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Clients Who Rely on Third Parties Risk Waiving Attorney-Client Privilege

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What happens when a client shows up for a meeting with you and brings his daughter to help him understand difficult concepts or for moral support? What if that client talks to his daughter about your advice? Clients often wish to have an intimate partner, adult child, business associate or other confidant help during a case. When the client is an individual, as opposed to a corporation, Oregon law is unclear about whether communications with a confidant waive the attorney-client privilege. In contrast, the rules are well-developed when the client is a business entity. An entity can communicate with its lawyer via "representatives," and the "representatives" can discuss the lawyer's advice in confidence. If the client is a natural person, the lack of clarity creates risk that communications with a third party will waive the privilege. It is a bit ironic that a corporation can involve scores of sophisticated "representatives" to help it make decisions, but an unsophisticated individual may have to go it alone or risk waiver.

There are two concepts at play under OEC 503, the rule that governs attorney-client privilege in Oregon. First, attorney-client communications may be disclosed to third parties, without waiving the privilege, when the disclosure is in furtherance of the rendition of the legal services or necessary for the transmission of a privileged communication. We can call this first concept the "circle of confidentiality rule." Unfortunately, the scope of the circle is uncertain because the rule does not define the qualifying third parties or when a communication is "in furtherance" or "necessary."

Second, OEC 503 provides that communications remain privileged if they involve a "representative of the client." We can call this second concept the "representative of the client rule." "Representative of the client" is a defined term (OEC 503(1)(e)) that covers control group people such as principals, officers, and others who, in the scope of their employment for the client, make or receive communications for the purpose of "effectuating" legal services. There is relatively old Oregon case law that restricts the representative of a client rule to a representative of an entity. However, the definition of representative of the client was amended in 2009, and it is uncertain whether the pre-2009 case law continues to apply.

The case law analyzes the two concepts separately. The privilege is preserved so long as either the circle of confidentiality rule or representative of the client rule applies.

Definitions: OEC 503 and 511

OEC 503 defines "client" and "confidential communication" as follows:

> (1) As used in this section, unless the context requires otherwise:
>
> (a) "Client" means:
>
> (A) A person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.
>
> . . .
>
> (b) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

The privilege protects communications with a "representative of a client":

> (2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;
>
> . . .
>
> (d) Between representatives of the client or between the client and a representative of the client;
>
> "Representative of the client," OEC 503(1)(e), means:
>
> (A) A principal, an officer or a director of the client; or
>
> (B) A person who has authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client, or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the person's scope of employment for the client.

The definitions of "client" and "confidential communication" have been unchanged since the Oregon Evidence Code was adopted in 1981. The definition of "representative of the client" was amended in 1987 and 2009.

With respect to waiver, OEC 511 provides, in part:

> A person upon whom [Rule 503] . . . confer[s] a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication.

The Circle of Confidentiality

The 1981 Legislative Commentary to OEC 503 helps explain the circle of confidentiality. The Commentary states:

> The rule allows some disclosure beyond the immediate circle of lawyer and client and their representatives without impairing confidentiality, as a practical matter. It permits disclosure to persons 'to whom disclosure is in furtherance of the rendition of professional legal services to the client,' contemplating that these will include a 'spouse, parent, business associate, or joint client.' Comment, California Evidence Code § 952. It also allows disclosure to persons 'reasonably necessary for the transmission of the communication' without loss of confidentiality.

Kirkpatrick opines that "this phrase" should be construed narrowly. Kirkpatrick does not clarify whether it is referring to the Rule or the Commentary. In any event, Kirkpatrick's only support is to argue that, if "this phrase" is not read narrowly, then every letter written by a lawyer to a third party would be privileged because it could be in furtherance of the rendition of legal services to a client. Kirkpatrick, *Oregon Evidence* (7th ed. 2020) §503.06, p. 337. Kirkpatrick's example does not involve a continuing expectation of confidentiality and does not justify narrowing the circle of confidentiality where there is an expectation of confidentiality, as in the case of an intimate partner.

Malbco Holdings, LLC v. Patel, 2015 WL 2260661 (D. Or. May 13, 2015) is one of the few cases in Oregon that discuss who may be in the circle of confidentiality. *See also State v. Miller*, 300 Or. 203, 217-20 (1985) (discussing circle of confidentiality in connection with psychotherapist-patient privilege). Judge Papak held in *Malbco* that adult children of the client had a joint concern with their parents, who were the clients; therefore, the privilege was not waived by copying the adult children on emails. Judge Papak also based his ruling on other arguments made by the parents but did not mention the other arguments in his Order (the briefs are not available due to a protective order).

Malbco cites *Insurance Co. of North America v. Superior Court*, 108 Cal.App.3d 758, 766-67 (1980), which states that the California Evidence Code § 952 contemplates that communications with family members or business associates will remain privileged when they pertain to matters of joint concern. In fact, the purpose for which the lawyer is consulted by the client may include satisfying concerns of other parties so that communicating with these parties may be necessary to accomplish the purpose. *Insurance Co. of North America*, 108 Cal.App.3d at 769. *Insurance Co. of North America* provides an extensive analysis of § 952 and the case law pertaining to the attorney-client privilege when a business associate of the client is included in attorney-client communications. The analysis also cites the California Comment that is quoted in the Oregon Commentary. *Id*. at 766-77

Malbco is similar to a number of California cases where courts are comfortable in maintaining the privilege when the third party has "joint concern" with the client or a financial

interest in the matter. However, neither Rule 503 nor the Commentary state that the non-client *must* have a financial interest, joint concern, or, in fact, any interest in the matter to preserve the privilege. Rule 503 protects disclosures to persons in furtherance of the rendition of professional legal services or necessary for the transmission of communications. The Oregon Commentary explains that the rule contemplates that those persons may be a "spouse, parent, business associate, or joint client."

Oregon's Rule 503 covers "those to whom disclosure is in furtherance of the rendition of professional legal services to the client. . . ." OEC 503(1)(b). California Evidence Code § 952 includes by its terms persons "present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the lawyer is consulted . . . ." Arguably, these concepts are the same. The closer that these concepts are to each other, the greater the chance that the California Comment and California case law may be helpful to understanding the Oregon rule.

In addition to the portion of the California Comment that refers to a spouse, parent, business associate, or joint client quoted in the Oregon Commentary, the California Comment also refers to a person who is present out of a concern for the welfare of the client:

> The words "other than those who are present to further the interest of the client in the consultation" indicate that a communication to a lawyer is nonetheless confidential even though it is made in the presence of another person--such as a spouse, parent, business associate, or joint client--who is present to further the interest of the client in the consultation. These words refer, too, to another person and his attorney who may meet with the client and his attorney in regard to a matter of joint concern. This may change existing law, for the presence of a third person sometimes has been held to destroy the confidential character of the consultation, even where the third person was present because of his concern for the welfare of the client. Cal.L.Rev.Comm.Reports 1 (1965).

In *Atmel Corp. v. St. Paul Fire & Marine Ins. Co.*, 409 F.Supp.2d 1180 (N.D. Cal. 2005), the client shared lawyer-client materials with its insurance broker. The insurance broker did not have a financial interest or joint concern in the matter. Atmel contended that the broker's expertise was necessary to understand general liability, coverage, and litigate issues. Applying California § 952 and citing *Insurance Co. of North America*, the court held that the insurance broker was a business associate of Atmel. The court also held that the broker furthered the interests of Atmel and that the disclosure to the broker was reasonably necessary for the transfer of information to the insurers.

On the other hand, *Total Recall Technologies v. Luckey,* 2016 WL 1298863 (N.D. Cal. Apr. 4, 2016), refused to extend the privilege to a business adviser who did not have a financial stake in the outcome of a matter. *Behunin v. Superior Court*, 9 Cal. App. 5th 833 (2017) concerned a public relations firm that participated in lawyer-client communications. The court held that communications with the public relations consultant were not reasonably necessary to the provision of legal services and therefore were not privileged.

Cases in other jurisdictions hold that when a client expects that communications involving a trusted third party or agent are confidential, the presence of the third party does not serve to waive the attorney-client privilege. For instance, *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264 (Mo. Ct. App. 1976), held that the presence of a trusted agent of a client present during discussions about a will did not waive the privilege. *McCaffrey* is one of several cases where the third party/agent who was present later gets involved in litigation concerning a matter such as a will that the client discussed with the lawyer, and the third party claims that his or her presence waived the privilege.

In *Berens v. Berens*, 785 S.E.2d 733 (N.C. Ct. App. 2016), a non-practicing lawyer friend acted as the wife's agent and consultant in a divorce. The wife and her friend entered into a signed agency agreement. The court held that communications between the wife and the lawyer who represented her in the divorce remained privileged even though the agent was a party to the communications.

People v. Doss, 514 N.E.2d 502 (Ill. App. 1987) involved two people who were present during a lawyer-client meeting. One of the people later became the guardian for the client, and the court said that she might be considered an agent whose presence did not serve to waive the privilege. The other person was at the meeting to provide support during a trying period in the client's life, and the appellate court held that her presence served to waive the privilege.

Several cases involve parents. In *Accomazzo v. Kemp*, 234 Ariz. 169 (Ariz. Ct. App. 2014), the court held that the presence of parents during a discussion about their daughter's pre-nuptial agreement did not waive the privilege. In *Rosati v. Kuzman*, 660 A.2d 263 (R.I. S.Ct. 1995), Rosati's parents were very involved in his defense of a criminal case. They accepted an offer from Kuzman, Rosati's former wrestling coach, to assist Rosati's defense lawyer and were "invaluable confidants" to their son. The court held that communications involving Rosati's parents remained privileged. *Cf. C.T. v. Liberal School District*, 2008 WL 217203 (D. Kan. Jan. 25, 2008) (communications with parents of client privileged prior to age of majority but not thereafter).

There also are cases that consider whether the third party was involved in lawyer-client communications in order to assist the lawyer in advising the client. *U.S. v. Kovel,* 296 F.2d 918 (2d Cir. 1961), is the seminal case in this area. The court held that an accountant who was present to assist a lawyer in explaining issues related to the legal advice did not waive the attorney-client privilege, but the situation would have been different if the accountant was solely giving accounting advice. Similarly, *Bankdirect Capital Finance, LLC v. Capital Premium Finance, Inc.*, 326 F.R.D. 176 (N.D. Ill. 2018), held that an

investment banker's communications with a lawyer were privileged because the investment banker was assisting the lawyer in advising the client on a complex transaction.

Leone v. Fisher, 2006 WL 2982145 (D. Conn. Oct. 18, 2006), takes a narrower approach. *Leone* discusses case law from several states and says that, to be within the definition of confidentiality, the cases appear to require a showing that communication with the non-client was necessary or could not have been made with the client alone. The court cited cases that ruled communication with parents of an injured college student and parents of an incarcerated child are privileged. However, *Leone* held that communications from the lawyer to the husband of a party to a false arrest case were not privileged because they were not necessary, even though they were described as confidential and were a request for legal advice.

Leone likely has limited applicability in Oregon because the Oregon Commentary cites a California statute, characterizes the approach "as practical," contemplates that specific categories of people fall within the expanded circle of confidentiality, and refers to them being present "in furtherance" of the lawyer-client communications, not necessary or absolutely essential to the communications. In *State ex rel. Oregon Health Sciences University v. Haas,* 325 Or. 492, 502 (1997), the Supreme Court said that, as used in OEC 503(2), to "facilitate" the rendition of legal services "means, as relevant, 'to make easier or less difficult' or 'to lessen the labor of (as a person): ASSIST, AID.'" (quoting *Webster's Dictionary*). Thus, communications in furtherance of the rendition of legal services are confidential, and a client has the privilege to refuse to disclose confidential communications made to facilitate the rendition of legal services. OEC 503 (1)(b), (2)(d).

In sum, while there is decent support for a reasonably sized circle of confidentiality under OEC 503, there is limited controlling case law. There also is limiting case law from other jurisdictions, such as *Leone, Liberal School District,* and *Total Recall Technologies*, and a confusing comment in Kirkpatrick.

The lesson is to be careful, especially when the client is not elderly or a minor. The more difficult situations involve unmarried intimate partners, close friends, people present to provide emotional or moral support, and business associates. It may be best not to take any chances, unless there is a genuine concern about the client's ability to watch out for his or her welfare due to particular circumstances.

Representative of the Client

Since there are potential limitations on the scope of the protection provided by the circle of confidentiality, the definition of representative of the client may be important in the case of clients who are individuals. The issue of the scope of "representative of the client" has been addressed in several Oregon cases and legislative amendments. The existing cases limit the representative of the client language of OEC 503 to representatives of entities, but, as indicated, there is at least some question as to whether these cases still apply in light of a 2009 amendment.

The representative of the client provision appeared in the original version of the Oregon Evidence Code in 1981. The provision was amended in 1987 and 2009. In *State v. Jancsek*, 302 Or. 270 (1986), the court discussed the history of the representative of the client provision, including work by drafting committees and legislative history. The court acknowledged that "[n]o one apparently realized that the text of the proposed definition was not limited to a business entity." 302 Or. at 280. But the court concluded that the history made clear that the Legislature intended the provision to apply only to a representative of a "corporation" or "at least some business entity akin to a corporation." *Id*. at 281.

In the 1981 Code, the Legislature intended to adopt a control group test. A representative of the client was "a person who has authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client." This meant that the privilege was restricted to communications with people "in a position to control or to take a substantial part in a decision about any action which the corporation may take on the advice of the attorney." *Jancsek,* 302 Or. at 277 (quoting drafting subcommittee minutes). One reason for the restriction to a control group was that extending the privilege to employees would favor corporations over sole proprietorships. The reasoning was that members of a control group of a corporation parallel the owner of a sole proprietorship. Communications with non-controlling employees were not privileged, even if the employee's acts were at issue. If the privilege had been extended to the employees of a corporation, this would have been unfair to sole proprietorships, whose employees were not covered by the privilege. *Id*. at 280.

In 1987, the Legislature broadened the definition of representative of the client, most importantly to include not only members of a control group but also an employee "who provides the lawyer with information" for the purpose of obtaining legal advice for the client or "who seeks, receives or applies legal advice from the client's lawyer." The amendment eliminated the control group test and extended the privilege to employees whose activities fell within the new definition. This change followed *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677 (1981), which broadened the federal common law attorney-client privilege beyond the control group. *See State ex rel. Oregon Health Sciences University*, 325 Or. at 506-509. *Little v. State by and Through Dept. of Justice,* 130 Or. App. 668, 674 (1994), held that the 1987 amendment "makes

explicit what was implicit in its antecedent: Only a person acting on behalf of a business entity client can be a 'representative of the client.'"

In 2009, the Legislature changed the definition of representative of the client once again. The prior definition, as amended in 1987, stated:

> (d) 'Representative of the client' means a principal, an employee, an officer or a director of the client:
>
> (A) Who provides the client's lawyer with information that was acquired during the course of, or as a result of, such person's relationship with the client as principal, employee, officer or director, and is provided to the lawyer for the purpose of obtaining for the client the legal advice or other legal services of the lawyer; or
>
> (B) Who, as part of such person's relationship with the client as principal, employee, officer or director, seeks, receives or applies legal advice from the client's lawyer.

The original Bill proposed in 2009 came about because there was a concern that an independent contractor was not covered by OEC 503. HB 2453 (2009): Hearing Before House Judiciary Committee, March 3, 2009 ("Hearing, March 3, 2009") (Testimony of Brent Barton ("Barton Testimony")). The Bill, as introduced, added the word "agent" to the types of people who may be a representative of the client. HB 2453-Introduced (2009). There was a concern that use of the term "agent" was too broad because it could include people not involved in a legal matter. Hearing, March 3, 2009 (Barton Testimony); Testimony of Richard Yugler ("Yugler Testimony")). This led to amendments that deleted most of the 1987 definition and instead adopted language based on the Uniform Rules of Evidence. *Id.* Oregon continued to include a specific reference, added in 1987, which does not appear in the Uniform Act, to a principal, officer, or director. The references to "employee," also added in 1987, were deleted, but the phrase "while acting in the person's scope of employment," found in the Uniform Act, was added. The new definition, as adopted, provides:

> (d) 'Representative of the client' means:
>
> (A) A principal, an officer or a director of the client; or
>
> (B) A person who has authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client, or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the person's scope of employment for the client.

The question is whether the amendment reopened the issue in *Jancsek*, which was decided in 1986, so that a representative of a client would now include the representative of an individual. The new language is similar to the prior language to the extent that a representative can give information to the lawyer, receive information from the lawyer, seek legal advice, or act on the legal advice. However, the new definition includes a provision that protects communications made or received for the "purpose of effectuating legal representa-

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tion for the client." Thus, the definition may include someone whose presence assists the legal representation, such as a trusted relative of an individual.

The issue may turn on the impact of the last phrase of the definition: "while acting in the scope of the person's employment for the client." This language would apply to an entity but could in theory also apply to an individual. The legislative history is of some value. The testimony in the House Judiciary Committee made it clear that the 2009 definition was based upon the language of the Uniform Act and that following the Uniform Act would provide the benefit of being able to consider the case law pertaining to the Uniform Act. Hearing, March 3, 2009 (Barton Testimony). But there was no specific discussion of whether the Uniform Act definition of representative of the client applied to both individuals and entities or whether this was even an issue. It is conceivable that the Legislature did not know that there was Oregon case law that the current definition applied only to entities. It appears that the only testimony was that the Oregon case law was "fairly sparse" and "somewhat confused" and that using language from the Uniform Act "would increase predictability." Hearing, March 3, 2009 (Barton Testimony, responding to question from Representative Smith).

There also was discussion of how the new definition would make it clear that a representative of a client could include an independent contractor of an entity, although it was unclear what language actually provides that an independent contractor was included. Hearing, March 3, 2009 (Barton Testimony, responding to questions from Committee Counsel and Representative Garrett); HB 2453 (2009): Hearing Before House Judiciary Committee, March 13, 2009 (Question from Representative Garrett). There was further discussion that adding the term "agent" was too broad because it could apply to people not involved in the legal representation but that the references to legal representation, advice, and services contained in Subsection (B) solved that problem. Hearing, March 3, 2009 (Yugler Testimony).

The most specific and clearest testimony concerned situations where a person would be the representative of a client. One of these situations was that a spouse of an individual client in a personal injury case would be a representative of a client, as would a property manager for a landlord and the managing agent of a homeowner association. Hearing, March 3, 2009 (Yugler Testimony).

With respect to the benefit of being able to consider interpretations of the Uniform Act, the current Oregon version makes use of the 1999 and 2005 versions of the Uniform Act, which in turn are a minor variation of the 1986 version of the Uniform Act. The comments to the 1986 version of the Uniform Act state that the purpose for the 1986 amendment was to broaden the definition of representative of the client following *Upjohn*, but the Uniform Act comments are otherwise not of much help.

There is limited and convoluted case law that interprets the Uniform Act or similar provisions. *Leone*, 2006 WL 2982145, at *4, discussed the definition of representative of the client under the Uniform Act and held that the provision applied only to entity clients. In discussing a Vermont statute that followed the Uniform Act, *Baisley v. Missisquoi Cemetery Assn.*, 167 Vt. 473 (1998), assumed that the definition of representative of the client applied only in the context of an entity.

In re *Texas Health Resources*, 472 S.W. 3rd 895 (Tex. Ct. App. 2015), the court held an insurance company was the representative of the client. The court considered a definition of representative of the client that was similar to Oregon's current definition and, while the client in question was an entity, the court tied the representative of a client provision to the definition of client, which includes a person.

Moler v. CW Management Corp., 190 P.3d 1250 (Utah S.Ct. 2008), considered a Utah rule that defined a representative of a client as:

> one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or one specifically authorized to communicate with the lawyer concerning a legal matter.

The Utah definition is somewhat different from the 1987 version of the Oregon rule and the 1986 Uniform Act. The court cited comments to the Utah rule which said that this definition was an amendment to the rule that was made to broaden the rule beyond the control group of an entity following *Upjohn*, the same purpose for the 1987 Oregon amendment and 1986 Uniform Act amendment. The court said that the definition of client referred to a person and that the amendment to be consistent with *Upjohn* did not mean that the definition was intended to exclude individuals. The Utah court cited and rejected *Jancsek*. 190 P.3d. at 1253 n.6.

Several cases have considered the meaning of representative of a client under federal common law. *In re North Plaza, LLC*, 2008 WL 7889912 (S.D. Cal. May 30, 2008), discusses some of these cases, some of which state that representative of a client can include a representative of an individual.

Applying Oregon rules of statutory construction, the text of Rule 503 states that "client" includes a "person." However, the introductory line to the definition sections states "unless the context requires otherwise." *See State v. Gaines*, 346 Or. 160 (2009). The text of Rule 503 and Legislative Commentary do not state that individual clients and entity clients are treated differently. "Representative of the client" is used in several places in the rule. For example, OEC 503(2)(d) states that a client may prevent disclosure of communications "[b]etween representatives of the client or between the client and a representative of the client." Since entities can only act through representatives, this text only makes sense if an individual "client" can have a representative. On the other hand, the reference to scope of employment in 503(1)(e)(B) may be enough to limit the context of the definition of representative of the client to entities, although that would make the last part of 503(2)(d) nonsensical.

There also is the issue that Oregon courts strictly construe privileges. *State ex. rel. Calley v. Olsen*, 271 Or. 369, 381 (1975) (citation omitted); *Kahn v. Pony Express Courier Corp.*, 173 Or. App. 127, 142-43 (2001) (explaining evidentiary privileges "are not favored," "not lightly created," and not "expansively construed") (citations omitted), *rev. den.*, 332 Or 518 (2001).

In sum, the old Oregon case law; some text; the pre-2009 context; some Uniform Act authority; the 1981, 1987, and some 2009 Oregon legislative history; and the strict construction of privileges are arrayed on one side. The text, some 2009 legislative history, the *Moler* decision, and cases under federal common law discussed in *North Plaza* are arrayed on the other side. Of note, the Legislature was given the clear example that the spouse of an injured person is the representative of a client.

The issue is whether you and your client want to be the test case that ventures into the representative of the client morass if you cannot fit in under the circle of confidentiality. On the flipside, do you really want to file a motion saying that an elderly person waived the privilege when he talked to his daughter about his case?

As a final note, appointment of a guardian or conservator may help to protect attorney-client privilege when a third party needs to be involved. Other protections from discovery, such as the spousal privilege, common interest privilege, joint representation, or the work product doctrine may also apply. The work product protection, for example, may continue to apply even where there has been disclosure to a third party if the disclosure did not substantially increase "the opportunity for the adverse party to obtain the information." *Skynet Elect. Co., Ltd. v. Flextronics, Int'l, Ltd.*, 2013 WL 6623874, at *3 (N.D. Cal. Dec. 16, 2013); *Shenwick v. Twitter, Inc.*, 2019 WL 3815719, at *3 (N.D. Cal. Apr. 19, 2019) (same); *see also Meyer v. State by and through Oregon Lottery*, 292 Or. App. 647, 671-72 (2018); ORCP 36 B(3) (non-opinion work product is not discoverable unless party seeking the discovery has "substantial need" for the discovery and cannot obtain it from other means without "undue hardship."). In addition, opinion work product remains highly protected even when disclosed to third parties, and a client's disclosure of work product may not be a waiver without the lawyer's consent. *See Meyer*, 292 Or. App. at 669-72 (distinguishing between highly protected opinion work product and fact work product and explaining opinion work product is "never discoverable").

Comments From The Editor

Novel Approaches to Witness Preparation

By Dennis P. Rawlinson
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Dennis P. Rawlinson

1. Traditional Method

A few years into practice, based on experience and study, most of us develop a checklist that we use as a basis to prepare witnesses for trial and deposition testimony. It is not unusual for the checklist to number 10 to 20 items or more.

We then invite our witness to a testimony preparation session. We spend half an hour to 45 minutes lecturing the witness on how to be a good witness and cover the 10 to 20 points (the witness no doubt feels like a worker caught behind a dump truck when the truck bed is lifted vertically, the gate opened, and the contents dumped). At the end of the session we ask the witness if he or she has understood or has any questions. We get either a nod of the head (to avoid the embarrassment of admitting that the witness is not on the same intellectual plane as the lawyer) or perhaps a question or two.

The witness then proceeds off to the examination not only with the trepidation of facing an unusual or unknown experience but with the additional baggage of trying to remember 10 to 20 foreign and unnatural rules.

We are then surprised when the testimony doesn't go the way we had hoped.

2. Novel Approaches

A number of psychologists have criticized the traditional form of witness preparation. The criticism is usually based on a number of factors, including:

a. Witnesses generally have limited attention and retention capabilities;

b. Dialogue and participation heightens the possibility of retention; and

c. Witness preparation should be confidence-building, not fear- provoking.

Set forth below are a number of suggestions collected from a number of sources, including participation as a faculty member at National Institute of Trial Advocacy Deposition Preparation seminars:

1. Question, don't lecture.

Don't start witness preparation sessions by advising and coaching. Instead, find out what is on the witness's mind. What concerns does the witness have? Answer and address those concerns so that they do not block the witness's ability

to pay attention to the rest of the session. You may even find that such a dialogue will cover some of the points you had hoped to cover.

2. Practice before lecture.

Practice a direct examination with the witness or even a difficult, but not brutal, cross-examination. You will discover the strengths and weaknesses of the witness. You may well discover that a number of the points you had hoped to cover don't need to be covered because the witness already understands and practices those points.

The same practice examination will raise weaknesses that can be discussed. These weaknesses will no doubt involve other points you had planned to cover and will allow you to:

a. Prioritize those points.

b. Take them one at a time.

c. Create pertinence and context for the points.

d. Promote dialogue with the witness.

As the practice and session continues, interrupted by dialogue, discussion, and suggestions, consider the following:

a. Initial comments should be mostly positive to build confidence. Initially instilling confidence in the witness will make the coaching session a positive experience. The witness will gain confidence and more readily accept suggestions for improvement later in the session.

b. Give good with bad. With every negative suggestion, mention something good. If a witness believes he or she is doing well, he or she is more likely to improve, concentrate, and enjoy the preparation experience. For instance:

"Good, calm, deliberate answer."

Then you may say,

"But remember to answer briefly."

c. Comment positively about the witness's appearance. Everyone cares about his or her appearance. Make the witness feel good about how he or she looks. For instance:

"Don't be afraid to stop and think before your answer. As you just did, you look thoughtful and credible."

d. Relative to roles, be sure your witness knows how his or her particular testimony is intended to fit into your overall case. This may prevent voluntary digressions and assist the witness in using his or her own wits in response to surprise questions.

e. Alert the witness to vulnerabilities. Discuss with the witness what you see as probable grounds for attack by the adverse party, and practice and discuss the handling of those attacks.

f. Conduct a practice cross-examination. Conduct or have someone in your office conduct a more ruthless cross-examination than you believe even the examiner will conduct. Discuss and cure problems and weaknesses.

g. Help the witness sound good. Assist the witness, if necessary, with testimony volume, speed, breathing, articulation, and fading of sentences. Help the witness be positive, clear, and engaging with his or her choice of words.

h. Encourage the witness to have proper eye contact with the proper party (in the case of a jury, looking comfortably from juror to juror and then the counsel and then the jurors again). Ensure that the witness avoids talking to the floor, the ceiling, and shirt fronts. The witness should also avoid looking to you for help and approval (and thereby losing credibility).

i. Consider video sessions. For witnesses who need work, consider preparing a videotape of their mock direct and cross-examinations and then viewing it with the witness. Often, when a witness sees his or her nagging idiosyncrasies and bad habits, it will enable the witness to address and correct them.

Consider conducting a debriefing after the testimony. Ask the witness which portions of the preparation were helpful and which were not. Witness preparation is one of the processes on which we have the opportunity to obtain regular feedback. With this feedback there is no excuse for not improving.

You may not find that by trying some of these testimony preparation approaches, you start winning cases that you otherwise would have lost. On the other hand, I believe you will find that you will improve the chances of communicating effectively with your witnesses and improve their abilities as witnesses. In a close case, that just might make the difference.

Ambiguous Contract? Disputed Facts? The Judge Might Still Decide What Your Contract Means

By Meg Houlihan
Stoll Berne


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Even seemingly simple contracts can lead to hard-fought court battles over interpretation. Contract provisions like "entirely independent and self-sufficient"[1] and "receptionist minute"[2] can spawn years of litigation. So, when the parties disagree on what a contract term means, who gets to decide? A judge, ruling as a matter of law, or the finder of fact? The answer is somewhat surprising in the case of some ambiguous contracts and in the case of standard form or adhesion insurance contracts, as shown recently in *Allianz Global Risks US Insurance. Co. v. Ace Property & Casualty Insurance Co.*, 367 Or. 711, 736, 483 P.3d 1124, 1139 (2021). There may be several reasons why one or both parties may want the judge to make the decision. A company may want to avoid inconsistent findings by different fact finders; it might be good policy to avoid exposing companies and their customers to incompatible contract interpretations; or a plaintiff may want to make certification of a plaintiff class more likely if a contact is interpreted to be the same as to the entire class. *See McKenzie L. Firm, P.A. v. Ruby Receptionists, Inc.*, 2020 WL 6780341, at *10 (D. Or. Nov. 18, 2020) (recognizing that class certification is appropriate in cases involving standard-form contracts that can be interpreted uniformly).

The answer to "who decides what a contract means" depends on the circumstances of each case. In *Yogman v. Parrott*, 325 Or. 358, 937 P.2d 1019 (1997), the Oregon Supreme Court set out a three-step process for resolving the meaning of a disputed contract term: (1) analysis of the text of the contract; (2) introduction of extrinsic evidence of the parties' intent, such as testimony about conversations during contract negotiations; and (3) application of maxims of construction. Conventional wisdom teaches that a judge may determine a contract's meaning based on the text at step one, but only a finder of fact can determine the meaning of a contract at steps two and three. Therefore, as a general rule, a jury will decide what the contract means after the judge concludes that the text of the contract is ambiguous or subject to multiple plausible interpretations.

1 *Ross Dress For Less, Inc. v. Makarios-Oregon, LLC*, 180 F. Supp. 3d 745 (D. Or. 2016) (concerning a dispute over the meaning of a commercial lease that required the tenant to make two joined properties "entirely independent and self-sufficient" at the lease's end).

2 *McKenzie L. Firm, P.A. v. Ruby Receptionists, Inc.*, 2019 WL 3412903 (D. Or. July 29, 2019) (concerning a dispute over what "receptionist minute" meant in agreements for virtual receptionist services).

However, Oregon law recognizes three circumstances in which a judge may interpret a contract as a matter of law, at summary judgment, even after *Yogman*'s step one and even when the contract is ambiguous and there are disputed facts in the record: (1) when there is no other admissible evidence of the contracting parties' intent beyond insufficient evidence in the summary judgment record; (2) when the party bearing the burden of proof fails to show a triable issue of fact; and (3) when the contract at issue is a standard-form insurance contract or possibly any other contract of adhesion, as discussed by the Oregon Supreme Court in *Allianz*, 367 Or. 711.

1. When There Is No Additional Evidence of the Contracting Parties' Intent

The first circumstance in which a judge may resolve the meaning of an ambiguous contract after *Yogman*'s step one is when no other admissible evidence of the contracting parties' intent is available beyond insufficient evidence in the record. This circumstance arose in *Yogman* itself. *Yogman* involved a dispute between neighboring property owners. Both the plaintiffs and the defendants owned houses in a beach-front subdivision. A restrictive covenant governing the subdivision required owners to use their properties for residential purposes only. The plaintiffs sought a declaration that the defendants' practice of renting out their property for short periods as a vacation home violated the restrictive covenant.

The Oregon Supreme Court affirmed summary judgment for the defendants, concluding as a matter of law that defendants' rental activity did not violate the terms of the restrictive covenant. The court first determined that the text of the covenant was ambiguous. The court then considered extrinsic evidence beyond the four corners of the covenant, such as evidence that the owners of at least one other house in the same subdivision had used it as a short-term vacation rental. The court concluded that this extrinsic evidence was "sketchy" and did not resolve the ambiguity. 325 Or. at 364. The parties agreed that they had no additional evidence of the original contracting parties' intent beyond what was in the record already. Without any additional evidence for a factfinder to consider, the court applied the maxim of construction that restrictive covenants should be construed most strictly against the covenant. This maxim led the court to conclude that the covenant did not prohibit the short-term rental of the defendants' property. Defendants therefore prevailed without needing to submit the case to a jury.

2. When the Party Bearing the Burden of Proof Fails to Show a Triable Issue of Fact

The second circumstance in which a judge may resolve the meaning of an ambiguous contract after *Yogman*'s step one is when the party who bears the burden of presenting evidence to establish the existence of a genuine issue of material fact fails to do so. For example, in *Dial Temporary Help Services, Inc. v. DLF International Seeds, Inc.*, the parties disputed whether their contract limited the defendant's liability for an injury to one of the plaintiff's temporary workers at the defendant's worksite. 252 Or. App. 376, 381, 287 P.3d 1202, 1205

(2012), *adhered to on reconsideration*, 255 Or. App. 609, 298 P.3d 1234 (2013). The trial court granted summary judgment to the defendant, and the plaintiff appealed. The Oregon Court of Appeals concluded that both parties offered plausible interpretations of the contract. The plaintiff, however, did not submit any admissible evidence of the contracting parties' intent in its opposition. In the absence of admissible extrinsic evidence, the court resorted to maxims of construction and construed the disputed contract term against the plaintiff, the party who drafted the contract.

Adhering to its decision on reconsideration, the court elaborated on its reasoning. The court explained that because the contract, if ambiguous, would be construed against the plaintiff, the plaintiff needed "to offer admissible evidence sufficient to show that there was a triable issue of fact on the intended meaning of the disputed provision." 298 P.3d at 1236. Because the plaintiff failed to offer such evidence, it was appropriate for the court to determine whether the defendant was entitled to judgment as a matter of law. The court emphasized that it is not the existence of ambiguity itself that generally makes it inappropriate for a judge to resolve the meaning of an ambiguous contract on summary judgment; rather, "it is the existence of competing extrinsic evidence—and the triable factual issue that the evidence creates." *Id.* In the absence of competing extrinsic evidence, there was no issue to submit to the jury. The court therefore affirmed summary judgment for the defendant.

3. When the Disputed Term Is Part of a Standard-Form Insurance Contract or Possibly Any Other Contract of Adhesion

The third circumstance in which a judge may resolve the meaning of an ambiguous contract after *Yogman*'s step one is not entirely settled in Oregon. At the very least, judges must resolve the meaning of standard-form insurance contracts. There also is strong support that judges, not juries, must interpret all contracts of adhesion. A contract of adhesion is "an agreement between parties of unequal bargaining power, offered to the weaker party on a 'take-it-or-leave-it' basis." *Sprague v. Quality Restaurants Nw., Inc.*, 213 Or. App. 521, 526, 162 P.3d 331, 334 (2007) (quoting *Reeves v. Chem Industrial Co.*, 262 Or. 95, 101, 495 P.2d 729 (1972)). Standard-form insurance contracts are among the most common contracts of adhesion. The parties to standard-form insurance contracts "do not ordinarily engage in a bargaining process in which the parties give and take as they formulate their contract." *Bunn v. Monarch Life Ins. Co.*, 257 Or. 409, 417, 478 P.2d 363, 366 (1970). Their contract is therefore "one of adhesion, affording the insured little or no opportunity to bargain." *Id.*

In *Allianz*, the Oregon Supreme Court recently confirmed that a trial court cannot allow a jury to interpret disputed standard-form insurance contracts. 367 Or. at 736. The meaning of "standard-form primary general liability policies approved for use by Oregon insurance regulators" is always "an issue for the court to decide as a matter of law." *Id.* at 736–37. *Yogman*'s step two, concerning extrinsic evidence or evidence outside the "four corners" of the contract, has no place in this legal inquiry: "The court is to consider the plain meaning of the relevant policy terms; if a term is ambiguous, the court considers the context in which the term appears and then the context of the policy as a whole; if ambiguity remains, the term is construed against the drafter—here, the insurer." *Id.* at 734. The Oregon Supreme Court did not resolve the converse question of whether a jury could interpret a negotiated, non-standard insurance policy, nor did the Court opine on whether the meaning of a non-insurance contract of adhesion is solely the province of a judge. *See id.* at 738 (noting only in passing that Oregon "caselaw and statutes regarding insurance policies indicate that the policy terms [in negotiated insurance contracts] would be construed by the court as a matter of law"). These appear to remain open questions in Oregon.

Other courts in Oregon have suggested in dicta that it may be appropriate for judges to resolve the meaning of any ambiguous contract of adhesion, not just standard-form insurance contracts, without considering extrinsic evidence and without submitting factual questions to a jury. *See McKenzie L. Firm, P.A. v. Ruby Receptionists, Inc.*, 2020 WL 6780341, at *4 (D. Or. Nov. 18, 2020) ("Oregon courts have only dispatched with the *Yogman* framework in favor of applying the maxim of *contra proferentum* [construction against the drafter] in insurance contracts—inapplicable here—and contracts of adhesion."); *Bob's Red Mill Nat. Foods, Inc. v. Excel Trade, LLC*, 2013 WL 5874574, at *9 (D. Or. Oct. 30, 2013) (stating that Oregon courts have suggested that judges should interpret ambiguous contracts as a matter of law "in the broader context of adhesion contracts generally"); *Derenco, Inc. v. Benj. Franklin Fed. Sav. & Loan Ass'n*, 281 Or. 533, 552, 577 P.2d 477, 489 (1978) ("Silence on the subject of a right which the drafter later contends he has is usually fatal to his contention unless such right is one which necessarily results from the other terms of the contract. . . . Construction against the drafter of the contract is particularly appropriate in a situation like the present where the contract is one of adhesion with the borrowers' having no opportunity to negotiate its terms.").

Having a judge resolve the meaning of a contract of adhesion as a matter of law makes practical sense. This approach avoids "the distinct possibility" that standard-form contracts "will be construed differently, *as a matter of fact*, by juries in Astoria and Ontario and Eugene." *Farmers Ins. Co. of Or. v. Munson*, 145 Or. App. 512, 522, 930 P.2d 878, 884 (1996) (emphasis in original). Without uniform interpretation of contracts of adhesion, customers who agree to the same contract could be entitled to different services or coverage "depending on each jury's decision—and, because each of those decisions will rest, ultimately, on a finding of 'fact' as to 'intent,'" no appellate court "could impose any degree of uniformity through appellate review and revision." *Id.*

In other jurisdictions, courts have expressly recognized that judges should rule as a matter of law in disputes over what contracts of adhesion mean. In *Tahoe National Bank v. Phillips*, for example, the California Supreme Court consid-

ered a contract of adhesion between a bank and a borrower. 4 Cal. 3d 11, 480 P.2d 320 (1971). The bank argued that the contract was ambiguous and required extrinsic evidence to resolve its meaning. The California Supreme Court concluded that the bank should bear responsibility for any ambiguity in the contract that it drafted and gave to the borrower on a take-it-or-leave it basis. The court therefore adopted the borrower's interpretation of the contract as a matter of law, without requiring a jury to resolve any factual questions about extrinsic evidence. In *Allianz*, the Oregon Supreme Court did not rule out the possibility that *Tahoe*'s treatment of contracts of adhesion also applies in Oregon.

Take-Aways

When parties disagree about what a contract means, the first question is whether, at *Yogman*'s step one, the text of the contract is ambiguous. If so, a jury ultimately may need to resolve the contract's meaning. But the parties still have a shot at having the judge interpret their contract as a matter of law at summary judgment. A judge can decide what a contract means after *Yogman*'s step one in three circumstances: (1) when there is no additional evidence of the contracting parties' intent to resolve the dispute at trial; (2) when the party bearing the burden of proof fails to present admissible evidence creating a genuine issue of material fact for trial; and (3) when the disputed term is part of a standard-form insurance contract or—arguably—any other contract of adhesion.

Getting the judge to say what the contract means can provide leverage in settlement negotiations, save the parties the expense of trial, or help show that a class should be certified because the contract means the same thing for every customer. Litigators may not want to miss a chance to ask the judge to say what the law is when it comes to the meaning of contracts. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Recent Significant Oregon Cases

By The Honorable Stephen K. Bushong
Multnomah County Circuit Court


Hon. Stephen K. Bushong

Claims and Defenses

Walker v. Oregon Travel Information Council,
367 Or 761 (2021)

Plaintiff was terminated from her job as chief executive officer of a semi-independent state agency governed by defendant Oregon Travel Information Council (Council) about six months after she sent a letter to the head of the Oregon Department of Administrative Services detailing 13 concerns about the Council's actions. A jury determined that the Council had wrongfully discharged plaintiff for engaging in protected whistleblowing activities and awarded $1.2 million in damages. The Court of Appeals reversed, concluding that plaintiff's actions had not served an important public policy, as required for a wrongful discharge claim. The Supreme Court reversed the Court of Appeals and remanded for further proceedings. The court explained that the Court of Appeals "incorrectly suggested" that the existence of an important public policy "rests on a court's legal determination of the plaintiff's reasonable belief that her employer violated the law in the whistleblowing context." 367 Or at 779. The court explained that, "[a]lthough the question of whether a wrongful discharge claim implicates an important public policy is a question of law for the court, that does not mean that resolution of the entire claim is for the court." *Id.* Whether an employee "had an objectively reasonable belief that her employer violated the law is a separate element of a common-law wrongful discharge claim based on whistleblowing protected under ORS 659A.203(1). And, whether a plaintiff can establish that separate element is, in most cases, an issue reserved for the trier of fact." *Id.* at 779-80. Here, the court concluded that plaintiff "produced evidence to support the jury's finding that she had a reasonable belief as to the Council's violation of law." *Id.* at 685.

Allianz Global Risks v. ACE Property & Casualty Ins. Co.,
367 Or 711 (2021)

The plaintiff insurance companies (collectively, Allianz) insured Freightliner Corporation (Freightliner) and Daimler Trucks North America LLC (Daimler) through general commercial liability policies. Allianz spent more than $24 million defending and paying environmental and asbestos claims against Daimler and Freightliner arising from Freightliner's business operations between 1952 and 1982. In this action, Allianz sought contribution for the payments it has made and will make in the future from insurance companies that insured

Freightliner—either directly or through its parent corporation, Consolidated Freightways (now known as Con-Way)—from 1976 to 1982. Defendants contended at trial that they were not responsible for any payments by Allianz because the liabilities covered by their policies were not transferred to Daimler when it acquired (and dissolved) Freightliner in 1981. Three defendants also contended that certain "side agreements" they had with Con-Way precluded contribution. Two defendants further contended that the "pollution exclusions" in their policies barred coverage. At trial, the jury found that (1) the insurers could be liable because Daimler had assumed Freightliner's contingent liabilities; (2) three defendants did not have a duty to defend or indemnify Freightliner based on their side agreements with Con-Way; and (3) one form of the pollution exclusion provisions—referred to as the Domestic exclusion—did *not* exclude coverage, but two other forms—referred to as the London and General exclusions—*did* exclude coverage. The Supreme Court affirmed the jury's verdict that Daimler assumed Freightliner's contingent liabilities, making defendants generally liable for contribution. The Supreme Court further held that the trial court erred in submitting the effect of the "side agreements" to the jury, concluding that, in this inter-insurer contribution case, "that question is to be decided by the trial court as a matter of law based on the relevant policies." 367 Or at 759. Finally, the Supreme Court held that the trial court erred in (1) failing to provide a legal interpretation of a key part of the London pollution exclusion as part of the jury instructions; and (2) instructing the jury about the London pollution exclusion in a manner that was different from the instructions on the Domestic exclusion. *Id.*

Bank of New York Mellon Trust Co. v. Sulejmanagic, 367 Or 537 (2021)

Defendant contended that its lien for unpaid condominium assessments had priority over the plaintiff bank's trust deed because the bank had not initiated a foreclosure action during the 90-day notice period prescribed by ORS 100.450(7). The Supreme Court, interpreting the statute, agreed with defendant, concluding that "a condominium association's notice under ORS 100.450(7) triggers an obligation on a first lienholder to act within 90 days, or the condominium association's lien will take priority." 367 Or at 557.

Lincoln Loan Co. v. Estate of George Geppert, 310 Or App 839 (2021)

In this action to foreclose multiple mortgages on the same property, the trial court dismissed the action regarding two of the mortgages, concluding that those mortgages expired under ORS 88.110—a statute of limitations on mortgage foreclosure—and did not fall within ORS 88.120's exception to that statute. The Court of Appeals affirmed, concluding that the rights of a purchaser at an earlier foreclosure sale "attached to the foreclosed property when the certificate of sale was recorded" and not when the sheriff's deed was subsequently recorded. 310 Or App at 854.

Appleyard v. Port of Portland, 311 Or App 498 (2021)

Plaintiff tripped over his own luggage and cut his foot on the bottom edge of a baggage carousel at the Portland International Airport. He brought this premises liability action against defendant Port of Portland, which owns and operates the airport. A jury returned a verdict in defendant's favor. Plaintiff appealed, arguing that no comparative fault could be attributed to him because he did know or have any reason to know that the base of the baggage carousel had a dangerously sharp edge. The Court of Appeals rejected that argument and affirmed. The court explained that (1) business invitees "must always exercise reasonable care for their own safety when on premises of others"; (2) an owner or occupier of premises "has a separate duty to maintain reasonably safe premises for its invitees, and neither an invitee's duty of care nor a failure to exercise it absolves the owner or occupier of its own duty"; and (3) an invitee's failure to exercise reasonable care for his or her own safety *may* be the basis of a comparative-fault defense if the invitee's negligence relates and contributes to the harm or risk of harm created by the defendant's negligence." 311 Or App at 518 (emphasis in original). Thus, "whether the plaintiff knew or could have known that an alleged dangerous condition was on the premises is not determinative." *Id.*

Box v. Oregon State Police, 311 Or App 348 (2021)

Robert Box was shot and killed by Oregon State Police troopers outside his home. The personal representative of his estate brought this wrongful death and trespass action, alleging among other things that the troopers trespassed on the Box property and were negligent in their tactical approach to Box's home. The trial court denied plaintiff's motion for summary judgment on the trespass claim, and granted defendant's motion for summary judgment, concluding that defendant was immune from liability under the doctrine of apparent authority immunity. The Court of Appeals reversed, concluding that (1) "the troopers were trespassers as a matter of law, and plaintiff was entitled to partial summary judgment on the trespass claim" (311 Or App at 385); and (2) the trial court "erred in granting summary judgment to defendant on the negligence claim on the ground of apparent authority immunity." *Id.* The court explained that the issue is not "whether apparent authority applies to the troopers' decision to shoot Box, but whether apparent authority immunity applies to the conduct at issue in plaintiff's complaint: the troopers' preshooting tactical decisions and OSP's preshooting supervisory decisions." *Id.* at 365. Applying that analysis, the court concluded that ORS 133.055(2)(a) (requiring troopers to arrest alleged assailant when responding to an incident of domestic disturbance), and ORS 161.239 (authorizing use of deadly force), did not provide apparent authority immunity given "the particular theories of negligence in this case." *Id.* at 366.

Allman v. Allman, 311 Or App 198 (2021)

The trial court struck Deutsche Bank National Trust Company (DBNTC)'s lien on certain property as an invalid encumbrance under ORS 205.460. The Court of Appeals,

construing the statute, reversed, concluding that "DBNTC is within the group of persons against whom the procedures of ORS 205.460 are not available, and the trial court did not have the authority to strike the deed of trust held by DBNTC under that statute." 311 Or at 206.

Hernandez v. Catholic Health Initiatives, 311 Or App 70 (2021)

Plaintiff, a registered nurse, injured her back lifting a patient at work at defendant Mercy Health's hospital. Mercy Health "administratively separated" plaintiff from her employment after she filed a workers' compensation claim and exhausted her medical leave. Plaintiff filed suit, alleging that Mercy Health's actions were unlawful employment actions, and that the individual defendants—who administered Mercy Health's employee benefit programs—unlawfully aided and abetted those practices in violation of ORS 659A.030(1)(g). The trial court granted the individual defendants' motion for summary judgment, concluding that liability for aiding and abetting under the statute applies only to employers and employees, not to third parties to the employment relationship. The Court of Appeals reversed, concluding that "aid-or-abet liability under ORS 659A.030(1)(g) is not limited to employers and employees. Anyone qualifying as a 'person' under ORS 659A.001(9) may be an aider or abettor of an unlawful employment practice in a way that subjects them to liability under ORS 659A.030(1)(g)." 311 Or App at 80-81.

Glenn v. Glenn, 310 Or App 661 (2021)

Defendant Thomas Glenn (Thomas) lived in the Glenn family home, holding title as a tenant in common with his siblings after the death of their parents. Thomas was in possession of the home, to the exclusion of all other tenants in common, and paid the property taxes since 1987. Plaintiff—one of the six Glenn siblings on the title as tenants in common—filed this partition action to force the sale of the property and distribution of the sale proceeds. Thomas argued in response that he had fee title to the property by adverse possession. The trial court ruled in plaintiff's favor and ordered partition and sale. The Court of Appeals reversed. The court concluded that Thomas "satisfied the requirements of ORS 105.615 in 2007 and, thus, fee simple title to the Glenn family home vested in him then as a matter of law." 310 Or App at 671.

Sova v. Vital Auto Brokers, LLC, 310 Or App 1 (2021)

Plaintiff bought a 2011 Dodge Ram truck from an acquaintance, Sergey Lupekha, paying Lupekha $9,800 in cash and providing a trade-in vehicle valued at $27,000. Unbeknownst to plaintiff, Lupekha had previously sold the same vehicle to defendant for $34,500 in cash. Defendant did not apply to DMV to have the title recorded because, as a dealer, it was not required to do so. After discovering the vehicle missing from its lot, defendant's investigators found it at plaintiff's place of business and towed it back to defendant's lot. Plaintiff then filed this action, asserting claims for conversion and fraud. The trial court ruled in favor of defendant, concluding that plaintiff had not met his burden of showing that he was a bona fide purchaser for value. The Court of Appeals reversed. The court explained that DMV's record of plaintiff's title "was *prima facie* evidence of his ownership of the truck" and "it was defendant's burden to rebut plaintiff's *prima facie* evidence that plaintiff was the rightful owner of the vehicle." 310 Or App at 6, 7. Defendant's speculation that plaintiff "might have been aware that Lupekha had previously sold the vehicle to defendant" was not legally sufficient to rebut plaintiff's *prima facie* evidence of ownership. *Id.* at 7.

Rohrer v. Oswego Cove, LLC, 309 Or App 489 (2021)

Defendant rents apartment units to tenants. Plaintiff worked as an assistant manager of defendant's leasing office. An individual began repeatedly calling the leasing office and harassing plaintiff. Plaintiff notified defendant, who allegedly "laughed off" the situation. Plaintiff complained to her supervisor and notified defendant that she had contacted an attorney for legal advice. Shortly thereafter, plaintiff's employment terminated. She then filed this action, alleging, among other claims, a common-law claim for wrongful termination. The trial court granted defendant's motion to dismiss, concluding that the common-law claim failed because plaintiff had an existing, adequate statutory remedy. The Court of Appeals reversed. The court first concluded, contrary to defendant's argument, that "common-law wrongful termination is a claim that remains available, in appropriate circumstances, under Oregon law." 309 Or App at 498. The court further concluded that ORS 659A.199—which applies when an employer takes an adverse employment action against an employee for reporting unlawful activity—"does not provide plaintiff a remedy for her claim that she was retaliated against for seeking legal counsel." *Id.*

Procedure

Otnes v. PCC Structurals, Inc., 367 Or 787 (2021)

Plaintiff submitted a motion for new trial under ORCP 64 on the last permissible day for filing such a motion. The clerk rejected the filing for failure to pay the filing fee. The next day, plaintiff paid the fee and requested that the filing relate back to the original submission date under Uniform Trial Court Rule (UTCR) 21.080(5). The trial court, Appellate Commissioner, and Court of Appeals determined that the motion was untimely, albeit for different reasons. The Supreme Court reversed, holding that (1) "ORS 21.100 does not render relation back unavailable when the reason that a document was rejected was the nonpayment of a required fee" (367 Or at 802); and (2) plaintiff's explanation of the reason for the request "was sufficient to comply with the requirements of UTCR 21.080(5)[.]" *Id.*

MAT, Inc. v. American Tower Asset Sub, LLC, 312 Or App 7 (2021)

Plaintiff owns the farmland on which defendants own and maintain a 900-foot tall television tower. Under a lease agreement between the parties, plaintiff was entitled to half of the revenue generated by any subtenants that use the tower. Plaintiff brought this breach of contract action, alleging that defendants had not disclosed all rent-paying subtenants or paid plaintiff its share of the revenue. Defendant responded that the action was barred by the six-year statute of limitations; plaintiff contended in response that defendant had fraudulently concealed the breach, tolling the limitations period. The trial court declined to conduct an *in camera* review of documents listed on plaintiff's privilege log, rejecting defendant's contention that those documents may show that plaintiff knew or should have known about a rent-paying tenant sufficient to trigger the running of the statute. The Court of Appeals vacated and remanded to the trial court to determine whether to conduct the *in camera* review under the appropriate legal standard. The court explained that, "[i]n determining whether to conduct an *in camera* review of material that might contain admissible information along with privileged information, the trial court must engage in a two-step process." 312 Or App at 24. First, the court must determine "whether the party seeking the review has 'produced evidence sufficient to support a reasonable belief that *in camera* review might yield' relevant unprivileged evidence." *Id.*, quoting *State v. Bray*, 281 Or App 584, 616 (2016). If so, the court must then consider "the facts and circumstances of the particular case, the volume of materials at issue, the relative importance of information sought, and whether such information might be available from non-privileged sources." *Id.* (internal quotes and citations omitted). Applying that test here, the court concluded that "the trial court erred in determining that defendants did not make the threshold showing for *in camera* review." *Id.* at 25.

Much v. Doe, 311 Or App 652 (2021)

Plaintiff brought a wage claim against defendant Fred Meyer Stores and obtained a default judgment after Fred Meyer failed to appear. The trial court then granted defendant's motion for relief from the default judgment under ORCP 71 B(1)(a) on the grounds of mistake, inadvertence, or excusable neglect. On appeal, defendant contended that (1) the trial court erred in considering the declarations and exhibits submitted by defendant, and (2) relief could not be granted because defendant did not simultaneously submit a responsive pleading asserting a defense as required by ORCP 71 B. The Court of Appeals rejected both arguments and affirmed. On the first issue, the court explained that the declarations submitted in support of and in opposition to the motion were in the court's record, and plaintiff did not file a written motion to strike them. Thus, "there could be no error in failing to strike the declarations" and, because they were not stricken, "they were a part of the record that the court could consider in ruling on defendant's motion under ORCP 71 B." 311 Or App at 657. On the second issue, the court explained that, "although defendant's initial motion did not attach an answer, the court, within its discretion (and before ruling on the motion) allowed defendant to withdraw its motion and refile." *Id.* at 658.

Anderson v. Sullivan, 311 Or App 406 (2021)

After defendant prevailed in this residential forcible entry and detainer (FED) action, she requested an award of $3,660 in attorney fees under ORS 90.255. Plaintiff objected to the fee request, defendant responded to the objections, and defendant ultimately requested an additional $4,070 in "fees on fees" for having to respond to the objections to her fee request. The trial court awarded $2,460 in fees but declined to award any "fees on fees." The Court of Appeals reversed, concluding that, "[a]lthough a court may deny fees on fees in connection with unsuccessful aspects of a fee request, it is legally incorrect to say that a party 'cannot' recover any fees on fees unless all of the requested fees are awarded. That is, a trial court has legal authority to make a discretionary award of fees on fees for a *partially* successful response to a fee objection." 311 Or App at 414 (emphasis in original).

Purdy v. Deere & Co./Norton, 311 Or App 244 (2021)

Plaintiff, as conservator for Isabelle Norton, a minor, brought this products liability and negligence action for damages Isabelle sustained when defendant Norton, her father, accidentally backed over her with a riding lawn mower manufactured by defendant Deere. The first trial, which resulted in a defense verdict, was reversed on appeal due to instructional errors. In the second trial, the jury found Norton and Deere liable and awarded damages. The Court of Appeals again reversed, concluding that the trial court again erred in instructing the jury in a way that likely affected the jury's verdict. Specifically, the court determined that the products liability instruction "could have been understood to present a risk/utility theory for establishing unreasonable dangerousness that was an alternative or conjunctive to the consumer-expectations test." 311 Or App at 257. The court also addressed other challenges to the jury instructions that were likely to arise on remand. The court concluded that the "duty to warn" instructions were incomplete because they "did not tell the jury that Deere's obligation to warn arose only if Deere knew or reasonably should have known of the risks of using the RIO [Reverse Implement Option] button." *Id.* at 264. The trial court also erred in rejecting Deere's requested instruction defining an adequate warning because, without the instruction, "the jury did not necessarily understand that the adequacy of a warning should be assessed from the standpoint of the reasonably prudent person, rather than from the perspective of the product's user, and that it should take into account the warning's form as well as its content, and whether it warned of the consequences of potential use *or misuse* of the product." *Id.* at 266 (emphasis in original; internal citations omitted). Finally, the court concluded that "the trial court did not err in giving the instruction that the jury could not consider Norton's negligence due to his inadvertent, inattentive,

or awkward failure to discover or guard against the defect in assessing Norton's percentage of fault." *Id.* at 270.

Hickey v. Scott,
310 Or App 825 (2021)

In this action for forcible entry and detainer (FED), tenant moved to dismiss on the grounds that the written notice of termination for nonpayment of rent was invalid because it specified that $1,700 in rent was due to cure the nonpayment when, in fact, the amount actually due was $1,175. The trial court denied the motion and granted possession to the landlord. The Court of Appeals affirmed. The court explained that, "upon receiving a notice of termination for nonpayment of rent, a tenant who is in fact behind on rent cannot pay nothing, continue to occupy the premises, litigate the amount owed, and then obtain dismissal of the FED action on the basis that the amount stated in the notice was not exactly the same as the amount ultimately found by the court to be owed." 310 Or App at 834.

Burns v. American Family Mutual Ins.,
310 Or App 431 (2021)

Plaintiff was injured in an automobile collision and submitted a claim for underinsured motorist (UIM) benefits against defendant, his insurer. Defendant accepted coverage and issued a "safe harbor" letter pursuant to ORS 742.061. The arbitrators awarded plaintiff $72,587.98 in damages, but defendant refused to pay the award. Plaintiff responded by filing a petition in circuit court for entry of judgment on the award, plus attorney fees under the statute. Defendant asserted defenses, but ultimately agreed to entry of judgment for the full amount of the arbitration award. The trial court awarded plaintiff attorney fees incurred in reducing the arbitration award to judgment but *not* any fees incurred in connection with the UIM arbitration, concluding that those fees were not recoverable under ORS 742.061 because of the "safe harbor" letter. The Court of Appeals reversed, concluding that, "despite initially employing the language and process contemplated by ORS 742.061, defendant cost itself the protection of the safe harbor by acting contrary to its agreement." 310 Or App at 445.

Altenhofen v. CHYP, LLC, 310 Or App 216

After trial, plaintiff submitted a document labeled "General Judgment and Money Award" that left unresolved the amount to be awarded by the court for a statutory penalty. The trial court signed the document, then entered an order granting defendant's motion for judgment notwithstanding the verdict (JNOV). Plaintiff appealed, contending that the JNOV was untimely under ORCP 63 D(1). The Court of Appeals affirmed, explaining that the "General Judgment and Money Award" submitted by plaintiff "is not a legally valid general judgment" nor is it "a legally valid limited judgment." 310 Or App at 218. The court concluded that "[t]he order granting the motion for JNOV thus was timely and the trial court correctly declined to set it aside." *Id.*

Saux v. Akebono Brake Corp., 310 Or App 190 (2021

Plaintiff worked at a motorcycle shop from 1961 to 2014. He was diagnosed with mesothelioma in 2014. Shortly before he died, plaintiff brought this negligence and strict-products-liability action against several defendants—Including Yamaha Motor Company, Ltd., and Yamaha Motor Corporation, U.S.A. (Yamaha)—alleging that his mesothelioma was caused by exposure to asbestos in brakes and other motorcycle parts. The trial court granted Yamaha's motion for summary judgment, concluding that there was insufficient evidence that plaintiff was exposed to Yamaha asbestos. The Court of Appeals affirmed. The court concluded that a Yamaha representative's statement that "asbestos-free friction materials began to surface in the market sometime in the 1970s" was insufficient to raise a triable issue of fact as whether plaintiff was exposed to asbestos in Yamaha brake friction materials. 310 Or App at 197.

Miscellaneous

Zweizig v. Rote,
368 Or 79 (2021)

In this case, the Supreme Court, answering a certified question from the Ninth Circuit Court of Appeals, concluded that "ORS 31.710(1) does not cap the noneconomic damages awarded on an unlawful employment practice claim brought under ORS 659A.030." 368 Or at 95.

De Young v. Brown,
368 Or 64 (2021)

Plaintiff ultimately prevailed in the Court of Appeals on his argument that a ballot measure seeking to disincorporate the City of Damascus was invalid under existing Oregon statutes. The Court of Appeals then awarded plaintiff about $40,000 in attorney fees and costs, concluding that it had inherent equitable power to award fees under a "substantial benefit" theory even though plaintiff did not vindicate any constitutional right. The Supreme Court affirmed, concluding that (1) "plaintiff acted in a representative capacity to the benefit of others"; (2) "that benefit was sufficiently substantial to support an award of fees under the substantial benefit theory"; and (3) "the substantial benefit supporting that fee award is the benefit to all residents of the state of the Court of Appeals' decision clarifying how the legislature may make referrals to voters on matters of local government structure." 368 Or at 77.