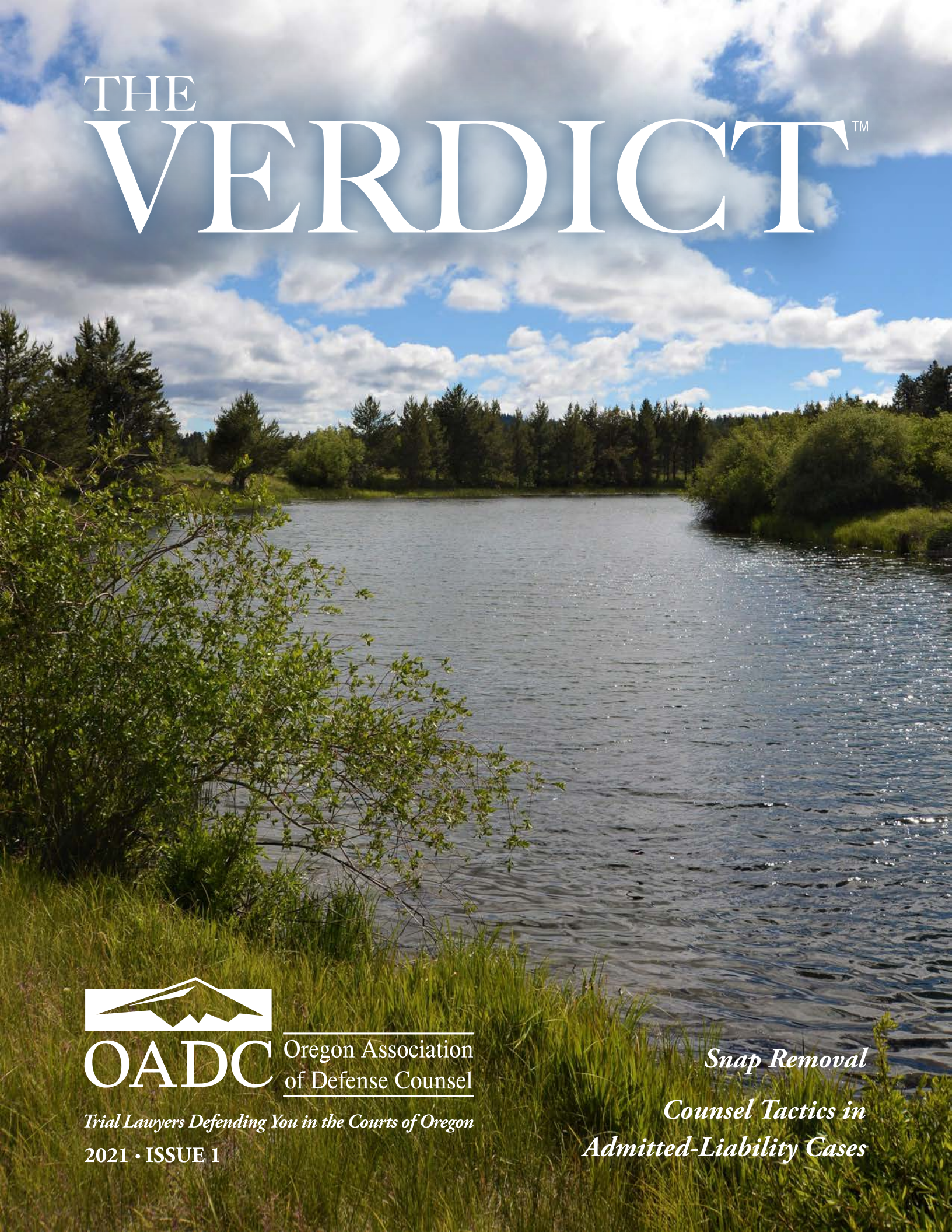


THE VERDICT™

OADC Oregon Association of Defense Counsel

Trial Lawyers Defending You in the Courts of Oregon

2021 • ISSUE 1

Snap Removal

Counsel Tactics in Admitted-Liability Cases

2021 OADC Practice Group Leaders

COMMERCIAL	**Bill Edgar,** *Chair* Greenspoon Marder 1211 SW 5th Ave., #2850 Portland, OR 97204 503.878.8036 bill.edgar@gmlaw.com	**Daniel Lis,** *Vice Chair* Buchalter 1331 NW Lovejoy St., #900 Portland, OR 97209 503.226.8407 dlis@buchalter.com	**Diane Lenkowsky,** *Publications* Bullivant Houser Bailey One SW Columbia St., #800 Portland, OR 97204 503.499.4515 diane.lenkowsky@bullivant.com	**Daniel Larsen,** *Board Liaison* Buchalter 1331 NW Lovejoy St., #900 Portland, OR 97209 503.226.1191 dlarsen@buchalter.com
CONSTRUCTION	**Jamison McCune,** *Chair* Bodyfelt Mount 319 SW Washington St., #1200 Portland, OR 97204 503.243.1022 mccune@bodyfeltmount.com	**Annalie Faddis,** *Vice Chair* Abbott Law Group 215 SW Washington St., #300 Portland, OR 97204 503.595.9510 afaddis@abbott-law.com	**Ian Baldwin,** *Publications* Wood Smith Henning & Berman 12755 SW 69th Ave., #100 Portland, OR 97223 971.256.4017 ibaldwin@wshblaw.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, #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 Ho,** *Publications* Thenell Law Group 12909 SW 68th Pkwy., #290 Portland, OR 97223 503.372.6450 christina@thenelllawgroup.com	**Chad Colton,** *Board Liaison* Markowitz Herbold 1455 SW Broadway, #1900 Portland, OR 97201 503.295.3085 chadcolton@mhgm.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	**Steven Yoshida,** *Board Liaison* MB Law Group 117 SW Taylor St., #200 Portland, OR 97204 503.382.4211 syoshida@mblglaw.com
GENERAL LIABILITY	**Christopher Piekarski,** *Chair* Allstate Staff Counsel 1000 SW Broadway, #1080 Portland, OR 97205 503.553.0360 chris.piekarski@allstate.com	**Mark Monson,** *Vice Chair* Law Offices of Julie Elkins 10200 SW Greenburg Rd., #365 Portland, OR 97223 503.892.2085 mark.monson@farmersinsurance.com	**Flavio "Alex" Ortiz,** *Publications* Rall & Ortiz 9700 SW Capitol Hwy., #120 Portland, OR 97219 503-880-8444 alex@rallortiz.com	**Megan Cook,** *Board Liaison* Bullivant Houser Bailey One SW Columbia, #800 Portland, OR 97204 503.228.6351 megan.cook@bullivant.com
GOVERNMENT LIABILITY	**Blake Fry,** *Chair* Hart Wagner 1000 SW Broadway, 20th Floor Portland, OR 97205 503.222.4499 bhf@hartwagner.com	**Ryan Christopher Bailey,** *Vice Chair* Portland Office of City Attorney 1221 SW 4th Ave., #430 Portland, OR 97204 503.823.9968 ryan.bailey@portlandoregon.gov	**Chris Gilmore,** *Publications* Washington County Counsel Public Services Bldg MS 24 155 N First Ave., #340 Hillsboro, OR 97124 503.846.8747 chris_gilmore@co.washington.or.us	**Brian Scott,** *Board Liaison* American Family Insurance 11850 SW 67th Ave., #160 Portland, OR 97223 503.403.1880 bscott@amfam.com
PRODUCT LIABILITY	**Daniel Nichols,** *Chair* Harris Berne Christensen 15350 SW Sequoia Pkwy, #250 Portland, OR 97224 503.968.1475 dan@hbclawyers.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	**Kelly Huedepohl,** *Vice Chair* Keating Jones Hughes 200 SW Market St., #900 Portland, OR 97201 503.222.9955 kuedepohl@keatingjones.com	**Breanna Thompson,** *Publications* Garrett Hemann Robertson 1011 Commercial St. NE Salem, OR 97301 503.581.1501 bthompson@ghrlawyers.com	**Grant Stockton,** *Board Liaison* Brisbee & Stockton PO Box 567 Hillsboro, OR 97123 503.648.6677 gds@brisbeeandstockton.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 Co. 11850 SW 67th Ave., #160 Portland, OR 97223 503.403.1880 x53619 scieslik@amfam.com	**Joel Petersen,** *Publications* Hodgkinson Street Mepham 1620 SW Taylor, #350 Portland, OR 97205 503.222.1143 jcp@hs-legal.com	**John Eickelberg,** *Board Liaison* Law Offices of Julie D. Elkins 10200 SW Greenburg Rd., #365 Portland, OR 97223 503.892.2069 john.eickelberg@farmersinsurance.com

2021 OADC Affinity Group Leaders

NEW LAWYERS	**Helaina Chinn,** *Chair* Bodyfelt Mount 319 SW Washington St., #1200 Portland, OR 97204 503.243.1022 chinn@bodyfeltmount.com	**Molly Silver,** *Vice Chair* Frohnmayer Deatherage 2592 E Barnett Rd. Medford, OR 97504 541.779.2333 silver@fdfirm.com	**Jason Evans,** *Publications* Smith Freed & Eberhard 111 SW Columbia St., #800 Portland, OR 97201 503.227.2424 jevans@smithfreed.com	**Donna Lee,** *Board Liaison* Hart Wagner 1000 SW Broadway, 20th Floor Portland, OR 97205 503.222.4499 dll@hartwagner.com
PRACTICE MANAGEMENT	**John Bachofner,** *Chair* Jordan Ramis 1499 SE Tech Center Pl. #380 Vancouver, WA 98683 360.567.3900 john.bachofner@jordanramis.com	**Michael Jacobs,** *Vice Chair* Hart Wagner 1000 SW Broadway, 20th Floor Portland, OR 97205 503.222.4499 mgj@hartwagner.com	**Julie Haddon,** *Publications* Gordon Rees 1300 SW 5th Ave., #2000 Portland, OR 97201 503.222.1075 jhaddon@gordonrees.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
WOMEN IN LAW	**Pamela Paluga,** *Chair* Abbott Law Group 215 SW Washington St., #300 Portland, OR 97204 503.595.9510 ppaluga@abbott-law.com	**Jaime Fender,** *Vice Chair* MacMillan Scholz & Marks OC 900 SW 5th Ave., #1800 Portland, OR 97204 503.224.2165 jfender@msmlegal.com	**Allie Boyd,** *Publications* Davis Rothwell Earle & Xóchihua 200 SW Market St., #1800 Portland, OR 97201 503.222.4422 aboyd@davisrothwell.com	**Katie Smith,** *Board Liaison* Lorber Greenfield & Polito 10200 SW Greenburg Rd., #740 Portland, OR 97223 503.416.4785 ksmith@lorberlaw.com
DIVERSITY, EQUITY, AND INCLUSION	**Katie Eichner,** *Chair* Lindsay Hart 1300 SW 5th Ave., #3400 Portland, OR 97201 503.226.7677 keichner@lindsayhart.com	**Chantal Guzman-Schlager,** *Vice Chair* Garrett Hemann Robertson 1011 Commercial St. NE Salem, OR 97301 503.581.1501 cguzman-schlager@ghrlawyers.com	**Royce Williams,** *Vice Chair* Brisbee & Stockton PO Box 567 Hillsboro, OR 97123 503.648.6677 rlw@brisbeeandstockton.com	**Janice Pilkenton,** *Vice Chair* Pilkenton & Reeves 10565 SW Nimbus Ave., #100 Tigard, OR 97223 503.495.4701 janice_l_pilkenton@progressive.com
	Jamie Azevedo Stremming, *Vice Chair* Bodyfelt Mount 319 SW Washington St., #1200 Portland, OR 97204 503.243.1022 azevedo@bodyfeltmount.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		

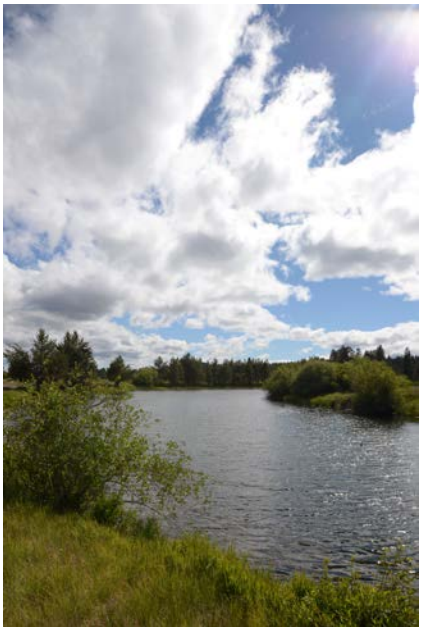
OADC
Oregon Association of Defense Counsel

147 SE 102nd Avenue | Portland, OR 97216
Phone: 503.253.0527 | Fax: 503.253.9172 | info@oadc.com | www.oadc.com

Features

Departments

On the Cover



The Verdict™

SUNRIVER, OREGON
Location for OADC Annual Convention, June 17-19, 2021

Cover photo courtesy of Dan Lindahl

PRESIDENT'S MESSAGE

Surviving and Thriving in Interesting Times

Grant Stockton, Brisbee & Stockton

There is a phrase "may you live in interesting times." Historically some have claimed it a cruel curse, while others a blessing. Irrespective of its origins, over the past year it has simply become our reality. 2020 was indeed an interesting time for legal professionals, especially for those like us who are deeply connected to courthouses and accustomed to personally interacting with each other, and clients, and experts, and court reporters, and judges—and even an occasional live juror.

GRANT STOCKTON

As an organization we survived the interesting times of 2020, but more so we thrived. This was thanks to the leadership of our outgoing President Lloyd Bernstein and the dedicated engagement of our membership. Many of OADC's successes were highlighted in the last edition of *The Verdict™,* including extensive CLE offerings, unprecedented levels of listserv activity, and a variety of efforts where we were called upon to collaborate with the broader legal community to address an abundance of COVID-driven challenges.

Now, as we look ahead, there are signs of normalcy on the horizon that appear ready to blossom with the coming spring. But as we look ahead, there are lessons from the last year which should be committed to memory.

Early last year when the judicial branch (like all of us) was struggling to figure out what to do about COVID, OADC was called upon. Time and again we were asked to work with the leadership at OTLA to provide input as the Chief Justice was working through a variety of prospective responses. There were times during those discussions where the civil practice of law was in true jeopardy. Moratoriums were being considered on all time deadlines, filings, discovery, motion practice, hearings, and the like. This would have ground our practices to a halt, indefinitely delaying resolution of our clients' disputes, and critically risking our very livelihoods.

If such limitations had been enacted, it is debatable whether we would have fared much better than the many businesses that have been shuttered or remain struggling. What a mess that would have been and how fortunate we all are that OADC had a seat at the table. Instead of enduring such moratoriums, we were able to partner with OTLA and speak with a unified voice to the receptive ears of the judicial branch, stave off more dire outcomes, and forge a path that allowed civil disputes to proceed with only minor disruption.

Now we are on the precipice of 2021 and as a professional community are facing a backlog of trials within a judicial system that has been historically underfunded and may be facing significant budget cuts for the biennium ahead. Just as OADC was called upon to help solve the challenges of last year, we are also being called upon to address these new challenges of 2021 and beyond.

While our organization has been in existence for over 50 years, I would argue that there has been no more important or defining period in our organization's history. Understand that as the voice of the civil defense bar, when issues arise across the state, OADC is *the* organization that is called upon to respond. It is not any of the variety of national, regional, or local organizations. OADC alone responds for our professional community, at times in conjunction with OTLA and at times as its counterpoint.

CONTINUED ON NEXT PAGE

PRESIDENT'S MESSAGE
continued from previous page

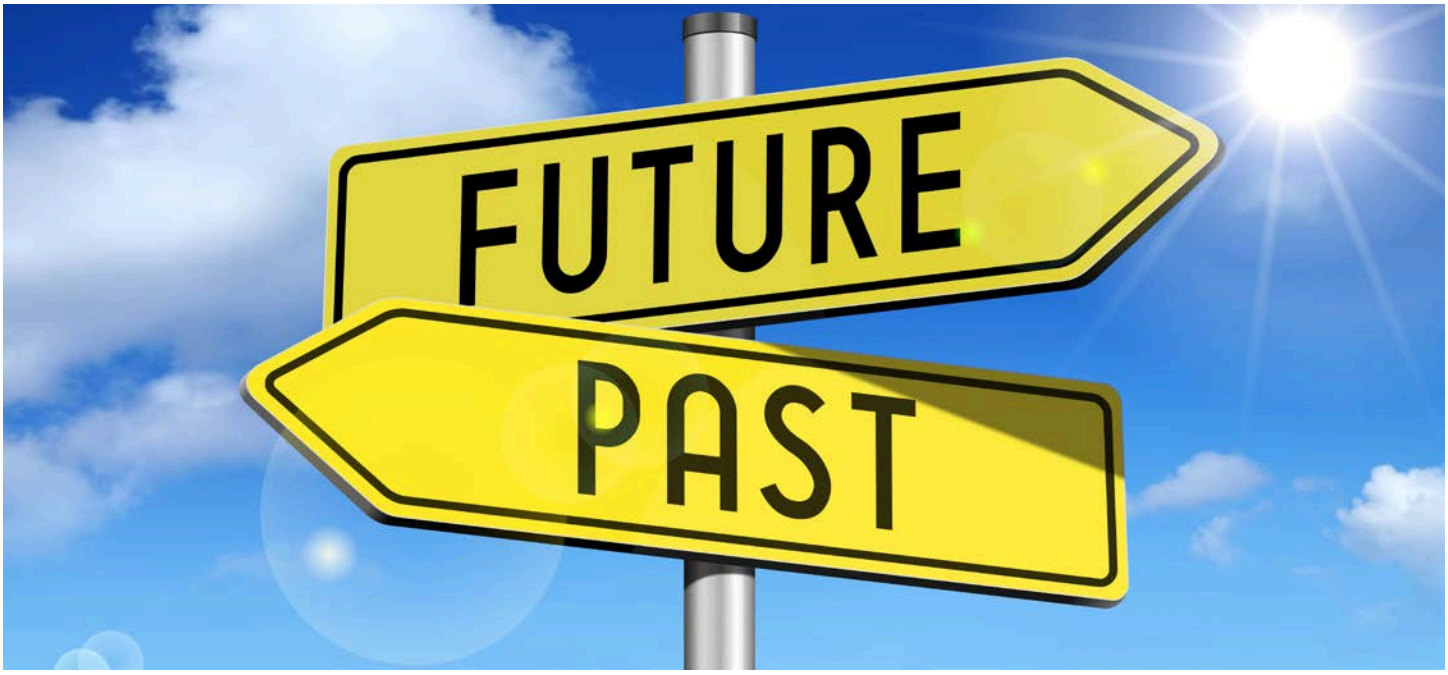
Our ability to serve as the voice of the defense bar is a testament to the credibility that our organization has fostered over decades. Likewise, our ability to serve in this capacity is only made possible by a robust membership. In the absence of OADC, there would be a vacuum consumed only by OTLA. At times I fear our presence as OTLA's counterpoint and partner is an existence that has been taken for granted by attorneys across this state as well as by our own members and member firms. To this take heed: Our membership numbers are in decline. Month by month they slip by ones and twos. Small numbers certainly, but like compound interest, they add up.

Our declining membership began with the recession, as firms pared back budgets and focused on revenue-generating affiliations over professional engagement. For example, some firms may only pay for one OADC membership, with everyone at the firm making use of our listserv, and other firms may only pay for one professional membership, requiring the attorney to choose between a variety of national or regional affiliations.

Hopefully the events of last year have served to remind many in our community of the value of OADC, of gathering as a group of common professionals in support of one another. Because in order to continue to hold a seat at the table and to have our perspective considered, we must maintain a vibrant group of professionals with a membership base large enough to warrant inclusion. As such, it is incumbent upon all of us to cultivate a vigorous membership.

While our membership numbers are in decline, we nonetheless remain the envy of almost every other state defense organization. In this I find significant basis for hope for the year ahead. Hope that we can help encourage the reopening of our courthouses and full funding of our judiciary. Hope that we can continue to organize incredible CLE offerings. Hope that we can continue to grow, to be broader and more inclusive in the year ahead, and to return many former members and firms to our fold. And hope that we will all return to seeing OADC membership as a defining aspect of our professional career—one that is worth maintaining as a matter of personal professional pride (even if the firm doesn't pay for it).

As we launch into this new year, with new professional challenges on the horizon, I in turn challenge each of you to find new ways to engage locally, to find ways to help professionally, and to reach out to individuals who should be OADC members and ask them to join our ranks. Because there are great opportunities ahead for us to shape how we are going to practice law for years ahead—and our ability to engage those opportunities will be limited only by the extent and vibrancy or our membership.



Snap Removal: Dodging the Mighty Forum-Defendant Rule with Its Own Plain Language

Sarah Pozzi
Bodyfelt Mount

As with many procedural issues, the idea seems simple enough: If original federal jurisdiction is satisfied with either federal-question or diversity jurisdiction, a pending state court case can be removed to federal court within 30 days after a defendant's receipt of the initial pleading.[1] This gives an out-of-state defendant the option of a neutral federal forum in lieu of the perceived "hometown" biases of a plaintiff's state court system. Of course, exceptions to removal apply. Under what is known as the "forum-defendant rule" of 28 U.S.C. § 1441(b)(2), an action that is otherwise removable based solely on diversity of citizenship cannot be removed if any defendant "properly joined and served" is a citizen of the state in which the action was brought.

SARAH POZZI

In short, the forum-defendant rule prevents removal in diversity cases when an in-state defendant is present in the lawsuit. Because a local defendant would not suffer the same purported biases as an out-of-state defendant, the theory is that the need for a more neutral federal setting is obviated.

"Properly Joined and Served"

The weeds of the forum-defendant rule take root and flourish in the "properly joined and served" language. Removal disputes most commonly involve fraudulent joinder, that is, cases in which a plaintiff names a nondiverse defendant despite a clear inability to establish a viable cause of action against them. In so doing, the plaintiff manufactures nondiversity to ensure that the action stays in state court. In response, a defendant can remove—despite the nondiversity—and immediately seek a limited dismissal on the ground that the nondiverse defendant was improperly joined in the action in order to defeat federal jurisdiction.

But fraudulent joinder is not the only dispute arising under § 1441's "properly joined and served" language. More recently, electronic docketing alerts have given rise to pre-service removal, a technique whereby a defendant (who is often monitoring daily electronic filing alerts) rushes to remove a diversity case in which an in-state defendant is named but remains unserved. Colloquially, this is "snap removal."

For example, assume a California plaintiff sues Washington Widget Manufacturing Company ("WWMC") and its distributor, Oregon Distribution Company ("ODC"), in Oregon state court. The prayer exceeds $75,000. Plaintiff serves WWMC well before he has an opportunity to serve ODC. WWMC wants to litigate in federal court, and it quickly files a removal notice on diversity grounds. Under § 1441's "properly joined and served" plain language, WWMC is permitted to snap remove the action so long as ODC has not yet been served.

Circuit Split: Literal Statutory Readings Tend to Trounce Absurdity Doctrine Arguments

The case law on the permissibility of snap removal is generally from the district courts, as appellate guidance remains meager. To date, the Second, Third, and Fifth Circuits are the only federal appellate courts to directly interpret § 1441(b)(2)'s forum-defendant rule as it relates to snap removal. All three courts have permitted the practice, though the Fifth Circuit's decision may be more narrowly applicable than those issued by the Second and Third Circuits.[2] The Eleventh Circuit has not addressed the issue directly, but it has expressed distaste for the practice.[3]

CONTINUED ON NEXT PAGE

The Second, Third, and Fifth Circuits each examined and adhered to the strict statutory text of § 1441(b)(2). The Third Circuit, for example, upheld an in-state defendant's snap removal, describing the forum-defendant rule's language as "unambiguous" and finding that its plain meaning "precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served."[4] The Second Circuit followed suit, holding that an in-state defendant's snap removal comported with the language of § 1441(b)(2). Notably, the Second Circuit added that snap removal does not contravene Congress's true intent in enacting the forum-defendant rule (namely, combating fraudulent joinder).[5]

Most recently, in *Tex. Brine Co., LLC v. Am. Arbitration Ass'n,* the Fifth Circuit upheld an out-of-state defendant's removal, holding that § 1441(b)(2) applies only when an in-state defendant has been served in accordance with state law.[6] While the decision is not necessarily limited to removal by out-of-state defendants, the court did note the importance of the removing party's status. This highlights an interesting tangential controversy among the courts over *who* is permitted to snap remove; that is, whether out-of-state and in-state defendants are equally entitled to utilize the procedure.

Appellate courts aside, district courts remain deeply divided over the practice, even those within the same federal judicial district. This clash is evinced by our Ninth Circuit brethren to the south: While the Southern District of California is well settled in permitting the practice, the Central, Eastern, and Northern Districts all contain intradistrict splits. In the Central District of California, for example, one district court rejected an out-of-state defendant's snap removal, finding that the plain-meaning interpretation of § 1441's "properly joined and served" language would produce "unreasonable results at variance with the policy of the legislation as a whole."[7] Yet another court in the same district denied remand and upheld a snap removal in a similar case, concluding that "reasonable minds differ" over whether the plain meaning interpretation of the forum-defendant rule produces absurd removal results.[8]

To date, the District of Oregon has yet to directly address snap removal, its musings on the subject limited to dicta in a footnote.[9]

No Clear Guidance from Congress

Congressional inaction seems to have fueled some of this controversy. Congress added the "properly joined and served" language to § 1441 in 1948, but it expressed little in the way of legislative intent at that time.[10] Congress amended other portions of § 1441 in 2011—well after several contentious judicial decisions permitting snap removal—but it nonetheless declined to alter the "joined and served" language.[11] As one court has observed, the decision to leave that statutory language intact indicates congressional "satisfaction with the unamended portion, or at least tolerance of its inadequacies."[12]

A Trend in Favor of Snap Removal

Although controversial, snap removal is trending toward permissible. Whether it will be accepted in the District of Oregon, the Ninth Circuit, or uniformly across the country remains to be seen. In the meantime, defense practitioners should be advised of changing practices within their local districts and consider snap removal a viable procedural tool if an in-state defendant remains unserved in a freshly filed state court action. Defendants should keep in mind, however, that lacking an objectively reasonable basis for removal may open up the removing party to fees.[13]

And to those who represent plaintiffs from time to time? Get those in-state defendants served post-haste.

Endnotes

1. 28 U.S.C. § 1446(b)(1).
2. *Encompass Ins. Co. v. Stone Mansion Rest. Inc.,* 902 F3d 147 (3d Cir 2018); *Gibbons v. Bristol-Myers Squibb Co.,* 919 F3d 699 (2d Cir 2019); and *Tex. Brine Co., LLC v. Am. Arbitration Ass'n,* 955 F3d 482 (5th Cir 2020).
3. *Goodwin v. Reynolds,* 757 F3d 1216, 1221 (11th Cir 2014).
4. *Encompass Ins.* Co., 902 F3d at 152.
5. *Gibbons,* 919 F3d at 706-07.
6. *Tex. Brine Co.* LLC, 955 F3d at 487.
7. *Mohammed v. Watson Pharms. Inc.,* No SA CV09-0079 DOC (ANx), 2009 US Dist LEXIS 31094, at *12-13 (CD Cal Mar 26, 2009).
8. *Zirkin v. Shandy Media, Inc.,* No 2:18-cv-09207-ODW (SSX), 2019 US Dist LEXIS 24540, at *9-10 (CD Cal Feb 14, 2019).
9. *Ekeya v. Shriners Hosp. for Children,* 258 F Supp 3d 1192, 1201 n 4 (D Or 2017).
10. *Sullivan v. Novartis Pharms. Corp.,* 575 F Supp 2d 640, 644 (DNJ 2008).
11. The Federal Courts Jurisdiction and Venue Clarification Act, Pub L 112-63, 125 Stat 758 (2011).
12. *Monfort v. Adomani, Inc.,* No 18-CV-05211-LHK, 2019 US Dist LEXIS 4230, at *10 (ND Cal Jan 8, 2019) (citing *Regal Stone Ltd. v. Longs Drug Stores Cal.,* LLC, 881 F Supp 2d 1123, 1129 (ND Cal 2012)).
13. 28 U.S.C. § 1447(c).

Objection! Why is Plaintiff's Counsel Trying to Make Us Look So Bad? Preparing for Plaintiff Tactics in Admitted-Liability Cases

Eric Pickard
Trial Attorney, Allstate Staff Counsel

Any attorney with an interest in trial advocacy knows that the most important thing to do at trial—next to establishing credibility with the jury—is to undermine the credibility of your opponent. When plaintiff attorneys know that undermining trust will prove too difficult, some will settle for just trying to make the other side look bad.

Some plaintiff attorneys make allegations for which they may eventually seek punitive damages despite having no evidence to support those allegations at the time the complaint is filed.


ERIC PICKARD

This could include alleging that the at-fault defendant in a car-accident case was texting while driving (without any reason to believe it was so), or claiming in a dog-bite case that the pet owner was aware of their dog's proclivity for aggression (though the dog had never been aggressive before). While it is possible that the discovery process could yield damaging information about a defendant's texting-while-driving or reveal that a defendant's beloved pet is known to be a vicious animal, why don't these plaintiff attorneys simply wait to find that evidence and then amend their complaint? While I do not have an answer for that, I do understand what they are after: They hope to introduce to a jury the circumstances surrounding the defendant's negligence, and this is often the case *even when liability is admitted.* In other words, they aim to make the defendant look bad. But presenting justification for seeking punitive damages is a tall order, especially in an admitted-liability case.

The High Bar for Recovery of Punitive Damages

For punitive damages to apply, a plaintiff must be able to prove "by clear and convincing evidence that [the defendant] acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety, and welfare of others."[1] If a plaintiff can prove such conduct, do not expect a jury to be kind to your client when assessing damages, punitive or otherwise. Fortunately, this is a high bar, and most cases will not support recovery of punitive damages. Further, even if punitive damages are allowed, a plaintiff is entitled to keep only 30 percent of the amount awarded.[2] Why, then, do plaintiff attorneys so desperately pursue punitive damages?

Punitive Damages as a Vehicle for Otherwise Inadmissible Evidence

In admitted-liability cases, a plaintiff may use a punitive-damages claim as a pretext for introducing evidence of the circumstances surrounding a defendant's negligence. This allows them to manipulate the jury's emotions while also circumventing relevancy requirements. And who can blame them? If plaintiff counsel's goal is to maximize the value of their client's case, what better way to ensure a generous damages award than to have the jury disgusted with the other side? The prohibitions on irrelevant evidence (as well as on evidence that is unfairly prejudicial) are necessary because violations of such rules can have a significant and unfair effect on a jury's decision making. When an attorney is able to circumvent or avoid the applicability of such rules, the chances of a landslide victory increase considerably.

The Court of Appeals Weighs in

In December 2020, the Oregon Court of Appeals issued its opinion in *Scott v. Kesselring.*[3] In *Scott,* the defendant had been looking down at her phone immediately before rear-ending the plaintiff on the freeway. Liability was admitted, making the nature and extent of the plaintiff's alleged injuries and damages the only factual dispute. Although the trial court granted the defendant's motion to preclude the plaintiff from arguing for punitive damages to the jury, it denied the defendant's motion to exclude the circumstances of her negligence from evidence. The trial court cited the type of alleged harm ("post-traumatic stress in particular") as the reason that "monkeying with the cellphone" could be brought up with the jury.[4] Plaintiff's counsel took full advantage of that ruling, emphasizing the defendant's cell-phone use during *voir dire,* opening statements, the examinations of the plaintiff and the defendant, and again in closing.[5]

CONTINUED ON NEXT PAGE

The Court of Appeals ruled that the defendant's motion to exclude that evidence should have been granted. In so ruling, the Court of Appeals quoted the following passage from plaintiff counsel's closing argument:

> Is it reasonably foreseeable that you could kill someone on [a] highway doing what [the defendant] did? Absolutely it is . . . [M]aybe technically she wasn't breaking the law [by using her cellphone]. But was she breaking the law of common sense and human nature and reasonable responsibility for everyone driving on the highway? *And that is not even a question that needs to get answered.*[6]

(Emphasis added.)

Agreed. That is not a question that needed to be answered. In fact, it was not a question that needed to be asked. Further, it was a question that never should have been asked because, as the Court of Appeals concluded, the defendant's cell-phone use was not relevant to any disputed issue at trial.[7] Plaintiff's counsel, by his own admission (albeit through a Freudian slip) already knew that. But the original verdict demonstrates the benefit of his tactics: $41,000 in economic damages and $200,000 in noneconomic damages.

Anticipating and Responding to Plaintiff Counsel's Tactics

How can defense counsel counter such tactics? Winning on appeal is great, but trial attorneys do not want to focus on an appeal; they want to focus on winning at trial. Additionally, most cases are not appealed, and, of those that are, most do not get reversed. Further, if a trial attorney's primary focus is setting up an appeal, this means they have already lost.

Rather, defense counsel must step up their trial advocacy, starting with motions *in limine* which clearly outline the dangers that such tactics pose. Reptile theory, golden-rule arguments, and any other attempts to prejudice the jury with emotional appeals are all prohibited by the rules of evidence. In admitted-liability cases where punitive damages are not a factor, plaintiff's counsel should not taint the minds of a jury with any discussion of the choices a defendant made or the conduct they engaged in leading up to the negligent act. If damages are the only issue, then discussion of the circumstances giving rise to the negligent act can only serve to play on a jury's biases and emotions.

If presentation of the prohibited topic is permitted over objection, remember that sunshine is the best disinfectant. If plaintiff's counsel is attempting to manipulate a jury by enraging them or making them fearful—all in an effort to get the jury to *punish* a defendant who has admitted liability—closely examine how this is being done. If you can articulate to a jury that plaintiff's counsel is attempting to manipulate them, you might be able to negate the effect of the strategy. Or, better yet, you might even get the jury to scorn plaintiff's counsel for the attempt.

> For punitive damages to apply, a plaintiff must be able to prove "by clear and convincing evidence that [the defendant] acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety, and welfare of others." If a plaintiff can prove such conduct, do not expect a jury to be kind to your client when assessing damages, punitive or otherwise.

Expect it, Reject it, Negate it

Ultimately, the financial incentive associated with circumventing the rules of evidence will be too great for many plaintiff attorneys to resist. Expect it, ask the court to reject it, and—if all else fails—negate it or find a way to turn it back on plaintiff. Pointing out plaintiff counsel's exaggeration, overzealousness, and manipulation can be effective, especially when there is no whiff of hypocrisy. As Michelle Obama would say, "When they go low, we go high."

Endnotes

1. ORS 31.730.
2. ORS 31.735.
3. 308 Or App 12 (2020).
4. *Id.* at 17.
5. *Id.* at 22.
6. *Id.*
7. *Id.* at 20.

Recent Case Notes

Sara Kobak, Schwabe Williamson & Wyatt
Case Notes Editor

Executive Authority

Governor's COVID-19 Restrictions and Social Distancing Protocols Are Enforceable

In *Elkhorn Baptist Church v. Brown,* 366 Or 506, 466 P3d 30 (Jun 12, 2020), in a mandamus proceeding, the Oregon Supreme Court upheld the enforceability of various executive orders that Governor Kate Brown issued on social distancing and other COVID-19 restrictions.

Plaintiffs were churches and individual churchgoers who filed a complaint in Baker County Circuit Court. Their complaint sought judicial declarations that the Governor exceeded her authority in issuing executive orders declaring a state of emergency based on the coronavirus pandemic. The circuit court granted a preliminary injunction, accepting plaintiffs' argument that the state-of-emergency orders violated a 28-day statutory time limit established by ORS Chapter 433. The Governor petitioned the Oregon Supreme Court for a writ of mandamus.

In a *per curium* opinion, the Supreme Court vacated the circuit court's preliminary injunction, holding that the circuit court erred in concluding that the orders exceeded a statutory time limit. The court explained that the Governor had issued the executive orders under ORS 401.165, which grants emergency powers to the Governor until the termination of the state of emergency.

In addition to ORS chapter 401, the Supreme Court also relied on the statutes in ORS chapter 433. Specifically, the court pointed out that ORS 433.441(4) provides that, "[i]f a state of emergency is declared as authorized under ORS 401.165, the Governor may implement any action authorized by ORS 433.441 to 433.452," which include actions relating to public-health emergencies. Thus, by declaring a state of emergency under ORS 401.165, the Governor has authority to take all actions authorized by the emergency provisions in both chapters 401 and 433.

The Supreme Court also analyzed the statute that the trial court relied on, ORS 433.441(5), related to a "public health emergency," which expires within 28 days from the day the Governor proclaims a "public health emergency." The court explained that the challenged orders were not subject to that time limit because the Governor had authority to respond to a public-health emergency by making a declaration under ORS chapter 401, which provides broader powers. Specifically, ORS 433.441(4) provides that "[n]othing in ORS 433.441 to 433.452 limits the authority of the Governor to declare a state of emergency under ORS 401.165."

Finally, the Supreme Court confirmed that the circuit court was correct in rejecting plaintiffs' alternative theory for invalidating the Governor's executive orders—that is, that the state of emergency declared was subject to the time limit on a "catastrophic disaster" declared under Article X-A of the Oregon Constitution. The court also declined to address plaintiffs' newly raised theory that the orders violated plaintiffs' state constitutional right to freely exercise their religion.

In conclusion, the Supreme Court determined that the circuit court erred when it granted the requested preliminary injunction on the theory that the Governor's executive orders were subject to the statutory time limit set out in ORS 433.441(5). Thus, the court concluded that the preliminary injunction must be vacated, and it ordered the immediate issuance of a peremptory writ of mandamus to that effect.

■ ***Submitted by Brad Krupicka***
Lewis Brisbois

Appellate Procedure

First-Class Mail Satisfies the Statutory Requirements for the Filing Date to Relate Back to Mailing Date for Notice of Appeals in Specific Circumstances

In companion cases *State v. Chapman,* 367 Or 388, 478 P3d 960 (Dec 31, 2020), and *Gould v. Deschutes County,* 367 Or 427, 478 P3d 982 (Dec 31, 2020), the Oregon Supreme Court held that first-class mail may be sufficient for the mailing date of a notice of appeal to count as its filing date under ORS 19.260(1)(a)(B) where the specific circumstances of the mailing

CONTINUED ON NEXT PAGE

RECENT CASE NOTES
continued from previous page

are estimated to achieve delivery of the particular notice of appeal within three calendar days.

In *Gould* and *Chapman,* both appellants mailed their notices of appeal via United States Postal Service (USPS) ordinary first-class mail on the last day of the applicable period to file a notice of appeal. For their appeals to be timely, both appellants relied on the relation-back benefit in ORS 19.260(1)(a)(B). Specifically, ORS 19.260(1)(a)(B) provides that the filing date of a notice of appeal will relate back to the date of mailing as long as the notice is mailed by a "class of delivery" that is "calculated to achieve delivery within three calendar days." ORS 19.260(1)(b) also requires the appellant to have proof of the date of mailing. The public website for USPS shows a delivery time of "1-3 business days" for first-class mail, potentially exceeding the three-calendar-day delivery period required under ORS 19.260(1)(a)(B). At issue in *Chapman* and *Gould* was whether the estimated delivery time for the "class of delivery" in ORS 19.260(1)(a)(B) referred to the delivery time for the particular class of mail as a whole or to the estimated delivery for the particular notice of appeal using that class of delivery. *Chapman* also addressed what constitutes sufficient proof of the date of mailing.

On review, the Supreme Court rejected the argument that "class of delivery" requires the class of mail as a whole to categorically guarantee delivery within three calendar days. Instead, the court held that ORS 19.260(1)(a)(B) only requires a party to use a class of delivery that is designed or estimated by the USPS or other delivery service to achieve delivery of the particular notice in question, in the circumstances, within three calendar days.

In *Gould*, appellant mailed her notice of appeal from Portland to the Appellate Court Administrator in Salem on Friday via first-class mail. It arrived on Monday, on the third calendar day. In addition to the notice arriving within three calendar days, the court noted that the USPS has a two-day service standard for first-class mail if the drive time between origin and destination is six hours or less. Thus, the USPS calculated and estimated delivery within three calendar days. In *Chapman,* appellant mailed her notice of appeal on Monday via first-class mail, and it arrived two days later on Wednesday. The USPS estimated delivery in three calendar days in *Chapman* because its service standard of three business days coincided with three calendar days in the specific circumstances of that mailing. Thus, in both cases, the USPS calculated and estimated delivery for first-class mail within three calendar days. Because the class of delivery was designed to achieve delivery of the particular notice of appeal within three calendar days, the Supreme Court held that the relation-back rule under ORS 19.260(1)(a)(B) applied in both cases.

Finally, in *Chapman,* the Supreme Court also held that ORS 19.260(1)(b) does not require physical proof of the date of mailing at the time of mailing. Instead, an appellant may mail a notice of appeal by first-class mail in a date-marked envelope, coupled with filing the ordinary certificate attesting to the method of delivery and date of dispatch. Alternatively, an appellant may mail the notice of appeal by first-class mail and thereafter obtain and file a copy of the date-marked envelope with a certificate attesting to that method of proof.

■ ***Submitted by Ramon Henderson***
Hodgkinson Street Mepham

Worker's Compensation Law

The Symptoms of a Preexisting Condition Combined with the Preexisting Condition Itself Do Not Give Rise to a "Combined Condition" Claim under ORS 656.005(7)(a)(B)

In *Carrillo v. SAIF Corporation,* 310 Or App 8 (March 17, 2021), the Oregon Court of Appeals reversed a Workers' Compensation Board order and held that the symptoms of a preexisting condition, combined with the preexisting condition itself, do not give rise to a combined condition claim under ORS 656.005(7)(a)(B). Under ORS 656.005(7) and its statutory framework, an employer may establish that an otherwise compensable injury is not the major contributing cause of a claimed disability, and may thereby reject Workers' Compensation claims made on that basis. This Court of Appeals decision effectively reduces the number of Workers' Compensation claims that an employer or insurance carrier may reject.

In *Carrillo,* the claimant filed an injury claim based on symptoms that he experienced in his shoulder after a day of heavy lifting. SAIF, Oregon's not-for-profit insurance company providing workers' compensation insurance, denied the claim. SAIF asserted that the work-related injury had combined with claimant's preexisting conditions and, thus, the work-related injury was not the major contributing cause of the combined condition under ORS 656.005(7)(a)(B). Claimant requested a hearing before the Workers' Compensation Board in response to SAIF's denial of his claim. The Board concluded that SAIF

CONTINUED ON NEXT PAGE

RECENT CASE NOTES
continued from previous page

presented persuasive evidence that the work-related incident was not the major contributing cause of claimant's disability or need for treatment. The Board therefore concluded that the claim was not compensable under ORS 656.005(7)(a)(B). Claimant appealed, and the case was remanded to the Board for reconsideration in light of the Supreme Court's reversal of a case that the Board had relied upon in reaching its conclusion.

On remand, the Board reconsidered the record under the legal framework for combined-condition claims set forth in *Brown v. SAIF,* 361 Or 241, 391 P3d 773 (2017). In doing so, the Board adhered to its original conclusion that SAIF had properly rejected the claim. In reaching its decision, the Board was persuaded by evidence that the claimant's work activities had precipitated symptoms of a preexisting condition and that those symptoms had "combined" with the preexisting condition itself but had not caused a new condition. The Board further found that claimant's work activities were not the major contributing cause of his need for treatment.

On appeal, the claimant argued that a symptomatic flare-up of a preexisting condition is, by definition, not two separate medical conditions. The Court of Appeals agreed and ruled that the Board erred. In reversing the Board's order and remanding for reconsideration, the Court of Appeals reasoned that the term "combined condition" involves two separate medical problems existing simultaneously. The Court of Appeals relied on *Multifoods Specialty Distribution v. McAtee,* 333 Or 629, 43 P3d 1101 (2002), for the proposition that a "combined condition occurs when a new injury combines with an old injury or pre-existing condition to cause or prolong either disability." The Court of Appeals explicitly stated that a "preexisting condition and its symptoms are not separate conditions."

The lesson from *Carrillo* is that employers and insurance carriers may no longer use the combined-injury framework to reject otherwise compensable claims when the injury, or need for treatment, arises from an aggravation or flare-up of a preexisting condition, unless an entirely separate medical problem simultaneously exists. Simply put, aggravations of preexisting conditions can no longer be rejected under Oregon's combined-injury statutory framework. It is noteworthy that *Carrillo* specifically left for the Board to consider in the first instance whether "a claimant's symptomatic flareup is compensable as a worsening of [his or her] preexisting condition."

■ ***Submitted by Noah H. Morss***
Gordon Rees Scully Mansukhani

Attorney Fees Requiring Court Approval

Probate Court Has Authority to Order Return of Attorney Fees from Law Firm Without Acquiring Personal Jurisdiction over Law Firm and Without Making the Firm a Party to the Case

In *Caswell v. Day Law & Assocs., P.C. (In re Guardianship & Conservatorship of Lang)*, 309 Or App 367 (Feb 18, 2021), the Oregon Court of Appeals held that attorney fees paid to the law firm without court approval remained "property of the protected person" for purposes of ORS 125.025(3)(f). As a result, the probate court had jurisdiction over those monies and authority to order return of the funds without acquiring personal jurisdiction over the law firm and without making the law firm a party to the case.

The law firm at issue represented the guardian and conservator of a conservatorship estate of a protected person. The probate court ordered the law firm to return $8,000 in attorney fees to the estate of the protected person because the fees were paid out of the estate without prior court approval, as required by ORS 125.095(2)(c). The law firm appealed, contending the probate court lacked jurisdiction to order the return of fees because the law firm was never properly served and made a party to the action. The law firm also argued that the probate court erred in denying its request for a hearing on its motion for reconsideration of attorney fees.

On appeal, the Oregon Court of Appeals was unpersuaded by the law firm's argument that the probate court lacked jurisdiction to order the return of the fees. The court found that the phrase "property of the protected person," as used in ORS 125.025(3)(f) and read in conjunction with ORS 125.095(2), includes funds used to pay for legal serves related to a protective proceeding until the probate court approves of those fees. Therefore, the unapproved fees paid to the law firm remained "property of the protected person," and the probate court had jurisdiction over the funds and authority to order their return. Because the probate court had independent jurisdiction over the funds, the probate court was not required to separately acquire personal jurisdiction over the law firm or add it as a party to the proceeding before ordering return of the funds. The Court of Appeals agreed, however, that the probate court was required under ORS 125.080(2) to hold a hearing on the motion

CONTINUED ON NEXT PAGE

RECENT CASE NOTES
continued from previous page

for reconsideration. Based on those holdings, the Court of Appeals remanded to grant the law firm a hearing on its motion for reconsideration, but otherwise affirmed the probate court's orders.

■ ***Submitted by Breanna Thompson***
Garrett Hemann Robertson

Product Liability

Evidence Allowing a Factfinder to Guess or Speculate Is Insufficient to Survive Summary Judgment

In *Laux v. Akebono Brake Corporation et al.,* 310 Or App 190 (March 24, 2021), the Oregon Court of Appeals affirmed the trial court's grant of defendants' motion for summary judgment, concluding that there was insufficient evidence that decedent was exposed to defendants' asbestos.

To survive a motion for summary judgment in a products liability and negligence case involving asbestos, a plaintiff must establish the presence of the defendant's asbestos in plaintiff's workplace. In this case, plaintiff alleged that replacing brake linings in defendants' motorcycles created airborne asbestos dust that decedent would breathe when removing old brakes and abrading new brakes. Decedent worked as a mechanic replacing brakes approximately two to four times a day during the 1960s. Plaintiff relied on one witness's statement that "asbestos-free friction materials began to surface in the market sometime in the 1970s" to support the inference that defendants' product contained asbestos until at least the 1970s. Neither the decedent nor any other witness expressly testified to knowing that any of defendants' products prior to 1970s contained asbestos, nor that decedent recalled doing any repair work on defendants' motorcycles. There was testimony that a small percentage of motorcycles serviced at decedent's employer were manufactured by defendants.

In affirming the grant of summary judgment to defendants, the Court of Appeals reasoned that the witness's testimony provided insufficient evidence from which a factfinder could reasonably infer that decedent was exposed to asbestos from defendants' products. To come to such a conclusion would require two inferences: (1) all brake-friction materials before the 1970s contained asbestos; and (2) all of defendants' brake-friction materials must have contained asbestos before the 1970s. The court found that plaintiff's argument relied on too much of an inferential leap and would require a guess or speculation rather than reasonable inference.

The dissent disagreed, reasoning a factfinder could still draw a reasonable inference regarding the presence of asbestos in defendant's brake parts.

■ ***Submitted by Breanna Thompson***
Garrett Hemann Robertson

Statute of Limitations

Oregon Court of Appeals Clarifies Tolling of Statute of Limitations for "Disabling Mental Condition"

In *Thompson v. Portland Adventist Medical Center,* 309 Or App 118 (Feb 3, 2021), the Oregon Court of Appeals reversed the trial court's grant of summary judgment on the issue of whether there was a triable question of fact regarding plaintiff having a disabling mental condition that tolled the limitations period pursuant to ORS 12.160(3) on plaintiff's claim of negligent infliction of emotional distress (NIED).

The plaintiff gave birth to her son at Portland Adventist Medical Center. Three days later she was cleared for discharge. Plaintiff wanted to be well rested for her first day at home, and she was provided sleeping medication by hospital staff. Plaintiff's son was brought to her in her room, and the two were left alone. Approximately an hour later, plaintiff woke from sleep to find her son unresponsive after suffocating under plaintiff's breast. Plaintiff's son's heart was restarted, but he had suffered severe and permanent brain damage. Life support was later withdrawn, and plaintiff's son passed away.

Plaintiff thereafter experienced feelings of grief and guilt, believing herself to be responsible for her son's death because she had signed a hospital policy form in which she agreed to not sleep in the same bed as her son. Plaintiff sought therapy for the first year following her son's death and was diagnosed with post-traumatic stress disorder and major depression. She resumed therapy multiple years later with a new therapist who found she was still experiencing severe symptoms. Approximately a year after this, plaintiff and her therapist discussed speaking with an attorney about any available legal options. Plaintiff filed her claim three days after speaking with an attorney.

Before trial, defendants moved for summary judgment, arguing that plaintiff's claim was time-barred. Plaintiff responded that her claim was timely because her mental condition prevented her from understanding her legal rights, thus tolling the statute of limitations.

CONTINUED ON NEXT PAGE

RECENT CASE NOTES
continued from previous page

The issue on appeal was whether an issue of fact existed whether the limitations period was tolled pursuant to ORS 12.160. The Court of Appeals held that a triable issue of fact did exist, explaining that for ORS 12.160(3) to toll the limitations period the mental condition must actually bar a plaintiff from knowing a defendant had harmed them and that whether a plaintiff's mental condition was severe enough to be such a bar is a question of fact.

While the Court of Appeals observed it was a "close call" whether plaintiff's therapy notes created a genuine issue of material fact, the court also noted that plaintiff's ORCP 47 E declaration stated that she had retained an expert qualified to testify regarding plaintiff's mental condition and its impacts on her. The court stated that because a jury would be required to assess the impacts of plaintiff's mental condition on her cognitive abilities, and because such evaluation exceeds the knowledge of an ordinary lay juror, the plaintiff's declaration that she would produce expert testimony at trial was sufficient to create an issue of fact and prevent summary judgment.

Accordingly, the Court of Appeals concluded the trial court erred in granting summary judgment on plaintiff's NIED claim.

■ ***Submitted by Joel C. Petersen***
Hodgkinson Street Mepham

Consumer protection defense

FDCPA Bona Fide Error Defense Available for Mistakes of State Law

In *Kaiser v. Cascade Capital, LLC,* 989 F3d 1127 (9th Cir 2021), plaintiffs alleged that the defendant law firm and its client, the defendant debt owner, threatened to file and did file debt-collection lawsuits outside the applicable Oregon statute of limitations. The defendants moved to dismiss, arguing that the plaintiffs failed to plead facts from which it could be inferred that the defendants "knew or should have known" that the limitations period had expired. The defendants also argued that the dismissal should be with prejudice because the question of what limitations period applied to the debts at issue was an open one, which precluded the plaintiffs from pleading facts that would show a plausible claim that the defendants violated the FDCPA.

The district court granted the motion to dismiss. The Ninth Circuit reversed, ruling that the FDCPA is a strict-liability statute and the "knew or should have known" standard does not apply. Even where it was an open question of law as to which limitations period applied to the debt and even where the collection case might be timely under one of the potentially applicable periods, the Ninth Circuit held that "lawsuits to collect time-barred debts are both unfair and misleading, violating § 1692f and § 1692e respectively, and threats to sue on time-barred debts are at least misleading, violating § 1692e." This holding subjects debt collectors and the lawyers representing them in litigation to liability under the FDCPA.

As a matter of first impression, however, the Ninth Circuit also held that "a mistake about the time-barred status of a debt is a mistake regarding a collateral legal element of an offense, which we treat as a mistake of fact." Because the legal analysis required to identify the applicable statute of limitations is often linear and subject to processes to avoid error, the court determined that the bona-fide-error defense should be interpreted to include mistakes about the time-barred status of a debt. The court also found it relevant that the FDCPA safe-harbor provision, under which a debt collector may avoid liability if it acts in conformity with an advisory opinion of the federal Consumer Financial Protection Bureau, is unlikely to provide meaningful protection when the question of liability turns on the interpretation of a state statute of limitations.

■ ***Submitted by Kelly F. Huedepohl***
Gordon Rees Scully Mansukhani

Attorney Fees

An Offer of Judgment under ORCP 54 Does Not Always Operate to Limit Attorney Fees in Actions for Unpaid Wages under ORS 652.200

In *Mathis v. St. Helens Auto Center, Inc.,* 367 Or 437, 478 P3d 946 (Dec 31, 2020), the Oregon Supreme Court held that the "reasonable" attorney fee award permitted to a plaintiff in an action to recover unpaid wages under ORS 652.200 cannot be categorically limited through ORCP 54(E)(3) when a plaintiff fails to accept defendant's offer of judgment and then recovers less in the action than the offer of judgment.

Plaintiff worked for defendant for several years before defendant ultimately terminated his employment. After his termination, plaintiff filed a lawsuit against defendant for unpaid wages. The case was assigned to mandatory court-

CONTINUED ON NEXT PAGE

RECENT CASE NOTES
continued from previous page

annexed arbitration. Prior to the arbitration hearing, defendant made an offer of judgment of $2,000, exclusive of attorney fees and costs. The arbitrator ultimately found that defendant had failed to timely pay plaintiff less than $1,400 in unpaid wages and penalty wages. Plaintiff then sought $62,500 in attorney fees. The arbitrator and later the trial court, however, limited the attorney fee award to $6,310 based on ORCP 54 E, since defendant's offer of judgment exceeded what was ultimately awarded to plaintiff at arbitration. The Oregon Court of Appeals affirmed the trial court's $6,310 attorney fee award.

Plaintiff appealed to the Oregon Supreme Court. At issue was whether ORS 652.200, which permits an employee who succeeds in an action to recover unpaid wages to also seek reasonable attorney fees, could be reconciled with ORCP 54 E(3), which cuts off a plaintiff's attorney fees where an offer of judgment exceeds the award ultimately awarded at trial to only those fees that had been incurred when the offer of judgment was made.

In a 5-2 decision, the Oregon Supreme Court reversed the decisions of the Court of Appeals and trial court. A majority of the Oregon Supreme Court found that the need to limit an employee's attorney fees where he or she unreasonably rejects an employer's good-faith offer or tender should be addressed on a case-by-case basis, and that the "reasonable" attorney-fee provision of ORS 652.200 could not be *per se* limited through ORCP 54 E(3). Importantly, both the majority and dissenting opinions noted that a defendant's reasonable settlement offer still can limit, or even cut off, the amount of attorney fees awarded to an employee.

■ ***Submitted by Christine Sargent***
Littler Mendelson

Legislative Update

Rocky Dallum, Tonkon Torp
OADC Lobbyist

The 2021 Legislative Session is nearly half over, with lawmakers, lobbyists, and the public adjusting to a whole new policy process. The State Capitol remains closed to the public, and the virtual environment has delivered both procedural and political challenges. OADC has actively engaged on a few issues this session, most notably several bills relating to insurance claim settlements potentially implicating attorneys. We will spend the rest of the session monitoring bills and advocating for court funding.

ROCKY DALLUM

Convening the legislature in the face of COVID has not been seamless. Oregon's constitution requires legislators to meet in person to introduce bills and when the full House and Senate chambers take up a bill for a vote. Through February and early March this meant limited meetings, slowing the introduction and passage of new legislation. Committee meetings do not require in-person attendance, and while online meetings allow greater participation from across the state, advocates continue to experience both technological and access issues during the public hearing process. On top of process challenges, February's ice storm closed the Capitol and delayed the hearing schedule for several days, and positive COVID cases kept representatives off the House floor for a week. Until mid-April, House Republicans withheld the votes necessary to suspend the constitutional requirement to read bills in their entirety before a debate, adding to the political tension and backlog of bills.

The major topics of discussion this session have naturally centered on responding to last year's devastating wildfires, calls for policy oversight and racial equity, and continuing to address the multi-faceted and ever-changing landscape of the pandemic. Additionally, this year (as any odd-numbered year) requires the legislature to pass a state government budget for the next two years and, following last year's census, redraw congressional and legislative boundaries. In early April, the Oregon Supreme Court granted the legislature an extension to propose new districts by late September—a proposal the Secretary of State opposed.

OADC has experienced a busy session tracking issues specifically for the civil defense bar. Two bills, HB 3171 and HB

3272, each sought to expand the Unlawful Trade Practices Act ("UTPA") to include insurance claims, allowing an insured to recover actual damages that result from unfair claim settlement practices. OADC opposed both on the grounds that attorneys could be subject to UTPA claims simply by representing an insurer. HB 3171 ultimately died in committee, and amendments to HB 3272 removed the section dealing with UTPA claims. In addition, OADC is monitoring a variety of employment related bills, several bills proposed by the Oregon State Bar's Board of Governors, and two COVID-related bills: SB 296, which gives the Chief Justice authority to move court deadlines during an emergency, and SB 765, which permanently allows for the use of remote notaries.

With the first major committee deadline on April 13th, the status of most bills is relatively clear. The legislature, and OADC, will turn attention to finalizing the state budget. State income tax and other revenues continue to look strong, and the infusion of federal funds directly and through stimulus checks will help bolster state coffers. OADC has already supported the Oregon Judicial Department budget, highlighting the need to clear the backlog of cases and maintain competitive judicial salaries.

Thanks to those of you tracking issues and reaching out the OADC Governmental Affairs Committee. We appreciate your engagement in this challenging legislative session.

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.

***Jeff Gist v. Zoan Management, Inc.*, S067992 (A159509), 305 Or App 708, 473 P3d 565 (Aug 12, 2020). Oral argument scheduled for May 4, 2021.**

This case is before the Oregon Supreme Court for a second time. Plaintiff filed a putative class-action complaint against defendants, alleging wage-and-hour claims under Oregon law. Defendants petitioned the trial court for an order to stay proceedings and compel arbitration pursuant to an employment agreement. After the trial court ordered the parties to arbitrate, plaintiff moved to dismiss the claims to challenge the arbitration order on appeal. On review, the Oregon Supreme Court held that the plaintiff's voluntary dismissal did not bar the appeal. In this second time on review, the issues before the court are: "(1) Must a court limit determinations of arbitrability to the issue of whether the arbitration provisions of the contract are unconscionable, and instead leave for arbitrators to consider whether the provisions are, by their terms, inseverable from a contract alleged to be illegal, void, and unenforceable as a matter of law?";
"(2) Does [the] court's analysis in *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543, 340 P3d 27 (2014) apply and inform a conclusion that the arbitration provisions were procedurally unconscionable, based on a claimed disparity in the parties' bargaining power and the contract's offer on a 'take-it-or-leave-it' basis as a condition of employment?"; and "(3) Are arbitration provisions substantively unconscionable if they expressly contravene Oregon's wage and hour law and impose costs 'significantly larger than the cost of a trial' in a putative class action?"

***Einar Einarsson v. Indoor Billboard Northwest, Inc.*, S068228. Oral argument scheduled for June 22, 2021.**

In this original mandamus proceeding, defendants challenge a circuit court's order denying a protective order and compelling the defendant to produce his medical records. Defendant objected to producing the requested medical records on the ground that the records were privileged under the physician-patient privilege at OEC 504-1(2). The circuit court disagreed, ruling that physician-patient privilege is limited to only direct communications between a patient and physician. On review, the issue is whether the physician-patient privilege at OEC 504-1(2) applies to medical records, including diagnostic test results and diagnoses.

***State of Oregon v. Hershey*, S067825 (A166962), 304 Or App 56, 466 P3d 987 (May 6, 2020). Oral argument scheduled for September 14, 2021.**

In this criminal case, the Oregon Court of Appeals held that there is no right to a jury trial in a forfeiture proceeding under ORS 167.347. On review, the issue is: "Does Article I, section 17, of the Oregon Constitution guarantee a right to a jury trial in proceedings where an individual's property could be found forfeit because of that property's connection to a criminal act?"

***SAIF Corporation v. Ward*, S068179 (A171025), 307 Or App 337, 477 P3d 429 (Oct 21, 2020). Oral argument scheduled for September 14, 2021.**

In this workers' compensation case, the Oregon Court of Appeals held that a truck driver injured while driving a truck that he leased from a trucking company for the sole purpose of driving for that company was a "subject worker" such that the company was required to provide workers' compensation insurance coverage for his injuries. On review, the issue is whether the Oregon Court of Appeals erred in interpreting the exclusion from coverage of the workers' compensation law in ORS 656.027(15).

Honorable Adrian Brown

Multnomah County Circuit Court

A BIOGRAPHY

Decisively elected to the bench by Multnomah County voters on November 3, 2020, after a 10-month-long competitive campaign, Judge Adrian Lee Brown was sworn in and began her service as a circuit court judge on January 4, 2021. Born in Bloomington, Indiana in 1975, Judge Brown was raised by a single mother who sacrificed her own dreams so that her children could pursue theirs. For Judge Brown, that dream included incorporating her passions for law and public service. With a scholarship awarded by the Air Force ROTC, she earned her Bachelor of Science degree in public policy from Indiana University and was subsequently awarded an educational delay of her active duty entry with the Air Force to pursue her JD from Lewis and Clark Law School.

Judge Brown describes her time with the Judge Advocate General's Corps ("JAG" Corps) as an immensely rewarding experience that allowed her to gain an understanding of diverse practice areas including civil, criminal, and family law. For Judge Brown, it wasn't just the experience she gained while serving as a JAG that she found rewarding, it was connecting with and serving her community that provided the most fulfillment. After seven years with the JAG Corps, Judge Brown and her husband, a retired prosecutor, were ready to settle in one spot, and chose to call Portland home.

When Judge Brown returned to Portland, she began working for the U.S. attorney's office, initially as a special assistant attorney prosecuting drug cases, and shortly thereafter as an Assistant United States Attorney, a position she maintained for over a decade. As an AUSA, Judge Brown transitioned to civil matters with a focus on civil rights enforcement. Helping members in her community who had faced discrimination was, by far, the most rewarding. This prompted Judge Brown to do outreach work with the Department of Justice's Civil Rights Division, with the goal of starting a civil rights program at the U.S. Attorney's office. In 2013, Judge Brown was selected to work as the National Civil Rights Coordinator, a 16-month detail in Washington, D.C. with a focus on ensuring that funding and training was directed to a systemic increase of civil rights enforcement by United States Attorneys' Offices. As a direct result of Judge Brown's commitment to public service, permanent funding was secured

for the first time ever in the Department of Justice's budget for over 30 Civil Rights Assistant United States Attorney positions.

During her time in D.C., Judge Brown was closely connected with organizations committed to improving access for people whose voices have been historically marginalized. With these experiences, Judge Brown believes that being a judge means working closely with the local community, and that judges can and should be involved in helping identify solutions to systemic problems. As a recently elected judge, Judge Brown believes that all parties should be treated equally and with respect, and she is committed to being accessible to both attorneys and the public. When asked how she plans to run her courtroom in the COVID-19 era, Judge Brown referenced the Air Force's motto echoed during her time in service: "Flexibility is the key to airpower; take out airpower, flexibility is the key to running a courtroom."

■ ***Submitted by Carmen Livengood***
Wood Smith Henning & Berman

Defense Victory!

Christine Sargent, Littler Mendelson
Defense Victory! Editor
Contributing authors Mike Jacobs, Daniel Lis, Alice Newlin, and Lucy Ohlsen

Motion to Dismiss Granted on Retaliatory Failure to Hire Claim

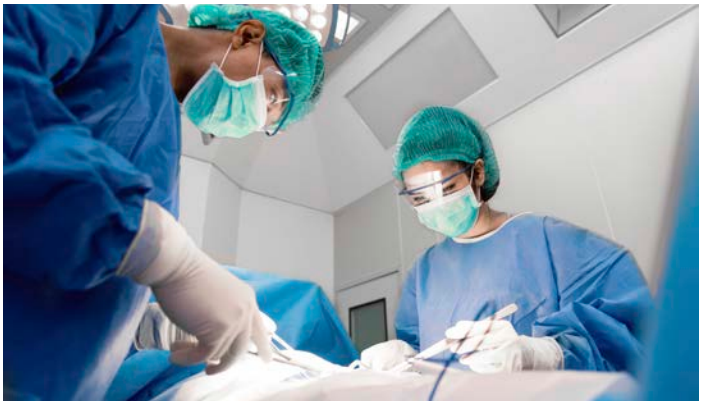
On February 11, 2019, Multnomah County Circuit Court Judge Amy M. Baggio granted defendant's motion to dismiss in *Leona Miotke v. NaphCare, Inc. et al.,* Case No. 19CV47201. Lucy Ohlsen of Lewis Brisbois represented defendant NaphCare. Anne Foster of Dunn Carney represented plaintiff. Plaintiff brought claims for whistleblower retaliation and aiding and abetting unlawful employment practices against NaphCare. NaphCare never actually employed plaintiff; it had indicated it would hire plaintiff, but ultimately decided not to do so before plaintiff started work. Plaintiff sued NaphCare alleging retaliatory "failure to hire."

Plaintiff's claims against NaphCare were based on her belief that she was an "employee," and NaphCare her "employer," for purposes of the whistleblower retaliation statute, ORS 659A.203. Relying on cases discussing the formation of an employment contract, plaintiff argued that she should be able to sustain her claim against NaphCare based solely on her allegation that NaphCare issued and then withdrew a job offer. The court determined that plaintiff's understanding of the terms "employee" and "employer" under ORS 659A.203 were mistaken. To be a protected employee under ORS 659A.203, plaintiff would have had to demonstrate that she was actively employed by NaphCare and that NaphCare used her services and exercised control over her. Because plaintiff had not alleged any facts to demonstrate that NaphCare actively employed plaintiff, used her services, or controlled her actions, the court dismissed plaintiff's claims against NaphCare. The court permitted plaintiff to attempt to replead.

Summary Judgment Granted in Medical Malpractice Suit

On September 30, 2020, Taylor B. Lewis of Hart Wagner obtained summary judgment in *Sherry Hawkins v. Dr. Aaron Gorin and Gorin Plastic Surgery & Medspa,* Clackamas County Circuit Court Case No. 20CV22785. Judge Henry C. Breithaupt presided. Alexander Daniloff of the Daniloff Law Firm argued for plaintiff.

Plaintiff filed her medical malpractice lawsuit against defendants alleging that defendants had been negligent and violated the



standard of care in cosmetic surgery. Defendants moved for summary judgment arguing that their conduct met the standard of care and that there was no evidence that they had caused the plaintiff's alleged injuries. Plaintiff failed to present admissible evidence creating a genuine issue of material fact on either issue.

The Court entered judgment in the defendants' favor and against plaintiff finding that there was no genuine issue of material fact.

Oregon Court of Appeals Adopts "Single Entity Test" for Tort Immunity Under LHWCA

On January 30, 2020, the Oregon Court of Appeals affirmed summary judgment in defendant's favor in *Ronald A. Sanders v. Vigor Fab, LLC,* Case No. 618 A168740. James McCurdy and Alice Newlin of Lindsay Hart defended Vigor Fab in a tort claim arising from injuries sustained by a Swan Island Shipyard worker, who was represented by Charles Robinowitz. Plaintiff had already successfully completed a claim against his employer, Vigor Fab's sister company, Vigor Marine, under the Longshore and Harbor Workers' Compensation Act (LHWCA). Vigor Fab argued below on summary judgment that it was immune from tort liability under the LHWCA's exclusivity provision because it should be treated as a "single entity" with Vigor Marine. Plaintiff appealed the trial court's decision granting Vigor Fab's motion for summary judgment.

On appeal, for the first time, Oregon courts explicitly adopted the "single entity" test used in many federal courts, holding that when

CONTINUED ON NEXT PAGE

DEFENSE VICTORY!
continued from previous page

two entities' labor and employment operations are "functionally integrated" and meet a multi-factor test, those entities are insulated from tort liability, and LHWCA benefits constitute the exclusive remedy available to an injured worker of either entity. After analyzing the available record, the Oregon Court of Appeals concluded that Vigor Fab and Vigor Marine, both subsidiaries of Vigor Industrial, had sufficiently integrated operations to be considered a single entity, and that summary judgment was appropriate.

Won Race to the Courthouse, but Lost Battle Over Jurisdiction

While the parties were negotiating terms for mediation, Louis Lopez and Philip Brailsford of Fennemore Craig filed *Southwest Behavioral Health Services, Inc. ("SBHS") v. EnSoftek, Inc. ("EnSoftek"),* Case No. 2:19-cv-03398-DJH in the District of Arizona. Before SBHS served its Complaint, EnSoftek, represented by Daniel Larsen and Daniel Lis of Buchalter Ater Wynne, filed claims against SBHS in Oregon District Court, Case No. 3:19-cv-00615-MO. Brian Hembd of Husch Blackwell and Sean Healy of Lewis Brisbois, who also represented EnSoftek, then moved to transfer SBHS's Arizona claims to Oregon.

On September 17, 2019, Judge Diane Humetewa granted EnSoftek's motion based on her findings that four of the factors under 28 USC § 1404(a) weighed in favor of transfer. First, Oregon law governed the majority of the claims. Second, the parties had minimal contacts with Arizona because SBHS solicited an Oregon company for services and agreed to have Oregon law govern the parties' agreement. Third, SBHS's claims were not closely connected with Arizona because EnSoftek created and provided services related to the software at issue in Oregon. Finally, transferring the claims to Oregon would avoid duplicative litigation costs. Judge Humetewa refused to give much weight to the fact that SBHS was first to file because it filed claims while representing that it was working out terms for mediation.

The Scribe's Tips for Better Writing

Dan Lindahl
Bullivant Houser Bailey

Underused and Useful — the Em Dash and the En Dash

The em-dash and en-dash are underutilized forms of punctuation. Perhaps the problem is uncertainty about the proper use of these close cousins. So let's eliminate the mystery and begin fully utilizing these useful tools.

Let's start at the beginning. The em-dash and en-dash derive their names from their size; the em-dash is approximately the width of a capital M; the en-dash is half as wide as the em-dash, but longer than a hyphen.

DAN LINDAHL

Although similar in appearance, each serves a different purpose.

The em-dash is a versatile device with many uses. Depending on the context, it can replace commas, parentheses, or colons.

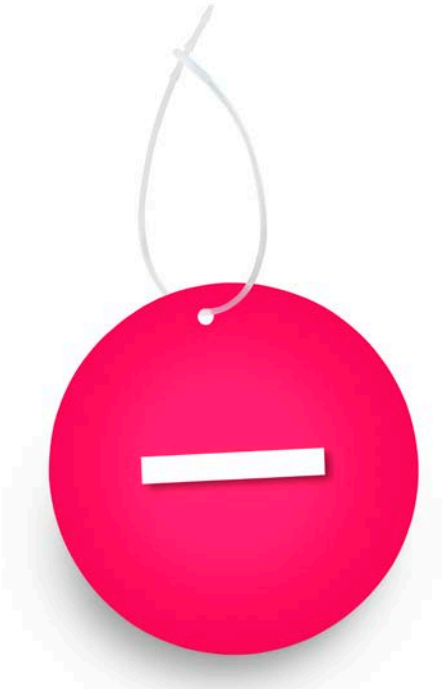
At its broadest level, the em-dash can be understood as marking an interruption in the structure of a sentence. But there are, of course, different reasons for such interruptions.

The em-dash is perhaps most often used to set off an amplifying or explanatory element: *Plagued by delays—the trial was postponed seven times—the case did not reach the jury until five years after the complaint was filed.*

The em-dash can also replace a colon: *After weeks of deliberations, the jury returned its verdict—guilty.*

The em-dash has many other uses. That is why Bryan Garner has called it "perhaps the most underused punctuation mark in American writing." Although useful, the em-dash can be overdone. Most style guides recommend against using more than two em-dashes in a single sentence.

Although similar to the em-dash, the en-dash serves an entirely different purpose. The en-dash is most often used to show a range; in this usage, the en-dash substitutes for "to": *During the Warren era, 1953–1969, the Supreme Court of the United States issued several landmark decisions.*



The en-dash can also substitute for "versus": *The controversy exposed the country's north–south divide.*

Finally, you might be wondering how to create these useful punctuation marks. There is no single answer to that question because the procedure varies among programs. In Microsoft Word, you can find true em-dashes and en-dashes in the Insert Symbol menu. That will also show you a keyboard shortcut for creating these punctuation marks.

Association News

New and Returning Members

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

Justin Bolster
Preg O'Donnell & Gillett

Amanda Bryan
Bullivant Houser Bailey

Kathryn Johnson
Rizzo Mattingly Bosworth

Joshua Kastan
DKM Law Group

Nicole Nowlin
Cosgrave Vergeer Kester

Rachel Perry
Bodyfelt Mount

Gregory Reinert
MacMillan Scholz & Marks

Barry Snyder
Barry Snyder ADR

Lynetta St Clair
Oregon Health & Science University

Erin Sweeney
Lane Powell

Carolyn Walker
Portland General Electric Company

Nathaniel Woodward
Smith Freed Eberhard

Pedro Zugazaga
Davis Rothwell Earle & Xóchihua

OADC Past Presidents

Lloyd Bernstein	2020
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

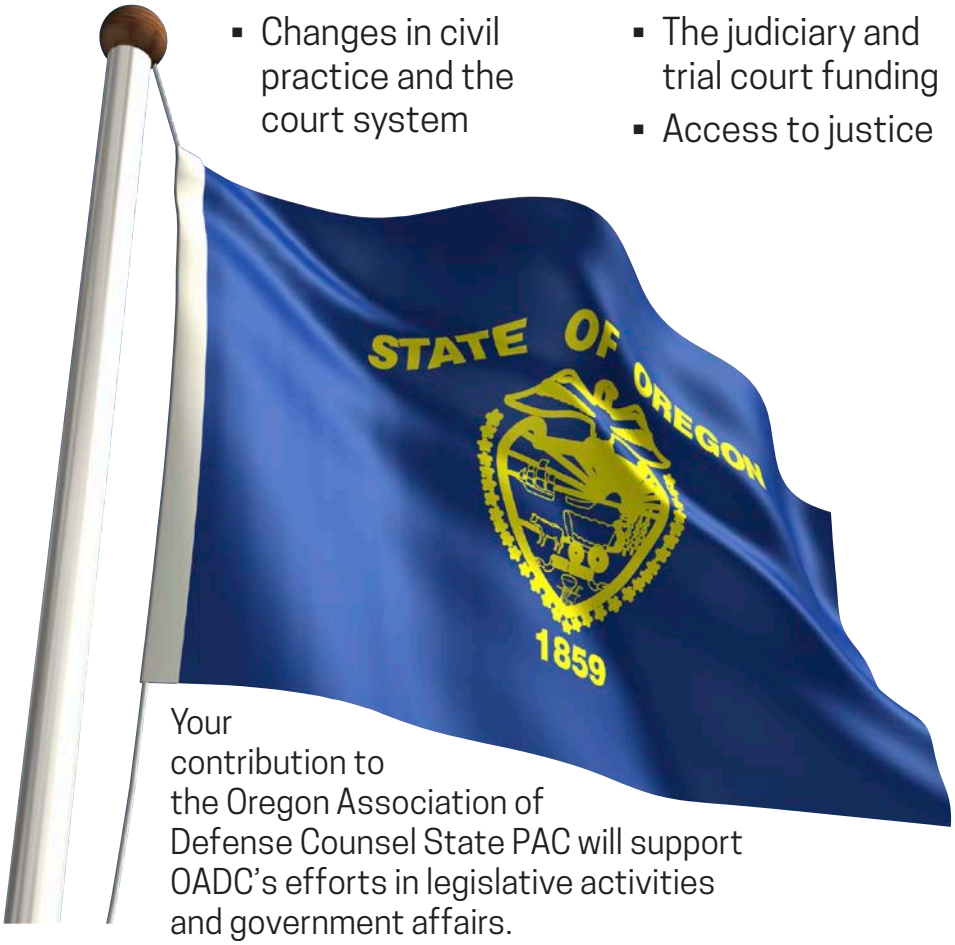
OADC

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 2021 Sponsorship Partners

ESi

Exponent®
Engineering and Scientific Consulting

JENSEN HUGHES
Advancing the Science of Safety

MACHAON
MEDICAL EVALUATIONS

Physician Direct Services

RIVER CITY MEDIA

T-SCAN
CORPORATION

ROCKFORD
INVESTIGATIONS, LLC

U.S. Legal Support