved to dismiss.

In considering the issue, the district court first noted that carelessness or negligence will not satisfy the "deliberate intent" requirement under Oregon law, and that the requisite intent to injure must be the company's intent, not its employees'

CONTINUED ON NEXT PAGE

RECENT CASE NOTES
continued from previous page

intent. The court stated that theories of vicarious liability and respondeat superior are incapable of satisfying the deliberate-intent exception to the worker's compensation exclusive remedy. In reviewing Oregon law, the court found that the allegations of conduct by Goodyear's managers cannot be legally attributed to the corporation under *Goings v. CalPortland Co.,* 280 Or App 395, 382 P3d 522 (2016), and *Bundy v. Nustar GP, LLC,* 277 Or App 785, 373 P3d 1141 (2016).

After reaching that conclusion, the district court next found that plaintiff had not sufficiently alleged that the managers "wielded the whole corporate power of the employer," so the managers' actions could not be wholly attributed to the corporation. Although plaintiff argued that Goodyear knew that its managers were not requiring the use of tire safety cages, the district court held that plaintiff had not sufficiently alleged that Goodyear had been informed that its managers were not enforcing the safety policies and procedures. Because the complaint did not allege Goodyear's knowledge of the ongoing course of misconduct and failure to act, plaintiff failed to allege facts necessary to support his claim that Goodyear deliberately intended to injure him. Based on those holdings, the district court dismissed plaintiff's complaint.

■ ***Submitted by David W. Cramer***
MB Law Group

Tort

Interference and employer liability claims fail to pass evidentiary thresholds

In *Sanford v. Hampton Resources, Inc.,* 298 Or App 555, 447 P3d 1192 (July 31, 2019), the Oregon Court of Appeals held that a defendant's economic power, alone, does not establish that an alleged intentional interference with economic relations (IIER) was done by improper means or for an improper purpose. The Court of Appeals also held that a defendant's right to control a bridge did not establish that the defendant had a right to control the risk-producing activity that caused the plaintiffs' injuries, for purposes of the plaintiffs' Oregon Employer Liability Law (ELL) claim.

Defendant Hampton contracted with the defendant logging contractor to cut timber on land owned by Hampton. The logging contractor subcontracted with plaintiff and his company to harvest the timber using a piece of heavy equipment. The logging contractor told plaintiff to access the work site using a bridge that was located on Hampton's property. While attempting to cross the bridge, plaintiff and the heavy equipment fell off the bridge into the creek below. Plaintiff was injured, and he subsequently asserted negligence, breach of contract, IIER, and ELL claims against the logging contractor and Hampton.

The trial court granted Hampton summary judgment on the IIER and ELL claims and denied the plaintiffs' motion to amend to increase their noneconomic damages and add new theories of negligence. At trial, the jury returned a verdict in favor of the defendants on all remaining claims.

Plaintiffs raised several issues on appeal. The Court of Appeals affirmed two of those issues without discussion and ruled that the trial court properly exercised its discretion to deny the motion to amend.

The Court of Appeals affirmed summary judgment in favor of Hampton on the IIER claim. The plaintiffs alleged that after the accident Hampton instructed the logging contractor and others not to work with the plaintiffs. At the most, however, the evidence showed that the logging contractor and other contractors had gotten a feeling that Hampton did

CONTINUED ON NEXT PAGE

RECENT CASE NOTES
continued from previous page

not want the plaintiffs working on their projects or property. Hampton never told them that directly. This evidence was insufficient to establish an intentional interference by improper means or for an improper purpose, the Court of Appeals ruled. The court specifically rejected the plaintiffs' argument that Hampton's economic power in the logging industry made its conduct improper or created a "duty of non-interference."

The Court of Appeals also affirmed summary judgment in favor of Hampton on the ELL claim. Plaintiff alleged Hampton had a "right to control" the roads and bridges on its property and had failed to use every device, care, and precaution that was practicable for the protection and safety" of plaintiff, as required by the ELL statutes. The court ruled that control of the bridge was not sufficient to make Hampton an indirect employer liable under the ELL, because the "risk-producing activity" was the plaintiff's travel across the bridge, not the bridge itself. There was no evidence that Hampton retained the right to control that activity.

■ ***Submitted by Holly E. Pettit***
Hart Wagner

Civil Procedure

Where an ORCP 54 E offer is silent regarding attorney fees, the court will add pre-offer attorney fees to both the offer and the award to determine whether the claimant's award exceeded the offer

In *Int'l Ass'n of Machinist, Woodworkers Local W-246 v. Heil,* 302 Or App 442, 461 P3d 1035 (Feb. 26, 2020), the Oregon Court of Appeals held that the correct approach for determining whether an offer of judgment under ORCP 54 E is more favorable than the entered judgment is to include the pre-offer costs and fees on both sides of the comparison. The court's holding creates a fair comparison equation for defendants who make reasonable offers under ORCP 54 E and penalizes plaintiffs who reject reasonable offers.

After successfully prosecuting defendants' breach-of-contract claim with a right to recover attorney fees, plaintiff argued the $8,201 judgement award—$6,801 in damages, plus fees and costs of $1,400 as of the date of offer—exceeded defendant A's offer of $7,800 and defendant B's offer of $2,600 under ORCP 54 E, with both of those offers silent on attorney fees. Based on that position, plaintiff claimed that it was entitled to all of its attorney fees, including fees incurred after defendants' offers. Plaintiff relied on *Carlson v. Blumenstein*, 293 Or 494, 504, 651 P.2d 710 (1982), where the Oregon Supreme Court compared the offer of judgment against the sum of the award, plus the costs and recoverable attorney fees incurred up to the time of service of the offer. The trial court agreed with plaintiff, and it awarded the requested attorney fees based on its conclusion that the plaintiff's award exceeded both offers.

On appeal, defendants assigned error to the trial court's award of fees and costs incurred after the service of their ORCP 54 E offers of judgment. Defendants argued that the current version of ORCP 54 E provides that, when an offer is silent regarding attorney fees, the proper approach is either to exclude costs and fees on both sides of the offer-award comparison, or include costs and fees on both sides.

The Court of Appeals agreed with defendants. It held that costs and fees must be included in both the offer and award when comparing the two numbers for the purpose of determining whether the judgment was more favorable than the offer of judgment. Based on that holding, the court reversed the award for attorney fees incurred after the offer of judgment for defendant A, because plaintiff's award was less than defendant A's offer after including fees and costs on both sides of the comparison.

The court explained that the purpose of ORCP 54 E is to encourage settlement and penalize a plaintiff who rejects a reasonable offer. "To allow the attorney fees that were incurred up to the time of service of the offer to be considered only on one side of the comparison . . . would frustrate the purpose of the rule." It would also encourage parties to reject reasonable offers and continue litigating if the attorney fees could later be calculated to inflate only the judgment and not the offer. Thus, the reasoning in *Carlson* was not compatible with the current version of ORCP 54 E.

Moving forward, *Woodworkers Local W-246* allows defendants to leverage plaintiffs with a reasonable offer when trial is imminent.

■ ***Submitted by***
— ***Josh Sherman,*** *Hart Wagner*
— ***Trent J. Andreasen,*** *Keating Jones Hughes*

Legislative Update

Rocky Dallum, Tonkon Torp
OADC Lobbyist

Oregon's executive and legislative leaders continue to respond to both the current pandemic and the call to address systemic racism following the unacceptable death of George Floyd and the ensuing historic demonstrations. Legislators have already convened one special session to address both crises, while the state continues to face significant budgetary challenges. The "First Special Session of 2020" lasted three days and focused on police reforms, COVID response, and several items left over from the February legislative session. The Capitol was closed to the public, and lawmakers attempted to vote on legislation while maintaining social distancing.

ROCKY DALLUM

While a special session has been brewing for weeks, the urgency to address law enforcement accountability helped prod legislators to formally meet and pass new legislation. Lawmakers agreed to a largely bipartisan package, which included restricting arbitrators from reducing disciplinary action, providing the attorney general with authority to investigate police misconduct, and addressing the use of physical force by law enforcement. The COVID response measures were more controversial, including extension of moratoriums on evictions and restrictions on foreclosure, as well as one issue that failed to make it to the governor's desk: liability protection for businesses facing suits related to COVID. Specific to OADC membership, the legislature did codify extensions for court filings and electronic appearances to account for the current pandemic, changes sought by the Oregon Trial Lawyers Association and supported by OADC (House Bill 4212).

Lawmakers also finalized several bills held over from the February session that ended following the Republican walkout. Legislators agreed to clarifications to the new Corporate Activity Tax, restrictions on pesticide use in forestry, and a new cell phone tax to fund rural broadband. Expect other employment-related issues to surface, particularly regarding paid sick leave requirements and unemployment or workers' comp eligibility arising from COVID. Most lawmakers and political insiders speculate that the next session will convene in late July or early August.

With the special session only addressing policy changes and minor budget adjustments, a significant budget shortfall still looms over state government. In the face of significant unemployment and the limitations on restaurants and bars, both income tax and lottery collections have taken significant hits, turning what was a $600 million surplus at the end of February into a $2.6 billion deficit by mid-May. State economists predict a $10.5 billion shortfall over the next five years. To respond, the governor directed state agencies in May to make across-the-board cuts of around 8.5 percent, but since the current biennium is nearly half over, the cuts will mean an approximate 16 percent reduction in all state agency budgets for the next 12 months. Only the legislature can make more specific cuts to programs or changes to existing budgets.

Despite the grim economic outlook, Oregon does have some tools to combat the oncoming revenue decline. First, in addition to federal stimulus for the disrupted workforce, small businesses, and enhanced unemployment benefits, the CARES Act allocated around $1.6 billion to the State of Oregon to use for its COVID response and to disseminate to local governments. Legislative leaders and the governor continue to determine how to distribute those funds through the legislative "Emergency Board." With some ambiguity over the allowable uses for those funds, policymakers have debated whether to give money directly to cities and counties, earmark funds for economic recovery, or invest directly in the public health response. Secondly, Oregon has wisely created a more robust "rainy day" fund since the last recession, holding a balance of around $1.75 billion. Tapping into those reserves will require a bipartisan effort, but the ability to do so places Oregon in a better position than many other states. These are all issues likely to be tackled in the next special session, although the governor's office in particular appears to be waiting for more federal support. Certainly, Oregon's courts will feel the budgetary challenges as well, and OADC continues to talk with legislators and other legal organizations to ensure that all litigants have access to a fair, competent, and efficient justice system.

Spring 2020 has already been a challenging year for the governor's office and state agencies, from the Oregon Health Authority's management of the pandemic to the well-documented failures of the Employment Department. Legislators continue to evaluate the ability to conduct a legislative session that meets our state constitution's requirements; keeps legislators, Capitol staff, and the public safe; and still allows for meaningful participation in the process. Like nearly everything else we've experienced in 2020, how the state responds changes day by day.

Petitions For Review

Sara Kobak, Schwabe Williamson & Wyatt
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.

***Allianz Global Risks US Insurance Company v. ACE Property & Casualty Insurance Company*, S067017, A159758 (control). 297 Or App 434, 442 P3d 212 (May 8, 2019). Argument scheduled for Sept. 16, 2020.**

In this insurance coverage action, the Oregon Court held that the purchasing corporation at issue did not assume the selling corporation's contingent liabilities so as to be entitled to make claims under the insurance policies of the selling corporation. The issues on review are: (1) "If a contract provides that a party unconditionally assumes all liabilities of a second party, and a contemporaneous contract provides that the second party does not transfer certain cash or contingent liabilities to the first party, is it established as a matter of law that the first party did not expressly or impliedly assume any contingent liabilities of the second party?"; (2) "May an insurer affect a co-insurer's contribution rights by entering into a separate agreement with the insured's parent, in which the parent agrees to indemnify the insurer for any claims the insurer pays, if the policy was issued to satisfy state and federal financial responsibility regulations and the separate agreement is not endorsed into the policy?"' and (3) "Does a variant of the domestic qualified pollution exclusion exception common in the London insurance markets that provides coverage for 'sudden, unexpected and unintended' discharges (the 'London Exclusion') have a meaning different from the domestic exclusion, such that the London Exclusion provides coverage only if the pollution discharge is abrupt?"

***State v. Pittman*, S067312, A162950. 300 Or App 147, 452 P3d 1011 (Oct. 16, 2019). Argument scheduled for Sept. 15, 2020.**

In this criminal case, the Oregon Court of Appeals affirmed a trial court's decision holding a criminal defendant in contempt for failing to comply with a court order to enter a passcode into a seized electronic device based on its conclusion that the "foregone conclusion" doctrine was applicable and that the state had proved that the defendant's knowledge of the passcode was a foregone conclusion. The issues on review are: (1) "Does compelling a person to provide the passcode to an electronic device such as a cell phone violate the right against self-incrimination provided by Article I, section 12, to the Oregon Constitution and the Fifth Amendment to the United States Constitution?"; (2) "Does the foregone conclusion doctrine permit the government to compel a person to disclose a passcode to a lawfully seized electronic device, including a cellphone?"; and (3) "Does the foregone conclusion doctrine apply under Article I, section 12, of the Oregon Constitution?"

***Walker v. State of Oregon*, S067211, A163420. 299 Or App 432, 450 P3d 19 (Sept. 19, 2019). Argument scheduled for Sept. 16, 2020.**

In this employment action, the plaintiff brought claims against an agency of the State of Oregon for common-law wrongful discharge and statutory whistleblowing, ORS 659A.203, after she was discharged from her position. On appeal, in addition to affirming the trial court's rejection of the plaintiff's statutory claim, the Oregon Court of Appeals held that the trial court erred in submitting the plaintiff's wrongful-discharge claim to the jury because the plaintiff's disagreements about governance and best practices did not fulfill an important public duty to support a wrongful-discharge claim, nor did her complaint about a public-meeting notice under the circumstances of this case. On review, the issues are: (1) "Whether the Court of Appeals correctly applied the appropriate standard of review for reviewing the trial court's denial of defendant's motions for directed verdict[?]"; and (2) "In applying that standard, did the Court of Appeals correctly apply the applicable law governing plaintiff's wrongful discharge claim?"

CONTINUED ON NEXT PAGE

PETITIONS FOR REVIEW
continued from previous page

***Otnes v. PCC Structurals, Inc.*, S067165, A167525. 299 Or App 296, 450 P3d 60 (Sept. 11, 2019). Argument scheduled for Sept. 23, 2020.**

On reconsideration of an order of the Appellate Commissioner, the Oregon Court of Appeals held that a plaintiff failed to provide an explanation adequate either to allow the trial court to excuse the plaintiff's failure to pay the filing fee or to justify its discretion in ordering that the filing date relate back to the date the motion was originally filed. On review, the issues are: "(1) Does UTCR 21.080(5)(a)(i) require a party who efiled a document before a filing deadline, but which was rejected by the clerk after the deadline, to establish that a 'filing failure is excusable or relief is justified' in order for a corrected filing to relate back to the date of the original submission?"; "(2) If the Court of Appeals correctly interpreted UTCR 21.080(5)(a)(i) as not requiring relation back as a matter of right, what must a party prove for an e-filed document to 'relate back' to the date of the original submission?"; "(3) Is relation back available when a clerk rejects a filing due to a failure to pay a filing fee?"; and "(4) Did the Court of Appeals err when it ruled that ORAP 6.25 does not allow a motion to reconsider an opinion issued on reconsideration of an order from the Appellate Commissioner?"

***The Bank of New York Mellon Trust Company, National Association v. Sulejmanagic*, S067155, A163269. 299 Or App 261, 450 P3d 14 (Sept. 5, 2019). Argument scheduled for Sept. 23, 2020.**

In this foreclosure action, the Oregon Court of Appeals affirmed the trial court's grant of summary judgment to a bank seeking to foreclose a trust deed recorded against a condominium unit, holding that the bank's deed of trust remained superior to the condominium association's lien on the unit. On review, the issue is: "Under ORS 100.450(7) and the facts of this case, did the lien of the condominium owners' association obtain priority over the bank's deed of trust, if the association sent a priority-jumping notice at a time when no legal action was pending, and the bank took no action in the 90 days following the notice?"

***De Young v. Brown*, S067385, A162584. 300 Or App 530, 451 P3d 651 (Nov. 14, 2019). Argument scheduled for Nov. 16, 2020.**

In its decision, the Oregon Court of Appeals exercised its inherent equitable authority to award attorney fees to a plaintiff who acted in a representative capacity to ensure that a special local election complied with statutory requirements. On review, the issues are: (1) "Does the substantial benefit theory for recovering attorney fees apply if awarding fees would spread the cost of litigation not just among those who benefited from it, but also to those who may not benefit from it?"; and (2) "May a court award fees under the substantial benefit theory absent reasonable certainty that the benefit will be realized?"

***Cox v. HP, Inc.*, S067138. Argument scheduled for Nov. 16, 2020.**

In the original mandamus proceeding, the issue on review is: "Does a corporation that certifies the design of a product ultimately used in Oregon have sufficient minimum contacts with Oregon to be sued in this state?"

The Honorable Kelly Skye

Multnomah County Circuit Court

A BIOGRAPHY

Not long ago, before we were all relegated to our homes to practice social distancing, I had the distinct pleasure of sitting down over chopped salads with my mentor and former boss, Judge Kelly Skye. Over the bustle of the typical Mother's lunch crowd, a dining experience which I now realize I took for granted, we caught up on Multnomah County courthouse news, parenting advice, and recent pet antics. Speaking with a unique blend of humility and compassion that I have come to expect and admire, Judge Skye reflected upon her particular path to the bench and offered some sage advice for practicing attorneys.

As a native Oregonian, Judge Skye has deep roots in the Pacific Northwest. After graduating from the University of Oregon with a degree in journalism, Judge Skye attended law school on the east coast at Northeastern University. She pursued her passion for constitutional law and public interest work by becoming a staff attorney at Metropolitan Public Defenders in Portland. Eventually, she became a chief attorney, training and supervising the misdemeanor lawyers and law clerks. While working as a criminal defense attorney, Judge Skye litigated misdemeanor and felony criminal cases, as well as juvenile delinquency and dependency cases. Twelve years of litigating as a public defender gave her a deep understanding of trial practice and the evidentiary rules applicable in both civil and criminal trials.

During her final years at Metropolitan Public Defenders, Judge Skye was looking for a change of pace and decided to use her experience as a criminal defense attorney to work as the legislative representative for the Oregon Criminal Defense Lawyers Association. For two

sessions she worked in the legislature, advocating for criminal justice and sentencing reform. She then became Deputy General Counsel and, within about two years, General Counsel to Governor Ted Kulongoski. As a tribal member herself, one of the many aspects of working for the governor that Judge Skye enjoyed was working closely with tribal leaders across the state on a variety of policy issues. Governor Kulongoski appointed Judge Skye to the Multnomah County Circuit Court in 2010. Having worked in all three branches of government, she brings a unique perspective to the bench.

Judge Skye offered a few practice tips. She suggests trial lawyers begin their trial preparation with jury instructions, using the summary of the pleadings as the roadmap for the jury. She notes that many lawyers forget to observe the jury's response to examination and argument by attorneys. Attorneys need to balance their interest in making a record with being flexible and responding to cues from jurors about when to move on. She also emphasizes the importance of using *voir dire* to learn about your potential jurors and focusing on rooting out biased jurors instead of trying to educate jurors on particular aspects of your case. Above all, Judge Skye emphasizes the importance of maintaining professionalism no matter what occurs in the courtroom.

After soaking up a lunch hour of warmth and wisdom, I felt grateful for the time to reconnect with Judge Skye. I appreciated her candor and reflections on building a successful career and practicing with professionalism and integrity. With renewed spirits, we stepped out into the crowded Portland streets and into the rain.

■ ***Submitted by Sheeba Roberts***
Betts, Patterson & Mines

The Honorable Lung S. Hung

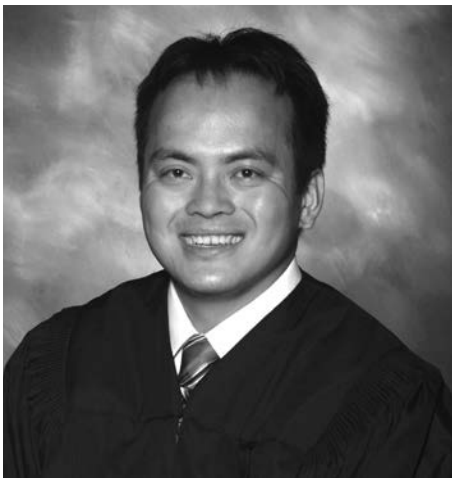
Presiding Judge - Malheur County Circuit Court

A BIOGRAPHY

From the outside, Malheur County (9th Judicial District) may seem like an unlikely landing spot for a man who was born in Hong Kong and raised in Seattle. The county, bordering Idaho, is the only county in Oregon that operates on Mountain Standard Time, rather than Pacific Standard Time. But this county, unique among Oregon counties, perfectly suits Judge Lung S. Hung.

In 1982, Lung S. Hung immigrated to the United States at the age of six. He lived in Seattle through the time he completed his undergraduate degree at the University of Washington. Though he initially became a CPA following his undergrad education, he was hesitant about accounting as a career path. Recognizing the versatility of a law degree, he then attended law school at the University of Colorado in Boulder. While in law school, he enjoyed classes that allowed him to experience the courtroom, and he knew, upon graduating, that he wanted to get into court. Interestingly, having lived in progressively smaller cities, he knew he wanted to end up in a smaller town following law school. At that time, the Malheur County District Attorney's office had an open position, so he applied and was hired.

Although Judge Hung is himself a first-generation immigrant, his family had been in the United States for many years, and part of the draw to Southeastern Oregon was that he had family in the area. While many of us know of the stain represented by the Japanese internment camps established during World War II from our history books (or from reading *Korematsu v. United States,* 323 US 214 (1944) in law school), that history forms part of Judge Hung's familial bond with the area. His grandmother and her siblings were sent to the Minidoka War Relocation Center in southern Idaho. One way that his great uncles were able to leave the



camps was through working the farmers' fields in that part of the country. Though the camps reflect a divisive point in our country's history, Judge Hung's family, like many Japanese Americans, found great acceptance from the people of Malheur County following the war, and so they stayed.

Judge Hung practiced with the Malheur County District Attorney's office from 2003 until his appointment to the bench in February of 2012 by Governor Kitzhaber. In November 2012 he was elected to the bench as the incumbent and is currently the Presiding Judge in Malheur County (Judge Erin Landis is also a Circuit Court Judge in Malheur).

Like many judges, Judge Hung expects collegiality from the advocates who appear before him. While he understands that issues or cases may be contentious, negativity or disparaging conduct toward counsel certainly affects an attorney's credibility with the bench. He also encourages attorneys to respect the intelligence of their jurors. If there is a bad fact, address it head on. If counsel refuses to address a negative fact, the jury is left with blanks in the story, which may damage your case.

Judge Hung enjoys the challenge of his work. As a judge in a smaller county (population-wise), his daily docket is filled with an array of matters. While he advises litigants to be prepared, he also recommends that attorneys prepare their judge. Judge Hung appreciates briefs that contain a Statement of the Law. As he jumps from a hearing on a murder charge to a traffic violation, he appreciates having a quick guide to the legal issues to refer to prior to the hearings. The Statement should be a quick synopsis of the important cases that explains the law on the main issues the court will need to decide.

As for life in Malheur County, Judge Hung loves that he knows his neighbors in a way he did not experience growing up in a larger city. The sense of community he has found in Malheur County feels like home in a way he never experienced before. And if you find yourself before Judge Hung, know you are in front a man who has found his perfect spot.

■ ***David W. Cramer***
MB Law Group

Defense Victory!

Christine Sargent, Littler Mendelson
Defense Victory! Editor
Contributing authors Alex Hill, Greg Lockwood, Jackie Mitchson, and Joel Petersen

Defense Verdict in Medical Malpractice Trial

On November 8, 2019, Karen O'Kasey and Colleen Scott of Hart Wagner, Sheri Browning of Brisbee & Stockton, John Pollino of Garrett Hemann Robertson, and Jennifer Oetter of Lewis Brisbois obtained a complete defense verdict in *Danny Stryffeler, et al. v. Tina Fan Jenq, M.D., et al.,* Case No. 17CV37543, a medical malpractice lawsuit tried before Multnomah County Circuit Court Judge Thomas M. Ryan. Stephen C. Thompson and George L. Kirklin represented plaintiffs.

Plaintiffs, the parents and guardians of their adult daughter, alleged that their daughter sustained permanent lower brain injury during surgery to repair a pressure sore on her buttocks and that this injury resulted in her suffering locked-in syndrome. Plaintiffs brought direct claims against the doctor and nurse anesthetist and a vicarious claim against the hospital. Plaintiffs alleged multiple theories of medical negligence and sought $35.5 million in economic damages and $20 million in non-economic damages.

At trial, defense counsel successfully obtained directed verdicts on multiple negligence allegations. The only remaining allegation for the jury's consideration against the surgeon and nurse anesthetist was placement of the patient in a head-down position during the surgery. An additional allegation against the nurse anesthetist was considered regarding failure to maintain adequate cerebral perfusion pressure. The defense

presented evidence that the defendants did not violate the standard of care, and the jury found no negligence against any defendant.

Defendant Prevails Where Employment Discrimination Lawsuit Was Filed Outside of 90-Day Limitation Under ORS 659A.875(2)

On November 26, 2019, Multnomah County Circuit Court Judge Benjamin Souede granted a complete dismissal in *Pacheco v. Home Forward,* Case No. 19CV14632, where plaintiff filed an employment discrimination case within the one-year employment discrimination statute of limitation, but more than 90 days after receiving his BOLI dismissal notice. Michael Tooley represented plaintiff. Sean Stokes and Greg Lockwood of Gordon Rees Scully Mansukhani represented defendant.

Defendant moved to dismiss under ORCP 21 A(9), because plaintiff failed to file within 90 days following BOLI's dismissal, as required by ORS 659A.875(2). Plaintiff, relying heavily on legislative history and a single federal court case, argued that the one-year statute of limitations, ORS 659A.875(1), superseded the 90-day limitation under ORS 659A.875(2). Defendant argued that the rules of construction, the plain language of the statute, and the overwhelming weight of federal case law supported dismissal. Judge Souede granted defendant's motion, dismissing all claims with prejudice, and entered an order with written findings of fact and conclusions of law. The court found that the legislative history did not support plaintiff's proposed "whichever is longer" interpretation of the language of ORS 659A.875.

Defendant Prevails Where Plaintiff Failed to Meet Burden on Writ of Garnishment

On December 31, 2019, after a two-day hearing, Multnomah County Circuit Court Pro Tem Judge Steven A. Todd found that garnishor plaintiff Pauline Jansen did not meet her burden on a writ of garnishment against garnishee defendant AXIS Surplus Insurance Company ("AXIS") in *Pauline*

CONTINUED ON NEXT PAGE

DEFENSE VICTORY!
continued from previous page

Jansen v. Moving On Up, Inc. and *Moving USA, Inc. v. AXIS Surplus Insurance,* Case No. 17CV13536. Lloyd Bernstein and Jackie Mitchson of Bullivant Houser Bailey represented AXIS. Matthew Kirkpatrick represented plaintiff.

In the underlying case against Moving On Up, plaintiff alleged four claims: breach of contract, elder abuse, conversion, and unlawful trade practices. Plaintiff and defendants Moving On Up and Moving USA entered into a settlement, which included (1) a stipulated judgment against Moving On Up and Moving USA in the amount of $100,000, (2) a covenant not to execute the judgment against Moving On Up, and (3) assignment of Moving On Up's claims against AXIS to plaintiff. After entry of the stipulated judgment in the underlying case, plaintiff filed a writ of garnishment against the CGL policy AXIS issued to Moving On Up seeking coverage under the policy for the $100,000 stipulated judgment. In response, AXIS denied having garnishable property of Moving On Up and asserted several coverage defenses. Plaintiff requested a garnishment hearing under ORS 18.782 to determine whether the policy covered the stipulated judgment against Moving On Up. Plaintiff testified that the moving company's actions caused her to delay having knee surgery, which exacerbated her PTSD and caused stress and knee pain.

After the hearing, the court issued a letter opinion concluding that plaintiff's testimony regarding "stress" and knee pain did not establish that she had sustained a "bodily injury" caused by an "occurrence" as those terms were defined in the policy. The court also concluded that plaintiff's testimony about defendants taking her money and property and refusing to return it did not establish any "property damage." Accordingly, the court determined plaintiff failed to meet her burden to establish coverage under the policy.

Plaintiff's Motion to Amend to Add Punitive Damages Denied

On April 10, 2020, Multnomah County Circuit Court Judge Melvin Oden-Orr issued an 11-page opinion denying plaintiff's motion to amend to add punitive damages as to defendant Interstate National Dealership Services, Inc. ("INDS") in *Glenn Kinder v. Interstate National Dealer Services, Inc., et al.,* Case No. 19CV25247. Matthew Kirkpatrick represented plaintiff. Alex Hill of Bullivant Houser Bailey opposed the motion on behalf of INDS.

Plaintiff filed suit against INDS and one of its authorized repair facilities after INDS declined to cover repairs to plaintiff's 2014 Can-Am Spyder RT, a three-wheeled motorcycle, that plaintiff contended were covered by warranty. Plaintiff alleged claims under the Unfair Trade Practices Act, the Magnusson-Moss Act, and elder abuse under ORS 124.110. To support his claim for punitive damages, plaintiff argued that a "secret agreement" existed between defendants and that defendants both made misrepresentations to plaintiff. Judge Oden-Orr, agreeing with INDS's argument, struck some of plaintiff's evidence as inadmissible hearsay, found that there was no "secret agreement" between defendants, and concluded plaintiff otherwise failed to provide any evidence that supported punitive damages against INDS. The court noted, in part, "[s]pecifically, citing *State v. Bivens,* 191 Or App 460, 467-68 (2004), Defendant INDS cautions [***] that, '[i]f a motion to amend for punitive damages relies on stacked inferences to the point of speculation, those inferences cannot support punitive damages.'"

The Scribe's Tips for Better Writing

Dan Lindahl
Bullivant Houser Bailey

Avoiding Ambiguity When a Single Word has Contradictory Meanings

The English language has many words that have contradictory meanings.

DAN LINDAHL

These words are known as contronyms, antagonyms, or auto-antonyms. *Cleave, oversight, clip, bill, enjoin,* and *sanction* are a few examples of contronyms.

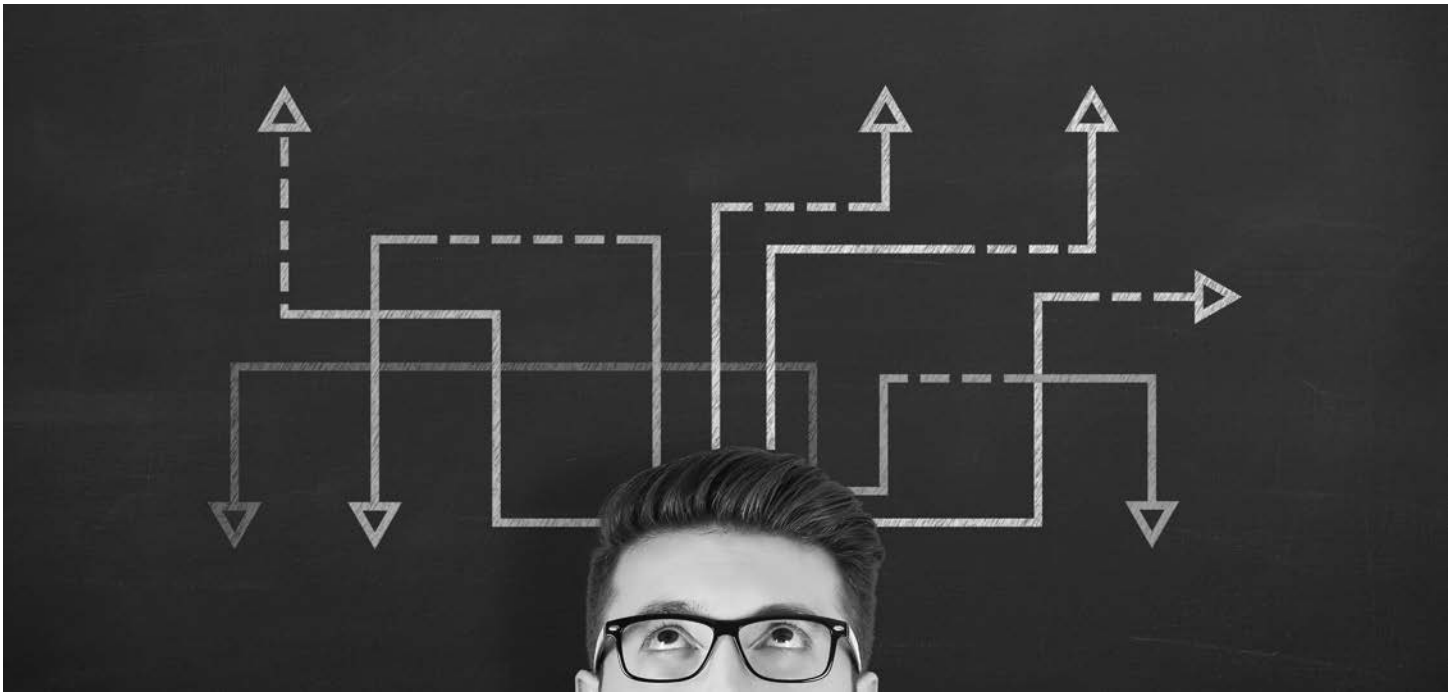
The problem with contronyms is the risk of ambiguity, or worse. Consider each of these sentences:

- The error was attributed to the board's oversight.
- The governor sanctioned the reopening of business.
- Sally handed Joe some bills for gasoline.

Adequate context will often prevent any ambiguity. For example, suppose the Sally and Joe sentence appeared in this context: "The gas tank was as empty as Joe's wallet. Sally handed Joe some bills for gasoline. Joe used the cash to fill the tank."

In context, it is clear "bills" means cash, not a demand for payment.

But in the absence of context, the reader can easily be misled about the intended meaning. The key is to be aware of the contradictory meanings and to provide sufficient context so the reader does not stumble over a puzzling ambiguity.



Council on Court Procedures Update

New Amendments to the ORCP

At the conclusion of the Council's last biennium, the following amendments were passed by the Council and submitted to the Legislature:

Known as the "Stewards of the ORCP," the Council on Court Procedures evaluates and updates rules affecting all aspects of civil practice. Helpful information concerning the Council, its history, members, and mission can be found at its website, https://councilonc ourtprocedures.org. The Council is made up of attorneys who primarily practice civil law as well as trial and appellate judges. The Council invites and encourages input from practitioners and the public.

The Council began its current two-year biennial work cycle in September 2019. The Council has not yet made final determinations as to what it will send to the Legislature for approval or modification. Here are some proposed modifications:

ORCP 7

Waiver of service. The Council is considering a process under which waiver of service can be accomplished if a plaintiff provides written information to a defendant asking for a waiver with a time limit for defendant to respond. Several other states have adopted a similar process. Concerns about unsophisticated and/or unrepresented defendants, potential attorney fees for not waiving service, and time deadlines make passage of this proposal unlikely.

ORCP 15/21/23

Modifications to answers. Plaintiff attorneys have raised a concern about defendants filing an answer adding new defenses and/or changing an answer after an amended complaint is filed. The specific issue deals with significant changes made to an answer close to trial. The proposal would provide explicit authority for a court to strike new defenses or modifications to an answer if not timely or unduly prejudicial. There is currently a split on the committee along the lines of plaintiff attorneys and defense attorneys on this issue.

ORCP 23

Death of a defendant prior to filing of lawsuit. This is not really an ORCP issue. Plaintiffs' Bar wants to modify ORS 12.190 to establish a statutory framework in terms of timing and relation-back for identifying a defendant as deceased and establishing a personal representative for the decedent.

ORCP 31

Modifications to interpleader. The proposed changes in the rule are somewhat technical in nature. The amendments will track federal rules in allowing a crossclaim or counterclaim in interpleader and establishing a process for potential attorney fees with regard to funds or property deposited with the court.

ORCP 55

Instructions to be served with subpoenas. The Council is considering proposals to require that written instructions be served with a subpoena concerning objections and how to present those to a court. The proposal is based on a concern that an unrepresented party may not have an understanding as to how to get before a judge if, for example, a trial subpoena creates undue hardship for the recipient. Another proposal is to allow a party to issue a written request to another party requiring the party or a representative of the party to appear as a witness at trial. This would forego the need of a party to subpoena another party for trial testimony.

ORCP 57

Jury selection. A recent Oregon Court of Appeals case addressed *Batson* challenges in jury selection, advising the Legislature and/or other decision-makers to delineate guidelines to aid trial judges. It is unclear whether the Council has authority to address this topic because it deals with substantive law.

—Submitted by Scott G. O'Donnell
Keating Jones Hughes

Association News

OADC Past Presidents

George Pitcher 2019
Vicki Smith 2018
Mary-Anne Rayburn 2017
Michael Lehner 2016
Gordon Welborn 2015
Dan Schanz 2014
Michael (Sam) Sandmire 2013
Greg Lusby 2012
Jeanne Loftis 2011
Drake Hood 2010
Julie Elkins 2009
Bill Sime 2008
Chris Kitchel 2007
Robert Barton 2006
Hon. Mark Clarke 2005
Martha Hodgkinson 2004
James Edmonds 2003
Stephen Rickles 2002
Steven Blackhurst 2001
Jonathan Hoffman 2000
Chrys Martin 1999
Thomas H. Tongue 1998
Paul Fortino 1997
Larry A. Brisbee 1996
Frank E. Lagesen 1995
Robert E. Maloney, Jr. 1994
Keith J. Bauer 1993
Michael C. McClinton 1992
Ronald E. Bailey 1991
John H. Holmes 1990
John Hart 1989
Carl Burnham, Jr. 1988
James H. Gidley 1987
Ralph C. Spooner 1986
G. Marts Acker 1985
James L. Knoll 1984
Walter H. Sweek 1983
James F. Spiekerman 1982
Hon. Malcolm F. Marsh 1981
Austin W. Crowe, Jr. 1980
Richard E. Bodyfelt 1979
Robert T. Mautz 1978
Douglas G. Houser 1977
Hon. Rodney W. Miller 1976
David C. Landis 1975
William V. Deatherage 1974
Frederic D. Canning 1973
Wayne Hilliard 1972
Roland (Jerry) F. Banks 1971
Jarvis B. Black 1970
Thomas E. Cooney 1969
James B. O'Hanlon 1968
Hon. Robert Paul Jones 1967

2020 Annual Convention — CANCELED

The June 18-21, 2020 OADC Annual Convention in Sunriver Resort, Sunriver, Oregon, has been canceled. Please visit oadc.com for further information.

New and Returning Members

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

Ruth Casby
Hart Wagner

Jonathon Himes
Farleigh Wada Witt

Judge Bios Previously Published in *The Verdict™*

Hon. Stacie Beckerman, Magistrate Judge, U.S. District Court ..... 2017 Issue No. 2
Hon. Leslie Bottomly, Multnomah County Circuit Court ..... 2018 Issue No. 4
Hon. Stephen Bushong, Multnomah County Circuit Court ..... 2017 Issue No. 3
Hon. William Cramer, Jr., 24th Judicial District ..... 2017 Issue No. 4
Hon. Joel DeVore, Oregon Court of Appeals ..... 2019 Issue No. 4
Hon. James Fun, Washington County Circuit Court ..... 2017 Issue No. 4
Hon. Norm Hill, Polk County Circuit Court ..... 2018 Issue No. 2
Hon. Danielle Hunsaker, Washington County Circuit Court ..... 2019 Issue No. 1
Hon. Mustafa Kasubhai, Magistrate Judge, U.S. District Court ..... 2019 Issue No. 2
Hon. Erin Lagesen, Oregon Court of Appeals ..... 2020 Issue No. 1
Hon. Andrew Lavin, Multnomah County Circuit Court ..... 2018 Issue No. 3
Hon. Heidi Moawad, Multnomah County Circuit Court ..... 2019 Issue No. 3
Hon. Melvin Oden-Orr, Multnomah County Circuit Court ..... 2019 Issue No. 1
Hon. Tracy Prall, Marion County Circuit Court ..... 2018 Issue No. 2
Hon. Christopher Ramras, Multnomah County Circuit Court ..... 2018 Issue No. 4
Hon. Shelley Russell, Multnomah County Circuit Court ..... 2019 Issue No. 2
Hon. Janet Stauffer, 7th Judicial District ..... 2019 Issue No. 4
Hon. Youlee You, Magistrate Judge, U.S. District Court ..... 2018 Issue No. 3
Hon. Katharine von Ter Stegge, Multnomah County Circuit Court ..... 2018 Issue No. 1

Thank You, OADC Members, for Mask Donation Effort

Grant Stockton, Brisbee & Stockton
OADC President-Elect

Thank you, OADC, for leading the effort to solicit donations of masks to our local courthouses. (See President's Message, this issue.) Since taking up Justice Walters' charge, over 100 different Bar, legal, and community organizations have been contacted, and the response has been robust. To date, the efforts by OADC members have already resulted in donations of over 40,000 masks to the court system, and there are commitments on the way that will push this number well beyond 100,000.

Jon Gadberry, Deputy Marshal of the Oregon Judicial Department Marshal's Office picking up masks donated by Oregon's legal community.

These masks are being distributed to local courthouses by the Oregon Judicial Department Marshal's Office. At the courthouse level, the masks are being provided to any court patron that wants or needs one, including attorneys and—more importantly—parties to legal matters, their family members, witnesses, and jurors.

The 100,000-donation number may seem like a very large number (because it is!), but this early success should not be confused with a completed project. With the governor's recent mask-wearing orders, the ongoing need is tremendous and is expected to continue into the indefinite future and for so long as the Chief Justice needs our support securing masks. The OADC will continue to lead the charge.

If you know an organization that may be able to help, please reach out to them. If you haven't donated yet, please do so. And if you have already donated, THANK YOU and please consider doing so again!

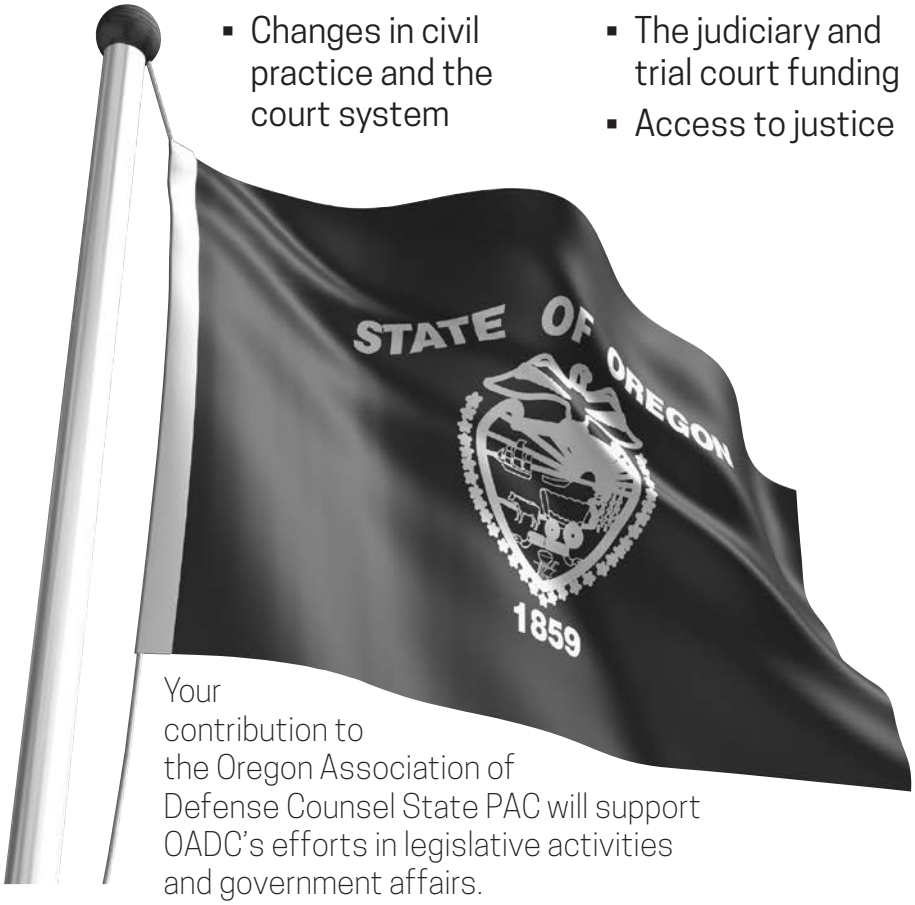
OADC

The Oregon Association of Defense Counsel State Political Action Committee (PAC)

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
- Access to justice



Your contribution to the Oregon Association of Defense Counsel State PAC will support OADC's efforts in legislative activities and government affairs.

The Oregon Association of Defense Counsel has a comprehensive government affairs program, which includes providing effective legislative advocacy in Salem.

We need your help and support to continue this important work. All donations to the OADC State PAC go to directly support our efforts to protect the interests of the Civil Defense Lawyer.

To make a contribution please contact the OADC office to receive a donation form at 503.253.0527 or 800.461.6687 or info@oadc.com.

OADC Thanks our 2020 Sponsorship Partners

Exponent®
Engineering and Scientific Consulting

JENSEN HUGHES

MACHAON
MEDICAL EVALUATIONS

Physician Direct Services

ROCKFORD
INVESTIGATIONS, LLC

T-SCAN
CORPORATION

USLEGAL SUPPORT
The Power of Commitment™

OADC
Oregon Association
of Defense Counsel

147 S.E. 102nd Avenue
Portland, Oregon 97216