Oregon State Bar

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## In This Issue...





## Presidential Tweets, Yelp Reviews, FREE BOOZY, and Admissibility

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Keith S. Dubanevich

The U.S. Supreme Court recently described cyber space and social media as the most important places today "for the exchange of views." In holding that a state statute that prohibited a felon's access to social media sites was unconstitutional as an unreasonable restraint of First Amendment rights, the Court noted that "[s]even in ten American adults use at least one Internet social networking service … [and that] Facebook has 1.79 billion active users, … about three times the population of North America."

In *Hawaii v. Trump*, the 9th Circuit recently took judicial notice of a presidential tweet. The Court said that President Trump's tweet was evidence of the purpose for the challenged travel ban. The Court cited the White House Press Secretary's confirmation that Presidential tweets are "considered official statements by the President of the United States."

Tweets and other social media also have been key pieces of evidence in more mundane matters such as a bail reduction hearing and an employment case involving a restaurant review on YELP. In the bail reduction case, New York attorney Ben Brafman told a Brooklyn federal judge:

> Tweeting has become, unfortunately, very fashionable and when people tweet they don't always mean what they say ….

Brafman wasn't referring to President Trump; rather he was referring to his client, controversial ex-pharmaceutical company executive Martin Shkreli. Shkreli was seeking a reduction in his $5 million bail allegedly so that he could pay legal fees, taxes and consultants. Unfortunately for Shkreli, he had previously claimed in tweets that he would pay a college student $40,000 to solve a math problem and offered a $100,000 reward for information leading to the arrest of a killer. Prosecutors offered the tweets to show Shkreli was not impoverished, and Brafman was left to claim that his client's tweets were only "preposterous promises."

In the employment matter, Yale University residential college dean Jan Chu was put on leave after using offensive language in a restaurant review on the website YELP. Chu wrote about a Japanese restaurant, which she said lacked authenticity: "If you are white trash, this is the perfect night out for you!" Chu added that the restaurant was perfect for "those low class folks who believe this is a real night out."

On the other hand, Crystal Eschert, a 29-year-old arson investigator for the Charlotte, North Carolina fire department, was awarded $1.5 million in her wrongful discharge lawsuit in which the city asserted that she was discharged

for her Facebook posts, made in August 2014 shortly after the fatal police shooting of a black teenager in Ferguson, Missouri. Eschert reportedly posted:

> If you are a thug and worthless to society, it's not race — You're just a waste no matter what religion, race or sex you are.

Eschert brought suit claiming that she wasn't fired for her Facebook post, but rather for her complaints about a new public building. The jury apparently agreed with her.

These and similar cases raise numerous questions about the use in court of social media posts and other forms of electronic information. The initial issue to be addressed is proper preservation of the evidence in order to make it admissible later and to avoid sanctions for spoliation.

One risk of failing to preserve is an adverse inference instruction, as happened in *Gatto v. United Airlines* when plaintiff Gatto failed to preserve his Facebook account. Gatto filed a lawsuit for job-related injuries, and defendants requested plaintiff's Facebook account to assess his activities and damages. Plaintiff provided defendants with a password for the account and one of the defendants, after printing some of the account pages, issued a subpoena to Facebook. The plaintiff deactivated his account, allegedly because he had received notice that the account had been accessed improperly, and a few days later the account was automatically deleted. The defendants claimed that photos that the plaintiff had posted and then deleted contradicted his claims and his deposition testimony. The Magistrate Judge agreed with defendants and granted their motion for an adverse inference instruction.

In a case that demonstrates what an attorney should never advise a client, a trial court judge in Charlottesville, Virginia, ordered plaintiff's counsel to pay $542,000 for defendant's attorney's fees as a sanction for instructing his client to remove photos from his Facebook profile.The plaintiff brought a wrongful death case after his spouse died in an automobile accident. The lawyer instructed his client to "clean up" his Facebook account which included a photo of the supposedly distraught widower holding a beer and wearing a t-shirt with the words "I [heart] hot moms."

Once social media or other Internet evidence is properly preserved and obtained, the next issue for admissibility is how to obtain the proof necessary to authenticate the evidence, including proof of who authored the post. The primary requirement (and obstacle) to admission is OEC 901, which requires "as a condition precedent to admissibility" that there be evidence "sufficient to support a finding that the matter in question is what its proponent claims." OEC 901 includes a list, "by way of illustration only," of ways that evidence can be authenticated, and OEC 902 lists self-authenticating documents. But other than specific references to voice communications and certain kinds of documents, the illustrations are based on common sense general factors such as the testimony of a witness with knowledge, comparisons with other evidence, and patterns or distinctive characteristics.

The initial question of authenticity is for the court, which must make a preliminary factual determination. In making the determination, the court is not bound by the rules of evidence. As Professor Kirkpatrick notes:

> Rule 901(1) provides only for a preliminary determination of authenticity by the court sufficient to allow the evidence to be received. The opponent may still offer counter-evidence contesting authenticity at trial, and the final determination of authenticity is made by the trier of fact after receipt of all evidence. Authentication is thus a matter of conditional relevancy under Rule 104(2).

Federal courts have interpreted FRE 901(a) to require that the proponent of the evidence make a prima facie showing of authenticity as "the rule requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." Thus, once the evidence is admitted based on the prima facie showing, disputes as to authentication or identification are left to the trier of fact.

It should not be surprising that it is not enough to print a copy of a tweet and consider it self-authenticating, unless you are quoting a tweet by the President of the United States. In *State v. Eleck*, the Court affirmed the trial court's decision to deny admission of Facebook messages the defendant printed from his own computer. The messages allegedly were from another Facebook user's account to defendant's account. The Court found it insufficient that the defendant proffered evidence that: the copy was accurate; the purported sender had a connection to the Facebook account; the purported sender had added the defendant to her list of Facebook "friends" shortly before allegedly sending the messages; and, the purported sender removed the defendant as a friend after testifying against him at the trial.

While admitting that the messages were sent from her Facebook account, the purported author denied that she was the author. Instead, she suggested that she could not have authored the messages because the account had been "hacked." The court concluded that the evidence was insufficient to prove that the information in the messages was so distinctive that they were generated by the purported author.

Authentication and authorship were also at issue in *Griffin v. Maryland*, in which the Court reversed the defendant's conviction, finding that the defendant's girlfriend's MySpace posting was wrongly admitted. There the defendant, who was nicknamed Boozy, was charged with murder. During trial the state sought to admit a printout of a MySpace page that contained the following words: "FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!" The account allegedly belonged to the defendant's girlfriend.

For reasons that are not clear, the state did not attempt to authenticate the printout through the girlfriend's testimony. Instead, the state sought to establish authenticity and authorship through the testimony of an investigator. The evidence included a picture of the girlfriend with Boozy from the account in question and personal information about the girlfriend that was posted on the account. The trial court admitted the printed copy, but the Maryland Supreme Court reversed, finding insufficient evidence to link the defendant's girlfriend to the MySpace profile posting. Part of the court's

reasoning was that anyone may have created the account and that there was no proof that the account was secure so that anyone may have made the postings, including the threat.

Another shooting case, this time from Texas, shows how MySpace postings can be properly authenticated. In *Tienda v. Texas* circumstantial evidence established that the MySpace account was opened in the defendant's name and at his email address; the MySpace page contained numerous photographs of the defendant; there were posts that were authored by someone who had been on home confinement just like the defendant; and, there were references to the defendant's gang name. That evidence was sufficient for the court to admit MySpace postings that bragged about killing ("I kill to stay rich") and complained about snitches.

One of the leading cases on the admissibility of electronically stored or transmitted information is *Lorraine v. Markel American Insurance Co*. There, the federal magistrate judge observed that "given the wide diversity of such evidence, there is no single approach to authentication that will work in all instances." *Lorraine* contains an extensive discussion of FRE 901 and 902 and how the Rules apply to electronic evidence. The opinion also discusses aspects of electronic evidence such as "hash values" that uniquely identify electronic evidence, analysis of metadata that shows the history of a document, self-authentication via identifiers in emails, use of a wayback machine to show the content of a website, use of circumstantial evidence to support the identification of the author of text and chat messages, and specific methods to authenticate digital photographs.

Courts have also relied upon a variety of methods to prove authorship. These range from corroborating evidence, evidence of facts known only by the party claimed to be the author, and evidence that the author showed up at a meeting discussed in a chat.

*State v. Eleck* discussed above illustrates why it is important to be prepared to prove in a variety of ways a claim of authenticity and authorship. For example, forensic computer evidence may be necessary to prove that tweets or Facebook and LinkedIn posts were properly collected and preserved with best-practices technology specifically designed for litigation purposes. There are over twenty unique metadata fields associated with individual Facebook posts and messages. Any one of those entries or a combination of them contrasted with other entries can provide unique circumstantial evidence that can establish foundational proof of authorship.

In sum, to fully utilize the benefit of a social media statement in court, consider the following:

Proper preservation and collection. Preserve and collect not only the basic electronic information but also metadata, validating "hash values," and other identifiers that can show "distinctive characteristics" for authentication purposes and prove key historical facts.

Pay special attention to metadata. Social media metadata fields can reveal lots of useful information. For example, Facebook's metadata fields include user account ID, the URL (web address) of where the user profile image is located, the creation date of the message or post, when the post was revised or updated, the recipients of the message identified by name and user ID, and unique identifiers for posted photographs and each wall post.

Be prepared to address "hacking" claims. When confronted with a damaging social media post, witnesses may claim they were not the author and that their account had been hacked. Proper collection and preservation and forensic examination can rebut such claims, as will marshaling other evidence to prove authorship.

Consider alternatives to find deleted information. Messages that may have been deleted from the sender's account may still exist in the recipient's account or may have been forwarded elsewhere. And posts that have been deleted from a social media site may still exist on the creator's computer's hard drive. Finally, deleted websites may be found via "wayback" mechanisms and via subpoenas to developers or internet service providers.

Keep in mind that the evidentiary analysis still follows Rules 901 and 902. Whether the information is scratching on a stone tablet or electrons on a server in Prineville, the analytical framework is the same.

# COMMENTS FROM THE EDITOR

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Dennis P. Rawlinson

"Spice Up Your Case With Viscerals"

Our ultimate goal as trial attorneys in a jury case is to provide at least some of the jurors with arguments and evidence they can use to support our client during jury deliberations or in a close court case to appeal to a judge's sense of equity to influence his or her decision. In either case, however, in order to make a juror a potential advocate for us or to appeal to a judge's sense of equity, we have to create emotion. The juror or the judge must want to support our view.

A "want" is an emotional process, not an intellectual one. It is usually effectively initiated by the use of viscerals.

### 1. What Are Viscerals?

Viscerals are words, descriptions, or other communications that appeal to our primal instincts. They appeal to our physical human reactions. There is a wide range of emotions and an even wider range of viscerals that trigger them.

Examples of viscerals are snakes, fingernails across a chalkboard, paper cuts on a tongue tip, a rat scurrying across a warehouse floor, blood, anger, thoughts of home, a child's laughter, revenge, confrontation, and so on.

### 2. Using Viscerals

The use of a visceral in a trial theme to punctuate an opening statement or witness examination or to persuade in a

closing argument separates the masters from the practitioners among trial lawyers. A master draws word pictures that evoke emotion. A master does not say:

"He injured his arm."

but says:

"It sliced through his skin into the tendon."

The first description is mere information. The second employs viscerals that draw attention, evoke emotion, and persuade.

Viscerals are often created by analogies, one of the lawyer's most potent tools. For instance:

"She felt like she was drinking her own blood."

or:

"It was as dark and silent as a sealed tomb."

or:

"He had a smile as inviting as a roaring fire on a winter day."

The writers of the classics all recognized and employed the power of viscerals. Shakespeare often has 10 or 20 viscerals in effect at once. Shakespeare's viscerals demand attention.

If your opponent persuades with dry logic and information and you build your own logic on a visceral framework, your advantage will be apparent.

### 3. Finding Viscerals

Finding and stockpiling viscerals for use in cases is fun and easy. You can read the masters—like Shakespeare—consciously noting viscerals.

On the other hand, viscerals are ever-present in modern culture. Watch a movie. Watch television. Watch MTV. The script writers fashion every scene, episode, and passage around the full human experience. They are forever reaching for our emotions. What will make us cry? What will make us laugh? What will disturb us? What will pleasure us? What will make our heart beat faster?

Each of us should train our mind to be sensitive to and conscious of the use of viscerals. To gather them for future case use. To evaluate cases with respect to visceral potential. Then with every new case, every new witness, and every piece of evidence, we should search our catalogue of viscerals for the matching and appropriate visceral.

I believe that with a little bit of awareness and a little bit of work, viscerals can help each of us at least to begin approaching the persuasive power of the masters.

# Uncomfortable Position: Disputed Third-Party Claims Against Law Firm Trust Accounts

*By Mark J. Fucile*
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Mark J. Fucile

One of the most uncomfortable positions a litigator can face is a disputed third-party claim against funds held in the law firm's trust account. Third-party claims can range from statutory liens connected with the litigation involved to writs of garnishment that have no connection to the matter being handled. They cannot be ignored and have the potential to put the lawyer at odds with the client against whom the lien is being asserted. The risks of mishandling third-party claims run from regulatory discipline to potential liability for the funds involved. The Oregon State Bar has provided guidance to lawyers navigating third-party claims, but it is necessarily general and does not offer "bright line" answers to every situation.

This article surveys two interwoven areas when confronted with third-party claims against funds held in a law firm trust account. First, the duties involved when holding disputed funds in trust are surveyed. Second, the procedural mechanisms for depositing the disputed funds into a court for resolution of the competing claims are outlined.

### *Duties*

By definition, funds held in a law firm's trust account are not the lawyer's money. RPC 1.15-1(a) puts it this way: "A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property." Although funds that may ultimately be due the lawyer—such as advance fee deposits and the lawyer's portion of a joint check from a defendant settling a contingent fee case—must be deposited initially into a trust account, they must be moved to the lawyer's general account as they are earned under RPC 1.15-1(c)-(d).[1] Therefore, beyond legal fees which have been earned but have not yet been transferred out of a trust account (for example, when work has been done but the resulting bill has not yet been generated[2]), the funds held in trust in a given matter are typically the client's property.[3] Because they are the client's property, the funds involved are subject to third-party claims against the client.[4]

Some third-party claims are related to the litigation involved. Medical service liens under ORS 87.555 are a ready illustration in personal injury cases. Others, such as writs of garnishment under ORS 18.615, may be wholly unrelated to the matter being handled. Although many third-party claims are rooted in statutory authority, some are not. Oregon State Bar Formal Opinion 2005-52, for example, discusses contractual obligations to secured and unsecured creditors in this

context if the client has agreed to have them satisfied out of funds coming into trust—such as settlement proceeds.

Most third-party claims are satisfied routinely with client consent. Others, however, are disputed. In either event, third-party claims cannot simply be ignored. Lawyers have been disciplined for mishandling disputed funds. Oregon disciplinary cases include both intentional and negligent mishandling within the ambit of RPC 1.15-1(e) and its predecessor under the former Disciplinary Rules—DR 9-101(A).[5] Moreover, the risk to lawyers extends beyond bar discipline. Depending on the statutory basis for the lien involved, a law firm that does not ensure that a lien is satisfied may be liable for the amount involved.[6] OSB Formal Opinion 2005-52 also discusses scenarios where a lawyer who ignores a valid lien may be subject to liability to the creditor involved for a fraudulent transfer.

RPCs 1.15-1(d) and (e) outline general procedures in the event of a dispute.

RPC 1.15-1(d) generally requires a lawyer to "promptly deliver to . . . [a] third person any funds . . . that the . . . third person is entitled to receive[.]" OSB Formal Opinion 2005-52 notes that the phrase "entitled to receive" has not been interpreted by the Oregon Supreme Court. In the absence of guidance from the Supreme Court, Formal Opinion 2005-52 discusses both the relevant comment to the corresponding ABA Model Rule of Professional Conduct and the analogous section of the Restatement (Third) of the Law Governing Lawyers (2000).[7] Formal Opinion 2005-52 reasons that the wording of RPC 1.15-1(d) suggests that a valid third-party claim can override a client's contrary instructions and allows a lawyer to disburse the funds involved even if the client objects.[8]

RPC 1.15-1(e), in turn, allows the lawyer instead to keep the disputed funds "separate . . . until the dispute is resolved." Examining the word "separate," OSB Formal Opinion 2005-52 counsels that the lawyer can either retain the disputed funds in trust or deposit them into the court concerned pending resolution of the dispute.[9] On a practical level and as will be discussed further in the next section, depositing the funds into the court is often the most prudent approach for two reasons. First, although an experienced personal injury lawyer may be well-equipped to assess the validity of a routine medical lien in a case the lawyer has handled, even seasoned lawyers may not be familiar with the intricacies of liens arising outside their areas of expertise or third-party claims stemming from unrelated matters. In short, the term "entitled to receive" may, at least in some circumstances, be easier to state than apply. Second, Comment 4 to ABA Model Rule 1.15, on which Oregon's rule is patterned and is the authority cited in Formal Opinion 2005-52, cautions that "[a] lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party[.]" Allowing a court to decide is inherently more protective of the lawyer from the perspective of risk management because it allows both the client and the third-party to present their respective arguments to a neutral decision-maker.

RPC 1.15-1(e) also instructs on the appropriate disposition of any *undisputed* portions: "The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute."

# Litigation Journal Editorial




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### *Court Resolution*

The forum for court resolution will ordinarily flow from how the claim involved arose.

If the claimant is a party to current litigation (originally or by intervention in a supplemental proceeding), then depositing the funds into the court involved is the simplest solution. UTCR 1.120 addresses disbursement of money in Oregon state trial courts and, implicitly, recognizes that funds may be deposited. 28 USC §§ 2041-2045 govern the deposit and withdrawal of funds in federal proceedings and Local Rule 67-1 supplements the statutory guidance for the District of Oregon.

If the claimant is not a party to current litigation, both state and federal courts offer the procedural mechanism of interpleader. ORCP 31 governs interpleader in Oregon state trial courts and FRCP 22 and 28 USC § 1335 do the same in federal courts.

If the claim arises through a writ of garnishment, the court issuing the writ effectively provides the venue for depositing funds under ORS 18.668(1).

Two related questions come into play when third-party claims are resolved in court.

First, should the lawyer represent the client on that claim? The answer will often turn on the nature of the claim. It is comparatively common for plaintiffs' personal injury lawyers to negotiate with holders of medical liens in an effort to discount those liens for the benefit of the lawyer's client. Those are typically situations, however, where there is no dispute over the face amount or validity of the lien, the lawyer is intimately familiar with medical treatment and the negotiations are being pursued against the backdrop of the overall resolution of the case involved. If the lien is being disputed and the nature of the dispute is beyond the area of the lawyer's expertise, then the lawyer handling the underlying matter may wish to refer the client to another lawyer with the requisite expertise to handle that facet. For example, even a seasoned plaintiffs' personal injury counsel may not be familiar with the nuances of ERISA benefit plans and related liens.[10] Similarly, a lawyer served with a writ of garnishment stemming from a wholly unrelated matter may have neither the requisite background nor the inclination to become involved in challenging the garnishment.[11]

Second, how should client confidential information be handled? In most instances, the third-party claimant involved already knows that the lawyer is or will be holding client funds. With a third-party claim related to the underlying litigation, the lawyer may have already negotiated over the amount of the lien with the holder. With an unrelated third-party claim, a lienholder may be aware that the lawyer is holding funds due to the public notoriety of the matter leading to the deposit of, for example, settlement funds. Therefore, the simple fact that a lawyer is holding a particular client's funds in trust is usually not an issue.[12] By contrast, if litigation follows, lawyers need to take appropriate precautions to protect client confidential information in public court filings and related public court proceedings. For example, a lawyer's fee arrangements and related confidential information may bear on what portion of settlement funds in trust belong to the client, what portions are to be paid out for litigation costs and expenses and what portion is due the lawyer in fees. Lawyers should use appropriate procedural tools—such as protective orders, sealed filings or *in camera* proceedings—to preserve client confidential information.[13]

### *Summing-Up*

A disputed third-party claim over client funds held in trust can put a lawyer in a very uncomfortable position between the claimant and the lawyer's client. RPC 1.15-1(e) offers an avenue for judicial resolution that allows lawyers to comply with their regulatory obligations without becoming an unwilling arbiter of the dispute involved.

**(Endnotes)**

1 RPC 1.15-1(b) permits a lawyer to maintain sufficient funds in a trust account to pay bank service charges—"but only in amounts necessary for those purposes." *See* OSB Formal Op 2005-145 (prohibiting "cushions" in trust accounts that would otherwise defeat overdraft notification).

2 *See* OSB Formal Op 2005-149 (lawyer may wait a reasonable period of time after a client has been billed to withdraw the corresponding funds from an advance fee deposit held in trust).

3 Third-party funds can also be held in trust when, for example, a lawyer is handling a transaction and the law firm's trust account is being used as the functional equivalent of an escrow. *See* OSB Formal Op 2005-55.

4 If a lawyer only receives notice of a claim after the lawyer has distributed the funds involved to the client, the lawyer is not required to restore the funds involved to the trust account. *See* OSB Formal Op 2005-149.

5 *See, e.g., In re Boothe*, 303 Or 643, 652-53, 740 P2d 785 (1987) (intentional violation of DR 9-102(A)); *In re Spies*, 316 Or 530, 535, 852 P2d 831 (1993) (same); *In re Arneson*, 22 DB Rptr 331, 334-37 (2008) (negligent violation of RPC 1.15-1(e)); *In re Hubbard*, 30 DB Rptr 378, 380 (2016) (same).

6 *See, e.g., United States v. Harris*, No. 5:08CV102, 2009 WL 891931 (ND W Va Mar 26, 2009) (unpublished), *aff'd*, 334 Fed Appx 569 (4th Cir 2009) (lawyer liable for failure to pay Medicare lien); *see generally* OSB Formal Op 2015-190 (2015) (discussing Medicare liens).

7 Respectively, Comment 4 to ABA Model Rule 1.15 and Section 45 to the Restatement.

8 Formal Opinion 2005-52 does not explore whether this creates a conflict under RPC 1.7(a)(2), which addresses, among others, conflicts between a lawyer's duty to a third-party and the lawyer's client.

9 *See also* OSB Formal Op 2005-68 at 2 (noting that in the event of a dispute over funds held in trust the lawyer must either retain the disputed portion in trust "or interplead the disputed funds").

10 *See generally Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, ___ US ___, 136 S Ct 651, 193 L Ed2d 556 (2016) (discussing ERISA liens).

11 Particularly with a garnishment unrelated to the matter being handled, any work in the dispute beyond simply responding to the writ should be documented with a separate fee agreement because it is independent from the original matter for which the lawyer was retained. On a related note, a garnishment of an advance fee deposit does not ordinarily excuse the client from the client's agreement with the lawyer to maintain an advance fee deposit.

12 Generally, the simple fact of representation is not privileged or otherwise confidential. *See generally* Laird C. Kirkpatrick, *Oregon Evidence* § 503.12[6] (6th ed 2013); RPC 1.0(f) (defining "information relating to the representation of a client" under the confidentiality rule, RPC 1.6).

13 OSB Formal Opinion 2011-185, which addresses withdrawal issues, offers useful guidance on using procedural tools to protect client confidential information in public court proceedings and related filings. Under *Frease v. Glazer*, 330 Or 364, 372, 4 P3d 56 (2000), submission of material to a trial court for *in camera* review generally does not waive privilege.

# PERSONAL AUTHENTICITY[1]

*By William A. Barton*
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William A. Barton

Why should anyone attempt to persuade others to seek (personal) authenticity? One should seek authenticity because it is necessary in order to be credible. Why should anyone who attempts to persuade others seek credibility? Credibility is necessary in order to be effective. Why? Because without credibility, it doesn't matter what you say.

Authenticity is related more to the speaker than to what is spoken. Reflect for a moment on what it means to say a speaker is "authentic." Many synonyms come to mind, including forthrightness, candor, and honesty; others include genuineness or the quality of being "real." It is obvious that credibility culminates from multiple sources. I submit that credibility is mostly about clearly communicating an attitude of caring. Once again, why is this so important? Because if the speaker doesn't care, why should the listener?

Here I suggest the reader pause and turn to the attachment to this paper, which is an article from the Oregonian. It is short and won't take much time to read. Once you have read the article, ask yourself, "Is he speaking from the heart, is he authentic?" Once these threshold questions are answered, it is easy to understand why this father possesses credibility.

Speaking from the heart is easy to say, difficult to do . . . and even harder to do before strangers in public. Perhaps one reason this is so difficult is because, at some deep level, all of us are frightened of rejection. So much honesty demands too much vulnerability. Often the smarter we are, the more apt we are to think rather than feel. When left to our instincts, we lawyers analyze, categorize, rationalize and intellectualize every minute aspect of a case. Yes, we need to do all of this, and do it well; but be aware this is the work of a legal technician. What is missing? It's that something extra, that potent "white-knuckled" passion that flows from "heart talk"!

So how do you argue a case, any case, with convincing authenticity? Stated differently, "Where are the roots to heart talk found?" For each of us there is one place, and only one place. It is unique to each of us, yet entirely the same for all of us. The headwaters of authenticity spring from deep within **you**, from the life **you have lived**.

Immerse yourself in the facts of your case. What aspects resonate with you? What element is compelling? Is it a sense of indignation generated by the liability, or the loss of something dear to your client, to which you can relate? Slowly reflect upon your emotions. Don't run from them—embrace them. Your clients are forced to live within this case and its attendant emotions every day. Ask yourself, "Which of my life experiences allows me to empathize with my client? Will a particular group of jurors have had a similar life experience and feel empathy for my client?" This is often expressed colloquially as "putting yourself in the shoes of another." This process is similar regardless of from which side of the table you advocate. Visit and spend some quiet time with your clients. How have their lives changed? What is poignant? What is different? What have the changes meant to your clients? Talk to them about prior hopes and dreams. How has not only their outer world changed, but also their inner world?

Being authentic isn't about being maudlin, or appealing to sympathy. Good advocates realize that. Even when sympathy is operative, it "thins out" entirely too fast. If something about your case naturally appeals to the jurors' sympathies, don't explicitly argue it. You will only lose ground by overtly appealing to their emotions. Jurors are properly offended when a lawyer panders by appealing directly to their sympathy.

Convert sympathy into material that has more impact. The obvious sympathetic aspects of the facts will speak for themselves. Acknowledge the presence of natural feelings of sympathy for your client, but then remind the jurors that no verdict is to be based upon sympathy. Explain that basing a verdict upon sympathy cheats not only the defendant, but also the plaintiff. Injured people don't want anyone's sympathy, and certainly no one's pity. They almost always come to court for one reason, and that is justice, which is also exactly what most defendants want. In the short term, it may seem you are giving up something of value. However, from the tactical perspective of a longer view, you are not really forfeiting anything. You are simply turning in silver for gold. You are morphing sympathy into credibility.

Whenever you are talking from the heart to a jury, you may be addressing the jurors in the third person, but emotionally and texturally you are really speaking to them from an "I-You" perspective, meaning the first person. Share the meaning of this particular experience with the jurors. The lawyer needs to walk a fine line when bringing something of his or her personal essence to the courtroom. It's not acting. It's close to the lawyer's personal sense of decency. It's the lawyer's humanity shining through. You needn't raise your voice. When spoken with a quiet resolve your "truth" will thunder.

The case theme often says as much about the lawyer as it does the case. From a universe of facts, many themes could have been selected, yet this particular lawyer has selected this particular theme. Maybe the case has been presented to a focus group with a jury consultant who has suggested the strongest theme. But whether or not is has, each lawyer must search for the manner in which he or she is most comfortable in effectively presenting the selected theme. The lawyer must bring more than mere words to generate maximum credibility.

One more quote from another Academy Award winning actor, Ben Kingsley, puts just the right spin on the opportunities a speaker has with his or her audience. "The tribe has elected you to tell its story. You are the shaman/healer, that's what the storyteller is, and I think it's important for actors to appreciate that. Too often actors think it's all about them, when in reality it's all about the audience being able to recognize themselves in you. The more you pull away from the public, the less power you have on stage."

1 Reprinted with permission from the Oregon State Bar *Litigation Journal*, May 2003, Vol. 22-1.

## COMMON QUESTIONS AND CRITICISMS ABOUT "HEART TALK"

1. Heart talk is really nothing more than a performance.

**Response:** When an argument comes from the heart, it's never a performance. If words don't come from the heart, it's always acting. Authenticity is driven only by the authenticity that comes from deep within each of us. Aristotle knew about this when he talked not only of logos (logic), but also pathos (emotion) and ethos (morality).

2. Heart talk seems to come more easily to others than to me. Oddly enough, when it does come, it arrives so quickly and with such ease it just can't be "real."

**Response:** At times, heart talk comes quickly, but it rarely comes easily. More often it is the result of hours and hours of agitated effort. Key insights will harken in the small hours of the morning, in the shower, at stop signs, in your sleep. Heart talk is often a flash of insight, the episodic result of a glacial process.

The following excerpts are from a speech actress Jodie Foster delivered to Yale's graduating class in 1993. What does this Academy Award winning actress know about communication? Jodie begins by confessing that storytelling is her Olympic event. She goes on to explain:

> "So let me tell you what I do for a living (I include all my various professions in this analogy). I put all my stuff—my history, my beliefs, my passions, and taboos and personal foibles, my weaknesses, and unconscious agendas and eccentricities—I put them delicately and precisely on the tip of the proverbial arrow. I take careful aim, keep the target in my sight, and try desperately to communicate all that is in me in a straight line toward an audience. But I am only human. My eyesight is faulty; my hands are shaky; a million things will distort the goal. And no matter how well I aim that arrow, I never completely connect with the other. But it's the process of trying that's significant. That's where all the messy, beautiful human stuff lies—in the space between the 'you' and the 'other,' between the 'you' and the 'I.'
>
> "This creative process depends entirely upon hope. I hope the next time I take aim and shoot, now that I'm more conscious of my previous misfirings, that I'll aim straighter and cleaner, and I hope more of me will find its way connecting intimately with more of you. Please don't misinterpret this sentiment as a call for some sort of commercial formula in film making. On the contrary, by connecting, I'm telling a story, by telling your story revealing yourself in the telling, reading and being read back."

3. The expression of personal opinions is ethically prohibited. *See* former DR 7-106(C)(4) and current RPC 3.4(e).

**Response:** You must be careful in your phrasing. It is improper to say "I think ——." Simply rephrase the material by dropping the words "I think" and substituting an alternative, such as "It is reasonable that ——." Saying "I think" is just a bad habit that is easy to correct. It provokes an objection that allows your opponent to interrupt the flow of your argument with an objection which they will win; and in the process they can correctly accuse you of unethical behavior before the jury (remember the former Disciplinary Rules and current Oregon Rules of Professional Conduct are statements of ethics).

4. Can you be a good trial lawyer without heart talk?

**Response:** Yes. In fact, most trial lawyers never reveal much of themselves in the process of advocacy. Many competent trial lawyers never bring **anything of themselves** to the courtroom. This is particularly true of attorneys who limit their practice to emotionally sterile matters such as patents, tax, or yes, even some commercial matters. These are lawyers who argue both the facts and law with great skill. In my opinion, however, they can never be more than competent technicians because they lack the passion and resulting authenticity that truly great lawyers exude. Such attorneys are not temperamentally suited for discussing the people behind the issues. If before a judge, traditional wisdom may argue in favor of a more aseptic presentation. However, even here, there are real people behind every "legal" issue. When advocating before juries, no matter what the issue, there is **always** a place for heart talk.

5. All this heart talk would be easy if I represented victims of sexual abuse and always was on the side of the underdog. Mr. Barton, I represent large businesses. Show me how to do heart talk in commercial cases.

**Response:** My friend Richard Bodyfelt used to represent all the Fortune 500 companies against product liability claims. When Dick was through introducing his client Ford Motor Company during jury selection, I could just hear Henry Ford out back in the toolshed creating the first Model A. No matter whom Dick represented, no matter how big the corporation, somehow he always managed to represent real people. Dick knew that behind every "set of facts" there were people and a compelling story to be told. When newspaper editors send writers out on assignment, they don't just want the facts; they want a story, meaning the story behind the facts. That's why television coverage of recent Olympic Games now includes not only excellent coverage of the competition, but supplemental, personalized stories about the contestants.

A good example of breathing life into a commercial claim is a lawsuit against McDonalds Hamburger Franchises, which alleged a breach of an oral contract. Wyoming lawyer Gerry Spence synthesized the case into the compelling theme of "Let's put honor back in a handshake." If you remain at a loss in selecting an effective case theme, consider retaining a respected jury consultant to assist you in acquiring a new perspective.

6. Not every case has a client or some aspect of the facts that conveniently lends itself to a sense of indignation. Maybe you don't even like the client you are representing. How do you generate heart talk under those circumstances?

**Response:** Life doesn't come to us as cleanly or clearly as we would like, nor always on our terms. I am often in conflict, and I don't really believe I'm always wearing the white hat in the courtroom. This is apart from the fact that I am running a business with monthly overhead that in many ways runs me. How many young lawyers might rather be doing public interest work, but have accepted the financial "golden handcuffs" and sold their souls to the high salaries of the big firms in order to pay off their student loans?

O.K., so you are an emotionally divided house. Carefully think your way through every aspect of the conundrum. Then "cut the baby," and by this I mean make a decision. Once this is done, put your full weight into the final position you have adopted. As natural as it may be, don't punish yourself by constantly revisiting a decision once it has been made. The process of becoming and being an effective trial lawyer demands great mental discipline. Ed Peterson, former Chief Justice of the Oregon Supreme Court, shared with me the following: Often the exact wording of many unanimous decisions the Oregon Supreme Court issued during his tenure was the product of vigorous debate, much compromise and innumerable rewriting as the justices struggled to find common language with which they were comfortable. It might take months for the judges to hash out their differences in conference. When later reading the unanimous result, you have no inkling of the many compromises that went into the exact words of the holding. At its conception in conference, this bold, black-letter rule would have been difficult to locate. Finally, at its birth, it arrives without dissent and little hint of just how close the court was to accepting the alternative arguments. A hint that this has been the case is when the court emphasizes the holding is limited to facts of the particular case.

Not only are you representing your client, but in a real sense you are also representing yourself. Sift through all the facts. There is always a story to tell. Go find it, and make it your story.

7. I am a female lawyer and I am worried about being perceived as "too emotional" if I fully embrace this technique; in other words, does the application or effectiveness of "heart talk" vary whether the lawyer is male or female?

**Response:** There is a context for everything. Too much emotional content or appeals too early in the case may backfire. The short answer is because the answer comes from deep within you, there are no gender-based criteria.

## COMMUNICATING AUTHENTICALLY, OR LEARNING HOW TO SPEAK "HEART TALK"

There are techniques that can assist anyone in locating and accessing the deep feelings that fuel heart talk. This process is divided into three stages—acquisition, presentation and substance. Substance is about the speech's content; presentation its delivery. First and most important is acquisition, meaning generating the content for the presentation.

Let's discuss the process of acquisition. Acquisition is a process that entails the identification and revisitation of the life experiences that allow the speaker and audience to emotionally relate to or empathize with the plaintiff.

1. Some times are better than others for accessing the material of heart talk. Life is similar to riding a bicycle: You don't have to pedal hard all the time. There are times you can coast, such as when going downhill or on level ground. Accessing feelings is similar: You don't always have to be engaged in the executive skills of problem solving. When problem solving, you are pedaling hard and it is difficult to do anything other than just stay focused on pedaling hard. Then there are other times when you can relax and coast. These are the times your emotions are closest to the surface, when they are easiest to access. Make the effort to create these reflective opportunities; then relax and harvest what you can. You will be drawing water from the deepest parts of your soul.

2. Free association is a technique some mental health professionals use in various types of therapy. It is a process by which you go backwards in your mind, like descending down a rope into the darkness when scuba diving at night. This mental process is called association. We do this when an old song or a smell brings back memories.

Now get comfortable, sit back, relax and muse upon the case. Let your mind wander, but not too far. Nudge your mind back to the (facts of your) case when it drifts. Return to the case. What thoughts and images come to mind? What in your life has been similar? How was your experience the same or different? How did you feel? Keep coming back to your client. When you hit a blank space, relax, just let it be. This isn't a test. Search for an experience, perhaps one from childhood that feels emotionally similar. You are getting ever closer to the headwaters of your heart talk for the case. Good trial lawyers spend the effort necessary to find the previous time(s) in their lives that they have walked an emotional mile in their client's shoes. Until you have found this special place, you are not ready to go to court. Trials are about much more than the facts and the law.

So you are fortunate enough that you have never been the victim of a severe burn or lost a child or a mate. I never have. What do you do then? Great literature allows us to experience these traumas vicariously. A sense of compassion for our fellow beings is the answer.

Now reread the Oregonian article. One more time, try to imagine what this father must have been feeling. Let your mind wander to some aspect of September 11. What sights, sounds, smells and images come to mind? Stay with them. This requires no eloquence or particular words. Just the words of one heart reaching out to another—to share with him or her.

3. During your presentation, when engaging in heart talk, consider slowing down and occasionally pausing. Silence can be deafening. There is no reason to rush through the most important part of your presentation. Eye contact with each juror is at a premium. It's the right time to lower your voice. This isn't about faking it, it's about effective communication, which is precisely what both effective advocacy and quality acting are.

## CONCLUSION

Law school classes on trial advocacy teach mainly mechanics with a skosh of technique. While advocacy certainly requires basic skills, it appears lost on academics and legal mentors that the most important attribute to effective jury advocacy is a lawyer's authenticity. Every young child inherently possesses this personal ethos; however, traditional law school curriculums and the subsequent litigation training most lawyers receive bleaches out the personal essence of beginning lawyers. Before lawyers went to law school they all rode in cars; after receiving their legal diplomas they only ride in vehicles.

# Learning how to live from one moment to the next

By KEN GOE
THE OREGONIAN

My family's world changed without warning on Thursday, Sept. 28, as I watched my 15-year-old son, Justin, leave the Putnam High School football field early in the first quarter of a junior varsity game.

He came off slowly, went to the bench, sat down, took off his helmet and put his head in his hands.

FIRST PERSON

Uh-oh, I thought. A concussion. Assistant coach Andy Hill squatted in front of him, looked up and waved for Brian Coble, Putnam's trainer. I felt a cold hand squeeze my heart. I came down the bleacher steps slowly, and one of Justin's teammates motioned for me to hurry.

By the time I reached his side, Justin's eyes were unfocused and Coble was dialing 9-1-1 on a cell phone.

"Take his hands and tell him to squeeze," Coble told me urgently.

He turned back to Justin and said loudly, "Stay with us, Justin. Don't close your eyes."

I have held Justin's hands before, the first time on March 22, 1985, in a birthing room at Adventist Medical Center, when he joined our family. His little fist curled around my finger as I held him, still messy from the delivery. My heart soared. I had a son. What could be more wonderful?

I held his hand when he took his first step. I held his hand on the way to the park, a Wiffle ball in his other hand, a plastic bat in mine. I held his hand on the way to the bus stop on the first day of kindergarten, then wiped away a tear as he climbed aboard.

But that was long ago. Now, his fingers are big, bigger than mine.

He spasmed as I gripped his hands.

"Stay with us, Justin," Coble said, the tension tight in his voice.

I heard the ambulance siren and my wife, Christy, crying from somewhere in the background.

The feel of the late-afternoon sun, the sounds of the game continuing a few feet away, the smells of sweat and cut grass, the pressure of Justin's hands in mine seemed like things in an impressionist painting, hazy, indistinct, sensed only from a great distance.

Christy rode to OHSU Hospital in the ambulance, I as a passenger in a friend's car. I looked back as I left the field and saw my 11-year-old daughter, Courtney, standing uncertainly next to family friends, clutching the game jersey the ambulance medical technicians had cut from Justin's body.

By the time I arrived at the emergency entrance, Justin was in surgery to remove a blood clot in his brain caused by a subdural hematoma, his life hanging on Dr. Randall Chesnut's skill with a scalpel.

Seconds crawled. Minutes seemed to stand in place, almost motionless. Only the presence of family, friends and three Putnam football coaches, who abruptly left varsity practice and came to be with us at the hospital, made time pass at all.

At last, Chesnut emerged to say Justin had survived the surgery. But, he cautioned, this had been a bad injury. Most people who have it die. But most who survive for 72 hours live.

For three days, I watched medical monitors instead of scoreboards. Rather than helping cover the Oregon-Washington football game at 41,698-seat Autzen Stadium, I sat in a small room in the pediatrics intensive care unit at Doernbecher Children's Hospital. Instead of the roar of the crowd, I heard the soft in-and-out whoosh of a ventilator.

I struggled to live in the moment, never thinking too far ahead or too far back. Memories tugged heartstrings until tears flowed. The future looked so daunting my knees weakened.

It was safer to live second by second, breath by breath, so every time the damaged right side of Justin's body reacted to painful stimuli, it seemed like a major victory.

The 72 hours passed. Then, a week. Then, two. Now, four. The ventilator has gone. The wires, the monitors and the feeding tube have followed.

My son always has been a competitor. An honor student, he competed fiercely with himself in the classroom. As an athlete, he competed as fiercely with others on the playing field.

In the fourth-place game in the state tournament for Junior State baseball last summer at Willamette High School, Justin's two-out, two-run triple on a 3-2 pitch in the bottom of the seventh inning gave Putnam a 4-3 victory.

It's early, but Justin appears to be winning this competition, too. He is walking with assistance, talking, writing, using a computer and doing math problems. He recognizes friends and family. The sense of humor that always has made him such a joy to be with has returned.

Justin is not making this fight alone. Teachers, the Putnam football coaching staff and his classmates have rallied around him, visiting in such numbers they sometimes clog hallways outside his room. They lift his spirits and ours. Their handmade posters cover his walls.

Fellow church members, neighbors, friends, high school players from other teams, college players and coaches, brain-injury survivors, co-workers, the physicians, surgeons, nurses, therapists and staff members who have worked with Justin have combined to be an uplifting force, carrying us through the dark times and joining in the celebrations.

Out of this life-changing event has come, for me, a deeper appreciation for the majesty of the human spirit, the sustaining power of God, and an understanding that when the two combine, miracles happen.

◆

*You can reach Ken Goe at 503-221-8040 or by e-mail at kengoe@news.oregonian.com*

# RECENT SIGNIFICANT OREGON CASES

*By Stephen K. Bushong*
*Multnomah County Circuit Court*


Honorable
Stephen K. Bushong

## Claims and Defenses

***Schmidt v. Noonkester,*** 287 Or App 48 (2017)

Plaintiffs lived next door to defendant—a woman in her mid-seventies—and her son. Part of defendant's property was accessed via an easement over plaintiffs' property. Plaintiffs hired defendant's son to perform some repair work on their home. Dissatisfied with the work, they brought a construction-defect action against the son. That litigation led to a settlement agreement that required the son to pay plaintiffs $6,000, and defendant to release her easement over plaintiffs' property. After defendant refused to sign the agreement, plaintiffs sued her for breach of contract and fraud. Defendant counterclaimed for financial elder abuse under ORS 124.110. A jury ruled in defendant's favor on the counterclaim. The Court of Appeals reversed, concluding that the trial court erred in denying plaintiffs' motion for a directed verdict on the elder abuse counterclaim. The court assumed that unfounded litigation "may be the predicate for an elder abuse claim" (287 Or App at 55), but concluded that the claim failed because defendant "must still establish a 'taking,' and, here, defendant fails to explain how the negative effects that she suffered as a result of plaintiffs' litigation equate to a 'taking'" under the statute, as interpreted in *Church v. Woods,* 190 Or App 112, 117 (2003).

***Merrill v. A.R.G.,*** 286 Or App 487 (2017)

Plaintiff and defendant—neighbors living in a rural, hilly area covered with heavy vegetation—had a long-running dispute over an easement that allows plaintiff and another neighbor to access their property from a public road. At one point, defendant erected a fence across part of the easement. When plaintiff removed the fence, defendant called the police and insisted that the officer arrest plaintiff for criminal mischief and trespass, though the charges were ultimately dismissed. Defendant also petitioned for a civil stalking protective order (SPO) against plaintiff; the SPO court ultimately dismissed the petition with prejudice. Plaintiff then sued defendant for malicious prosecution and wrongful initiation of a civil proceeding. A jury found in plaintiff's favor on both claims and awarded substantial damages, including punitive damages. The Court of Appeals reversed on the malicious prosecution claim and affirmed on the wrongful initiation of a civil proceeding claim. The court concluded that the trial court erred in denying defendant's directed verdict motion on the malicious prosecution claim because "defendant did have probable cause to believe that plaintiff had criminally trespassed on his property." 286 Or App at 495. The trial court did not err in denying defendant's directed verdict motion on the wrongful initiation of civil proceedings claim because "the trial court correctly gave preclusive effect to the SPO court's determination that defendant had 'no objective reasonable basis' to have asserted the SPO claim." *Id.* at 502.

***Adams v. Presnell***, 286 Or App 390 (2017)

Plaintiff was injured in a single-car accident while defendant—her minor son—was driving. The trial court granted defendant's motion for summary judgment, concluding that the claim was barred by the "family purpose" doctrine. The Court of Appeals reversed. The court explained that the family purpose doctrine "relies on a fictitious agency relationship to 'impute vicarious liability to the owner of a car for the negligence of a family member.'" 286 Or App at 395 (quoting *Arizpe v. Vankirk,* 204 Or App 372, 374 (2006)). The purpose of the doctrine—permitting injured third parties to collect from the owner of a family vehicle negligently driven by a member of the owner's family—"does not support the imputation of liability where the owner is the injured party." *Id.* at 398.

***Humphrey v. OHSU***, 286 Or App 344 (2017)

A series of oral surgeries left plaintiff with nerve damage and facial disfigurement. She sued OHSU and the surgeons for professional medical negligence. The trial court dismissed the action as untimely and for failure to comply with the notice requirements in the Oregon Tort Claims Act (OTCA). The Court of Appeals reversed. The court explained that plaintiff alleged sufficient facts for OTCA notice "by pleading that defendants paid for the costs of her medical care at a time when she had a basis to assert a claim[.]" 286 Or App at 353. The court further explained that "defendants' provision of free or discounted medical services qualifies as 'compensation' for the 'injury' that plaintiff suffered . . . [as] required for an 'advance payment' for purposes of the tolling provision in ORS 12.155." *Id.* at 356.

***Home Forward v. Graham***, 287 Or App 191 (2017)

In this FED case, landlord served tenant with a 24-hour eviction under ORS 90.396 after tenant assaulted another resident at the apartment complex. The trial court concluded that tenant's conduct was not "outrageous in the extreme" as required for an expedited eviction under the statute. The Court of Appeals reversed. The court concluded that the trial court misinterpreted the statute by considering the duration of the tenancy, the tenant's past behavior, and the fact that tenant's conduct also constituted a "material violation" of the rental agreement that would justify a 30-day eviction under the statute. The court explained that "the proper inquiry . . . is whether the act was 'more extreme or serious' than the violations enumerated in ORS 90.325 and 90.392, including, for example, nonpayment of certain charges." 287 Or App at 200.

***Federal Home Loan Mortgage Corp. v. Smith***, 287 Or App 42 (2017)

The trial court in this FED case awarded possession of the premises to the purchaser at a foreclosure sale. The Court of Appeals reversed. The court explained that this case "is yet another in a series of lawsuits pertaining to the nonjudi-

cial foreclosure of trust deeds naming Mortgage Electronic Registration Systems, Inc. (MERS), rather than the lender, as the beneficiary, and purporting to authorize MERS to exercise the rights of the lender." 287 Or App at 43. The court concluded that "there is no evidence in the record that a valid foreclosure sale was conducted by a duly appointed 'trustee' within meaning of the Oregon Trust Deed Act," so the foreclosure sale purchaser is not entitled to possession of the premises under *Wolf v. GMAC Mortgage, LLC*, 276 Or App 541 (2016), and *Bank of America, N.A. v. Payne*, 279 Or App 239 (2016). *Id.* at 43.

***Curzi v. Oregon State Lottery***, 286 Or App 254 (2017)

Plaintiff sued the Oregon State Lottery and manufacturers of video poker machines after a machine's "auto-hold" feature recommended a suboptimal strategy based on plaintiff's poker hand. The trial court granted defendants' motion to dismiss. The Court of Appeals affirmed on the merits, but reversed the prevailing party fee awarded to the defendant manufacturers. The court concluded that (1) the trial court correctly dismissed plaintiff's tort claims for failing to give timely notice under the Oregon Tort Claims Act because "a reasonable juror could only conclude that plaintiff either discovered or should have discovered that he had a potential claim more than 180 days before giving notice under ORS 30.275(2)(b)" (286 Or App at 268); and (2) "the state has not waived its sovereign immunity from unjust enrichment claims, and, therefore, the trial court did not err by dismissing plaintiff's unjust enrichment claim against the Lottery." *Id.* at 270-71. The court further concluded that "the trial court erred in awarding the manufacturers their prevailing party fees because the proceeding was alleged as a class action proceeding under ORCP 32," thereby qualifying for the exception from prevailing party fees provided in ORS 20.190(6)(a).

## Procedure

***Spearman v. Progressive Classic Ins. Co.***, 361 Or 584 (2017)

ORS 742.061(3) provides a "safe harbor" for the insurer in uninsured motorist (UM) cases. Under the statute, an insured is not entitled to recover attorney fees if, within six months of a proof of loss, the insurer accepts coverage, agrees to binding arbitration, and the only remaining issues are the liability of the uninsured motorist and the "damages due the insured." In this case, the insured contended that the "safe harbor" did not apply because the insurer challenged the nature and extent of plaintiff's injuries and the reasonableness and necessity of his medical expenses. The trial court disagreed; the Supreme Court affirmed. The court explained that its prior decision in *Grisby v. Progressive Preferred Ins. Co.*, 343 Or 175, *adh'd to as modified on recons*, 343 Or 394 (2007)—which construed the "safe harbor" statute for claims involving personal injury protection (PIP) benefits—"does not control" because the two statutory provisions "are worded differently, and for reasons that have to do with significant differences between PIP and UM/UIM claims." 361 Or at 595. The court acknowledged that the insurer could owe nothing in UM benefits if plaintiff did not incur any reasonable and necessary medical expenses as a result of his injuries in the accident, but concluded that

contesting the extent of injuries or expenses "does not establish that the insurer raised issues beyond the 'damages due the insured,' as that term is used in ORS 742.061(3)." *Id.* at 601.

***Lang v. Rogue Valley Medical Center***, 361 Or 487 (2017)

The trial court dismissed plaintiff's wrongful death action for willfully failing to comply with two court orders, and the Court of Appeals affirmed without opinion. The Supreme Court granted review "to clarify the standard that applies when a trial court dismisses an action pursuant to ORCP 54 B(1) for failing to comply with a court order." 361 Or at 489. The court concluded that a trial court may dismiss an action under that rule "if it finds that the failure was willful, in bad faith, or reflected a similar degree of fault." *Id.* at 501. Before dismissing the action, the court "must consider whether a lesser sanction will suffice and explain why it concluded that dismissal was the appropriate sanction." *Id.* Applying that standard, the court reversed because it could not conclude on this record "that the trial court's dismissal was supported by evidence that plaintiff's counsel willfully failed to comply with the court's orders." *Id.* at 506.

***Krein v. Szewc***, 287 Or App 481 (2017)

Plaintiffs brought a nuisance claim, alleging that defendants' dogs barked uncontrollably for long periods of time. A jury awarded damages and the trial court entered an injunction that required defendants to have their dogs undergo a devocalization or "debarking" procedure. The Court of Appeals affirmed. The court explained that, in determining whether the trial court erred in issuing the injunction, it need not decide whether plaintiffs had adequately alleged in the complaint that they had no adequate remedy at law because the issue "was tried by the consent of the parties" under ORCP 23 B. 287 Or App at 486. The court further explained that the damages award did not preclude injunctive relief because the damages award addressed past harm and "damages could not provide plaintiffs with the complete relief they seek, silencing incessant barking." *Id.* at 491.

***Doe v. Silverman***, 286 Or App 813 (2017)

Plaintiff asserted claims for negligence and intentional infliction of emotional distress arising out of sexual abuse that plaintiff suffered at the hands of defendant's husband. The trial court granted defendant's motion for summary judgment on statute of limitations grounds. The Court of Appeals reversed. The court concluded that the summary judgment record disclosed factual issues as to whether defendant "knowingly" allowed her husband to commit child sex abuse sufficient to bring the claim within the extended limitations period provided by ORS 12.117.

***Columbia Cascade Co. v. City of Fernandina Beach***, 286 Or App 729 (2017)

Plaintiff Columbia Cascade (Columbia) manufactured playground equipment sold to the City of Fernandina Beach. Columbia and its sales representative, Site Creations, LLC (Site Creations) both invoiced the city for the equipment. The city paid Site Creations' invoice, but Columbia never received payment. Columbia then sued the city to collect on its invoice. The trial court granted the city's motion for summary judgment, concluding that Site Creations had actual or apparent authority to receive payment on Columbia's behalf. The Court of Appeals reversed. The court agreed with Columbia that, "to the extent that the trial court concluded that Site Creations had actual authority to invoice and receive payment from the city, that conclusion was incorrect as a matter of law." 286 Or App at 739. The court further concluded that "summary judgment in favor of either party was inappropriate because there are issues of fact with respect to apparent authority." *Id.* at 740.

***Bryant v. Recall for Lowell's Future Committee***, 286 Or App 691 (2017)

Plaintiff, a former city councilor for the city of Lowell, sued the organizers of a petition to recall plaintiff from office, alleging that defendants made false statements in election materials in violation of ORS 260.532. The trial court granted defendants' special motion to strike under Oregon's anti-SLAPP statute, ORS 31.150. The Court of Appeals reversed in part. The court concluded that plaintiff presented a *prima facie* case sufficient to defeat an anti-SLAPP motion to strike with respect to four of the seven statements at issue. The court also held that UTCR 5.010's conferral requirement did not apply to an anti-SLAPP special motion to strike.

***Marandas Family Trust v. Pauley***, 286 Or App 381 (2017)

Plaintiff hired defendants to repair the roof of a cabin. Due to faulty workmanship, the roof leaked, causing damage to the cabin's interior. Plaintiff sued, and recovered nearly all of the damages it sought in a court-annexed arbitration. The arbitrator denied plaintiff attorney fees, concluding that plaintiff failed to serve one of defendant's insurers with a written pre-litigation demand, as required to recover attorney fees under ORS 20.080. The trial court affirmed arbitrator's denial of attorney fees. The Court of Appeals reversed. The court concluded that, although plaintiff was aware of three potential insurance carriers for defendants, plaintiff's attorney did not believe that Brookwood—the insurer that ultimately covered the claim—was defendant's insurer for the claimed damage. Based on those facts, the court concluded that "Brookwood was not *known to plaintiff* to be defendant's insurer for the claim, and, thus, plaintiff was not required to serve a written demand on Brookwood under ORS 20.080 as a prerequisite for an award of attorney fees." 286 Or App at 389 (emphasis in original).

## Miscellaneous

***Oregon Wild v. Port of Portland***, 286 Or App 447 (2017)

Plaintiff brought a declaratory judgment action against the Port of Portland after it rejected proposed advertising that plaintiff wanted to run at the Portland International Airport. The trial court concluded that the Port's advertising policy impermissibly restricts the content of speech by prohibiting political but not commercial advertisements in violation of

Article I, section 8, of the Oregon Constitution, as interpreted in *Karuk Tribe of California v. TriMet*, 241 Or App 537 (2011), *aff'd by an equally divided court*, 355 Or 239 (2014). The Court of Appeals affirmed, adhering to its reasoning in *Karuk Tribe*, which applied the analytical framework established in *State v. Robertson*, 293 Or 402 (1982). In a concurring opinion, Judge Armstrong opined that the court "erred in *Karuk Tribe* in concluding that the *Robertson* analysis applied to the advertising restrictions at issue[.]" 286 Or App at 467 (Armstrong, J., concurring).

***Courter v. City of Portland***, 286 Or App 39 (2017)

In 2003, the city condemned an easement to bury water pipes beneath plaintiffs' property. Plaintiffs alleged that the city agreed during the condemnation trial to bury the pipes at least 18 feet below the ground's surface. Plaintiffs then brought an inverse condemnation action and a request for declaratory relief, alleging that the city actually buried the pipes as shallow as four feet, thereby exceeding the scope of the easement, effecting an inverse condemnation, violating the 2003 judgment, and interfering with plaintiffs' ability to develop the property in the future. The trial court granted the city's motion for summary judgment, concluding that the claims were not ripe for adjudication. The Court of Appeals reversed. The court explained that, once the pipes were placed on plaintiffs' property, "there has been a taking, and nothing else must occur before a court can adjudicate that issue." 286 Or App at 48. The court further concluded that, under the Declaratory Judgments Act, ORS 28.010, "the circuit courts have jurisdiction to issue declarations construing ambiguous provisions in prior judgments." *Id.* at 53.

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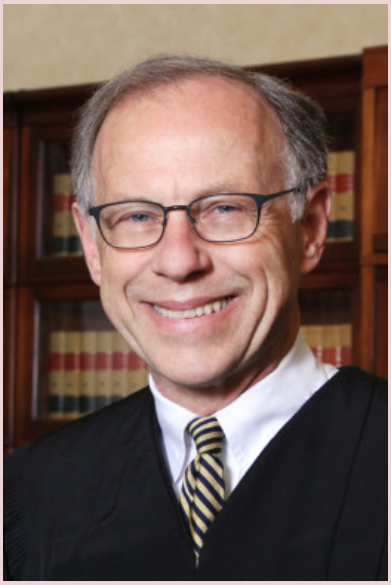

*Chief Justice Thomas Balmer*

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