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In This Issue...

2006 Owen M. Panner Professionalism Award

By Martha Lee Walters
of Walters, Chanti & Zennache PC

Arthur C. Johnson (right) with Owen M. Panner.

Justice Alfred T. Goodwin, who began his judicial career in Lane County and who is now a judge on the Ninth Circuit Court of Appeals, knew Arthur C. Johnson's father, a distinguished Eugene lawyer, before Arthur Johnson "went off to Harvard to get some polish." When he returned to the place of his birth, it did not take Mr. Johnson long to make his own name. To Justice Goodwin, who observed his early trial work and watched as he made contribution after contribution to the Oregon State Bar, and the other speakers, colleagues privileged to honor Mr. Johnson when the Owen M. Panner Professionalism Award was presented this year, Mr. Johnson is a mountain by which we can set the compass of professionalism. The speakers at the annual event hailed the ways in which Mr. Johnson exemplifies the following standards of professionalism:

Avoidance of All Forms of Discrimination

Federal District Court Judge Ann Aiken gave testament to the important role Mr. Johnson played for her and for many women attorneys in Oregon. Mr. Johnson hired, promoted and mentored women as they began to graduate from law schools in the 1970s. Mr. Johnson demonstrated that a professional career only starts with work for clients. Mr. Johnson and his wife, Anita Johnson, a well-regarded journalist, were actively involved in raising and educating four children, three of whom have taken up the legal calling and the youngest of whom is a media/political consultant. Art and Anita Johnson are each, independently, important community leaders. Judge Aiken lauded this incredible partnership and the Johnsons' exemplar that family, community and work play equal parts in a successful career.

Martha Walters, once a young associate in Mr. Johnson's office, noted that in addition to backing women attorneys, Mr. Johnson has acted to protect the rights of

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FROM THE EDITOR

END-GAME CROSS-EXAMINATION

BY
DENNIS RAWLINSON
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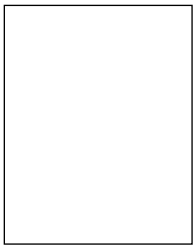
Cross-examination can be one of the most challenging yet satisfying portions of any trial. There is a moment in time at the end of every cross-examination during which everyone in the courtroom, including the examiner, knows whether the cross-examination was a success or a failure. That moment in time comes not at the beginning of the examination but at the end.

I. The Importance of Ending Strong

When the witness falls silent after answering your last question, the moment should be memorable.

Primacy, recency, and repetition are the lawyer's tools. The power of recency (that we remember well what we hear last) should never be underestimated by the cross-examiner. As you retake your seat after having completed the cross-examination, everyone in the courtroom will remember the last line of questions and answers from the cross-examination, and whether the witness was "gored" or you were.



Dennis Rawlinson

To a large degree, we will be protected from failures throughout a cross-examination if we are able to end strong. But we must end strong.

II. Don't Leave the Last Line of Questions to Chance

Realizing the importance of the last line of questions of any cross-examination, you should select your strongest and most certain point as the last point.

It is essential that the point be an important one. It should be central to your theme. It should be worth remembering. Don't waste this golden moment on trivia, minutiae, or quibbling over the unimportant.

The last point of a cross-examination should be undeniable—a line of questions from which the witness cannot escape. Such opportunities are often offered by an inconsistent statement or a document or testimony that directly contradicts the witness. Examples are:

- the expert's testimony in another case in which he or she took exactly the opposite position;
- the deposition testimony of a fact witness in which the fact witness testified on a key point 180 degrees differently from the way in which the witness is testifying now; and
- a contemporaneous document or testimony of another witness that flies in the face of the witness's testimony, directly contradicting it.

This is no time to leave admissibility to chance. Be certain that the deposition excerpt, inconsistent document, or earlier inconsistent statement is absolutely admissible. This is the one part of your cross-examination that deserves extra attention, extra research, and removal of any doubt as to its admissibility. Be prepared with authorities or a slip memorandum to support admissibility if there is a risk of any challenge.

The last line of cross-examination questions must be planned, certain, and deadly. Spontaneity and flexibility are important in cross-examination. Sometimes the most important nuggets from an adverse party's testimony can be derived from an unguarded or intemperate comment made during the discomfort of a cross-examination. But the last line of questions is not the portion of the cross-examination to leave to chance or inspiration.

The end game of any effective cross-examination is to save the best for the end. Your cross-examination will be judged in those brief moments of silence as the cross-examination witness utters the last words of his or her last answer. You and everyone else in the courtroom will know whether you or the witness prevailed. And at that moment in time, you will reap the benefits of end-game cross-examination. ❐

Owen M. Panner Award

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injured women, allowing them to seek and begin to attain safety in the products they use, the procedures they undergo and the places in which they work.

Devotion to the Public Interest

"To do justice, to love mercy and kindness, and to walk humbly" is, according to Elden Rosenthal, quoting a Hebrew prophet, Micah, what is good and what the Lord requires of us. Mr. Rosenthal described Mr. Johnson as our example of those attributes. In pursuing and accomplishing justice, Mr. Johnson has worked pro bono representing many whose voices would not otherwise have been heard, including reporters and University faculty members taking on First Amendment and academic freedom issues. Mr. Johnson has also worked as a community leader to help resolve disputes such as school district strikes and environmental disputes. His current pro bono work focuses on local and state school funding issues. True to form, Mr. Johnson used the time he was given to accept the Professionalism Award to challenge all of us to do more to educate our children.

Courteous, Fair and Respectful Practice

Larry Wobbrock eloquently explained how Mr. Johnson, even when exasperated by discovery issues and disagreements with the court and counsel, appeared calm and courteous to judges, opposing counsel, staff and clients. Mr. Wobbrock wondered how he was able to do so, knowing the extent of his frustration. He concluded that Mr. Johnson had immense respect for our system of justice. He believes in the system above all and he accords the system and all the participants in that system his respect and courtesy. Judge Aiken confirmed how important Mr. Johnson's demeanor and adherence to the rules are in creating expectations of professionalism in the proceedings in which he is involved. She told in amazement of a phone call she received recently from Mr. Johnson, apologizing for using her first name in front of a client.

Zealous Representation

Mr. Johnson's representation of his clients does not stop when the settlements he makes or the verdicts juries award are paid. To demonstrate Mr. Johnson's abiding kindness, Mr. Rosenthal told of a talented, successful and beautiful woman who was rendered a paraplegic in a skiing accident. After the case was resolved and all others were satisfied with the result, Art was not. Quietly and without fanfare, he bought a piano for this woman who was destined to live her life in a chair. Martha Walters told of a man whose wife lay in a coma a year after her case was resolved. This troubled husband turned to Mr. Johnson for assistance with the most difficult of dilemmas any of us may be asked to face. This thankful man has returned to Mr. Johnson's office every Christmas for nearly fifteen years with a gift for the lawyer who went "above and beyond."

The unanimous verdict of all those who gave Arthur C. Johnson a standing ovation at Skamania was that he inspires us every day when he goes above and beyond the standards of professionalism we have set for ourselves. ❐

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Articles are welcome from any Oregon attorney. If you or your law firm has produced materials that would be of interest to the 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 or published for a firm newsletter or other publication. We are looking for timely, practical, and informational articles.

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Computer-Generated Animation and Simulation Evidence

By Daniel C. Dziuba
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"One picture is worth ten thousand words"[1]
—Fredrick R. Barnad

Introduction

Commentators frequently use the word "powerful" to describe computer animation evidence.[2] The potential impact of this evidence should not be underestimated.

The rate of retention of information by jurors depends upon whether the evidence was presented orally, visually, or to a combination of the senses of sight and hearing. According to Thomas F. Parker, *Applied Psychology in Trial Practice*, 7 Def L J 33, 44-45 (1960), 85 percent of learning is through the sense of sight. J. Rick Gass, *Defending Against Day-in-the-Life Videos*, 34 For Def, July 1992, at 9, writes: "Studies have shown that jurors exposed to visual presentations retain 100 percent more information than those who receive only oral presentations." In *Blind Justice or Just Blindness?*, 50 Chi-Ken L Rev 209, 212 (1984), James G. McConnell cites research that:

Daniel C. Dziuba

> [W]hen information is presented through the spoken word alone, seventy percent of the information can be recalled after three hours, but only ten percent can be remembered after three days. When the same information is presented through visual means alone, retention increases slightly to seventy-two percent after three hours and only twenty percent after three days. Remarkably, however, when the information is presented through both spoken and visual means, retention rises dramatically to eighty-five percent after three hours, and to a startling sixty-five percent after three days. Thus, the juror who can perceive the evidence only through hearing it, or only through seeing it, is at a demonstrable disadvantage not only in his initial ability to assimilate all the evidence presented, but also in his ability to retain any significant portion of what he has perceived until the jury retires at the end of the case to deliberate. [Footnotes omitted.]

In discussing what was becoming the routine use of computer graphics as an instrument of persuasion, Roy Krieger observed:

> The value of demonstrative evidence to help jurors understand complex issues has long been recognized by experienced trial lawyers. Contemporary research on cognitive function has further underscored its importance. For example, a study entitled "The Weiss-McGrath Report" found a 100 percent increase in juror retention of visual over oral presentations and a 650 percent increase in juror retention of combined visual and oral presentations over oral presentation alone.

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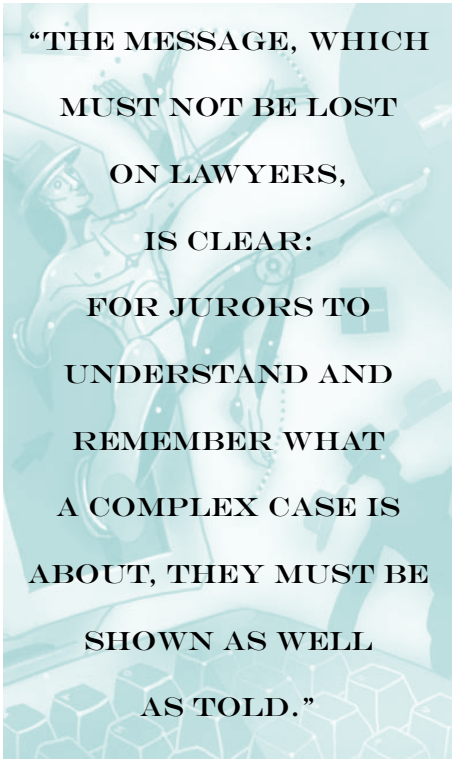
> However impressive these findings are, they are not surprising, for visualization is the very soul of comprehension. Neurophysiologists believe that fully one-third of the human brain is devoted to vision and visual memory. The message, which must not be lost on lawyers, is clear: For jurors to understand and remember what a complex case is about, they must be shown as well as told.[3]

Although it may be overstating the research findings to claim that jurors are more likely to believe that visual information, as opposed to oral testimony, is true,[4] there is little doubt that "complex events or theories can be better understood with the aid of video presentations."[5]

Computer Animations and Computer Simulations

Commentators[6] and, increasingly, the courts[7] distinguish between computer animations and computer simulations. While the terms "computer animation" and "computer simulation" are sometimes used interchangeably,[8] the distinction is important because there are different requirements for admissibility depending upon the classification.[9]

"A computer-generated animation is demonstrative evidence used to illustrate and explain a witness' testimony. As such, computer-generated animations attempt to recreate a scene or a process and they are treated like demonstrative aids."[10] [Footnote omitted] They are based on information about some event gathered from such materials as police reports, investigations, photographs, records and depositions. "An expert enters the data into a computer, which draws the animation based solely on the data."[11] Computer animations have been used for reconstructing automobile and truck accidents, construction equipment accidents, industrial accidents and aircraft collisions.[12] They are frequently "employed to illustrate the opinion of the party's expert witness as to the manner in which an accident or crime occurred."[13]



Computer-generated simulations, by contrast –

> are typically recreations of events or experiments based on scientific principles and data; in a simulation, data is entered into a computer, which is programmed to analyze and draw conclusions from the data. Computer simulations are substantive evidence offered to support a fact in issue and have independent evidentiary value.[14] [Footnotes omitted]

According to *Weinstein's Federal Evidence*, "Simulations are used to fill in gaps in the information, supplying possibilities for data that were not known to the person making the drawing."

> Simulations are mathematically accurate and are based upon sophisticated formulae that faithfully reflect the laws of physics. Off-the-shelf software programs can be used to create computer simulations. The software program adds data, like velocity, weight, and gravity, that may not be known to the data imputter and then projects the most likely outcome based on calculated probabilities.
>
> * * *
>
> Computer-generated graphic simulations and models are most often used as the basis of opinion offered by an expert. In such cases they are being proffered as substantive evidence, since the evidence goes beyond merely illustrating or clarifying testimony. The models or graphic simulations supply missing information, through the operation of the computer program, for the purpose of proving the existence of a material fact. Unlike demonstrative evidence, substantive evidence has independent probative value and can be used by an expert as the basis of the expert's opinion.[15] [Footnotes omitted]

Admissibility

Computer Animation

Computer animations offered as demonstrative evidence must be authenticated before being admitted. Under the Federal Rules of Evidence[16] and Oregon law,[17] the general requirement of authentication or identification "as a condition precedent to admissibility is satisfied by

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evidence sufficient to support a finding that the matter in question is what its proponent claims." In the typical case, a computer animation is "an illustration of someone else's *opinion* of what happened."[18] (Emphasis in original.)

> Thus, if proffered as demonstrative evidence, a computer-generated animation or model can be authenticated by a showing that it fairly and accurately depicts the underlying testimony. Requiring a computer animation to be "a fair and accurate depiction of that which it purports to be" is the same standard that applies to photographs.
>
> The admission standard is quite low because explaining or clarifying the witness's testimony is all that a proponent claims for demonstrative evidence. Ordinarily, the expert presenting the computer-generated animation or model simply testifies that it is a fair and accurate representation of the expert's testimony. A trial judge has wide discretion in admitting or excluding . . . computer-generated demonstrative evidence.
>
> Computer-generated demonstrative evidence merely aids in explaining someone's opinion of what happened. Thus, the hearsay rule is not applicable. Moreover, there is no requirement that demonstrative evidence be shown to be totally accurate. Rather, alleged inaccuracies go to the weight and not the admissibility of the evidence.[19] [Footnotes omitted]

Brown v. Boise-Cascade Corp., 150 Or App 391, 946 P2d 324 (1997), rev den 327 Or 317 (1998), was an action for "grievous" personal injuries for a painter who fell from a structure at defendant's paper mill. Plaintiff appealed from a judgment for defendant. One of plaintiff's assignments of error challenged the trial court's exclusion of plaintiff's "demonstrative computer animation, which purports to depict the accident scene and plaintiff's theories of how the accident itself occurred."[20] "The animation showed two scenarios in which a human figure fell from what resembled the sample roof [where plaintiff had been working] – first after hitting his head on an overhead pipe and becoming disoriented and, second, after tripping over a conduit." The fall was unwitnessed and plaintiff had no memory of it.[21] In upholding the trial court's exclusion of the animation, the Court of Appeals stated:

> "... A COMPUTER-GENERATED ANIMATION OR MODEL CAN BE AUTHENTICATED BY A SHOWING THAT IT FAIRLY AND ACCURATELY DEPICTS THE UNDERLYING TESTIMONY."

> We understand the trial court to have excluded that evidence as being potentially misleading. Trial courts exercise broad discretion with respect to such evidence, *see James v. Carnation Co.*, 278 Or 65, 81, 562 P2d 1192 (1977), and the court's ruling here was within the permissible range of discretion.[22] [Footnote omitted]

James v. Carnation Co., 278 Or 65, 562 P2d 1192 (1977), was an action for personal injuries resulting from a motor vehicle collision. Defendants appealed from a judgment for plaintiff. Among defendants' assignments of error was the contention that "the trial court erred in failing to sustain objections to the relevancy of plaintiff's evidence concerning the highway design and traffic patterns (referred to as custom and usage evidence) at the site of the accident."[23] The Oregon Supreme Court reversed and remanded the action for a new trial holding that one of plaintiff's allegations of negligence should have been stricken. It affirmed, however, the trial court's evidentiary rulings concerning the highway design and traffic patterns, stating:

> The trial court was also within its discretion in allowing plaintiff's expert to give his opinions regarding the highway design and usage of the auxiliary area. The difference between his time of observation and the time of the accident goes only to the weight of his testimony.
>
> More difficult problems are presented by the difference in the surrounding circumstances depicted in the photographs and movies and that portion of the expert's testimony explaining what was observed in the movies. As has already been noted, the photographs and movies were taken in a period

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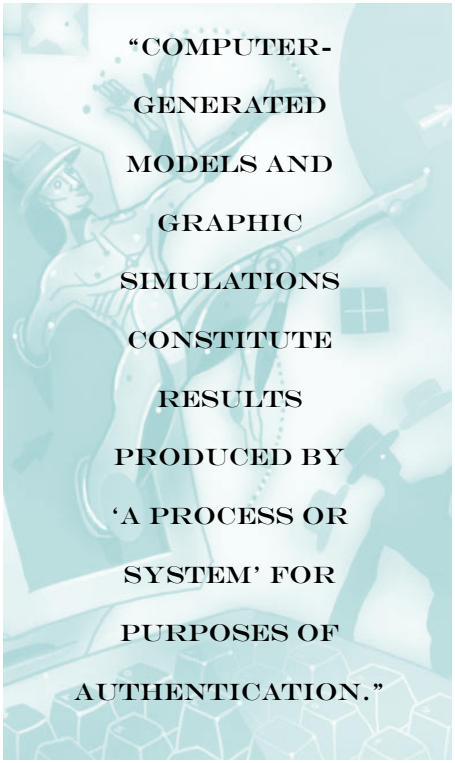
of heavy highway use, when traffic was leaving Portland on a Friday afternoon and evening. The accident occurred in the early morning hour during a period of relatively low use of the highway for traffic going out of Portland. If the sole purpose of this evidence was to describe the physical nature of the accident, a lesser problem would be presented by this discrepancy. However, some of this evidence might tend to prove more than the physical nature of the highway at the place and time of the accident. Although no evidence was offered on the difference or similarity of traffic conditions at the conflicting hours and days depicted, the trial court is usually allowed considerable discretion in deciding if such evidence should be received.

The problem is whether the relevance of the evidence is outweighed as a matter of law by the tendency to mislead the jury as to the conditions existing at the time of the accident. Where such evidence is received, precautionary instructions should be given the jury and care should be taken that the evidence is not wrongfully "posed," or purely "experimental" in form. Nevertheless, we are not prepared to say, in this case, that the court erred in this respect.[24] [Citations omitted]

By citing *James v. Carnation Co.,* it appears that the Court of Appeals in *Brown v. Boise-Cascade Corp.* was equating the same requirements for admission of photographs and movies to the admission of computer animation evidence.



Computer Simulation

When a computer simulation or model is used as the basis of an expert's opinion, it is offered as substantive evidence.[25] It may be authenticated by the expert who developed the computer program or by a user who is familiar with it. The expert need not have personally input the data. A court may take judicial notice of widely accepted programs for producing computer animations, models or simulations.[26]

> Computer-generated models and graphic simulations constitute results produced by "a process or system" for purposes of authentication. Under Rule 901(b)(9), such computer outputs may be authenticated by evidence (1) describing the process or system used and (2) showing that the process or system produced an accurate result. [27] [Footnotes omitted]

Because computer simulations may constitute substantive evidence and may be used by an expert as the basis of his or her opinions, they are subject to more exacting reliability standards, which include an analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[28] and even the hearsay rule. Any hearsay issues are ordinarily dealt with when an expert explains how the simulation works and is subject to cross examination.[29]

According to *Weinstein's Federal Evidence*[30]

> The foundation requirements for computer-generated models or simulations offered as substantive evidence are straightforward:
>
> - The witness who proffered the graphic simulation or model must be qualified to testify as an expert.
> - The computer must be functioning properly.
> - The computer program must produce accurate results.
> - The data supplied to the program must be sufficiently complete and accurate.
>
> There are three general stages in producing computer-generated models or simulations: data input, data manipulation, and output. Data must be first collected and input into the computer, the data are then manipulated and processed by the computer using a software program, and the results of the software application are produced and transferred from the computer to a display medium,

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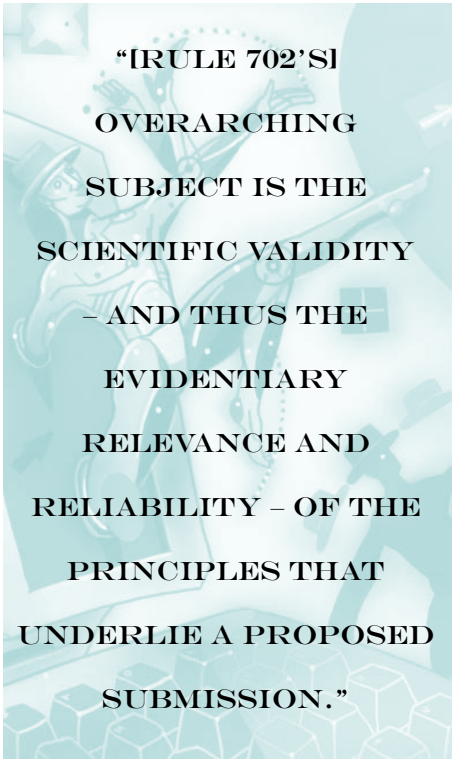
e.g., printout or animated video. [Footnotes omitted]

Computer simulations are typically introduced during the testimony of an expert witness. Under Rule 702 of the Federal Rules of Evidence:

> A witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Among the factors which federal courts may consider in making a preliminary assessment of whether the reasoning or methodology underlying the expert testimony is scientifically valid and of whether the reasoning or methodology can be applied to the facts in issue are:

- Whether a theory or technique advanced by an expert can be and has been tested.
- Whether the theory or technique has been subjected to peer review and publication.
- In the case of a particular scientific technique, the known or potential rate of error.
- The existence and maintenance of standards controlling the technique's operation.



- Whether there is general acceptance of the opinion within the relevant scientific community.[31]

The *Daubert* opinion emphasized that the Rule 702 inquiry is "a flexible one. Its overarching subject is the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."[32]

In *Kumho Tire Co. v. Carmichael*,[33] the United States Supreme Court amplified the reasoning of its decision in *Daubert*:

> This case requires us to decide how *Daubert* applies to the testimony of engineers and other experts who are not scientists. We conclude that *Daubert*'s general holding – setting forth the trial judge's general "gatekeeping" obligation – applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. See Fed. Rule Evid. 702. We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.

In *Kumho*, the court emphasized that rulings of the trial court concerning whether to admit or exclude expert testimony were to be reviewed using an abuse-of-discretion standard and that reliability proceedings were not necessary in every case:

> The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* that expert's relevant testimony is reliable. Our opinion in *Joiner* makes clear that a court of appeals is to apply an abuse-of-discretion standard when it "review[s] a trial court's decision to admit or exclude expert testimony." 522 U.S., at 138-139. That standard applies as much to the trial court's decisions about how to determine reliability as to its

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ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises. Indeed, the Rules seek to avoid "unjustifiable expense and delay" as part of their search for "truth" and the "jus[t] determin[ation]" of proceedings. Fed. Rule Evid. 102. Thus, whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.[34]

Oregon follows its own approach concerning the admission of scientific evidence. *State v. Brown*[35] was a criminal case involving the question whether polygraph evidence is admissible. In holding that, upon proper objection, polygraph evidence is not admissible in any civil or criminal trial or any other legal proceeding subject to the rules of evidence,[36] the Oregon Supreme Court provided the following guidance concerning the admissibility of scientific evidence:

> To determine the relevance or probative value of proffered scientific evidence under OEC 401 and OEC 702, the following seven factors are to be considered as guidelines:
>
> (1) The technique's general acceptance in the field;
>
> (2) The expert's qualifications and stature;
>
> (3) The use which has been made of the technique;
>
> (4) The potential rate of error;
>
> (5) The existence of specialized literature;
>
> (6) The novelty of the invention; and
>
> (7) The extent to which the technique relies on the subjective interpretation of the expert.
>
> The existence or nonexistence of these factors may all enter into the court's final decision on admissibility of the novel scientific evidence, but need not necessarily do so. What is important is not lockstep affirmative findings as to each factor, but analysis of each factor by the court in reaching its decision on the probative value of the evidence under OEC 401 and OEC 702.[37] [Footnotes omitted]

"UNLIKE ALMOST ALL OTHER PRELIMINARY FACT QUESTIONS MADE UNDER OEC 104(1), A LARGE COMPONENT OF THE DECISION SURROUNDING SCIENTIFIC EVIDENCE TRANSCENDS INDIVIDUAL CASES."

In *State v. O'Key*,[38] in which the accused was charged with driving under the influence of intoxicants, the Oregon Supreme Court was asked to rule upon the admissibility of the Horizontal Gaze Nystagmus test. The court ruled that the test was admissible. It stated that the validity of proffered scientific evidence is a question of law.[39] The court explained:

> Although this court typically is deferential to a trial court's findings of preliminary facts under OEC 104(1), good reasons exist to modify this approach in the context of scientific evidence. Unlike almost all other preliminary fact questions made under OEC 104(1), a large component of the decision surrounding scientific evidence transcends individual cases. In the usual application of OEC 104(1), a trial court must make a context-specific factual determination. * * * Because those preliminary facts are specific to the case before the trial court and do not repeat themselves in the same form in other cases, substantial deference to the trial court as factfinder logically flows out of the trial court's close proximity to the matter. When the preliminary facts are not case-specific, little or no deference to the trial court's findings is appropriate. The validity of scientific knowledge does not change from court to court; assessment of

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> that knowledge should not change from court to court. Moreover, if evidentiary rulings as to the admissibility of scientific evidence are reviewed with deference to trial court discretion, inconsistent decisions concerning the admissibility of scientific evidence may go unchecked from one trial court to another. Such inconsistency may confound efforts to provide uniformity under the Oregon Evidence Code.[40] [Citations omitted]

In federal court, the standard of review concerning decisions on the admissibility of computer animations and simulations is abuse of discretion. Although there is very little authority, it appears that in Oregon the standard of review for admissibility of computer animations is abuse of discretion.[41] While there are no reported decisions which I have seen concerning the standard of review of admissibility decisions involving computer simulations, depending upon the extent to which scientific testimony is required to establish the foundation, appellate courts may review for errors of law.[42]

Conclusion

Although computer animations and simulations are persuasive, even powerful evidence, it does not follow that a jury is likely to give them more weight than they would otherwise deserve.[43]

> If audio or visual presentation is calculated to assist the jury, the court should not discourage the use of it. . . . Jurors, exposed as they are to television, the movies, and picture magazines are fairly sophisticated. With proper instruction, the danger of their overvaluing such proof is slight.[44]

If computer animations and simulations make trials more interesting and assist jurors in understanding complex matters, their use should be encouraged, not distrusted. ❒

Endnotes

1 *Printers' Ink*, March 1927, The Oxford Dictionary of Quotations 56 (Elizabeth Knowles, ed., Oxford University Press 6th ed 2004).

2 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 900.07[7][b] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2006); Kurtis A. Kemper, *Admissibility of Computer Generated Animation*, 111 ALR 5th 529, 539 (2003); Laird C. Kirkpatrick, *Oregon Evidence* § 901.04[2][g] (Matthew Bender 4th ed. 2002).

3 Roy Krieger, *Now Showing at a Courtroom Near You . . . , Sophisticated Computer Graphics Come of Age – And Evidence Will Never Be the Same*, ABA Journal Dec. 1992 at 92.

4 *Weinstein's Federal Evidence* at § 900.07[7][c].

5 *Id.*

6 *Weinstein's Federal Evidence* at § 900.07[7][a]; 2 Kenneth S. Brown, et al, *McCormick on Evidence*, 20-21 (John W. Strong, ed., *Practitioner Treatise Series*, West Group 5th ed 1999); and 111 ALR 5th at 538-40.

7 *Datskow v. Teledyne Continental Motors*, 826 F Supp 677, 686 (W.D.N.Y. 1993); *McCormick on Evidence*, 2003 Pocket Part at 2 ("The distinction noted is now becoming firmly established. Computer generated evidence used solely to illustrate testimony is commonly denominated 'animation,' while computer models purporting to recreate the event in question are termed 'simulations'.")

8 *Weinstein's Federal Evidence* at § 900.07[7][a].

9 111 ALR 5th at 540; *Weinstein's Federal Evidence* at § 900.07[7][c], [d], [e], [i], and [f].

10 111 ALR 5th at 539.

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11 *Weinstein's Federal Evidence* at § 900.07[7][a].

12 *Pierce v. State*, 718 So 2d 806, 808 (Fla 4th Dist Ct App 1997).

13 111 ALR 5th at 539.

14 111 ALR 5th at 540.

15 *Weinstein's Federal Evidence* at § 900.07[7][a], [d][ii].

16 Fed Rule Evid 901(a).

17 Oregon Evidence Code 901(1).

18 *Dastkow v. Teledyne Continental Motors*, 826 F Supp at 686.

19 *Weinstein's Federal Evidence* at § 900.07[7][e][i].

20 150 Or App at 420.

21 *Id.*

22 150 Or App at 420.

23 278 Or at 77-78.

24 278 Or at 81-82.

25 *Weinstein's Federal Evidence* at § 900.07[7][d][ii].

26 *Weinstein's Federal Evidence* at § 900.07[7][c].

27 *Weinstein's Federal Evidence* at § 900.07[7][f][i].

28 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469 (1993).

29 *Weinstein's Federal Evidence* at § 900.07[7][d][ii].

30 § 900.07[7][f][ii].

31 *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 US at 592-94.

32 *Id.* at 594-95.

33 526 US 137, 141, 119 S Ct 1167, 143 L Ed 2d 238 (1999).

34 526 US at 152-53.

35 297 Or 404, 687 P2d 751 (1984).

36 *State v. Brown*, 297 Or at 445.

37 *Id.* at 417-18.

38 321 Or at 285, 899 P2d 663 (1995).

39 321 Or at 309, n. 35.

40 321 Or at 320-21, n. 45.

41 *See, Brown v. Boise Cascade Corp.*, 150 Or App at 420. In addition, "Evidential error is not presumed to be prejudicial. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected," and an appropriate objection or offer of proof is made. OEC 103(1)(a) and (b).

42 *State v. O'Key*, 321 Or at 309, n. 35, 320, n. 45.

43 *Dastkow v. Teledyne Continental Motors*, 826 F Supp at 685.

44 *Id.* quoting *Weinstein's Federal Evidence.*

OSB Events for 2006

The Oregon State Bar Board of Governors recently decided to end the traditional format of the OSB Annual Meeting and Tradeshow, beginning in 2005. Instead of providing a 2 & 1/2 day conference and tradeshow, the Oregon State Bar will hold certain events separately throughout the year. Keep checking our web site for updates on dates and locations for the following events:

House of Delegates Meeting
September 16
Eugene Hilton

OSB Tent Show & Dinner
2006 event rescheduled
Please continue to check our website for event updates

OSB Annual Awards Dinner
Thursday, December 7, 2006
The Benson Hotel
Mayfair Ballroom
Portland, OR

The Role of the Jury in Our Trial System

By Stephen F. English
of Bullivant Houser Bailey PC

As many of you are aware, the role of the jury in our trial system is constantly under scrutiny by interest groups, legislators and the public at large. Last year, a Committee to Improve Jury Service was formed to address what judges and lawyers can do to improve the quality of the jury's experience in our court system. Interesting and potentially significant issues, which could have significant impact on jury trials, are being explored by a subgroup of this committee, the Trial Issues Work Group, with Judge Janice Wilson leading a group of experienced trial lawyers and obtaining valuable input from trial consultant, Chris Dominic. These topics include, at least for Multnomah County, the reintroduction of a general written questionnaire and the introduction of written questionnaires in specific kinds of cases such as employment, products liability, premises liability, and commercial cases.


Stephen F. English

One of the issues being discussed is the mini opening statement, requiring attorneys to give a very short "two to three minute" opening statement or having the trial judge give an agreed upon statement of the case before jury selection. The feedback so far is that for the attorneys who have used this tool, it has proven very effective in streamlining jury questioning and giving a better framework for voir dire.

Another issue is the use of preliminary instructions at the beginning of trial. Again, the early consensus is that at least some jury instructions allowing the jury to understand the standards under which they are to receive evidence and the legal standards under which liability must be established is useful to a jury as they hear opening statements and evidence.

Use of deposition summaries has also been discussed to shorten the presentation of perpetuation testimony, particularly of expert witnesses, and to make that testimony more useful and palatable to a lay jury, without having to read each and every question and answer to them.

One of the more interesting and controversial issues being explored is allowing jurors to question witnesses themselves during trial. Some judges and courts in Oregon and other states already allow this, at least via a written question submitted by the juror and then read by the court or by counsel. Some courts have also simply allowed jurors to raise their hand and ask questions of a witness.

Debriefing of witnesses post trial has been an ongoing issue and, as many of you know, debriefing of jurors post-trial is regularly done in many, if not most, states. Oregon has always taken the position that the protection of the jurors' right to privacy post trial and to the privacy of their jury deliberations outweighed any benefit to the litigants or their counsel to have an understanding of how the jury reached a decision.

As a part of the Trial Issues work group's planning, it is anticipated that selected judges will be asked to try some or all of these suggestions during some of their trials. On behalf of Judge Wilson and the group, we invite any input by attorneys--criminal, civil, plaintiff, or defendant--to give us a better understanding of both your experiences with any of these issues or your reaction or suggestions to them. It makes sense for us as a profession to understand that the nature of jury trials should be a dynamic one. Our best protection for continuing to make juries a vibrant and necessary part of our judicial system is to adapt their participation to allow flexibility and change while at the same time protecting the integrity of the jury trial. Your comments are invited and welcome. ❐

Be Careful Who You SLAPP

By Kevin Kono
of Davis Wright Tremaine LLP

Introduction

If you are considering bringing any claim that relates to the exercise of free speech, whether it involves comments about a cat breeder dispute, a statement on consumer-oriented talk radio, a comment about a contestant on *Who Wants to Marry a Millionaire*, or any other matter of public interest, be prepared to present substantial evidence, before discovery, to avoid dismissal of your case. Otherwise, Oregon's anti-SLAPP statute provides the defendant with a vehicle not only to dismiss the claims very early in the action, but also to recover attorney fees.

Kevin Kono

Oregon's anti-SLAPP statute and its broad application to speech-related claims

Enacted in 2001, Oregon's anti-SLAPP statute allows for dismissal early in litigation of certain meritless cases relating to free speech or public participation in the political process – along with attorney fees. ORS 31.150 *et seq.*;[1] *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003) (anti-SLAPP statutes allow the "early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation"). Designed to counteract "Strategic Lawsuits Against Public Participation" and perhaps most commonly viewed as means to attack frivolous lawsuits filed based on participation in governmental proceedings, the anti-SLAPP statute is in fact much broader in application. ORS 31.150 provides, in pertinent part:

> (1) A defendant may make a special motion to strike against a claim in a civil action described in subsection (2) of this section. The court shall grant the motion unless the plaintiff establishes in the manner provided by subsection (3) of this section that there is a probability that the plaintiff will prevail on the claim. The special motion to strike shall be treated as a motion to dismiss under ORCP 21 A but shall not be subject to ORCP 21 F. Upon granting the special motion to strike, the court shall enter a judgment of dismissal without prejudice.
>
> (2) A special motion to strike may be made under this section against any claim in a civil action that arises out of:
>
> (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;
>
> (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law;
>
> (c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or
>
> (d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.
>
> (3) A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section. If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on

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> the claim by presenting substantial evidence to support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.
>
> (4) In making a determination under subsection (1) of this section, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

As the "catch-all" provision set forth in ORS 31.150(2)(d) states, the anti-SLAPP statute provides a mechanism for defendants to seek early dismissal of claims that arise out of defendants' exercise of free speech rights in connection with any public issue or issue of public interest.

Further, the statute applies to *any* claim connected with protected speech – not solely defamation claims. *See* ORS 31.150 ("A special motion to strike may be made … against *any claim in a civil action*" that arises out of the specified conduct) (emphasis added). Indeed, Oregon's statute has been applied to claims for defamation, false light, intentional infliction of emotional distress, and intentional interference with economic relations. *See Card v. Pipes*, 398 F. Supp. 2d 1126, 1137 (D. Or. 2004); *Gardner v. Martino*, 2005 WL 3465349 (D. Or. September 19, 2005) (Civil No. 05-769-HU) (Findings & Recommendations adopted in their entirety by order dated December 13, 2005).

The term "public interest" is not defined in the statute and there exists no reported Oregon appellate decision construing the term as used in ORS 31.150. Other courts applying ORS 31.150 have construed the phrase "an issue of public interest" very broadly, however, to cover a wide range of topics. For example, in *Card v. Pipes*, *supra*, a university professor sued for defamation and intentional infliction of emotional distress after defendants published "anti-Israel" statements attributed to plaintiff. In that case, the court held that the statements were "in connection with an interest of public concern (alleged political activism and bias in the college classroom)." *Card*, 398 F. Supp. 2d at 1136. Finding that the plaintiff could not present substantial evidence to establish a probability that he would prevail, the court in *Card* granted the defendants' motion to strike both of the plaintiff's claims pursuant to ORS 31.150. *Id.* at 1137.

Similarly, in *Gardner v. Martino*, *supra*, the court dismissed the plaintiffs' claims for false light, defamation, intentional interference with economic relations, and intentional interference with prospective economic advantage, pursuant to ORS 31.150. The court held that the statements at issue – comments on a national talk-radio show about a single consumer's dealings with a single Oregon retailer – constituted statements about a public issue or an issue of public concern. *Gardner*, 2005 WL 3465349 at *7. In arriving at its conclusion, the *Gardner* court noted that state trial courts in Oregon had broadly interpreted the meaning of "an issue of public interest." *Id.* at *5. The court specifically referred to *Kurdock v. Electro Scientific Industries, Inc.*, Multnomah County Circuit Court No. 0406-05889 (statements made by employer to other employees and shareholders concerning plaintiff's termination are statements made on "an issue of public interest"), and *Thale v. Business Journal Publications*, Multnomah County Circuit Court No. 0402-02160 (dismissing under ORS 31.150 claims for libel and false light based on statements about the plaintiff's resignation from a company and regarding some business decisions plaintiff made while employed at the company). As the *Gardner* court further stated:

> Just as persuasive are the California decisions, interpreting California's analogous anti-SLAPP statute, which have broadly interpreted the "public issue" or "public interest" standard. *E.g.*, *Traditional Cat Ass'n, Inc. v. Gilbreath*, 13 Cal. Rptr. 3d 353, 356 (Cal. App. 2004) (statements concerning a dispute among different factions of cat breeders were matters of public interest for purposes of anti-SLAPP statute because they "concerned matters of public interest in the cat breeding community"); *Seelig* [*Seelig v. Infinity Broad. Corp.*, 119 Cal. Rptr. 2d 108 (Cal. App. 2002)], 119 Cal. Rptr. 2d at 115 (discussion on radio talk show regarding participant on television program called "Who Wants to Marry a Multimillionaire" was subject to anti-SLAPP statute because the subject of the radio discussion, a television show featuring "the sort of person willing to meet and marry a complete stranger on national television," fell within the statutory criterion of "an issue of public interest").

Gardner, 2005 WL 3465349 at *5.[2]

The defendant's and the plaintiff's respective burdens

As the statutory language makes clear, application of the anti-SLAPP statute requires a two-step analysis. First, the defendant has the burden of making a prima facie showing that the plaintiff's claim arises out of conduct

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falling within the statute's scope, including any conduct in furtherance of the constitutional right of free speech in connection with a matter of public interest. ORS 31.150(3). Notably, the statute does not protect only the *speaker*, but broadly encompasses "**any conduct** in furtherance of the…constitutional right of free speech." ORS 31.150(3) (emphasis added); *see also Gardner*, *supra* (applying ORS 31.150 to dismiss claims against not only the radio personality who made the remarks at issue, but also the show's distributor and rebroadcaster).

If the defendant meets this initial burden, the burden then shifts to plaintiff, who must demonstrate a probability that he will prevail on his claims. ORS 31.150(3). The plaintiff must present "substantial evidence to support a prima facie case." *Id.* "[T]he plaintiff cannot simply rely on the allegations in the complaint ... but must provide the court with sufficient evidence to permit the court to determine whether there is a probability that the plaintiff will prevail on the claim." *Gardner*, 2005 WL 3465349 at *8 (quoting *ComputerXpress, Inc. v. Jackson*, 113 Cal. Rptr. 2d 625, 641 (Cal. App. 2001)).

Beyond the *Gardner* court's discussion, no reported Oregon decision has analyzed what it means to demonstrate "a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case." California courts, however, have applied varying formulations. In one case, the California Court of Appeals stated that "We must reverse the order denying the motion if plaintiff failed to make a prima facie showing in the trial court of facts, which, if proved at trial, would support a judgment in her favor." *Seelig v. Infinity Broadcasting Corp.*, 97 Cal.App.4th 798, 807, 119 Cal.Rptr.2d 108 (2002). The California Court of Appeals has also said:

> This standard is similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment, in that the court cannot weigh the evidence. However, the plaintiff cannot simply rely on the allegations in the complaint but must provide the court with sufficient evidence to permit the court to determine whether there is a probability that the plaintiff will prevail on the claim. Importantly, the court can also consider a defendant's opposing evidence to determine whether it defeats a plaintiff's case as a matter of law.

Traditional Cat Assoc., Inv. v. Gilbreath, 118 Cal.App.4th 392, 398, 13 Cal.Rptr.3d 353 (2004) (internal citations and quotations omitted). Notwithstanding the articulation of a prohibition on "weighing" the evidence, the *Gilbreath* court further stated: "Thus on its face the statute contemplates consideration of the substantive merits of the plaintiff's complaint, as well as all available defenses to it, including, but not limited to constitutional defenses. This broad approach is required not only by the language of the statute, but by the policy reasons which gave rise to our anti-SLAPP statute." *Id.*

Thus, under California's formulation, the court arguably may not "weigh" conflicting evidence. Instead, "[I]n order to establish the requisite probability of prevailing, the plaintiff need only have stated and substantiated a legally sufficient claim. Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Rivero v. Am. Federation of State, County and Municipal Employees, AFL-CIO*, 105 Cal.App.4th 913, 919, 130 Cal.Rptr.2d 81 (2003) (internal citations and quotations omitted). *But see Sipple v. Foundation for Nat'l Progress*, 71 Cal. App.4th 226, 240-46, 83 Cal.Rptr.2d 677 (1999) (conducting detailed analysis of the application of privilege and of facts supporting necessary finding of actual malice and concluding that the article at issue was a "fair and true report").

Notably, however, California's anti-SLAPP statute requires only that the plaintiff demonstrate a "probability that the plaintiff will prevail on the claim." Cal. C.C.P. § 425.16(b)(1). By contrast, Oregon's statute requires the plaintiff to "establish that there is a probability that the plaintiff will prevail on the claim **by presenting substantial evidence to support a prima facie case**." ORS 31.150(3) (emphasis added). The addition of this "substantial evidence" language demonstrates that something more than the "sufficient prima facie showing" that California's courts have deemed adequate is required. Instead of merely presenting evidence sufficient to support a favorable judgment – a considerable hurdle in itself – the plaintiff must introduce "substantial evidence." Arguably, the requirement that a plaintiff adduce "substantial evidence" establishing a "probability" of prevailing means that the plaintiff must show that he is *likely* to prevail, not just that it is possible.

Timing considerations

The anti-SLAPP statute is designed for motions to dismiss to be brought early in a case. Pursuant to ORS 31.152(1), an anti-SLAPP motion "must be filed within 60 days after the service of the complaint." This raises an area of potential procedural confusion. Does this mean the "original complaint"? What if the plaintiff files an amended complaint more than 60 days after filing and service of the

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original complaint? Has the defendant lost the opportunity to file an anti-SLAPP motion against the amended complaint? Does it matter if the defendant did not file an anti-SLAPP motion against the original complaint? The best answer is that the statutory language must mean that a defendant has 60 days from the date of service of the complaint containing the claims or allegations that are subject to the motion. Otherwise, a coy plaintiff could file a claim arguably not subject to the anti-SLAPP statute, and then amend after the 60-day period expired to add a claim which would be subject to an anti-SLAPP motion. Such an outcome would, of course, be untenable in light of the purpose of the statute. Indeed, the Court in *Gardner* embraced this precise approach when faced with the argument that the filing of an anti-SLAPP motion in response to an amended complaint was untimely.

> First, although the statute does not expressly state that the sixty days runs from the service of the complaint, *or amended complaint*, it cannot logically be read any other way. Notably, the statute does not expressly require that the motion be filed within sixty days of service of the original complaint and it does not state that the motion must be filed within sixty days of service of process or service of summons and the complaint. Moreover, common sense requires that the sixty days be counted from the service of an amended complaint because otherwise, a party could be served with a complaint raising no issues implicating O.R.S. [sic] 31.150 and sixty-one days thereafter, the plaintiff could serve an amended complaint implicating O.R.S. [sic] 31.150. Under plaintiffs' reading of the statute, a defendant faced with such an amended pleading could not file an anti-SLAPP motion to strike. The only reasonable interpretation of the statute is to construe it as meaning sixty days after service of the complaint or any amended complaint.

Gardner, 2005 WL 3465349 at *7 (emphasis in original). Moreover, the statute provides that an anti-SLAPP motion can in any event be brought at "any later time" in a case at the court's discretion. ORS 31.152(1).

Another area of potential confusion is the directive that an anti-SLAPP motion "shall be treated as a motion to dismiss under ORCP 21 A, but shall not be subject to ORCP 21 F." ORS 31.150(1). Can an anti-SLAPP motion be filed within 60 days of the operative complaint, even if an answer has been filed? These statutory requirements give rise to some question regarding precisely when an anti-SLAPP motion can be brought and what it means to treat it as a motion "under ORCP 21 A."

ORCP 21 A provides that "[e]very defense, in law or fact, to a claim for relief in any pleading … shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss." The "following defenses" consist of the well-known Rule 21 defenses of lack of jurisdiction, another action pending, lack of legal capacity, insufficiency of process, failure to join a party, failure to state a claim, and statute of limitations. ORCP 21 A further provides that a "motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted." In other words, a motion to dismiss under ORCP 21 A must be made before answering. A defendant has 30 days in which to appear and defend. ORCP 7 C(2). Accordingly, at first blush, the reference to ORCP 21 A would seem to require a defendant to file an anti-SLAPP motion within 30 days of service of the complaint.

This would, of course, be inconsistent with the statutory allowance of a 60-day period from the date of service in which to file an anti-SLAPP motion. The best explanation for the reference to ORCP 21 A therefore relates not to the time to appear or the sequence even of making such a motion before answering, but rather the reference simply indicates that the filing of an anti-SLAPP motion constitutes defending for purposes of ORCP 69. ORCP 69 provides that a party who fails "to plead [*i.e.* answer] or otherwise defend as provided in these rules" may be subject to an order of default. ORCP 21 is the catalogue in the rules of civil procedure of every way in which a party may "defend." The requirement that an anti-SLAPP motion be treated as a motion to dismiss under ORCP 21 A thus provides that filing an anti-SLAPP motion constitutes defending. By stating that an anti-SLAPP motion is treated as an ORCP 21 A motion, the Legislature made clear that a plaintiff may not take a default against a defendant who files an anti-SLAPP motion.

Other procedural considerations

Another notable component of the anti-SLAPP statutory scheme is that all discovery is stayed upon the filing of an anti-SLAPP motion. Under ORS 31.152,

> All discovery in the proceeding shall be stayed upon the filing of a special motion to strike under ORS 31.150. The stay of discovery shall remain in effect until entry of the order ruling on the motion. The court, on motion and for good cause shown, may order that specified discovery be conducted notwithstanding the stay imposed by this subsection.

Accordingly, a plaintiff must have conducted a thorough investigation *before* bringing a claim based on activities protected by free speech.

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In addition, as mentioned above, a *defendant* who prevails on a motion to strike pursuant to ORS 31.150 "shall be awarded reasonable attorney fees and costs." ORS 31.152(2). A prevailing plaintiff is entitled to fees related to the motion only if "the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay." *Id.*

Finally, although it is a state law referencing Oregon's procedural rules, ORS 31.150 *et seq.* applies in actions originally filed in or removed to federal court in which Oregon law applies. *See Card v. Pipes*, *supra*; *Gardner v. Martino*, *supra*.

Conclusion

Oregon's anti-SLAPP statute provides a powerful tool for defendants facing claims based on free-speech-related conduct in connection with matters of public interest. It allows defendants to seek early dismissal of cases brought without substantial supporting evidence, before incurring the costs of discovery, and it entitles defendants to recover their attorney fees if successful. Plaintiffs should take care to collect as much evidence as possible before filing claims arising from speech-related conduct. ❐

Endnotes:

1 Formerly ORS 30.142 *et seq.*

2 The legislative history of ORS 31.150 demonstrates that the Oregon Legislature closely modeled ORS 31.150 on California's 1992 anti-SLAPP statute. *See* Testimony of Legislative Counsel to House Committee on Judiciary, Subcommittee on Civil Law, March 19, 2001.

The Benefits and Limitations of Courtroom Technology in Presenting the Complex Case

By David H. Angeli
of Stoel Rives LLP

In May 2003, the United States Department of Justice's Enron Task Force convinced a grand jury to indict seven former executives of Enron Broadband Services for conspiracy, securities fraud, wire fraud, insider trading, and money laundering. The indictment alleged that the defendants, over the course of a two-year conspiracy, (1) lied to investors about the technical capabilities of a complex nationwide telecommunications network; (2) employed a complicated accounting scheme to mislead investors with regard to the company's revenues; and (3) engaged in numerous illegal "insider" sales of Enron stock. Discovery from the government and third parties yielded over 100 million pages of documents, hundreds of hours of transcribed video, hours of audio recordings, hundreds of photographs, and thousands of electronic documents created with many different software applications. Ultimately, five defendants were tried on a total of 176 counts beginning in April 2005. Three months later, the jury acquitted the defendants on 24 of those counts and deadlocked on the remainder.


David H. Angeli

This case obviously presented a number of challenges to us as counsel for one of the defendants. Chief among those challenges was how to sort through the mountain of discovery and present our case to the jury in a clear and compelling way, notwithstanding the complexities and technical nature of the subject matter. We realized quickly that tried-and-true case preparation methods—physically reviewing all (or at least most) of the materials produced in discovery, compiling physical "issue" binders and witness binders, etc.—were not practical. Assuming that a lawyer could review 50 pages per hour, a team of 20 lawyers working 40 hours per week would take approximately 50 years to review 100 million pages!

We turned to technology to help us. Discovery management software (Concordance® and CaseMap®) allowed us to store all of the discovery materials in a single database and to organize and sort it by a number of criteria, including by issue, witness, date, etc. At trial, we relied on Sanction® software for instant access to documents, videos and other materials during witness examinations, and to enlarge and highlight key portions of those materials for emphasis. We used PowerPoint® software during our opening statement and closing argument to create slideshows with timelines, video clips, and animations to explain difficult concepts and convey key themes. Along the way, we learned lessons that should be valuable to counsel in virtually every case, not just those as complex as Enron.

I. The Benefits of Courtroom Technology

Technology is no silver bullet. Thorough preparation, a well thought-out strategy, and compelling advocacy remain the key ingredients of an effective trial presentation. Nevertheless, when used properly, courtroom technology can make the difference between an "effective" presentation and a great one.

The lawyer who uses a well-orchestrated electronic presentation ensures that jurors literally "see" the

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evidence just as counsel does. We have all heard about gripping oral presentations that "paint a picture" for jurors, but the reality is that those mental pictures vary widely depending on the jurors' individual experiences, education, etc. Visual presentations, on the other hand, allow counsel to dictate the content of the images that will be left in jurors' minds. As a result, according to the Federal Judicial Center's study of the issue, "jurors who have seen electronic displays work better as a group because they all experienced the trial 'together' and are more likely to have a common understanding of the evidence."[1]

Psychological research confirms that "bimodal" forms of communication (i.e., those that include both an auditory and a visual component) are far superior to mere oral presentations in terms of maximizing the likelihood that the audience will retain the information presented.[2] That is particularly true in complex trials involving numerous fact and expert witnesses, hundreds of exhibits and complex subject matters. Technology allows counsel to electronically store and instantly search and organize the entire universe of evidence in a case. Documents, photographs, videos, and other evidence may be displayed instantly on large screens or flat-panel monitors, with key portions annotated, enlarged, or highlighted. Animated graphics allow jurors to visualize complicated concepts that are difficult or impossible to explain verbally including, for example, the specifics of various financial transactions, the operation of complex technology (like a telecommunications network), and the unfolding of temporal events.

Using an electronic presentation with a variety of media also helps to break the monotony of a long trial that involves less-than-compelling issues. By presenting graphics as an integrated part of a witness's testimony or of counsel's argument, the lawyer maximizes the chances that jurors will remain attentive and participate actively in the learning process.

II. The Jury's Perspective

Although the benefits of courtroom technology may be widely accepted in theory, there remains a certain mystique attached to such technology. Many trial lawyers fear the possibility of looking too "slick" in front of the jury. Perhaps that is why, according to a 2004 survey conducted by the ABA's Legal Technology Resource Center, only 1 in 4 litigators uses litigation support software regularly.[3]

Study after study has demonstrated that those misgivings are misplaced, and that jurors actually appreciate it when counsel effectively incorporates technology into his or her trial presentation. The Federal Judicial Center concluded recently that "[j]urors become more involved in the proceedings when they can see the exhibits clearly and follow the lawyers' presentations more easily. . . . Jurors also appreciate the generally faster pace of trials using technology. They become impatient when lawyers spend time digging through piles of paper looking for exhibits." Reinforcing that view, the trial consulting and research firm DecisionQuest recently conducted a survey asking respondents to consider a case where one side used computer technology to present its case and the other side did not. Thirty-eight percent of respondents said that they "would feel more positively" toward the side that used technology, 62 percent said that it would make no difference either way, and no respondents said that they would feel more positive toward the side that did not use technology.

In today's world of computers, flat-screen televisions, cell phones, handheld organizers, and other devices, "[j]urors who come into a technology-equipped courtroom are usually comfortable with the surroundings and do not find the environment unusual at all."[5] Many jurors have also seen courtroom technology used in highly publicized trials.[6] For these reasons, "the equipment for visual displays makes it appear to jurors that what is about to go on in the courtroom will be informative and easy to understand."[7]

In short, jurors expect and appreciate it when trial lawyers incorporate technology into their trial presentations. Counsel who refuse to do so will find themselves at a competitive disadvantage as technology becomes more and more of a fixture in our courtrooms.

III. Practice Pointers

There are a number of critical considerations to keep in mind when deciding how best to incorporate technology into a courtroom presentation:

1) Plan Early.

■ Particularly in a complex case, the seeds of a compelling courtroom presentation are sown long before trial. When it comes to electronic databases, the quality of the output is only as good as the quality of the input. All the bells and whistles in the world cannot make up for poor coding and organization of documents, audio and video materials and other forms of media during the discovery phase. Discovery management software (including, for example, Concordance® and CaseMap®) offer a robust set of organizational and search tools that allow counsel to store, sort, and instantly access documents, photographs, video clips, and other media during trial.

2) Choose the Right Technology and Account for Murphy's Law.

■ Counsel should choose courtroom presentation software that is (1) compatible with the discovery management software discussed above, (2) simple to use in the "heat of battle," and (3) enabled with the basic features that counsel will need to make a compelling presentation (e.g., the ability to enlarge and highlight key passages of documents, to project "side-by-side" comparisons of various pieces of evidence, to play back video synchronized with the accompanying transcript, etc.). Sanction® trial presentation software by Verdict Systems satisfies all of those criteria and is very useful during witness

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examinations. With Sanction, counsel has every piece of evidence in the case available at his or her fingertips. Documents can be displayed with key passages expanded and highlighted as witnesses refer to those passages and videotape segments can be accessed "on the fly" to impeach witnesses. For more "scripted" presentations (e.g., opening statements and closing arguments), Microsoft PowerPoint allows users to create slide shows containing graphics, animations, video clips, and other multimedia content.

■ In terms of hardware, counsel should ensure that (1) projectors have a lumens or brightness of at least 2000; (2) laptops (and/or external drives) have enough memory to store all of the key evidence and access it instantly; and (3) a portable audio system is available, as many courtroom audio systems are lacking.

■ Anticipating the impact of Murphy's Law, counsel should also have available a "non-tech" alternative to his or her presentation (e.g. "anchor boards" of PowerPoint slides, etc.).

3) Understand the Limitations of Technology.

■ Standing alone, a flashy presentation is unlikely to carry the day. Communicating a message effectively requires a careful review of the evidence, an understanding of the opponent's case, the development of understandable case themes, and a great deal of thought as to how those themes can best be communicated to the jury. Only then should counsel begin to prepare a presentation that conveys those themes as simply and effectively as possible.

■ There is no substitute for the lawyer's ability to connect with jurors by looking into their eyes and conveying an absolute belief in the client's position. During key moments in the argument (e.g., when the jury is being asked to conclude that the government's star witness is a liar), the jurors' attention should be focused on the lawyer, not on the screen.

4) Reveal the Information in an Orderly and Effective Way.

■ Facts should be revealed on the screen slowly and systematically. With this type of presentation, jurors anticipate the revelation of additional facts with increased interest and curiosity. This technique also allows the lawyer to maintain the jury's attention because there is congruency between what is being presented visually and orally.[8]

■ Including too much information on a chart or slide can be counter-productive. Accordingly, charts and slides should be clear and contain only the information that will be necessary to assist jurors in recalling key information during deliberations.

5) Get the Most Out of the Technology.

■ Electronic presentations should not be viewed simply as surrogates for blow-up boards. Asking the jury to view a full-page document—whether in hard copy or as an image on a screen—is not conducive to learning. The more effective technique is to enlarge and highlight the key text in the document, while dimming or minimizing the background, so the jury focuses on and remembers the key information from the document.

■ Use a variety of tools—including sound, animation, video and other special effects—to hold the jury's interest.

■ Today's technology offers counsel limitless options for creativity in presentations. For example, Sanction® trial presentation software allows for "split screen" presentations that allow one type of media (e.g., videotaped testimony) to be displayed on one side of a screen and a document (e.g., the document that is the subject of the witness's testimony) to be displayed on the other side.

6) Use Technology to Most Effectively Complement Your Own Style.

■ Ultimately, technology is just one more weapon in the trial lawyer's arsenal. As such, the best use of technology will vary from lawyer to lawyer, based on the lawyer's individual style and skill-set. Everything about the technical presentation—from content to where the equipment is situated in the courtroom—should be tailored to the lawyer's individual style.

IV. Conclusion

The Enron litigation may be an extreme example of the challenges that trial lawyers face in the typical case in the 21st century. Nevertheless, the technological lessons learned from that case—relating to the processing, organization, and presentation of information—can assist lawyers in their trial presentations in any case, regardless of its relative complexity. The powers of courtroom technology can be fully harnessed only by lawyers who recognize the advantages, as well as the limitations and risks, involved in choosing and using that technology. ❐

Endnotes

1 Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial at 52 (Federal Judicial Center 2001) (referred to hereafter as "Judge's Guide.").

2 See, e.g., Jeffrey M. Zacks & Barbara Tversky, Structuring Information Interfaces for Procedural Learning, 9 J. Experimental Psychology 88-100 (2003); Richard E. Meyer, Multimedia Learning (2001); Allan Paivio, Mental Representations: A Dual Coding Approach (1986).

3 See Anatomy of Trial Technology (ABA Legal Technology Resource Center 2004), available at http://www.abanet.org/tech/ltrc/publications/trialtech.html.

4 Judge's Guide, supra note 1, at 52.

5 Id. at 51.

6 Id. at 51-52.

7 Id. at 51.

8 See Roxana Moreno & Richard E. Meyer, Verbal Redundancy in Multimedia Learning: When Reading Helps Listening, 94 J. of Educational Psychology 156-63 (2002).

The Role of Storytelling in Motion Practice:
Confessions of a Frustrated Drama Queen

By Deana S. Peck
of Quarles & Brady LLP

I am a civil lawyer with a big firm. I represent large corporations, usually on the defense side. Because the stakes involved in litigating tend to be high, my opportunities to go to trial are not as numerous as I would like. I have plenty of opportunities to take and defend depositions, review documents, read and analyze cases, and write and argue motions. But, the courtroom drama of a trial by jury is a rare treat. So, I am a frustrated drama queen.


Deana S. Peck

But, wait, all is not lost. I believe that judges need to hear good stories, too – always honest ones, of course. While motion practice is generally thought to be an appeal to reason, the tools of good storytelling have a place on the motion calendar as well. A colleague, Denny Rawlinson, recently wrote an article reminding us that Cicero (a great trial lawyer in his day) identified as the first and foremost principle of persuasion the need to "move the mind and the heart."[1] A good story puts some "heart" in your effort to persuade the judge of the logic and reason of your position.

In his article, Denny discusses a few storytelling tools and illustrates how they can be used in the courtroom to appeal to the hearts of a jury. These same tools – the single-sentence theme, verbal analogy and visual analogy – can be put to use in motion practice as well. The aim of this paper is to illustrate that point.

The Single-Sentence Theme

Although it appears to be quite simple, one of the most challenging storytelling tools is to develop a single sentence that sums up the theme of your case. For example, Michael Tigar concisely described his defense of Terry Nichols in the federal Oklahoma bombing case in a single sentence: "Terry Nichols was building a life, not a bomb." While the crime was horrific, this appeal to the heart may have played a role in Nichols receiving a life sentence rather than the death penalty, as was meted out to his co-conspirator, Timothy McVey.

I will not attempt to persuade you that civil motion practice is – or should be – as emotionally charged as a capital case. Nonetheless, the power of a single, well-crafted sentence should not be ignored. Consider, for example, a motion to compel. You have served a document request, and your adversary objects. After making sincere, good faith efforts to resolve the discovery dispute, you find that you must file a motion to compel. Only then does your adversary relent and turn over the documents. Meanwhile, you have incurred fees and expenses in bringing the motion, and you have a claim for them under Fed. R. Civ. P. 37(a)(4)(A) (or the Arizona counterpart). As we know, that rule was amended in 1993 to cover this situation, where the requested documents are produced only after the motion is filed. What is the theme of your motion in a single sentence? It could be: "It shouldn't take a motion to get a document."

Verbal Analogy

A verbal analogy is the use of a commonplace occurrence or maxim, or a familiar literary reference, to explain your position. A good verbal analogy will not only explain your position, but also provide an emotional anchor by aligning your position with predictable life experience, aspirational goals or respected literary wisdom. For example, as Denny points out in his article, the plaintiff in a breach of contract case might gain emo-

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tional traction from using the adage: "A man's word is his bond."

It is important to use a verbal analogy that makes the right connection. Using something like "you snooze, you lose" as a banner for a statute of limitations defense is not the type of anchoring you are looking for. It sounds cavalier, if not downright callous. It does not bring to mind admirable principles or people that you hope will be perceived as your allies in the courtroom. Here are some examples of verbal analogies that may make the right connection if they fit your theme on a particular motion day:

- There is nothing so powerful as truth – and often nothing so strange. Daniel Webster
- When the well's dry, we know the worth of water. Benjamin Franklin
- A little neglect may breed great mischief . . . for want of a nail the shoe was lost; for want of a shoe the horse was lost; and for want of a horse the rider was lost. Benjamin Franklin
- Don't throw stones at your neighbors' if your own windows are glass. Benjamin Franklin
- We must all hang together, or assuredly we shall all hang separately. Benjamin Franklin[2]
- There is a Southern proverb – fine words butter no parsnips. Sir Walter Scott

- Truth is generally the best vindication against slander. Abraham Lincoln
- Important principles may and must be inflexible. Abraham Lincoln
- This is one of those cases in which the imagination is baffled by the facts. Sir Winston Churchill
- Nothing in life is so exhilarating as to be shot at without result. Sir Winston Churchill

On one motion day, I witnessed a verbal analogy used to great effect by an adversary who, given a short deadline to submit a motion, filed a lengthy one, together with a motion to exceed the page limitation. Knowing that the judge was generally displeased with lengthy papers, my adversary began his argument by summoning to his side Abraham Lincoln and recounting that Lincoln had once written to a close friend: "I apologize for the length of this letter, but I did not have much time to write it." The judge grinned and then listened attentively to the substance of the argument, never once criticizing the length of the written motion.

Visual Analogy

A visual analogy makes your point by painting a word picture that aligns your position with an experience from everyday life. To illustrate, I will tell a story on myself.

In the mid 1970s, I was a young associate, and research was still done by reading cases in books shelved in the firm law library. A couple of partners who were in the midst of a trial returned to the office late one afternoon and reported that we needed to file by 8 a.m. the next morning a written response to a motion filed in court that day. The issue was whether the anchor tenant in a shopping center in metropolitan Phoenix, who was contractually obligated to remain open for business during "normal business hours," was obligated to open for business on Sundays. The adversary was arguing that Sunday was not a normal business day, and my job was to draft a response espousing the contrary view. I worked long into the night, finding support for our position among various cases decided in the past decade or two. By about 3 a.m., it was time to read and distinguish the adversary's case authority, which consisted of a single case – let's call it State v. Black – decided back in 1890.

At the time, I did not realize that I was creating a "visual analogy." But, the lateness of the hour and my weariness and frustration caused me to write in the response the following words (all of which were literally true): With the aid of a stepladder, we have located the dusty

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volume in which *State v. Black* (1890) is contained. It was not worth the effort. The case stands only for the proposition that, back in 1890, a man could not be hanged on a Sunday.

I finished up and went home, fully expecting that one of the partners, in editing the response before filing it, would exorcise my "tell it like it is" fit of pique. Neither did. As they say, a picture is worth a thousand words.

And, silence can be golden. Denny points out in his article that visual analogies are a good way to impeach a witness based on time and distance. He uses as an example the witness who exaggerates or miscalculates how much time went by before an accident occurred. While the witness may say it was "20 seconds," a skillful trial lawyer can bring that testimony into grave doubt by simply forcing the jury to sit and listen in silence for 20 seconds. It can seem like an eternity.[3]

What does this have to do with motion practice? One of the better motion arguments I think I ever made was made without uttering a word. The same adversary who so skillfully enlisted the assistance of Abe Lincoln to deflect criticism of his lengthy motion was not so lucky the next time. He thought he could obtain a broad array of documents from a sister bank of the defendant bank I was representing in a complex multi-party civil RICO case by simply serving me with a request for production under Fed. R. Civ. P. 34. Consistent with the rules, I told him that a subpoena was necessary, but he would not listen. Instead, he filed a motion to compel production in compliance with his Rule 34 RFP.

Motion day came, and we all went to court to do battle on a full line-up of motions. Midway through the docket, the motion to compel surfaces on the

agenda. The judge asks who is present for the sister bank. Silence. Nothing. I am sitting there silently counting "thousand one, thousand two, thousand three …." About 15 seconds into this exercise (I could restrain myself no longer), I rise and tell the court that, although I represent a party affiliated with the sister bank, it does not appear that there is anyone present for the sister bank, which is not a party to the proceedings, nor has it been served with a subpoena or any other process that would compel it to be present. Without further ado, the motion to compel was denied.[4]

So there you have it – final and positive proof that I am, indeed, a frustrated drama queen. I am unapologetic about it. It is a good thing. ❐

Endnotes

1 Dennis P. Rawlinson, Winning Their Hearts, Trial Evidence Journal (ABA Section of Litigation, Chicago, Ill.), Fall 2005, 3.

2 On second thought, this maxim should be reserved for a meeting among defense counsel.

3 This brings to mind another great visual analogy. Anyone who has watched the movie "My Cousin Vinny" may remember the impeachment of Sam Tipton's testimony that he observed – within the span of five minutes – the defendants both enter and exit the convenience store where the crime was committed. But, Sam was cooking grits at the time and ultimately had to admit that, measured in grits cooking time, 20 minutes must have elapsed between his observation of the comings and goings at the convenience store.

4 Adverse counsel and I thereafter worked out our differences on the discovery sought from the sister bank, but under the more protective principles of Fed. R. Civ. P. 45.

I am, indeed, a frustrated drama queen. I am unapologetic about it. It is a good thing.

Preserving Issues For Appeal In Oregon Civil Actions

By Charles F. Adams
of Stoel Rives LLP

I. Matters That Can Be Raised on Appeal Even When Never Presented Below

A. Failure to State a Claim Can No Longer Be Raised

Although failure to state a claim could be raised for the first time on appeal under *Richards v. Dahl*, 289 Or 747, 752, 618 P2d 418 (1980), that holding has been superseded by the adoption of ORCP 21 G(3). *Waddill v. Anchor Hocking, Inc.*, 330 Or 376, 382, 8 P3d 200 (2000).

B. Subject-Matter Jurisdiction.

SAIF v. Shipley, 326 Or 557, 955 P2d 244 (1998); *Stirton v. Trump*, 202 Or App 252, 255, 121 P3d 714 (2005).

C. Issues Raised on Matters of Public Importance.

State ex rel School Dist. 13 v. Columbia Co., 66 Or App 237, 249, 674 P2d 608 (1983).

D. Errors of Law Apparent on the Face of the Record.

ORAP 5.45(2). An "apparent" error of law is one as to which "'the legal point is obvious, not reasonably in dispute.'" *State v. Farmer*, 317 Or 220, 224, 856 P2d 623 (1993) (quoting *State v. Brown*, 310 Or 347, 355, 800 P2d 259 (1990)). Whether error is "apparent" is determined based on the perspective of the appellate court deciding the question and the timing of that decision. *State v. Jury*, 185 Or App 132, 57 P3d 970 (2002) (error "apparent" based on case law decided after lower court's decision). The error must be obvious and not reasonably disputed, it must be an error of "law," the court must be able to identify the error from the record without choosing between competing inferences, and the facts constituting the error must be irrefutable. *Mekkam v. Oregon Health Sciences Univ.*, 126 Or App 484, 491-92, 869 P2d 363 (1994); *Empire Wholesale Lumber Co. v. Meyers*, 192 Or App 221, 227-28, 85 P3d 339 (2004) (error not "apparent on the face of the record" when answer to question of law was not

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free from dispute). Such an unpreserved claim of error is available for appellate review only if (1) the claim of error qualifies as an error "apparent on the face of the record" and (2) the appellate court expressly applies the plain-error methodology to justify consideration of the question. *State v. Castrejon*, 317 Or 202, 211, 856 P2d 616 (1993).

E. Supporting the Judgment on Alternate Grounds.

Based on the existing factual record, a *respondent* may present for the first time on appeal new arguments to support the judgment. *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 659-62, 20 P3d 180 (2001). If, however, the appellant might have developed a differing factual record at trial had the new argument been presented, then affirmance on a new ground is forbidden. *Id.*; *see also Lozano v. Schlesinger*, 191 Or App 400, 407, 84 P3d 816 (2004) (court may not affirm under "right for the wrong reason" principle when losing party might have created different trial court record had prevailing party asserted alternative argument).

F. Statutory Interpretation – Limited Exception

When the issue is one of statutory interpretation, and a party preserved at trial interpretations of the statute as an issue *generally*, the appellate court must interpret the statute correctly, even when the appellant failed to raise at trial the correct interpretation. *Burke v. Oxford House of Oregon Chapter V*, 196 Or App 726, 738, 103 P3d 1184 (2004) (en banc); *J. R. Simplot Co. v. Dept. of Agriculture*, 340 Or 188, 194, 131 P3d 162 (2006)

(when construction of statute is placed at issue, appellate court must arrive at correct interpretation, regardless of parties' arguments).

II. Preservation Generally

A. Purpose

Rules regarding preservation of error are based on two concerns: (1) fairness to the parties in making and responding to arguments in a case, and (2) efficient judicial administration. *Peiffer v. Hoyt*, 339 Or 649, 656, 125 P3d 734 (2005).

When the trial court is presented with both sides of an issue, it then has the opportunity to correct any errors. *Oregon Health Sciences Univ. v. Physicians Assn.*, 125 Or App 199, 202, 864 P2d 872 (1993).

B. Court's Role

An appellate court is obliged, on its own motion, to determine independently whether the rules of preservation have been satisfied. *Baker v. DMV*, 201 Or App 310, 313, 118 P3d 852 (2005) (citing *State v. Wyatt*, 331 Or 335, 344-46, 15 P3d 22 (2000)).

C. Requirements Generally.

The general rule is that a question not preserved in the trial court can not be raised on appeal. *Propp v. Long*, 129 Or App 273, 277, 879 P2d 187 (1993) (citing *State v. Kessler*, 289 Or 359, 371 n 17, 614 P2d 94 (1980)). In determining whether an error has been preserved, the reviewing court looks to see whether the appellant raised the issue, identified a source for the claimed position, and made a particular argument at trial. *State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988). The first requirement is ordinarily essential, the second is less important, and the third is the least important. *Boytano v. Fritz*, 321 Or 498, 504, 901 P2d 835 (1995); *see also State v. Smith*, 184 Or App 118, 121, 55 P3d 553 (2002) ("The problem, of course, is that the cases never have defined precisely what is meant by an 'issue,' as opposed to a 'source' or an 'argument.'").

D. Pleading Not Enough.

Ordinarily, it is not enough to have simply pleaded an assertion. *Manifold Business and Investment, Inc. v. Wroten*, 116 Or App 573, 843 P2d 950 (1992) (purchasers pleaded violation of statute but failed to pursue theory at trial, and no instruction on theory was sought or given).

E. Evidence Not Enough.

The mere introduction of evidence during trial does not preserve for appellate review a legal theory that was never presented to the trial court. *Roseburg Investments, LLC v. House of Fabrics, Inc.*, 166 Or App 158, 164, 995 P2d 1228 (2000).

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III. Before Trial

A. Motions in Limine.

Motions in limine can preserve exceptions or objections, but only if the procedures followed are ones that would adequately preserve the issue if followed during trial. For example, if a party seeks a ruling in limine on admission of evidence but either the party makes no actual offer of proof or the court reserves its ruling, nothing has been preserved for appeal. *Compare State v. Adams*, 296 Or 185, 189-90, 674 P2d 593 (1983) (no offer of proof and no definitive ruling by trial court in limine), *and State v. Coleman*, 130 Or App 656, 663-64, 883 P2d 266 (1994) (in limine motion only denied as "premature" and motion not renewed during trial), *with State v. Foster*, 296 Or 174, 674 P2d 587 (1983) (offer of proof made and final ruling issued in limine). Additionally, a motion and ruling in limine on exclusion or admission of evidence on one ground will not support presentation of a different ground on appeal. *State v. Sanger*, 89 Or App 493, 497, 749 P2d 1202 (1988) (new argument to exclude not allowed); *Bornhoft v. Aubry*, 178 Or App 625, 629-30, 37 P3d 1049 (2002) (new argument to admit not allowed). As a general proposition, to preserve the issue, a party need not object to evidence at the time of hearing or trial if there has been a conclusive determination of admissibility beforehand. *Rogue Valley Medical Center v. McClearen*, 152 Or App 239, 243, 952 P2d 1048 (1998). When a party raises in limine a substantive issue before trial and obtains a definitive ruling but does not raise the issue again when the court instructs the jury and submits the verdict form, such conduct does not waive for

appeal the party's argument on the issue. *Davis v. O'Brien*, 320 Or 729, 738-39, 891 P2d 1307 (1995).

One critical caveat exists, however, in relying on written submissions before trial or hearing in order to preserve evidentiary objections. In *Purcell v. Asbestos Corp. Ltd.*, 153 Or App 415, 432-33, 959 P2d 89 (1998), the defendant objected in a pretrial written motion to the admission of certain evidence, on grounds of unfair prejudice under OEC 403. Despite this express written objection, the issue was held not preserved for appeal, because the defendant did not argue this objection orally or obtain a specific ruling from the court either at the pretrial hearing or when the evidence was introduced at trial.

B. Motion to Strike.

A pretrial motion to strike an allegation will not support an assignment of error on appeal unless the moving party also moves at trial to take the allegation from the jury or in some other way gives the trial court opportunity to correct any error in the pretrial ruling. *Arney, Gohn v. City of North Bend*, 218 Or 471, 475-76, 344 P2d 924 (1959), *cited with approval in Mt. Fir Lumber Co. v. Temple Dist. Co.*, 70 Or App 192, 195-96, 688 P2d 1378 (1984).

If a matter is stricken, care must be taken to preserve objection to the stricken matter. Repleading, when not accomplished carefully and skillfully, can result in waiver of issues for appeal. In *Sims v. Software Solutions Unlimited, Inc.*, 148 Or App 358, 369-70, 939 P2d 654 (1997), certain allegations of the plaintiff's complaint were stricken as "irrelevant and frivolous" and not "support[ing] a wrongful discharge claim under Oregon law." On appeal, the plaintiff did not in her brief assign error to this ruling. Instead, the plaintiff assigned error in her appellate brief to the trial court's grant of summary judgment against the plaintiff's *amended* complaint. In the latter, the plaintiff repleaded her original allegations but also added a few new contentions. The original allegations were repleaded "simply to preserve the argument on appeal." *Id.* at 370. In her appellate brief, the plaintiff assigned error to the grant of summary judgment against the amended complaint on grounds that the underlying earlier order to strike the original complaint had been erroneous. Held:

> "Plaintiff cannot have it both ways. In the light of her assignment of error, it was incumbent on her either to seek a ruling from the trial court on the legal sufficiency of the amended complaint and then assign error to that ruling or to assign error to the court's ORCP 21E order regarding the original complaint. Because she did neither, the trial court did not have the opportunity at the hearing on the motion for summary judgment to rule on the claim of error that

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plaintiff makes here. Plaintiff has failed to preserve the error that she assigns in this court."

Id. (footnote omitted).

C. Pretrial Hearing.

Arguments discussed at a pretrial hearing and ruled on by the court are preserved for appeal. *State v. Engweiler*, 118 Or App 132, 846 P2d 1163 (1993).

D. Defenses Automatically Waived.

Certain defenses are automatically waived if not made by motion before pleading or not made in a responsive pleading.

1. Lack of jurisdiction over the person. ORCP 21 G(1).

2. Another action pending between same partners on the same cause. *Id.*

3. Insufficiency of process. *Id.*

4. Insufficiency of service of process. *Id.*

5. The plaintiff does not have legal capacity to sue. ORCP 21 G(2).

6. The party asserting claim is not the real party in interest. *Id.*

7. Statute of limitations. *Id.*

8. Note that ORCP 21 G(2) allows defenses E-G to be raised by amendment, but only under very limited circumstances.

9. Defects in pleadings must be raised before the trial court, or they will not be considered on appeal. *See, e.g., Hartford Acc. and Ind. Co. v. Ankeny*, 199 Or 310, 316, 261 P2d 387 (1953); *Hackett v. Jones*, 176 Or 518, 523, 159 P2d 205 (1945); *Verret v. DeHarpport*, 49 Or App 801, 804, 621 P2d 598 (1980).

E. Defenses Waived if Not Raised by Motion or Responsive Pleading.

Other affirmative defenses are not automatically barred but may be precluded if not raised by motion or responsive pleading or if leave to amend is denied.

1. All defenses listed under FRCP 8(c), plus a defense alleging unconstitutionality. ORCP 19 B.

F. Right to Jury Trial.

1. Trial of all fact issues must be by jury unless the parties expressly stipulate to trial without a jury. ORCP 51 C. Despite the express provisions of ORCP 51 C and its predecessor statute, case law establishes that a party can waive a right to a jury trial by failing to timely assert that right. *Rexnord Inc. v. Ferris*, 294 Or 392, 394-402, 657 P2d 673 (1983).

G. Jury Selection.

1. Any claim of failure to comply with the jury-selection provisions of ORS chapter 10 must be brought within seven days after a party discovers or should have discovered facts showing the failure. ORCP 57 A.

H. Summary Judgment.

A party opposing summary judgment must, before the motion is decided, make any evidentiary objections it has. *Aylett v. Universal Frozen Foods Co.*, 124 Or App 146, 154, 861 P2d 375 (1993). An appellate court will not review the admissibility of evidence that was admitted without objection in opposition to summary judgment. *Schram v. Albertson's Inc.*, 146 Or App 415, 419 n 1, 934 P2d 483 (1997); *Gullett v. Fred Meyer, Inc.*, 150 Or App 262, 266 n 2, 946 P2d 311 (1997).

An attorney's affidavit under ORCP 47 E can create a factual dispute by asserting that an expert will provide admissible evidence. However, an affidavit that specifies the issues on which the expert will testify yields a triable dispute only as to those specific issues. *Piskorski v. Ron Tonkin Toyota, Inc.*, 179 Or App 713, 718, 41 P3d 1088 (2002).

If materials are submitted late in opposition to a motion for summary judgment, those materials are not, merely by having been filed, automatically part of the record for appellate review of a trial court's grant of summary judgment.

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Rather, the appellate court will first decide, and then review only for abuse of discretion, whether the trial court did or did not consider the late-filed materials. If the trial court did not consider such materials and is found to have acted within its discretion on the facts presented, the late materials are not part of the record that the appellate court will consider in deciding whether to uphold summary judgment. *Finney v. Bransom*, 326 Or 472, 478-81, 953 P2d 377 (1998).

IV. At Trial

A. Conduct of Trial in General.

1. One party cannot avail itself of the record made by another. *Oregon Auto Ins. Co. v. Baltzor*, 70 Or App 34, 39, 688 P2d 403 (1984) ("record" was another party's motion for judgment of dismissal).

2. The Oregon Court of Appeals will not reverse a trial court for evidentiary error unless the error affects the substantial right of a party. ORS 19.415(2). The admission or exclusion of evidence that is merely cumulative does not affect a substantial right. *Hansen v. Abrasive Engineering and Manufacturing*, 112 Or App 586, 831 P2d 693 (1992). To obtain reversal an appellant has not always been required to establish that the absence of evidentiary error would have produced a different result. Instead, the test for prejudicial error has been whether the evidence affected a substantial right, that is,

whether erroneously admitted evidence has "some likelihood of affecting the result." *State v. Johnson*, 313 Or 189, 201, 832 P2d 443 (1992); *Hass v. Port of Portland*, 112 Or App 308, 314, 829 P2d 1008 (1992). **CAVEAT:** In *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 173, 61 P3d 928 (2003), the court construed ORS 19.415(2) to require "error that can be said to '*produce* a material influence' or 'to *have* a detrimental influence' on th[e] rights [of a party] and not merely one that 'might' have changed the outcome of the case." (Emphasis in original.)

B. Admission of Evidence.

1. A party must either specifically object to, or move to strike, inadmissible evidence. OEC 103; *Shields v. Campbell*, 277 Or 71, 77, 559 P2d 1275 (1977). If a witness gives allegedly inadmissible testimony, a prompt motion to strike is required if exclusion is to be considered on appeal. OEC 103(1)(a); ORS 40.025(l)(a); *see, e.g., McEwen v. Ortho Pharmaceutical*, 270 Or 375, 421, 528 P2d 522 (1974); *Devine v. Southern Pacific Co.*, 207 Or 261, 273, 295 P2d 201 (1956).

C. Exclusion of Evidence.

1. When evidence is excluded, the trial lawyer must declare on the record, before or immediately after the ruling, why the evidence is admissible and make an offer of proof. *Berhanu v. Metzger*, 119 Or App 175, 180, 850 P2d 373 (1993). On the specificity required in an offer of proof, see *Gatewood v. Simpson*, 56 Or App 586, 642 P2d 367 (1982). An offer of proof may be made by questions to and answers from the witness or by counsel summarizing what the proposed evidence is expected to be. Either method is acceptable if the reviewing court is able to determine whether it was prejudicial error to exclude the proffered evidence. *State v. Hughes*, 192 Or App 8, 16-17, 83 P3d 951 (2004) (en banc).

2. Failure to explain to the trial court why the evidence is admissible waives the right to challenge the ruling on appeal. *Simpson v. Simpson*, 83 Or App 86, 88, 730 P2d 592 (1986). Moreover, evidentiary objections once made easily can be waived subsequently. When a plaintiff

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timely objected to offered testimony on grounds of relevance, but agreed the witness could testify on one limited issue, plaintiff could not challenge the testimony thereafter given if plaintiff did not object to or move to strike the testimony actually given. *Honstein v. Metro West Ambulance Service*, 193 Or App 457, 467, 90 P3d 1030 (2004).

Once a party has sufficiently objected to the admission of evidence and that objection has been overruled, the objecting party does not waive its evidentiary objection by thereafter countering its opponent's evidence during trial. *McCathern v. Toyota Motor Corp.*, 332 Or 59, 70, 23 P3d 320 (2001).

3. When evidence is offered and the appellant fails to offer evidence of foundation at the time of exclusion, exclusion of the evidence is not error even if, later in the case, evidence is admitted that could have supplied the foundation earlier. *State ex rel Pershall v. Woolsey*, 51 Or App 339, 342-43, 625 P2d 1340 (1981).

4. If cross-examination of a witness is precluded, the attorney must make an offer of proof of what the prohibited questioning would have shown. An offer of proof may be made by questioning the witness with the jury excused. *State v. Affeld*, 307 Or 125, 128-29, 764 P2d 220 (1988).

5. When an error that affects a substantial right of a party is based on a ruling that excludes evidence, error is preserved if the substance of the evidence was made known to the court or was apparent from the context within which the questions were asked. *Schacher v. Dunne*, 109 Or App 607, 820 P2d 865 (1991).

6. Exclusion of evidence is preserved for appellate review, even without an offer of proof, when the exclusion is a consequence of a trial court's underlying legal ruling. *Marcoulier v. Umsted*, 105 Or App 260, 805 P2d 140 (1991).

7. A party cannot reverse positions on appeal and argue for reversal on a ground which that party contradicted at trial. *State v. Solomon*, 133 Or App 184, 187, 890 P2d 433 (1995).

8. Finally, exclusion of evidence will be considered harmless if there is little likelihood that it affected the result. The test includes two inquiries: "First, what was the relative strength of the parties' evidence? And, second, in the totality of the parties' evidence, how significant was the excluded evidence?" *State v. Lytsell*, 184 Or App 75, 83, 55 P3d 503 (2002).

D. Examination and Cross-Examination of Witnesses.

An objection must be specific when seeking to examine a witness. In *McFarlane v. Pony Express Courier Corp.*, 184 Or App 461, 465, 60 P3d 590 (2002), counsel's objection that "I should get it now" was held insufficient to permit an appeal argument that delaying disclosure of an expert's report until the night before violated due process.

E. Jury Instructions Given.

1. Error in an instruction is not preserved unless the opposing party both objects and particularly states the grounds for its objection. *Menke v. Bruce*, 88 Or App 107, 113, 744 P2d 291 (1987); ORCP 59 H. Generally, only citing a case as the basis for an objection is insufficient to preserve an objection. *Hovey v. Davis*, 120 Or App 425, 428, 852 P2d 929 (1993); *Ball v. Jorgenson*, 147 Or App 55, 60, 934 P2d 634 (1997). A party who disagrees with a proposed instruction must call the court's attention to a specific objection so that the court may have an opportunity to correct

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the error. *Doe v. Oregon Conference of Seventh-Day Adventists*, 199 Or App 319, 327-28, 111 P3d 791 (2005). Additionally, an exception to a jury instruction on one ground does not preserve the claim of error on a differing ground. *Baker v. Infratech Corp.*, 174 Or App 452, 457, 26 P3d 835 (2001).

2. Two exceptions are recognized to the requirement of ORCP 59 H that specific objection be made after an instruction is given. First, refusal by the court to give a requested instruction can, in certain circumstances, preserve error in an instruction that was given. *See infra* IV.E.4. Second, error is preserved when counsel has made its objection "very clear" before the jury is instructed. *Lutz v. State of Oregon*, 130 Or App 278, 282, 881 P2d 171 (1994) (citing *Rogers v. Hill*, 281 Or 491, 496 n 4a, 576 P2d 328 (1978)).

3. Failure to give a requested instruction does not automatically serve as an exception to instructions if they were in fact given. *State v. Castrejon*, 317 Or 202, 208-09, 856 P2d 616 (1993). If the attorney believes an instruction is objectionable in comparison to an instruction the attorney has requested on the same issue, he or she should not rely solely on his or her tender of the requested instruction to preserve his or her record. *Leiseth v. Fred Meyer, Inc.*, 185 Or App 53, 56, 57 P3d 914 (2002). Instead, the attorney should also object to the court's instruction, with an explanation on the record. Refusal of a requested instruction preserves error as to an instruction given only if the requested instruction is both a correct statement of the law and clearly and directly brings to the trial court's attention the claimed error in the instruction actually given. *Bennett v. Farmers Ins. Co.*, 332 Or 138, 154-55, 26 P3d 785 (2001).

4. If an exception is taken and an instruction proves to be erroneous on some other ground, the exception will not preserve the error for appeal. *Blair v. Mt. Hood Meadows Development Corp.*, 291 Or 293, 304, 630 P2d 293 (1981); *Henderson v. Nielsen*, 127 Or App 109, 119, 871 P2d 495 (1994). An exception focusing on only part of an instruction can, however, be sufficient to preserve an exception to the whole instruction when the emphasis on the portion is consistent with the argument against the whole. *Rogers v. Meridian Park Hospital*, 93 Or App 533, 536, 763 P2d 400 (1988).

5. The giving of an erroneous instruction must also be shown to be prejudicial. In context with the instructions as a whole, this requires persuading the court that it "can fairly say that the instruction probably created an erroneous impression of the law in the minds of the jury[] which affected the outcome of the case." *Jennison v. Providence St. Vincent Medical Center*, 174 Or App 219, 228, 25 P3d 358 (2001) (citations and internal quotation marks omitted; brackets in original).

F. Jury Instructions Refused.

1. Instructions should be requested in writing and, once approved by the court, should also be given in writing to the jurors, who will take those instructions with them while deliberating. ORCP 59 B. It is not sufficient to request the court to instruct generally on an issue; rather, the party must state for the record precisely the form and content of the proposed instruction. *Roop v. Parker Northwest Paving Co.*, 194 Or App 219, 248-50, 94 P3d 885 (2004). A party is entitled to jury instructions consistent with his or her theory of the case, provided that the instructions (a) correctly state the

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law, (b) are based on the current pleadings, and (c) are supported by evidence. *Fuller v. Merten*, 173 Or App 592, 596, 22 P3d 1221 (2001); *see also Schwarz v. Philip Morris Inc.*, No. A118589, ___ Or App ___, 2006 WL 1330862 (May 17, 2006). No party is required to request a jury instruction that advances the use of evidence in a way that benefits the party's adversary. "Rather, Oregon law allocates the responsibility of each party to request a jury instruction on *its* theory of the case, not on the other party's theory of the case." *Schwarz*, 2006 WL 1330862 at *17.

2. Effective January 1, 2006, ORCP 59 H was amended to *delete* language that, until then, provided an automatic exception when a trial court refused to give a requested instruction. *See, e.g., Beall Transport Equipment Co. v. Southern Pacific*, 335 Or 130, 137, 60 P2d 530 (2002) (under pre-2006 rule, automatic exception arose when request for instruction was refused). In cases tried after January 1, 2006, refusal to instruct is preserved as error only if counsel (1) objects to the refusal as error, (2) explains with particularity and on the record why the refusal is error, and (3) also states this objection "immediately after" the trial court instructs the jury. ORCP 59 H.

3. If the attorney discovers that he or she has requested an instruction that is erroneous, he or she should withdraw it before the court instructs, in order to avoid invited error. A party can assign error on appeal to a challenged instruction similar to the one that party requested, so long as the requested instruction was unequivocally withdrawn before the jury was instructed. *PGE v. Hershiser, Mitchell, Mowery & Davis*, 86 Or App 40, 43, 738 P2d 593 (1987).

4. Failure to instruct on an allegation has been deemed not equivalent to striking the allegation from the pleading. It consequently is necessary to object separately to a trial court's striking of allegations from a pleading. *Mounts v. Knodel*, 83 Or App 90, 97-98, 730 P2d 594 (1986).

5. The test for prejudice from an erroneous refusal to instruct resembles the test for prejudice arising from the giving of an erroneous instruction. Again considered in context with the instructions as a whole, prejudice arises if the failure to instruct "'probably created an erroneous impression of the law in the minds of the members of the jury, and * * * that erroneous impression may have affected the outcome of the case.'" *Fuller*, 173 Or App at 597 (citation omitted). **CAVEAT:** While an erroneous jury instruction was not involved in *Shoup*, 335 Or at 173, the court's interpretation of ORS 19.415(2) may require showing that the error *did* affect, not merely "may have affected," the outcome of the case.

G. Verdict Form.

A deficiency in a verdict form is waived unless excepted to before submission to the jury. *Bucher v. Cascade Steel Rolling Mills, Inc.*, 98 Or App 375, 377-78, 779 P2d 201 (1989). Objecting after the jury has been dismissed is too late. *Building Structures, Inc. v. Young*, 328 Or 100, 968 P2d 1287 (1998). Similar to an instructional error, an error in a verdict form is reversible only if it "'probably created an erroneous impression of the law in the minds of the jurors which affected the outcome of the case.'" *Nolan v. Mt. Bachelor, Inc.*, 317 Or 328, 337, 856 P2d 305 (1993) (citation omitted).

H. Sufficiency of the Evidence.

1. In a jury trial, a party must move for a directed verdict before the jury is instructed. The motion must specify grounds; grounds not argued to the trial court cannot be raised on appeal.

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Remington v. Landolt, 273 Or 297, 302, 541 P2d 472 (1975); *Beckett v. Computer Career Institute, Inc.*, 120 Or App 143, 149-50, 852 P2d 840 (1993).

2. When there are multiple claims in a jury trial, it is possible that one claim may be factually sufficient while one or more of the other claims may arguably be insufficient. In that circumstance, counsel needs to decide whether to seek or oppose use of either a special verdict or a general verdict, with interrogatories seeking a separate finding on each claim. If you earlier timely objected to submission of one or more claims being legally erroneous or factually insufficient, but agreed to use of a general verdict, an appellate court may not be able to tell whether the jury actually based its verdict on the factually insufficient or legally erroneous claim.

   Reversing *Whinston v. Kaiser Foundation Hospital*, 309 Or 350, 788 P2d 428 (1990), the court in *Shoup*, 335 Or 164, held that appellate courts (1) may no longer employ the "we can't tell" rule to vacate a judgment and order a new trial but (2) may, when the appeal is from a JNOV, employ the "we can't tell" rule among other factors in deciding in its discretion whether to order a new trial. In either event, the court must be able to say that the error *is not* substantially affected, and not merely *might*

have affected the outcome of the case. *Jensen v. Medley*, 336 Or 222, 239-40, 82 P3d 149 (2003) (award of noneconomic damages upheld when court could not tell whether award was based on erroneous agency instruction or on unchallenged ratification instruction). Because the "we can't tell" rule yields affirmance of a judgment, compound questions in a special verdict also should not be submitted or, if submitted by the adverse party or the court, should be challenged. *Lyons v. Walsh & Sons Trucking Co., Ltd.*, 337 Or 319, 323-26, 96 P3d 1215 (2004) (judgment affirmed when compound question in special verdict form left appellate court unable to determine whether jury based its verdict on lawful or unlawful ground).

3. In a trial to the court, a party must move for dismissal before the court's decision. In civil cases tried to a judge, a litigant can not raise the sufficiency of the plaintiff's evidence on appeal unless the litigant has asserted the legal insufficiency of the evidence in the trial court. *Falk v. Amsberry*, 290 Or 839, 846, 626 P2d 362 (1981); *Lee v. Koehler*, 200 Or App 85, 91, 112 P3d 477 (2005) (in cases tried to the court, insufficiency of evidence must be raised in some cognizable manner).

   Whether at law or in equity, a party *without* the burden of proof must assert the legal insufficiency of his or her opponents' evidence in the trial court in order to assert that issue on appeal. *Brown v. D2S Resources*, 61 Or App 8, 12, 656 P2d 946 (1982). A party that *bears* the burden of proof on an issue at trial is not required to raise, for preservation purposes, the claim that it should prevail on the evidence as a matter of law. *Peiffer v. Hoyt*, 339 Or 649, 656-60, 125 P3d 734 (2005).

4. Keep in mind the differences between motions for summary judgment, for dismissal, and for a directed verdict. Renewal of a summary judgment motion at the end of the plaintiff's case does not preserve error that could have been preserved by a motion for dismissal or for a directed verdict. *First Interstate Bank v. Silvey-Bames Prop.*, 80 Or App 197, 201, 721 P2d 878 (1986).

5. The proper method for moving to withdraw fewer than all issues in a claim is not by motion for a directed verdict or dismissal.

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Instead, a peremptory instruction should be requested or the attorney should move to strike the deficient allegations. *Stokes v. Lundeen*, 168 Or App 430, 434 & n 3, 7 P3d 586 (2000). A motion for a directed verdict may not preserve an error for appeal when the error is insufficient evidence on an issue but not on a claim. For example, if the evidence in a negligence action shows without dispute that a defendant violated a statute, that the injured party is within the class intended to be protected, and that the risk presented was within the scope of the risk intended to be avoided, a peremptory instruction on negligence per se would be proper. This is not, however, equivalent to a directed verdict on the negligence claim. A jury issue remains if there is also evidence from which a jury could find that the defendant acted reasonably in violating the statute. If there is such evidence and only a directed verdict is moved for and denied, that denial will not preserve error that could have been preserved by offering a peremptory instruction. *See Roach v. Kelly Health Care*, 87 Or App 495, 503, 742 P2d 1190 (1987); *Erickson Air-Crane Co. v. United Tech. Corp.*, 87 Or App 577, 579, 743 P2d 747 (1987); *Bossingham v. Klamath Co.*, 81 Or App 399, 403 & n 1, 725 P2d 931 (1986); *Skaggs v. Hendge*, 127 Or App 660, 661 n 3, 874 P2d 93 (1994) (effect of peremptory instruction and motion for directed verdict may sometimes be same).

I. Misconduct of Counsel or Court.

Alleged impropriety must be challenged by contemporaneous objection or motion for mistrial. *Staples v. Union Pacific R.R. Co.*, 265 Or 153, 156, 508 P2d 426 (1973). When a court makes comments that could be the subject of a mistrial motion, it is imperative that the attorney move against those comments immediately. A motion for mistrial is timely only if it is made when the objectionable event occurs. *State v. Williams*, 322 Or 620, 912 P2d 364 (1996).

J. Entitlement to Attorneys' Fees.

If fees are going to be sought, the safest course is to make explicit by your pleadings and during trial the grounds upon which fees are being sought. *Precision Lumber Co. v. Martin Marietta Corp.*, 125 Or 34, 40, 865 P2d 376 (1993) (awarding fees when party failed to state at trial basis for award but it was clear from pleadings that claim was based on contract clause). Submission of a detailed statement of attorneys' fees is not required to preserve challenge to a trial court's refusal to award any fees at all. *Wiper v. Fawkes*, 198 Or App 331, 339, 109 P3d 798 (2005).

V. *In the Trial Court After Verdict or Decision*

A. Judgment NOV.

Unlike federal court, a motion for judgment NOV is not required to preserve on appeal an attack on the sufficiency of the evidence in a jury case, so long as the appellant timely moved for a directed verdict before submission to the jury. *Meyers v. Oasis Sanitorium, Inc.*, 224 Or 414, 418, 356 P2d 159 (1960). A corollary to this is that a court may not grant a judgment notwithstanding the verdict on grounds not previously asserted and rejected in a motion for directed verdict. *Hamilton v. Lane County*, 204 Or App 147, 152, 129 P3d 235 (2006). **CAVEAT:** If, however, you file *only* a motion for judgment NOV, and do not join it with an alternative motion for a new trial, you have waived for appeal any and all arguments for a new trial. *Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto*, 322 Or 406, 411, 908 P2d 300 (1995).

B. Motion for New Trial.

With one notable exception, a motion for a new trial is not required to preserve on appeal an error previously preserved during trial. *Kahn v. Weldin*, 60 Or App 365, 371, 653 P2d 1268 (1982). When there was a "we can't tell" verdict with at least one factually insufficient claim, any right to a new trial was waived if a party files, after the verdict, a motion for judgment NOV alone. *Goodyear Tire & Rubber*, 322 Or at 411. **CAVEAT:** Evisceration of the "we can't tell" rule

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in *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 171, 61 P3d 928 (2003), probably moots this exception. **CAVEAT:** A party may not use "surprise" under ORCP 64 B as a basis for seeking a new trial unless a party moved for a continuance so as to respond during trial, thus possibly eliminating the need for a new trial. *Mitchell v. Mt. Hood Meadows Oreg.*, 195 Or App 431, 440, 99 P3d 748 (2004) (en banc).

C. Motion to Reconsider.

Never file a motion to reconsider. Motions to reconsider are "motions asking for trouble." *Carter v. U.S. National Bank*, 304 Or 538, 546, 747 P2d 980 (1987) (Peterson, J., concurring). An argument is not preserved for appeal if it is made for the first time in a motion for reconsideration. *Mears v. Marshall*, 138 Or App 476, 479, 909 P2d 212 (1996).

D. Flaws in the Verdict.

1. An improper verdict must be challenged when the verdict is returned, or the error is waived. *Big Bend Agric. Coop v. Tim's Trucks*, 277 Or 17, 20, 558 P2d 844 (1977); *Torbeck v. Chamberlain*, 138 Or App 446, 453, 910 P2d 389 (1995).

2. An objection to the form of judgment will not preserve for appeal the issue of whether the verdict is defective. *Kilgore v. People's Sav. & Loan Ass'n*, 107 Or App 743, 814 P2d 163 (1991).

3. If, however, a verdict is void and not just improper, failure to object before the verdict is received and filed is not a waiver. *Shultz v. Monterey*, 232 Or 421, 425, 375 P2d 829 (1962).

4. If a party fails to request a jury poll, the right to request a poll is waived. *Eisela v. Rood*, 275 Or 461, 468, 551 P2d 441 (1976). The court does not have to poll the jury in the exact manner requested by counsel. *Martin v. Burlington Northern*, 47 Or App 381, 385, 614 P2d 1203 (1980).

E. Amount of Punitive or General Unliquidated Damages.

Before one can say that the amount of a jury's general or punitive damage award was the product of passion and prejudice, or that the amount of a punitive damage award is excessive under federal due process, there must first be a verdict. Just as a ruling on a motion for a new trial is reviewable when it concerns juror misconduct, *see State v. Mayer*, 146 Or App 86, 88, 932 P2d 570 (1997), a motion for a new trial is the appropriate (and, temporally, the only) means for challenging an excessive verdict. *Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 558-59 & n 14, 17 P3d 473 (2001).

Additionally, in a trial to the court, a party must object to a legally erroneous damage determination in the period after issuance of the judge's opinion but before entry of judgment. *Northwest Country Place v. NCS Healthcare of Oregon*, 201 Or App 448, 458, 119 P3d 272 (2005).

F. Defects in Court's Findings.

1. Unless a request has been made before commencement of the trial, a court is not required to make special findings. ORCP 62 A.

2. If special findings are made, a party need not object to the findings themselves, nor even to general findings, in order to challenge the findings on appeal. ORCP 62 E. If, however, the issue is not the findings themselves, but instead the sufficiency of those findings to support a judgment, a party must assert the insufficiency before the trial court in order to argue insufficiency on appeal. *Sappington v. Brown*, 68 Or App 72, 77, 682 P2d 775 (1984).

G. Evidentiary Errors or Legal Errors Previously Raised.

No motion for a new trial or other posttrial motion is required to preserve for appeal exceptions or objections already made. *Kahn*, 60 Or App 365.

H. Loss of Right to Appellate Review Through Acceptance of Benefits.

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1. An appellant can lose the right to appeal, by accepting benefits under a judgment when that acceptance is inconsistent with appeal of the judgment. In summary, an appellant cannot accept the benefits of a judgment and also pursue an appeal that may overthrow the right to those benefits. An appeal may, however, be maintained when benefits have been accepted and the relief sought by the appellant on appeal is consistent with acceptance of the benefits of the judgment. *Ramex, Inc. v. Northwest Basic Industries*, 176 Or App 75, 80-84, 29 P3d 1211 (2001). *See generally Schlecht v. Bliss*, 271 Or 304, 308-14, 532 P2d 1 (1975). Similarly, if a judgment is divisible, an appellant may accept benefits under one portion and challenge on appeal a divisible portion of the judgment. *Bates v. Masvidal*, 85 Or App 614, 617, 737 P2d 973 (1987).

VI. On Appeal

A. Appeal.

1. Timely appeal from a judgment also serves as an appeal from prior rulings and orders leading to that judgment. ORS 19.140; *Northern Ins. Co. v. Conn Organ*, 40 Or App 785, 793, 596 P2d 605 (1979).

2. If, in your notice of appeal, you designate less than the complete transcript of all testimony and all instructions given and requested, you must specify in your notice of appeal the errors you assign. ORAP 2.05(7).

3. Error is not preserved by an appellant unless error is specifically assigned in the appellant's brief, with verbatim quotations showing how the issue was raised below. ORAP 5.45.

4. An issue cannot be raised for the first time at oral argument or in a reply brief. *State v. Jones*, 184 Or App 57, 60 & n 2, 55 P3d 495 (2002); *Hayes Oyster Co. v. Dulcich*, 170 Or App 219, 237 n 20, 12 P3d 507 (2000).

B. Cross-Appeal.

1. A cross-appeal is not required to argue, in *support* of the judgment, a ground that the trial court considered but rejected. *McKinley v. Owyhee Project North Board of Control*, 103 Or App 253, 268, 798 P2d 673, *modified on other grounds* 104 Or App 576 (1990).

2. A cross-appeal is required when a party seeks relief that would alter the judgment. *Id.*

C. Respondent's Cross-Assignment of Error.

1. A cross-assignment of error by a respondent is an assertion of error that becomes relevant if and when the trial court reverses or otherwise awards relief to the appellant, *e.g.,* evidentiary issues that will again arise following reversal and remand for a new trial. ORAP 5.57.

2. Although a cross-assignment of error does not require that a cross-appeal has been filed, such arguments are preserved for appellate review only when the respondent makes the arguments in its brief, in the format required for assignments of error generally. *Id.*; *Badger v. Paulson Inv.*, 100 Or App 12, 14, 784 P2d 125 (1989), *modified on other*

Photo of Author & Sled Dogs

Recent Significant Oregon Cases

Stephen K. Bushong
Department of Justice

I. Claims and Defenses

■ *Washburn v. Columbia Forest Products, Inc.*, 340 Or 469 (2006)

An employee who used marijuana in accordance with the Oregon Medical Marijuana Act to treat leg spasms that disrupted his sleep was not "disabled" for purposes of ORS 659A.112 to 659A.139, the Supreme Court held in *Washburn v. Columbia Forest Products, Inc.*, 340 Or 469 (2006). Plaintiff's employment was terminated after he tested positive for marijuana use; he argued that his employer was required to accommodate his disability. The Court of Appeals agreed with plaintiff, but the Supreme Court reversed, noting that plaintiff could counteract his condition by using prescription medication. As a result, the Court concluded that, "because plaintiff can counteract his physical impairment through mitigating measures, his impairment does not…rise to the level of a substantial limitation on a major life activity." *Id.* at 479. Therefore, plaintiff's employer had no statutory duty to accommodate his physical limitation "in the manner sought by plaintiff." *Id.* at 480.

Stephen K. Bushong

■ *Bergeron v. Aero Sales, Inc.*, 205 Or App 257 (2006)

The purchaser of a private airport hangar was liable for converting thousands of gallons of jet fuel stored on the premises, the Court of Appeals concluded in *Bergeron v. Aero Sales, Inc.*, 205 Or App 257 (2006), because the purchaser did not acquire title to the jet fuel when he bought the hangar and fuel tank. Third-party plaintiff (Kasper) stored several thousand gallons of jet fuel in a tank owned by Praegitzer; Praegitzer then sold the hangar and the fuel tank to Curtright. Curtright argued that he purchased the fuel with the hangar and tank and refused to allow Kasper to remove the fuel. Kasper thought he had at least a ghost of a chance of prevailing on his conversion claim, but the trial court ruled in Curtright's favor. The Court of Appeals reversed, holding that "Kasper was entitled to prevail as a matter of law[.]" *Id.* at 266. The court explained that Curtright did not acquire good title to the fuel under the Uniform Commercial Code's general rule that "a purchaser can acquire only the title that his seller had" (*Id.* at 262), and it was undisputed that the seller—Praegitzer—did not own the fuel. An exception allowing a seller with "voidable title" to transfer good title to a good faith purchaser for value did not apply, because Praegitzer did not have "voidable title" to the fuel. "Voidable title" is obtained, the

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court explained, only "when the owner willingly parts with the goods but the transaction is flawed in some way." *Id.* at 263. An exception allowing a merchant to transfer title of goods "entrusted" to the merchant in the ordinary course of business did not apply because there was no evidence that Praegitzer "dealt in jet fuel." *Id.* at 263. The jet fuel also did not qualify as "treasure trove"—which would belong to the "finder"—and it was not "lost" or "abandoned" by Kasper. Thus, "Kasper retained his superior title to the jet fuel, notwithstanding Curtright's good-faith purchase of the hangar and fuel tank from Praegitzer." *Id*. at 266.

■ *Weston v. Camp's Lumber & Building Supply, Inc.*, 205 Or App 347 (2006)

The purchasers of lumber infested with a wood-boring beetle larvae that compromised the structural integrity of their home had a viable breach of warranty claim against a lumber retailer, the Court of Appeals held in *Weston v. Camp's Lumber & Building Supply, Inc.*, 205 Or App 347 (2006). Plaintiffs also had a viable claim under Oregon's Unlawful Trade Practices Act (UTPA) against the retailer and lumber wholesalers and manufacturers. The trial court had granted summary judgment to all defendants, holding that all claims were barred by the eight-year statute of ultimate repose that applies to product liability actions (ORS 30.905). The Court of Appeals reversed on the UTPA claim, holding that ORS 30.905 did not apply because "the gravamen of the facts alleged in plaintiffs' UTPA claim is not based on a product defect or failure, but on a willful misrepresentation made in the course of the lumber defendants' businesses." *Id.* at 359. ORS 30.905 did not apply to the breach of warranty claim because that claim "arises predominantly from the contractual obligations of the parties and not from a defect in the lumber." *Id.* at 363. Neither claim was barred by the applicable statute of limitations as a matter of law because the UTPA and breach of express warranty as to future performance claims accrued when plaintiffs discovered the breach, and there were issues of material fact as to when that occurred. *Id*. at 364, 368-69.

■ *T.R. v. Boy Scouts of America*, 205 Or App 135 (2006)

A civil rights claim against the City of The Dalles based on allegations that the city was responsible for an employee's sexual abuse of plaintiff was barred by the two-year statute of limitations, the Court of Appeals held in *T.R. v. Boy Scouts of America*, 205 Or App 135 (2006). Plaintiff (a 16 year old boy) joined an Explorer program operated by the city in cooperation with the Boy Scouts. Plaintiff alleged that the program's advisor, Officer Tannehill of The Dalles Police Department, thereafter engaged in sexual activity with plaintiff "on numerous occasions, usually without plaintiff's consent and sometimes under compulsion by Tannehill." *Id.* at 138. The claims were barred, the court explained, because "[m]ore than two years before he filed this action, plaintiff knew sufficient facts to trigger the duty to discover the parties that caused his injury." *Id.* at 142-43. In particular, "at the time of the abuse itself, plaintiff had sufficient information regarding his injury and its physical cause to trigger a reasonably diligent inquiry into whether he had legal recourse and, if so, whether it ran against the city." *Id.* at 143.

■ *Hamilton v. Paynter*, 204 Or App 119 (2006)(per curiam)

In *Hamilton v. Paynter*, 204 Or App 119 (2006)(per curiam), the Court of Appeals adhered to its ruling in *Minisce v. Thompson*, 149 Or App 746 (1997), holding that the statute of limitations in a personal injury action is tolled pursuant to ORS 12.155 by advance payments "only when an advance payment is made by a third-party insurer[.]" *Hamilton*, 204 Or App at 120. On June 2, 2006, the Oregon Supreme Court granted review in *Hamilton* to decide whether ORS 12.155 applies only when a liability insurer makes the advance payment or also when an individual makes the advance payment.

■ *Beers v. Brown*, 204 Or App 395 (2006)

The plaintiff in *Beers v. Brown*, 204 Or App 395 (2006), owned a home adjacent to defendants' golf course and driving range. Plaintiff sued for nuisance, trespass, and negligence, alleging that golf balls from the driving range "were landing on her property and hitting her house." *Id.* at 397. Defendants asserted that they had "obtained a prescriptive easement giving them the right to allow golf balls to go onto plaintiff's property." *Id.* Defendants also filed a counterclaim, seeking to recover "the cost of erecting a 70-foot-high fence between the driving range and plaintiff's

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property." *Id.* The trial court rejected the counterclaim and ruled for plaintiff, awarding her $5,500 in compensatory damages and enjoining defendants from allowing golfers to use other than "low compression" golf balls at the driving range. The Court of Appeals affirmed, holding that defendants "failed to show by clear and convincing evidence that their use of plaintiff's property was open or notorious throughout" the 10-year period required to establish a prescriptive easement. *Id.* at 406-07.

- ***Clifford v. City of Clatskanie*, 204 Or App 566 (2006)**

Summary judgment was improperly granted on a claim for intentional infliction of emotional distress (IIED) against a police officer for falsely disclosing the identity of a 9-1-1 caller, the Court of Appeals held in *Clifford v. City of Clatskanie*, 204 Or App 566 (2006). The claim arose after a teenager, Travis Clifford, committed suicide 4 days after the police—responding to two anonymous 9-1-1 calls—raided a teenage drinking party at the home of Travis's former girlfriend. Plaintiff (Travis's mother) alleged that at least one of the police officers falsely disclosed to high school students that Travis "had made the 9-1-1 call and gotten them busted." *Id.* at 574. As a result, plaintiff alleged, "other high school students ostracized and harassed Travis, causing him extreme emotional distress" that ultimately resulted in his suicide. *Id.* at 569. The Court of Appeals, in reversing summary judgment in favor of defendants, first found that the complaint alleged a legally sufficient claim for IIED, "so long as relief is limited to recovery of non-death-related damages." *Id.* at 572. The court then found that there were disputed issues of material fact regarding the requisite causation, and whether the officer's disclosure of the identity of the 9-1-1 caller was protected by an absolute privilege or discretionary immunity. *Id*. at 576-77.

- ***Generaux v. Dobyns*, 205 Or App 183, 195 (2006)**
- ***Graves v. Tulleners*, 205 Or App 267 (2006)**
- ***Nixon v. Cascade Health Services, Inc.*, 205 Or App 232 (2006)**

The beneficiaries of an irrevocable trust were entitled to rescind the trust where they established by clear and convincing evidence that a mistake existed when the trust instrument was executed that was "so fundamental that it frustrated the purpose of the instrument[.]" *Generaux v. Dobyns*, 205 Or App 183, 195 (2006). An agreement apportioning proceeds of a wrongful death action could not be rescinded based on (1) misrepresentation because there was no proof of reliance; (2) mutual mistake because the agreement functioned as a release; or (3) negligent or willful acts on the part of the personal representative of the estate because the apportionment did not result in a loss to the estate. *Graves v. Tulleners*, 205 Or App 267 (2006). A release executed in settling a medical malpractice claim did not preclude a negligence defense to the hospital's collection action. *Nixon v. Cascade Health Services, Inc.*, 205 Or App 232 (2006).

II. Procedure

- ***Gritzbaugh Main Street Prop. v. Greyhound Lines*, 205 Or App 640 (2006)**
- ***Webster v. Harmon*, 205 Or App 196 (2006)**

A corporation may be held in contempt for violating a preliminary injunction only if "an agent of the corporation, while acting within the scope of employment and on behalf of the corporation, engages in willful disobedience of the court's order." *Gritzbaugh Main Street Prop. v. Greyhound Lines*, 205 Or App 640 (2006). The procedure for objecting to an arbitrator's award of attorney fees is governed by ORS 36.425, not ORCP 68 C(4). *Webster v. Harmon*, 205 Or App 196 (2006).

- ***Miller v. Pacific Trawlers, Inc.*, 204 Or App 585 (2006)**

A denial of a motion to change venue is not reviewable on direct appeal from a final judgment, the Court of Appeals held in *Miller v. Pacific Trawlers, Inc.*, 204 Or App 585 (2006), where venue was based on a legal determination rather than the court's discretion. Under those circumstances, mandamus "was the proper remedy for defendant to pursue." *Id.* at 594. The court also held in *Miller* that plaintiff was not required "to produce expert testimony of the present value of his lost future income" in order to recover those damages. *Id.* at 601.

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Recent Significant Oregon Cases

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- ***Hamilton v. Lane County*, 204 Or App 147 (2006)**
- ***Maricich v. Lacoss*, 204 Or App 61 (2006)**

A trial court may not grant a motion for judgment notwithstanding the verdict (JNOV) based on grounds not previously raised in a motion for directed verdict. *Hamilton v. Lane County*, 204 Or App 147 (2006). And in *Maricich v. Lacoss*, 204 Or App 61 (2006), the Court of Appeals held that the trial court erred in dismissing, *sua sponte*, a complaint on the grounds of *forum non conveniens*. The court explained that dismissal "for *forum non conveniens* presumes that the trial court has jurisdiction, but defers its jurisdiction in favor of the jurisdiction of another court", and that was "a finding that the trial court expressly refused to make." *Id.* at 65-66.

III. Miscellaneous

- ***MacPherson v. DAS*, 340 Or 117 (2006)**
- ***Outdoor Media Dimensions v. Dept. of Transportation*, 340 Or 275 (2006)**
- ***Jury Resource Service Center v. De Muniz*, 340 Or 423 (2006)**

The Oregon Supreme Court recently issued several rulings on significant constitutional questions. The Court rejected constitutional challenges to Measure 37 in *MacPherson v. DAS*, 340 Or 117 (2006). The Court held in *Outdoor Media Dimensions v. Dept. of Transportation*, 340 Or 275 (2006), that (1) many of the restrictions on highway signs set forth in the Oregon Motorist Information Act (OMIA), ORS 377.700 to 377.840 and ORS 377.992, are reasonable time, place and manner restrictions that do not violate Article I, section 8 of the Oregon Constitution; but (2) the OMIA unconstitutionally restricts the subject of expression by requiring a permit for a sign whose message does not relate to the premises on which it is located. In *Jury Resource Service Center v. De Muniz*, 340 Or 423 (2006), the Court held that the First Amendment does not require full disclosure of all jury pool records, including source lists, master lists, and jury term lists.

- ***Williams v. Philip Morris Inc.*, 340 Or 35 (2006)**

In *Williams v. Philip Morris Inc.*, 340 Or 35 (2006), the Supreme Court held that a $79.5 million punitive damage award on a fraud claim against a tobacco company did not violate the Due Process Clause. On May 30, 2006, the United States Supreme Court granted *certiorari* in that case to review two issues: (1) whether the Oregon Supreme Court's conclusion that the defendant's conduct was highly reprehensible and analogous to a crime can override the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm, and (2) whether due process permits a jury to punish the defendant for effects of its conduct on non-parties. ❐

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