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WHAT'S INSIDE

The Statute of Ultimate Repose in Medical Malpractice Actions: A Reprise

PART 2

Renée G. Wenger
Hibbard, Caldwell & Schultz

In Part One of this article, published in the March, 1995 issue, I discussed the history and interpretation of the statute of ultimate repose in medical malpractice actions. I argued against the application of the "continuing tort" doctrine in such cases and disagreed with Mr. Stephen Lawrence's description of the case of *McKechnie v. Stanke,* 122 Or App 249, 857 P2d 870, *superseded,* 124 Or App 405, 862 P2d 507 (1993) (Judge Marcus's Opinion and Order on plaintiffs' Motion for Leave to Amend) published in the October, 1994 issue of the *Litigation Journal.* In Part Two of this article, I offer an analysis of the exception in ORS § 12.110(4) for "fraud, deceit or misleading representations" (hereinafter referred to as "the exception") and additional comments on Judge Marcus's Opinion and Order in *McKechnie.*

1. Fraud, Deceit or Misleading Representation

ORS § 12.110(4) provides that "every" medical malpractice action "shall be" commenced within five years from the date of the treatment, omission or operation upon which the action is based. This is the statute of ultimate repose for medical malpractice actions. *Gaston v. Parsons,* 318 Or 247, 262, 864 P2d 1319 (1994).

The statute goes on to provide that:

> . . . if there has been no action commenced within five years because of fraud, deceit or misleading representation, then [the action shall be commenced] within two years from the date such fraud, deceit or misleading representation is discovered or in the exercise of reasonable care should have been discovered.

This misrepresentation exception was created in 1971 when the period of repose was reduced from seven to five years. 1971 Or Laws, ch 473, § 1.[1] It is applicable *only* when an action has been commenced *more* than five years after the date of the treatment, omission or operation upon which the action is based. *Gaston,* 318 Or at 257 n.9.[2]

The exception was first interpreted in *Duncan v. Augter,* 286 Or 723, 596 P2d 555 (1979).[3] In *Duncan,* plaintiff sued her surgeon almost eight years after her gall bladder operation for alleged negligence in performance of the operation. The surgeon removed plaintiff's appendix as an incidental surgical procedure to the cholecystectomy. After the surgery, plaintiff continued to suffer from abdominal pains. She had two additional exploratory surgeries. During the second surgery in 1975, it was discovered that her pain was being caused by bacterial con-

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Comments from the Editor

Direct Examination of Expert Witnesses

By Dennis P. Rawlinson
Miller, Nash, Wiener, Hager & Carlsen

One of the most important but often least effective components of a trial presentation is the direct examination of expert witnesses. It is unusual these days when a trial or arbitration presentation does not include direct examination of at least one expert. Completing such a direct examination is not difficult, but it is rarely done effectively and persuasively.

Set forth below for your consideration are some suggestions for the framework of the direct examination of an expert.

1. The Tickler

For two to three minutes, when an expert first takes the stand, he enjoys a few golden moments when he has the fact-finder's full attention, and so do you as his direct examiner. Instead of spending the first 15 minutes of testimony on a litany of the background and qualifications of the expert and encouraging the court or jury to daydream or grow bored, ask two or three initial questions that tell the fact-finder who the expert is and why he is there. For instance:

Q. Doctor, can you tell us what kind of doctor you are?

A. Yes, a neurologist.

Q. Is a neurologist a doctor skilled in the diagnosis and treatment of diseases of the nervous system?

A. Yes.

Q. And have you come here today to explain to the fact-finder (court or jury) your diagnosis and treatment of the damage to plaintiff's nervous system caused by the accident?

In short, within the first two to three minutes, make it clear to the fact-finder who the expert is and what he or she will be talking about.

2. Qualifications

In federal court, curriculum vitaes and resumes are generally admitted into evidence. In state court, they are admitted by certain judges and upon stipulation by the parties. If you have the opportunity to do so, save precious examination time by introducing the vitae.

It is preferable to cover only the highlights of the expert's qualifications (which will relate directly to his or her specific opinion) during direct examination and leave the rest of the general background for the fact-finder to obtain from the curriculum vitae. This, of course, means the curriculum vitae should be reviewed and edited so that it becomes self-explanatory and persuasive and so that extraneous matters are deleted.

Nothing encourages the fact-finder's mind to wander more than 20 minutes of detailed background questioning of an expert that has little to do with his or her opinion in a specific case. An effective discipline is to limit the expert's qualifications to no more than five minutes or no more than 10 to 15 questions (depending on the expert and the case). Consider covering only the vitae's highlights and select those highlights for their relevance to the opinion in the particular case.

3. Lead With the Opinion

Unlike lay witnesses who seem to be most believable when they explain the factual basis for their opinions before they give an opinion (i.e., the symptoms of drunkenness as perceived by the witness before the opinion of drunkenness), expert opinion is more powerful if the opinion is given before its basis.

To begin with, if the opinion is held back until a lengthy explanation of the basis is given, the opinion itself may be lost as the fact-finder's mind wanders. Accordingly, if your expert is going to give three opinions, you should consider having the expert give all three opinions early in his or her testimony in a succinct, systematic manner and explain after each opinion that you will come back to it and explain the basis and procedure in arriving at it.

Such an approach ensures that even if a fact-finder pays attention to only the

opening ten minutes of the examination, the fact-finder will understand who the expert is, why he is there, and what his opinions are.

4. Explain the Basis for the Opinion

In my experience, the most persuasive expert testimony is the expert testimony in which the basis for the opinion is well organized, understandable, and succinct.

It is often helpful to use an overhead projector or a chalkboard to list the points or the procedures as the expert testifies about them to reinforce them and demonstrate their interrelationship.

The expert must use common, everyday language—not jargon. The best experts use picture words and analogies, just as the best lawyers use them in a closing argument.

5. Prepare for Cross-Examination

An often overlooked but important component of any direct examination of an expert is to have the expert undercut the adversary's anticipated cross-examination by explaining away in his or her own words the points you believe he or she will be asked upon cross-examination. Such a preemptive strike, particularly at the end of the direct examination and just before cross-examination is to begin, may convince your adversary to either abandon the proposed line of cross-examination or risk the patience of the fact-finder by covering "purported weaknesses," which you have already shored up on direct examination.

6. Conclusion

One thing I have learned about direct examination is that it may not be as exciting as cross-examinations, opening statements, and closing arguments, but it is usually the battlefield on which cases are won or lost.

It is a constant challenge to turn the direct examination of an expert into an entertaining and attention- demanding presentation. You may want to consider the above-listed suggestions the next time you conduct the direct examination of an expert. Experience has taught me that no matter how accomplished your direct examination of an expert may be, it can always be made better. ❐

Experts and the Bases of Their Opinions; Issues Surrounding the Presentation of this Data to a Fact-Finder

By Alexander Gordon
St. Paul Insurance Company[1]

In Oregon under ORE 702 expert testimony may be presented in those cases where an expert may prove helpful or of assistance to a fact-finder in resolving a disputed issue. Indeed this helpfulness standard was the Oregon rule prior to the adoption of the evidence code. See: *Tijerina v. Cornelius Christian Church*, 273 Or 58 (1975), *State v. Stringer*, 292 Or 388 (1982). FRE 702 also requires only that an expert's testimony be helpful to be admitted, notwithstanding the language sometimes used by federal district courts suggesting that expert testimony is appropriate only in those cases where the subject is outside the realm of knowledge of the average juror. *US v. Daly*, 842 F2d 1380, 1388 (2d Cir. 1980). "[T]he requirement for admissibility that expert testimony be 'beyond the jury's sphere of knowledge' adopts a formulation which was rejected by the drafters of Rule 702. While that formulation applied prior to the adoption of evidence rules, it no longer applies." *In re Japanese Elec. Prods. Antitrust Litigation*, 723 F2d 238, 279 (3rd Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1980).

Because this standard is so easily met there are a host of situations where a litigator may wish to call an expert. In presenting an expert, a significant issue will be to what extent the facts or data upon which the expert has relied in formulating his, or her, opinion will be presented to the fact-finder.

> **"The requirement for admissibility that expert testimony be 'beyond the jury's sphere of knowledge' adopts a formulation which was rejected by the drafters of Rule 702."**

This article will explore that issue.

ORE 703 and Hearsay

In many minds the provisions of ORE 703 and FRE 703 which provide that "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,...the facts or data [upon which an expert has, in a particular case, based his or her opinion] need not be admissible in evidence" have created the belief that the inadmissible as well as the merely unadmitted facts or data may be presented to a jury. Note that ORE 103(3) and FRE 103(c) both state, "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means...." It is submitted that there are no circumstances under which inadmissible facts or data underlying an expert's opinion may be disclosed on direct examination. This view is not unanimously held and is contradicted both by commentators asserting that Rule 703 is a hearsay exception and court decisions which fail to explain why and to what extent an advocate may present to a fact-finder the facts or data underlying an expert's opinion. However, this view is in accord with the opinion of Laird Kirkpatrick, Kirkpatrick Oregon Evidence 463, 464 (2d ed. 1989). As Michael H. Graham glibly yet concisely points out, hearsay and its exceptions are dealt with in Chapter 8 and have 800 numbers whereas the rule relating to the bases of opinions by experts is dealt with in Chapter 7 and has a 700 number. Graham, Handbook of Federal Evidence § 703.1 at 643 n21 (3rd ed. 1991).

Oregon's own legislative commentary on ORE 703 fails to distinguish between an expert's permitted reliance on information that has not been presented at trial and the disclosure of such information to the fact-finder so that he or she may also rely upon it in reaching a decision. The commentary states that "In effect, it [703] represents another exception to the hearsay rule. See Blakey, 'An Introduction to the Oklahoma Evidence Code: The 34th Hearsay Exception' in Tulsa L.Rev. (1980)," reprinted in Kirkpatrick Oregon Evidence 459 (2d ed. 1989).

Two anomalous results emerge if ORE 703 is a hearsay exception. One involves learned treatises, the other specific instances of conduct as the basis for character evidence.

[1] Until recently, Mr. Gordon served as a deputy district attorney for Multnomah County.

Learned Treatises

Oregon's rules on hearsay, unlike the federal rules, FRE 803 (18), do not provide that a learned treatise whether relied upon by an expert in offering his opinion on direct examination or acknowledged by him during cross-examination may be received as substantive evidence. Indeed, in its commentary on ORE 803 (18)(a), the legislature expressly asserted that it wished to retain the then prevailing practice in Oregon that learned treatises be used only for impeachment purposes. Reprinted in Kirkpatrick Oregon Evidence 531, 590-591 (2d ed. 1989). Yet if ORE 703 is an exception to the hearsay rule then those learned treatises relied upon by an expert are substantive evidence on direct examination but not on cross-examination.

In regard to the limited use of learned treatises in Oregon reference is made to *Scott v. Astoria Railroad*, 43 Or 26, 35-43 (1903). In that case, the court stated that while on direct examination an expert may not read to the jury various supporting recognized treatises but may only refer to various learned authorities as agreeing with his opinion, however "when he bases his opinion, upon the work of a particular author, such book may be read in evidence [for the purpose of contradicting the expert]." *Id.* at 42-43. Similarly, *Kern v. Pullen*, 138 Or 222, 231-232 (1931) relying in large part on *Laird v. Boston and Maine RR*, 80 N.H. 377(1922), clearly distinguished between the prohibited use of extracts from learned treatises on direct examination to bolster an expert's opinion and their use on cross-examination to challenge the validity of an expert's opinion; similarly *Eckleberry v. Kaiser Foundation, et al.*, 226 Or 616, 620-623 (1961).

Opinions on Mental Status as Character Evidence

Character evidence may be presented in many ways. As Kirkpatrick notes:

> If character is defined as the kind of person one is, then account must be taken of the various ways to develop a picture of character. These may range from the opinion of the employer who has found the person honest to the opinion of the psychiatrist based upon examination and testing. *Supra* at 170.

Indeed Kirkpatrick opines that "[t]he provision in Rule 405 authorizing opinion testimony regarding character is likely to cause courts to be more receptive to opinions of experts, such as psychiatrists and psychologists." *Supra* at 172. *See State v. Lawson*, 127 OrApp 392 (1994), noting that psychological testimony on certain character traits of the defendant under ORE 404(2)(a) was nonetheless scientific evidence subject to ORE 702.

A mental health professional frequently will base his or her opinion on a variety of sources: medical reports involving the subject; statements the subject made to the expert so that the expert could form an opinion for trial; and reports from third parties about the subject's conduct in the community. Under ORE 703 the expert may utilize all of these sources, and some of these sources may be disclosed in detail under other code sections. Under ORE 803(6) the medical records may be disclosed as business records. Under ORE 803(4) which provides for the admissibility of statements for the purposes of medical diagnosis or treatment the statements of the subject to the expert are admissible. ORE 803(4) marks a break with prior Oregon law to the degree that it includes within its scope statements made to an expert retained to make a diagnosis for litigation. It should be noted that upon presentation of evidence of the party's medical condition under this section all prior consultations between the party and physicians or psycho-therapists are no longer confidential and may be inquired into under ORE 511. Further under ORE 806, the person making the statements for the purpose of medical diagnosis or treatment may be impeached as if he or she were testifying.

However, if ORE 703 is a hearsay exception, examine its impact on the third party sources of information, a mental health professional would be permitted to testify as to specific instances of an individual's conduct which the expert became aware of through reliable secondary sources which formed a basis for his opinion about a party's character or trait of character whereas a lay witness offering an opinion about a party's character or trait of character under ORE 404(2) could not testify as to such specific instances of conduct. ORE 405, like ORE 705, limits inquiry into this otherwise inadmissible data to cross-examination. As Kirkpatrick notes regarding 405 "[i]t is not proper on direct examination to inquire into the basis of the opinion or the reasons for the reputation." Kirkpatrick Oregon Evidence 172 (2d ed 1989). Similarly, opinions under ORE 608(1) may not be explained to the fact-finder by reference to specific acts.

"In presenting an expert, a significant issue will be to what extent the facts or data upon which the expert has relied in formulating his, or her, opinion will be presented to the fact-finder."

If ORE 703 is a hearsay exception, character experts could disclose specific acts whereas lay witnesses could not.

As noted above, a lack of clarity in various court decisions has contributed to the erroneous belief that ORE 703 is a hearsay exception. In *Hager v. American Honda Motor Co., Inc., et al.*, and *Beaverton Motorcycles Inc, dba Beaverton Honda*, 101 OrApp 640 (1990) the defendant's expert testified as to previously unadmitted conversations between himself and various individuals regarding certain design features of Honda's all terrain vehicle. This testimony provided jurors with partial bases for his opinion. A hearsay objection was made and overruled. Presumably the trial judge did not view the exchange between the expert and these other individuals to be admissible hearsay but rather found that this material was not being offered for the truth of the matter asserted but for its effect on the

Please continue on next page

Experts, *continued from page 5*

listener. Counsel did not request a limiting instruction nor did counsel inquire as to whether it was reasonable for the defendant's expert to rely on such sources of information. On appeal the court unhelpfully stated "Even assuming that Otto's [the defendant's expert] testimony was inadmissible hearsay we conclude that any error was not prejudicial and does not require reversal." *Id.* at 643.

ORE 702, 703 and 705 and the Balancing Test of ORE 403

Regrettably ORE 403's balancing test and its federal counterpart are regularly employed by courts in deciding whether the inadmissible facts or data underlying the expert's opinion should be disclosed to the fact-finder on direct examination. The application of ORE 403 to this issue is regrettable because on its face its application is limited to examining whether or not otherwise admissible evidence should be presented to a fact-finder. It is not a mechanism to make inadmissible evidence admissible.

In *State v. Knepper*, 62 OrApp 623 (1983), the court raised the applicability of ORE 403 to ORE 703. There the court found reversible error in a physician's disclosure to a jury that his opinion that Mr. Knep-per was under the influence of intoxicants was based upon an excluded and thus inadmissible blood alcohol test result which showed an alcohol content of Mr. Knepper's blood of 0.24 percent. The court stated that "OEC 703 does not authorize an expert witness to tell the jury the inadmissible details of the basis of his opinion." *Id.* at 626.

"Regrettably ORE 403's balancing test and its federal counterpart are regularly employed by courts in deciding whether the inadmissible facts or data underlying the expert's opinion should be disclosed to the fact-finder on direct examination."

Unfortunately, the court, in dicta, 62 OrApp at 626 n.2, relying on Professor Kirkpatrick's 1982 edition of his *Oregon Evidence* treatise, went on to suggest that when examining whether or not to allow the disclosure on direct examination of inadmissible facts or data which form the basis of an expert's opinion a trial court should employ the balancing test of ORE 403. This is unfortunate because the court in support of its position erroneously merged remarks Professor Kirkpatrick made about disclosure under 705, relating to cross-examination, with remarks about disclosure under 703, relating to direct examination, and the issue of admissibility differs when the expert is being cross-examined. ORE 705 states in part that "[t]he expert may in any event be required to disclose the underlying facts or data on cross-examination."

Prior to adoption of the evidence code, rule 58 from the Uniform Act on Expert Testimony adopted in *Wulff v. Sprouse Reitz Co.*, 262 Or 293 (1972) addressed both the expert's reliance on unadmitted facts and data and their subsequent disclosure. The test as set forth in *Wulff* follows:

> Rule 58. *Hypothesis for Expert Opinion Not Necessary.* Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross examination he may be required to specify such data. *Id.* at 307-308.

Although not applicable to ORE 703, ORE 403 is applicable to expert testimony in two instances. First, in evaluating under ORE 702 the admissibility of scientific evidence, *State v. Futch*, 123 OrApp 176 (1993); second, under ORE 705 in evaluating the degree to which the otherwise inadmissible facts or data which form the basis for the expert's opinion are to be disclosed to the fact-finder on cross-examination.

The 4th Circuit made the role of FRE 403 quite clear in *U.S. v. A & S Council Oil Co*, 947 F2d 1128 (4th Cir. 1991).

> The data which an expert bases his opinion need not be admissible in evidence. Fed.R.Evid. 703. However, to counteract the potential advantage this liberalized rule confers on the proponent of the opinion, Rule 705 permits the cross-examiner to require the expert to reveal otherwise-inadmissible underlying information before the jury, subject only to Fed.R.Evid. 403's prejudice/probative value balancing test. *United States v. Gillis, 773 F.2d 549, 553-554 (4th Cir. 1985). Id.* at 1134.

"Although many litigators believe that jurors are unable to understand limiting instructions, it is submitted that to the degree this is true the fault lies with the advocate and not the jurors."

The Reasonableness of Reliance Under ORE 703 Upon Certain Data as a Standard for the Admissibility of an Expert's Opinion as Well as for Disclosing the Data to the Fact-finder

The literal language of ORE 703 suggests that if an expert based his or her opinion on data of the type reasonably relied upon by experts in the field the trustworthiness of the data involved is not subject to a trial court's independent review. Notwithstanding this, Oregon has long required its trial courts to determine both whether the particular data relied upon by the expert is reasonably relied upon by other experts in the field and whether such data is trustworthy under the helpfulness standard for admitting expert testimony. Justice Tongue in *State v. Stringer*, 292 Or 388 (1982) viewed this inquiry as part of ORE

702's threshold analysis of whether the expert's opinion would be helpful or of assistance to the fact-finder. Oregon is not alone in requiring such an inquiry, but many courts resist any inquiry beyond the expert's testimony. One commentator has noted the wide distribution of these two approaches which he has respectively labeled the liberal approach to the admission of expert testimony and the restrictive approach. The Oregon rule is an example of the latter approach. Expert Testimony on Organized Crime Under the Federal Rules of Evidence: *United States v. Frank Locascio and John Gotti*, 22 Hofstra L. Rev. 177.

In *State v. Stringer, supra* (1982), which noted that the then new Oregon Evidence Code in Rule 702 was adopting prior Oregon case law that the standard for the admissibility of expert testimony was whether such testimony would be helpful or of assistance to the fact-finder, Justice Tongue, dissenting on other grounds, argued that "in the exercise of the 'broad discretion' conferred upon him in such matters, [the judge may] exclude such testimony upon the ground that such an opinion 'cannot be reasonably grounded on such facts,' or that an opinion based on such facts would be either 'speculative' or without sufficient probative value to be of 'appreciable help' to the jury on 'this subject'." *Id.* at 400-401. *Accord Dyer v. R.E. Christiansen Trucking, Inc.*, 318 Or 391, 399 (1994). Inasmuch as this determination is a preliminary matter under ORE 104(1) one wonders about the advisability of that provision of ORE 705 which provides that the facts or data which underlie an expert's opinion need not, as a general condition, be disclosed prior to the expert's testimony. Indeed the legislative commentary and that of Professor Kirkpatrick devote substantial time to discussing the potential hazards to the integrity of the trial inherent in an expert not disclosing the basis for his or her testimony prior to being called as a witness and the rare number of occasions when there will be prior disclosure either through court order or as a result of a preliminary inquiry under ORE 104(1) at trial.

In *Mission Ins. Co. v. Wallace Security Agency, Inc.*, 84 OrApp 525 (1987) the court suggested that in determining under ORE 703 the admissibility of the facts or data underlying an expert's opinion, the trial court should determine the reasonableness of the expert's reliance on such information. The standard in making this decision would be whether these facts or data have independent guarantees of trustworthiness equivalent to those present in exceptions to the hearsay rule. The court certainly suggested a reasonable standard, but one likely to increase confusion about ORE 703's relationship to the hearsay rules.

There four expert fire investigators wished to tell the jury about specific statements made to them by eyewitnesses to a July 10, 1982, fire at Zidell's ship building and repair facility in Portland, Oregon. Although their testimony was received, these interviews were not disclosed to the jury. The appellate court's basis for sustaining the trial court's refusal to allow the experts to disclose the statements of the eyewitnesses was its own finding that the "statements that plaintiff seeks to have admitted do not have ...extraneous indicia of reliability. They are not 'data or facts' within the purview of OEC 703." *Id.* at 528.

When the inadmissible facts or data which underlie an expert's opinion are presented to a jury, it seems sound practice for the court to utilize a limiting instruction to advise the jurors of the narrow purpose for which this information may be used. *U.S. v. Affleck*, 776 F2d 1451, 1458 (11th Cir. 1985), approved a course of action where the government's expert was permitted to disclose to the jury the basis for his opinion but the district court "[t]hroughout the direct and re-direct examination of the government's expert...repeatedly instructed the jury that...." these items of information were not to be used as true statements but rather were to be used in evaluating the expert's testimony and his opinions in determining the value of his opinion.

Although many litigators believe that jurors are unable to understand limiting instructions, it is submitted that to the degree this is true the fault lies with the advocate and not the jurors. In the end, the ability to keep the inadmissible facts or data outside of the courtroom or minimize their impact on the fact-finder will be a matter of the advocate's skill as well. ❐

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Articles are welcome from any Oregon attorney. If you or your law firm has produced materials that would be of interest to the 1,200 members of the Litigation Section, please consider publishing in the Oregon Litigation Journal. We welcome both new articles and articles that have been prepared or published for a firm newsletter or other publication. We are looking for timely, practical, and informational articles.

Dennis P. Rawlinson, Editor
Miller, Nash, Wiener,
Hager & Carlsen
111 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 224-5858

Juror Interviews in Oregon . . . sort of

By Thomas C. Howser
Howser & Munsell, P.C.

As we watch the O.J. saga unroll its tattered tapestry, we are besieged by jurors being besieged by reporters, trial consultants and the just plain nosy, asking intimate details about their experience, at least up to the point where they are booted off the jury. Those of you who practice in California and Washington have the right and opportunity to talk to jurors about the case after their deliberations are concluded. In Oregon, however, by trial court rule and tradition, no attorney may discuss a case with a juror without permission of the Court. Now, however, in at least a limited fashion and in four counties, participating attorneys may obtain written input from jurors based upon voluntary completion of questionnaires after conclusion of the jury deliberations.

For the last four years the Litigation Section has worked on a juror debriefing program. The questionnaire was developed by Tsongas and Associates and is intended to elicit information about the jurors' view of the case, the performance of the attorneys, and other subjective and objective evaluations.

On March 13, 1995, Chief Justice Carson signed an Order approving the project for use in four counties, Jackson, Lane, Coos and Polk. The Order waives the prohibitions against the juror contact in UTCR 3.120 for purposes of allowing the project to be instituted in those counties as a pilot project.

The project has a number of restrictions to insure that the information obtained is not abused.

First, the questionnaires are to be filled out by the jurors following their deliberations, sealed in an envelope, and mailed to the Litigation Section where they will be eventually compiled into a statistical study when there are sufficient responses.

Second, the litigants must agree that no use will be made of any of the information in the questionnaires for post trial motions.

Third, the questionnaires will not be released to the participating attorneys until after 90 days have elapsed.

Fourth, the information in the questionnaires may not be disseminated to any third parties including clients, nor used for any advertising or promotional purposes.

Fifth, all questionnaires will be done by jurors on an anonymous and confidential basis.

In order to participate, all the attorneys must agree at the beginning of the trial and sign a written request for participation which incorporates the rules and procedures. It will *not* be available in criminal cases for constitutional reasons. The Litigation Section's local liaison member will then be contacted and advised that the parties have agreed to participate. The questionnaires will be filled out with the case title, names of the parties, and the attorneys by the Section's liaison and delivered to the Court. At the conclusion of the jury's deliberations and return of their verdict, the Judge will then advise them that the parties have requested them to fill out a questionnaire, advise them it is purely voluntary and provide the questionnaires to them. The jurors would then retire to the jury room and complete the

Local Liaison Volunteers for the Litigation Section

- **Lane County - Shaun McCrea, 1147 High St., Eugene OR - 485-1182**
- **Coos County - Marty Stone - 222 E. 2nd St, Coquille OR - 396-3171**
- **Polk County - Chris Lillegard - 236 SW Mill, Dallas OR - 623-6676**
- **Jackson County - Tom Howser - P. O. Box 640, Ashland OR - 482-2621**

questionnaires which would take about four or five minutes in most cases. The jurors will then be asked to place them in a pre-addressed, stamped envelope which they will seal and deliver to court personnel for mailing to the Litigation Section. After 90 days have elapsed, the questionnaires will be released to the attorneys for their review. The originals will be retained until a sufficient statistical sample is obtained to do a study of jurors' perceptions of attorneys' performance generally.

The forms are not yet printed, but should be available in the pilot counties around July 1, 1995. For those who are interested in more information or would like to get information about the forms, the local liaison volunteers for the Litigation Section are listed in the table on the opposite page.

The executive committee of the Litigation Section has worked long and hard to bring this program to fruition and sincerely hopes that we will have solid and enthusiastic participation in order to allow the program to continue and perhaps expand into other jurisdictions in the state. ❐

An Indian War

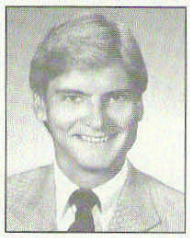
United States of America on Behalf of Heirs to the Absentee Wyandotte Allotment of Laura M. Van Pelt. v. Weyerhaeuser Company

By Norman J. Wiener & Peter C. Richter
Miller, Nash, Wiener, Hager & Carlsen

This litigation is of particular interest because of its historical significance. It involves to a certain extent the treatment of Indians by the United States Government, both past and present, and the application of Indian law to a current legal problem.

The scenario goes back to the War of 1812 when the Wyandotte tribe in the Great Lakes Region of what is now the United States sided with the British. After that war, our government saw fit to create a reservation miles away from their homelands for the Wyandottes. Most of the members of the tribe became reservation Indians, but some did not. To those who did not become part of the reservation, they became known as Absentee Wyandottes.

Norman J. Wiener



Peter C. Richter

In 1904, the Congress of the United States, perhaps out of a feeling of remorse, but more probably because of some expert lobbying (see later references to McAlpine), passed legislation, 33 Stat 519, which authorized an Absentee Wyandotte to select 80 acres of agricultural lands from the surveyed public domain, anywhere in the United States. Having so selected an allotment, the Absentee Wyandotte was entitled upon application to receive a patent to the fee title. A caveat was attached to the legislation. The fee title could not thereafter be transferred—"aliened"—without the consent of the Secretary of the Interior.

With this background, now the key events began, ultimately culminating in this litigation.

In December 1906, Laura M. Van Pelt, an Absentee Wyandotte, received an allotment of 80 acres of surveyed, undeveloped public domain land in Klamath County, Oregon.[1] In 1908 Laura Van Pelt requested the Bureau of Indian Affairs to authorize the sale of her 80 acres to Antone Kuckek. In 1910 the request was turned down, ostensibly because the amount being paid to Laura Van Pelt was less than the Bureau's 1910 appraisal of $1,620.

On May 26, 1917, Laura Van Pelt bypassed the necessity of obtaining Secretary of Interior approval and, along with her white husband, Philip Proff,

Please continue on next page

An Indian War, *continued from page 9*

gave a warranty deed to a J.W. Farnell of Klamath Falls, Oregon. That deed was recorded in Klamath County in May 1923. Thereafter, title passed through various hands, ending up in 1942 with an owner who made a business of buying cutover lands and who had put together a package of some 8,000 acres, including the Laura Van Pelt 80-acre tract.

In 1942, Weyerhaeuser purchased the 8,000 acres for $8,000, obtaining at the time $8,000 in title insurance for the entire tract.

From that day forward, Weyerhaeuser managed the entire property as a tree farm, granting grazing leases, harvesting timber from the Van Pelt tract as well as from others, paying property taxes, building roads, providing fire protection, and generally operating as a prudent land owner.

However, bureaucracy was at work. The Bureau of Indian Affairs Indian files reflected that this 80-acre tract was owned by Laura Van Pelt at the time of her death and that, as a consequence, her heirs became the owners. Eventually this problem ended up in the lap of the Department of Justice and demand went to Weyerhaeuser that it surrender the lands and pay damages to the Van Pelt heirs.

Thus, this litigation ensued.

On December 28, 1990, the United States of America, on behalf of the heirs to the Absentee Wyandotte allotment of Laura M. Van Pelt filed this proceeding in the Federal District Court of Oregon. The complaint demanded the ejectment of Weyerhaeuser from the 80-acre tract, the confirmation of title in the Van Pelt heirs, and damages for "nearly 50 years of occupancy." The damages included the loss of the use of the property since 1942 plus payment for timber removed by Weyerhaeuser in 1984.

As a defense, Weyerhaeuser claimed that the government had no standing to bring this action for the Indian heirs, and, as a consequence, all defenses (e.g., adverse possession) available to Weyerhaeuser against any other citizen should be available in this case.

On a motion for partial summary judgment, Federal Judge Robert E. Jones in December 1991 held for the government, ruling that the government had standing to sue for the heirs, and that title never left Laura Van Pelt in 1917; consequently she is entitled to possession. Of particular legal significance was his further ruling that affirmative defenses normally available in a dispute over title such as laches, estoppel, and adverse possession were not applicable because of long-standing Indian law. Judge Jones stated:

> "By virtue of it's being Indian land, this land is protectable by the United States because of the unique relationship between the Indians and the government. The United States has capacity to bring suit so long as the Indians have not been emancipated, which the Absentee Wyandotte Indians have not." (765 F Supp at 652)

In March 1993 the case was settled by payment by Weyerhaeuser of $50,000 in exchange for a dismissal of the lawsuit and delivery of a deed to the 80-acre tract, this time approved by the Secretary of the Interior. The settlement brought to an end another chapter in the ongoing legal history of the American Indian. ❐

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[1] It is interesting to note that in 1910 the Van Pelt patent was forwarded by the Lakeview, Oregon, Land Office to a Mr. McAlpine in Kansas City, Kansas. Mr. McAlpine apparently had made a deal with 72 Absentee Wyandottes to lobby Congress and select allotments for them with the ultimate intention to sell the 72 allotments with the proceeds to go to the Absentee Wyandottes, less Mr. McAlpine's commission. The files indicate that earlier in 1909 Weyerhaeuser Company unsuccessfully tried to buy the 72 allotments for approximately $50,000.

Can Real Lawyers Learn Anything from Television Lawyers?

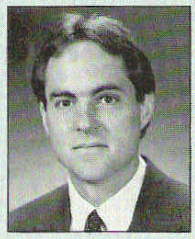
Chuck Rosenberg thinks they can, and will attempt to convince you at this year's Oregon State Bar Convention. Chuck Rosenberg has been a successful trial lawyer for 23 years. His practice concentrates on complex business litigation and white collar criminal defense. Rosenberg has taught at the UCLA School of Law and the UCLA Graduate School of Management. He also served as legal technical consultant for the popular television series *L.A. Law*.

Chuck currently serves as co-chair of the ABA Litigation Section's Train-ing the Advocate Committee, serves on the Board of Directors of the American Judicature Society, and is a member of the American Arbitration Association. He has delivered advocacy training programs across the United States for the ABA, the National Institute for Trial Advocacy, numerous law schools, and state and local bar associations.

Chuck's premise is that the art of storytelling has always been a big weapon in the arsenal of the successful litigator, and that all litigators might learn a thing or two from the devices script writers use to enthrall a jury and involve them in the emotional conflict of trial. In his insightful CLE program, Chuck Rosenberg will guide you through the new world of attorney stardom and will give you practical pointers on how to use your stage to excite and influence both judge and jury.

Chuck Rosenberg's three-hour presentation will begin at 1:30 p.m. on Thursday, September 28, at this year's Oregon State Bar Convention in Seaside. Come and discover whether you are ready for prime time. ❐

Recent Significant Oregon Cases



By GREGORY A. CHAIMOV

JURISDICTION

Mootness

In *Barcik v. Kubiaczyk*, ___Or___ (May 25, 1995), the Supreme Court ruled that an Oregon court cannot apply state standards of mootness and justiciability to bar federal claims when federal standards would allow the claims. In *Barcik*, students challenged regulations their school adopted to govern student publications, but had graduated by the time the court tried their claims. Applying Oregon law, the Court of Appeals concluded that the former students' claims were moot. On review, the Supreme Court applied federal law and concluded that the former students' claims for declaratory relief and nominal damages for alleged violation of First Amendment rights were not moot:

> "[A] claim brought under 42 USC § 1983 for [nominal] damages for a past wrong is not moot, even if claims for prospective declaratory and injunctive relief have become moot." Slip op at 28.

Personal Jurisdiction

An Oregon court cannot exercise jurisdiction over an out-of-state medical provider who merely responds to an Oregonian's telephone request for advice. In *Biggs v. Robert Thomas, O.D., Inc.*, 133 Or App 621, ___P2d___ (1995), a child's mother called a California optometrist for his opinion about the child's eye condition. Later, the child sued the optometrist for malpractice in Oregon, claiming that he had failed to diagnose a tumor. The court dismissed the action because "[a]part from [the optometrist's] conversation with [the child's mother], which he did not initiate, [the optometrist] has no other connections with the State of Oregon." 133 Or App at 627.

REMEDIES

Workers' Compensation Claims

In *Errand v. Cascade Steel Rolling Mills, Inc.*, 320 Or 509, ___P2d___ (1995), the court clarified when an injured worker may bring an action to redress a workplace injury. ORS 656.018 bars a lawsuit by an injured worker, making workers' compensation the exclusive remedy for a "compensable [workplace] injury." *Errand* explains that a covered compensable injury is one for which the Workers' Compensation Law compensates a worker, not just any workplace injury. In *Errand*, the worker claimed that inhalation of substances in the workplace exacerbated a respiratory condition. The Workers' Compensation Board denied the worker's claim because "work was not the 'major cause' of the respiratory condition." The Supreme Court allowed the worker to sue his employer because "it may be inferred from the exclusivity provision that there must exist, as a predicate for that freedom [from suit], some actual liability under the Workers' Compensation Law***." 320 Or at 518.

Comparative Fault

The comparative fault statutes, ORS 18.470-.485 do not authorize a court to reduce a lone defendant's liability to reflect the percentage of fault the jury allocates to a non-party. In *Davis v. O'Brien*, 320 Or 729 (1995), a car collided with a log truck and a passenger in the car sued the log truck driver for negligence. The parties stipulated that the passenger was not negligent. The jury then found the trucker to be 3.5% at fault, and the driver of the car, who had settled with the passenger and was not a party, to be responsible for 96.5% of the passenger's $200,000 in damages. The trial court entered judgment against the trucker for around $7,000, his 3.5% of the damages. On review, however, the Supreme Court interpreted ORS 18.485, which provides for several liability when a defendant is less than 15% at fault, to apply only when there is more than one defendant. Therefore, the trucker, whom the jury found to be only 3.5% at fault, was liable for all of the passenger's damages (less the amount the passenger received in settlement from the driver of the car).

Please continue on next page

Cases, *continued from page 11*

Arbitration

A statute cannot force a party into binding arbitration when the constitution would otherwise allow trial by jury. ORS 742.504 (10), which governs uninsured motorist policies, requires the insurer or insured to arbitrate a dispute if demanded by the other party before the commencement of litigation. In *Lind v Allstate Ins. Co.*, 134 Or App 395, ___P2d___ (1995), the insurer's policy provided that either party could request arbitration and that any award of up to $25,000 would be final. An uninsured motorist injured the insured, who demanded arbitration of her claim under the policy. The arbitrator awarded the insured $72,000. The trial court enforced the award because ORS 742.504 (10) did not allow the insurer to limit its liability in arbitration to $25,000. The Court of Appeals agreed that ORS 742.504 (10) required binding arbitration regardless of the size of the claim, but held that the requirement violated the insurer's jury trial rights under Article I, section 17 of the Oregon Constitution.

Declaratory Judgment

In the latest chapter of *O'Connor v. Zeldin*, ___Or App___ (May 24, 1995), the Court of Appeals held that the availability of supplementary relief under the Declaratory Judgments Act does not preclude other remedies. In an earlier action, the plaintiff had obtained a declaration that a settlement agreement was valid and enforceable against the defendant. When the defendant refused to honor the agreement, the plaintiff sued again, this time for breach of the agreement. The trial court dismissed the second action because the plaintiff could have remedied any breach of the agreement in the original declaratory judgment action through ORS 28.080, which provides that "[f]urther relief based on a declaratory judgment * * * may be granted whenever necessary or proper." On appeal, the court reinstated the action because the right to supplementary relief is not an exclusive remedy: "[T]he availability of supplemental relief does not prevent the filing of an independent action * * *." (Slip op at 3).

Reversed Judgment

Shook v. Vonder Haar, 134 Or App 170, 175, ___P2d___ (1995), explains that at least "on reversal of an erroneous judgment affecting an interest in property, a court should try to return the parties to the positions they held *before* the judgment was entered" (emphasis in original). In *Shook*, the vendor had obtained a judgment of strict foreclosure in an action to enforce a land sale contract. Two years later, the Court of Appeals reversed the judgment because the vendor had not properly served the purchaser. After the vendor completed the service, the parties disputed how to treat their respective obligations during the two-year period the vendor had displaced the purchaser. The Court of Appeals held that reversing the judgment reinstated the foreclosed contract and required the purchaser to make up the payments owing for the two-year period offset by the reasonable rental value of the property for the time the purchaser was out of possession.

CLAIMS FOR RELIEF

Defamation

In *Wallulis v. Dymowski*, 134 Or App 219, 228-229, ___P2d___ (1995), the Court of Appeals rejected a contrary holding in *Rice v. Comtek Mfg. of Oregon, Inc.*, 766 F Supp 1550, 1551 (D Or 1990), and held that, under Oregon law, the statement of one corporate employee to another during the course of employment can constitute the publication of a defamatory statement. In *Wallulis*, the court found actionable an employee's complaint to a supervisor that another employee was a "substance abuser."

Negligence

Rectenwald v. Snider, 134 Or App 250, 254, ___P2d___ (1995), confirms that ORS 18.590, which says that a court may admit evidence of the non-use of safety belt only to mitigate the injured party's damages, protects defendants as well as plaintiffs. In *Rectenwald*, the plaintiff hurt himself helping the defendant from her car, which had crashed, pinning her legs inside. The plaintiff's only allegation of negligence was that the defendant put herself in the peril from which the plaintiff tried to rescue her by failing to use her seat belt. The Court of Appeals affirmed summary judgment for the defendant because the plaintiff's only allegation of negligence—non-use of a safety belt—was inadmissible to prove the defendant's fault.

SUMMARY JUDGMENT

Expert Affidavit

An attorney's affidavit about an expert's testimony must rebut the moving party's evidence. *In Flint v Portland Pizza Delivery No. 8, Inc*, 134 Or App 234, ___P2d___ (1995), the defendant's delivery vehicle struck the plaintiff's car. The defendant brought a third-party claim against adjacent property owners alleging that their hedge caused the accident by obstructing its driver's vision. The Court of Appeals affirmed summary judgment for the property owners, who presented the driver's testimony that nothing obscured her vision of the plaintiff's car. The defendant countered the evidence with the affidavit of its attorney, who testified that the defendant had an expert witness who would testify about how the hedge affected the vision of approaching motorists. The court found that this testimony did not create a material issue of fact: "[E]ven if [the defendant's] expert would testify about some tendency of the hedge to obstruct motorists' vision, that would not rebut [the property owners'] evidence that [the hedge] did not block *this* driver's view * * *." 134 Or App 239 (emphasis in original).

Amendment of Pleadings

A party must move to amend its pleading to rely on a new theory to defeat summary judgment. In *Anderson v. PERB*, ___Or App___ (May 24, 1995), school administrators sought to stop a state agency from conducting a contested case hearing to recover overpaid retirement benefits. The agency moved for summary judgment and, in response, the administrators raised a ground not alleged in their petition for judi-

cial review. The Court of Appeals refused to consider the new ground: "We will not treat the [petition] as amended to include a new allegation * * * because petitioners have not sought to amend the pleading to include that allegation." (Slip op at 10.)

PRESERVATION OF ERROR FOR APPEAL

Davis v. O'Brien, discussed above, demonstrates when a party does not waive a claim of error by complying with the trial court's earlier ruling. In that case, the plaintiff moved before trial to exclude evidence of a non-party's fault in causing the plaintiff's injuries. The court overruled the motion and, without making new objections, the plaintiff's attorney helped craft jury instructions and a verdict form that were consistent with the trial court's ruling. The defendant presented a judgment that tracked the jury's verdict, which assigned most of the fault of the accident to the non-party. The plaintiff objected and presented a form of judgment assessing all liability to the defendant. The Supreme Court held that the plaintiff had properly preserved his claim that the defendant should have to pay all of the damages:

> "Plaintiff's failure to object to the jury instructions and to the verdict form did not operate as a waiver in this unusual case, because plaintiff's ability to object to the judgment was not dependent on an earlier objection to the jury instructions or to the verdict form. As this particular case was tried, the jury made all the findings that needed to be made on both parties' theories, and the trial judge had been made aware of those theories at the beginning of the trial." (Slip op at 12; footnote omitted).

THE CAMPAIGN FOR EQUAL JUSTICE
CONSORTIUM OF LEGAL SERVICES

The Litigation Section Executive Committee has unanimously adopted a resolution urging each member of the Section to generously support the 1995 Campaign for Equal Justice, the annual effort by Oregon's lawyers to help fund legal aid throughout the state.

That such support is necessary can be established by a few simple statistics:

- There are 600,000 Oregonians who are eligible for legal aid. This number has increased 20 percent since 1980.

- Of the 9,000 attorneys in Oregon, only 74 are legal aid attorneys. This number has decreased from the 85 legal aid attorneys existing in 1980.

- Oregon's legal aid services handled 30,000 cases in 1994. Due to funding limitations, only one in three legal aid applicants receives full assistance.

- Nationally, legal aid relies on federal support for approximately 46 percent of its funding. Legal aid anticipates a minimum 30 percent cut in federal support in the near future, increasing the need to cultivate alternative funding sources.

The Campaign should be an especially high priority among members of the trial bar who, perhaps more than any other lawyers, know that without access to Oregon's courts the protection and vindication of basic rights is a meaningless notion. During the past three years, Oregon's lawyers have distinguished themselves across the country for their generous support of the Campaign for Equal Justice. Now that funding for legal aid is in ever greater peril, the Executive Committee of the Litigation Section encourages all members to embrace this important opportunity to help provide equal justice for all.

Please make your donations to:

The Campaign for Equal Justice
516 S.E. Morrison, Suite 1000
Portland, Oregon 97204
(503) 234-1534

—Robert C. Weaver, Jr.
Secretary, Executive Committee
OSB Litigation Section

Ultimate Repose, *continued from page 1*

tamination of an appendix fragment that was left behind by the surgeon. Plaintiff filed a lawsuit, and the defendant demurred on the basis of the statute of ultimate repose. Plaintiff was permitted to amend her complaint to allege that ORS § 12.110(4) was tolled by the surgeon's statement to her, after the operation, that he had removed her appendix. Defendant's subsequent demurrer was denied. The defendant appealed from a verdict and judgment for plaintiff, and the judgment was reversed on the basis of the statute of ultimate repose.

The issue in *Duncan* was what constitutes a misleading representation for purposes of tolling the statute. *Duncan,* 286 Or at 727. The dispute between the parties was whether the exception is limited to knowing misrepresentations by the defendant. The defendant argued that only deliberate and knowing misrepresentations toll the statute. *Id.* at 729.[4]

In its preliminary discussion of legislative intent, the Court posited the following: (1) the overall objective of S.B. 43 was to restrict rather than enlarge the period of limitation for malpractice actions and the amendment to the bill (adding the exception) was intended to be compatible with that objective; (2) the amendment was intended to give a misinformed patient additional time to sue, if and only if the defendant was responsible for the misinformation; (3) the representation must actually have misled the patient; (4) the committee that proposed the amendment was primarily concerned with representations made after the act or omission alleged to constitute the malpractice; (5) the amendment was not intended to excuse a delay in bringing an action *any time* a plaintiff in fact acts or fails to act on misleading information; and (6) the amendment was intended to relieve a plaintiff of "default for an *excusable* delay."[5] *Id.* at 730-31 (emphasis added).

The Court then held that a "misleading representation" need not be fraudulent or deceitful, and it may be made before or after the alleged negligent act or omission. *Id.* at 731-32. However, the Court was clear that the exception could not be used to bootstrap a plaintiff around the preceding clauses of ORS § 12.110(4). *Id.* at 732.

> *"The Court then held that a 'misleading representation' need not be fraudulent or deceitful, and it may be made before or after the alleged negligent act or omission."*

> . . . the consequence of finding that one has been misled whenever one discovers the allegedly unprofessional treatment contradicts the object of ORS 12.110(4). *Id.* at 733.

To prevent this, the Court held that a careless or innocent misleading representation must be noncontemporaneous. An innocent and contemporaneous misrepresentation does not toll the statute if it goes to the gravamen of the complaint. It goes to the gravamen of the complaint if it is about "the careful performance or the success of the very treatment or operation whose failure is the basis of plaintiff's subsequent complaint." *Id.* at 731-32. Finally, the Court held that defendant's misleading representation in *Duncan* was contemporaneous and went to the gravamen of the complaint. Therefore, it did not toll the statute of ultimate repose and defendant's demurrer should have been sustained. *Id.* at 733.

The Court's focus, in its application of the exception to the facts in *Duncan*, was on the *nature* of the misleading representation and *how* it related to the allegations in the pleading, rather than the *timing* of the representation. Although the misrepresentation in *Duncan* was made *after* the operation, it was considered "contemporaneous" by the Court. It appears then that careless or innocent misrepresentations going to the gravamen of the complaint are, by their nature, contemporaneous and insufficient to toll the statute. There is nothing about the passage of time in and of itself that qualifies a misrepresentation as noncontemporaneous.[6]

This analysis was next applied in *Skuffeeda v. St. Vincent Hospital*, 77 Or App 477, 714 P2d 235, *rev. denied,* 301 Or 240, 720 P2d 1279 (1986). In that case, plaintiff sued his hospital, open heart surgeons, cardiologist and radiologists for negligence and fraud five and one-half years after his surgery. The trial court granted defendants' motion to dismiss because all plaintiff's claims were barred by ORS § 12.110(4). Judgment was entered for all defendants. The trial court's ruling was reversed on appeal.

The plaintiff had open heart surgery. During the surgery, a metal screw fell into the surgical opening and it lodged next to plaintiff's heart muscle. Post-operative chest x-rays were ordered by the cardiologists. The x-rays were done by the radiologists. All defendants read the x-rays. The screw was visible on the x-rays. However, plaintiff was not told of the presence of the screw until it was discovered by another doctor more than five years after the surgery. *Id.* at 479-81.

Plaintiff's many allegations of negligence against multiple defendants fell into three general categories: (1) negligence in the performance of the surgery itself, (2) negligence in reading the x-rays, and (3) negligence in advising plaintiff about the results of the x-rays. *Id.* at 479-80.[7] Plaintiff alleged that the misrepresentations by all defendants were: (1) that they intentionally or recklessly represented to him that his postoperative condition was normal and (2) that they failed to disclose to him the x-ray findings. *Id.* at 479-81.

The Court cited and discussed *Duncan* and again defined "contemporaneous" misrepresentations (including nondisclosures) in terms of the relationship between the misleading information and the negligence allegations of the complaint. The Court stated that a doctor's misleading representation will not toll the statute

> . . . if the representation is made innocently *and* concerns the very act 'whose negligent performance is the gravamen of the complaint'. *Id.* at 483.

Furthermore, the Court held that an innocent/careless, noncontemporaneous misleading representation tolls the statute only as to an action against the person responsible for the misinformation. *Id.* The Court found that the participation of each surgeon and the cardiologist in plaintiff's discharge from the hospital constituted a representation that the postoperative x-rays were normal.[8] Therefore, each of the defendants made a misleading representation. However, the representations went to the gravamen of plaintiff's allegations of negligence against those defendants concerning misreading the x-rays and failing to inform plaintiff. It did not go to the gravamen of plaintiff's allegations of negligence against those defendants in the performance of the surgery.[9]

As to the radiologists, the failure to disclose the existence of the screw went to the gravamen of the claims of misdiagnosis against them, regardless of the actual dates of either, and the Court held that the statute was not tolled as to the radiologists at all:

> In this claim, however, the 'tolling misrepresentation' concerns the very act whose negligent performance is the gravamen of plaintiff's negligence claim against these defendants. *Id.* at 484.

The *Duncan* and *Skuffeeda* holdings come together in *Jones v. Salem Hospital*, 93 Or App 252, 762 P2d 303 (1988), *rev. denied*, 307 Or 514 (1989). In *Jones*, the trial court granted defendants' motion to dismiss on the basis of the statute of ultimate repose. Judgment in favor of defendants was reversed. Plaintiff's mother, as guardian ad litem, claimed that her child's brain damage was the result of medical negligence. Five physicians, who treated plaintiff and his mother at different times and in different ways, were named as defendants: Sproed (a family practitioner), Alsever and Thomas (obstetricians), and Holly and Lace (pediatricians). The hospital was also a defendant. The principal issue was whether the statute of ultimate repose was tolled as to some or all of the defendants. *Id.* at 254.

> *"The Court held that an innocent/careless, noncontemporaneous misleading representation tolls the statute only as to an action against the person responsible for the misinformation."*

Plaintiff in *Jones* was born May 4, 1979. Sproed provided prenatal care from November 1978 to May 3, 1979. Alsever provided care from February 1979 through the cesarean delivery on May 4, and continued as the mother's physician until 1984. Thomas was present at the delivery. Holly and Lace provided neonatal care until the time of discharge on May 18, 1979. Holly continued as the child's pediatrician until May 1981. The complaint was filed in October 1985.

Plaintiff alleged that Alsever and Sproed were "negligent from February 26, 1979 through May 2, 1979" in failing to perform an ultrasound and to order bed rest. *Id.* at 255. Plaintiff alleged that Alsever and Thomas were negligent "on May 3 and May 4, 1979" in performing amniocentesis without the benefit of ultrasound, in failing to use a fetal heart monitor, in delaying cesarean section in the presence of fetal distress and bleeding, in failing to have at hand someone qualified to resuscitate plaintiff, and in failing to order bed rest. *Id.* at 255-56. Plaintiff alleged that Holly and Lace were negligent "between May 4 and May 18, 1979" in failing to provide adequate oxygen, in not obtaining blood gas levels, and in not transferring plaintiff to a Level III care center after birth. *Id.* at 256.

Plaintiff in *Jones* alleged that there were innocent misrepresentations. *Id.* at 260. It was alleged that, following plaintiff's birth, Lace and Holly falsely represented "in the hospital records and to plaintiff's parents" that: (1) plaintiff had suffered no fetal distress, (2) his sole problem was fetal distress syndrome related to prematurity, (3) there had been no negligence during the delivery, (4) there had been no birth injury to plaintiff, and (5) plaintiff's developmental delay was the result of prematurity alone and would eventually resolve. *Id.* at 256. Plaintiff alleged that Lace and Holly failed to disclose: (1) amniocentesis had caused a puncture in the umbilical cord, (2) there had been severe bleeding prior to delivery as a result, (3) there had been meconium staining indicative of fetal distress, (4) diagnostic tests after birth had demonstrated respiratory acidosis, and (5) there had been a two-and-a-half-hour delay in providing oxygen to plaintiff. *Id.* at 257.

Plaintiff alleged that Alsever and Thomas failed to disclose: (1) amniocentesis had caused a puncture in the umbilical cord, (2) the amniotic fluid contained blood, and (3) there had been meconium staining which indicated fetal distress. *Id.* at 257. Plaintiff alleged that Alsever had failed to make these disclosures even when questioned by plaintiff's mother regarding the possibility of premature birth and developmental delay occurring in another pregnancy, and "requested information regarding the cause of plaintiff's injuries." Plaintiff further alleged that Alsever represented to plaintiff's mother that she had

> . . . received good care during . . . her pregnancy and delivery, and that there had been no act or omission on the part of her physicians which could have contributed to plaintiff's problems. *Id.* at 257.

At least some of the alleged misleading representations and claims were unrelated to each other in that the alleged representations were statements made by some defendants about care provided by other defendants. *Id.*

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Ultimate Repose, *continued from page 15*

at 262.

Plaintiff argued that he was in a Catch-22. If the alleged misleading representation and claim are related, then the representation goes to the gravamen of the complaint and does not toll the statute. But if they are not related, then the representation does not toll the statute either. Plaintiff argued that it was a fallacy to propose that a representation which has nothing to do with a claim cannot toll the statute as to that claim. *Id.* at 263. The Court disagreed. While acknowledging the difficulty plaintiff faced in his case, the Court recognized that the statute of ultimate repose, of necessity, presents a difficulty to any plaintiff whose claim may be barred by its application. *Id.*

> In order to be misleading, a representation *must* have *some* relationship to the plaintiff's knowledge or awareness of the facts constituting the claim. *Id.* at 263 (emphasis in original).

In other words, there must be *some* relationship between the misrepresentation of a defendant and the claim against that same defendant, but the relationship cannot be so close that the misrepresentation is, in essence, a restatement of the specifications of negligence. *Jones,* 93 Or App at 264-65.

The Court found that plaintiff had alleged sufficient misleading representations as to only three of the five defendants. *Id.* at 263. The Court further found that only some of the alleged misleading representations made by the remaining defendants were legally sufficient to survive a motion to dismiss. *Id.* at 264-66. The Court used both the *Duncan* and *Skuffeeda* cases to sort through the specific allegations for legal sufficiency as follows:

1. Holly's and Lace's nondisclosure of plaintiff's test results, which showed respiratory acidosis, was careless or innocent misleading representations that did not go to the gravamen of the claim against them because it was new information made available to the defendants and not disclosed to the plaintiff that tended to reveal the alleged negligence;

2. Holly's and Lace's nondisclosure of their alleged delay in administering adequate oxygen went to the gravamen of the claim against them and was not sufficient to toll the statute;

3. Holly's and Lace's statement that plaintiff's developmental delay was the result of prematurity alone went to the gravamen of the claim against them because it was a diagnosis and was not sufficient to toll the statute;

4. Alsever's failure to disclose that the amniocentesis caused an umbilical cord puncture went to the gravamen of the claim against him and was not sufficient to toll the statute;

5. Alsever's failure to disclose the amniocentesis complication over the course of two years of persistent questioning from plaintiff's mother about whether prematurity and developmental delay could recur in future pregnancies was not a misleading representation at all because it was simply nonresponsiveness to a tangential question; and

6. Alsever's statement two years after the birth that plaintiff's mother received good care and that the doctors' conduct did not cause plaintiff's problems was a careless or misleading representation that did not go to the gravamen of the claim against Alsever.

> *"there must be some relationship between the misrepresentation of a defendant and the claim against that same defendant, but the relationship cannot be so close that the misrepresentation is, in essence, a restatement of the specifications of negligence. Jones"*

Plaintiff then tried to reassert a temporal definition of contemporaneity by arguing that, even if some of the representations went to the gravamen of the claims, they were noncontemporaneous and, thus, tolled the statute. *Id.* at 265. The Court reminded plaintiff of the significance of *Duncan:*

> *. . . we do not think that the court in Duncan intended contemporaneousness to be measured by a universal bright line based on a particular chronological period or a particular event — such as discharge or the termination of treatment*—which follows the negligent act. The contexts in which the court used 'contemporaneous' imply that the negligence and the physician's representations must be related—temporally and otherwise—in such a way that the representation simply espouses a satisfactory performance before the physician can or should have any reason to doubt its success. *Id.* at 265-66 (emphasis added).

The court concluded that:

> . . . [c]ontemporaneousness ends when the maker of the representa-

> tion knows or has reason to know information which he did not have at the time of the negligently performed procedure or its immediate aftermath *and which reasonably indicates that something . . . went wrong*. *Id.* at 666 (emphasis added).

This synthesis of the cases and the application of ORS § 12.110(4) in *Jones* is particularly instructive. It is this author's opinion that *Duncan, Skuffeeda* and *Jones* interpret the exception for fraud, deceit or misleading representation narrowly. It is not analytically interchangeable with the discovery rule for the statute of limitations. Even though a plaintiff may not have to plead and prove intentional and knowing conduct by the defendant to toll the statute of ultimate repose, the nature of the misleading representation and the effect it must have on the plaintiff is the same as in a case of fraud or deceit. In *Jones*, the only two alleged misrepresentations that were legally sufficient were the undisclosed new information (lab results) acquired after the birth that "reasonably indicated something went wrong" and the assurances two years after the birth that none of the defendants had been responsible for plaintiff's injuries. Everything else was considered a restatement of the specifications of negligence.

2. McKechnie v. Stanke

In *McKechnie*, plaintiffs' original complaint was filed on March 26, 1991 and their amended complaint was filed on January 9, 1992. The amended complaint alleged negligent conduct against five individual physicians and a medical clinic for care and treatment provided to plaintiffs' minor son between June 1981 and October 1990. The physicians treated the child at different times and in different ways. Plaintiffs alleged that the child's condition was diagnosed by another physician in November 1990.

Plaintiffs claimed generally that defendants failed to diagnose a congenital urinary tract anomaly. There were ten specifications of negligence for failing to properly evaluate and diagnose his condition. Plaintiffs alleged generally that the first negligent acts occurred after November 15, 1983. In spite of the fact that each defendant was individually named, plaintiffs alleged that all the defendants were negligent in the same way and over the same nine-year period. There were no specific allegations made as to any one defendant. There were no allegations made as to exactly when any particular act or omission occurred.

> *"Even though a plaintiff may not have to plead and prove intentional and knowing conduct by the defendant to toll the statute of ultimate repose, the nature of the misleading representation and the effect it must have on the plaintiff is the same as in a case of fraud or deceit."*

Plaintiffs alleged that defendants had made material misrepresentations and nondisclosures which delayed plaintiffs' discovery of defendants' alleged negligence. Plaintiffs alleged that "over the entire course of their improper care and treatment" all of the defendants told plaintiffs that: (1) the child's signs and symptoms were not related to a surgically correctable urinary tract abnormality; (2) his recurrent urinary tract infections required nothing more than periodic treatment with antibiotics; (3) no other consultation or referral was necessary; (4) he would ultimately outgrow his urologic symptoms; and (5) he would have no permanent adverse effects from his urologic problem at all. There were no specific allegations as to who made these representations or when.[10] Plaintiffs alleged that defendants had "ongoing knowledge of facts relating to their own improper care and treatment" and failed to disclose such facts, "despite plaintiffs' inquiry and the opportunity to disclose such facts at a time when additional injury would have been avoided." There were no specific allegations as to what facts defendants failed to disclose to plaintiffs.

Defendants raised as an affirmative defense the statute of limitations and ultimate repose found in ORS § 12.110(4). Defendants filed motions for partial summary judgment and/or summary judgment on behalf of each individual physician. The trial court granted defendants' motions as to four of the five physicians on the ground that all claims arising out of treatment rendered more than five years prior to commencement of the action on March 26, 1986 were barred by the statute of ultimate repose. Following a settlement conference, and based on the stipulation of the parties, a Two-Year Abatement/Removal Order, a Rule 67B Order and an Order of Dismissal were entered. Based on the Rule 67B Order, a Judgment was entered in favor of defendants on all claims arising more than five years before the commencement of the action and plaintiffs' claims were dismissed with prejudice.

On appeal, the Court of Appeals affirmed the summary judgment. *McKechnie v. Stanke*, 122 Or App 249, 857 P2d 870, *superseded*, 124 Or App 405, 862 P2d 507 (1993). The Court was unequivocal in its opinion:

> According to plaintiffs, defendants' misdiagnoses of Shawn's condition constituted misleading representations, which they discovered less than two years before they filed their complaint. Plaintiffs are wrong. *Id.* at 253.

Plaintiffs argued to the Court that defendants' statements were analogous to those alleged in *Jones*. They said that each time defendants examined the child, they had at their disposal his prior history of complaints and the record of previous treatment and diagnosis. That prior history constituted the "additional information" referred to in *Jones*, which should have made clear to defendants that their continued diagnoses of urinary tract infections were incorrect. *Id.* at 255. The Court found, however, that this information was the same information providing the basis for plaintiffs' allegations of negli-

Please continue on next page

Ultimate Repose, *continued from page 17*

gence. Thus, the alleged misleading statements were identical to and contemporaneous with the very negligence forming the basis of the complaint. *Id.*[11]

Plaintiffs petitioned the Oregon Supreme Court for review. The Court of Appeals treated the petition as one for reconsideration, allowed it, withdrew their opinion, dismissed the appeal and remanded the case to the trial court with instructions to vacate the judgment. *McKechnie v. Stanke*, 124 Or App 405, 862 P2d 507 (1993). This was based on the Oregon Supreme Court's opinion in *Lesch v. DeWitt*, 317 Or 585, 858 P2d 872 (1993), which held that the ORCP 67B judgment was not a final judgment under the circumstances, and the appellate court did not have jurisdiction.

Upon remand to the trial court, plaintiffs moved for leave to file a Second Amended Complaint. In their renewed effort to circumvent the Court of Appeals' opinion, plaintiffs proposed dividing their allegations of negligence into three counts: (1) the "1982 Treatment," (2) the "1983 Treatment," and (3) the "1985 Negligence."[12] The negligence was alleged against one individual physician who had provided the most continuous care for the plaintiff. In each Count, plaintiffs alleged that at certain points in time the defendant made misleading representations that there was no underlying illness or other abnormality to account for plaintiff's signs and symptoms and that plaintiff would outgrow his urologic signs and symptoms.[13] A hearing on the Motion was held May 9, 1994 by Judge Michael Marcus.

Judge Marcus wrote in his Opinion and Order that plaintiffs' argument that the representations did not go to the gravamen of the specifications of negligence was "unpersuasive":

> Plaintiffs' specifications of negligence *all* consist of ways in which the defendants allegedly *failed* to do that which would have resulted in a correct diagnosis or that which would have been indicated by a correct diagnosis. The misrepresentations relied upon for avoiding ultimate repose constitute the equivalent of assertions of the 'careful performance or success of the very treatment . . . whose failure is the basis of plaintiff's [sic] complaint.' *Duncan v. Augter*, supra, 286 Or at 732. After all, it is inappropriate diagnosis which is the gravamen of plaintiffs' complaint, and representations that there was no underlying illness or abnormality are the equivalent of that allegedly inappropriate diagnosis itself. Opinion, pp. 6-7 (emphasis in original, footnote omitted).

> *"Contemporaneity has to do with the relationship between the representation and the alleged negligence."*

At this point, for the first time, plaintiffs argued that the misrepresentations were noncontemporaneous, even if they went to the gravamen of the complaint, and thus tolled the statute of ultimate repose. Judge Marcus responded to this argument as follows:

> The Court of Appeals expressly rejected plaintiffs' quite plausible suggestion that 'each time defendants examined Shawn, they had at their disposal Shawn's prior history of complaints and the record of previous treatment and diagnosis.' 122 Or App at 255. The Court's response, that the representations were the same as the failure to diagnose and were therefore both *'identical and contemporaneous with'* the negligence plaintiffs alleged, seems hard to reconcile with *Jones* (which was decided by a different panel). Perhaps the distinction turns on the circumstance that in *Jones* the representation that 'developmental delay was the result of prematurity alone and would eventually resolve' allegedly hid the doctors' negligent procedure which *caused the developmental delay*, while in the version of the complaint subject of this appeal the representations and the negligence are 'identical' in that both amount to misdiagnosis. Opinion, pp. 7-8 (emphasis in original, footnote omitted).

This was the distinction between *Jones* and *McKechnie* argued by defendants to Judge Marcus and advocated by defendants as the correct interpretation of *Jones*. Judge Marcus went on to state that the Court of Appeals' opinion in *McKechnie* did not appear to be based on a pleading error:

> Plaintiffs' separation of specifications of negligence into three periods and their specifications of temporally distinct representations should make no difference to the panel which decided the previous appeal. It does not appear from that panel's decision that it was holding plaintiffs to a pleading error, and there is no reason why a repeated and continuous course of presenting symptoms is any less likely to provide the 'additional information' required by *Jones* than is a repeated but noncontinuous course of presenting symptoms. The prior opinion apparently holds identity of representation and negligence sufficient to render the representation perpetually contemporaneous.
>
> * * * *
>
> Continued misdiagnosis is no different in this regard than the physician's assurance of appropri-

> ate past care in spite of new information hypothesized in *Duncan*. Opinion, pp. 8, 11.

Again, this was defendants' position as to the correct interpretation of *Duncan, Skuffeeda* and *Jones* taken together. Contemporaneity has to do with the relationship between the representation and the alleged negligence.

However, consistent with his discretion under ORCP 23A, Judge Marcus granted plaintiffs' leave to attempt to replead in some way that might allege representations which were not contemporaneous with the previous misdiagnosis. He suggested:

> *If* plaintiffs can allege in good faith as to any 'representation' alleged that it was made after the accumulation of such intervening information as to render the new denial of underlying illness or abnormality and the new assertion that Shawn would outgrow his symptoms an 'independent breach' of the defendants' duty to their patient, the representations are not contemporaneous with the previous misdiagnosis and—more to the point—allowing delay of ultimate repose does not swallow the provision for ultimate repose. Opinion, p. 11 (emphasis in original).

Judge Marcus defined "good faith" in his opinion as meaning plaintiffs would have retained an expert who would be prepared to testify consistent with such allegations. Judge Marcus expressed skepticism from the bench, although not in his written opinion, that plaintiffs would be able to replead in such a way that they could avoid another motion to dismiss. No new amended pleading was ever proposed or filed, and the case was eventually settled. ❐

[1] There is little, if any, legislative history concerning the intended scope of this exception. *Duncan v. Augter,* 286 Or 723, 728, 596 P2d 555 (1979). The larger purpose of Senate Bill 43 was to limit the societal costs of medical litigation and to preserve a physician's ability to defend. *Id.* at 728-29. The judiciary committee of the House of Representatives had the fraud exception prepared as an amendment to Senate Bill 43 to meet objections to reducing the repose period—specifically, the speculative objection that a physician intentionally could delay a malpractice action by continuing to treat a patient and concealing the source and nature of the patient's difficulty. *Id.* at 729. Arguably, the practical difficulties of applying the repose period can be traced back to this legislative compromise.

[2] The plain language of the statute indicates that the "fraud, deceit or misleading representation" must have prevented the filing of the lawsuit against the defendant rather than the discovery of the injury. *See Gaston,* 318 Or at 252 n.5. This is more than a technical nicety; it is a fundamental analytical distinction that reflects the perceived purpose of the statute of ultimate repose and informs any proposed interpretation and application of the exception. This analytical debate is evident in Justice Unis's and Justice Peterson's opinions in *Gaston. See Gaston,* 318 Or at 257 n.9 and at 271 n.5. *See also Asher v. Hald,* 100 Or App 630, 633 n.2, 788 P2d 468 (1990).

[3] The Oregon Supreme Court reversed a jury verdict for plaintiff. On remand for further proceedings to the Circuit Court of Jackson County, the trial court allowed the plaintiff to file a Second Amended Complaint and then granted defendant's motion for summary judgment. The Court of Appeals affirmed in *Duncan v. Augter,* 62 Or App 250, 661 P2d 83, *rev. denied,* 295 Or 122 (1983).

[4] In footnote four of the Court's opinion, there is a list of the particular questions put to the parties by the Court, which is helpful in analyzing the opinion.

[5] This discussion suggests that the intended application of the exception was more limited than is often advocated to our trial courts. The discussion can be used in whole or in part to analyze any particular alleged misleading representation and plaintiff's burden of proof.

[6] If the statute is tolled, then it accrues from the date that the fraud, deceit or misleading representation is discovered or in the exercise of reasonable care should have been discovered. This is an objective test. *Asher v. Hald,* 100 Or App 630, 788 P2d 468 (1990). The relevant inquiry is how a reasonable person of ordinary prudence would have acted in the same or similar situation. This includes consideration of a plaintiff's failure to make a further inquiry if a reasonable person would have done so. *Gaston v. Parsons,* 318 Or 247, 256, 864 P2d 1319 (1994). Ironically, the more time that passes for undiagnosed complaints and the more frequent the patient's questioning of the physician, the less reasonable is the patient's reliance on the physician's representations.

[7] Plaintiff also alleged fraud claims against all of the defendants.

[8] The Court considered the failure of defendants to advise plaintiff of the accurate results of a diagnostic test as a failure to disclose sufficient to constitute a misrepresentation. *Skuffeeda,* 77 Or App at 483 n.3.

[9] The Court stated:

> A misrepresentation as to the result of a post-operative procedure is not just an assurance that the operation 'went well.' *Skuffeeda,* 77 Or App at 484.

In this case, there was a surgical complication (presumably visible on x-ray) that was not disclosed before discharge. The difference between the end results in *Skuffeeda* and in *Duncan* lies in the very specific medical facts of each case. In *Skuffeeda,* the doctors obtained additional information (the x-ray films), after the alleged negligent act or omission, that was not made available to the patient. If the additional information had been made available to the patient, then it arguably would have revealed the alleged negligence.

[10] Defendants filed Rule 21 motions against the amended complaint asking that plaintiffs be required to plead the dates of treatment, dates of alleged negligence, and dates of alleged misrepresentations as to each individual defendant. These motions were denied.

[11] As noted by Judge Marcus in his Opinion and Order on plaintiffs' Motion for Leave to File an Amended Complaint:

> The Court of Appeals rejected plaintiffs' contention that the growing medical record constituted new information which defendants should have recognized as inconsistent with their continued diagnosis.

[12] Count IV contained allegations regarding "negligence within 5 years of commencing this action," which were not affected by the period of ultimate repose.

[13] The alleged misrepresentations were the same for each Count, but plaintiffs attempted to identify in each Count a date (by month and year) when the misrepresentations were made.

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