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PRESIDENT'S MESSAGE

Is the seesaw broken? Find time to fix it!

Katie L. Smith, Walhood Law Group

Now that the courts are open to civil practice again after nearly a two-year hiatus, there is one recurrent theme I hear every time I speak to a colleague, regardless of their area of practice: Work is busy! Trial calendars are stacked trying to push through the two-year backlog, and there seems to be a non-stop influx of new work. When I call someone up and ask how they are doing, the reply is more often than not a sarcastic, "Living the dream." And while we might all have said one time or another that being busy is better than not being busy, it is in times like these that it becomes ever more critical to take some time, even if just for a moment, to recharge and focus on maintaining a healthy work-life balance.

KATIE L. SMITH

We all know the importance of work-life balance, but maintaining that balance is harder than it sounds, especially when things get busy at work. I think many of us struggle to recognize how far off balance we are. So, with hopes of encouraging you to take a minute to reflect and check your own balance, I will share my own personal story of realization that my work-life balance was catawampus. Be warned, there is no drama or glamor to this story. I have always been someone who cannot sit still for long, running on what you might refer to as high-octane fuel—a busybody. This holds true in my professional and personal life. In 2021 I was probably the busiest I've been in my life. I was managing two legal offices, handling several high-stakes cases in three different states, and co-managing a family with five kids, all of whom were teenagers or older. To say life was busy was an understatement. There simply were not enough hours in the day to do what needed to be done. Sound familiar?

When times are busy, I usually wear my ability to multi-task and manage stress as a banner of pride. One day I was standing in the kitchen with my daughter, after having worked a 10-hour day barely moving from my desk. My daughter was telling me something about her day, and I was nodding along, all the while my eyes glassed over and my mind racing 100 miles an hour over something about work. I noticed she stopped talking, so I refocused and urged her to continue, to which she responded, "You're not even listening." Of course, I took it upon myself to prove her wrong by digging out of my subconscious the subject matter of which she was talking, repeating words or phrases I recalled. My daughter gave me "a look" and proceeded to go on about her business. That moment, as she walked away, I realized there was nothing to be proud of in the way I was balancing my work and home life in that moment. The truth was, I was not balancing them. I was physically present but not mentally present when my daughter was talking, and far too often, I was playing my little game of reciting certain words or phrases from a conversation just to prove I was listening. It was in that moment I realized I was wasting away the last few precious months I would have while my daughter, a high school senior, still lived under the same roof. My balance was off, and I needed to make a change to rebalance things.

For some, this story may sound all too familiar and for others, it may not resonate

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PRESIDENT'S MESSAGE
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at all, but the moral of the story is this: **Check your own balance.** If you check your balance and find that all is well-aligned, keep doing what you are doing and do not lose sight of that. If you check your balance and realize maybe your seesaw is a little off balance, or perhaps catawampus like my own was, here are some of my favorite tips, and tricks to turn the wrench on that seesaw and bring it back into balance.

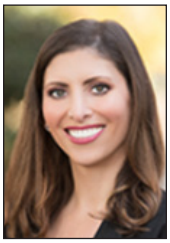
1. *Let Your Phone Sleep In:* How many of us look at our phone first thing in the morning? As if the world imploded during those few hours when it did not have our constant attention. This is not to say sleep in, though if you can, do it. This is to say, go about your morning routine and get ready for the day without checking in on work. If you must, take a quick peek at your calendar once you get up just to remind yourself of what you have planned for the day, but do not check emails. Allow yourself time to get your routine rolling before you jump into the world. And if you have a significant other or kiddos at home, during that morning ritual, check in with them rather than the office. The office will be there when you decide it's time to start the workday.
2. *Reclaim Your Lunch Break:* When I get really busy, I realize I do not stand up from my desk nearly enough, and I find myself working through lunch. Reclaim your lunch break and move around. On those rare sunny days, take a walk around the block, meet a friend or colleague, walk down to a nearby coffee shop, or take care of some of the things on your list like going to the bank or picking up dog food. Just do something to move around and give your eyes a break from the computer.
3. *No Phones at the Dinner Table:* The most significant thing I have done as my kids have become teenagers is to maintain family dinner. It may not be every day of the week as we balance sports and academic and social calendars, but at least two if not three times a week we sit down for a family dinner, and no phones are allowed at the dinner table. I know this can be tough, so over the weekend, figure out the days that work, plan your menu (make it easy) and shop. That way all you have to do is come home, prep, and eat. You'd be amazed at the conversations you can have if you leave your phone in another room and just sit with your family for 30 minutes. It is a great way to catch up with everyone and stay connected. My kids' friends often ask to stay for dinner just so they can have this experience. Bring back family dinner!
4. *Take 30 Minutes to Read a Book or Watch TV Before Bed:* I cannot count the number of times I have struggled to fall asleep while my mind continued to reel. Nor can I count the number of nights my dreams would be related to work and I would wake up angry that these work-related dreams were neither productive nor billable. If I am going to dream work, I might as well get something done, right?! I have no hope if I do not shut my brain down before bed. In that half-hour before you turn the lights out, let your mind completely unplug from work. Read a book or watch your guilty pleasure show—something that lets your mind turn off the work—even if it is the tenth time you've seen that *Friends* episode.
5. *Take a Day:* Every once in a while you may find yourself without a deposition, hearing, or meeting. There is no doubt there is still work to do and deadlines to meet, but there are times when those deadlines are not today. Find that day and take it for yourself. Mark yourself out on your calendar and set your out-of-office response on email. You don't have to be explicit: Just say you are unavailable that day and will respond to emails upon your return. Then take a day. For an added challenge, ignore your emails. Perhaps let your assistant know to call you if it's an emergency and let all other emails wait until you return the next day. Throwback to the days before smart phones, when we were not available 24/7 to respond to emails instantaneously.
6. *Plan Your Vacation:* One of the best ways that helps me push through the busy days is to have something to look forward to. Plan your next great adventure, perhaps a nice weeklong trip. With a busy schedule, it may be a year out before you can find a week to spare, but pick the week and block it out on your calendar now. Then make every effort to not book over that week. Treat it like you would a date-certain trial when you are asked to schedule a deposition. And when you are on that vacation, lean on your colleagues back at the office so you can be present in that vacation and not have your mind at work.

I know you all work hard, and rather than play hard, you probably work even harder. With any luck, this message will cause you to pause, reflect on your own work-life balance, and identify a few simple ways you can adjust to realign the balance in your work-life.

"Bystander Distress" and Medical Negligence: *Philibert v. Kluser* Six Years Later

Melissa Bushnick
Lindsay Hart

Since *Philibert v. Kluser* was decided in 2016, there has been an increasing effort by plaintiffs to seek recovery for negligent infliction of emotional distress ("NIED") under the bystander theory of negligence, particularly in the medical malpractice context.[1] These claims most often arise out of a spouse or other close family member witnessing sequelae from an illness. By relying on the language of *Philibert* and teasing out the individual elements of the bystander rule, key distinctions can be drawn to support a motion to dismiss or summary judgment against an NIED claim.


MELISSA BUSHNICK

Bystander Liability Under *Philibert*

Historically, Oregon followed the "physical impact" rule for NIED claims, prohibiting recovery for emotional distress unless the plaintiff was physically injured. In *Philibert,* the Oregon Supreme Court rejected the "physical impact" rule and held emotional distress damages are recoverable when a plaintiff establishes an invasion of a "legally protected interest" or under the bystander liability test.

In *Philibert,* two boys, aged eight and twelve, were walking across the street in a crosswalk when their younger brother was run over and killed by the driver of a pickup truck.[2] The two boys were not struck by the vehicle and were not physically injured, but suffered serious emotional distress as a result of witnessing the accident.[3] The trial court granted defendant's motion to dismiss based upon the "physical impact" test, and the Court of Appeals affirmed.

The Oregon Supreme Court reversed and reinstated the boys' claim, adopting the bystander test for NIED set out in Section 48 of the Restatement (Third) of Torts.[4] Under *Philibert,* a plaintiff can *only* state a NIED claim if she can establish all four of the following elements: (1) witness a sudden, *serious physical injury* to a *third person* negligently *caused* by the defendant; (2) suffer *serious* emotional distress; (3) perceive the events that caused injury to the third person as they occurred; and (4) the person physically injured is a close family member of the plaintiff.[5]

In outlining these elements, the court acknowledged that, unlike physical injury, emotional harms occur frequently, and thus foreseeability alone is insufficient to limit the scope of liability for NIED claims.[6] The court noted that without limiting principles in addition to foreseeability, "permitting recovery for emotional injuries would create indeterminate and potentially unlimited liability."[7] As such, all four elements of the bystander test must be satisfied to state a claim for NIED under *Philibert*.[8]

Distinguishing the Facts of *Philibert* from NIED Claims Arising Out of Medical Negligence

Most claims for NIED arising out of medical negligence will be factually distinguishable from *Philibert* such that the elements of the *Philibert* test will support a motion to dismiss or for summary judgment.

Many injuries resulting from medical negligence do not occur "suddenly," and family members rarely contemporaneously perceive medical negligence. In a failure-to-diagnose case regarding a lab or imaging study, for example, the injury is not a "sudden, serious physical injury" that can be witnessed, and the events causing the injury cannot be contemporaneously perceived. Thus, it fails both the first and third elements of the test.

The plaintiff's framing of the "injury" as "negligently caused" by the defendant is also subject to attack. The *Philibert* court discussed *Hammond v. Central Lane Communications,* in which the Oregon Supreme Court found no viable NIED claim where the plaintiff awoke to find her husband lying on the floor, apparently the victim of a heart attack, and suffered severe emotional distress when the defendant 911 service negligently delayed responding for 45 minutes.[9] The *Philibert* court noted that while the defendant's delay may have contributed to the death, the defendant did not cause the actual physical injury—the heart attack.[10] As such, the case would not satisfy the bystander test that the person witness a sudden, serious physical injury to a person *negligently caused* by the defendant.[11]

Similarly, in the medical negligence context, the issue could arise where a patient suffers an undiagnosed infection, leading to serious symptoms such as a fever, loss of consciousness, or seizure. While a seizure may be upsetting for a family member to observe, neither the

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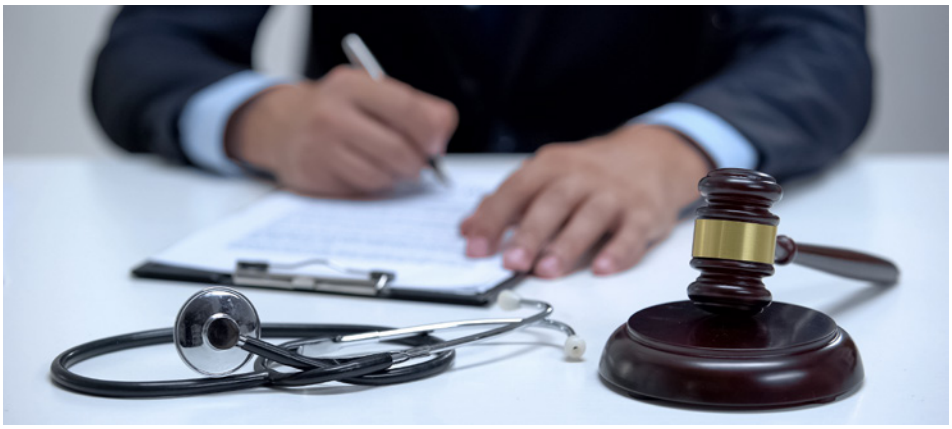
infection nor the seizure were "negligently caused" by the defendant. The actual negligent conduct—the failure to diagnose the infection—is also likely not contemporaneously perceptible.

Courts in other states have held that misdiagnosis or failure-to-treat cases do not satisfy the element of contemporaneous observation of a sudden, serious injury.[12] Consistent with *Philibert,* these other jurisdictions have held that extending the bystander test to cases where the plaintiff observes the suffering of the victim but not the event that causes the suffering would conflict with the basic premise of the bystander rule, which is the contemporaneous perception of a sudden, traumatic, negligently caused, injury-producing event. Failing to apply these limitations would improperly create a cause of action for any person who learned of a family member's negligently-inflicted death or injury.

Considering Motion Practice Against Medical Malpractice NIED Claims

The requirement that the bystander plaintiff contemporaneously perceive the events that caused the injuries as they occurred is "at the core" of a claim for NIED.[13] Perceiving the scene after the injury happened, or perceiving a recently injured person, is categorically not sufficient.[14]

Although the plaintiff may be a close family member of the patient and may have suffered serious emotional distress—perhaps from seeing the patient become ill or experience an emergent medical event—the plaintiff cannot state a claim for NIED without satisfying all four independent elements of the *Philibert* test, including contemporaneously perceiving negligent conduct that caused sudden, serious bodily injury as it occurred.



As plaintiffs make NIED claims with greater frequency, defense counsel should consider moving against them either at the pleading stage or in a motion for summary judgment by distinguishing the facts of their case from the narrow circumstances of *Philibert*. Depositions and requests for admissions should be used strategically to target the elements of *Philibert* to set up arguments on a summary judgment motion. With careful attention to the strict limitations of *Philibert* at the pleading stage and in the course of discovery, many medical malpractice NIED claims should not survive a dispositive motion.

Endnotes

1 *Philibert v. Kluser,* 360 Or 698 (2016).

2 *Id.* at 700.

3 *Id.* at 700-01.

4 *Id.* at 702.

5 *Id.* at 712-14 (italics in original)

6 *Id.* at 703-04.

7 *Id.* at 704.

8 Observe, however, that Oregon appellate courts have begun citing to *Philibert* to permit novel "legally protected interests" for NIED claims. *See, e.g., I.K v. Banana Republic, LLC,* 317 Or App 249 (2022) (relying on *Philibert* to establish a legally protected interest to support employees' NIED claim due to right to privacy not to be video recorded while using a private employee restroom); *Tomlinson v. Metro. Pediatrics, LLC,* 362 Or 431 (2016) (relying on *Philibert* to hold that plaintiffs pled a legally protected interest in receiving information that implicated the parents' reproductive choices in a "wrongful birth" claim).

9 *Hammond v. Central Lane Communications,* 312 Or 17, 20 (1992).

10 *Philibert,* 360 Or at 712-13.

11 *Id.* (emphasis added)

12 *Budavari v. Barry,* 176 Cal. App. 3d 849 (2nd Dist. 1986) (the failure to detect cancer or follow up on x-ray findings was not an "event" which could be witnessed); *Bird v. Saenz,* 28 Cal. 4th 910 (2002) (holding a misdiagnosis is often beyond the awareness of lay bystanders and that the rule permitting bystanders to sue for NIED on account of unperceived medical errors hidden in the course of treatment cannot be reconciled with the bystander test's requirement that the plaintiff be aware of the connection between the injury-producing event and the injury); *Cavanaugh v. Jones,* 863 S.W.2d 551, 557 (3rd Ct. App. Tex. 1993) ("While we recognize that failure to diagnose, improper diagnosis, and failure to monitor a patient's condition can cause much distress and may sometimes lead to the pain of witnessing further injury to, or the death of, a loved one, we conclude that these circumstances generally do not give rise to a cause of action under bystander recovery."); *Estate of Davis v. Yale – New Haven Hosp.,* 200 Conn. Super. Lexis 225 (2000) (holding that in a misdiagnosis or failure to treat case, a resulting severe condition or death observed by the family member without contemporaneous observance of the actual misdiagnosis or failure to treat cannot satisfy the bystander test).

13 *Philibert,* 360 Or at 713.

14 *Id.*

The Wooden Shield of "As-Is" Clauses in Construction Defect Cases

Michael Stando
Wood Smith Henning & Berman

"As-is" clauses are a typical feature in most real estate agreements, intended to insulate the seller from claims by the buyer for any defects the buyer uncovers after the sale of a property. The Oregon Supreme Court recognized the validity of "as-is" clauses in the 1976 case of *Wilkinson v. Carpenter.*[1] The court in *Wilkinson* ruled that the seller made no misrepresentation that would have induced the buyer to purchase the home, because the seller included an "as-is" clause in the sale agreement. However, Oregon courts have also ruled that "a contract will not be construed to provide immunity from the consequences of a party's own negligence unless that intention is clearly and unequivocally expressed."[2] No Oregon court has ruled to date on the enforceability of an "as-is" clause against a construction defect claim sounding in negligence against a third-party contractor who had previously done work on the home, who is not in privity of contract with the buyer. In a clash between these two principles, which would prevail? Could these "as-is" clauses insulate contractors and sellers who built/renovated projects from claims of construction defect? Or do they provide only the illusory protection of a wooden shield?

MICHAEL STANDO

The Case for Recognizing "As-Is" Clauses as a Bar to Negligence-Based Construction Defect Claims

Contractual ambiguities may arise when factual disputes exist concerning what representations were made to a buyer during the negotiations for a property purchase, and whether said representations were contemplated by the "as-is" language in the purchase agreement or part of the agreement itself. When a contract is unambiguous on its face, the court is to apply the clear meaning.[3] However, should there be ambiguities, courts determine the meaning of a clause through its presentation in the contract as a whole.[4] Oregon law generally allows parties the freedom to allocate risk within their contracts as those parties see fit, including the freedom to impose a bar on rescinding real estate agreements (except in the case of fraud).[5] It is for these reasons that Oregon courts generally favor enforcement of "as-is" clauses.

In *Hoover v. Hegewald,*[6] the Oregon Court of Appeals determined there were no grounds to rescind a real estate agreement because any misrepresentations, if they existed, were made unintentionally, and did not rise to the level that would void the "as-is" clause in the agreement. However, *Hegewald* considered an attempt to rescind a real estate agreement as a result of a misrepresentation arising out of the agreement of the buyer and the seller, not a claim by a buyer against a third party that was involved in construction work at the property.

Potential Pitfalls to Reliance on "As-Is" Clauses in Construction Defect Claims

In Oregon, a buyer may bring claims for property damage against the developer of the property caused by the developer's negligence, despite a lack of privity of contract with said developer.[7] In a negligence action brought by a non-contracting party, the developer has little recourse to contractual defenses such as "as-is" clauses. Indeed, even as to the original contracting parties, enforcement of "as-is" clauses is not always absolute. In the 2022 opinion of *Rudder v. Hosack,*[8] the Oregon Court of Appeals determined that an "as-is" clause in a real estate agreement between the parties did not absolve the sellers of liability stemming from environmental issues on the property. The court held that the existence of an "as-is" clause "does not plausibly suggest that the parties intended to form a global resolution of any claims between them," and that more specific language would be needed if the court was to accept that the buyers had intended to waive all environmental claims against the sellers. This holding implies that certain claims may not be contracted around by the simple inclusion of an "as-is" clause without specific language or other circumstances making clear the parties' intent to waive those otherwise-valid claims.

Likewise, in *Abraham v. T. Henry Const., Inc.,* the Oregon Supreme Court permitted a negligent construction claim to proceed despite the contractor's compliance with various contractual terms that purported to define the standard of care the contractor was required to adhere to during the project.[9] The court held that, "Nothing in this court's cases suggests that, by entering into a contract, a party necessarily waives tort claims against another party to the contract . . . . A contract will not be

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construed to provide immunity from the consequences of a party's own negligence unless that intention is clearly and unequivocally expressed."[10] Thus, while a standard "as-is" clause may protect the seller of a home from actions brought by the buyer for some defects, it may be insufficient, without more, to "clearly and unequivocally" express an intent to protect the builder of the home from claims for the builder's own negligent construction.

Expanding on *Abraham,* the United States District Court for the District of Oregon held in *Ri Ky Roofing & Sheet Metal, LLC v. DTL Builders, Inc.*[11] that, where property damage occurred, no "special relationship" was required to bring a negligence claim, and the plaintiff must show only that it was reasonably foreseeable that the negligent construction of the building would cause damage to the property.

Extrapolating from the holdings in *Rudder*, *Abraham,* and *Ri Ky Roofing,* it is likely that Oregon courts would also permit negligent construction claims to proceed notwithstanding an "as-is" clause in the original contract of sale, unless the plaintiff was an original party to the contract and the contract clearly and specifically expressed an intent to waive any claims based on the contractor's negligence.

Conclusion

In short, these cases give fair warning that blanket "as-is" clauses will not necessarily afford third-party contractors (or owners) a shield against negligent construction claims brought by a subsequent purchaser—and may not even be effective in all circumstances as against the original purchaser. Despite the routine inclusion of these clauses in many real estate agreements, parties to a contract should be aware of their significant limitations when it comes to common-law negligence claims, particularly with respect to subsequent purchasers and other non-parties to the contract.

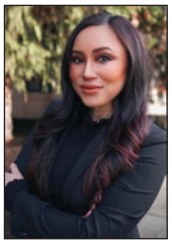
Endnotes

1 *Wilkinson v. Carpenter,* 276 Or 311 (1976).
2 *Transamerica Ins. Co. v. U.S. National Bank,* 276 Or 945, 951 (1976).
3 *Yogman v. Parrott,* 325 Or 358, 361 (1997).
4 *See Eagle Industries v. Thompson,* 321 Or 398 (1995).
5 *See Wilkinson,* 276 Or 311 (1976).
6 *Hoover v. Hegewald,* 70 Or App 223, 229 (1984).
7 *See Harris v. Suniga,* 344 Or 301 (2008).
8 *Rudder v. Hosack,* 317 Or. App. 473, 485-86 (2022).
9 *Abraham v. T. Henry Const., Inc.,* 350 Or 29, 43 (2011).
10 *Id.* at 38.
11 2019 WL 2453781 (D Or).

What's Bitcoin? First-Party Cryptocurrency Coverage Issues Decrypted

Christina Anh Ho
P.K. Schrieffer

As the purchase and ownership of digital assets such as cryptocurrencies and non-fungible tokens ("NFTs") by retail investors continues to rise, property insurers should expect a corresponding increase in claims involving these types of assets, particularly under homeowners' policies. Many insurers may not have contemplated that their property policies could apply to digital assets. The lack of clarity in case law and federal regulations as to the classification of digital assets may pose challenges in analyzing coverage of cryptocurrencies and NFTs under the property provisions of a homeowners' policy.


CHRISTINA ANH HO

A case of first impression out of Ohio, *Kimmelman v. Wayne Ins. Group,*[1] addresses whether Bitcoin should be classified as "money" under a homeowners' policy. The litigation arose out of a first-party dispute regarding coverage for $16,000 worth of stolen Bitcoin. The insured sought reimbursement for the entire amount under the personal property coverage of his policy. The insurer conceded that Bitcoin was "property" but took the position that a $200 sublimit for lost or stolen "money" applied. However, the court held that the Bitcoin was not money, relying upon guidance from the IRS, determing that "virtual currency is treated as property … for federal tax purposes."[2]

Another discrete issue related to digital assets is whether cryptocurrencies are "securities" under standard homeowners' policies, which are often subject to a dollar limitation. An example of a securities sublimit is below:

> ***Special Limitations on Certain Property***
>
> *We will not pay more than the following amount for each category in any one loss. These limitations do not increase the amount of insurance under* ***Coverage C – personal property.***
>
> . . . .
>
> *2.* ***Securities.*** *$5,000 for securities, checks, cashier's checks, traveler's checks, money orders and other negotiable instruments, accounts, bills, deeds, evidences of debt, letters of credit, notes other than bank notes, passports, stamps at face value, and tickets.*

The term "securities" is almost never defined in insurance policies and was not further defined in the policy quoted above. For undefined terms in a contract, courts typically look first to the dictionary to determine meaning. *Black's Law Dictionary* defines "security" as "a negotiable or non-negotiable investment or financing instrument that can be sold and bought on the financial market." For a cryptocurrency, it is not entirely clear whether a resort to the dictionary would end the inquiry. Consequently, a court interpreting this language would likely look further to the decision rendered by the United States Supreme Court in *SEC v. W.J. Howey Co., et al.,* 328 U.S. 293 (1946), which considered whether a transaction qualifies as an "investment contract" and thus a security subject to disclosure and registration requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934. Under the *Howey* test, an investment contract exists if there is an "investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others."

Over the last several years, the Securities and Exchange Commission (SEC) has pushed for more regulatory oversight of cryptocurrencies, relying principally upon the factors outlined in *Howey.* Depending upon their specific attributes, many cryptocurrencies have the potential to be classified as securities under the *Howey* test and trigger the sublimit for securities. However, the SEC stated in 2018 that "true" cryptocurrencies (i.e., those that simply act as replacements for traditional fiat currency, such as Bitcoin and Ethereum) are commodities rather than securities. Although no SEC rulings have been promulgated as to any other similar digital assets, at least one case that relates to the classification of the cryptocurrency XRP is ongoing.[3]

If courts follow the reasoning of the above cases and the guidance provided by the federal agencies, losses involving

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cryptocurrencies could be subject to personal property limits under a policy. As always, it is important to look to the specific policy language and the applicable case law in one's jurisdiction when analyzing insurance coverage of cryptocurrencies.

As of March 2022, there were over 18,000 different cryptocurrencies in circulation. While cryptocurrency-specific insurance is available, the options are not as robust as the options for homeowners' or renters' insurance. Some centralized cryptocurrency exchanges, such as Coinbase, provide crime insurance, which protects a portion of digital assets held across their storage systems against losses from theft. However, Coinbase specifically states that "our policy does not cover any losses resulting from unauthorized access to your personal Coinbase or Coinbase Pro account(s) due to a breach or loss of your credentials." One solution insurers may try in the future could be an endorsement that addresses coverage for digital assets and places appropriate parameters on coverage of such assets. Such an endorsement should contemplate whether other insurance policies are available to cover the loss—be it an excess policy or insurance via a cryptocurrency exchange.

Attorneys drafting endorsements and addressing other novel legal issues that may arise regarding cryptocurrencies will need to be familiar with digital assets, as well as the classification issues surrounding them, in order to identify and decrypt these novel coverage issues for their clients.

Endnotes

1 2018 WL 11417314 (Ohio Com.Pl. Sep. 25, 2018).

2 *See* IRS Notice 2014-21. Courts in other countries have also classified cryptocurrency as property—however, in doing so, those courts looked to whether the cryptocurrencies at issue met the definition of "property" in their respective jurisdictions. See, e.g., *CLM vs. CLN*, SGHC 46 (General Div. of Singapore High Court 2022), *Ruscoe vs. Cryptopia Ltd.* (in liq), NZHC 728 (New Zealand High Court 2020).

3 *See SEC v. Ripple Labs, Inc., et al.*, No. 1:20-cv-10832 (SDNY Dec. 22, 2020).

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Specific Personal Jurisdiction Gets More Specific

Mandi Summers
Cosgrave Vergeer Kester

Pennoyer, International Shoe, Asahi, and *Goodyear* are all familiar names, and now *Ford, Bristol-Meyers, Robinson,* and *Cox* have joined the personal jurisdiction party. In the last decade, and especially the last few years, specific personal jurisdiction has been a hot topic: both the United States Supreme Court and the Oregon Supreme Court have handed down decisions that, taken together, shake up our longstanding idea of the concept. These decisions now require that, in Oregon, a plaintiff's claim against an out-of-state defendant be foreseeably related in some way to the defendant's in-state conduct.


MANDI SUMMERS

The *Bristol-Meyers* and *Ford* Effect

The United States Supreme Court held in *Bristol-Meyers,* and clarified in *Ford,* that a defendant's in-state conduct must relate to the claim at issue. In *Bristol-Meyers,* the court held that a defendant's contacts with a state unrelated to a plaintiff's claim, no matter how pervasive, cannot sustain specific personal jurisdiction.[1] In that case, the drug company had myriad contacts with the state of California, but the plaintiffs were not California residents and claimed no California connection specific to their injuries.[2] Rather, they claimed to have been injured by a drug that the company sold to them elsewhere but also sold in California.[3]

The California Supreme Court had employed a "sliding scale" approach to specific personal jurisdiction, finding that, because of the company's pervasive contacts with the state, a "less direct connection between [the company's] forum activities and plaintiffs' claims" supported specific personal jurisdiction "than might otherwise be required."[4] The Supreme Court rejected this approach and chided the California "sliding scale" method as "a loose and spurious form of general jurisdiction."[5] The drug company had not developed, manufactured, labeled, packaged, or worked on regulatory approval for the drug in California; the plaintiffs did not live there and had not obtained the drug there; and the company was headquartered and incorporated in the Northeast.

Last year, in *Ford,* the Court rejected the idea that specific personal jurisdiction requires a strict causal relationship between the defendant's acts and the plaintiff's injury. Rather, it requires that the defendant's in-state activities, if many and pervasive, are of the sort that could give rise to similar injury.[6] In this case, the plaintiffs had been injured (and, in one case, killed) by defective Ford vehicles that they had bought secondhand and that Ford had originally manufactured and sold in other jurisdictions.[7] For that reason, Ford argued, it was not subject to personal jurisdiction for these claims.[8] The court rejected Ford's argument on the basis that Ford had "systematically served a market"[9] in plaintiffs' jurisdictions by "every means imaginable."[10] Ford's contacts, therefore, had a relationship to plaintiffs' injuries—plaintiffs may never have become Ford owners "except for Ford's contact with their home [s]tates."[11] Together, *Bristol-Meyer* and *Ford* stand for the proposition that a defendant's in-forum conduct must relate in some way to the plaintiff's claims, although a direct but-for causal relationship is not required.

The *Robinson* and *Cox* Effect

The Oregon Supreme Court had originally held in *Robinson v. Harley-Davidson Motor Co.*[12] that the exercise of specific personal jurisdiction in Oregon required both a but-for causal link to a defendant's Oregon activities and a reasonable foreseeability of the litigation. Last year, in *Cox v. HP Inc.,* the court disavowed *Robinson's* but-for causation requirement as unduly narrow in light of *Ford.* However, *Cox* left intact the remainder of *Robinson's* holding, that "the nature and quality of the nonresident defendant's activities in this state must be such that litigation is reasonably foreseeable," finding that *Robinson's* reasoning with respect to foreseeability closely tracked that of the U.S. Supreme Court in *Bristol-Meyers* and *Ford.*[13] The resulting opinion is a comprehensive overview of specific personal jurisdiction in Oregon, which employs both *Bristol-Meyers/Ford's* relatedness and *Robinson's* foreseeability.

In *Cox,* a generator exploded at an HP plant, severely injuring the plaintiff.[14] He sued HP, and HP filed a third-party claim for contribution against TÜV, a testing laboratory that had certified as safe the design of the generator, which

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had been manufactured by a different company in Connecticut.[15] HP asserted that it relied on this certification when choosing the generator.[16] While TÜV had an Oregon sales office and had obtained approval from the state to perform its testing services here, there was little evidence in the record regarding any actual advertising, marketing or services performed by TÜV in Oregon, and it was undisputed that TÜV had not conducted any such activities in Oregon related to the actual generator in question or any similar type of equipment.[17] The court dismissed HP's claim against TÜV for want of personal jurisdiction, holding that, while it was a "close question," the record was insufficient to establish either the relatedness or foreseeability elements necessary to form a basis for specific personal jurisdiction over TÜV in Oregon.[18]

In sum, specific personal jurisdiction in Oregon depends on whether the plaintiff's claim arises out of or relates to the defendant's in-forum conduct, which must foreseeably give rise to the type of claim at issue.[19] Simple, right?

The Bottom Line

Practically, for defense attorneys, this means that when your out-of-state client is sued, regardless of how many contacts your client has in Oregon, the first thing you should consider is whether those contacts are related in some way to the plaintiff's claims. Because an objection to personal jurisdiction is waived if not asserted before answering a complaint, this is a threshold question. If there is any doubt that your client's conduct is related to the plaintiff's claims, you should read closely this complicated and conceptual line of cases and consider whether you may want to dispute personal jurisdiction.

Endnotes

1 *Bristol-Meyers Squibb Co. v. Super. Ct.* of Cal., 582 US ___, 137 SCt 1773, 1782 (2017).

2 *Id.* at 1778.

3 *Id.*

4 *Id.* at 1779.

5 *Id.* at 1781.

6 *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 591 US ___, 141 SCt 1017, 1026–27 (2021).

7 *Id.* at 1023.

8 *Id.* at 1026.

9 *Id.* at 1028.

10 *Id.* (Using "billboards, TV and radio spots, print ads, and direct mail—Ford urges Montanans and Minnesotans to buy its vehicles, including [the models at issue]." The court goes on to discuss the dozens of Ford dealerships in each jurisdiction, that "Ford works hard to foster ongoing connections to its cars' owners" through repairs, and so "by making it easier to own a Ford, they encourage Montanans and Minnesotans to become lifelong Ford drivers.")

11 *Id.* at 1029.

12 *Robinson v. Harley-Davidson Motor Co.*, 354 Or 572, 594 (2013).

13 *Cox v. HP Inc.*, 368 Or 477, 495 (2021) (quoting *Robinson,* 354 Or at 594 (2013)).

14 *Id.* at 482.

15 *Id.* at 482–83.

16 *Id.*

17 *Id.* at 484.

18 *Id.* at 509.

19 A recent opinion from the Oregon Court of Appeals, known as *Cox II,* provides an excellent and thorough application of this standard. *See Cox v. HP Inc.*, 317 Or App 27 (2022).

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Noncompetition Agreements

Oregon employers bear the burden of proving a noncompetition agreement's enforceability

In *Oregon Psychiatric Partners, LLP v. Henry,* 316 Or App 726, 504 P3d 1223 (Jan. 5, 2022), the Oregon Court of Appeals held that employers have the burden to prove a noncompetition agreement is enforceable under ORS 653.295, once an employee takes an affirmative step to manifest intent to treat the agreement as void.

Defendant worked at Oregon Psychiatric Partners ("OPP") under a noncompete. After defendant left OPP and treated dozens of her former OPP patients, OPP sought to enforce the noncompete. Defendant asserted an affirmative defense that the noncompete was unenforceable under ORS 653.295.

The trial court ruled in defendant's favor, and OPP appealed. The Court of Appeals reversed and remanded, holding that the noncompete was enforceable at least in part under ORS 653.295(4)(b), which permits covenants not to "solicit or transact business with customers of the employer."

On remand, the court entered judgment for defendant because OPP did not prove that the patients at issue were its "customers" under ORS 653.295(4)(b).

OPP appealed again, and the Court of Appeals addressed three assignments of error:

1. Whether the employer bears the evidentiary burden under ORS 653.295;
2. Whether defendant withdrew her affirmative defense under ORS 653.295, resulting in a presumptively valid noncompete; and
3. Whether the patients were OPP's customers under ORS 653.295(4)(b).

On the second appeal, the Court of Appeals affirmed, holding that the trial court did not err in finding that the customers at issue were not covered by ORS 653.295. The court also held that the employer bears the burden to prove an agreement is enforceable under ORS 653.295.

In placing the evidentiary burden on the employer under ORS 653,295, the court interpreted the statutory text, which provided that a noncompete "is voidable and may not be enforced by a court of this state" unless five criteria are met (*former* ORS 653.295 (2021)). The court took that text to mean that "the court must treat the agreement as void and unenforceable, *unless* the employer establishes that it is valid and enforceable." *Id.* at 733. The court therefore concluded that "once an employee takes affirmative steps to manifest an intention to treat a noncompetition agreement as void, it is the employer's burden to prove that the agreement is enforceable." *Id.* at 735.

The court then concluded that defendant had withdrawn her affirmative defense, but not her attempt to void the noncompete. In reaching that conclusion, the court explained: "We decline to speculate as to the different ways—or the 'best' way—that an employee might manifest an election to treat a noncompetition agreement as void, especially because that is an issue that neither party has addressed. For present purposes, what matters is that defendant adequately manifested her election and never withdrew that election, even though she withdrew her 'affirmative defense[]' [that the noncompete was unenforceable under ORS 653.295(1)]. Defendant initially manifested her election by pleading an affirmative defense." *Id.* at 738.

Because defendant manifested her intention to treat the noncompetition agreement as void, the court held that the burden was on OPP to prove that the noncompete was enforceable. Since January 1, 2022, ORS 653.295(1) provides that a noncompete is "void" instead "voidable"; consequently, the decision's relevance may be limited to noncompetes entered prior to that date.

■ ***Submitted by Ryan Kunkel***
Stoel Rives

Labor Unions

Arbitration provision in a collective bargaining agreement wins the day

In *Columbia Export Terminal, LLC v. International Longshore and Warehouse Union,* 23 F 4th 836 (9th Cir 2022), the Ninth Circuit held that an employer's federal Racketeer Influenced and Corrupt Organizations Act ("RICO") claims against a union and its individual members

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were preempted by § 301 of the Labor Management Relations Act ("LMRA"). The Ninth Circuit affirmed the district court's ruling, dismissing the matter without prejudice and holding that plaintiff's RICO claims were subject to the arbitration provisions contained in the Collective Bargaining Agreement ("CBA") between plaintiff and defendants.

Plaintiff, a grain-export-terminal operator, alleged that the union and 154 of its members conspired to fraudulently create timesheets reflecting work that was not actually performed, overbilling plaintiff by more than $5.3 million.

Plaintiff brought its action in federal district court. Defendants argued that plaintiff's RICO claims were preempted by the LMRA. Plaintiff argued that the RICO claims were not preempted because they were federal-law claims and, even if the claims could be preempted, such claims were not governed by the arbitration provisions contained in the CBA. The district court dismissed the case without prejudice. Plaintiff appealed.

On appeal, the Ninth Circuit affirmed the district court's ruling. The Ninth Circuit began by noting that § 301 of the LMRA confers federal jurisdiction to "[s]uits for violation of contracts between an employer and a labor organization." *Id.* at 841. The court further detailed the well-established principle that § 301 preempts state law claims to allow federal courts "to create a uniform body of federal common law to adjudicate disputes that arise out of labor contracts." *Id.* (internal citation and quotation marks omitted). The court described that one of the central tenets of that federal common law is that "[an] arbitrator, not the court … has the responsibility to interpret the labor contract in the first instance." *Id.* (internal citation and quotation marks omitted). The court noted that it had previously applied the "preemptive effect of § 301 to all 'state law claims grounded in the provisions of a CBA or requiring interpretation of a CBA.'" *Id.* (internal citation omitted).

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Although this case involved no state law claims, the court examined preemption of federal laws under different federal statutory schemes and reasoned that "claims which are, in substance, labor disputes subject to the CBA must not be evaded by artful pleading." *Id.* at 842-43. To that end, the court held that "a RICO claim is precluded by § 301 of the LMRA when the right or duty upon which the claim is based is created by a CBA or resolution of the claim substantially depends on analysis of a CBA." *Id.* at 844.

The court concluded that the plaintiff's RICO claims were precluded because "resolution of the claims is substantially dependent on interpretation of the CBA," and indicated that "a host of CBA provisions … could excuse … workers from being present at the time of work reported on the timesheets or could explain why workers are compensated for time not actually worked." *Id.* Furthermore, the court held that the arbitration provisions in the CBA covered the RICO claims raised by plaintiff. *Id.* at 845.

■ ***Submitted by Matt Tellam***
Stoel Rives

Attorney Fees

A defendant pleading an equitable counterclaim may recover attorney fees under ORS 20.080 as long as the prayed-for damages are below the statutory limit

In *Albany & Eastern Railroad Company v. Martell,* 319 Or App 816 (2022), on remand from the Oregon Supreme Court, the Oregon Court of Appeals held that a defendant pleading a counterclaim for damages and equitable relief—or even a sole counterclaim for equitable relief—could recover attorney fees pursuant to ORS 20.080 so long as the prayed-for damages did not exceed $10,000. In that case, plaintiff railroad owned a narrow tract of land adjacent to developed residential lots owned by defendants (a group of neighbors). For years, the neighbors had utilized a road across the railroad's land to access their property, arguing that they were authorized to access the railroad's property under a prescriptive easement. The railroad filed suit for trespass, requesting quiet title and nominal damages. The neighbors brought an equitable counterclaim for declaratory relief and sought recovery of their attorney fees under ORS 20.080(2).

The trial court found in favor of the neighbors, and it awarded the neighbors attorney fees under ORS 20.080(2). After the railroad appealed to the Supreme Court and the court remanded the issue to the Court of Appeals, the Court of Appeals affirmed the trial court's ruling awarding such attorney fees. At trial, the railroad argued that the neighbors were not entitled to attorney fees because they prevailed on an equitable claim rather than a legal one, positing that ORS 20.080 only applied to legal (i.e., monetary) claims. Although the Court of Appeals ultimately affirmed, it did so on different grounds than the trial court's holding.

In electing not to rely strictly on a statutory interpretation analysis, the Court of Appeals based its holding primarily on *Halperin v. Pitts,* 352 Or 482, 287 P3d 1069 (2012). The *Halpherin* case considered whether, to be entitled to attorney fees under ORS 20.080(2), a defendant was required to have previously served the plaintiff with a demand letter, which ORS 20.090(1) expressly required of plaintiffs seeking attorney fees under the statute. As discussed by the Court of Appeals, the *Halperin* court observed that "subsection (1) plainly applies to plaintiffs only… [and] subsection (2) plainly applies to defendants only." *Id.* at 487. Halperin further emphasized that "subsection (2) makes no mention of a prelitigation demand requirement…" *Id.* Looking at that reasoning, the Court of Appeals found that *Halperin* correctly found that the legislature intended for plaintiffs to be subject to distinct requirements to qualify for attorney fees under ORS 20.080, which it did not intend to require of defendants.

In extrapolating the rationale in *Halperin* to the instant case, the Court of Appeals found that subsection (2) of the statute does not specify that a defendant's counterclaim must be one "for damages" to qualify for attorney fees, unlike subsection (1), which contemplates a plaintiff prevailing in an "action for damages." Thus, "a defendant's prosecution of an equitable counterclaim neither converts the action to a "suit in equity" nor precludes an award of attorney fees to the defendant, so long as the dollar value of the counterclaim, if any, does not exceed $10,000." This guidance from the Court of Appeals should prove instructive for practitioners seeking to recover attorney fees for their clients under equitable claims.

■ ***Submitted by Ian D. Baldwin***
Wood Smith Henning & Berman

Plaintiff's claim for attorney fees under ORS 742.061 denied because the incorrect application of a PIP offset to UM policy limits is a question of damages covered under the safe-harbor provision of ORS 742.061(3)

In *McNeil v. Geico Casualty Co., Inc.,* 319 Or App 458, 510 P3d 224 (May 11, 2022), the Oregon Court of Appeals held that plaintiff could not seek attorney fees against defendant insurer under ORS 742.061(1) because defendant's initial decision to apply personal injury protection (PIP) benefits to uninsured motorist (UM) policy limits was an issue of

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"damages due to the insured" and covered under the safe-harbor provision of ORS 742.061(3).

Plaintiff was injured in a motor vehicle accident with an uninsured driver. Plaintiff made a claim for UM benefits to defendant, plaintiff's insurer. Defendant sent a "safe harbor" letter under ORS 742.061(3) to plaintiff whereby defendant admitted coverage and agreed to resolve the claim through arbitration, including the issues of the other driver's liability damages and, after arbitration, defendant initially asserted that it was entitled to offset previously paid PIP benefits against the UM policy limits. Later, defendant admitted that the PIP offset should have been applied to the total arbitration award, and agreed to pay plaintiff the offset amount. Plaintiff filed suit prior to being paid by defendant. Plaintiff alleged that she was entitled to recover attorney fees under ORS 742.061, and defendant moved to dismiss plaintiff's complaint for failure to state a claim under ORCP 21A(1)(h). The trial court granted defendant's motion, but allowed plaintiff to file an amended complaint.

Plaintiff's first amended complaint alleged statutory violation of ORS 742.061 as the basis for her attorney-fees claim. Defendant again moved for dismissal for failure to state a claim, which the trial court granted. The trial court also denied plaintiff's motion for leave to file another amended complaint. Plaintiff appealed both the trial court's dismissal and denial of her motion for leave to amend.

On appeal, plaintiff argued that defendant's application of the PIP offset to the UM policy limits raised an issue of claim coverage, thereby taking defendant's actions out of the safe-harbor of ORS 742.031(3) and entitling plaintiff to assert a claim for attorney fees. The Court of Appeals examined ORS 742.542—the PIP benefits offset statute—to determine that the application of a PIP offset is necessarily an issue of the damages due to the insured and not an issue of claim coverage. The court also found that defendant's initial incorrect application of the PIP offset did not inject a new issue into the case that would remove defendant's actions from the safe-harbor provision. As plaintiff's claim for attorney fees was dependent on defendant leaving the "safe harbor," the Court of Appeals found that the trial court did not err in granting defendant's motion to dismiss and denying plaintiff's motion for leave to file a second amended complaint.

■ ***Submitted by Matika Levy***
Gilbert Levy Bennett

Ballot Initiatives

Oregon Supreme Court addresses standards for ballot title initiatives

In *Salsgiver v. Rosenblum,* 369 Or 724, 510 P3d 205 (May 27, 2022), the Oregon Supreme Court was presented with challenges to the ballot title that the Attorney General has certified for Initiative Petition 41 (2022) (IP 41). Two groups of petitioners challenged the ballot title, arguing it failed to substantially comply with statutory requirements.

The petitioners first contended that the summary of the ballot initiative lacks clarity as to when it may apply. In short, they contended the caption fails to identify that it will apply not just to newly imposed tolls and fees but to any toll or fee that was not in operation before January 1, 2018. According to the petitioners, a phrase in the caption "after certain date" indicates there is a temporal limitation on the measure's application, but they argued the phrase does not convey as it must that the "certain date" actually reaches back in time (not forward). The attorney general countered that the current phrase adequately informed voters and avoided confusion by simply stating there was a temporal limitation (a limitation which could be more specifically ascertained by the proposed initiative itself). The court sided with petitioners, noting that by its clear terms, the measure would operate to invalidate any toll not in operation by the end of 2017, and that the "phrase that the Attorney General included in the caption is insufficient to identify that actual major effect." *Id.* at 728.

Second, petitioners argued the summary of the initiative failed to meet the requirement to be a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effects" under ORS 250.035(2)(d). Specifically, petitioners argued the use of the term "collected" in the summary's final sentence—"Measure applies to tolls collected after December 31, 2017"—improperly causes the summary to suggest that IP 41 would require all existing tollways to stop collecting tolls until they obtain the approval of voters in nearby counties, an outcome that the petitioners argued was not the law's effect. The attorney general countered that voters will not be misled because, when read in the context of the last clause of the sentence ("Including forthcoming I-205 and I-5 tolls") the challenged wording does not suggest that the measure would apply to currently operating tollways. The court was not persuaded and found in favor of petitioners on that issue as well.

As a result, the court found that two parts of the attorney general's certified

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ballot title for IP 41 must be modified to ensure substantial compliance with ORS 250.035(2).

■ ***Submitted by Ian D. Baldwin***
Wood Smith Henning & Berman

Bad Faith

Oregon Court of Appeals finds that merely not acting in bad faith doesn't necessarily equate to acting in good faith

In *Santoro v. Eagle Crest Estate Homesite Owners Assn.,* 319 Or App 793, 512 P3d 828 (May 25, 2022), the Oregon Court of Appeals held that, where restrictive covenants provide a duty to act in good faith, merely showing the absence of fraud, bad faith, or failure to exercise honest judgment does not equate to a finding of acting in good faith.

Plaintiffs owned two lots in a planned residential community, the Eagle Crest Estates Homesite. Homesites within Eagle Crest are subject to the recorded CC&Rs, which established the homeowner's association ("HOA") and the architectural review committee ("the committee"). Plaintiffs purchased lots in 2011 and 2016. On both lots, the HOA levied a $825 application processing fee and a $500 pavement-damage assessment.

Plaintiffs were required to submit proposed construction plans to the committee for approval prior to construction. On their second lot, plaintiffs submitted proposed plans that included a 12-foot garage door sufficient to accommodate an RV. The committee informed plaintiffs that they needed to use a standard-sized garage door. Plaintiffs' appeal of the committee's decision was denied. Plaintiffs subsequently sued, alleging

that the unambiguous terms of the CC&Rs imposed an affirmative duty on the committee to make their decisions in good faith and challenging the HOA's authority to charge application processing fees and levy the first pavement assessment.

At trial, defendants argued that the correct standard of review was found in the Oregon Supreme Court's decision in *Valenti v. Hopkins,* 324 Or 324, 926 P2d 813 (1996). In *Valenti,* the court held that where restrictive covenants unambiguously authorize certain disputes to be resolved by a third party, the court reviews the third-party's decision for fraud, bad faith, or failure to exercise honest judgement in interpreting the language of the CC&Rs. *Id.* at 335. Defendants argued that the trial court was required to uphold the defendant's decision in the absence of such a showing. The trial court agreed with defendants, and plaintiffs appealed.

On appeal, the Court of Appeals noted that the deferential standard in *Valenti* does not apply if the CC&Rs at issue restrict the third-party's discretion or apply a different standard of review. The court then examined Eagle Crest's CC&Rs, which stated that the committee's decision, "acting in good faith and in its sole discretion," shall be final. Based on that standard, the Court of Appeals ruled that the trial court erred in applying the *Valenti* standard, concluding as a matter of law that a determination that the defendant lacked bad faith, dishonesty, or fraud does not necessarily equate to a determination that the defendant acted in good faith. Based on the holding, the Court of Appeals vacated the trial court's judgment and remanded for reconsideration. The Court of Appeals also held that the plain language of the CC&Rs did not prohibit levying a pavement assessment or application-processing fees and, under ORS 94.704(6), the HOA could levy such assessments to deposit in a reserve account even though the expenses had not yet been incurred.

■ ***Submitted by Matika Levy***
Gilbert Levy Bennett

Damages/Trial Practice

The letter "S" makes all the difference in meaning

In *McCoy v. Pompa,* 318 Or App 600, 509 P3d 138 (March 30, 2022), the Oregon Court of Appeals examined a scenario wherein a jury found that the defendant in an action for bodily injuries arising from a motor-vehicle accident had caused damage to the plaintiff, but also rendered an award of zero damages. Plaintiff argued that this inconsistency was due to confusing phrasing in the

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jury instructions and verdict forms, which turned a plaintiff verdict into a defense verdict. The Court of Appeals held that the trial court properly returned the entire verdict form to the jury to clarify its decision, which the jury then confirmed was intended to be a defense verdict.

McCoy involved a driver operating a van that collided with plaintiff's vehicle in a parking lot. In the resulting action for personal injuries, defendant admitted liability, but also argued that plaintiff was comparatively negligent. Following trial, the jury initially returned a verdict finding that defendant's negligence was a cause of damages to plaintiff, but the jury awarded zero damages to plaintiff. The trial court determined that the verdict was inconsistent and instructed the jury to continue deliberating. After reconsidering the verdict form, the jury returned a verdict for the defendant, this time answering "no" to the first question. Plaintiff appealed, contending that the trial court erred by resubmitting the entire verdict form to the jury, rather than instructing the jury to only apply a monetary value to the amount of plaintiff's damages.

On review, the Oregon Court of Appeals determined that resubmitting the entire verdict form was proper, as it ensured that the jury was not forced to submit an unintended answer. The court noted that, in tort law, there is a conceptual difference between the terms "damage" and "damages." Damage in the singular refers to "loss, injury or harm resulting from an act or omission." *Sager v. McClenden,* 296 Or 33, 37, 672 P2d 697 (1983), while damages in the plural means "a compensation in money for a loss of damage." *Black Law's Dictionary,* 351 (5th ed 1979). The intermingling of these very similar, but vastly different, concepts was the most likely cause for the jury's internally inconsistent initial verdict. In affirming the trial court's decision to resubmit the entire verdict form to the jury, the Court of Appeals explained that it would have been improper for the trial court to accept a partial verdict while sending the jury back to deliberate on only one of the issues, because this could lead to an unintentionally incorrect verdict.

■ ***Submitted by Josh Hayward***
Smith Freed Eberhard

Partnerships

Being in a partnership does not always mean that a party is liable for their partner's missteps

In *Little v. Branch 9 Design and Contracting, LLC,* 317 Or App 639, 505 P3d 440 (Feb. 16, 2022), the Oregon Court of Appeals limited the manner in which one member of a partnership may be held jointly and severally liable for the wrongful acts of a partner, when the wrongdoer's conduct was performed in connection of another entity and not part of the partnership itself.

In this case, defendant had formed a general partnership with a partner, Gorman, who shared defendant's CCB license to carry out construction activities and services. Gorman began to take projects with another entity, Raymond, under the name Branch 9 Design and Contracting, LLC. Defendant knew and approved of the arrangement, but he was not an owner or employee of the Branch 9 company. Gorman, Raymond, and Branch 9 entered into a contract with plaintiffs in 2017 to perform renovation work on plaintiffs' property. The contract included the use of the partnership's CCB license, but defendant did not participate in contract negotiations, nor did he make any representations to plaintiffs or share in the compensation.

About one month into the work, plaintiffs terminated the contract due to the contractors' failure to complete the work on time as well as misrepresentations they had made about paying subcontractors. At the time of termination, they had paid $53,600 that was not refunded.

Following a lawsuit on these facts, the trial court held that defendant, as the general partner of Gorman, was jointly and severally liable for Gorman's breach of contract and all resulting damages. The trial court based that holding on ORS 67.105(1), which provides that "all partners are liable jointly and severally for all obligation of the partnership unless otherwise agreed by the claimant or provided by law." Defendant appealed, asserting that he was not liable for the debts and obligations incurred in the course of Gorman's separate business.

The Oregon Court of Appeals agreed with defendant. On appeal, the Court of Appeals determined that the fact Gorman was in a partnership with defendant, standing alone, did not mean that all of Gorman's business activities were connected to that partnership. In holding that defendant could not be jointly and severally liable for the debts of Gorman's separate business engagements, the court noted that Branch 9 was a separate business from the partnership. The court also pointed out that defendant was not associated with the business and that defendant had not participated in the formation of the contract for plaintiffs' project, nor had he received compensation in connection with it. The judgment was ultimately reversed.

■ ***Submitted by Mike Staskiews***
Smith Freed Eberhard

Petitions For Review

Sara Kobak, Schwabe Williamson & Wyatt
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.

***Moody v. Or. Community Credit Union*, S069409, A172844. 317 Or App 233, 505 P3d 1047 (Jan. 26, 2022). Oral argument scheduled for Nov. 17, 2022.**

In this action, plaintiff made an insurance claim under an accidental death and dismemberment insurance policy after plaintiff's husband was accidentally shot and killed by a friend on a camping trip. The insurer denied the claim. Plaintiff then sued the insurer, alleging, among other things, that the insurer had negligently committed unfair claim settlement practices in violation of ORS 746.230(1) in the insurer's review, investigation, and decision to deny the insurance claim. Plaintiff's negligence claim sought both economic and emotional distress damages. The insurer moved to dismiss the negligence claim under ORCP 21 on the ground that Oregon law does not recognize claims for negligent breach of an insurance contract. The trial court agreed and dismissed the claim. On appeal, however, the Oregon Court of Appeals reversed. The insurer petitioned for review, and the Oregon Supreme Court granted the petition. On review, the issue is: "Does Oregon law recognize a tort claim against an insurer for negligence *per se* predicated on alleged violations of ORS 746.230(1)?"

***PNW Metal Recycling, Inc. v. Or. Dep't of Enviro. Quality*, S069412, A171317. 317 Or App 207, 505 P3d 462 (Jan. 26, 2022). Oral argument scheduled for Nov. 17, 2022.**

In this rule challenge under ORS 183.400(1), petitioners argued that a decision by the Oregon Department of Environmental Quality (DEQ) to reinterpret one of DEQ's governing statutes on solid-waste permitting requirements constituted a "rule" within the meaning of the Oregon Administrative Procedures Act (APA), ORS 183.310-690. Based on the characterization of DEQ's decision as a "rule" under the APA, petitioners contended that the "rule" was invalid both because it was outside of the scope of DEQ's rulemaking authority and because DEQ did not follow formal rulemaking procedures. On appeal, the Oregon Court of Appeals agreed with petitioner that the decision satisfied the standard for a "rule" under ORS 183.310(9) as a generally applicable, policy-based decision. DEQ petitioned for review, and the Oregon Supreme Court granted the petition. On review, the issue is: "Is an agency's interpretation of an inexact statutory term a 'rule' under the APA?"

***Clark v. Eddie Bauer, LLC*, S069438. Oral argument scheduled for Nov. 29, 2022.**

In this case certified from the Ninth Circuit Court of Appeals, plaintiff purchased garments from Eddie Bauer Outlet Stores advertising sales of 40-70 percent off. The price tags on the garments included two numbers, a "reference" price and a lower "sale" price. Plaintiff paid the "sale" price for the clothes. Plaintiff subsequently brought a claim against Eddie Bauer under Oregon's Unlawful Trade Practices Act (UTPA), ORS 646.605 *et seq.,* alleging that Eddie Bauer never sold some of the garments for the "reference" price and that Eddie Bauer Outlet Stores have perpetual sales of 40-70 percent off. Eddie Bauer moved to dismiss the UTPA claim under FRCP 12(b)(6) because plaintiff failed to plead that she suffered any "ascertainable loss of money or property" from the alleged sale practices. The federal district court agreed and dismissed the claim. Plaintiff appealed to the Ninth Circuit, and the Ninth Circuit certified the question of state law to the Oregon Supreme Court. On review, the certified question is: "Does a consumer suffer an 'ascertainable loss' under ORS 646.638(1) when the consumer purchased a product that the consumer would not have purchased at

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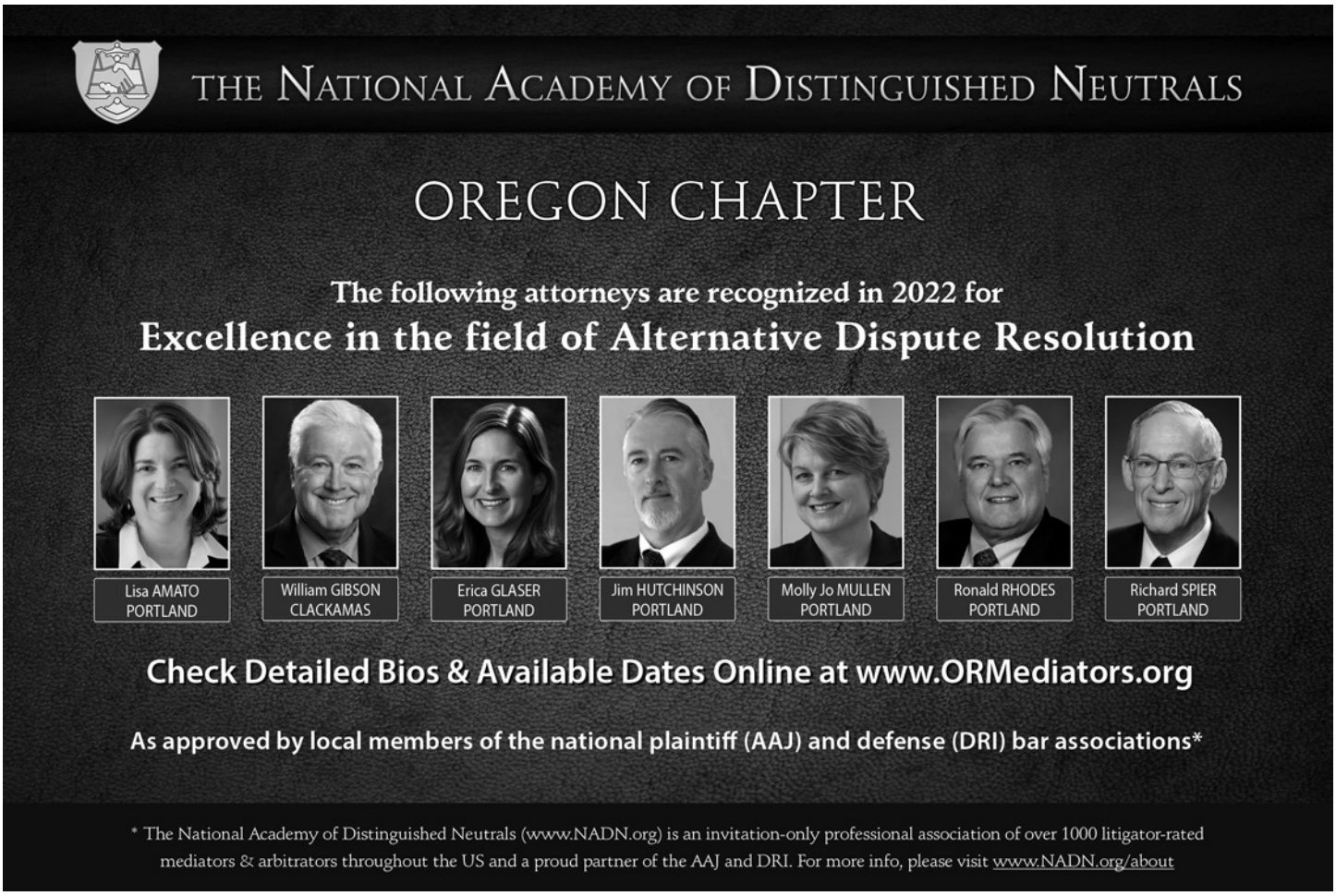
the price that the consumer paid but for a violation of ORS 646.608(1)(e), (i), (j), (ee), or (u), if the violation arises from a representation about the product's price, comparative price, or price history, but not about the character or quality of the product itself?"

***Marshall v. PricewaterhouseCoopers, LLP*, S069442, A169635. 316 Or App 416, 505 P3d 40 (Dec. 15, 2021). Oral argument scheduled for Nov. 29, 2022.**

In this negligence action, plaintiffs brought legal malpractice claims against a law firm for money damages, alleging that the law firm had provided plaintiffs with negligent advice about a transaction designed to reduce their tax liability. The trial court dismissed the claim based on the statute of repose in ORS 12.115(1). On appeal, however, the Oregon Court of Appeals reversed. Although it acknowledged that past precedents had applied ORS 12.115(1) to legal malpractice claims, the Oregon Court of Appeals concluded that ORS 12.115(1) did not bar plaintiffs' claims because, according to the decision, ORS 12.115(1) does not apply to negligence actions seeking to recover financial losses. On review, the questions presented are: (1) "Does ORS 12.115(1) apply to all negligence claims, other than those that are subject to a specific statute of repose?"; and (2) "If ORS 12.115(1) does not apply to all negligence claims other than those that are subject to a specific statute of repose, does ORS 12.115(1) apply to legal malpractice claims where the underlying case involved interests in property?"

***Trebelhorn v. Prime Wimbleton SPE*, LLC, S069417, A170010. Or App , P3d (x 2022). Oral argument scheduled for Nov. 29, 2022.**

In this personal-injury action, plaintiff brought a claim against the owners and managers of an apartment building after



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plaintiff suffered a knee injury from falling through a defective walkway. The case was tried to a jury, and the jury returned a verdict in favor of plaintiff with roughly $45,000 in economic damages, $250,000 in noneconomic damages, and $10,000,000 in punitive damages. On defendant's motion, the trial court reduced the amount of punitive damages to $2,660,373, finding that a 9:1 ratio of punitive damages to compensatory damages was warranted as "a single-digit ratio principle is generally recognized as the appropriate measure for punitive damages, even in cases involving personal injury." Plaintiff appealed, and the Oregon Court of Appeals affirmed without a written opinion. On appeal, the issue presented is whether the trial court erred in reducing the punitive damages award to a 9:1 ratio to comport with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

***Bundy v. NuStar GP, LLC*, S069448, A169235. 317 Or App 193, 506 P3d 458 (Jan. 26, 2022). Oral argument scheduled for Dec. 1, 2022.**

This case is before the Oregon Supreme Court for a second time. During his employment with defendant as a terminal operator, plaintiff was exposed to dangerous levels of gasoline fumes. Defendant accepted a workers' compensation claim for plaintiff's exposure. Later, plaintiff sought compensation for additional conditions arising out of the same incident, but defendant denied those subsequent claims. Plaintiff challenged those denials through the workers' compensation system, but he was unable to establish that the work incident was the major contributing cause of his subsequent conditions, and the

Workers' Compensation Board ultimately affirmed the denials on that ground. Plaintiff then filed this action against defendant, arguing that his negligence claims for noncompensable conditions were subject to ORS 656.019, which provides an exception to the normal exclusive-remedy provision in ORS 656.018. On review in the first appeal, the Oregon Supreme Court held that ORS 656.019 used "the terms 'work-related injury' and 'the claim' in the expansive sense that encompasses claims—like plaintiff's—for a condition that is denied on major-contributing-cause grounds after an initial claim acceptance has been issued." *Bundy v. NuStar GP, LLC,* 362 Or 282, 297, 407 P3d 810 (2017) (Bundy II). On remand, defendant raised a new defense to plaintiff's claim—namely, that ORS 656.019 does not provide a substantive exception to the normal exclusive-remedy bar in ORS 656.018, but instead merely establishes the procedural requirements for filing actions that otherwise are exempt. The trial court agreed with defendant's argument, and the Oregon Court of Appeals affirmed. On review, the question presented is whether ORS 656.019 provides a substantive exception to the exclusive-remedy provision of the workers' compensation scheme in ORS 656.018, or instead imposes a procedural limitation on when the claims described in the statute can be brought.

***Lawrence v. Or. State Fair Council*, S069473, A172888. 318 Or App 766, 508 P3d 42 (April 6, 2022). Oral argument scheduled for Dec. 1, 2022.**

In this negligence action, plaintiff sued defendant after slipping on wet bleachers while attending the Oregon State Fair. At trial, plaintiff sought to offer evidence that a young girl also slipped on the same bleacher shortly after plaintiff fell. Defendant objected to the evidence on the ground that it was minimally probative and would be unduly prejudicial under OEC 403, particularly as the identity of the young girl was unknown, and the girl was not a witness at trial. In making that argument, defendant asserted that it did not plan to offer evidence that no one else fell on the bleachers. During defendant's cross-examination of plaintiff, however, defendant asked plaintiff to confirm his elderly mother had no trouble going up and down the bleachers. Plaintiff then argued that defendant had "opened the door" to testimony from plaintiff and his family members about witnessing the young girl's fall. The trial court concluded that defendant had "opened the door," but it excluded the evidence because plaintiff and his family members had a "self-serving interest" in testifying about another person's fall. Plaintiff did not object to the trial court's conclusion or argue why the "form of evidence" was appropriate. On appeal, the Oregon Court of Appeals concluded that plaintiff's objections to the exclusion of the evidence was not preserved for review due to plaintiff's failure to raise arguments about the trial court's specific grounds for exclusion. On review, the issues presented are whether the Oregon Court of Appeals erred in its application of the preservation requirements for appellate review and whether the trial court erred in its exclusion of the evidence at issue.

Legislative Update

Rocky Dallum, Tonkon Torp
OADC Lobbyist

It's election season…which shouldn't surprise anyone with a television, mobile device or mailbox. There's not much to report about the candidates that ink hasn't already been spilled over, but we can share some insight into the "legislative math" capturing lobbyists' minds this fall. For this edition of *The Verdict,* we are providing some detail on the coming changes to leadership in Oregon, the political make-up of the chambers in the statehouse and the uncertainty the election is casting over next year's legislative session.

ROCKY DALLUM

This year, Oregonians are experiencing a historic gubernatorial campaign featuring three women, all with significant experience in state government and their own assertive leadership style. Public polling is revealing a deeply dissatisfied electorate in Oregon and each candidate is working to prove they can respond to the demand for change. To sum up the race in the few days left until the election: Democrat and former Speaker of the House Tina Kotek is painting her opponents as too conservative for our state and voters' priorities. Former House Republican leader Christine Drazan is painting her opponents as former Democratic insiders responsible for the state's current struggles. And Unaffiliated candidate Betsy Johnson, a former Democrat and Ways & Means co-chair, is staking a position as a long-time independent thinker and hawk who can break up partisanship.

The biggest impact the Governor can have on civil practice is generally through the budget process and through pushing for better funding for the Judicial Department. Post-election, OADC and other legal stakeholders will likely coordinate to advocate for providing adequate funding to our courts and for salaries for judges.

The Governor's office won't be the only leadership position turning over next January. Regardless of the outcome of the election, the Oregon Senate will choose its first new Senate President in two decades after Senator Peter Courtney retires at the end of this year. Oregon's longest-serving legislator, Senator Courtney was first elected to state service in 1980. He began his tenure as Senate President in 2003, after Democrats broke the Republican grip on the State Senate by tying it 15-15 in the 2002 election.

The Oregon State Senate currently sits at 18-11, with one Senator identifying as an Independent (but voting mostly with Republicans). Last year, following the 2020 Census, the Legislature redrew the Legislative and Congressional districts. 16 out of the 30 Senate Districts are on ballots this year. Two of them are new, featuring no incumbent (SD 6, Rural Lane County and SD 13, Washington County). Six of the districts have less than a 10% difference between Democratic and Republican registered voters, and several of those districts actually include more non-affiliated voters than either party. Republicans are targeting districts near Salem, the Coast and Southern Oregon to pick-up seats, while Democrats are defending those seats while looking at a re-aligned seat in Clackamas County and a district in the Gorge. Only one of the Senate incumbents faces no challenger—Senator Floyd Prozanski in Lane County, who currently chairs the Senate Judiciary Committee. OADC works frequently with Senator Prozanski, and a change in control of that chamber would likely mean a new Republican Senate Judiciary chair.

Similarly, the Oregon House of Representatives also has several new districts or districts where the incumbent's current district has new boundaries. Regardless of the political overtones, the major theme in the Oregon House races this year is turnover: over one third of the chamber will be new faces. 21 of the 60 seats feature races with no incumbent on the ballot. Four incumbents were appointed since the last election and have never actually campaigned for election. Finally, of the 60 seats, nine feature uncontested races (races with only one candidate on the ballot: 6 Republicans, 3 Democrats). Like in the Senate, the districts most likely to change hands, depending on whether the electorate shifts to Republicans or stays strongly with Democrats, are in the Willamette Valley and Metro-area suburbs. Earlier this year, current House Speaker Dan Rayfield made several new committee chair appointments; the current Judiciary chair in the House is Rep. Jason Kropf (D-Bend), a Deschutes County Deputy D.A.

These recent and pending changes in leadership, committee chairs, rank-and-file legislators and the Governor's office are creating a fair amount of uncertainty in planning for and projecting the themes of the 2023 session. Please look into the candidates records, review the voters' guide, and vote before November 8.

Judge Judith Matarazzo

Multnomah County Presiding Judge

Born in Nashville, Judith (Hudson) Matarazzo, Presiding Judge of Multnomah County, never lived anywhere long. During her childhood, she moved with her parents (her father was a university administrator) from Nashville to New Orleans to Atlanta. She even lived in Heidelberg, Germany, for a period of time before attending high school in Southern California. She completed her undergraduate studies and earned a bachelor's degree in history and political science at Hamline University in St. Paul, Minnesota before arriving in Oregon to meet her parents in Salem, where her father was installed at Willamette University. After spending more than 20 years as a plaintiffs' personal injury lawyer, including many years as a partner at Hudson & Gutzler, the firm she helped found, she was elected to the Multnomah County bench in 2006. She became Presiding Judge on January 3, 2022.

Although a legal career was not originally what Judge Matarazzo had planned for herself, after working for a freshman senator for a year when she first moved to Salem, she concluded that there had to be a way to contribute to the legal system and decided to attend Willamette University College of Law. She loved the small Willamette community and her tight-knit class of 72 students, a third of whom were women. She graduated and passed the Bar in 1985.

As a student, Judge Matarazzo clerked at Vick & Gutzler in Salem. Following law school, she joined the firm, moving with it when it expanded to Portland, and remained there until she joined the bench. Along the way, she met a man named Harris on a blind date. He insisted that he would live no

further than 11 blocks in any direction from the house in which he grew up. Although Judge Matarazzo had never lived in any place for more than a handful of years, she married that man and has enjoyed life inside that 11-block radius in SW Portland for almost 40 years.

When asked how the bench and bar have changed over the years, Judge Matarazzo recounts her first trial in Salem: As she entered the bar within the courtroom, a state court judge told her, "Not so fast little lady; that's just for lawyers." When she let him know that she was a lawyer, he reprimanded her: "Not dressed like that you are not; you can't wear dungarees to court." Even though she did not know what dungarees were or whether she was in fact wearing them, she went home to change. "It was very different," she recounts, "you did what you were asked. You couldn't afford to make enemies of judges you were going to appear in front of."

Another change Judge Matarazzo has noticed is that there is less collegiality than before. She encourages lawyers to get to know each other, develop personal relationships, and do everything they can to maintain the civility that is a hallmark of Oregon lawyers. Mild manners are also a more effective way to fulfill your clients' goals than aggressive behavior—not only does that professional demeanor make the Oregon bar a nicer place to practice law, it also is more persuasive to jurors. Judge Matarazzo reminds us that the quiet, unassuming, friendly, and well-prepared lawyer usually wins the day. Do not use "personal attacks" like the word "liar" in her courtroom: "We do not treat people that way in Oregon." She continues: "That is not who we are, and that is not who we should ever be."

In contrast to the unapproachable judges of her early career, Judge Matarazzo encourages lawyers to talk to her after an applicable appeal period has run. She appreciates the opportunity to talk about a trial, share her observations, and go through what did, and did not, work. As the newly minted Presiding Judge of Multnomah County, Judge Matarazzo also helps newer judges get acquainted with the bench, which is particularly important because over half of the judges currently serving in Multnomah County have been at court for less than five years.

Finally, while appreciating the personal toll the pandemic and two years of remote work have taken on attorneys and judges alike—not to mention the broader community—Judge Matarazzo believes that deadlines motivate us all. She believes that a firm trial date is crucial. She warns civil lawyers about their lingering 2019 and 2020 cases: "If you've got a trial date, it's going!"

■ ***Submitted by Julie Preciado and Joshua Stadtler***
Dunn Carney

Judge Andrew D. Hallman

Magistrate Judge, Pendleton Division of the U.S. District Court for the District of Oregon

Judge Andrew D. Hallman, the newest magistrate judge in the Pendleton Division of the U.S. District Court for the District of Oregon, was seemingly born to be a judge—even if he never expected to be one.

Born and raised in Pendleton, Judge Hallman's parents were both well-respected Eastern Oregon attorneys. Through his parents' involvement in the local legal community, Judge Hallman first met his predecessor, Judge Patricia Sullivan, when he was just a baby.

As many do, Judge Hallman left home for college, attending the University of Oregon. There he received a bachelor's degree in political science in 2004 and his J.D. in 2008. He did not know exactly what type of law he wanted to practice but knew he wanted to be in the courtroom. So he applied to the Oregon Department of Justice ("DOJ") and, in his own words, "never left."

Judge Hallman's DOJ pedigree is impressive. He started as a law clerk in the Trial Division of the Criminal and Civil Rights Section, supporting assistant attorneys general ("AAGs") on federal habeas and post-conviction matters and defending the Oregon Department of Corrections ("ODOC") in civil rights cases. He then became a DOJ Honors Attorney, first in the Child Advocacy Section litigating child welfare proceedings, and then in the Trial Division of the Torts Section, defending state agencies in civil lawsuits. In 2010, Judge Hallman became an AAG in the Trial Division of Collateral Remedies, managing a full federal habeas

corpus caseload with additional state post-conviction cases and civil rights cases involving ODOC. From 2013 to 2021, Judge Hallman worked as an Assistant Attorney in Charge of the Trial Division of DOJ's Civil Litigation Section, supervising a team of AAGs defending ODOC in state and federal court and advising ODOC on litigation matters.

With 15 years of experience in the DOJ, Judge Hallman has enjoyed plenty of time in the courtroom. His time in federal court was the most rewarding. He worked with many magistrate judges, giving him a deep respect for the position. Even so, he never considered joining the bench until Judge Sullivan's position came open in 2021. It was a unique opportunity to continue working in federal court while returning to Pendleton to be closer to family. Family is certainly important to Judge Hallman: He and his wife are raising three young boys, and coaching T-ball is his primary pastime.

Transitioning to the bench during the pandemic was not easy, but Judge Hallman credits his fellow federal magistrate judges with aiding that transition through their assistance, advice, and guidance. He has a busy and interesting caseload, primarily handling civil cases filed in the Pendleton division. His caseload includes various types of disputes over real property, diversity cases involving major auto accidents, employment and civil rights litigation, and many other matters. His advice for attorneys who might appear before him is simple: If you have issues the court can assist with, such as discovery disputes or issues with scheduling, and you have conferred with opposing counsel, email the courtroom deputy and request the court's assistance. Just make sure you have conferred with opposing counsel first!

Life is a little bit quieter on the federal bench than it was at DOJ. Instead of managing a team of lawyers handling high volume litigation, with his phone ringing off the hook and his email inbox constantly full, Judge Hallman finds himself in the Pendleton federal courthouse, which he describes as lending itself to "more quiet, thoughtful consideration." With only a year under his belt, Judge Hallman does not purport to have all the answers. His focus is on getting the right results and treating people fairly. He does his best to live by the advice he received when he joined the bench: "When you're a judge, remember you're not any smarter than you were when you were a lawyer, and you're not any dumber. Be kind to people." Words for all of us to live by.

■ ***Submitted by Delfina S. Homen***
Miller Nash

Defense Victory!

Will Gunnels, Bullivant Houser
Interim Defense Victory! Editor

Littler Mendelson Serves Up Complete Defense Verdict in Employment Retaliation Case

On March 11, 2022, Anthony Kuchulis and Sara Dueno of Littler Mendelson obtained a complete defense verdict in *Horton v. Pudding on the Rice, LLC,* et al., Multnomah County Circuit Court Case No. 19CV03289. Judge Kelly Skye presided. Kyann Kalin and Maria Witt represented plaintiff.

Plaintiff's claims arose out of her employment with a restaurant/bar. Plaintiff alleged that a cook had asked for her phone number, asked her on a date, and generally made her uncomfortable. Plaintiff reported the issue, and defendants conducted a thorough investigation, moved plaintiff to a different position (which paid more), and suspended the cook for 10 days without pay. Unsatisfied, plaintiff started a disruptive rumor campaign suggesting that defendants were harboring sexual harassers. Defendants recorded a discussion between them and plaintiff, during which plaintiff told them she did not feel comfortable working there. Defendants offered her paid leave. Plaintiff accepted the paid leave and never returned.

An earlier motion for summary judgment decision had dismissed plaintiff's harassment and discrimination claims as time-barred. The only issue for trial was whether defendants retaliated against plaintiff. Defendants argued that they

did everything in their power to address plaintiff's concerns. Further, despite plaintiff's argument that she had been involuntarily terminated, defendants were able to show that if someone had been terminated, they could not log into the restaurant's system to check their schedule, which plaintiff testified she had done numerous times following her leave. Defendants also presented evidence of text messages plaintiff exchanged with her mother about applying for unemployment and searching for other jobs while she was still employed by defendants. Ultimately, the jury needed less than a half day of deliberation to decide all claims in defendants' favor.

■ ***Submitted by Anthony Kuchulis and Christine Sargent***
Littler Mendelson

Unsupported and Vague Expert Declaration Insufficient to Avoid Summary Judgment

On March 10, 2022, United States District Court for the District of Oregon Magistrate Judge Stacie F. Beckerman granted summary judgment in defendant's favor in *Pearl Morgan v. Kimco Realty Corporation,* Case No. 3:21-cv-00073. Willard E. Merkel of Merkel & Associates represented plaintiff. Julie Bardacke Haddon and Kelly F. Huedepohl of Gordon & Rees represented defendant.

Plaintiff asserted claims for negligence and negligence *per se* after tripping over a wheel stop in a handicap parking space in defendant's lot. Defendant moved for summary judgment on plaintiff's

CONTINUED ON NEXT PAGE

DEFENSE VICTORY
continued from previous page

negligence *per se* claim because plaintiff could not establish defendant violated the ADA and on plaintiff's negligence claim because plaintiff could not establish that the parking stall fell below the applicable standards or that any negligence caused plaintiff's injury.

In response, plaintiff submitted an expert declaration opining that the parking stall was negligently designed and did not comply with the ADA. Defendant argued that the declaration did not show expertise in parking lot design, contained unsupported conditional statements, and asserted opinions without stating the basis on which they were formed. The court agreed, ruling the declaration failed to establish that defendant's conduct fell below the standard of care and that the expert's generalized opinion about likely causation was insufficient to satisfy plaintiff's burden. The case was dismissed with prejudice.

■ ***Submitted by Kelly Huedepohl***
Gordon & Rees

Expert-Packed In-Person Trial Leads to Full Defense Verdict

On April 29, 2022, after a four-day, in-person jury trial at the Multnomah County East Courthouse, CJ Martin of Maloney Lauersdorf Reiner obtained a full defense verdict on behalf of her client in *Quan Ho v. William Henderson,* Multnomah County Circuit Court Case No. 19CV42303. Judge Beth Allen presided. Man Vu represented plaintiff.

The case arose out of a rear-end motor vehicle accident. Liability was admitted by defendant. The question before the jury was whether plaintiff suffered a neck strain or sprain, back strains or sprains, disc bulges or annular tears, and a worsening of avascular necrosis of his hip leading to a hip replacement surgery.

Plaintiff sought treatment with an orthopedic surgeon and neurosurgeon regarding these alleged injuries, but over objection, the court allowed plaintiff to present only chiropractors to testify to the causation of the claimed injuries and the reasonableness, necessity, and relatedness of plaintiff's treatment. Fatally, plaintiff presented almost no evidence of neck and back injuries (which were minor), instead relying upon his chiropractic experts to provide opinions regarding the large money claim for the avascular necrosis of his hip leading to a hip replacement surgery. In defense, defendant presented orthopedic surgeon, neurosurgeon, accident reconstruction, and biomechanical engineer expert witnesses. The jury reacted to the high cost of experts but reacted more strongly to plaintiff's very high initial claim. The jury agreed with defendant's experts that the accident was not the cause of plaintiff's alleged avascular necrosis of his hip necessitating hip replacement surgery.

■ ***Submitted by CJ Martin***
Maloney Lauersdorf Reiner

"Battle of the Forms" Analysis Results in Full Dismissal on Jurisdictional Grounds

On December 17, 2021, Clark County Superior Court Judge Gregory Gonzales granted defendant's motion to dismiss for lack of personal jurisdiction in *The Neil Jones Food Company v. Factory Technologies, Inc.,* Case No. 20-2-02838-06. Rick Lee of Bodyfelt Mount and Jamison McCune of Driggs Bills and Day represented defendant Factory Technologies, Inc. ("FTI"). Fred Meine III of Coleman & Horowitt in Fresno, California represented plaintiff.

Plaintiff alleged breach of contract and negligence claims against FTI arising from FTI's work installing equipment at a tomato processing plant in Hollister, California. Plaintiff, whose headquarters are in Vancouver, filed suit against FTI in Clark County, relying on a forum selection clause in a purchase order plaintiff issued to FTI. FTI moved for dismissal on the grounds that it never consented to jurisdiction in Washington and that the terms and conditions of its purchase order controlled. FTI also argued that it did not have minimum contacts in Washington.

Judge Gonzales granted FTI's motion to dismiss. Under the "battle of the forms" analysis, the terms and conditions in FTI's purchase order controlled because FTI issued its purchase order to plaintiff first. Judge Gonzales ruled that FTI never consented to jurisdiction in Washington, and that FTI did not have sufficient contacts for Washington to exercise jurisdiction over FTI.

■ ***Submitted by Jamison McCune***
Driggs Bills and Day

The Word Smith

Chester Hill[1]
Cosgrave Vergeer Kester

Introducing block quotations

I have always thought of block quotations as a necessary evil in a writer's arsenal. They are necessary because sometimes the writer has no choice but to quote a lengthy passage. It may be that the entire passage is crucial to understanding the argument, but, more often, chopping a passage up using ellipses, brackets, or separate sentences would make the passage harder to understand. I also often worry that omitting a sentence or two that I think do not matter invites the dreaded "the other side has quoted selectively and strategically from the relevant case/contract" type of response.


CHESTER HILL

Block quotations are also evil. As one leading commentator has noted:

> "The common mistake is to pack page after page with long quotations. This won't earn you any points with your reader. Even the friendliest, most patient reader will eventually begin to skip the quoted passages. The busy judicial reader will toss your brief aside and pick up another—probably your opponent's."

Bryan A. Garner, *The Winning Brief* 494 (3d ed. 2014).

See what I did there? Did you actually read, as opposed to merely just sort of skim, the block quotation? If you did read it, did your brain get stuck in the middle of it? I don't blame you, because I didn't introduce the block quotation in a way that told you why it was important. That's the evil of block quotations. They are easy to skip, and, even if the reader actually reads them, they are also easy to get lost in.

If you must use a block quotation, it is best to tell the reader what they need to understand about the quote as part of introducing it. That way, the reader will be more likely to read the quotation in the first place and will have a roadmap to follow in reading it. For example:

The Amended and Restated Services Agreement contains the following provision specifying that it is to be interpreted according to Oregon law, and naming Oregon state courts as the exclusive venue for disputes between the parties:

> "This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon including all matters of construction, validity, performance, and enforcement. Any action brought by any party hereto to interpret or enforce the provisions of this Agreement must be brought in state court in Oregon."

The block quotation is still clunky and difficult to read. But, at the outset, the reader knows to look out for the choice of law clause, and the venue clause. Next time you find yourself using a block quotation, consider introducing it with a sentence that tells the reader what they need to understand about the quotation.

1. Julie Smith, OADC's regularly scheduled Word Smith, is out of the office on sabbatical. Chester Hill is filling in for her for this issue.

Association News

New and Returning Members

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

Ronald Downs
Special Districts Association of Oregon

Claire Whittal
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Jon Monson
Cable Huston

Benjamin Veralrud
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2022 Annual Conference Highlights

Checking in with the Sunriver Lodge host from left Sean O'Connor, Donna Lee, Chad Colton, Shelia Cieslik and Breanna Thompson.

OADC Member Jennifer Street and family at the Islands of Fun

Dressed to kill from left Helaina Chinn and her spouse, Amber Pritchard and Vicki Smith.

Best Dressed Table at the Al Capone Murder Mystery dinner

Presenter Tom Dupree providing a Supreme Court overview of recent decisions and changes

Demonstrating a fun way to get around in Sunriver, from left Peter Tuenge, Jaci Houser, Megan Cook and Helaina Chinn

OADC Member Connor King and family sharing their love for OADC at the Islands of Fun

2022 Annual Conference Highlights

OADC Member Claire Whittal at their first convention

Katie Smith with spouse Shane Fitzpatrick and Heather Bowman with spouse Jim Bowman

Check that way... from left Peter Tuenge, Helaina Chinn. Megan Cook and Jaci Houser on their scavenger hunt

OADC Leaders from left John Bachofner, Melissa Bushnick, Pam Paluga, Brian Scott and Mai Anh Nako sharing the OADC spirit

President's Award Recipient Mike Scott with from left Martha Hodgkinson, Katie Smith and his wife Laurie Scott

Congratulations to our 2022 OADC Award Winners

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Scott Hookland

Attorney on the Rise

CHRISTINE SARGENT
Littler Mendelson

Lifetime Achievement Award Recipient

GORDON WELBORN
Hart Wagner

Distinguished Service Award

HELAINA CHINN
Bodyfelt Mount

Distinguished Service Award

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Garrett Hemann Robertson

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