

THE VERDICT™

Artificial Intelligence in the Legal Field

“Recklessness” and Comparative Fault

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Moody Claims



OADC Oregon Association
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Trial Lawyers Defending You in the Courts of Oregon

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2023 OADC Practice Group Leaders

COMMERCIAL	Daniel Lis, Chair Buchalter 1331 NW Lovejoy St., #900 Portland, OR 97209 503.226.8407 dlis@buchalter.com	Diane Lenkowsky, Vice Chair Gordon Rees Scully Mansukhani 1300 SW 5th Ave., #2000 Portland, OR 97201 503.222.1075 dlenkowsky@grsm.com	Molly Honoré, Publications Markowitz Herbold 1455 SW Broadway, #1900 Portland, OR 97201 503.295.3085 mollyhonore@markowitzherbold.com	Chad Colton, Board Liaison Markowitz Herbold 1455 SW Broadway, #1900 Portland, OR 97201 503.295.3085 chadcolton@mhgm.com
CONSTRUCTION	Annalie Faddis, Chair Gillaspy Rhode Faddis & Benn 1220 SW Morrison St., #805 Portland, OR 97205 503.688.5020 afaddis@gillaspyrhode.com	Ian Baldwin, Vice Chair Wood Smith Henning & Berman 12755 SW 69th Ave., #100 Portland, OR 97223 971.256.4017 ibaldwin@wshblaw.com	Claire Whittall, Publications Gillaspy Rhode Faddis & Benn 1220 SW Morrison St., #805 Portland, OR 97205 503.688.5020 cwhittall@gillaspyrhode.com	Pamela Paluga, Board Liaison Gillaspy Rhode Faddis & Benn 4380 S Macadam Ave., #590 Portland, OR 97239 503.595.9510 ppaluga@gillaspyrhode.com
COVERAGE	Chris Parker, Chair Davis Rothwell Earle & Xóchihua 200 SW Market St., #1800 Portland, OR 97201 503.222.4422 cparker@davisrothwell.com	Robert Kirsher, Vice Chair Gordon & Polscer 9020 SW Washington Sq Rd., #560 Tigard, OR 97223 503.242.2922 rkirsher@gordon-polscer.com	Bryce Adams, Publications Bullivant Houser Bailey One SW Columbia St., #800 Portland, OR 97204 503.499.4455 bryce.adams@bullivant.com	Megan Cook, Board Liaison Bullivant Houser One SW Columbia St., #800 Portland, OR 97204 503.228.6351 megan.cook@bullivant.com
EMPLOYMENT	Christine Sargent, Chair Littler Mendelson 1300 SW 5th Avenue, #2050 Portland, OR 97201 503.221.0309 csargent@littler.com	Jaci Houser, Vice Chair Littler Mendelson 1300 SW 5th Avenue, #2050 Portland, OR 97201 503.221.0309 jhouser@littler.com	Rachel Timmins, Publications Ogletree Deakins Nash Smoak & Stewart 222 SW Columbia St., #1500 Portland, OR 97201 503.552.2140 rachel.timmins@ogletree.com	Melissa Healy, Board Liaison Stoel Rives 760 SW 9th Ave., #3000 Portland, OR 97205 503.294.9263 melissa.healy@stoel.com
GENERAL LIABILITY	Mark Monson, Chair Law Offices of Julie D. Elkins 10200 SW Greenburg Rd., #365 Portland, OR 97223 503.892.2085 mark.monson@farmersinsurance.com	Flavio “Alex” Ortiz, Vice Chair Rall & Ortiz 9700 SW Capitol Hwy., #120 Portland, OR 97219 503.880.8444 alex@rallortiz.com	Rachel Wolfard, Publications Hart Wagner 1000 SW Broadway, #2000 Portland, OR 97205 503-709-8884 rgw@hartwagner.com	Tessan Wess, Board Liaison Gordon Rees Scully Mansukhani 1300 SW 5th Ave., #2000 Portland, OR 97201 503.382.3853 twess@grsm.com
GOVERNMENT LIABILITY	Ryan Bailey, Chair Portland Office of City Attorney 1221 SW 4th Ave., #430 Portland, OR 97204 503.823.9968 ryan.bailey@portlandoregon.gov	Chris Gilmore, Vice Chair 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	Andrew Campbell, Publications Heltzel Williams 117 Commercial St NE, #400 Salem, OR 97308 503.585.4422 andrew@heltzel.com	Dan Larsen, Board Liaison Buchalter 805 SW Broadway, #1500 Portland, OR 97205 503.226.8431 dlarsen@buchalter.com
PRODUCT LIABILITY	David Cramer, Chair MB Law Group 117 SW Taylor St., #200 Portland, OR 97204 503.382.4211 dcramer@mbglaw.com	Kyle Rohrer, Vice Chair Cosgrave Vergeer Kester 900 SW Fifth Ave., #2400 Portland, OR 97204 503.219.3815 krohrer@cosgravelaw.com	Tom Purcell, Publications MB Law Group 117 SW Taylor St., #200 Portland, OR 97204 503.382.4211 tpurcell@mbglaw.com	Peter Tuenge, Board Liaison Keating Jones Hughes 200 SW Market St., #900 Portland, OR 97201 503.222.9955 ptuenge@keatingjones.com
PROFESSIONAL LIABILITY	Breanna Thompson, Chair Garrett Hemann Robertson 1011 Commercial St NE Salem, OR 97301 503.581.1501 bthompson@ghrlawyers.com	Melissa Bushnick, Vice Chair Lindsay Hart 1300 SW 5th Ave., #3400 Portland, OR 97201 503.226.7677 mbushnick@lindsayhart.com	Hannah McCausland, Publications Brisbee & Stockton 139 NE Lincoln St. Hillsboro OR 97123 503.648.6677 him@brisbeestockton.com	Heather Bowman, Board Liaison OSB Professional Liability Fund 16037 SW Upper Boones Ferry Rd. Tigard, OR 97281 503.639.6911 heatherb@osbplf.org
TRIAL PRACTICE	Sheila Cieslik, Chair American Family Insurance Co 11850 SW 67th Ave., #160 Portland, OR 97223 503.403.1880 x53619 scieslik@amfam.com	Peder Rigsby, Vice Chair Bullivant Houser 1 SW Columbia St., #800 Portland, OR 97204 503.499.4417 peder.rigsby@bullivant.com	Chris Piekarski, Publications The GLB Attorneys 7455 SE Bridgeport Rd., #235 Tigard, OR 97224 971.213.2532 chrisp@theglb.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

2023 OADC Affinity Group Leaders

DIVERSITY, EQUITY, AND INCLUSION	NEW LAWYERS	PRACTICE MANAGEMENT	WOMEN IN LAW
Mai-Anh Nako, Chair Allstate Insurance Staff Counsel's Office 1000 SW Broadway #1080 Portland, OR 97205 503.553.0363 mnako@allstate.com	Jason Evans, Chair Smith Freed & Eberhard 111 SW Columbia St., #800 Portland, OR 97201 503.227.2424 jevans@smithfreed.com	Michael Jacobs, Chair Hart Wagner 1000 SW Broadway, #2000 Portland, OR 97205 503.222.4499 mgj@hartwagner.com	Amy Saack, Chair Davis Rothwell Earle & Xochihua 200 SW Market St., #1800 503.222.4422 Portland, OR 97201 asaack@davisrothwell.com
Nelly Greenberg, Vice Chair Bullivant Houser Bailey One SW Columbia St., #800 Portland, OR 97204 503.499.4623 nelly.greenberg@bullivant.com	Alejandra Torres, Vice Chair Gilbert Levy Bennett 5400 Meadows Rd., #150 Lake Oswego, OR 97035 971.268.5193 alejandra@theglb.com	Sharlei Hsu, Vice Chair Betts Patterson & Mines PS 111 SW 5th Ave., #3650 Portland, OR 97204 503.961.6331 shsu@bpmlaw.com	Matika Levy, Vice Chair Gilbert Levy Bennett 5400 Meadows Rd., #150 Lake Oswego, OR 97035 971.312.0660 matika@theglb.com
Gabrielle Martinez deCastro, Vice Chair Smith Freed Eberhard 111 SW Columbia St., #800 Portland, OR 97201 503.227.2424 gdecastro@smithfreed.com	Sarah E Jones, Publications Smith Freed & Eberhard 111 SW Columbia St., #800 Portland, OR 97201 503.227.2424 sjones@smithfreed.com	Taylor Lewis, Vice Chair Hart Wagner 1000 SW Broadway, #2000 Portland, OR 97205 503.222.4499 tbl@hartwagner.com	Ashley Shearer, Publications MacMillan Scholz & Marks 900 SW 5th Ave., #1800 Portland, OR 97204 503.224.2165 ashearer@msmllegal.com
A C Estacio-Heilich, Vice Chair Lane Powell 601 SW 2nd Ave., #2100 Portland, OR 97204 503.778.2106 estacioheilich@lanepowell.com	Helaina Chinn, Board Liaison Chinn Smith Winters LLP 4428 Galewood Ct Lake Oswego, OR 97035 503.675.4306 chinn@csw-law.com	Sarah Tuthill-Kveton, Vice Chair Chock Barhoum 121 SW Morrison St., #500 Portland, OR 97204 503.223.3000 sarah@chockbarhoum.com	Heather Bowman, Board Liaison OSB Professional Liability Fund 16037 SW Upper Boones Ferry Rd. Tigard, OR 97281 503.639.6911 heatherb@osbplf.org
Royce Williams, Board Liaison TriMet 1800 SW Harrison Portland, OR 97201 503.962.6467 williaro@trimet.org		Kirsten Curtis, Board Liaison Thenell Law Group 12909 SW 68th Pkwy., #290 Portland, OR 97223 503.372.6450 x111 kirsten@thenelllawgroup.com	



The Verdict™ Editors

EDITOR IN CHIEF

Jeanne Loftis
Bullivant Houser
One SW Columbia St., #800
Portland, OR 97204
503.499.4601
jeanne.loftis@bullivant.com

FEATURE ARTICLES

Megan Uhle
Williams Kastner
1515 SW 5th Ave., #600
Portland OR 97201
503.944.6944
muhle@williamskastner.com

CASE NOTES

Kevin Sasse
Dunn Carney
851 SW 6th Ave., #1500
Portland OR 97204
503.224.6440
ksasse@dunnearney.com

DEFENSE VICTORY!

Christine Sargent
Littler Mendelson
1300 SW 5th Ave., #2050
Portland, OR 97201
503.889.8915
csargent@littler.com

JUDGE BIOS

Tessan Wess
Gordon Rees Scully Mansukhani
1300 SW 5th Ave., #2000
Portland, OR 97201
503.382.3853
twess@grsm.com

THE WORD SMITH

Julie Smith
Cosgrave Vergeer Kester
900 SW 5th Ave., 24th Floor
Portland OR 97209
503.219.3821
jsmith@cosgravelaw.com

EDITORIAL ASSISTANT

Stephanie Wilken
Bullivant Houser
One SW Columbia St., #800
Portland, OR 97204
503.499.4490
stephanie.wilken@bullivant.com

New and Returning Members

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

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President

Keating Jones Hughes
200 SW Market St., #900
Portland, OR 97201
Phone: 503.222.9955
Email: ptuenge@keatingjones.com

HEATHER BOWMAN

President-Elect

OSB Professional Liability Fund
16037 SW Upper Boones Ferry Rd
Tigard, OR 97281
Phone: 503.639.6911
Email: heatherb@osbplf.org

DANIEL LARSEN

Secretary/Treasurer

Buchalter
1331 SW Lovejoy St., #900
Portland, OR 97209
Phone: 503.226.8431
Email: dlarsen@buchalter.com

DIRECTORS

CHAD COLTON

Markowitz Herbold
1455 SW Broadway, #1900
Portland, OR 97201
Phone: 503.295.3085
Email: chadcolton@mhgm.com

HELAINA CHINN

Chinn Smith Winters
4248 Galewood St.
Lake Oswego, OR 97035
Phone: 503.675.4306
Email: chinn@cs-w-law.com

MEGAN COOK

Bullivant Houser
One SW Columbia St., #800
Portland, OR 97204
Phone: 503.499.4402
Email: megan.cook@bullivant.com

KIRSTEN CURTIS

Thenell Law Group
12909 SW 68th Parkway, #290
Portland, OR 97223
Phone: 503.372.6450 x 111
Email: kirsten@thenelllawgroup.com

JOHN EICKELBERG

Law Offices of Julie D. Elkins
10200 SW Greenburg Rd, #365
Portland, OR 97223
Phone: 503.892.2069
Email: john.eickelberg@farmersinsurance.com

MELISSA HEALY

Stoel Rives
760 SW 9th Ave., #3000
Portland, OR 97205
Phone: 503.294.9263
Email: melissa.healy@stoel.com

PAMELA PALUGA

Gillaspy Rhode Faddis & Benn
1220 SW Morrison St., #805
Portland, OR 97205
Phone: 503.595.9513
Email: ppaluga@gillaspyrhode.com

TESSAN WESS

Gordon Rees Scully Mansukhani
1300 SW 5th Ave., #2000
Portland, OR 97201
Phone: 503.382.3853
Email: twess@grsm.com

ROYCE WILLIAMS

TriMet
1800 SW Harrison
Portland, OR 97201
Phone: 503.962.6467
Email: williaro@trimet.org

ADMINISTRATIVE OFFICE

GEOFF HORNING

9600 SW Oak Street, Suite 565
Tigard, OR 97223
503.253.0527 • 503.253.9172 (fax)
800.461.6687 • info@oadc.com

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9600 SW Oak Street, Suite 565, Tigard, OR 97223
503.253.0527 | 800.461.6687 | Fax: 503.253.9172
info@oadc.com | www.oadc.com

Artificial Intelligence – The Time to Prepare Is Now

Peter Tuenge, Keating Jones Hughes



I typed the following prompt into the Chat AI inquiry tab on my iPad: "I am the President of the Oregon Association of Defense Counsel. This is an association of civil defense attorneys. We have a quarterly publication. I need to write a 1,000 word message to our membership. It needs to reference our June convention in Sunriver, our fall seminar in Portland, our efforts to grow our membership, our monthly educational seminars, and the sense of community and professionalism that have long been hallmarks of our group. Mention that there will be a social happy hour after the fall seminar. Please write a message for me."



PETER TUENGE

In 11 seconds, Chat AI wrote this (unedited):

Dear Members,

As we pass the halfway point of the year, I would like to take this opportunity to commend all of you for the dedication and hard work that you have put into making our association a success. We have achieved many significant milestones this year, and I am proud to be part of a group of such talented and passionate attorneys.

As you all know, our June convention in Sunriver was a great success. This year's convention was one of the best yet. It provided a tremendous opportunity to network with fellow members, attend informative seminars, and engage with speakers who are experts in our field. Thank you to those who attended and made this year's convention so memorable.

I am also excited to remind you that our fall seminar in Portland will be taking place soon. The seminar will be focused on current issues and trends in our profession, and we will have a chance to learn from some of the top lawyers and legal minds in the state. Our social happy hour after the fall seminar is an excellent opportunity for us to unwind and connect with our fellow members.

One of our primary goals this year has been to expand our membership, and we have been successful in doing so! With the addition of new members, we can continue to grow and evolve as an association. I encourage each of you to engage with new members and help them feel welcome within our organization.

Finally, it is essential to remember that our community of defense counsel has a longstanding tradition of professionalism and camaraderie. We work together to support one another, and we hold ourselves

to the highest standards of ethics and excellence.

In conclusion, I want to take this opportunity to thank each of you for being part of this esteemed organization. It is through your dedication and hard work that we are able to move forward with our mission. I look forward to seeing you all at our upcoming events.

I then asked Chat AI the following question: "What will the impact of AI be on the practice of law?"

In seven seconds, I received this response (unedited):

AI can quickly and accurately analyze vast amounts of legal data and identify patterns and insights that may be difficult for human lawyers to identify. This can lead to more efficient research and insights for lawyers.

AI can also be used to automate routine tasks such as contract and document drafting, enabling lawyers to focus on more complex legal work. AI can also streamline the contract review and analysis process, leading to faster and more accurate contract review.

AI can even be used to assist in court proceedings, by performing tasks such as predicting case outcomes or analyzing evidence.

Despite the potential benefits of AI, there are real concerns about its impact on employment in the legal profession, and about the need to ensure that AI is used ethically and fairly. AI, as it noted above, has the potential to revolutionize various aspects of the legal profession, such as those it mentioned—legal research, document drafting, contract review and analysis, and even perhaps court proceedings.

Despite these potential benefits, which AI itself touts (just ask it . . .), lawyers and law firms should start thinking now about ways to use AI ethically and fairly to avoid traps lawyers have already fallen into. In one recent example reported by the *New York Times*¹, an experienced lawyer in New York submitted a 10-page brief in opposition to a motion to dismiss. The brief cited several legal opinions and included helpful quotations and citations. The problem, however, was that the lawyer who submitted the brief had used the

artificial intelligence program ChatGPT to do his legal research. Several quotations and case citations, it turns out, had been wholly invented by ChatGPT. The program had generated a framework of a legal argument, but then apparently drew from a mix of cases, facts and citations to invent supportive authorities. When the lawyer specifically asked ChatGPT if the citations were real, the program said they were. The lawyer now faces sanctions for filing a brief with what the judge termed “bogus” citations.²

With that cautionary tale, here are some ways we can begin to identify ways to use AI ethically and fairly (of note, this list was generated in part through a “conversation” I had with Chat AI on the subject):

1. **Transparency:** Lawyers should be transparent in their use of AI technology, including discussing the limitations and any potential biases of the technology with their clients and the court (if AI technology is used in any court filing).

2. **Training and Supervision:** Lawyers should ensure that they and their staff are properly trained in the use of AI technology. Parameters of acceptable use need to be articulated, and any AI use must be subject to appropriate supervision and auditing.

3. **Fairness:** Lawyers should ensure that AI technology is used in a fair manner, taking into account the potential impact on all parties involved. This can be done by monitoring and auditing the results of any AI use to ensure that it is producing fair outcomes.

4. **Informed Consent:** Lawyers should obtain informed consent from their clients before relying on AI technology in any legal matter.

5. **Confidentiality:** Lawyers must ensure that the use of AI technology does not breach their client’s confidentiality or privacy rights.

These are just a few early ideas to consider in your own practice as AI technology advances. AI is already being used in legal matters, and its use almost certainly will grow. By following ethical and fair practices, lawyers may be able to harness AI technology to provide high-quality legal services to their clients, but in doing so they must maintain the integrity of the legal profession.

Endnotes

1. Benjamin Weiser, *Here’s What Happens When Your Lawyer Uses ChatGPT*, N.Y. TIMES, May 27, 2023, <https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html?searchResultPosition=1>.
2. Benjamin Weiser & Nate Schweber, *The ChatGPT Lawyer Explains Himself*, N.Y. TIMES, June 8, 2023, <https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html?searchResultPosition=1>.



The Practical Limitations of Pleading *Moody* Damages in Insurance Disputes

Bryce Adams

Bullivant Houser Bailey

When the Oregon Court of Appeals decided *Moody v. Oregon Community Credit Union*¹ in January 2022, insurance



BRYCE ADAMS

litigators lamented that Oregon had joined the 40-plus other states that allow for bad faith claims against first party insurers. For policyholder attorneys, it was a triumphal moment

that some attorneys predicted would coalesce into the type of aggressively pro-insured bad faith environment that typifies Washington insurance law.

Eighteen months and dozens of so-called “*Moody* claims” later, as we await the Oregon Supreme Court’s ruling on the appellate court’s decision, I offer an observation based solely on my own experience as an insurance defense litigator: *Moody* has amounted to a far weaker vehicle for bad faith claims than policyholder attorneys predicted, for two predominant reasons. First, policyholder attorneys underestimated how cautiously federal courts have reacted to *Moody*’s perceived departure from longstanding case law.² Second, policyholder attorneys have not proven uniformly adept at packaging the personal injury aspects of these new noneconomic damages that *Moody* has (allegedly) made available.

Since other OADC pieces have examined the federal court *Moody* rulings, I will not revisit them here. Rather, this article focuses on the under-examined

second issue. In my experience, *Moody*’s effectiveness has been blunted even in state courts simply because policyholder attorneys often fail to support their “*Moody* claims” for noneconomic damages with the type of objective evidence that underpins credible personal injury claims, such as medical records. Accordingly, *Moody*’s coercive potential has proven limited, and insurance carriers are still settling claims based primarily on quantifiable economic damages, not the vague threat of “bad faith.”

Policyholders Rush to Make *Moody* Stick

The appellate court’s rationale in *Moody* has been dissected at length elsewhere. For present purposes, only the basic outline of *Moody* matters: A widow sued her husband’s life insurer for failing to honor a small policy following his unexpected death, seeking the value of the policy plus emotional distress damages stemming from the insurer’s purported breach of ORS 746.230 et seq., Oregon’s Unfair Claim Settlement Practices Act (“UCSPA”).

Plaintiff based her second claim on the theory that a breach of the UCSPA statute met the essential elements of a negligence *per se* claim. The insurer moved to dismiss based on *Farris v. U.S. Fidelity & Guaranty Insurance Co.*, in which the Oregon Supreme Court had ruled that the UCSPA does not create a private right of action and therefore cannot trigger a negligence *per se* claim.³ The trial court granted the motion to dismiss, and the plaintiff appealed.

Notwithstanding five decades of *Farris*-based precedent, the Court of Appeals sided with the plaintiff, noting that since *Farris*, the Oregon legislature had demonstrated its intention to create private rights of action for other industry-regulating statutes, and the UCSPA’s original purpose is not appreciably different from those schema. The insurer appealed to the Oregon Supreme Court, with oral arguments held in November 2022.

While the Oregon Supreme Court deliberates, other policyholder plaintiffs have not been idle. Virtually every insurance complaint filed since February 2022 has included a negligence *per se* claim alongside the standard breach of contract and breach of implied covenant allegations, reciting some combination of the UCSPA’s 20-plus distinct sub-rules for why an insurer should pay noneconomic damages for committing negligence *per se*. However, as discussed below, alleging such claims has proven far easier than winning them.

Plaintiffs Are Not Shoring up *Moody* Claims with Medical Records

Notwithstanding *Moody*’s divisiveness amongst jurists on the issue of first party bad faith, subsequent courts analyzing the decision have agreed that (to the extent possible) *Moody* should still be harmonized with existing Oregon tort law. Among other things, this means that *Moody*-derived negligence claims must satisfy the “physical impact rule” if they make allegations of noneconomic damages for emotional distress.⁴ In



practice, this means that attorneys now file *Moody* claims for negligence *per se* that contain a paragraph alleging some derivation of: “[a]s a result of defendant’s negligence, plaintiff suffered emotional distress with accompanying physical symptoms.”

Such a pleading may be artful enough to satisfy the physical impact rule, but it has the tandem effect of also placing an insured’s medical history at issue “regarding any matter, not privileged, which is relevant to their claims.”⁵ And in my experience, policyholder attorneys are rarely giving robust responses to basic discovery requests like “produce your complete medical records, including mental health records, for the past five years.” Rather, it is becoming commonplace to see plaintiffs’ attorneys filing discovery responses containing admissions like: “No records exist which are responsive to this request.” Put differently, in making *Moody* claims, policyholder attorneys have frequently teed up potentially embarrassing lines of inquiry for their clients, while also painting themselves into a position where they must admit that no evidence of that claim exists. Worse, this predicament has manifested even before we insurance defense attorneys have been forced to

adopt independent medical examinations and medical record subpoenas as standard tools in our repertoires.

My preliminary explanation for this shortcoming is that policyholder attorneys in Oregon focus on structuring their lawsuits to create fact questions that will defeat summary judgment and leverage ambiguous policy language to favor coverage.⁶ For coverage questions, this approach is often successful. However, actually gathering substantiating evidence for a plaintiff’s purported damages alleged in these artful pleadings sometimes gets relegated to a secondary issue.

Unfortunately for plaintiffs, proof of noneconomic injury is not a secondary issue for insurance carriers, particularly if a defense attorney reports to carrier representatives who have experience with bodily injury claims. For these specialists, an unsupported personal injury claim often has little persuasive power, and therefore does not achieve a core goal of pleading inflated damages through claims like negligence: forcing an insurer to minimize their risk by settling a case early, on a plaintiff’s terms.

Gathering substantiating evidence for a plaintiff’s purported damages alleged in these artful pleadings sometimes gets relegated to a secondary issue.

Conclusion

These observations are not meant to denigrate policyholder attorneys, or to minimize the challenge of *Moody*: The threat of extracontractual damages

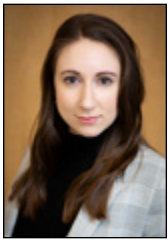
based on an unsettled body of law must be taken seriously. However, I do maintain that policyholder attorneys have been swept up by this moment, to their own detriment, and may be overextending themselves and their clients in an effort to capitalize on these newly available claims. (One cannot imagine that a policyholder who sued their homeowner’s insurer over a claim denial would be enthused about revealing their psychiatric history, let alone submitting to an IME). By appending *Moody* claims to every insurance dispute, policyholder attorneys may be too focused on alleging the technical elements of these new claims, without due regard for the difficulties of actually substantiating the noneconomic damages they allege. Without such evidence, carriers may assign such claims *de minimis* value when balancing whether to settle or litigate, depriving *Moody* of the coercive power that policyholder attorneys have attributed to it. Rather, insurers still largely decide whether to settle a claim much as they did before January 2022: by evaluating the supporting evidence for a plaintiff’s alleged economic damages. Status quo, *ante Moody*.

1. 317 Or App 233, 505 P3d 1047 (2022).
2. See, e.g., *Bryant v. Allstate Indem. Co.*, 605 F Supp 3d 1326 (D Or June 3, 2022); *Runyan v. Foremost Ins. Co.*, Opinion & Order, Case No. 6:21-cv-01341-MC (D Or Oct. 26, 2022); *Triem v. State Farm Fire & Cas. Co.*, Opinion & Order, Case No. 3:21-cv-00710-MO (D Or Feb. 15, 2022); *White v. United Heritage Prop. & Cas. Co.*, 2023 WL 2526137 (D Or Jan. 27, 2023).
3. 284 Or 453, 587 P2d 1015 (1978).
4. See, e.g., *Bryant v. Allstate Indem. Co.*, 605 F Supp 3d 1326 (D Or June 3, 2022).
5. See ORCP 36(B)(1).
6. See, e.g., *Hoffman Const. Co. v. Fred S. James & Co.*, 313 Or 464, 836 P2d 703 (1992).

Jury Instructions: Choosing the Appropriate Causation Standard after *Haas*

Carleigh McMahon
Smith Freed & Eberhard

Causation in a negligence action is a tricky area of law that has long haunted practitioners and law students alike. In the



**CARLEIGH
MCMAHON**

case of *Haas v. Estate of Carter*,¹ the plaintiffs proposed abandoning the but-for causation test altogether in favor of the substantial factor test as a general rule in all cases involving multiple potential causes. The case was important

for both sides, with amicus briefs filed in the Oregon Supreme Court by both OTLA and OADC. The Oregon Supreme Court ultimately rejected the plaintiffs' argument, upholding the defense verdict in the case and reiterating that but-for causation remains the appropriate test in most negligence cases, with only limited exceptions for unusual fact patterns involving multiple sufficient causes or combined causal sets. *Haas* should serve as a reminder for Oregon defense attorneys to pay close attention to the distinctions between causation, foreseeability, and damages in cases involving multiple potential causes; make sure to carefully select and word their requested jury instructions; and preserve appropriate objections to any unfavorable deviations from the standard but-for causation instructions requested by opposing counsel.

Facts of the *Haas* Case

A primary issue at trial in the *Haas* case was whether defendant's driving was a cause-in-fact of the injuries that plaintiffs alleged. Plaintiffs claimed that, as a result

of defendant's negligence, they suffered injuries requiring medical treatment, including surgery. At trial, plaintiffs' medical experts attributed plaintiffs' injuries to the motor vehicle accident, but also testified that plaintiff Roberta Haas's spine was already "a mess" prior to the collision, and that anything, even a sneeze, could have made her symptomatic, and that plaintiff Kevin Haas's alleged neck injuries were not uncommon and frequently occur due to age and degeneration.

Plaintiffs requested two Uniform Civil Jury Instructions regarding the issue of causation: a "but-for" instruction and a "substantial factor" instruction. The trial court rejected the substantial factor instruction stating, in part, that substantial factor instruction only applies "when you have multiple actors potentially at the same time." Ultimately, the trial court delivered a "previous infirm condition" instruction to the jury and chose to deliver only the "but-for" instruction on the issue of causation. The jury returned a verdict in favor of the defendant, and plaintiffs appealed, claiming that the trial court erred when it refused to give the substantial-factor jury instruction, to account for the evidence that there were multiple possible causes of their back and neck problems.

On review, the Supreme Court disagreed with plaintiffs' characterization of the but-for test, noting that most negligence cases include evidence of multiple causal factors and, in the majority of cases, the but-for instruction correctly describes the necessary cause-in-fact relationship.

After examining the element of causation as it relates to underlying conditions, the Supreme Court affirmed the trial court's decision to give only the but-for causation instruction plaintiffs proffered, in conjunction with a previous infirm condition instruction. The Supreme Court found that, while a plaintiff may be entitled to an instruction informing the jury that multiple factors could operate together or separately to cause the plaintiffs' injuries, the mere existence of a pre-existing condition does not mean the substantial factor instruction must be provided.

But-For Causation

Since *Fazzolari* rejected the concept of "proximate cause" in favor of a general foreseeability analysis, the element of causation in Oregon has referred to factual cause only. Factual causation involves consideration only of what acts or omissions in fact caused the harm that occurred, without regard for the wrongfulness of the conduct. The Supreme Court in *Haas* reiterated that the standard but-for causation test can and should be applied as the general rule, in all but certain enumerated circumstances. The but-for causation test asks quite simply "whether the plaintiff's injury would have occurred but for the defendant's negligence."² Stated differently: "If the plaintiff's injury would not have occurred but for the defendant's negligence, then the defendant's negligence is a cause of the injury."³ However, the *Haas* court was careful to clarify that the but-for instruction does not require that a defendant's conduct be the only or even the predominate cause of the plaintiff's

injury. Rather, if the defendant's conduct is a but-for cause of the injury, the causation element is satisfied as to that defendant, regardless of how minimally the defendant's conduct contributed or how many other factual causes may also have contributed. *Haas* also reminds us that both negligent and non-negligent conduct may be but-for causes of the injury.

Substantial Factor Causation

The Oregon Uniform Civil Jury Instruction for substantial factor causation instructs that "[m]any factors may operate either independently or together to cause harm. In such a case, each may be a cause of the harm even though the others by themselves would have been sufficient to cause the same harm. If you find that the defendant's act or omission was a substantial factor in causing the harm to the plaintiff, you may find that the defendant's conduct caused the harm, even though it was not the only cause."⁴ Judge James, of the Court of Appeals, agreed with plaintiffs that the substantial factor test is the "more elegant, accurate, and understandable way to instruct jurors."⁵ The Supreme Court, however, disagreed. Far from accepting plaintiffs' invitation to expand the application of substantial factor causation to all cases involving multiple causal factors, the Supreme Court in *Haas* actually expressed some skepticism (in dicta) as to the utility of the substantial factor instruction even in the few cases in which the but-for instruction fails. The court noted that the substantial factor test was developed primarily for the situation in which the concurrent conduct of two or more causes combine to create an injury, and either one of those causes, operating independently, would have been sufficient to produce the same result.

Liability and Damages

The *Haas* court took care to note that the

question of causation is distinct from questions of liability and allocation of damages, although those issues may be susceptible to confusion in cases, such as *Haas*, involving pre-existing medical conditions. The court was not persuaded by the concerns raised in OTLA's amicus brief that the but-for causation instruction could undermine the "eggshell skull" rule in this context, noting that the "eggshell skull" rule applies in the context of assessing liability for damages and is simply not relevant to causation.

The court also emphasized that attribution of liability among multiple but-for causes is determined by percentage of fault, not causation. Thus, a defendant who played only a small causal role in the injury, but whose conduct was more wrongful than other causal factors, would be apportioned a larger percent of the verdict. *Haas* reminds us that, even where a substantial factor instruction is used, it "should not be worded, understood, or used to shield a defendant from liability because that defendant's causal role is less significant than the role played by another tortfeasor or causative factor."⁶

Requesting the Appropriate Jury Instructions

Interestingly, the plaintiffs in *Haas* had proffered both a substantial factor and a but-for causation instruction. They took the position on appeal that the trial court was required to choose between the two, and did not argue that both instructions could be given, or challenge the clarity of the but-for instruction that was ultimately given (which they themselves proffered). However, the court suggested that plaintiffs could have requested a special but-for causation instruction that provided some of the clarity they sought—including, for instance, an explicit statement that "many factors may operate either independently or together to cause

injury," that "each may be a cause of the injury," or that the jury "may find that the defendant's conduct caused the injury even though it was not the only cause."

In selecting appropriate jury instructions, practitioners must evaluate the specific facts of their case. Litigators must consider evidence of multiple tortfeasors, potential non-negligent causes, and potential pre-existing conditions of the parties, among many other facts, to determine the appropriate instructions to request. And, regardless of whether they ultimately choose to request a but-for or substantial factor instruction, practitioners should also carefully consider whether the pattern jury instructions sufficiently and clearly apprise the jury of all of the applicable law on causation that could benefit their client, or if additional language could be inserted to ensure that jurors are not confused about how the standard should be applied to the specific facts of their case.

Defense counsel would do well not to merely rubber-stamp the standard causation instructions but, rather, carefully consider how the law on causation applies to their case, particularly in cases where there is a dispute as to whether a plaintiff's underlying conditions made them more susceptible to injury or were an independent cause of the plaintiff's injuries. In some cases, carefully crafted causation instructions could mean the difference between two completely distinct jury verdicts.

Endnotes

1. 370 Or 742, 525 P3d 451 (2023).
2. *Id.* at 749.
3. *Id.*
4. UCJI 23.02.
5. 316 Or App at 88.
6. 370 Or at 757.

Miller v. Agripac: From Allegation to Allocation—How the Recent Decision Impacts Oregon’s Comparative Negligence Scheme

Thomas Purcell, David Cramer, and Johnathon Carter
MB Law Group

Since the Oregon legislature abolished joint and several liability in 1995, fault in most civil tort cases has been



THOMAS PURCELL

allocated by an equitable scheme of comparative negligence.¹ In *Miller v. Agripac, Inc.*,² the Oregon Court of Appeals altered that landscape. After *Miller*, if a jury finds a defendant “reckless in its negligence,” that defendant will instead be subject to common-law joint and several liability, and the plaintiff will be immunized from any finding of comparative fault.



DAVID CRAMER

Miller frames recklessness as qualitatively more similar to intentional conduct than negligence, and therefore holds that a “reckless” defendant cannot allocate fault to the plaintiff or other defendants, including settling parties.



JOHNATHON CARTER

Defense counsel should anticipate more plaintiffs seeking to prove “recklessness” in negligence claims (thereby limiting the allocation of fault)—especially when some defendants have deeper pockets than others or when plaintiff’s own conduct is not beyond reproach. Further, *Miller* held that in addition to being unable to allocate fault to others, a reckless party also cannot

be allocated fault itself, as it is removed from the statutory scheme entirely.

The *Miller* opinion leaves a host of unresolved issues going forward. As appellate counsel for the defendant in *Miller* put it, case law related to this new strategy of litigating negligence claims is “all but nonexistent.”³ This article explores some of these new allocation quandaries and notes some basic litigation strategies defense counsel may utilize as they navigate this unfamiliar terrain.

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Background

In *Miller*, plaintiffs sued more than 50 defendants for negligence, strict product liability, and loss of consortium related to decedent Donald Miller’s alleged exposure to asbestos-containing products and subsequent diagnosis of mesothelioma. Kaiser Gypsum (“Kaiser”) was the sole defendant remaining at trial, as all others had either settled or

been dismissed. As to Kaiser, plaintiff alleged that decedent occasionally worked in the vicinity of other workers using an asbestos-containing Kaiser joint compound for two and a half years in the late 1960s, out of a total of 36 years of alleged asbestos exposure.

Shortly before trial, plaintiffs moved to amend their complaint to assert that Kaiser had acted recklessly, and therefore should be held jointly and severally liable for the full amount of plaintiffs’ damages.⁴ The trial court granted the motion to amend, and, at trial, instructed the jury that “Recklessness means an intentional doing or failing to do an act when one knows or has reason to know of facts which would lead a reasonable person to realize that their conduct not only creates unreasonable risk of harm to others but also involves a high degree of probability that substantial harm would result.” The jury ultimately found that Kaiser was “reckless in its negligence,” and the court entered judgment against Kaiser for the full amount of plaintiffs’ damages.⁵

On appeal, Kaiser argued that the court’s instruction on recklessness, as relevant to the defense of comparative fault, was inconsistent with plaintiffs’ claims and contrary to Oregon law.⁶ The Court of Appeals examined Oregon’s statutory scheme of comparative negligence and several-only liability, ORS § 31.600 et seq., to determine if “reckless” conduct fit within the categories of conduct subject to those statutes. In so doing, the court identified four

categories of tortious misconduct “into which the infinite variety of fact situations must fall”: negligence, gross negligence, wantonness/recklessness, and intentional assault and battery.⁷ The court then conducted a historical analysis of those categories, focusing on the terms “wanton” versus “reckless.”

The court principally relied on *Shin v. Sunriver Preparatory School* and *State v. Gutierrez-Medina*. *Shin* concerned the allocation of fault between a negligent defendant and an intentional tortfeasor. In that case, the Court of Appeals held that the legislature intended the comparative negligence statutes (including several-only liability), “to

extend comparative fault to tortious conduct to which contributory negligence was a valid defense at common law.”⁸ Because contributory negligence was not available to intentional tortfeasors as a defense at common law, the *Shin* court held that those statutes do not permit apportionment of fault between negligent and intentional tortfeasors.⁹ Thus, the negligent defendant in *Shin*, Sunriver Preparatory School, could not apportion fault to the perpetrator who had intentionally abused the plaintiff student.

The *Miller* court also relied on *Gutierrez*, a criminal restitution case. In *Gutierrez*, the Oregon Supreme Court noted that

the affirmative defense of contributory negligence was not available at common law to defendants “who acted with a culpability greater than what the common law considered to be ‘gross negligence’—conduct that was either ‘wanton’ or intentional.”¹⁰ The court then held that criminally “reckless” conduct, to which the defendant had pled guilty, is equivalent to “wanton” conduct, as they both fall under the same standard. Notably, the *Miller* court’s instruction on “recklessness” was pulled from *Gutierrez*.

Relying on the holdings of *Shin* and *Gutierrez*, the Court of Appeals in *Miller* held that the jury instruction on “reckless” conduct was proper, and that such reckless conduct was not subject to the comparative negligence scheme, such that Kaiser was properly held jointly and severally liable for all of plaintiffs’ damages. Further, the court held that—because “reckless” defendants “are simply not in the comparison group for allocation of fault—they not only cannot rely on the defense of comparative fault themselves, but no one can look to them for apportionment under ORS 31.605.”¹¹

Impact

Under *Miller*, common-law joint and several liability continues to apply to those tortfeasors that a jury finds acted recklessly.¹² The “practical ramifications” of this holding, as the *Miller* court put it, have the potential to be burdensome on defendants in cases featuring multiple tortfeasors—and not just those found to be reckless.¹³

Consider a common fact pattern in product liability cases: Plaintiff is injured in an automobile accident when he is struck by a drunk driver who crosses into his lane in traffic. In addition to suing the drunk driver, plaintiff sues the manufacturer of his own vehicle, alleging that the vehicle’s roof collapsed in the



crash, rendering him quadriplegic. Before *Miller*, the vehicle manufacturer would likely seek to allocate fault to the drunk driver of the other vehicle as the primary cause of the accident, and thereby reduce the manufacturer's share of liability. Now, under *Miller*, if the jury determines that the drunk driver was "reckless" in his conduct, he cannot be apportioned fault under ORS 31.605. Although the plaintiff could seek to recover from the drunk driver (who is jointly and severally liable), it is likely that the driver will not have sufficient assets to pay for plaintiff's damages, leaving the manufacturer on the hook and with no way to reduce its share of liability. Essentially, the manufacturer is unable to allocate fault to the more culpable party because of how culpable that party is.

One must also consider how the lack of apportionment under *Miller* might affect contribution. ORS 31.800 provides for a right of contribution among joint tortfeasors, but if a "reckless" tortfeasor is removed from the pool of common liability, then how could one calculate "proportional shares" for contribution purposes? Multiple verdict forms? Multiple rounds of deliberation? A separate contribution action? Or, will contribution even be available under these circumstances if *res judicata* applies? Although the answer is unclear, the question highlights *Miller*'s most immediate impact: uncertainty as to how courts will apply it practically.

Conclusion and Recommendations

One can imagine how a creative plaintiff's counsel might plead and prosecute a case to her advantage under the new regime. Despite the relative uncertainty of the post-*Miller* landscape, the defense bar should expect (especially in cases where a plaintiff has settled with all but one party) for plaintiff's counsel to seek to

prove that the remaining defendant acted recklessly to avoid apportionment of fault to the settled parties. Alternatively, plaintiff's counsel could allege that one defendant amongst a group was reckless—either the defendant with the deepest pockets (to prevent that party from obtaining comparative fault), or the defendant with no assets (to prevent unrecoverable allocation of fault to that party). Where does this leave defense counsel?

Defense counsel should diligently insist that plaintiffs define precisely what they mean when they allege "recklessness."

First, defense counsel must remember that the issue is one of statutory interpretation, and it is an issue that the Oregon Supreme Court has yet to substantively consider.¹⁴ Therefore, defense counsel should continue to argue that the definition for "reckless" utilized by *Gutierrez* came in a criminal restitution case, where recklessness required a *mens rea* qualitatively similar to intentional conduct. Making the distinction between the criminal and civil definitions of recklessness can help courts parse this issue.

Next, defense counsel should diligently insist that plaintiffs define precisely what they mean when they allege "recklessness." This can be done early in the case, through ORCP 21 motions, to ensure the parties and the court are clear on what must be proved. Defendants, too, would do well to be exacting in their own use of such terms. And, consistent with the first point, defendants should

focus their arguments not just on proper definitions, but the quality of the conduct at issue. Rather than simply explaining how reckless conduct has been historically defined, attempt to place the conduct on the spectrum of negligent conduct based on kind.¹⁵ The defense should attempt to divorce a tortfeasor's negligent conduct from the "reckless" standard used in *Miller* by arguing that, regardless of the label applied to it, the conduct lacks the type or quality of mental state that befits traditional "wanton" or "intentional" conduct as contemplated by the legislature.

Finally, defense counsel should clearly present their arguments to ensure they are preserved for appeal. As noted by the Supreme Court in *Gutierrez*, "[t]he task of understanding where particular conduct falls in relation to the line between 'gross negligence' and 'wanton' misconduct is one with which this court has repeatedly struggled."¹⁶ Arguments that state plainly why a "reckless" tortfeasor should not be removed from Oregon's comparative negligence scheme will assist courts in understanding this nuanced issue. Preserving those arguments for appeal increases the likelihood that the Supreme Court will take this issue up for review and, hopefully, clarify Oregon's comparative negligence scheme as it relates to allegations of "reckless" conduct in civil cases.

Endnotes

1. ORS §§ 31.600–31.610 (renumbered 2003).
2. 322 Or App 202 (2022).
3. Petitioner's Petition for Review at 23, *Miller v. Agripac, Inc.*, 322 Or App 202 (2022) (No. A174355). Aaron Landau was appellate counsel in *Miller* and he authored Kaiser's Petition for Review. He generously took time to discuss the case and the issues with the authors.
4. Plaintiffs advanced two theories in

support of joint and several liability. They argued that (1) the claims “arose” before the abolition of joint and several liability; and (2) “recklessness” removes a party from allocation under the comparative negligence statute.

5. 322 Or App at 306–08.

6. Plaintiffs’ amended complaint alleged “wanton” and “reckless” conduct by Kaiser, stating that: “Defendants, any of them, engaged in the alleged conduct wanton and recklessly in that the Defendants’ actions and omissions presented an unreasonable and highly probable risk of substantial bodily harm and Defendants consciously disregarded said risk or reasonably should have been aware of said risk” (the allegation states Oregon’s definition of “wanton” conduct). Plaintiffs then moved to drop the allegation of “wanton,” because Kaiser’s insurance proceeds did not

cover “wanton” conduct, and proceeded only with recklessness. The jury instructions, however, retained the same definition of “wanton.” The argument over proper terminology followed.

7. *Id.* at 217 (quoting *Cook v. Kinzua Pine Mills Co.*, 207 Or 34, 58–59 (1956)).

8. *Shin v. Sunriver Preparatory Sch., Inc.*, 199 Or App 352, 379, rev. den., 399 Or 406 (2005).

9. For context, *Shin* involved two claims: (1) that the defendant had a special relationship with the plaintiff; and (2) that the defendant was negligent in failing to protect plaintiff from the exact intentional tort committed by the third-party defendant.

10. *State v. Gutierrez-Medina*, 365 Or 79, 84 (2019).

11. 322 Or App at 224.

12. *Id.* at 225.

13. *Id.* at n.4 (noting that “If the plaintiff was negligent, the comparison group being smaller could result in the plaintiff having a higher percentage of fault to the smaller group”).

14. The Oregon Supreme Court declined to grant Kaiser’s Petition for Review. Given the procedural complexities involved in *Miller*, it may be that the Supreme Court will take the issue up for review when the question is presented more squarely.

15. The spectrum of negligent conduct: negligence; gross negligence; wanton (under *Miller*, include reckless here); and intentional. The latter two categories are not to be included in the allocation pool under ORS 31.600.

16. 365 Or 79 at 88.



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Ready or Not, AI is Coming for Your Practice

Mackenzie Schmitt
Brisbee & Stockton

Recently a New York attorney, who had been practicing for more than 30 years, made headlines for submitting a 10-page brief that was entirely authored by ChatGPT. The brief, a response to a motion to dismiss, was riddled with fake citations to non-existent cases. The United States District Court judge presiding over the case imposed a \$5,000 sanction on the lawyers who submitted the brief, finding that they acted in bad faith, engaged in “acts of conscious avoidance,” and made “false and misleading statements to the court.”¹ However, the judge also noted that “there is nothing inherently improper about using a reliable artificial intelligence tool for assistance,” as long as attorneys comply with their ethical obligations to ensure the accuracy of their filings.

ChatGPT was launched in November 2022 by OpenAI² and has since taken the world by storm. ChatGPT is a free, publicly available artificial intelligence program that “interacts in a conversational way.”³ According to the company’s website, this “dialogue format makes it possible for ChatGPT to answer follow up questions, admit its mistakes, challenge incorrect premises, and reject inappropriate requests.”⁴ The ChatGPT “chatbot” is simple to use, operating much like the relic AOL Instant Messenger, with the user typing requests in natural language and ChatGPT responding in kind. A user can ask ChatGPT to write a poem or an

essay, answer questions on Shakespeare, and even solve complex math problems. It learns from user input and therefore, as ChatGPT warns (and those New York attorneys learned the hard way), it can “produce inaccurate information.”⁵

Despite this potential for generating false information, ChatGPT has already infiltrated many programs catering to the legal industry. Notable legal programs such as CaseText, Thompson Reuters,

LexisNexis, and Rocketmatter have integrated artificial intelligence into their programs or have AI programs launching in the near future. Moreover, new, targeted artificial intelligence software, such as Harvey AI, is being developed to cater specifically to the legal industry. These programs promise to make lawyers more efficient by becoming the platform their workflow is built on, and offer to perform a variety of services ranging from document



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review, legal research memos, deposition preparation, and contract analysis in a matter of seconds, streamlining an attorney's workflow and cutting down on clients' bills. Allegedly, they are not designed to replace attorneys, but instead allow attorneys to focus on giving advice, using their judgment, and strategizing.⁶

However, these programs are not without drawbacks. In addition to the risk of inaccurate or false information, artificial intelligence programs may also implicate a bevy of other issues involving privacy, client confidentiality, and privilege, especially today as many of these programs are still in beta stage and rely on cloud computing. We will likely witness the promulgation of new rules for professional conduct and advisory opinions from the various state bars in the coming years as they attempt to address the numerous potential ethical concerns surrounding the use of this new technology in the legal field. In the meantime, some judges are already creating rules governing the use of AI in their courtrooms.⁷

While some attorneys are embracing artificial intelligence with open arms (search "Twitter lawyers and AI" for a deluge of examples), many are not. It should come as no surprise that many firms in the Portland area have issued memorandums to their attorneys and staff implementing new rules prohibiting inputting client information into any artificial intelligence program. While caution may be the better part of wisdom while these artificial intelligence programs are in their beta stage, AI programs are rapidly advancing and will no doubt develop solutions to address these concerns in the near future.

In any event, Oregon legal practitioners cannot expect to escape the future impact of artificial intelligence just by choosing not to incorporate it into their

own law practice. Many of our clients' industries are in for the same awakening that the legal profession must reckon with. For example, already there are continuing education courses offered for medical practitioners on how artificial intelligence can revolutionize their practice.⁸ These courses explore the utility of AI for all aspects of their practice, from patient intake and communication to billing patients and their insurance providers. Like the legal profession, these industries will encounter difficult issues regarding privacy and security, such as compliance with HIPAA regulations.

Whether you are ready or not, the future is beckoning.

Legal practitioners in these fields can prepare to help their clients navigate these coming obstacles by staying on top of the benefits and limitations of artificial intelligence through research, continuing education courses, or industry conferences offering sessions addressing AI. Because whether or not your firm chooses to adapt and incorporate artificial intelligence into its own practice, many of your clients will bring these challenges straight to your doorstep, and they will be looking to you for the answers.

Whether you are ready or not, the future is beckoning. Artificial intelligence is becoming more embedded in the technology used by people and industries the world over, and the legal industry is no exception. Even if ethical rules or conservative law firm policies may constrain the speed with which artificial intelligence technology is adopted within the legal profession itself, many legal professionals will still find themselves tackling the issues this technology creates on behalf of their clients sooner

rather than later. Oregon defense practitioners should collectively welcome the inevitable advancement of this technology with a glad hand and a critical eye for our clients, and our law practices will be the better for it.

Endnotes

1. Opinion and Order on Sanctions, *Mata v. Avianca, Inc.*, No. 22-cv-1461 (S.D.N.Y. June 22, 2023).
2. "OpenAI is a private research laboratory that aims to develop and direct artificial intelligence (AI) in ways that benefit humanity as a whole. The company was founded by Elon Musk, Sam Altman and others in 2015 and is headquartered in San Francisco. [...] The stated intent of the company—to work toward safe artificial general intelligence (AGI) for the benefit of humanity—is reflected in its objective to freely collaborate with other research organizations and individuals. Research and patents made by the company are intended to remain open to the public except in cases where they could negatively affect safety." Cameron Hashemi-Pour, *OpenAI, TechTarget Enterprise AI* (2023), <https://www.techtarget.com/searchenterpriseai/definition/OpenAI> (last visited May 29, 2023).
3. *Introducing ChatGPT*, OpenAI, <https://openai.com/blog/chatgpt> (last visited July 17, 2023).
4. *Id.*
5. *Id.*
6. See, e.g., Colleen Williams, *Introducing Harvey AI: Revolutionizing the Legal Field with Artificial Intelligence*, Martindale Avvo (May 25, 2023), <https://www.martindale-avvo.com/blog/harvey-ai-artificial-intelligence> (last visited July 17, 2023).
7. Megan Cerullo, *Texas Judge Bans Filings Solely Created by AI After ChatGPT made up cases*, <https://www.cbsnews.com/news/texas-judge-bans-chatgpt-court-filing/> (last visited July 26, 2023).
8. *AI in Family Medicine: Transforming Your Practice*, AAFP Foundation (May 26, 2023) <https://www.aafp.org/cme/all/practice-management/ai-in-family-medicine-transforming-your-practice.html>.

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Recent Case Notes

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LITIGATION

Denial of For-Cause Challenge Upheld Where Biased Juror Was Sufficiently Rehabilitated During Voir Dire

In *Hartt v. City of Keizer*, 324 Or App 515, 526 P3d 1224 (Mar 8, 2023), the Oregon Court of Appeals held that the trial court did not abuse its discretion by rejecting a for-cause challenge to a juror where the juror was sufficiently rehabilitated that the trial court had concluded that she could be fair and impartial in considering a claim.

Plaintiff brought a negligence action against the cities of Salem and Keizer, Oregon, seeking to recover damages for personal injuries allegedly sustained as the result of a bite by a police dog during plaintiff's arrest. During *voir dire*, a juror expressed bias against the magnitude of plaintiff's claimed damages. Following questioning by the trial court, plaintiff's counsel, and defendant's counsel into the source and nature of the juror's expressed bias against a large jury verdict based on the facts as she understood them, the juror agreed that she could fairly award

damages if supported by the evidence that was ultimately introduced. Plaintiff made a for-cause challenge, which the trial court rejected. The juror was seated and was then selected as jury foreperson. After trial, the jury returned a defense verdict.

On appeal, plaintiff argued that the trial court abused its discretion by rejecting his for-cause challenge to the biased juror. The Court of Appeals observed that "[a]ctual bias is a question of fact to be determined by the court from all of the circumstances, including the prospective juror's demeanor, apparent intelligence, and candor during *voir dire*." 324 Or App at 523. Accordingly, the Court of Appeals held that where a juror has initially expressed bias during *voir dire*, it is possible to be rehabilitated through questioning by the court and attorneys such that the court can determine that the juror is capable of viewing the evidence without the expressed bias. However, where an expressed bias relates to a specific opinion, rehabilitation must sufficiently address that opinion.

Because the trial court had asked targeted questions specifically directed to the source of the juror's bias, the juror's responses provided the trial court sufficient evidence from which it could determine that the juror could be fair and impartial in considering plaintiff's claim. Judgment was affirmed in favor of defendants.

■ **Submitted by Ashley Shearer**
MacMillan Scholz & Marks



UIM COVERAGE

UIM Policy May Not Exclude a Motorcycle from Newly Acquired Vehicle Coverage

In *Cantu v. Progressive Classic Insurance Company*, 325 Or App 184, 528 P3d 1187 (Apr 5, 2023), the Oregon Court of Appeals held that a policyholder could recover underinsured motorist (UIM) benefits for an accident while riding a newly acquired motorcycle, even though the policy defined "auto" and "additional auto" to exclude vehicles with fewer than four wheels.

Plaintiff purchased a motorcycle eight days before being seriously injured in an accident when another driver turned left in front of plaintiff. Because plaintiff sought damages in excess of the other driver's insurance coverage, plaintiff claimed benefits under his own policy based on the motorcycle being a newly acquired vehicle. The policy provided coverage for newly acquired vehicles for up to thirty days, but excluded from its definition of "auto" those vehicles with less than four wheels. Accordingly, the insurer denied coverage because motorcycles are not covered "autos."

The Court of Appeals began with the observation that minimum UM coverage is prescribed by statute. Accordingly, the parties' dispute turned on a matter of statutory construction. Two statutes were critical to the court's analysis. First, ORS 742.504(2)(d)(A) provides, in part, that an "[i]nsured vehicle" means "[t]he



vehicle described in the policy or a newly acquired or substitute vehicle, as each of those terms is defined in the public liability coverage of the policy, insured under the public liability provisions of the policy[.]” Second, ORS 742.504(2)(m) provides, “‘Vehicle’ means every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, but does not include devices moved by human power or used exclusively upon stationary rails or tracks.”

The insurer argued that ORS 742.504(2)(d)(A) does not incorporate the definition of “vehicle” in ORS 742.504(2)(m), and instead leaves it to the parties to contractually describe the vehicles covered by the policy and define what constitutes “a newly acquired or substitute vehicle.” The Court of Appeals rejected this argument: “The notion that the parties are free to decide which vehicles are covered, or whether they are ‘newly acquired’ or ‘substitute’ does not compel the conclusion that it is left to the parties to decide whether or not a transportation device is a vehicle, however.” 325 Or App at 189.

The Court therefore held that the policy’s limitation of “auto” to vehicles having “at least four wheels” did not apply to the newly acquired vehicle provision for purposes of UIM coverage because it provided less favorable coverage to plaintiff than required by law.

■ **Submitted by Heather Bowman**
OSB Professional Liability Fund

QUALIFIED IMMUNITY

No Clearly Established Law Governs Excessive Use of Force by Deploying Non-Lethal Stinger Rounds in Response to Unlawful Protest

In *McCrae v. City of Salem*, et al., F Supp 3d, 2023 WL 2447438 (D Or Mar 10, 2023) (appeal filed), the District of Oregon concluded that, although the jury found that defendant police officer violated plaintiff’s Fourth Amendment rights against excessive force, the officer was entitled to qualified immunity because there was no clearly established law governing the use of non-lethal force in the circumstances of the case.

This case arose from police involvement in dispersing protest activity in May 2020 that had become unlawful and threatened critical infrastructure in the City of Salem. Plaintiff alleged she was hit in the eye by a piece of a crowd-control munition referred to as a stinger round, which deploys eighteen rubber balls in an indiscriminate manner. Stinger rounds are designed to disperse a crowd by causing discomfort to the lower extremities of a crowd. They are not meant to be used to target specific individuals.

The case proceeded to trial against the officer on First Amendment, Fourth Amendment, and battery claims. The jury concluded that the officer violated plaintiff’s Fourth Amendment rights, but otherwise found in favor of the officer. The jury also made special findings that the officer did in fact shoot plaintiff in the eye and chest, but that the officer did not target plaintiff. The jury awarded economic and non-economic damages that totaled slightly more than \$1 million.

Prior to trial, the officer had asserted qualified immunity, which the court had initially denied. Although qualified immunity is often used as an immunity from suit, and is a matter of law for the court, it can be decided after trial if disputed findings of fact are necessary for the court’s analysis. After the jury’s verdict, the officer reasserted his qualified immunity.

Qualified immunity protects officers from civil liability even if they have violated a constitutional right of a plaintiff, so long as the right was not clearly established. Although there are various considerations in determining whether a right is clearly established, the court observed that qualified immunity “‘protects all but the plainly incompetent or those who knowingly violate the law.’” 2023 WL 2447438, at *5 (quoting *Mullenix v. Luna*, 577 US 7, 12 (2015)).

The court determined that the officer was entitled to qualified immunity based on: (1) a public safety interest where the protestors were marching back to bridges that would have cut off ingress and egress between West and East Salem; (2) dispersal orders were issued for several minutes; (3) the crowd was becoming increasingly hostile; (4) the stinger round is designed for crowd control and is designed to be non-lethal; (5) the officer did not target plaintiff; and (6) a protestor in close proximity to plaintiff had thrown a gas canister back at officers. Based on these factors, no cases cited by plaintiff “clearly established” that the officer’s conduct had violated plaintiff’s Fourth Amendment rights. This case is now on appeal with the opening brief due August 28, 2023.

■ **Submitted by Andrew D. Campbell**
Hetzel Williams

LANDLORD TENANT

One-Year Statute of Limitations in Oregon Residential Landlord Tenant Act Does Not Incorporate Discovery Rule

In *Hathaway v. B&J Property Investments, Inc.*, 325 Or App 648, 531 P3d 152 (May 3, 2023), the Oregon Court of Appeals held that ORS 12.125, which imposes a one-year statute of limitations on claims alleged under ORS Chapter 90, the Oregon Residential Landlord Tenant Act (“ORLTA”), does not incorporate a discovery rule.

ORLTA regulates landlord-tenant relations in Oregon. Among other things, it permits tenants to bring causes of actions for habitability violations, including claims for ineffective weatherproofing, mold, and failure to maintain stairs, rails, and decks. See ORS 90.320(1)(a)-(k). It also permits the court to award attorney fees at trial. See ORS 90.255. However, it has a short statute of limitations: Pursuant to ORS 12.125, “[a]n action arising under a rental agreement or ORS chapter 90 shall be commenced within one year.”

Plaintiffs, who were at various times recreational vehicle (“RV”) park tenants, asserted class action claims against the owners and managers of the RV park. Plaintiffs alleged that defendants engaged in, among other things, a series of improper billing practices. Defendants argued that plaintiffs’ claims were barred by the one-year statute of limitations in ORS 12.125. The trial court concluded that ORS 12.010—which provides that statutes of limitations in ORS Chapter 12 apply “after the cause of action shall have accrued,” and which prior appellate case law has held implies a discovery rule—imputes a discovery rule within ORS 12.125. The trial court accordingly rejected defendants’ arguments and



allowed the matter to proceed, with plaintiffs eventually being awarded damages and attorney fees as a result of defendants’ violations of ORLTA.

On appeal, defendants argued the trial court had erred in applying a discovery rule to plaintiffs’ ORLTA claims. The Oregon Court of Appeals initially observed that, “[i]n the absence of a discovery rule, a limitations period begins to run when every fact necessary for the plaintiff to prove the elements of their claim has occurred and the plaintiff has a right to sue.” 325 Or App at 662. In other words, the one-year statute of limitations would begin to run when the relevant billing practices occurred, unless there is a discovery rule.

The text of ORS 12.125 does not expressly incorporate a discovery rule. Moreover, although ORS 12.125 is codified in ORS Chapter 12, it was placed there by the Office of Legislative Counsel—not the legislature. Accordingly, its placement in ORS Chapter 12 does not, alone, impute a discovery rule. Finally, there was nothing in the legislative history that suggested the legislature intended to incorporate

a discovery rule. Unlike prior laws, the legislature did not affirmatively place the one-year statute of limitations provision in ORS Chapter 12. Accordingly, the Court of Appeals held that ORS 12.125 is not subject to a discovery rule.

■ **Submitted by Claire Whittal**
Gillaspy Rhode Faddis & Benn

CONSTRUCTION

No Quantum Meruit Claim for Work in Excess of Stated Scope of Contract

In *Kizer Excavating Co. v. Stout Building Contractors, LLC*, 324 Or App 211, 525 P3d 883 (Feb 15, 2023), the Oregon Court of Appeals clarified that work performed outside the stated scope of a construction contract does not support a claim for *quantum meruit*.

Plaintiff was hired as an excavation contractor by defendant general contractor to remove fill material in connection with construction of a Jiffy Lube service station in Dallas, Oregon. In completing the work, plaintiff excavated

3,290 cubic yards of fill, a significant increase over plaintiff's estimate. At least part of the increase was due to a clerical error by plaintiff in his proposal, which had stated that plaintiff would excavate 1,500 cubic yards of dirt rather than 500 cubic yards. Plaintiff had submitted a change order that the general contractor rejected as being too late under the contract's terms.

Plaintiff asserted claims for breach of contract and *quantum meruit*. As to *quantum meruit*, plaintiff claimed that the unexpected overrun was work performed outside of the contract (especially after rejection of the change order), and that not paying for that work constituted unjust enrichment. The trial court agreed with plaintiff and awarded *quantum meruit* damages.

The Oregon Court of Appeals reversed, because a claim of *quantum meruit* is not available when the work supporting such claim is within the subject matter of the contract, even if such work might be unexpected, additional, or different. "If a dispute is governed by an express contract, no contract will be implied either in fact or in law, and the terms of the express contract control." 324 Or App at 218.

Although plaintiff argued that the general contractor's rejection of the proposed change order made the extra excavation work "extracontractual," the parties had



agreed at trial and on appeal that "the excavation work for which plaintiff sought compensation in its *quantum meruit* claim was within the scope of the parties' subcontract." *Id.* at 219. Moreover, plaintiff pointed to no "factual or legal ground on which to conclude that the fact that defendant rejected the change order relating to the additional excavation brought the work itself outside the scope of the subcontract." *Id.* Accordingly, plaintiff's remedy for payment was found only in the subcontract, and the trial court should have dismissed the *quantum meruit* claim.

■ **Submitted by D. Gary Christensen**
Miller Nash

DISCOVERY PRACTICE TIP

Old Authorities Still Relevant for Requiring Parties to Appear In-Person for Depositions

In *Collins v. Jackson County*, No. Civ. 02-3054-CO, 2004 WL 1228321 (D Or May 28, 2004), report and recommendation adopted, 2004 WL 1616639 (July 16, 2004), the district court sanctioned plaintiffs for failing to appear for their depositions in person.

Defendants noticed two plaintiffs' depositions to take place on January 20, 2004 in Medford, Oregon. On January 19, 2004, defendants' counsel traveled from Portland, Oregon to Medford to attend the deposition. After arrival, plaintiffs' counsel called defendants' office to inform counsel that plaintiffs Robert and Lillian Collins would not be appearing for their depositions. Plaintiffs' counsel explained that he had not had any contact with Robert Collins and offered to dismiss him, and further indicated that Lillian Collins could only be available by



telephone because she lived in Florida.

Defendants sought sanctions against plaintiffs for failure to appear for their depositions, including dismissal of the case and reasonable attorneys' fees and costs. Plaintiffs moved for a protective order allowing the deposition of Lillian Collins by telephone or, alternatively, by live video conferencing. Defendants argued that plaintiffs' explanations for not appearing are not legally viable reasons to negate their duty to appear and that their failure to appear could be characterized as willful. Plaintiffs responded that their inability to appear was not willful and that defendants violated FRCP 26(d) by seeking sanctions without first making a good-faith effort to confer.

The court dismissed Robert Collins from the lawsuit. As to Lillian Collins, the court concluded that defendants had not demonstrated that her failure to appear prejudiced their inability to go to trial, and therefore refused to dismiss her. However, the court denied Lillian Collins' motion for protective order; ordered her deposition to take place in Portland within 45 days of the order; and indicated that if she failed or refused to attend the deposition, the court would recommend her complaint be dismissed with prejudice. The court also granted defendants' request for attorneys' fees and costs.

■ **Submitted by Rachel Timmins**
Ogletree Deakins Nash Smoak & Stewart

Legislative Update

Maureen McGee, Tonkon Torp
OADC Lobbyist

The 2023 Oregon Legislative Session adjourned Sine Die on June 25, 2023, and may go down as one of the most dramatic in state history, with political dynamics



MAUREEN MCGEE

proving yet again to be a significant barrier to business. For this issue of *The Verdict™*, we summarize the highlights of the recently completed session and the outcome of several high-priority measures for OADC.

Democrats once again held strong majorities going into 2023, holding a 35-25 edge in the House and a 17-13 advantage in the Senate. Of the 90 total members of the Legislature, 29 were either brand new or new to their current position, and the Senate elected a new president for the first time in two decades (Rob Wagner, D-Lake Oswego). His counterpart in the House, Dan Rayfield (D-Corvallis), held the big gavel for his first long session in that role after filling the void made by former Speaker Kotek's successful run for governor.

An opening commitment to bipartisanship led to early wins for the new Governor Kotek, with Democrats and Republicans in both chambers collaborating to quickly pass priority legislation on affordable housing, homelessness, and semiconductor manufacturing incentives. With April legislative deadlines looming, however, the emergence of partisan and controversial bills caused camaraderie to crack. Debate on bills addressing gender-affirming care and gun control ultimately

spurred a walkout by nine Senate Republicans and a conservative-leaning Independent.

Oregon is one of only four states that require two-thirds of the Representatives or Senators to be present to conduct business, and minority lawmakers often strategically use denial of quorum to leverage compromise. While Democrats had hoped that a recently enacted ballot measure, Measure 113, would have limited any walkouts to less than 10 days, conservative lawmakers were undeterred by the risk of disqualification. The historically prolonged walkout ground the Senate to a halt for over six weeks—the longest in Oregon history.

Only ten days before the Constitutional adjournment date, several Senate Republicans returned to the floor after netting changes to the abortion and gun bills. While both sides claimed victory as the session resumed, the waning moments were not without surprises as three House-passed measures failed to receive Senate votes, including HB 3242 regarding insurance bad faith.

With the 2023 session in the rearview mirror, a major outstanding question is whether Senate Republicans who participated in the walkout will be able to file for reelection. Under the text of Measure 113, a lawmaker who accrues 10 or more unexcused absences may not hold office “for the term following the election after the member’s current term is completed.” Secretary of State Griffin-Valade says that regardless of any ambiguities in that text, the voter’s intent was to immediately block lawmakers who walked out from running

again and has issued administrative rules providing as such. Republican lawmakers disagree. A lawsuit recently filed by several affected lawmakers against Secretary Griffin-Valade in the Court of Appeals will decide the fate of both Measure 113 and the Republicans who participated in the walkout and will likely significantly contribute to the political tone and tenor going into 2024.

Below is a summary of key priority issues for OADC in 2023, and comments on our engagement:

HB 2224: Juror Fee and Mileage Compensation Increases (Died)

HB 2224 increased fees paid to jurors in circuit court and modified the rate paid to jurors in circuit court for mileage. OADC Government Affairs Committee member Heather Bowman testified in person and in writing on behalf of OADC in support of this measure before the House Judiciary Committee. Although this bill garnered bipartisan support, it remained in Ways & Means until adjournment.

HB 3242: Unfair Claims Settlement Practices Act/Insurance Bad Faith 1 (Died)

HB 3242 was introduced on behalf of the Oregon Trial Lawyers Association to expand the Unfair Claims Settlement Practices Act (UCSPA) to include an insured’s right to bring a private cause of action to recover “actual damages” for a violation of the UCSPA if the insurer does not resolve the claim within 45 days of getting notice from the insured. If the court determines that the insurer “acted unreasonably,” the court may “triple an award of actual damages.” A prevailing

insured would also be entitled to recover attorney fees and litigation costs.

HB 3242 and HB 3243 (described below) were OADC's top two priorities for the 2023 Session. As originally introduced and in the version that passed the House, HB 3242 could have potentially subjected defense lawyers to a direct private cause of action under the USCPA, as the bill would have allowed an insured to bring an action not only against the insurer but also against an undefined "other person." OADC worked diligently to protect defense attorneys from such a new cause of action. Due to OADC's efforts, changes were made in the Senate to add language excluding potential claims against attorneys. Other

changes made in the Senate included exclusions for insurance agents and for medical malpractice claims, and an extension of an insurer's opportunity-to-cure timeline to 45 days from the originally proposed 20 days. While the amended version passed the Senate, the new medical malpractice exclusion proved highly controversial in the House, which, in an unusual turn during the final days of session, failed to concur in the Senate amendments. When a conference committee voted to remove the medical malpractice exemption, that caused the bill to lose support in the Senate, and the bill ultimately failed a critical Senate floor vote and died mere hours before adjournment Sine Die.

HB 3243: Unfair Trade Practices Act/ Insurance Bad Faith 2 (Died)

HB 3243 would have amended the Unfair Trade Practices Act to allow a UTPA action for violation of the UCSPA which, as introduced along with HB 3242, could have provided a separate mechanism to bring suit against an insurance lawyer or subject them to prosecution by the attorney general. However, if HB 3242 with OADC's negotiated amendments and HB 3243 were both to have passed, reconciling the two bills relative to bad faith claims would have provided protection to prevent direct claims against attorneys. HB 3243 passed the House but, in a late-session compromise to allow for only one of the Insurance Bad



Faith bills to go to a Senate floor vote, the bill was removed from the Senate reading calendar and sent back to the Rules Committee. The bill remained in Rules until session adjourned, making the Senate's failure to pass HB 3242 even more astounding. Throughout session OADC zealously advocated to protect defense attorneys from any new direct causes of action under the UTPA.

SB 233: Judicial Salary Increases (Died)

SB 233 would have increased annual judicial salaries and allowed for continued cost of living adjustments. As of July 2021, Oregon judicial salaries ranked 50th out of the 50 States and Washington, D.C. when cost of living was factored in. OADC has continually advocated for judicial salary increases in Oregon and testified in-person and in writing to support SB 233 before the Senate Rules Committee in April. This bill passed out of Senate rules but remained in Ways and Means until session adjourned.

Although SB 233 did not become law, the legislature did adopt Senate Joint Resolution 34, which sends to Oregon voters a proposed constitutional amendment to establish an Independent Public Service Compensation Commission. That commission will

be charged with setting salaries for statewide elected officials, judges of the Supreme Court and other courts under administration of the judicial branch, state senators, representatives, and district attorneys. SJR 34 was a bipartisan measure that was first introduced in mid-June as part of the negotiated agreement for the Senate Republicans to return from their historic walkout and had the support of the Judicial Department.

SB 235: Judicial Position Increases in Key Counties (Died)

SB 235 would have added seven additional trial judges to the bench statewide, spread out across six key counties: Jackson, Lane, Clackamas, Josephine, Douglas, and Washington. OADC advocated for SB 235 throughout session and submitted a letter in support of SB 235 to the Senate Committee on Judiciary in January. Although this bill garnered bipartisan support, it remained in Ways & Means until session adjourned.

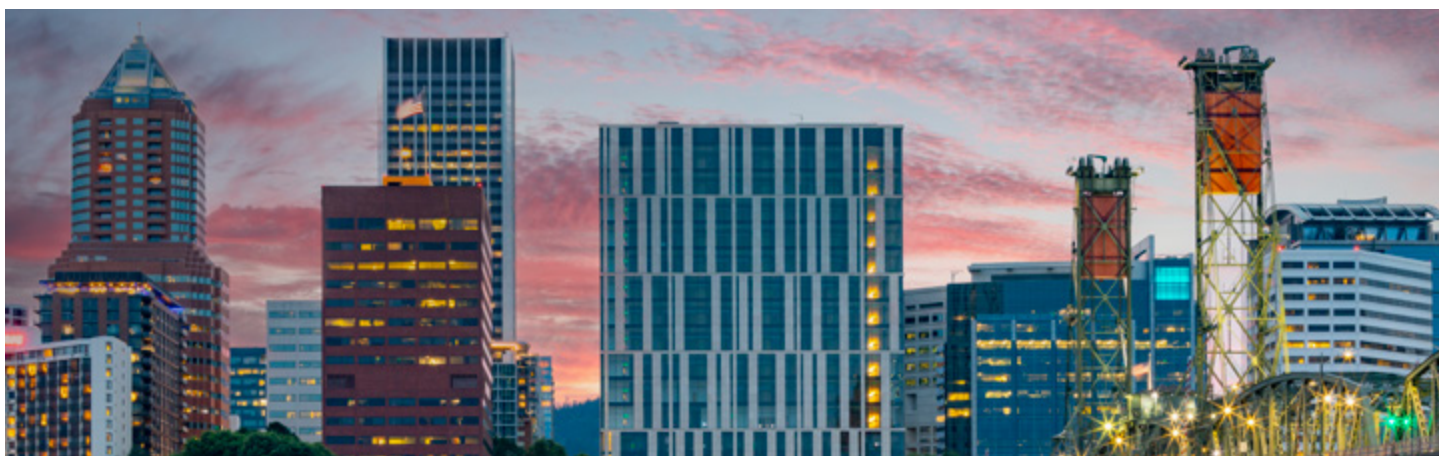
SB 807: Motions to Disqualify Judges (Passed)

SB 807 provides a procedure whereby an elected judge may challenge a party, attorney, law firm, district attorney's office, defense consortium or public defender's office that files motions

to disqualify a judge if the motions effectively deny judge assignment to criminal or juvenile delinquency dockets. OADC successfully worked with legislators, OCDLA, and OTLA to ensure that the modifications made by this measure to ORS 14.260 narrowly apply only in the context of criminal or juvenile delinquency dockets, and not to civil proceedings.

SB 5512: Oregon Judicial Department Budget (Passed)

SB 5512 is the Oregon Judicial Department Budget bill. As ultimately passed, this bill provides for an increase of \$66.8 million in General Fund dollars, or 10.7 percent over the previous biennium. While a very large portion of that increase—\$21.2 million—went to increased debt service, this budget allows the OJD to maintain current service levels while also supporting new or continued investments in the pretrial release program, records expungement, and information technology for remote proceedings. OADC advocated throughout session for funding the Judicial Branch at current service levels and testified in support of SB 5512 before the Joint Ways and Means Subcommittee on Public Safety in March.



Honorable Jenna Plank

Multnomah County Circuit Court

Judge Jenna Plank's engagement with law started long before she took the Multnomah County Circuit Court bench in 2021 to replace departing Judge Leslie Roberts. When she was working with the U.S. Forest Service as a Seasonal Wilderness Ranger, she enforced National Forest laws and regulations through the process of issuing and prosecuting violations in federal court.

Judge Plank's interest in law was piqued much earlier, though, when a close family friend in the small town of Pollock Pines, California, would share his stories of the work he did as a general practitioner in a small community, handling a diverse range of needs for his neighbors. Judge Plank found these stories intensely interesting, and they stoked an attraction to the law that would guide her in her ambitions and development moving forward.

After graduating high school, Judge Plank attended the University of Portland and pursued a major in communications. The major included a substantial amount of public speaking and persuasive writing, which she enjoyed and which became of substantial use to her in pursuing her legal career. With her bachelor's degree in communications, Judge Plank accepted a position in the field of public relations, yet her interest in a legal career persisted and she realized that the law was her true calling.

Judge Plank earned her law degree from Lewis & Clark Law School in 2005. While in law school, she interned in the area of civil



law both with the Portland City Attorney's Office and Legal Aid Services of Oregon, but during her third year she interned with the Multnomah County District Attorney's office and found her home. She enjoyed the fast pace of the work and more than anything loved the chance it gave her to be in court, engaging in litigation as a trial attorney. She decided that she wanted to be in court as much as possible, and with that goal, took a position as a Deputy District Attorney after graduating law school.

As a Deputy District Attorney, Judge Plank prosecuted all manner of criminal matters, from juvenile matters to low-level property crimes to major offenses such as sexual assault, domestic abuse, and murder. She eventually served as a Senior Deputy District Attorney overseeing the misdemeanor prosecution team.

In that role, she was heavily engaged in training and mentoring law students and new attorneys as they developed their legal thinking and trial skills. She has enjoyed mentoring law students and lawyers throughout her career, both as a supervising attorney and through other mentorship opportunities.

Advancing to the bench was a natural progression for Judge Plank. Her trial practice spurred her interest in becoming a judge, both because it fulfilled her love of the courtroom and provided new challenges analyzing and ruling on issues in real-time in a neutral and sensible manner to resolve conflicts. She has developed a simple and straightforward judicial philosophy: Allow as much room as possible for the parties to express their arguments as to the facts and the law, follow the law in coming to conclusions, and in the process be humble about what you do and don't know.

Judge Plank offers the following advice for attorneys in her courtroom: Always allow the bench the opportunity to have advance notice of foreseeable or known issues that may require modifications or interruptions to the proceedings, and argue to the court, not at your rival. Dignity, respect, and courtesy are incapable of being over-valued.

■ **Submitted by Chris Piekarski**
The GLB Attorneys

Defense Victory!

Christine Sargent, Littler Mendelson

Defense Victory! Editor



Failure to Identify Specific Rule Violated Leads to Dismissal of State Whistleblower Retaliation Claims

On October 20, 2022, Judge Eric L. Dahlin dismissed plaintiff's whistleblower retaliation claims in *Torani v. PGE Co.*, Multnomah County Case No. 22CV09219. Dallas DeLuca of Markowitz Herbold argued the case for defendant. Joseph J. Haddad of JJH Law argued for plaintiff.

Plaintiff sued her former employer, alleging whistleblower retaliation under ORS 659A.199 and ORS 659A.030(1)(f). She alleged she reported and opposed conduct she believed violated state and federal law governing defendant's operations. Defendant moved to dismiss, arguing the plaintiff's complaint failed to allege the specific statute or rule the employer supposedly violated, and failed to allege that she had reported the alleged misconduct to anyone who did not already know about the issue.

In response, the plaintiff argued she

sufficiently pleaded her claim, because she had a good faith belief at the time of the report that her employer's conduct violated the law. The plaintiff also argued she should get discovery to determine what exact rules were violated. Judge Dahlin disagreed. He held that ORS 659A.199 and ORS 659A.030(1)(f) required the plaintiff plead as an ultimate fact the actual statute or rule the employee believes was violated, and to identify the person to whom she blew the whistle. The plaintiff was not entitled to discovery to investigate potential unlawful conduct.

■ **Submitted by Molly Honoré**
Markowitz Herbold

Jury Finds No Negligence During Hysterectomy Procedure

On March 23, 2023, defendants obtained a complete defense verdict in *Sabrina Burgett v. Northwest Medical Foundation of Tillamook and Brittany J. Gerken, MD*, Multnomah County Circuit Court Case No. 20CV41945. The Honorable Amy M.



Baggio presided. Robert Beatty-Walters represented plaintiff, Chip Horner of Hart Wagner represented Northwest Medical Foundation of Tillamook, and Peter Eidenberg of Keating Jones Hughes represented Dr. Gerken.

Plaintiff's medical negligence claim arose out of complications following a hysterectomy performed by an OB-GYN. Plaintiff alleged that she suffered a permanent bladder injury as a result of the surgery, and sought \$3.2 million in damages. On March 22, 2023, after an eight-day jury trial, the jury returned a verdict for the defense, finding that defendants had not been negligent.

■ **Submitted by Trent Andreasen**
Keating Jones Hughes

Disclosures Must Predate Discipline for Protection

On March 6, 2023, Andrew Campbell of Heltzel Williams prevailed on summary judgment one week before trial in *Copeland v. City of Redmond, Deschutes County Case No. 21CV04991*. Daniel Thenell and Kirsten Curtis of Thenell Law Group represented plaintiff. The Honorable Walter Miller presided.

Plaintiff, who was a former police officer, sued the City of Redmond alleging that the City had (1) disciplined her because she was a protected whistleblower, (2) retained an abusive supervisor, (3) subjected her to a hostile workplace, and (4) caused her labor union to under-advocate on her behalf. The City maintained that plaintiff was properly disciplined for initiating a dangerous high-



speed pursuit that violated numerous department policies. From the City's perspective, plaintiff's discipline was nothing more than holding an officer responsible for breaking the rules and endangering the public. After two years of discovery, the City moved for summary judgment.

Regarding the whistleblower claims, the City argued that plaintiff failed to admit any evidence of causation because plaintiff's "disclosures" only took place once the City had already begun its discipline process. Regarding the negligent retention claim, the City argued that, even taking plaintiff's

allegations at face value, there was no evidence in the record that the City knew of the bad behavior and subsequently retained the supervisor. The court agreed with both arguments and ordered the claims be dismissed. Having heard the court's rulings, the plaintiff withdrew and conceded all remaining claims on the spot, handing the defense a complete victory less than one week before trial.

■ **Submitted by Andrew Campbell**
Heltzel Williams

COVID-19 Tolling Does Not Save Plaintiff's Untimely Claims

On April 6, 2022, Bill Taaffe and Melanie Rose of Smith Freed Eberhard obtained a dismissal when Multnomah County Circuit Court Judge Steffan Alexander granted defendants' motion to dismiss in *Behzad Roohandeh v. Auto Transport Group, LLC, et al.*, Case No. 22CV21285.

Plaintiff, represented by Kevin Cathcart, initially argued that his claim was timely because the Oregon legislature had

tolled the statute of limitations during COVID. However, COVID tolling had clearly expired by the time plaintiff filed his complaint and, accordingly, defendants moved to dismiss plaintiff's claim.

In response, plaintiff pivoted and argued that an advance payment for property damage was made, which tolled the statute of limitations. However, that argument did not save plaintiff either. Although an advanced payment was made to plaintiff's LLC, no payment was made to plaintiff himself because he was not the owner of the vehicle—the LLC was.

Based on plaintiff's representation about the nature of the advance payment at oral argument, the court allowed leave to re-plead. Upon receiving plaintiff's amended complaint, defendants quickly filed another motion to dismiss. At the hearing, Judge Alexander granted defendants' motion to dismiss the amended complaint with prejudice, disposing of plaintiff's claim in its entirety.

■ **Submitted by Jasmine C. Eberhard**
Smith Freed & Eberhard



OADC Amicus Committee Update

Michael J. Estok, Lindsay Hart

The OADC Amicus Committee remains ready to assist the OADC membership with complex or significant issues on appeal. 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. We believe it is important to provide the appellate courts with insight from the defense bar, above and beyond the interests of the parties to the case at issue.

For more information about our committee, check out our page on the OADC website: <https://www.oadc.com/amicus-committee>. There you will find a brief bank of prior submissions by our attorneys, as well as the contact information for our committee’s members. You will also find a questionnaire that can be used when submitting a request for amicus support.

Recent Submissions

2023 has been off to a busy start, and we have been grateful to receive several amicus brief requests from our members. So far in this calendar year, the Committee has filed briefs in two important cases:

1. *Yeager v. Montgomery*, A179618. This case pertains to the correct interpretation and application of the “sunset provision” that repealed the extension of statutes of limitation for civil claims under section 7 of HB 4212, which was part of the emergency legislation enacted during the COVID-19 pandemic. This brief was authored by Sara Kobak of Schwabe Williamson & Wyatt.

2. *Brown v. Providence Health System-Oregon*, S070082. This case pertains to whether a hospital can be considered a “seller” of a medication provided incidental to medical treatment for

purposes of a strict liability claim under Oregon’s product’s liability statutes. This brief was authored by David Cramer of MB Law Group.

The Committee’s briefs for both cases can be found on our website. We are currently working on a third amicus brief in a case involving the Remedy Clause of the Oregon Constitution. We will also, of course, keep our eyes out for your future submissions.

Membership Opportunity

Lastly, the OADC Amicus Committee is looking for a new member to join its ranks following the retirement of Mike Stone of Brisbee & Stockton. Mike has been a helpful and valued member of the committee for many years, and we wish him the best. Please reach out to me if you have interest in applying to become a member of the committee.





The Word Smith

Julie Smith

Cosgrave Vergeer Kester

Getting to Know the Oregon Appellate Courts Style Manual

The Oregon Appellate Courts Style Manual is the go-to guide for legal citation and writing conventions in Oregon courts.¹ Strictly speaking, the mission of the



JULIE A. SMITH

Style Manual is to ensure that the courts' published opinions follow a consistent format and style.² But the Oregon Rules of Appellate Procedure encourages, and in one respect requires,

appellate court practitioners to follow the style manual as well.³ And somewhere along the way, trial court practitioners have started following it too.

You should take some time to get to know the *Style Manual*, even if you practice only in Oregon trial courts.

The Style Manual's Organization

The Style Manual is organized in four main sections.

Formatting. The first section addresses formatting, including organization and the use of headings, quotations, footnotes, maps, pictures, italics, underscoring, boldface, and uppercase. Although this section is drafted with judicial opinions in mind, most of the suggestions in this section can be applied to most briefs and motions.

Citation. The second section covers citations to legal authorities. The formats described in this section differ in many respects from *The Bluebook*. The *Style Manual* provides, however, that *The Bluebook* should be consulted for any citation questions not covered in the manual.

Quotation. This section governs quotations, including when a block quotation should be used and how to format quotations and the citations that relate to them.

Style Guide. This section lists rules of grammar, punctuation, and word use. It covers a wide variety of grammar and punctuation topics, including proper word usage and the use of italics, uppercase, lowercase, numbers, dates, acronyms, initialisms, titles, abbreviations, apostrophes, colons, semicolons, commas, dashes, hyphens, and lists.

Some Differences Between Oregon Courts and Courts in Other Jurisdictions Several of the conventions adopted in the *Style Manual* differ from those used in *The Bluebook* and in other jurisdictions. Here are just a few highlights.

- With few exceptions, periods are omitted from abbreviations in citations.⁴

For example:

This:
State v. Smith, 324 Or 400, 399 P3d 465 (1999).

Not this:
State v. Smith, 324 Or. 400, 399 P.3d 465 (1999).

- Asterisks (not periods) are used to indicate omitted words in quotes.⁵

For example:

This:
Article I, section 10, of the Oregon Constitution provides that "every man shall have [a] remedy * * * for injury done him in his person, property, or reputation."

Not this:
Article I, section 10, of the Oregon Constitution provides that "every man shall have [a] remedy . . . for injury done him in his person, property, or reputation."

- In referring to "this court" or to "the court," the word "court" is not capitalized except when referring to the United States Supreme Court.⁶

For example:

This:
"This court should affirm."

Not this:
"This Court should affirm."

One Difference Between Oregon's Trial and Appellate Courts

Although the *Style Manual* mandates the use of parallel citations in appellate briefs when citing to published Oregon appellate court decisions, the Uniform Trial Court Rules make it clear that parallel citations are not required in trial court filings.⁷

Conclusion

It is less distracting, and therefore easier, to read a brief or motion that follows the conventions the reader is used to seeing. Trial court practitioners should

get to know the conventions in the *Style Manual*, even if they are not required to follow them.

Endnotes

1. *The Oregon Appellate Court Style Manual* is available online at <https://www.courts.oregon.gov/rules/ORAP/ORAP%2023,%20Full,%20Permanent%20and%20Temp%20Amendments%20Eff%2001-01-2023.pdf>.
2. See *Style Manual* at Preface ("The Oregon Appellate Courts have adopted this style manual as a guideline for conventions used in format, citation, quotation, and style when writing opinions").
3. See ORAP 5.20(5) ("guidelines for style and conventions in citation of authorities may be found in the Oregon Appellate Courts Style Manual"); ORAP 5.35(3) ("Citations are to be in the form prescribed by the Oregon Appellate Courts Style Manual.").
4. *Style Manual* at 20-51.
5. *Id.* at 62.
6. *Id.* at 68-69.
7. See UTCR 2.010(12)(a) ("In all matters submitted to the circuit courts, Oregon cases must be cited by reference to the Oregon Reports as: *Blank v. Blank*, Or (year) or as *State v. Blank*, Or App (year). Parallel citations may be added.") (Emphasis added.)





Oregon Association
of Defense Counsel

9600 SW Oak Street, Suite 565
Tigard, OR 97223

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