Oregon State Bar

Litigation Journal

FALL 2015 VOLUME 34 NUMBER 3

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"Justice Has Scales; Jurors Don't"

by Charese Rohny

Charese A. Rohny

How we collectively choose to persuade has an impact on the development of the human brain, however small it may be in the larger scheme of evolution. We each have choices to make in our approach. History has proven that humans have the ability to be convinced of almost anything. At the same time, humans consistently have sought meaning and have been moved toward justice. Moving jurors to act justly, and by a means that acknowledges they are evolved humans, is our task as trial lawyers.

To tell a story you have to lose control and be fully human.

As trial lawyers, we attempt to persuade by telling stories. It is how we share our facts. "To tell a story well, you, the teller, have to go there. You can't hold back. You must be willing to be fully human, to lose control, to let go."[1] As humans, we are wired to be drawn into a narrative. It organizes our facts and gives them meaning. To do it well takes a creative process – we can't find the story in case law and we can't train for it like a marathon. As the narrator we have to internalize characters and develop them to put flesh on the bones of our story skeleton.

Similar to what drives a good story, core values and the internal tensions among them drive our profession. Values such as honesty, respect, justice, empathy, and service move us in the legal profession. Regardless, lawyers are characterized in our culture and in media as dishonest, aggressive, and deceitful. Yet we know among ourselves that the vast majority of lawyers are ethical people who endeavor to do the right thing and who seek justice for their clients.

The popular Reptile theory invokes "science" to treat jurors as sub-human.

So how does the "Reptile theory" of trial strategy play into how humans are wired to listen and how we are driven as attorneys? The Reptile theory is a framing of arguments in terms of our most biological basic need for security.[2] Its premise relies on the since-debunked "triune brain" theory that the brain has three distinct parts, and at its core is the reptile brain, which is responsible for a person's most basic, primal instincts.[3] Authors David Ball, a jury consultant, and Don Keenan, a trial attorney, adopted this belief and subsequently applied it to their popular "reptilian" strategy on how to win jury trials by invoking a juror's primal instincts of fear, anger, safety, and self-preservation by emphasizing the opposing party's danger to the community.[4]

Reptile theory is intended to scare jurors to justice.

In 2006, Ball and Keenan undertook an empirical study to determine what happens in the jurors' minds to decide particularly close cases. Their surprising finding was that conscious thought process is not as important as we think it is. In a deliberative process, humans are subject to primal, "reptilian" unconscious factors that place survival and safety ahead of everything else.[5] While Ball and Keenan also discuss emotion, hypocrisy, and altruism; they distill these to be merely based on self-interest, and therefore a response from the reptile brain.

As others have already articulated in greater and lengthier detail, the Reptile theory and its supposed "reptile brain" are based on inaccurate and simplistic understandings of human brain anatomy.[6] Yet the Reptile theory claims to access the jurors' primitive brain by suggesting danger, thereby provoking the "reptilian" response of putting the juror in "survival mode." For humans, any perceived harmful event, attack, or threat to survival causes a physiological reaction commonly known as the fight-or-flight response.

True fight-or-flight response takes over the brain and distorts perception.

So what actually happens in true fight-or-flight response? Rather than three separate parts of the brain functioning independently like in the Reptile theory's triune brain model, we know that the brain functions and processes as a whole. Fear is an emotional response created by the amygdala, which receives sensory information from the lower thalamus or the higher sensory cortex.[7] The process of experiencing fear monopolizes all of the brain's resources in order to prioritize, assess, and survive the threat.[8]

The amygdala rests until we spot potential risk – a spot on the wall that could be a spider or a sound in your house at night that could be someone entering. The fear response is not uniform among humans and is triggered by perception. What one person perceives as a threat another may perceive as a routine incident. If you are a veteran, then fireworks can trigger a fight-or-flight response; if you are an officer, then a cellphone mistaken as a weapon could trigger a fight-or-flight response. A drastic bodily change is triggered by something that is perceived as novel by the individual.

When a person is truly faced with a life threatening crisis resulting in a fight-or-flight response, certain bodily functions are attenuated while others temporarily stop.[9] Heart rate increases, blood pressure rises, respiration becomes more efficient, pupils dilate, and the liver increases conversion of glycogen into glucose, which provides instant energy. Sometimes there is even a surge of strength.

There is no doubt that the impact of fear on the human brain is very powerful. When people are frightened it shuts down the smart part of the brain, and literally changes what people hear.[10] We are flattering ourselves to really think that we trigger such a powerful physiological and psychological response in jurors.

Fight-or-flight distorts perception, tunnel vision occurs, and memory is lost.[11] Do we really want to lead jurors to have less conscious thought and distorted perception in making decisions? At a minimum, it directs attention in an unpredictable manner.[12]

Even though the physiological and psychological underpinnings of the Reptile theory have been demonstrated to be incorrect, the approach has been successful and has been enthusiastically received by the plaintiff's bar. But why? Well, it works, and it has certainly helped moved plaintiffs past the sympathy model. Perhaps the reason Reptile works for plaintiffs is that it appeals to jurors with "conservative" brain constructs (correlated with greater physiological responses to threats) whom we might otherwise lose.[13]

The Reptile theory is simply rebranding of effective propaganda techniques.

In many respects, the Reptile theory is not revolutionary at all, but a rebranding and repackaging of story-telling tactics used for decades by lawyers, journalists, advertisers, political candidates, and government officials.

United States war propaganda during World War I and II was successful because it was simple and concrete, it appealed to emotions, and it directed the community's attention toward a specific "danger" or "villain" to fear. Effective propaganda works by evoking an emotional response, which occurs at the level of emotional processing below the higher thought processes of rational and logical reasoning.

Advertising and news media outlets have followed similar fear-mongering approaches. Robert Greenwald's documentary OUTFOXED, which offered a takedown of the arguably biased Fox News, found that many of the network's stories and themes focused on generating fear through viewer hypotheticals, e.g., what to do if your plane is hijacked by terrorists or how to survive an anthrax attack. (Not unlike golden rule arguments urging jurors to imagine themselves in the position of a party.) The success of the network and its ardent viewership were attributed in part to the network's pandering to fear, which is "a great motivator and organizer" and created "a very simple black and white world" for its viewers.[14]

Defense attorneys use the Reptile Theory, too; they likely used it first.

Using fear as a persuasive and motivating means of story-telling has been an equal-opportunity activity among lawyers. In my own practice as a plaintiff-side employment lawyer, I commonly encounter arguments from defense counsel asserting that the basis behind employers' decisions to terminate or suspend employees is a concern for "safety" and eliminating a "danger" that an employee allegedly may cause. It's often an aspect of the protected class itself that is scariest. (Admittedly, perhaps it is this successful use of the Reptile theory by defense attorneys against me that has caused me to view it with some derision.)

For ourselves, we know fear limits us, so why do we want to motivate jurors with it?

Even if we acknowledge that pandering to fear works, is it a strategy we want to endorse as a profession? Some have said fear can be our greatest limitation as humans.[15] In fact, it limits us in our journey to make our case a story and allow it to become more than a set of facts. It pulls us in a negative direction, rather than a positive one.[16] Fear can kill our creativity.[17] With fear we worry more about messing things up than about creatively and passionately working to do our best.[18]

Sustained fear and stress about perceived threats and dangers also takes a physiological toll. The fight-or-flight response and the body's corresponding physiological response mechanisms evolved to protect humans from short-term physical emergencies.[19] Instead, humans are experiencing a sustained, daily influx of fear messaging.[20] Living in chronic fear ultimately causes bodily harm. Sustained or repeated initiation of the fight-or-flight response can cause a host of physical and mental health problems, e.g., a weakened immune system, cardiovascular damage, gastrointestinal problems, decreased fertility, fatigue, depression and anxiety, or even premature death.[21]

If we know that humans are compromised when acting based on fear or in a fight-or-flight mode, and we know that overexposure to perceived fear causes harm, why would we want to "trigger" such a response in jurors?

We can choose to use empathy as one alternative motivator.

Although sympathy and the golden rule are impermissible, we are certainly not expected to have a case devoid of emotion. Empathy is permissible.

As a mammal, we depend on the evolution of empathy to be sensitive to the needs of our offspring and to cooperate as a society.[22] Maybe the Reptile theory is right and empathy is just self-interest, but I doubt it. Researchers reported in the *American Journal of Psychiatry* that rhesus monkeys refused to pull a chain that delivered food to themselves if doing so gave a shock to a companion.[23] One monkey stopped pulling the chain for twelve days after witnessing another monkey receive a shock, literally starving itself to avoid harm to another.[24]

Empathy is what gives us heart. It is an essential component for human society, and it is what causes us to want to repair the world.

True, emotions can oftentimes trump rules.[25] We recognize, as attorneys, that we have an ethical duty to the rule of law. However, in a jury trial, emotions matter sometimes with or without regard to rules. Humans are moved to act based on emotions. During World War II, when Oskar Schindler took action to keep Jews out of concentration camps, his empathy trumped the rules. We can reconcile our duty to the law with our empathy as humans. We can speak with our heart, not just our brains, in guiding jurors to follow rules to solve dilemmas. Our job is to use the rules to tell jurors when and how to apply their innate, empathetic tendencies. Shouldn't our communication style encourage empathy more than reducing jurors to reptiles engaged in fight-or-flight responses?

Jurors are both emotional *and* rational beings. As attorneys we sometimes want to inundate them with evidence to make sure that they understand. The struggle is how much evidence is enough and how much is too much. In *Made to Stick*, Chip and Dan Heath described research that sought to discover whether people would donate less money to charity if the request was preceded by statistical information.[26] The finding was that the mere act of the statistical calculation *reduced* people's charity. The Heaths theorized that putting on an analytical hat caused people to react differently than when they had on their emotional hat.

It is our hearts that make us human.

Jurors are not one-dimensional. Swiss philosopher Henri Frederic Ariel stated it this way: "Man becomes man only by his intelligence, but he is man only by his heart." Humans are an evolved being, and the evolution of the limbic system (the center of emotional processing) brought about the new hormone of oxytocin.[27] Oxytocin pathways are critical to bonding with other people, they enable us to experience trust and empathy toward humans, and are responsible for the evolutionary emergence of human intellectual development and eventually complex society and cultures.[28] It's what separates us from our reptilian ancestors. It is our cerebral cortex that allows us to learn, problem solve, be creative, think abstractly, and deal with different perspectives. The combination of both rational and emotional thinking allows us to formulate our moral code.[29]

Empathy is an emotion as well as part of our moral code. Fairness, goodness, guilt, anger, and hate are too. Hating the effects of racism, power inequities, and excessive greed can motivate us to fight injustice. The Reptile theory relies almost solely on fear to move jurors, and it is effective. Yet what we each choose from our individual tool boxes has a collective impact on how we evolve as a profession. It also has an impact on how we choose to play a part in the evolution of the human brain.

Conclusion.

Bob McChesney, author of *The Problem of the Media*, has commented that the "[f]irst rule of being a great propaganda system, and why our system is vastly superior to anything in the old Soviet Union, is not that people think they're being subject to propaganda. The people don't think that. They're not looking for that. They're much easier to propagandize. And that's the genius of our media system, a system of ideology, of control, compared to an authoritarian system."[30] The Reptile theory discounts jurors the way the public discounts us.

Our country is shaped by laws and court decisions. As servants for justice who shape our civil rights, consumer rights, access to justice, constitutional rights, and workplace security, we have a duty to choose methods of communication that do not dehumanize jurors, that do not treat them like snakes, and that do not attempt to control them through propaganda methods. We can choose instead to bring humanity into the lives of those in our community in a way that respects the integrity, heart, and entire mind of each juror. Our focus should be the scales of justice, not the imaginary scales on "reptile" jurors.

Endnotes

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3 Ben Thomas, *Revenge of the Lizard Brain*, Scientific American Guest Blog, Sep. 7, 2012, *http://blogs.scientificamerican.com/guest-blog/revenge-of-the-lizard-brain/*.

4 Ball and Keenan, *supra* note 2.

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6 Thomas, *supra* note 3.

7 Joseph E. LeDoux, *The Emotional Brain: The Mysterious Underpinnings of Emotional Life* (1998).

8 *Id.*

9 The most vivid example of what happens during a fight-or-flight response is in the police officer context. A survey of 72 police officers who had been involved in a shooting explains the following was found as human responses during life-threatening fight-or-flight experiences:

Diminished Sound: 88% did not hear sounds such as gunfire, shouting, or sirens, or the sounds had "an unusual distant, muffled quality."

Tunnel Vision: 82% reported that their "vision became intensely focused on the perceived threat" and they lost their peripheral vision.

Automatic Pilot: 78% reported responding "automatically to the perceived threat, giving little or no conscious thought" to their actions.

Heightened Visual Clarity: 65% reported being able to "see some details or actions with unusually vivid clarity or detail."

Slow Motion Time: 63% reported that "events seemed to be taking place in slow motion and seemed to take longer to happen than they really did."

Memory Loss for Parts of the Event: 61% reported that, after the event, there were parts of it that they could not remember.

Memory Loss for Actions: 60% reported that, after the event, they could not remember some of their own actions.

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13 Jill. P. Holmquist, *The Reptile Brain, Mammal Heart and (Sometimes Perplexing) Mind of the Juror: Toward a Triune Trial Strategy,* The Jury Expert, Jul. 2010, at 21, 24-25, *http://www.thejuryexpert.com/2010/07/the-reptile-brain-mammal-heart-and-sometimes-perplexing-mind-of-the-juror-toward-a-triune-trial-strategy/.*

14 Commentary by Larry Johnson, former Fox News contributor, in Outfoxed (Brave New Films 2004), *https://youtu.be/P74oHhU5MDk.*

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17 *Id.*

18 *Id.*

19 Robert M. Sapolsky, *Why Zebras Don't Get Ulcers* (3rd ed. 2004).

20 David Ropeik *The Consequences of Fear,* 5(1) EMBO Reports 56, Oct. 2004.

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EFFECTIVE CROSS-EXAMINATION (THINK OF YOUR MOTHER)

By Dennis P. Rawlinson
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Dennis P. Rawlinson

Cross-examination is perhaps the most challenging aspect of our trial presentations. Unlike Raymond Burr in *Perry Mason* television serials, it's fair to say that we seldom, if ever, force the opposition to concede our claims or dismiss their claims as a result of brilliant cross-examination.

Spend an afternoon at one of the state or federal courthouses watching cross-examinations, and you are likely to witness a number of the techniques listed below, none of which are particularly effective. These traditional techniques and then a proposal for an alternative approach ("remember your mother") are discussed below.

1. Ineffective Cross-Examination Techniques

Assume for purposes of illustration that the witness to be examined is an 85-year-old grandfather who claims that on a dark and rainy night at a poorly lit intersection, he witnessed your client's car (which was attempting to make a left-hand turn in the intersection) run into the plaintiff's vehicle (which was proceeding through the intersection in the opposite direction). Your client admits that he was trying to make a left-hand turn, but that he simply was in the middle of the intersection with his left-turn indicator on, and that the oncoming plaintiff's vehicle crossed the centerline and ran into him.

a. Useless Niceties.

Many cross-examinations begin with "useless niceties" that rob you of the opportunity to capitalize on the "golden moments" as you begin your cross-examination. When one begins a cross-examination, the fact-finder (be it judge or jury) will be paying the most attention. These golden moments should not be squandered.

Useless niceties consist of questions and comments like these:

"Good morning, Mr. Murphy. How are you doing this morning?"

"Mr. Murphy, I'd just like to ask you a few questions. Could you give me your attention for a little while?"

"Mr. Murphy, beautiful weather we're having, aren't we, for a state that's noted for its rain?"

b. Repeating Direct Examination.

After starting the cross-examination by squandering golden moments with useless niceties, the examiner then proceeds to repeat portions of the direct examination, thereby reaffirming and reinforcing the points made on the direct examination—apparently believing that by repeating the direct examination a second time, it will seem less credible. But this tactic almost never works.

"You testified that my client's vehicle crashed into the plaintiff's vehicle while trying to make a left-hand turn, didn't you?"

"You claim that my client is the one at fault, don't you?"

"You claim that you had a clear and unobstructed view of the accident?"

c. Begging.

Then, after useless niceties and repeating the direct examination, the cross-examiner begins begging the witness to change his story:

"You can't be sure that my client's car hit the plaintiff's car first, can you?" (The witness asserts that he is sure, despite the begging.)

"The plaintiff's vehicle could have just as easily veered into my client's lane by three or four inches as my client could have veered into the plaintiff's lane, right?" (The witness denies that this happened.)

"It all happened so fast, you can't be absolutely certain that my client's vehicle was the one that went over the centerline first, can you?" (The witness is certain.)

d. Pulling Out the Hatchet and Chain Saw.

The useless niceties, repeating of the direct examination, and begging are then followed by what I call "pulling out the hatchet and chain saw." (Just like Freddy Krueger and Jason from *Nightmare on Elm Street* and *Friday the 13th* or the demented son in *Texas Chainsaw Massacre*.)

You are going to take no hostages. You are going to use a "hatchet" and a "chain saw" to demonstrate that this elderly gentleman is not only mistaken, but also a liar—that he must have some improper motive, such as an economic interest with the plaintiff.

You pick up the hatchet and start the chain saw. You are ruthless. You maim him. You slash him. You show no mercy. You then sit down and your client leans over and tells you what a marvelous job you did.

Of course, your client is wrong. Your hatchet and chain-saw massacre may have bloodied the courtroom, but it also completely alienated the fact-finder (judge or jury), who was naturally sympathetic to an elderly gentleman undergoing the foreign experience of testifying in a courtroom and being subject to a cross-examination by an experienced lawyer.

Most of us realize over time that these types of hatchet and chain-saw cross-examinations are more likely to hurt our client than persuade the fact-finder. It's surprising, however, how long it takes many of us to put away the hatchet and chain saw and trade them in for a scalpel. Admittedly, we are misled for a while by the positive comments of our clients, who inevitably compliment us after using the hatchet and chain saw. But the compliments are soon forgotten when the fact-finder comes back with a disappointing verdict or judgment.

Litigation Journal Editorial

The Oregon *Litigation Journal* is published three times per year by the Litigation Section of the Oregon State Bar, with offices located at 16037 S.W. Upper Boones Ferry Road, Tigard, Oregon 97224; mailing address: Post Office Box 231935, Tigard, Oregon 97281; 503-620-0222.

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2. Conduct Your Cross-Examination as Your Mother Would

Mothers love us regardless of our foibles. Perhaps this underlying affection explains why the questions of a mother are so effective. Mothers do not use hatchets or chain saws; they use a scalpel to get at the truth.

a. Childhood Experience.

Most of us have had the childhood experience as an underage adolescent of having our parents leave us at home alone for the weekend. We are given strict orders that no friends are to visit, particularly friends of the opposite sex. We are instructed that there is to be no drinking, no cigarette-smoking, no loud music—yet inevitably, there is.

Try as we might to hide, destroy, or mask the evidence, inevitably our parents, upon returning home, talk with the elderly neighbor who sits in her front window and watches your home about what she saw while they were gone. You then come home from school and undergo the following cross-examination by your mother:

> "Our neighbor, Mrs. Smith, was home looking out her window last Saturday night when we were out of town. Did you know that?"
>
> "Cars were parked in front of the house?"
>
> "Cars that belong to your friends?"
>
> "There was loud music?"
>
> "Beer?"
>
> "Smoking?"
>
> "Girls?"

You answer "no" to the first question and then "yes" to her questions like a lap dog barking for snacks. Her cross-examination is effective without being mean-spirited.

b. Cross-Examining the Witness as Your Mother Would.

You laid the groundwork for trial at the elderly gentleman's deposition by asking questions as if you were conducting a cross-examination (using leading questions) to ensure that you would get the same answers at trial. Applying the same loving yet direct technique as your mother used on you, you now begin your cross-examination of the gentleman:

> "It was dark?"
>
> "It was raining?"
>
> "The intersection was dimly lit?"
>
> "You can't see without your glasses?"
>
> "Your glasses were wet from the rain?"
>
> "Your glasses were 'fogged up' at times?"

Plus, your deposition work has allowed you to add a distraction to the cross-examination of Mr. Murphy:

> "Let's talk about your terrier's attempt to eat the remnants of a fast-food wrapper . . . you understand . . . ?"
>
> "You were walking your terrier?"
>
> "Your terrier once ate the remnants of a fast-food wrapper . . . ?"
>
> "It made her ill . . . ?"
>
> "Your terrier had a wrapper in her mouth that night . . . ?"
>
> "You were concerned that she would be ill?"
>
> "You love your terrier?"
>
> "You were attempting to pull the wrapper from her mouth?"
>
> "That's when the two cars approached?"
>
> "You were bent over?"
>
> "You were facing away from the intersection?"
>
> "You did not turn around until you heard the crash?"

3. Conclusion

Next time you have an opportunity to conduct cross-examination (or, for that matter, conduct a cross-examination during deposition in preparation for a trial cross-examination), consider putting away the hatchet and the chain saw and trading them in for a scalpel. After all, Aristotle recognized that "to persuade" we must be "liked." We are more likely to be "liked" without the hatchet and chain saw.

Conduct your cross with the skill, care, and affection of your mother when she cross-examined you as an adolescent. Your client may not be as effusive with his or her praise after the cross-examination has been completed. But instead of running the risk of alienating the jury by filling the jury box with blood, gore, and limbs, you are likely to find that you have persuaded the jury to your point of view. Most clients would trade an opportunity to compliment us on a ruthless cross-examination for a successful outcome.

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What's In and What's Out: Contract Interpretation on Summary Judgment

By Harry Wilson
Markowitz Herbold PC


Harry Wilson

What tools can a litigant use and on what evidence can a litigant rely to interpret a contract in a motion for summary judgment? Can a litigant employ maxims of construction such as *ejusdem generis* and trade usage? What about earlier drafts of the contract and email negotiations between the parties about the purpose and meaning of the agreement? If the court determines that the contract is ambiguous, must the court deny the motion for summary judgment? This article addresses these questions.

The starting point for all discussions of contract interpretation is the Oregon Supreme Court's decision in *Yogman v. Parrott*, 325 Or 358 (1997). *Yogman* set forth a three-step analysis for determining the meaning of a contract. At the first step, the court examines the text of the disputed provisions in the context of the contract as a whole. *Id.* at 361. "Whether terms of a contract are ambiguous is a question of law." *Id.* (citing *Eagle Industries, Inc. v. Thompson*, 321 Or 398, 405 (1995)). If the disputed provision is unambiguous, the analysis ends, and the court enforces the contract according to its terms. *Id.* If the provision is ambiguous, however, the court proceeds to the second step and examines extrinsic evidence of the contracting parties' intent. *Id.* at 363. If this extrinsic evidence still does not resolve the ambiguity, the court proceeds to the third step. Here, the court relies on appropriate maxims of construction. *Id.* at 364.

The application of these three steps can become tricky when litigants move to enforce a contract on summary judgment. Oregon Rule of Civil Procedure 47 C requires a court to grant a motion for summary judgment when "the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." The welding of *Yogman's* three-step analysis onto ORCP 47 C's summary judgment standard has created two common misconceptions. The first misconception is that an Oregon court cannot review extrinsic evidence and employ maxims of construction at *Yogman*'s first step to determine whether a contract is ambiguous. On the contrary, an Oregon court can consider a wide range of evidence to determine whether a contract term is ambiguous and it may resort to textual maxims of construction to test for ambiguity.

The second misconception is that an Oregon court can only resolve the first step of the *Yogman* analysis on a motion for summary judgment. As a general rule, this is true. If the terms of the contract are unambiguous, the court will enforce it. *See, e.g., Madson v. W. Or. Conference Ass'n of Seventh-Day Adventists*, 209 Or App 380, 393 (2006) (trial court properly granted summary judgment in favor of the defendant because "the unambiguous terms of the contract" did not entitle the plaintiff to termination pay). If, on the other hand, the terms are ambiguous, Oregon courts have frequently held that summary judgment is not appropriate. *See Cassidy v. Pavlonnis*, 227 Or App 259, 264 (2009) ("In a dispute over the meaning of a contract, a party is entitled to summary judgment only if the terms of the contract are unambiguous."). As discussed below, however, this general rule has an important exception.

This article reviews what tools litigants can use and on what evidence they can rely when contesting the meaning of a contract on a motion for summary judgment.

Oregon courts may rely on some extrinsic evidence to determine whether a contract is ambiguous.

In *Yogman*, the Supreme Court mentioned only text and context at the first step. However, ORS 42.220 provides that "[i]n construing an instrument, the circumstances under which it was made, including the situation of the subject and of the parties, may be shown so that the judge is placed in the position of those whose language the judge is interpreting." Relying on that statute, the Supreme Court held in *Abercrombie v. Hayden Corp.*, 320 Or 279, 292 (1994), that a "trial court may consider parol and other extrinsic evidence to determine whether the terms of an agreement are ambiguous."

Abercrombie was decided three years before *Yogman*. In *Batzer Construction, Inc. v. Boyer*, 204 Or App 309 (2006), the Court of Appeals evaluated *Abercrombie*, *Yogman*, ORS 42.220, and Oregon's parol evidence rule, ORS 41.740, to decide whether, after *Yogman*, an Oregon court could consider extrinsic evidence to determine whether a contractual term was ambiguous. The Court of Appeals concluded that *Abercrombie* remained good law. It held that although a court could not consider *any* extrinsic evidence at *Yogman*'s first step, courts could "consider the circumstances underlying the formation of a contract to determine whether a particular contractual provision is ambiguous." *Batzer Constr.*, 204 Or App at 317. In other words, at least some extrinsic evidence—extrinsic evidence of the circumstances underlying the formation of the contract—is in at *Yogman*'s first step. *Sollars v. City of Milwaukie*, 222 Or App 384, 388, 193 P3d 75, 77 (2008) ("[p]arol evidence regarding the circumstances underlying the formation of a contract may be considered to determine whether a contract provision is ambiguous.").

Batzer Construction's holding permits a wide array of evidence. Drafts of earlier agreements constitute circumstances underlying the formation of the contract. *Milne v. Milne Const. Co.*, 207 Or App 382, 393 (2006) ("The content of plaintiff's draft, however, is extrinsic evidence circumstantial to contract formation that adds information."). And, in addition, the "content of discussions during contract negotiations" may also be considered. *Nixon v. Cascade Health Servs., Inc.*, 205 Or App 232, 241 n10 (2006); *Harris v. Warren Family Properties, LLC*, 207 Or App 732, 749 (2006) (considering parties' negotiations at first step). However, a party may not rely on

"the circumstances and conduct of the parties during the life of the agreement" at *Yogman*'s first step. *See Harris*, 207 Or App at 738. Such evidence may only be used to resolve a contract ambiguity. *Id.*

Oregon courts may employ textual maxims of construction to determine whether a contract is ambiguous.

At the first step of the *Yogman* analysis, the court considers the text and context of the disputed contractual provision. Although *Yogman* provides that courts may not employ maxims of construction until step three of the analysis, in practice Oregon courts have deployed textual maxims of construction at *Yogman*'s first step in order to determine whether a contract is ambiguous.

One of the most useful maxims is *ejusdem generis*. This maxim provides "that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." Black's Law Dictionary (10th ed. 2014). The Oregon Supreme Court relied on *ejusdem generis* to interpret an ambiguous term in *Groshong v. Mutual of Enumclaw Insurance Co.*, 329 Or 303, 313 (1999). The *Groshong* Court was construing an insurance policy and did not cite to or specifically apply the *Yogman* three-step analysis. Nonetheless, during an examination of the disputed contractual phrase "in its context," the Court relied on *ejusdem generis*. *Id.* at 312. Using *ejusdem generis*, the Court concluded that in "light of our examination of both the wording of the phrase at issue and the context in which the wording occurs," one of the proffered interpretations of the phrase was not plausible.

In *In re Marriage of Smith*, 176 Or App 619 (2001) the Oregon Court of Appeals cited *Groshong* to apply *ejusdem generis* at the first stage of the *Yogman* analysis. *In re Marriage of Smith* involved a marital settlement agreement incorporated into a dissolution judgment. *Id.* at 621. Such judgments are interpreted in the same manner as contracts. *Id.* at 622. The dispute centered on the meaning of the phrase "earned income" as it was used in the dissolution judgment. The wife contended that shareholder dividends, among other payments received by the husband, were "earned income." *Id.* at 621. The husband disagreed: he contended that shareholder dividends were not earned income because he would have received the dividends whether he worked or not. *Id.* at 621-22.

The dissolution judgment defined "earned income" as "all compensation for a party's efforts, including, but not limited to, salary, wages, bonuses, fees, tips and dividends pai[d] in lieu of salary or wages from a closely held corporation." *Id.* at 622-23 (quoting dissolution judgment; alterations in original). To ascertain the meaning of the phrase, the Court of Appeals considered two definitions of "compensation." It noted that both definitions of compensation provide that "compensation" "is part of a *quid pro quo*: payment in exchange for value." *Id.* at 623. The Court of Appeals did not rely on the definitions alone, however. It also examined the context of the phrase by looking at the list of examples that qualified as "earned income" according to the dissolution judgment. It decided that "under the maxim of *ejusdem generis*, the enumerated examples demonstrate that the general term 'earned income'" is consistent with the dictionary definitions' requirement of a *quid pro quo*. *Id.* at 623. In so deciding, the Court of Appeals cited *Groshong* for "applying *ejusdem generis* at the 'text and context' level of contract interpretation." *Id.* The Court of Appeals ultimately concluded that husband's interpretation of the dissolution judgment was correct and shareholder dividends were not "earned income" because there was no *quid pro quo* between the husband and the company paying the dividend. *Id.* at 624-26.

Courts have applied other maxims of textual construction at the first level of *Yogman*. In *Harris v. Warren Family Properties, LLC*, 207 Or App 732, 738 (2006), the Court of Appeals stated that to "determine whether a provision is ambiguous, a court generally focuses on analysis of the disputed text and its context, including maxims of textual construction[.]" In that case, the Court of Appeals considered, but ultimately did not rely on, the "distinct meanings" maxim of construction at *Yogman*'s first step. *Id.* at 748. The Supreme Court has also applied textual maxims at the first step of *Yogman*. In *Peace River Seed Co-Operative, Ltd. v. Proseeds Mktg., Inc.*, 355 Or 44, 67 (2014), the Court held that "it is appropriate to consider any applicable trade usage at the first level of analysis under *Yogman*."

Oregon courts may resolve an ambiguity in the terms of a contract on a motion for summary judgment if there is no competing extrinsic evidence.

As noted above, if a court determines, at *Yogman*'s first step, that a contract is unambiguous, it will enforce its terms on summary judgment. If, however, the court determines that the contract is ambiguous, the Oregon Court of Appeals has frequently suggested that summary judgment is inappropriate. *Cassidy*, 227 Or App at 264 ("In a dispute over the meaning of a contract, a party is entitled to summary judgment only if the terms of the contract are unambiguous."); *Milne v. Milne Const. Co.*, 207 Or App 382, 388 (2006) ("In a contract dispute, a party will be entitled to summary judgment only if the governing terms of the contract are unambiguous."); *Brown v. Am. Prop. Mgmt. Corp.*, 167 Or App 53, 61 (2000) ("A dispute over the meaning of a contract may be disposed of by way of summary judgment only if its terms are unambiguous.").

These decisions created a common misconception that the presence of ambiguity alone necessitates the denial of a motion for summary judgment. Under this misconception, *Yogman*'s second and third steps were off limits to a court on a motion for summary judgment.

In an important 2013 decision, however, the Court of Appeals clarified its earlier rulings and made clear that it is "not the existence of an ambiguity itself" but rather "the existence of competing extrinsic evidence—and the triable factual issue that the evidence creates—that, as a general rule, makes the resolution of the meaning of an ambiguous contract on summary judgment inappropriate[.]" *Dial Temp. Help Serv., Inc. v. DLF Int'l Seeds, Inc.*, 255 Or App 609, 612 (2013). In *Dial Temporary*, the appellant argued that "'disputes over the

meaning of a contract may be disposed of by way of summary judgment *only* if the contract's terms are unambiguous.'" *Id.* at 610 (emphasis added; alterations omitted; quoting *Brown*, 167 Or App at 61). The Court of Appeals disagreed and held that *Brown*'s statement represented a "general rule," but one subject to exceptions. *Id.* at 611.

The Court of Appeals explained that when a contract is ambiguous, "ascertaining its meaning is a question of fact." *Id.* at 611 (emphasis omitted; quoting *Madson v. Oregon Conf. of Seventh–Day Adventists*, 209 Or App 380, 389 (2006)). It is, the Court of Appeals went on to explain, this question of fact, "not the ambiguity of the contract that render[s] summary judgment inappropriate." *Id.*; ORCP 47 (summary judgment appropriate where there is no "genuine issue as to any material fact").

Where a contract is ambiguous, but there is no genuine issue as to any material fact, however, summary judgment is still appropriate. Indeed, as the Court of Appeals noted, the Supreme Court in *Yogman* interpreted an ambiguous contract on summary judgment because there "'the parties agreed that no additional evidence of the contracting parties' intent was available beyond what was in the summary judgment record.'" *Id.* at 612 (alterations omitted; quoting *Yogman*, 325 Or at 364).

Since the Court of Appeals issued *Dial Temporary* in 2013, it has repeatedly stated "that a dispute over an ambiguous document *can be resolved on summary judgment* in the absence of 'competing extrinsic evidence' that would permit a factfinder to find that the ambiguity at issue should be resolved in favor of the nonmoving party." *Yale Holdings, LLC v. Capital One Bank*, 263 Or App 71, 77 (2014) (emphasis added). The Court of Appeals now formulates its law on ambiguity and summary judgment in the form of a general rule—summary judgment is not appropriate when a contract is ambiguous—subject to an exception—unless there is no relevant evidence to resolve the ambiguity. The Court of Appeals succinctly stated the law in a 2014 case:

> "As a general rule, summary judgment is not appropriate in a contract dispute if the terms are ambiguous. An exception to that general rule, however, exists when there is no relevant extrinsic evidence to resolve the ambiguity. That is because it is the existence of competing extrinsic evidence—and the triable factual issue that the evidence creates—that, as a general rule, makes the resolution of the meaning of an ambiguous contract on summary judgment inappropriate, not the existence of an ambiguity itself."

Copeland Sand & Gravel, Inc. v. Estate of Dillard, 267 Or App 791, 797 (2014) *adhered to on recons*, 269 Or App 904 (2015) (quotation marks and citations omitted). As it now stands, "[w]hen the extrinsic evidence is undisputed, * * * the court may interpret an ambiguous contract term on summary judgment." *Web Analytics Demystified, Inc. v. Keystone Solutions, LLC*, No. 3:13-CV-1304-HU, 2015 WL 882577, at *5 (D. Or. Mar. 2, 2015); *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F3d 1033, 1042 (9th Cir 2014) ("In Oregon, the meaning of a contract such as the OA is a question of law, unless it is ambiguous and there is competing extrinsic evidence from which a jury could resolve the ambiguity in favor of either party." (quotation marks and citation omitted)).

Durette v. Virgil – Skating (By) On Thin Science


Kennon Scott


Jan K. Kitchel

So . . . junk science. We hate it when the other guy tries to use it. Our experts, well, their science is the real thing, right? Maybe it's all in the telling, the selling. The gray area between creative cutting edge and garbage is getting foggier in Oregon state courts, with a little more room to move, to skate, and maybe that ice won't give out under us. A recent pair of Court of Appeals cases – *Durette v. Virgil*,[1] and its companion case, *Thoens v. Safeco Ins. Co. of Oregon*[2] – seem to say that Oregon courts are more welcoming "gatekeepers" than their federal counterparts.

Federal courts rely on a relatively defined and demanding test when considering whether to admit expert testimony, and arguably that hurdle (or maybe the federal bench) just continues to get higher. We first saw that test in the U.S. Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[3] In *Daubert* several mothers sought to prove that defendant's drugs caused birth defects, but the Court didn't like the science.

In *Daubert*, the Court imposed on trial courts the role of a "gatekeeper." Judges are required to make a preliminary assessment to determine whether the proffered "expert" evidence is reliable in the case at bar. If the court doesn't open the gate, the jury doesn't hear the testimony.

The *Daubert* court established a four-factor guide for federal courts to apply in assessing the scientific validity of a reasoning or methodology:

- Whether the expert's theory or technique can be (and has been) tested;
- Whether the theory or technique has been subjected to peer review and publication;
- Whether the theory or technique has an acceptable known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and
- Whether the theory or technique has attained "general acceptance."[4]

A wealth of case law has developed since *Daubert*. Oregon courts have, at least in part, adopted the analysis applied by the United States Supreme Court. Or so we thought. In *State v. Brown*, a pre-*Daubert* case, the Oregon Supreme Court articulated seven factors (including the later *Daubert* factors), but said they weren't exclusive.[5] In *State v. O'Key* the Oregon Supreme Court adopted the four *Daubert* factors to help trial courts fulfill their "vital role as 'gatekeeper[s]'" keeping out "bad science," but emphasized the value of cross examination and the wisdom of the jury to "separate the wheat from the chaff."[6]

Leaving the gate loosely ajar, Oregon courts do not apply the four *Daubert* factors exclusively. Instead, they are considered along with several other factors, which can number at least 18, as in *Jennings v. Baxter Healthcare Corp.*[7]

Giving the gate a swift kick, a recent pair of Court of Appeals cases – *Durette v. Virgil*,[8] and its companion case, *Thoens v. Safeco Ins. Co. of Oregon*[9] – make clear that Oregon courts are more lenient "gatekeepers" than their federal counterparts. The *Durette* opinion relies heavily on *Thoens*, pointing out that the expert's qualifications were developed more fully in *Thoens*. Senior Judge Janice Wilson authored both opinions, and both cases involved auto collisions, and testimony from the same biomechanical expert, Bradley Probst.

In *Durette*, plaintiff's car was rear-ended while stopped at a red light. Defendant admitted negligence in causing the collision. At trial, the jury was asked to decide whether defendant's negligence had been a substantial factor in causing plaintiff's injury. Each side called chiropractic experts, but defendant also introduced the testimony of Probst, a well-known biomechanical expert, to prove that plaintiff's alleged injuries could not have been caused by the collision. Plaintiff moved *in limine* to exclude the expert's testimony, arguing, among other things, that he was not qualified to testify as to the cause of bodily injury and that his analysis was scientifically invalid.

The trial court held an OEC 104 hearing to determine admissibility. At the hearing, the expert testified at length about his training and education and explained that, as a biomechanical engineer, he analyzed certain scientific facts surrounding an accident, such as how materials hold up under certain forces.[10] Although arguably not an expert in diagnosing injuries (which Probst refused to concede), he explained that his expertise was in determining whether the materials and forces involved in an accident are capable of causing injury.

After the OEC 104 hearing, the trial court denied plaintiff's motion and allowed the expert to testify on the grounds that he was qualified and his methodology was scientifically sound. Plaintiff appealed to the Court of Appeals.

On appeal, plaintiff argued that the expert's qualifications were lacking and that his methodology was flawed and unaccepted by the medical community. Relying on *Jennings*, the Court held that review of the trial judge's ruling on the 104 hearing will be for errors of law. In rejecting plaintiff's argument, the Court conceded that cross-examination had shown weaknesses in the studies and authorities the expert cited in support of his methodology.[11] Those weaknesses, however, went to the weight rather than to the admissibility of the expert's testimony. Because plaintiff "did not establish that there was *no support* for his methodology at all," it was "precisely the situation in which the jury is given the task of deciding what weight, if any, to give to an expert's testimony" [emphasis added].

In a footnote, the Court stated that it would apply the seven *Brown* factors, along with the eleven "somewhat overlapping additional factors" listed in a *Brown* footnote,[12] and two additional factors listed in *O'Key*.[13] So the careful

practitioner should now consider those 20 factors, many of which will overlap.

Plaintiff also argued that the expert, as an engineer, was not qualified to testify as to whether the collision caused plaintiff's injuries. The Court rejected that argument as well, explaining that the expert did not offer testimony as to the cause of the injury; his opinion was limited to whether the collision *could* have caused plaintiff's injuries, not whether it actually did.

Durette's holding with respect to the expert's specific qualifications and methodology probably will have little impact outside of personal injury cases, though it is worth noting that, in other states, the use of biomechanical experts to counter medical evidence of injury and causation is controversial. For example, the Washington Court of Appeals has blessed the admission of biomechanical expert testimony twice. In a third case, however, the same court excluded similar testimony on the grounds that an opinion that a collision *could not* have caused plaintiff's injury was tantamount to an opinion that the collision *did not* cause plaintiff's injury, a logical inference the Oregon court failed to make.[14]

The implications of *Durette* and *Thoens*, and the extensive dicta regarding the expert's methodology, are of more concern. The Oregon trial judge's role as a gatekeeper will be diminished as a result. *Daubert* and its progeny require federal trial courts to act as gatekeepers, applying a contextual factual analysis, to ensure that a testifying expert's scientific method is the product of reliable principles and methods.[15] In *Durette*, however, the Court admitted the expert testimony because plaintiff "*did not establish that there was no support for his methodology at all.*" That sentence implies that *some* support will be enough.

Should Oregon courts be willing to abdicate their gatekeeper role where there is even a whisper of support for an expert's methods? Most experienced experts will have at least some studies to back them up, and 27 glossy photos complete with circles and arrows. So the vaunted 104 hearing may be an exercise in futility.

Durette currently is on appeal to the Oregon Supreme Court. Assuming it survives review, *Durette* will: (1) allow that cutting edge creativity some of us desire; and (2) require us to sharpen our skills at preparation, cross examination, and argument.

Endnotes

1 *Durette v. Virgil*, 272 Or App 545 (2015).

2 *Thoens v. Safeco Ins. Co. of Oregon*, 272 Or App 512 (2015).

3 *Daubert v. Merrell Dow Pharm., Inc.*, 509 US 579 (1993).

4 *Id.* at 592-94.

5 *State v. Brown,* 297 Or 404, 687 P2d 751 (1984)

6 *State v. O'Key,* 321 Or 285, 299-307, 899 P 2d 663 (1995).

7 *Jennings v. Baxter Healthcare Corp.,* 331 Or 285, 302-03, 14 P 3d 596, 605-06 (2000) (listing the 18 factors).

8 *Durette v. Virgil,* 272 Or App 545 (2015).

9 *Thoens v. Safeco Ins. Co. of Oregon,* 272 Or App 512 (2015).

10 The expert's methodology consisted of first determining the force applied to plaintiff's car. Then he considered how the forces experienced by plaintiff's joints and tissues compared to her "personal level of tolerance." Finally, he compared the forces he calculated plaintiff had experienced in the collision to "known level[s] of human tolerance" based on studies of vehicle collisions and crash tests and his own studies of human tissue response to various stresses.

11 In assessing the expert's methodology, the Court focused on his assertion that there is a known level of tolerance of human tissue that could be compared to the forces applied to plaintiff's body to determine whether the accident was capable of causing plaintiff's alleged injuries.

12 The evidence expert Justice McCormick listed those 11 factors in his article *Scientific Evidence: Defining a New Approach to Admissibility,* 67 Iowa L.Rev. 879, 911-12 (1982).

13 *Durette*, *supra*, 272 Or App 528.

14 *Compare Johnston–Forbes v. Matsunaga,* 177 Wash App 402, 311 P 3d 1260 (2013) (admitting testimony) *and Ma'ele v. Arrington,* 111 Wash App 557, 45 P 3d 557 (2002) (admitting testimony) *with Stedman v. Cooper,* 172 Wash. App. 9, 20, 292 P.3d 764, 769 (2012) (excluding testimony).

15 *See Daubert,* 509 US at 589–590; FRE 702.

Can an Offer of Complete Relief to the Named Plaintiff Moot a Class Action?

By Laura L. Richardson and Erin M. Wilson, Lane Powell PC

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Class actions can be costly and a headache for those defending them. One strategy that defendants may consider in endeavoring to resolve a class action swiftly and efficiently is providing a full offer of judgment to the named plaintiff prior to class certification. The theory is that by offering such relief, the named plaintiff arguably no longer has a personal stake in the outcome of the lawsuit, thereby rendering the plaintiff's claim moot.

In 2013, the Supreme Court decided *Genesis HealthCare Corp. v. Symczyk.*[1] That case involved a collective action under the Fair Labor Standards Act (FLSA), and the Court held that a defendant's offer to satisfy the named plaintiff's interest in the case mooted her individual claim *and* the entire collective action she purported to bring under the FLSA. The Court, however, limited its decision to collective actions — as opposed to class actions. Since then, the lower courts have been assessing when and how the Court's ruling in *Genesis* applies to class actions. However, recent trends within the U. S. Courts of Appeals suggest that an offer of judgment to a named plaintiff prior to class certification will *not* moot the class action.[2]

Recently, the Fifth Circuit, in *Hooks v. Landmarks Industries, Inc.*,[3] and the Seventh Circuit, in *Chapman v. First Index, Inc.*,[4] considered whether an offer of complete relief to the named plaintiff prior to class certification would render the class action moot. Relying heavily on Justice Elena Kagan's dissent in *Genesis*, these courts found that class actions survive such offers, joining the Second, Third, Ninth, Tenth and Eleventh Circuits.[5]

For the Seventh Circuit, *Chapman* is a change of course. In 2011, the Seventh Circuit came to the opposite conclusion in *Damasco v. Clearwire Corp.*,[6] holding that a class action does not survive where the named plaintiff's claim is mooted as a result of a complete offer of judgment prior to certification. The court stated that the simple solution to avoid "picking off" a named plaintiff through such an offer was for class counsel to move to certify the class at the same time the complaint was filed, reasoning that the interests of putative class members are alive in the case once a class certification motion has been filed. The Seventh Circuit's decision in *Damasco*, however, was an outlier, and most other federal courts around the country declined to allow precertification offers of judgment to moot an entire class action.

The Supreme Court is set to resolve this issue this term when it considers the matter of *Gomez v. Campbell-Ewald Co*. In *Gomez*, the Ninth Circuit noted that courts have routinely concluded that the Supreme Court's holding in *Genesis* does not apply to class actions. The court pointed out that the *Genesis* court itself noted that Rule 23 class actions are fundamentally different from collective actions under the FLSA. Accordingly, the court found that the offer of judgment did not moot the class action.

Should the Supreme Court determine that class actions survive such offers of judgment, defendants will have to consider alternative methods of limiting their exposure to class action liability. In the words of Benjamin Franklin, "an ounce of prevention is worth a pound of cure."

One method to consider is contractual class action waivers, a practice that has been upheld by the Supreme Court. In *AT&T Mobility LLC v. Concepcion*,[7] the Supreme Court struck down a California rule banning class action waivers in consumer arbitration contracts. Moreover, courts have expanded the Supreme Court's analysis in *Concepcion*. For example, the Fifth Circuit's decision in *D.R. Horton v. NLRB*[8] upheld the use of class action waivers in the employment agreement arena. Contractual class action waivers can be a powerful tool that companies should consider including in commercial and employment contracts to avoid expensive class action litigation.

Another preventative measure for certain commercial defendants to consider is a "money-back" policy. In 2011, the Seventh Circuit issued its opinion in *In re Aqua Dots Products Liability Litigation*,[9] holding that no class should be certified where the defendant company had offered and honored "money-back" requests for refunds on recalled products. The court reasoned that the company's approach was preferable to a class action because it more fairly and adequately protected the interests of the class than the representative "who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer."

Finally, in FLSA collective actions, an offer of judgment of complete relief to the named plaintiff remains a viable option for early resolution.

Endnotes

1 133 S. Ct. 1523 (2013).

2 *See Tanasi v. New Alliance Bank,* 786 F.3d 195 (2d Cir. 2015), *as amended* (May 21, 2015); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014) *cert. granted,* 135 S. Ct. 2311, 191 L. Ed. 2d 977 (2015); *Stein v. Buccaneers Ltd. P'ship,* 772 F.3d 698 (11th Cir. 2014).

3 No. 14-20496, 2015 WL 4760253 (5th Cir. Aug. 12, 2015).

4 No. 14-2773, 2015 WL 4652878 (7th Cir. Aug. 6, 2015).

5 *See Tanasi*, 786 F.3d 195 (2d Cir. 2015); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004), *as amended* (Oct. 22, 2004); *Gomez*, 768 F.3d 871 (9th Cir. 2014); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011); *Stein*, 772 F.3d 698 (11th Cir. 2014).

6 662 F.3d 891 (7th Cir. 2011).

7 131 S. Ct. 1740 (2011).

8 737 F.3d 344 (5th Cir. 2013).

9 654 F.3d 748 (7th Cir. 2011).

RECENT SIGNIFICANT OREGON CASES

Stephen K. Bushong
Multnomah County Circuit Court


Honorable
Stephen K. Bushong

Claims and Defenses

Montara Owners Assn. v. La Noue Development, LLC, 357 Or 333 (2015)

The plaintiff homeowners' association sued the defendant developer/general contractor (La Noue) for damages caused by design and construction defects in a complex of townhouses. La Noue filed a third-party complaint against various subcontractors based on contractual indemnity provisions. The trial court granted the subcontractors' motion for summary judgment on the issue of contractual indemnification, concluding that the indemnity provision is invalid under ORS 30.140 because it required indemnification for loss caused in part by La Noue's own negligence. The Supreme Court reversed. The court concluded that "the trial court should have severed the unenforceable parts of the indemnity clause—the parts that violate ORS 30.140(1)—but still allowed La Noue's claim to go forward to determine if, and to what extent," the property damage arose out of the subcontractors' own negligence or fault. 357 Or at 343-44. The Supreme Court also affirmed the trial court's pretrial decision not to send to the jury La Noue's claim to recover as consequential damages the attorney fees it incurred in defending against the homeowners' complaint. The court concluded that "ORCP 68 provided the procedure for seeking an award of those attorney fees." *Id.* at 357.

Smith v. OHSU Hospital and Clinic, 272 Or App 473 (2015)

The trial court granted defendant's motion to dismiss plaintiff's medical malpractice claim, concluding that plaintiff failed to commence her action within the two-year limitations period in the Oregon Tort Claims Act (OTCA), ORS

30.275(9). The Court of Appeals reversed. The court agreed with the trial court that no objectively reasonable factfinder could conclude that plaintiff's action arose later than August 30, 2007, but concluded that the tolling provision in ORS 12.160 (2005) applied to plaintiff's claim, so the action was timely. Applying and construing the pertinent statutes, the court concluded that ORS 30.275(9) "does not bar application of ORS 12.160 (2005) to OTCA claims, because ORS 12.160 (2005) does not provide a limitation on the commencement of an action but instead provides for tolling the time allowed for commencement of an action." 272 Or App at 486.

Lunsford v. NCH Corp., 271 Or App 564 (2015)

The trial court dismissed plaintiff's product liability action because it was not commenced within 10 years of sale of the product, as required by ORS 30.905(3)(b) (2008). Plaintiff argued on appeal that the statute violates the remedy clause, Article I, section 10, and the jury trial clause, Article I, section 17, of the Oregon Constitution. The Court of Appeals affirmed. The court explained that the remedy clause argument failed under *Hughes v. PeaceHealth*, 344 Or 142 (2008), and *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001). The court acknowledged that Justice Landau's concurrence in *Klutchkowski v. PeaceHealth*, 354 Or 150 (2013) may be an "invitation" for litigants to challenge the reasoning of *Smothers* and *Hughes*, but concluded that it "is not an 'invitation' to this court to ignore the controlling Supreme Court precedent." 271 Or App at 571. The court further concluded that the jury trial argument was foreclosed by *Sealey v. Hicks*, 309 Or 387 (1990), *overruled in part by Smothers*, 332 Or at 123. The court explained that, "unlike the remedy clause analysis employed in *Sealey*, the decision's jury trial analysis has not been disavowed." 271 Or App at 571, citing *Jensen v. Whitlow*, 334 Or 412 (2002).

Knappenberger v. Davis-Stanton, 271 Or App 14 (2015)

Plaintiff sued defendant in December, 2009 to collect for legal services rendered before July, 2002. Defendant moved for a directed verdict and JNOV, contending that the claims were barred by the six-year limitation period in ORS 12.080 and 12.090. Plaintiff responded that the limitation period was tolled by ORS 12.150 because defendant moved to Vancouver, Washington in November 2003. The trial court granted defendant's JNOV motion, concluding that the tolling statute violated the dormant Commerce Clause under *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 US 888 (1988), and cases from other jurisdictions applying *Bendix*. The Court of Appeals reversed. The court concluded that defendant "has failed to establish the threshold requirement that he is an out-of-state person 'engaged in commerce' for purposes of invoking the dormant Commerce Clause; accordingly, ORS 12.150 does not, as applied here, violate the dormant Commerce Clause." 271 Or App at 37.

Hucke v. BAC Home Loans Servicing, L.P., 272 Or App 94 (2015)

The beneficiary of a trust deed to secure payments plaintiff owed under a promissory note assigned its interest to the Federal National Mortgage Association (Fannie Mae). Fannie Mae failed to record the assignment. The trial court, relying on the Court of Appeals decision in *Niday v. GMAC Mortgage, LLC*, 251 Or App 278 (2012), declared the nonjudicial foreclosure sale void because of Fannie Mae's failure to record the assignment. The Court of Appeals reversed. The court noted that its prior decision in *Niday* was reversed by the Supreme Court, and concluded that, under the Supreme Court's decisions in *Niday v. GMAC Mortgage, LLC*, 353 Or 648 (2013), and *Brandrup v. ReconTrust Co.*, 353 Or 668 (2013), the governing statute—*former* ORS 86.735(1)—does not require recording assignments of a trust deed to secure payments due under a note before a nonjudicial foreclosure can proceed.

McManus v. Auchincloss, 271 Or App 765 (2015)

Defendant hired plaintiff to live and work in his home as a full-time personal assistant. Plaintiff reported defendant to the police after discovering that defendant was in possession of child pornography. Defendant then discharged plaintiff, physically moved him out of the residence, and hired new assistants that prevented plaintiff from retrieving his personal property. Plaintiff sued for wrongful discharge, intentional infliction of emotional distress (IIED), and other claims. The trial court granted defendant's motion for summary judgment, concluding that (1) the wrongful discharge claim failed because plaintiff, as a domestic service worker, did not meet the statutory definition of "employee" in ORS 659A.001(3); and (2) the IIED claim failed because defendant's conduct did not rise to the level of outrageous conduct, *i.e.*, conduct extraordinarily beyond the bounds of socially tolerable behavior. The Court of Appeals reversed. The court concluded that the statutory definition of "employee" did not apply to plaintiff's wrongful discharge claim because plaintiff's claim was "under the common-law public-duty exception to at-will employment." 271 Or App at 780. The court further concluded that "defendant's actions were sufficiently aggravated to present a jury question as to whether defendant's conduct was outrageous enough to constitute IIED." *Id.* at 782.

Fossen v. Clackamas County, 271 Or App 842 (2015)

Plaintiff was arrested and held in the Clackamas County Jail based on an arrest warrant issued in New York. She was eventually released after 25 hours in custody when the sheriff determined, based on fingerprints taken during the booking process, that they had arrested the wrong person. Plaintiff sued for false arrest and false imprisonment. The trial court granted the county's motion for summary judgment on the false arrest claim, concluding that the county was entitled to quasi-judicial immunity because the sheriff's deputies were acting pursuant to a facially-valid arrest warrant issued by the New York court. The court allowed the false imprisonment claim to go to the jury, on the theory that the county unlawfully continued to detain plaintiff even after it determined that it had the wrong person. The jury ruled in plaintiff's favor and awarded $1500 in economic damages and $100,000 in noneconomic damages. The Court of Appeals affirmed. The court explained that the New York arrest warrant may immunize defendant regarding the initial arrest but it did not shield defendant from the consequences of continuing to hold plaintiff in custody after learning that the factual basis for imprisoning her had evaporated. 271 Or App at 849. The Clackamas County

judge's order at arraignment to hold plaintiff in custody did not confer immunity because the sheriff's office had the fingerprint results prior to the arraignment but did not inform the judge that they were detaining the wrong person.

Piazza v. Kellim, 271 Or App 490 (2015)

Martha Paz de Noboa Delgado (Delgado), a foreign student participating in an international exchange program run by the Rotary International (Rotary defendants), was fatally shot while waiting in line to enter an underage nightclub called The Zone. Delgado's estate sued the Rotary defendants and the club owners (Zone defendants) for negligence. The trial court granted defendants' motions to dismiss under ORCP 21 A(8), concluding that the shooting that killed Delgado was unforeseeable as a matter of law. The Court of Appeals reversed. The court explained that the foreseeability analysis "will differ depending on whether the alleged negligence by a defendant is the failure to protect against the risk of harm posed by criminals in general . . . or whether the alleged negligence is negligent supervision or screening of *particular individuals* who might engage in criminal activity." 271 Or at 506 (emphasis in original; citations omitted). In cases such as this one, where the theory of negligence is based on foreseeability of criminal activity at large, "courts have focused on whether the defendant was on notice of the potential for harm from some class of criminal activity." *Id.* at 507. The court concluded that the alleged facts about the nature of The Zone and its neighborhood, if proved, would permit a reasonable factfinder to find that "(1) the Zone defendants were on notice that, absent appropriate security measures, their patrons were at risk of harm by physical assault, including assault by weapon; (2) the Rotary defendants were on notice that assaultive conduct occurred frequently in The Zone's neighborhood and, thus, on notice that, by leaving Delgado at The Zone, they would be exposing her to the risk that she would become the victim of such assaultive conduct; and (3) the harm that befell Delgado—death by shooting—fell within the class of criminal harms of which both The Zone and the Rotary defendants had notice, making that harm a foreseeable one." *Id.* at 516.

Procedure

Mullen v. Meredith Corp., 271 Or App 698 (2015)

Plaintiff, a corrections officer, sued a local TV station and its reporter for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress after the station showed plaintiff on camera as part of a news story about gunshots fired in the West Salem neighborhood where plaintiff and his wife lived. Defendants filed a special motion to strike the tort claims under ORS 31.150, Oregon's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute. The trial court denied the motion, concluding that defendants had failed to make the required *prima facie* showing that the claims arose out of a statement, document or conduct described in the statute. The Court of Appeals reversed, concluding that the special motion to strike should have been granted. The court explained that (1) defendants met their burden of showing that the claims arose out of conduct "in furtherance of the exercise of defendants' right to free speech in connection with a public issue or an issue of public interest" (271 Or App at 715); and (2) plaintiffs "have not met their consequent burden of establishing that there is a probability that they will prevail on their tort claims." *Id.*

Miller v. Shenk, 272 Or App 12 (2015)
Nordbye v. BRCP/GM Ellington, 271 Or App 168 (2015)

The plaintiff in *Miller* brought an action under the Uniform Declaratory Judgment Act, ORS 28.010 to 28.160, seeking a declaration that he has an implied easement over defendants' property for access to plaintiff's land. The Court of Appeals held that the trial court erred in failing to dismiss the action because neighboring landowners were necessary parties. 272 Or App at 21. The plaintiff in *Nordbye* filed a class action lawsuit; her claims became moot, and the trial court allowed two other members of the putative class to intervene as plaintiffs. The Court of Appeals reversed, holding that, because plaintiff did not move to certify the class and intervention was not sought until after plaintiff's claims became moot, "the case became moot along with plaintiff's individual claims and, accordingly, the trial court lacked jurisdiction to consider the motion to intervene." 271 Or App at 186-87.

Tseng v. Tseng, 271 Or App 657 (2015)
Johnson v. Johnson, 271 Or App 307 (2015)

In *Tseng*, the beneficiaries of a revocable trust sued the trustee to obtain information about the administration of the trust. The trial court dismissed the action, concluding that the beneficiaries cannot obtain such information during the settlor's lifetime. The Court of Appeals reversed, concluding that ORS 130.710(1), "when construed in the context of the Oregon Uniform Trust Code and its legislative history, requires the trustee to provide qualified beneficiaries with . . . 'the material facts necessary for those beneficiaries to protect their interests.'" 271 Or App at 659. In *Johnson*, the Court of Appeals held that the trial court erred when it rejected plaintiff's motion for an order of default for lack of a proposed order and dismissed the action for want of prosecution under UTCR 7.020(3). The court explained that submission of a proposed order "was not a requirement under any statute, court rule, or court order." 271 Or App at 308.

Evidence

Durette v. Virgil, 272 Or App 545 (2015)
Thoens v. Safeco Ins. Co. of Oregon, 272 Or App 512 (2015)

In *Durette* and *Thoens*, the Court of Appeals addressed the admissibility of an expert witness's testimony in a personal injury case. The expert opined—based on his analysis of photographs and repair estimates of vehicles involved in the collision—that the collision could not have produced the forces necessary to cause the plaintiffs' claimed injuries. In *Thoens*, the court held that the type of biomechanical or biomedical analysis undertaken by the witness is scientifically valid for purposes of OEC 702. The court rejected plaintiff's argument that the witness was not qualified to give expert testimony on an issue of "medical causation." The court concluded that the witness was qualified "to calculate and testify to the impact speed in the collision, the forces transmitted to plaintiff in her

car in the collision, the forces plaintiff's body experienced in her daily activities before the collision, and the forces generally tolerated by human joints and tissues without injury as reflected in the literature in his field." 272 Or App in 544. In *Durette*, the court applied *Thoens* and further held that the testimony was relevant under OEC 401, and that the court did not err in declining to exclude the testimony under OEC 403 because "plaintiff did not establish that the probative value of [the] testimony was substantially outweighed by undue prejudice." 272 Or App at 564.

Yoshida's Inc. v. Dunn Carney Allen Higgins & Tongue, 272 Or App 436 (2015)

Plaintiff asserted claims for legal malpractice (negligence) and breach of contract arising out of the mediated settlement of a dispute regarding the alleged mishandling of the termination of an equipment and software lease. At trial, plaintiff moved *in limine* to exclude evidence of all communications relating to the mediation. The trial court denied the motion, concluding that what happened at the mediation was central to the claims at issue in this case, and the communications related to mediation of the underlying dispute, not this case. The Court of Appeals reversed. The court explained that, under ORS 36.222, "mediation communications generally are not admissible evidence in *any* later adjudicatory proceeding, even if that proceeding is not the same proceeding in which the mediation occurred." 272 Or App at 445 (emphasis in original).

Hamlin v. Hamlin, 271 Or App 647 (2015)

The parties to this family dispute disagreed about their deceased mother's intent in deeding an interest in her house to her son (defendant). The trial court found that the mother (Joan) intended to have defendant hold the property in trust for the beneficiaries of her will. On appeal, defendant contended that the trial court erred in considering evidence extrinsic to the deed, including evidence of defendant's conduct subsequent to the execution of the deed, in determining the mother's intent. The Court of Appeals disagreed. The court concluded that, "where *both* parties invoked the court's equitable jurisdiction, and both parties agreed that the deed did not fully reflect Joan's intent, but disagreed as to what that intent was, the trial court permissibly considered all relevant extrinsic evidence of Joan's intent in making the conveyance in order to ascertain what, in fact, that intent was." 271 Or App at 654-55. The court further explained that, under Oregon law, "evidence of the parties' 'practical construction' of the deed—that is, what the 'parties did under it'—is probative of that intent and, thus, relevant." *Id.* at 655.

Jury Instructions

Dosanjh v. Namaste Indian Restaurant, LLC, 272 Or App 87 (2015)

Plaintiff brought a wage claim against her former employer, claiming that she was owed for 2,673 hours of work as a hostess and waitress at defendant's restaurant. Defendant filed a counterclaim for conversion, alleging that plaintiff and her husband misappropriated about $100,000 from the restaurant. At trial, defendant requested, but the trial court declined to give, a jury instruction stating, among other things, that an employer "may not withhold an employee's wages based on allegations, even if confirmed, that the employee stole from the employer." 272 Or at 89 (quoting instruction). The Court of Appeals reversed and remanded for a new trial on plaintiff's wage claim. The court explained that the requested instruction was a correct statement of the law, and that given the record "and the potential confusion created by defendant's assertion that plaintiff had both converted cash from the restaurant and been paid cash 'under the table' from the restaurant, plaintiff was entitled to have the jury instructed that defendant's wage-claim defense was independent of its counterclaim, *i.e.*, that plaintiff's conversion did not eliminate defendant's obligation to pay wages." *Id.* at 92.

Hadley v. Extreme Technologies, Inc., 272 Or App 49 (2015)

Plaintiff agreed to share his idea for a new bow design with defendant, a designer, manufacturer, and seller of archery equipment. The parties entered into a nondisclosure agreement which required defendant to refrain from using or disclosing the information provided by plaintiff for a period of two years. Plaintiff ultimately sued, alleging that defendant breached the agreement by using the information to develop its own bow, which it put on the market just short of two years after its initial meeting with plaintiff. The jury determined that defendant breached the agreement but that the breach had not caused any damage to plaintiff. Defendant contended on appeal that the trial court erred in instructing the jury that a portion of the agreement was ambiguous, and that it was the jury's job to determine what the agreement meant. The Court of Appeals agreed, and remanded for a new trial. The court concluded that "the disputed provision is susceptible to only one plausible interpretation: that, after two years, defendant is no longer restricted from using or disclosing plaintiff's information." 272 Or App at 64. The court further concluded that, under *Purdy v. Deere and Company*, 355 Or 204 (2014), "plaintiff's failure to request or obtain a special verdict form addressing the contract interpretation issue does not preclude him, as a procedural matter, from claiming that the trial court's error warrants reversal under ORS 19.415 if we are persuaded by the record as a whole that the trial court's error created some likelihood that the jury reached a legally erroneous result." *Id.* at 72.

Miscellaneous

Couey v. Atkins, 357 Or 460 (2015)
Rogue Valley Sewer Services v. City of Phoenix, 357 Or 437 (2015)

In *Couey*, the Supreme Court held that the Oregon legislature has the constitutional authority to enact ORS 14.175, which authorizes courts to review certain cases that are moot but likely to reoccur and evade judicial review, under the standard set out in the statute. In reaching that conclusion, the court disavowed the justiciability analysis in *Yancy v. Shatzer*, 337 Or 345 (2004). The court concluded that "*Yancy*'s analysis is undercut by significant omissions and by misinterpretations of the historical evidence of what the

framers likely would have understood of the 'judicial power' conferred by the constitution. The decision must be disavowed in favor of *Kellas [v. Dept. of Corrections*, 341 Or 471 (2006)]." 357 Or at 520. In *Rogue Valley*, the Supreme Court held that a home-rule city's ordinance imposing a five percent franchise fee on a sanitary authority "was within the authority granted to the city by its charter and was not preempted by state law." 357 Or at 439.

Johnson v. State Board of Higher Education, 272 Or App 710 (2015)
Estate of Michelle Schwarz v. Philip Morris USA, Inc., 272 Or App 268 (2015)

In *Johnson*, defendant/cross-complainant (Davis) sued under the Oregon Tort Claims Act (OTCA) to recover attorney fees he incurred in defending against plaintiff's claims that he sexually assaulted her at a work-related conference. The trial court granted cross-defendants' motion for summary judgment; the Court of Appeals affirmed. The court agreed with the trial court "that the underlying claims all related to Davis's sexual conduct with a coworker, and, as a matter of law, could not constitute an act or omission occurring in the performance of duty." 272 Or App at 712. In *Schwarz*, the Court of Appeals held that the trial court did not err in declining to reduce a $25 million punitive damage award in a "low tar" tobacco case. The court concluded that "the jury's award of punitive damages was not arbitrary or unconstitutionally excessive." 272 Or App at 291.

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