Oregon State Bar

Litigation Journal

SUMMER 2016 VOLUME 35 NUMBER 2

In This Issue...

The Honorable Michael McShane Receives 2016 Owen M. Panner Professionalism Award

By Michael Hsu
Metropolitan Public Defender

Judge McShane receiving award from Judge Panner

The Honorable Michael McShane, United States District Court Judge for the District of Oregon, received this year's Owen M. Panner Professionalism Award. Judge Panner presented the award at the annual banquet of the Litigation Institute and Retreat at Skamania Lodge on March 4, 2016.

Three different speakers paid tribute to Judge McShane. Michael Hsu, an attorney at Metropolitan Public Defender, praised Judge McShane's mentorship. He thanked Judge McShane for teaching law students and young lawyers about the significance of incorporating compassion into their work. The Honorable Nan Waller, Presiding Judge of Multnomah County Circuit Court, highlighted Judge McShane's involvement in the community. She commented on Judge McShane's devotion to helping marginalized populations by working with at-risk youth and probationers. The Honorable Eric Bergstrom, Criminal and Civil Judge of Multnomah County Circuit Court, recounted Judge McShane's talent as a trial attorney. When they used to try cases against each other, the time and effort Judge McShane put into his cases made Judge Bergstrom work harder and prepare better.

Judge McShane accepted the award by praising Judge Panner's kind and generous spirit. In his speech, he emphasized the important role that hard work, empathy, and humility play in developing a lawyer's sense of professionalism. Judge McShane was joined by his husband, Gregory Ford, as well as many colleagues and friends.

Back to the Future

By Dennis P. Rawlinson


Dennis P. Rawlinson

What's the secret to professionalism? Senior U.S. District Court Judge Owen M. Panner once noted that it's simply a matter of "looking back to the future." At the time, I did not know what he meant. Now I do.

Judge Panner simply meant to practice over the course of one's career in the manner in which one would like to be remembered at the end of one's career. In short, "look back to the future."

I had the privilege of serving on the Advisory Committee for the Section of Litigation of the American Bar Association. The committee of five selects the future leadership for some 60,000 members of the Section of Litigation nationally. In performing the due diligence for one of the candidates for chair of the section, judges, opposing counsel, and clients listed the following as the candidate's qualities:

1. Trial skills

- "Gifted" first-chair trial lawyer;
- "Superb" trial lawyer;
- "Nice touch" with both witnesses and the court;
- Ability to conduct an "aggressive" cross-examination and yet be "likable";
- A "strategic" thinker;
- "Savvy" in the courtroom;
- An "extraordinary litigator."

2. Personal qualities

- Approaches everything he does with a "contagious enthusiasm";
- A "joy" to work with;
- "Responsive, creative, and delightful";
- "Patient demeanor and a willingness to listen to all";
- "Bright, articulate, and quick-witted";
- "Capable of 'disagreeing' without 'being disagreeable'";
- "Razor-sharp intellect";
- "Passionate."

3. Professionalism

- "Bigger than life";
- "Quick-witted, practical, and professional";
- A "lawyer's lawyer";
- A "solid guy";
- "A credit to his profession";
- "His word is his bond";
- "An example for our profession."

4. Leadership

- "Ability to listen to others and build consensus";
- A "good sense of self";
- "Comfortable with himself";
- Charismatic, enthusiastic, and energetic in his practice;
- A "peacemaker";
- Has a "strong work ethic, a passion for the law, and a love of lawyering."

I couldn't help, at the end of conducting these interviews, concluding that this candidate knew and understood professionalism. He had been looking back to the future his entire career and had conducted each year, month, week, and hour of his practice in the manner in which he had hoped to be remembered at the end of his career.

Professionalism is simply "writing your eulogy day by day." It is simply, as Senior Judge Owen M. Panner noted, looking back to the future.

My Favorite Plaintiff's Damages Arguments

By William A. Barton


William A. Barton

Counter-intuitive Arguments in Cases with Major Injuries

1. When your plaintiff is seriously injured there's a natural inclination to emphasize the obvious. However, there comes a time when the damages are so clear and compelling that, paradoxically, understatement from the plaintiff becomes effective. The jurors know what's happened to the plaintiff; you don't get extra credit for proving the obvious. Now they want to know who the plaintiff is, meaning what is the plaintiff's character? Is it the whole story? Of course not. Have experts and lay witnesses tell of the devastating changes, then finish by having the plaintiff tell how grateful she is for what she has left.

There are three stories: the plaintiff's, the defendant's, and the jurors'. The plaintiff's story may truly be "woe is me…," but that's not the story the jurors want to hear. They want to hear a plaintiff's story of hope and courage. That's the kind of person they want the plaintiff to be. So, I have plaintiffs tell the jury's story, but in their own voice. I have plaintiffs talk about the remaining positive things in their lives, all they are grateful for, keeping in mind that there's always someone who has less.

2. Focus groups will help you identify and refine the jurors' story, meaning the dominant community narrative. The more the plaintiff's story is congruent with the jury's, the more they will naturally "recognize" the plaintiff and their story and, thus, see themselves in the plaintiff's shoes. Once this

happens, a finding for the plaintiff becomes "common sense." This also turns your case into a de facto class action, meaning the plaintiff's case has now become everybody's case.

3. Rather than talking about the plaintiff's unfortunate circumstances, reframe the discussion to speak in positive terms about the value of what the plaintiff has lost. For example, what is the value of eyesight, a good night's sleep, or a strong back?

4. It's true that liability is generally the defendant's turf, and damages, at least in cases with serious injuries, are the plaintiff's turf. (Ball, David, David Ball on Damages 3, NITA 2011, p. 4, 149) However, that ignores the reality that big fault segues to big damages. This means it's always to your advantage to keep the "focus of judgement" on the defendants' misconduct or, better yet, their "choices." (McElhaney, James, McElhaney's Trial Notebook 4th Ed., ABA 2006, p. 43) Even in cases with major damages there's a "range of reasonableness" and, when the jurors spend too much time on the "poor" plaintiff, it's just human nature that they'll naturally end up engaging in "counter-factual" reasoning by thinking: "Poor plaintiff, if only she had done this or that, then she wouldn't have ended up like this." It's just human nature. The verdict may be big, but it would have been bigger if you had focused on the defendant's "choices" rather than the plaintiff's plight.

This is consistent with having the plaintiff only appear briefly and just when testifying. It means they probably shouldn't be in the courtroom when not testifying. After a while jurors can become anesthetized to the full measure of the plaintiff's injuries.

5. I write my clients an informed consent letter carefully explaining and outlining my strategy of having others testify about their losses and my reasons for recommending they not be in the courtroom except when testifying or, in some cases, not at all.

More Traditional Orthopedic Damages Arguments

Explain the difference between impairment and disability. Impairment is an objective, measurable loss and is expressed in terms of reduced range of motion or capacities. See the AMA guidelines of Medical Impairment. The plaintiff may well have physical losses a defense medical expert characterizes as "minimal" or "mild" yet the losses have serious implications in the life of this particular individual. Disability assessment involves the application of an impairment to a specific individual. Two examples make the point. For instance, I have an injured knee. It would disable me if I was a policeman or firefighter, but as a lawyer it's just an inconvenience. Another example is if I were a professional baseball pitcher, even a minimal impairment to my throwing arm would 100% disable me as a professional athlete, yet it may hardly be noticeable in many other vocations. Show why and how this otherwise nominal impairment has resulted in a substantial disability to this specific person.

1. Invite the jurors to value the plaintiff's injuries by considering the plaintiff's future as a job. Oh, by the way, there are a few conditions of the job: It's not for 40 or 50 hours a week, it's for every hour of every day, every day of each week . . . The job also has no annual vacations or weekends off; it's for every moment for the rest of the plaintiff's life. There's one more provision: The plaintiff can't quit. He goes to bed frightened and hurting. He sleeps poorly, he has nightmares, and he wakes up tired. He must forfeit most of the activities he used to enjoy the most. This is his future job. Is there any juror who would apply for it—at any price? See also *Canton v. Hagne,* 72 Or App 548 (1985). For anecdotal arguments involving promissory notes and that per diem arguments are not permissible, see *Hoyle v. Van Horn,* 236 Or 205 (1963).

2. Your argument can illustrate how modest even a large verdict is compared to the price we pay for other things in our society that are obviously of lesser intrinsic value. Professional athletes, actors, and entertainers command multi-million dollar paychecks. Racehorses sell for millions and their seed alone for huge sums. Art sells at Sotheby's for millions and it doesn't breathe or cry. Modern military airplanes and equipment cost millions and billions of dollars. Maybe these are commentaries on our times and society's values, or lack of them. The plaintiff's losses compare favorably with the value of any of these.

3. When the plaintiff is aged, argue that our health and loved ones are life's greatest treasures. If you're a senior and possess good health, it's probably because you've earned it from a lifetime of good choices and healthy habits. Good health is the investment of a lifetime.

4. By injuring the plaintiff, the defendant has taken away the plaintiff's choices. She may or may not have ever pursued these lost options, but she certainly can't now. Be specific, state exactly what the plaintiff can and can't do that she could do before, and then explain why this is so important to her.

5. Physical disfigurement. In our culture physical beauty is prized. Magazines endlessly tell us how to improve ourselves. Mrs. Jones' scars aren't going to be "airbrushed" away. "Time heals all wounds, but wounds leave lasting scars."

6. What the plaintiff has lost might seem minor to others, but it's important to her. During jury selection, ask the jurors what's "big" to them, yet probably minor to the rest of the world. Examples can be gardening, lifting and holding your grandchild, picking up agates on the beach, etc.

Arguments against Businesses

Here are generic arguments that are effective against businesses or corporations:

1. When the defendant is a business, argue that everything in its business life is a choice, (Business) Profit v. (Consumer) Safety, with welcomed benefits and accepted burdens. The defendant's conduct that injured the plaintiff was a conscious, calculated, corporate business decision. The defendant chose to commit the acts that led to the consequences. It may not have intended the effects, but it intended the acts which produced the effects.

2. Explain that the defendant will lose nothing by the jury's just verdict. The defendant made a choice to proceed with inadequate maintenance, which permitted it to profit outside the law. The defendant is being asked to return its windfall profits to the consumer. Instead, defendant is asking

you to punish the plaintiff because he wasn't looking at his feet. Defendant is, in effect, saying that customers shouldn't assume a business's floor is safe. The business chooses to compromise safety for profit.

3. We participate in a system where society distributes resources and money among its various parts in accordance with previously agreed-on ground rules. Anyone who ignores the community's ground rules thereby profits or gains an edge against those who do play by the rules. In the process, safety and integrity are compromised.

4. To a business defendant, the plaintiff is merely a statistic, a cost of doing business. Only the names change. If the defendant had made the right choice, of properly balancing profit with safety, we wouldn't be here.

5. The defendants don't appreciate that people aren't interchangeable; citizens aren't things. You don't treat people like common currency.

6. The corporation has one way of grading its proficiency—through its profitability. We already know that the defendant is profitable. We ask this jury as the conscience of the community to grade the defendant's citizenship, not its profitability.

7. Profits and safety aren't antagonists, but roommates. The consuming public rewards safety with patronage. If the defendant had made the correct choices, it wouldn't now be in the position of having to pay the innocent parties it has damaged.

"Breach of Contract" Arguments

There's a wonderful species of "breach of contract" type arguments. These types of arguments appeal to conservative jurors who are rule based. Rick Friedman gives a good example in his book, *On Becoming a Trial Lawyer*, 2nd Ed. at page 129 (page 123 in the 1st Edition).

> "A lawyer I know tries cases in a conservative area of Oklahoma. In this jurisdiction, arguing that the defendant was negligent in causing a traffic accident is a tough sell. The strong predisposition of jurors is that stuff happens, everyone makes mistakes, 'There but for the grace of God go I,' and the plaintiff should have been more careful. After attending a seminar on juror attitude, he learned that conservative jurors place a high value on contractual obligations. These jurors embrace the 'sanctity of contract' with an almost religious fervor. In his next personal injury case, he reframed a traditional negligence case to address the jurors' values. He said something like:
>
> When we get our driver's license from the state, we are entering into a contract with the State of Oklahoma and all other drivers who are legally on the road. The laws of the state are the contract we all agree to follow. Among other things, all of us agree to yield when the state put a yield sign up. A year and a half ago, at the corner of Elm and Shuster, Mr. Simpson broke that contract.
>
> His cross-examination followed up on this theme:
>
> Q: When you got your driver's license, you were promising to follow the laws of this state?
>
> Q: This was a promise made to all other drivers?
>
> Q: You knew other drivers were promising the same thing to you?
>
> Q: It is part of what made you feel safe on the road–the promises of these other drivers to follow the law?
>
> I don't know about you, but I think that is one of the most creative examples of advocacy I have ever heard. He won the case and several others that followed. Everyone makes mistakes, but if you break a contract–even by mistake–you have to pay.
>
> This lawyer zeroed in on his audience's values. He didn't change the facts, just the lens through which his audience viewed them–a lens his audience valued. He had enough respect for the audience to make an argument–an honest argument–that would appeal to them. You should do the same. Present an audience-centered case."

Along the same line, Jim McElhaney maintains that in a personal injury action "a theory of the case that is articulated as an obligation owed because of the wrong that was done–rather than as an appeal for pity because a person got hurt–is more likely to bring an adequate award."[1]

A Few Thoughts on Strategy

1. Don't start your trial story at the time and date of the injury; instead, start your narrative long before the actual liability event occurred, thus showing the plaintiff was merely a statistic, an accident waiting to happen.

2. Embrace your client's weaknesses. What is ostensibly a case deficiency can become strength if you artfully argue the "as is" features of UCJI 70.06 "Previous Infirm Condition."

3. Strategically list defendants in your case caption. Place the deep pocket front and center. It's easy for a target institution to hide if you place them last in a long line of defendants.

4. Don't start your trial preparation at the beginning; instead, begin at the end with the jury instructions. The law is your case's legal road map and source of powerful case themes. The judge is your ally when she reads jury instructions that support your case to the jury. I prefer that the judge instruct the jurors before closing argument for this very reason. Also remember, ORCP 59-B now requires that the judge provide written instructions to the jurors in addition to orally charging them.

5. Don't argue for justice, instead argue against injustice. Questions of justice invite contemplative responses; however, we all instinctively sense injustice on a gut level.

6. Don't argue that a verdict in your client's favor will improve health care or community safety. This suggests you're the one who's seeking change. Jurors resist changing the status quo. Instead, argue that it's the defendant who wants the change; the defendant seeks to reduce the standard of care, and thereby provide less protection for jurors and the community.

1 McElhaney, *Trial Notebook*, 4th Ed., page 21.

Kids These Days: How to Deal with Millennials on the Jury

By Stephen English & Brian Samuelson
Perkins Coie LLP


Steve English


Brian Samuelson

"The children now love luxury; they have bad manners, contempt for authority; they show disrespect for elders and love chatter in place of exercise. Children are now tyrants, not the servants of their households. They no longer rise when elders enter the room. They contradict their parents, chatter before company, gobble up dainties at the table, cross their legs, and tyrannize their teachers."

- Attributed to Socrates

Old people have been complaining about young people for as long as both have been around. Today, America's favorite generational villain is Generation Y, also known as the Millennials—that loosely defined cohort of Americans born between 1982 and 2000. Surveys from the Pew Research Center—or a simple Google search—show that Millennials are widely viewed as entitled, narcissistic, self-absorbed, wasteful, and greedy. In an article titled "Millennials: The Me Me Me Generation," TIME Magazine described Millennials as "fame-obsessed," "overconfident," "self-involved," "convinced of their own greatness," and "stunted." Perhaps not surprisingly, another Pew study found that a majority of Millennials do not even consider themselves part of the Millennial generation.

But while it's easy to poke fun at younger generations, it is also becoming increasingly important for the savvy trial lawyer to understand who Millennials are and what they expect from the legal system. Millennials recently surpassed the Baby Boomers as the nation's largest living generation. According to the US Census Bureau, there are now more than 83 million Millennials around—more than a quarter of the nation's population. And they are increasingly showing up for jury duty.

So what is the typical Millennial juror really like? For starters, there may be no such thing. The stereotypical Millennial is wealthy and white, but in reality Millennials are more diverse than any other generation before them. The generation spans all racial, ethnic, and income categories, and more than 44% of them are part of a minority race or ethnic group. A recent article in the New York Times argued that companies hoping to market their products to the "mythical Millennial" would be better off recognizing more meaningful characteristics than the year of their birth, like income and credit history, educational history, social media musings, and so on. The author concluded, "you are as likely to come upon an archetypal millennial as you are to run into Joe Sixpack or be invited to a barbecue at the median American household. It's hard to believe this even needs

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.

Articles are welcome from any Oregon attorney. If you or your law firm has produced materials that would be of interest to the approximately 1,200 members of the Litigation Section, please consider publishing in the Oregon Litigation Journal. We welcome both new articles and articles that have been prepared for or published in a firm newsletter or other publication. We are looking for timely, practical, and informational articles.

Dennis P. Rawlinson, Managing Editor
Miller Nash Graham & Dunn LLP
111 S.W. Fifth Avenue, Suite 3400
Portland, Oregon 97204
503-224-5858

to be said, yet here we are: Macroscale demographic trends rarely govern most individuals' life and work decisions."

That said, age remains an important heuristic for trial attorneys when more specific information about a juror is not available. So what do we know about Millennials? Compared to older cohorts, studies from the Pew Research Center show that Millennials are:

- **More socially liberal.** Millennials are more likely to vote Democratic and more likely to hold liberal views on issues like immigration, same-sex marriage, the legalization of marijuana, and the role of government.
- **Better educated.** About one-third of Millennials who are old enough have a four-year college degree, making them the best-educated cohort in history.
- **More comfortable with technology.** Millennials have been described as "digital natives"—the first generation to grow up with the internet, mobile technology, and social media. Not surprisingly, they are more likely than previous generations to use social media.
- **Slower to marry.** The median Millennial will wait until his or her late 20s to get married, longer than previous generations. Millennials are also more likely than older generations to have birth out-of-wedlock.
- **Less trusting of institutions**, including religious institutions, political institutions, and marriage. Roughly half of Millennials describe themselves as political independents. About 30 percent do not identify with any religion. And only about a quarter are married.
- **Less trusting of people in general.** According to the Pew Research Center, just 19% of Millennials agree that most people can be trusted. This represents a significant decrease from previous generations.
- **More likely to face financial hardship.** Millennials have less wealth and personal income and more student debt, poverty, and unemployment than Generation X or the Baby Boomers had at the same stage of their life cycles. Millennials with college degrees face record student debt: two-thirds have outstanding student debt, with an average debt of about $27,000. And Millennials without college degrees are more vulnerable to low wages and unemployment than their counterparts in previous generations.

Knowing these broad trends, how does the savvy trial attorney adapt to the presence of Millennials on the Jury?

Use voir dire wisely. Although the trends above describe Millennials broadly as a generation, it's important not to assume that young jurors fit all—or any—of these stereotypes. Ask open-ended questions about attitudes or perspectives that are relevant to the case. If you listen carefully, you may be able to determine if they adhere to "typical" Millennial views. Remember that a wealth of information about specific jurors may be available online and through social media, if local practice and applicable ethical rules allow you to access these resources.

Think about how your case themes speak to Millennials. For example, Millennials tend to be less trusting of institutions and less trusting of people generally. If you represent a corporation, it would be wise to take this distrust into account. Consider spending extra time introducing the jury to the people behind the corporation and establishing their trustworthiness. The same advice applies to expert witnesses—don't assume that young jurors will defer to your expert just because they are an authority on the subject at hand. Take the time to establish trust.

Don't be afraid of technology. It is safe to assume that younger jury members are more comfortable with technology and expect you to be comfortable with it too. They are less likely to be forgiving of technological glitches or ineptitude. Don't go overboard with technology in an attempt to impress younger jurors—it probably won't work. But as much as possible, make sure your presentation is engaging and technically flawless.

Remember that Millennials are people too. Don't abandon the principles of good trial advocacy in the face of a young jury. The same persuasive techniques that work on all people work on Millennials too: Establish your personal credibility and the credibility of your witnesses. Identify a simple and memorable theme for your case. Use repetition to reinforce key points. Summarize key evidence with engaging visuals. Millennial jurors, like all jurors, are looking to you to provide the information they need to do their job.

Millennials are people, not space aliens. Find out as much about your specific jurors as possible, rely on the broad generalities that describe their generation when you have to, and hold fast to the principles of good trial advocacy that apply across generations.

In summary, common courtesy spans all generations. Be respectful of each prospective juror without pandering and focus on each individual as just that—an individual and not necessarily the embodiment of multiple stereotypes. The challenge of cross-generational jury selection can be exciting, energizing, and educational. And, shock of shocks, you might just get a better result.

Statements of Opinion as Actionable Securities Law Violations after *Omnicare*

By Jennifer Wagner


Jen Wagner

Debates about whether statements of opinion can be a basis for a misrepresentation span centuries. For example, in 1884, Lord Justice Bowen opined that the sellers of a property could be held liable for a statement that Mr. Fleck was "a most desirable tenant," when, in fact, the sellers knew that Mr. Fleck paid his rent "by driblets." *Smith v. Land and House Prop. Corp.*, 28 Ch. D. 7 (1884).

Not to be outdone by Lord Justice Bowen, let alone a disagreement among the circuit courts, the U.S. Supreme Court considered when a statement of opinion can form the basis of a claim under Section 11 of the Securities Act of 1933 (the "Securities Act") in *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318 (2015). The Court held that an issuer's opinion statement may give rise to liability if: (1) the issuer omits to disclose material facts regarding the basis for its opinion, and (2) the omitted facts conflict with what "a reasonable investor would take from the statement" (for example, where an issuer announces that it is in compliance with applicable law, but fails to disclose that it has not consulted legal counsel). *Id.* at 1329.

Omnicare was a victory for investors because it rejected a rule that would have insulated overly-optimistic opinion statements from liability. In *Tongue v. Sanofi*, 816 F.3d 199 (2nd Cir. 2016), however, the Second Circuit released its first decision interpreting *Omnicare* and placed a heavy burden on investors seeking to hold issuers liable for misleading opinions. While *Omnicare* remains a promising decision for plaintiffs, only time will tell whether it will prove to be a meaningful victory.

The Decision

Omnicare arose out of a registration statement that the company filed in connection with a public offering. In the registration statement, Omnicare stated: (1) "[w]e believe our contract arrangements … are in compliance with applicable federal and state laws," and (2) "[w]e believe that our contracts with pharmaceutical manufacturers are legally and economically valid … ." 135 S. Ct. at 1323.

Subsequent *qui tam* lawsuits, however, alleged that Omnicare had violated anti-kickback laws. *See id.* at 1324. Further, the *Omnicare* plaintiffs alleged that one of Omnicare's attorneys had warned of potential violations. *Id.* Thus, plaintiffs alleged that the registration statement was false and misleading because Omnicare had no "reasonable grounds" for believing that the opinions expressed were "truthful and complete." *Id.* Plaintiffs filed suit against Omnicare asserting claims under Section 11 of the Securities Act (15 U.S.C. § 77k(a)), which imposes liability on an issuer if a registration statement: (1) "contain[s] an untrue statement of a material fact," or (2) "omit[s] to state a material fact … necessary to make the statements therein not misleading."

The district court granted Omnicare's motion to dismiss on the basis that the opinion statements as to legal compliance were considered "soft" information that did not give rise to liability. *Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 2012 WL 462551, *4 (E.D. Ky. 2012), *aff'd in part, rev'd in part*, 719 F.3d 498 (6th Cir. 2013), *vacated and remanded*, 135 S. Ct. 1318 (2015). The district court further held that statements of belief are actionable only if the speaker knows they are untrue. *Omnicare*, 135 S. Ct. at 1324.

The Sixth Circuit reversed. *Omnicare*, 719 F.3d at 510. The Sixth Circuit noted that, in contrast to a claim under Section 10(b) of the Securities and Exchange Act of 1934 (the "Exchange Act"), which requires proof of scienter, a Section 11 claim provides for strict liability. Therefore, the Sixth Circuit held that plaintiffs needed only to allege that the stated belief was objectively false, and did not need to allege that the opinion was disbelieved. *Id.* at 506-07.

The Supreme Court granted certiorari and vacated the Sixth Circuit's decision. *Omnicare*, 135 S. Ct. at 1324-25. The Court first distinguished statements of fact and statements of opinion. Based on the distinction, the Court determined that a statement of opinion is not actionable under the first clause of Section 11, providing liability for untrue statements of *fact*, simply because the opinion turns out to be erroneous. *Id.* at 1325-26. The Court held that statements of opinion are actionable as untrue statements of fact only if the speaker does not actually believe the opinion expressed,[1] or the opinion contains an embedded statement of fact. *Id.* at 1326-27.

While the Court ruled that a sincerely-held opinion cannot give rise to liability as an alleged false fact, the Court went on to hold that such opinion statements are not immune from liability under Section 11's omissions clause. The Court determined that a reasonable investor may fairly understand an opinion statement to convey certain information about how the speaker formed the opinion. The Court held that if a "statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then § 11's omissions clause creates liability." *Id.* at 1329.

The Court considered an opinion statement to the effect that "We believe our conduct is lawful." *Id.* at 1328. The Court noted that such a statement may be misleading if the issuer failed to consult with a lawyer or undertake any meaningful inquiry in expressing the opinion. The Court further recognized that the statement could be misleading if the issuer made the statement despite receiving contrary legal advice. *Id.* at 1329.

The Court recognized that an opinion may be misleading if it is not "fairly align[ed]" with the information in the issuer's possession. *Id.* However, the Court went on to make clear that an opinion is not rendered misleading simply because the issuer is aware of "some fact cutting the other way." *Id.*

Omnicare argued that allowing inquiry into an issuer's basis for its opinions was "unpredictable" and would have a chilling

effect on an issuer's willingness to make opinion statements (thus "depriving investors of potentially helpful information"). *Id.* at 1331. In response to Omnicare's concerns, the Court noted that stating a claim was "no small task for an investor." *Id.* at 1332.

> The investor must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context. *Id.*

Finally, the Court seemed unconcerned that its decision could have a chilling effect on issuers. The Court noted that in order to avoid liability, an issuer need only qualify or explain the basis for its opinion. *Id.* The Court also held that to the extent its decision "chill[ed] *misleading* opinions, that is all to the good: In enacting §11, Congress worked to ensure better, not just more, information." *Id.* (emphasis in original).

The Court remanded the case for reconsideration in light of its holding.

The Second Circuit Weighs In

The Second Circuit issued its first opinion interpreting *Omnicare* in *Tongue v. Sanofi*, 816 F.3d 199 (2nd Cir. 2016). The opinion places a high bar on plaintiffs seeking to hold issuers liable for opinion statements.

Investors alleged that Sanofi and its predecessor, Genzyme Corporation, made misrepresentations and omissions regarding the Food and Drug Administration's ("FDA") anticipated approval of the drug Lemtrada. Investors asserted claims both under Section 11 of the Securities Act and also under Section 10(b) of the Exchange Act. Consistent with the majority of courts that have addressed the issue since *Omnicare*, the Second Circuit (without discussion) applied *Omnicare*'s rulings both to the Section 11 and Section 10(b) claims. *See Sanofi*, 816 F.3d at 209.

Investors alleged that Genzyme had misled investors by expressing optimism regarding the timing of Lemtrada's FDA approval, while failing to disclose that the FDA had repeatedly raised significant concerns regarding the structure of Lemtrada's clinical trials. *Id.* at 211. Instead of using a double-blind study (a study in which both the patient and the researcher are unaware of what drug is being administered), Genzyme used only a single-blind study.

As early as 2002, the FDA had expressed concerns about the use of a single-blind trial for Lemtrada. *Id.* at 203. Despite its expressed concerns, the FDA permitted the company to enroll patients in Phase III trials (the final phase before approval for public use). In 2007, the FDA indicated that a single-blind trial might "potentially" be accepted if the trials "reveal[ed] an extremely large effect." *Id.* at 203-04. During Phase III, in March of 2010, the FDA expressed that "the bias introduced by unblinding physicians and patients remains a significant problem which will cause serious difficulties in interpreting the results of the trial." *Id.* at 204. In early 2011, the FDA informed the company that "the lack of blinding remains a major concern." *Id.*

In April of 2011, Sanofi initiated a tender offer to acquire Genzyme. As part of the merger, Genzyme's shareholders would receive a cash payment plus contingent value rights (CVRs). *Sanofi*, 816 F.3d at 204. The CVRs entitled the holders to cash payment upon achievement of certain milestones. The "Approval Milestone" provided a payment to CVR holders if the FDA approved Lemtrada by March 31, 2014. *Id.* at 204.

The offering materials incorporated opinion statements relating to Lemtrada to the effect that the company "[e]stimated a 90% probability that Lemtrada would achieve the Approval Milestone," and further that the company "anticipat[ed] product approval in the United States in the second half of 2012." *Id.* at 204-05.

Lemtrada, however, did not receive approval by the second half of 2012. The FDA announced it would hold a hearing regarding Lemtrada in November of 2013. In advance of the hearing, briefing materials were released in which physicians reviewing Lemtrada determined that the single-blind trials were not sufficient to support the effectiveness of Lemtrada. *Id.* at 206-07. After the release of the briefing materials, the value of the CVRs dropped by more than 62 percent. *Id.* In December of 2013, Sanofi announced that the FDA formally rejected the application and that the company did not anticipate the Approval Milestone would be met. This announcement caused a further decline in the value of the CVRs. *Id.*

Under *Omnicare*, the fact that the company's opinions, regarding the timing of Lemtrada's approval, turned out to be incorrect does not give rise to liability. Instead, the question addressed by the Second Circuit was whether the company's statements of optimism in 2011 (including the company's statement expressing a 90 percent probability of approval by a particular date) "fairly aligned" with the information available to the company at that time.

The investors argued that the company's statements of optimism were misleading, because the company failed to disclose material facts regarding the FDA's repeated expressions of concern over the single-blind trials. *Id.* at 211. The Second Circuit disagreed. First, the court held that the FDA's statements suggesting that it potentially would accept a single-blind trial that revealed an "extremely large effect" made it impossible for the investors to plausibly allege that the company's later statements of optimism were misleading. *Id.*

The court did not rest on this ruling alone, and instead went on to announce a number of additional grounds for dismissal of the claims. One of the most notable aspects of the Second Circuit's opinion is that it analyzed whether the statements were misleading from the perspective of a "sophisticated investor." *Id.* In *Omnicare*, the Court reiterated that the inquiry into whether a statement is misleading is an "objective" one, and asks whether a statement is "misleading to an *ordinary investor*." *Omnicare*, 135 S. Ct. at 1327-28 (emphasis added).

Without commenting on this apparent divergence from *Omnicare*, the Second Circuit went on to opine that "sophisticated investors" (such as plaintiffs) who were "accustomed" to the practices of the industry must have expected that the company and the FDA were in a dialogue regarding the application

process. *Sanofi*, 816 F.3d at 211. The court further indicated its belief that such sophisticated investors would understand that differing views were "inherent" in the nature of the dialogue. *Id.* In the court's view, this dialogue did not prevent the company from issuing statements of "exceptional optimism" regarding the likelihood of drug approval. *Id.* The court further rejected plaintiffs' argument that the relevant test should be whether the company failed to disclose a risk above and beyond the normal risk associated with drug approval. *Id.* at 212.

Finally, the Second Circuit determined that the company's statements were not misleading because "sophisticated investors" were charged with the knowledge of the FDA's public preference for double-blind trials. "Especially where a complex financial instrument whose value is tied to FDA approval is involved, investors may be expected to keep themselves apprised of the FDA's public positions on testing methodology." *Id.* at 212-13.

In sum, *Sanofi* places a high burden on investors alleging claims based on opinion statements even after *Omnicare*. However, the opinion's emphasis on whether the statements were misleading to *sophisticated* investors gives plaintiffs the opportunity to argue that the holding is limited to its facts and does not apply outside of cases involving complex securities.[2]

Mixed Results in the District Courts

In the district courts, investors have invoked *Omnicare* in opposing motions dismiss with mixed results. *Compare, e.g., City of Westland Police and Fire Ret. Sys. v. Metlife, Inc.*, 129 F. Supp. 3d 48, 68-77 (S.D.N.Y. 2015) (granting motion to dismiss claims based on allegedly misleading opinion statements); *West v. Ehealth, Inc.*, 2016 WL 948116, *7-8 (N. D. Cal. 2016) (same); *In re Velti PLC Sec. Litig.*, 2015 WL 5736589 (N.D. Cal. 2015) (same); *with In re Genworth Fin. Inc. Sec. Litig.*, 103 F. Supp. 3d 759, 776-79 (E.D. Va. 2015) (denying motion to dismiss claims based on allegedly misleading opinion statements); *In re Bioscrip, Inc. Sec. Litig.*, 95 F. Supp. 3d 711, 728-32 (S.D.N.Y. 2015) (same).

Further, in at least two cases, *Omnicare* has helped investors survive motions for summary judgment. *See In re Lehman Bros. Sec. and ERISA Litig.*, 131 F. Supp. 3d 241, 250-59 (S.D.N.Y. 2015); *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, 2015 WL 2250472, n.7 (D.N.J. 2015) (finding *Omnicare* instructive as to the scienter analysis under Section 10(b) of the Exchange Act).

The Outlook Going Forward

While *Sanofi* gives issuers some cover, *Omnicare* should continue to make issuers think twice before expressing overly-optimistic opinions affecting stock price. Further, investors seeking to hold issuers liable for opinion statements should heed the Supreme Court's caution that pleading such a claim is "no small task." Investors are likely to be successful only where they can point to specific material facts that call into question whether an issuer's optimism is fairly aligned with the information in its possession, something akin to the most desirable Mr. Fleck paying by driblets.

(Endnotes)

1 Consistent with the Court's prior holding in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), the Court acknowledged that Section 11 does not impose liability on the issuer in the "rare" circumstance in which an issuer expresses an opinion that is not sincerely-held, but in fact turns out to be accurate. *Omnicare,* 135 S. Ct. at n.2.

2 The Private Securities Litigation Reform Act ("PSLRA") provides a statutory safe harbor for forward-looking statements that meet certain criteria. 15 U.S.C. § 77z-2; 15 U.S.C. § 78u-5. The Second Circuit acknowledged that the district court ruled that the opinion statements at issue were protected by the PSLRA safe harbor. *Sanofi*, 816 F.3d at 208. However, the Second Circuit affirmed without discussing the PSLRA safe harbor or its interplay with *Omnicare* in the context of forward-looking statements of opinion.

In Case You Missed It: Amendments to the Federal Rules of Civil Procedure

By Elliott J. Williams of Stoel Rives LLP


Elliott J. Williams

The Federal Rules of Civil Procedure were amended in 2015, effective December 1, 2015. The following summary is a summary, not a substitute for reading the amendments (a redline is available for download at *http://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure*). The Local Rules of Civil Procedure (LR) for the United States District Court for the District of Oregon were also recently amended, effective March 1, 2016. Recent changes to the Local Rules are summarized below and in greater detail at *https://ord.uscourts.gov/local-rules/civil-procedure*.

Rule 1: *The parties and the court* are responsible to construe, administer, and employ the rules of procedure to secure the just, speedy, and inexpensive determination of every action. From the Advisory Committee Notes: Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.

Rule 4: The time limit for serving a complaint is *90 days* (no longer 120).

Rule 16(b): The court's deadline to issue a scheduling order is *reduced by 30 days* (the earlier of 90 days after service of a defendant or 60 days after appearance of a defendant). Exceptions are not permitted *unless the judge finds good cause for delay*. Permitted contents of the scheduling order are expanded expressly to permit an order *to preserve ESI*, *to incorporate claw-back agreements for privileged information (see FRE 502)*, and *to require a conference with the court before making a discovery motion*.

LR 26-3: New Practice Tip reminds lawyers that their assigned judge may require a court conference prior to filing a motion to compel.

Rule 26(b)(1): Scope of discovery is limited to material that is relevant and *proportional to the needs of the case, considering the issues at stake, the amount in controversy, the parties' respective conditions, and other factors*. From the Advisory Committee Notes: This amendment contemplates greater judicial involvement in discovery and acknowledges the reality that discovery cannot always operate on a self-regulating basis. The phrase permitting discovery of inadmissible evidence so long as it was "reasonably calculated to lead to the discovery of admissible evidence" is deleted because it was used incorrectly by some to define the scope of discoverable information to include irrelevant information. The amended rule provides that *information within this scope of discovery need not be admissible in evidence to be discoverable*.

LR 26-1(2): During the initial discovery conference, the parties must confer on the preservation and scope of discoverable ESI, including preservation steps and search terms that are proportional to the needs of the case, as required by FRCP 26(b)(1).

Rule 26(c)(1)(B): Protective orders may specify *the allocation of expenses* for discovery.

Rule 26(d)(2): Requests for production may be delivered *as early as the 22nd day after the summons and complaint are served*. Such requests are not considered to have been served until the first Rule 26(f) conference.

Rules 30, 31, and 33: From the Advisory Committee Notes: These are amended to reflect the recognition of proportionality in Rule 26(b)(1).

Rule 34(b)(2)(A): Requests for production served prior to the Rule 26(f) conference require a response within 30 days of the Rule 26(f) conference, reflecting changes to Rule 26(d)(2).

Rules 34(b)(2)(B) and (C): Responses to a request for production must *state with specificity the grounds for objecting* and must *state whether any responsive materials are being withheld on the basis of that objection*. From the Advisory Committee Notes: By way of example, an adequate objection would state the scope of the request that is not objectionable and would identify anything beyond that scope as withheld on the basis of the objection.

LR 37-1: Motions to compel must set forth only the pertinent request, including any pertinent response or objection, together with the legal arguments. The formatting, length, and scheduling requirements of LR 26-3 apply to such motions.

Rule 37(e): The court may impose sanctions for failing to take reasonable steps to preserve ESI that should have been preserved and cannot be restored or replaced. *Upon finding prejudice to another party*, the court may order *measures no greater than necessary to cure the prejudice*. The court may presume that lost information was unfavorable to the party, instruct the jury to presume that the lost information was unfavorable, or dismiss the action, *only upon finding that the party acted with the intent to deprive another party of the information's use in litigation*. From the Advisory Committee Notes: These changes aim to establish uniform standards for imposing sanctions for lost ESI.

Rule 55(c): A *final* default judgment may be set aside under Rule 60(b). From the Advisory Committee Notes: Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time.

Rule 84: *Abrogated entirely*, along with the Appendix of forms. From the Advisory Committee Notes: This does not alter existing pleading standards. From the Advisory Committee Notes for Rule 4: Former Forms 5 and 6 for waiver of service and request of the same are now incorporated in Rule 4.

LR 84: Retained but moved to LR 10-7. This local rule allows the use of any form provided by the federal rules or at uscourts.gov even if the form does not comply with LR 10.

Recent Significant Oregon Cases

By Stephen K. Bushong
Multnomah County Circuit Court


Honorable
Stephen K. Bushong

Claims and Defenses

Deckard v. Bunch, 358 Or 754 (2016)

Baker v. Croslin, 359 Or 147 (2016)

In *Deckard*, the Supreme Court held that (1) ORS 471.565 does not provide an independent statutory right of action against a host who furnishes alcohol to a visibly intoxicated person; and (2) the statute codifies the common-law negligence standard, which requires plaintiff to show that a defendant knew or should have known of an unreasonable risk of harm to a third party at the time defendant served a visibly intoxicated person. In *Baker*, the Supreme Court held that (1) ORS 471.565's requirement that a social host "provided" alcohol to a visibly intoxicated person may be met if the host controlled the supply of alcohol at a party; and (2) the host can be liable for harm caused by a visibly intoxicated guest only if the host perceived that the guest was visibly intoxicated when the host provided the alcohol.

Neumann v. Liles, 358 Or 706 (2016)

Plaintiff sued defendant for defamation after defendant posted a negative review of plaintiff's wedding venue business on Google Reviews. The trial court granted defendant's special motion to strike under Oregon's anti-SLAPP statute, ORS 31.150, concluding that the posting was opinion protected by the First Amendment. In affirming the trial court, the Supreme Court adopted the test developed in *Unelko Corp. v. Rooney*, 912 F2d 1049 (9th Cir 1990), *cert den*, 499 US 961 (1991), to determine whether a reasonable factfinder could conclude that an allegedly defamatory statement touching on a matter of public concern implies an assertion of objective fact that is not constitutionally-protected. In making that determi-

nation, the court must consider "(1) whether the general tenor of the entire work negated the impression that the defendant was asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement in question is susceptible of being proved true or false." 358 Or at 717. Applying that test, the court concluded that the online review at issue in this case was protected by the First Amendment.

Larisa's Home Care, LLC v. Nichols-Shields, 277 Or App 811 (2016)

Bundy v. Nu Star GP, LLC, 277 Or App 785 (2016)

The plaintiff in *Larisa's Home Care* sought to hold the resident of an adult foster care facility liable on an unjust enrichment claim for the difference between the Medicaid-based rate the facility received and the higher "private rate" that it would have charged absent the resident's fraud. The Court of Appeals held that the trial court erred in entering judgment for plaintiff, concluding that plaintiff failed to prove that it would be unjust to allow the recipient to retain a benefit without paying for it. In *Bundy,* the Court of Appeals affirmed the dismissal of plaintiff's personal injury claim against his employer, concluding that plaintiff had not alleged a claim for deliberate intent to injure, as required to fit within ORS 656.156's exception to the rule that workers' compensation is the exclusive remedy.

Deutsche Bank Trust Co. Americas v. Walmsley, 277 Or App 690 (2016)

VFS Financing, Inc. v. Shilo Management Corp., 277 Or App 698 (2016)

In *Deutsche Bank,* the Court of Appeals held that the trial court properly granted summary judgment to the plaintiff bank on its claim to judicially foreclose a trust deed. The bank "proved that it was the 'holder' of the note, and therefore entitled to enforce it in the event of default, by establishing that it possessed the note at the time of the foreclosure action and that the note was indorsed to plaintiff." 277 Or App at 696. The bank "was not required to prove ownership of the note in order to be entitled to enforce it under these circumstances." *Id.* at 697. In *VFS Financing,* the Court of Appeals, applying New York's version of Article 9 of the Uniform Commercial Code (UCC), held that the plaintiff lender did not fail to act in a commercially reasonable manner or in good faith when it pursued collection of a debt without first selling the collateral for the debt. Defendants' affidavit under ORCP 47 E was insufficient to avoid summary judgment on the lender's claim because defendants' expert "could not have testified at trial that plaintiff's conduct breached reasonable commercial standards of conduct under the UCC because New York case law holds, as a matter of law, that such conduct is permissible." 277 Or App at 708.

McKenzie v. A. W. Chesterton Co., 277 Or App 728 (2016)

Plaintiff alleged that her late husband developed mesothelioma from exposure to asbestos-containing replacement gaskets while working on aircraft carriers for the U.S. Navy

during the 1940s. Plaintiff brought actions for negligence and strict products liability against the manufacturer of pumps with gaskets sold to the Navy during that time. The trial court granted defendant's motion for summary judgment, concluding that, if plaintiff's late husband was exposed to asbestos through the replacement gaskets, defendant could not be liable because it only manufactured and supplied the pumps, not the replacement gaskets. The Court of Appeals reversed. The court, deciding "a matter of first impression in Oregon" (277 Or App at 730), concluded that ORS 30.920 allowed plaintiff to pursue a strict liability claim on the theory that the pumps "were in substantially the same condition as when defendant had sold them to the Navy and it was reasonably foreseeable that seamen would be exposed to asbestos through the replacement gaskets, packing, and insulation used with defendant's pumps, even though defendant had not manufactured or sold the replacements." *Id.*

Springville Corp. v. Stoel Rives LLP, 276 Or App 725 (2016)
Gordon v. Rosenblum, 276 Or App 797 (2016)

Plaintiff in *Springville* brought a legal malpractice claim against its former attorneys, alleging that defendants gave plaintiff erroneous legal advice about the need to appeal a limited judgment in a construction case. The Court of Appeals held that the trial court properly granted summary judgment in favor of the defendants because, even if the advice was erroneous, "there was no merit to an appeal of the limited judgment in the underlying case[.]" 276 Or App at 746. In *Gordon,* the Court of Appeals held that (1) ORS 646.607(1) and ORS 646.608(1)(b) of the Unfair Trade Practices Act can apply to attorneys who file litigation on behalf of their clients to collect debts owed by third parties; and (2) ORS 646.639(2)(k), (m), and (n) of the Unlawful Debt Collection Practices Act do not apply to the attorneys' debt collection litigation.

Yes on 24-367 Committee v. Deaton, 276 Or App 347 (2016)

Plaintiff alleged that defendants violated ORS 260.532 by publishing a false statement in the Voters' Pamphlet in opposition to a bond measure. The pamphlet stated: "This bond levy will DOUBLE the Fire District Tax assessment for the next 20 years." The trial court granted defendants' special motion to strike under Oregon's anti-SLAPP statute, ORS 31.150, concluding that the statement was not actionable because it was a statement of opinion, not fact, and defendants' evidence established that they did not make the statement with reckless disregard as to its accuracy. The Court of Appeals reversed. The court first concluded that plaintiff "has made a *prima facie* showing that defendants made a false statement of material fact." 276 Or App at 359. The court further concluded that, "regardless of whether the trial court regarded defendants' evidence as more 'believable and persuasive,' that evidence was not sufficient to defeat plaintiff's *prima facie* showing as a matter of law because plaintiff submitted substantial evidence of each element of a violation of ORS 260.532." *Id.* at 362.

Currier v. Washman, LLC, 276 Or App 93 (2016)

Plaintiff was injured when his bike slipped on wet pavement on defendant's car wash property. A jury returned a verdict in plaintiff's favor on his negligence claim. Defendant contended on appeal that the trial court erred in denying its motion for directed verdict because plaintiff was a trespasser, not a licensee, when he rode his bike across defendant's property. The Court of Appeals affirmed, concluding that "evidence that defendant did not object to past or future entries to the property or otherwise [attempt] to restrict access to the property, and that community members commonly interpreted that type of landowner inaction as consent to entry, is enough to create a jury question as to whether plaintiff was a licensee." 276 Or App at 101.

Procedure

Couch Investments, LLC v. Peverieri, 359 Or 125 (2016)

Landlord and tenant each contended that the other was liable for the cost of storm water drainage improvements required by the Department of Environmental Quality. An arbitrator ruled that landlord was liable, and ordered additional remedies. The trial court confirmed the arbitration award. Landlord appealed, contending that the arbitrator exceeded the scope of his authority under the arbitration agreement in ordering additional remedies. The Supreme Court disagreed, concluding that (1) the parties' stipulation to arbitrate was ambiguous, so trial court could consider extrinsic evidence of the parties' intent; and (2) there was sufficient evidence in the record to support the trial court's conclusion that the arbitrator acted within his authority in ordering remedies.

Espinoza v. Evergreen Helicopters, Inc., 359 Or 63 (2016)
Shell v. Schollander Companies, Inc., 358 Or 552 (2016)

In *Espinoza,* the Supreme Court held that "the doctrine of *forum non conveniens* is part of the common law of this state." 359 Or at 124. When a party moves to dismiss or stay an action on that basis, the court may grant the motion "if that party demonstrates that an alternative forum is available and adequate, and that the relevant private- and public-interest considerations weigh so heavily in favor of a dismissal or stay that allowing the litigation to proceed would be contrary to the ends of justice." *Id.* In *Shell,* the Supreme Court held that (1) the 10-year period of repose in ORS 12.135(1)(b)—which runs from the date that construction is substantially complete—applies to construction defect claims that arise from contracts to construct, alter, or repair an improvement to real property; and (2) the 10-year period of repose in ORS 12.115(1)—which runs from the date of the act or omission complained of—applies to negligence claims that do not arise from a contract.

Chevalier Advertising v. Ballista Tactical Systems, 278 Or App 148 (2016)

LaCasse v. Owen, 278 Or App 24 (2016)

Jones v. Randle, 278 Or App 39 (2016)

In *Chevalier,* the Court of Appeals held that the trial court abused its discretion "in resolving a summary judgment issue on what was, at most, a minor technical defect" in a declaration filed in opposition to the motion. 278 Or App at 161. In *LaCasse,* the Court of Appeals held that the trial court erred in granting summary judgment to defendant on a retaliation claim, concluding that plaintiff's ORCP 47 E affidavit, combined with other evidence in the record, was sufficient to raise a genuine issue of material fact "as to whether plaintiff's referral of a coworker to a labor attorney was a substantial factor in his termination." 278 Or App at 32. In *Jones,* the Court of Appeals held that the trial court erred in granting summary judgment in an action to partition real property, concluding that plaintiff was not judicially estopped from claiming ownership in the property based on her failure to claim an interest in a previously-filed bankruptcy petition. Judicial estoppel does not apply because "the automatic stay that resulted from the filing of the bankruptcy petition is not a benefit derived from the nondisclosure of her ownership interest in the house." 278 Or App at 47.

TriMet v. Aizawa, 277 Or App 504 (2016)

Weitman Excavation, LLC v. CPM Development Corp., 276 Or App 583 (2016)

In *Aizawa,* the Court of Appeals held in a condemnation case that, although ORS 35.300(2) only authorizes a trial court to award attorney fees incurred *before* TriMet served an offer of compromise, "ORCP 68 authorized defendant to seek, and the trial court to award, the requested 'fees on fees' as legal services related to the defense of the underlying condemnation action." 277 Or App at 514-15. In *Weitman Excavation,* the Court of Appeals held that ORS 36.715(3)—which authorizes a court to award fees incurred "in a judicial proceeding"—does not authorize an award of fees "for work undertaken in an arbitration proceeding." 276 Or App at 585.

Hancock v. Pioneer Asphalt, Inc., 276 Or App 875 (2016)

Salibello v. Board of Optometry, 276 Or App 363 (2016)

In *Hancock,* the Court of Appeals held that the trial court erred in dismissing plaintiff's personal injury action based on issue preclusion following dismissal of an earlier action on statute of limitations grounds. The court explained that "defendant failed to establish that the first action, which was dismissed without prejudice, ended in a final decision to which issue preclusion applies." 276 Or App at 876. The plaintiff in *Salibello* sought a declaration under Oregon's Uniform Declaratory Judgment Act that the Board of Optometry was required to give him copies of the complaint that triggered the Board's investigation into plaintiff's practices and the Board's investigation summary. The trial court granted the requested relief. The Court of Appeals reversed, concluding that the Administrative Procedures Act "provides the exclusive process for plaintiff to obtain the judicial intervention he seeks and, thus, the trial court lacked jurisdiction to enter the declaratory judgment." 276 Or App at 365.

Spearman v. Progressive Classic Ins. Co., 276 Or App 114 (2016)

Robinson v. TriMet, 277 Or App 60 (2016)

The plaintiffs in *Spearman* and *Robinson* were injured, sought to recover Uninsured Motorist (UM) benefits, prevailed in arbitration, and then sought to recover their attorney fees. In both cases, the trial court declined to award fees, concluding that, under ORS 742.061(3), the defendant insurer was not liable for attorney fees because it had sent a "safe harbor" letter acknowledging coverage before the arbitration. The Court of Appeals affirmed in both cases. In *Spearman*, the court rejected plaintiff's argument that the insurer did not qualify for the "safe harbor" because the insurer disputed whether some of the claimed medical expenses were "reasonable and necessarily incurred" as a result of the accident, thereby raising the possibility of an award of zero dollars. The court concluded that a dispute "about whether plaintiff sustained economic damages would still be a dispute regarding the amount of the damages due the insured as a result of the collision." 276 Or App at 128. In *Robinson,* the court explained that, unlike claims for Personal Injury Protection (PIP) benefits, "a zero recovery can be a permissible outcome in a UM/UIM claim as a simple matter of fact or evidence, and, as such, it is a permissible outcome within the bounds of the fee exemption in ORS 742.061(3)." 277 Or App at 69.

Hughes v. Ephrem, 277 Or App 193 (2016)

Law v. Zemp, 276 Or App 652 (2016)

The plaintiffs in *Hughes* and *Law* sought to utilize special statutory procedures to collect on money judgments. In *Hughes,* the Court of Appeals concluded that the trial court erred in dismissing a writ of garnishment that sought to garnish property pawned by the debtor instead of executing against the pawn ticket. The court explained that garnishment was permitted under ORS 726.330 because the effect of the writ of garnishment "is to enjoin the negotiation of the pawn ticket." 277 Or App at 200. In *Law,* plaintiff sought to execute on a debtor's interests in limited partnerships and a limited liability company (LLC) through "charging orders" entered pursuant to ORS 70.295 and ORS 63.259. The charging orders prohibited the companies from making loans, transferring or encumbering their partnership or membership interests, and required them to provide plaintiff with financial statements, tax returns and other records. The Court of Appeals vacated the charging orders, concluding that (1) the trial court "was authorized to require the limited partnerships to disclose financial information" to plaintiff (276 Or App at 654); but (2) the trial court exceeded its authority "by imposing the restrictions on loans and on the transfer or encumbrance of partnership interests" and imposing additional obligations against the LLC. *Id.* at 654-55.

DeLashmutt v. Parker Group Investments, LLC, 276 Or App 42 (2016)

Gozzi v. Western Culinary Institute, Ltd., 276 Or App 1 (2016)

In *DeLashmutt,* the Court of Appeals affirmed the trial court's order denying defendant's motion to compel arbitration, concluding that the operative investment agreement

unambiguously demonstrated that the parties did not intend to arbitrate these types of claims. In *Gozzi*, the Court of Appeals reversed the trial court's order denying defendant's motion to compel arbitration, concluding that plaintiff's objections to arbitration—contentions that the arbitration provision in the parties' agreement is unconscionable, and that defendant had waived the provision—must be decided by the arbitrator.

Miscellaneous

Horton v. OHSU, 359 Or 168 (2016)

In *Horton*, the Supreme Court held that ORS 30.265(1) and ORS 30.271(3)(a), which limit the tort liability of the state and its employees, do not violate the remedy clause of Article I, section 10, or the jury trial clauses of Article I, section 17, and Article VII (Amended), section 3, of the Oregon Constitution. The court expressly overruled two of its prior decisions, *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001), and *Lakin v. Senco Products*, 329 Or 62, *modified*, 329 Or 369 (1999).

Northwest Natural Gas Co. v. City of Gresham, 359 Or 309 (2016)

In *Northwest Natural*, the Supreme Court held that (1) ORS 221.450 authorizes a city to impose a privilege tax of up to five percent on utilities using the city's rights-of-way without a franchise; (2) the statute did not preempt a city's home-rule authority to impose privilege taxes of more than five percent on private utilities; and (3) the statute did not authorize the city to impose a privilege tax of more than five percent on a public utility district.

Progressive Party of Oregon v. Atkins, 276 Or App 700 (2016)

In *Progressive Party*, the trial court dismissed as moot plaintiffs' challenge to the validity of OAR 165-007-0320—which required each candidate's political party to be identified on the ballot by a specified "three character designation"—after the Secretary of State repealed the rule. The Court of Appeals affirmed, concluding that the challenged act is not capable of repetition, yet evading review, for purposes of ORS 14.175(2). The court explained that plaintiffs "have not identified evidence suggesting that there is *any* likelihood that defendant will take action in the future similar to the past action that plaintiffs challenged[.]" 276 Or App at 712 (emphasis in original).

Oregon State Bar
Litigation Section
16037 SW Upper Boones Ferry Rd
PO Box 231935
Tigard, Oregon 97281-1935