Oregon State Bar

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In This Issue…

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Transforming a Personal Purgatory into a Successful Outcome

State's Largest Construction Defect Case

By Dennis P. Rawlinson
Miller Nash LLP

At the end of 2010, the largest construction defect case in the state's history was resolved. The case involved 29 parties, more than 105 deposition days, more than 1,300 deposition exhibits, and a claim for more than $40 million in damages. The case arose out of the construction of the largest commercial building in Clatsop County, the Wyndham Resort, located on the ocean in Seaside, Oregon.

From the plaintiff's perspective, the case began as a "personal purgatory" for the Miller Nash team representing Wyndham. Analogies were used for the plaintiff's team.


Dennis P. Rawlinson

The one that seemed the most apt was the "Spartan 300." Members of the team who knew what had happened to the Spartan 300 at the hands of the Asian hordes from Persia were unsettled by the comparison.

The plaintiff's team led by Dennis Rawlinson, Gary Christensen, and Kieran Curley faced two significant challenges in prosecuting construction defect claims that sought to recover in excess of $40 million against the general contractor and more than 25 assembled third-party defendants,

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An Underused Defense Tool? *Special Motions to Strike*

By Anna Sortun
Tonkon Torp LLP[1]

Imagine a scenario in which a new potential Client A presents you with the following set of facts:

Client A owns a local gas station that has been targeted by environmental protesters, who accuse Client A of foolishly refusing to sell bio-diesel products. The protesters regularly picket Client A's gas station; distribute pamphlets comparing Client A to BP and Exxon; block the entrance to the gas station; and scream at Client A's customers. Client A is certain the protesters have adversely impacted her business and damaged her reputation in town. She is prepared to sue for defamation and other business torts.[2]

Now imagine that potential Client B asks you to consider the following:

Client B, a movie producer, has been sued by a plaintiff who previously agreed to be filmed in a segment of a "reality-based" movie. When the movie is released, plaintiff is shown making sexist and vulgar remarks, under the influence of alcohol, which plaintiff says was provided by Client B. Plaintiff also claims he was misled into believing the movie would not be released in the United States and that he was encouraged by Client B to engage in bad behavior. Plaintiff sues Client B for fraud, negligent infliction of emotional distress and other tort claims.[3]

In handling either engagement, Oregon practitioners should take note of a potent weapon against certain claims relating to the exercise of rights of expression. That weapon, a "special motion to strike" under ORS 31.150-31.155, is more commonly known as an anti-SLAPP motion. Practitioners on both sides of the aisle should be aware of this statute, and its possible broad application to a variety of cases, because enforcement of the statute leads to dismissal of claims and mandatory awards of attorney fees for prevailing defendants. The trend in California, which has a similar anti-SLAPP statute, demonstrates that such special motions to strike can be used in wide and sometimes unpredictable contexts.

Anna Sortun

This article describes the basic anti-SLAPP framework in Oregon, the expansion of anti-SLAPP litigation in California, and the possible underuse of the statute in Oregon. It concludes by revisiting the scenarios above.

What Is Anti-SLAPP?

An anti-SLAPP statute is a statute designed to discourage "strategic lawsuits against public participation," or "SLAPPs." A stereotypical SLAPP action is brought to deter citizens from exercising their political or legal rights, or to punish them for doing so.[4] For example, a large developer might sue a nonprofit, which claims a project should be stopped on environmental grounds, for defamation. The developer may hope that the burden and cost of the lawsuit will stop the nonprofit's protest activity, or send a message to other groups hoping to engage in similar activity. The

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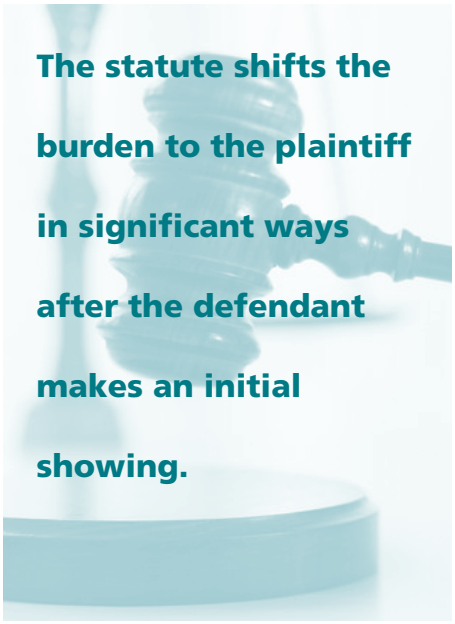
purpose of anti-SLAPP statutes has been described as the "protection of individuals from meritless, harassing lawsuits whose purpose is to chill protected expression."[5]

Legislatures, concerned about the chilling effects of such lawsuits, began passing anti-SLAPP statutes in the early 1990s, with Oregon adopting its statute in 2001.[6] The statutes offer a few key protections for defendants. Most fundamentally, anti-SLAPPs allow defendants an early opportunity to dismiss certain claims, and potentially entire lawsuits, prior to expending money to defend them. In addition, filing an anti-SLAPP motion in most states, including Oregon, stays discovery.[7] Finally, the statutes shift the burden of litigation costs onto plaintiffs who cannot overcome an anti-SLAPP motion. These plaintiffs generally are faced with a mandatory attorney fee award in favor of a prevailing defendant.[8]

Use of anti-SLAPP statutes has now evolved, particularly in the State of California, to encompass a broad range of litigation involving disputes between private individuals, corporations, the entertainment business, and beyond. Oregon has very few published cases interpreting its anti-SLAPP statute, suggesting that it remains relatively infrequently used.

The Oregon Anti-SLAPP Framework

The Oregon statute closely mirrors the California statute. Defendants must file anti-SLAPP motions prior to filing an answer, but within 60 days of service of the complaint.[9] Motions under ORS 31.150 are not subject to ORCP 21F's requirement that the defendant consolidate it with other available motions against the complaint.[10] Thus, as pointed out by the Oregon Court of Appeals, "a defendant may make a special motion to strike at the very beginning of the litigation without foreclosing subsequent motions if the special motion fails."[11]



The statute shifts the burden to the plaintiff in significant ways after the defendant makes an initial showing. First, the defendant must make a threshold showing that an act of which the plaintiff complains arises out of protected conduct. Specifically, the claim must arise out of an oral statement made, or a written statement or other document submitted:

- in a legislative, executive or judicial proceeding authorized by law;
- in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law; or
- in a place open to the public or a public forum in connection with an issue of public interest.

A catch-all provision also provides that a defendant may make a special motion to strike a claim that arises out of "[a]ny other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."[12]

The most contentious issue facing petitioning defendants is whether targeted activity is connected to "a public issue" or "an issue of public interest." Here is where courts and litigants can potentially expand the use of anti-SLAPP statutes beyond the "stereotypical" SLAPP scenario, as discussed further below.

Once a defendant makes the requisite showing, the burden shifts to the plaintiff to prove "that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case."[13] The plaintiff's burden here is "potentially much heavier than merely establishing the existence of a disputed issue of fact," such as when defending against a motion for summary judgment.[14] If the plaintiff cannot meet this burden, the court "shall" enter a judgment of dismissal without prejudice and award the defendant reasonable attorney fees and costs.[15]

The Oregon Legislature instructs that the statute is "to be liberally construed in favor of the exercise of … rights of expression."[16] This guidance suggests that the Oregon anti-SLAPP statute may have wide application in cases involving expression.

Guidance from Oregon Courts on the Meaning of "Public Issue" and "Public Interest"

Only two published Oregon state cases address anti-SLAPP motions, and those cases focus on procedure.[17] The

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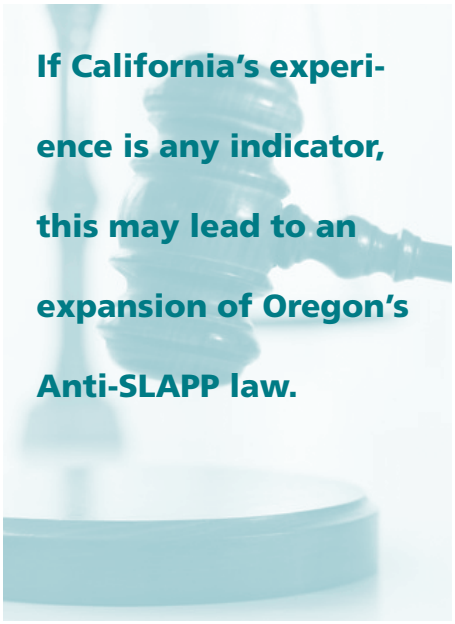
federal District Court, however, has analyzed the Oregon anti-SLAPP provisions on a number of occasions, looking to California case law for guidance.[18]

Most of the federal cases in Oregon courts grapple with the definition of "public issue" or "issue of public interest," which are found in the protections of subsections (2)(c) and (2)(d) of the Oregon statute.[19] These definitions are crucial in determining the parameters of anti-SLAPP protection.

Consistent with the guidance from the Oregon Legislature, Oregon federal courts generally apply a broad interpretation of the "public issue" or "public interest" concepts. The *Gardner v. Martino* court, after summarizing anti-SLAPP litigation at the circuit court level in Oregon, explicitly endorsed such a "broad interpretation" of "public issue" and "public interest."[20] The court then held that statements at issue—comments on a national talk-radio program about a consumer's dealings with an Oregon retailer—constituted statements about a public issue or an issue of public concern.[21]

Other examples held to be "public interest" issues in Oregon include: (1) statements published in a newspaper and on the Internet that a professor at University of Oregon made anti-Israel statements in his classroom;[22] (2) statements in a magazine article regarding the "sex.com" domain name litigation;[23] (3) statements made on an Internet forum regarding the quality of a company's products in light of a co-founder's criminal proceeding;[24] (4) statements published in an article regarding business decisions made by a plaintiff and his subsequent resignation from a corporation;[25] (5) statements made in the course of an administrative ethics investigation;[26]



and (6) statements made by a plaintiff's former employer to other employees and shareholders regarding a plaintiff's termination. This is not an exhaustive list, but is illustrative of the variety of statements that have met a defendant's initial burden of proving protected conduct.

However, the federal court has also issued a caution about the potential for abuse within the definition of "public interest." In *Englert v. MacDonell*, Judge Aiken cautioned against using "newsworthiness" as a measure of "public interest" because "[i]f the court … were to accept this definition, there is no subject, comment, or action that would ever be beyond the bounds of 'public interest' in a world where news reports run the gamut of celebrity marriages and divorces, waterskiing squirrels, exploding whales, and national anthem singing tryouts."[27] That case went on to hold that comments made in connection with an ethics complaint against a forensic scientist satisfied an "issue of public interest," but that comments made outside that ethics investigation did not.

Of course, in each of the cases described above, after proving that a statement fell into a protected category, the burden then shifted to the plaintiff to prove "a probability that the plaintiff will prevail on the claim." Where the plaintiff could not make the requisite evidentiary showing, the courts dismissed the claims and awarded attorney fees to the defendants.

Because neither the wording of the statute nor the Oregon state courts present guidance on how courts are to determine whether expression constitutes a "public issue" or "public interest," the court generally turned to California precedent in making its decisions.[28] If California's experience is any indicator, this may lead to an expansion of Oregon's anti-SLAPP law.

Expansion of Anti-SLAPP in California---From Borat to Paris Hilton

The broadest guidance on the potential application and expansion of the Oregon statute comes out of the State of California, where an automatic right to appeal has led to an explosion of case law.[29] California cases illustrate that the definition of "public interest" is where litigants can advocate for expansion of the Oregon statute. The evolution of the statute in California shows that such an expansion is consistent with the intent of the California Legislature.

Specifically, the California Legislature amended the state's anti-SLAPP statute in 1997 with the intention of expanding the scope of the law. These amendments were made to resolve conflicts in the California courts over whether the statute was intended to apply to a narrow subset of expression or more broadly. On the restrictive

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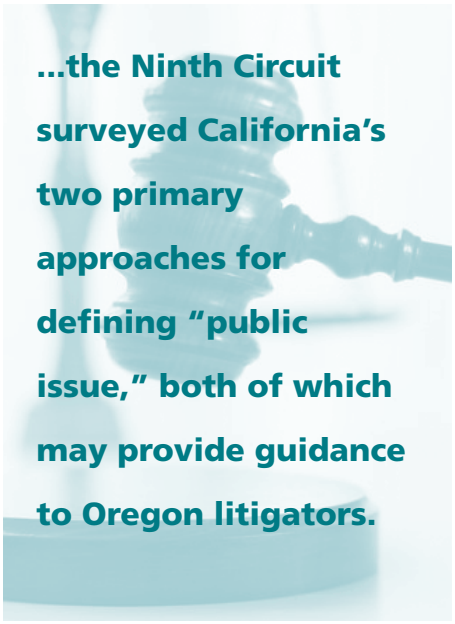
side, echoing Judge Aiken's concern, one case held that "[m]edia coverage cannot by itself … create an issue of 'public interest' within the statutory meaning. Rather, the term refers to matters occupying the highest rung of the hierarchy of First Amendment values, that is, to speech pertaining to the exercise of democratic self-government."[30] Other courts took a broad view of the statute, for example holding that allegedly slanderous statements made by a woman to her employer (urging the employer to refrain from supporting a battered women's shelter) were protected under anti-SLAPP, even though the statements were made in a private conversation.[31]

The California Legislature surveyed the court conflict and adopted the broad view, adding language that the statute was to be "construed broadly," and adding a provision protecting "any other conduct in furtherance of the exercise of the . . . constitutional right of free speech in connection with a public issue or an issue of public interest."[32]

Following the amendments, California courts began granting an increasing number of anti-SLAPP motions, culminating in a case that granted a pharmaceutical company anti-SLAPP protection against a class action alleging that it made misleading statements in advertising, essentially turning the statute on its head.[33] This swing led the California legislature to amend the statute again in 2003, adopting some specific restrictions for the use of anti-SLAPP motions against public-interest-oriented class action lawsuits or in actions involving financial companies.[34]

However, even with those restrictions in place, California courts continue to apply the anti-SLAPP statute to a broad range of cases. In one recent Ninth Circuit case coming out of California, for example, the Ninth Circuit held that a Hallmark card depicting a caricature of celebrity Paris Hilton saying her trademark "That's Hot" expression constituted "conduct in furtherance of the exercise of the constitutional right of . . . free speech in connection with a public issue or an issue of public interest" by Hallmark.[35] In reaching that holding, the Ninth Circuit surveyed California's two primary approaches for defining "public issue," both of which may provide guidance to Oregon litigators.



The first approach breaks down "public issues" into three categories: "(1) statements concerning a person or entity in the public eye; (2) conduct that could directly affect a large number of people beyond the direct participants; and (3) topics of widespread, public interest."[36] The second approach attempts to distinguish between issues of private, as opposed to public, interest by cutting out issues of "mere curiosity" in favor of "something of concern to a substantial number of people" that have "some degree of closeness between the challenged statements and the asserted public interest."[37] This approach also requires that the "focus of the speaker's conduct … be the public interest rather than a mere effort to gather ammunition for another round of private controversy," and warns that a "person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people."[38]

Using either of these tests, the conduct at issue in litigation relating to the "Borat" movie falls under anti-SLAPP, as the California court ruled in 2007. The Borat movie depicted comedian Sacha Baron Cohen as a fake Kazakh journalist, traveling around the US and encountering real Americans in a variety of comic scenes. The movie depicted plaintiffs, students from University of South Carolina, making racist and sexist comments while drinking with the Borat character in an RV. Once the movie was released, the students sued for fraud, false light invasion of privacy, and other claims.[39] They alleged that the producers of the Borat film recruited them to be in the film, bought them drinks at a bar, and then had them sign a consent agreement before encouraging their bad behavior. A California Superior Court judge struck down the lawsuit using anti-SLAPP, finding that the Borat film dealt with issues of public concern, namely racism, sexism, homophobia, and other societal ills. The court went on to observe that" [t]he importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain."[40]

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From the Managing Editor

Experience Teaches Us to Be Diplomats and Ambassadors

By
Dennis Rawlinson
Miller Nash LLP

I recently reviewed an audiocassette program by James W. McElhaney on mastering evidence and proving your case. One portion of the program confirmed what all of us learn from experience: that trial lawyers must be diplomats and ambassadors (using finesse, not brute strength, against one's opponent) to achieve success.

Dennis Rawlinson

I believe three examples will demonstrate the point.

1 Determining the Basis for Your Opponent's Objection

All of us have had the disconcerting experience of having our opponent make an unidentified objection during trial and having it sustained. Not knowing the basis for the objection makes it difficult to cure. What would a diplomat or ambassador do?

In the middle of trial is not the time to ask your opponent the basis for his or her objection. Such an effort will probably lead to a reprimand from the court. Moreover, it violates the generally recognized tenet that one should ignore one's opponent when trying a case.

Asking the court for the basis of the objection will be equally futile. Even a polite question such as, "May I have the basis for the court's ruling?" will probably result in the response, "No, you may not."

Experience teaches us that perhaps the best way to handle this situation is to simply turn to the court and explain:

> "Your Honor, if we understood the basis for the objection, we'd be pleased to provide whatever is missing."

The court is likely to give you a one-word response and at the same time nod to your opponent, "Counsel?"

This simple procedure of making a polite request to the court and allowing the court to put the burden on your opponent for the explanation usually proves successful.

2 Misunderstood Evidentiary Foundation

With some frequency, a court will misunderstand the evidentiary basis on which we are offering a piece of evidence. Again, the role of diplomat and ambassador should be helpful.

Often we use the business-record exception to the hearsay rule to introduce business records. The business-record exception, however, is undermined if the record was prepared in anticipation of litigation. *Hoffman v. Palmer*, 129 F2d 976 (2d Cir 1942),

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aff'd, 318 US 109 (1943).

An alternative basis for introducing a business record, if the witness is the preparer of the record, is to use the recorded-recollection exception to the hearsay rule. OEC 803(5). The elements of the hearsay exception are as follows:

a. A written record;

b. Made or adopted by the witness when his or her memory was fresh;

c. That is accurate when it was prepared;

d. Concerning which the witness had knowledge;

e. But concerning which the witness now has insufficient recollection.

Just because a memorandum recording one's recollection was prepared in anticipation of litigation does not undermine its admissibility under OEC 803(5).

Accordingly, if you offer a business record under OEC 803(5) and the judge sustains an objection that the record was prepared in anticipation of litigation, a diplomat and ambassador might respond:

> "Your Honor, I apologize [taking the blame yourself], but I didn't make myself clear. This document is being offered under the recorded-recollection [OEC 803(5)] exception to the hearsay rule, not the business-record exception.
>
> "You are right, Your Honor; it does fail as a business record if it is prepared in anticipation of litigation. But as you know, preparation of a record in anticipation of litigation does not undermine the recorded-recollection exception."

In short, don't ask the judge to admit that he or she made an error or misunderstood you. Take the blame yourself and you are likely to get the ruling you need. By the way, a document admitted under the recorded-recollection exception may be read but not received into evidence.

3 Tipping the Scales When the Judge Is on the Fence

On difficult evidentiary questions, it is not unusual for it to become apparent to us that the judge sees merit in both our argument and the argument of our opponent. When we find ourselves in this circumstance, it is best to step away from the "all-or-nothing" or "single-minded" argument. We may enhance our credibility and ultimately succeed in our argument if we say something like this:

> "Frankly, Your Honor, there are two sides to this issue, both of which have some merit. Fortunately, however, under circumstances such as these, the law has provided us with some guidance when there is doubt. We remind the court that under OEC 403, the standard is not a level playing field, but the rule creates a bias in favor of admission. It is not enough if the evidence has some probative value and creates 'some unfair prejudice.' The evidence's probative value must be 'substantially outweighed by the danger of unfair prejudice.'
>
> "This is a close case. But . . . we do not believe the merit of our opponent's arguments substantially outweighs the merit of our arguments."

In short, admit the validity of two sides to the issue, but remind the court that in such cases, the standard tips in your favor.

Experience teaches us to be diplomats and ambassadors. Unfortunately, most of us do not practice long enough to learn these lessons well. ❐

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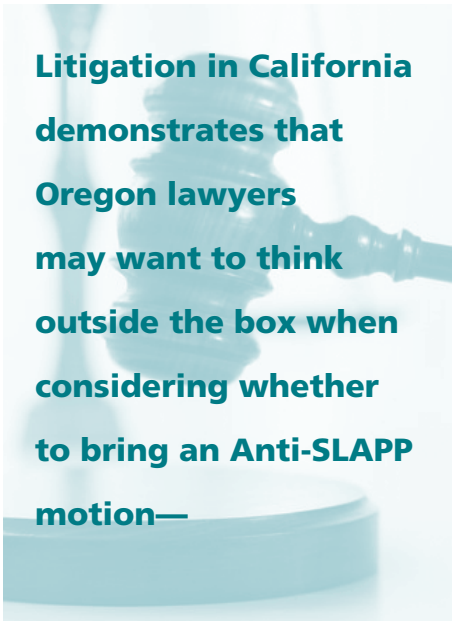
demonstrate how far courts have come, particularly in California, in construing protected speech under anti-SLAPP statutes. Gone are the days when the only speech subject to anti-SLAPP motions involved protesters or consumer groups advocating against large corporate interests. Now, the entertainment industry, and other expressive corporate groups like Hallmark, can find protection behind the statute. Likewise, disputes between private individuals are fair game for application of the statute.

Conclusions

Litigation in California demonstrates that Oregon lawyers may want to think outside the box when considering whether to bring an anti-SLAPP motion—and they should be cautious when filing defamation or other claims involving expression.

Revisiting the fact scenarios at the beginning of this article, both may be appropriate cases for anti-SLAPP motions. Client A's lawyer will want to carefully assess whether there is a probability that the plaintiff will prevail on the claim before drafting a complaint. Faced with an anti-SLAPP motion, Client A's lawyer will have to present substantial evidence to support her prima facie case against the protesters or risk mandatory dismissal and an award of fees against her client. On the other hand, Client B's lawyer should consider an immediate anti-SLAPP motion against the plaintiffs' complaint. The Borat litigation demonstrates that such a motion may succeed. ❐



[1] Anna Sortun is an associate at Tonkon Torp LLP, where her practice focuses on commercial litigation.

[2] Facts loosely based on *Schumacher v. City of Portland*, 2008 WL 219603 (D. Or. 2008).

[3] Facts based on *John Doe 1 v. One Am. Prods., Inc.*, No. SC091723 (Cal. Super. Ct. Feb 15, 2007) (litigation regarding "Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazazhstan").

[4] *See Batzel v. Smith*, 333 F.3d 1018, 1024-26 (9th Cir. 2003).

[5] *See Metabolife Int'l Inc. v. Wornick*, 264 F.3d 832, 837 n.7 (9th Cir. 2001).

[6] Or. Laws 2002, ch. 616.

[7] *See* ORS 31.152(2). The stay of discovery remains in effect until the entry of the judgment, but the court can order that specified discovery be continued on a showing of good cause.

[8] *See id*. at (3).

[9] *Horton v. W. Protector Ins. Co.*, 217 Or. App. 443, 453, 176 P.3d 419 (2008) (construing ORS 31.152 and ORCP 21A).

[10] ORS 31.150(1).

[11] *Staten v. Steel*, 222 Or. App. 17, 29, 191 P.3d 778 (2008).

[12] ORS 31.150(2).

[13] *Id.* at (3). The plaintiff "cannot simply rely on the allegations in the complaint . . . but must provide the court with sufficient evidence to permit the court to determine whether there is a probability that the plaintiff will prevail on the claim." *Gardner v. Martino*, 2005 WL 3465349, *8 (D. Or. 2005) (quoting with approval from *ComputerXpress, Inc. v. Jackson*, 113 Cal. Rptr. 2d 625, 641 (Cal. App. 2001)).

[14] *Staten*, 222 Or. App. at 31.

[15] ORS 31.152(1) & (3).

[16] *Id.* at (4).

[17] *Horton*, 217 Or. App. 443 (holding defendant untimely filed anti-SLAPP motion); *Staten*, 222 Or. App. 17 (holding the denial of an anti-SLAPP motion is not reviewable after trial).

[18] Defendants can bring special motions to strike under the Oregon statute in federal diversity actions. *See Card v. Pipes*, 398 F. Supp. 2d 1126, 1136-1137 (D. Or. 2004).

[19] ORS 31.150(2).

[20] *Gardner*, 2005 WL 3465349 at *5 ("[C]ourts have applied Oregon's statute to situations involving private companies, . . . internal employee or shareholder communications, and to newspaper and Internet publications regarding statements made in a classroom.").

[21] *Id.* at *7.

[22] *Card*, 398 F. Supp. 2d 1126.

[23] *DuBoff v. Playboy Enters. Int'l, Inc.*, 2007 WL 1876513, *8 (D. Or. 2007).

[24] *Higher Balance, LLC v. Quantum Future Group, Inc.*, 2008 WL 5281487, *3 (D. Or. 2008) (holding that the Internet forum constituted a "public forum" under ORS 31.150(c)).

[25] *Thale v. Bus. Journal Publ'ns, Mult. Co.* No. 0402-05889, October 15, 2004 Order.

[26] *Englert v. MacDonell*, 2006 WL 1310498, *7 (D. Or. 2006).

[27] *Id.* at *7.

[28] *See Gardner*, 2005 WL 3465349 at *5-6.

[29] Unlike the California anti-SLAPP statute, Cal. Code. Civ. Pro. § 425.16(i), the Oregon statute does not contain an automatic right of appeal. The denial of a special motion to strike is not reviewable in Oregon. *Staten*, 222 Or. App. at 33-34.

[30] *Zhao v. Wong*, 55 Cal. Rptr. 2d 909

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Visual Advocacy: *The Effective Use of Demonstrative Evidence at Trial*

By Janet L. Hoffman
Janet Hoffman & Associates LLC

This article explores the favorable and unfavorable impact demonstrative evidence may have on jurors at trial and the effective ways in which trial lawyers may use demonstrative evidence to educate and persuade jurors about their theory of the case.

I. Introduction

Jurors today are awash in modern technology and accustomed to its uses in all kinds of settings and at all times. Media reports have discussed the impact of trials during which jurors were observed texting, tweeting, or researching issues on the Internet in violation of the judge's instructions and long-established trial rules.[1] As a result, judges have repeatedly felt compelled to declare a mistrial—referred to in one report as an outcome that "might be called a Google mistrial."[2] In another notorious instance, a juror not only posted updates on the case on Twitter and Facebook, but alerted his readers to a "big announcement," coming on Monday. No mistrial was declared in that case and the defendant was found guilty. Lawyers for the defendant subsequently used the juror's conduct as grounds for appeal.[3]

While new technology lends itself to abuse by jurors, jurors have come to expect its use at trial. Lawyers hoping to engage and persuade jurors of their theory would do well to employ various forms of media when presenting their case. For one, scientific studies have shown that demonstrative exhibits can assist in making the jury understand relevant facts and data. Yet, as advertising has taught us, images and visual messages have the potential to manipulate the emotions of jury members. Visual presentations may send subconscious messages to jurors, creating a significant risk that jurors reach verdicts based on emotionalism and leaps in logic rather than on the facts in evidence. Effective advocacy, therefore, requires an attorney to understand both the potential benefits and the risks associated with sophisticated visual tools. In doing so, the attorney must formulate persuasive arguments for the admission and exclusion of certain forms of demonstrative evidence.

Janet Hoffman

II. What Is Demonstrative Evidence and How Does It Affect the Brain?

In general, exhibits are useful at trial to educate jurors. They may serve to summarize large amounts of information or to amplify a lawyer's arguments. Demonstrative evidence comes in many forms, be it in the physical presence of the client at trial sitting next to her attorney, or in the form of a sophisticated piece of animation

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that reconstructs an accident at issue. Jurors in the courtroom use all of their senses—visual, auditory, olfactory—to absorb, analyze, and understand the facts of the case they are required to decide.

Lawyers need to be aware that studies of the brain, and research on learning, have shown that people learn best when all their senses are engaged. The brain is most active when it is stimulated in various ways. In practical terms, this means that jurors at trial will absorb more information and be more receptive to the attorney's message when the case is presented in a multimedia format, rather than by strict narration and recitation.

Neuroscientists have also found that the brain enjoys puzzle-solving. In ancient times, the rhetorical device of creating syllogisms—where an audience is presented with two independent propositions from which it is meant to reach a desired conclusion—was used to sway public opinion. In the context of trial, this may mean that jury members who are shown "before and after" photographs will try to fill in the blanks and supply the missing data to understand the story.

III. The Futility of PowerPoint

PowerPoint is one of the least effective tools with which to educate jurors. Brain research and common experience tell us that presenting an audience with slides filled with words while reading that same information out loud is one of the quickest ways of losing the audience's attention. The brain is unable to effectively absorb the written message and spoken information simultaneously. While the audience tries to read the slides, it fails to pay attention to the speaker. Because reading the visually presented words and listening to those same words engages the same portion of the brain through its verbal channel, the viewer/listener experiences an overload of verbal information. As a consequence, his brain ignores a certain portion of the conveyed information.

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A study by scientists at University of California at Santa Barbara examined some of the most brain-friendly instructional strategies to enhance learning. It showed that people learn best when presented with narration and exposed to a visual representation.[4] Put differently, if an attorney wants to augment the effect of a point, she can do so by speaking (or voice-over) while also showing a graphic by way of a slide or video or film clip. The brain is able to absorb both types of information by processing them through separate channels. It will process what it hears through its verbal channel and what it sees through its visual channel. What's more, the verbal information will enhance the visually conveyed message and vice versa. More information is retained. However, when a viewer/listener is asked to read information presented on a graphic and at the same time listen to the presenter, as is the case with most PowerPoint presentations, her brain shifts focus rapidly between what it reads and what it hears. Critically, in the back-and-forth, valuable information becomes lost to the audience.

Knowledge of the interaction between brain and eye lends itself to manipulation by advocates in their efforts to sway jurors to adopt the presenter's point of view. The Rodney King trial is an example of how the defense, with the help of visual technology, managed to create the impression that King, rather than the officers accused of beating him, was the aggressor. Counsel for the defendant officers slowed down the well-known film clip that depicted the beating; while individual stop-action pictures taken from the visual recording showed King raising his arm or crouching, an expert for the officer defendants commented on the officers' right to defend themselves. Defense counsel also created still photographs that reduced King to a white-marker outline. King became an abstraction, while the officers remained recognizable persons. By way of the defense's visual deconstruction of the incident, defense counsel managed to portray King as an aggressor whose behavior invited the officers' violent reactions. Once that image took hold in the jurors' brains, it became fixed and permanently influenced how the jurors saw the video recording. It ultimately determined their assessment of the case in favor of the defendants.

IV. Demonstrative Evidence and the Rules of Evidence

a. Oregon Law

Under Oregon law, courts may not exclude an exhibit received for demonstrative purposes from the use and consideration by jury during deliberation.[5] Making a demonstrative piece of evidence available to the jury creates

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a number of risks, including the jury's assigning it undue significance at the expense of other relevant information received, or the jurors' uncritical surrender to the emotional impact of that particular piece of evidence. However, once an exhibit has been received into evidence, the court does not have the discretion to preclude it from going to the jury room regardless of whether it is "demonstrative" or not.[6]

As a general rule, visual exhibits—photographs, films, and videos—must be authenticated and shown to be relevant in order to qualify for admission into evidence. Any exhibit must be a "fair and accurate" representation of what existed at the time of the event or when it was prepared. While a visual need not be identical to the original, it must be similar in the aspects that are relevant to an issue in the case. The degree of variance may be taken into account in terms of what weight must be assigned to a piece of evidence rather than in terms of its admissibility.

Under Oregon law, the admission or exclusion of demonstrative exhibits is left to the discretion of the trial court.[7] However, the court may not arbitrarily exclude evidence; this means that evidence that is shown to be material and relevant to an issue in the case must be received into evidence barring a statutory reason for excluding it.[8] Oregon Rule of Evidence ("OEC") 401 defines relevance. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The admission of a piece of evidence may be challenged pursuant to OEC 403, which provides for the exclusion of relevant evidence on grounds of prejudice, confusion or undue delay. Specifically, OEC 403 states

Counsel may not introduce demonstrative evidence that is calculated to produce strong emotions in jury members such that they will decide complex questions of law on the basis of personal feelings rather than the facts introduced at trial.

that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence." Counsel may not introduce demonstrative evidence that is calculated to produce strong emotions in jury members such that they will decide complex questions of law on the basis of personal feelings rather than the facts introduced at trial. In *Old Chief v. United States*, the United States Supreme Court found that it was an abuse of discretion for the trial court to admit an entire record of an underlying conviction to prove the fact of that prior conviction when a stipulation would have been sufficient to establish the fact.[10] Admission of the entire criminal record carried with it an inherent risk of being unfairly prejudicial under the Federal Rule of Evidence 403, and a stipulation would have had the same probative value.

Counsel may want to use Rule 403, for example, to object to the introduction of gruesome pictures. Research studies using mock jurors have shown that those members exposed to gruesome photographs are almost twice as likely to convict a defendant than are jury members who were not shown the photographs. Importantly, research also has proven that when questioned about the effect of those photographs on their decision-making, none of the jurors believed they were influenced by them. Researchers note that this impact is subliminal and connected to a person's flight or fight defenses. At the same time, some scientific research has indicated this subliminal impact may be mitigated, if not completely counteracted, by alerting the conscious part of the viewer's brain to the potential effect of a certain visual before the exposure occurs.[11]

The Michael Skakel murder case serves to illustrate the prosecution's successful use of technology to influence the jury's decision-making process through the skillful overlaying of visual and audio information. In 1975, Martha Moxley was murdered on her family's property. For decades the crime was unresolved. Ultimately, Michael Skakel was accused, and subsequently found guilty, of committing the murder although the prosecution had no fingerprints, no DNA, and no witnesses. Appellate courts upheld the prosecution's effective, yet controversial, closing argument that combined visual images, visually displayed text, audio testimony, and oral advocacy.

The defense argued that Skakel was not the murderer. He had no contact with the victim at the time of the incident, but rather was sitting in a tree outside her house masturbating. Skakel also stated that the morning after the incident, when the girl's mother came to look for her, he felt panic out of fear that he had been observed masturbating on the Moxleys'

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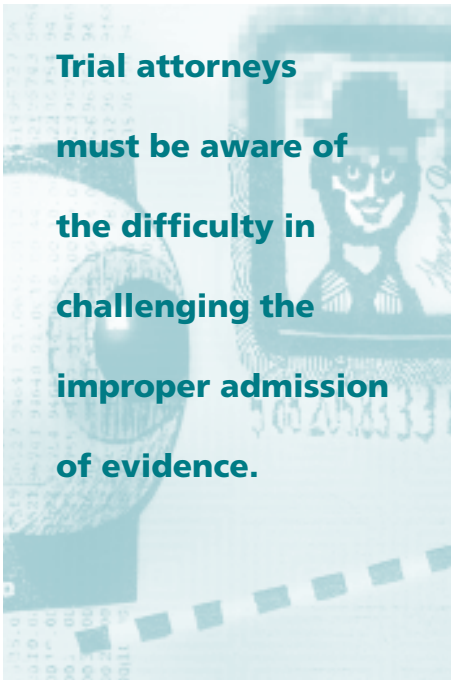
property. The prosecution countered the defense's argument by playing a redacted version of the defendant's statement—omitting his statements about masturbation—in conjunction with a photograph depicting the deceased girl as found in the woods. What the jury heard and saw was the accused admitting to panic coupled with troubling images of the dead girl. Furthermore, the prosecution was able to introduce a transcript of Skakel's statement highlighting the incriminating words in red, as well as a voice-over reading the words from a transcript.

Numerous law review articles have analyzed the impact of the prosecutor's closing argument based on its sophisticated and emotionally charged multimedia summation of the case. Critics of the outcome have argued that Skakel's conviction resulted from prosecutorial overreaching and served as an example of the courts' failure to rein in attorneys seeking to advance their cases by exploiting the power of visual tools.[12] In contrast, supporters have argued that in making a multimedia evidence presentation, the prosecution simply used the most effective method to educate the jury about its theory of the case.[13]

Skakel's first cousin, Robert Kennedy, wrote a well-researched and much-discussed analysis of the trial. He argued that Skakel's conviction was the product of an overzealous prosecution, but he also recognized that the outcome may have been inevitable given the prosecution's brilliant and largely unchallenged multimedia summation.[14]

Critics of Skakel's defense point to the attorney's "complete failure to anticipate the logic of the prosecution's visual arguments."[15] They suggest that instead of simply arguing the evidence should be excluded because it was selective or prone to create improper subliminal messages, the defense might have pointed to brain research showing



the problematic interplay in the jurors' minds between the gruesome visual and the audio information received. When the jurors saw the gruesome pictures while simultaneously hearing the accused's admission of panic, their brains adopted the conclusion created by the prosecution's syllogism—Skakel was panicked because he committed the murder.

Based on common sense rather than evidence, jurors could be led to conclude that a person who has murdered is likely to experience panic once he understands the nature of his action. Applying this reasoning, because Skakel felt and admitted to panic, he must have murdered the girl. Although Skakel's panic could be explained in other ways, once the jurors were exposed to the image of the dead girl and the incriminating statements conveyed by way of the voice-over, they were no longer receptive to other explanations.

Appellate courts also have been concerned with a jury's subjection to evidence that speaks to jurors' emotions but is not amenable to challenge by cross-examination or a counter-offer of proof. This concern is illustrated by a personal injury case in which the plaintiff cried out in pain in the courtroom.[16] In deciding the case, jurors may remember these improper demonstrations more clearly than the facts. As a consequence, jurors may uncritically decide in favor of the proponent of the evidence.

As noted above, the Supreme Court discussed how potentially damaging information may be limited within the context of the Federal Rule of Evidence 403.[17] Similar to OEC 403, FRE 403 provides that otherwise relevant evidence may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay, including wasting time or needless presentation of cumulative evidence. Under *Old Chief*, trial courts must weigh the probative value of a defendant's stipulation to the fact of a prior conviction against the potential for unfair prejudice when jury members are being presented with facts pertaining to the defendant's prior conviction.

Rule 611 of the Oregon Evidence Code grants trial courts discretion to control the mode and order of interrogation and presentation. Specifically, subsection (1) provides that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time and protect witnesses from harassment or undue embarrassment."

Trial attorneys must be aware of the difficulty in challenging the improper admission of evidence. Under Oregon law, evidentiary rulings by the trial court will only be reversed if the appellant can show an abuse of discretion on the lower court's part. On review, the

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appellate court asks "whether there was little likelihood that the error affected the jury's verdict. We recognize that, if the particular issue to which the error pertains has no relationship to the jury's determination of its verdict, then there is little likelihood that the error affected the verdict."[18]

Frequently, the use of experts is an effective way of establishing the theory of the case in a graphic way. However, expert opinions may only be admitted if the proponent can show their scientific reliability.[19] OEC 702 provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." OEC 703, in turn, addresses the rules for the bases on which expert testimony rests. It provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

By way of illustration, the key issue in a case I handled involved the government's use of undercover tapes to establish guilt. Our client was charged with interstate racketeering murder for hire. Under our theory of the case, the defendant was deaf, but routinely disguised his loss of hearing with conventional affirmations along the lines of "that's right," or "that's great." To prove its case, the government introduced tape recordings featuring an undercover informant and our client. In response to the informant's statement that "Steadman's dead," our client could be heard saying: "That's great."

It is trial counsel's job to establish the main issues of the case and develop a compelling visual presentation to assist the jury in assessing the case.

We were successful in countering this evidence by arguing that, given his loss of hearing, our client did not actually hear the informant's statement. An expert audiologist informed the jury about our client's hearing loss which was the result of his experience during the Vietnam War. The expert further made jurors understand what scientific tests had shown regarding our client's hearing impairment and, with the help of a recording, was able to replicate for jurors what the client could in fact hear. Because we were able to show that our client did not hear the informant's statement, his response was rendered meaningless. The jury found our client not guilty.

b. Ninth Circuit Law

As a general rule in the Ninth Circuit, illustrative exhibits are not permitted in the jury room for use during deliberations and their admission may constitute reversible error in some circumstances.[20] In *Cox*, the defendant objected to the admission of three mockup bombs into the jury room during deliberations—none of these prototypes was an exact replica of the actual destructive devices used in the bombings, but rather a mockup using the same ingredients and an expert's knowledge of how those types of bombs are generally made.[21] The court stated that trial courts should refrain from allowing into the jury room evidence that was received for illustrative purposes only; in the case at bar, however, the court found that the judge's limiting instruction coupled with defense counsel's opportunity to cross-examine neutralized any abuse of discretion which would have mandated reversal.[22]

c. Use of Composite Exhibits

Demonstrative exhibits are useful tools to break down complex data with the use of a simple graphic or design. As a general rule, the only requirements for the introduction of composite exhibits are that 1) the underlying data has been made available to the other parties; 2) the exhibit accurately summarizes the otherwise voluminous documentation; 3) the composite exhibit is introduced as evidence; and 4) the underlying documents are admissible evidence in their own right.

d. Practice Tips

It is trial counsel's job to establish the main issues of the case and develop a compelling visual presentation to assist the jury in assessing the case. Brain research on learning has proven that multimedia presentations that engage the jurors' different senses will create long-lasting impressions that interact with long-term memory. At the same time, given today's sophisticated technology, jurors may be manipulated by demonstrative evidence more than ever before. Therefore, it is critical that practitioners analyze and deconstruct their opponents' visual exhibits with the same degree of care they apply to verbal exhibits. Finally, practitioners should remember that at times simple tools may be as effective as fancy foot-

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graphs or charts in front of the jury and allowing an expert to analyze and explain the visual may be all that is needed to help the jury understand the issues and ultimately rule in your favor. ❐

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* Special thanks to Sylvia Golden and Shannon Riordan Armstrong for their assistance with this article.

[1] *See, e.g.*, John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, March 18, 2009 at A1.

[2] *Id.*

[3] *Id.*

[4] *See* Roxana Moreno & Richard E. Mayer, *Cognitive Principles of Multimedia Learning: The Role of Modality and Contiguity*, 91, No. 2, JOURNAL OF EDUCATIONAL PSYCHOLOGY 358 (1999).

[5] *See Christensen v. Cober*, 206 Or. App. 719 (2006).

[6] *Id.* at 727, 731–32. As the court in *Cober* noted, to avoid its being sent to the jury room, counsel may ask that the item of evidence be marked as available for demonstrative purposes only. *Id.* at 734, n.9.

[7] *Rich v. Cooper*, 234 Or. 300, 311–12 (1963).

[8] *Id.* at 312.

[9] *See Id.* (holding that "[t]he evidence may be excluded because it may produce undue prejudice, confuse the jury, or if for some other specific policy reason the harm which might result from its reception may outweigh the probative value of the evidence").

[10] 519 U.S. 172, 190–91 (1997).

[11] *See* Lucille A. Jewel, *Through the Looking Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. CAL. INTERDISC. L. J. 237, 254 (Winter 2010).

[12] *See, e.g.*, Evelyn Marcus, Note, *The New Razzle Dazzle: Questioning the Propriety of High-Tech Audiovisual Displays in Closing Argument*, 30 VT. L. REV. 361, 382 (2005–2006) (describing how visual presentations may unduly appeal to the "non-rational portion of the mind," similar to the "machinations of Madison Avenue").

[13] *See, e.g.*, Brian Carney & Neal Feigenson, *Visual Persuasion in the Michael Skakel Trial: Enhancing Advocacy Through Interactive Media Presentation*, 19 CRIM. JUST. 22, 22–23 (Spring 2004).

[14] *See* Robert F. Kennedy, Jr., *A Miscarriage of Justice*, 291 ATLANTIC MONTHLY 51 (Jan.-Feb. 2003).

[15] Jewel, *supra* note 11, at 280.

[16] *See, e.g.*, *Peters v. Hockley*, 152 Or. 434, 439–40 (1936).

[17] *See Old Chief*, 519 U.S. at 190–91.

[18] *State v. Davis*, 336 Or. 19, 27, 32 (2003).

[19] *See, e.g., State v. Brown*, 297 Or. 404 (1984) (stating guidelines for determining relevance or probative value of proffered scientific evidence: 1) general acceptance in field; 2) expert's qualifications and stature; 3) use made; 4) potential for error; 5) existence of specialized literature; 6) novelty; and 7) reliance on subjective interpretation).

[20] *United States v. Cox*, 633 F.2d 871, 874 (9th Cir. 1980) (citing *United States v. Abbas*, 504 F.2d 123 (9th Cir. 1974) and *United States v. Krasn*, 614 F.2d 1229 (9th Cir. 1980)).

[21] *Id.* at 873–874.

[22] *Id.*

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(Cal. Ct. App. 1996).

[31] *Averill v. Superior Court*, 50 Cal. Rptr. 2d 62 (Cal. Ct. App. 1996).

[32] Cal. S.B. 1296, 1997-1998 Assem., Reg. Sess. (Cal. 1997).

[33] *See generally* Jonathan Segal, *Anti-SLAPP Law Make Benefit for Glorious Entertainment Industry of America: Borat, Reality Bites, and the Construction of an Anti-SLAPP Fence Around the First Amendment*, 26 CDZAELJ 639, 651 (2009) (discussing amendments and *DuPont Merck Pharmaceutical Co. v. Superior Court*, 92 Cal. Rptr. 2d 755 (Cal. Ct. App. 2000)).

[34] Cal. Code Civ. Pro. § 425.17. The 2003 amendments contain express carve-outs for the publication and entertainment industry, making it clear that any restrictions in the amendments do not apply to those groups. *Id.* at (d).

[35] *Hilton v. Hallmark Cards*, 599 F.3d 894, 908 (9th Cir. 2010).

[36] *Id.* (quoting *Rivero v. Am. Fed. Of State, County & Municipal Emp'ees*, 105 Cal. App. 4th 913 (2003) (internal punctuation omitted).

[37] *Id.* (quoting *Weinberg v. Feisel*, 110 Cal. App. 4th 1122 (2003)).

[38] *Id.*

[39] *See* Note 3, *supra*.

[40] *John Doe 1 v. One Am. Prods., Inc.*, No. SC091723 (Cal. Super. Ct. Feb. 15, 2007).

Getting Paid: Attorney Fee Recovery in Oregon State Court

By Mark J. Fucile
Fucile & Reising LLP

When attorney fee recovery is litigated in Oregon state court, three areas are often involved. First, what is the legal basis for seeking fees? Second, has the correct procedure been followed? Third, is the amount sought reasonable? In this article, we'll examine all three. Although the focus is on Oregon state court, it is important to note that the substantive elements of fee recovery in federal diversity actions are also governed by state law.[1]

Mark J. Fucile

Basis

Fee recovery is not automatic. Rather, a party seeking fees must demonstrate both legal grounds entitling it to fees and that it was the "prevailing party."

In Oregon, there are three primary alternative grounds for fees.[2]

First, many Oregon statutes direct or permit an award of attorney fees to litigants who successfully handled matters within the substantive purview of those statutes. Some statutes direct an award of fees to a successful litigant, using the affirmative term "shall award." *See, e.g.*, ORS 652.230(2) (statutory claim for unpaid wages); ORS 20.085 (inverse condemnation). Other statutes simply permit a fee award, using the discretionary term "may award." *See, e.g.*, ORS 646.638(3) (statutory claim for unlawful trade practices); ORS 30.075(2) (survivorship actions). Some statutes permit any prevailing party to recover, while others limit the recovery to a successful plaintiff (*see, e.g.*, ORS 652.230(2) (wage claims, subject to limited exceptions)) or defendant (*see, e.g.*, ORS 35.346(7) (condemnation actions, subject to specified conditions)).

Second, attorney fees are available when permitted by the contract at issue in a case. Under ORS 20.096(1), attorney fee recovery in contract cases is "reciprocal": they are available to the prevailing party even if the contract involved nominally provides fee recovery only to a particular contracting party. In 2003, the Legislature adopted and then in 2009 expanded ORS 20.083, which permits attorney fee recovery "even though the party prevails by reason of a claim or defense asserting that the contract is in whole or part void, a claim or defense asserting that the contract is unenforceable or a claim or defense asserting that the prevailing party was not a party to the contract." In *Dess Properties, LLC v. Sheridan Truck & Heavy Equipment, LLC*, 220 Or App 336, 344, 185 P3d 1113 (2008), the Court of Appeals found that "the word 'void' in the statute refers to agreements actually entered into that

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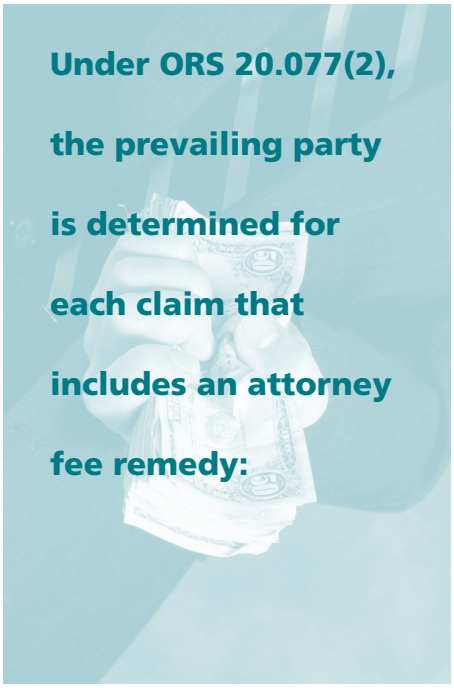
are unenforceable by reason of their failure to comply with some other legal requirement." As I write this, there are as yet no appellate decisions addressing whether rescinded contracts fall within the ambit of ORS 20.083. *See Bennett v. Baugh*, 329 Or 282, 985 P2d 1282 (1999) (discussing the traditional rule that a party who successfully rescinds a contract is not entitled to attorney fees).

Third, even in the absence of a statute or contract, attorney fees may be available—at the discretion of the court involved and under its equitable powers—in very limited circumstances when the prevailing party has conferred a significant benefit on others. For example, fees may be available when the prevailing party sought to "'vindicat[e] an important constitutional right applying to all citizens without any gain peculiar to himself.'" *Swett v. Bradbury*, 335 Or 378, 382, 67 P3d 391 (2003) (citation omitted); *accord Deras v. Myers*, 272 Or 47, 65-67, 535 P2d 541 (1975); *Vannnatta v. Oregon Government Ethics Com'n*, 348 Or 117, 228 P3d 574 (2010) (discussing the criteria for awards under this theory). Other examples include litigation that created a "common fund" (*see, e.g., Strunk v. Public Employees Retirement Bd.*, 341 Or 175, 139 P3d 956 (2006)) and shareholder derivative cases (*see, e.g., Crandon Capital Partners v. Shelk*, 342 Or 555, 157 P3d 176 (2007)).

ORS 20.077 generally controls the determination of who is the "prevailing party" for purposes of attorney fee recovery whether the basis for that recovery is statutory[3] or contractual. *See CMS Sheep Co. v. Russell*, 179 Or App 172, 177, 39 P3d 262 (2002) (applying the statutory term to contract-based fee recovery in the absence of evidence of contrary intention); *accord Carlson v. Blumenstein*, 293 Or 494, 500, 651 P2d 710 (1982) (equating the contractual term "successful party" with the statutory term "prevailing party"); *Rosekrans v. Class Harbor Ass'n, Inc.*, 228 Or App 621, 641-44, 209 P3d 411 (2009) (examining the contractual term "losing party"); *see also Asiatic Company (USA), Inc. v. Expeditors International*, 183 Or App 528, 529, 52 P3d 1112 (2002) (taking the same approach with costs).



Under ORS 20.077(2), the prevailing party is determined for each claim that includes an attorney fee remedy:

> "For the purposes of making an award of attorney fees on a claim, the prevailing party is the party who receives a favorable judgment or arbitration award on the claim. If more than one claim is made in an action or suit for which an award of attorney fees is either authorized or required, the court or arbitrator shall:
>
> "(a) Identify each party that prevails on a claim for which attorney fees could be awarded;
>
> "(b) Decide whether to award attorney fees on claims for which the court or arbitrator is authorized to award attorney fees, and the amount of the award;
>
> "(c) Decide the amount of the award of attorney fees on claims for which the court or arbitrator is required to award attorney fees; and
>
> "(d) Enter a judgment that complies with the requirements of ORS 18.038 and 18.042 [which govern the form of money judgments]."[4]

Procedure

ORCP 68C governs the procedural aspects of attorney fee recovery from initial pleading through award by the trial court.

Pleading the right to attorney fees is controlled by ORCP 68C(2). ORCP 68C(2)(a) requires a party seeking fees to plead the "facts, statute or rule" in that party's complaint, answer, counter or cross claim or third party pleading. *See Lumberman's v. Dakota Ventures*, 157 Or App 370, 378, 971 P2d 430 (1998) (summarizing the law on this

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point and describing it as the "first appropriate opportunity"). If the party's first response is by way of a motion to dismiss or summary judgment, then ORCP 68C(2)(b) requires that the right to fees be included in the motion. *See Mulier v. Johnson*, 332 Or 344, 350-51, 29 P3d 1104 (2001). With both, ORCP 68C(2)(c) simply requires an assertion of the right to "reasonable attorney fees" rather than a specific amount. Again with both, the rationale is to put the other side on notice that the remedies sought include attorney fees. *See generally Swartsley v. Cal-Western Reconveyance Corp.*, 212 Or App 365, 157 P3d 1260 (2007) (discussing "notice" at length). Finally, under ORCP 68C(2)(d) an allegation of the right to fees is deemed denied by the adverse party without the need for a specific response.[5]

Proof of attorney fees, in turn, is governed by ORCP 68C(4). ORCP 68C (4)(a) requires a prevailing party to file and serve a "detailed" statement of fees (and costs) within 14 days of the entry of judgment. The level of detail required includes an itemization of the time spent and the activities undertaken so the court can determine whether the services involved were reasonable. *Thompson v. Long*, 103 Or App 644, 645, 798 P2d 729 (1990). Courts have the discretion to reduce fee statements that contain "block billing." *See, e.g., Rosekrans v. Class Harbor Ass'n, Inc.*, 228 Or App at 641. Under UTCR 5.080, the request for attorney fees must be filed "substantially in the form" set out in the UTCR Appendix of Forms. ORCP 68C(4)(b) requires "specific" objections to be filed and served within 14 days following service of the request. Both requests and objections may be amended in accord with ORCP 23.

Although fee awards may be included in a general judgment, they are more typically entered by supplemental judgment.

ORCP 68C(4)(c) controls hearings on fee requests and objections. Fee requests are heard and decided by the court. If no objections are timely filed, the court may award the fees sought or it may instead make an independent inquiry into their reasonableness. *See Fredrickson v. Ditmore*, 132 Or App 330, 334-35, 888 P2d 108 (1995), *abrogated on other grounds*, 170 Or App 305, 13 P3d 114 (2000). Hearings are evidentiary in character and the parties are permitted to submit testimony by affidavit (or declaration) or live, including expert testimony. If no fact issues are raised by an objection, however, the court need not hold an evidentiary hearing and, instead, may simply rely on the evidence already in the record. *Jimenez v. Ovchinikov*, 98 Or App 336, 339, 779 P2d 189 (1989). ORCP 68(C)(4)(e) requires the court to make findings of fact and conclusions of law if requested, or, absent a request, the court may (in its discretion) make them on its own.

Although fee awards may be included in a general judgment, they are more typically entered by supplemental judgment. ORCP 68(5)(a)-(b). Under ORS 20.220(1), an appeal from a judgment either allowing or denying fees (or costs) is only permitted on questions of law (including whether there was supporting evidence in the record). Review is for an abuse of discretion under ORS 20.075(3). If the underlying judgment in a case is reversed, then ORS 20.220(3)(a) also reverses the related fee award. Fees on appeal are governed by ORAP 13.10, not ORCP 68. *See McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84, 90, 957 P2d 1200 (1998).

Amount

If an underlying statute requires an attorney fee award to a prevailing party, then ORS 20.075 limits a reviewing court's discretion to the amount of the fees. *Petersen v. Farmers Ins. Co. of Oregon*, 162 Or App 462, 466, 986 P2d 659 (1999).[6] By contrast, if fee recovery is itself discretionary, then the reviewing court under ORS 20.075 will examine both "whether" and "how much."

ORS 20.075(1) addresses "whether":

> "(1) A court shall consider the following factors in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees:
>
> "(a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, includ-

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ing any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.

"(b) The objective reasonableness of the claims and defenses asserted by the parties.

"(c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.

"(d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.

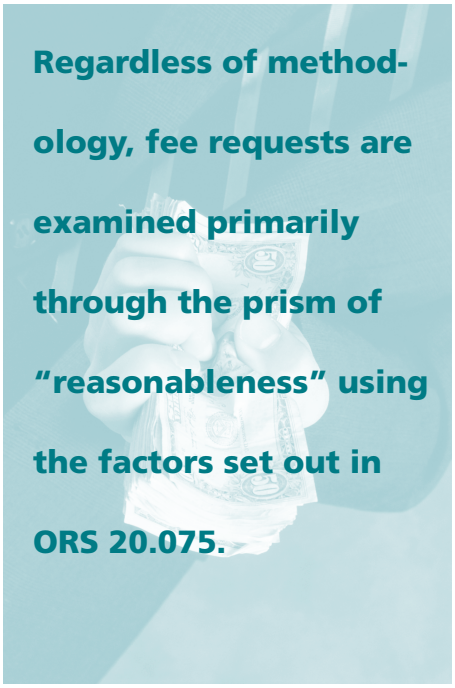
"(e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.

"(f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.

"(g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.

"(h) Such other factors as the court may consider appropriate under the circumstances of the case."

ORS 20.075(2), in turn, addresses "how much":



"(2) A court shall consider the factors specified in subsection (1) of this section in determining the amount of an award of attorney fees in any case in which an award of attorney fees is authorized or required by statute. In addition, the court shall consider the following factors in determining the amount of an award of attorney fees in those cases:

"(a) The time and labor required in the proceeding, the novelty and difficulty of the questions involved in the proceeding and the skill needed to properly perform the legal services.

"(b) The likelihood, if apparent to the client, that the acceptance of the particular employment by the attorney would preclude the attorney from taking other cases.

"(c) The fee customarily charged in the locality for similar legal services.

"(d) The amount involved in the controversy and the results obtained.

"(e) The time limitations imposed by the client or the circumstances of the case.

"(f) The nature and length of the attorney's professional relationship with the client.

"(g) The experience, reputation and ability of the attorney performing the services.

"(h) Whether the fee of the attorney is fixed or contingent."[7]

Although ORS 20.075 requires consideration of all of the factors listed, the relevance of particular factors is case-specific. See *Hale v. Kemp*, 220 Or App 27, 35-36, 184 P3d 1185 (2008); *accord McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or at 96-96. Although not routine in Oregon state court practice, courts may use a multiplier or "lodestar" in awarding fees. *See Strawn v. Farmers Ins. Co. of Oregon*, 233 Or App 401, 412-18, 226 P3d 86 (2010) (reviewing issue and so holding); *see also Strunk v. Public Employees Retirement Bd.*, 343 Or 226, 245-47, 169 P3d 1242 (2007). Regardless of methodology, fee requests are examined primarily through the prism of "reasonableness" using the factors set out in ORS 20.075.

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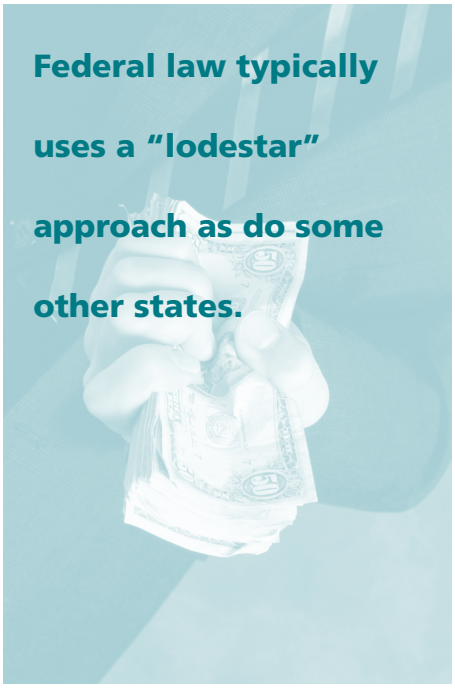
Strawn v. Farmers Ins. Co. of Oregon, 233 Or App at 416. From a practical perspective in a noncontingent fee setting, the hourly rates charged and the amount of time spent in relation to the outcome achieved are often the key factors. In this regard, the Oregon State Bar's Economic Survey provides an influential starting point for analysis of rates. *See, e.g., Valentine v. Equifax Information Services LLC*, 543 F Supp2d 1232, 1235 (D Or 2008); *Clark v. Capital Credit & Collection Services, Inc.*, 561 F Supp2d 1213, 1218 (D Or 2008). A court may base an award on rates beyond the immediate geographic venue depending on the complexity of the case and the availability of specialized expertise. *See, e.g, Hanna Ltd. Partnership v. Windmill Inns of America*, 223 Or App 151, 165-67, 194 P3d 874 (2008) (awarding Portland rates in a Douglas County case). In a contingent fee setting by contrast, the risk assumed is included in the factors assessed and can result in compensation at a higher effective rate than an hourly case. *See Tanner v. OHSU*, 161 Or App 129, 134, 980 P2d 186 (1999). With either, although denominated "attorney" fees, recoverable fees are construed more broadly to encompass "legal services" provided to achieve the result meriting the award. *See Robinowitz v. Pozzi*, 127 Or App 464, 470, 872 P2d 993 (1994).

Finally, fee awards may include both amounts incurred in prosecuting a successful fee request (*see Lekas v. Lekas*, 23 Or App 601, 609-10, 543 P2d 308 (1975)) and, upon appropriate evidence, for collection on the judgment (*see Johnson v. Jeppe*, 77 Or App 685, 688-89, 713 P2d 1090 (1986)). ❐



Federal law typically uses a "lodestar" approach as do some other states.

[1] *See Kabatoff v. Safeco Ins. Co. of America*, 627 F2d 207, 210 (9th Cir 1980) ("In a diversity action, the question of attorney's fees is governed by state law."); *accord Roberts v. Interstate Distributor Co.*, 242 F Supp2d 850, 852 (D Or 2002). In a diversity case, however, the procedural aspects of attorney fee recovery are controlled by federal law. *See* FRCP 54(d).

[2] Several court rules governing litigation conduct, as distinct from the substantive matters involved in the litigation, also provide attorney fee recovery as a form of sanction. *See, e.g.*, ORCP 17D, 45C, 46. Similarly, some statutes permit the award of attorney fees as a sanction for an opponent's improper litigation conduct. *See, e.g.*, ORS 20.105 (disobedience of court orders); ORS 20.125 (deliberate misconduct causing mistrial).

[3] Some statutes governing specialized proceedings, such as eminent domain, have their own prevailing party definitions. *See, e.g.*, ORS 35.346(7).

[4] For a discussion of the legislative history of ORS 20.077, *see Robert Camel Contracting, Inc. v. Krautscheid*, 205 Or App 498, 134 P3d 1065 (2006).

[5] A party can deny an opponent's right to fees (for example, the dispute at issue did not arise out of the contract under which fees are claimed) while pleading in the alternative that it is entitled to fees if the court finds the right but the party otherwise successfully defends the claim. *See, e.g., Associated Oregon Veterans v. Department of Veterans' Affairs*, 308 Or 476, 480-81, 782 P2d 418 (1989).

[6] Similarly, if a contract requires an attorney fee award to a prevailing party, then the court is required to select one. *Beggs v. Hart*, 221 Or App 528, 536, 191 P3d 747 (2008).

[7] These same factors are used in federal actions when Oregon substantive law applies. *See, e.g., Clausen v. M/V New Carissa*, 171 F Supp2d 1138, 1141-44 (D Or 2001). These factors mirror those found in RPC 1.5(b) governing the reasonableness of a fee. ORS 20.075(4) notes that nothing in the statute authorizes anything beyond a reasonable attorney fee.

[8] Federal law typically uses a "lodestar" approach as do some other states. *See, e.g., Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or App 553, 588-89, 152 P3d 940 (2007) (applying federal law); *Bank of the West v. Burlingame*, 134 Or App 529, 539-40, 895 P2d 1367 (1995) (applying Washington law).

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Transforming a Personal Purgatory

continued from page 1

including architects, subcontractors, and material providers. These two challenges caused the plaintiff's team to view the case as a personal purgatory early on and caused many to predict that the ultimate outcome for the team would not be much better than that of the Spartan 300.

Significant Challenges

Each case and each lawsuit has its own challenges. Overcoming those challenges can sometimes be instructive, not only for the case at hand, but also for future cases.

Here, the challenges related to two classic defenses raised in construction cases. The first was "design." The second was "failure of the owner to maintain."

Design Failure

A claim by an owner that a building has been defectively constructed is routinely met by a response from the general contractor and those supporting the construction effort that the building was "improperly designed." In short, the more than $40 million in damage suffered by the owner was caused by architectural design flaws, not construction defects. As explained below, this defense seemed particularly strong early in this case.

To begin with, the Wyndham Resort was clad with an exterior insulation foam system ("EIFS"). Not only were the EIFS cladding and its claimed design flaws the subject of widespread national class actions and industry criticism, but defense team experts were prepared to testify that the Seaside, Oregon, site had some of the worst weather conditions in the United States and that EIFS had a history of repeatedly failing in wet climates. Matters were made worse by the fact that the Oregon legislature had outlawed the use of EIFS cladding in certain applications.

The design defense gained momentum when discovery disclosed that two building envelope experts who had been hired by the owners at the time of construction recommended that EIFS cladding not be used unless a "backup water drainage management system" was included as part of the EIFS cladding system. The owner ignored these recommendations. Personal purgatory was heating up.

Failure of the Owner to Maintain

Early in discovery, documents were produced in which the owner, Wyndham, at the time of substantial completion of the resort "accepted responsibility for maintenance." Product data sheets were produced requiring that a maintenance program for the EIFS cladding begin "within six months" and be continued "every six months." Similar maintenance requirements were established for the windows of the resort. Admissions by the owner's high-ranking officials, however, disclosed that no mainte-

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nance had been conducted for the first six years of the building's life. Worse yet, documents were produced in which high-ranking Wyndham officials recommended and directed others to perform annual EIFS cladding and window maintenance, but later admitted that the maintenance had not been conducted. Purgatory continued to heat up.

Overcoming Early Challenges to Prosecuting the Construction Defect Claims

The plaintiff's team was eventually able to largely overcome the "defective design" defense as a result of two key case developments: first, through the admission of the highest-ranking officer for the general contractor, and second, through admissions by the general contractor's own experts relating to the most cost-effective means to repair.

Crucial Admission by the General Contractor's Highest-Ranking Executive at the Construction Site

During deposition, the general contractor's highest-ranking executive repeatedly emphasized how he and his team had "objected" to the use of "EIFS cladding" as the cladding for the Wyndham Resort. Although the general contractor's executive had been directly involved with the design team for more than a year in selecting the cladding for the resort and the written record disclosed no objection to the use of EIFS cladding, once the history of the failure of EIFS cladding in wet climates and the outlawing of EIFS cladding by the Oregon legislature was introduced, the general contractor's chief executive suddenly remembered that he had "verbally"

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and "repeatedly" objected to the use of this defective design approach.

The general contractor's executive was more than accommodating in exaggerating and overstating the objection to the faulty design. He clearly did not anticipate the awkward place to which this would eventually take him.

The general contractor's executive was shown the construction contract that he had signed. He admitted that it contained an exhibit in which he had had the opportunity to list "any exclusions, limitations, conditions, or restrictions" of the general contractor at the time that he entered into the contract. He had already testified that the defective nature of the EIFS design had been apparent to him and had been embraced over his objections before the contract was signed. He had to admit, however, **that when he and the general contractor had had the opportunity in writing to state their objection to the use of EIFS cladding, they failed to do so**. The exhibit to the construction contract where one would have anticipated the exclusion, limitation, restriction, condition, or disclaimer relating to the EIFS cladding did not contain it. The general contractor's strong assertion of objection to the use of EIFS cladding and the general contractor's assertion of a design defect defense was unraveling. Purgatory was beginning to cool.

The Most Cost-Effective Means of Repair

The defense was highly critical of the use of EIFS cladding on a building fronting the ocean in what some experts described as the "most challenging moisture weather conditions" in the United States. Suggestions were made that the building should have been built of brick, steel, and hardy plank. As the parties prepared for trial, however, the defense made a decision that seemed to undermine the design defect defense that it had so heavily relied on early in the case. Instead of proposing more expensive repairs, the defense proposed repairs that reapplied EIFS cladding to the Wyndham Resort.

An eight-story building with falling football-sized chunks of concrete onto public streets and children's playgrounds began to turn the attention of the case from owner lack of maintenance back to construction defects.

The result was an admission that the design could not have been the cause of the $40 million in damage because the same design was being proposed by the defense team in its alternative costs of repair to challenge the cost of the repair proposed by the plaintiff.

Overcoming the Assertion That the Owner "Failed to Perform Maintenance"

As noted above, the evidence had been developed that the owner had performed little or no maintenance on the windows and EIFS cladding during the first six years of the life of the Wyndham Resort. Based on the maintenance requirements of the building, the defense had planned to use this admission to topple and disintegrate the construction defect claims.

The success of the failure-to-maintain defense was turned on its head by two key pieces of evidence.

First, the major defects that were causing the Wyndham Resort to leak were largely wholly unrelated to the maintenance of the windows and the EIFS cladding. For example, evidence was developed that showed that large pieces of concrete were falling from more than 300 decks on the resort, which had no relationship to EIFS and the window maintenance. An eight-story building with falling football-sized chunks of concrete onto public streets and children's playgrounds began to turn the attention of the case from owner lack of maintenance back to construction defects. Moreover, evidence was introduced to show that EIFS cladding was delaminating and falling from the building not because of lack of maintenance, but because a "prohibited craft spray" had been used by the general contractor and its subcontractors to apply the EIFS cladding in clear violation of manufacturer's standards. With this evidence came evidence that the general contractor had concealed the use of the craft spray from the owner and the architect in an effort to avoid having to reapply the EIFS cladding.

Second, evidence that the general contractors and subcontractors had misaligned the walls and floors of the building in clear violation of building and contract standards, and preventing any chance for the EIFS cladding to

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provide a proper weather seal, further undermined the defense's effort to claim failure of maintenance as a defense or cause of the Wyndham Resort damage.

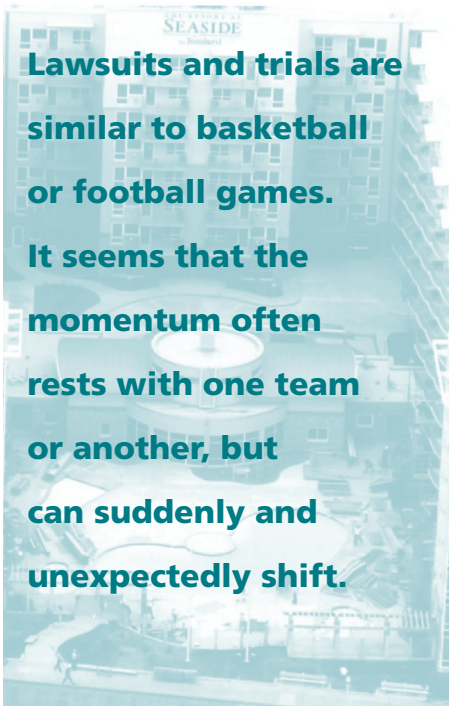
The Timing of the Construction Defect Symptoms Further Toppled the Lack-of-Maintenance Defense

The lack-of-maintenance defense was further undercut by discovery that disclosed that the symptoms of the construction defects, including water leakage, manifested themselves well before maintenance programs would have begun. Water leakage occurred not only during the one-year warranty period after substantial completion, but during construction itself.

General contractor personnel admitted that symptoms of defects during construction and during the first one-year warranty period after substantial completion caused them to assume responsibility for repairs during the period when owner maintenance would normally begin. In short, the evidence demonstrated that although the owner had performed no maintenance, the symptoms of construction defects had been early, consistent, and continuous, and had caused many during the early life of the resort to conclude that maintenance would be futile or that maintenance responsibility should not shift to the owner in view of continued symptoms of construction defects. Purgatory was becoming quite cool.

A Lesson Worth Remembering

Lawsuits and trials are similar to basketball or football games. It seems that the momentum often rests with one team or another, but can suddenly and unexpectedly shift.



Lawsuits and trials are similar to basketball or football games. It seems that the momentum often rests with one team or another, but can suddenly and unexpectedly shift.

This is particularly true at trial when experienced trial practitioners seem to have the momentum when they are presenting their evidence and then lose the momentum when their adversary is presenting the evidence.

In some cases, as result of surprise evidence or otherwise, the momentum can change even when we are presenting our own case.

In any event, the lesson to be remembered is that each case has its own "purgatory" and its own "rescues from purgatory." Be patient. Be resolved. Many cases will be transformed from purgatory to a better place. For every one that is not, there will be one case that does not involve purgatory at all. In the long term, just as the delights and challenges of life seem to even out over a lifetime, similarly the lawsuits and cases carrying personal purgatory and rescues from personal purgatory seem to even out as well. ❐

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Recent Significant Oregon Cases

Hon. Stephen K. Bushong
Multnomah County
Circuit Court Judge

Claims and Defenses

Kelly v. Hochberg, 349 Or 267 (2010)

In *Kelly*, the Supreme Court addressed the scope of a landowner's "recreational immunity" under ORS 105.682. Plaintiff was injured when his motorcycle collided with an automobile on a road traversing Bureau of Land Management (BLM) property. At the time, plaintiff was participating in a motorcycle rally known as the Poker Run, in which riders "departed from the Lake Selmac campground and collected cards at several intermediate stops before returning to the lake to compare hands." 349 Or at 269. The defendant attorney represented plaintiff in a personal injury action; in that case, the attorney erroneously named Josephine County instead of BLM as a defendant. By the time defendant realized his mistake, the statute of limitations for bringing a timely action against BLM expired. Plaintiff then sued the attorney for legal malpractice. The trial court granted summary judgment for defendant on the ground that any action against BLM would have failed because BLM was entitled to immunity under the "recreational immunity" statute. Plaintiff appealed, arguing that riding his motorcycle as part of the Poker Run was "travel" and could not be a "recreational purpose" under *Liberty v. State Dept. of Transportation*, 343 Or 11 (2006). The Supreme Court disagreed, concluding that the recreational immunity statute applied because plaintiff's "purpose in traveling on BLM land when the accident occurred was not to gain access to the site, but instead was to participate in the Poker Run, i.e., it was recreational." 349 Or at 276.

May Trucking Co. v. Northwest Volvo Trucks, Inc., 238 Or App 21 (2010)

May Trucking was a "civil litigation morass" that involved "the intersection between the seventeenth-century statute of frauds and twenty-first century electronic mail." 238 Or App at 24. Plaintiff sued a truck manufacturer (Volvo) and two of its dealers for breaching a contract to sell plaintiff 499 new tractor trucks. The trial court granted Volvo's motion for summary judgment, holding that plaintiff's claim was barred by the statute of frauds. The case proceeded to trial against the two dealers, and plaintiff obtained a $3.14 million verdict, plus prejudgment interest. Plaintiff then settled with the dealers for the full amount of the verdict, not including interest, and appealed the dismissal of its claim against Volvo, contending that the trial court "erred in concluding that the contract with [Volvo] failed for want of compliance with the statute of frauds." *Id.* Volvo moved to dismiss the appeal, contending that, as a result of plaintiff's settlement with the dealers, "the claim has been extinguished with respect to all obligors under the supposed contract." *Id.* at 25. The Court of Appeals denied Volvo's motion, concluding that (1) plaintiff's breach of contract claim "did not allege the joint liability" of Volvo and the dealers, so plaintiff's "satisfaction of the judgment against [the dealers] does not prevent plaintiff from pursuing an appeal on its claim against [Volvo] for its separate contractual obligation" (*Id.* at 32); and (2) in appealing the dismissal of its claims against Volvo, plaintiff "is not taking a position inconsistent with its judgment against [the dealers]." *Id.* at 33. On the merits, the court held that emails and draft agreements exchanged during ne-

Judge Bushong

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gotiations were insufficient to evidence an intention by Volvo to be bound by the terms of the agreement sufficient to satisfy the writing and signature requirements in the UCC's statute of frauds, ORS 72.2010(1). *Id.* at 36-37. The court also rejected plaintiff's contention that Volvo should be estopped from asserting a statute of frauds defense, concluding that (1) it was "doubtful that plaintiff has established detrimental reliance" (*Id.* at 38); and (2) plaintiff "cannot establish that the reason for its reliance was a misrepresentation of some fact other than the contractual promise itself." *Id.* at 39.

Greenwood Products v. Greenwood Forest Products, 238 Or App 468 (2010) *Manusos v. Skeels*, 238 Or App 657 (2010)

The plaintiff in *Greenwood* agreed to buy defendant's inventory of wood and other products at defendant's cost, plus a premium of 2%. Plaintiff sued for breach of contract, alleging that it overpaid because defendant misstated the cost of its inventory. The Court of Appeals held that the trial court erred in denying defendant's motion for directed verdict because (1) plaintiff's claims were "predicated upon a purported contractual obligation for [defendant] to accurately account for its inventory"; and (2) the contract "imposes no such obligation explicitly or by necessary implication." 238 Or App at 482. In *Manusos*, the plaintiff sued for reformation of a deed, contending that "when defendants acquired their property from a third party, the deed was supposed to have included an easement for [plaintiff's] benefit." 238 Or App at 659. The Court of Appeals held that the trial court erred in granting plaintiff relief in the form of reformation because plaintiff "was neither a party to the deed nor in a relationship of privity with any party to the deed[.]" *Id.* at 662.

Johnson v. Babcock, 238 Or App 513 (2010)

The plaintiff in Johnson brought a legal malpractice claim against the attorney that represented him in a criminal case. Plaintiff relied in part on the fact that a federal court had granted him habeas corpus relief on the grounds of ineffective assistance of counsel. The trial court granted defendant's motion for summary judgment, concluding that, "notwithstanding the federal court's subsequent judgment affording plaintiff collateral relief, the final state court judgment denying post-conviction relief precluded plaintiff from litigating defendant's alleged malpractice." 238 Or App at 515. The Court of Appeals reversed, holding that "a judgment in favor of a defendant attorney in a post-conviction proceeding does not give rise to defensive issue preclusion when there is a later, inconsistent judgment in a federal habeas corpus case that counsel's performance was constitutionally inadequate." *Id.* at 522.

Paul v. Providence Health System-Oregon, 237 Or App 584 (2010)

The plaintiffs in *Paul* sued after "unencrypted records containing personal, medical, and financial information of an estimated 365,000 patients were stolen from the car of one of defendant's employees." 237 Or App at 586. Plaintiffs alleged that defendant "had negligently failed to safeguard those records and that defendant had violated the Unlawful Trade Practices Act (UTPA) by representing that it would keep patient information confidential when it knew that it had not taken sufficient steps to ensure that." *Id.* The trial court dismissed the complaint for failure to state a claim; the Court of Appeals affirmed. The court concluded that the negligence claim failed because "plaintiffs have failed to identify a duty defendant owes them, beyond the duty to exercise reasonable care, sufficient to support a claim in negligence for economic damages." *Id.* at 600. In addition, plaintiffs "failed to state a claim in negligence for their emotional distress damages because they do not allege an affirmative disclosure by defendant of their confidential personal and medical information, nor do they allege facts sufficient to support an inference of a specific professional duty by defendant to protect against emotional distress caused by the theft of that information." *Id.* The UTPA claim failed because (1) "rather than allege a loss of money or property as a result of defendant's misrepresentations, plaintiffs' complaint alleges out-of-pocket expenses to prevent a potential loss of money or property (through identity theft) that might result from the misrepresentations" (*Id.* at 604, emphasis in original); and (2) "the money spent to prevent a potential ascertainable loss under the UTPA is not itself an 'ascertainable loss of money or property, real or personal, as a result of' a violation of the statute." *Id.*

Fox v. Collins, 238 Or App 240 (2010)

In *Fox*, the trial court dismissed for a third time plaintiff's product liability action as time barred. After her first complaint was dismissed, plaintiff re-filed under a "revival" statute enacted in 2003. Defendants moved for summary judgment, contending that the revival statute was unconstitutional. The trial court agreed, but the Court of Appeals reversed and remanded. On remand, defendants asserted that the plaintiff's claims did not meet the requirements of the revival statute. The trial court agreed. On appeal, plaintiff pointed out that, in the first appeal (reversing

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CLE Seminars

April 28
Business Valuation for Lawyers
9 a.m. to 4:30 p.m.
Oregon State Bar Center
Tigard, Oregon
6.5 General CLE credits

April 29
Family Law 2011
9 a.m. to 3:45 p.m.
Oregon Convention Center
Portland, Oregon
5.5 General CLE credits

June 2-3
11th Annual Oregon Tax Institute
9 a.m. to 5:15 p.m.
Multnomah Athletic Club, 1849 S.W. Salmon Street
Portland, Oregon
Oregon: 13.5 General CLE credits
Washington: 12 General CLE credits
Eligible for CPE credits

June 9
Deposition Techniques and Strategy
9 a.m. to 4:15 p.m.
Oregon State Bar Center
Tigard, Oregon
6.25 General or Practical Skills CLE credits

June 17
Building Your Practice
Oregon State Bar Center
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June 24
Advanced Estate Planning
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the trial court's determination that the revival statute is unconstitutional), the Court of Appeals declined to affirm on the alternative ground that plaintiff's claim did not qualify for revival under the statute. Plaintiff contended that (1) that ruling precluded defendants from "re-litigating" the statutory argument under the law of the case doctrine; and (2) defendants waived the statutory argument by not asserting it in their original motion for summary judgment (which only challenged the constitutionality of the revival statute). The Court of Appeals concluded that defendants' argument was not barred by the law of the case doctrine because the court "did not fully consider and resolve defendants' statutory arguments in the disposition of the prior appeal." 238 Or App at 249. The court also rejected plaintiff's argument that "defendants waived the defense at issue simply by virtue of failing to include it in the original motion for summary judgment." *Id.* at 252.

Procedure

Patton v. Target Corp., 349 Or 230 (2010)
Bonds v. Farmers Ins. Co., 349 Or 152 (2010)

After a jury returned a verdict that included $900,000 in punitive damages, the parties in *Patton* reached a settlement that did not include any payment for punitive damages. The State of Oregon objected, arguing that, under ORS 31.735, it "had a vested interest in 60 percent of the jury's punitive damages award" which precluded the parties from settling the case without the state's consent. 349 Or at 232. The Supreme Court disagreed, stating that "it simply is not possible for us to conclude that ORS 31.735 as presently worded makes the

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Recent Significant Oregon Cases

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state's consent necessary before a court may enter a judgment giving effect to a settlement between the parties that would reduce or eliminate punitive damages to which the state otherwise would be entitled, even if that is what the legislature intended." *Id.* at 243-44. In *Bonds*, the Supreme Court held that two letters stating defendant's consent to arbitrate plaintiff's claim for underinsured motorist (UIM) benefits were insufficient to "formally institute" arbitration within the meaning of ORS 742.504(12)(a)(B). The court concluded that, to formally institute arbitration under the statute, "an insured or an insurer must expressly communicate to the other party that the initiating party is beginning the process of arbitrating a dispute." 349 Or at 154.

First Resolution Investment Corp. v. Avery, 238 Or App 565 (2010)
Harvey v. Christie, 237 Or App 237 (2010)

In *First Resolution*, the Court of Appeals held that a foreign corporation that does not transact business in Oregon was not precluded from filing suit in Oregon by ORS 60.704(1). The court rejected defendant's argument that filing a lawsuit "is transacting business" for purposes of the statute. 238 Or App at 570. The plaintiff in *Harvey* filed his notice of appeal and request for trial de novo 23 days after entry of an arbitration award. The trial court concluded that the notice was not filed within the 20 day period required by ORS 36.425(2)(a); the Court of Appeals reversed. The court concluded that, "because the arbitration award was mailed to the parties in this case, three days should have been added to the appeal period [under ORCP 10 C]." 237 Or App at 244.

Crimson v. Parks, 238 Or App 312 (2010)
Johnson v. Best Overhead Door, LLC, 238 Or App 559 (2010)

In *Crimson*, the Court of Appeals held that the trial court erred in failing to give the uniform civil jury instruction on a "previous infirm condition" (UCJI 70.06) in a personal injury case. The court explained that, "contrary to the trial court's understanding in this case, to support the giving of the 'previous infirm condition' instruction, it was not necessary for there to be evidence explicitly stating that plaintiff's preexisting condition made her more susceptible to injury." 238 Or App at 316-17. The requested instruction should be given if there is "evidence that the accident aggravated plaintiff's preexisting condition, from which the finder of fact could draw an inference that plaintiff 'had a bodily condition that predisposed her to be more subject to injury than a person in normal health." *Id.* at 317. In *Johnson*, the Court of Appeals held that "ORCP 15 D expressly gave the trial court authority to permit the late filing of plaintiff's statement of attorney fees." 238 Or App at 563. The court acknowledged that it had previously held in *Jaffe v. The Principle Company*, 215 Or App 385, 390 (2007), that "the failure to comply with the 14-day filing requirement in ORCP 68 C(4)(a) was not the type of defect that can be excused under ORCP 12 B." 238 Or App at 563. But, the court explained, the prevailing party in *Jaffe* "should have relied on ORCP 15 D" instead of ORCP 12 B. *Id.*

A.G. v. Guitron, 238 Or App 223 (2010)

The plaintiff in *A.G.* asserted claims for sexual battery and intentional infliction of emotional distress. The jury returned a defense verdict and plaintiff appealed, assigning error "to the trial court's exclusion of expert testimony by plaintiff's forensic psychologist, Dr. Green, as a sanction for a purported discovery violation by plaintiff for failing to provide defendants with a copy of a report by Green." 238 Or App at 225. Plaintiff produced records from her treating therapist, but contended that she was not required to produce Dr. Green's report because Green "had been retained as an expert for trial, and, as a consequence, his report was not discoverable." *Id.* at 225-26. The Court of Appeals disagreed. The court explained that the report "appears to be one that plaintiff was required to produce under ORCP 44 C and hence, plaintiff violated the rule by failing to produce it." *Id.* at 227. Plaintiff argued, however, that ORCP 44 "necessarily embodies" a distinction between "reports and notations of examinations that are produced by physicians and psychologists in the course of treating a person's injuries and those that are produced as a result of examinations conducted by those professionals for purposes of litigation[.]" *Id.* However, the court found nothing in the materials from the Council on Court Procedures and the Oregon legislature suggesting any intent to alter the rule requiring "plaintiffs in personal-injury actions to deliver to defendants, on request, all reports of all examinations of plaintiffs 'relating to injuries for which recovery is sought.'" *Id.* at 233. It followed that the trial court did not err "in concluding that plaintiff had committed a discovery violation by failing to produce the report" and "in excluding Green's testimony." *Id.* ❐

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