THE VERDICT™

Beating the Odds on Dispositive Motions in Oregon

Preserving Issues for Appeal

OADC Oregon Association of Defense Counsel

Trial Lawyers Defending You in the Courts of Oregon

2022 • ISSUE 4

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PRESIDENT’S MESSAGE

A Farewell and My Most Memorable Take-Aways

Katie L. Smith, Walhood Law Group

While this is my final President’s Message, as you are reading it, we have turned the calendar year over to 2023 and my tenure as President of OADC has already come to an end. I want to begin by saying how truly grateful I am to have had the honor to serve as President of OADC and lead this great organization. OADC has and always will hold a special place in my heart. I have fond memories and strong bonds with fellow OADC members forged during my time serving with the OADC leadership team, which I will cherish. And I think I will actually miss those monthly meetings with my fellow leaders.

KATIE L. SMITH

I also want to give a shout-out to the OADC 2023 leadership team under the direction of current OADC President Peter Tuenge. The OADC Board of Directors and the practice group, affinity group, and committee leaders are fantastic people who serve this organization well. Thank you all for your time, effort, and your commitment to leading our great organization.

As I sign off, I thought, what better way to do so than by sharing some of my favorite memories, and by doing so hopefully encourage you to make some of your own through participating in OADC. I look forward to seeing you at the next event!

Number 1 - Family Fun at the Annual Convention

Perhaps my most favored event hosted by OADC each year is the Annual Convention in Sunriver. It is always full of great content and provides an opportunity to connect and catch up with fellow OADC colleagues. But as the years have gone by, it is no longer just a favorite event of mine; it is an event looked forward to each year by my entire family. Sunriver has become a place full of great family memories, and our annual visit to Sunriver is a family “tradition.” It is a treasured kickoff to the summer. On the following page is a family photo at Benham Falls in Sunriver, 2022.

Number 2 - Bonding with Fellow Past Presidents

Each year, the Board of Directors takes a weekend to sit down, discuss the past year, identify what is working and what changes need to be made to keep OADC a thriving and valuable organization, and plan for the next year. These planning meetings are extremely valuable, but also present a great opportunity for the board members to bond with one another. Top amongst my favorite and most memorable take-aways from my time involved with the OADC leadership is the bond I have formed with fellow OADC members and past leaders of this organization. These are no longer just colleagues: They are friends I know I can call on and whom I truly enjoy spending time with. See above for my band of brothers.

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Number 3 – Leading with the Support of Great People

The success of this great organization is due to all the past and present OADC members who dedicate countless hours serving OADC, working to create great programming, and planning events for our members to connect with each other and strengthen their professional development. I had the honor to serve as President but only with the support of so many practice group leaders, affinity group leaders, committee members, and the Board of Directors. I thank you all for your dedication and support. It was a pleasure and blast to serve with you! !

Number 4 – Building New Connections at the Women in Law Social

One of my proudest achievements during my time on the OADC Board has been working with Vicki Smith to form the OADC Women in the Law group. At the kickoff meeting for this event, we invited anyone who had interest to meet at Urban Farmer and talk about great ideas for getting the new group off the ground. There was so much interest and support that was fantastic to see. That same year we initiated the Women in Law Social at the Annual Convention. That event has been going strong ever since and is now one of my favorite events to attend each year.

Number 5 - Recognizing a Great OADC Leader

In 2022, OADC initiated its awards program to recognize exemplary leaders of this organization. During this inaugural year, OADC presented many awards to deserving individuals, including the Lifetime Achievement Award to Gordy Welborn. This particular recognition had special meaning to me. Gordy has spent many years of his career dedicated to serving OADC, including serving as President in 2015. Gordy, along with another former president, Dan Schanz, personally reached out to me and encouraged my involvement in OADC leadership. It was really that encouragement that culminated in my own service as President. I am truly grateful for their mentorship and leadership, and it was fantastic to witness Gordy receive the Lifetime Achievement award!

Number 6 - Memorable Board Meetings

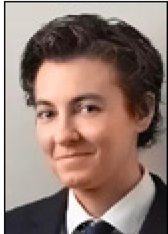
The OADC Board of Directors meets monthly, and while these meetings are full of business, they are also full of good times and laughter, and they became something I looked forward to each month. But there is one meeting in particular that forged a forever memory. On March 11, 2020, the Board of Directors came together in a meeting as the world was on the brink of a shutdown without anyone realizing it. During that meeting it was learned that the NBA had suspended their season, and this thing called COVID-19 suddenly became very real. This was the last in-person meeting the Board would have for over a year; what followed was an interesting couple of years, but the leadership team held steadfast, and the bond I share with that particular team is greater because of it.

The legacy of this organization is now in the hands of another group of fantastic leaders. Whether you are in leadership or just enjoy coming along to the OADC events, I hope you too find value in OADC, forge your own bonds, and make lasting memories. I hope to see you soon!

Beating the Odds on Dispositive Motions in Oregon

Amber R. Pritchard
Chock Barhoum

Introduction
Winning a dispositive motion in Oregon state court often feels like a long shot. Like an underdog sports team facing a juggernaut, a summary judgment motion that seems winnable at first often results in disappointment. Despite countless hours of strategy, preparation, diligence, and sheer hope, the rival finds a way to win, and you're left preparing for the next matchup.


AMBER R. PRITCHARD

The case law and limited statistics available on dispositive motions in Oregon indicate most dispositive motions filed in state court are denied. By requiring trial courts to draw all justifiable inferences in favor of the non-moving party, the law leans away from granting summary judgment to ensure the right to trial is preserved for legitimately disputed issues. Judges are, understandably, acutely aware of preserving this right to trial as a core tenet of our legal system. However, much like underdog teams pulling off an upset, with a sophisticated understanding of the tricks of the trade (and a little luck), it is sometimes possible to beat the odds. Knowledge of the statistical trends, standards, and approaches in federal and state courts, combined with consideration of the timing, costs, and your client's preferences, can yield effective results.

Statistical Trends
A comprehensive 2010 study analyzed dispositive motions in Multnomah County Circuit Court and the U.S. District Court for the District of Oregon from 2005 to 2006, using a sample of 500 randomly selected cases involving contract and tort claims.[1] While that study was narrowly tailored and has not been recently updated, the results give some insight into the trends of Oregon's busiest state court and the U.S. District Court.

In Multnomah County, motions to dismiss, motions to strike pleadings, or motions for judgment on the pleadings were filed in 11 percent of cases. Around 46 percent were granted in full or in part. In federal court, these motions were filed in 21 percent of cases, and more than 62 percent were granted in whole or in part. This confirms the assumption that federal court is a friendlier venue for these motions. Despite the higher likelihood of success in federal court, however, these motions are still filed at a low rate in both state and federal court.

In Multnomah County, summary judgment motions were filed in approximately 18 percent of cases. Fewer than 30 percent of summary judgment motions were granted in whole or in part. In federal court, summary judgment motions were filed in approximately 45 percent of cases, with nearly 60 percent granted in whole or in part. These numbers show a significant difference between summary judgment rulings in state and federal courts. They also suggest that, as of 2010, Oregon attorneys were already dialed into the differences in outcomes, filing summary judgment motions over twice as often in federal court.

Pre-Answer Motions to Dismiss
Pre-answer motions to dismiss present a unique opportunity to foreclose claims at an early stage, saving costs and time. Dismissal of even one claim at an early stage can save your client significant costs in discovery, mediation, or trial.

Plaintiffs are not required to present evidence in initial pleadings, and Oregon courts grant wide latitude for plaintiffs to amend their complaint.[2] However, claims can be dismissed with prejudice if repleading is considered futile. [3]

Consider the claims against your client and decide if any may be irreconcilably defective. Before filing a motion to dismiss, confer with opposing counsel to request voluntary dismissal of those claims. This can save time and costs for you and your client. If counsel is resistant, you may want to mention that ORS 20.105 permits recovery of attorney fees on a successful motion to dismiss. Holding opposing counsel accountable for futile claims may also discourage frivolous claims in the future.

Motions for Summary Judgment
Why is the denial rate for summary judgment motions so much higher in state court than federal court? It could be because federal judges have more leeway to consider the strength of the evidence. In *Anderson v. Liberty Lobby, Inc.*,[4] the United States Supreme Court held that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case.[5] A judge may

CONTINUED ON NEXT PAGE

not weigh the evidence, but the mere scintilla of evidence in support of the plaintiff's position will be insufficient.[6] If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.[7] As outlined in *Anderson*:

> In ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. The question is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.[8]

ORCP 47E and a lack of expert discovery complicates matters further in state court. Under ORCP 47E, the nonmoving party may survive a motion for summary judgment by submitting an affidavit stating that the party has retained an expert whose testimony will create a genuine dispute of material fact. However, if your motion involves issues that cannot be proven through expert testimony, ORCP 47E should not preclude summary judgment on its own.[9]

If your motion relies on factual evidence, ensure that your depositions and discovery requests are tailored to your summary judgment goals, and draft the motion to rely as much as possible on testimony from the opposing party. This will strengthen your position that there is no genuine dispute of material fact.

Timing, Costs, and Client Preferences

The cost of a motion for summary judgment may exceed other early resolution options. However, if an opposing party's settlement demands are unreasonable, a dispositive motion may be worth the cost. Ultimately, that's something to fully discuss with your client. Failing to disclose all pertinent facts can lead your client to push for a dispositive motion that will likely fail, wasting time and increasing costs. The client should also be aware of estimated costs if the motion is initially successful but appealed. A summary judgment motion granted at the trial court level may not withstand an appeal, so even succeeding in the trial court may not resolve the matter.

Timing often works in tandem with cost considerations. A client may be tempted to file dispositive motion before completing discovery to save costs. Motions for summary judgment tend to be most successful when relying on testimony and evidence from the opposing party, so motions relying on factual matters are most persuasive if drafted after discovery and plaintiff's deposition are complete. It's best to assess discovery as it is received to determine if there are any "smoking guns" that could significantly bolster an earlier dispositive motion. Overall, it may be most cost-effective to complete discovery before pursuing a dispositive motion.

Takeaway

While the odds are against you, in the right case, dispositive motions can be a useful tool for early resolution, even in state court. State courts are less likely than federal courts to grant such motions, but attorneys should be on the lookout for potentially futile claims or cases where expert testimony cannot preclude summary judgment. With careful forethought and consideration of the statistics, your jurisdiction, and the facts of your case, you can provide your client with a thorough analysis of the potential costs and benefits of filing a dispositive motion – and maybe even win them that elusive prize of a dispositive motion upheld on appeal.

Endnotes

1. Institute for the Advancement of the American Legal System at the University of Denver (IAALS), Civil Case Processing in the Oregon Courts: An Analysis of Multnomah County (2010), available at https://iaals.du.edu/sites/default/files/documents/publications/civil_case_processing_oregon_courts2010.pdf. IAALS is a national, non-partisan organization at the University of Denver dedicated to improving the process and culture of the civil justice system. IAALS analyzed the dockets of Oregon civil courts as part of a civil case processing study. The institute chose Oregon due to the state's reputation for a constructive legal culture and its unique rules of civil procedure. IAALS narrowed its focus to Multnomah County because it has the largest civil docket of any of the state's circuit courts, which helped provide adequate data for the study.
2. ORCP 23A.
3. *Nicita v. Holladay*, No. 3:19-cv-01960-YY, 2022 US Dist LEXIS 64011, at *6 (D Or Apr. 4, 2022).
4. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 253-254 (1986).
5. *Id.* at 255.
6. *Id.*at 252.
7. *Id.*at 244.
8. *Id.*at 254-255 (emphasis in original).
9. *Hinchman v. UC Mkt., LLC,* 270 Or App 561, 572 (2015).

Preservation: Slicing the Onion Just Right

William Gunnels
USDA Office of the General Counsel

A party seeking to ensure that an issue is preserved for appeal must place the trial court and the opposing party on notice that it is making a particular argument under a particular legal framework. The "touchstone" of preservation is '"procedural fairness to the parties and to the trial court."'[1] Preservation rules also promote judicial efficiency by fostering the creation of a complete record as early in the life of a case as possible.[2] However, in a recent opinion, the Oregon Supreme Court held that the preservation rule must be interpreted with "some degree of liberality,"[3] because "problems may arise if the preservation onion is sliced too thinly."[4] What does this mean in practice, and how can Oregon trial practitioners best position their clients for success in the event of an appeal?[5]

WILLIAM GUNNELS

What Is Preservation, and Why Is It Important?

Preservation of issues is key to the appellate process and serves an essential gatekeeping function for appellate courts. The trial court needs an opportunity to understand the party's argument and correct any errors of law based on that argument; the opposing party needs to understand the argument to such an extent that it can fairly rebut it—both before the trial court and on a subsequent appeal. While it is, of course, preferable to win the case at trial and not have to appeal at all, preservation of key legal issues may be critical to mitigating the effects of an unfavorable verdict.

Oregon's preservation rule, ORAP 5.45, states that:

> No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court and is assigned as error in the opening brief in accordance with this rule, provided that the appellate court may, in its discretion, consider a plain error.[6]

While the rule provides the basic outline of the preservation doctrine, decades of case law have added substantial additional judicial interpretation to flesh out the more detailed contours of the doctrine. Particularly helpful to understanding the doctrine, Oregon courts have identified three components of preservation, in descending order of importance:

(1) Identifying the issue to be appealed;

(2) Identifying the legal source of one's argument; and

(3) Presenting a specific argument based on that issue and the legal source(s).[7]

As to the three elements, "[t]he first is ordinarily essential, the second less so, and the third least."[8]

Unpeeling the Three "Layers" of Preservation

An issue, for the purposes of effecting an appeal, refers to the broadest category of argument available. Identifying the issue is the first and most important step in preserving the issue for appeal. For example, arguing that a statute of limitations bars the plaintiff's claim, moving to dismiss for lack of personal jurisdiction, or objecting that a particular statement is inadmissible hearsay will be essential to preserving those issues for appeal, and is a necessary precursor to the next components of preservation.

Once you've identified the issue, the next step is to identify the "legal source" of your argument: the statute, case, rule, or other literal source of law upon which your argument is based. When thinking ahead about a potential appeal, it is important at this step to ask yourself whether you have

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identified all of the sources of law that are necessary for the court and opposing counsel to fully consider and respond to all facets of your arguments.[9]

The least essential component of preservation is the specific arguments presented. A party does not necessarily need to make the same exact argument before the appellate court as it made before the trial court—so long as it raised the same issue and generally identified the applicable sources of law.[10] Once the particular issue and relevant authorities are identified, appellate counsel will likely be able to advance whatever legal arguments might be supported by those authorities, even if they were not thoroughly explored by the parties at trial, so long as the purposes of preservation are served.

Preservation in Practice

Deciphering how to apply the basic components of preservation in practice can be more of an art than a science. Arguing an issue too broadly in the trial court may not alert the court or opposing party of the specific basis and merits of your argument. Arguing too narrowly, on the other hand, may limit the scope of your options on appeal. Furthermore, practical strategic considerations, such as managing juror perceptions or interpersonal relations with the trial judge, may limit a trial practitioner's ability to preserve every legal issue as thoroughly as they might otherwise.

Although the three components are useful guideposts in ensuring that you have preserved all relevant issues, the particulars of the framework itself are less important than the question of whether the underlying preservation principles—in particular, fairness and efficiency—are served by permitting an argument to be presented on appeal.[11] Thus, "close calls" should turn on whether "the policies underlying the [preservation] rule have

been sufficiently served,"[12] rather than any rigid framework. Those policies are

> to (1) apprise the trial court of a party's position such that it can consider and rule on it, (2) ensure fairness to the opposing party by avoiding surprise and allowing that party to address all issues raised, and (3) foster full development of the record.[13]

This more liberal approach to preservation allows appellate courts to focus on addressing the merits of substantive arguments when it is fair and just to do so, rather than wasting judicial resources on fact-intensive threshold questions of preservation.

Conclusion

Given the evolving interpretation of ORAP 5.45 over the past several decades, the contours of the preservation doctrine can be elusive. However, the essence of preservation is fairly simple (even if difficult to translate into practice): You must put the court and all other parties on notice of every argument you believe you could make on appeal. Err on the side of being over-inclusive when referencing statutes, case law, and specific legal theories to support your arguments and be careful not to argue at too high of a level of abstraction.

Ultimately, you should keep in mind that the doctrine itself is not rigid, but that it aims to promote a policy of fairness and a full development of the record. Identifying a legal issue, naming its source, and presenting an argument based on the issue and source of law is generally sufficient to successfully bring your argument before an appellate court. And keep in mind that appellate courts do not slice "the preservation onion too thinly." No need for tears.

Endnotes

1. *State v. Weaver,* 367 Or 1, 16 (2020) (internal citation omitted).
2. *Entrepreneurs Foundation v. Employment Dept.,* 267 Or App 425, 429 (2014).
3. *State v. McKinney,* 369 Or 325, 332 (2022) (quoting *State v. Stevens,* 328 Or 116, 122 (1998)).
4. *State v. Amaya,* 336 Or 616, 629 (2004).
5. This article focuses only on how to preserve specific arguments for appeal. There are a number of procedural preservation rules related to specific motions or pre-trial matters (*e.g.,* failing to give certain jury instructions), which are outside the scope of this article.
6. ORAP 5.45(1). Because the issue is far too complicated for the scope of this article, it does not discuss plain error.
7. *State v. Hitz,* 307 Or 183, 188 (1988).
8. *Id.*
9. *State v. Ames,* 298 Or App 227, 232 (2019).
10. *Schultz v. Franke,* 273 Or App 584, 587 (2015).
11. *Vanspeybroeck v. Tillamook County,* 221 Or App 677, 691 n 5 (2008).
12. *State v. Parkins,* 346 Or 333, 341 (2009).
13. *State v. Roberts,* 291 Or App 124, 130 (2018).

Recent Case Notes

Sara Kobak, Schwabe Williamson & Wyatt
Case Notes Editor

ATTORNEY FEES

Oregon Court of Appeals Confirms the Importance of Pleading a Right to Attorney Fees

In Wedemeyer v. Nike IHM, Inc., 348 Or App 781, 513 P3d 610 (May 25, 2022), the Oregon Court of Appeals highlighted the importance of proper pleading under ORCP 68 when a defendant seeks to recover attorney fees.

Plaintiff filed suit against a former employer, alleging multiple forms of employment discrimination. Some of her claims were rejected on summary judgment, and the last one was rejected on directed verdict. A general judgment was then entered against plaintiff. Although defendant failed to allege a right to attorney fees in its answer, as required by ORCP 68C(2)(a), defendant petitioned for attorney fees under ORS 659A.885(1), and the trial court awarded fees.

After the subsequent hearing on attorney fees, plaintiff moved for reconsideration, arguing that defendant's failure to plead an entitlement to fees violated ORCP 68 C(2)(a), which provides that "[a] party seeking attorney fees shall allege the facts, statute, or rule that provides a basis for the award of fees in a pleading" and "[n]o attorney fees shall be awarded unless a right to recover fees is alleged..." Defendant responded that plaintiff waived any right to object, citing ORCP 68 C(2)(d), which provides that "[a]ny objection to the form or specificity of the allegation of the facts, statute, or rule that provides a basis for the award of fees shall be waived if not alleged prior to trial or hearing." Defendant also requested leave from the court to amend its answer to allege an entitlement to attorney fees in conformity with ORCP 68 C(2)(a).

The trial court declined to reconsider the award, finding that plaintiff's objection was untimely. The trial court also denied defendant's motion to amend, concluding that it lacked jurisdiction in the matter, but it issued a supplemental judgment awarding defendant's attorney fees.

On appeal, plaintiff raised an assignment of error challenging the trial court's award of attorney fees to defendant despite failure to plead a right to fees under ORCP 68 in its answer. Defendant opposed plaintiff's challenge, arguing that her objection was untimely.

The Court of Appeals found that the trial court erred in awarding unpled attorney fees to defendant. In doing so, the court rejected defendant's argument that its fee claim under ORS 659A.885(1) was based on the unreasonableness of plaintiff's claims and conduct during litigation and, therefore, that defendant was not aware of the basis for fees until after trial. The Court of Appeals noted that although it may not be apparent to a defendant that attorney fees are warranted under ORS 659A.885(1) until after litigation, a defendant is still obligated under ORCP 68 C(2)(a) to allege a basis for an attorney-fee claim in a pleading "at some point before judgment has been entered."

As to defendant's contention that plaintiff waived any right to object to attorney fees, the Court of Appeals explained that ORCP 68C(2)(d) limits waiver only to objections challenging "the form or specificity" of an allegation to a right to attorney fees. Because defendant made no such allegation in the first place, plaintiff could not have objected under the rule and, therefore, there could be no waiver.

■ ***Submitted by Thomas Purcell and Johnathon Carter***
MB Law Group

PRODUCTS LIABILITY

Oregon District Court Applies Broad Standard of Foreseeability in Products Liability Case

In Bowden v. Genie Industries (A Terex Brand) Inc., No. 3:17-cv-1411-SI, 2022 U.S. Dist. WL 2981448 (D Or July 28, 2022), the Oregon district court offered an important reminder that, when analyzing a products liability claim based on defective design, the foreseeability standard regarding potential risks associated with a product will be broadly construed.

Plaintiff alleged that he suffered injuries after a self-propelled boom lift moved "suddenly and violently" as he was operating it. As the trial court explained, the operator of the boom lift stands in a cage—a "boom"—which is attached

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to the base of the lift by a movable, extendable shaft. The boom can be positioned over either the non-steering wheels (forward) or steering wheels (reverse), but it is less stable when in the reverse position because it is further from its fulcrum. On the day of plaintiff's injury, the boom lift was in a reverse position, and it was parked against a curb. Plaintiff alleged that, as he was backing the lift away from the curb, he lightly engaged the boom's operating joystick, and the boom lift threw the cage violently back and forth with plaintiff inside, resulting in serious physical injury.

Plaintiff brought a products liability action against the manufacturer of the boom lift based on, among other theories, a failure to warn. After a four-day trial, the jury found the manufacturer liable for strict products liability. The manufacturer subsequently filed a renewed motion for summary judgment as a matter of law, new trial, or remittitur.

In resolving the manufacturer's motions, the federal district court relied on *Purdy v. Deere Co.,* 311 Or App 244, 492 P3d 99 (2021). In that case, the Oregon Court of Appeals held that a manufacturer is not required to provide a warning against danger unless it knew, or reasonably should have known, of the presence of the danger—in other words, unless the danger was foreseeable. *Id.* at 263-64. It was partially on this issue of foreseeability that the manufacturer based its argument for judgment as a matter of law. The manufacturer argued that it was unforeseeable that the boom lift would make a sudden lateral movement after an operator lightly engaged the joystick. For that reason, the manufacturer argued, it had no reason to know of the risk and, thus, had no duty to warn against it.

The district court rejected that argument, reasoning that the manufacturer's construal of the foreseeability standard was too narrow. The district court explained that, to be foreseeable, an injury need not be the result of a particular set of events. Certain risks may be foreseeable from certain conduct, even if the "exact mechanism of harm itself was not necessarily foreseeable." Rejecting the manufacturer's narrow construction of foreseeability and adopting the broader view, the court held that plaintiff was not required to show that it was foreseeable that the boom lift would react specifically as it did in this case in order to prevail. Based on that reasoning, the court denied the manufacturer's renewed motion for summary judgment as a matter of law.

■ ***Submitted by Thomas Purcell and Johnathon Carter***
MB Law Group

CIVIL PROCEDURE

Horse Lacks Legal Capacity to Sue

In Justice v. Vercher, 321 Or App 439, 518 P3d 131 (Aug 31, 2022), the Oregon Court of Appeals affirmed the trial court's dismissal of a negligence action in which the plaintiff was a horse named "Justice." Defendant was a previous owner of Justice. In 2017, defendant's neighbor became concerned that Justice was underfed and emaciated. Defendant's neighbor convinced defendant to have the horse examined by a veterinarian. The veterinarian concluded that Justice was malnourished and recommended the horse be stalled or rehomed. Defendant surrendered custody of Justice to Sound Equine Options ("SEO"). Significant care was needed for emaciation, lice, rain rot, and penile infection, and future treatment

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was anticipated. Defendant subsequently pled guilty to first degree animal neglect, and she agreed to pay for some of Justice's care. A SEO executive then filed a negligence action against defendant on behalf of Justice, alleging she was Justice's "guardian." The lawsuit asserted that Justice was entitled to economic and noneconomic damages from defendant for negligent care.

Defendant filed a motion to dismiss under ORCP 21A for lack of legal capacity to sue and for failure to state a claim. In considering defendant's motion, the trial court opined that a "non-human animal lacks the legal status or qualifications necessary" to assert legal rights in a court of law. The trial court accordingly dismissed the action, but noted that the legislature or appellate courts may address whether an animal should have a right to sue in specific circumstances.

On appeal, the question of whether the SEO executive could act as Justice's guardian was not directly at issue. The Court of Appeals explained in some detail, however, why it was doubtful that a guardian ad litem could be appointed to act in the interests of an animal. Among other things, this would be inconsistent with existing court rules and statutes. Additionally, there is no way to actually discern and give effect to an animal's wishes or intentions in a legal action.

As to legal capacity to sue, the Court of Appeals explained that under long-standing English common law and Oregon law, only a natural or artificial person could bring a legal action to redress a violation of rights. Oregon statutory law defines "person" to include individuals, corporations, and similar entities. ORS 174.100(7). In contrast, animals have historically been treated as a special form of property. Oregon has enacted animal cruelty laws that recognize the sentience of animals, aiming to minimize the pain, stress, fear, and suffering of animals. ORS 167.305. However, Oregon's animal cruelty statutes govern human conduct and do not purport to grant substantive or procedural legal rights to animals. The Court of Appeals declined to depart from well-settled rule that only human beings and human-created legal entities have the capacity to sue in Oregon.

■ ***Submitted by Flavio A. (Alex) Ortiz***
Rall & Ortiz

MEDICAL MALPRACTICE

Physician Not Guarantor of Result Instruction Rejected, and Loss of Chance Claim Recognized in Death Case

In Martineau v. McKenzie-Willamette Med. Ctr., 320 Or App 534, 514 P3d 520 (June 29, 2022), the decedent was examined by an emergency room physician with chest pain. A chest x-ray was obtained and read in the radiology department. The emergency room physician reviewed the x-ray report and an electrocardiogram of a different patient, and wrongly concluded that the decedent did not have an urgent cardiovascular problem or need immediate further testing. The decedent in fact had an urgent cardiovascular problem, and he died approximately 24 hours later.

Plaintiff, in her capacity as the decedent's personal representative, brought medical malpractice claims. The trial court dismissed plaintiff's claim for "loss of chance of recovery." Plaintiff's wrongful death claim proceeded to trial, and defendants obtained a defense verdict from the jury. On appeal, the Court of Appeals held that the trial court committed reversible error in providing Uniform Civil Jury Instruction ("UCJI") 44.03 and in dismissing plaintiff's loss of chance of recovery claim. The case was reversed and remanded for a new trial.

The Court of Appeals first addressed plaintiff's argument that the trial court should not have provided UCJI 44.03, which states: "Physicians are not negligent merely because their efforts were unsuccessful. A physician does not guarantee a good result by undertaking to perform a service." Even though it generally is a correct statement of law that a physician is not a "warrantor of a cure," the Court of Appeals held that UCJI 44.03 was overbroad. It was noted that a physician may be obliged to warrant or guarantee against certain poor results, such as not amputating a foot when treating a completely unrelated condition. It was also noted that even correct legal statements do not necessarily make appropriate jury instructions. The Court of Appeals held that UCJI 44.03 was problematic because the jury might be misled into believing a physician is not negligent simply because no good result is guaranteed. In considering negligence, the jury's focus should be on whether the physician met the applicable standard of care. The court held that, in the circumstances of the case, the instruction was not harmless.

The Court of Appeals next addressed plaintiff's argument that the trial court erred in dismissing plaintiff's loss of chance of recovery claim. In considering that issue, the court pointed to *Smith v. Providence Health & Svcs.,* 361 Or 456, 393 P3d 1106 (2017), which recognized that a plaintiff may assert a medical negligence claim for a loss of chance of recovery. Such a claim requires the plaintiff to plead the percentage and quality of his or her chance of recovery and that there has been a present adverse medical outcome to serve as the foundation for calculating plaintiff's damages. Defendants raised several arguments against plaintiff's claim for loss of chance of recovery, including arguments that plaintiff's remedy in the case of death was through the wrongful death statute. The Court of Appeals rejected defendants'

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arguments and stated that in a loss of chance claim, the actual "injury" is the loss of chance of recovery, rather than death. The Court of Appeals stated it would be untenable for the courts to allow a loss of chance of recovery claim when the patient survived, but to disallow a claim when the patient died.

- ***Submitted by Flavio A. (Alex) Ortiz***
  Rall & Ortiz

EMPLOYMENT

Oregon's Wage Laws Track Federal Wage Laws Regarding What Activities Are Compensable

In Buero v. Amazon.com Services, Inc., 370 Or 502 (Dec 15, 2022), the Oregon Supreme Court held that Oregon law aligns with federal law regarding what work-related activities are compensable.

Thus, as under federal law as decided in *Integrity Staffing Solutions, Inc. v. Busk, 574 US 27, 135 S Ct 513, 190 L Ed 2d 410 (2014),* time that employees spend on an employer's premises waiting for and undergoing mandatory security screenings before or after work shifts are compensable only if: (1) the screenings are an integral and indispensable part of the employees' principal activities; or (2) the screenings are compensable as a matter of contract, custom, or practice.

Plaintiff worked for defendants in a warehouse for retail products. In the warehouse, there was a secured area where the merchandise was located. To prevent theft, the employer required employees to pass through a mandatory security screening when exiting the secured area of the warehouse. After passing through the security screening, employees could remain in the unsecured area of the warehouse for a variety of reasons, such as to use a breakroom located in that part of the warehouse.

In this action, plaintiff brought a putative class action against defendants, alleging that defendants had violated Oregon's wage laws by failing to pay employees for time spent in the mandatory security screenings for exiting the secured area of the warehouse at the end of their shifts. Relying on the Integrity Staffing case—in which the United States Supreme Court held that time spent in similar security screenings was not compensable under federal law—defendants argued that the time was not compensable under Oregon law. The Ninth Circuit certified the question to the Oregon Supreme Court, asking whether Oregon law aligns with federal law.

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In answering the certified question as yes, the Oregon Supreme Court concluded that Oregon wage laws track federal law on what constitutes compensable work activities. Looking at the Fair Labor Standards Act (FLSA), as modified by the Portal-to-Portal Act, the Oregon Supreme Court first explained that the test for compensable activities under federal law was whether the activities were "integral and indispensable" to the principal work activities. Looking at ORS 653.010(11) and related administrative rules, the Court then held that the governing rules were intended to mirror federal law based on their text, context, and rulemaking history. The Court further held that such rules were consistent with ORS 653.010(11) and its definition of work time. Based on those conclusions, the Oregon Supreme Court held that, as was true under federal law, the screenings at issue were not compensable under state law.

■ ***Submitted by Sara Kobak***
Schwabe Williamson & Wyatt

TORT LIABILITY

The Legislature Did Not Intend a Private Right of Action for Violations of Child-Abuse-Reporting Statutes

In E.J.T. v. Jefferson County, 370 Or 215 (2022), the Oregon Supreme Court answered certified questions from the federal district court to address: (1) whether a claim for abuse of a vulnerable person under ORS 124.100 *et seq.* was available against public bodies; and (2) whether a violation of Oregon's mandatory child-abuse-reporting law could serve as a basis for statutory liability. With respect to the first question, the Court held that a claim is available against a public body, through the Oregon Tort Claims Act (OTCA), when the claim is based on the acts or omissions of agents of the public body acting within the scope of their employment. As to the second question, the Court held that the legislature did not intend to create a private right of action to address violations of child-abuse-reporting duties.

Plaintiff was a toddler when he suffered permanent catastrophic brain damage from an assault by his mother's boyfriend. Prior to that incident, plaintiff's mother

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took plaintiff to a hospital to address bruising around his genitals. The attending nurse reported the bruising injury as suspected child abuse to local law enforcement and, later, to tribal law enforcement. A local law enforcement officer came to the hospital to investigate the abuse report, but he concluded that he lacked jurisdiction to investigate the report after learning that plaintiff's father was a member of the Confederated Tribes of Warm Springs. A tribal law enforcement officer also responded to the abuse report, but he ultimately failed to do any investigation, and he did not notify the Department of Human Services (DHS) that his department had received a report of child abuse. In the meantime, plaintiff's mother continued to leave plaintiff in the care of her boyfriend, and her boyfriend caused the serious physical injuries resulting in plaintiff's brain damage.

Plaintiff subsequently filed a complaint against the county and local law enforcement for failing to report the first incident of suspected child abuse. In response to a claim for violations of Oregon's Vulnerable Person Act, ORS 124.105, defendants argued that OTCA precluded such a claim against a public body or its employees. With respect to a claim alleging violations of Oregon's mandatory child-abuse-reporting statutes, defendants argued that the legislature had not created a private cause of action for violations of those duties.

In answering the certified questions from the federal district court on the viability of defendants' arguments, the Oregon Supreme Court first held that OTCA authorizes an action against a public body for violations of Oregon's Vulnerable Person Act if the agent of the public body was acting within the scope of their employment. That was so, as reasoned by the court, because a claim for abuse of a vulnerable person was a "tort" subject to OTCA. As to whether there was a private right of action for violations of Oregon's mandatory child-abuse-reporting statutes, however, the Oregon Supreme Court concluded that the legislature did not intend to create such a statutory cause of action based on its review of the text, context, and legislative history of the statutes.

■ ***Submitted by Sara Kobak***
Schwabe Williamson & Wyatt

PRODUCTS LIABILITY

The Oregon Court of Appeals Holds That a Hospital May Be Subject to Strict Product Liability Under ORS 30.920 for Administering a Drug as Part of Its Medical Care for a Patient

In Brown v. GlaxoSmithKline, LLC, 323 Or App 214 (2022), the Oregon Court of Appeals held that a hospital charging for a pharmaceutical drug administered to a patient in its emergency department qualifies as a "seller" of the drug subject to strict product liability under ORS 30.920. In so reasoning, the court held that a service provider may be a "seller" of a product subject to strict liability under ORS 30.920, even if the provider is primarily engaged in providing a service and the sale of the product was merely incidental to that service.

Defendant was a hospital. Plaintiff's mother went to the hospital's emergency room when she was pregnant with plaintiff to get treatment for nausea and vomiting, among other symptoms. A physician in the emergency room evaluated and treated plaintiff's mother with an injectable drug to address her symptoms. The hospital's licensed in-house pharmacy maintained a stock of different medications for treatments in the hospital, including the drug used to treat plaintiff's mother.

Plaintiff later brought a strict product liability claim under ORS 30.920 against the hospital, asserting that the hospital was strictly liable for alleged defects in the drug as a "seller" of the drug. The hospital moved for summary judgment, arguing that it was a service provider and not a "seller" of drugs dispensed in the course of medical treatments.

The trial court agreed with the hospital and granted its motion for summary judgment, but the Oregon Court of Appeals reversed. Defining the issue as one of statutory interpretation, the court looked at the text and context of ORS 30.920, and it held that strict liability applied to the hospital as a "seller" of drugs administered in the course of medical treatment. In so holding, the court explained that strict liability applies to the sale of products that are incidental to a service transaction, as well as to products that are consumed on site. The court found that hospitals engaged in administering drugs as part of medical treatments were not excluded from strict liability as "sellers" of drugs because nothing in the statutes affirmatively excluded hospitals from such liability. Because the hospital maintained a stock of the drug in its pharmacy and charged patients for the drugs that it administered, the Court of Appeals held that summary judgment was improper, and the hospital could be liable for drug defects under ORS 30.920.

■ ***Submitted by Sara Kobak***
Schwabe Williamson & Wyatt

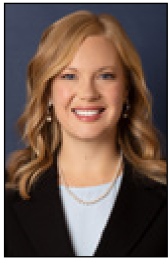
Thank You & Welcome

OADC wishes to thank outgoing Case Notes Editor Sara Kobak for her contributions to *The Verdict*™. We welcome Kevin Sasse to the Case Notes Editor role.

Legislative Update

Maureen McGee, Tonkon Torp
OADC Lobbyist

The 2023 Legislative Session began on January 17, 2023. With the first few full weeks behind us, the major themes taking shape are reflective of both the practical and policy aspects of legislating during a time of transition for Oregon politics.



MAUREEN MCGEE

On the practical side, new and veteran members of the Capitol community are readjusting to an in-person environment that still reflects restricted access to the Capitol building. Due to both COVID and ongoing construction, physical access to the Capitol has been either unavailable or limited since March of 2020. Capitol access is now available, but largely limited only to the House and Senate office wings, the hearing rooms, and a single connecting hallway, as planned construction continues into 2025. While regaining Capitol access is universally regarded as a positive development, for many newer lawmakers it is a significant adjustment from a virtual-only environment, and the continued restricted access is having an effect on how lobbyists approach in-person advocacy. Shortened hearing lengths—down from 2 hours to 1.5—are also causing committee chairs to face different choices about how they manage hearing time and agendas.

Of the 35 Democrats and 25 Republicans in the House, almost half—a total of 26 members—consist of newly elected legislators or appointees starting full terms, and things are starting somewhat slowly as the new legislators are educated and new committee chairs settle into their positions. In the Senate, minority party lawmakers are employing early a parliamentary procedure to slow advancement of more partisan Democratic agenda items by requiring that all bills be read in full before a final vote. The tactic is intended to encourage the Democratic majority to work with Republicans on major issues during the 2023 session, and to potentially drive Democrats to eventually pull back some of their priority bills in order to avoid the session running out of time.

Majority Democrats and minority Republicans do appear to agree on what the major issues for this session are, even if they disagree on what the solutions might be. At the top of that list is housing and homelessness, as well as obtaining some of the federal money being made available as incentives for domestic manufacturing of semiconductors. Governor Kotek's recommended budget was released on January 31, 2023, and also focuses on building more housing and reducing homelessness as one of three top priorities, followed by improving access to mental health and addiction services and improving outcomes in early literacy and K-12 schools.

Regarding issues of specific concern to OADC, we are monitoring a wide variety of bills on issues relating to workplace safety inspections (HB 2272); public meetings (HB 2805); information that may be considered by insurers in determining rates for motor vehicle liability policies (HB 2920); motions to strike (SB 305); and others. While we have yet to see bills addressing insurance bad-faith claims, we expect that we may see such legislation introduced before the end of February and will continue to raise specific concerns with such bills.

OADC is also again taking a leadership role through partnering with the Oregon Justice Department, the Oregon Trial Lawyers Association, the Oregon State Bar and others in supporting the proper functioning of our court system.

In January, OADC provided written testimony in support of SB 235, which adds judges in 6 of 27 judicial districts in Oregon, and will help to ensure meaningful access to prompt and fair resolution of disputes by focusing on key counties based on changing demographics of Oregon's growing population and needs. OADC also testified and submitted written testimony in support of HB 2224, which increases juror compensation and mileage rates to improve access and eliminate barriers to jury service. We will continue over the course of the session to join with other stakeholders to support access to justice measures such as these, and to support the Oregon Judicial Department's budget request for the 2023-25 biennium.

With a long session ahead where anything can happen, OADC will continue to closely monitor issues of concern and advocate on behalf of the civil defense bar in Oregon.

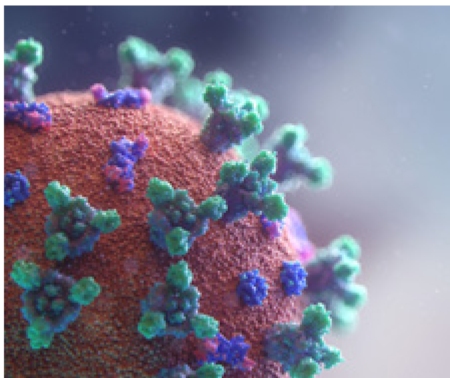
Defense Victory!

Christine Sargent, Littler Mendelson
Defense Victory! Editor

Oregon District Court Weighs in on COVID-19 Tolling Bill, HB 4212

In Milligan v. C.R. Bard, Inc., Case No. 3:22-cv-00448-HZ, the U.S. District Court of Oregon issued its first opinion on the interpretation of HB 4212, which extended the deadline for filing civil actions in response to the COVID-19 pandemic. As of the date of this opinion, the Oregon Court of Appeals has not had an opportunity to consider this issue. Derek Johnson of Johnson Johnson Larson & Schaller and Regan Downing of Moll Law Group represented plaintiff. Diane Lenkowsky and Nancy Erfle of Gordon Rees Scully Mansukhani and Allison Ng and Marcella Ducca of Greenberg Traurig represented defendant.

Defendant filed a motion to dismiss plaintiff's products liability complaint as barred by the statute of ultimate repose because it was filed more than 10 years after the allegedly defective device was implanted. In response, plaintiff claimed that her lawsuit was timely because it was filed within 90 days of the repeal date set forth in HB 4212. Defendant cited to four state court opinions interpreting HB 4212 that concluded that, under Section 7, December 31, 2021 was the ultimate deadline for filing a claim that was tolled by this law.



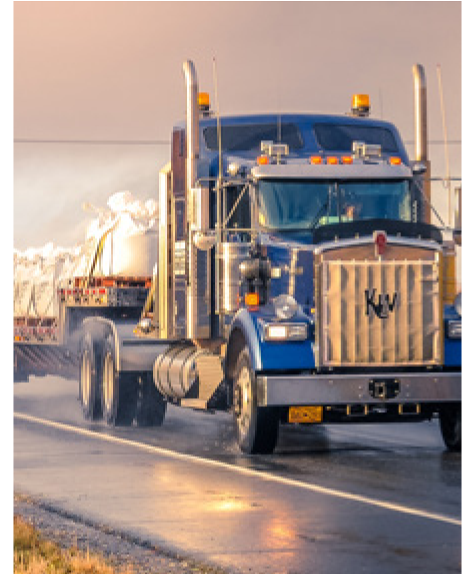
The court agreed with defendant's position. On October 26, 2022, Chief District Court Judge Marco Hernandez issued an opinion granting defendant's motion and dismissing plaintiff's complaint with prejudice.

■ ***Diane Lenkowsky***
Gordon Rees Scully Mansukhani

Lack of Causal Connection Results in Summary Judgment in Workers' Compensation Retaliation Case

On February 8, 2022, Lane County Circuit Court Judge Charles Carlson granted summary judgment dismissing plaintiff's workers' compensation retaliation claim in *Peter Gomez v. Central Oregon Truck Company dba Leavitt's Freight Service, Inc., et al.,* Case No. 20CV37311. Sharon Peters of Lewis Brisbois argued for defendants. Matthew Zekala of Macke Law Offices argued for plaintiff.

Plaintiff worked as a truck driver for defendant Leavitt's Freight Service. He was terminated after he was in an on-duty motor vehicle accident and failed to follow any of his employer's accident protocols. Plaintiff alleged that his termination was pretextual and claimed that his employment was actually terminated



because of a prior on-the-job injury.

Through summary judgment briefing and oral argument, defendants argued that there was no evidence to support plaintiff's claim of retaliation. In fact, there was evidence to the contrary: Plaintiff admitted at his deposition that he failed to follow company procedure after the accident he caused. Plaintiff claimed that the timing of his termination — sixteen days after his on-the-job injury —was evidence of retaliation. Defendants argued that plaintiff's misconduct broke the causal inference between the protective activity and plaintiff's termination.

Defendants' argument was successful. The court agreed with their arguments and dismissed plaintiff's claims in their entirety.

■ ***Jacqueline Houser***
Lewis Brisbois

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DEFENSE VICTORY
continued from previous page

$2.8 Million Medical Malpractice Claim Time-Barred Pursuant to HB 4212

On August 18, 2022, Judge Beau Peterson granted a motion to dismiss plaintiff's medical malpractice claim in *Flesey v. Columbia Memorial Hospital, et al.,* Clatsop County Case No. 22CV10739. Christian Jahn of Hart Wagner argued the case for defendant. Patrick Angel of Angel Law argued for plaintiff.

Plaintiff's claim related to medical treatment that occurred in November 2018. The case was not filed until March 30, 2022. Defendant moved to dismiss the case with prejudice on the grounds that the two-year statute of limitations had run. Defendant also argued that the emergency extension to the statute of limitations for COVID-19 provided by Section 7 of HB 4212 did not apply, because it had been repealed by operation of its sunset provision on December 31, 2021. Plaintiff argued that Section 7 of HB 4212 extended the applicable statute of limitations to a date 90 days after the repeal date, i.e., March 31, 2022. Judge Peterson agreed with defendant that Section 8 of HB 4212 unambiguously repealed Section 7 on the date certain of December 31, 2021, and that claims filed after that date are not entitled to an extension of the statute of limitations under HB 4212.

■ ***Christian Jahn***
Hart Wagner

Taco Bell Trip Results in Denial of Coverage and Summary Judgment

On November 17, 2021, Jamison R. McCune and Vicki M. Smith of Bodyfelt Mount won summary judgment on the duty to defend/indemnify in the United States District Court, District of Oregon in *EMCASCO Ins. Co., et al. v. James Cartwright, et al.,* 3:20-cv-00953. Also on the briefing on behalf of the insurers was Nicholas L. Dazer of Nicholas L. Dazer PC, and Peter J. Whalen of Clyde & Co. US. Representing the underlying claimants and the putative insured were attorneys Ted E. Runstein and Zachary B. Walker of Kell Alterman & Runstein, Michael T. Wise of Michael Wise and Associates, Travis Stephen Eiva of Eiva Law, and Brent W. Barton of Barton & Strever, Magistrate Judge John Acosta presided.

Russ Auto, Incorporated ("RAI") procured commercial auto, umbrella, and excess liability insurance policies. RAI hosted a holiday party, after which several employees went to a bar and continued drinking. On his way home, employee Darby McBride stopped at Taco Bell and was subsequently involved in an auto accident. McBride tendered the claim to RAI's insurers, who denied coverage because he lacked "insured" status and was not "using a covered 'auto' … in [RAI's] business or personal affairs" at the time of the loss.

In an action for declaratory judgment, Judge Acosta agreed with the insurers, found no coverage, and determined that McBride was only an insured to the extent he was "carry[ing] out a purpose of Russ Auto or while in the pursuit of Russ Auto's business or personal affairs. Even if this interpretation encompassed McBride's attendance and departure from the holiday party (which is debatable, given the voluntary nature of the holiday party), it does not encompass McBride's trip to the [bar] or to Taco Bell." An appeal to the Ninth Circuit has been filed.

■ ***Sean O'Connor***
EMC Insurance Group

OADC Amicus Committee Review

Michael J. Estok, Lindsay Hart

The OADC offers an Amicus Committee to assist its members with thorny legal issues on appeal before the Oregon Supreme Court, Court of Appeals, and federal Ninth Circuit. When appropriate, the Amicus Committee will draft and submit an *amicus curiae* brief (Latin for "friend of the court") on behalf of Oregon's defense attorneys.

Such a brief might be appropriate in connection with a Petition for Review or a Brief on the Merits. We may be able to offer a different perspective or point of emphasis than what is being offered by the litigants.

This year, we have some new members on the committee, and so we are eager to get started. I am the current Chair of the committee, and our other members are Jonathan Henderson (Davis Rothwell), Sara Kobak (Schwabe Williams & Wyatt), Jeremy Rice (Parks Bauer), Michael Stone (Brisbee & Stockton), and Hillary Taylor (Keating Jones Hughes).

For more information on our committee, check out our page on the OADC website: *https://www.oadc.com/amicus-committee*

That page has our contact information, a brief bank of prior submissions by our committee, and a questionnaire that can be used when requesting amicus support. In addition to the written materials requested, we ask for a summary of the issues and arguments on appeal or review. Identifying those issues for which you are seeking amicus support is important. Also, please give your thoughts on what an amicus brief can lend to your position, what you believe an appropriate focus would be, and how you believe an amicus appearance might make a difference.

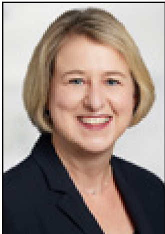
With the trial docket now heating up and many new appellate judges on the bench, the coming years may present many notable civil appeals in Oregon, on issues ranging from damages caps, punitive damages, comparative fault, loss of chance, statutes of limitation, and many more. We would love to assist you on these and other issues. Let's make 2023 a year of some big defense victories.

The Word Smith

Julie Smith
Cosgrave Vergeer Kester

It's About Time: Conveying Chronology More Compellingly

A statement of facts packed full of dates makes for a tedious read. The facts should tell a story. And while a well-written chronology can tell a good story, requiring the reader to absorb a bunch of dates, especially those having no real relationship to the plot, is not the most effective way to draw the reader in. It can also be confusing, giving the reader the impression that the dates should be remembered for future reference.[1]



JULIE A. SMITH

That is not to say that dates should never be used, just that they should be included only when the date really matters. Even then, dates can often be replaced or supplemented with phrases like "within a few months," "more than a month later," or "almost two years after," which provide better context and signal the passage of time more persuasively and interestingly. Consider these illustrations:

THIS	INSTEAD OF	BECAUSE
This case arises out of a car accident that occurred during a snowstorm. A week before the accident, defendant took his car in for an oil change and learned that his front tires were bald and needed to be replaced.	This case arises out of a car accident that occurred during a snowstorm on January 10, 2016. On January 3, 2016, defendant took his car in for an oil change and learned that his front tires were bald and needed to be replaced.	That the accident occurred during a snowstorm is relevant, but the date is not. When the defendant learned this information matters, but not the precise date.
Plaintiff was injured on January 10, 2016, when she slipped and fell while walking through defendant's store. Plaintiff filed this action two years and one day later, on January 11, 2018.	Plaintiff was injured on January 10, 2016, when she slipped and fell while walking through defendant's store. Plaintiff filed this action on January 11, 2018.	The dates are material to a statute-of-limitations defense. But the first narrative puts the date in better context.

A well-crafted chronology can be compelling if dates are used strategically and not as a crutch.

Endnotes

1. *Ross Guberman, Point Made: How to Write Like the Nation's Top Advocates 69 (2d ed 2014).*

Association News

New and Returning Members

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

Ronald Downs
Special Districts Association of Oregon

Claire Whittal
Gillaspy & Rhode

Jon Monson
Cable Huston

Benjamin Veralrud
Lewis Brisbois Bisgaard & Smith

Camille McMahan
Smith Freed Eberhard

Allyson Swecker
Maloney Lauersdorf Reiner

Erica Glaser
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Steven Gassert
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Stoel Rives

Erin Dawson
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