OADC Oregon Association of Defense Counsel

Trial Lawyers Defending You in the Courts of Oregon

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THE VERDICT™

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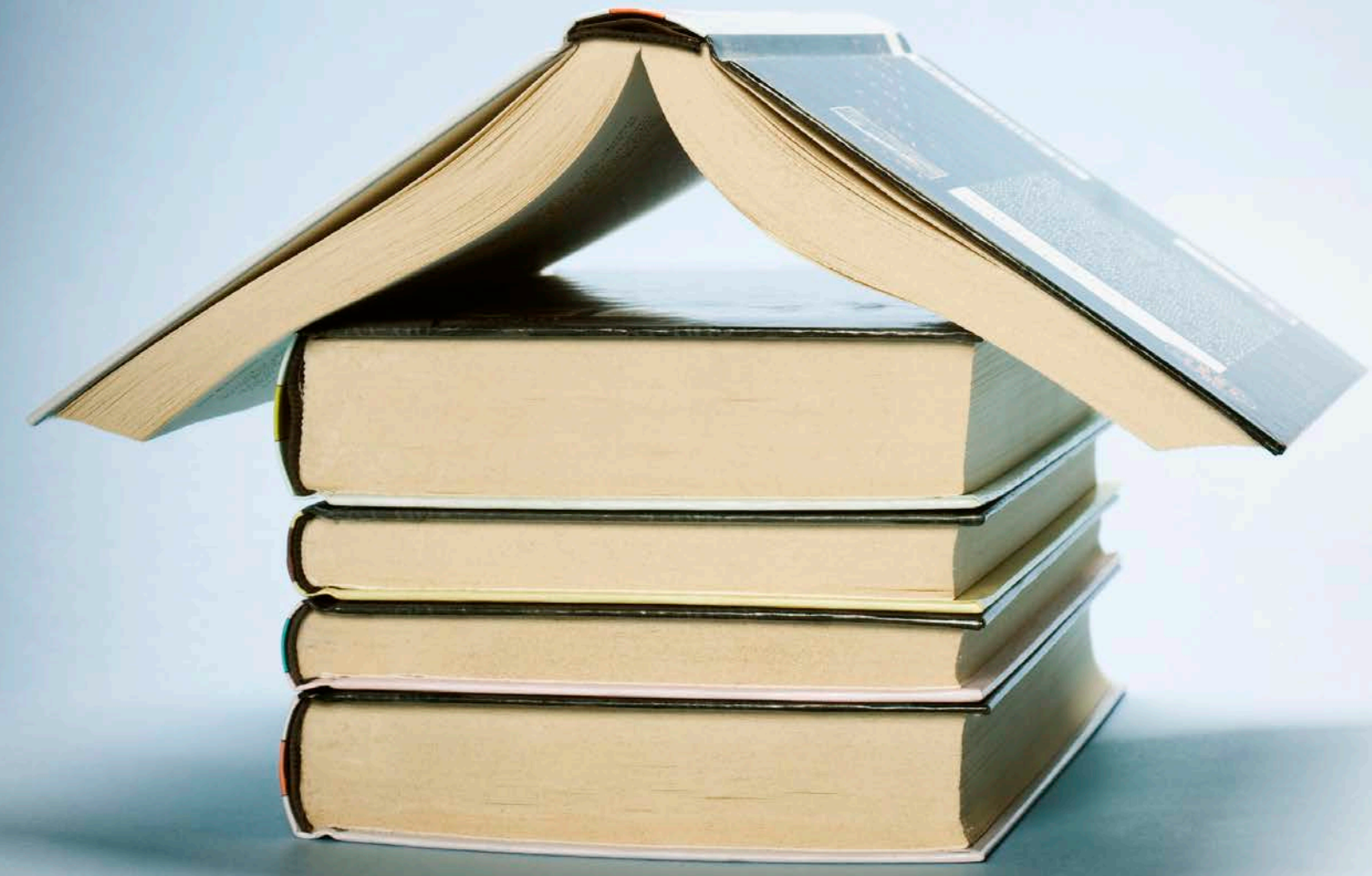

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FEATURES

DEPARTMENTS

PRESIDENT'S MESSAGE

BY DANIEL R. SCHANZ

OADC – Exceeding Member Expectations

t is my privilege to continue to serve OADC this year as its 47th President. The current OADC Board, Past Presidents, and I have set a necessary goal this year to bring our membership solidly above 700 members. For the past few years, we have hovered just below the 700-member mark, occasionally jumping that hurdle only to fall back after a few short months. As OADC Board Members, we are committed individually to recruiting new members. As a result, I frequently talk to prospective new members and reflect on why I have been an OADC member for the last 17 years. As my first message to you, please let me share my own 10 reasons to be an OADC member—as a reminder of the extraordinary benefits of belonging to this organization.

You Could Improve Your Overall Health

Longstanding members routinely describe OADC as nothing less than a "miracle drug" for their careers. Common side effects include a friendlier disposition; an increased IQ; a desire to serve, recreate with family, protect one's practice, and promote the judiciary; and an increased ability to save time, make money, and gain peace of mind. Sound too good to be true? Keep reading.

You Will Make New Friends

When I first joined OADC in 1996, I walked into the Fall Seminar and was welcomed by Sandra and Mike Fisher, our Association Managers. I was given a packet and name badge. I saw that others were actually wearing their name badges, and so I stuck mine to my lapel and sat down in the back corner. Other than two partners in my firm, I did not know a soul. But by the end of the day, I had met a number of OADC members, some of whom have been friends for the past 17 years. That group of friends and professional acquaintances has expanded. I have observed that, by being a member of OADC, I have become friends with more experienced lawyers who provide mentoring, with peers who allow me to exchange ideas, and with younger lawyers who energize me by allowing me the opportunity to help someone else advance their career.

You will also make friends in OADC with members you would not otherwise encounter. Our 2013 Past President, Sam Sandmire, is one example. Sam works at a prestigious firm, earns twice my hourly rate, and has a practice completely different from my own. Our professional paths were unlikely to cross, but I have had the privilege of knowing and working with Sam on the OADC Board for the last six years. I credit OADC for providing that opportunity.

You Will Become a Better Lawyer

I receive continual email solicitations to participate in CLEs on every imaginable topic. What sets OADC CLEs apart is the local, timely, and personal connection to us as Oregon practitioners. Most of our CLEs are taught by Oregon-practicing attorneys and judges directly involved in the very issues we face in the trenches. A lot of planning and work goes into each convention and seminar. We are continually incorporating members' feedback to make our CLEs better. In the years I have been attending OADC CLEs, I have always gained something from a Fall Seminar or Summer Convention that helped me in a current case I was handling. That is a great track record.

You Will Have an Opportunity to Serve

If you are looking for a place to serve, OADC has opportunities. Fundamental to the success of OADC is its members' willingness to volunteer and engage in free speech(es). Every year I am gratified by the efforts that our members and speakers put into a presentation without any pay, other than an occasional Starbucks gift card. We have 10 practice groups in which members volunteer significant time to make us better lawyers. This year, we started a new practice group, Governmental Liability. It will provide a new

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dimension to OADC, and we welcome our new members who practice in this area.

You Will Have a Great Family Vacation

My wife, Becky, and our four children have attended almost every Summer Convention at Sunriver since I joined OADC. It is an annual event that we do not want to miss. OADC has always encouraged members to bring their families. The Summer Convention provides a great setting for our members to meet the people most important to us—the people who are the primary reason we do what we do.

You Will Protect Your Practice

OADC has a very active legislative committee and a full-time lobbyist in constant contact with the legislature. We have steadfastly stood against special interests that would use legislation or administrative rules to negatively impact our practices or our ability to zealously represent our clients. As an OADC member, you have access to our lobbyist and to biweekly teleconferences for members. You can also track the status of legislation that will impact you.

You Can Positively Impact Our Oregon Judicial System

OADC has the highest respect for our judiciary and court staff. Oregon judges define public service. We have supported judicial salary increases and participated in almost every bipartisan effort to fund and promote our judicial system. This magazine, *The Verdict™,* is sent to every Oregon judge. We frequently receive comments on articles and case notes from judges. We also host an annual Judges Reception, in which we encourage all OADC members, particularly our younger members, to become acquainted with our judges.

You Will Save Time

OADC's email Listserv connects all of us. If you have a professional question, there is a high probability it will be answered by someone smarter and more experienced than yourself. Where else can you have access to 700 lawyers willing to share their knowledge and experience?

You Could Make More Money

Some of OADC's CLEs are joined by industry representatives who assign cases. In addition, members routinely refer cases that are out of their practice areas to other trusted OADC members.

You Will Have Peace of Mind

OADC is great because of its members. Over the years, I have called on many different members for advice or help with a particular issue. Our members are among the brightest and most talented defense lawyers in this state. There is a peace of mind that comes from being able to tap into that kind of resource. I would like to mention one former member who has exemplified selfless service, Joel DeVore. Judge Devore is now on the Court of Appeals. As an OADC member, he was a problem solver for many of us, and for all members of the Oregon State Bar. We are pleased that he has been granted the opportunity to expand his service. Fortunately for OADC, there are many other members who exemplify the same willingness to give of their time and wisdom.

For most of us, the cost of membership in OADC is about one or two billable hours. I cannot think of a better deal. Will you help us share the benefits of OADC with someone in your sphere of practice? Thank you again for the opportunity to serve OADC in 2014.

Navigating Polluted Waters: The Impact of Senate Bill 814

Bryana L. Blessinger
Hill & Lamb LLP

With two Superfund Sites—Portland Harbor and North Ridge Estates Asbestos Site—as well as numerous other cleanup sites identified by the Environmental Protection Agency ("EPA"), Oregon is, and will remain, heavily entrenched in environmental litigation for the foreseeable future.[1] Oregon's Portland Harbor Superfund Site is one of the largest in the nation, spanning over 11 miles of the Lower Willamette River and involving over 140 Potentially Responsible Parties.[2] As a result, attorneys practicing in this area must be aware of recent developments and changes to Oregon environmental statutes.


Bryana L. Blessinger

Senate Bill 814

On June 10, 2013, Governor Kitzhaber signed Senate Bill 814 into law. The law modifies Oregon's Environmental Cleanup Assistance Act ("OECAA") by making it easier for Potentially Responsible Parties to recover costs from their insurers and to resolve underlying environmental claims.[3] The OECAA was originally enacted in 1999 in response to complaints that insurers were not assisting with payment of claims related to environmental liability. It was modified in 2003 when the legislature added provisions regarding lost policy issues, allocation, and contribution among insurers, as well as certain claims-handling procedures.

SB 814 was enacted, in part, as a response to the ongoing Portland Harbor litigation. "SB 814 will give shipbuilders and riverside industries in my district the tools they need to proceed with cleaning up pollution of the lower Willamette River," Senator Chip Shields (D-Portland) stated in April 2013. "Holding insurance companies accountable to their policyholders by giving businesses a private right of action will ensure that these companies can be environmentally conscious while continuing to put thousands of Oregonians to work."[4] According to Senator Betsy Johnson (D-Scappoose), "Industries, businesses, and manufacturers need certainty that their insurance claims will be paid in order to comply with orders to clean up the Portland Harbor. This bill [SB 814] gives affected companies the tools to navigate environmental insurance claims and get the resources they need to be good stewards of both the economy and the environment."[5]

The notable changes made to the OECAA by SB 814 are set forth below.

Assignment of Rights

Section 2 of SB 814 adds language regarding the assignment of rights to collect under an insurance policy. It states that even if a general liability policy requires the insurer's consent prior to assignment of rights under the policy, the insurer's consent is not required for losses existing prior to the assignment (existing environmental claims).[6]

Non-Cumulation Clauses

The law makes non-cumulation clauses unenforceable. It states, in part:

> A general liability insurance policy that provides that any loss covered under the policy must be reduced by any amounts due to the insured on account of such loss under prior insurance may not be construed to reduce the policy limits available to an insured that has filed a long-tail environmental claim,[7] or to reduce those policies from which an insurer that has paid an environmental claim may seek contribution.[8]

The section adds that non-cumulation clauses may be a factor considered in the allocation of contribution claims among insurers.[9]

Property Damage

SB 814 provides that the release of hazardous substances into the water or onto property owned by a non-insured constitutes "damage, destruction or injury to property."[10] It adds that even if some of the damage occurs on the insured's property, all remedial action costs incurred by the insured to protect another's property

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from the contamination constitute damages that the insured is legally obligated to pay.[11]

Insurer's Duty to Pay

SB 814 amends ORS 465.480 to clearly identify the duty of insurers to pay their insureds' defense costs. Section 4(3)(b) states that if an insured files suit against fewer than all of its insurers, the insured may choose which policies are required to satisfy the insured's claim. Although an insurer may have a right to contribution from other insurers, an insurer cannot avoid payment on the basis that another insurer has not yet paid. This rule does not apply, however, if the selected insurer has no obligation to pay until limits of the underlying policies have been met.

Contribution

The law makes numerous amendments to the contribution portion of ORS 465.480, including:

(1) An insurer may not seek contribution from another insurer who has "entered into a good faith settlement agreement with the insured regarding the environmental claim."[12]

(2) A rebuttable presumption exists "that all binding settlement agreements entered into between an insured and an insurer are good faith settlements." Settlements approved by a court after a 30-day notice has been provided to all insurers constitute good-faith settlements.[13]

(3) Insurers may not seek to avoid payment of defense costs by asserting that another insurer has fully satisfied the insured's environmental claim.[14]

(4) The contribution rights set forth under the law preempt all common law contribution rights.[15]

(5) A court shall consider the "terms of the policies that related to the equitable allocation between insurers" as a factor when apportioning contribution amounts among insurers.[16]

Unfair Claims Settlement Practices

SB 814 sets forth a list of "unfair environmental claims settlement practices" such as: (a) failure to commence an investigation of an environmental claim within 15 days of notice; (b) failure to make timely payment of reasonable defense or indemnity costs; (c) improper denial of a claim; (d) requiring an insured to provide answers to repetitive questions and requests for information; and (e) failure to pay interest as required by Oregon law.[17] The law provides a civil remedy by which insureds may recover actual damages, attorney fees, and costs, and provides courts with the authority to award treble damages if they find that the insurers acted unreasonably.[18]

Mediation

SB 814 requires insurers to participate in non-binding mediation at the insured's request to address lost policy and coverage related issues.[19] The Oregon attorney general is responsible for appointing a "mediation service provider" to operate a program specifically related to environmental claims; for providing requirements related to qualification and training for all mediators participating in the program; and for establishing a schedule of fees related to the program.[20]

Conclusion

It remains to be seen how SB 814 will impact environmental cases moving forward and retroactively.[21] Nevertheless, coverage attorneys should advise their insurers to strictly comply with the provisions set forth in the bill. And insurers should be prepared to issue payments promptly, regardless of whether other insurers have defense and/or indemnity obligations to the insured.

Endnotes

1 United States Environmental Protection Agency, *EPA in Oregon* (Jan 2, 2014), http://www2.epa.gov/aboutepa/epa-oregon.

2 United States Environmental Protection Agency, *Portland Harbor Superfund Site* (Jan. 3, 2014), http://yosemite.epa.gov/r10/cleanup.nsf/sites/ptldharbor.

3 Oregon Senate Democrats, *Insurance claims bill to support economy and environment passes Senate* (April 10, 2013), http://www.orsenatemajority.org/tag/sb-814.

4 *Id.*

5 *Id.*

6 2013 OR SB 814, Section 2.

7 "Long-tail environmental claim" is defined as an "environmental claim covered by multiple general liability insurance policies." 2013 OR SB 814, Section 4(1)(a).

8 2013 OR SB 814, Section 4(2)(d).

9 *Id.*

10 2013 OR SB 814, Section 4(2)(e).

11 *Id.*

12 2013 OR SB 814, Section 4(4)(a).

13 2013 OR SB 814, Section 4(4)(b).

14 2013 OR SB 814, Section 4(4)(c).

15 2013 OR SB 814, Section 4(4)(d).

16 2013 OR SB 814, Section 4(5)(d).

17 2013 OR SB 814, Section 6(1).

18 2013 OR SB 814, Section 6(4)(a) and (e).

19 2013 OR SB 814, Section 6(2)(a) and (b).

20 2013 OR SB 814, Section 6(2)(e).

21 SB 814 by its terms is retroactive. It applies to all environmental claims arising before, on, or after the effective date of the law, but does not apply to claims for which a final judgment has been entered. *See* 2013 OR SB 814, Section 8.

Negligent Construction Claims: Uncertainty in the Wake of *Abraham*, *Sunset*, and *PIH Beaverton*

Lindsey M. Sabec
Davis Rothwell Earle & Xóchihua PC

Three recent appellate cases have materially impacted the practice of construction defect litigation as a result of their analyses of the applicable limitations and repose periods for negligent construction claims: *Abraham v. T. Henry Construction, Inc.,*[1] *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.,*[2] and *PIH Beaverton, LLC v. Super One, Inc.*[3] These decisions have provided some clarity for practitioners, while also creating uncertainty.


Lindsey M. Sabec

Statute of Limitations: Two Years, Six Years or More?

The primary issue in *Abraham* was "whether a claim for property damage arising from construction defects may lie in tort, in addition to contract, when the homeowner and builder are in a contractual relationship."[4] The Supreme Court held that, unless altered in some manner by contract or statute, Oregon common law permits "negligent construction" claims against contractors. In so doing, however, the Court, in dicta, suggested such negligent construction claims are also subject to the limitations period set forth in ORS 12.110, and "[t]ort claims arising out of construction of a house must be brought within two years of the date that the cause of action accrues, but in any event, within 10 years of the house being substantially complete."[5]

The *Abraham* opinion, and the Court's subsequent denial of plaintiffs' request for reconsideration, has reawakened debate between the plaintiff and defense bars about the applicable limitations period for negligent construction claims. Prior to *Abraham,* plaintiffs largely prevailed when arguing these claims were subject to a six-year statute of limitations with a discovery rule under ORS 12.080(3). Since *Abraham,* however, various trial courts have enforced three distinct and conflicting limitations periods: a two-year period with a discovery rule under ORS 12.110(1), a six-year period with a discovery rule under ORS 12.080(3), and a six-year period without a discovery rule under ORS 12.080(3).

Multnomah County judges have generally followed the pre-*Abraham* view that negligent construction claims must be brought within six years of "discovery" of the claim. In contrast, judges in Clackamas and Benton County have applied the six-year limitations period, but have found no discovery rule exists in ORS 12.080(3). Finally, Washington County seems to have adopted the two-year limitations period—with a discovery rule—as mentioned in *Abraham*.

At least two lawsuits dismissed at the trial level on limitations grounds have been appealed: *Liberty Oaks Homeowners Association v. Liberty Oaks, LLC,* Washington County Circuit Case No. C096255CV, and *Goodwin v. Kingsmen Plastering, Inc.,* Benton County Circuit Case No. 11-10128. Plaintiff's negligence claims in *Liberty Oaks* were dismissed as time-barred under the two-year statute of limitations with a discovery rule under ORS 12.110(1). Similar claims in *Goodwin* were dismissed as time-barred by the six-year statute of limitations with no discovery rule under ORS 12.080(3) (at least as it applies to contractors involved in original construction). Both cases remain in the briefing phase and an opinion is not expected for some time.[6]

Ultimate Repose and the Ambiguity of "Substantial Completion"

Following *Abraham*, the Court of Appeals' decisions in *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.,*[7] and *PIH Beaverton, LLC v. Super One, Inc.*[8] provided both clarity and uncertainty regarding the applicable statute of repose for negligent construction cases in three significant ways.

First, these cases provide certainty that the statute of repose found in ORS 12.135 (actions arising from construction, alteration or repair of real property)—and not the repose statute in ORS 12.115 (general statute of repose for injury to

Continued on next page

NEGLIGENT CONSTRUCTION CLAIMS
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person or property of another)—govern claims related to negligent construction and derivative indemnity claims, except in cases where a contractor constructs his/her own home.[9] In *PIH Beaverton,* the Court rejected the argument that *Huff v. Shiomi*[10] provides relief from the 10-year statute because indemnity claims do not accrue until discharge (or contemporaneous litigation) of the underlying claims.[11] While *PIH Beaverton* specifically addressed indemnity actions, the decision likely applies to derivative statutory contribution claims as actions arising in "contract, tort, or otherwise."[12]

Second, it is also now clear that the term "contractee," defined in ORS 12.135 as "the person for whom the improvement is constructed," refers not to a general contractor but, rather, typically to the owner or project developer[13]—a clarification that is vital to the question of "substantial completion." Regarding that question, *Sunset and PIH Beaverton* recognized that claims subject to the repose period accrue upon substantial completion, which may be proven in two ways: (1) evidence of written acceptance by the "contractee" of completed construction, which can occur when additional work remains to be done; or (2) in the absence of written acceptance, evidence of the date "the contractee 'accepts' the construction as completed," which occurs "when the person takes from the contractor responsibility for maintenance, alteration, and repair of the improvement."[14] On that last point, the Court of Appeals reasoned that substantial completion "does not incorporate any notion of less-than-total completion," and may occur even after the date on which use and/or occupancy commenced.[15]

Prior to *Sunset and PIH Beaverton,* trial courts widely accepted as conclusive evidence of substantial completion (1) acceptance of subcontractor work by a general contractor or (2) the governing jurisdiction's certificate of occupancy or certificate of final inspection. The burden of proof is now more complicated and nuanced: counsel now must offer specific evidence of acceptance not by a general contractor, a municipality, a building inspector or an architect, but rather by the person—likely the owner, who is often the plaintiff—for whom the improvement was constructed. Even if a party can satisfy this burden, trial judges (during motion practice or otherwise) often find material issues of fact exist where evidence of additional work performed after the date of acceptance (e.g., punchlist work, isolated repairs or maintenance) is offered in opposition. For this reason, it has become increasingly difficult for defendants to prevail on summary judgment on a repose issue. And given *PIH Beaverton's* rejection of the *Huff v. Shiomi* defense against the repose statute, it has also become imperative that defense counsel asserting derivative claims (in contract or tort) not concede the substantial completion date when dealing with projects nearing or exceeding 10 years in age.

The *Abraham* opinion, and the Court's subsequent denial of plaintiffs' request for reconsideration, has re-awakened debate between the plaintiff and defense bars about the applicable limitations period for negligent construction claims.

Sunset and *PIH Beaverton* are now pending in the Supreme Court and have been consolidated into a single appeal. The consolidation of the two cases suggests that the Court's decision will focus less on the factual distinctions presented by each case but more on the scope and application of ORS 12.135. Oral argument took place on January 13, 2014.

Going Forward

Given the timing of the appeals, opinions on the issues raised by these cases are not expected until late 2014 for *Sunset* and *PIH Beaverton* and likely later for *Liberty Oaks* and *Goodwin.* In the meantime, these opinions will continue to guide negligent construction discovery, motion practice, and trial strategy. Until these issues are resolved at the appellate level, practitioners should continue to file motions to preserve the record.

Endnotes

1 340 Or 29 (2011).
2 254 Or App 24 (2012).
3 254 Or App 486 (2013).
4 350 Or at 33.
5 350 Or at 34, n 3.
6 The Supreme Court recently found ORS 12.080(4) contains a discovery rule in *Rise v. Rabb,* SC S060790 (January 30, 2014). Practitioners facing this issue should be aware of this case and seek to distinguish it if arguing ORS 12.080(3) does not contain a discovery rule.
7 254 Or App 24 (2012).
8 254 Or App 486 (2013).
9 *Sunset,* 254 Or App at 31, n.3.
10 73 Or App 605 (1985).
11 254 Or App at 504.
12 ORS 12.135(1).
13 *Sunset,* 254 Or App at 32.
14 *Sunset*, 254 Or App at 31-33; *PIH Beaverton,* 254 Or App at 498-99.
15 *PIH Beaverton,* 254 Or App at 496-99.

Any Nine Will Do—If You Are the Defendant

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Trial attorneys focused on preparing for trial may approach the document that will serve as the culmination of the trial—the verdict form—last, and with little thought. But that verdict form deserves close attention. Do not simply reach for uniform verdict forms and use them without thought. While those familiar uniform verdict forms are good places to start, they may not offer an approach favorable to the defense. For a variety of case-specific reasons, you may want a detailed verdict form, or a very general verdict form. You will also want to consider the "same nine" rule and how that rule might affect a verdict. This rule may offer those of us representing defendants further opportunities to obtain a defense verdict.


Sara A. Cassidey


Richard A. Lee

The "same nine" rule is derived from article VII (Amended), section 5(7) of the Oregon Constitution, which provides that, in civil cases, "three-fourths of the jury may render a verdict." Where the jury consists of 12 members, that constitutional provision requires the same nine jurors to agree on every interdependent element of a particular claim against a particular defendant.[1] In other words, the "same nine" rule applies where the answers reached by the jury are *interdependent* and build to a verdict for one of the parties. It does not apply in situations where the answers are *separate and independent.*[2]

Currently, UCJI No. 90.03A, the special verdict form for "Fault/Negligence, Causation, and Damages," and UCJI No. 90.04, the special verdict form for "Comparative Fault/Negligence," begin with a preliminary instruction regarding the "same nine" rule: "At least the same nine jurors must agree to the answer for *each* of the following questions that you answer." (Emphasis added.) UCJI Nos. 90.03A and 90.04 then pose the following separate questions for the jury regarding negligence and causation:

(1) Was the defendant [at fault/negligent] in one or more of the ways the plaintiff claims?

ANSWER: (Yes or No)
If "yes," go to question 2.
If "no," your verdict is for the defendant. Do not answer any more questions. Your presiding juror must sign this verdict form.

(2) Was the defendant's [fault/negligence] a cause of damages to the plaintiff?

ANSWER: (Yes or No)
If "yes," go to question 3.
If "no," your verdict is for the defendant. Do not answer any more questions. Your presiding juror must sign this verdict form.

The problem with the foregoing instructions is that they do not take into account that, although questions of negligence and causation are interdependent questions when building toward a verdict for the plaintiff, those questions are *independent* questions for purposes of rendering a verdict for the defendant. It is axiomatic that a plaintiff must prove each required element of his or her claim to prevail, such as negligence, causation, and damages. When a plaintiff fails to prove any one element, however, the defendant will not be liable.

To illustrate the problem presented by the preliminary instruction in UCJI Nos. 90.03A and 90.04 concerning the "same nine" rule, consider the simple negligence case involving a single defendant, where the plaintiff presents ambiguous evidence of negligence and poor evidence that the defendant's conduct caused any injury. Thus, causation is the best defense. The jury is then instructed under either of the foregoing uniform verdict forms.

Assume that the vote on the first question, negligence, is nine to three in favor of the plaintiff. Because the verdict form has instructed that "[a]t least the same nine jurors must agree to the answer for each of the following questions," the nine jurors who voted in favor of plaintiff—and only those nine—proceed to the question of causation. Now, for the defendant to obtain a favorable verdict based on causation, *all nine* who

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answered "yes" to the question of negligence would have to answer "no" to the question of causation. Likewise, for the plaintiff to obtain a verdict, *all nine* who answered "yes" on the negligence question would have to agree. Under the instruction, the three jurors who voted "no" on the first question on negligence would not participate in answering the second question on causation. Under the instruction given, there is a hung jury if those nine who voted "yes" on negligence do not agree on causation.

But, what if six of the nine who voted "yes" on negligence would answer "no" on causation? And, further assume that the three jurors who voted "no" on negligence would also vote "no" on causation. In such a case, the defendant just missed an opportunity for a defense verdict, because there were nine jurors who would have voted "no" on causation. Because causation is independent of negligence for purposes of a defense verdict, *any nine* jurors who answered "no" on causation could have rendered a constitutionally valid verdict for the defendant. Thus, in this situation, the uniform instruction did a disservice to the defendant.

One way to avoid this problem would be to combine the elements of negligence and causation into a single question, such as, "Was the defendant negligent in one or more ways claimed by plaintiff that caused damage to plaintiff?" Prior uniform verdict forms posed the questions of negligence and causation that way.[3] Another way to avoid the problem posed by this hypothetical would be to ask the causation question first. Then nine jurors would have answered "no" on the first question, and the case would end with a defense verdict. But this forces the parties to engage in gamesmanship in ordering the questions on the verdict form.

Perhaps a better way to avoid the problem posed by the above hypothetical is to keep the questions of negligence and causation separate, but to clearly instruct the jury which nine jurors must agree on each question to reach a valid verdict. By keeping the questions separate, the jury is presented with multiple opportunities to render a defense verdict, and is forced to distinctly consider each element necessary to reach a valid verdict for the plaintiff. To achieve this goal, the preliminary instruction regarding the "same nine" rule could be omitted from the verdict form, and the questions of negligence and causation might be presented as follows:

(1) Was the defendant [at fault/negligent] in one or more of the ways the plaintiff claims?

ANSWER: (Yes or No)
If any nine jurors answer "yes" to question 1, go to question 2. If any nine jurors answer "no" to question 1, your verdict is for the defendant. Do not answer any more questions. Your presiding juror must sign this verdict form.

(2) Was the defendant's [fault/negligence] a cause of damages to the plaintiff?

ANSWER: (Yes or No)
If at least nine of the same jurors who answered "yes" on question 1 answer "yes" to question 2, go to question 3.

If any nine jurors answer "no" to question 2, your verdict is for the defendant. Do not answer any more questions. Your presiding juror must sign this verdict form.

Similar considerations regarding the application of the "same nine" rule should be given to questions concerning the fault of multiple defendants, the comparative fault of the plaintiff, and any other affirmative defenses raised by the defendant or defendants. Any one of those may be an independent basis for a defense verdict.

Do not fall into the habit of proposing a current uniform verdict form without giving your case some thought. Strive to give your client every available opportunity to win the case. Simply put, where a question is independent for purposes of a defense verdict and the agreement of any nine jurors will do, the verdict form should say so.

Endnotes

1 *Kennedy v. Wheeler,* 258 Or App 343, 344 (2013) (citing *Sandford v. Chev. Div. Gen. Motors*, 292 Or 590, 613 ("[T]he same jurors must constitute the three-fourths majority that finds every separate element required for the verdict.")).

2 *Veberes v. Knappton Corp.,* 92 Or App 378, 381 (1988) (stating that the "same nine" rule "applies only to cases in which the answers are interdependent, not where they are separate and independent").

3 See *Thompson v. Inskeep*, 95 Or App 688, 691 (1989) (discussing a verdict form that was based on former UCJI No. 11.59 and that asked, "Was defendant driver negligent in one or more of the respects claimed in plaintiff's complaint which caused damage to plaintiff?").

Quantity of Fault Versus Quality of Fault: When Comparative Fault and Indemnity Collide, How Do We Decide Who Is "Most Bad"?

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You engage in negligent conduct but I provide you negligent supervision. You negligently construct a structure but I negligently provide erroneous technical information for that construction. You negligently fail to keep a proper lookout while driving but I recklessly disobey a red light. In each hypothetical, no contractual right to indemnity exists. But common law indemnity may be available to one of us, assuming that the jury can decide which one of us is "most bad."


James B. Rich

Common Law Indemnity Balances "Quality of Fault"

We have been told that in a common law indemnity claim, the claimant should prevail "where, 'in justice,' either the relationship of the parties or the quality of their respective conduct warrants that one of them should bear the full responsibility for joint liability to an injured third party."[2] Authorities offer various descriptions of indemnity's "quality of conduct" calculus. Those descriptions include: active v. passive fault;[3] primary v. secondary fault;[4] "equitable distribution of responsibility";[5] "a disproportion or difference in character of the duties owed by the two [tortfeasors] to the injured plaintiff";[6] and "a 'great difference' in the gravity of the fault of the two tortfeasors."[7]


Byron Farley

The case law stresses that the indemnity focus differs from the comparative fault focus.[8] Indemnity litigants match up against one another not in terms of mathematic, temporal, physical, measurable "quantity of fault"; rather, the parties' conduct is evaluated in terms of kind, character, or "quality of fault." If one of the tortfeasors is found to be "most bad," that actor bears full responsibility for the damages, not just for a percentage.

The *Irwin Yacht* case is an example of the difference in these two concepts. In that products liability case, the court held that an earlier jury verdict allocating fault between the underlying plaintiff and two defendants was not dispositive of the subsequent indemnity dispute between the defendants.[9] The *Irwin Yacht* court reasoned that the "active/passive" (quality of fault) question had not been pleaded or presented when the earlier jury determined percentages of fault.[10] Hence, the liability decision in the underlying case allocated the parties' quantity of fault, not their relative quality of fault.

But, Percentage of Fault Allocations May Also Balance Quality of Fault

The indemnity authorities suggest a clear distinction between the quality of fault and quantity of fault concepts. However, a recent trio of opinions reminds us that such distinction is difficult to draw out of the case law.

In *Lasley v. Combined Transport,* the Court of Appeals and Supreme Court, in three opinions, wrestled with the relevancy of driver intoxication evidence and prior driving history evidence in apportioning percentages of fault between defendants when the intoxicated driver had admitted at least some fault.[11] All three *Lasley* opinions reached back to the exhaustive comparative fault analysis found in *Sandford v. Chevrolet*[12] and highlighted *Sandford's* holding that a jury should consider evidence regarding the relative "culpability" or "blameworthiness" of the alleged tortfeasors when apportioning percentages of fault.[13] The original *Lasley* Court of Appeals opinion quoted from *Sandford:*

> [A]pportionment is on the basis of fault or blame. This involves a comparison of the culpability of the parties, meaning by culpability not moral blame but the degree of departure from the standard of a reasonable man .... Negligence ranges from the least blameworthy type, namely, inadvertence and negligent errors of judgment up to the state where knowledge or more complete knowledge supervenes

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> and the negligence of obstinacy, self-righteousness or reckless is reached. The factfinder must be told then under our statute, it should give consideration to the relative blameworthiness of the causative fault of the claimant and of the defendant.[14]

It seems, therefore, that the relative "kind" or "quality" of the parties' behavior logically affects allocation of fault even when an indemnity claim is not at issue.

"Quantity" Plus "Quality" Conflation Has Practical and Policy Impact

Tactically, when defending a plaintiff's claims against multiple tortfeasors (action #1), those tortfeasors might be wary of inadvertently precluding a subsequent indemnity claim (action #2). If all of the "smut" allegations and evidence about the defendants' conduct is presented to the jury in action #1 for purposes of allocating fault, the "quality of fault" element of any indemnity claim might have necessarily been decided in action #1. A subsequent indemnity action would seem redundant and, at least arguably, precluded.[15]

Another possible tactical consideration could be motions in limine for action #1. Since, as we have been told, liability drives damages, the damaged plaintiff in action #1 is likely to want the jury to learn the full scope of the defendants' bad behavior. An agreement between those defendants that their relative quality of fault should be decided in a subsequent indemnity action might buttress a motion to exclude bad conduct from the jury. For example, in *Lasley,* if the DUII driver and the trucking company had agreed that there would be a subsequent indemnity action, they might both have benefited from sanitizing the aggravated liability evidence from the case (similar to a liability/damages trial bifurcation).

The separate determination of the quantity and quality of fault seems also to implicate the broader policy notion of judicial economy. If the culpability/blameworthiness of tortfeasors (quality of fault) is necessarily being litigated in the course of the original trial deciding a plaintiff's damages, should judicial resources be spent to re-litigate the tortfeasors' relative quality of fault in a subsequent indemnity action?

Perhaps, clarity on this topic can be found in the old "action at law"/"suit in equity" distinctions. If indemnity is to be considered a completely distinct equitable remedy with no relationship to the percentage of fault allocation, then so be it. At present, more direction from the courts is needed.[16]

Endnotes

1 Gratitude is extended to Mr. Randall Snow for his editing assistance.

2 *Maurmann v. Del Morrow,* 182 Or App 171, 178 (2002) (emphasis supplied). [This article focuses on the conduct, not the relationship, of the tortfeasors.]

3 *Fulton Ins. v. White Motor Corp,* 261 Or 206, 210 (1972).

4 *Id.*

5 *Piehl v. Dalles General Hospital,* 280 Or 613, 620 (1977).

6 Prosser, *The Law of Torts,* 313 (4th ed 1971).

7 *Id.*

8 See, e.g., *U.S. Fid & Guar. Co. v. Thomlinson Co.*, 172 Or 307 (1943) (an earlier judgment in favor of an injured plaintiff against both a general contractor and subcontractor did not resolve a subsequent indemnity action between those underlying defendants); *Irwin Yacht Sales, Inc. v. Carver Boat Corp.,* 98 Or App 195 (1989) (verdict allocating percentages of fault between plaintiff and two defendants did not resolve the subsequently raised indemnity claims between the defendants); *Maurmann v. Del Morrow,* 182 Or App 171 (2002) (jury verdict finding developer and contractor both to have fault did not preclude the developer from obtaining indemnity from the contractor); and *Eclectic Investment v. Richard Patterson,* 2014 WL 767978 (Or Ct App Feb. 26, 2014) (county found by jury to be seven percent at fault for permitting of excavation project could not recover indemnity for defense costs from excavator found to be four percent at fault and reiterating that the indemnity focus is whether the indemnity defendant, "in justice," should have discharged the joint obligation rather than the indemnity plaintiff).

9 *Irwin Yacht,* 98 Or App 195.

10 *Id.*

11 *Lasley v. Combined Transport,* 351 Or 1, 13 (2011); *Lasley v. Combined Transport*, 236 Or App 1, 237 P3d 859 (2010) (opinion on reconsideration); and *Lasley v. Combined Transport,* 234 Or App 11 (2010).

12 *Sandford v. Chevrolet Division of General Motors,* 292 Or 590 (1982).

13 *Lasley, supra,* 351 Or at 13; 236 Or App at 5; and 234 Or App at 21-23.

14 *Lasley,* 234 Or App at 21-22 (quoting *Sandford,* 292 Or at 608) (internal citations and quotations omitted).

15 The *Irwin Yacht* opinion, *supra,* certainly leaves open the possibility that the #2 action for indemnity might have been precluded if allegations and evidence pertaining to the active fault v. passive fault calculus had been presented in action #1. 98 Or App at 199.

16 This article intentionally avoids addressing what is sometimes phrased as the "common duty" element of a common law indemnity claim. See, e.g., *Safeco v. Russell,* 170 Or App 636 (2000). Various courts' ad hoc analyses of that element seem, at least to these authors, to foreclose much in the way of a clear statement of law.

Online Defamation: Multiple Coverage-Triggering Events or a Single Publication?

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Social media, blogs, and websites have transformed the way people receive and transmit news and opinions. However, these forums also provide opportunities for people and organizations to post statements that defame other individuals or entities—statements that may remain on the Internet for years to come, or that may be re-posted on different websites, "shared" on Facebook, or "re-tweeted" on Twitter. This poses the question, then, of whether leaving an allegedly defamatory statement on the Internet or re-posting the statement constitutes a republication, thus triggering coverage under later policies.


Nicole M. Nowlin

The question can be illustrated as follows. Under standard Commercial General Liability ("CGL") and homeowner policies, "personal injury" refers to injury of whatever kind (mental or physical), arising from certain offenses. Those offenses include libel, slander, and defamation of character. Furthermore, the act resulting in the "personal injury"—*i.e.,* the alleged defamatory statement—must take place during the policy period. What happens, then, when an insured posts an alleged defamatory statement on a website before the policy incepts, but the material is accessed by others during the policy period? While no Oregon court has analyzed these exact facts in the context of insurance coverage, insurance industry professionals and insurance coverage attorneys can look to recent decisions in the Ninth and Seventh Circuits regarding the "republication" of Internet-based defamatory statements for guidance on this issue.

Yeager v. Bowlin

In *Yeager v. Bowlin,*[1] the Ninth Circuit, applying California law, held that leaving a statement on a website unchanged did not qualify as republication. Plaintiffs, retired General Charles E. "Chuck" Yeager and his foundation, sued defendants for posting statements on their website in October 2003 that, according to Yeager, violated his common law right to privacy and California's statutory right to publicity, Cal. Civ. Code § 3344. Both claims were subject to a two-year statute of limitations. There was no evidence in the record that defendants added any information about Yeager on their website after October 2003. However, Yeager argued that the website was republished, and the statute of limitations restarted, each time the defendants added to or revised content on their website, even if the new content did not reference or depict Yeager. The district court, applying the "single-publication" rule limiting tort claims premised on mass communications to a single cause of action that accrues upon the first publication of the communication, determined that the statute of limitations accrued in October 2003, and dismissed these two claims as untimely. Yeager appealed.

In addressing whether the single-publication rule applies to postings on the Internet, the Ninth Circuit noted that "applying the single-integrated-publication test to nontraditional publications can be tricky" because one of the general rules for single-publication is that a statement is republished when it is repeated or recirculated to a new audience. On the other hand, under California's single-publication rule, once a defendant publishes a statement on a website, the defendant does not republish the statement by simply continuing to host the website. The Ninth Circuit, however, rejected Yeager's argument and affirmed the district court's decision, holding that, under California law, a statement on a website is not republished unless the "statement itself is substantially altered or added to" or "the website is directed to a new audience." The court also found that the statements regarding Yeager were not "republished" simply because the defendants edited other parts of their website and left the statements alone. Therefore, continually hosting alleged defamatory statements on a website does not make them "republished."[2]

Pippin v. NBCUniversal Media, LLC

In *Pippin v. NBCUniversal Media, LLC*,[3] the Seventh Circuit affirmed the Northern District of Illinois' dismissal of former basketball player Scottie Pippin's defamation lawsuit against several media and Internet companies and held that the passive maintenance of a website is not a republication.

Despite winning six championship rings with the Chicago Bulls, Pippin lost a large portion of the fortune he amassed during his playing days due to bad business decisions. The media caught wind of Pippin's struggles, and several news organization defendants reported on-line that he had filed for bankruptcy when, in fact,

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he had not. The defendants also failed to remove the statements from their websites once they learned they were false. Pippin sued the defendants, contending that he was defamed and cast in a false light. Pippin also argued that each day that an unaltered defamatory statement remains online after a publisher learns of its falsity constitutes an actionable republication. The district court dismissed the complaint, concluding that the falsehoods did not fit within any of the categories of statements recognized by Illinois law, and because, as a public figure, Pippin must allege that the defendants acted with actual malice, which he failed to do.

The Seventh Circuit affirmed the district court's decision. In doing so, it held that actual malice cannot be inferred from a publisher's failure to retract a statement once it learns it to be false. It also held that if presented with the opportunity, the Supreme Court of Illinois would reach the same conclusion that many other state and federal courts have reached: the single-publication rule applies to alleged defamatory statements posted on the Internet. As the court explained: "[t]he theme of these decisions is that excluding the Internet from the single-publication rule would eviscerate the statute of limitations and expose on-line publishers to potentially limitless liability."

Practice Point

No Oregon case has dealt with the single-publication rule in the context of the Internet. *Shenck v. Oregon Television, Inc.,*[4] however, offers some insight into how a court might rule on this issue. In *Shenck,* the media defendant broadcast a news report in 1993 that included defamatory statements about plaintiff. Defendant rebroadcast the same report in 1994. The court held that a defamatory statement occurs whenever there is a new publication of the statement, and the statute of limitations on each statement started running on the date that it was made.

Under *Yeager* and *Pippin,* leaving an allegedly defamatory statement on an Internet website does not constitute republication of the statement, even if the publisher later learns that the statement is false and does not remove it from the website. However, if the statement is substantially altered or added to, or if the information is later posted to a new audience (*e.g.,* the statement is re-posted on a different website—similar to the re-broadcast in *Shenck*), this may qualify as a "republication," thus triggering "personal injury" coverage under a later policy.

For now, it is unclear whether re-posting constitutes "republication" for coverage purposes under Oregon law. But this area of law is developing, and could trap the unwary.

Endnotes

1 693 F3d 1076 (9th Cir 2012), *cert den,* __ US __, 133 S Ct 2026, 185 L Ed 2d 886 (2013).

2 See also *Shepard v. TheHuffingtonPost.com,* Inc., 509 Fed Appx 556 (8th Cir 2013) (applying Minnesota law and adopting the single-publication rule for Internet posts set forth in *Yeager*).

3 734 F3d 610 (7th Cir 2013)

4 146 Or App 430 (1997).

Recent Case Notes

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Case Notes Editor

Damages

Reduction of non-economic damage award violates right to jury trial

In *Klutschkowski v. PeaceHealth,* 354 Or 150 (2013), the Supreme Court held that application of ORS 31.710(1), the $500,000 cap on noneconomic damages, to a jury verdict violated plaintiff's right to a jury trial under Article I, section 17 because in 1857 the common law recognized a right to recover for injuries to a baby during delivery.

In 1999, a mother gave birth to her third child. The delivery was complicated by a shoulder dystocia, which occurs when the baby's shoulder gets stuck behind the mother's pubic bone. The doctor noted the shoulder dystocia in the hospital chart, but did not tell the mother about it. The standard of care requires an obstetrician to inform a mother that, when a shoulder dystocia occurs during a delivery, shoulder dystocias are 10 times more likely in subsequent deliveries.

When the mother became pregnant again in 2004, a different obstetrician failed to inform her about the heightened risk of a shoulder dystocia. Nor did the doctor suggest a cesarean section. A shoulder dystocia occurred during delivery, and the newborn suffered a brachial plexus injury. The jury awarded $1,375,000 in noneconomic damages, and the trial court denied defendant's motion to impose the $500,000 statutory cap, finding that to do so would violate Article I, section 10 of the Oregon Constitution (the "Remedies Clause"). The Court of Appeals reversed because "a claim for prenatal injuries—including those that occur during birth—did not exist at the time that the Oregon Constitution was adopted." *Klutschkowski v. PeaceHealth,* 245 Or App 524, 546 (2011).

The Supreme Court reversed. The Court acknowledged that there was no 19th-century case that addressed this specific issue, so it followed the general principle that an action for medical malpractice existed in 1857 unless it falls within some exception. The Court found that no exception existed in this case. It distinguished the "prenatal injury" cases cited by the Court of Appeals by noting that there was evidence that the baby's injury was not "prenatal"—the jury could have found that the baby was injured after his head had emerged from his mother's body.

The next step under the Remedies Clause is to examine whether the $500,000 award was an adequate substitute remedy when compared to the $1,375,000 jury award. Rather than conduct this analysis, however, the Supreme Court held that any reduction of the jury's award violated the plaintiff's right to a jury trial under Article I, section 17. The Court offered no opinion on whether the cap also violated the Remedies Clause or, for that matter, whether the Remedies Clause had any continuing relevance to a damages cap case.

Justice Landau filed a concurring opinion of note, where he outlined his view that, inter alia, it made little sense to look to 1857 when determining the application of the Remedies Clause or the right to a jury trial to current conceptions of tort law. Justice Landau urged future litigants to brief this issue. ✪

— Submitted by Christopher Allnatt, Brisbee & Stockton LLC

Standard of Care

Engineer can testify about standard of care of neurosurgeon

In *Trees v. Ordonez,* 354 Or 197 (2013), the Supreme Court held that a biomechanical engineer could testify to the standard of care of a neurosurgeon who had installed a metal plate in a patient.

The defending neurosurgeon performed an anterior cervical discectomy and fusion (ACDF), which involved attaching a metal plate to the patient's spine. Plaintiff alleged the neurosurgeon failed to properly place and secure the plate and its screws, which caused perforation of plaintiff's esophagus, and an infection. At trial, plaintiff called a biomechanical engineer to testify about the proper installation of the plate. No medical doctor testified that defendant breached the standard of care. The court granted defendant's motion for directed verdict because plaintiff failed to provide evidence of the applicable standard of care. The Court of Appeals affirmed, concluding that the engineer's testimony

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"failed to bridge the gap … between the biomechanical construct of the plate and the methods with which they were intended to be installed and whether compliance with those same methods as a medical matter set the standard of care for [defendant.]" *Trees v. Ordonez,* 250 Or App 229, 238 (2012).

The Supreme Court reversed. It rejected defendant's argument that an engineer cannot testify about the standard of care for a neurosurgeon performing an ACDF, because "Oregon cases have looked to the substance, rather than form, and focused on the knowledge of the expert, rather than on an expert's particular medical degree or area of specialty." In so holding, the Court relied in part on cases where it had allowed doctors from one specialty to testify about the standard of care in different specialties, so long as those experts had the requisite knowledge and experience to do so.

The Court therefore held that "testimony from a qualified expert, who has knowledge about the standard of care that is helpful to the trier of fact, is admissible, and we see no principled reason why such testimony is necessarily insufficient to establish the standard of care in a medical malpractice case merely because that testimony comes from an expert who is not a medical doctor." It specifically rejected a rule requiring expert testimony from a medical doctor to survive a motion for a directed verdict on the issue of negligence in a medical malpractice case.

The Court then found that the biomechanical engineer was qualified to testify about the standard of care regarding the installation of the metal plate because of his education and experience, and the overlap between the two disciplines. It therefore held that the biomechanical engineer's testimony was "sufficient for plaintiff to survive a motion for a directed verdict." ✪

— Submitted by Christopher Allnatt, Brisbee & Stockton LLC

ORLTA

Claim brought for breach of habitability under ORLTA is a tort claim

In *Jenkins v. Portland Housing Authority,* 260 Or App 26 (2013), the Court of Appeals held that the term "tort" in the Oregon Tort Claims Act (OTCA) included a claim for breach of the habitability provisions under the Oregon Residential Landlord and Tenant Act, (ORLTA).

Plaintiff rented an apartment in a public housing project operated by the Housing Authority of Portland (HAP). After a broken washing machine allowed water to collect in a common walkway, plaintiff was injured when she slipped and fell in the puddle. She brought suit against HAP arguing that it was liable for a breach of the habitability provisions of the ORLTA, ORS 90.320, which requires walkways to be maintained "in good repair." The trial court granted HAP's motion for summary judgment on the ground that its periodic inspections and maintenance staffing were decisions subject to the discretionary immunity afforded to public bodies under the OTCA.

Plaintiff argued that the OTCA did

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not apply to her claim because it was not a tort. Plaintiff reasoned that a residential lease agreement must exist for the standards in ORLTA to apply. The court disagreed. "Tort" is defined in the OTCA as "the breach of a legal duty that is imposed by law, other than a duty arising from contract ...." ORS 30.260(8). Because Oregon law imposed habitability standards on landlords through the ORLTA, these standards applied "regardless of whether the parties manifest any intention of agreement to those terms." That is, although a "tort" does not include obligations created by contract, in this case the existence of the rental agreement did not create the habitability standard: it merely determined that the ORLTA applied. Thus, the habitability standards that plaintiff alleged had been breached did not arise from contract.

Plaintiff also appealed on the grounds that HAP's inspection and maintenance staffing were "ministerial" decisions not subject to discretionary immunity under the OTCA, but the Court of Appeals found that issue unpreserved. ✪

— Submitted by Greg Roberson, Peterson Peterson & Walchli LLP

Summary Judgment

ORCP 47 E affidavit insufficient if it does not address the affirmative defense at issue in the motion for summary judgment

In *LaVoie v. Power Auto, Inc.*, 259 Or App 90 (2013), the Court of Appeals held that an ORCP 47 E affidavit was insuffi-

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cient to create an issue of fact when it addressed the elements of plaintiff's prima facie case but not the affirmative defense at issue in the summary judgment motion. The Court also held, however, that the defendant did not prove its affirmative defense as a matter of law.

Plaintiff was injured in a car accident when the driver's side floor mat slid forward and interfered with his ability to operate the accelerator and the brake in his girlfriend's car. When purchased, the car did not come equipped with floor mats or a floor mat retention system. Rather, plaintiff's girlfriend purchased after-market floor mats and placed them in the car. Moreover, plaintiff had removed the after-market floor mats twice after experiencing similar interference with the accelerator and the brake, but an unknown person reinstalled them. After the accident, plaintiff sued the dealer from which his girlfriend had purchased the car for negligence and products liability.

The dealer filed a motion for summary judgment based on the "alteration or modification" affirmative defense in ORS 30.915, which requires evidence that an alteration or modification: (1) was made without the seller's consent or against the seller's instructions or specifications; (2) was a substantial contributing factor to the injury; and (3) if reasonably foreseeable, then the seller gave adequate warning. Specifically, the dealer argued: (1) it did not consent to the floor mats; (2) plaintiff admitted that the floor mats caused the accident and the injuries; and (3) the car dealer did not have a duty to warn.

In response to the dealer's motion for summary judgment, plaintiff filed an expert affidavit under ORCP 47 E. Rather than relying on a general assertion that the expert would create an issue of fact, the ORCP 47 E affidavit specifically addressed the elements of plaintiff's prima facie case, not the ORS 30.915 affirmative defense at issue in the summary judgment motion. The Court held that the ORCP 47 E affidavit was insufficient for the following reasons: (1) whether the seller consented to the floor mats required evidence of personal—and not expert—knowledge; (2) plaintiff's complaint had already admitted that the floor mats caused the accident; and (3) the affidavit's averment regarding a duty relative to the prima facie case did not also create an issue of fact regarding the ORS 30.915 duty to warn.

Nevertheless, the Court of Appeals held that the defendant had not proved its ORS 30.915 affirmative defense as a matter of law. Although no genuine issue of material fact existed as to the first two prongs of the analysis, the court held that there were issues of fact on the scope of the dealer's duty to warn and regarding whether a warning would have made a difference. ✪

— Submitted by Robert E. Sinnott, Keating Jones Hughes PC

ORS 31.150

Trial judge may not weigh competing evidence in evaluating whether a plaintiff met burden to defeat an ORS 31.150 Special Motion to Strike

In *Young v. Davis,* 259 Or App 497 (2013), the Court of Appeals held that a trial judge may not weigh competing evidence in evaluating whether a plaintiff met her burden to defeat an ORS 31.150 "Special Motion to Strike." The court also explained the applicable legal standards for such motions under the state's "anti-SLAPP" (Strategic Lawsuits Against Public Participation) law, which establishes a mechanism for defendants to seek the early dismissal of claims that arise out of certain expressive conduct.

The parties in *Young* were co-workers at the Veterans Administration. After defendant Davis reported multiple allegations of sexual harassment by Young to her supervisor, Young filed suit against Davis as well as others for defamation and wrongful use of civil proceedings. Davis moved to strike both claims pursuant to ORS 31.150. Davis asserted that both claims arose out of conduct covered by the anti-SLAPP statute and that Young failed to meet her statutory burden of evidence. The trial court granted the special motion to strike, and Young appealed.

The Court of Appeals reversed, explaining that ORS 31.150 creates a "two-step burden-shifting process" for resolving a special motion to strike. The

Continued on next page

Recent Case Notes

moving defendant has the "initial burden to show that the claim against which the motion is made 'arises out of' one or more" of the activities described in the statute (such as, for example, statements made in a judicial proceeding). The burden then "shifts to the plaintiff to 'establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case.'"

The Court of Appeals focused on the second step of the burden-shifting analysis. The court ruled that, when determining whether the plaintiff met his burden under ORS 31.150(3) to "establish that there is a probability that the plaintiff will prevail on the claim," a trial court may not weigh competing evidence "in order to determine whether plaintiff's claims were 'likely to succeed on the merits.'" Instead, the trial court should limit its analysis "to the question whether plaintiff had met her burden 'by presenting substantial evidence to support a prima facie case.'" The court explained that the "presentation of substantial evidence to support a prima facie case is, in and of itself, sufficient to establish a probability that the plaintiff will prevail; whether or not it is 'likely' that the plaintiff will prevail is irrelevant in determining whether it has met the burden of proof set forth by ORS 31.150(3)." A trial court's consideration of the defendant's evidence is limited to determining whether that evidence "defeats plaintiff's claims as a matter of law."

The court remanded the case "for application of the correct legal standard under ORS 31.150(3)." ✪

— Submitted by Derek Green, Davis Wright Tremaine LLP

Employment

Supreme Court holds "donning and doffing" protective equipment qualifies as "changing clothes"

In *Sandifer v. U.S. Steel Corp.*, the U.S. Supreme Court held that an employer did not violate the Fair Labor Standards Act (FLSA) when it declined to pay its union-represented employees for time spent "donning and doffing" protective equipment at the beginning and end of their shifts, because the union and the employer had agreed in their collective bargaining agreement (CBA) that time spent changing clothes would not be compensable.

The federal courts have issued numerous decisions regarding when the FLSA, as a general matter, requires that "donning and doffing" time be paid. This case, however, involved a specific provision of the FLSA, 29 U.S.C. Section 203(o), which allows employers and employees to agree in a CBA that "time spent in changing clothes ... at the beginning or end of each workday" is not compensable. The employees and U.S. Steel's CBA contained such a provision. The issue, then, was whether the time spent donning and doffing the protective gear at issue (which included flame-retardant jackets and pants, heavy gloves, steel-toed boots, safety glasses, earplugs, and respirators) qualified as "changing clothes" for purposes of Section 203(o).

Applying the plain text definition of the term, the Court held that the protective gear qualified as "clothes." The Court rejected the employees' attempt to limit the definition to non-protective coverings, finding the interpretation (which would have excluded certain items that are plainly "clothes" simply because they also served a protective purpose) strained and unworkable. The Court also rejected U.S. Steel's interpretation contending that any covering worn by the employee would automatically qualify as "clothes." Instead, the Court adopted a middle position in which "clothes" refers to "items that are both designed and used to cover the body and are commonly regarded as articles of dress." The Court also construed the term "changing," again using a plain text analysis but concluding that the broader statutory context of Section 203(o) meant that employees were "changing" even when they were putting on aprons or other coveralls that did not require removing other items of clothing.

The Court then held that most of the items the employees were required to don and doff (gloves, boots, jackets, pants, etc.) plainly met the definition of "changing clothes." But what about the glasses, earplugs, and respirators? The Court determined that although glasses, earplugs, and respirators were not "clothes," the Section 203(o) exception still applied because the employees' pre- and post-shift periods were, on the whole, spent "changing clothes." Consequently, the entire "time spent" in the pre- and post-shift period was properly considered non-compensable under Section 203(o). ✪

— Submitted by John B. Dudrey, Stoel Rives LLP

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Recent Case Notes

Security Fund

Oregon Supreme Court finds restaurant is "essentially same business" as predecessor entity, and therefore must repay wage security fund

In *Blachana LLC v. BOLI,* the Supreme Court held that a restaurant and bar that operated in the same space and offered the same services and amenities as its predecessor was required to reimburse the Oregon Bureau of Labor and Industries (BOLI) for unpaid wages paid to the predecessor's employees from the state's Wage Security Fund.

The Portsmouth Club was a North Portland bar and restaurant owned and managed by CPU Underhill LLC. In 2005, CPU Underhill sold the Portsmouth Club's goodwill and inventory and leased its building to NW Sportsbar. When it ceased making its lease payments in 2006, CPU Underhill repossessed the business's assets, including the building, its inventory, and the "Portsmouth Club" name. Within weeks, the owners of CPU Underhill registered a new company, Blachana LLC, to operate the bar and restaurant. Prior to closing, NW Sportsbar had paid its employees only a portion of their wages for 2005 and no wages for 2006. The former employees submitted unpaid wages claims to BOLI. Because NW Sportsbar had gone out of business, BOLI paid the wages from the Wage Security Fund, a fund established to pay wage claimants when their employer goes out of business or lacks sufficient funds to pay past-due wages.

BOLI is authorized by ORS 652.414(3) to recover amounts paid from the Wage Security Fund from the claimants' employer. The term "employer" is defined to include any "successor to the business of any employer." ORS 652.310(1). The phrase "successor to the business of any employer" is not defined in the statute, but it has been interpreted by BOLI in its administrative case law to refer to

a company that operates "essentially the same business" as the predecessor, as determined by a non-exclusive list of factors. Following a contested case hearing, BOLI concluded that Blachana LLC was NW Sportsbar's successor and was therefore responsible for repaying the wages to the Wage Security Fund.

Reversing the Court of Appeals, the Supreme Court held that Blachana LLC was NW Sportsbar's successor under ORS 652.310(1). First, the Court decided that the statutory phrase "successor to the business of the employer" was an inexact term. Thus, BOLI's "essentially the same business" test was only proper if it was "consistent" with the legislature's intent when it drafted the "successor" language in ORS 652.310(1). Examining the statute's legislative history, its context, and contemporaneous dictionaries and legal texts from the time of the statute's enactment in 1931, the Court concluded that the test was consistent with the legislature's general intent to make successor employers liable so long as they carried on a business that "sustains the like part or character" of the previous employer.

Second, the Court held that BOLI properly applied the "essentially the same business" test when it concluded that Blachana LLC was NW Sportsbar's successor. The test considers several factors: the identity of the business, its location, the period of time between the former and current employer's operations, whether the same product or service is offered, and whether the same equipment or methods of production are used to prepare the product or service. Given the timing and the similarity between Blachana LLC and NW Sportsbar's businesses (similar trade name, same location, same products and services, same equipment), the Court concluded that BOLI was correct in determining that Blachana LLC was a successor employer under the statute. ✪

— Submitted by John B. Dudrey, Stoel Rives LLP

Petitions For Review

Matthew J. Kalmanson, Hart Wagner LLP
Case Notes Editor

The following is a brief summary of cases for which petitions for review have been granted by the Oregon Supreme Court. These cases have been selected for their possible significance to OADC members; however, this summary is not intended to be an exhaustive listing of the matters that are currently pending before the court. For a complete itemization of the petitions and other cases, the reader is directed to the court's Advance Sheet publication.

Appellate Jurisdiction

■ ***Jennifer Ann Heikkila v. Shawn Dean Heikkila* (S061636). Oral argument scheduled for June 23, 2014.**

The question on review is whether the Court of Appeals has jurisdiction over an appeal if the appellant timely served the respondent with the notice of appeal by mail but did not serve the respondent's attorney.

Justiciability

■ ***Marquis Couey v. Kate Brown* (S061650), 257 Or App 434 (2013). Oral argument scheduled for June 24, 2014.**

The Court of Appeals affirmed summary judgment to the State on the ground that plaintiff's declaratory judgment action, although justiciable when it was filed, had become moot. The issues on review relate to the continuing justiciability, if any, of a challenge to an elections law limiting political speech by paid petitioners after the expiration of the election cycle during which the claim arose, including possible review of ORS 14.175, the so-called "capable of repetition, likely to evade review" statute.

Class Actions

■ ***Marilyn C. Pearson v. Philip Morris, Inc.* (S061745), 257 Or App 106 (2013)). Oral argument scheduled for June 23, 2014.**

Plaintiffs alleged that defendant violated the UTPA by misrepresenting the characteristics of Marlboro Lights cigarettes and that, as a result of defendant's misrepresentations, they had suffered economic losses. Plaintiffs sought to certify a class of approximately 100,000 people who had purchased Marlboro Lights in Oregon from 1971 until 2001. The trial court denied plaintiffs' motion for class certification and their alternative motion for certification of an issue class, but a divided Court of Appeals sitting en banc reversed.

Among other things, the Supreme Court will review the Court of Appeal's decisions that: (1) plaintiffs could prove ascertainable loss on a class-wide basis;

Continued on next page

PETITIONS FOR REVIEW
continued from page 20

(2) plaintiffs could prove reliance on a misrepresentation on a class-wide basis; and (3) issues common to the class predominated over individual issues.

Evidence

- ***State of Oregon v. Shawn Gary Williams*** **(S061769), 258 Or App 106 (2013). Oral argument scheduled for June 23, 2014.**

In this criminal case, the Supreme Court will review the interplay of OEC 401 (relevance) and OEC 404(3) (prior crimes, wrongs or acts), as it relates to the introduction of evidence against a defendant charged with sexual abuse.

Contractual Waivers of Negligence

- ***Myles A. Bagley v. Mt. Bachelor, Inc.*** **(S061821), 258 Or App 390 (2013). Oral argument scheduled for May 7, 2014.**

The plaintiff injured himself while snowboarding on Mt. Bachelor. The questions on review concern the legal validity of a release/indemnification agreement found in a ski resort's season pass.

Negligence/ORCP 47 E/Product Liability

- ***Linda Two Two v. Fujitec America, Inc.*** **(S061536), 256 Or App 784 (2013). Oral argument scheduled for March 11, 2014.**

The plaintiffs were injured in an elevator serviced by the defendant. The Court of Appeals affirmed the trial court's grant of summary judgment to the defendant on plaintiffs' negligence claim and their claims under Oregon's product liability statutes.

On review, the issues are:

(1) What information must be included in an attorney's affidavit under ORCP 47 E to successfully oppose a motion for summary judgment?

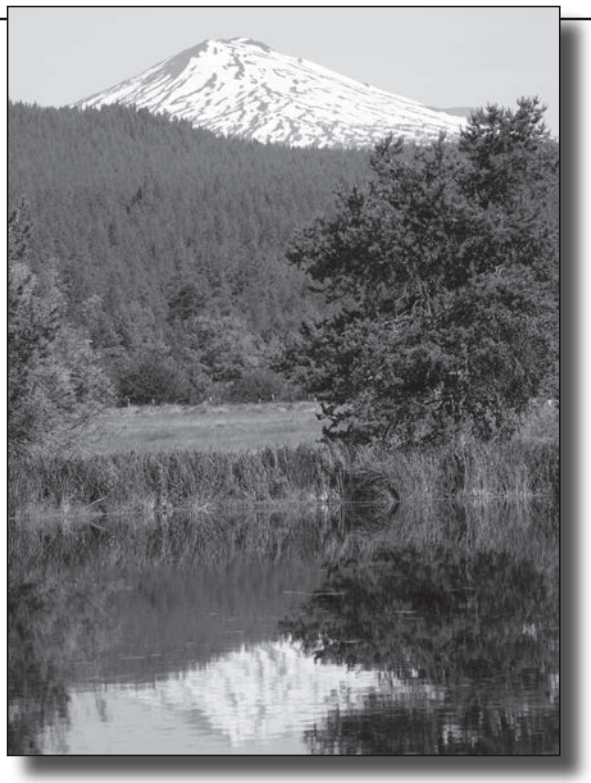
(2) Did the plaintiff establish an issue of fact on a theory of res ipsa loquitur?

(3) Was an elevator service company subject to strict product liability?

Utilities

- ***Frank Gearhart v. Public Utility Commission of Oregon*** **(S061517) (S061518), 255 Or App 58 (2013). Oral argument scheduled for March 4, 2014.**

The Supreme Court granted review of the latest appellate opinion in the continuing litigation over PGE's closure of the Trojan nuclear power generating plant, and PGE's attempt to recover the cost of its investment through rates.



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Association News

New Members

OADC welcomes the following new and returning members to the association:

Drew Baumchen
Smith Freed & Eberhard PC

Jeff Bradford
Tonkon Torp LLP

Alison Brown
Hiefield Foster & Glascock LLP

Jason Bush
Geico Staff Counsel

Stephen Dingle
Lane County Office of Legal Counsel

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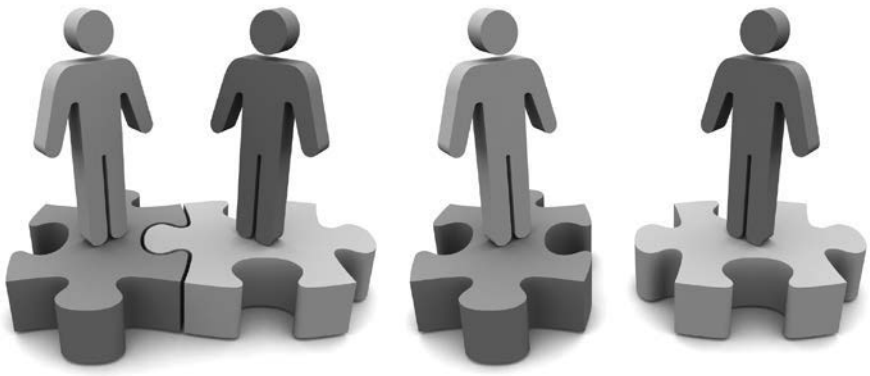

Calendar

May 16, 2014
Advanced Commercial Damages Seminar
Tonkon Torp • Portland, OR

June 19-22, 2014
Annual Convention
Sunriver Resort • Sunriver, OR

September 25, 2014
Defense Practice Academy & Judges Reception
Portland, OR

November 5, 2014
Fall Seminar
Hilton Portland • Portland, OR

All programs are subject to change

Deadline

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Bullivant Houser Bailey PC
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Amicus Update

Lindsey Hughes, Keating Jones Hughes PC
OADC Amicus Committee Member

The OADC board has determined that the interests of the membership are served by an active Amicus Committee.

The OADC Amicus Committee offers our sincere congratulations to our former committee colleague, the Honorable Joel DeVore. Joel was appointed by Governor Kitzhaber in October 2013 to serve on the Oregon Court of Appeals. While in practice at Luvaas Cobb in Eugene, Joel served on the Amicus Committee for many years. We miss his presence and guidance in our discussions, but know that his wisdom, keen insight, professionalism and good humor will serve the Court and all parties well.

Amicus Committee members are Janet Schroer, Michael Lehner, Tom Christ, Michael Stone, Susan Marmaduke, and Lindsey Hughes. We look forward to welcoming a new member soon, pending OADC board approval. The Amicus Committee convenes several times a year, when asked to participate in matters before the appellate courts. Most often, the OADC amicus briefs are authored by members of our committee. Although a small stipend is available through OADC to help defray costs, the effort, which can be significant, is largely a volunteer commitment.

The process for requesting amicus support in matters of interest to the defense bar is detailed on the OADC website, www.oadc.com. In addition to the written materials requested, we ask for a summary of the arguments on appeal or review, and, particularly, an analysis of the issues on which support is requested, along with your thoughts on what in particular an amicus brief can add to the arguments already being made.

Currently, the committee has approved amicus briefs on behalf of OADC in two cases. We are working on a Supreme Court amicus brief on the merits in *Bagley v. Mt. Bachelor,* 258 Or App 390, 310 P3d 692 (2013), review granted 354 Or 699 (Jan. 7, 2014), weighing in on the arguments concerning the viability of pre-injury releases. Michael Estok is authoring the brief in collaboration with the committee.

We are also arguing in support of a petition for review of the Court of Appeals decision in *Burgdorf v. Weston*, 259 Or App 755, 316 Or 303 (2014), focusing on issues regarding discovery for statutes of limitation purposes and motions for summary judgment.

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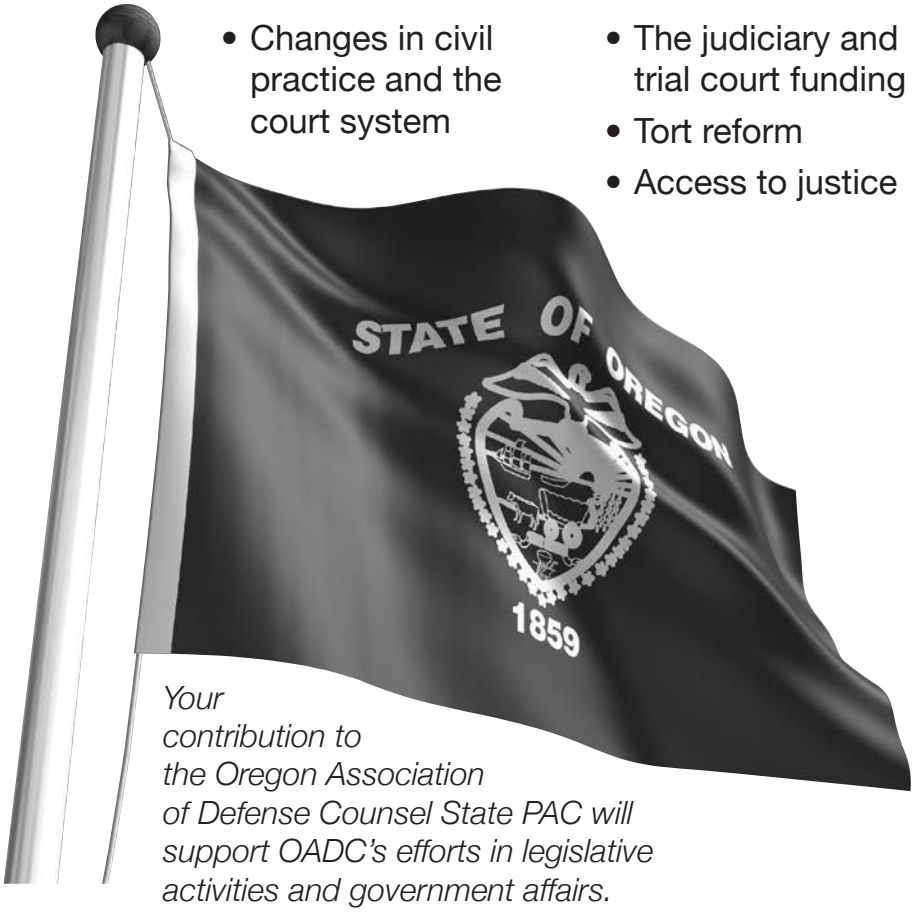

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