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In This Issue...

Evidence in Employment Cases:
Have the Courts Really Gone Too Far?

By Stephen L. Brischetto

In the Spring 2006 issue of the Litigation Journal Portland lawyers Jon P. Stride and Anna K. Sortun challenge the admissibility of evidence of acts of discrimination directed at employees other than the plaintiff to prove intent or motive to discriminate against the plaintiff in employment cases. Because the Litigation Journal is read by a significant portion of the Oregon bench and bar and because I think Stride and Sortun err both in their analysis of the historical basis for the admissibility of this evidence as well as their analysis of the substantive law concerning admissibility of this evidence, I felt it important to respond and provide the other side of the argument.

Stride and Sortun argue that the circuit and district courts have taken *dictum* in a Supreme Court decision, *United Airlines v Evans*, 431 US 553, 52 LEd2d 571 (1977) and expanded that *dictum* beyond its original intent to open the door to admission of character evidence against the employer in employment cases.

United Airlines concerned a female flight attendant who held two periods of employment with United Airlines. When she was re-hired as a flight attendant in her second period of employment, she claimed she was entitled to seniority based upon her earlier period of employment. United Airlines declined to credit her for her prior service because of the rules of its seniority system. The plaintiff contended that United Airlines unlawfully discriminated against her because United had an unlawful invalidated policy that flight attendants be unmarried which forced the plaintiff to leave her job when she got married. To fail to give her credit for her earlier service, plaintiff argued, would perpetuate a prior act of discrimination.

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FROM THE EDITOR

DIRECT EXAMINATION: AN ALTERNATIVE APPROACH

BY
DENNIS RAWLINSON
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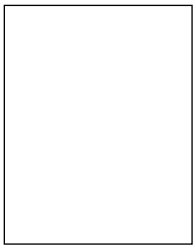
Traditionally, the techniques employed in direct examination and cross-examination are directly opposite.

For instance, in direct examination, the examiner attempts to place the attention of the fact finder on the witness. The witness is given free rein and encouraged to tell his or her story in a narrative manner with limited guidance from the examiner.

In contrast, on cross-examination the attention should be on the cross-examiner. The cross-examiner argues his or her themes or theories by asking questions, the answers to which are often irrelevant. The cross-examiner is really arguing his or her case through the "window of the adverse witness." The emphasis is on controlling the witness and, by raising impeaching, contrasting, and contradictory points, exposing weaknesses in the recently conducted direct examination of the witness. (*See Direct versus Cross-Examination: A Study in Contrast,* Lit J, Mar. 1998, at 3.)



Dennis Rawlinson

A number of respected trial practitioners and trial-technique teachers are challenging this traditional approach. They contend that the direct examination should be tightly controlled by the examiner, that the direct-examination witness should be given little or no leeway, and that the attention of the fact finder during direct examination should be on the examiner, not the witness. They believe that like cross-examination, direct examination is an opportunity for the examiner to argue his or her case "through the window of a witness."

Set forth below are some of the reasons why this alternative approach to direct examination is gaining favor.

1. Alternative Approach to Direct Examination.

Under this alternative approach, the witness on direct examination is never allowed to answer any more than a sentence. This allows the examiner to do the work and control the examination. It limits the amount of "each bite" of information that is given to the fact finder, improving the possibility of understanding. Moreover, it allows the examiner to take advantage of the additional benefits discussed below.

2. Removes Pressure From the Witness.

Under traditional direct-examination techniques, the witness is placed under a tremendous amount of pressure. He is told that he will be asked, "What happened?" The witness is then expected to tell his story in the way that is most persuasive, articulate, and memorable. The witness is told to "be sure to cover this, be sure to cover that, and don't forget to say this . . . and by the way, you cannot use any notes."

Is it really fair to place all this burden on the witness? Is this really the most effective approach to direct examination? Shouldn't a lawyer be doing the "rowing" (work)?

In contrast, under the alternative approach, the lawyer takes control and does the work. The witness is asked a series of short questions to each of which he gives an answer of only a word or two and in no event any longer than a sentence. The lawyer then leads the witness to the next point. The witness can now relax.

3. Employs the Techniques of Persuasion.

If the lawyer does the work and coaches the witness to give short answers, the lawyer has a full array of persuasive techniques available. First, repetition on the most important and damaging points; the direct examiner can repeat a point several times by rephrasing the question to ensure that it is remembered by the fact finder.

Second, the lawyer can remove from the direct-examination testimony tangential, irrelevant, and side points that clutter up the information the

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fact finder needs to receive. Third, the lawyer can, by controlling the witness, make the arguments to the jury that are available through the direct-examination witness. Similar to cross-examination, the examiner can argue the case through the "window" of the direct-examination witness.

These techniques are demonstrated in Section 5 below.

4. Allows the Examiner, Not the Witness, to Be the Salesperson.

In traditional direct examination, it was up to the witness (whether a fact or an expert witness) to be persuasive—to be the salesperson. At least in my experience, most fact finders are suspicious of fact or expert witnesses who appear to be "salespersons."

In contrast, the fact finder expects the lawyer examiner to be a salesperson. As a result, if the lawyer argues through the direct-examination witness and the witness simply provides short, accurate, and thoughtful answers, the resulting argument is that of the lawyer. The witness's credibility is not undercut or tainted by the witness's active effort to sell the point.

5. A Sample Examination for Your Consideration.

Two of the proponents of this alternative approach to direct examination are Judge Herbert Stern (who will be speaking at the litigation retreat at Skamania Lodge in March) and Judge Ralph Adam Fine. One of Judge Fine's examples of the effectiveness of this technique is taken from the novel *Runaway Jury*, by John Grisham.

In the novel, a turncoat former employee of a tobacco company is testifying about a memorandum that went to the president of the company, which has since been destroyed by the tobacco company (thereby overcoming the best evidence rule problem). The examination follows the traditional method of having the witness do the work.

Q: *What was in the memorandum?*
A: I suggested to the president that the company take a serious look at increasing the nicotine levels in its cigarettes. More nicotine would mean more smokers, which would mean more sales and more profits.

The question and answer are powerful. But not as powerful as they could be if the lawyer was doing the work. With a single question and answer, there is always the risk that the fact finder will be distracted for the moment and miss or misunderstand the answer.

Now, here's a sample of the same direct examination where the examiner does the work, limits the answer of the witness and argues the important points to the fact finder "through the window of the direct examination witness."

Q: *Did you read the third paragraph of the memorandum?*
A: Yes.

Q: *What was the subject of the third paragraph?*
A: Nicotine.

Q: *What about nicotine was discussed?*
A: The nicotine levels in cigarettes.

Q: *Did the paragraph suggest that the nicotine levels be increased or decreased?*
A: Increased.

Q: *If the nicotine levels were increased, would that have any effect on anything?*
A: Yes.

Q: *What?*
A: The number of smokers.

Q: *Would increasing nicotine mean more smokers or fewer smokers?*
A: More smokers.

Q: *More smokers than if the nicotine levels were not increased?*
A: Yes.

Q: *Would this mean more or fewer sales?*
A: More.

Q: *Would this mean more or less profit for the company?*
A: More.

Q: *Would the increased profits be substantial or insubstantial?*
A: Very substantial.

Under the second example, with a lawyer doing the work, it would be hard for a fact finder to miss the answer or miss the point. In fact, after the first couple of questions, the fact finder knows the answer to the next question before it's even answered. Why? Because the answer is compelled by common sense.

One of the advantages of arguing the case through a witness not only on cross-examination but on direct examination is that the fact finder knows the answer before it is given. An answer that the fact finder arrives at on his or her own regardless of the witness's answer is an answer that will not be subject to impeachment by your adversary.

6. Summary.

We all have plenty to do and think about at trial. Perhaps that is why allowing the witness to do the work on direct examination is so attractive.

In any event, next time you conduct a direct examination at trial, you may want to consider this alternative approach. You may find that the rewards from this technique far outweigh the detriment of the extra work. ❐

Vexing Questions:
Deposing Percipient "Experts" in Oregon

By David B. Markowitz and Lynn R. Nakamoto of Markowitz Herbold Glade & Mehlhaf, PC

The deposition of a percipient witness, that is, an actor or viewer of events, who has expertise in a particular subject matter or who is a licensed professional is a familiar event, both in malpractice actions and in other cases. As to some areas of deposition testimony, such a percipient witness clearly testifies about "fact," such as dates of services, conversations and statements, and other occurrences. In other areas, though, the demarcation between "fact" and "opinion" can quickly become blurry. Discerning whether the witness is giving "expert opinion" testimony rather than "fact" testimony is made particularly difficult when the witness is asked to testify about an opinion that he or she previously formed, the earlier opinion was based on expertise, and the opinion itself is a relevant historical fact. Nevertheless, the distinction between testimony as an "expert" and as a percipient witness matters because of Oregon's unique "no-expert discovery" practice. Not surprisingly, disputes at depositions often arise regarding the proper scope of the questions directed to percipient witnesses who have expertise. We offer an overview of the rules and some case law to consider when you find yourself preparing for such depositions in Oregon cases.

David Markowitz

Lynn Nakamoto

I. When are percipient witnesses testifying as "experts"?

The primary Oregon evidence rule governing opinion testimony by percipient witnesses is OEC 701, ORS 40.405, which provides,

> If the witness is not testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are:
>
> (1) Rationally based on the perception of the witness; and
>
> (2) Helpful to a clear understanding of testimony of the witness or the determination of a fact in issue.

Its federal counterpart is Fed. R. Evid. 701. Both were in substance identical until a 2000 amendment to FRE 701, which added an express condition to permissible "lay" opinion testimony. Such testimony could not be "based on scientific, technical, or other specialized knowledge within the scope of Rule 702 [govern-

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ing expert testimony]." In part, the rule was amended to prevent parties from circumventing reliability requirements in Rule 702. *See* Advisory Committee note to 2000 amendment to FRE 701. Federal courts since 2000 have begun to consider opinions of percipient witnesses based in part on expertise as expert testimony, regardless of when the witness formed the opinion, or in what context. *E.g., Musser v. Gentiva Health Services*, 356 F.3d 751, 757 n.2 (7th Cir. 2004).

However, neither OEC 701 nor the pre-2000 federal rule by their terms prohibit percipient witnesses from testifying concerning opinions that they formed in part based on their expertise, when rationally based on their personal knowledge and helpful to a clear understanding of their testimony. Thus, under the old version of Rule 701, federal courts regularly approved of treating physicians and other professionals testifying at trial as percipient witnesses to opinions formed because of or based on a combination of their expertise and their personal knowledge of the facts.

In some cases, the witnesses testified to opinions that they had previously developed during the regular course of business, not in anticipation of litigation. *E.g., Richardson v. Consolidated Rail Corp.,* 17 F.3d 213, 218 (7th Cir. 1994). In other cases, courts did not require the witness's opinion to be historical, and allowed opinions formed for the litigation if based on personal observations, and if the witness possessed sufficient knowledge or experience to form the opinion. A frequently cited example is *Teen-Ed, Inc. v. Kimball Int'l, Inc.*, 620 F.2d 399, 402-04 (3d Cir. 1980) (the plaintiff's accountant could testify under Rule 701 in a breach of contract action regarding his calculation of lost profits because of personal familiarity with the books). *See also Asplundh Mfg. Division v. Benton Harbor Engineering*, 57 F.3d 1190 (3d Cir. 1995).

No Oregon appellate cases have affirmed whether a percipient witness may only testify under OEC 701 concerning opinions formed before the litigation based in part on expertise, or whether a percipient witness may also testify regarding new opinions formed in connection with the litigation, if based on personal knowledge. In fact, only a few reported Oregon cases address OEC 701 in any detail, and they do not shed much light on the issue at hand. *See State v. Lerch*, 296 Or. 377, 383-87, 677 P.2d 678 (1984) (noting that OEC 701 provides a "liberal standard for the admissibility of lay opinions" and holding that the trial court correctly admitted opinion testimony of a police detective as to what caused a stain and of a war veteran as to the nature of an odor he noticed); *State v. Tucker*, 315 Or. 321, 845 P.2d 904 (1993) (in his concurring opinion, Justice Unis discussed the elements of personal knowledge, rational connection, and helpfulness required for "lay" opinion testimony in some detail); *State v. Wright*, 323 Or. 8, 17-18, 913 P.2d 321 (1996) (specifically approving some of that exegesis).

Several cases from other jurisdictions suggest that opinions on new facts, or on issues specific to the litigation, such as the standard of care, implicate expert opinion testimony. In that sense, they support objections to such questioning in Oregon. On the other hand, in both cases the courts would permit deponents to be questioned as to such opinions during the phase of discovery devoted to percipient witnesses and not to retained experts. Thus, they were treated as a hybrid of both percipient and expert witnesses, and deposing lawyers were given wide latitude to explore the opinions they held, when based on the witness's first-hand knowledge or observations.

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In *Kekelik v. Hall-Brooke Hospital*, No. X05CV980169297S, 2000 WL 1918016 (Conn. Super. Ct. Dec. 15, 2000), a malpractice action, the trial court denied a motion for a protective order that the defendant hospital sought to prevent the plaintiff from eliciting expert opinion testimony from the hospital's physicians in depositions regarding the standard of care, and their compliance with that standard of care. Although the physicians had not been designated as experts yet, the court rejected the defendant's contention that such questions were beyond the scope of permissible discovery and would constitute improper expert discovery. *Id.* at *1. Among other grounds, the court cited that there was no prohibition of such questioning in the practice rules; allowing the questioning was in accord with liberal discovery under the rules; litigants are permitted to use the opinions of treating physicians to establish the standard of care, breach, and causation in Connecticut; the plaintiff's counsel had agreed that such questioning would not encompass what the witnesses learned about the standard of care from counsel or from review of materials in the litigation; and the witnesses were not consulting experts, but instead would be trial witnesses. *Id.* at *4. However, the trial court also suggested in passing that such testimony could be "expert" testimony that ought to be paid for. *Id.*

In a different context, the California Supreme Court in *Schreiber v. Estate of Kiser*, 989 P.2d 720 (1999), also focused to some degree on the ability of counsel to fairly question percipient witnesses with expertise. *Schreiber* was an auto accident case, and the issue at trial was whether the accident caused the plaintiff's injuries. The plaintiff designated treating physicians as experts, but did not serve expert declarations disclosing the testimony as required for retained experts. The trial court granted a motion *in limine* to exclude any expert opinion testimony, including causation testimony, by the treating physicians. The California Supreme Court disagreed with the Court of Appeals' holding that once the treating physician opined regarding causation, he converted from a percipient witness into a retained expert whose testimony had to be disclosed in a declaration. 989 P.2d at 722.

We are aware that litigants in Oregon often frame the issue as whether a witness has been asked a question requiring expert testimony.

Rather, the Supreme Court held that a treating physician is a "percipient expert" who may provide both fact and opinion testimony, *id.* at 723, and that such witnesses "are subject to no special discovery restrictions." *Id.* at 725. Thus, the court concluded that treating physicians could be identified and deposed early in the litigation, and that defendants had a strong incentive to do so. *Id.* The court held that such a witness "may testify as to any opinions formed on the basis of facts independently acquired and informed by his training, skill, and experience," including as to "causation and standard of care because such issues are inherent in a physician's work." *Id.* at 726. The California high court's solution avoided the need for trial courts to parse whether the witness is giving expert opinion or percipient testimony at any particular point in a deposition, which it described as a "near impossible task." *Schreiber*, 989 P.2d at 726.

We are aware that litigants in Oregon often frame the issue as whether a witness has been asked a question requiring expert testimony. Our understanding of the developing practice is that attorneys defending depositions will permit percipient witnesses with expertise to state whether they previously formed opinions and the substance of such opinions based on their personal knowledge, what information they had or lacked, and how they formulated the opinions. But, questions concerning opinions formed in anticipation of litigation, or requiring the witness to form opinions at the deposition based on hypothetical additional or modified facts, beyond the witness's personal knowledge, are the subject of dispute. Likewise, objections are raised when the witnesses are asked to adopt or reaffirm previous opinions or recommendations, because the deposing lawyer is eliciting expert

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testimony that is not discoverable. Our understanding is that some Oregon trial courts agree, and will grant protective orders to bar such questions.

However, it remains to be seen how Oregon appellate courts will construe OEC 701. They could permit wide-ranging deposition testimony by "percipient experts" on opinions based on personal knowledge, along the lines of what was permitted in *Teen-Ed* and *Schreiber*, or they could require litigants and the trial courts to determine when a percipient witness has been asked to testify as an expert and enforce the "no-expert discovery" practice on a question-by-question basis. *See, e.g., Patel v. Gayes,* 984 F.2d 214, 218 (7th Cir. 1993) (depending on the substance of the witness's testimony, a percipient witness may testify at some points as an expert and at other points as a fact witness); *Gubbins v. Hurson,* 885 A.2d 269, 277 (D.C. 2005) (percipient witness who testified regarding diagnosis and course of treatment should not have given opinion on cross-examination regarding causation because he was not disclosed as an expert).

If the latter, it is not clear what the dividing line will be (e.g., no opinions formed in anticipation of litigation). Notably, in *State v. Lerch*, although the Oregon Supreme Court cited to the *Teen-Ed* decision permitting opinion testimony developed for the litigation, its decision rested on a conclusion that the detective, despite his experience, was not testifying based on any specialized knowledge. 296 Or. at 384-85.

Arguably, the right to be insulated from expert discovery is a "privilege or constitutional or statutory right" within the meaning of ORCP 38 D(3)(c).

II. Procedure.

Oregon deposition procedure relating to this issue is not clear-cut, either. The safest practice is to get a protective order, but if you are defending a deposition and object to questions that you believe are outside the scope of OEC 701, there appears to be a basis under the deposition rule, ORCP 38, to instruct the witness not to answer without filing a motion for a protective order. (In contrast, FRCP 30 would not permit such an instruction. *See, e.g., Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.*, No. 95 CIV 8833 (RPP), 1998 WL 2829 (S.D.N.Y. Jan. 6, 1998).)

Under ORCP 38 D(3), "a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only: (a) when necessary to present or preserve a motion under section E of this rule; (b) to enforce a limitation on examination ordered by the court; or (c) to preserve a privilege or constitutional or statutory right." In *Stevens v. Czerniak*, 336 Or. 392, 403, 84 P.3d 140 (2004), the Supreme Court held that Oregon courts have no authority to require expert discovery in civil cases absent a specific provision allowing it. Arguably, the right to be insulated from expert discovery is a "privilege or constitutional or statutory right" within the meaning of ORCP 38 D(3)(c). If so, at the deposition of a defendant surgeon, for example, counsel could use ORCP 38 D(3)(c) as the basis for an instruction not to answer questions concerning whether acts or omissions conformed to the applicable standard of care, since classic expert testimony in a typical medical malpractice case includes opinions concerning whether the defendant's conduct breached the standard of care. *See Chouinard v. Health Ventures*, 179 Or. App. 507, 512-13, 39 P.3d 951 (2002).

With no settled law on either OEC 701 or the procedure for protecting objections in the discovery context, Oregon litigators retain significant flexibility in handling depositions of percipient witnesses with expertise. We would welcome receiving relevant opinions and orders other section members have obtained from Oregon trial courts for a potential follow up article next year. ❐

Some Differences Between State and Federal Trial Courts in Oregon

By William A. Barton
of Barton & Strever, PC

Introduction

Each of us best knows the world as we have lived in it. I am a plaintiff's personal injury lawyer with most of my experience in state court. I live in a small town with seven stoplights, and at heart remain an intersection lawyer. When I was asked to discuss this topic, I prepared a paper that isn't driven by legal citations, but is cryptically clinical.[1] So, what's the difference between trying a (plaintiff's jury) trial in federal court vs. state court? Here are my views:


Bill Barton

1 The Differences

One federal judge summarized the difference between state court and federal court as follows: "In state court, the lawyers run the courtroom; in federal court, the judges run the courtroom." There's a lot of truth in this statement. It acknowledges that federal judges can comment on the evidence (though in my experience, they rarely do) and, it seems to me, federal judges can pretty well do whatever they want. Maybe they can't, but they've got me fooled.

2

There are many more rules and documents to be filed in federal court. In an attempt to give you a feel for the sheer amount of paper involved, I set forth a trial management order from a recent case in our office. This isn't the same for all judges, and may vary from case to case, but it gives you an idea:

08/31 Plaintiff's exhibits and exhibit lists
Plaintiff's lay witness statements and expert narratives
Any itemized list of special damages

09/01 Joint Alternative Dispute Resolution Report
Pre Trial Order

09/11 Defendant's exhibits and exhibit lists
Defendant's lay witness statements, and expert narratives
Plaintiff's and defendant's deposition designations
Plaintiff's and defendant's trial memoranda
Plaintiff's and defendant's motions in limine

09/18 Plaintiff's rebuttal exhibits
Plaintiff's rebuttal lay witnesses, and expert narratives
Requested voir dire, joint jury instructions and verdict form
Plaintiff's and defendant's objections to the other party's exhibits and witnesses
Responses to motions in limine

09/25 Plaintiff's and defendant's responses to objections to exhibits and witnesses

10/02 9:30 a.m.-5:00 p.m.
Pre Trial Conference, and continuing on into the next day

10/03 9:30 a.m.-12:00 p.m.
Pre Trial Conference

10/10 9-day Jury Trial

This doesn't include all the amended and supplemental documents that may be filed. Deadlines are important. A good example is the witness list; once the deadline passes, you can't add to the list. It feels to me, in federal court, like I have to try my case twice.[2] The first trial involves getting all the paperwork done, and the second is the trial itself. The extent of detail each judge expects in the

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witness summaries varies. I recommend you err on the inclusive side, lest you later face a trial objection based on surprise or nondisclosure if your witness inches beyond the four corners of your pretrial testimony summary. During my final trial preparations in state court, I sometimes discover that my proof could use one more expert, or maybe I've found another helpful lay witness. Adding witnesses pretrial in state court is never a problem; this isn't true in federal court.

As an aside, trial lawyers from other jurisdictions call practicing in Oregon's state courts "trial by ambush." This is because they aren't used to the lack of depositions and discovery of expert witnesses, interrogatories, pretrial disclosure of witness names, and testimony summaries. Once you get used to the Oregon practice, it's hard to imagine doing it any other way; however, it's quite a shock if you aren't used to it. A good way to think of the differences between state and federal court is in federal court you have to give the opponent your play book before the game even starts. The element of surprise is eliminated, and any edge is found in the execution or application.

I have tried cases in five states, and submit some of America's best civil trial lawyers, and certainly some of America's best defense attorneys, practice in Oregon. This is because with no pretrial discovery of experts, you've got to be nimble on your feet. Defense attorneys can't sit in a corner office and delegate the discovery depositions of key opposing witnesses to a smart associate, who lifts the best questions and answers from the deposition, and hands them to his or her boss, who then regurgitates them back to the witness before the jury. Nay, nay! Cross-examination of experts in state court is in real time, before the jury, with no pretrial discovery. This demands serious talent, and if the jury returns a big plaintiff's verdict, the insurance carrier might not be rehiring that defense attorney in the immediate future.

3 Within the rules, each Oregon federal judge and magistrate have their own preferences. Some are willing to waive the necessity of a pretrial order, while others leave the wisdom of settlement conferences up to the lawyers, etc. If you have a procedural question, ask the judge at an early status or scheduling conference; also consider asking the judge's clerk for the names of lawyers who have recently tried cases in front of that particular judge to get their feedback. Finally, in my experience, the judges are surprisingly accessible with telephone conferences when there are problems they can help with.

4 I am a technology dinosaur, however many younger lawyers tell me they really like the electronic filing option in federal court. In order to participate in electronic filing, the attorney must first register, using a form that can be downloaded from the federal court website (www.uscourts.gov). The registration form outlines the technological capabilities required to utilize the electronic filing system. Once you have registered, the court assigns a login and password and you can begin filing documents online. The program is easy to navigate (so I've been told) with a tutorial that will walk you through the filing process until you have it down. Of course, if you're feeling inept, the staff at the courthouse is more than willing to help you out, after all, electronic filing makes their job easier too.

5 A cagey defense lawyer cannot drag you into federal court in a diversity case unless diversity of citizenship is complete. That means, if there is an instate co-defendant that can legitimately be named, and you choose to do so, then complete diversity is "broken," or incomplete, thus allowing you to stay in state court. There are times when you might want to be in federal court, such as when your claim arose in a conservative rural county, and you'd prefer trying the case to a more liberal metropolitan jury. Or maybe you're not confident that the state court judges in a smaller county are up to the challenges and complexities of your case; or maybe you're worried about being "home-towned."

6 The federal magistrates in Oregon have a long tradition of excellence. Most experienced federal court practitioners will tell you they are just as comfortable trying their cases to a magistrate as to an Article III judge. This tends to get you a little quicker trial date. It is called filing a "Consent," and requires the agreement of all parties.

7 The extent to which settlement conferences are encouraged or required varies widely between judges in the Oregon District. I will say, when you find yourself in a settlement conference with a federal judge, they certainly aren't used to hearing "No, thank you, Your Honor." They have a real knack for staring you down, and not so subtly encouraging you to get your thinking "straight." My point here is I privately suspect some federal judges' hearing gets a little impaired when it's their turn to listen. I'm sure I'm wrong on this, but it's just an impression I have formed . . .

8 The jury pool in federal court is drawn from a much wider geographical area than the

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State & Federal Trial Courts

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county in which you are located in state court. This can be good or bad, depending on the state court venue, and the nature of the case.

9 There are twelve jurors in Oregon's civil trial courts. There are at least six, generally eight, and sometimes more in federal court. To me, the number of jurors isn't the problem, it's the federal requirement that the verdict be unanimous. It takes only a 9-3 verdict in civil cases tried in state court, and requiring unanimity allows one juror to produce a hung jury, or, as is more often the case, a compromise that would not be necessary in state court.

10 In state court, the lawyers are given more time and latitude in jury selection. It's much more restricted in federal court, and varies significantly between judges. Each federal judge, including the magistrate judges, has their own rather strongly held ideas concerning what is relevant in assessing whether a prospective juror can be "fair and impartial." Assume that federal judges will do most of the questioning, leaving maybe ten to fifteen minutes for each lawyer to briefly follow up. All of the federal judges request the lawyers to submit questions for the jury which the judge may, or may not, actually ask. The judges try to be fair, and do ask many important questions; however, the problem is that the same question asked by two different people doesn't necessarily get the same answer. Psychologists call this phenomenon "referent authority bias." To illustrate, when a judge, and particularly a federal judge, asks a prospective juror, "Can you be fair?" the answer is almost always "Yes." If a lawyer asks the same question, there is a better chance of getting an honest answer.

Judge Anna Brown prepares a list of prospective questions that considers the various questions the lawyers have submitted. She then of course adds her own. A final list is then typed and distributed to each of the jurors. This seems to encourage generous juror input and spontaneity as they individually answer the questions. Unless a lawyer is very good at jury selection, I begrudgingly admit most of the federal judges probably do a better job than the lawyers would have, even if they were in state court.

11 Senior Judge Robert E. Jones, and a number of the other federal judges, allow brief (about three minutes) neutral mini opening statements, by the lawyers to the entire jury panel before starting the jury selection. They also sometimes allow a brief, and neutral, summary by the lawyer of what a particular (expert) witness will be testifying to prior to the witness being sworn in.

12 The Federal Rules of Evidence are straightforward. There is not much practical difference between the state and federal evidence rules. The real change is in the area of exhibits. All exhibits are submitted, and ruled upon, pretrial in federal court. Sometimes the judge may reserve ruling on a few exhibits, to wait to see how the evidence comes in. Try to avoid this, so that you can use any exhibit in your opening statement. It's also easier to prepare exhibit books for each juror, which can be used with great effectiveness in the opening statement. Preparing exhibit books takes a little time, but it's worth it.

13 Don't run out of witnesses. Stories of the now-deceased U.S. District Judge Gus Solomon still haunt the hallways of the old federal courthouse that bears his name. It is said that if you ran out of witnesses before the end of the day, Judge Solomon would rule that you had just rested your case.[3]

14 During closing argument in state court you can request a specific dollar amount. This also usually means you can discuss dollars during the jury selection. In contrast, most, but not all, federal judges allow you to argue for a dollar sum. I think it's important to be able to talk to the jury about the amount in question during jury selection. Psychologists call the prayer a "bracketing number." It provides legal boundaries, which frame the jury's damages dialogue. It is common to instruct the jurors prior to the attorney's arguments. While permitted in state court, it doesn't happen that often.

15 Remittitur is permitted in federal court but it is constitutionally prohibited in state court. If you get a large verdict, remittitur allows the defense another opportunity to reduce the judgment by post-verdict, prejudgment motion, on grounds that the amount of the unanimous jury award was too large. The judge need only find the amount awarded was against the "weight of the evidence," which, in my view, amounts to a finding that the judge didn't like the unanimous verdict. In state court, no judge can revisit a jury's factual determinations, so long as there is any evidence to support it.

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State & Federal Trial Courts

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16 While I compliment the federal bench, it's fair to note they have the benefit of immensely talented law clerks and staff to assist them with the research and writing of their opinions. Such resources aren't equally available to their state judicial counterparts. This means when your case presents exotic legal theories, particularly when federal rights are involved, federal court may present real advantages. I also note that the staff at the federal court level couldn't be more helpful. This isn't to say state court staffs are lacking, but it seems to me the courtesy shown by the staff at the federal court is up even another notch.

17 My parting comments are the federal world is much more rule and process oriented. Virtually everything is disclosed pursuant to FRCP 26 and the mandatory witness summaries. The judges do most of the jury selection. Enormous amounts of energy are spent in pretrial paper wars, a.k.a., motions for summary judgment, that might result in the striking of a theory or two, but rarely the complaint. As an experienced state practitioner, I submit in state court most such legal questions would have been more economically addressed by defense motions to strike, for a directed verdict, or post-verdict motions. Also, in my experience, tactically clever defense lawyers lay in the weeds and punish plaintiffs for any unsupported allegations before a jury. Why help the plaintiff by cleaning up their messy complaints and unfounded allegations? They are properly viewed as opportunities for the defense, but alas, one would have to rely on skill, strategy and give up all those billable hours . . .

If you can survive the rules, paper and process, the actual trial isn't quite as exciting as state court where strategy and tactics are still very much alive. This tends to produce a class of federal trial lawyers who are consummate technicians, and are strong on the law and every aspect of causation. It's my sense however, that because of a lack of much "rough and tumble" state court trial experience, federal practitioners understandably don't tend to think of jury trials in psychological or dynamic terms.

Summary

I generally prefer not to try a case in federal court, primarily because of the extra paper work, the judges doing the jury selection, the unanimous verdict requirement, and the threat of remittitur. Still, I always enjoy my time in federal court; where the judges are firm but good, the courtrooms are bigger and nicer, and loaded with all the latest technology. For me, a federal court trial is just another invigorating challenge to do everything right. ❐

(Endnotes)

1 I want to express my gratitude for his contributions in the preparation of this paper to my law school classmate Jeff Batchelor of the Portland firm Markowitz, Herbold, Glade & Mehlhaf. Most of the ideas herein are mine, the good grammar is his. Jeff handles all my appeals. Our symbiotic relationship began in September 1969, when he started giving me his notes for all the property classes I missed. Nothing has changed in the last three decades.

2 The added expense and time from all this paperwork proves it's not just a feeling, but a reality.

3 I was always treated well by Judge Solomon. I think it was because he got me confused with Portland attorney Richard Barton, whose father was an FBI agent, and friend of the judge. Every time I was before Judge Solomon, he would ask me how my father was. My father was deceased, and so I would simply say "Your Honor, I haven't seen my father in a while ...." The judge would smile, and tell me to give my father his regards.

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The *Lis Pendens* Doctrine in Oregon:
Caging the Golden Goose in Real Estate Litigation

By Erick J. Haynie
of Perkins Coie LLP

Over the past few years, real estate values in Oregon have increased dramatically. The boom has met with widespread investment in land throughout the state. Where the money goes, litigation cannot be far behind. And with any litigation involving real estate, the key asset in play—the Golden Goose—is often the property itself.

This article is intended to provide a brief overview of an important doctrine to anyone litigating real estate disputes: the doctrine of *lis pendens*. "Lis pendens" is a Latin term meaning "a pending lawsuit." It is a common law doctrine, codified in ORS 93.740, that operates to place the world on notice of a pending claim against property. The doctrine creates no lien as a formal matter. Rather, it serves to impose constructive notice to third parties that, if they purchase the property, they will take subject to whatever valid judgment may ultimately be rendered in the litigation.

Though the doctrine is merely a notice doctrine, its economic impact can be considerable. In practical terms, a *lis pendens* notice can function to freeze the status quo for the life of the lawsuit. Due to the uncertainties of litigation, buyers and title insurance companies are slow to assume any risk associated with the outcome of a case.[1] For better or worse, a plaintiff can often use a *lis pendens* filing to generate significant leverage at the outset of a lawsuit.

I. History of *Lis Pendens*

The law of *lis pendens* has existed for centuries. Some attribute the doctrine to Lord Chancellor Bacon, who is reported to have adopted the doctrine for the English Court of Chancery in the 17th Century. Lord Bacon's rule was that: "No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited and is made no party… but, where he comes in *pendente lite*, and, while the suit is in full prosecution, … there regularly the decree bindeth …."[2] Others attribute the rule to Roman law, which provided: *rem de qua controversia prohibemur in acrum dedicare* ("A thing concerning which there is a controversy is prohibited, during the suit, from being alienated.").[3]

The rule became part of the modern common law in America. Under its traditional formulation, the doctrine was deemed to place the world on notice of a claim effective upon plaintiff's filing of the action.[4] The modern rule, and the rule under ORS 93.740, is different.

Under ORS 93.740, the lawsuit itself is not the notice device. Instead, the plaintiff must file a separate notice in the local land records (i.e., with the county clerk or recorder). This makes for a much better policy in the modern era, as it simplifies a buyer's due diligence process. Buyers should not be expected to scour voluminous court records to find peace and serenity in connection with a real estate purchase.[5]

Please continue on next page

Golden Goose

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As ORS 93.740(1) provides:

> In all suits in which the title to or any interest in or lien upon real property is involved, affected or brought in question, any party thereto at the commencement of the suit, or at any time during the pendency thereof, may have recorded by the county clerk or other recorder of deeds of every county in which any part of the premises lies a notice of the pendency of the action containing the names of the parties, the object of the suit, and the description of the real property in the county involved, affected or brought in question, signed by the party or the attorney of the party. From the time of recording the notice, and from that time only, the pendency of the suit is notice, to purchasers and incumbrancers, of the rights and equities in the premises of the party filing the notice.

Prior to certain amendments to this provision that became effective January 1, 1988, Oregon law was much closer to the common law rule that the lawsuit itself places the world on notice. Under the historical version of ORS 93.740, a separately filed notice with the recorder was only contemplated in connection with lawsuits pending in a county other than the county in which the property was located.[6] In other words, the lawsuit itself was notice to the local community, but only the local community.

Curiously, the Oregon Court of Appeals issued an opinion shortly after the 1988 amendment became effective suggesting that the old common law rule still applied, such that no separate notice is required.[7] They did it again in 1993.[8] These were likely oversights. Under a plain reading of the current version of ORS 93.740, a separate "Notice of Pending Action" is required to give constructive notice of a pending claim.

II. Adequate Nexus to Property Required

A *lis pendens* notice is not appropriate in all cases. Such notices are only appropriate in actions "in which the title to or any interest in or lien upon real property is involved, affected or brought into question."[9] There is little case law in Oregon explaining exactly what kinds of claims implicate an "interest" in real property. The Oregon Supreme Court has stated that, for the doctrine to apply, the litigation must relate to "a specific thing" (i.e., the property) that will be "affected by the termination of the suit."[10] The Oregon Court of Appeals has stated that "the subject of the suit must be an actual interest in real property, not merely a speculative future one."[11]

Courts in other jurisdictions have held that underlying claims must present an "adequate"[12] or "fair"[13] nexus to the subject real property. The claim must not be merely "collateral," though the claimed interest can be less than a claim to the fee.[14]

Under these standards, a claim to specifically enforce a real estate purchase agreement or a lease would easily qualify. By contrast, a bare claim for money damages would not. Aggressive colleagues have occasionally asserted claims for "constructive trust" in an effort to fuse a money damage claim with real estate. There are, however, a number of out-of-state cases finding that improper,[15] at least in the absence of allegations of fraud by the plaintiff[16] or a prior determination imposing a constructive trust on the property.[17]

III. Motions to Quash

When a *lis pendens* is filed in a case not involving a sufficient nexus to the property, the aggrieved party may move the court to nullify the filing. Courts ought to be receptive to such motions, as the *lis pendens* statute is subject to abuse. With the stroke of a pen, a claimant can hold up someone's real property (or worse, an entire real estate development). As a California court put it: "The purpose of the *lis pendens* statute is to provide notice of pending litigation and not to make plaintiffs secured creditors of defendants nor to provide plaintiffs with additional leverage for settlement purposes."[18]

IV. Logistics

The *lis pendens* form is simple. It is generally comprised of a single cover page with the formal property description attached as an exhibit. The form of the notice is prescribed by ORS 93.740(4), which sets forth a template for the document.

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Golden Goose

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Those filing notices need to be sure, of course, that the legal description is correct. The easiest way to get a copy of the legal description is to call a title company. Title companies are generally happy to provide lawyers with copies of the vesting deed on the property. Many will fax you a copy within an hour for free.

You must also make sure that your property description is clearly legible. Clerks will reject a filing if any aspect of the filing cannot be clearly read.

Finally, don't forget your filing fee. Typically counties charge $25 for the first page and $5 for each additional page of the filing. ❐

(Endnotes)

1 Even in small cases, the risk can be significant because of the possibility of an amended complaint that expands the scope of the plaintiff's claims.

2 See Burnham v. Smith, 82 Mo. App. 35, 1899 WL 2080, *6 (1899); see also Houston v. Timmerman, 17 Or. 499, 503, 21 P. 1037, 1038 (1889).

3 Burnham, 1899 WL 2080 at *6.

4 See, e.g., Trus Joist Corp. v. Treetop Assoc., Inc., 477 A.2d 817, 822 (N.J. 1984).

5 In simpler (and less litigious) times, the public was expected to know of all pending lawsuits in a jurisdiction. See, e.g., Burnham, 1899 WL 2080, at *6 ("Every man is supposed to be attentive to what passes in the superior courts of the sovereignty where he resides . . . .")

6 See ORS 93.740 (1985). In light of the mandatory venue requirements of ORS 14.040(1), one might wonder when litigation involving real property should ever be pending in another county.

7 See Landsing Property Corp. v. Angela, 89 Or. App. 381, 384, 749 P.2d 588, 589 (February 10, 1988) ("Plaintiff's complaint was filed before [the date of transfer] and specifically described the property that is the subject of the outcome of the litigation. Under the doctrine of lis pendens, anyone purchasing the property would take it subject to the litigation") (citing Pedro v. Kipp, 85 Or. App. 44, 735 P.2d 651 (1987)).

8 See Cusick v. Meyer, 124 Or. App. 515, 522 n.2, 863 P.2d 486, 490 n.2 (1993) (citing 1982 Oregon Supreme Court decision).

9 ORS 93.740(1).

10 Houston, 17 Or. at 504-05; see also Hoyt v. American Traders, Inc., 76 Or. App. 253, 257, 709 P.2d 1090, 1092 (1985).

11 Doughty v. Birkholz, 156 Or. App. 89, 95, 964 P.2d 1108, 1111 (1998).

12 Olbrich v. Touchy, 780 SW.2d 6, 7 (Tex. Ct. App. 1989).

13 Fisher v. Fisher, 873 So.2d 534, 535-36 (Fla. Ct. App. 2004).

14 In re Wolf, 65 SW.3d 804, 805 (Tex. Ct. App. 2002).

15 See S.B. McLaughlin & Co., Ltd. v. Tudor Oaks Condominium Project, 877 F.2d 707, 708 (8th Cir. 1989); Urcz Corp. v. Superior Court, 190 Cal. App.3d 1141, 1149 (1987); Flores v. Haberman, 915 SW.2d 477, 478 (Tex 1995).

16 Fingerhut Corp. v. Suburban National Bank, 460 NW.2d 63 (Minn. Ct. App. 1990).

17 Tudor Oaks, 877 F.2d at 708.

18 Urcz Corp., 190 Cal. App. 3d at 1149. In the wake of Urcz and other cases, the California Legislature in 1992 enacted legislation to curb lis pendens abuse. Under the statute, a land owner may move to expunge a lis pendens filing. In such proceedings, the burden is shifted to the recording party to prove the "probable validity" of a "real property claim." The legislation also enables a judge to require, among other things, that the claimant post a bond as a condition for maintaining the notice. See California Civil Code, § 405.30 et seq.

The Equitable Accounting:
Not All Fiduciaries Have the Same Obligation

By Jeanne M. Chamberlain and Ava L. Schoen
of Tonkon Torp LLP

Litigating with a fiduciary may entitle a plaintiff to seek a powerful remedy that puts the defendant on his heels - the equitable relief of an accounting.[1] The accounting remedy offers an important tactical advantage to a plaintiff because it shifts the burden of proof. To trigger the right to an accounting, a plaintiff must establish two things: first, the existence of a fiduciary relationship with the defendant, and second, that the plaintiff has entrusted some property to the fiduciary so that there is something to account for. (A plaintiff must also demonstrate the amount or value of the entrusted property.) Once the plaintiff establishes these two elements, the burden will then shift to the fiduciary defendant to prove that he has properly handled the plaintiff's assets. *Croisant v Watrud,* 248 Or 234, 245, 432 P2d 799 (1967); *Schulstad v Hudson Oil Co.,* 55 Or App 323, 329, 637 P2d 1334 (1981).

Jeanne Chamberlain

Ava Schoen

The fiduciary cannot avoid liability by simply denying any wrongdoing. Instead, he has an affirmative duty to show that he has carried out his duties properly. The presumption arises that any funds or property that cannot be accounted for were misappropriated by the fiduciary. If a defendant fails to support the accounting with adequate evidence, the plaintiff will recover the amount for which there is inadequate support. This shifting of the burden of proof obviously gives the plaintiff a significant advantage and allows him to recover where he might otherwise lose.

So what precisely is an accounting? In general terms, it is a bookkeeping process where debits and credits are balanced or a balance of mutual accounts is struck. *Carey v. Hayes,* 243 Or 73, 79, 409 P2d 899, 902 (1966). On a more practical level, an accounting may be rendered in a number of different ways depending on the nature of the fiduciary relationship. At its most basic level, an accounting provides an accurate record of receipts and expenditures including the persons involved, the dates of transactions, the amounts received, and payments made. *In re Niles,* 106 F3d 1456, 1461 (9th Cir. 1997); Restatement (Third) of Agency § 8.12 Comment d. In many cases, this

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Equitable Accounting

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kind of an accounting can be provided through simple ledgers or spreadsheets. At other times, a more detailed and elaborate accounting may be required, including copies of vouchers or invoices supporting individual transactions. A general ledger report generated by QuickBooks or similar software will typically provide all the basic information needed in this kind of accounting. In still other circumstances, the kind of accounting required may be controlled by statute or agreement. *See Sec'y of State v. Hanover Ins. Co.,* 242 Or 541, 411 P2d 89 (1966) (vouchers required by statute governing bonded officers); *Adams v. Mason,* 358 SW2d 7 (Mo 1962) (defendant obligated to account according to partnership agreement); *Hill v. Roberts,* 311 SW2d 569 (Ky Ct App 1958) (executor obligated to account in conformity with state statute).

THE KEY QUESTION FOR PLAINTIFFS AND DEFENDANTS LITIGATING THIS ISSUE IS THE DETERMINATION OF WHAT TYPE OF FIDUCIARY RELATIONSHIP THE DEFENDANT HAS UNDERTAKEN.

The key question for plaintiffs and defendants litigating this issue is the determination of what type of fiduciary relationship the defendant has undertaken. The general rule is that defendants who may be characterized as trustees are held to a higher standard than mere agents. An agent need only show how and when money was spent, but a trustee's obligation includes a higher standard of showing that the expenditures he claims to have made were in fact "correct, just and necessary." *Wood v. Honeyman,* 178 Or 484, 169 P2d 131 (1946). All doubts are resolved against the trustee who maintains an inadequate accounting system. *Jimenez v. Lee,* 274 Or 457, 547 P2d 126 (1976). The difference in the accounting obligation stems directly from the different rights of a principal dealing with an agent versus those of a beneficiary dealing with his trustee. The principal has the right to make reasonable inspections of the books and records of account, including the original entries. An agent is always subject to the control and direction of the principal. But neither the settler nor the beneficiary has such power unless it is expressly reserved or granted in the trust instrument. Restatement (Third) of Agency § 1 Comment f., Restatement (Third) of Trusts § 5 Comment e. Accordingly, a trustee undertakes more rigorous duties than those of most other fiduciaries. Restatement (Third) of Trusts § 2 Comment b.

From these general rules, it should be clear that plaintiffs will want to show that the defendant is a trustee, while defendants will want to characterize their role as that of an agent. Do not underestimate the leverage and risks associated with an accounting claim. The success of your claim or defense may well turn on which side is able to win the argument on whether the defendant is a trustee or a mere agent. ❐

(Endnote)

1 Historically, an equitable accounting was available in three instances: where a fiduciary relationship existed between the parties creating a duty to account; where the complicated nature of the accounts would make it difficult for a jury to unravel the transactions; and, finally, where the request for an accounting was incidental to some other relief. Today, the latter two grounds are of limited use. *See, generally,* Wright & Miller, Federal Practice and Procedure: Civil 2d § 2310. A claim for an equitable accounting likely involves a fiduciary relationship.

Lawyer Liability for Assisting in Breach of Fiduciary Duty: Privilege or Peril?

By Mark J. Fucile
of Fucile & Reisling LLP

On September 8, the Oregon Supreme Court issued its opinion in *Reynolds v. Schrock*, ___ Or ___, ___ P3d ___, 2006 WL 2578330 (SC S52503 Sept. 8, 2006), a major lawyer liability case for anyone who advises fiduciaries—whether they are in formal roles such as trustees or informal ones such as joint venture partners. In *Reynolds*, the Supreme Court reversed the Court of Appeals (197 Or App 564, 107 P3d 52 (2005)), which held that a lawyer could be liable for assisting in a client's breach of fiduciary duty by giving the client legal advice on evading a fiduciary duty and then helping the client implement that advice. The Supreme Court recognized a privilege for lawyers who give clients otherwise lawful advice and assistance that exempts them from liability in this situation.

In doing so, however, the Supreme Court also reaffirmed its own earlier decision in *Granewich v. Harding*, 329 Or 47, 985 P2d 788 (1999), where the Supreme Court upheld the more general proposition that a lawyer could be held liable for assisting in breaching a fiduciary duty to a third party if the lawyer was acting outside the scope of advising the lawyer's client. *Granewich*, in turn, drew on Section 876 of the Restatement (Second) of Torts (1979), which deals with tortiously acting in concert with another resulting in injury to a third person. The central facet of the Supreme Court's *Reynolds* decision offers an important shield for lawyers who advise fiduciaries. At the same time, the Supreme Court's reaffirmation of *Granewich* means that lawyers must still proceed with caution in many circumstances in which they may be drawn out of the protective confines of the attorney-client relationship.

In this article, we'll look at five aspects of lawyer liability for assisting in a breach of fiduciary duty. First, we'll briefly review Section 876. Second, we'll examine the *Granewich* decision. Third, we'll look at the Court of Appeals' decision in *Reynolds*. Fourth, we'll contrast that with the Supreme Court's decision in *Reynolds*.

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Lawyer Liability
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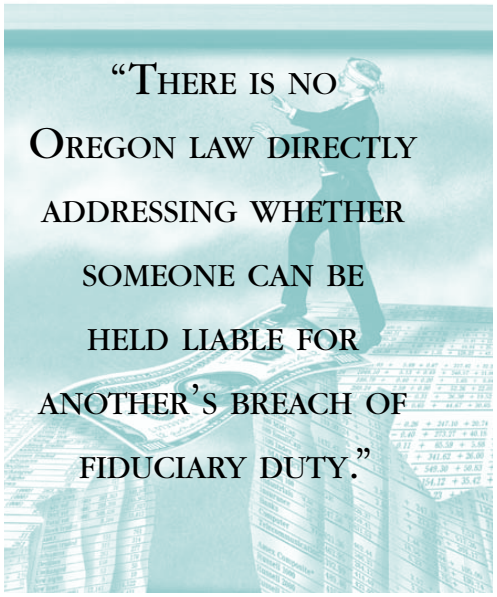
Finally, we'll discuss what lawyers can do to protect themselves from liability under *Granewich*.

Section 876

Section 876 isn't aimed at lawyers. Rather, it sets out three broad categories where someone acting in concert with another can be liable for resulting harm to a third person:

> "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."

The Supreme Court in *Granewich* found that prior Oregon case law recognized each element of Section 876 and noted that "to state that this court recognizes section 876 as reflecting the common law of Oregon breaks no new ground."[1] The Supreme Court went on to "conclude that persons acting in concert may be liable jointly for one another's torts under any one of the three theories identified in *Restatement* section 876."[2]



Depending on the circumstances, subsections (a) and (c) can create risks for lawyers. But, subsection (b) poses the greatest practical risk to lawyers because it potentially creates liability to a *nonclient* for advice and other legal work. *Granewich* and *Reynolds* both focused on subsection (b).

Granewich

Granewich involved a "minority squeeze out." Granewich and two business associates, Harding and Alexander-Hergert, formed a closely held financial corporation in 1992. All three were directors, officers and employees of the company and each owned one-third of its shares. About a year later, Harding and Alexander-Hergert had a falling-out with Granewich and began planning to remove him from the company. At that point, they hired a law firm to represent the company. The complaint alleged, however, that the law firm soon exceeded this neutral role as corporate counsel and began to advise and assist Harding and Alexander-Hergert individually in their efforts to oust Granewich by amending the company's bylaws and calling special meetings that resulted in Granewich's removal.

After he was forced out, Granewich sued his fellow owners, the corporation and the lawyers. The two other owners and the corporation settled, leaving only the lawyers. The charge against them was that they allegedly assisted in the two majority owner-directors in breaching *their* fiduciary duties to Granewich. The trial court dismissed on the pleadings and the Court of Appeals affirmed, holding that if the lawyers had no direct fiduciary duty to Granewich they could not be vicariously liable for the majority owner-directors' asserted breach. The Supreme Court reversed.

Relying on Section 876, the Supreme Court found that the complaint stated a claim against the lawyers:

> "There is no Oregon law directly addressing whether someone can be held liable for another's breach of fiduciary duty. Legal authorities, however, virtually are unanimous in expressing the proposition that one who knowingly aids another in the breach of a fiduciary duty is liable to the one harmed thereby. **That principle readily extends to lawyers."**

329 Or at 57 (emphasis added; footnotes omitted).

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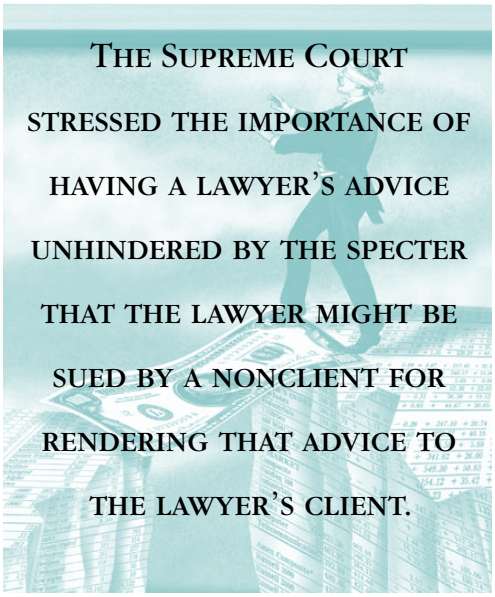
Reynolds at the Court of Appeals

Reynolds was painted against the backdrop of a real estate joint venture. Reynolds and Schrock purchased two parcels—one was commercial timber and the other was recreational. They had a falling-out and later entered into a settlement agreement to wind-up the joint venture. Under the settlement, Reynolds conveyed his interest in the recreational parcel to Schrock and, in return, Reynolds was to receive all proceeds from the sale of the timber. Reynolds had invested $500,000 in the joint venture by that point. To make Reynolds whole, the settlement provided that if the timber sale did not net him at least $500,000, Schrock would pay Reynolds any deficiency and Reynolds would have a lien on the recreational parcel to secure the deficiency.

After Reynolds had deeded his interest in the recreational parcel to Schrock, Schrock asked her lawyer if the settlement agreement required her to keep the recreational property pending the timber sale. Schrock's lawyer concluded that the settlement agreement contained no such obligation and advised Schrock accordingly. Schrock then sold the recreational parcel with the lawyer's assistance. Schrock later prevented the timber sale—leaving Reynolds without either his interest in the recreational property or his share of the timber sale proceeds.

Reynolds sued Schrock. Reynolds framed the primary claim against Schrock as breach of fiduciary duty. He argued that Schrock had a fiduciary duty to wind-up the joint venture as contemplated by the settlement agreement and that her failure to do so—notwithstanding the apparent loop-hole in the settlement agreement allowing the sale of recreational property—constituted a breach of that duty. Reynolds also sued Schrock's lawyer. Reynolds did not contend that Schrock's lawyer had an independent fiduciary duty to him. Rather, he argued that the lawyer was jointly liable with Schrock for the breach of Schrock's fiduciary duty to Reynolds by providing the advice and assistance in implementing that advice to Schrock. Schrock settled with Reynolds. Her lawyer moved for summary judgment, which the trial court granted. The Court of Appeals reversed.



Relying principally on Section 876 and *Granewich*, the Court of Appeals concluded that a lawyer advising a client to act contrary to a fiduciary duty may be liable to a nonclient to whom that duty is owed *even if* the act would otherwise be permitted by an associated contract: "[I]f the attorney knows that the fiduciary relationship imposes a higher standard of conduct than the agreement, then the attorney who advises the client that he or she may do an act that the contract permits but that is incompatible with the fiduciary relationship may be liable for the breach of fiduciary duty."[3]

Reynolds at the Supreme Court

In reversing the Court of Appeals, the Supreme Court wove together three primary threads.

First, the Supreme Court distinguished *Granewich* by noting that the law firm there had exceeded its role as corporate counsel and began offering its advice and assistance to the two majority shareholders who were not its clients.

Second, the Supreme Court recognized a privilege against joint liability for a lawyer assisting in a client's breach of fiduciary duty. The Supreme Court found that both Restatement Section 890 ("One who otherwise would be liable for a tort is not liable if he acts in pursuance of and within the limits of a privilege[.]") and prior Oregon case law suggested that in some narrow circumstances a shield from joint liability should be recognized to vindicate important public policy goals. It then found that protection of the lawyer-client relationship was one such goal. In particular, the Supreme Court stressed the importance of having a lawyer's advice unhindered by the specter that the lawyer might be sued by a nonclient for rendering that advice to the lawyer's client. Therefore, the Supreme Court created a limited shield against liability in this circumstance:

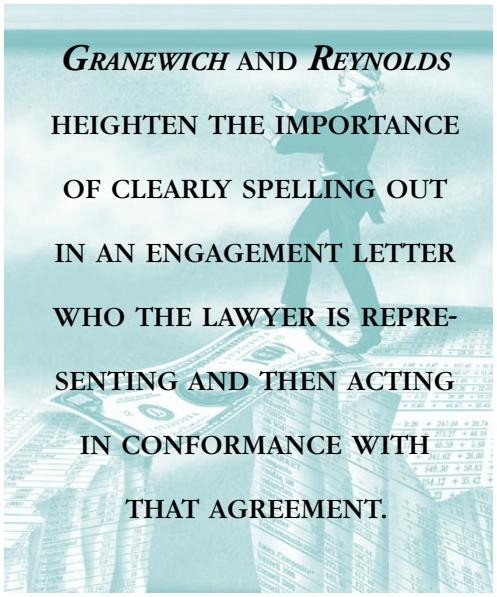
> "We extend those well-recognized principles to a context that we have not previously considered and hold that a lawyer acting on behalf of a

Please continue on next page

client and within the scope of the lawyer-client relationship is protected by such a privilege and is not liable for assisting the client in conduct that breaches the client's fiduciary duty to a third party. Accordingly, for a third party to hold a lawyer liable for substantially assisting in a client's breach of fiduciary duty, the third party must prove that the lawyer acted outside the scope of the lawyer-client relationship." 2006 WL 2578330 at *7.

Third, the Supreme Court outlined several exceptions to the shield. In doing so, it focused on situations where the lawyer is acting outside the lawyer-client relationship, is acting contrary to the client's interests or is otherwise advising the client on future unlawful or fraudulent conduct:

> "[T]he rule protects lawyers only for actions of the kind that permissibly may be taken by lawyers in the course of representing their clients. It does not protect lawyer conduct that is unrelated to the representation of a client, even if the conduct involves a person who is a client. Because such unrelated conduct is, by definition, outside the scope of the lawyer-client relationship, no important public interest would be served by extending the qualified privilege to cover it. . . For the same reason, the rule does not protect lawyers who are representing clients but who act only in their own self-interest and contrary to their clients' interest. Similarly, this court would consider actions by a lawyer that fall within the 'crime or fraud' exception to the lawyer-client privilege, OEC 503(4)(a), and Rule of Professional Conduct 1.6(b)(1), to be outside the lawyer-client relationship when evaluating whether a lawyer's conduct is protected." *Id*. (Citation omitted.)[4]



Lessening the Continued Risks Under *Granewich*

Although the Supreme Court's decision in *Reynolds* creates a shield when advising fiduciaries, the Supreme Court's reliance on *Granewich* underscores that the risks identified in that more common situation remain. Lawyers advising closely held corporations, family groups, partnerships and other joint ventures are often put in situations which invite them to step beyond their role as lawyers for the entities involved to give advice to individual shareholders, family members or partners as was the case in *Granewich*. Under *Reynolds*, they would not have the protective shield of privilege for advice beyond their clients.

Granewich and *Reynolds* heighten the importance of clearly spelling out in an engagement letter who the lawyer is representing and then acting in conformance with that agreement. In situations like *Granewich*, if a law firm confines its role to entity counsel only it will lessen the risk of being accused later of having "taken sides" and, in doing so, assisting one camp in an internal dispute in breaching fiduciary duties to the other.[5]

Summing Up

Reynolds is a very important decision for lawyers and law firms. In taking comfort from *Reynolds*, however, law firms need to continue to keep *Granewich*'s cautionary tale in mind. ❐

(Endnotes)

1 329 Or at 54.

2 *Id.* at 55.

3 197 Or App at 577.

4 This approach is consistent with OSB Formal Ethics Opinion 2005-92, which concludes that a lawyer can generally advise a client to breach a contract as long as the conduct suggested does not constitute fraud or is otherwise unlawful.

5 RPC 1.13 deals specifically with entity representation.

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In denying her claim for a "continuing violation" the Court stated:

> "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. *It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue*, but separately considered, it is merely an unfortunate event in history which has no present legal consequences."

United Airlines, *supra,* 431 US at 558.

It was this passage, Stride and Sortun argue, that inadvertently created a rule that acts of discrimination directed at other employees were admissible in individual discrimination cases. Prior to 2002, they argue, such evidence was generally admitted only in cases alleging a "continuing violation" or a "hostile workplace." They contend that a statement in a concurring opinion by Judge Thomas about "background evidence" in *National Railroad Passenger Corp v Morgan,* 531 US 101 (2002) led the circuit and district courts to admit this evidence in individual discrimination cases even when there is no allegation of a continuing violation or a hostile workplace. They conclude that admitting such background evidence of discrimination in an individual discrimination case effectively allows a plaintiff to admit propensity evidence to prove that an employer acted in conformity therewith. This, they say, results in employers being unfairly tried based upon character evidence, that is, what they think and believe rather than what they did. They claim that the circuit and district courts have admitted such evidence so pervasively that the courts have effectively swallowed the rules under FRE 404 and 403 in employment cases.

> ***"It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."***

Initially, I take issue with Stride and Sortun's analysis of the historical background for the admissibility of evidence of an employer's acts of discrimination directed at employees other than the plaintiff in an individual discrimination case. I don't believe that the admissibility of this evidence arises from *dictum* in the *Evans* case and I don't believe that there has been marked change in the admissibility of this evidence due to either *Evans* or *National Railroad Passenger Corp*.

The reason that evidence of an employer's acts of discrimination directed at employees other than the plaintiff is admissible in a discrimination case is because the evidence is relevant to the central inquiry in a Title VII case – the employer's state of mind with respect to members of the protected class.

There are but two elements to a Title VII claim – one refers to an employer's conduct and the other refers to the employer's state of mind. The two elements are: (1) the employer took adverse action against the plaintiff; and (2) the plaintiff's membership in a protected class was a motivating factor in the employment decision. See, Ninth Circuit Model Civil Jury Instructions, No. 12.1C.

The Supreme Court has recognized that the second element of a discrimination claim is a question of fact concerning the employer's "state of mind":

> "All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes….The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago:
>
> > "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."

US Postal Service Bd. Of Gov. v Aikens, 460 US 711, 716 (1983).

The motive or intent element of a claim of discrimination focuses broadly on the employer's motive and intent with respect to the protected class of individuals of which the plaintiff is a member, not narrowly just on the individual plaintiff. The Supreme Court has described the focus of the inquiry in a Title VII case as:

> "The central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'"

Furnco Construction Corp v Waters, 438

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US 567, 577 (1978) *quoting from Teamsters v United States,* 431 US 324, 335 n. 15 (1977).

The evidence that is admissible to prove the employer's state of mind is evidence consistent with this "central focus of the inquiry." Thus, both the employer and the employee may offer evidence of how the employer treats members of the protected class as well as employees who are not members of the protected class. The purpose of admitting such evidence is to prove the employer's intent or motive (or lack of intent and motive) with respect to the protected class of which the plaintiff is a member.

For example, the classic method of proving an employer's intent to discriminate against an individual plaintiff is through comparative evidence of discrimination, that is, proof that the employer treats others who are not members of the protected class differently from the plaintiff. In the seminal case of *McDonnell Douglas v Green*, 411 US 792 (1973), the Supreme Court examined one method of proving an employer's discriminatory intent in a case in which an employer refused to hire an African American employee who was arrested for participating in a protest at the employer's workplace. The Supreme Court held that the employer's reason for failing to hire the plaintiff was relevant. Further, the Court held that the admissible evidence was not limited to the employer's stated reason for the termination. Especially relevant evidence would include evidence that white employees engaged in acts of comparable seriousness against the employer and were retained in employment or re-hired. *McDonnell Douglas, supra,* 411 US at 804.

In *Furnco Construction Corp. v Waters*, 438 US 567 (1978), the Supreme Court considered whether statistical evidence that the employer's work force was *racially balanced* was admissible to disprove discriminatory intent in an individual discrimination case. The Court concluded the statistical evidence was admissible describing the relevance of such evidence as follows:

> "A *McDonnell Douglas prima facie* showing is not the equivalent of a factual finding of discrimination, however. Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations. When the *prima facie* showing is understood in this manner, the employer must be allowed some latitude to introduce evidence which bears on his motive. Proof that his work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided. We cannot say that such proof would have absolutely no probative value in determining whether the otherwise unexplained rejection of the minority applicants was discriminatorily motivated. Thus, although we agree with the Court of Appeals that in this case such proof neither was nor could have been sufficient to *conclusively* demonstrate that Furnco's actions were not discriminatorily motivated, the District Court was entitled to *consider* the racial mix of the work force when trying to make the determination as to motivation."

Furnco Constr Corp., supra, 438 US at 580.

Thus, both the employer and the employee may offer evidence of how the employer treats members of the protected class as well as employees who are not members of the protected class.

It should be noted that evidence of the statistical composition of the employer's workforce is nothing more than a statistical summary of whether the employer does or does not employ other members of the protected class. Such statistical evidence has no focus specifically on the employer's conduct with respect to the plaintiff. Further, evidence of how the employer treats employees who are not members of the protected class can be argued to be nothing more than character evidence.

If the focus of the intent inquiry was restricted narrowly to the employer's intent with respect to the plaintiff (as Stride and Sortun appear to argue), rather than to the employer's intent and motive with respect to the protected class of which plaintiff is a member, none of the statistical evidence or comparative evidence described above would be admissible in an individual case of discrimination. Further, under Stride and Sortun's approach all of the above evidence would be considered character or propensity evidence offered to prove the employer acted in conformity therewith.

The Supreme Court's *dictum* in *United Airlines v Evans* came after decision of *McDonnell Douglas*, and is nothing more

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than a logical application of the rules of evidence in employment discrimination cases to determine whether time-barred acts of discrimination occurring prior to the time of the incidents are evidence of a discriminatory intent.

Thus, as demonstrated above, *dictum* in *United Airlines v Evans* is not the source of the rule admitting evidence of an employer's acts of discrimination against other employees. Rather, this evidence is admissible because of the careful application of well-settled definitions of the central focus of the inquiry in a discrimination claim.

Stride and Sortun complain that the courts have improperly applied FRE 404 to allow the exception to the character evidence rule to swallow the rule. However, the rule of FRE 404 provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident…"

Since the central focus of the inquiry in a discrimination case is whether the employer's intent or motive is to "[treat]… some people less favorably than others" because of their protected class and the rule under FRE 404 expressly permits the use of evidence of "other wrongs" for the purpose of proving motive and intent, it is difficult to understand how an employer's discriminatory acts directed at employees other than the plaintiff would be inadmissible character evidence rather than proper evidence of motive and intent.

While Stride and Sortun paint a picture of a judicial system out of control freely admitting evidence of an employer's discriminatory acts directed at other employees, quite the contrary is true. In fact the federal courts have used FRE 403 to control the admissibility of such evidence just like any other relevant evidence. Thus, courts routinely employ FRE 403 to weigh the relevance of evidence of an employer's acts of discrimination directed against other employees against the potential for unfair prejudice, confusion of the issues or waste of time.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

Under FRE 403, the federal courts have created the "stray comments" doctrine which excludes evidence of discriminatory comments remote in time or made by persons outside of the decision-making chain of command for the challenged employment decision. *Nesbit v Pepsico, Inc.*, 994 F2d 703 (9th Cir 1993). The courts exclude under FRE 403 evidence of discrimination directed at employees other than the plaintiff on the grounds that it would require a "mini-trial" unnecessarily confusing the issues or lengthening the trial. *Tennison v Circus Circus Enterprises, Inc.*, 244 F3d 684, 688 (9th Cir 2001)(holding trial court properly excluded evidence that supervisor sexually harassed two employees other than plaintiff on grounds that it would cause a mini-trial.). Sometimes the court excludes this kind of evidence if the trial court is simply unpersuaded that force of the plaintiff's evidence proves any act of unlawful discrimination. *Beachy v Boise Cascade Corp.*, 191 F3d 1010, 1015 (9th Cir 1999)(holding trial court properly excluded, in a disability discrimination case, evidence that other employees were disciplined for medical problems because the testimony did not show conduct that was unlawful and did not show the employer was hostile to employees with medical problems).

While Stride and Sortun allege that the courts do not carefully evaluate the admissibility under FRE 403 and 404 of evidence that an employer has discriminated against other employees, quite the contrary is true. In *Heyne v Caruso*, 69 F3d 1475, 1480-1481 (9th Cir 1995), for example, the Ninth Circuit provided a careful analysis both of the relevant force of this category of evidence as well as the potential for unfair prejudice arising from admitting such evidence. The court stated:

> "There is no unfair prejudice, however, if the jury were to believe that an employer's sexual harassment of other female employees made it more likely that an employer viewed his female workers as sexual objects, and that, in turn, convinced the jury that an employer was more likely to fire an employee in retaliation for her refusal of his sexual advances. There is a direct link between the issue before the jury – the employer's motive behind the firing of the plaintiff – and the factor on which the jury's decision is based – the employer's harassment of other female employees."

In short, I can with some degree of confidence report there is no exception swallowing either Rule 404 or 403 in employment cases. ❐

Recent Significant Oregon Cases

Stephen K. Bushong
Department of Justice

I. Claims and Defenses

A. Negligence claims.

***Bailey v. Lewis Farm, Inc.*, 207 Or App 112 (2006).**

In *Bailey,* the Court of Appeals debated whether plaintiff pleaded a viable negligence claim under the "general foreseeability" analysis of *Fazzolari v. Portland School Dist. No. 1J,* 303 Or 1 (1987); the debate led to an affirmance by an equally divided court. Plaintiff was injured in an auto accident when the rear tires fell off a Kenworth tractor-trailer unit traveling in the opposite direction. Plaintiff sued the owner of the Kenworth, its manufacturer, and May Trucking Company (a prior owner). Plaintiff alleged that May Trucking negligently failed to maintain the vehicle's rear axle assembly during its ownership. Judge Ortega, writing a concurring opinion joined by Judges Brewer, Edmonds, Landau and Linder, concluded that the negligence claim was properly dismissed under ORCP 21 A(8) because plaintiff failed to allege facts that would support a finding that his injuries, "occurring a year after May last exercised any control over the Kenworth and while the Kenworth was in the possession of an owner with whom May had had no contact, were a reasonably foreseeable consequence of May's alleged ongoing failure to maintain the Kenworth during May's prior period of ownership." 207 Or App at 123.

Stephen K. Bushong

Judges Haselton, Armstrong, Wollheim, Schuman and Rosenblum dissented, writing 3 separate dissenting opinions. Judge Haselton wrote that "there can be no question that the accident that injured plaintiff was within the reasonably foreseeable scope of the risk created by [May Trucking's] conduct." *Id.* at 125. Judge Armstrong wrote separately "to elaborate further on the concurrence's departure from the established negligence law of this state[.]" *Id.* at 128. In Judge Armstrong's view, the concurrence "very rapidly departs from the *Fazzolari* analysis", taking the court to "a critical juncture at which [it] must decide whether to continue to apply the *Fazzolari* analysis or to pay only lip service to it and cloak otherwise prohibited free-wheeling judicial policy declarations and thinly disguised value judgments in the language of the *Fazzolari* framework." *Id.* Judge Rosenblum wrote separately to explain why, in her view, the allegations of the complaint were sufficient to state "all that is required to state a claim for negligence under the principles announced in *Fazzolari.*" *Id.* at 138.

***Boothby v. D.R. Johnson Lumber Co.*, 341 Or 35 (2006).**

The Supreme Court held in *Boothby* that a lumber company could not be liable on a common-law negligence claim arising out of a logging accident. The lumber company (Johnson Lumber) owned the timber rights to a tract of land and contracted with an independent contractor (Intermountain) to harvest the timber. Plaintiff's husband (Boothby),

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an Intermountain employee, was killed when he was run over by a log loader at the timber site. The jury found that Johnson Lumber was 67 percent at fault on the negligence claim and awarded more than $4 million in economic and noneconomic damages. The Court of Appeals reversed, holding that no reasonable juror could find that Johnson Lumber was responsible for the acts and omissions that led to Boothby's death. The Supreme Court affirmed, rejecting plaintiff's argument that Johnson Lumber's failure to address unsafe conditions at the job site "created a foreseeable risk of the kind of harm that befell Boothby." 341 Or at 45. The court, citing *Fazzolari*, explained that "liability in negligence does not extend to every failure to prevent a foreseeable injury[.]" *Id.* at 46. Here, "even if the harm resulting from Intermountain's operation of the log loader was foreseeable, Johnson Lumber neither had any right to control nor exercised any actual control over the way that Intermountain operated the log loader." *Id.* Thus, the court applied the general rule that "an owner ordinarily is not liable in negligence for its independent contractor's acts and omissions[.]" *Id.* at 47. An exception making an owner who provides an unsafe work site liable to an independent contractor's employees did not apply because there was no evidence that any defect in the tract of land "led to the accident that resulted in Boothby's death[,]" so "the basis for finding a duty to an independent contractor's employee…is not present here[.]" *Id.*

B. Constitutional claims.

Juarez v. Windsor Rock Products, Inc., 341 Or 160 (2006).

Clarke v. OHSU, 206 Or App 610 (2006).

In *Juarez*, the Supreme Court held that plaintiffs' wrongful death claim did not allege an interest protected by the remedy clause of Article I, section 10, of the Oregon Constitution. The court concluded that plaintiffs' "loss of aspects of their relationship with decedent…is not a loss of any property interest for which Article I, section 10, guarantees a remedy." 341 Or at 173. In *Clarke*, the Court of Appeals held that (1) the damages limitation set forth in the Oregon Tort Claims Act, ORS 30.270, as applied to plaintiffs' claim against OHSU, did not violate Article I, section 10, of the Oregon Constitution; and (2) the substitution of OHSU for the individual defendants pursuant to ORS 30.265(1) violated Article I, section 10, in this case.

Nakashima v. Board of Education, 206 Or App 568 (2006).

Estate of Michelle Schwarz v. Philip Morris Inc., 206 Or App 20 (2006).

In *Nakashima*, the Court of Appeals rejected an attempt by the Oregon School Activities Association (OSAA) to challenge the constitutionality of a statute (ORS 659.850) that prohibits discrimination in public education programs. The court explained that, to the extent OSAA was bringing a facial challenge to the statute, "such a challenge would founder against OSAA's burden to demonstrate that the statute cannot be constitutionally applied *under any circumstances.*" 206 Or App at 573 (emphasis in original). OSAA's "as-applied" argument that "requiring it to engage in a *particular* accommodation may result in a violation of the Establishment Clause…is premature[.]" *Id.* In *Schwarz*, the Supreme Court vacated a $100 million punitive damage award because the trial court failed to instruct the jury that it could not punish defendant for the impact of its conduct on individuals in other states, as required by the Due Process Clause. 206 Or App at 48-57.

C. Other claims.

Brown v. Board of Education, 207 Or App 163 (2006).

Carvalho v. Wolfe, 207 Or App 175 (2006).

Berg v. Hirschy, 206 Or App 472 (2006)

In *Brown*, the Court of Appeals affirmed a directed verdict in favor of defendants on a wrongful discharge claim. Plaintiffs contended that they were wrongfully discharged for perfoming an important public duty in investigating the qualifications of a public safety officer hired by Clackamas Community College. Plaintiffs argued that they had a public duty to determine whether the public safety officer had committed the crime of impersonating a police officer. The court rejected that argument, finding that "the actions that led to [plaintiffs'] terminations were not related to investigating the criminal activity that they identify." 207 Or App at 170.

* * *

In *Carvalho*, the Court of Appeals held, in deciding an issue of first impression in Oregon, that claims for trespass and nuisance based on intrusion of tree roots from neighboring lands were properly dismissed by the trial court. Plaintiffs had alleged that tree roots from their neighbor's property encroached on their land, damaging the foundation of their home. The court of appeals noted that courts in some jurisdictions have concluded that tree roots or branches intruding onto neighboring lands may be a trespass or nuisance, while courts in other states have rejected liability under those theories. 207 Or App at 178. The court concluded that, because plaintiffs "have not alleged that defendants acted with any level of fault or that they were engaged in an ultrahazardous activity[,]" they "essentially seek to hold defendants strictly liable for the damage

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that the trees caused." *Id.* at 181. Those claims failed in Oregon because "neither trespass nor nuisance provides for strict liability except for an ultrahazardous activity." *Id.*

* * *

In *Berg*, the Court of Appeals affirmed the dismissal of a declaratory judgment action at the pleading stage because the case did not present a justiciable controversy. Plaintiffs retained the defendant attorney to give them advice about the tax consequences of converting their company from a subchapter S corporation to a limited liability company. Plaintiffs sought a declaration that the attorney's advice was negligent, thus exposing them to liability for future taxes or, in the alternative, that their malpractice claim against the attorney had not yet accrued for statute of limitations purposes. The court concluded, however, that the claims were not justiciable because they "depend on the occurrence of future events that may or may not happen." 206 Or App at 475. The negligence issue was not justiciable because plaintiffs "have yet to incur any damages; no tax authority has imposed on them any additional tax liability, and it is impossible to know when or even if they will incur such liability." *Id.* at 476. And "the dispute between the parties regarding accrual of plaintiffs' malpractice claim will become actual and therefore justiciable only if plaintiffs file a negligence action and defendants raise a limitations defense." *Id.* at 477.

D. Defenses.

Lincoln Loan Co. v. City of Portland, 340 Or 613 (2006).

Osborne v. Nottley, 206 Or App 201 (2006).

In *Lincoln Loan*, the Supreme Court held that plaintiffs' declaratory judgment action challenging the constitutionality of the procedure by which the voters adopted Article VII (Amended) of the Oregon Constitution in 1910 is barred by claim preclusion. Lincoln Loan argued that the Court of Appeals had no authority to vacate a judgment in favor of Lincoln Loan in a prior case "on the ground that the Court of Appeals does not lawfully exist[.]" 340 Or at 615. The Supreme Court held that plaintiffs' claim is barred by claim preclusion because its challenges to the validity of Article VII (Amended) and the establishment of the Court of Appeals pursuant to that amendment "could have been raised and litigated in the prior case." *Id.* at 620. And in *Osborne*, the Court of Appeals held that a claim for alleged breach of oral agreements to sell real property and a mobile home were barred by the unclean hands doctrine. The court explained that a conveyance "designed for the purpose of placing property beyond the reach of creditors constitutes inequitable conduct sufficient to bar relief under the unclean hands doctrine." 206 Or App at 205.

II. Procedure.

Asato v. Dunn, 206 Or App 753 (2006).

State ex rel Crown Investment v. City of Bend, 206 Or App 453 (2006).

In *Asato*, the Court of Appeals held that the trial court did not abuse its discretion in awarding an enhanced prevailing party fee because there was evidence that plaintiffs "had willfully disobeyed the order compelling production" of requested documents. 206 Or App at 753. In *Crown Investment*, the Court of Appeals affirmed a $100,000 remedial sanction entered by the trial court after plaintiff (Crown) demolished a historic building without a permit and without waiting for the court to decide Crown's pending mandamus petition to compel the City of Bend to issue a permit. The court held that the remedial sanction was authorized by ORS 33.015(2) because Crown's "deliberate decision to execute an action, the legality of which was still pending in court, was an obstruction of the court's authority and process. Crown committed a flagrant contempt. In doing so, it injured the city." 206 Or App at 460.

* * *

Christensen v. Cober, 206 Or App 719 (2006).

Quail Hollow West v. Brownstone Quail Hollow, 206 Or App 321 (2006).

In *Christensen*, the Court of Appeals held that ORCP 59 C(1) does not authorize a trial court "to withhold from a jury's use in deliberations any exhibit—except a deposition—that was received in evidence, whether or not the exhibit was described as having been received for demonstrative purposes." 206 Or App at 731. And in *Quail Hollow*, the Court of Appeals held that claims by a homeowners association against a developer for defective construction were properly dismissed because the association was not the real party in interest under ORCP 26 A. The court found that the association was not within the class of persons who would be either "benefited or injured by the judgment" or statutorily authorized to bring an action, as required to qualify as the real party in interest. 206 Or App at 328. ❐

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