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Robert Shlachter Receives Professionalism Award

By David R. Shlachter

Robert Shlachter receiving award from Dennis Rawlinson

The Litigation Section honored Robert A. Shlachter as the 2018 recipient of the Owen M. Panner Professionalism Award at its annual Litigation Institute and Retreat at Skamania Lodge. The Award, which recognizes personal and professional qualities, reputation and conduct of a lawyer actively engaged in Oregon litigation, is named for Senior U.S. District Judge Owen M. Panner, recipient of the first award in 1998.

Three people who have known Rob well in different capacities spoke at the dinner. Oregon Court of Appeals Judge Scott Shorr, Rob's former law partner, described Rob as a mentor and role model ever since they met 25 years ago. He viewed Rob at his essence as a teacher and someone who unselfishly helped him as a young partner to prepare for an argument before the U.S. Supreme Court. He also pointed out some of Rob's "quirks", such as his willingness to become an expert on almost anything, regardless of his training, and his penchant for details including pointing out to newbie attorney Shorr that his shirt was not properly pressed.

Alex Byers (a local Spanish teacher and high school lacrosse coach) shared how Rob has been a steadfast friend since 2005 when Rob regularly drove her home from mock trial practice while Alex entertained him with jokes. Rob and his wife Mara have coached mock trial for 22 years and positively affected the lives of more than 200 high school students. Alex described Rob taking the time to attend junior high and high school sports games to cheer on Alex and her teams. Alex did point out, however, that Rob would not hesitate to offer coaching advice even if he did not know anything about the sport in question. More seriously, she observed that, "with Rob, we know that professionalism encompasses a personal connection, rather than excludes it." She joked that Rob is the Jewish mother she never had but always wanted, as he often identifies eligible young men to fix her up with. Noting that Rob has always encouraged her and been in her corner no matter what, Alex wryly concluded that "because of Rob, I suffer from high self-esteem."

Lastly, as Rob's son, I spoke. I described my parents teaching me at a young age about budgeting and negotiating when they annually set a strictly enforced clothing allowance. As a 12-year-old, I was obliged to plan and live within the agreed budget. If I blew all my allowance on a North Face jacket, I would have to accept the consequences and go without other items. My dad was born with the professionalism gene and helped me and my business partner navigate appropriately and with dignity the defense of a particularly aggravating lawsuit filed in Texas against our real estate company. My dad showed us how to lead

with integrity, how to treat people fairly—even unethical folks on the other side—how to lift others up, how to be better prepared, and how to craft a strategy that discounts the short term and puts a premium on the long term.

After receiving the award presented by Dennis Rawlinson on behalf of the Litigation Section, Rob joked about his 97-year-old mother hacking into the Litigation Section balloting system in an effort to swing the vote to her son. He then got more serious and identified the biblical quote, "Justice, justice you shall pursue," as a bedrock source for the notion of professionalism. To Rob, the passage means that if you use unrighteousness as a means to a righteous end, that makes the end itself unrighteous. He encouraged the audience to practice law well within the legal and ethical lines, to always be straight-shooting with clients, opposing counsel and the court, and implored that "justice, justice you shall pursue."

COMMENTS FROM THE EDITOR

Unconscious Effective Practices

By Dennis P. Rawlinson
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Dennis P. Rawlinson

Anyone who has prepared to run a marathon or has become a serious bicyclist knows that you tend to become introverted, introspective, and egocentric. For instance, you worry about whether you've placed sufficient oil between your toes to avoid chafing and whether you've been able to remove an additional two ounces of weight from your bicycle. So an effective trial practice requires great attention to detail and at times what must seem to be an introverted, introspective, and egocentric approach to the practice.

Discussed below are a few effective practices that most of us regularly employ unconsciously. In an effort to improve our skills of persuasion and to enable us to pass those skills on to those who will follow us, it makes sense from time to time to stop and analyze what good trial practitioners do automatically.

1. Impact points in questions.

a. Generally.

Impact points in questions can have a substantial effect on the persuasiveness of the presentation of evidence.

Clarity and emphasis are generally improved by placing your impact point near the end of a sentence. The impact point is the word or phrase that you are trying to emphasize, the point that the questioner is attempting to draw to the fact-finder's attention. For instance, if the questioner is trying to draw to the fact-finder's attention the time of day (perhaps because the witness was late for work, which begins at 8:30 a.m.), the questioner might ask:

> *"You didn't leave home that morning in your Ferrari until* ***8:28 a.m.****?"*

On the other hand, if the point to be emphasized is the kind of car that the witness was driving, the question would be asked:

> *"The car you drove that morning to work was a* ***Ferrari****?"*

The impact point belongs as close to the end of the sentence as you can place it without twisting your syntax because once you have communicated your point of emphasis, the listener tends to stop listening. Put another way, the purpose of your sentence is to get to your impact point. Once you have gotten to it, end the sentence. Keeping impact points in mind generally assists the questioner in shortening his or her sentences and avoiding rambling, complex sentences that often obscure the very point that the questioner is attempting to make.

b. On cross-examination.

Particularly on cross-examination the impact point should be at the end of the sentence, leaving the witness no time to think. Returning to the question:

> *"You didn't leave your home that morning until 8:28 a.m.?"*

That phrasing leaves the witness no time to think before answering the question. The fact-finder will notice any unusual hesitation, and it will cause suspicion. In contrast, if the point of emphasis were placed in the middle of a longer complex sentence, the witness would have several seconds to think of a response before answering. A less effective question would be:

> *"You didn't leave your home until 8:28 a.m. that morning, and you know that is the case because as you got into your Ferrari you looked at the clock on the dashboard, which lights up when you close the driver's door?"*

c. On direct examination.

Just the opposite practice should be undertaken with your own witness on direct examination, particularly if the witness is nervous. You want to give the witness as much time as possible to answer questions and not present the impact point at the last second unless you are sure that the witness is ready to handle the question. For instance, if you want to know what the witness saw on the morning of May 14, 2018, at the corner of the intersection, you might ask:

> *"What did you see when you arrived at the intersection after leaving your home and arranging with your wife to have her run the errands you had originally planned to run?"*

d. Greater emphasis for impact points.

Impact points can be further emphasized by a number of other speaking techniques, including:

- Change of pace
- A pregnant pause before the emphasis point
- Change in the tone of your voice
- A slight nod of your head
- Turning your body toward the fact-finder and pausing

The number of means available to draw emphasis to your

impact point is limited only by your imagination. The lesson is to stop and consciously determine the "point" that you are trying to make with each question and then deliberately structure the question to increase or decrease the "impact" of the point.

2. Use of the eyes.

One's eyes are often the most powerful means of communicating. Actors and actresses know that credibility and persuasion arise only when you put aside your script and look at the other actors and actresses with whom you are communicating. Similarly, seasoned practitioners use their notes to only a limited degree as they realize that looking at the witness or looking at the fact-finder is too powerful a technique to be lost by dependence on a script.

Impact points again can be emphasized with the use of the eyes. If a particularly important question is being asked of a witness being cross-examined, why not turn to the fact-finder and engage the judge's or jury's eyes as you ask the question and make your impact point. If necessary, ignore or turn your back on the cross-examined witness. Your eyes draw the fact-finder's attention to your point and subtly communicate that this is a point of importance and emphasis.

3. Images.

The most accomplished trial lawyers do not speak words; they paint images. They use the language to draw a word picture, which the fact-finder can easily imagine based on his or her experience. Often the specific technique is to use an analogy or a simile.

For instance, your expert witness should be well enough prepared to describe the "unanticipated outward vector of lateral stresses on the fission chamber's brittle ceramic containment wall" by an analogy that likens the action to a "rock smashing through a living-room picture window." The fact-finder is able to cut through the scientific jargon and understand the analogy and the point. Each of us can easily imagine a rock smashing through the picture window of a home. Although each of us may be envisioning a different living room, a different picture window, or a different size of rock, the image is nonetheless vivid and allows the witness and the witness's lawyer to have a private dialogue with each of the listeners.

During the course of a hearing or a trial, a memorable image can often be drawn or may even arise as a matter of happenstance. For instance, the witness whose cellular phone rang in his briefcase while he was testifying might provide a rare moment of comic relief. In closing argument, the image of that witness can best be resurrected not by describing the witness's background, but by simply reminding the fact-finder of the memorable incident:

> *"Remember Mr. Brown, the witness whose cell phone rang while he was on the stand?"*

Immediately the fact-finder will have in mind the image of the witness to whom you are referring. Similarly, if you want to refer to the expert's testimony about the vector and stresses, don't repeat the technical analysis; simply remind the fact-finder of the expert who testified about the interaction of the stresses being like "a rock smashing through a living-room picture window."

The beauty of images is that not only do they communicate powerfully in the first place, but also, once an image has been established, the repetition of that image can immediately bring to mind the witness, the result of the experiment, or the point to be made.

4. Conclusion.

All of us are faced with two challenges as we attempt to master the art of persuasion. First, finding the time to prepare with the sufficient detail to be sensitive to issues such as impact points, use of the eyes, creating images, and using our passions. Second, stopping when we see an accomplished practitioner employing these methods and analyzing what was done, how it was done, and how it should be modified to work best for us. All of this inevitably leads to introversion, introspection, and egocentricity.

What Can You Afford to Risk? Self-Incrimination in Civil Litigation

By Janet Hoffman
Janet Hoffman & Associates LLC


Janet Hoffman

When a civil action results in criminal charges, often the most compelling evidence in favor of conviction is self-incriminating evidence disclosed in the civil case. Recently, I spoke on a panel addressing the various ways civil litigation can implicate a client in criminal conduct. Following the presentation, a member of the audience submitted a question: "Practically speaking, what options exist if you identify an area where your client might incriminate himself? And, if your client makes an incriminating statement or turns over an incriminating document, what can be done to protect them in the criminal context?" This article is my attempt to answer these practical questions from the perspectives of plaintiff, defendant, and witness.

I. The Basic Legal Framework

The Self-Incrimination Clause of the Fifth Amendment to the United States Constitution gives every person the right not to "be compelled in any criminal case to be a witness against himself."[1] Article I, section 12 of the Oregon Constitution states: "No person shall be … compelled in any criminal prosecution to testify against himself."[2] These privileges can be raised in any proceeding at any juncture where the testimony may be incriminating in a future

1 U.S. Const. Amend. V.

2 The jurisprudence regarding the Self-Incrimination Clause of the Fifth Amendment generally applies to the Oregon Constitution's analogous privilege.

criminal proceeding.[3] This includes civil, administrative, and criminal cases, as well as non-judicial settings.[4]

In order for a person to assert their Fifth Amendment right against self-incrimination, they must have an articulable interest that can be expressed in order to show their testimony would either support a conviction or "furnish a link in the chain of evidence needed to prosecute [them] for a federal crime."[5] A court determines whether a person's Fifth Amendment assertion is justified by deciding "whether [they are] confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination."[6] Of course, the witness does not need to explain why answering a question would incriminate them. "To sustain the privilege, it need only be evidenced from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[7] In other words, the Fifth Amendment protects more than the proverbial smoking gun and other plainly phrased admissions of wrongdoing. It also protects statements that may seem innocent on their faces but, in light of previously developed facts, could be injurious.

In addition to the testimonial setting, the Fifth Amendment also applies when a person produces documents, which typically occurs in response to a subpoena *duces tecum* or a request for production. Pursuant to the "Act of Production" privilege, the very act of producing documents (as opposed to the contents of the documents themselves[8]) is protected under the Fifth Amendment to the extent that the production may constitute implied testimony that could be incriminating.[9] The "Act of Production" privilege may arise where the production of records amounts to the tacit admission of a document's existence or a client's possession of them, either of which could be incriminating. In addition, the "Act of Production" privilege is implicated when the production may serve to authenticate documents that would otherwise have questionable foundations.[10] If, under any of these theories, a production of documents is incriminating, a person can assert their Fifth Amendment right and refuse to produce the documents unless the requesting party can show with "reasonable particularity" that the existence, location, and authentication of the documents are "foregone conclusions."[11]

3 *United States v. Balsys*, 524 U.S. 666, 672 (1998).

4 *See id.; State v. Langan*, 301 Or. 1, 5 (1986) (Article I, section 12 privilege against self-incrimination applies in any judicial or non-judicial setting where compelled testimony is sought that might be used against the witness in a criminal prosecution).

5 *United States v. Rendahl*, 746 F.2d 553, 555 (9th Cir. 1984) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

6 *United States v. Apfelbaum*, 445 U.S. 115, 128.

7 *Hoffman*, 341 U.S. at 486-7.

8 Because the Fifth Amendment only protects a person from *compelled* self-incrimination, a document that was voluntarily created is not protected. *See Fisher v. United States*, 425 U.S. 391, 396 (1976); *cf. Schmerber v. California*, 384 U.S. 757, 761 (the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature").

9 "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe v. United States*, 487 U.S. 201, 210 (1988).

10 *See id*. at 216 (noting that authentication by production would be "testimonial" in nature).

11 *In re Grand Jury Subpoena*, 383 F.3d 905 (9th Cir. 2004).

II. Strategic Considerations

In some cases, your client may choose to waive their Fifth Amendment right against self-incrimination and make statements or produce documents in a civil case. Such a waiver must be "knowing, intelligent, and voluntary."[12] Before making this choice, however, counsel must carefully advise a client on the risks of doing so. Balancing your client's interests against likely outcomes is extremely difficult, and the decision is not always clear cut. For example, if your client is the subject of a SEC enforcement action and an ongoing criminal investigation, the answer is far simpler than in a situation where you believe your client could be implicated in a civil matter that involves no known criminal investigation, but which may still carry criminal ramifications. Your advice will also depend on whether your client is a plaintiff, a defendant, or a witness subpoenaed to testify or produce documents.

A. Plaintiffs

Advising plaintiffs on whether they should waive their Fifth Amendment right requires contending with a number of emotional considerations. In some instances your client feels wronged, and you, having conducted discovery, also believe that your client has been wronged. In other instances you believe in the client's cause, and the client either needs financial compensation for his losses, wants to set a precedent, or simply wants to vindicate themselves or repair their reputation. Regardless, if the matter is pursued, the defense may try to implicate your client in wrongdoing, whether fairly or not. There is a significant risk that, even if your client prevails in the civil case, the evidence obtained in that litigation could later be used against your client to build a criminal case. The success in one arena could jeopardize your client's interests in another.

For a plaintiff, there is really only one option for avoiding criminal liability: not pursuing a claim. Although this outcome is difficult for a client to accept, the added costs of later defending against a criminal prosecution will usually outweigh any potential recovery in a civil case. Of course, counsel should also consider any avenue to settle a matter in a way that might partially, if not totally, bring about the relief sought in the lawsuit. For example, with the client who sees themselves as a whistle blower, perhaps you could persuade your client's employer to adopt new policies that will help ensure that the sort of conduct at issue in the case does not reoccur.

B. Defendants

Like plaintiffs, defendants certainly experience strong emotions and the same considerations may exist: vindication, reputation, money, and fear of setting a precedent. Yet the risk of incrimination in formulating a defense may exist because of the nature of the claims and the interest of the accuser. The risk in this situation may be more obvious, but the choices more limited. Defendants, unlike plaintiffs, do not have the initial choice of whether or not to bring the litigation in light of all of the risks. Therefore, before you begin the discussion with your client about what they can "afford to risk," it is important to understand the various areas where criminal liability arises, and what can or can't be done to resolve the risk.

12 *Edwards v. Arizona*, 451 U.S. 477, 482 (1981); *State v. McAnulty*, 356 Or 432, 455 (2014).

In determining whether your client may be facing criminal liability, you should consider whether the facts used to establish your client's claims or defenses, or the facts that will come out in their testimony, could also be used to satisfy the elements of a criminal charge. You should also determine whether the government is already investigating your client. If you are unsure whether there is an active investigation, but believe your client has potential criminal liability, it can be wise as a first step to reach out to the law enforcement agency or prosecutor's office that would be the entity investigating your client. Although prosecutors are not required to inform prospective defendants that they are being investigated, they cannot engage in "trickery or deceit" in order to affirmatively mislead the subject of parallel civil and criminal investigations into believing that the investigation is exclusively civil in nature pursuant to the "parallel proceedings" doctrine.[13] Regardless of what a prosecutor tells you about the status of their investigation, an initial inquiry will at a minimum open up a dialogue and, in some circumstances, the dialogue itself can help counsel understand whether or not their client's case is the type that the prosecutor would have an interest in. It can also create an opportunity for you to explain your client's role in the matter. If you have a compelling argument to make at this early stage, it could make the difference between your client being a cooperating witness or a defendant in a future criminal proceeding.

If you ultimately determine your client has potential criminal liability, the next step is to consider the potential downsides of asserting the Fifth Amendment. If your client is a litigant in federal court, they run the risk of having an adverse inference drawn against them with respect to the fact they refuse to disclose.[14] However, such an inference can be drawn only if independent evidence exists that could prove the fact your client refuses to disclose.[15] In Oregon state court, on the other hand, no adverse inference is allowed in the event your client asserts their Fifth Amendment right.[16] But, a defendant cannot use the assertion of the Fifth Amendment as both a sword and shield. If your client testifies affirmatively, they may then waive their right to assert the Fifth Amendment during cross examination. In that situation, the client runs the risk of having their testimony struck if they do not answer questions.[17]

In addition to asserting the Fifth Amendment there are several alternatives available to defendants that, if successfully obtained, can at least temporarily mitigate the risk of criminal liability.

13 *United States v. Stringer*, 521 F.3d 1189, 1198 (9th Cir. 2008) (citing *United States v. Robson*, 477 F.2d 13, 18 (9th Cir. 1973).

14 *Baxter v. Palmigiano,* 425 U.S. 308, 318 (1976).

15 *Doe ex rel. Rudey-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000) ("[W]hen there is no corroborating evidence to support the fact under inquiry, the proponent of the fact must come forward with evidence to support the allegation, otherwise no negative inference will be permitted.").

16 OEC 513(1) ("The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from a claim of privilege."); *John Deere Co. v. Epstein*, 307 Or 348 (1989).

17 *See United States v. Seifert*, 648 F.2d 557, 561 (9th Cir. 1980).

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1. Settlement

Settlement is, of course, the obvious choice if the parties can reach an acceptable agreement. Even with a settlement, however, counsel must carefully draft written agreements to ensure recitals and other factual provisions do not implicate their client.

2. Stay of Proceedings

In a case where a settlement is not an option, a defendant can move to stay a civil case in whole or in part if the facts of the lawsuit parallel possible criminal liability. However, a court has discretion to refuse to stay the proceeding after balancing the following factors: (1) the interest of the plaintiffs in proceeding expeditiously, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court, and the efficient use of judicial resources; (4) any relevant interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and, if applicable, criminal litigation.[18] Put more simply, a defendant will not be granted a stay based on the mere possibility of criminal liability, and will have to assert their Fifth Amendment right if denied a stay.

3. Motions to Quash or Motions for a Protective Order

A complete consideration of the grounds for seeking a protective order against a discovery request or quashing a subpoena is beyond the scope of this article. However, a discovery request or subpoena may be objectionable because it is overbroad, asks for privileged information, or, of course, where responding to it would expose your client to self-incrimination because it assumes guilt.[19]

C. Witnesses

A client who is subpoenaed to testify as a witness or produce documents in a matter where they may be exposed to criminal liability is in a different situation than a plaintiff or a defendant. Such a client lacks the power to stay a proceeding, and has no claim to drop. Furthermore, they cannot simply refuse to comply with a subpoena or decide not to attend the proceeding. A witness can, however, refuse to answer questions by asserting their Fifth Amendment right without having to worry about an adverse inference being drawn against them. But, the act of refusing to answer will certainly place the spotlight on them and their conduct. It may also cause reputational damage. This sort of client, because of their role in society or within a company, may be reluctant to assert their Fifth Amendment right. Such a client is also the very person with whom having the discussion regarding risks may be the most important.

III. Damage Control

The biggest risk of your client making incriminating statements is that those statements may later be used in a criminal prosecution against them. But how does this play out in the real world? One example is where your client appears for a deposition and makes statements that implicate them in criminal activity. These statements have several negative consequences. First, the statements may provide the government a road map of your client's likely defenses. Second, the government may claim that the statements themselves (if any aspect of them are at odds with the facts alleged by the prosecution) were an obstruction of an investigation. This, in turn, could allow a prosecutor to bring an obstruction charge separately, or use the allegation of obstruction to enhance a criminal sentence.[20] Third, and most importantly, the statements will be admissible in evidence in a criminal prosecution against your client as admissions of a party opponent. Unfortunately, regardless of your client's intent when making the statements, there is no similar right for a criminal defendant to use the exculpatory portions of the same deposition. Such a deposition can be particularly damaging if your client chooses not to testify during a criminal trial and has no chance to explain the context of the statement or what they were thinking when they made it.

Under the rules of evidence, in order to mitigate the harm of the prior statement, defense counsel can (1) find other areas of testimony from the prior statement, omitted by the prosecutor, that are admissible under the "rule of completeness;"[21] (2) challenge the prosecutor's characterization of the statement as an admission; or (3) argue a constitutional basis for exclusion that would otherwise make the statement involuntary.

One such constitutional basis could be that the statement was given pursuant to an involuntary waiver of your client's Fifth Amendment right. If a government investigator was questioning your client when the incriminating statement was made, then there may be an avenue to suppress the statement through the doctrine of parallel proceedings. This doctrine, in a nutshell, says that a civil case cannot be used as a stalking horse for a criminal prosecution. For one thing, the government cannot bring a civil action solely to obtain evidence for a criminal prosecution.[22] But even if the civil action is not brought *solely* for the sake of criminal prosecution, the circumstances may indicate that a criminal prosecution is inappropriately utilizing a civil investigation for fact-gathering.[23] If, for instance, staff from separate civil and criminal agencies meet regularly, identify targets together, or share documents, there may be grounds in the criminal prosecution to suppress a statement made in response to questioning by the civil investigators. The same argument could be made if the government creates an "agency" with a private civil attorney and uses that attorney to gather information for a prosecution. In such a

18 *Id*.

19 For example, if a subpoena to a banker ordered the production of "all documents related to the unauthorized cashing of checks," a court would almost certainly quash it.

20 However, before the statement can be used for such a purpose, the government must demonstrate that "the defendant gave false testimony on a material matter with willful intent." *See, e.g.*, *United States v. Herrera-Rivera,* 832 F.3d 1166, 1175 (9th Cir. 2016) (quoting *United States v. Castro-Ponce*, 770 F.3d 819, 822 (9th Cir. 2014)).

21 Federal Rule of Evidence 106 provides that, "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time." Rule 106 of the Oregon Evidence Code provides the same rule, but extends it beyond just writings and recorded statements to "act[s], declaration[s], and conversation[s]."

22 *United States v. Kordel*, 397 U.S. 1, 11 (1970).

23 *Stringer*, 521 F.3d 1198.

situation, the civil attorney may be found to have acted "as an 'instrument' or agent of the state."[24] A court may make such a finding after determining: "(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends."[25]

IV. Conclusion

The decision of whether to assert the Fifth Amendment right against self-incrimination can have a dispositive impact on civil litigation. Clients facing this choice may be dealing with the potential loss of a business, a job, emotional or physical pain, or a dire need for financial compensation or even simple vindication. These clients certainly never imagined they would need to choose between asserting legal claims or defenses and taking the Fifth. I have learned over the years that in order to resolve the issue the most important question to explore with the client is: "What can you afford to risk?" For each client in each situation, the answer may be very different. An outsider may assume that the obvious answer is, "I cannot afford a criminal conviction," or, "I cannot afford a prison sentence." But sometimes, despite counsel's concern for their client's criminal prosecution, that is not the most important factor to a client. Some clients may care more about their reputation in the proverbial "court of public opinion," or the business they have built up over time, or conveying to their children that you can't just give in to bullies. Each client is unique, and each has a different take on what constitutes too large a risk. Helping a client figure out the risks and how to navigate the areas that are potentially incriminating is one of the most difficult areas for counsel to advise, and for the client to decide what is ultimately not worth risking.

24 *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971).

25 *United States v. Cleaveland*, 38 F.3d 1092, 1093 (9th Cir. 1994) (quoting *United States v. Reed*, 15 F.3d 928, 931 (9th Cir. 1994)).

Omnicare: The Case for Application to Oregon's Securities Law Statutes

By Meryl Hulteng
Lane Powell PC


Meryl Hulteng

In 2015, the Supreme Court issued their now well-known *Omnicare* opinion, weighing in on the debate about what extent statements of opinion in securities offerings can be the basis for a securities fraud claim.

Prior to *Omnicare*, actionability of opinion statements in securities claims was treated inconsistently among the circuits. In the Second and Ninth Circuits, statements of opinion were only misleading, and thus actionable, if the issuer did not sincerely believe the opinion. *See, e.g.*, *Fait v. Regions Financial Corp.*, 655 F.3d 105, 110 (2d Cir. 2011); *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156 (9th Cir. 2009). In contrast, in the Sixth Circuit, an opinion was misleading if objectively incorrect, regardless of whether the issuer actually believed it. *Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare*, 719 F.3d 498 (6th Cir. 2013), *rev'd sub nom Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S.Ct. 1318 (2015).

In *Omnicare*, the Supreme Court fashioned a test for statements of opinion that was a departure from both the defendant-friendly standards in the Second and Ninth Circuits, as well as the more plaintiff-friendly Sixth Circuit standard. The Court held that an issuer's statement of opinion can be actionable, but only if: (1) the issuer did not actually believe the stated opinion; or (2) the stated opinion contains other embedded factual statements that were untrue. In addition, even if an opinion is sincerely held and otherwise true, it may also be actionable if the issuer omits material facts and the omission makes the statements misleading to a reasonable investor.

Omnicare was originally touted as a major victory for investors, seemingly expanding the circumstances under which an opinion may be actionable. And the standard was quickly applied to other types of claims, including Rule 10b-5 fraud claims. *See City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 610 (9th Cir. 2017).

Thus, immediately after *Omnicare*, with investors buoyed by the impression of a more investor-friendly standard and an expansion to several types of securities claims, opinion-based claims based on *Omnicare* proliferated, or at the very least gained more attention. Yet the bounty of subsequent litigation merely gave the courts ample opportunity to tamp down investor excitement by narrowly interpreting the new rule and imposing a high burden on investors trying to prove opinion-based claims.

Now, three years out from the Supreme Court's ruling in *Omnicare*, for Oregon practitioners the question remains —

what does this mean for claims brought under the Oregon securities statutes? Looking back at the origins of Oregon's securities fraud statutes, adoption of the *Omnicare* standard seems likely despite Oregon's notoriously investor-friendly statutes. Consider the following:

It is well-established that the Oregon securities laws were modeled after the federal securities laws. *State ex rel. Oregon State Treasurer v. Marsh & McLennan Companies, Inc.*, 269 Or. App. 31, 42, *review denied*, 357 Or. 299 (2015) ("The modern version of the Oregon Securities Law was enacted in 1967 and was patterned in many respects on the Uniform Securities Act."). Moreover, since their enactment, Oregon's securities laws have amended and supplemented with the express goal of achieving greater consistency with the federal statutes. *State v. Marsh & McLennan Companies, Inc.*, 353 Or. 1, 18, 292 P.3d 525, 534 (2012) ("The legislative history confirms that SB 609, now codified as ORS 59.137, was intended to create consistency between Oregon and federal securities law."). On this basis, the Oregon Supreme Court and Court of Appeals have found the elements of the federal fraud claim — reliance and *scienter* — elements of some fraud claims under Oregon securities law.

The Oregon courts' increased tendency to look to the federal securities law statutes is not the only reason the *Omnicare* standard will likely be adopted in Oregon. The Oregon courts have also articulated similar rules regarding opinion statements in other fraud contexts.

For example, in 1918 in *Ward v. Jenson*, 87 Or. 314 (1918), the Supreme Court cited with approval a rule very similar to the standard articulated in *Omnicare*: "[S]ometimes a statement of an opinion is necessarily based upon a fact or carries with it such an inference of fact that it can be interpreted as a statement of fact, and where it is known to be false and made with intent to deceive, it may be actionable." *Ward v. Jenson*, 87 Or. 314, 320, 170 P. 538, 540 (1918). A rule the Oregon Supreme Court relied on again in *Dorr v. Janssen*, 233 Or. 505, 509–10, 378 P.2d 999, 1001 (1963.)

With actionability of opinion statements attaining greater prominence in federal securities litigation, it is only reasonable to expect that Oregon will have to articulate its own standard soon. If Oregon's recent precedents favoring interpretation based on federal securities statutes and aging precedents are any indication, practitioners should anticipate an *Omnicare* standard may be coming soon to a courtroom near you.

Winning More by Losing Less

By William A. Barton
The Barton Law Firm, P.C.

Editor's note: This is the first in a three-part series exploring winning and, more importantly, losing cases and how we as advocates and counsel for our clients can integrate those losses in ways that motivate and position us for future wins. Parts two and three will be published in the fall 2018 and winter 2019 editions, respectively, of the Litigation Journal.


William A. Barton

I know I'm not the only one who loses and struggles with how to avoid losing; however, few successful jury trial lawyers specifically address this topic. In this article I discuss my feelings after losing and recommendations on how to process losing in a manner that sustains my enthusiasm and maximizes the odds I'll win my next trial. We'll explore the value of perspective, and how some personal qualities we commonly consider assets can become liabilities when taken to excess.

We're all one trial away from our next loss. I have only done defense of the criminally accused and plaintiffs' personal injury, so my thoughts are driven by my personal experiences. I write however for all trial lawyers. At the end of this three-part series, I will invite you to consider writing your professional obituary. This exercise invites perspective and emphasizes the long view of what we do.

There's an assumption that many of my peers reject. If I do happen to win, then I presume (perhaps incorrectly) that the opposing lawyer will suffer as much as I would if I'd lost. Of course there are important differences. In criminal cases, prosecutors always win, no matter the verdict, because ostensibly justice was done. In civil cases, insurance companies front the costs and their retained counsel gets paid, win, lose or draw. I'm confident however the lawyers opposing me are as passionate about their clients and trials as I am mine. Our system expects such loyalty, and each of our clients deserves and demands it.

Jury trials are social petri dishes wherein a committee of the community, a jury, passes judgment upon our cases and, in a sense, upon us. Jury trials are publicly performed high wire acts with no emotional safety nets. Feelings and attachments naturally arise during the preparation and presentation of a case. There are predictable emotions after a loss. Being smitten by a client and/or a case is easy; it's losing that's so painful.

As professionals, losing is an existential threat to our personhood and status. Losses are a dagger into our hearts, self-esteem, and, yes, egos. I accepted the case; I signed the complaint; I prepared the facts; I selected the themes and arguments, and thus it becomes an extension of me. So yes, the jury verdict feels like a referendum on my competence and judgment. Losing can and should force us into an introspective examination of our legal services and can be a

confidence-shaking referendum on ourselves. However, no matter how painful, when processed with best practices, losing can ultimately be good for us.

Pick and choose from my suggestions, consider what resonates with you. I settled into my current approach after about 15 years of practicing law. By my comments I'm not judging anyone else's choices, and agree that some of my present advice may seem formulaic and trite.

Young lawyers ask me what my win-loss record is, and what's the most trials I've lost in a row. First, I don't keep track of "my" wins and losses; besides, there are too many cases where there's not a clean answer, such as when my client is convicted in a criminal trial of a lesser included, but on balance it's a major win given the client's exposure. In the civil arena, maybe the insurance company offered X and the jury awarded X plus 30 percent, which covered any increase in the attorney's fee for going to trial and the additional costs advanced necessitated by going to trial. You can try a civil rights case, lose, and still feel good about it. Small verdicts will feel a lot better when they're accompanied by a substantial attorney's fee award. So, what if I got a great verdict but the insurance company appeals and my client dies during the appeal? It doesn't feel like much of a win to me. What good is a big verdict without insurance coverage? What if you receive only a so-so verdict but create great new law on the appeal? Think here of criminal verdicts for lesser included offenses, a mid-level plaintiff's verdict, or a mediocre result with a serious attorney's fee award. It's interesting that Olympic third-place bronze medal winners are generally happier than second-place silver medalists. Why? Because runner-ups can't let go of how close they were to being the best, to winning the gold ("If only I had…."), while bronze medalists can take solace in thinking of all the competitors they beat to win a medal. Privately, I have maybe a dozen results I feel really good about, and three I'd call major losses.

Once you start worrying about protecting a win/loss record or are frightened of losing because of anything to do with your ego, then you're vocationally disabled and shouldn't be doing this job. I think of this as your "pucker" factor.

As to the second question, I once lost 14 straight criminal misdemeanors. It was maybe 40 years ago when we had jury panels in my rural county that lasted for three-month terms. I don't remember the panel acquitting anyone. If I retried the same cases today, I doubt I'd do any better before the same jury panel.

Ex-DAs who migrate across to doing criminal defense often suffer a crisis of confidence when they start losing and losing a lot. As the public representative they could always plea bargain their soft cases and, of course, they wore a halo. They never had to defend alleged child abusers, rapists, terrorists, burglars, murderers, or shoplifters. Public defenders and single parents bear a much greater burden and are my heroes.

Personal injury work is like a contractor who makes bids on various projects. You form estimates based upon a case's prospective value, factoring in the time and money necessary to do the job, meaning processing the claim to its value. Your ability to accurately assess risk, and thus case value, improves with experience and, just like a contractor, if you make too many bad bids, then you're out of the market. On the civil side, if you can't afford to lose, then you're probably making settlement decisions in the shadow of your finances rather than what's best for your client.

Early drafts of this paper seemed to sterilize, if not trivialize, the past pains and difficulties I've had on my long professional journey. When I first started, you'd think I was bipolar with the emotional highs and lows. So how do any of us grow into this job? How did I? First, we can agree that everybody does it differently. My generation might jog, work out, split a cord of wood or maybe have a couple of drinks; many of my young millennial friends find inner peace in mindfulness, meditation, and yoga.

I ran and exercised hard every day (which also helped me sleep), had a spouse I could share and be vulnerable with, chose not to drink, and then just worked harder. These self-care habits allowed me a measure of peace amidst the unremitting challenges of the job. My background in athletics also helped. In basketball, if I was in a shooting slump, I would show up early for practice paying close attention to my fundamentals and then stay late and shoot an extra 250 times, while trying to stay loose and find my rhythm.

During my first ten years I did lots of DUIIs, criminal defense, and domestic relations. I had lots of practice losing. I then shifted to plaintiffs' personal injury work where losing included not just bigger trials but also no compensation after a defense verdict. Add to that the loss of all the costs I carried, which was money I'd already earned.

Coming to grips with losing is a big part of being a jury trial lawyer. Some say, "Show me a good loser and I'll show you a loser," and there can be a sliver of truth to this. It's more what we do about it that counts. We need to regularly and willingly submit to a searing examination of our services. Our losses help us do that.

Just because lawyers may be successful with their win/loss rate or finances doesn't necessarily mean they are satisfied and happy in court or in life. In contrast, you may struggle financially and continue to suffer over each and every loss (sound familiar?), yet still enjoy — no, love — the nature of this work.

It's incumbent on each of us to find ways to emotionally self-nourish amidst this work. Being self-regenerating is deeply personal work. We must be strong enough to endure losing while remaining flexible enough to learn and grow from each of our losses. That's what this article is really about, you improving your inner relationship with yourself.

Fear of Losing Can Be a Powerful Motivator

During an incredibly honest and insightful 1991 speech at the annual American Association for Justice (then ATLA) convention, Wyoming attorney Gerry Spence shared his fears and the lengths he's gone to avoid the pain of losing. He closed by inviting us to reflect upon our deepest motivations for doing our work and, thus, our values. Let me share parts of his speech with you:

> "I wished in a way that I had lived, that I could live my life over again. I don't feel very smug about the kind of life I have lived. I wish that I weren't 62 years old and have retained so little of the living of my life. I can't remember most of my life. Some people say, 'Well, Mr. Spence, that's just natural for old bastards like you. That's called premature Alzheimer's, you know.' But I can't remember most of my life. I don't know if any of you are like that. I can't remember much of my children. They're all grown now. Most of my children are older than you. I don't remember them as babies. I don't remember much about the joy with my wife as they grew up. I don't remember the vacations and hunting trips. You know why I don't remember? I don't think it's because of Alzheimer's. I think it was because of a terrible intense, compulsive, insane focus on what I did. I think it was a . . . I, I think I wiped out everything in my life except the case in front of me. I think I lived it. I think I became it, I think I became my client. I think I became a case. Look at me! I am a case! I am a thousand cases! Maybe I'm not a human being. Maybe I am just a bunch of cases I can't even remember. People would come up to me and tell me stories about what I did. They'll come up to me and tell me how I would lay my very life down in a case and I can't even remember the client anymore. I can remember the losses but I can't remember the victories. I can remember the pain but I can't remember the joy, which was very little, that came out of winning cases. You don't get the joy out of winning a case. You get only relief. Thank God, you know, this client isn't going to lay in the gutter. Thank God that I didn't lose this case. That's the kind of joy that comes. And then it's the next case that comes. And the next fear. And I want to say to you that the price that's been paid for what people say is quote 'success' is a very high price."

If the fear of losing is a great motivator, can we have too much of a good thing? and, if so, what exactly does that excess look like for you? How does it compare with Spence's admitted obsessive compulsions? Is this a price you're prepared to pay? Each of us will have our own answer. While it is beyond the scope of this article, this level of aversion to losing directly implicates important work-life balance questions. Is Spence's reaction compatible with a work-life balance?

Why did you pick this kind of work? What are your deepest motivations?

We are used to excelling, otherwise we wouldn't be lawyers. We've further selected the courtroom and then, additionally, chosen the specialties of criminal defense and/or personal injury. We have often chosen these practice areas for powerful psychological and ideological reasons that are central to our personal identities. I want you to pause and identify as many of the positive reasons you have for choosing your line of trial work. These reasons can be powerful sources of emotional nourishment and strength when you lose.

Psychologist Carl Jung identified archetypes that help explain our motivations and Joseph Campbell later expanded on Jung's early work. Two Jungian archetypes predominate among criminal defense and plaintiffs' personal injury trial lawyers' work: the hero and the caregiver. While we all display aspects of multiple archetypes, one predominates. Knowing which archetype best describes us can offer keen insights into our motivations. Let's consider and reflect upon both.

The (Crusading) Hero

The hero's main desire is to prove his or her self-worth through courageous acts with an expert mastery that improves the world. The hero's greatest fear is weakness, being vulnerable, or being seen as "chicken." Heroes strive to be strong and competent. Their Achilles heel is arrogance and the constant need to be in a battle. Heroes see themselves as warriors, crusaders, rescuers, superheroes, soldiers, dragon slayers, winners, and ultimately as team players. It's a wide rut in the road of life that describes most successful criminal defense and plaintiffs' personal injury lawyers.

The Caregiver

Caregiver archetypes protect and care for others. Their purpose is to help others. Their greatest fears are selfishness and ingratitude. While caregivers are compassionate and generous, martyrdom and being exploited can be their downfall. They're often described as saints, altruists, helpers, and supporters. Ring a bell? Remember how difficult it is to turn down a prospective client, particularly when they really need our help? Sometimes it seems I'm a human life raft.

We're All Sheepdogs

Based on the 2012 book, the 2014 movie, *American Sniper*, is illustrative. Actor Bradley Cooper plays military hero Chris Kyle who recalls a story his father drilled into him as a boy. There are three kinds of animals in the world: sheep, who are the good folks who make up our communities; wolves who prey on the innocent sheep; and sheepdogs, who are the guardians of the flock. We plaintiffs' lawyers and criminal defense practitioners see ourselves as sheepdogs; we are sentinels protecting our herds, our communities.[1] It's what we do; it's

1 Jason Hall, *American Sniper*, 2014.

who we are. Reflect here upon our deep-seated need to protect our clients. This is expressed in the often unconscious psychological phenomena of transference and countertransference.[2]

We're Also Guardians

Next, remember the 2006 movie, *The Guardian*, about the U.S. Coast Guard's "top guns" starring Kevin Costner in the lead role as a revered Coast Guard hero who rescues hundreds of maritime victims by jumping from a helicopter. One night in a bar, Costner's idolizing sidekick, played by Ashton Kutcher, asks Costner how many people he actually saved, "How many hundreds was it?" Costner pauses, slowly turns, and says, "Twenty-two. I never kept track of the ones I saved; only the ones I had to swim away from." There will always be someone just beyond the reach of your abilities and resources anytime you're in the business of helping people. And, yes, those are the clients you'll never forget.

Joseph Campbell's *The Hero With a Thousand Faces*[3] explains that each of our life stories tends to fall into patterns. While, of course, we all experience life individually, the reality is we have much more in common than we suspect. Once you step outside of yourself, you'll realize that many of our life stories are variations on a theme. A typical American one involves service to others and a life of redemption.[4] Are you a sheepdog or guardian?

As I reflect upon my prior losses, I can't help but remember the cases I'm sure I would win if I tried them today. Here's my tortured excuse: Top surgeons are doctors of last resort who routinely perform high risk surgeries. This means they are going to leave some of their patients dead on the operating table. It's inherent in what they do; however, this doesn't mean they aren't always committed to doing their best and improving. As an aside, they didn't start out doing the most difficult surgeries; they've spent a career perfecting their craft. I wonder how many patients they might have saved earlier in their careers, if they were as skilled then as they became later. Their competence grew, just as mine has. We all learn from trial and error. I never said I forget the past; only that I try to learn and grow from it. I am just one part in our nation's evolving system of justice, which itself is a part of our country and its larger social process.

So, what are your deepest motivations for your line of work?

Do you like what you're doing? Do you really enjoy criminal defense and plaintiffs' personal injury? If so, why? We're all a mix of motives, some lofty and noble, and others less so. Try generating your own positive list. This exercise will help you better understand what being a jury trial lawyer means to you, and why. These motivations can be sources you access to sustain your creativity, enthusiasm, and professional growth. Start your list with the two obvious ones: (1) helping people; and (2) making the world a better place. For most of us, these are front and center, but are there more? Think about it and create your list. I will share mine in part two of this series.

Editor's Note: The second of this three-part series will be published in the fall 2018 issue of the Litigation Journal.

2 Transference refers to the feelings that your client experiences in relation to you. It is where our clients transfer feelings and attitudes from a person or situation in the past on to a person or situation in the present. Countertransference, in a similar vein, is about our feelings back toward our clients. Much of this can be unconscious. *See*, Racker, Heinrich, *Transference and Countertransference*, Taylor Francis (London 1982) (eBook 2018).

3 Campbell, Joseph, *The Hero with a Thousand Faces* 21st Ed., Princeton University Press (1972).

4 McAdams, Dan, *The Redemptive Self-Stories Americans Live By*, Oxford University Press (2005), p.15.

RECENT SIGNIFICANT OREGON CASES

By Stephen K. Bushong
Multnomah County Circuit Court


The Honorable Stephen K. Bushong

Claims and Defenses

McLaughlin v. Wilson, 292 Or App 101 (2018)

Plaintiff worked as a medical assistant at Hope Orthopedics, where she assisted defendant—an orthopedic surgeon—on a full-time basis. Plaintiff alleged that defendant harassed plaintiff sexually and on the basis of religion, and later made disparaging comments about plaintiff after both plaintiff and defendant were no longer employed at Hope Orthopedics. The trial court granted defendant's motion to dismiss plaintiff's statutory unlawful employment retaliation claim. The Court of Appeals reversed. The court, construing the statute, ORS 659A.030, concluded that (1) the trial court erred to the extent that it concluded that defendant "could not be liable under the statute simply because he was not plaintiff's employer" (292 Or App at 114); and (2) "defendant's conduct is the kind of discrimination that the legislature intended to regulate in ORS 659A.030(1)(f), even though it occurred outside of the workplace and after both plaintiff and defendant resigned from Hope." *Id.* at 118.

Rush v. Corvallis School Dist. 509J, 291 Or App 252 (2018)

Plaintiff, a high school student, was injured when she tried to stop a fight between two other students across the street from Corvallis High School. Plaintiff sued the school district, alleging that it was negligent in failing to supervise the students involved in the fight, and failing to enforce its anti-violence protocols, despite knowing of the potential for violence between the students. The trial court granted the district's motion for summary judgment; the Court of Appeals affirmed. The court concluded that (1) "there is no genuine issue of material fact that defendant supervised students during the lunch period" at the off-campus location of the fight (291 Or App at 258); and (2) the summary judgment record "does not contain evidence legally sufficient to support a finding that

defendant had or should have had specific knowledge that the fight between [the two students] would occur." *Id.* at 260.

Payne v. Kersten, 291 Or App 436 (2018)

Plaintiff sued his former lawyer for legal malpractice and breach of fiduciary duty based on legal advice defendant gave him on personal matters and in connection with trusts created by plaintiff and his wife. The trial court granted defendant's motion for summary judgment, concluding that (1) plaintiff could not pursue claims on behalf of the trusts or their beneficiaries, and (2) plaintiff's individual claims were barred by issue preclusion following resolution of an earlier lawsuit between plaintiff and his son. The Court of Appeals reversed in part. The court concluded that the trial court did not err in dismissing plaintiff's claims "to the extent they were brought on behalf of the trust and its beneficiaries." 291 Or App at 444. However, the trial court erred in granting summary judgment on the claims brought in plaintiff's individual capacity because the record "does not conclusively establish that the findings and conclusions in the [earlier] action foreclose any possibility of damages in this action." *Id.* at 442.

Tressel v. Williams, 291 Or App 215 (2018)

This dispute between neighbors centered on plaintiff's easement to access her property by way of defendants' driveway. The trial court ruled that defendants breached the easement by blocking a portion of plaintiff's driveway and by removing an electronic gate that controlled access to the driveway when the easement was originally recorded. The Court of Appeals reversed in part. The court concluded that "the trial court erred when it declared that plaintiff's easement requires defendants to maintain an electronic gate at the entrance of their driveway . . . and when it ordered defendants to reinstall an electronic gate[.]" 291 Or App at 225. The court explained that the easement document "does not require defendants to maintain an electronic gate." *Id.*

Jones v. Four Corners Rod and Gun Club, 290 Or App 811 (2018)

Plaintiff worked for defendant as a groundskeeper and maintenance worker in exchange for being allowed to live in a home located on defendant's property. Plaintiff never received a paycheck, check stub, or any monetary wages during his employment. After defendant terminated plaintiff's employment and evicted him from the property, plaintiff sued, asserting claims for damages, civil penalties, and attorney fees under Oregon's wage-claim statutes. Defendant responded that it was entitled to "set off" plaintiff's minimum wage by the value of lodging and utilities furnished to plaintiff. A jury found that plaintiff was entitled to $38,796 as a minimum wage, and that defendant was entitled to recover $43,404 on its counterclaims. The trial court ultimately entered a net judgment—after accounting for statutory penalties and prejudgment interest—of $12,500 in favor of defendant, and awarded defendant attorney fees totaling $22,272. The Court of Appeals affirmed the money judgment but reversed the attorney fee award. The court rejected plaintiff's argument that, under *Kling v. Exxon Corp.*, 74 Or App 399 (1985), equi-

table counterclaims such as unjust enrichment and *quantum meruit* cannot be used to offset obligations imposed by statute. The court concluded that "the decision in *Kling* is limited to circumstances where the parties have entered into an agreement that specifically exempts the defendant from complying with the wage-claim statutes, and the BOLI commissioner has not approved the agreement." 290 Or at 819. This case did not involve such an agreement; defendant properly asserted a "lawful setoff or counterclaim" as authorized by ORS 652.610(5). *Id.* The court further determined that the trial court "erred by concluding that plaintiff was not entitled to attorney fees on his second claim for relief [for a civil penalty under ORS 652.150] and failed to provide a sufficient explanation for its decision to deny plaintiff a discretionary attorney fee award on his third claim for relief." *Id.* at 825.

Wilda v. Roe, 290 Or App 599 (2018)

Plaintiff was injured when a pickup truck driven by defendant crashed through a wall of plaintiff's home, striking plaintiff while he was asleep in bed. Plaintiff alleged that defendant had spent the night drinking at a tavern, fallen asleep while driving, and lost control of his pickup. Defendant admitted liability and asserted third-party claims against two taverns, alleging that they had served him while he was visibly intoxicated. The trial court granted the taverns' motions to dismiss, concluding that the third-party claims were barred by ORS 471.565(1), which generally bars liquor liability claims by a patron against the establishment that overserved the patron. The Court of Appeals reversed, concluding after examining the text, context and legislative history of the statute that "ORS 471.565(1) does not prohibit a patron's claim that seeks contribution for payment of the damages of the plaintiff injured by the intoxicated patron." 290 Or at 608.

Berger v. State Farm Mutual Auto. Ins. Co., 290 Or App 485 (2018)

Plaintiff prevailed in this action to recover personal injury protection (PIP) and uninsured motorist (UM) benefits under a State Farm insurance policy after he was injured in a motor vehicle accident. The trial court declined to award attorney fees, concluding that State Farm had complied with the applicable statutory "safe-harbor" provisions, ORS 742.061(2) (PIP); ORS 742.061(3) (UM). The Court of Appeals affirmed the denial of fees on the UM claim but reversed on the PIP claim. The court held that (1) plaintiff is entitled to recover reasonable attorney fees on the PIP claim because he "recovered more on his PIP claim than any tender by State Farm" (290 Or at 490); and (2) the trial court did not err in denying fees on the UM claim because "State Farm's affirmative defenses did not put plaintiff's UM coverage at risk" so State Farm "adhered to its safe-harbor letter stating that it did not dispute UM coverage." *Id.* at 494.

Lee v. State of Oregon, 290 Or 310 (2018)

Plaintiffs filed negligence and wrongful death claims against the state after a bus crash on an icy stretch of I-84 resulted in numerous deaths and injuries. The trial court held that plaintiffs' claims are barred by their failure to give timely notice of their claims under the Oregon Tort Claims Act, ORS 30.275. The Court of Appeals affirmed. The court explained that, even though the state was well aware of the time, place and circumstances of the bus crash, "a reasonable factfinder could not find that the state had actual notice that *these plaintiffs* intended to assert claims against the state." 290 Or at 315 (emphasis in original). The court further explained that plaintiffs did not substantially comply with the notice requirement because their lack of notice "is not a 'technical error' in an 'otherwise valid notice.'" *Id.* at 316, quoting *Brown v. Portland School Dist. No. 1,* 291 Or 77, 80, 82 (1981).

Timmermann v. Herman, 291 Or App 547 (2018)

Plaintiff landlord brought a forcible entry and detainer (FED) action after tenant failed to pay rent. Tenant asserted counterclaims under the Oregon Residential Landlord Tenant Act. The trial court determined that (1) tenant owed $606 in rent; (2) tenant was entitled to recover $2,550 in damages on her counterclaims; and (3) landlord was entitled to possession of the premises—even though the damages more than offset the rent owed—because tenant had not paid the rent into court before trial. The Court of Appeals reversed. Construing the statute, the court concluded that "nothing in the text or context of ORS 90.370(1)(b) requires a tenant to pay rent into court to be awarded possession of the premises if her counterclaim for damages exceeds any rent adjudged due." 291 Or App at 564. The court further explained that its prior case law "confirms that conclusion, and nothing in the legislative history leads us to think otherwise." *Id.* at 564-65.

Procedure

Coos County Airport Dist. v. Special Districts Ins., 291 Or App 829 (2018)

A fire destroyed plaintiff's aircraft hangar, including the concrete slab that served as the hangar's floor. Plaintiff spent $1,284,288 to replace the slab. When the defendant insurer only reimbursed plaintiff $942,719 for the slab, plaintiff sued to recover the difference. At trial, defendant contended that its policy only required it to pay the cost of a slab that was "functionally equivalent" to the old slab, and that the extra expense incurred by plaintiff was an upgrade that was not covered by the policy. The trial court, construing the policy, instructed the jury that "functionally equivalent" means "to have the corresponding or virtually identical purpose or activity for which the original slab existed or was used." 291 Or App at 832 (quoting jury instruction). The jury then returned a defense verdict. The Court of Appeals reversed and remanded for a new trial. The court concluded that "the term 'functional equivalent' is susceptible to more than one plausible interpretation. In other words, it is ambiguous." *Id.* at 836. The context of the provision did not resolve the ambiguity, so the court construed it against the drafter and in favor of the insured. The court concluded that the instruction given by the trial court "improperly limited the jury to considering only functions for which the original hangar floor was actually used in the past." *Id.* at 837. The error required reversal because the instruction addressed "a critical issue that went to the crux of the parties' dispute[.]" *Id.* at 838.

C.I.C.S. Employment Services v. Newport Newspapers, 291 Or App 316 (2018)

After hackers breached a database owned by plaintiff, stole the personal information of thousands of people, and used the information to defraud the Internal Revenue Service, the *Newport News-Times* published a story on the breach and IRS fraud. Plaintiff then sued the newspaper publisher for defamation, alleging that the story inaccurately linked plaintiff to the hacking and fraud, instead of clearly identifying plaintiff as the victim of the crime. Defendants filed a motion to change venue to Lincoln County; plaintiff eventually stipulated to the change of venue. Defendants then filed a special motion to strike under the anti-SLAPP statute, ORS 31.150. The trial court denied the motion as untimely; the Court of Appeals affirmed. The court concluded that the motion was untimely because defendants "filed the motion more than 60 days after plaintiff served its complaint, and defendants' pending motion to change venue did not toll the 60-day statutory deadline." 291 Or App at 327.

Wingard v. Oregon Family Council, Inc., 290 Or App 518 (2018)

Plaintiff, an unsuccessful legislative candidate, sued defendant for defamation and violation of ORS 260.532, alleging that defendants published false statements about plaintiff's prior sexual relationship with a legislative aide. Plaintiff admitted the relationship; he contends that defendants defamed him by asserting that he had "pressured" the aide into the relationship. The trial court denied defendants' special motion to strike under ORS 31.150, the anti-SLAPP statute. The Court of Appeals reversed. The court, applying the test adopted in *Handy v. Lane County,* 360 Or 605 (2016)—decided after the trial court's ruling—concluded that plaintiff "failed to present sufficient evidence from which a reasonable factfinder could find that defendants knew that those assertions (including the description of the relationship as 'pressured') were false (or acted with reckless disregard as to their falsity)" as required to establish actual malice. 290 Or App at 524.

South Valley Bank & Trust v. Colorado Dutch, LLC, 291 Or App 175 (2018)

Plaintiff Bank obtained a money judgment against an individual, John Batzer (Batzer), recorded the judgment in Deschutes County, and then obtained a writ of execution and order authorizing the sale of Batzer's real property in Deschutes County. In November, 2013—two days before plaintiff recorded its judgment—Batzer deeded the property to himself as trustee of North Pacific Trust (NPT). The deed purported to "memorialize" a transfer of ownership that had occurred in 2010. NPT then filed a motion under ORCP 71 B to vacate the writ of execution and order authorizing the sale. The trial court denied relief, concluding that Batzer's transfer to NPT was void as against the Bank's judgment lien under ORS 18.165. The Court of Appeals affirmed. The court explained that the deed "was effective—that is, it transferred title to the property—on November 20, 2013, when it was executed and delivered, and not on any earlier date." 291 Or App at 183. And because there was no consideration given for the 2013 transfer, NPT did not qualify for the statutory exception for a conveyance to a purchaser in good faith for valuable consideration. *Id.* at 185-86.

Thorson v. Bend Memorial Clinic, 291 Or App 33 (2018)

Plaintiff sued her doctors and their clinic for medical malpractice, alleging that (1) they negligently prescribed her Ativan—a benzodiazepine—for longer than was medically appropriate; and (2) they then negligently diagnosed her with, and treated her for, a seizure disorder instead of recognizing that her seizures were related to her withdrawal from Ativan. The trial court granted defendants' motion for summary judgment. The Court of Appeals affirmed. The court concluded that (1) the trial court correctly concluded that plaintiff "was required to demonstrate that she had procured the necessary expert testimony in order to avoid summary judgment" on her claims (291 Or App at 37); (2) under *Due-Donohue v. Beal,* 191 Or App 98, 102 (2003), plaintiff—a self-represented litigant—"could not rely on an affidavit from herself containing the recitations otherwise required under ORCP 47 E" to avoid summary judgment (*Id.*); and (3) the facts in the record on plaintiff's ostensible expert's qualifications "make it entirely speculative to think she is competent to supply the necessary expert testimony in this medical malpractice case." *Id.* at 40.

Bridgestar Capital Corp. v. Nguyen, 290 Or App 204 (2018)

After granting defendant's motion for summary judgment in a judicial foreclosure action, the trial court entered a supplement judgment awarding attorney fees to the prevailing defendant. The Court of Appeals reversed. The court concluded that attorney fees could not be awarded because defendant "did not allege, or even admit, the existence of a contract or any contractual fee provision, and she did not assert any right at all to fees on plaintiff's claims" as required by ORCP 68 C(2)(a). 290 Or App at 211. The court explained that "a party's complete failure to comply with the textual requirements of ORCP 68 C(2) cannot be excused by the fact that the opposing party's pleadings, or the circumstances as a whole, would have alerted the opposing party of the prevailing party's intention to seek attorney fees." *Id.* at 210.

Evidence

U.S. Bank National Assn. v. McCoy, 290 Or App 525 (2018)

The trial court granted plaintiff's motion for summary judgment in this judicial foreclosure action, relying in part on statements in a bank employee's declaration to establish that the bank had possession of the underlying promissory note when it filed suit. The Court of Appeals reversed, concluding that the bank employee's statements are inadmissible hearsay. The court explained that, although the declarant did not couch her statements in terms of what the bank records "said," by stating that the records "reflect" the bank's possession of the note, the declaration "represents [the employee's] account of what [the bank's] records say—that is hearsay." 290 Or App at 533. The court further concluded that the declarant's statements did not qualify for admission under OEC 803(6)—

the business records exception to the hearsay rule—because defendant did not offer the records themselves. The court explained that "no part of [OEC 803(6)] purports to render *testimony* about [the contents of the records] admissible over a hearsay objection" (*Id.* at 535), and the court's case law "has consistently applied OEC 803(6) to documents or comparable materials, not to testimony about those materials." *Id.* (emphasis in original).

Miscellaneous

State ex rel Smith v. Hitt, 291 Or App 750 (2018)

The Court of Appeals held that a Douglas County ordinance limiting the number of consecutive terms that county commissioners are permitted to serve violates Article VI, section 8, of the Oregon Constitution. The court explained that (1) Article VI, section 8, "prescribes the qualifications for holding county office" (291 Or App at 759); (2) term limits impose a "qualification" for office because they "have the effect of barring certain individuals from seeking and holding office" (*Id.* at 756); and (3) the constitutional provision authorizing counties to adopt home-rule charters—Article VI, section 10—did not give the county the constitutional authority to decide this matter of local concern because "Douglas County has not adopted a home-rule charter." *Id.* at 761.

Scharfstein v. BP West Coast Products, LLC, 292 Or App 69 (2018)

In this class action lawsuit, plaintiff alleged that defendant violated the Unlawful Trade Practices Act (UTPA) and an administrative rule addressing gasoline price advertising when it failed to disclose that it charged a 35-cent fee when debit cards are used to purchase gasoline at defendant's service stations. The trial court certified a class of more than 2 million individuals. A jury ruled in favor of the class, and the court entered judgment awarding more than $400 million in statutory damages. The Court of Appeals affirmed, rejecting the 10 assignments of error defendant raised on appeal. Among other things, the court concluded that (1) "the 35-cent debit card fee is a 'condition' that affects the price of fuel" that must be disclosed on the stations' street signs to comply with the administrative rule, OAR 137-020-0150 (292 Or App at 82-83); (2) unlike the UTPA claims addressed in *Pearson v. Philip Morris, Inc.*, 358 Or 88 (2015), "proof of reliance on BP's nondisclosure was not 'integral' to plaintiffs' claim that BP illegally charged class members an unlawful 35-cent debit card fee" (*Id.* at 89); (3) BP's post-verdict motion to strike plaintiffs' request for statutory damages as unconstitutionally excessive "was not raised in a timely manner" (*Id.* at 96); and (4) "the trial court did not abuse its discretion in denying BP's post-verdict motion seeking to decertify the class" on "the newly advanced theory that a class action cannot be superior when the resulting statutory damages award is unconstitutionally excessive." *Id.* at 99.

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