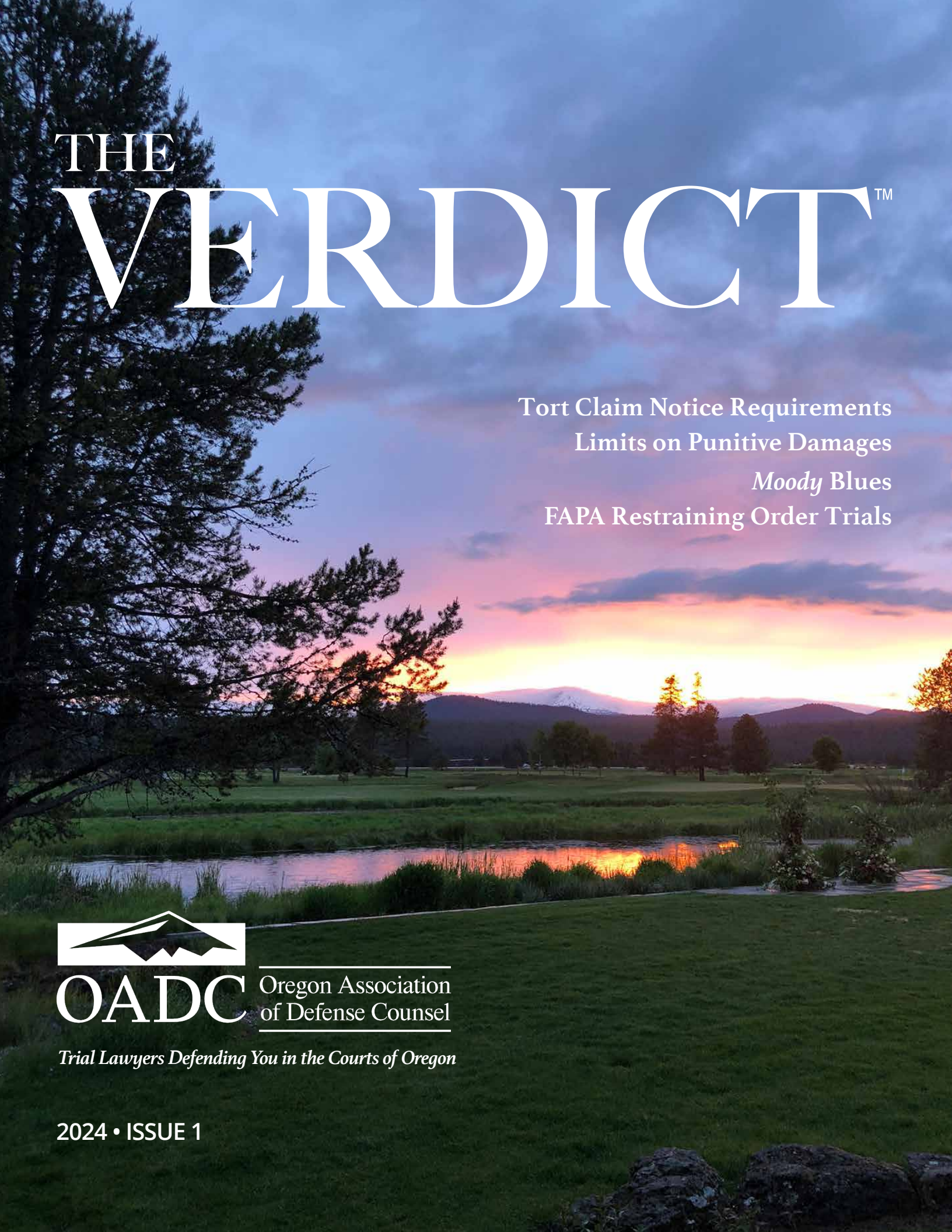

THE VERDICT™

Tort Claim Notice Requirements
Limits on Punitive Damages
Moody Blues
FAPA Restraining Order Trials

OADC Oregon Association of Defense Counsel

Trial Lawyers Defending You in the Courts of Oregon

2024 • ISSUE 1

THE VERDICT™

ON THE COVER

Sunriver, Oregon—Location for OADC Annual Convention
Photo courtesy of Megan Uhle

FEATURES

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OADC
Oregon Association of Defense Counsel

Connection Through OADC

Heather Bowman
OADC President

More than four years after the start of the COVID-19 pandemic, lawyers have found themselves working in ways that would have been unimaginable to previous generations. Lawyers now beam into courthouses across the state and nation. Lawyers work remotely and some rarely see their colleagues in person. Many lawyers have entirely abandoned traditional offices and the expense and formality that accompany those.

There are huge benefits to these changes—clients do not pay the travel time for a lawyer driving across the state for a short hearing, lawyers find it easier to serve clients in remote or rural locations, many fewer hours are wasted commuting to and from the office, and lawyers have more flexibility in their schedules for themselves and their families.

Along with benefits, this new style of practice also presents challenges. The technological ones are mostly manageable, like setting up a secure VPN and working with a paperless office. Others are more complex. How do we effectively onboard new staff? How do we train new attorneys when face time has been replaced by Teams meetings and Slack chats? How do we maintain strong partnerships when partners live in multiple states and only occasionally see each other? How do we create firm culture that attracts and retains talent? How do we withstand all the challenges of being lawyers and running law firms without the social cushions we unwittingly relied on until they disappeared in a flurry of safety concerns?

Although I don't personally have the answers to these questions, OADC is a resource for addressing all of these challenges.

OADC expanded its Defense Practice Academy in 2023 to educate new lawyers, particularly those who joined the bar during the pandemic. The Defense Practice Academy provides in-depth instruction from a variety of experienced attorneys, teaching new lawyers how to work a case from start to finish. As opportunities for time in the courthouse dwindle, Defense Practice Academy also gives new lawyers an opportunity to practice skills and receive feedback from knowledgeable lawyers. This all occurs in a supportive environment focused on a desire for growth rather than fear of failure. Our first cohort will be recognized at Defense Practice Academy graduation at the annual convention in June.

In addition, OADC's Practice Management affinity group brings together resources from civil defense firms and outside experts across the state to collaborate on strategies for running a civil defense firm in the modern world. And the OADC listserv continues to be a daily point of connection and shared knowledge for our members.

Of course, OADC continues to provide the resources its members have long relied on. Our 12 practice and affinity groups present timely and valuable CLEs to keep members up to date on developments in the law. *The Verdict*™ provides thoughtful articles on current legal issues, biographies of the judges on Oregon's quickly changing bench, updates on relevant appellate decisions, and kudos for members' defense victories. Our reinvigorated amicus committee filed four amicus briefs in 2023 on issues relevant to the civil defense practitioner, providing additional perspective and support in the appellate courts for our members.

OADC also provides a real opportunity for community. Most importantly, it is a community that understands the work we do and the burdens we carry.

While our non-lawyer friends and family may not understand why we are willing to work so much and so hard and carry so much stress to help our clients, our OADC colleagues get it. The statistics on the challenges to lawyer mental health and prevalence of substance abuse are staggering.[1]

At the 2023 OADC annual convention in Sunriver, keynote speaker Bena Stock presented concrete strategies for fostering positive change in lawyer well-being. The development and maintenance of social connections is one critical component of lawyer well-being,[2] and sadly, one that the social isolation of the COVID-19 pandemic has dramatically decreased. Our annual convention, fall seminar, Defense Practice Academy, and in-person social events and CLEs all provide opportunities to build your professional—and personal—community.

This year, I encourage each of you to engage in all that OADC has to offer, from practical skills to friendship. Over the course of 2024, I challenge each of you to sample OADC's offerings. Sign your new associate up for the Defense Practice Academy, log on to a webinar, come to Sunriver for the annual convention, join us for a happy hour or practice group social, and shake hands with your colleagues. Build your community and feel the benefits.

As we look forward to all that 2024 has in store for us, I also want to look back and thank immediate past president Peter Tuenge and retiring Board members John Eickelberg and Chad Colton for their many years of contributions to OADC. Thank you also to each of the retiring and continuing Practice Group leaders for their involvement in OADC and the excellent programming they have created. Many thanks to *The Verdict*™ editors, without whose hard work you would not be reading this message or any of the content that follows. Finally, enormous thanks to Geoff Horning and the staff of Update Management who keep OADC operations running smoothly.

Heather Bowman

Heather Bowman
OSB Professional Liability Fund
OADC President

Endnotes

1. Patrick R. Krill, JD, LLM, et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,* J. Addiction Med., https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/the_prevalence_of_substance_use_and_other_mental.8.aspx.
2. Douglas Querin, *Social Connections: An Essential for Well-Being*, Oregon Attorney Assistance Program (Dec. 1, 2023), https://oaap.org/insights/winter-2023-full-issue/social-connections--an-essential-for-well-being/

FEATURE

Tort Claim Notice Requires *Moore* than Substantial Compliance

Rachel Wolfard
Hart Wagner

Rachel Wolfard

When defending claims against public bodies, one of the first things defense counsel should do is confirm whether the party asserting the claim has issued a tort claim notice. If a tort claim notice was not issued, the claim may be barred. If a tort claim notice was timely issued, defense counsel should closely scrutinize the notice, as it may provide strong grounds to resolve the claim.

I. Tort Claim Notice Requirements

The Oregon Tort Claims Act (OTCA)[1] provides the sole civil cause of action against a public body for torts committed by its officers, employees, and agents acting within the scope of their employment. Accordingly, in order for a party to bring a claim pursuant to the OTCA, they must do so in strict compliance with the prescriptions of ORS 30.260 to 30.300.[2]

One of those strict requirements is that a plaintiff must provide advance notice of intent to assert a claim that is both timely and sufficiently descriptive. The purpose for such notice is to afford public bodies the opportunity to promptly investigate the underlying facts of a claim.[3] In most cases, after the alleged loss or injury, the tort claim notice must be provided within one year for wrongful death claims and 180 days for all other claims.

While there are a few available methods of providing notice, plaintiffs often send a letter to meet the formal tort claim notice requirements. Formal notice is a written communication, which ORS 30.275(4) requires to contain the following:

> (a) A statement that a claim for damages is or will be asserted against the public body or an officer, employee or agent of the public body;
> (b) A description of the time, place and circumstances giving rise to the claim, so far as known to the claimant; and
> (c) The name of the claimant and the mailing address to which correspondence concerning the claim may be sent.

II. Recent Case Law Confirms that Substantial Compliance with the OTCA Is Insufficient

In *Moore v. Portland Public Schools*, issued in September 2023, the Oregon Court of Appeals clarified the standards of sufficiency of a tort claim notice. *Moore* was a consolidated appeal of two lawsuits educators brought against Portland Public Schools (PPS) for failing to prevent students from engaging in physical and sexual assaults against them.

A. *Moore v. PPS*

Plaintiff Moore sent PPS a tort claim notice on May 21, 2018, which stated her intent to file one or more claims for damages against PPS and/or one or more of its officers, employees, or agents for being subject "to daily sexual and physical assault and battery without recourse or ways to report the attacks" over the past few years. Plaintiff Ferrer-Burgett sent a similar notice that same day.

Moore and Ferrer-Burgett filed their lawsuit on November 1, 2018, against PPS, as well as its risk manager and the school principal, alleging that they had been "subject to daily assaults and battery" by students. On January 28, 2019, Moore and Ferrer-Burgett filed an amended complaint to add claims from several additional plaintiffs who had sent PPS tort claim notice on December 10, 2018, asserting potential claims for being subject to "daily sexual and physical assaults [.]" In addition, the amended complaint dropped the risk manager as a defendant, and added three other PPS personnel as defendants. The common claims amongst plaintiffs included a claim for battery and unlawful employment practices against PPS.

Defendants moved to dismiss, in part, because the tort claim notices failed to identify the "time, place, and circumstances giving rise to their claims," requiring dismissal of any claims based on conduct that occurred more than 180 days before filing the complaints. The trial court agreed, concluding that since the tort claim notices were deficient, it lacked subject matter jurisdiction over claims arising more than 180 days prior to the filing of the complaints.

B. *Demma v. PPS* et al

On January 7, 2019, Deema provided PPS with tort claim notice, then filed a lawsuit on June 14, 2019. Consistent with her tort claim notice, she alleged being subject to "ongoing physical violence and attacks by students at both schools where she worked since the beginning of the 2018-19 school year." Defendants prevailed on a motion to dismiss on the same basis as the *Moore* defendants.

C. Consolidated Appeal

On appeal, plaintiffs argued, in part, that the trial court had erred in dismissing their claims for failure to provide adequate tort claim notices. In affirming the trial court's ruling in this respect, the Court of Appeals confirmed that strict compliance with formal tort claim notice requirements is mandatory, and plaintiffs bore the burden to prove adherence.

First, the court rejected plaintiffs' procedural argument that the trial court cannot rule on the adequacy of the tort claim notice on a motion to dismiss because it raised an issue for summary judgment. The court reasoned that defendants moved to dismiss for lack of subject matter jurisdiction due to plaintiffs' failure to provide adequate tort claim notice, which is appropriately raised through a motion to dismiss.

Second, the *Moore* plaintiffs argued the trial court erroneously concluded their tort claim notices only provided generalized information and did not supply a description of the time, place, and circumstances as required by ORS 30.275(4)(b). Plaintiffs contended that their notices "substantially complied" with the statutory requirements to provide sufficient information for PPS to undertake an investigation.

The Court of Appeals disagreed and held that despite each tort claim notice identifying the parties and alleging that claims would be asserted for being subject to ongoing sexual and physical assaults, the notices still "failed to specify the places and circumstances of the alleged torts." Specifically, none of the notices referred to specific student conduct or action PPS did or did not take. Accordingly, the notices did not apprise PPS of the alleged perpetrators, physical locations of the alleged assaults, and who at PPS may have been involved. Since none of the tort claim notices sufficiently described the places or circumstances giving rise to plaintiffs' claims, the Court of Appeals deemed each of the tort claim notices deficient. Therefore, plaintiffs had not provided a tort claim notice until filing their lawsuit, and all claims arising out of conduct occurring more than 180 days prior were barred.

III. Challenging Tort Claim Notices in Practice

Careful review of a tort claim notice can resolve a claim at various stages. Raising the issue of untimely or insufficient tort claim notice can strengthen defense counsel's position in pre-litigation negotiations or dissuade a plaintiff from filing a lawsuit altogether. As stated in *Moore*, defense counsel can challenge the sufficiency of tort claim notice through a motion to dismiss for lack of subject matter jurisdiction. Initially requiring a plaintiff to identify the time, place, and circumstances giving rise to a claim may provide additional facts upon which to move for summary judgment at the appropriate time.

Endnotes

1. ORS 30.260 to 30.300.
2. *Baker v. State Bd. of Higher Educ.,* 20 Or App 277, 281 n1 (1975).
3. *Moore v. Portland Public Schools,* 328 Or App 391, 403 (2023).

FEATURE

Oregon Supreme Court Issues Decision on Qualitative Limit on Punitive Damages

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In recent years, punitive damage awards have increased in both amount and frequency. A 2023 study published by the Institute of Legal Reform concluded that between 2016 and 2022, awards have become more frequent and disproportionate.[1] The number of awards over $25 million have more than doubled during that time. In addition, the median punitive damage award increased from $35 million in 2017 to $86 million in 2022, with the mean in 2022 topping $690 million. However, as these awards have increased, so too have court rulings finding excessive punitive damage awards unconstitutional.

In Oregon, similar to other jurisdictions, punitive damages must be proven by clear and convincing evidence that the at-fault party "acted with malice" or "reckless and outrageous indifference to a highly unreasonable risk of harm and acted with a conscious indifference to the health, safety and welfare of others." ORS 31.730. If a jury awards punitive damages, the trial court must review the award and may reduce it if they find it unreasonable. There is a twist in Oregon, however, as the state has a law that plaintiffs only receive 30 percent of the punitive damage award; the remaining 70 percent is paid to the state. ORS 31.735. The rationale for this law is that punitive damages are not intended to create a windfall to plaintiffs, but to instead punish the at-fault party.

Oregon has a somewhat complicated history with punitive damage awards. Under Oregon law, the jury's assessment of punitive damages is a determination of fact subject to the prohibition in Article VII (Amended), section 3 of the Oregon Constitution that "no fact tried by a jury shall be otherwise re-examined in any court of this state."[2] Thus, the question of whether an Oregon jury's punitive damages award is constitutionally excessive is governed entirely by federal law.[3] The United States Supreme Court has identified three factors that courts should consider in assessing the excessiveness of punitive damages awards under the federal Due Process Clause: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.[4] While the United States Supreme Court has repeatedly declined to adopt a bright-line numerical ratio that punitive damages cannot exceed, it has held that "[s]

ingle-digit multipliers are more likely to comport with due process," and that greater ratios will be appropriate only in cases involving particularly egregious acts that result in only a small amount of compensatory damages.[5]

In 2015, in *Estate of Michelle Schwarz v. Philip Morris USA*,[6] the Oregon Court of Appeals affirmed a $25 million punitive damages award against a cigarette company—148 times the compensatory damages award—for fraudulently marketing a low-tar cigarette that caused the plaintiff's death. With regard to the first (and most important) prong of the Due Process inquiry, the reprehensibility of the defendant's conduct, the court reasoned that the defendant's conduct was particularly egregious, in light of evidence that its conduct appeared to be intentional (or at least knowing), had continued for decades, and had foreseeably caused or contributed to the deaths of many Oregonians. As to the second prong—the disparity between the actual harm and the punitive damages award—the court reasoned that the $170,000 compensatory damages award did not fully represent the "actual harm" caused by defendant's conduct, because damages for the decedent's loss of life were not recoverable under Oregon's wrongful death statute. Thus, a large part of the value of the actual harm caused by defendant was not accounted for in the amount of the jury's compensatory award. Further, loss of human life is a very serious harm, as to which Oregon could impose severe criminal and civil penalties, under the third prong of the Due Process inquiry. As all three prongs supported the jury's $25 million punitive damages award, the court affirmed the award as neither arbitrary nor unconstitutionally excessive, despite the ostensible 148 to 1 ratio.

However, in February of this year, in *Robert Trebelhorn v. Prime Wimbledon SPE, LLC, et al.*,[7] the Oregon Supreme Court affirmed a trial court's reduction of a 33 to 1 punitive damages award to a 9 to 1 ratio. In that case, the plaintiff suffered a serious knee injury when his leg punched through a section of elevated walkway weakened by dry rot, and sued the owner and manager of the apartment complex for negligence. Evidence presented at trial demonstrated that the defendants were aware that the walkway and other structures at the apartment complex were significantly deteriorated and required "life safety" repairs, but chose not to repair the walkway. The jury awarded just under $300,000 in compensatory damages, and $10 million in punitive damages against each defendant. The trial court found that the maximum amount of punitive damages permitted by due process was nine times the compensatory damages, and reduced the punitive damage awards to just under $2.7 million against each defendant.

On appeal, the Oregon Supreme Court agreed that the reprehensibility of the defendants' conduct and comparable civil sanctions supported significant punitive damage awards under the first and second considerations of the federal Due Process test. However, the court nonetheless held that the $10 million punitive damages awards were disproportionate under the second prong to the value of the actual and potential harm to plaintiff from the defendant's conduct. Plaintiff had argued that the award was not disproportionate because the compensatory damages did not include the much higher value of the potential harm of life-threatening injuries or death that defendant's conduct could have caused him had the walkway collapsed entirely or failed in a different way, causing him to fall to the ground from the second floor walkway. While the court generally agreed that it was appropriate to consider potential harm in addition to the actual compensatory damages awarded, it held that, in this case, plaintiff's alternative scenarios were too remote from the evidence of what actually happened to warrant adjusting the harm denominator in this case.

Although punitive damage amounts awarded by juries have been increasing in recent years across the country, this recent Oregon Supreme Court case provides some encouragement for defendants to fight back against the trend. To preserve their clients' rights to seek reduction of punitive damage awards exceeding double-digit ratios, defense attorneys should make sure to plead the affirmative defense that a punitive damage award may violate the defendant's due process rights under the U.S. Constitution and any applicable state law. Counsel must also preserve those arguments at trial by filing a timely post-verdict motion to reduce any excessive punitive damages award. In addition, in evaluating the potential exposure a client may face, it is important to consider a potential punitive damages award, but to also keep in mind that any award exceeding a single-digit ratio of punitive damages to compensatory damages may be subject to reduction. However, as courts have uniformly declined to commit to a bright-line numerical rule, there is still some risk that punitive damage awards in excess of single-digit ratios could be affirmed, particularly where the total value of the actual or potential harm caused by the defendant's conduct may not be fully accounted for by the compensatory damage award, or in cases of extraordinarily egregious conduct.

Endnotes

1. Evan Tager, et al., *Unfinished Business: Curbing Excessive Punitive Damage Awards,* U.S. Chamber of Commerce Inst. for Legal Reform (2023), https://instituteforlegalreform.com/research/unfinished-business-curbing-excessive-punitive-damages-awards/
2. *DeMendoza v. Huffman,* 334 Or 425,447 (2002).
3. *See, e.g., Goddard v. Farmers Ins. Co.,* 344 Or 232, 256 (2008).
4. *State Farm Mutual Automobile Insurance Co. v. Campbell et al.,* 538 US 408 (2003).
5. *Id.* at 425.
6. 272 Or App 268, 355 (2015).
7. 372 Or 27 (Feb. 15, 2024).

FEATURE

Moody Blues? The Oregon Supreme Court's Recent Insurance Coverage Ruling May Not Be as Far-Reaching as It Seems

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In *Moody v. Oregon Community Credit Union, et al.*,[1] the Oregon Supreme Court for the first time recognized the existence of a negligence tort claim for "bad-faith" denial of insurance benefits under ORS 746.230, based on the unique facts of the case before it. Some commentators view *Moody* as a seismic shift in Oregon law.

Moody may signal the beginning of a sea change in Oregon to recognize negligence-based claims in most or all cases of bad-faith denial of insurance coverage. However, the actual impact of *Moody* may be significantly less than anticipated due to the way the majority structured its opinion and reasoning. In the meantime, defense counsel can use aspects of the decision to push back on new negligence claims for alleged unreasonable and/or bad-faith denial of coverage.

Moody's Facts Narrow the Reach of the Holding

The facts of *Moody* are relatively simple.[2] Plaintiff was the beneficiary of her husband's life insurance policy. He was accidentally shot and killed while on a camping trip. The insurer denied coverage because the decedent was allegedly under the influence of marijuana, citing a policy exclusion for deaths "caused by or resulting from [decedent] being under the influence of any narcotic or other controlled substance."[3]

Plaintiff brought claims for breach of contract, breach of implied covenant of good faith and fair dealing, and negligence. She alleged that Oregon's Unfair Claims Settlement Practices Act provided an independent standard of care, and that defendant violated that standard of care by failing to comply with several claims-handling practices enumerated in the Act. In addition to contract damages, plaintiff alleged non-economic damages based on emotional distress and anxiety.

Moody's Procedural History

Defendant moved to dismiss plaintiff's claim for negligence on the basis that her only remedy under Oregon law was contractual, relying on a line of Oregon cases dating back to *Farris v. U.S. Fidelity and Guaranty Co.,* which had long been understood to limit remedies for breach of insurance contracts to contractual damages.[4]

The trial court granted the motion and dismissed all but plaintiff's breach of contract claim. The Court of Appeals reversed, finding that ORS 746.230, *et seq.,* provided statutory authority to support a negligence *per se* claim. The Court of Appeals based its holding on a handful of cases that had found a heightened standard of care beyond the terms of a contract that allowed negligence claims under certain circumstances.[5] The Oregon Supreme Court affirmed the Court of Appeals' ruling on other grounds.

The Oregon Supreme Court's Analysis

The Supreme Court focused its inquiry on whether plaintiff had "alleged facts sufficient to state a legally cognizable common-law negligence claim for emotional distress damages" sufficient to support a negligence claim in the first place.[6] The court noted that there is no established "test" for making this determination, so its analysis was necessarily case-specific.[7]

To make this determination, the court first considered whether ORS 746.230 indicated the existence of a legally protected interest and whether its prior holding in *Farris* precluded a common-law negligence claim for bad-faith denial of coverage. The majority opinion essentially side-steps *Farris,* arguing that *Farris* did not concern a "negligence" claim, but rather a breach of contract claim seeking tort damages and, therefore, its holding was not dispositive here.[8] In declining to directly address or overturn *Farris,* the court passed up an opportunity to establish a broad cause of action for negligence in bad-faith claims, opting

instead for a case-specific analysis.

The court then compared the facts of *Moody* to those cases in which it had previously allowed recovery of "psychic injury"—*i.e.,* emotional distress damages without accompanying physical injury—noting that it had long been reluctant to allow recovery for purely emotional harms without some accompanying physical injury. It also emphasized the need for a "limiting principle in additional to foreseeability," which would permit such recovery in only rare circumstances.[9] For example, the court considered *Philibert v. Kluser,* a case involving two brothers who had watched their third brother die in a collision. In *Philibert,* the "limiting principles" employed by the court held that only (1) a close family member of the person suffering injury who (2) perceives the event contemporaneously would be able to recover, thereby reducing the risk of "indeterminate and potentially unlimited liability."[10]

In *Moody*, the court considered whether there were "objective indicators of possible serious emotional injury," as in *Philibert.* The court reasoned that, because "life insurance is intended to provide peace of mind and necessary resources for a beneficiary," an unreasonable denial "can certainly cause the beneficiary serious emotional injuries," especially when "the spouse is dependent on the [decedent] for their financial well-being."

The court further considered whether the interest protected is of significant importance to the public. It determined that in this case, "when life insurance proceeds enable survivors to obtain basic needs such as food and shelter, the survivors are not dependent on society for those needs."[11]

Based on these factors, the court held that plaintiff had alleged a legally protected interest that provides sufficient "limiting principles," which the court defined as follows: "Plaintiff, *as the surviving spouse of a deceased breadwinner,* has a legally protected interest sufficient to support a common-law negligence claim for emotional distress damages against her husband's *life insurer* …."[12]

Moody's Potential Reach Remains Unknown

The court's holding in *Moody* could reasonably be interpreted as limited to life insurance beneficiaries who are the surviving spouse of a deceased breadwinner. However, just a few sentences later, the court added, "we conclude that the insurance claim practices that ORS 746.230 requires and the emotional harm that foreseeably may occur if that statute is violated are sufficiently weighty to merit imposition of liability for common-law negligence and recovery of emotional distress." We are left to litigate whether *Moody's* holding is limited to beneficiaries of life insurance of a breadwinner spouse, or whether any negligent claim handling is sufficient to give rise to tort liability.

Policyholder lawyers are likely to challenge denials of coverage in all contexts. However, despite the broad language of the court's comments on ORS 746.230, the reasoning of the opinion suggests that the court intended to limit its holding to claims involving life insurance. Indeed, the court commented "our conclusion here does not make every contracting party liable for negligent conduct that causes purely psychological damage, nor does it make every statutory violation the basis for a common-law negligence claim for emotional distress damages." Rather, as the court noted, "[f]ew contracting parties promise to provide necessary financial resources on the death of a spouse knowing that their obligations to act reasonably in doing so is required by statute."

When presented with a negligence claim on behalf of an insured plaintiff, defense counsel should contrast the facts of that specific case with those of *Moody* to determine whether the claim at issue is consistent with other cases in which purely emotional distress damages have been awarded. Surely a claim for failure to pay repair costs after a car accident would not trigger the same "psychological damage" as failure to pay death benefits for a deceased breadwinner. Nor would that failure to pay trigger the same societal concerns that underpinned the reasoning in *Moody.* Additionally, defense counsel should be prepared to identify the "limiting principles"—or lack thereof—that would apply to their specific claim. Has the plaintiff identified any guardrails that would protect against the risk of "indeterminate and potentially unlimited liability"?

The court's fact-specific analysis and narrow "limiting principles" in *Moody* seem to have little application to most insurance bad-faith claims. And by side-stepping *Farris and* declining the opportunity to establish a broad negligence claim in all bad-faith actions, the *Moody* court appears to have issued a relatively narrow opinion. This issue is sure to be hotly contested in the coming years, and while the result of *Moody* may ultimately be such a broad rule, we are not there yet.

Endnotes

1. 371 Or 772 (2023).
2. 371 Or at 775.
3. 284 Or 453 (1978).
4. 371 Or at 780.
5. Or 371 at 790.
6. Or 317 at 791-796. Justice Garrett contested this point in his dissent, arguing that the majority opinion effectively abrogates *Farris*, without undertaking the necessary analysis to do so. Or 317 at 807.
7. 371 Or at 785.
8. 371 Or at 785-789, *citing* 360 Or 698 (2016).
9. 371 Or at 804.
10. 371 Or at 805.

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FEATURE

Lawyers Fight Domestic Abuse and Gain Trial Experience—Learn How You Can, Too

Adam Starr
Markowitz Herbold


Adam Starr

My office specializes in complex business litigation, and we pride ourselves on being trial attorneys. But when few complex cases are going to trial, it is tough to get trial experience. In the past few years, our firm has partnered with Legal Aid Services of Oregon ("LASO") to handle restraining order trials under the Oregon Family Abuse Prevention Act ("FAPA") for survivors of domestic abuse on a pro bono basis. In addition to providing an important community service, these trials are an opportunity for our attorneys to gain valuable trial experience, which also develops those same skills in our commercial practice.

What Are FAPA Restraining Order Trials?

In short, a FAPA restraining order trial is an expedited bench trial to establish the merits of a restraining order entered *ex parte*.

A petitioner typically applies for a temporary restraining order on their own or with the assistance of Legal Aid, using forms that are available through the Oregon Judicial Department website. The forms are user-friendly and designed for self-represented persons. The temporary restraining orders are submitted to the court and granted on an *ex parte* basis. After the order is entered, the respondent then has an opportunity to request a trial to contest the restraining order. If the petitioner prevails at trial, the restraining order will remain in place for two years.

If the respondent is successful, the restraining order is dissolved. Each trial we handle originates with LASO. LASO contacts our firm regarding a client facing a contested restraining order trial. In general, a petitioner is entitled to a FAPA restraining order when they have been abused within the last 180 days by a family member or person with whom they are in a sexually intimate relationship, and where there is an imminent danger of further abuse. The court can also consider incidents of abuse outside the 180-day window for purposes of evaluating the threat of future abuse.

LASO typically contacts our office three to five days before the trial on a contested order. With such limited notice, I generally only have time for one short meeting with the client to hear their story and develop the case, including preparing for direct exam of my client and any witnesses, and cross-examination of the respondent. Sometimes the client provides me with pictures of injuries or other documentary evidence. At times there are other witnesses to the abuse whom I need to interview within my (at most) five-day window. Because of the short time before trial, there is no time to subpoena police officers to testify about police reports, or doctors to testify about medical exams.

The restraining order trials typically take two to four hours and are conducted like normal bench trials, with opening statements, live testimony, and closing statements. Respondents may appear *pro se,* or may be represented by counsel.

How Defending Contested Restraining Orders Has Made Me a Better Commercial Litigator

Because these trials are short and conducted with no discovery, they are a good training ground for Oregon's trial-by-ambush state courts. These expedited trials have helped me get comfortable with handling the unexpected. There are no prior depositions to review, and no exchange of witness lists or exhibits before trial. I have to be comfortable thinking on my feet, particularly when dealing with the parties and the court.

Getting Comfortable with the Unknown

The FAPA cases are often won or lost on the petitioner's direct examination, yet I often only have an hour or so to prepare with my client before trial. As a result, the direct examination at trial is less scripted, more free-flowing, and often filled with some surprises. There is very little opportunity to coach my client or rehearse the direct.

I need to develop strategies to exert control over my client's testimony without leading them. I do this by orienting my client and reminding them about the topic at hand when they're testifying. Open-ended questions like "what happened next" can lead the witness into irrelevant digressions. Instead, I use specific signposts, which have the added benefit of orienting the court as well.

For example, I will say to the client: "Now let's talk about the incident in the kitchen." Often clients will veer off into details about side stories that are not relevant to the judge. These witnesses require a gentle interruption to re-focus them on what matters to the case. It could be as simple as "Ms. Smith, we'll get into that in a minute, but right now let's get back to the incident." The witness will also often rush through the most important part of their testimony—the assault—since it is a painful experience to recall. That's where I will need to slow my client down, break a long narrative into smaller parts, and hover over the critical parts of their story.

> **FAPA restraining order trials have helped me get comfortable with handling the unexpected.**

Being comfortable leading lightly scripted direct exams based on limited information is a skill that has directly translated to my commercial practice. For example, it is common that there are third-party witnesses in my cases. I may have an hour to interview them, but not an opportunity to rehearse or script an examination with them. The same skills I've used with my pro bono cases translate well to interviewing and examining third-party witnesses in my regular practice. For example, I need to quickly assess whether the witness is likeable, credible, and has helpful information, and whether the benefit of their testimony is outweighed by any negatives, such as bias or other unhelpful information. I also need to assess what type of witness this person will be on the stand, such as whether they'll be overly talkative, stay on topic or not, or will need coaxing to get their personality to shine in front of the jury (or judge). The pro bono work has given me practice with creating outlines based on these short interviews, and then being comfortable and flexible dealing with the unexpected during the direct examination.

Cross-Examining an Unrepresented Party

Conducting a cross-examination of the unrepresented respondent is like conducting cross of an expert: I approach it with a "do no harm" mentality. It is important not to come across as a bully, because they are representing themselves. And because there is no discovery, it is difficult to impeach their testimony on the stand.

I therefore proceed carefully and ask narrow questions without giving the witness any opportunity to provide long-winded responses.

Maintaining Credibility and Trust with the Court

Because FAPA trials are often conducted without attorneys, the judges are adept at taking control of the proceedings and getting the information they need from the parties to make a decision on the merits. The appearance of an attorney for one of the parties should make things easier for the court, not more difficult. I want the judge to see me as someone facilitating the search for the truth, not obscuring the facts, wasting time, and making their job more difficult.

In practice, this means keeping my witness examinations organized, direct, and to the point. I am judicious with the use of documentary evidence. One or two photographs of an injury is sufficient. With an unrepresented party on the other side, I am very sparing with my evidentiary objections. It is undoubtedly important to assert meritorious objections that keep out potentially harmful evidence (such as hearsay objections). But there is a risk of annoying the court with technical objections and coming off as a bully or unnecessarily slowing down the proceedings. When I assert an objection, the judge should know it is important and meritorious.

These are the same skills and judgment calls I've applied to court and jury trials in my regular practice. Although the subject matter is different, the principles are the same.

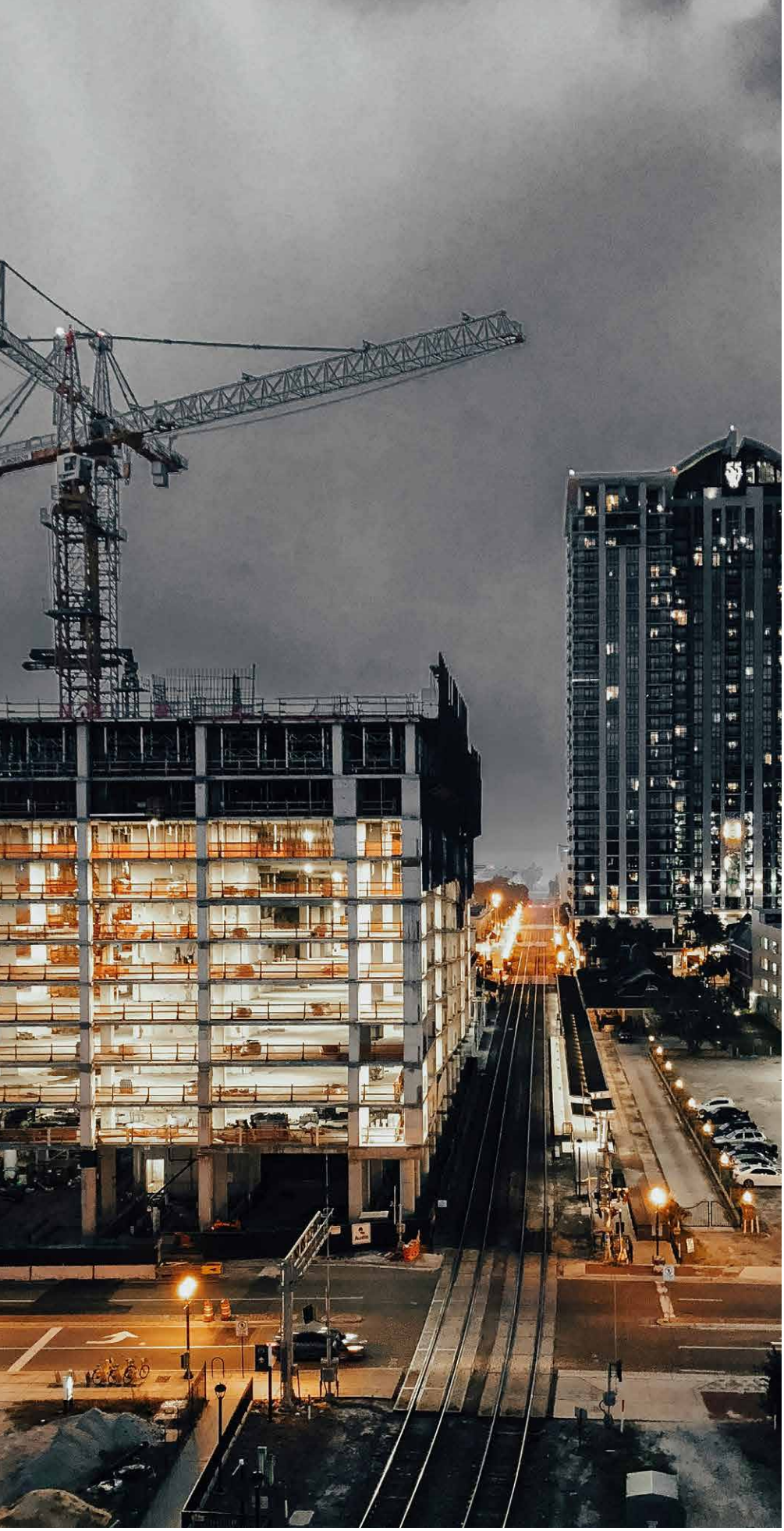
Logistics of Working with Legal Aid and Handling FAPA Cases

If you are interested in FAPA trial work, you can reach out directly to one of the staff attorneys at Legal Aid Services of Oregon (such as Shelby Smith shelby.smith@lasoregon.org) and let them know you are interested in volunteering. Typically, when Legal Aid has a client in need, they will send an email with some basic information about the case, the date of the hearing (which may be less than a week away), and ask whether you are available and interested in taking the case. If you are, they will send you the file, which consists of the prior case filings, a client intake form, the client's contact information, and a simple sample engagement letter for taking on the matter. Usually, the total time commitment is somewhere between seven to twenty hours of work, which largely consists of preparing for the trial and handling the trial. There is very little, if any, legal writing or briefing involved. And once the trial is over, the representation is complete. No experience or training is required, and Legal Aid also offers live and recorded CLEs and trainings on FAPA hearings for first timers.

Handling pro bono FAPA restraining trials has been a rewarding experience, on both a personal and professional level. I encourage all attorneys who are looking for pro bono opportunities, or even just more trial experience, to consider volunteering to take these cases to both enrich their private practice skills and to provide greater access to justice for our community.

Endnotes

1. The Oregon Family Abuse Prevention Act is codified at ORS 107.700-107.735.
2. Forms and more information about the orders are available at https://www.courts.oregon.gov/programs/family/domestic-violence/pages/restraining.aspx.



Recent Case Notes

Kevin Sasse, Dunn Carney
Case Notes Editor

PROFESSIONAL RESPONSIBILITY

RPC 1.8(a)'s Conflict-of-Interest Rule Requires Essential Terms of Business Agreement Between Lawyer and Client Be Included in Written Disclosure Between Lawyer and Transacting Client

In In re DuBoff, 370 Or 720, 525 P3d 62 (Feb 16, 2023), the Oregon Supreme Court held that a "business transaction" within the meaning of RPC 1.8 occurs when a lawyer and client enter into an arrangement that presents the possibility of overreaching by the lawyer because the lawyer has an advantage in dealing with the client. The court further held that if a lawyer enters into a business transaction with a client, the lawyer must fully disclose the essential terms of the business transaction, in writing, to which the client must give informed consent.

Respondent is a lawyer whose long-standing business client was in the construction business. Respondent provided the client legal services in numerous legal matters in exchange for money. After more than a decade into their attorney-client

relationship, respondent began hiring the client's construction company to perform construction services on respondent's properties. Simultaneously, the client's need for legal services substantially increased, and the client began to accumulate large outstanding legal fees owed to respondent.

The client proposed to offset future costs of construction work for respondent against legal services provided by respondent. Respondent agreed to this arrangement, and sent a letter to the client stating, in relevant part, that: (1) the parties agreed to the client providing construction services to pay for some or all of the amounts owed to respondent's law firm; (2) respondent would not represent the client in this business transaction; (3) respondent's firm and the client would both continue to calculate costs for their respective work based on the then-standard hourly rate; and (4) respondent's interests in the transaction could at some point be different than or adverse to those of the client.

The client consented to the arrangement, including "the legal representation, the terms of the business, and the lawyer's role in [the] transaction as set forth in this letter." Subsequently, the client provided several years of construction services to respondent but never provided respondent with an accounting of the construction work performed. After becoming dissatisfied with the client's construction work, respondent demanded the client provide documentation for the work performed, for which respondent had never provided any credit, and pay the outstanding legal fees, which exceeded $175,000.

The court held that the arrangement between respondent and client did not fall under the "standard commercial transaction" exception to RPC 1.8(a) because the terms and conditions the client offered to respondent were not what the client regularly offered to the general public for construction services. The court accordingly looked to the terms of the written agreement to see if the client had adequately waived the conflict. The court found that since the writing failed to include how the parties would determine what construction projects the client would perform, for whom, when they would be performed, or how the rates would be determined, the writing failed to include all material terms in violation of RPC 1.8(a).

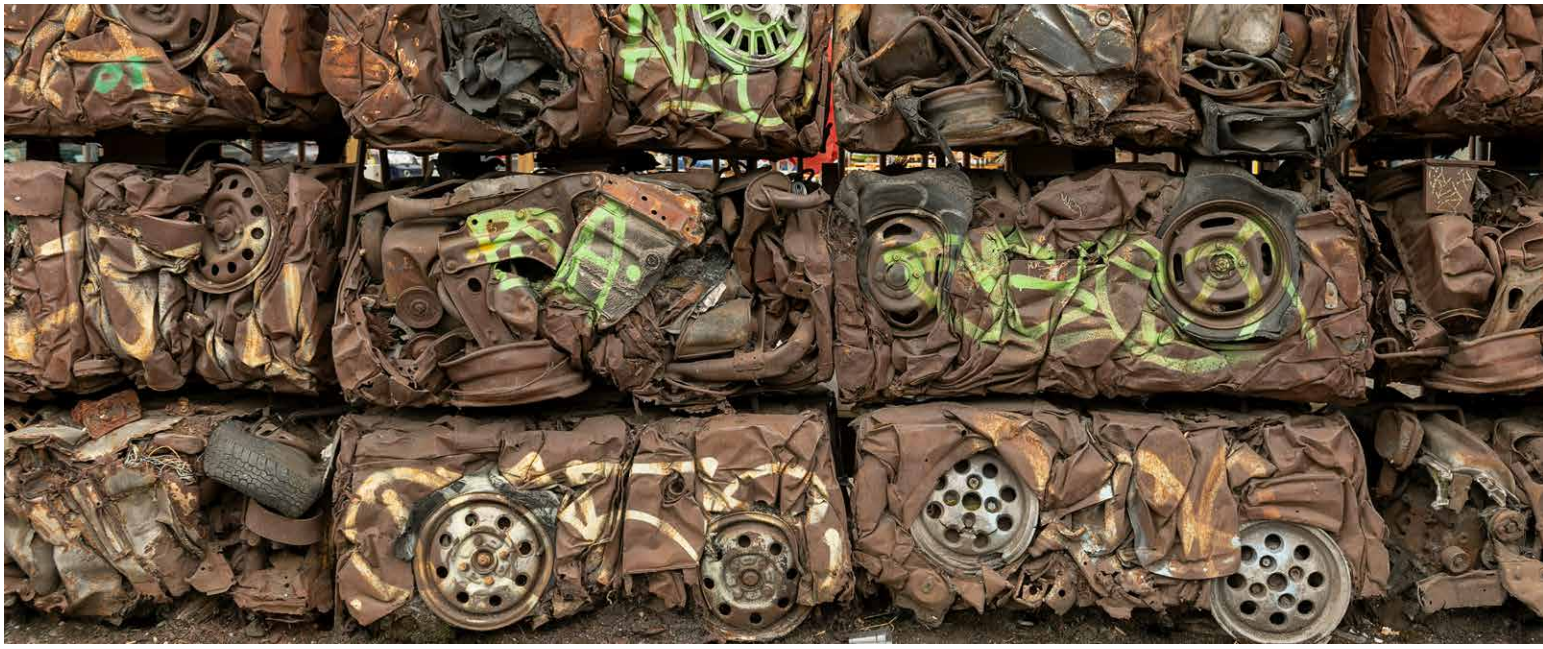
Submitted by Tabatha Schneider
Rosen & Schneider

ATTORNEY-CLIENT PRIVILEGE

Confidential Emails on Former Employers' Servers May Still Be Privileged

In Gollersrud v. LPMC, LLC, 371 Or 739, --- P3d --- (Dec 21, 2023), the Supreme Court of Oregon held that email messages on plaintiff's former employers' servers were confidential communications protected by the attorney-client privilege, and plaintiff did not waive the attorney-client privilege by failing to delete the messages before terminating the employment relationship.

Plaintiffs Inez and David Gollersrud (mother and son, respectively) were realtors who alleged fraud in a real estate relationship with LPMC, LLC. LPMC issued subpoenas to David Gollersrud's former employers seeking the production of all communications between David Gollersrud's email address and nine others, including that of Inez Gollersrud. Plaintiffs moved to quash the subpoenas because some of the emails included communications with their attorneys, and thus, were protected by the attorney-client privilege.



LPMC argued that the emails were not protected because David Gollersrud had no reasonable expectation of privacy in emails on an employer's email system, and had waived the attorney-client privilege by failing to delete the messages before severing employment.

The court first considered whether the communications were confidential. The court determined that there is a presumption of confidentiality under OEC 503(1)(b) if the party asserting the privilege establishes that the communications were between a class of persons found in OEC 503(2)(a) to (e) and were made for the purpose of facilitating the rendition of professional legal services. LPMC did not contest that the communications met these criteria.

Once the presumption is established, the burden shifts to the other party to demonstrate that the communications were not confidential. The court found that the mere possibility that a third party may have discovered the contents of the communications is not sufficient to overcome the presumption of confidentiality. The court reasoned that OEC 503 is a pragmatic and practical rule and that the modern realities of remote work have blurred the lines between private and work communications. Thus, a party seeking discovery of such communications must make an evidentiary showing that establishes more than a risk that privileged communications might be disclosed to a third party. The court offered examples of facts that could successfully overcome the presumption, such as an employer's policies concerning the personal use of company equipment and an employer actually monitoring employee communications. LPMC failed to present sufficient evidence to overcome the presumption.

Next, the court considered whether plaintiff's failure to delete the confidential communications before severing employment constituted a waiver of the attorney-client privilege.

Whether the privilege has been waived centers around an actual disclosure (express or implied). The court found that David Gollersrud's departure from employment did not constitute a voluntary disclosure, and there was no evidence that his employers ever actually reviewed the communications. As a result, the court rejected LPMC's argument that the privilege had been waived.

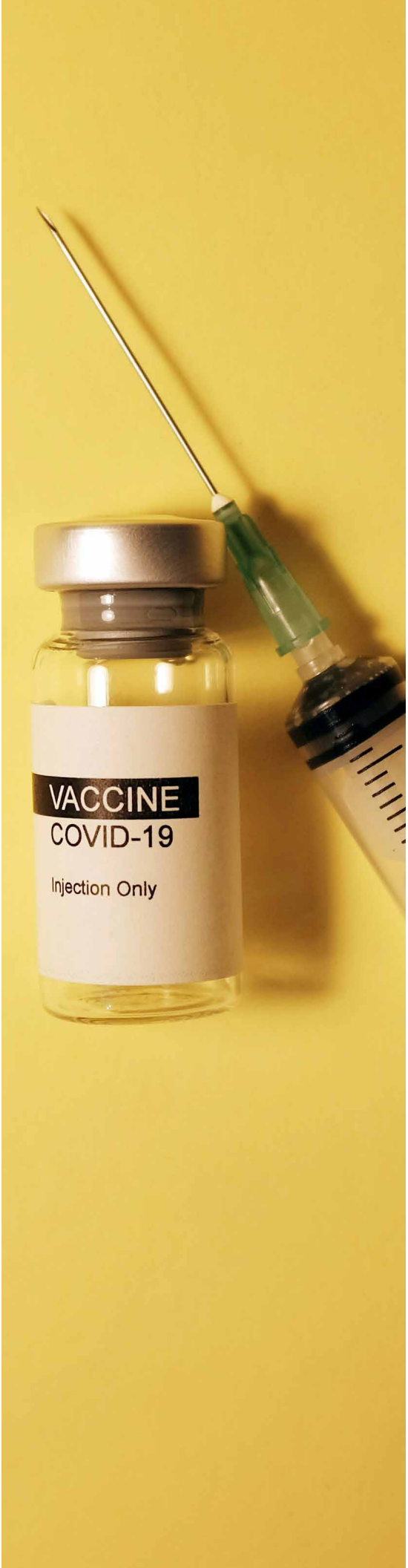
Submitted by Steven Gassert
Smith Freed & Eberhard

ADMINISTRATIVE PROCEDURE

Agency Interpretations Are Not Necessarily Rules, but May Require Rulemaking

In *PNW Metal Recycling, Inc. v. Department of Environmental Quality,* 371 Or 673, 540 P3d 523 (Dec 7, 2023), the Oregon Supreme Court held that a prospective agency interpretation of a statute is not itself a rule under Oregon's Administrative Procedure Act (APA), but left open the possibility that rulemaking may be required.

Prior to 2018, the Department of Environmental Quality (DEQ) did not require facilities that dismantled and recycled used vehicles to obtain a permit for operating a solid waste disposal site under ORS 459.205, even if those facilities also disposed of other solid waste. However, in 2018, DEQ informed petitioners that the



agency had changed its interpretation of the relevant statutes, and petitioners would thereafter be required to obtain permits.

Petitioners challenged DEQ's interpretive shift by asserting that it was an agency "rule" under the APA. Petitioner argued that DEQ's "rule" was improper because DEQ lacks statutory authority to promulgate rules and in any event had failed to follow the rulemaking process.

The Oregon Supreme Court rejected the argument that DEQ's interpretation constituted a rule for purposes of the APA. The court determined that the key question is whether the statutory terms delegate policymaking authority to an agency. If they do, rulemaking is required. Otherwise, if the statutory terms contain a "complete" expression of policy, the agency may interpret those terms, although their interpretation is a question of law. Under either reading of the statute, however, the Department's interpretive decision was not necessarily a rule.

If the statutory terms required interpretation only, then DEQ's interpretation was either correct or incorrect as a matter of law. Alternatively, if the terms were delegative, then DEQ's internal decision was still not necessarily a rule because agencies can sometimes make policy determinations "through the contested case process." Thus, neither interpretation of the statute required a conclusion that DEQ's internal decision was a rule.

Having concluded that DEQ's internal decision was not necessarily a rule, the court considered whether DEQ's interpretation bore any indicia of a rule. The court concluded that it did not because it was not generally applicable. Although DEQ had communicated its interpretation to petitioners in advance, the court refused to hold that, without rulemaking, agencies could only announce policy in contested cases "without forethought." Notably, agencies are required to give notice to affected parties before instituting a contested proceeding, and the court presumed that agencies can "decide what a statute means before they prosecute violations of it."

The court concluded that DEQ's interpretative decision was not itself a rule, but did not decide whether DEQ was *required* to promulgate a rule embodying its interpretation based on the procedural posture of the case.

Submitted by Joseph M. Levy
Markowitz Herbold

EMPLOYMENT

Court of Appeals Upholds Vaccination Rule for Providers and Staff in Healthcare Settings and Teachers and Staff in School Settings

In *Free Oregon, Inc. v. Oregon Health Authority,* 329 Or App 460, --- P3d --- (Dec 13, 2023), the Court of Appeals held that rules adopted by the Oregon health Authority (OHA) that imposed COVID-19 vaccination requirements on providers and staff in healthcare settings, and on teachers and staff in school settings, were validly adopted.

Plaintiffs sought judicial review of two administrative rules adopted by OHA, OAR-019-1010 and OAR 333-019-1030, which have both since been repealed. The rules required providers and staff in healthcare settings and teachers and staff in school settings to be vaccinated against COVID-19. Petitioners argued that the rules exceeded OHA's statutory rulemaking authority. Petitioners further argued that the rules were preempted by federal law and violated various provisions of both the Oregon and United States Constitutions.

Because the rules had been repealed, OHA moved to dismiss the case as moot. The court observed that a party can successfully resist a mootness claim by

showing practical effects or collateral consequences that will flow from the outcome of the case. Importantly, one petitioner had a pending proceeding in which she was challenging her employer's decision to place her on unpaid leave based on her failure to obtain a vaccination or exemption as required by (repealed) OAR 333-019-1030. Because the court's determination of the validity of that rule would impact that proceeding, the court rejected OHA's mootness claim.

However, the court held that the rules were validly adopted. First, OHA had statutory authority to adopt the rules pursuant to ORS 413.042, which imbues OHA with authority to adopt rules necessary for the administration of laws that OHA is charged with administering. One such statute, ORS 431.110, directs OHA to have direct supervision of all matters relating to the preservation of life and health of the people of the state, as well as full power in the control of all communicable diseases.

Second, the court held that the rules did not conflict with ORS 431.180 because, although they establish consequences resulting from the decision on whether to get a vaccine, they do not rise to the level of interfering with the medical decisions of individuals.

Third, the court held that the rules did not violate ORS 433.416, which prohibits immunization as a condition of work, unless such immunization is otherwise required by federal or state law, rule, or regulation. Because the immunization rules were based on separate statutes, ORS 413.042 and ORS 431.110, they complied with the exception in ORS 433.416.

Finally, the court held that the rules are not preempted by federal law, and that petitioners' constitutional arguments were either undeveloped or outside the procedural scope of the specific rule challenge.

Submitted by Rachel Timmins
Ogletree Deakins

Collective Bargaining Employer Not Required to Accommodate All Employees with Approved Religious or Medical Exceptions to Vaccination Requirement

In *Airport Fire Fighters' Association, IAFF Local 43 v. Port of Portland,* 329 Or App 545, --- P3d --- (Dec 13, 2013) (unpublished opinion), the court affirmed the Employment Relations Board's dismissal of the union's unfair labor practice claims that were based on a rule that had generally required healthcare workers, including firefighters, to receive the COVID-19 vaccine to work in healthcare settings. The union asserted four assignments of error, all of which the court overruled.

In the union's third assignment of error, it argued that the Employment Relations Board erred in concluding that the Port of Portland did not violate the parties' memorandum of understanding and, therefore, ORS 243.672(1)(g), when it declined to provide reasonable accommodations to employees who had obtained approved religious exceptions from the requirement to receive the vaccine. The Employment Relations Board had also determined that the Port of Portland was not required to provide notice of anticipated changes to vaccination requirements, as they are not a mandatory subject of bargaining. The court reviewed the Employment Relations Board's order for substantial evidence, substantial reasons, and errors of law. The court affirmed the order because, among other reasons, the Memorandum of Understanding did not require the Port of Portland to accommodate all employees with approved religious or medical exceptions to the vaccination requirement.

Submitted by Rachel Timmins
Ogletree Deakins

Judge Biography

Honorable Hafez Daraee

Washington County Circuit Court

Judge Hafez Daraee is Washington County's newest judge. He was recently appointed to the position vacated by Judge Beth Roberts, who retired in September.

Judge Daraee was born in Iran and emigrated to the United States with his family in 1976 when he was 10 years old. After some time spent in Louisiana and Texas, his family found a home in Lake Oswego, Oregon. Judge Daraee attended the University of Oregon, where he earned his undergraduate degree in political science.

After earning his undergraduate degree, Judge Daraee spent a year in Los Angeles working for his father's construction business—and one year in Los Angeles was exactly enough time for him to realize he belonged in Oregon. While he has ultimately decided to call Oregon home, Judge Daraee recommends that every native Oregonian spend time living in one of the larger U.S. cities because it will change your perspective and enhance your appreciation for Oregon.

Judge Daraee returned to Oregon in 1990, an eventful and meaningful year for him—he met his wife in July, started at Lewis & Clark Law School in August, and began work as a clerk in November for his best friend's father, where he would develop his practice over the following nine years. Over his legal career, Judge Daraee has had experience litigating a variety of civil subspecialties including securities and other business-related litigation, though construction law in particular was a natural fit based on his background with his father's construction business.

Contemporaneous and complementary to his legal career, Judge Daraee has always been committed to community service. He has long been active in juvenile diabetes fundraising efforts, and has held various civic positions serving on the Rivergrove City Council and as mayor of Rivergrove.

Judge Daraee is appreciative of his educational background and acknowledges that his legal education has allowed him to develop specialized skills. He values his role as a community member and is committed to utilizing the skills he has developed through his education and career to give back to the community. To that end, becoming a judge presented the next logical step to enhance his investment in his community. Irrespective of this endeavor, the appointment to the position came as a surprise to him.

For practitioners who will be appearing in front of him, Judge Daraee asks them to embrace their role as educators and take the time to explain the details of the legal theories they are presenting. Judge Daraee takes the rule of law and the importance of making the right decision based on the law very seriously.

For practitioners who will be appearing in front of him, Judge Daraee asks them to embrace their role as educators and take the time to explain the details of the legal theories they are presenting.

However, he knows he will be faced with areas of the law that he is not familiar with. He is looking forward to hearing from members of the bar, listening closely as they help educate him on making the right decision, and learning about areas of the law he has not yet been exposed to.

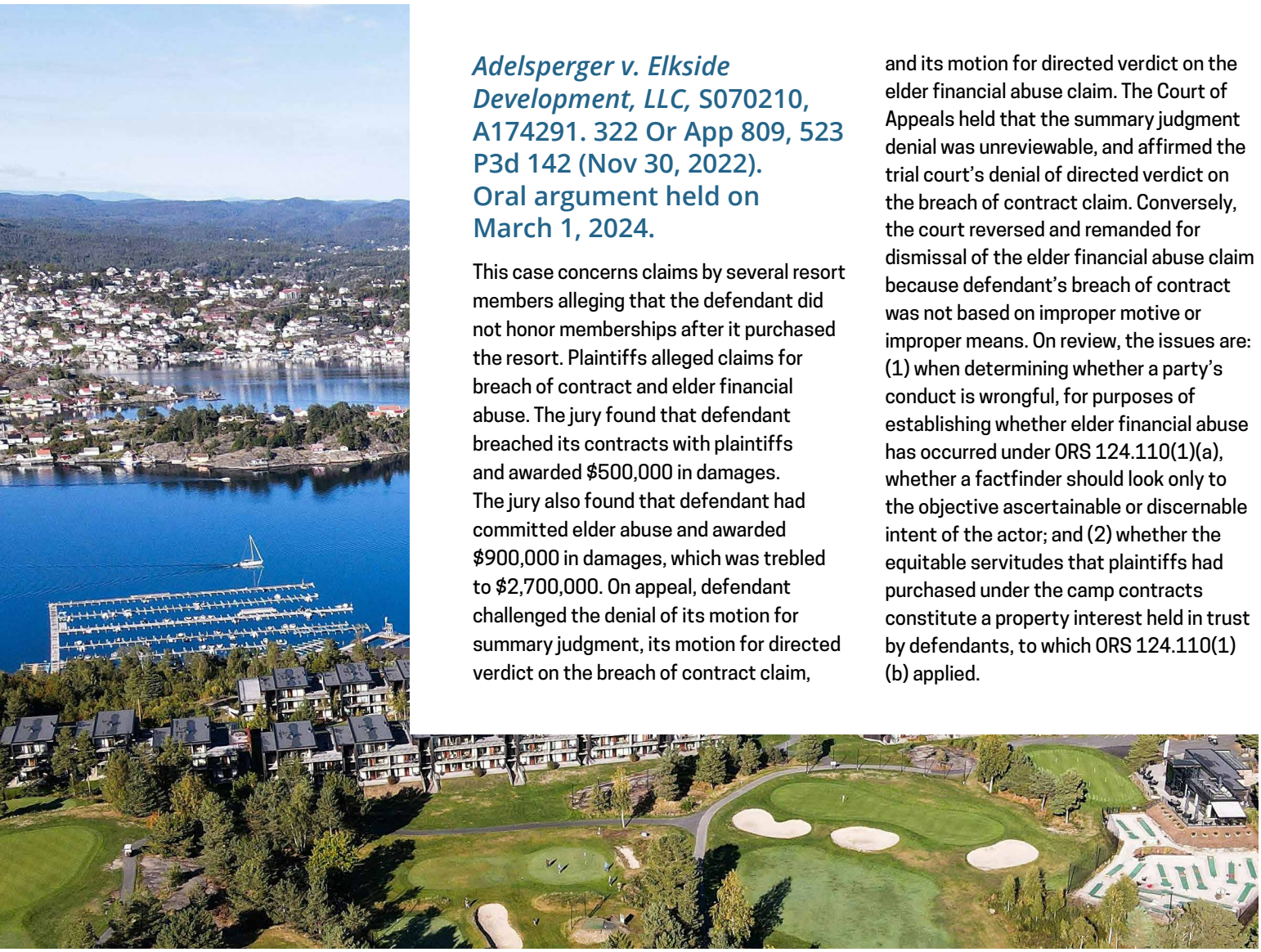
In addition to learning new areas of the law, Judge Daraee is also looking forward to getting to know the other members of the bench in Washington County and experiencing the new perspective that comes from being a judge.

Hannah McCausland
Brisbee & Stockton

Petitions For Review

Kevin Sasse, Dunn Carney
Case Notes Editor

The following is a brief summary of cases for which petitions for review have been granted by the Oregon Supreme Court. These cases have been selected for their possible significance to OADC members; however, this summary is not intended to be an exhaustive listing of the matters that are currently pending before the court. For a complete itemization of the petitions and other cases, the reader is directed to the court's Advance Sheet publication.



Adelsperger v. Elkside Development, LLC, S070210, A174291. 322 Or App 809, 523 P3d 142 (Nov 30, 2022). Oral argument held on March 1, 2024.

This case concerns claims by several resort members alleging that the defendant did not honor memberships after it purchased the resort. Plaintiffs alleged claims for breach of contract and elder financial abuse. The jury found that defendant breached its contracts with plaintiffs and awarded $500,000 in damages. The jury also found that defendant had committed elder abuse and awarded $900,000 in damages, which was trebled to $2,700,000. On appeal, defendant challenged the denial of its motion for summary judgment, its motion for directed verdict on the breach of contract claim, and its motion for directed verdict on the elder financial abuse claim. The Court of Appeals held that the summary judgment denial was unreviewable, and affirmed the trial court's denial of directed verdict on the breach of contract claim. Conversely, the court reversed and remanded for dismissal of the elder financial abuse claim because defendant's breach of contract was not based on improper motive or improper means. On review, the issues are: (1) when determining whether a party's conduct is wrongful, for purposes of establishing whether elder financial abuse has occurred under ORS 124.110(1)(a), whether a factfinder should look only to the objective ascertainable or discernable intent of the actor; and (2) whether the equitable servitudes that plaintiffs had purchased under the camp contracts constitute a property interest held in trust by defendants, to which ORS 124.110(1)(b) applied.

Bellshaw v. Farmers Insurance Company of Oregon, S070423, A173722. 326 Or App 605, 533 P3d 40 (June 28, 2023). Oral argument held on March 14, 2024.

This case concerns a class action against an automobile insurer to recover statutory penalties for insufficient notice of rights regarding choosing an automobile repair shop. The trial court found that the notice in question did not satisfy all of the statutory requirements, and awarded each member of the class the statutory penalty of $100 for a total award of more than $26 million. On appeal, the insurer argued: (1) the trial court misinterpreted the statute; (2) the trial court misapplied the statute of limitations; (3) the aggregate statutory penalty violates due process; and (4) the trial court erroneously amended the class parameters after making a decision on the merits. The Court of Appeals affirmed the trial court's interpretation of the statute, but held that the trial court misapplied the statute of limitations, which had the effect of requiring the trial court to reassess the insurer's remaining arguments on remand. On review, the issue is whether testimony constitutes hearsay if the witness relays the substance of a declarant's out-of-court statements for the truth of the matter asserted, but does not quote a particular statement or identify the declarant.

KKMH Properties, LLC v. Shire and All Other Occupants, S070343, A176826. 326 Or App 1, 530 P3d 531 (May 17, 2023). Oral argument held on March 1, 2024.

This case concerns a forcible entry and detainer action against a tenant. The plaintiff sought restitution of possession of a residential dwelling unit based on a violation of the rental agreement. The tenant moved to dismiss because the landlord's notice of termination did not include a notice of an opportunity to cure the violation of the rental agreement as required by ORS 90.392(4)(a)(A). The trial court denied the motion to dismiss, and the tenant appealed. The Court of Appeals affirmed, holding that there was evidence supporting the conclusion that, even had the notice of opportunity to cure the violation been issued as required, the violation could not have been cured within the 14-day notice period, excusing the landlord's failure to give the required notice. On review, the issue stated is, in determining whether a tenant can cure a violation under ORS 90.392(4)(a), is a court bound by a landlord's good faith determination that a violation is not curable, or must the court instead consider all possible ways to cure?

Defense Victory!

Christine Sargent, Littler Mendelson
Defense Victory! Editor

Coos County Defense Verdict Reached in 45 Minutes

On November 30, 2023, a Coos County jury reached a complete defense verdict after deliberating for less than 45 minutes following a three-day trial in *Conrad Debert v. State of Oregon (ODOT), The Brown Emrick Company, and Brown Contracting, Inc.,* Coos County Case No. 22CV29276. Judge Martin E. Stone presided. Skip Winters and Cam Passmore of Chinn Smith Winters represented defendants. Mark Passannante of Broer & Passannante represented plaintiff.

Plaintiff's claims arose out of a motorcycle accident that occurred on U.S. 101 in an ODOT work zone near Bandon, Oregon, contracted to the company defendants. Plaintiff struck an orange traffic barrel that had been dislodged from its weighted ring (likely from a vehicle strike) and was then knocked by another vehicle into plaintiff's path just before the accident.

Plaintiff asserted negligence claims against the defendants, alleging $1.3 million in damages. After expert evidence and witness testimony arguing that the plaintiff was following too closely to see or avoid any hazards, the jury found that plaintiff alone or in combination with the unknown third-party vehicles was the sole cause of his injuries.

Submitted by Cam Passmore
Chinn Smith Winters

City of Eugene Obtains Complete Summary Judgment in Section 1983 Civil Rights Case

On November 27, 2023, Ben Miller of the Eugene City Attorney's Office obtained summary judgment on behalf of the City of Eugene and other individual defendants against a pro se plaintiff in *Miller v. City of Eugene, et al.,* District of Oregon Case No. 6:21-cv-01803-SI. The Honorable Michael H. Simon presided.

Plaintiff brought a § 1983 case pro se alleging violations of his civil rights related to his arrest and prosecution for various sexual offenses. Plaintiff claimed defendants unlawfully searched his cell phone and that police committed perjury during a pretrial hearing. In granting defendants' summary judgment motion, Judge Simon first ruled that the claims related to officers lying under oath were barred under the Rooker/Feldman doctrine. The court next determined that claims related to an attempted search of a cell phone were barred by qualified immunity.

Submitted by Ben Miller
Eugene City Attorney's Office

Asphyxiation Case Could Not Survive Summary Judgment

On December 7, 2023, Ben Miller of the Eugene City Attorney's Office and Robert Franz of the Law Office of Robert E. Franz, Jr., obtained summary judgment in a case involving the asphyxiation of an individual in the back of a patrol car in *Estate of Sanchez, et al. v. City of Eugene, Carlos Jones, et al.,* District of Oregon Case No. 6:21-cv-00142-MC. Robert Hamilton and Robert Miller represented plaintiffs. The Honorable Michael McShane presided.

The decedent, Sanchez, was arrested for various crimes and transported unbelted in the back of a patrol car to a hospital for medical clearance. While in transport, Sanchez asphyxiated himself with a seatbelt. Sanchez's Estate sued the City of Eugene and several individually named defendants for numerous claims, but the claims ultimately at issue included an ADA claim against the City and a Section 1983 denial of medical care claim against one of the officers.

The district court decided that plaintiffs attempted to change their theory of the case at summary judgment to allege that the officer intentionally allowed Sanchez to asphyxiate himself. The court concluded that plaintiffs did not plead such a claim, nor did plaintiffs have proof of such a claim. Rather, the evidence showed the officer was unaware of any medical emergency. As a result, plaintiffs could not meet the standard of deliberate indifference necessary to move forward on their remaining federal claims.

Submitted by Ben Miller
Eugene City Attorney's Office

Jury Finds Dental Malpractice Case Has No Teeth

On November 17, 2023, Michael Belisle, Peter Tuenge, John Pollino, Clark Horner and Todd Reichert obtained a complete defense verdict on behalf of their clients in a dental malpractice case, *Shunk, et al. v. Advantage Dental Group, et al.,* Deschutes County Case No. 21CV49326. Christopher Kuhlman represented plaintiff. Judge Alycia Sykora presided.

Plaintiff alleged failure to diagnose squamous cell carcinoma of the tongue. After seven visits to the defendant dental clinic in 2018—including three with the named dentist defendant—plaintiff, a 34-year-old high school track coach and math teacher with a newborn baby, was diagnosed with Stage 3 tongue cancer in 2020. He then had half of his tongue removed, received radiation therapy, and was given a poor future prognosis with a low survival rate. Plaintiff claimed he had reported a non-healing lesion on his tongue at every dental visit, but his complaints were brushed off, and he was never given a referral to an oral surgeon or for a biopsy. Plaintiff and his wife asserted claims for dental negligence, loss of chance, and loss of consortium. After a three-week trial, plaintiff asked the jury for $25 million in damages. After approximately five hours of deliberation over two days, the jury found no negligence by most dentist clients. They did find negligence by a hygienist who saw the lesion in 2019, but found no causation. All defendants obtained a defense verdict.

Submitted by George Pitcher
Wilson Elser Moskowitz Edelman & Dicker

Legislative Update

Maureen McGee, Tonkon Torp
OADC Lobbyist

The 2024 Legislative Session is in the books, as legislators wrapped their work on March 7, three days before last month's Constitutional deadline. Along the way, both chambers, both parties, and the Governor's office tackled several high-profile issues with minimal political rancor or friction. The session brought very little legislation of concern to OADC in terms of legislation affecting the practice of civil law, but did bring forth some major changes in laws relevant to OADC practice groups. Legislative political observers are now turning attention to the pending election season, and to how legislative leadership changes may affect the policy process going into 2025.


Maureen McGee

Going into session, most political observers identified two significant issues on the agenda—housing and drug enforcement—with a third emerging and passing in the final days: campaign finance reform. Governor Kotek touted facilitating new housing as her single priority for the session, ultimately passing SB 1537, a bill to expand available land for housing, create a new housing authority, and address a few other changes to incentivize housing. The package includes directing around $376 million to various housing sectors and initiatives. Similarly, legislators found a way to address the public outcry surrounding drug use and possession, passing HB 4002, which reverses Measure 110's decriminalization of drug possession, and included other tools for local government and law enforcement. That package was coupled with $211 million for treatment and other mechanisms to address the drug crisis in Oregon. Finally, business groups and organized labor were able to forge a deal implementing new campaign contribution limits starting in 2027, passing HB 4024. This will change the current law, which allows unlimited campaign contributions, and staves off several ballot measures that would have otherwise appeared on the ballot in November.

From OADC's perspective, the biggest success of the session was passage of Senate Bill 1541, a bill introduced by the Chief Justice to add one circuit court judge each in Clackamas, Jackson, and Washington county circuit courts, respectively. OADC testified in support of SB 1541 during its first public hearing on February 6, and the bill passed out of the Senate Judiciary Committee on February 8 with unanimous support. The bill ultimately passed on a bipartisan basis and was signed by the governor on March 27. The application process for the new Jackson and Washington county positions is already underway; the new Clackamas County position will not become effective until July 1, 2025. SB 1541 was brought this session after a failed attempt in 2023 to add seven additional trial judges to the bench statewide, an effort that OADC also strongly supported.

Another successful legislative effort that OADC was tracking included HB 4001, which establishes a task force to study funding mechanisms, administrative issues, and eligibility and operational questions related to specialty courts within this state. Specialty courts have experienced diminishing levels of state support in recent years, and this bill is intended to address crucial needs for specialty courts into the future.

Of interest to certain OADC practice groups, the 2024 session also brought significant updates to Oregon's debt collection laws via passage of Senate Bill 1595, and separately initiated a temporary "fix" to address concerns with the effects of the Nicole Fields v. City of Newport case on recreational immunity via passage of Senate Bill 1576. In the labor and employment practice area, significant progress was made this session toward reconciling OFLA and Paid Leave Oregon through passage of Senate Bill 1515. However, HB 4050, which was a top priority bill for a large coalition of employers and would have modified Oregon's pay equity laws to allow employers to provide pay differentials, failed after only receiving public hearings in its initial committee.

Looking ahead, 2024 will bring significant change to the political landscape. At the end of session, Speaker of the House Dan Rayfield (D-Corvallis) stepped down to focus on his run for attorney general. He will be replaced by Rep. Julie Fahey (D-Eugene), representing our third speaker in as many years. As is widely known, several Senate Republicans have been ruled ineligible to run for their current seats, leading to leadership changes in that caucus as well. The 13-member GOP caucus unanimously elected state Senator Daniel Bonham, R-The Dalles, to be the next Senate minority leader beginning April 15, taking over the job from Senator Tim Knopp, R-Bend. While both men are ineligible to run for another term, Senator Knopp's tenure ends in early 2025 whereas Senator Bonham has another two years left before his term is complete. The leadership change allows for the caucus to more successfully raise money for political races during the current election season.

With several Senate Democrats also running for statewide office, we expect decent turnover once again in both chambers. This churn in legislators will require us to educate new candidates on issues of concern to OADC, and we look forward to continuing to work in the interim to identify OADC's priorities for 2025 and advocate for the interests of the association.

The Word Smith

Julie Smith
Cosgrave Vergeer Kester

I'm right. They're wrong. The end.

Julie A. Smith

There is one writing technique I learned early on in my career that I find myself returning to almost every time I craft an argument: Explain why I'm right before saying why the other side is wrong. More simply put: Argue affirmatively and respond incidentally. This technique is useful for three, somewhat overlapping, reasons.

The first reason relates to the fundamentals of persuasion. One of the main goals of persuasive writing is to educate the reader. A brief that starts out by educating the judge on the law as applied to the facts of the case lends itself to a linear, step-by-step analysis that will orient the judge to the case faster and better. A well-oriented judge will understand my position, and a judge who understands my position will better understand my responses to the other side's arguments when the judge gets to them.

The second reason is psychological in nature. If my brief starts out with a persuasively written argument that explains why I win under the law as applied to the facts, the judge is more likely to lean my way even before hearing my responses to the opposing party's arguments. The goal is to persuade the judge that the other side is wrong based on the strength of the "why I'm right" arguments before the judge even reads my responses to the other side's arguments. When the judge does read my responses to the other side's arguments, the hope is that they merely serve to confirm conclusions the judge has already reached about them.

The third and last reason is a practical one. A brief that only tells the court why the other side (or the trial court, in the case of an appeal) was wrong is not that helpful. The court needs to decide what the correct answer is to the legal question, not what it isn't. If a brief does nothing but tear down the other side's arguments, it leaves a void that the court will need to fill. Using this approach forces me to understand and better articulate my own position and ensures that I don't forget to tell the court why I'm right.

This approach to brief writing is a versatile one. It works for opening briefs on appeal, the goal of which is to explain why the trial court was wrong. And it works for responses to motions and replies. It creates structure, and the structure it creates ensures that my strongest points won't get left behind or underemphasized and that I won't forget to respond to the other side's best arguments.

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