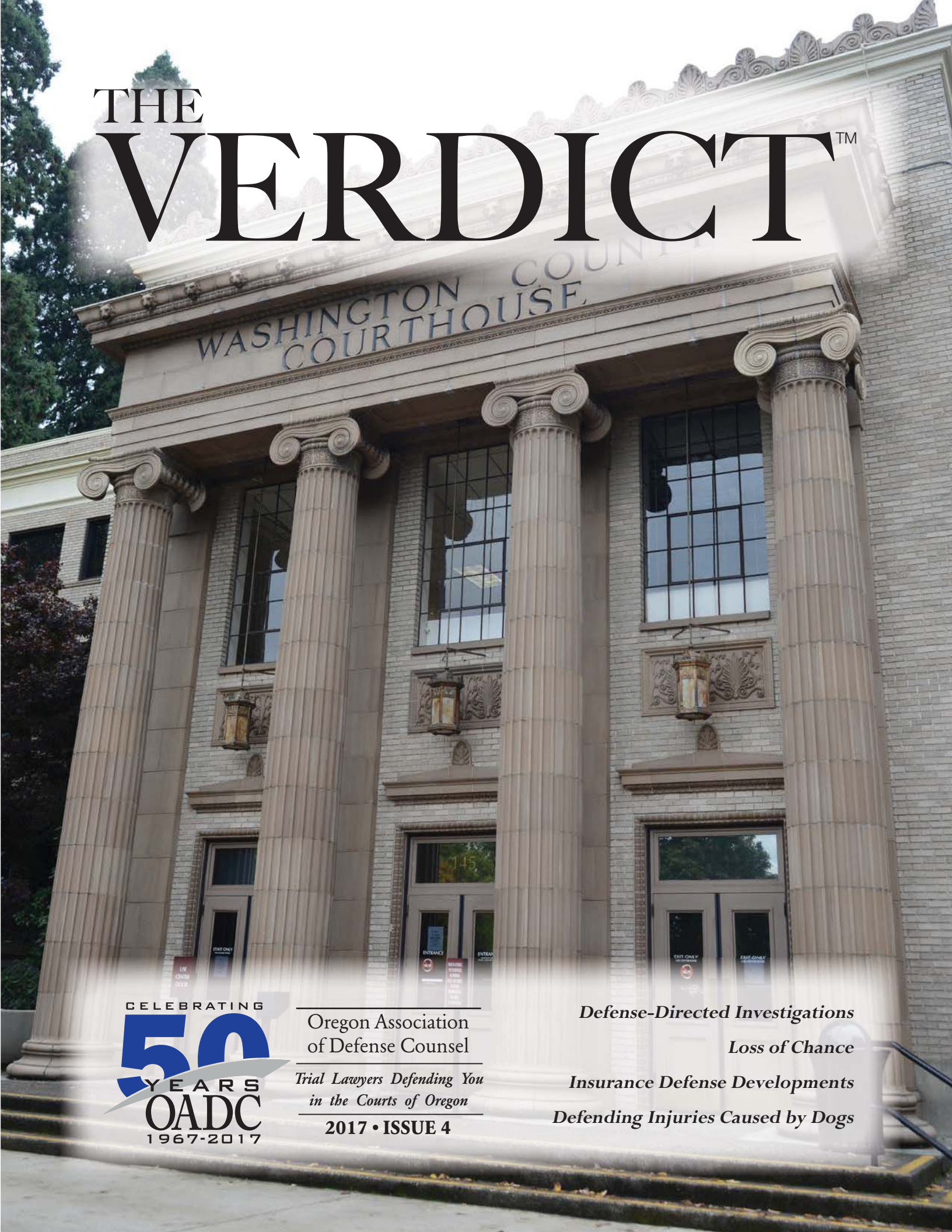

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Sara Kobak, Schwabe Williamson & Wyatt PC
Case Notes Editor

Whistleblower Act

How to heed your pragmatic HR manager's advice (and get sued anyway)

In *Folz v. State of Oregon,* 287 Or App 667 (Sept. 7, 2017), the Oregon Court of Appeals held that a human resources (HR) manager who raised valid concerns about a proposed discipline of another employee had not "disclosed" or "reported" actions that she believed were violations of law as required to qualify as a whistleblower under ORS 659A.199 and ORS 659A.203. Even though this particular HR manager did not enjoy whistleblower status, the case reminds us that HR managers have unique access to protected whistleblower status because they are often reporting or disclosing illegal behavior in the course of their employment.

Plaintiff, an HR manager for the Oregon Department of Transportation (ODOT), warned management that having an employee sign a "last chance" before termination agreement was too severe a punishment for an uninvestigated incident of "intoxication" at work. Plaintiff pointed out that, without an investigation into whether the employee required medication as a result of a disability—a potential source of the employee's alleged intoxication—ODOT would be "at risk" because a last-chance agreement was "premature" and "extreme." Plaintiff never informed ODOT that a last-chance agreement would be illegal or in violation of any laws. ODOT agreed with plaintiff and altered the discipline of the employee accordingly.

Two months later, plaintiff's supervisor was terminated, and plaintiff was reassigned to a different position within ODOT with the same salary and benefits. Plaintiff considered her new supervisor as a colleague, not a supervisor, and she objected to the reassignment. After an unsuccessful appeal to the Employee Relations Board, plaintiff filed suit asserting whistleblower claims.

On appeal, the Court focused on the requirement under ORS 659A.199 and ORS 659A.203 that a whistleblower must "disclose" or "report" information that she believed to be "evidence" of a violation of law. When plaintiff voiced concerns about the response to the allegations of intoxication against the employee, she did not disclose or report an act that she believed was a violation

CORRECTION

The case note on *Baker v. Maricle Industries* on page 21 of this issue was previously published in The Verdict™ 2017 Issue 3 and attributed to the incorrect author. We regret the error.

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of law. Rather, she was performing her duty as an HR manager to alert her employer to potential issues with the proposed course of action. Had plaintiff reported her concerns differently, or more forcefully asserted a belief that the proposed discipline was illegal, the result would likely have been very different. ✪

— Submitted by Jonathan Rue, Hart Wagner LLP

Statute Of Limitations

Forgiveness or reduction of medical/dental bills tolls the statute of limitations despite the lack of a formal claim

In *Humphrey v. OHSU,* 286 Or App 344 (June 21, 2017), plaintiff experienced severe complications following an oral surgery performed by medical professionals at OHSU, necessitating additional surgeries and medical procedures. Plaintiff did not assert a claim of legal liability or threaten to sue, but alleged that she complained to OHSU about her belief that the surgery had "gone bad" and that she was not going to pay for her subsequent care. Allegedly, one OHSU provider told her, "Don't worry about it; we'll take care of it." Thereafter, defendants provided plaintiff additional medical care at little or no cost. Well over two years after the allegedly negligent care occurred, plaintiff brought suit. Defendants prevailed on a motion to dismiss in the trial court.

The Oregon Court of Appeals reversed, holding that the "advance payment" statutes, specifically ORS 12.155 and ORS 31.550, tolled the statute of limitations, because defendants had not provided plaintiff written notice of the expiration of the statute of limitation at the time they waived and provided reduced cost medical care. The Court held that plaintiff's allegations that she complained about the bad results and insisted she would not pay for either initial procedure or for subsequent remedial care were sufficient to place her claim within the advance pay statute for purposes of ORS 12.155's tolling provision. The Court was not persuaded by the fact that plaintiff never asserted or articulated any actual claim for legal liability or obligation on which an "advance payment" could be made.

This case was decided under the Oregon Tort Claims Act Statute of Limitations in ORS 30. 275. The case did not present the question of whether the statute of repose in ORS 12.110(4) would also be tolled by a write-down or write-off; the repose provision in ORS 12.100(4) expressly trumps the statutory tolling for minors and disabling mental conditions, but does not except tolling based on the advance pay statute, ORS 12.155. This decision may also be asserted to support tolling of the statute of limitations in non-medical malpractice settings where professionals reduce or write off bills for clients who express unhappiness with a result, without providing written notice of the expiration of the statute of limitations. ✪

— Submitted by Janet Schroer, Hart Wagner LLP

Oregon Court of Appeals applies current statute of limitations to claim that was time barred prior to its passage

In *Doe v. Silverman,* 287 Or App 247 (August 16, 2017), the Oregon Court of Appeals determined that the current version of ORS 12.117, which sets the statute of limitations for child-abuse claims, applies to all claims arising before the effective date that have not proceeded to final judgment.

In *Doe,* the plaintiff appealed a limited judgment entered in the defendant's favor on his claims for negligence, sexual battery, and intentional infliction of emotional distress. The plaintiff sued the defendant when he was 30 years old for sex abuse that he sustained when he was a minor. At the time the abuse occurred, ORS 12.117 required that claims for child abuse must "be commenced not more than six years after that person attains 18 years of age." Applying this statute, the trial court ruled that the plaintiff's claims were time barred, because he filed his lawsuit roughly six years beyond the limitations period. The plaintiff appealed, arguing that the current version of ORS 12.117, which was enacted in 2009, should apply. The current statute provides that a child-abuse action must be commenced "before the [plaintiff] turns 40 years of age."

After analyzing the legislative history, the Oregon Court of Appeals accepted the plaintiff's arguments, holding that the current version of ORS 12.117 applied and, as a result, did not bar the plaintiff's claims. To make its determination, the Court looked to the

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2009 enacting legislation, which states that the current statute applies "to all causes of action, whether arising before, on or after the effective date" of the act. The Court rejected the defendant's argument that statutory "revival" wording was required, because the plaintiff's claims had extinguished in 2007 or 2008, prior to the enactment of the current version of ORS 12.117. The Court reasoned that plaintiff's claims had not "extinguished" but, rather, were subject to the procedural time bar of the prior iteration of the statute. Additionally, the Court found that the legislature's expansive intent as expressed in the enacting legislation militated toward the application of the current version of the statute, to preserve claims that would have been procedurally time barred under the prior version of the statute. ✪

— Submitted by Michael Jacobs, Hart Wagner LLP

Insurance

The UM "safe harbor" provision does not require an insurer to stipulation that it owes some amount of damages

In *Spearman v. Progressive Classic Insurance Company,* 361 Or 584 (June 22, 2017), the Oregon Supreme Court upheld an arbitrator's denial of attorney fees to an insured plaintiff in an uninsured motorist (UM) arbitration pursuant to the "safe harbor" under ORS 742.061(1). Under the safe-harbor provision, an insured is not entitled to recover attorney fees if, within six months of the filing of a proof of loss, the insured states in writing that it has accepted coverage, that it agrees to binding arbitration, and that the only remaining issues are the liability of the uninsured motorist and the "damages due the insured."

Plaintiff was injured in an automobile accident with an uninsured motorist. Within six months after plaintiff filed a proof of loss for UM benefits, the insurer sent a safe-harbor letter that included language reserving the right to challenge the nature and extent of damages. Plaintiff challenged the adequacy of the safe-harbor letter, arguing that an insurer does not qualify for the safe harbor unless it agrees that it owes some amount of damages above zero.

In rejecting plaintiff's argument, the Supreme Court first considered the plain text of the statute and found nothing suggesting that the "damages due the insured" language had to be some amount above zero. The Court next found that the legislative purpose of the statute was consistent with this plain meaning because

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in a UM arbitration, unlike a claim for personal injury protection (PIP) benefits, the liability of the uninsured motorist remains a litigated issue, so damages of zero remain a possibility during the litigation. The Court further explained that the purpose of the UM statute was to put the insured motorist in the same position that she or he would have been in had the tortfeasor been insured. Contrary to this purpose, requiring the insurer to stipulate to an award of some damages might put the insured in a better position in those situations where no damages should be awarded. The Court additionally highlighted the legislative history showing that the purpose of the current UM law was to avoid creating an incentive for insureds to rush to the courthouse in an attempt to generate recoverable attorney fees. ✪

— Submitted by Patrick Wylie, Davis Rothwell Earle & Xóchihua PC

Negligence

The family-purpose doctrine does not apply to claims brought by a vehicle owner against the owner's family-member drivers

In *Adams v. Presnell,* 286 Or App 390 (June 28, 2017), the Court of Appeals held that, as a matter of law, the negligence of a family-member driver is not imputed to the vehicle owner under the family-purpose doctrine when the vehicle owner brings an action for negligence against the family-member driver.

Plaintiff was injured in a single-car accident while defendant, plaintiff's minor son, was driving her vehicle. At the time of the accident, defendant only had a learner's permit, and plaintiff was the sole passenger in the car. After plaintiff filed suit against her defendant minor son for her injuries, defendant raised the family-purpose doctrine as an affirmative defense and argued that its application barred plaintiff's recovery. After a hearing on the issue, the trial court granted summary judgment for defendant, agreeing with defendant's contention that defendant's negligence is attributable to plaintiff under the family-purpose doctrine, thereby negating plaintiff's ability to make a claim against her own family member because she was legally responsible for defendant's negligence.

Plaintiff appealed, and the Court of Appeals reversed. In holding that the trial court erred in granting summary judgment to defendant, the Court began its analysis by looking at the traditional application of the family-purpose doctrine. Under that doctrine, if a vehicle is maintained for the use of a family, any family member using the vehicle with the consent of the owner is treated as an agent of the owner, and the owner is the liable responsible for the family member's negligence. The policy behind the family-purpose doctrine is to hold the owner of a vehicle responsible for any family members driving the vehicle given the potential dangers from negligence operation of vehicles. After reviewing the family-purpose doctrine, the Court then analyzed two agency cases and extracted the rule that an agent's negligence normally is not imputed to the principal where the principal brings a negligence action against an agent. The Court opined that application of this rule was in agreement with the "practical necessity" underlying the family-purpose doctrine—namely, that it permits injured third parties to collect from the owner of a family vehicle negligently driven by a family member. According to the Court, those rules do not support the imputation of liability where the owner is the injured party. Although plaintiff would have been responsible for defendant's torts if defendant had injured a third party, the Court held that the family-purpose doctrine did not preclude plaintiff from recovering for her injuries caused by her son's negligence. The Court reasoned that the policy of protecting third parties is irrelevant and does not justify vicarious liability where the principal is the injured party. ✪

— Submitted by Roland Lau, Davis Rothwell Earle & Xóchihua PC

Attorney Fees

Court of appeals rejects need for service of ORS 20.080 demands on a defendant's "potential" liability insurers

In *Marandas Family Trust v. Pauley,* 286 Or App 381 (June 28, 2017), the Oregon Court of Appeals rejected the trial court's broad construction of ORS 20.080 that would require plaintiff to serve the written demand for payment on all of defendant's liability insurers potentially affording coverage for the claim as a prerequisite to attorney fee entitlement.

Plaintiff was the owner of a cabin near Mt. Hood and hired defendants to repair the roof in 2006. In 2011, plaintiff discovered water damage to the cabin caused by the faulty repair work. Plaintiff sent a written demand for payment pursuant to ORS 20.080

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to the defendants, two of defendant's liability insurers, and to defendant's insurance broker. ORS 20.080 requires the plaintiff to serve the demand on both the defendant and the defendant's insurer, if known to the plaintiff, not less than 30 days before commencing the action. The matter proceeded to court-annexed arbitration, and plaintiff prevailed, but the arbitrator rejected plaintiff's attempt to collect attorney fees under ORS 20.080. Plaintiff had served the written demand on the insurer providing liability coverage at the time of defendants' negligent repair work, and on the current liability insurer providing coverage at the time of plaintiff's discovery of the damage, but had neglected to serve the demand on a third liability insurer providing coverage during the interim period beginning two years after the work was performed. The arbitrator reasoned that, because the policy issued by the third insurer was a "potential" source of coverage for the claim, and plaintiff was aware of the third insurer at the time of the demand, plaintiff had failed to comply with the statute.

Plaintiff filed exceptions to the arbitrator's ruling with the trial court, and the trial court agreed with the arbitrator. The trial court pointed out that construction-defect litigation routinely presents coverage challenges and that "multiple [insurance] policies are the rule, rather than the exception." The trial court reasoned that ORS 20.080 requires plaintiffs "to provide notice to all the potential insurers that they are aware of, and not just those [that] the plaintiff thinks are most likely to be responsible for coverage."

On appeal, the Court of Appeals reversed. In doing so, the Court rejected the reasoning of both the arbitrator and the trial court, and construed the statute narrowly: ORS 20.080 only requires notice of the demand to insurers that the plaintiff is aware have a coverage obligation, not to insurers that might have such an obligation. Because plaintiff's counsel testified that he believed one or more of the other two policies covered the claim, but did not believe the third policy applied, the Court of Appeals concluded that he was not required to serve it with the written demand for payment in order to comply with ORS 20.080.

The *Marandas* decision eases the burden on plaintiffs in ORS 20.080 cases, at least those in which multiple liability policies are potentially implicated. The decision does beg the question whether a plaintiff can avoid the insurer notice obligation altogether in situations where he or she is aware of multiple liability insurers, but unaware of which policies actually cover the claim. So long as the plaintiff does not actually know that a policy provides coverage, *Marandas* appears to conclude that plaintiff need not serve that insurer with the demand. This could effectively eliminate the insurer notice obligation in many multi-policy cases. ✪

— Submitted by Brandon Stuber, Davis Rothwell Earle & Xóchihua PC

Condemnation

Property Owners May Recover Attorney Fees Incurred in Determining Amount of Fee Award after Offer of Compromise in Condemnation Proceeding

In *TriMet v. Aizawa,* 362 Or 1 (Oct. 5, 2017), the Oregon Supreme Court confirmed that a property owner accepting

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an offer of compromise under ORS 35.300(2) in a condemnation proceeding is entitled to recover both pre-offer attorney fees incurred in litigating the merits of the condemnation action, as well as post-offer attorney fees incurred in determining the proper fees award.

TriMet filed this condemnation action to acquire certain property in the course of constructing the Portland-Milwaukie light-rail line. Approximately a year and a half after it filed the condemnation action, TriMet made a formal offer of compromise to the property owner under 35.300(1). The property owner accepted the offer, and the parties entered a stipulated judgment with a money award for the property. The judgment also provided that the property owner could petition for her attorney fees pursuant to ORCP 68 and ORS 35.300.

In petitioning for attorney fees, the property owner sought to recover both her pre-offer fees and her fees incurred in determining the amount of her fees award. TriMet took the position that the "fees on fees" are not recoverable under 35.300(2). The trial court disagreed and awarded both types of fees. The Oregon Court of Appeals affirmed, and the Supreme Court granted review.

On review, TriMet argued that "fees on fees" are not recoverable under ORS 35.300(2) based on the plain text of the statute. In examining the meaning of ORS 35.330(2), the Supreme Court agreed that ORS 35.300(2) precluded a court from awarding post-offer fees incurred in litigating the merits of a condemnation action. The Court concluded, however, that ORS 35.300(2) did not preclude the recovery of other types of post-offer attorney fees, including fees incurred to determine the proper amount of a fees award. The Court first considered text and statutory context, including ORCP 68 and longstanding case law recognizing the availability of attorney fees incurred as part of a fee application. The Court also considered other subsections of ORS 35.300, as well as the statute's legislative history. The Court concluded that the context and history of ORS 35.300 did not support TriMet's reading of the statutory text, and it held that "fees on fees" are available under ORS 35.300. ✪

— Submitted by Sara Kobak, Schwabe Williamson & Wyatt PC

Employment

A supervisor may be liable for aiding-and-abetting its own conduct if acting outside of the scope of employment

In *Baker v. Maricle Industries, Inc., dba Servicemaster Cleaning Specialists et al.,* 2017 WL 1043282 (D Or March 17, 2017) the Oregon District Court broadened a plaintiff's ability to establish a viable aiding-and-abetting claim against an individual under ORS 659A.030(1)(g). The Court held that a company president that was the decision-maker in an adverse employment action could be found liable for aiding and abetting his own conduct if he was acting outside the scope of employment.

Plaintiff was employed by defendant as a water technician. Prior to his employment, plaintiff was a reservist with the United States Air Force and had served in Afghanistan. Following his military service, plaintiff was diagnosed with PTSD. Plaintiff claimed that he overheard his project manager and the company president making disparaging comments about his PTSD. Shortly thereafter, plaintiff met with the president and his manager, and plaintiff's employment ended, although a dispute existed as to whether the separation was voluntary or involuntary.

Plaintiff sued the company alleging, inter alia, disability discrimination in violation of the Americans with Disabilities Act as well as state law. Plaintiff also sued the company president under ORS 659A.030(1)(g), alleging that the president aided and abetted the discrimination.

Defendant moved to dismiss the aiding and abetting claim against the president, citing extensive precedent establishing that an executive acts directly on behalf of a company and a defendant cannot aid and abet itself. In response, plaintiff analogized the situation to *McGanty v. Staudenraus*, 321 Or 532 (1995), where the Oregon Supreme Court found a corporate president could be a third party to the employment relationship for purposes of a claim of intentional interference with economic relations where the president's "sole purpose is one that is not for the benefit of the corporation."

In denying summary judgment for the employer, the district court held that a corporate president could be individually liable for aiding and abetting under ORS 659A.030(1)(g) when the president acted in a personal capacity, not as an agent of the corporation, and was thus a third party to the employment relationship. The court further found that whether the president acted outside the scope of his employment is a question of fact and, thus, summary judgment was inappropriate. ✪

— Submitted by Mitch Cogen, Bullard Law

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