THE VERDICT

Statutory Interpretation

Attorney Fees

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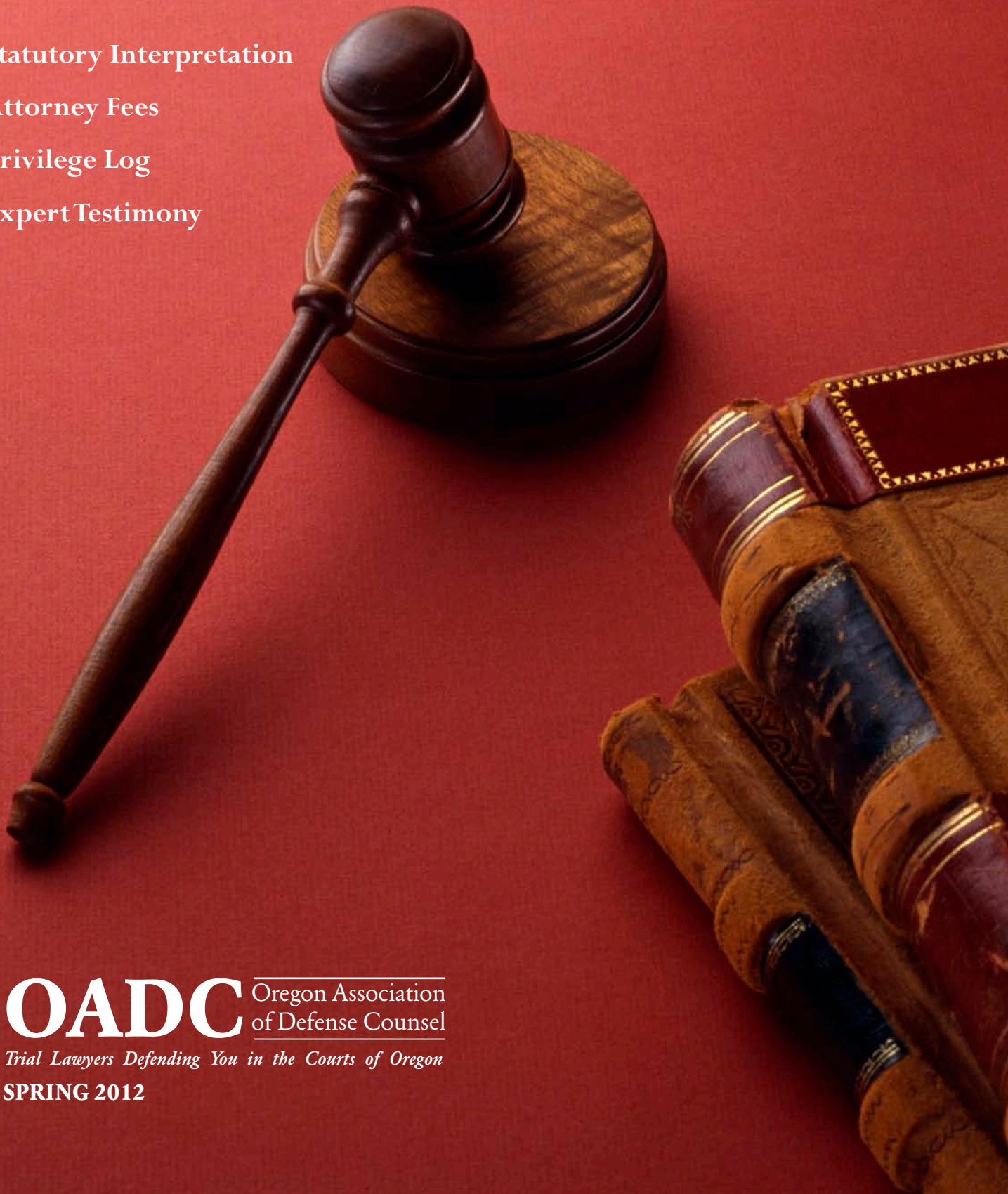
Expert Testimony



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The Verdict

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FEATURES

4 **OREGON STATUTORY INTERPRETATION BASICS AFTER *STATE V. GAINES***
Alan J. Galloway, Davis Wright Tremaine LLP

8 **DO YOU HAVE AN ORDER AWARDING ATTORNEY FEES ON CLAIMS ADJUDICATED IN A LIMITED JUDGMENT? THEN BE PREPARED TO WAIT…**
Sharon A. Rudnick, Harrang Long Gary Rudnick PC

10 **BEST PRACTICES FOR PRIVILEGE LOGS IN OREGON STATE COURT CASES**
George S. Pitcher and Rachel A. Robinson, Williams Kastner

12 **SOCIAL SCIENCE EXPERT TESTIMONY IN EMPLOYMENT DISCRIMINATION SUITS: BE WARY**
Blake H. Fry, Mersereau Shannon LLP

DEPARTMENTS

 **FROM THE PRESIDENT** **2**

 **RECENT CASE NOTES** **14**

 **PENDING PETITIONS FOR REVIEW** **19**

 **COUNCIL ON COURT PROCEDURES UPDATE** **20**

 **ASSOCIATION NEWS** **20**

 **PRACTICE TIPS** **21**

 **LEGISLATIVE UPDATE** **23**

 **AMICUS UPDATE** **24**

PRESIDENT'S MESSAGE

BY GREG LUSBY

OCD Moments and OADC

We have all lain awake at night thinking about a file back at the office. If you didn't have obsessive/compulsive (OCD) type traits before graduating from law school, the difficult daily aspects of being a civil defense attorney have likely helped those traits surface in you at some time. On a daily basis, we walk around with the facts, issues, and deadlines in multiple cases turning in our heads. Our time and thoughts are further consumed by client development, billing, and what is going on back at the office. Being at home is no longer a sanctuary due to our smart phones buzzing with emails and texts.

Greg Lusby

I remember a few years ago, I took a final draft of a brief with me on vacation to Wyoming to leisurely proofread. As I sat in camp, I decided to tweak a couple of things and then followed those up with a few more adjustments. Within a short amount of time, I decided I was unhappy with the brief, and my work evolved into a complete overhaul. If the brief had been a car engine, I would have started off to give it a check-up and then ended up with all of the parts scattered on the floor. While my family was exploring Cody, I spent an afternoon in the law library at the Park County Courthouse putting the brief back together.

I once had someone with knowledge tell me that having some OCD type traits is actually helpful to being a successful lawyer or judge. The French called OCD the "Doubter's Disease," which some might think describes the large amount of time civil defense attorneys spend focused on doubting the claims being made against their clients. Obviously, anyone suffering from actual OCD bears a horrible burden and I am not trying to trivialize such an actual diagnosis. However, the reality is that the nature of our jobs makes it very difficult to turn it "off" even at home or on vacation.

Through the years, OADC has had an evolving goal to improve the professional lives of its members. The emphasis of OADC should not be to carry the agenda of any particular client or industry, but to be dedicated to making the working lives of civil defense attorneys better. OADC has developed a respected voice that can weigh in on issues related to the daily practice of law, access to justice, and the other multitude of issues that affect those hours of the day we spend working as civil defense attorneys.

The great singer/songwriter John Hiatt has a memorable line in a song that seems to come up frequently on my iPod: "There are only two things in life but I forget what they are…." Clearly, it can be difficult for everyone to keep perspective on what should be important in their lives. However, the fact that our jobs cannot be easily left back at the office does seem to be an aggravator for us. The inherent pressures and responsibility of being a civil defense attorney consumes the limited time we have in a day. It is hoped that the trickle-down effect of OADC's efforts to improve the professional lives of its members will then allow us to spend more time focusing on our priorities outside the office.

Through the years, OADC members have given thousands of hours sitting on work groups, committees, and panels, and testifying at hearings at the Capitol to ensure that the best interests of OADC's membership are heard. We all owe a great amount of appreciation to the many OADC members who have given OADC its voice while receiving no recognition or reimbursement. The result of the many hours of work has been that OADC's input on issues directly impacting our daily working lives has been heard.

As most of you know, OADC took a significant step toward getting our interests heard by hiring a lobbyist in 2008. After much debate, the OADC Board decided that we needed to move to the next level to ensure that our voice was heard against the competing interests. Though OADC had relied on a "grassroots" approach for many years at the Capitol,

Continued on next page

it had become clear that a greater and more constant presence was necessary. The goal is for our lobbyists to be able to move quickly and effectively when issues arise at the Capitol that directly impact our working lives.

Though I realize you have seen and heard multiple solicitations to contribute to the Oregon Association of Defense Counsel Political Action Committee (PAC), it is important to keep in mind that a contribution supports efforts to protect your day-to-day interests as a civil defense attorney. Though a contribution may not prevent you from having an OCD moment in the middle of the night or spending your vacation days thinking about work, it will go toward improving the large part of our lives that we do spend working as civil defense attorneys. It makes sense that if we all support the PAC to ensure that our interests are heard, then our lives away from the office will also benefit.

As further evidence of OADC's efforts to improve the daily working lives of its members, I want to point out two significant events that were recently rolled out by the Commercial and Employment Practice Groups.

The Commercial Practice Group just held its inaugural Commercial Practice Seminar with an impressive line-up of speakers, including Judge Janice Stewart, Magistrate, U.S. District Court, District of Oregon; Judge R. William Riggs, Senior Judge, Oregon Supreme Court (Retired); Steve English, Perkins Coie, LLP; Dan Skerritt, Tonkon Torp, LLP; Chris Dominic, President & Senior Consultant, Tsongas Litigation Consultants; and Eric Fruits, Ph.D., President of Economics International Corp. As the Commercial Practice Group has grown, the need for a stand-alone annual CLE for commercial litigators has become clear. OADC Board member Jon Stride deserves a tremendous amount of recognition for getting the Commercial Practice Seminar off the ground during his first year on the Board. In addition, the Commercial Practice Group leadership of Chair Dan Larsen, Vice Chair Thomas Hutchinson, and Publications Liaison Alan Galloway worked hard to put the program and speakers together.

The Employment Practice Group implemented a new listserv devoted exclusively to their area of practice. Due to the specialized nature of employment law, Board member Jeff Eberhard and Employment Practice Group Chair Todd Hanchett, Vice-Chair Allyson Krueger, and Publications Liaison Karen Vickers advocated that a separate listserv for the Employment PG will be a great resource for connecting employment law practitioners on their own unique issues.

As I write this message, we are only a few weeks out from the OADC Annual Convention at Sunriver. The program titled "Tools for Your Trial" that has been put together by Board Members Dave Auxier, Molly Jo Mullen, and Gordy Welborn looks top-notch. As always, the OADC Annual Convention is an easy opportunity to get away with family and friends while picking up some CLE credits. A few days of biking, golfing, or just relaxing at the OADC Annual Convention can help relieve those OCD moments … as long as you leave that draft brief back at the office.

Oregon Statutory Interpretation Basics after *State v. Gaines*

Alan J. Galloway
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Litigation often turns on the meaning of a particular statutory provision. The interpretation of a statute may eliminate claims or defenses, enable (or preclude) summary judgment, and may provide an important basis for appeal. Just as the meaning of a key provision of a contract can make or break a case, so can the meaning of a key statute that is relevant to a party's claims or defenses. That is why it is essential that Oregon lawyers understand how Oregon courts interpret statutes—particularly in light of the greater emphasis courts have placed on legislative history in the last few years.


Alan J. Galloway

In Oregon, statutory interpretation has long been governed by a framework set forth by the Oregon Supreme Court in *Portland General Electric Co. v. Bureau of Labor & Industries.*[1] In 2009, that framework was modified by *State v. Gaines,*[2] which announced that courts would have additional flexibility to consider legislative history offered by parties. The following discussion reviews the *PGE v. BOLI* framework and the changes made by *Gaines*; examines key features of the framework in detail; and suggests (based on an analysis of the non-criminal cases adjudicated since *Gaines*) that *Gaines* is having an impact on Oregon litigation concerning the meaning of statutes.

The PGE framework, before and after *Gaines.*

An Oregon court's task in statutory interpretation is to effectuate the intent of the legislature that enacted the statute.[3] The Oregon Supreme Court's *PGE v. BOLI* decision set forth a three-step process for determining that intent in cases where statutory meaning is in dispute. *PGE v. BOLI* required completion of each of the following steps, in order, before moving to the next.

- First, a court "examines both the text and context of the statute."[4]
- Second, if the statute is ambiguous after the court's examination of the text and context, the court looks to legislative history for clarification.[5]
- Third, if legislative intent remains unclear after step two, "then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty."[6]

State v. Gaines retains these three steps, with a significant modification: Even in cases where there is no apparent ambiguity after the court's examination of "text and context" under step one, courts may consider legislative history (as in PGE's step two) and in fact must consider legislative history if any is offered by a party. [7] Yet *Gaines* also stated that although the court is obligated to consider such history, the court is allowed to determine what weight—if any—such history should be given.[8] Thus, following *Gaines,* the modified *PGE v. BOLI* framework is as follows:

- Step one: As under *PGE v. BOLI,* the court "examines both the text and context of the statute."[9]
- Step two: As under *PGE v. BOLI,* if the statute is ambiguous after the first step, the court looks to legislative history to clarify the ambiguity. But in addition, if any party offers legislative history—even in the absence of apparent ambiguity— the court considers the history, giving it whatever "evaluative weight" it merits.[10]
- Step three: As under *PGE v. BOLI,* if legislative intent remains unclear after step two, "then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty."[11]

Key features of the PGE/Gaines framework.

Text and context. While determining the text of a statute is simple, determining what constitutes the context is less straightforward. While this list is not comprehensive, the Oregon courts have considered the following to be part of the context of a statute:

- Prior versions of a statute;[12]
- Commentary to another state's law upon which an Oregon statute was based;[13]

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Oregon Statutory Interpretation Basics
continued from page 4

- Other provisions of the same statute and other related statutes;[14]
- The pre-existing common law;[15]
- The statutory framework within which the statute was enacted;[16]
- Prior opinions of the Oregon Supreme Court interpreting the pertinent statutory wording;[17] and
- The wording changes adopted from session to session in a serially amended statute.[18]

In considering the text and context during step one, the court also applies certain rules of construction.[19] For instance, in *PGE v. BOLI,* the Court cited two rules of construction to be applied in step one: (1) "use of a term in one section and not in another section of the same statute indicates a purposeful omission" and (2) "use of the same term throughout a statute indicates that the term has the same meaning throughout the statute."[20]

The rules applied in step one include those that are established by statute for use in determining the statute's meaning. Among those rules are the following:

> In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.[21]
>
> When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.[22]

Note that the rules of construction applied at step one are not the same as "general maxims of statutory construction" that are applicable only in step three, which is seldom reached. However, ORS 174.030 is a bit of a special case: The rule is statutory, but by its terms appears to apply only after other statutory interpretation tools fail to resolve two equally plausible interpretations.[23]

Ambiguity. Although the modification made to *PGE v. BOLI* by *Gaines* requires courts to consider legislative history if offered by a party even in the absence of an ambiguity, the existence of an ambiguity still requires the court to look at legislative history in step two, and may open the door to step three of the analysis. So, when is a statute ambiguous? The answer is not—as some might believe—whenever the statute might be interpreted negatively for your client. But the Oregon Court of Appeals has stated that "the threshold of ambiguity is a low one," and that finding ambiguity "does not require that competing constructions be equally tenable" but only that a competing construction not be `wholly implausible.'"[24] However, "[t]he court is not at liberty to give effect to any supposed intention or meaning in the legislature, unless the words to be imported into the statute are, in substance at least, contained in it."[25]

Are Oregon courts resorting to legislative history more often after *Gaines*?

In light of the low threshold for ambiguity described above, one might wonder whether Oregon courts are actually resorting to legislative history more often after *Gaines.* It appears so.

In spring 2008, a Comment in the Willamette Law Review analyzed all 150 published Oregon Supreme Court decisions applying *PGE v. BOLI* between 1999 and 2006 (just a few years before *Gaines*). According to that Comment, 141 of the cases (94 percent) were resolved at level one of the analysis, 9 were resolved at level two (6 percent), and zero at level three. See Robert M. Wilsey, Comment, *Paltry, General, & Eclectic: Why the Oregon Supreme Court should Scrap PGE v. Bureau of Labor & Industries*, 44 Willamette L Rev 615 (Spring 2008). Taking that analysis as rep-

Continued on next page

Oregon Statutory Interpretation Basics
continued from page 5

resentative of the pre-*Gaines* framework, that means that legislative history was only even considered in about 6 percent of all cases, since it was only relevant when step two was reached.

In contrast, looking at 27 non-criminal cases decided after *Gaines* by the Oregon Supreme Court and the Oregon Court of Appeals, substantial discussion of legislative history appears in seven,[26] history was considered but deemed unhelpful in eight,[27] and history was considered but deemed impertinent to the issue at hand in a ninth.[28] Based on those cases, it appears that following *Gaines,* legislative history is at least substantially considered in about one-third (33 percent) of cases at the appellate level, rather than the meager 6 percent prior to *Gaines.* In another two cases, the court suggested that no legislative history was considered because none was offered by the parties. [29] Two of the remaining cases considered the history of serially revised statutes— which actually is "context" under step one in the *PGE v. BOLI/Gaines* framework, not legislative history, as explained above.[30] The remaining 14 cases did not reach legislative history, with many turning on the plain meaning of the statutory provisions in dispute.[31]

Conclusion

Following *Gaines,* every litigator confronting a statutory interpretation issue should be aware of any potentially relevant legislative history, since the court would be required to at least consider that history if offered. Therefore, if favorable history exists, one might wish to offer it; if unfavorable history exists, one should be prepared for an opponent to offer it. In addition, lawyers should keep in mind the differences between the elements considered in step one of the *PGE v. BOLI/Gaines* analysis, such as context conveyed in previous versions of a serially amended statute, and true legislative history that may be given less weight even if considered. By understanding the *PGE v. BOLI/Gaines* framework, you can maximize your chance of successfully persuading the court to read a statute in a way that will provide a good outcome for your client.

Following *State v. Gaines,* every litigator confronting a statutory interpretation issue should be aware of any potentially relevant legislative history, since the court would be required to at least consider that history if offered.

Sources

1 *PGE v. BOLI,* 317 Or 606 (1993).
2 *State v. Gaines*, 346 Or 160 (2009).
3 *PGE v. BOLI,* 317 at 610
4 *PGE v. BOLI,* 317 at 610.
5 *PGE v. BOL*I, 317 at 611-12.
6 *PGE v. BOLI,* 317 at 612.
7 *State v. Gaines*, 346 Or at 171-72.
8 *State v. Gaines,* 346 Or at 172.
9 *Gaines*, at 171.
10 *Gaines*, at 171-72.
11 *Gaines,* at 172.
12 *Pete's Mountain Homeowners v. Water Dept.,* 236 Or App 507, 520 (2010).
13 *State v. Stokes,* 350 Or 44, 51-52 (2011)
14 *In the Matter of the Marriage of Polacek,* 349 Or 278, 284 (2010).
15 *Id.*
16 *Id.*
17 *Id.*
18 *Krieger v. Just,* 319 Or 328, 336 (1994).
19 *PGE v. BOLI,* 317 at 611.
20 *PGE v. BOLI,* 317 at 611.
21 ORS 174.010.
22 ORS 174.020.
23 *See* ORS 174.030 ("Where a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to prevail."); *PGE v. BOLI,* 317 at 612 (discussing ORS 174.030 as a step three rule).
24 *State v. Dasa,* 234 Or App 219, 231 (2010); see also *Godfrey v. Fred Meyer Stores,* 202 Or App 673, 686 (2005); (citing *Owens v. MVD*, 319 Or 259, 268 (1994); *State v. Walker,* 192 Or App 535, 542 (2004).
25 *Patton v. Target Corp.*, 349 Or 230, 242 (2010) (internal quotation marks omitted).
26 *A.G. v. Guitron,* 351 Or 465, 479 (2011) (considering history of Council on Court Procedures in amending the ORCP); *Carrillo v. City of Stanfield*, 241 Or App 151, 160 (2011) (considering prior versions of the bill ultimately enacted); *In re Marriage of Harris,* 349 Or 393, 405 (2010) ("The legislative history of the compensatory spousal support provision also supports our conclusion"); *Hopkins v. SAIF Corp.,* 349 Or 348, 356 (2010) ("[I]t is obvious to us that, to resolve the question presented, we also must consult the legislative history that the parties proffer."); *Oregon Cable Telecommunications Ass'n v. Dept. of Revenue,* 237 Or App 628, 635 (2010) ("That understanding is supported by the legislative history surrounding the enactment of ORS 183.336."); *Port of Portland v. Oregon Center for Environmental Health,* 238 Or App 404, 415 (2010) ("Further, the legislative history supports a legislative intent

Continued on next page

Oregon Statutory Interpretation Basics
continued from page 6

in line with the plain meaning of the statutory language."); *Belknap v. U.S. Bank Nat. Ass'n,* 235 Or App 658, 670 (2010) (The legislative history confirms that the legislature's intent was to provide the employer with an opportunity to resolve the wage claim before the expense of litigation was incurred.").

27 *Portland General Elec. Co. v. Mead,* 235 Or App 673, 685 (2010) ("The parties' contextual arguments and the adoption history of the measure do little to clarify the legislative intent.").

28 *El Rio Nilo, LLC v. Oregon Liquor Control Com'n,* 240 Or App 362, 369 (2011) (noting that no pertinent legislative history existed concerning the meaning of "notification" in statute).

29 *Foster v. Miramontes,* 236 Or App 381 (2010) (noting "parties have not referenced any legislative history on this issue"); *Montgomery v. City of Dunes City,* 236 Or App 194, 203 (2010) (noting "parties offered no pertinent legislative history for our consideration").

30 *Klutschkowski v. PeaceHealth*, 245 Or App 524, 551 (2011) (considering amendment history of serially amended statute); *Aronson v. Public Employees Retirement Bd.,* 236 Or App 17, 26 (2010) (no legislative history to contradict context).

31 *Smith v. Public Employees Retirement Bd.,* 235 Or App 159 (2010); *Gross v. Employment Dept.,* 237 Or App 671, 687 (2010); *Safeway Stores, Inc. v. Martinez,* 239 Or App 224 (2010); *Miller v. Tri-County Metropolitan Dist.* 241 Or App 86, 90 (2011) (citing prior Supreme Court construction of statute as authoritative); *Proctor v. City of Portland,* 245 Or App 378, 384 (2011); *Greenway v. Parlanti,* 245 Or App 144, 150 (2011); 1000 *Friends of Oregon v. Land Conservation and Development Com'n,* 244 Or App 239, 287 (2011); *Clackamas County Employees' Ass'n v. Clackamas County/Clackamas County Dist. Attorney,* 243 Or App 34 (2011); *In re Guardianship of Derkatsch,* 2012 WL 604299, at *6 (Or App 2012); *Oregon AFSCME Council 75, Local No. 2503 v. Hood River County,* 2012 WL 758892, at *3 (Or App 2012).

Do You Have an Order Awarding Attorney Fees on Claims Adjudicated in a Limited Judgment? Then Be Prepared to Wait...

Sharon A. Rudnick
Harrang Long Gary Rudnick PC

Consider this scenario: Party A and Party B are co-defendants in a contract dispute. Party A obtains summary judgment on all of plaintiff's claims against it. The claims against Party B remain unresolved. Party A moves for entry of a limited judgment, which the court enters. Party A files a petition for attorney fees and costs as provided in the contract in dispute. The court enters an order awarding Party A its fees and costs. Party A wants to collect its award, and therefore seeks to reduce the court's order to a judgment. But how? According to a recent order of the Oregon Court of Appeals, Party A cannot reduce its attorney fee award to judgment—or collect on it—until the matter is entirely resolved and a general judgment is entered.


Sharon A. Rudnick

Since the Oregon legislature amended the law of judgments effective in 2004, Oregon law has recognized three types of judgments. A general judgment decides all requests for relief except a request for relief previously decided by a limited judgment, or a request for relief that may be decided subsequently by a supplemental judgment. ORS 18.005 (7). A limited judgment may be rendered before entry of a general judgment, and disposes of one or more but fewer than all of the requests for relief in an action. A judgment entered under ORCP 68 B or G is a limited judgment. ORS 18.005 (13). Finally, a supplemental judgment is rendered after a general judgment, most commonly to reduce an attorney fee award to judgment. ORS 18.005(17); ORCP 68 C(5)(b).

Returning to Party A's attorney fee order, Party A cannot reduce the attorney fee award to a general judgment because fewer than all claims of all parties have been resolved—claims against Party B remain to be litigated. Nor can Party A include its attorney fee award in a supplemental judgment, because a supplemental judgment must follow entry of a general judgment. Can Party A reduce the attorney fee award to another limited judgment?

In the action underlying the scenario described here, Party A did just that, moving for entry of a second limited judgment and making several arguments in support. First, Party A asserted that allowing entry of a limited judgment on the fee award would further the purposes of Oregon's law of judgments, which are twofold: While a limited judgment makes an immediate appeal available on separate claims, avoiding unwarranted delay in reaching a final resolution of the dispute, on the other hand, most interlocutory appeals are prohibited to avoid the inherent inefficiency of piecemeal appeals. Requiring Party A to wait until the case was ready for entry of a general judgment before reducing its attorney fee order to judgment would defeat both of those purposes. If the plaintiff appealed from the limited judgment on the merits of its claims against Party A, Party A would have to litigate that appeal while the claims against Party B were litigated. Once the litigation against Party B was finally concluded, Party A's attorney fee award would be included in the general judgment and Party A would then have to litigate (and fund) a second, separate appeal on the fee issue. Party A argued that such piecemeal appeals would be avoided here by reducing the court's attorney fee order to a second limited judgment which could be considered on appeal together with the limited judgment on the merits—much as a general judgment on the merits and a supplemental judgment awarding fees are routinely consolidated and consid-

Continued on next page

Order Awarding Attorney Fees
continued from page 8

ered together in one appeal.

Second, Party A argued that its claim for attorney fees fit within the scope of a limited judgment as defined by Oregon statute. The limited judgment sought by Party A would finally adjudicate its claim for attorney fees, and thus would be authorized by ORS 18.005(13) and ORCP 67 B, which authorizes entry of a "limited judgment as to one or more but fewer than all of the claims or parties * * * if the judge determines that there is no just reason for delay." A "judgment" is "the concluding decision of a court on one or more requests for relief in one or more actions, as reflected in a judgment document." ORS 18.005(8). Party A argued that since no issue pertaining to Party A's request for attorney fees remained undecided in the trial court and no further action by the trial court on the remaining claims against Party B could possibly affect the concluding decisions reflected in the two limited judgments Party A seeks, a limited judgment adjudicating Party A's claim for attorney fees should be final, enforceable, and appealable.

The trial court granted Party A's motion for entry of a second limited judgment awarding Party A its attorney fees. The plaintiff appealed and moved the appellate court for summary determination of appealability of the limited judgment awarding attorney fees.[1] The Court of Appeals granted the plaintiff's motion, vacated the limited judgment on fees, and dismissed the appeal from that judgment.

In short, the Court of Appeals determined that Party A's claim for attorney fees was not a "claim" for purposes of a limited judgment. The court said:

> It does not appear that the attorney fees awarded in the… judgment disposed of a claim; that is, it *appears* that the attorney fees awarded in the… judgment were for services rendered in this case, rather than an actual claim for attorney fees incurred in another case and being sought in this case as a form of damages. The distinction is important because a request for reimbursement of attorney fees incurred in another case properly may be the subject of a claim, but attorney fees awarded for services rendered in the case before the court may not. * * * [A] limited judgment may be used only to dispose of a claim; therefore, the trial court lacked authority to adjudicate a request for attorney fees rendered in connection with this case in the form of a limited judgment.[2]

The court also concluded that, under Oregon's law of judgments, "the trial court had no authority to award fees rendered in connection with claims disposed of by a limited judgment; but, rather, such fees may be awarded only in the general judgment or in a supplemental judgment entered after the general judgment is rendered."[3] Thus, given the court's decision, it appears that Party A could have done nothing to reduce its attorney fee award to an enforceable judgment prior to the conclusion of the entire litigation and entry of a general judgment.

Now, you have probably realized that I did not make this up. This scenario replicates the circumstances in a business dispute tried in Lane County Circuit Court. The limited judgment on the merits is currently on appeal. The order awarding attorney fees remains just that—an order—and Party A continues to await final resolution of the claims against Party B to include the attorney fee award in a general judgment. That judgment, including Party A's award of fees, will likely be appealed, and Party A will face the kind of piecemeal appeal process that Oregon's law of judgments was intended to avoid. Perhaps a legislative fix is in order to allow a supplemental judgment to follow the entry of a limited judgment on the merits so that orders awarding attorney fees on the claims resolved by the limited judgment can be timely appealed and enforced.

Endnotes

1 ORAP 2.35(2) allows the appellate court to "make a summary determination of whether [a] decision is appealable." ORAP 2.35(1) defines a "decision" in this context as "any oral or written ruling of a circuit court or the Tax Court." Parties may file a petition for Supreme Court review from a Court of Appeals summary determination of appealability. ORAP 2.35(3).

2 Order Summarily Determining Jurisdiction, Vacating Judgment, And Order of Dismissal, Brewer, J., November 29, 2010, *Munson et al v. Valley Energy Investment Fund, U.S., LP, et all,* Lane County Circuit Court No. 160826841; Court of Appeals No. A147119, at 2 (emphasis in original).

3 *Id.*

Best Practices for Privilege Logs in Oregon State Court Cases

George S. Pitcher and Rachel A. Robinson
Williams Kastner

For attorneys who regularly appear in federal court, the privilege log is well known and expressly regulated – the federal rules require that a party describe the nature of documents withheld under a claim of privilege, and the privilege log has become the most common way of doing so. For state court practitioners, however, a demand for a privilege log places defense counsel in largely uncharted waters. This article briefly examines the law regarding privilege logs, and provides some practical tips for responding to requests for privilege logs in Oregon state court cases.


George S. Pitcher

Are privilege logs required in state court?

The first question defense counsel is likely to ask after receiving a demand for a privilege log is: are privilege logs *required* in Oregon state court? The short answer seems to be no—unless the trial judge says it is. No Oregon Rule of Civil Procedure explicitly requires a party to identify documents that are being withheld from production in a privilege log, and no reported Oregon appellate decision has ever held that a party must provide a privilege log with its response to a request for production.


Rachel A. Robinson

That a privilege log is not required with a response to a request for production is not, however, to say that the trial court lacks authority to compel a party to produce a privilege log in the same manner that it may, for example, order an in camera review of documents. Indeed, in 2006, the Council on Court Procedures (the "Council") considered adding commentary to ORCP 43 that specifically stated that "[t]he trial court has inherent authority to require a party to produce a privilege log." Although the Council ultimately decided not to add the commentary to ORCP 43, there was no dispute regarding the trial court's authority to require a privilege log.

Because the court has inherent authority to require a privilege log, defense counsel's decision regarding whether to voluntarily produce such a log should turn on the unique facts, circumstances, and discovery requests of each case.

Because the court has inherent authority to require a privilege log, defense counsel's decision regarding whether to voluntarily produce such a log should turn on the unique facts, circumstances, and discovery requests of each case. In many instances, it likely will be wise to provide a privilege log without requiring your opponent to file (or the court to consider) a motion to compel. In other instances, such as when the privileged nature of the documents "is obvious from the requests themselves" or when the fact that the documents exist is itself privileged, it may be appropriate to refuse voluntary production of a privilege log.

Best practices for privilege logs

Following is a list of suggested best practices with respect to privilege logs.

1. Make it clear in discovery responses if you are withholding documents based on privilege, and demand that your opponent do the same.

While there is no need to provide a privilege log with a written response to a request for production, defense counsel should make it clear in the response if documents are being withheld on the basis of privilege. In return, demand that your opponent do the same. If you cannot tell from your opponent's response whether documents were withheld under a claim of privilege, send a written request for confirmation that no documents have been withheld. Since the obvious first step in determining whether a privilege log may be appropriate is determining whether documents are being withheld on the basis of privilege, do not accept written discovery responses that are vague on this topic.

Continued on next page

Best Practices for Privilege Logs in Oregon
continued from page 10

2. Consider whether a privilege log is appropriate on a case-by-case basis.

If your opponent demands a privilege log, evaluate the demand in light of the specific document requests and the circumstances of the case. Consider whether the privilege log is necessary for your opponent to evaluate the claimed privilege, or whether the basis for the privilege is obvious from the language of the request and response. If the basis of the privilege is obvious and the categories of documents withheld can be easily described, then there may be no need for a privilege log. Also consider whether the existence of the documents is privileged, and should not, therefore, be disclosed on a privilege log. In the absence of a specific reason to refuse disclosure of information about the documents in a privilege log, it is likely best to voluntarily produce one without requiring your opponent to file a motion to compel. This is particularly true in situations where documents being withheld are "close to the line" or where the exact boundaries of the privilege are subject to debate.

3. Require reciprocity.

If you voluntarily provide a privilege log for the documents you withheld from production, demand that your opponent do the same.

4. Include sufficient information in the privilege log to allow the opposing party and the court to evaluate the claims of privilege.

Because Oregon law does not provide guidance on the information that should be included in a privilege log, look to the federal rules for guidelines and insight into what a state court judge would likely require a party to produce. The federal standard is set forth in FRCP 26(b)(5)(A). It provides:

> (A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
>
> (i) expressly make the claim; and
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(Emphasis in original).

Under this standard, federal courts have held that a privilege log is adequate if it contains the identity of the author of the document, the date on which the document was prepared, a description of the document, the identity of all persons or entities shown on the document to have received or sent the document, and the specific reason for which the document has been withheld. Although a document-by-document analysis is generally preferred, in cases involving voluminous documents, a category-based log may be adequate. In addition, documents created after the litigation is commenced generally do not need to be included on the privilege log.

Conclusion

In summary, there are no rules regarding privilege logs in Oregon state court. But there is also no doubt that trial courts have the power to order the production of a privilege log in appropriate cases. Defense lawyers should provide, and demand, written discovery responses that make it clear when documents are withheld on the basis of privilege. In cases where a privilege log is produced (either voluntarily or by court order), federal law provides good guidance for the likely boundaries of the information that is required.

Social Science Expert Testimony in Employment Discrimination Suits: Be Wary

Blake H. Fry
Mersereau Shannon LLP

A plaintiff making an employment discrimination claim must prove that the defendant employer treated him differently because of his membership in a protected class, like race or gender. Frequently, there is no direct evidence that an employer held discriminatory beliefs, let alone direct evidence that those discriminatory beliefs motivated the employment action or practice over which the plaintiff has sued. Instead, a plaintiff often has to rely on evidence from which the employer's beliefs and motivations can be inferred. Because such circumstantial evidence is open to interpretation, the outcome of an employment discrimination suit may ultimately depend on factors a plaintiff's attorney might not want a jury to consider, like the relative likability of the parties. So, an increasingly popular way that plaintiffs' attorneys attempt to make whatever circumstantial evidence they have mustered seem more conclusive than it may actually be is to call a social science expert to opine on the significance and meaning of that evidence.

Blake H. Fry

By way of example, an expert might propose to testify that social science studies show that a male supervisor's kind-but-paternalistic treatment of female subordinates is an indication that the supervisor views women as the weaker sex, in need of male protection, and that these studies also show that men with this attitude systematically deny promotions to women—if only unconsciously and as a way to protect them. The expert might propose to testify, further, that a male supervisor working for the defendant employer made comments that are typical of a paternalistic mindset toward women, that he therefore had a paternalistic mindset, and therefore that the plaintiff, a woman denied a promotion, was denied a promotion because of the employer's discriminatory beliefs. Regardless of whether the expert proposes to go so far as to testify to the latter conclusion, it's obvious how social science testimony can have an outsized effect on a jury. At worst, it could compel a jury to think that comments or behavior they might have otherwise interpreted as innocuous or even benevolent were somehow discriminatory.

Of course, a defendant's attorney will want to exclude social science testimony if he can. (True, he can get his own expert, but that could leave the jury feeling they have to decide the issues based on competing expert opinions rather than on the basis of circumstantial evidence that may not be obviously suggestive of discrimination.) Whether expert testimony is admissible depends on whether it is relevant and reliable. *Daubert v. Merrell Dow Pharm., Inc.,* 509 US 579 (1993). Applying these rules should be relatively straightforward, but social science testimony—perhaps because it's among the "softest" of sciences—somehow muddles things.

For instance, courts generally allow social science testimony even if its only purpose is to help the jury understand the context within which an employment decision was made. That is, this kind of testimony (dubbed "social frameworks" testimony) is allowed even though the expert is not offering an opinion on the defendant's liability. Thus, in the example above, the part of the expert's testimony about what social science academic literature has to say generally about male supervisors' attitudes toward female subordinates may be admissible as social frameworks testimony. This would seem to except social frameworks testimony from the relevancy and reliability requirements, leading a defense attorney to think that "social frameworks" testimony—and by extension other testimony by a social scientist—is subject to special treatment. The lesson for the defendant's attorney is to remain attentive to the rules governing the admissibility of expert testimony.

Half the battle is knowing, and then not forgetting, that the rules on admissibility apply just as much to social science testimony as they do to any other kind of expert testimony, including testimony coming from the "hardest" sciences. Social frameworks testimony is allowed because whether something is "relevant" is simply

Continued on next page

Social Science Expert Testimony
continued from page 12

shorthand for saying that it "will assist the trier of fact to understand or determine a fact in issue." *Daubert,* 509 US at 592. Here's the point: not all testimony by a social scientist automatically "assists the trier of fact." One pitfall is to assume that just because a social scientist offers testimony that is related to the plaintiff's theory of discrimination—the employer operated out of paternalistic views toward women, for instance—it necessarily follows that the testimony helps the jury to understand whether the plaintiff's theory is right. Discrimination is within everyone's lay ken. A social scientist's testimony really does nothing to help the jury decide whether the employer acted discriminatorily when, for instance, only a single employment decision at a small employer is at issue. Such testimony therefore may not do anything to "assist the trier of fact." *See, e.g., McClellan v. I-Flow Corp.,* 710 F Supp 2d 1092, 1136 (D Or 2010).

If a social scientist is allowed to testify, the defendant's attorney must be vigilant that the testimony is proper in content. Too many factors than can be listed or discussed here determine whether the content of testimony is proper. Nevertheless, when a social scientist purports to be testifying only to help the jury understand the context within which an employment decision was made, he is bound to accurately summarize what the academic literature has to say about it. In other words, a social scientist cannot cherry-pick among what might be relevant in a given field.

This leads, finally, to the most important aspect of a social scientist's testimony that defense practitioners must bear in mind: the standard that such testimony is restricted in scope only to that which is reliable. Of course, as in the example above, a plaintiff's attorney would love to be able to call his expert to testify about specific facts at issue, or to say flat-out that the defendant employer discriminated against the plaintiff. But an expert cannot use only his credentials as a justification to spout opinions, and he cannot use the admissibility of social frameworks testimony as a way to sneak in pure speculation on his part. Instead, his opinions must be the result of "scientific knowledge," which is what it means for expert testimony to be "reliable." To qualify as "scientific knowledge," an expert's opinions must be "derived by the scientific method." And the "scientific method," of course, is the process by which a falsifiable hypothesis is tested in an effort to disprove it. *See Daubert,* 509 US at 589-95. There are myriad ways—including statistical analyses, interviews, and experiments—that a social scientist could subject his opinion to the "scientific method" before offering it.

What the expert social scientist should not be allowed to do, however, is simply to review discovery material provided by the plaintiff to look for evidence of discrimination and then, if the expert finds some, give an opinion that the employer acted discriminatorily. Nor can the expert link the results of general studies, or studies—conducted on non-parties to the litigation—to the case in which his testimony is being offered, and say that these studies somehow demonstrate that the defendant employer discriminated against the plaintiff. Neither opinion would be based on "scientific knowledge," properly defined. *See Wal-Mart Stores, Inc. v. Dukes,* 131 S Ct 2541, 2553–54 & n 8 (2011).

Finally, the expert cannot skirt the requirement that any conclusions an expert gives be the result of "scientific knowledge" by hedging his testimony; by saying, in effect, that his testimony is not that the employer discriminated against the plaintiff, but that it is possible he did. If the expert can only say that discrimination was a "possible" motivation, then he has not "assisted the trier of fact." *See Daubert v. Merrell Dow Pharm., Inc.,* 43 F 3d 1311, 1321–22 (9th Cir 1995). It is the jury's province to sort between possibilities.

Recent Case Notes

Matthew J. Kalmanson, Hart Wagner LLP
Case Notes Editor

Workers Compensation

Managing members of a limited liability company are not protected by the Workers' Compensation Act's exclusive remedy provision, or LLC immunity for their own independent torts

In *Cortez v. Nacco Materials Handling Group, Inc.,* Case No. A144045 (February 29, 2012), the Oregon Court of Appeals held that managing members of limited liability companies are not covered by the exclusive remedy provision of the Workers' Compensation Act.

Sun Studs, a member-managed LLC, was responsible for the day-to-day management of its employees. Defendant Swanson Group, Inc was the sole managing member of Sun Studs, and had high-level management responsibilities for Sun Studs. Plaintiff, an employee of Sun Studs, was struck by a forklift that was owned by Sun Studs and operated by a Sun Studs employee. After receiving workers' compensation benefits from Sun Studs, plaintiff sued Swanson for negligence in its management of Sun Studs' safety protocols, and for violations of the Employer Liability Law (ELL). The trial court granted Swanson's motion for summary judgment on the ground that it was immune from liability under the Workers' Compensation Act's exclusive remedy provision, ORS 656.018.

The Court of Appeals reversed in part and affirmed in part. The court acknowledged that LLCs are covered "persons" under the Workers' Compensation Act, but noted that an LLC is a legal entity distinct from its members. The court then examined ORS 656.018(3), which extends the exclusive remedy provision to third parties, such as the "officers and directors of the employer," but not specifically to members of an LLC. The court reasoned that, had the legislature intended to include LLC members under the exclusive remedy provision, it would have done so expressly in 656.018(3). The court then turned to ORS 63.002, which provides that any statute that applies to "partners" and "directors" also applies to members. The court concluded that, because ORS 656.018(3) also does not identify "partners" as third parties to whom the exclusive remedy provision extends, it must not apply to members.

The court also held that Swanson was not immune from liability under ORS 63.165, which provides that a "member or manager is not personally liable for a debt, obligation or liability of the limited liability company solely by reason of being or acting as a member or manager." The court ruled that this exception did not apply because the plaintiff had alleged that defendant's own conduct in managing Sun Studs' safety protocols caused defendant's injury.

Finally, the court affirmed summary judgment on the ELL claim on the ground that plaintiff did not present any evidence that Swanson had exercised control over the instrumentality that caused plaintiff's injury, i.e., the forklift. ✪

— Submitted by Matthew G. Ukishima of Smith Freed & Eberhard PC

DAMAGES

The increased risk of a potential, future harm is not an injury that gives rise to a claim for negligence, negligent infliction of emotional distress or violations of the Unlawful Trade Practices Act

In *Paul v. Providence Health System-Oregon,* 351 Or 587 (2012), the Oregon Supreme Court held that patients whose medical information was stolen from their medical provider did not state a claim against the medical provider, when the harm alleged was only the increased risk of a potential, future injury.

Paul was a class action brought by patients of defendant Providence Health System-Oregon after computer disks and tapes containing personal information for approximately 365,000 patients were stolen from a Providence employee. Plaintiffs asserted claims against Providence for negligence, negligent infliction of emotional distress, and violations of the UTPA. Plaintiffs did not allege that anyone had accessed their personal information but, rather, that their injuries were the costs associated with monitoring the increased risk of identity theft, and emotional distress caused by this potential, future harm.

Continued on next page

Recent Case Notes

The trial court granted defendant's motion to dismiss the complaint for failure to state a claim, and the Oregon Court of Appeals affirmed.

On review of the appellate decision, the Supreme Court affirmed, holding that plaintiffs' allegations did not establish a legally cognizable injury. Under case law in the medical malpractice context, an increased risk of future harm, by itself, does not give rise to a negligence claim. The court held that the same rule applied in this context, i.e., where the only harm alleged was the cost of monitoring the increased risk of a future injury. The court clarified that the rule barred plaintiffs' claims irrespective of whether a "special relationship" existed between the plaintiff and the defendant – in the absence of a present injury, plaintiffs could not state a claim for negligence.

Finally, the court held that plaintiffs could not state a claim for emotional distress or for violations of the UTPA because those claims also were based on the increased risk of a potential, future harm. ✪

— Submitted by Matthew G. Ukishima of Smith Freed & Eberhard PC

EMPLOYMENT

First Amendment's "ministerial exception" bars employment discrimination lawsuits against ministers of religious organizations

In *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 US ___, 132 S Ct 694 (2012), the United States Supreme Court recognized the existence of the "ministerial exception," which precludes application of the discrimination laws to claims concerning the employment relationship between a religious institution and its ministers.

Hosanna-Tabor arose when Cheryl Perich, a teacher at a religious school, sought to return to work after taking disability leave, but the school had hired a replacement teacher. After Perich threatened legal action, the school terminated her employment. The Equal Employment Opportunity Commission ("EEOC") commenced an action against the school for violations of the Americans with Disabilities Act. The District Court held that the suit was barred by the "ministerial exception" of the First Amendment, but the Sixth Circuit reversed on the ground that Perich was not a "minister" under that exception.

On review, the Supreme Court for the first time recognized the "ministerial exception," which prevents the state from interfering with a decision of a religious group to fire one of its ministers. The Court reasoned that allowing the state to impose an unwanted minister on a religious organization through the discrimination laws infringes the Free Exercise Clause of the First Amendment to the United States Constitution. Moreover, permitting the state to determine which individuals can minister to a religious organization violates the Establishment Clause of the First Amendment. The Court noted that its decision extended only to employment discrimination suits and withheld any opinion as to whether the ministerial exception barred other types of suits, such as breach of contract and tort claims.

The Court then examined whether Perich qualified as a "minister" under the ministerial exception. The Court refused to adopt a rigid formula for deciding when an employee qualifies as a minister, but did hold that the exception was not limited to heads of religious congregations. In light of several relevant factors—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—the Court concluded that Perich was a minister. ✪

— Submitted by Bryana Blessinger of Bodyfelt Mount LLP

CHOICE OF LAWS

Oregon statute of limitation applies in contract Action where application of out-of-state law would indefinitely toll limitation period

In *CACV of Colorado v. Stevens,* Case No. A144594 (March 14, 2012), the Oregon Court of Appeals held that Oregon's statute of limitations, and Delaware's cap on attorney fee awards, applied to an action for breach of a credit card agreement that contained a Delaware choice-of-law provision.

CACV was a breach of contract action brought by the purchaser of an overdue credit account against the holder of the account. The underlying agreement contained a Delaware choice of law provision. The parties filed cross-motions for summary judgment on defendant's statute of limitations defense. The trial court held that Oregon law applied, granted summary judgment in plaintiff's favor,

Continued on next page

Recent Case Notes

and awarded plaintiff its attorney fees under Oregon law. The Court of Appeals affirmed in part and reversed in part, holding that Oregon law applied to the statute of limitations question, but Delaware law applied to the determination of a reasonable attorney fee.

The court first concluded that, pursuant to ORS 12.430 and ORS 12.440, the choice-of-law provision in the contract required the court to apply Delaware law. Delaware applies a three-year statute of limitations to contract actions, but tolls the limitation period if the defendant resides outside of Delaware and is not otherwise subject to service of process in Delaware. The court then noted that, pursuant to a recent Delaware Supreme Court decision, it must interpret the Delaware tolling statute to toll the limitation period for the entire time that the defendant resided outside of Delaware. The court then examined whether these circumstances implicated ORS 12.450, which requires a court to apply Oregon's limitation period when (1) the other state's limitation period is substantially different from Oregon's and (2) application of the other state's limitation period would impose an unfair burden on the defendant. Oregon law, unlike Delaware law, applies a six-year statute of limitations, without a similar tolling provision. Because application of Delaware law essentially removed the statute of limitations as a defense for Oregon residents, the court held that Delaware law was substantially different than Oregon law and imposed an unfair burden on defendant. Thus, the court held that Oregon's limitation period applied.

The court then examined whether Oregon or Delaware law governed the award of attorney fees. Delaware law limits attorney fees to 20 percent of the principal and interest recovered, while Oregon law permits the recovery of a "reasonable" fee. The court conducted a comparative-interest analysis and held that application of the 20 percent cap was not contrary to a fundamental Oregon policy. Thus, the court remanded the case for a determination of attorney fees under Delaware law. ✪

— Submitted by Mary Anne Nash of Dunn Carney Allen Higgins & Tongue LLP

Evidence

Deposition testimony of doctor is admissible if based on facts that a doctor knew or should have known about at the time of surgery

In *Randy Dew v. Bay Area Health District,* Case No. A145619 (February 15, 2012), the Oregon Court of Appeals reversed a defense verdict, ruling that the trial court erred when it excluded deposition testimony of the defendant doctor about his impression of evidence that he reviewed after the purportedly negligent surgery.

Defendant was an emergency room physician who had failed to review the results of a CT scan and x-rays of the patient's abdomen before telling an anesthesiologist to anesthetize a patient for emergency surgery. The anesthesiologist asked the defendant whether he first should suction fluid out of the patient's stomach using an "NG tube," but the doctor said "no." When the anesthesiologist inserted a scope into the patient's mouth, the patient began to vomit because her stomach was filled with fluid. The anesthesiologist then inserted a tube down the patient's throat to suction out the fluid so the patient would not choke. A few days after surgery, different doctors discovered an infected tear in the patient's pharynx, which was caused by the insertion of the tube while the plaintiff was vomiting. The patient ultimately died as a result of the infection.

Plaintiff's theory at trial was that defendant's failure to review the CT scan and x-rays led to the patient's death. In support of that theory, plaintiff tried to introduce as evidence defendant's deposition testimony that he had examined the CT scan and x-rays after the surgery and had concluded that "you could have used an NG tube." The trial court excluded this evidence as irrelevant because it was based on after-acquired information. The jury then found that the defendant had breached the standard of care, but his breach had not caused plaintiff's death.

The Court of Appeals held that the trial court erred when it excluded the deposition testimony. The court noted that, under *Foxton v. Woodmansee,* 236 Or 271 (1963), a jury must evaluate a surgeon's negligence by reference to facts in existence at the time of the procedure, of which the doctor knew or should have known about when the surgery was performed. The court reasoned that the deposition testimony did concern facts in existence at the time of the surgery that defendant should have known about – the results of the CT scan and x-rays – thus his conclusion that the patient "could have used an NG tube" was relevant to plaintiff's theory of the case.

Continued on next page

Recent Case Notes

The Court also held that the evidentiary error substantially affected plaintiff's rights. The court first ruled that the proper inquiry was whether there was "some likelihood" that the error affected the jury's finding on causation. Based on its view of the evidence, the court held that the jury's view of causation might have been affected had it heard defendant's testimony about his reaction to seeing the CT scan and report. ✪

— Submitted by Donna Lee of Hart Wagner, LLP.

CONFLICT OF LAWS

Oregon law applies to tort claims against insurer despite out-of-state adjusting activities

In *HTI Holdings, Inc. v. Hartford Casualty Insurance Co.,* 2011 WL 6205903 (December 8, 2011), the United States District Court for the District of Oregon ruled that Oregon law applies to a first-party action against an insurance company when the purportedly wrongful conduct occurs in another state.

Following a fire loss, HTI sued Hartford for breach of contract, negligence, breach of the implied covenant of good faith and fair dealing, and tortious interference with prospective economic advantage. Hartford moved for summary judgment on HTI's tort claims, arguing that Oregon law applied and did not permit the insured to recover under these circumstances. HTI responded that either California or Connecticut law applied because defendant's adjusters in those states committed the purportedly tortious acts.

Under ORS 31.875(3)(c), the law of the state of injury applies to a dispute when (1) the activities of the person whose conduct caused the injury were such as to make foreseeable the occurrence of injury in that state and (2) the injured person formally requests the application of the law of the state of injury through a pleading or amended pleading. The court held that, because HTI's facility was located in Oregon, it was foreseeable that an injury would occur in Oregon. In addition, HTI pleaded its tort claims under Oregon law. Thus the district court held that Oregon law applied.

The court also held that, even if the requirements of ORS 31.875(3)(c) had not been met, Oregon law would still apply because it was the "most appropriate law" under ORS 31.878(4). That statute requires a court to apply the law of the state that is "substantially more appropriate" based on a number of factors, including which states had contact with the dispute, and the policies embodied in the laws of these states on the disputed issues. The court noted that, because (1) the place of the resulting injury was Oregon; (2) the domicile and pertinent place of business of HTI was Oregon; (3) the place in which the relationship was centered was Oregon; and (4) Oregon has a substantial interest in regulating the insurance industry within the state, the law of Oregon was the "most appropriate" law to apply to this case. The court thus entered summary judgment in favor of the defendant on HTI's tort claims. ✪

— Submitted by Kyle A. Sturm of Maloney Lauersdorf Reiner PC

LANDLORD/ TENANT

Tenant alleging retaliation under ORS 90.385 has the burden of proving improper intent by the landlord

In *Elk Creek Management Co. v. Gilbert,* 244 Or App 382 (2011), modified on recons, 247 Or App 572 (2011), the Oregon Court of Appeals held that, to prove a retaliatory eviction in an FED action, the plaintiff must establish that the landlord intended to disadvantage the tenant and was motivated by an injury caused by the tenant.

The defendants in *Elk Creek* were tenants of a house managed by Elk Creek Management Company (ECM) who had complained about the house's electrical system. The tenants subsequently received a 30-day no-cause eviction notice from ECM. The tenants refused to leave the premises, and ECM filed an FED action. In their answer, defendants alleged that the eviction was retaliatory under ORS 90.385, which precludes a landlord from retaliating against a tenant who has made a complaint related to the tenancy. The trial court found that the tenant had failed to submit evidence that ECM sent the 30-day notice because of the complaints about the electrical system, and ruled in favor of ECM.

The tenants argued on appeal that a tenant establishes a rebuttable presumption of retaliation by showing the temporal proximity of the complaint and the eviction, thereby shifting the burden to the landlord, who can rebut the

Continued on next page

Recent Case Notes

presumption by demonstrating a non-retaliatory reason for the termination. The Court of Appeals disagreed, holding that the legislative history showed that the legislature considered and rejected a burden-shifting approach to proving retaliation. The court also noted that the word "retaliation" means an intention on the part of the landlord to disadvantage the tenant, motivated by an injury or perceived injury that the tenant had caused the landlord. Because the tenants had not presented such evidence, the court affirmed the summary judgment ruling in favor of ECM.

On defendants' motion for reconsideration, the court affirmed its interpretation of ORS 90.385, clarifying that a tenant cannot rely solely on the chronology of events to establish a presumption of retaliation. ✪

— Submitted by Nicole M. Nowlin of Cosgrave Vergeer Kester LLP

PRESERVATION OF ERROR

Arguments not advanced at trial court cannot be grounds for reversal on appeal

In *Greenwood Products, Inc., et al. v. Greenwood Forest Products, Inc., et al.*, Case No. S059097 (February 24, 2012), the Oregon Supreme Court reversed the Court of Appeals reversal of a jury verdict because it was based on arguments not made in the trial court.

Plaintiffs filed a breach of contract action against defendants, alleging that defendants had erroneously accounted for their cost of inventory, causing plaintiffs to suffer $820,000 in damages. After the court denied defendants' motion for directed verdict, the jury returned a verdict for plaintiffs. On appeal, the Court of Appeals held that the trial court should have granted defendants' motion because the contract did not impose any obligation on defendants to accurately account for the cost of inventory.

On review, the Supreme Court held that plaintiffs' evidence was sufficient to create a jury question on plaintiffs' breach of contract claim, and thus the trial court did not err when it denied defendants' motion for directed verdict. The court held that the grounds on which the Court of Appeals reversed the jury verdict – that the contract did not impose any obligation on defendant to account for the cost of inventory – was not based on any argument that defendant had raised in the trial court. Because defendant had failed to make that argument in the trial court, plaintiff was denied the opportunity to present evidence or argument that showed that the obligation was "implicit" in the agreement between the parties, and the trial court did not have the opportunity to consider that evidence or argument. Thus, the Supreme Court reinstated the jury verdict in plaintiffs' favor. ✪

— Submitted by Brian J. Best of Hart Wagner LLP

Pending Petitions For Review

The following is a brief summary of cases for which petitions for review have been filed with 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.

Petitions for Review That Have Been Allowed

Appellate Jurisdiction

- ***The Association of Unit Owners of Timbercrest Condominiums v. Warren,* 242 Or App 425, *rev allowed,* 350 Or 716 (2011) (argued before the Oregon Supreme Court on January 10, 2012).**

The issue on review is whether a notice of appeal filed prematurely, i.e., while a motion for new trial is still pending, is effective to confer appellate jurisdiction.

Attorney Fees Under ORS 20.080

- ***Halperin v. Pitts,* 241 Or App 249, *rev allowed,* 351 Or 216 (2011) (argued before the Oregon Supreme Court on January 13, 2012).**

The issue on review is whether ORS 20.080(2) requires a defendant who pleads a counterclaim not exceeding the amount specified in the statute to first make written demand upon the plaintiff for payment before filing the counterclaim, in order to be entitled to attorney fees under the statute.

Attorney Fees Under ORS 742.061

- ***Morgan v. Amex Assurance Co.*, 242 Or App 665, *rev allowed,* 351 Or 254 (2011) (argued before the Oregon Supreme Court on March 9, 2012).**

Plaintiff successfully sued in Oregon to recover uninsured motorist benefits under her auto policy, which was issued and delivered in Washington. The trial court denied plaintiff's petition for attorney fees under ORS 742.061 on the grounds that fees under that statute are available only in connection with suits brought on policies delivered or issued for delivery in Oregon. The Court of Appeals affirmed. The issue on review is whether a claim brought in Oregon for insurance benefits under a Washington policy is subject to the right to recover attorney fees under ORS 742.061.

Damages and Preservation

- ***Bobbi Klutschkowski v. PeaceHealth* (S059869) (A138722) (appeal from Lane County Circuit Court; opinion reported at 245 Or App 524 (2011)).**

Plaintiff received a jury award of economic and non-economic damages in a medical malpractice action. The Court of Appeals reduced the non-economic award to $500,000 pursuant to ORS 31.710. The issues on review are: (1) whether the statutory cap on noneconomic damages violates the Oregon constitution if applied to a claim brought on behalf of a baby who suffered an injury during birth; (2) whether the defendant preserved review of its directed verdict motion on informed consent when it used a general verdict form; and (3) whether a failure to object to an instruction immediately after the jury is instructed fails to preserve appellate review of that instruction, when the objection is made throughout trial.

Statute of Limitations

- ***Jack Doe 1 v. Lake Oswego School District* (S059589) (A140979) (appeal from Clackamas County Circuit Court; opinion reported at 242 Or App 605 (2011)).**

Plaintiffs brought a number of claims based on sexual abuse by a teacher. The abuse was alleged to have occurred between 1968 and 1984. On review, the issues are:

(1) When did the statute of limitations in the Oregon Tort Claims Act begin to run?

(2) Does a statute of limitation that begins to run before a claimant knows that a legally protected interest has been invaded violate Article I, section 20, of the Oregon Constitution, or the Fourteenth Amendment to the United States Constitution?

Council on Court Procedures Update

The Council on Court Procedures continues to evaluate a number of proposals and rule changes. The following is a list of committees that have been formed to review issues that will likely result in rule changes. The OADC members on each committee are indicated.

- ORCP 19 B, 24 - Affirmative Defenses and Compulsory Counterclaims (Kristen David)
- ORCP 39 C 6 - Designation of Deponent in Advance of Deposition (John Bachofner)
- ORCP 43 - Electronic Discovery (Kristen David)
- ORCP 44 - Medical Examinations (John Bachofner and Bob Keating)
- ORCP 47 - Summary Judgment (Kristen David)
- ORCP 54 A – Voluntary Dismissals (Mark Weaver)
- ORCP 55 - Production of Medical Records (Jay Beattie and Bob Keating)
- ORCP 57 F - Alternate Jurors (Gene Buckle)
- ORCP 59 H - Exceptions to Jury Instructions (Jay Beattie)
- ORCP 68 - Cost Bill and Attorneys' Fees (Kristen David)

The Council has also reviewed a number of additional issues relating to guardians ad litem.

OADC members are encouraged to contact OADC members on the Council with any comments, questions, or concerns. We encourage your participation.

— Submitted by Kristen David of Bowerman & David PC

Association News

Deadline

Contributions for *The Verdict* are always welcome. For our **Summer 2012** edition, please send your articles to:

Jeanne Loftis, Editor in Chief
Bullivant Houser Bailey PC
888 SW 5th Ave., #300
Portland, OR 97204
503/499-4601

jeanne.loftis@bullivant.com
Please email your articles in either WordPerfect or Microsoft Word format (preferred). ✪

Calendar

OADC Defense Practice Academy and Judges Reception
September 28, 2012
Portland, OR

OADC Fall Seminar
November 8, 2012
Portland, OR

All programs are subject to change

New Members

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

Shannon Armstrong
Markowitz Herbold

Brett Baumann
Frohnmayer Deatherage

Alicia Bettenburg
Frohnmayer Deatherage

Carey Caldwell
Hart Wagner LLP

David Cramer
Davis Rothwell Earle & Xóchihua

Shelly Damore
Hitt Hiller Monfils Williams LLP

Michael Jacobs
Hart Wagner LLP

Leah Lively
Ogletree Deakins

Adina Matasaru
Dunn Carney

Eileen McKillop
Oles Morrison Rinker & Baker LLP

Abby Michels
Preg O'Donnell & Gillett PLLC

Leslie O'Brien
Markowitz Herbold

Sharon Peters
Williams Kastner & Gibbs PLLC

Sean Ray
Barran Liebman LLP

Russell Rotondi
Cosgrave Vergeer Kester LLP

Elizabeth Semler
Sussman Shank

Mark Sherman
Hart Wagner LLP

Practice Tips

Social Media, The Internet And Litigation: The Future Ain't What It Used To Be

Eric Meyer
Zipse, Elkins & Mitchell

As much as I like to flatter myself with the belief that I am still a relatively young person, a few seconds' reflection on the technological changes that have occurred over the course of my lifetime makes me realize just how long I have been inhabiting this mortal coil. Unlike my parents, I am not old enough to remember the days before television, but I did grow up in a house with a black and white set and can remember a world without cable (much less satellite TV), VCRs (much less DVD players), compact discs (much less iTunes), push-button phones (much less cell phones), and fax machines (much less e-mail).


Eric Meyer

But all of that pales next to two closely related advances that truly deserve to be described with that adjective so overused by advertisers, "revolutionary": the advent of the Internet and social media. According to an article by U.S. District Court Judge Amy J. St. Eve and Michael A. Zuckerman published in the *Duke Law & Technology Review* this past March, over two billion people have regular access to the Internet, including over 240 million in the United States alone. Facebook has over 800 million subscribers, more than half of whom access it each day, with Americans spending more time on it than any other website. Somewhat behind but gaining is Twitter, which by March 2011 had some 200 million users creating 350 billion "tweets" *every day.*

It would be beyond naïve to think that this type of online traffic would not raise significant issues for our judicial system and its ability to afford litigants the guarantee of a fair jury trial. It wasn't long ago that concerns about the possibly contaminating influence of the outside world could largely be obviated by a simple, general jury instruction proscribing communication with anyone other than fellow jurors about the case, and even with each other before deliberation at the close of evidence, but those days are gone. As Yogi Berra has observed, "The future ain't what it used to be."

The first challenge presented by the online universe is its sheer breadth and scope. If a juror places a phone call to a friend during a break to discuss a trial in progress, that juror opens herself to the possibility of being improperly influenced by an opinion about the case expressed by that one person. But if the same juror posts a message on Facebook or Twitter, it is possible, and perhaps even likely, that she will receive dozens or even hundreds of replies.

In one extreme—but true—example from 2008, a juror in the UK announced on her Facebook page that she couldn't decide whether or not to find criminal defendants charged with child molestation guilty and was therefore conducting a "poll." As if this was not egregious enough in itself, the juror had not activated any of the available "privacy settings" on her Facebook page, making her posting accessible to anyone in the world.

Similarly, the Arkansas Supreme Court reversed the death sentence of a criminal defendant after it was discovered that, during deliberations, a juror had posted messages about the case on Twitter. It need hardly be said what a catastrophe such a development is in a proceeding as expensive as a capital trial in a judicial system already desperately short of funding.

While such events are rare, the literature is replete with stories of jurors attempting to communicate with parties or their attorneys through social media during trial and even trying to "friend" them on Facebook.

Not every juror who crosses the line of propriety with respect to the Internet does so with nefarious intent, of course. Indeed, some of those jurors likely believe that through independent online research they are assisting the court in its search for the truth. No one who has seen the film *Twelve Angry Men* will forget the scene in which Henry Fonda disabuses his fellow deliberating jurors of the belief—accepted as fact by the court and all parties and their attorneys during the trial—that a certain type of knife would be difficult to obtain by pulling an identical knife from his pocket in the jury room, declaring that he had bought it at a store near his home at the close of trial the day before. In much the same way, a juror could well believe that consulting Google Earth, Web MD, Wikipedia, or another site during deliberation will help to ensure that he and his colleagues reach the correct decision. But the problem with jurors taking it upon themselves to become "private investigators" is that there is no guarantee that they are reaching their ultimate decisions based upon reliable, legally admissible evidence—or indeed, that they are all relying on the same evidence in attempting to reach consensus between themselves. As attorney Jana Lauren Harris has observed, in a point that is self-evident but so critical as to bear being stated explicitly, "It is incumbent upon the lawyer to try to keep the jurors focused on only evidence

Continued on next page

PRACTICE TIPS
continued from page 21

presented during the trial of the case."

Communication related to the case or its participants with the outside world can also cause a chilling effect on deliberations between the jurors themselves. One amusing story I came across in researching this article recounted a situation in which one juror posted on social media during a trial that she wanted to punch another juror who kept cracking her knuckles. More seriously, however, as Justice Cardozo observed (and as cited by Judge St. Eve and Mr. Zuckerman in their above-mentioned article), "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."

The obvious question, then, is this: How do the court and the lawyers prevent jurors from opening the Pandora's box of the Internet during trial? Different courts have employed different methods to address the issue. In May of this year, the Florida Supreme Court forbade jurors from discussing their cases through social media or electronic devices. Other courts confiscate cell phones and other electronic devices during jury deliberations or even during entire trials. Still others issue stern warnings about the personal repercussions for jurors that could result from the improper use of the Internet and/or social media during trial, including being held in contempt and/or sent to jail.

In September 2010, the Board of Regents of the American College of Trial Lawyers approved a model "statement of compliance" to be signed by each juror vowing not to conduct any independent research into any of the issues or parties involved in the case during trial.

In its 2010 Supplement to the Uniform Civil Jury Instructions, Oregon, like many other states, incorporated language specifically addressing electronic and online resources in UCJI 5.01:

> Although many of you use cell phones, the Internet, and other tools of technology, communicating with others about the case before it ends is strictly prohibited. You may not communicate by cell phone, smartphone, e-mail, Blackberry, iPhone, text messaging, on Twitter, through any blog or Web site, Internet chat room, or by way of any other social networking Web sites, including Facebook, LinkedIn, and YouTube.

The early evidence is heartening insofar as it suggests that jurors are taking seriously such admonishments in the form of jury instructions. An article in the March 16, 2012 *Chicago Tribune* on a decidedly—and admittedly—unscientific survey of jurors conducted by Judge St. Eve indicated that "despite some high-profile acts of misconduct, judges who instruct jurors to avoid social media leave an impression." The judge herself observed that her study "reaffirmed the importance of giving a jury instruction in the area of social media, and the fact that jurors do follow our instructions." I suspect that Judge St. Eve's statement is consistent with what most of us who try cases have found over the course of our careers: While many of us have lived through the occasional outlier trial whose result left us scratching our heads, the vast majority of jurors take their responsibilities seriously and try to do justice according to the direction they are given by the court.

Numerous authorities have suggested, and I concur, that the admonition against going online should be given to the jurors more than once, at the very least at both the opening of trial and just before the commencement of deliberations. Some recommend that, in longer trials, it be given every day. Furthermore, trial lawyers should not make this solely the burden of the court. We should develop the habit of asking prospective jurors during voir dire about their online and social media habits and whether they believe it might be difficult for them to refrain from posting about the case and/or doing their own research while the trial is ongoing.

Our jury system is and always will be a human system, which means that it will never be perfect and that there will always be the danger of renegade jurors going online improperly during trial, regardless of any safeguards employed by the court or counsel. As such, it is critical that we advise our clients not to post messages disparaging the opposing party, counsel, judge, or (God forbid) jurors. In a recent Oregon trial, an e-mail by one of the parties' attorneys to an expert disparaging the intelligence of the jurors ended up in the hands of the jury after opposing counsel discovered it while reviewing the expert's file during trial. The author of the e-mail ended up losing that trial. Whether the insult to the jury played a part in that is anybody's guess, but it certainly couldn't have helped his cause.

Finally, as a corollary to the importance of preventing jurors' access to social media and the Internet during trial, it is essential that we go online ourselves to determine if opposing parties or witnesses have been foolish enough to post anything that we can use against them. I once obtained a defense decision at arbitration, which my opponent did not appeal, against a young plaintiff who claimed that an auto accident with my client two years earlier had left her in constant pain and rendered her unable to do anything athletic. I had to bite my tongue hard to prevent myself from breaking into a ridiculously huge grin as I handed her a printout of her Facebook posting of just a few days earlier in which she had boasted of having "eaten it hard" while snowboarding on Mt. Hood. As the old cliché goes, lawyers generally don't win cases; rather, their opponents lose them. If that young woman had not made the mistake of sharing that information through social media, or had at the very least activated privacy settings so that I could not access it, I have no doubt that the result of that arbitration would have been very different.

Legislative Update

Marching Toward Summer and Fall

By Inga Deckert and Jack Isselmann, Jr.

Notable Election Results

Now that the Primary election is behind us, the stage is set for the General Election in November. While incumbents traditionally have an advantage at the ballot box, two incumbents on the May ballot—Senator Chris Telfer (R) and Representative Mike Schauffler (D)—were unseated in highly contested elections and will not be returning to Salem next year.

The make-up of legislative districts is different than it was in the last General Election as a result of the decennial redrawing of district lines that took place last year. While the party registration remained relatively stable in most districts post redistricting, a few districts experienced more of a swing one way or the other, which could impact the election results for those seats.

Interim Legislative Days

In May, Oregon's legislative committees convened for the first time since the end of the February legislative session. The committees met over a three-day period to receive progress updates on the implementation of several reform initiatives, approve adjustments to the State's budget, confirm executive appointments to State boards and commissions, and begin laying the groundwork for issues anticipated to be debated in the 2013 legislative session.

During this time, the House and Senate Judiciary Committees met jointly to hear presentations on eye witness identification, law enforcement training and best practices, and alimony reform. The Joint Interim Committee on State Courts Revenue Structure also held its first meeting. The committee heard an update on how the new civil filing fee revenue collection and distribution structures are working. According to the testimony, attorneys and court staff feel that the filing fee structure has been simplified and is more transparent. To date, the filing fees collected are higher than projected, but circuit court case filings are declining. It remains to be seen whether collections continue to exceed projections or if this is simply a function of other factors, such as the fact that the fees are now frontloaded under the new system. Maintaining access to the judicial system remains a concern.

The General Election campaign cycle has begun, and OADC will again participate in political activities by supporting candidates who are supportive of OADC and who work on issues of interest to OADC attorneys.

The next interim legislative days will take place in September. After that, one more set of interim legislative days will occur in December, just prior to the start of the 2013 Legislative Session.

OADC Political Action

The General Election campaign cycle has begun, and OADC will again participate in political activities by supporting candidates who are supportive of OADC and who work on issues of interest to OADC attorneys. These important activities enable OADC to maintain a consistent presence before policy makers, to gather intelligence on issues as they begin to surface, and to participate early in the policy-making process for the benefit of OADC membership. To accomplish this, we must continually refresh the funds in OADC's PAC. That's where you come in—OADC relies on its members to make this possible!

Amicus Update

Michael A. Lehner
OADC Amicus Committee Member and Board Liaison
Lehner & Rodrigues, PC

The OADC board has determined that the interests of the membership are served by an active Amicus Committee.

The OADC Amicus Committee recently enjoyed some success in *Eads v. Borman,* decided by the Supreme Court on April 26, 2012. The Court affirmed the Court of Appeals in concluding that evidence was not sufficient to find Willamette Spine Center, LLC vicariously liable for the negligence of a doctor who leased office space in the Center's facility. See 234 Or App 324 (2010). An amicus brief was filed by the OADC in support of the defendant Willamette Spine Center, and Tom Christ, the author of our brief, was allowed to participate in the oral argument.

The OADC also filed an amicus brief in the Supreme Court to support the defense in a mandamus proceeding in *Lindell v. Kalugin and Countryside Construction,* argued on April 30, 2010. In the *Lindell* case, the plaintiff asked the Supreme Court to require the trial court to order that plaintiff may have a witness, family member, attorney and/or a recording device at a neuropsych IME. The Supreme Court had issued an alternative writ directing the trial court to allow attendance by plaintiff's attorney or, in the alternative, to explain why not. The trial judge issued a well-reasoned letter opinion about why he denied plaintiff's original request. In its subsequent briefing to the Supreme Court by plaintiff and OTLA, plaintiff again asserted his original argument that the court should allow any of the options mentioned above, not simply attendance by the attorney. An opinion by the Supreme Court should be issued in due course.

The OADC Amicus Committee consists of Lindsey Hughes (Chair), Janet Schroer, Tom Christ, Joel Devore, Mike Stone, P. K. Runkles-Pearson, and Michael Lehner (Board Liaison). We invite referrals from any member of the OADC. The Committee exists to address issues believed to be of importance to the defense bar, and we strive to provide assistance to our appellate courts. It is our hope that our amicus briefs will help the courts issue fair, logical, and well-reasoned opinions.

If you have a case on appeal which you feel raises important issues, please contact any member of the Committee. Directions for submitting requests can be found on the OADC website.

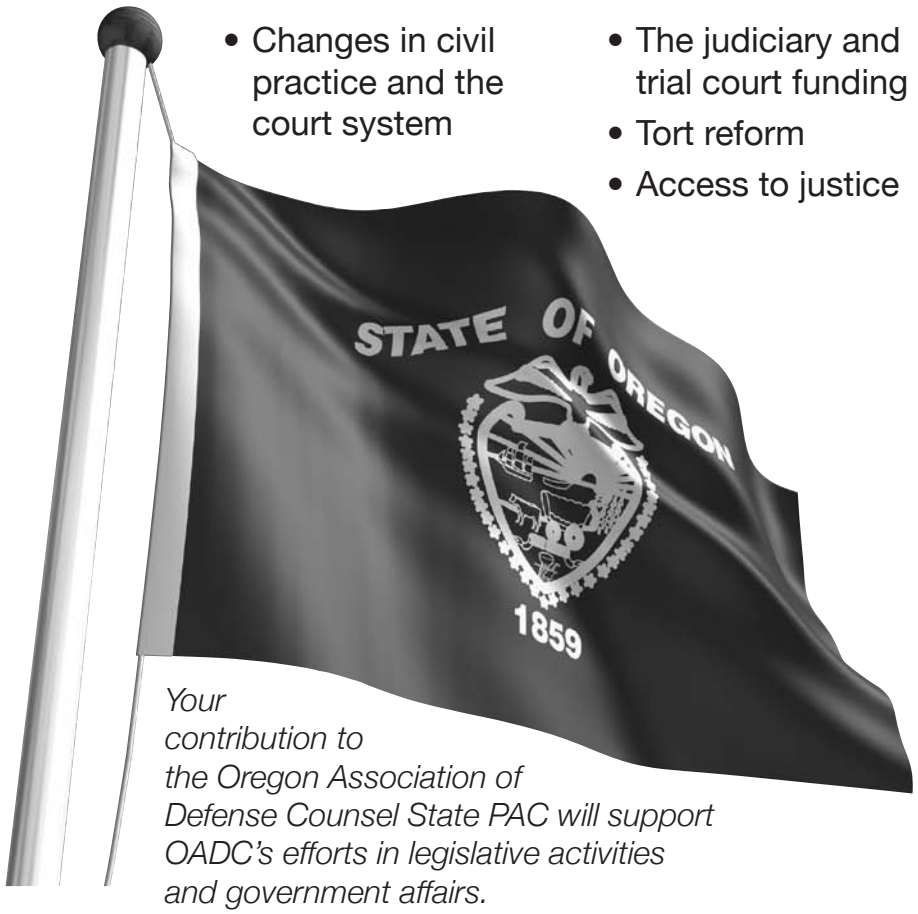
OADC

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

The Voice of the Civil Defense Lawyer

The Oregon Association of Defense Counsel works to protect the interests of its members before the Oregon legislature, with a focus on:

- Changes in civil practice and the court system
- The judiciary and trial court funding
- Tort reform
- Access to justice



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

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

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

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

Trial Lawyers Defending You in the Courts of Oregon

OADC Oregon Association of Defense Counsel

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