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Recent Significant Oregon Cases

by The Honorable Stephen K. Bushong
Multnomah County Circuit Court

Hon. Stephen K. Bushiong

Claims and Defenses

Thompson v. Portland Adventist Medical Center, 309 Or App 118 (2021)

A four-day-old infant accidentally suffocated while sleeping in his mother's bed at the hospital maternity ward. About five years later, the mother, plaintiff Monica Thompson, acting as representative of the infant's estate, brought this negligence action against the hospital and an unnamed nurse. Monica and the infant's father, plaintiff Graham Thompson, also asserted their own claims for negligent infliction of emotional distress (NIED). The trial court granted defendant's motion for summary judgment, concluding that all claims were barred by the statute of limitations. The Court of Appeals reversed in part. The court concluded that the evidence in the record, viewed in the light most favorable to plaintiffs, "contains a genuine issue of material fact about whether Monica had a disabling mental condition that tolled the statute of limitations pursuant to ORS 12.160." 309 Or App at 126. The court therefore reversed on Monica's NIED claim, and otherwise affirmed. The court explained that Monica's claim as representative of the infant's estate was time barred because ORS 30.075's three-year limitations period had already elapsed by the time Monica was appointed personal representative of the estate, so "no claim remained for Monica's mental condition to toll." *Id.* at 120 n. 2. Graham's NIED claim "was extinguished by the running of ORS 12.110(4)'s five-year statute of ultimate repose." *Id.*

Jennewein v. MCI Metro Access Transmission Services, 308 Or App 396 (2021)

Plaintiff injured her head when she walked into a cabinet affixed to the wall in a hallway of the Apple Store where she worked. Despite a work order specifying that the cabinet be installed nine feet above the floor, defendants installed it one or two feet above the floor. Unbeknownst to defendants, a third party later relocated the cabinet to five to six feet above the floor. The trial court granted defendants' motion for summary judgment, concluding that plaintiff's head injury did not foreseeably follow from defendants' conduct of placing the cabinet at knee level. The Court of Appeals reversed. On the issue of causation, the court concluded that a reasonable juror could conclude that defendants' role in the initial installation of the cabinet was a "substantial factor" in causing the injury because, "[i]f not for the negligent installation in the walkway, the cabinet would not have been relocated to the place where plaintiff was injured." 308 Or App at 401. On the issue of foreseeability, the court explained that "the harm contemplated by plaintiff's allegations and evidence is not specific to a body part based

on the original installation." *Id.* at 406. The court concluded that there was sufficient evidence to create a genuine issue of material fact that "someone could collide with the cabinet if it were not placed outside the walkway[.]" *Id.* at 406 -07.

Stanton v. Medellin, 308 Or App 376 (2021)

Landlord brought this forcible entry and detainer (FED) action to terminate defendant's tenancy without cause under the Oregon Residential Landlord Tenant Act (ORLTA), ORS 90.427 (2017), *amended* by Senate Bill (SB) 608 (2019). The version of the statute that was in effect at the time of the trial court's decision allowed for "no-cause" evictions, though the lease provided that defendant's tenancy could only be terminated for nonpayment of rent or failure to comply with the rental agreement. The Court of Appeals affirmed the trial court's ruling in tenant's favor, concluding that "neither the ORLTA nor public policy prohibit a landlord from bargaining away the landlord's ability to terminate a tenancy for reasons that the landlord would otherwise be entitled to do under the ORLTA." 308 Or App at 388.

Sanders v. Vigor Fab, LLC, 308 Or App 282 (2020)

Plaintiff was injured while trimming a steel deckplate for a barge being built by defendant Vigor Fab at a shipyard facility. Plaintiff was employed by Vigor Fab's sister company, Vigor Marine, at the time of the injury. Vigor Fab and Vigor Marine were both wholly-owned subsidiaries of Vigor Industrial. Plaintiff filed a workers' compensation claim against his employer, Vigor Marine, under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 USC §§901-950, and filed this civil action against Vigor Fab for negligence. The trial court granted Vigor Fab's motion for summary judgment, concluding that Vigor Fab and Vigor Marine were functionally integrated and should be treated as a single entity for purposes of the LHWCA. As a result, plaintiff's negligence claim was barred by the exclusive remedy provision in section 905 of the LHWCA. The Court of Appeals affirmed. The court explained that the test for finding two related companies a "single entity" for purposes of the LHWCA's exclusive remedy provision was not the same as the test for "piercing the corporate veil" under Oregon law. 308 Or App at 290. Applying the "single entity" test articulated in *Claudio v. United States*, 907 F Supp 581, 586 -89 (EDNY 1995), the court concluded that "Vigor Fab and Vigor Marine are a single entity for LHWCA purposes. No reasonable jury could find otherwise." 308 Or App at 294.

McClusky v. City of North Bend, 308 Or App 138 (2020)

Plaintiff sued the City of North Bend for employment discrimination and retaliation after his employment as a manager for the Coos County Library Service District (CCLSD) was terminated. The trial court granted North Bend's motion for summary judgment on the grounds that it was not plaintiff's "employer" as defined in ORS 659A.001(4)(a). The Court of Appeals reversed. The court noted that the statute defines "employer" as one who reserves the "right to control" the means by which services are or will be performed. 308 Or App at 142. The court further observed that it had previously identified "four nonexclusive factors in assessing the right to control: '(1) direct evidence of the right to, or the exercise of, control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire.'" *Id.* at 142 -43, quoting *Oregon Country Fair v. Natl. Council on Comp. Ins.*, 129 Or App 73, 78 (1994). The court rejected North Bend's argument that there could only be one employer, because even assuming that "CCLSD possessed a right to control plaintiff, and even if CCLSD actually exercised control over plaintiff, neither point forecloses that North Bend also retained a right to control him." *Id.* at 144. The court concluded that the undisputed factual record in this case establishes that "North Bend reserved the right to control plaintiff and was his employer for purposes of ORS chapter 659A." *Id.* at 145.

Lopez v. Kilbourne, 307 Or App 301 (2020)

In this forcible entry and detainer (FED) action, the trial court awarded landlord possession of the residence based on tenant's nonpayment of rent. The trial court disregarded tenant's defense based on her tender of rent to landlord and then into the court, concluding that the defense was not available because tenant had been untruthful in her rental application, violating the duty of good faith imposed by the Oregon Residential Landlord Tenant Act (ORLTA). The Court of Appeals reversed. The court explained that "tenant's representation about her rental and income history in the rental application process was neither a duty nor a condition precedent to the exercise of her right to pay rent prior to termination of her lease or her right to pay rent into court under the ORLTA and, as such, the duty of good faith in ORS 90.130 did not apply." 307 Or App at 312. As a result, the trial court "erred in failing to consider tenant's tender-of-rent defense and in awarding possession to landlord." *Id.* at 313.

Rowden v. Hogan Woods, LLC, 306 Or App 658 (2020)

Plaintiffs lived and worked as property managers at apartments owned by defendant. Plaintiffs experienced health issues that they attributed to mold in the apartments. The Workers' Compensation Board (WCB) rejected their claim on the ground that they failed to prove the existence of an occupational disease related to their alleged work exposure. The trial court then granted defendant's motion for summary judgment, concluding that the WCB decision had preclusive effect, and that plaintiffs' efforts to pierce the corporate veil of defendant Hogan Woods, LLC, and hold its members liable was not ripe because there was not yet a judgment against the company. The Court of Appeals reversed. The court concluded that the trial court erred in granting summary judgment on the basis of issue preclusion because the record "does not establish as a matter of law that a finding of 'no exposure' was actually determined apart from the major contributing cause standard and was essential to the board's orders." 306 Or App at 672 -73 (emphasis in original). The court also rejected two alternative grounds for affirmance offered by defendant. First, the court rejected defendant's argument that summary judgment was appropriate on the claim under Oregon's Residential Landlord Tenant Act (ORLTA), concluding that defendant failed to meet its burden of proving that plaintiffs' right to occupy the premises was conditioned upon their employment arrangement (as required to fall within a statutory exception to the ORLTA). *Id.* at 674 -78. Second, the court rejected

defendant's argument that plaintiffs' claim under the Employer Liability Act (ELA) failed because working and breathing in an office is not "inherently dangerous" for purposes of the ELA. The court explained that the ELA claim "is not based on working and breathing in an office," and the record "does not present the type of 'clear case' for the court to assess the risk as a matter of law." *Id.* at 678. Finally, the court concluded that the "piercing the corporate veil" claim was ripe because the Uniform Fraudulent Transfer Act (UFTA), ORS 95.200 to 95.310, "recognizes a party's right to seek relief when a fraudulent transfer is made in the midst of dispute over the right to payment[.]" *Id.* at 684.

Rogowski v. Safeco Ins. Co., 306 Or App 505 (2020)

After a tenant sued plaintiff for damages due to exposures to degraded air quality and long-term carbon monoxide exposure and poisoning when the furnace's exhaust duct was plugged by debris, plaintiff tendered defense to Safeco, his liability insurance carrier. Safeco declined to provide a defense, citing a "pollutant exclusion" provision in the policy. The trial court granted plaintiff's motion for summary judgment. The Court of Appeals affirmed. The court explained that, "[b]ecause the complaint alleges conduct that is covered by the policy, and because at least one plausible interpretation of the policy's pollutant exclusion does not exclude that conduct, Safeco had a duty to defend Rogowski." 306 Or App at 515.

Procedure

Mathis v. St. Helens Auto Ctr., Inc., 367 Or 437 (2020)

Plaintiff brought this wage claim against his former employer, alleging that defendant failed to pay all wages that were due at termination. An arbitrator ruled in plaintiff's favor, but limited the amounts awarded as costs and attorney fees under ORS 652.200(2) because the amount of a pre-arbitration offer of judgment under ORCP 54 E exceeded the amount plaintiff ultimately recovered on his claims. A divided Court of Appeals affirmed; the Supreme Court reversed. The court concluded that "ORS 652.200(2)—which applies to a specific category of claim—is more particular than, and is paramount to, ORCP 54 E(3)[.]" 367 Or at 454 -55. The court explained that any need to limit the attorney fee award to an employee who unreasonably rejects a good faith offer "can be addressed on a case-by-case basis under ORS 20.075(2), but the 'reasonable' attorney fee required by ORS 652.200(2) cannot be categorically limited through ORCP 54 E(3)." *Id.* at 455.

C.R. v. Eugene School Dist. 4J, 308 Or App 773 (2021)

Plaintiff, a middle school student, brought defamation and other claims against the school district, alleging that district employees communicated false and defamatory statements that plaintiff had sexually harassed disabled younger students, that he was a "ringleader," and that he was a thief. The trial court granted the school district's special motion to strike the claims under ORS 31.150, Oregon's Anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute, concluding that the alleged tortious statements and conduct occurred during school disciplinary proceedings that were protected under ORS 31.150(2). The Court of Appeals reversed. The court first concluded that the trial court did not abuse its discretion in allowing defendant to file its motion beyond the 60-day statutory deadline to await resolution of an appeal in a related federal lawsuit. 308 Or App at 778. Next, on the merits, the court concluded that "defendant has not made a *prima facie* showing that plaintiff's claims arise out of conduct or statements made in or in connection with an issue under consideration in a proceeding within the protection of ORS 31.150(2)." *Id.* at 781 -82.

Simington Gardens, LLC v. Rock Ridge Farms, LLC, 308 Or App 661 (2021)

Defendant's cows escaped from their enclosure onto plaintiffs' field and trampled and defecated on a newly planted crop of organic salad plants. A jury awarded $26,564 in damages on plaintiff's trespass claims, which included a statutory "trespass to produce" claim under ORS 105.810. The jury attributed $11,000 in damages to plaintiff's loss of produce and found that defendant's employees injured the crop "casually/involuntarily," not "willfully." The trial court added an enhancement of $11,000 to "double" the trespass-to-produce award and awarded attorney fees to plaintiff. The Court of Appeals affirmed. The court explained that "the injury constitutes the trespass in the context of ORS 105.810 and ORS 105.815, and whether the plaintiff's damages are doubled or trebled will depend on whether that injury was willful." 308 Or App at 669. The court also found no abuse of discretion in awarding attorney fees under ORS 105.810(2). *Id.* at 671.

Stewart v. Albertson's, Inc., 308 Or App 464 (2021)

Plaintiffs brought this class-action lawsuit, alleging that defendants' supermarkets violated the Unlawful Trade Practices Act (UTPA) when they offered meat on a "buy one get one free" basis after inflating the regular price to pass on the cost of supposedly "free" products to consumers. The trial court granted defendant's motion to dismiss the damages claim under Oregon's unique "notice and cure" procedures in ORCP 32 H and I. The Court of Appeals reversed. The court rejected plaintiffs' argument that the proposed remedy was untimely because it was not presented as a prelitigation offer, concluding that plaintiffs "have not offered a persuasive argument to overcome the glaring textual omission of any requirement that the 'showing' under ORCP 32 I be of a prelitigation offer or that the requirements set out in ORCP 32 I 'exist' before the damages claims have been filed." 308 Or App at 475. On the merits, the court concluded that the trial court, in evaluating a class-action defendant's proposed remedy under ORCP 32 I, "must make a series of determinations." *Id.* at 487. It must (1) "consider the pleadings to determine the alleged wrong and the extent of available remedies under the substantive law that applies to that wrong" (*Id.*); (2) "consider the defendant's evidentiary showing about the remedy offered, including resolving any factual disputes in that regard" (*Id.*); and (3) "determine whether, in light of what the substantive law treats as available and just relief, the defendant's proposed cure is the appropriate compensation, correction, or remedy under the circumstances." *Id.* Here, the court concluded that, because defendant's cure "omitted the statutory damages the legislature has deemed nec-

essary to compensate for a knowing or reckless violation of the UTPA, it was not within the range of appropriate remedies for that alleged wrong[.]" *Id.* at 492.

Magno, LLC v. Bowden, 307 Or App 668 (2020)

The dispute in this case under ORS 18.235(1) and ORCP 71 B(1)(e) centered on whether a judgment arising out of a five-year commercial lease had been satisfied. The trial court determined that defendants' obligation to pay rent remained in effect for the duration of the lease, requiring defendants to make additional payments to fully satisfy the judgment. The Court of Appeals reversed, concluding that defendants' "obligation to pay 'rent' under the judgment terminated with the restitution of the premises on August 1, 2000. After defendants were no longer occupying the premises, there was no entitlement to rent or obligation to pay it." 307 Or App at 676 -77.

Nyland v. City of Portland, 307 Or App 348 (2020)

The trial court dismissed this declaratory judgment action, concluding that it lacked jurisdiction under *Bay River v. Envir. Quality Comm.*, 26 Or Ap 717 (1976), and the Administrative Procedures Act (APA), to determine whether an investigative subpoena issued by the City of Portland under ORS 200.065 was unreasonably broad and unduly burdensome. The Court of Appeals reversed, concluding that: (1) plaintiffs "have standing to seek a declaration under the declaratory judgment act" regarding the scope of the subpoena (307 Or App at 363); (2) under *Bay River*, the statute "does not divest the circuit court of jurisdiction to resolve that dispute" (*Id.*); and (3) "the APA generally and ORS 183.480(3) specifically do not apply to the city's subpoena." *Id.*

Rice v. State Farm Mutual Automobile Ins. Co., 307 Or App 238 (2020)

Plaintiff was injured in a motor-vehicle accident. Defendant insurer accepted coverage for uninsured motorist (UM) benefits and paid $44,736, the amount the insurance company believed to be undisputed. Plaintiff sued to recover the $55,264 remaining under her policy limit. Before trial, the case settled when defendant agreed to pay plaintiff the balance of the UM policy limit. The trial court declined to award plaintiff attorney fees, concluding that fees were not recoverable under the "safe-harbor" provision in ORS 742.061(3). The Court of Appeals affirmed, concluding that "nothing in ORS 742.061 allows a trial court to deprive the insurer of the statutory safe harbor based on a factual determination that the insurer acted unreasonably or in bad faith in contesting liability or damages or not reaching a settlement on those issues earlier." 307 Or App at 245.

Lincoln Loan Co. v. Estate of George Geppert, 307 Or App 213 (2020)

This case involved a dispute over the distribution of the proceeds of a foreclosure sale. After applying some of those proceeds to satisfy Lincoln Loan's money award, the trial court denied defendant's successor-in-interest's motion for distribution of the surplus funds. Instead, the trial court determined that the surplus funds should be held for the benefit of potential senior lienholders, whose rights were then at issue in a separate foreclosure case. The Court of Appeals reversed, concluding that, "under ORS 18.950(1), the trial court was required to enter an order providing for the delivery or conveyance of the proceeds of the foreclosure sale, and to do so in accordance with the proceeds recipients' respective interests" that had been adjudicated at the time the trial court was required to enter such an order. 307 Or App at 225.

Warren v. Smart Choice Payments, Inc., 306 Or App 634 (2020)

Plaintiff was hired by defendant to sell or lease credit card processing equipment and services to potential business customers, entering into a series of written employment/independent contractor agreements. After his employment was terminated, plaintiff sued to recover future commissions and residuals, at least some of which were allegedly owed under a 2008 agreement containing an arbitration clause. The trial court denied defendants' motion to compel arbitration, concluding that a 2009 agreement between the parties that did not require arbitration superseded the 2008 agreement. The Court of Appeals affirmed, concluding that, even though the 2009 agreement was not a fully integrated contract, the 2009 agreement "is in conflict with and supersedes the 2008 arbitration clause." 306 Or App at 643.

Evidence

Johnson v. Keiper, 308 Or App 672 (2021)

Plaintiff alleged in this medical malpractice case that defendants' negligence in performing spinal-fusion surgery—specifically, by failing to properly place the "pedicle screws" inserted during surgery—and in providing post-surgical diagnostics and care led to his loss of strength necessary to raise his left foot. The trial court excluded some of plaintiff's experts' testimony, concluding that they were not qualified to testify about the post-surgical standard of care. The trial court also granted defendants' motion for directed verdict, concluding that plaintiff's expert testimony was insufficient to establish causation of his injury. The Court of Appeals reversed. On the evidentiary issue, the court concluded that plaintiff's expert's "education, training, and extensive experience in neurosurgery and post-surgical care sufficiently qualified him to testify about what defendants should have communicated to plaintiff about the pedicle screw and whether Keiper should have been more personally involved with plaintiff's post-surgical care." 308 Or App at 687. The trial court erred in granting the directed verdict motion because "there is evidence in the record from which a jury could find that it was below the standard of care for defendants not to order appropriate imaging to rule out a misplaced pedicle screw as the source of the foot drop, and, had defendants identified and addressed the misplaced pedicle screw earlier, it was probable that plaintiff's condition would have improved." *Id.* at 683.

Scott v. Kesselring, 308 Or App 12 (2020)

Plaintiff was injured in a rear-end car accident. Defendant admitted liability but disputed the amount of damages claimed.

The trial court denied defendant's pretrial motion to exclude evidence that defendant was looking at her cellphone at the time of the accident. A jury awarded plaintiff $41,000 in economic damages and $200,000 in noneconomic damages. The Court of Appeals reversed and remanded for a new trial. The court explained that "the cellphone evidence is not relevant to the foreseeability of plaintiff's claimed injuries[.]" 308 Or App at 21. The court further noted that "the evidence that defendant used her cellphone had the potential to inflame the sympathies of the jury[.]" *Id.* at 23. Because of that potential and the large noneconomic damage award relative to the economic damages award, the court concluded that "there is some likelihood that the evidence had an effect on the jury's verdict, and, thus, the court's error in admitting that evidence substantially affected defendant's rights." *Id.*

Miscellaneous

Chernaik v. Brown, 367 Or 143 (2020)

Plaintiffs—concerned about the effects of climate change—contended that the public trust doctrine required the State of Oregon to act as trustee to protect various natural resources in Oregon from substantial impairment due to greenhouse gas emissions and the resultant climate change and ocean acidification. The Supreme Court declined to alter current law concerning the state's duty under the public trust doctrine, which "currently encompasses submerged and submersible lands underlying navigable waters and the navigable waters themselves." 367 Or at 169. Accordingly, the court did "not impose broad fiduciary duties on the state, akin to the duties of private trustees, that would require the state to protect public trust resources from effects of greenhouse gas emissions and consequent climate change." *Id.* at 170.

Harisay v. Clarno, 367 Or 116 (2020)

Defendant Secretary of State declined to certify for circulation an initiative petition that called for a federal constitutional convention under Article V of the United States Constitution. The Supreme Court affirmed, concluding that "the voters did not intend the initiative power reserved to the people under Article IV, section 1, of the Oregon Constitution, to extend beyond state lawmaking." 367 Or at 136.

Whitehead v. Clarno, 308 Or App 268 (2020)

Defendant Secretary of State determined that an initiative petition did not qualify for the 2016 ballot after disqualifying the signatures of electors whose voter registration status was determined to be "inactive." The trial court agreed with the Secretary of State. A divided panel of the Court of Appeals reversed, concluding that "the secretary's exclusion of signatures made by registered but inactive voters unconstitutionally deprived those electors of their right to participate in the initiative process." 308 Or App at 280.

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McNichols v. Dept. of Fish and Wildlife, 308 Or App 369 (2021)

Plaintiff—a long time Canby resident who uses a walking trail along a conservation easement—brought this action to challenge an agreement settling a dispute between the Oregon Department of Fish and Wildlife (ODFW) and Canby Development, LLC. The settlement allowed emergency vehicles to use the conservation easement to access a private subdivision to be developed by Canby Development. The trial court dismissed the case, concluding that plaintiff lacked standing under the Administrative Procedures Act (APA) and the Uniform Declaratory Judgments Act. The Court of Appeals affirmed, concluding that plaintiff lacks standing (1) under the APA because he "has not alleged facts that would allow for the nonspeculative inference that the emergency vehicle use allowed under the settlement agreement will alter the character of the easement in a way that injures plaintiff's aesthetic interests" (308 Or App at 372 -73); and (2) under the Declaratory Judgments Act because "plaintiff's allegations do not allow for the inference that the claimed injury to his interest in the use and enjoyment of the conservation easement is 'real or probable, not hypothetical or speculative.'" *Id.* at 374, quoting *MT & M Gaming, Inc., v. City of Portland*, 360 Or 544, 555 (2016).

Be On the Lookout for Changes to the ORCP

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Unless you're on the Council of Court Procedures or an appellate judge, it's likely that you rarely think about how amendments to the Oregon Rules of Civil Procedure ("ORCP") are made, how they have changed over time, or even how they might change in the near future. Luckily, this author has done the work for you. After spending hours upon hours reading Council minutes and amendment drafts, this article brings you the latest proposed changes to the ORCP, a little historical context, and, hopefully, a bit of entertaining debate along the way.

Below are summaries of the major amendments from the 2019-2021 cycle. Those amendments will go into effect around January 1, 2022, unless the legislature decides to supplement or repeal them. In addition to the technical information below about the expected changes to the rules, this article highlights some of the more interesting points of debate between Council members.

But First, Some Context

Before immediately diving into the amendments, it is helpful to have a basic understanding of the Council and its process. The Council is comprised of judges, lawyers, and one public member. The Oregon appellate courts get one dedicated seat, each. The circuit courts get eight dedicated seats, chosen by the Circuit Judges Association. Twelve lawyers also sit on the Council, appointed by the Oregon State Bar Board of Governors. Finally, the Supreme Court selects the public member.[i]

The Council conducts its business on a two-year cycle, or a "biennium." Typically, the Council sends out a survey to the bench and bar every two years, asking for feedback on the Rules. Although relatively few people participate in the survey, many of the amendments to the Rules in recent years originated from survey responses. Believe it or not, that survey that you are most likely sending directly to your junk folder actually matters.

The Council considers the survey responses, along with suggestions that arise in various other ways, and drafts amendments to the Rules after much research and debate. The Council also has the authority to draft entirely new rules and repeal existing rules.[ii] This article refers collectively to the repeal, amendment, and creation of rules as "promulgations."

The Council then publishes its proposed amendments for public comment. After the public comment period closes, the Council votes on the proposed amendments. Any promulgation of the Rules must be passed by a supermajority of 15 affirmative votes out of the 23 council members. Approved changes are then sent to the legislature, which has the opportunity to repeal, supplement, or approve the changes. The promulgations that are approved by the legislature become effective on January 1 following the close of the session.

With that context in mind, what follows is a discussion of the major amendments to the ORCP to come out of the 2019-2021 biennium.

ORCP 21: Motion to Strike Response to an Amended Pleading

The most controversial amendment this biennium was the amendment to Rule 21 E. Currently, Rule 21 E permits the court, on motion of a party or on its own initiative, to strike "(1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; [and] (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading."[iii] Rule 21 E tracks fairly closely with Federal Rule of Civil Procedure 12(f), which permits a court to strike from a pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The proposed amendment is a significant departure.

Of particular importance to defense counsel, the amendment to Rule 21 E permits the court, on motion of a party or on its own initiative, to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

What the Council Wanted To Do. A member of the Bar first raised a concern about amended pleadings in the Council's biennial survey. In fact, the concern was initially brought up as a concern about Rule 23 amendments. Under the current

Rule 23, a plaintiff who amends their complaint opens the door to defendants to respond with an amended answer. The commenter complained that, often, a minor amendment to a complaint unfairly allows a defendant to raise brand new defenses or even factual theories in an amended answer. For example, if a plaintiff amended her complaint on the eve of trial to increase the amount of damages, a defendant could file an amended answer that raised new substantive defenses based on new factual or legal theories. In such a scenario, the trial schedule may be disrupted, increasing the time and cost of the litigation.

The Council solicited feedback from the plaintiff and defense bars about whether and how to amend the ORCP to address that concern. Although a range of opinions were expressed, the plaintiff's bar was generally in favor of a rule that would prohibit defendants from raising new defenses that did not relate to the changes in the amended complaint if those defenses could have been raised earlier. The defense bar was generally opposed to a categorical rule and raised a concern about the Council's ability to craft a generally applicable standard that would guide a court's decision about whether an issue raised in an amended answer was truly new, or whether it was triggered by the amended complaint.

The Amendment Generated Controversy. The issue was much debated among Council members. Those in favor of the amendment argued that it was unfair for a defendant to be able to raise new a new defensive theory simply because a plaintiff amended something completely unrelated to that theory. They argued that it was unfair that plaintiffs were required to seek leave from the court to amend their complaint under Rule 23, but defendants were allowed to freely amend their pleadings in response. They also argued that the amendment does not restrict defendants' ability to seek leave to file new substantive defenses under Rule 23.

Those opposed argued that defendants have an unqualified right to file a responsive pleading when an amended complaint is filed, and that courts do not have the ability to prevent a defendant from doing so. They also argued that the proposed amendments were unevenly applied to defendants.

What the Council Did. In the end, the Council published for public comment a proposed amendment to Rule 21 E that permits the court to strike, on motion of a party or on its own initiative, "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."[iv]

All of the public comments received were supportive of the amendment. In the end, the amendment passed with exactly enough votes to pass pursuant to the supermajority rule.

ORCP 15 D: Enlarging time to plead or do other act.

Rule 15 D currently permits a court discretion to extend filing deadlines or allow a late filing of an "answer or reply" or "any other pleading or motion." The Council approved an amendment to Rule 15 D that primarily does two things. First, the Council added the phrase "except as otherwise prohibited by law" to alert the Bar that Rule 15 D does not grant courts discretion to extend the filing deadlines for every type of filing, but only those not otherwise provided for by the Rules. Second, the Council expanded the scope of Rule 15 D to apply to "any pleading. . .[,] motion, or response or reply to a motion." The following is a brief history of the Council's discussions of Rule 15 D and a summary of their action.

History: The current amendment is the first of any substance to Rule 15 D in the Council's history. Rule 15 D first came to the Council's attention during the 2017-2019 biennium, when it was revising Rule 68 to allow for extended deadlines for filings related to attorney fees. In its ongoing discussions about Rule 68, the Council had become concerned that Rule 15 D was unclear regarding which filings were covered under the rule.[v] Although the rule was a frequent subject of debate at Council meetings, the clock ran out on the 2017-2019 biennium before the Council could agree on an amendment. The Council promulgated only a minor stylistic change to Rule 15 D and held over the weightier discussion for the following biennium.

Current Amendment: At the beginning of the 2019-2021 biennium, the Council picked up right where it left off regarding the scope of Rule 15 D. The Council was concerned that many attorneys and judges believed that Rule 15 D was an omnibus rule that granted courts discretion to extend any and all filing deadlines. Given that concern, the Council set out to address two related issues.

First, the broad discretion granted to courts under Rule 15 D seemingly conflicts with the particular filing deadlines set out in other rules. In keeping with basic rules of statutory interpretation, a consensus formed around the conclusion that a general interpretation of Rule 15 D must yield when it conflicts with a more specific rule.[vi] For instance, Rule 15 D did not give courts discretion to extend the 10-day deadlines for Rule 63 motions for judgments notwithstanding the verdict and Rule 64 motions for new trial. To address that issue, the Council added the phrase "except as otherwise prohibited by law," to alert the Bar to the fact that deadlines for some types of filings are not permitted to be extended.

Second, the plain language of the rule limited its scope to only "motions" and "pleadings," but in practice the Council believed the rule was applicable to a broad range of filings. The Council, therefore, amended the rule to include "response or reply to a motion" in addition to the motions and pleadings already explicitly covered by Rule 15 D.

The Council published the proposed amendments, received no public comments, and voted unanimously in favor of the amendment.

ORCP 27: Emancipated minors [Minor] or incapacitated parties

ORCP 27 sets out various rules for parties appearing by proxy, whether by guardian, conservator, or guardian ad litem. The rule also governs the procedure for the mandatory appointment of a guardian ad litem. The Council approved two noteworthy but uncontroversial amendments to Rule 27 A and B.

The Issues. Members of the Bar brought two concerns to the Council's attention in regard to Rule 27. First, a policy working group from the Oregon Judicial Department (OJD)

raised a concern that the Latin term "guardian ad litem" was confusing to unrepresented parties, court staff, and even to new judges, who might confuse "guardian" and "guardian ad litem." Second, a request was raised through the Bar survey to clarify that the mandatory appointment of a guardian ad litem in Rule 27 B does not apply to emancipated minors. The Council formed a committee, which drafted amendments to Rule 27 A and B to address both of those concerns.

A debate on the Council's duty to non-lawyers. Interestingly, in the course of the Council's discussions regarding whether to amend or define the term "guardian ad litem," a broader philosophical debate arose among the members regarding the scope of the Council's duty to make the rules clear for non-lawyers. It will shock absolutely no one who has attended law school that a range of opinions were expressed.

On one end of the spectrum, some expressed opposition to amending well-established legal terms such as "guardian ad litem" simply so that non-lawyers and "younger generations" could understand them. Similarly, one member expressed that it was not the duty of the Council to amend the rules so that "every lay person understands what lawyers studied in law school."

A more utilitarian view was that the Council was too often "tripping over itself" to amend the rules to make them usable for laypeople instead of working to make sure that unrepresented parties had access to qualified representation.

On the other end of the spectrum, some expressed support for amending the rules for the sole purpose of giving clarity to unrepresented parties. A member observed that a lack of clarity in the rules for self-represented parties was bad not only for the pro se litigants but also for the represented parties opposing them, often driving up the cost of litigation.

Promulgation of the amendment. Notwithstanding the philosophical debate, the Council published proposed amendments for public comment that addressed both issues that the committee had set out to address. The Council voted unanimously to approve the amendments.

ORCP 31 C: Attorney fees in Interpleader Actions

The Council completely rewrote Rule 31 C to address a concern that dismissal from the case and attorney fees were only permitted for "plaintiffs" in interpleader cases, as opposed to other parties who interplead funds.

The rule regarding fees in interpleader cases was brought to the attention of the Council by a member of the Bar. That attorney represented an elderly client in an interpleader action. The client had money deposited into his account by fraud, and as a result was at risk of losing his Social Security benefits, because his bank account was over the asset limit. The client had therefore deposited the wrongfully-deposited funds with the court, but, because he was not the plaintiff in the action, he was not entitled to attorney fees and was not able to be dismissed from the case under the current rules.

The subject of attorney fees in interpleader cases appears to be somewhat uncommon, nuanced, and frankly confusing, even for members of the Council. The Council tackled the lofty subject by looking to secondary sources. It relied heavily on a law review article to guide its drafting of the amendments to Rule 31. *See* Franklin L. Best, Jr., *Reforming Interpleader: The Need for Consistency in Awarding Attorneys' Fees*, 34 Baylor L. Rev. 541 (1982).

The Council drafted an amendment that was a complete rewrite of Rule 31 C. The amendment had three goals: first, to clarify that, whether an action is filed as an interpleader or becomes one as a result of a counterclaim or cross-claim, a party doesn't have to be the "plaintiff" to get fees; second, to change the existing award of fees from mandatory ("shall") to permissive ("may"); and third, to identify factors that courts must consider when deciding whether to award fees, including those listed in ORS 20.075.

The amendment was published, no public comments were received, and the Council voted to pass it unanimously.

ORCP 55: Subpoenas

The Council approved some uncontroversial changes to Rule 55 regarding a witness's entitlement to fees and mileage when appearing pursuant to a subpoena, however it deferred action on a controversial amendment regarding the procedure by which non-party witnesses may avoid a subpoena. The Council voted approvingly on a modified version of the amendment than approved amendment varied from the version that was published for public comment, and the Council has not yet posted the approved version to its website.

Preview of Issues for the 2021-2023 Biennium

The Council deferred action on two big topics that will be taken up at the beginning of the next biennium in September, 2021.

The first topic is the discussion of subpoenas to nonparties under Rule 55, mentioned above. Under the current Rule 55, it is unclear how unrepresented nonparties should object to a subpoena and defend their right to not appear. In September, 2020, the Council published a proposed amendment to Rule 55 A(7) that garnered some negative feedback, including from a former chair of the Council. Those opposed to the amendment worried that the Council might be creating more unintended problems than it was solving. The Council deleted the controversial amendment and will resume its discussion of subpoenas to nonparties in the upcoming biennium.

The second topic to be addressed in the upcoming biennium is bias in jury selection. During the 2019-2021 biennium, the Council explored an amendment to Rule 57 D to address bias in jury selection in response to numerous comments from members of the bench and from the Oregon State Bar. In its recent decision in *State v. Curry*, 298 Or App 377 (2019), the Court of Appeals appeared to invite the Council and the legislature to consider crafting a procedure for handling a challenge to a peremptory strike to a juror for biased reasons, known as a "*Batson*" challenge, after *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting peremptory challenge to juror based solely on race). The Council heard from many stakeholder groups, and there appeared to be broad consensus that Rule 57 D could do more. However, there were concerns among

some Council members that the particular changes that the Council explored crossed a boundary into substantive lawmaking, which was better left to the legislature. In the end, the Council took no action but agreed to continue working on the issue.

Important Takeaways

Having spent substantial time analyzing the Council's work, this author notes two important takeaways for members of the Bar who regularly interact with the ORCP.

First, the Council welcomes and responds to practical suggestions for changes to the Rules that come from members of the Bar. Amendments often first arise from the Council's survey, which is emailed to certain Bar groups every two years. Our active participation with that survey quite literally changes the Rules, and we all have an opportunity—perhaps a duty, even—to offer feedback to help shape the Rules so that they are clearer and more understandable for all Oregonians who use them. Be on the lookout for the survey to arrive in your inboxes this summer, before the next biennium starts in September.

Second, the Council is obligated to publish its proposed changes to the Rules for public comment. We should all take the time to read the Council's proposals and comment, whether in favor or against. The Council is the official rule making body charged with being the stewards of the ORCP, but we all have an opportunity through the public comment process to protect and improve the Rules. Those of us who work with the Rules every day should seize that opportunity. The next opportunity for public comment will be toward the end of the 2021-2023 biennium, likely in September, 2022. The proposed changes will be published on the Council's website.

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i The composition of the Council is a product of legislation. ORS 1.730(1) dictates the Council's membership and the process by which members are chosen. The current membership is as follows: from the Supreme Court, Hon. Lynn Nakamoto; from the Court of Appeals, Hon. Doug Tookey; from the circuit courts, Hon. Charles Bailey, Hon. R. Curtis Conover, Hon. Norman R. Hill, Hon. David Euan Leith, Hon. Thomas McHill, Hon. Susie L. Norby, Hon. Leslie Roberts, and Hon. John A. Wolf; attorney members are Kelly L. Anderson, Troy S. Bundy, Kenneth C. Crowley, Travis Eiva, Jennifer Gates, Barry Goehler, Meredith Holley, Drake A. Hood, Scott O'Donnell, Shenoa L. Payne, Tina Stupasky, and Jeffrey Young; the public member is Margurite Weeks.

ii See ORS 1.735 (setting forth the Council's authority to promulgate, amend, or repeal the rules of civil procedure, after publication of the proposed changes to the Bar and subject to legislative approval).

iii The current Rule 21 E states, in its entirety,

> "Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading.

iv The Council also completely rewrote Rule 21 A, though the changes appear to be only formalistic in nature, and it also made other minor changes regarding word usage throughout the other sections of Rule 21. Minor stylistic changes are not addressed in this article. The Council has not yet published the promulgated amendments on its website, but the proposed amendments that were published for public comment prior to the Council's vote at its December 12, 2020, meeting can be viewed at the Council's website. https://councilonCourtProcedures.org/current-biennium/.

v. In 2015, the Court of Appeals held that attorney fee statements were "pleadings" within the meaning of Rule 15 D, and that therefore courts had discretion to permit their late filing. *Ornduff v. Hobbs*, 273 Or App 169 (2015). *Ornduff* applied only to a very small number of cases. By the time *Ornduff* was decided, in mid-2015, the Council had already amended Rule 68 to permit courts to grant flexibility in filing deadlines related to attorney fee statements. Thus, *Ornduff* became obsolete on January 1, 2016, when the new Rule 68 became effective. As limited as *Ornduff* itself was, though, it seemingly expanded the definition of "pleadings" for the purpose of Rule 15 D, which raised several questions: was every type filing a "pleading" subject to deadline extension under the rule? If not, where were the limits?

During the 2017-2019 biennium, the Council had much discussion regarding the scope of the rule and whether it was subordinate to other specific deadlines encompassed in the ORCP—such as the 10-day deadline for filing a motion for new trial or a motion for judgment notwithstanding the verdict—or whether, on the other hand, it was an "omnibus" rule that permitted discretion for expanding timelines for all filings. The Council was also concerned with the rule's effect on self-represented parties, who often ask why represented parties are allowed to extend their filing deadlines.

vi. The principle that the general must yield to the particular is a basic tenet of Oregon statutory interpretation. See ORS 174.020(2) ("When a general provision and a particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent."); *Powers v. Quigley*, 345 Or 432, 438 (2008) ("In short, if a court can give full effect to both statutes, it will do so, and if not, it will treat the specific statute s an exception to the general.").

Comments From The Editor

It's Only a Matter of Time

By Dennis P. Rawlinson
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Dennis P. Rawlinson

The value of time is not taught in law school. Instead, we are taught to be careful, detailed, and thorough. Somewhere in our quest to be the best lawyer we can be, we tend to lose our layperson's recognition of such universal truths as "Time is our most valuable possession."

Experience has taught me that time is the most valuable possession of a fact-finder. Honor this principle, and you will succeed. Squander the fact-finder's time, and you will be punished.

One of the principles of a book on trial strategy entitled *Sponsorship Strategy*[1] is worth repeating. The more of a fact-finder's time you take, the better use you should make of it. Otherwise, the use of that time will be held against you.

A case in point is the direct examination by the prosecution in the O. J. Simpson case of the prosecution's pathologist.

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1 Robert H. Klonoff & Paul L. Colby, *Sponsorship Strategy* (1990) (see October 1994 issue of *Litigation Journal*).

The direct examination lasted six days. The cross-examination conducted by Robert Shapiro of the defense team was brief, creating a stark contrast. Shapiro's cross-examination included the admission by the pathologist that after six days, all he could really tell the jury was that:

1. The victims had bled to death.
2. They had been stabbed with a sharp instrument, probably a knife.
3. The murder weapon was probably a single- rather than a double-edged knife.

We can all imagine what the jury (which several times nearly mutinied because of the length of the trial) thought about a direct examination that lasted six days, but that resulted in only three pieces of information. Under sponsorship strategy, the prosecution's use ("waste") of the jury's time will be, and was, held against it.

The lesson here for the rest of us is a simple one. It is a lesson recognized by the advertising industry. In our fast-paced world, advertisers provide us with information by sound bites and pictures that change seemingly every nanosecond. The message is that we should be "brief, powerful, and clear."

Applying this message to a trial, we notice that several principles become apparent:

1. Use as few witnesses as possible.
2. Make your direct examinations "brief, powerful, and clear [simple]."
3. Don't waste the first 60 seconds of each opportunity you have to speak. These golden moments should not be wasted on preliminaries, procedural and evidentiary foundations, and "warming up."
4. Objections and courtroom interruptions should be kept to a minimum (object only if you are right and if it is crucial).
5. Cross-examinations should be brief. (Making any more than your three strongest points may dilute the impact of the examination.)
6. Sidebar conferences and requests for conferences with the court (causing the jury to recess) should be kept to a minimum.

Next time you are trying to determine how long to make your direct examination, think about how you enjoy being caught in a traffic jam, waiting in line at a grocery store, or circling the block looking for a parking place. Your direct examination should be no longer than you wish to engage in any of these activities.

Similarly, when you prepare cross-examination, think about how long you can comfortably stand on one foot. In fact, perhaps some trial judges should start forcing us to conduct our cross-examinations while standing on one foot.

I suspect you will find that if you force yourself to be brief and condense your case, you will consciously or unconsciously separate the wheat from the chaff and create a presentation that is not only brief, but also more "powerful and clear."

Make good use of the fact-finder's time. You will be rewarded for your effort.