Oregon State Bar

Litigation Journal

FALL 2016 VOLUME 35 NUMBER 3

In This Issue...

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The New World Order of Dispute Resolution

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For lawyers working in nearly every area of civil practice, arbitration is on the rise. Whether a lawyer primarily works in construction, employment, financial services, commercial contracts, or consumer credit, arbitration clauses are becoming ubiquitous in the agreements in these areas. Further, under expansive Federal and state law, these clauses are almost always enforced and court review is highly limited.

As arbitration becomes more and more prevalent and courts enforce these clauses more and more often, it becomes increasingly important for the savvy litigator to understand the many differences between courtroom litigation and arbitration, with an eye towards exploiting them to his or her advantage.

One of the key areas in which a party can gain an advantage in a dispute is by structuring the record and controlling the presentation of evidence before the decision-maker. In arbitration, this requires an appreciation of the rules—or the lack thereof—surrounding the discovery and the admission of that evidence. In any arbitration, these rules will vary greatly from those which litigators have become accustomed to. But it's not anarchy: there are rules, guidelines, and a structure which can be understood and exploited.

Knowing your agreement: It's almost become a cliché at this point: "Arbitration is simply a matter of contract between the parties." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Parties are entirely free to agree on whatever rules governing discovery and the admission of evidence they want. Even if this agreement is not reflected in the actual contract which creates the arbitration, parties are free to reach a separate agreement after the dispute arises. Parties can even elect to import the Federal Rules governing discovery or the Federal Rules of Evidence. Thus, it's absolutely critical that litigators not only know what terms (if any) govern the arbitration, but consider further agreements with opposing counsel. Furthermore, because the arbitration is outside the usual governing framework of the Federal Rules, the space for an agreement is much wider. This leaves a lot of room for a savvy litigator to craft a useful set of rules for his/her client and his/her case.

Knowing your forum: Even where the parties have not crafted their own set of rules or guidelines, a contract creating an arbitration will often select a set of "off-the-shelf" arbitration rules or will specify an arbitration forum with its own rules. For example, a common set of rules for ad-hoc arbitrations are those promulgated by the CPR Institute for Dispute Resolution, available at http://www.cpradr.org/RulesCaseServices/CPRRules.aspx. If a contract selects the

arbitration forum, common choices include The American Arbitration Association ("AAA"), JAMS (formerly the "Judicial Arbitration and Mediation Service"), the National Arbitration Forum, or for international disputes, the International Chamber of Commerce Court of Arbitration ("ICC") or the United Nations Commission on International Trade Law ("UNCITRAL").

Keep in mind that the cost of these different arbitration forums can vary dramatically. Some are extremely costly and others less so. As an overall observation, it has been my experience that "big" arbitrations are just as expensive as "big" cases, but for smaller cases, arbitration can be much less expensive than the court system.

Each of these arbitration forums has its own set of rules which can be viewed on the website. Understanding these rules is critical for the lawyer. Take, for instance, discovery, which is governed by a complex tangle of rules and decisions at the federal level. Many of the listed forums do not provide for any right to discovery whatsoever. For example, the AAA Commercial Arbitration rule covering discovery states: "The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute." Under this rule, while an arbitrator *may* allow some limited discovery where necessary, a party's desire for evidence will be carefully weighed against the need for "an efficient and economical" resolution. This will come as a large shock to any party expecting document collection on par with what they are used to in federal court.

When it comes to evidence presentation, the differences are similarly stark. The AAA rule on evidence states the following: "The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary." Indeed, many regard the lack of the Rules of Evidence as one of the primary advantages of arbitration. There is no question that the lack of hearsay rules, the lack of a need for formal authentication, and flexible decisions on what is "prejudicial" can shape the presentation of a case.

Flexible rules like those typical to arbitration forums give only limited guidance to the parties, and make clear that the final decision rests with the arbitrator. For that reason, it is equally critical for parties to appreciate the particular decision maker they will be working with.

Knowing your arbitrator: Given the plenary power which is typically vested in the arbitrator, it is absolutely critical that parties take care in the selection of their arbitrators, always with an eye toward their case. Most arbitration forums will give you a number of options, and the local lawyer community can be helpful in evaluating local arbitrator candidates. Many parties, accustomed to the random draw of the court system, may underrate the value and importance that the arbitrator selection can play to the presentation of their case.

Once selected, it's important that parties take the time to get to know their arbitrator's background and preferences and that it be considered throughout the planning of a case. For example, an arbitrator which is a formal federal judge or trial attorney may have a different view of an excludability argument than an arbitrator from a different background. The better a party knows the arbitrator, the more he will be able to anticipate that arbitrator's decisions on crucial discovery and evidentiary questions.

Knowing your strengths: Finally, perhaps the most important thing for a litigator to know is his own strengths and weaknesses, and the strengths and weaknesses of his case. Is your case one which will require substantial discovery to prove? Then you should take care to select a forum or a set of rules which permit some discovery, or, failing that, an arbitrator which will be sympathetic to considerable discovery motions. Are you an expert trial lawyer, up against an adversary with less experience with the Rules of Evidence? Push for a more formal forum, where those strengths can be realized.

In summary, arbitration seeks to avoid the expense, bureaucracy, and strictures of litigation. This is generally done by doing away with cumbersome rules and vesting authority in a central decision-maker. As courts and contracting parties shift more and more civil disputes to arbitration, it becomes even more important to treat arbitration with the seriousness with which a party would treat litigation. And though Oregon provides some options for court review of an arbitration, at least at the state level, these limitations are necessarily limited. Any litigator preparing for an arbitration needs to be prepared as though it will be the final presentation of their claim. They need to be conscious of the many differences from the court litigation they may be used to and prepared to think critically about how they can be made to work for their clients.

COMMENTS FROM THE EDITOR

Eyes Are the Windows to the Soul

By Dennis P. Rawlinson
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Dennis P. Rawlinson

Our objective as trial lawyers is to persuade. In our effort to be thorough and marshal every detail in our client's favor, we often overlook one of our strongest weapons: our eyes.

It's been said:

"Eyes are the windows to the soul."

As we stand before the fact-finder, our conviction, credibility, and belief in our client's contentions are being judged by what appears in our eyes. Too often, in an effort to be thorough, we spend our time with our eyes cast down to our notes like an actor or actress reading a script. As anyone knows who has watched an actor read his lines rather than simply say them, reading is fatal to persuasion.

In his "Theater Tips and Strategies for Jury Trials,"[1] David Ball makes a number of valid and significant points. One of his best points is that reliance on extensive notes undermines our

1 Published in 1994 by the National Institute for Trial Advocacy.

ability to be a persuasive advocate. The best opening statements and closing arguments are given with few or no notes. The advocate opens his or her soul to the fact-finder through eye contact. The eyes of an accomplished advocate are forever darting from one juror to another juror, looking for a wrinkled nose, a raised eyebrow, or a nodding head that will suggest a need to paraphrase, repeat a point, or move on to a different subject.

For many of us, trying an entire case without the use of notes of any kind would be impossible (after all, even the best actors and actresses review the script between scenes). For those of us who do use notes, two suggestions may be helpful:

1. Use only skeletal notes. Notes should be limited to a word or at most a phrase that will refresh our recollection of the point to be made. Writing out detailed questions, opening statements, and closing arguments word by word may be helpful as a preliminary exercise, but if used at the time of trial, copious notes make the necessary eye contact impossible.

2. Maintain eye contact whenever words are being exchanged. We should never look at our notes while speaking. We should never look at our notes while listening. We should quickly glance at our notes only when we are not speaking or our witness is not speaking.

A little bit of practice can work wonders. When we need to look at our notes, it is best to finish what we are saying *and stop talking*. Then we can look down at our notes. We should not start talking again until *after* we have looked back up from our notes and have reestablished eye contact. As David Ball suggests:

1. *Finish* the point you are on.

2. *Pause* for a split second. Observe your listener's reaction (do not dive-bomb into your notes).

3. *Glance down* at your notes. (Do not dawdle there.)

4. Look up to establish eye contact.

5. *Pause* for an instant of eye contact.

6. Start talking again.

Similarly, when listening to a witness, we should not be looking at our notes or our next question, or we will make the answer seem unimportant. After asking the question, we should listen to the answer. Then and only then, after the answer has been given and has registered, should we look at our notes for the next question.

A number of benefits will accrue from these habits. Often we will not need to look at our notes for the next question because the answer will suggest the next question. And sometimes, when the witness gives us an answer we do not expect, we will have *listened* to it and be able to react rather than proceeding by rote to our next question like a robot.

The next time you give an opening statement, throw away your detailed notes before you arrive in the courtroom. You know your case. Do not cheat yourself and your client by allowing fear, detail, or too much preparation to undermine your ability to persuade.

Use It or Lose It: The Right to a Jury Trial

By Charese A. Rohny
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This year, the Oregon Supreme Court issued a ruling that dealt a stunning blow to injured and wronged Oregonians and exacerbated preexisting concerns that the constitutional right to a jury trial is in a state of rapid decline. In *Horton v. OHSU*, the court held that the Oregon Tort Claims Act "both waives the state's sovereign immunity and, as applicable here, limits the tort liability of the state and its employees to $3,000,000."[1] Justice Walters dissented, viewing the court's limit on damages as an infringement on the constitutional right to a jury trial.

Regardless of the jury's awarding a total of $12 million, finding that past and future medical expenses of Tyson Horton amounted to more than $6 million, and finding that the boy was entitled to $6 million for pain and suffering, the Supreme Court's majority opinion in a 5-2 decision held that Tyson would not receive what the jury awarded. Instead, the court held that Tyson would receive only the $3 million already paid by OHSU.

In her dissent, Justice Walters begins with the Oregon Constitution, which sets forth the legislative limits and defines what justice means.[2] "Together, Article I, section 10 and Article I, section 17 ensure that an individual who suffers personal injury will have a legal remedy for that injury, and that a jury will determine the extent of that injury and the monetary sum necessary to restore it."[3] She explains that "the constitutional right to a jury trial precludes the legislature from interfering with a jury's fact finding role by reducing a jury's factual determination of damages to a predetermined amount."[4] Walters cited a Washington Supreme Court case that held the same and rested its decision on the plain language of the Washington Constitution. That case interpreted its constitutional provision by stating that "[t]he right of trial by jury shall remain inviolate," and concluded that "[t]he term 'inviolate' connotes deserving of the highest protection" and "indicates that the right must remain the essential component of our legal system that it has always been."[5]

Justice Walters explains that "the majority bargains away and belittles the two constitutional provisions designed to guarantee justice for all."[6]

Walters concludes that a damages cap "nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function."[7] In doing so, Walters reminds the majority that "[t]he jury is, above all, a political institution" and that the civil jury places "the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government" drawing from Alexis de Tocqueville.[8] Walters urged that jurors—"plain people"—defend our constitutional rights against powerful and wealthy citizens and judges

and that "we lose that strength when we permit interference with that function," thereby doing "real damage" to the "constitutional structure that is designed to provide justice for all and a means to preserve justice for all."[9]

Call to Action following *Horton v. OHSU*: "Use It or Lose It."

At a recent CLE, Justice Walters issued a call to action to the Oregon legal community: "use it or lose it." She urged that we must use the constitutional right to a jury trial or risk losing that right. The thought of what our judicial system would look like without a jury trial caused me to jump to my feet, along with nearly everyone else present, for a standing ovation following her presentation.

No matter what side you are on regarding the *Horton* decision, it is indisputable that the jury trial is becoming an endangered species and that the near-extinction of jury trials affects our entire judicial ecosystem. As with climate change, we need to act if we care enough. Our legal community has the ability and the duty to engage in loss prevention. All we have to do is *go to trial*. Be trial lawyers.

Sure, there are lots of reasons why we each did not try more cases last year, why settlement was "good" for our clients, why the judge implied that not settling and going to trial would be failure, and why the costs of litigation were unduly high. Honestly, though, can we each say that there wasn't at least one (more) case we could have tried last year to serve the best interest of our client? The mere act of handling one more jury trial a year by each of us would reverse this concerning trend.

There are many reasons why we should act. In choosing our profession, most of us at one point were moved by our founding fathers, so let's start there.

"Born in the U.S.A.": Even Jefferson and Hamilton Sang the Same Tune on Juries.

Although jury trials originated in British legal history, the right to trial as laid out in the Sixth and Seventh Amendments of the U.S. Constitution's Bill of Rights, and the concepts embedded in those rights, was truly "born in the U.S.A." The distrust of the state guaranteed an accused the right to be judged by his or her neighbors. The involvement of ordinary people in business decisions reflected our belief in the power of people. The first U.S. Congress chose to inject the community's values along with the rigidity of laws into the factual flesh of a case.

One's view of jury service represents one's view of democracy. At the least, jury service promotes civic participation. For better or worse in our democracy, the ordinary and the aristocratic, the unbiased and the biased, the open-minded and the closed-minded are raised to that level of judge. We fought for that.

Colonists used the jury to rebuke and avoid enforcement of English orders.[10] Thomas Jefferson stated, "I consider trial by jury as the only anchor ever yet invented by man, by which a government can be held to the principles of its constitution."[11] John Adams believed that "representative government and trial by jury are the heart and lungs of liberty."[12] To Thomas Paine, the civil jury was an extension of a natural right.[13] To James Madison, "[t]rial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[14]

Alexander Hamilton stated in his *Federalist* papers that people on both sides of the aisle, even "if they agree in nothing else[,] concur at least in the value they set upon the trial by jury; or . . . the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of a free government."[15]

Many examples in U.S. history demonstrate that the jury trial has shaped who we are as a society. During the 1850s, for example, the northern communities rejected the "Fugitive Slave Laws," making their conscience known by repeatedly refusing to convict individuals charged with violating the law mandating that people who discovered escaped slaves had to return them to their owners. Jurors play a historic, sometimes subversive, role that is critical to our democracy.

Contemporary society has turned in large part over the last 50 years as a result of cases we try involving products liability, tort liability, employment discrimination, police misconduct, medical malpractice, crimes, etc. The courthouse is where ordinary people go. On a case-by-case basis juries have been significantly shaping society and defining justice in social, racial, safety, consumer, civil rights and criminal matters.

Despite the Jury Trial's Value, Civil and Criminal Trials Continue in Rapid Decline.

Civil and criminal cases have been in a continual nosedive in both state and federal courts. For federal civil cases, about 20% went to trial in 1938, about 12% went to trial in 1962 and merely 1.7% went to trial by 2009, with less than 1% as actual jury trials.[16] The trajectory of decline for federal criminal trials fell from 15% in 1962 to 5% in 2002.[17]

"State statistics are harder to come by, but between 1992 and 2002 the number of trials in the 75 most populous counties [nationwide] fell by 50% even though the cases filed increased."[18]

In Oregon, Multnomah County has the most civil trials in the state, but is still lower than the national average. In 2008, Multnomah County had less than 1% of its civil cases terminate by jury trial—far more than any other county in the state.[19] In 2009, use of jury trials in Multnomah County was almost 20% lower than the national average.[20]

As some readers may recall, in 2009, judges from the Multnomah County bench conducted a report on "The Vanishing Civil Jury Trial in Multnomah County."[21] The committee concluded that "the civil jury trials are indeed disappearing in Multnomah County and that this is cause for grave concern if the constitutional right to a jury trial is to remain meaningful."[22]

The committee concluded that several factors contribute to the decline of the jury trial.[23] For one, lack of trial experience can chill efforts to try cases. Increased complexity of cases, high costs, expanded discovery, and the risk of paying huge attorney fees also discourage jury trials. "When asked what can be done to address the decline of civil trials, the participants said that certainty in trial dates, better case management by

judges, discovery limitations, prompt and consistent judicial decisions in pretrial matters, and earlier assignment of trial judges would significantly improve our current system."[24]

The decline of jury trials in the criminal arena can be traced to mandatory minimum sentences and more defendants' accepting pleas because of the risk of going to trial.[25] In 1980, 81% of federal convictions were the product of guilty pleas; recently, the figure was 97%.[26] According to federal courts nationwide, in 1997, the data showed that 3,200 of 63,000 federal defendants were convicted in jury trials; in 2015, there were only 1,650 jury convictions out of 81,000 defendants—2%.[27]

Because "most pleas are negotiated before a prosecutor prepares a case for trial," the "thin presentation" of evidence needed for indictment "is hardly ever subjected to closer scrutiny by prosecutors, defense counsel, judges or juries."[28]

Even if the prosecutor has weak evidence and the defendant has mitigating circumstances, the defendant will often think the risk of going to trial too high.[29] Jury trials are supposed to check against the potential abuse of prosecutorial power—but that check is rapidly declining.[30] With that decline goes the quality of justice.

Efforts Toward Speedy, Economical Civil Cases.

In 2009, Chief Justice Paul DeMuniz's Uniform Trial Court Rules (UTCR) Committee adopted rules for "Speedy, Economical Civil Cases."[31] UTCR 5.150 allows for expedited jury trial for smaller cases—after opting into the program, it guarantees a trial in four months.

De Muniz also led the initiative that adopted UTCR 23 and established the Oregon Complex Litigation Court, a complex case docket, in which judges with vast civil/business litigation experience are assigned to cases no matter which county they are filed in. This allows attorneys with complex cases to request judges with a certain level of experience. It further allows smaller courts to get help from more experienced judges from different counties when they need to handle complex cases.

In the Ninth Circuit, Judge Edward Leavy is among the supporters of the "fast track" concept.[32]

A Secret Judicial System Exacerbates Public Distrust.

Alternative dispute resolution indeed has benefits, but is part of the problem too. In a society that already views attorneys and the justice system with a certain degree of distrust and skepticism, private ADR tribunals (or "secret trials") further undermine public confidence in the rule of law.[33] In 2011 and 2013, two United States Supreme Court rulings[34] "upended decades of jurisprudence put in place to protect consumers and employees" when the Court upheld the use of class-action bans in contracts, giving a victory to a "Wall-Street led coalition of credit card companies and retailers" who aimed to successfully insulate themselves from costly lawsuits.[35]

Despite the power imbalance in making these contracts, mandatory arbitration clauses in employment contracts keep many employment disputes from the public eye, and are upheld because the employee had the "choice" to not turn down the job and not agree to the arbitration clause. As Judge Schiller of Philadelphia's federal courthouse stated, "To sug-

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

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gest that [an employee] had bargaining power because he could wait tables elsewhere ignores reality."[36]

Although many companies give people a window to opt out of arbitration, few people do, because they do not realize that they have signed a clause, or do not understand what arbitration is, or its consequences.[37] When individuals proceed with arbitration, there is the problem of a repeat-player bias in favor of corporations.[38] Fearful of losing business, some arbitrators pass around the story of arbitrator Stefan M. Mason as a cautionary tale. Mr. Mason ruled in favor of an employee in an age discrimination suit, awarding him $1.7 million; he was never hired to hear another employment case.[39]

The increase in ADR means that, in essence, justice is becoming privatized. This is similar to the trend in other public services—education, prisons, etc.—with similarly adverse results. Unfortunately, privatized justice fails to hold wrongdoers publicly accountable. It further lacks the checks and balances, such as appeals, that help protect the rule of law. For example, in a gender discrimination case that went to arbitration, the plaintiff asked the arbitrator to sanction the defense for breaking rules of discovery and destroying evidence. After investigating the matter, the arbitrator fined the defense $1,000, but billed the plaintiff $2,000 for the time it took him to investigate.[40]

Although the increasing role of arbitration is certainly a factor in the reduced role of jury trials, we should be wary of making it a scapegoat for all the systems failures, the delays, and our own choices.[41]

Constitutional Rights: When Some Go, Others Follow.

Broadly, "any time people stop availing themselves of their constitutional rights, including trial by a jury of our peers, we should probably take notice as rights tend to be valued or devalued together. When some go, others typically follow."[42] More specifically, though, jury trials form the bedrock of our society because they are about empathy and trust—people are guaranteed a trial, not by a single judge, separated by the accused "by class or life experience," but by a group of peers.[43] That concept "speaks to our commitment that all people are equal before the law, and that those sitting in judgment should be connected to those to be judged, not just sitting above them."[44]

Trial by jury "upholds the notion that justice is best served when it combines both enforcement of rules and *genuine empathy* for the accused. Take away trial by jury, and we are left with the notion that justice could be done by machines, applying already defined codes with no human element involved."[45] Perceived as not convenient or efficient, in that transactional robotic way, due process and jury trials are examples of constitutional rights that are slowly becoming less popular.

Judges Can Choose to Defend the Right Too.

Like attorneys, judges also have a responsibility to defend and maintain trial by jury, rather than keeping cases from the jury.[46] Judges can refrain from banishing parties to mandatory mediation and, if a case goes to trial, keep schedules clear and rulings consistent.[47] This may also include judges' embracing new technology in the court to increase efficiency.[48]

Furthermore, we can correct the misconception that we must forsake juries because courts are "overworked and backlogged."[49] If we fail to defend the jury, we risk losing it. And inconveniences suffered will seem trite when weighed against the loss of justice.

It's Easily Within Our Power to Stop the Decline.

It is a matter of choice and, yes, perhaps a bit more work. Kafoury & McDougal is an example of a firm that does the hard work and tries cases. Since 2009, the firm has tried 55 jury trials, averaging about seven per year. Firms that go to trial, such as Kafoury & McDougal, set the value for civil cases in our state. A commitment to try more cases by each of us would exponentially increase the number of cases going to trial. It would also allow more court fees to fund the court system. The legislature would need to expand the court's resources to keep up with higher demand. As judges heard more cases, they would become more experienced, which would lead to better, more consistent rulings. The benefits would spill out.

Want to Save Our Endangered Judicial Ecosystem? Try Cases.

Really. Try harder—that's all we have to do. Commit to one more this coming year, and if for whatever reason you don't have one more trial, then do the following:

- Defend the laws that provide for the right to a jury trial.
- File fewer cases, so that you have time to try one more.
- Let associates try cases.
- Encourage associates (and partners inexperienced in litigation) to participate in jury trial experience projects or internships with district attorney and public defender offices.[50]
- Become an expert in your substantive area of law so that you are competent, are confident, and are seen as an expert when you do try a case.
- Be self-aware if you are gently coercing your client to take a settlement offer because you don't want to try the case, and change course.
- Advocate for replacing mandatory arbitration in smaller cases with a speedy civil trial before a six-person jury.
- Advocate for increased funding for our judicial system.
- Teach your neighbors and friends about how precious the jury system is or volunteer to teach about it at a neighborhood school.
- Keep this discussion and cause for concern alive.

We know that most cases are resolved without a trial. That said, the trial is the endgame in American jurisprudence.[51] Without it, our judicial system and ordinary people's rights dramatically change.

Whether you are a person who believes that "the sky is falling" or that this is "much ado about nothing," or whether you lie somewhere in between, we all know that the trend signals a new kind of "justice."[52] Like others, I believe that this trend, if left unchecked, will result in a less just system.[53] We have an obligation and duty to preserve our fundamental constitutional rights. As attorneys who are dedicated to the preservation of

the rule of law, due process, and a vibrant judicial system, we must continue to protect and defend that right. Otherwise, as Justice Walters warned, we will lose the right altogether.

Only in the conscience and voice of "plain people" can our democracy find justice.

(Endnotes)

1 *Horton v. OHSU*, 359 Or. 168, 173, __ P.3d __ (2016).

2 *Id.* at 287 (Walters, J., dissenting).

3 *Id.*

4 *Id.* at 299 (Walters, J., dissenting).

5 *Id.* at 299-300 (Walters, J., dissenting) (citing *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 656, 771 P.2d 711, 721-22 (1989)).

6 *Id.* at 287 (Walters, J., dissenting).

7 *Id.* at 301 (Walters, J., dissenting).

8 *Id.* (citing Alexis de Tocqueville, *Democracy in America* 282 (Phillips Bradley ed., 1946) (originally published 1835)).

9 *Id.* at 308.

10 Jennifer Walker Elrod, *W[h]ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Wash. & Lee L. Rev. 1, 7 (2011).

11 Thomas Jefferson, Letter to Thomas Paine (1788), 3 *The Writings of Thomas Jefferson* 71 *(*George Washington ed., 1861).

12 *See* Thomas J. Methvin, *Alabama—The Arbitration State*, 62 Ala. Law. 48, 49 (2001) ("In 1774, John Adams stated: 'Representative government and trial by jury are the heart and lungs of liberty. Without them, we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swines and hounds.'").

13 *See* Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 Ohio St. L.J. 1005, 1009 (1992) (noting that "Thomas Paine felt civil juries were an extension of a natural right" (citing 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 316 (Bernard Schwartz ed., 1971)).

14 1 J. Kendall Few, *In Defense of the Jury Trial* 8 (1993).

15 *The Federalist* No. 83, at 521 (Alexander Hamilton) (G.P. Putnam's Sons ed., 1888).

16 Julianne Davis, *"The Vanishing Trial, Revisited,"* Litig. J., Spring 2012, at 2 (citing Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Emp. Legal Stud. 459, 468 (2004)).

17 *Id.*

18 *Id.* at 3.

19 Janine Robben, *Oregon's Vanishing Civil Jury Trial*, Or. Bar Bull., Nov. 2009, https://www.osbar.org/publications/bulletin/09nov/jurytrial.html.

20 *The Vanishing Civil Jury Trial in Multnomah County,* Report of the Presiding Judge's ADR/Vanishing Civil Jury Trial Committee 3 (Nov. 6, 2009) (even in civil cases, the use of jury trials in Multnomah County is low—in 2005, the national average of civil cases tried to a jury was 70%; in Multnomah County, 53.2% of civil cases were tried to a jury).

21 *Id.* at 3.

22 *Id.* at 2.

23 Robben, *supra* note 19.

24 *Id.* The survey asked two key questions.

First, "Which, if any, of the following COURT-RELATED factors discourage your, or your client's use of jury trials to resolve civil cases?"

The five most commonly selected answers, by frequency of response, were:

Not enough certainty that the case will be tried on trial date (40.9%, 163 respondents); mandatory arbitration (38.8%, 155 respondents); judges not familiar with the issues (32.6%, 130 respondents); rulings on motions not predictable (32.1%, 128 respondents); and not enough management of cases by judges (28.8%, 115 respondents).

Second, "Which, if any, of the following NON COURT-RELATED factors discourage your, or your client's use of jury trials to resolve civil cases?"

The five most commonly selected answers, by frequency of response, were:

Jury trials are too expensive (83.3%, 349 respondents); risk of losing (all-or-nothing nature of jury verdict) (64%, 268 respondents); risk-averse client (43.2%, 181 respondents); risk of paying opponent's attorney fees (38.7%, 162 respondents); stress of jury trials (33.2%, 139 respondents).

Vanishing Civil Jury Trial Report, *supra* note 20, at 24.

25 Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. Times, Aug. 7, 2016, http://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html?emc=eta1&_r=1&referer.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 Robben, *supra* note 19.

32 *Id.*

33 *See* Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 Chi.-Kent L. Rev. 463, 492 (2006) ("Unlike publicly available court decisions, unpublished arbitral awards do not communicate public values or educate the community about the underlying law.").

34 *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. __, 131 S. Ct. 2304 (2013).

35 Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times, Oct. 31, 2015, http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

36 *Id.*

37 Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a "Privatization of the Justice System*," N.Y. Times, Nov. 1, 2015, http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html.

38 *Id.*

39 *Id.*

40 *Id.*

41 Elrod, *supra* note 10, at 17.

42 Brad Hirschfield, *Jury Trials Are Vanishing. Here's Why We Need Them Back*, Wisdom Daily, Aug. 11, 2016, http://thewisdomdaily.com/jury-trials-vanishing-need-them/.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Vanishing Civil Jury Trial Report*, *supra* note 20, at 27.

51 Davis, *supra* note 16, at 2.

52 *Id.*

53 *Id*.

Tort Cap Survives Despite Trend of Increasing Liability

By Kate A. Wilkinson
Director of Litigation Services,
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Kate A. Wilkinson

Over the last two years, Oregon appellate courts have decided five notable negligence cases, expanding the reach of liability in four of those decisions. Those four decisions signal renewed difficulties for defendants who seek to limit liability through statute, contract and general principles of foreseeability. Despite this expansive trend, the Oregon Supreme Court upheld the state's key monetary protection for public bodies, the tort cap limits.

Most recently, the Oregon Supreme Court determined that recreational immunity did not extend to employees of a landowner. See *Johnson v. Gibson*, 358 Or 624 (2016). As a practical matter, public entities will now be required to defend and indemnify employees for negligence while acting in the course and scope of their employment. Prior to *Johnson*, public entities could substitute themselves as sole defendants pursuant to the Oregon Tort Claims Act and then seek dismissal of the case claiming recreational immunity. *Johnson* signals an end to that practice and likely a subsequent expansion of potential liability for those entities that make land available to the public for recreational purposes.

In another case, the Court also determined that exculpatory releases, such as those contained on every ski pass or lift ticket in Oregon, are unconscionable and unenforceable. See *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543 (2014). In *Bagley*, the Court analyzed the release at issue through both a procedural and a substantive unconscionability lens and found it lacking on both counts. *Id.* at 555-573 (noting the unequal bargaining power of the parties, the public interests at stake and the degree of risk). In a footnote, the Court noted that its decision is not intended "to suggest that a business owner or operator may never enforce an anticipatory release or limitation of negligence liability * * *." *Id.* at 573, n. 21. However, after *Bagley*, business owners may well wonder about the efficacy of any attempt to limit liability through releases.

Following *Bagley*, the Court of Appeals rendered two decisions that seemingly expand the scope and breadth of traditional foreseeability principles. See *Rhodes v. West Coast Taekwondo Association, Inc.*, 273 Or App 670 (2015), *rev den* 358 Or 833 (2016) and *Scheffel v. Oregon Beta Chapter of Phi Kappa Psi Fraternity*, 273 Or App 390 (2015).

In *Rhodes*, the appellate court reversed summary judgment in favor of defendants on a negligence claim against the former owner/operator of a public swimming pool. The Tigard-Tualatin School District transferred all control of the facility to a voter-created aquatic district 50 days prior to the injury. *Id.* at 673. At the time of the injury, the school district did not control the facility and had contractually transferred all responsibility for operating and maintaining the pool to the aquatic district. Under general principles of contract and tort law, the school district had ended its legal responsibility to users of the pool. Ownership and control are generally fundamental requirements for ascribing liability.

Despite a legally sound transfer of the facility and its operation to the aquatic district, the court found that general principles of foreseeability encompassed potential risks present before the transfer and the fact that those risks may continue to exist: "[t]he aquatic district was new and inexperienced, and it inherited the school district pool employees by express agreement." *Id.* at 688-89. According to the majority's reasoning, this was enough to allow plaintiff to survive summary judgment.

As Judge DeVore noted in a vigorous dissent, "* * * plaintiff's novel theory of predecessor liability is a ready means by which to disregard corporate form, which will be troublesome for private businesses and public entities." *Id.* at 690.

Similarly in *Scheffel*, the appellate court determined that anecdotal evidence of possible harm when alcohol, fraternity parties and college campuses come together was enough to withstand summary judgment, despite the absence of any evidence of specific knowledge of the perpetrator's propensity for violent sexual assault. *Id.* at 404, 407-08, 411, 413 ("the chapter knew that alcohol-related sexual assaults were a foreseeable risk of hosting social events where alcohol is available * * * and that alcohol-related sexual assaults in college fraternities were a serious problem on college campuses nationwide"). In the case, plaintiff was sexually assaulted at the fraternity and brought a negligence action against the local chapter.

As Judge DeVore notes in his lengthy dissent, there was no evidence that the local chapter had reason to know or should have known of the perpetrator's propensity for violence and there was no evidence of prior sexual assaults at the chapter. Instead the majority's reasoning rested on the party setting as "facilitation" and on a Risk Management and Insurance Guide produced by the national fraternity that provided information and statistics on alcohol, injuries and sexual assaults on campuses generally. *Id.* at 444-447. The holding in *Scheffel* suggests that providing the setting, coupled with anecdotal statistical evidence of general harm, is enough to withstand summary judgment.

Lastly, in a closely-watched decision, the Supreme Court upheld the Oregon Tort Claims Act (OTCA) limits on damages against a public body in *Horton v. OHSU*, 359 Or 168 (2016). The *Horton* court, in a 5-2 decision, concluded that the right to jury trial is a procedural right and that that right is not an impediment to the legislature imposing damages caps. Based on that reasoning, the Court also determined that Oregon's $500,000 limit on noneconomic damages in personal injury cases is enforceable. Over an impassioned dissent by Justices Walters and Baldwin, the majority determined that the legislature's limits on claims for personal injury do not run afoul of either the right to jury trial, Oregon Constitution, Article 1, section 17, or the Remedy Clause, Article 1, Section 10.

In conclusion, over the last two years Oregon appellate courts have expanded liability for negligence with regard to attempts to limit liability through contract, by relience on recreational immunity and on general principles of foreseeability, while retaining Oregon's most important tort protection for public bodies.

On Billing: Perspectives from the Inside

By Brie Bridegum, Stoel Rives


Brie Bridegum

I recently sat down with four major figures in Portland's in-house legal community and asked them about best practices for outside counsel: Jennifer Allison, General Counsel at Viewpoint Software; Liz Large, former General Counsel at KinderCare Education; Katie Abbott, Senior Director of Legal at Puppet; and Bill Pierznik, Senior Vice President of Business Development and General Counsel at Act-On Software. Their candid responses touched on universal themes and specific suggestions useful for any private practitioner.

Predictability. Each in-house attorney championed the importance of predictability and transparency when it comes to billing. Liz Large put it succinctly: "Don't surprise your mother or your CFO."

Understanding how your client budgets money for legal costs can help ensure that inside counsel and outside counsel are on the same page. Some legal departments charge individual business units for discrete legal projects (charging employment matters to human resources or immigration expenses to whichever unit wants the hire, for example) while other companies place the entire legal budget under legal's control. And some large legal departments have discrete cost centers within the legal department and route legal charges to those centers' individual budgets. "The general counsel will have the most control over selecting outside counsel if the money comes directly from the legal budget," said Pierznik.

Whatever the particular allocation, business priorities always drive legal spend. Abbott explained that she routinely sits down with finance partners in each business group to discuss upcoming projects and anticipated costs.

Abbott's experience tracks Allison's. Allison explained that her budget is set annually but broken down with the finance department by month. That means that some months she will have less room for non-essential projects, and other months she will have more flexibility to tackle things proactively. According to Allison, outside counsel should always ask before doing work that may not have been clearly authorized: "Don't force me to have an uncomfortable conversation after the fact."

Pierznik, Abbott, and Large echoed Allison and explained that the in-house attorney should always make the call when it comes to incurring fees and expenses. Outside counsel should explain the tactical or strategic reason behind a certain plan, the anticipated cost, and the risks of not following the plan as outlined, Pierznik said. Large explained, "As outside counsel, it's your job to make sure I fully understand the risk. And then I will make the call about whether that's how I want to spend my limited dollars." Abbott agreed. "We can't mitigate every risk. Give me good business advice."

Invest in the Relationship. Each attorney also stressed that outside counsel should understand their client's business and be invested in its success. Large suggests that, with every significant new engagement, the lawyer ask to observe the client's operations firsthand and not charge for that time.

Pierznik agreed with that sentiment. Before going in-house, Pierznik ran his own successful small firm. He said that he routinely checked in with clients about their evolving business objectives and frequently invested non-billable time building the relationship and understanding the companies' needs. "You'd be surprised how many non-billable lunches ended with a new matter opening. View the $400 investment of your time in relation to the $10,000 project that may result."

Allison's take is similar. She said that she wants her outside counsel to approach the relationship like a member of the team, not as a vendor. She wants her lawyers to know her business better than anyone else in town and understand the impact every dollar spent has on her company. "Every dollar we spend on legal is one dollar we can't spend on marketing or product development. I want to know my lawyers understand and appreciate that."

Each attorney also stressed that alternative fee arrangements are a great way to invest in the relationship. They noted, however, that many attorneys are quick to invoke the AFA acronym without actually offering tangible proposals. Large noted that AFAs are great for budgeting, but in a litigation context, they must be done with a lot of communication as the case progresses. She noted that she has seen workable AFAs in the single-plaintiff employment litigation context.

Pierznik said firms should be proactive about coming up with AFA proposals. He noted that law firms, unlike in-house legal departments, have a wealth of historical billing data to draw upon. "If a firm has a new client, the lawyer should think to themselves, 'This client reminds me of X client back in the day.' Then go look at the bills for X client back in the day and use those bills to devise an AFA."

Allison has had great experience with AFAs. She noted one arrangement she used to have with a local firm to handle patent work. She said the arrangement was fair to both sides and allowed her to accurately forecast her annual patent spend. "I'd love to have something similar for litigation."

In addition to considering AFAs, outside counsel also should consider providing meaningful programming to their in-house clients. Large said that the best way to build non-billable goodwill with her is to come to her legal department and present a pertinent CLE that makes her team and internal clients smarter. She suggests that outside counsel spend some time thinking about client-tailored programming and present the information in a business-minded way, and "not with case citations. A CLE like that is worth more to me than any Blazer tickets. And I love the Blazers."

Billing. Each in-house attorney had very specific feedback as to bills and invoices. The most popular piece of advice? Always include billing rates on your bills. The second most popular piece of advice? Bill timely. Large believes that "I should not have to call you at the end of the fiscal year to track down unbilled work. You should be proud of the work you do, and you should be paid promptly."

Pierznik noted that he should never see a new name on a bill without a heads up from the relationship partner. "Partners seem to think associates are fungible. They are not. If I am paying for someone's work, make sure I understand the value they add. Even just a quick email telling me someone will be working on the matter would be appreciated."

Abbott likes to see detailed narratives. "Lack of detail on bills is frustrating. It will take you longer to get paid if I have to spend time interpreting your bill. My priority is getting business done, not reviewing unclear or ambiguous invoices." Large agrees. "Treat bills as client communications. Make sure they are properly labeled and that the right entries are on the right bills."

Allison added that, if insurance is involved in a case, outside counsel should see the matter all the way through and help make sure her company gets paid on its claim. And, should a client challenge a bill, Pierznik advises playing ball. "If I haven't been a jerk and routinely challenged your bills, pay attention if I raise a concern. Have the conversation with me, and maybe offer to reduce the bill by 5 or 10 percent. That will go a long way to ensuring that I want to continue sending you work in the future."

Table Stakes. Allison noted that outside counsel should break things down in ways that will make business sense to the business people. It is particularly helpful when outside counsel prepares status summaries of open litigation for her in advance of board meetings so she can give concise updates. This becomes especially important when there are multiple, high-visibility cases.

Large wants her bosses to believe that she exercised good judgment, hired the best-suited lawyers for the job, and the spend is justified. As a corollary, she cautioned that outside counsel should not do anything to undermine the CEO's or CFO's confidence in the lawyer: "If the CEO and CFO have confidence, all our lives are easier. But if they lose confidence in you, that's not an internal battle that I'm going to take on for very long."

At the end of the day, each in-house attorney has the same goal articulated by Allison: "Make me look good to my CEO and to my Board of Directors."

RECENT SIGNIFICANT OREGON CASES

By Stephen K. Bushong
Multnomah County Circuit Court


Honorable
Stephen K. Bushong

Claims and Defenses

Piazza v. Kellim, 360 Or 58 (2016)

Martha Delgado, a foreign student participating in an international exchange program run by the Rotary International, was fatally shot while waiting in line to enter an underage nightclub. Delgado's estate sued the Rotary and the club owners for negligence. The trial court granted defendants' motions to dismiss under ORCP 21 A(8), concluding that the shooting was unforeseeable as a matter of law. The Court of Appeals reversed; the Supreme Court affirmed the Court of Appeals decision. The court explained that the concept of foreseeability "embodies a prospective judgment about a course of events; it 'therefore ordinarily depends on the facts of a concrete situation' and, if disputed, is a jury question." 360 Or at 69-70, quoting *Fazzolari v. Portland School Dist. No. 1J,* 303 Or 1, 4 (1987). A "narrow focus on the actual sequence of events that led to a particular injury to a particular person 'misunderstands foreseeable risk.'" *Id.* at 80, quoting *Towe v. Sacagawea, Inc.,* 357 Or 74, 106 n 17 (2015). "Facts pertaining to the similarity, frequency, and recency of prior criminal acts, committed under the same or similar circumstances, or at or near the same location, and involving the same or similar types of victims, as well as the place and character of the location of the current criminal act, are all relevant to the determination." *Id.* at 81. In this case, plaintiff alleged that "the scene of this shooting was an inadequately secured sidewalk queue where teenagers were waiting to enter a nightclub, late in the evening, in a high-crime urban neighborhood that, based on publicized past experience, posed a risk of violent harm to persons present." *Id.* at 95. Based on those allegations, the court concluded that "[t]he harm that befell Delgado, although thankfully uncommon, was within the range of risks of harm that a reasonable factfinder could find was reasonably foreseeable[.]" *Id.*

Yeatts v. Polygon Northwest Co., 360 Or 170 (2016)

The plaintiff in *Yeatts*, an employee of a subcontractor working on a construction jobsite, was injured when he fell while doing some framing work. He sued the general contractor (Polygon) under the Employer Liability Law (ELL), ORS 654.305 to 654.336, and for common-law negligence. The Supreme Court held: (1) the trial court erred in granting summary judgment to Polygon on the ELL claim because plaintiff submitted sufficient evidence to avoid summary judgment that Polygon "retained a right to control the risk-producing activity at issue" (360 Or at 197); and (2) the trial court properly granted Polygon's motion for summary judgment on the negligence claim because Polygon did not have a common-law duty to the subcontractor's employees "to discover, warn against, or avoid unknown dangerous conditions relating to fall protection for the framing work." *Id.* at 196.

Wyers v. American Medical Response Northwest, Inc., 360 Or 211 (2016)

The plaintiffs in six consolidated cases in *Wyers* were sexually abused by a paramedic employed by defendant American Medical Response (AMR). They brought claims under ORS 124.100(5), which authorizes a vulnerable person to sue a person who permits another person to engage in abuse if the person "knowingly acts or fails to act under circumstances in which a reasonable person should have known" of the abuse. The trial court granted AMR's motion for summary judgment, concluding that there was no evidence that it actually knew of the abuse and acted in a way that permitted it to occur. The Supreme Court reversed as to two plaintiffs. The court explained that the statute "refers to two different mental states, one referring to actual knowledge and the other to constructive knowledge." 360 Or at 230. The evidence here was sufficient to establish a genuine issue of material fact "about whether a reasonable person in AMR's position should have known that the sort of abuse that plaintiffs Webb and Corning suffered would occur." *Id.* at 234.

Turner v. Dept. of Transportation, 359 Or 644 (2016)

Cruz v. Multnomah County, 279 Or App 1 (2016)

In *Turner*, the Supreme Court held that the trial court erred in granting summary judgment to defendant Oregon Department of Transportation (ODOT) on plaintiff's negligence claim based on the "discretionary function" immunity in the Oregon Tort Claims Act (OTCA), ORS 30.265(6)(c). The premise of ODOT's immunity argument was that its failure to improve the intersection at the crash site was ascribed to policy choices that ODOT made in determining which safety improvements to fund. The court concluded that the summary judgment record did not establish that premise as undisputed fact. 359 Or at 665. In *Cruz,* the Court of Appeals held that the trial court did not err in granting summary judgment to defendants on plaintiff's false imprisonment claim based on the OTCA's "apparent-authority" immunity provision, ORS 30.265(6)(f). The court explained that (1) defendants detained plaintiff under the authority of a federal immigration regulation; and (2) immunity applied "even when the apparent authority on which the public actors relied is based on a misinterpretation of an otherwise valid law." 279 Or App at 19.

Harkness v. Platten, 359 Or 715 (2016)

Plaintiffs were the victims of a fraudulent investment and loan scheme. They sued the loan officer (Kantor) and her successive employers, Sunset Mortgage (Sunset) and Directors Mortgage, Inc. (Directors). When that action was not resolved to plaintiffs' satisfaction, they brought a legal malpractice action against their lawyer. The trial court granted a directed verdict in defendant's favor, concluding that plaintiffs' theories in the underlying lawsuit—that Sunset and Directors were liable for Kantor's actions under the doctrines of apparent authority and *respondeat superior*—were not supported by sufficient evidence in the record. The Court of Appeals affirmed, but the Supreme Court reversed and remanded for a new trial. The court concluded that the trial court erred in granting a directed verdict on apparent authority grounds because a reasonable factfinder (1) "could infer that Sunset and Directors

manifested their assent to be bound to the loan transactions between plaintiffs and third parties arranged by Kantor" (359 Or at 731); and (2) "could infer from the evidence that it was reasonable for plaintiffs to believe that Kantor was authorized—as a loan officer for Sunset and Directors—to engage in the investment and loan scheme on behalf of those companies." *Id.* at 732. The court further concluded, based on the evidence plaintiffs presented regarding apparent authority, that a factfinder "could infer that the requirements for holding an employer vicariously liable under the doctrine of *respondeat superior* are met in this case." *Id.*

Goodwin v. Kingsmen Plastering, Inc., 359 Or 694 (2016)

After water intrusion damaged their house, plaintiffs sued the contractor responsible for installing the siding on the house's exterior. The trial court granted summary judgment to defendant, concluding that plaintiffs' claims were barred by the six-year statute of limitations in ORS 12.080(3). The Supreme Court reversed. The court held that the six-year statute "applies to actions for interference with or injury to an 'interest' in real property, such as trespass or waste. It does not apply to actions for damage to property itself, which are subject to the two-year statute of limitations" in ORS 12.110(1). 359 Or at 696. Summary judgment on limitations grounds was inappropriate because there was a genuine issue of material fact "as to precisely when plaintiffs discovered the damage to their property, which starts the two-year limitations period running." *Id.*

Dayton v. Jordan, 279 Or App 737, 280 Or App 236 (2016)

Kerr v. Bauer, 278 Or App 224 (2016)

In its first *Dayton* opinion, the Court of Appeals held that the fact that the deed conveying property referenced a partition plat depicting a road running through adjacent property was insufficient to establish an implied easement over the road as a matter of law. The court concluded that the trial court "was required to determine whether the circumstances that existed at the time that defendants' parcel was created establish that the grantor of the parcel intended to create an easement." 279 Or App at 754. That "inherently factual" determination involves weighing a number of factors. *Id.* at 753. In its second *Dayton* opinion, the court concluded that the trial court erred in dismissing the implied easement based on the lack of evidence of prior use. The court concluded that "evidence of prior use is highly relevant, but not essential, to an implied easement claim." 280 Or App at 247. In *Kerr,* the Court of Appeals held that ORS 105.970(2) does not require a trial court to reform a deed that violates the common law rule against perpetuities. Instead, that decision is discretionary. In this case, "the trial court did not abuse its discretion in declining to reform the deed." 278 Or App at 237.

Bank of America, N.A. v. Payne, 279 Or App 239 (2016)

Nationstar Mortgage, LLC v. Peper, 278 Or App 594 (2016)

In *Payne,* the Court of Appeals held that the trial court erred "in determining that plaintiff was a purchaser entitled to possession, because there is no evidence in the record that the sale of the property was conducted by a validly appointed trustee" for purposes of the Oregon Trust Deed Act (OTDA), ORS 86.782(6). 279 Or App at 239. The chain of title was defective, the court explained, because the trust deed named Mortgage Electronic Registration Systems, Inc. (MERS), rather than the lender, as the beneficiary of the security interest, and "there is no evidence in the record that MERS had any authority to appoint plaintiff as the beneficiary of the trust deed or that [seller] is a duly appointed successor trustee." *Id.* at 241. In *Peper,* the Court of Appeals held that plaintiff was entitled to judicially foreclose a trust deed even though MERS was named a beneficiary in the trust deed because (1) plaintiff "is the successor to the original lender and, as such, is the beneficiary of the deed of trust for purposes of the OTDA" (278 Or App at 598); and (2) "as holder of the note, plaintiff has the right to judicial foreclosure on the deed of trust, which followed the note when it was assigned to plaintiff." *Id.*

Medina v. State of Oregon, 278 Or App 579 (2016)

Plaintiff alleged that his former employer, the Oregon Department of Fish and Wildlife (ODFW), denied him a promotion and eventually terminated him based on race discrimination, retaliation for complaining about race discrimination, and retaliation for engaging in whistleblowing activity. The trial court granted ODFW's motion for summary judgment, concluding that there was no evidence of racial animus or any evidence to support an inference that plaintiff's complaints resulted in retaliation. The Court of Appeals reversed on the race-based discrimination and retaliation claims and affirmed on the whistleblowing claim. The court explained that, although there was no direct evidence of a discriminatory motive, there was evidence that plaintiff had been disciplined seven times in two years while non-Hispanic employees were not disciplined for the same conduct. A reasonable factfinder "could infer from that evidence that defendants denied plaintiff a promotion because of his race." 278 Or App at 588. The court further explained that a reasonable factfinder "could infer from the timing of the disciplinary actions that they were the result of plaintiff's having complained of racial discrimination." *Id.* at 589-90. The trial court did not err in granting summary judgment on the whistleblower retaliation claim because "plaintiff failed to present *prima facie* evidence of a causal connection between his disclosures [about improper use of federal funds for a fish smoker project] and any of the disciplinary actions taken against him." *Id.* at 592.

Procedure

Kiryuta v. Country Preferred Ins. Co., 360 Or 1 (2016)

Plaintiff filed a claim for underinsured motorist (UIM) benefits after he was injured in an automobile accident. Plaintiff prevailed in arbitration and sought to recover his attorney fees. The trial court declined to award fees, concluding that fees were precluded by ORS 742.061(3) because the insurer had issued a timely "safe harbor" letter that accepted coverage for the claim. The Supreme Court reversed. The court concluded that "defendant's allegation that plaintiff's UIM benefits are subject to all 'terms and conditions' of its policy of insurance precludes defendant from obtaining the protection of ORS 742.061(3)[.]" 360 Or at 9. The court noted that its decision in *Grisby v. Progressive Preferred Ins. Co.,* 343 Or 175, *adh'd to as modified on recons,* 343 Or 394 (2007), applied to "a different safe harbor provision than that at issue here—the

safe harbor provision applicable to claims for personal injury protection (PIP) benefits." 360 Or at 5. Thus, the court left "for another day" the issue of "whether an insurer remains eligible for safe harbor protection in UM/UIM cases, under ORS 742.061(3), when the insurer raises a defense that could result in no recovery by the insured." *Id.* at 7.

Hinman v. Silver Star Group, LLC, 280 Or App 34 (2016)

Shriners Hospitals for Children v. Woods, 280 Or App 127 (2016)

In *Hinman*, the Court of Appeals held that (1) ORS 36.620 and 36.625 "give courts the authority to deny a motion to compel arbitration under an arbitration clause in a contract on the ground that the contract containing the clause is unenforceable" (280 Or App at 41); and (2) in resolving that issue, if the facts bearing on unconscionability are in dispute, "the court must allow the parties to present evidence on those facts and must decide the factual questions presented to it." *Id.* In *Shriners*, the Court of Appeals held that (1) the "reasonable time" to move under ORCP 71B(1) to set aside a default judgment on the grounds that the judgment is void for lack of personal jurisdiction "is forever" (280 Or App at 133); and (2) the predicate to defendant's jurisdictional argument was his claim that he was not personally served, which presents "a factual issue that could not be avoided as a matter of law, nor resolved with Shriners' affidavit." *Id.* at 134.

Graydog Internet, Inc. v. Giller, 279 Or App 722 (2016)

Federal Natl. Mortgage v. United States of America, 279 Or App 411 (2016)

In *Graydog*, the Court of Appeals construed ORS 60.952(6), which allows closely-held corporations to resolve certain shareholder claims through the mechanism of a forced buyout of the complaining shareholder's shares for fair value. The court held that (1) the filing of a third-party complaint "constitutes 'the filing of a proceeding' for purposes of ORS 60.952(6)" (279 Or App at 724); and (2) "the real character of at least some of the third-party claims is a claim for oppression against the majority shareholder" covered by the statute. *Id.* In *Federal Natl. Mortgage*, the Court of Appeals held that the trial court applied an incorrect standard in dismissing the complaint under ORCP 21 A(3) on the grounds that there is another action pending between the same parties for the same cause. The court concluded that "a trial court cannot dismiss a claim under ORCP 21 A(3) that is brought by a plaintiff who is a defendant in the other action pending, unless that claim either (1) was required to be asserted as a counterclaim or (2) was or necessarily will be adjudicated in the other action." 279 Or App at 416.

Kachan v. Country Preferred Ins. Co., 279 Or App 403 (2016)

Lawrence v. Bailey, 279 Or App 356 (2016)

In *Kachan*, the Court of Appeals held that the trial court erred in granting summary judgment in favor of the defendant insurer on plaintiff's claim to recover Personal Injury Protection (PIP) benefits under his policy. The court concluded that there were material factual disputes "as to whether plaintiff's failure to comply with defendant's demand for an EUO [examination under oath] was a violation of the policy." 279 Or App at 404. In *Lawrence*, the Court of Appeals held that the trial court erred in entering judgment on an arbitration award in a personal injury case. The trial court "should have entered an order and judgment that reflects all that the arbitrator actually decided and only that—*i.e.*, plaintiff had damages of $9,074.50 and defendant was entitled to a credit for medical expenses that her insurer had already paid" instead of reducing the judgment by the amount of that credit. 279 Or App at 363.

Wingett v. Silbernagel, 279 Or App 245 (2016)

Lee v. American Family Mutual Ins. Co., 279 Or App 282 (2016)

The plaintiff in *Wingett* was injured in a motor vehicle accident. He sued the driver and the two social hosts who served the driver alcohol while he was visibly intoxicated. The Court of Appeals held that ORS 31.605(4) does not permit a trial court to combine the fault of the two social hosts to make them jointly and severally liable when the jury assessed their fault separately. The plaintiff in *Lee* filed a request for a trial *de novo* under ORS 36.425(2) after arbitration but did not separately follow the procedure set out in ORS 36.425(6) for filing exceptions to the arbitrator's attorney fee award. The Court of Appeals held that plaintiff's request for trial *de novo* "encompassed 'all issues of law and fact,' including those regarding plaintiff's entitlement to attorney fees incurred during arbitration." 279 Or App at 289.

Hooker Creek v. Central Oregon Land Development, 279 Or App 117 (2016)

Village at North Pointe Condo. Assn. v. Bloedel Constr., 278 Or App 354 (2016)

In *Hooker Creek*, the Court of Appeals held that, to recover attorney fees in a construction lien foreclosure action under ORS 87.060(5), a party must prevail on both the validity and foreclosure of the lien. The statute "does not authorize an award of fees to a party who prevails on other grounds but does not prevail on those two issues." 279 Or at 125. In *Village at North Pointe*, the Court of Appeals held in a construction defect case after a jury verdict for defendant contractors that "the trial court should have apportioned fees incurred on insurance coverage issues, which were not recoverable by [the contractors], from the fees incurred on the litigated claims, which were recoverable because they shared common issues with the fee-generating breach-of-contract claim." 278 Or App at 357.

Miscellaneous

City of Eugene v. Comcast of Oregon II, Inc., 359 Or 528 (2016)

Wittemyer v. City of Portland, 278 Or App 746 (2016)

In *City of Eugene*, the Supreme Court held that a license fee that the city imposes on companies providing telecommunications services over the city's rights of way was not a tax barred by the Internet Tax Freedom Act, 47 USC § 151, nor was it a franchise fee barred by the Cable Communications and Policy Act of 1984, 47 USC §§ 521-73. In *Wittemyer*, the Court of Appeals held that a $35 tax imposed on the income

of each income-earning resident of the City of Portland to support the arts in public schools was not a "poll or head tax" in violation of Article IX, section 1a, of the Oregon Constitution.

Rains v. Stayton Builders Mart, Inc., 359 Or 610 (2016)

Rains involved claims by a construction worker and his wife after the worker was seriously injured when a defective board broke. Plaintiffs sued the retailer, Stayton Builders Mart (Stayton), and the manufacturer, Weyerhaeuser Company (Weyerhaeuser), of the defective board. Stayton asserted a cross-claim against Weyerhaeuser for common-law indemnity. Before trial, plaintiffs and Stayton partially settled in an agreement that required Stayton to pay at least $1.5 million in damages to plaintiffs but capped Stayton's liability at $2 million. The Supreme Court held that the trial court did not err in (1) refusing to dismiss Stayton as a party (and refusing to dismiss Stayton's indemnity cross-claim) for lack of adversity based on Stayton's settlement with plaintiffs; (2) refusing to admit the settlement agreement into evidence at trial; and (3) submitting a verdict form that did not give the jury the option of allocating some fault to the general contractor. The court reversed the noneconomic damages award and remanded the question of whether the statutory cap on noneconomic damages in ORS 31.710(1) violated Article I, section 17, of the Oregon Constitution for reconsideration in light of *Horton v. OHSU*, 359 Or 168 (2016). Finally, the court concluded that "ORS 20.220(3) requires the general judgment awarding defense costs [to Stayton on its indemnity claim] to be reversed along with the underlying judgment for common-law indemnity." 359 Or at 643.

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