Oregon State Bar

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Bill Barton Receives 2013 Owen M. Panner Professionalism Award

By Brent Barton, The Barton Law Firm, P.C.

Bill Barton of Newport received this year's Owen M. Panner Professionalism Award. Judge Panner presented the award at the annual banquet of the Litigation Institute and Retreat at Skamania Lodge on March 1, 2013. Judge Panner enjoyed sharing several stories of his longtime friend from the coast.

Bill Barton with Judge Owen M. Panner

Bill was joined for the evening by his wife, JoAnn, his daughter Monique, his entire Newport office, as well as many friends from both sides of the bar.

In addition to Judge Panner, four very different speakers toasted Bill: Peter Richter, Bill's friend from Miller Nash, celebrated Bill's unparalleled trial skills as well as his unique personality. Brent Barton, Bill's son and law partner, praised his father as his ultimate role model, both as a lawyer and a father. Anthony Owens, assistant men's basketball coach at Portland State University, recounted Bill's extensive volunteer work in mentoring his team's players and coaches, many of whom traveled to Skamania for the ceremony. Jeff Batchelor, mediator extraordinaire, described Bill as perhaps the best lawyer he has ever known. The two have been close friends since they met when Willamette Law School assigned seats alphabetically.

As only Bill can do, he accepted the award with a reminder to honor our profession by treating each other with respect and courtesy. By learning to disagree without being disagreeable, we can advocate aggressively and while building lasting friendships.

Comments From the Editor

Keys to Persuasion

By Dennis Rawlinson, Miller Nash LLP

Dennis Rawlinson

Decades of experience seem to teach us certain things about the art of persuasion. Ask any trial lawyer what three things that lawyer has learned over the course of his or her career that make the lawyer a more persuasive advocate, and you will receive a myriad of answers. But there will also be some commonality and repetition among those answers.

Here are three points for your consideration.

1. Simplicity

Our challenge is to reduce any argument down to a simple, easily understood concept. One that, in the case of a jury, can be understood, remembered, and repeated in the deliberation room. One that, in the case of a complex summary judgment or Rule 21 motion, reduces all the factual and legal complexities down to a single thought or expression.

Over the course of my career, I have become a believer of the mantra "simplify, simplify, simplify." Less is more. To the extent that we can present our client's position in an easily understood, simple concept and story, we will be successful.

So the best among us exercise discipline in attempting to come up with a trial theme that reduces all the law, all the facts, and all the arguments into a simple, easily understood and remembered theme. For example, Michael Tigar in his defense of Terry Nichols, the purported coconspirator with Timothy McVeigh in the Oklahoma bombing case, reduced the entire case to the simple theme:

> ***"Terry Nichols wasn't there. He was building a life, not a bomb."***

Then Tigar went about weaving that simple theme into his jury selection, opening statement, direct and cross-examinations, and closing. Ultimately, it was a theme that a fact-finder could understand, remember, and repeat in the deliberation room.

Simplicity in my view is discovering the "ultimate truth" that summarizes all the facts, all the arguments, and all the law. Often it is simply the description of a contrast:

> ***"This is a prosecution of a young man guilty of exercising 'poor judgment,' not the prosecution of a murderer."***

2. Authenticity

This technique has been written and spoken about at length by fellow Oregon trial lawyer Bill Barton. I will not attempt to repeat here what Barton does much better in other *Litigation Journal* articles. I will, however, do my best to simply describe my personal views on authenticity.

Authenticity is the ability to stand in your client's shoes, feel what your client feels, and muster your own passions based on those experiences. That is why it is important not only that you know your case well, but also that you know your client well and know the intimate details of the "scenes" that make up your case.

This is no doubt why many who take the art of persuasion seriously are focusing on the art of "psycho-drama." In psycho-drama, one acts out cases like scenes in a play and thinks through what the characters in the case were feeling, seeing, tasting, hearing, and smelling to inspire the emotions and language that will persuade.

Finding one's path to this place requires following one's heart. Persuasion that comes from the heart is the most effective. Such persuasion needs no notes and carries its own structure, rhythm, and drama.

3. Preparation

I have long heard that one of the principles of effective persuasion is preparation. I will have to admit, however, that I have only recently begun to understand its meaning.

Preparation does not just mean hours and hours of studying the facts and the law. It does not just mean working over and over to reduce the facts, the contention, and the law to the most persuasive, simple, and powerful themes and subthemes. It means more than that.

I can best illustrate what preparation means with a story. Jim Brosnahan is an outstanding contemporary trial lawyer who practices in San Francisco. Several years ago, Brosnahan represented John Walker, the American Taliban.

As you may recall, Walker was a young, idealistic 20-year-old who in his zeal to follow Islamic doctrine found himself in Afghanistan as a Taliban soldier.

The Justice Department charged Walker with conspiracy to kill U.S. military forces in Afghanistan. Walker faced charges of treason that could have called for the death sentence and did call for the penalty of life in prison.

Walker was defended by Jim Brosnahan. You may recall that a plea bargain was eventually worked out that resulted in Walker's serving several months of jail time, serving extended probation, and committing to public service. All of this happened in late 2001 and early 2002.

Of course, there was never a trial. Nor was there ever jury selection or an opening statement, or even close to one.

Yet almost four years later, in the fall of 2005, I sat in a room where Brosnahan was discussing the case and was shocked when someone asked Brosnahan not only whether he had begun preparing opening statement for the case, but also whether he could deliver an executive-summary version of it. Without hesitation, he said that he could. And then he did.

It began by reminding the jurors that in 1776, less than 20 miles from where they were seated today, the Declaration of Independence had been written. The evidence would show remarkable similarities between the authors of the Declaration of Independence and John Walker.

The Declaration of Independence was written by young, idealistic men who were not much older than John Walker. It was written by men who were revolting against the government of their fathers, grandfathers, and forefathers in Europe. It was written by young men who were not afraid to follow their hearts, undergo hardship, and pursue their dreams.

Brosnahan believed that Walker, the 20-year-old from California, was such a man. Admittedly, Walker was misguided. But he had not taken the "easy way." He had left a posh suburban existence with his parents to train with Al Qaeda and undergo the hardships and rigors as an American Taliban in the Afghan war.

There was no evidence that Walker had actually ever killed an American.

Brosnahan captured the ultimate simple truth in his opening statement. This was the prosecution of a young man who had made "a mistake in judgment" by following the wrong ideals, not the prosecution of a "murderer" of Americans.

I find it incredible that months before any trial, Jim Brosnahan had prepared his opening statement. I find it equally incredible that almost four years later, Brosnahan still remembered that statement and could repeat it with ease. This is the kind of preparation in which the masters engage.

Simplicity, authenticity, and preparation—three potent principles of persuasion that I offer for your consideration.

Removal Jurisdiction: Are Attorney Fees Included?

By Tim Cunningham, Davis Wright Tremaine LLP

Tim Cunningham

Federal removal jurisdiction is available when the parties are diverse and the "amount in controversy" exceeds $75,000. 28 U.S.C. § 1441; 28 U.S.C. §1332(a). Determining the amount in controversy is not an issue that most lawyers consider—typically the amount in controversy is readily ascertainable from the face of the complaint. But when the prayer includes attorney fees, the amount on the face of the complaint can bear little relation to the amount actually awarded after trial. This article briefly examines whether or not attorney fees can be included in the amount in controversy, particularly in the District of Oregon, where the law is unsettled but a recent case held that only fees accrued *at the time of removal* are included in the amount in controversy.

The jurisdictional statutes do not define what constitutes the "amount in controversy," but courts agree that the amount includes attorney fees. *E.g. Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1555-56 (9th Cir. 1998) ("[W]here an underlying statute authorizes an award of attorneys' fees, either with mandatory or discretionary language, such fees may be included in the amount in controversy."); *Williamson v. Aetna Life Ins. Co.*, 481 F.3d 369,

376-77 (6th Cir. 2007). Given that many Oregon statutes expressly provide for fees, practitioners frequently encounter the situation where the prayer itself is below the threshold for removal, but fees, if awarded, could push the amount in controversy over (and in some cases well over) the jurisdictional threshold. Are these cases removable? It depends.

While the federal circuits uniformly agree that attorney fees are includable within the amount in controversy, they disagree regarding whether *future fees* can be included in the amount in controversy. For example, if a plaintiff prays for $74,995 in damages, and also includes a prayer for attorney fees, is the action removable?

The Ninth Circuit has not ruled on the issue, and a split has developed in other federal circuits. On the one hand, the Seventh Circuit takes a restrictive approach and holds that fees are only included in the amount in controversy if they have already accrued at the time of removal. *BEM I, LLC v. Anthropologie, Inc.*, 301 F.3d 548, 551 (7th Cir. 2002). In contrast, the Tenth Circuit allows parties to include a "reasonable estimate" of future attorney fees when establishing the amount in controversy. *Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1340 (10th Cir. 1998) ("The Supreme Court has long held that when a statute permits recovery of attorney's fees a reasonable estimate may be used in calculating the necessary jurisdictional amount in a removal proceeding based upon diversity of citizenship.") (citing *Missouri State Life Ins. Co. v. Jones*, 290 U.S. 199, 202 (1933)).[1]

District courts in the Ninth Circuit have employed both approaches, some including fees within the amount only if they are incurred at the date of removal, with others allowing a reasonable estimate of future attorney fees to be included within the amount. *See Dukes v. Twin City Fire Ins. Co.,* CV-09-2197-PHX-NVW, 2010 WL 94109 at *2 (D. Ariz. Jan. 5, 2010) (discussing the split). Until 2012, District of Oregon Courts generally allowed parties to include a "reasonable estimate" of future fees when establishing jurisdiction. *E.g. Beaver v. NPC Int'l, Inc.*, 451 F Supp 2d 1196, 1198-1200 (D. Or. 2006) (basing estimate on prior, similar cases); *Hendrickson v. Xerox Corp.*, 751 F. Supp. 175, 176 (D. Or. 1990) ("[A] reasonable estimate of . . . attorney fees may be included in determining whether the jurisdictional minimum is satisfied.").

However, in *Reames v. AB Car Rental Services, Inc.*, No. 3:11-cv-1448-PK, 2012 WL 786849 (D. Or. March 8, 2012), Judge Marsh adopted findings by Magistrate Judge Papak rejecting the reasonable estimate approach and holding that only fees that are accrued *at the time of removal* are counted towards the amount in controversy. *Id.* at *3 ("[I]ncluding anticipated, but unaccrued attorney fees in calculating the amount in controversy is necessarily speculative."). In that case, the plaintiff had prayed for a total of $47,894 in damages. Defendant removed the case, and in opposition to plaintiff's motion to remand, argued that plaintiff was likely to exceed the jurisdictional threshold once reasonable attorney fees were included. Magistrate Judge Papak reviewed the conflicting authority and ultimately sided with the Seventh Circuit, reasoning that the Ninth Circuit has stated that "courts may consider evidence 'relevant to *the amount in controversy at the time of removal*' in calculating the amount in controversy for jurisdictional purposes." *Id.* at *6 (quoting *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 690 (9th Cir. 2006)) (emphasis in *Reames*). In addition, Magistrate Judge Papak found that any "reasonable estimate" is necessarily speculative. *Id.* ("[I]t is impossible to devise any workable 'actuarial' formula for determining the amount of attorney fees that may be reasonably anticipated at the time of removal."). Finally, Magistrate Judge Papak distinguished prior District of Oregon cases like *Beaver* by noting that they *assumed* that cases would go all the way through to trial—and that defendants had made no showing that their particular case was "among the small minority of cases that cannot be resolved by settlement or by dispositive motion." *Id.* at *7. In any event, Magistrate Judge Papak buttressed his holding by noting that defendant had not submitted any evidence of the amount of fees plaintiff was likely to incur, either before remand or through trial. *Id.* at *6-*7.[2]

While *Reames* is not binding on other judges in the District of Oregon, practitioners should anticipate that parties attempting to remand after removal will rely heavily on it. To distinguish *Reames*, parties can, first and foremost, submit evidence demonstrating what the fees are at the present time, what they are likely to be through trial, *and* that trial is likely. Courts may be more likely to find that future attorneys' fees satisfy the

jurisdictional threshold where the current prayer and fees are extremely close to the limit—as opposed to the over $27,000 in fees necessary to reach the threshold in *Reames*. *See, e.g. Raymond v. Lane Const. Corp.*, 527 F. Supp. 2d 156, 164 (D. Maine 2007) (rejecting the Seventh Circuit's concern about speculative fees and allowing inclusion of reasonable attorney fees where the current prayer and fees totaled precisely $75,000).

In addition, even where the initial complaint does not meet the jurisdictional threshold, parties can remove a case for up to one year, provided that they do so within 30 days of the time that they first receive notice that the threshold has been met. 28 U.S.C. § 1446 (b)-(c). If the prayer is close when the claim is filed and the parties engage in substantial discovery or alternative dispute resolution, those activities may push the claim over the jurisdictional limit. In that case, any discovery evidencing that the amount of attorneys' fees has caused the prayer to go over the limit will trigger the defendant's right to remove. *Id.* at (3)(A).

Finally, defendants who have removed a claim can request jurisdictional discovery from the district court if the plaintiff moves to remand. In *Abrego*, the Ninth Circuit acknowledged that "it may be appropriate to allow discovery relevant to jurisdictional amount prior to remanding," but stressed that "[o]ur decisions do not, however, indicate that such discovery is *required*." 443 F.3d at 691 (citation and internal quotation omitted) (emphasis in original). Thus, whether or not to grant jurisdictional discovery is within the discretion of the trial court, and that decision will not be disturbed "except upon the clearest showing that the dismissal resulted in actual and substantial prejudice to the litigant." *Id.* (citation omitted). In this context, prejudice arises when the party can demonstrate that further discovery would lead to facts sufficient to confer jurisdiction. *See Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977) ("[S]uch a refusal is not an abuse of discretion when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction." (citation omitted)); *see also Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006) (affirming denial of discovery request where additional facts would be immaterial because jurisdiction did not exist as a matter of law); *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 240 (9th Cir. 1995) ("Additional discovery would not affect the jurisdictional analysis"). Given this high bar, parties disputing removal jurisdiction should not rely on jurisdictional discovery from the district court without being able to demonstrate that discovery is likely to lead to facts triggering jurisdiction.

In sum, whether future attorney fees may be considered within the amount in controversy for removal jurisdiction based on diversity is not settled in the Ninth Circuit or in the District of Oregon, but recent law suggests that only fees accrued *at the time of removal* may be considered. Although that case is not binding on other courts in the District, its reasoning is persuasive and practitioners should be prepared to demonstrate that in their particular case, the anticipated fees that will trigger the jurisdictional threshold are either accrued at the time of removal, or are not speculative because the amount of fees is minimal and the case is postured to proceed through trial.

Endnotes

1 Though the 10th Circuit correctly states that the Supreme Court allowed for attorneys' fees to be included within the "amount in controversy" in *Missouri State*, *Missouri State* did not specify whether the included fees were *already incurred* or were *anticipated*. In that case, the defendant sought to remove where the prayer, $3,000, was at the jurisdictional limit. The defendant argued that reasonable attorneys' fees of $250 should be included, but the case was remanded. The Supreme Court held that the denial of removal was improper, but did not specify whether, at the time of removal, the $250 had already been incurred. Subsequent courts determining the scope of *Missouri State* have described its holding as "cryptic." *Raymond v. Lane Const. Corp.*, 527 F. Supp. 2d 156, 163 (D. Maine 2007) ("It may be that *Missouri State* stands for the proposition that a court may make a reasonable estimate of future fees, but, if so, this holding is not explicit.").

2 In doing so, Magistrate Judge Papak firmly rejected defendant's argument that the plaintiff's refusal to stipulate to a total award beneath the jurisdictional amount was sufficient evidence. Though the argument has been accepted in the past, *see Hendrickson v. Xerox Corp.*, 751 F. Supp. 175, 176 (D. Or. 1990), more recently the "argument has been rejected repeatedly." *Reames*, 2012 WL at *3 (Marsh, J.).

"Co-First Chair?" An Open Letter to the Senior Trial Bar and Our Heirs[1]

By William A. Barton, The Barton Law Firm, P.C.

William A. Barton

To the senior trial bar:

The next generation of jury trial lawyers is failing to emerge because of the vanishing civil jury trial. In light of this, it's incumbent upon the senior members of the trial bar to help create and author the next generation. I urge all senior trial lawyers to upgrade the traditional second chair. Maybe we should think of the new role as "co-first chair." In the same voice, I invite young lawyers to stimulate this discussion by sharing this article with their bosses and mentors and re-imagining what a second chair's responsibilities can be. I close this article by encouraging beginning personal injury lawyers to reframe their case referral efforts to explicitly negotiate for the opportunity to participate in the preparation and trial of their case.

On the commercial side, the associate's role varies with the firm's culture, the type of case, and, of course, the level of funding. In well-capitalized cases there are multiple associates working with the lead lawyer who keeps the case moving forward and coordinates the tasks. Traditional second chair responsibilities include discovery, writing motions and briefs, identifying and preparing witnesses, taking and defending selected depositions, finding experts, and assisting at trial with organizational tasks while handling a few of the less important witnesses.

A leading Portland commercial lawyer says "I always go to trial with a co-first chair or meaningful second chair attorney. I delegate everything that can be cured or corrected if it goes poorly." Another said "As the senior lawyer, I always involve associates and negotiate with the client either not to charge or bill at a reduced rate for the younger lawyer's participation."

So, why shouldn't we continue with business as usual? Many senior lawyers think juries only want one lawyer to look to, one person they can relate to and identify with. Yes, you're lead counsel; however, your younger co-counsel will always make positive and intangible contributions based on gender, race, age, personality, and style. Different lawyers bring different assets to the task of persuasion and, with some forethought, there are ways to feature each lawyer's strengths to the client's advantage. For instance, you might be logical and matter of fact in your presentation, while your co-counsel might bring a fresh set of life experiences, enthusiasm, and values to the case.

Age disparity and differences in gender between the lead counsel and second chair require being sensitive to behavior and appearance. At no time should there be an air of condescension. Being respectful, no matter the age or gender of co-counsel, while maintaining your best professionalism, is always a net gain.

It goes without saying the senior bar isn't getting any younger. Trials can be challenging, long, difficult, and lonely. Many of us could get by on only a few hours of sleep years ago, but maybe that doesn't work so well anymore. It's always a welcome breather when my co-counsel takes the next witness. I also value the shared strategizing during dinner and evening jogs. In my experience, the more I invest in my co-counsel, the more they will have to offer.[2]

So, what am I suggesting? There's no one recipe or answer. If you think about it, stubbornly continuing to do things the way you've always done them could be an indication that you're not doing a very good job selecting and training your associates and future partners. At a deep and personal level, most of us are frightened of aging because we know we will become irrelevant with a loss of status and power; yet a key part of our jobs at this stage in our careers is to "create our own obsolescence." This means preparing those following us to take our place. Somewhere from within your lifetime of experience is a teacher-in-waiting.

Of course, the senior lawyer shouldn't assign responsibilities beyond an associate's abilities. However, when provided sufficient time and guidance, eager but less seasoned lawyers will usually exceed expectations, and if they fall short, it's usually not by much. Jurors recognize the young and that's not a bad thing. A new voice can be a refreshing change.

Annual or semi-annual reviews to revisit newer lawyers' progress along with the opportunity for them to state goals, such as "I want to take and/or defend X number of depositions during the next year," sets targets and clarifies expectations. The downside is talented associates will leave the firm because there's no opportunity for growth. This is a shared investment that involves a mutual commitment by both the firm and associates.

Yes, it takes more time and more work to give your second-chair a hand up, but opportunity is a gift we bequeath to our successors. By developing your less experienced co-counsel, you help yourself, your associates, our profession and the right to a jury trial. Everyone rails about the vanishing civil jury trial; however, a committed investment of your teaching gifts is a much needed available antidote.

The more you ask of your younger co-counsel, the more you'll get. Why? It's just human nature. None of us wants to embarrass ourselves and, the more vulnerable we feel, the harder we will work to avoid it. This means the more you reasonably delegate, the more energy and creativity will be brought to the table. These restless associates are exactly the future partners your firm wants to keep.

There's always one last shot in the game; you're lead counsel, take it . . . that's your job. However, I suggest there's a lot of game leading up to the end that can be shared with co-counsel for the benefit of the client, you, your firm and our profession. This is where your leadership, experience, and teaching are front and center.

Now a few words to aspiring plaintiffs' personal injury lawyers:

If you get a serious case that's beyond your current competence and/or financial abilities, take it to a more experienced trial lawyer. Sure, it's possible to borrow money from the many firms who specialize in lending lawyers money. They conspicuously advertise that you won't have to share your fee, but money doesn't buy experience or competence. Your ultimate duty is to maximize your client's recovery, not your fee. When you don't have the competence or the capital, referring the case to a more experienced lawyer will generate a better result and is therefore the ethical thing to do for your client.

However, rather than calling it "referring," I suggest you think of it as "associating." Explicitly negotiate for the senior lawyer to invest, not only in your clients and the case, but also in you and thus your future. That way, the next time a big case walks through your door, you'll be better able to handle it yourself. Some associating lawyers simply want the referral fee, others want to continue as a liaison between the lawyers and the client, but many more want to immerse themselves in the trial with all its preparation. It's the senior lawyer's job to guide and teach, and that means helping you, the associating lawyer, to actually participate in the trial. This won't happen if you don't ask and negotiate for it, and then take full advantage of the opportunity. Be specific; put your expectations in writing. Keep the line of communication open. Once again, show this article to the senior lawyer you're considering associating with. Have a plain discussion. I think you'll be pleased at how welcome your energy and involvement will be.

Endnotes

1 I want to thank Steve English, Dave Markowitz, Peter Richter and Paul Fortino for their thoughtful contributions to this article.

2 I'm a life coach for the Portland State University Men's Basketball team. NCAA Division One programs have a head coach and three assistants. Confident head coaches hire strong assistants and expect them to contribute. You see this occur during time-outs when the players return to the bench and all four of the coaches step away and briefly caucus. They return to the players and usually, but not always, the head coach speaks. The assistants then offer advice to individual players before heading back out on the court.

Recent Significant Oregon Cases

By Judge Stephen K. Bushong,
Multnomah County Circuit Court

Honorable Steven K. Bushong

Claims and Defenses

Cocchiara v. Lithia Motors, Inc., 353 Or 282 (2013)

Plaintiff worked as a salesperson for defendant for nearly eight years before he suffered a heart attack that required him to seek a less stressful job. He turned down a position with another employer in reliance on his manager's promise that he would be placed in a "corporate" position that would meet his health needs. Ultimately, plaintiff did not get the "corporate" position. He sued for promissory estoppel and fraudulent misrepresentation. The trial court granted defendant's motion for summary judgment on those claims. The Court of Appeals affirmed, holding that "because the corporate job was terminable at will, plaintiff could not reasonably rely on the promise of employment or recover future lost wages." 353 Or at 284. The Supreme Court reversed, holding that the "at-will nature of the employment does not foreclose plaintiff from attempting to prove the likely duration of employment had he been hired as promised and allowed to start work, although 'at-will employment may be a factor that bears on whether the proof is sufficient in a particular case.'" *Id.* at 295 (quoting *Tadsen v. Praegitzer Industries, Inc.,* 324 Or 465, 471 (1996)). The court explained that a contrary rule "would allow an employer to abuse its ability to induce the reliance of prospective employees." *Id.* at 296.

Doe v. Lake Oswego School District, 353 Or 321 (2013)

Plaintiffs alleged that, from 1968 to 1984, they were sexually abused by a fifth-grade teacher, causing physical, mental and emotional injury. Plaintiffs alleged that they did not discover their injuries until 2006 because they did not comprehend the abusive nature of the teacher's offensive touching. The trial court granted the school district's motion to dismiss, concluding that plaintiffs failed to provide timely notice of their claims or to commence their action within the time required by ORS 30.275. The court concluded that plaintiffs "must be deemed to have discovered the facts necessary to their claims at the time of the touching." 353 Or at 326. The Court of Appeals affirmed. The Supreme Court reversed, explaining that "knowledge that an actor committed an act that resulted in harm is not always sufficient to establish that a plaintiff also knew that the act was tortious." *Id.* at 332. Whether a plaintiff "knew or should have known the elements of a legally cognizable claim, including the tortious nature of a defendant's act is generally a question of fact determined by an objective standard." *Id.* The court noted that "the line between offensive and socially acceptable touching also may be difficult to ascertain." *Id.* at 333. The court declined to hold as a matter of law that, "in 1984, all fifth-graders must be deemed to have known that a trusted teacher who had touched them in socially acceptable ways and whom they had been conditioned to respect and obey had crossed a line and touched them in a new way that society abhorred." *Id.* at 335.

Doughton v. Morrow, 255 Or App 422 (2013)

Plaintiffs drilled a well based on a recorded easement showing the location of the relevant cul-de-sac. It turned out that the original developer had constructed the cul-de-sac in a location that differed from the recorded easement, so plaintiffs' well was actually located on a neighbor's property. When plaintiffs discovered the error, they brought negligence and breach of contract claims against the developer. The trial court granted defendant's motion for summary judgment, concluding that the claims were barred by the statute of limitations. The Court of Appeals reversed in part. The court held that summary judgment was improperly granted on plaintiffs' negligence claim regarding the cul-de-sac's location because the facts did not compel the conclusion that plaintiffs knew or should have known two years before filing suit that "there was a substantial possibility that the well was not on their property." 255 Or App at 429-30. The court acknowledged that, as a matter of law, plaintiffs "had a duty to make follow up inquiries" as soon as they heard their neighbors assert that the well was on their property. *Id*. at 430. But "a duty to inquire does not trigger a statute of limitations to which the discovery rule applies." *Id*. Instead, the statute would commence "at some later point when, after inquiry, the facts reasonably should disclose

the existence of an actionable injury." *Id.* (quoting *Greene v. Legacy Emanuel Hospital,* 335 Or 115, 123 (2002)).

Whalen v. American Medical Response Northwest, 256 Or App 278 (2013)

Herring v. American Medical Response Northwest, 255 Or App 315 (2013)

The plaintiffs in two cases alleged that a paramedic sexually abused them in an ambulance. The plaintiff in *Whalen* had no recollection of the ambulance trip, but later began having disturbing nightmares about the paramedic's conduct. She sued for battery after learning that the same paramedic had been charged and ultimately pleaded guilty to five counts of attempting to commit sexual abuse against other women. The trial court granted the ambulance company's motion for summary judgment on the grounds that (1) the claim was barred by the two-year statute of limitations in ORS 12.110(1); and (2) plaintiff failed to raise a genuine issue of material fact as to the occurrence of the battery because she could not remember what happened during the ambulance transport. The Court of Appeals reversed, holding that (1) the "discovery rule" applies "in all circumstances involving tort claims based on bodily harm" described in ORS 12.110(1) (256 Or App at 287); (2) the discovery rule's application "does not extend the time within which the plaintiff may bring a claim" when the injury is "inherently discoverable" (*Id.*); (3) under *Doe v. Lake Oswego School District*, 353 Or 321 (2013), at least some batteries are not "inherently discoverable" at the moment of occurrence; (4) there were genuine issues of material fact as to whether plaintiff suffered from traumatic amnesia and whether she "reasonably should have discovered the alleged battery more than two years before she initiated this litigation" (*Id*. at 288); and (5) the ORCP 47 E affidavit submitted regarding plaintiff's memory loss, "in combination with evidence about [the paramedic's] sexually offensive behavior following the ambulance ride, and evidence that plaintiff does not recall the transport but subsequently has experienced nightmares about [the paramedic] and obsessive feelings of uncleanliness" created genuine issues of material fact regarding the occurrence of a battery. *Id*. at 292.

The plaintiff in *Herring* sued the ambulance

company for negligence and abuse of a "vulnerable person" as defined in ORS 124.100 after she was sexually abused by the same paramedic. A jury awarded her $500,000 in noneconomic damages; the court tripled that amount pursuant to the vulnerable person statute. Defendant contended on appeal that (1) plaintiff was not a "vulnerable person" under the statute because she was not incapacitated for any extended period of time; and (2) tripling the noneconomic damage award exceeded the $500,000 cap on noneconomic damages in ORS 31.710(1) or was excessively punitive. The Court of Appeals affirmed, concluding from the text, context and legislative history of the statute that "in protecting 'incapacitated' persons, ORS 124.100 protects, among others, persons who are only temporarily and fleetingly unable to protect their own health and safety, from abuse inflicted, at least in part, during that temporary and fleeting period." *Id.* at 321-22. The court further concluded that the trial court did not err in trebling her noneconomic damages.

***Wood Park Terrace Apartments v. Tri-Vest, LLC*, 254 Or App 690 (2013)**

***PHH Beaverton, LLC v. Super One, Inc.*, 254 Or App 486 (2013)**

In *Wood Park*, the Court of Appeals held that plaintiff's claims for negligent construction of an apartment complex were barred by the statute of limitations because, under the "accrual clause" of the parties' contract, the claims were deemed to accrue on the date of "substantial completion" of the project. The court rejected plaintiff's contention that the "accrual clause" "must be read to apply only to contract claims." 254 Or App at 693. In *PHH Beaverton*, the Court of Appeals held that "the trial court erred when it granted summary judgment to defendants on the ground that plaintiff's negligent construction claim was time-barred." 254 Or App at 490. The court explained that the evidence raised a genuine issue of material fact as to whether the owner's "acceptance of the completed construction" of the improvement to real property occurred within 10 years of the filing of plaintiff's complaint, so the claim was not necessarily barred by the 10-year ultimate repose period in ORS 12.135. *Id.* at 500.

Procedure

***Lindell v. Kalugin*, 353 Or 338 (2013)**

Plaintiff in a personal injury action objected to a defense medical examination under ORCP 44 A, stating that he would only submit to the examination if allowed to bring a friend, family member or counsel with him. The trial court declined to impose those conditions. Plaintiff petitioned for a writ of mandamus to compel the trial court to permit the examination only on the conditions he requested, contending that the trial court erroneously interpreted and applied ORCP 44 A. The Supreme Court, after reviewing the text, context, and legislative history of ORCP 44 A, declined to issue a peremptory writ and dismissed the alternative writ of mandamus. The court rejected plaintiff's contention that ORCP 44 A "imposes on the party seeking a physical or mental examination the burden of proving that conditions that are requested by the examinee are unreasonable." 353 Or at 357. Instead, the court concluded, the burden "rests with the examinee to establish that any requested limitations or conditions on discovery are supported by good cause." *Id.* As a result, the trial court "did not commit a fundamental legal error in requiring [plaintiff] to establish good cause for his request that he be permitted to have a third party accompany him during the compelled medical examination." *Id.*

***Silberman-Doney v. Gargan*, 256 Or App 263 (2013)**

On the second day of trial in a residential landlord and tenant case, the trial court informed the parties that it believed that defendants would be entitled to recover their attorney fees under ORS 90.370(4) if they proved any monetary damages on their counterclaims because they had paid into court all rent owed before the action was commenced. That conclusion, among other things, led to a settlement of the dispute. Before judgment was entered on the settlement, the court informed the parties that, on further reflection, it made a mistake on defendants' entitlement to attorney fees. The court ultimately entered judgment based on the settlement agreement and granted plaintiff's motion for a new trial under ORCP 64 B. The Court of Appeals reversed, concluding that, "[a]lthough the trial court regretted its initial ruling during the trial

and informed the parties that it believed its ruling was incorrect, that does not render the settlement agreement that the parties voluntarily agreed to enter into and the judgment based on the terms of that settlement 'irregular.'" 256 Or App at 273. As a result, the trial court "lacked a basis to grant a new trial for an 'irregularity' under ORCP 64 B(1)." *Id*.

***Dial Temporary Help Service v. DLF Int'l Seeds*, 255 Or App 609 (2013)**

***Greer v. ACE Hardware Corp.*, 256 Or App 132 (2013)**

In *Dial*, the Court of Appeals held that the parties' dispute over the meaning of an ambiguous contract was properly resolved on summary judgment. The court explained that "it is the existence of competing extrinsic evidence—and the triable factual issue that the evidence creates—that, as a general rule, makes the resolution of the meaning of an ambiguous contract on summary judgment inappropriate, not the existence of an ambiguity itself." 255 Or App at 612. The court concluded that the meaning of the ambiguous contract at issue in this case was properly resolved on summary judgment because "the party that bore the burden of presenting evidence to establish the existence of a genuine issue of material fact…failed to do so." *Id.* In *Greer*, the Court of Appeals held that the trial court properly granted three defendants' motions for summary judgment on negligence and strict-products-liability claims arising out of decedent's alleged exposure to asbestos on home-construction sites during the 1960s and 1970s. The court concluded that "plaintiff has not established that the record included evidence that could support an inference that decedent used any specific asbestos-containing product" manufactured or supplied by those defendants. 256 Or App at 143.

***Congdon v. Berg*, 256 Or App 73 (2013)**

In *Congdon*, the Court of Appeals held that "the trial court erred in rejecting [defendant's] request to poll the jurors individually to determine whether the same nine jurors agreed on economic and noneconomic damages, as required in this case for a valid verdict." 256 Or App at 74. The trial court had polled the jury, and asked them by a show of hands whether they agreed with the economic and noneconomic damages stated on the verdict form. The record reflected that nine jurors raised their hands each time, but the record was not clear "whether the same nine jurors agreed on both economic and noneconomic damages in the two showings of hands." *Id*. at 82. As a result, the case was remanded for a new trial on both types of damages.

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Miscellaneous

Howell v. Boyle, 353 Or 359 (2013)

In *Howell*, the Supreme Court held that, assuming that "plaintiff's negligence action is constitutionally protected by Article I, section 10 [of the Oregon Constitution], the $200,000 limitation on her recovery [in the 2007 version of the Oregon Tort Claims Act, ORS 31.270(1)(b)] is constitutionally permissible." 353 Or at 361. The court explained that its prior case law "consistently holds that the legislature is authorized to enact a limitation on tort claim recovery so long as the remaining remedy is 'substantial.'" *Id*. at 373. Those cases also "make clear that the mere fact that the statutory limitation resulted in a reduction in the amount that plaintiff otherwise would have been awarded, by itself, does not establish a violation of Article I, section 10." *Id*. at 375. Here, plaintiff would have recovered a total of $507,500 without the statutory limitation. The $200,000 remedy was "substantial" because it "represents a far more substantial remedy than the paltry fraction that remained after the imposition of the limitation in *Clarke* [*v OHSU*, 343 Or 581 (2007)]." *Id*. at 376.

Morgan v. Sisters School District #6, 353 Or 189 (2013)

In *Morgan*, the Supreme Court held that plaintiff's status as a taxpayer and voter within the district was not enough to give him standing under the Declaratory Judgments Act, ORS 28.020, to challenge a school district's "authority to enter into a particular form of financing arrangement without a vote of the people." 353 Or at 190. The court explained that the requested declaratory relief "will not remedy any injury to plaintiff's voting rights. And adding to the inquiry his allegations of purely contingent, hypothetical fiscal harm does not alter that fact." *Id.* at 201.