2024 Appellate Update

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Brown v. Providence Health 372 Or 225 (2024).

Brown v. Providence

- The issue was whether a hospital sells medications as products for purposes of product defect liability under ORS 39.920.
- The statute establishes strict products liability for "one who sells or leases any product in a defective condition unreasonably dangerous . . . if the seller or lessor is engaged in the business of selling or leasing such a product." *Id.* at 231.
- The opinion turned on the definition of "sells" and "engaged in the business of selling."
- Ultimately, the Court held that "sell" includes the "transfer of a product to another in exchange for money or other valuable consideration." *Id.* at 233.

Brown v. Providence

- After deciding that administering the drug was a sale, the court turned to whether the hospital was "engaged in the business of selling" prescription drugs.
- The court concluded that because the hospital's business regularly involved transferring products to others in exchange for consideration, it was "engaged in the business of selling."
- This puts Oregon in a tiny minority (possibly a minority of one) of jurisdictions to allow such a claim.
- Implications for access to care.
- Hospitals are essentially like retailers in a product liability action.

Certain Underwriters at Lloyd's London v. TNA NA Mfg., Inc., 372 Or 64 (2024)

Lloyd's London v. TNA NA Mfg., Inc.

- The issue was the enforcement of a liability waiver.
- After Bagley v. Mt. Bachelor a decade ago held that most all liability waivers in consumer contracts are unenforceable as against public policy, this case stands for the general proposition that they may still be enforceable in commercial contracts.
- The Court followed the pre-Bagley analysis in Lloyd's.
- While the word "negligence" need not always be included in the waiver to waive a claim for negligence, the fact is that the courts are not likely to enforce it against a negligence claim unless the contract makes it really clear that it applies to negligence claims.

Trebelhorn v. Prime Wimbledon SPE, LLC, 372 Or 27 (2024)

Trebelhorn v. Prime Wimbledon SPE, LLC

- A tenant at a Portland-are apartment fell through the concrete walkway and injured his leg, requiring knee surgery.
- He sought $45,000 in economic damages and $350,000 in noneconomic damages.
- The landlord admitted negligence but disputed damages.
- The tenant conducted extensive discovery and sought to portray the landlord as a slumlord who chose not to fix known problems at the complex, and sought punitive damages at trial.
- The jury awarded the full economic damages, $250,000 in noneconomic damages and $10,000,000 in punitive damages.

Trebelhorn v. Prime Wimbledon SPE, LLC

- After hearing post-trial motions, the trial court concluded the maximum constitutionally permissible ratio of compensatory damages to punitive damages was nine times the actual damages the jury awarded. The $10,000,000 punitive damages award was reduced to $2,660,373.54. Both sides appealed.
- Oregon's Supreme Court affirmed the trial court's ruling. It extensively examined the factual record as applied to its case law concerning the difficult task of assessing when a punitive damages award is constitutionally problematic. Ultimately, it concluded the tenant had not met his burden to allow the original $10,000,000 award and its 33:1 ratio to stand. The 33:1 ratio "is dramatically greater than the single-digit ratio that the [United States] Supreme Court has suggested is – except in extraordinary circumstances – the limit of what due process will permit, no matter what the tort."

Trebelhorn v. Prime Wimbledon SPE, LLC

- This case is somewhat remarkable given the Supreme Court's history of punitive damage cases and its resistance to the US Supreme Court's constitutional limitations on the recovery of punitive damages.

Mouton v. Tri-Cnty. Metro. Transp. Dist. of Oregon, 331 Or App 247 (2024)

Mouton v. Tri-Cnty. Metro. Transp. Dist. of Oregon

- This was one of 3-4 cases involving the COVID era bill that created a statute of limitations safe harbor.
- HB 4212 said that the statute of limitations is effectively extended until 90 days after the governor's declared state of emergency expired.
- But the statute had a sunset clause that repealed the statue or bill on December 31, 2021.
- The plaintiffs filed after that date and argued that they had until 90 days after the governor's latest state of emergency order expired, so sometime in June, 2022.
- The Court correctly concluded that the sunset provision ended the entire statutory scheme on December 31, 2021, regardless of the state of emergency order.

Final Table, LLC v. Acceptance Cas. Ins. Co., 328 Or App 620 (2023), review denied, 372 Or 63 (2024)

Final Table, LLC v. Acceptance Cas. Ins. Co

- This was the first Oregon case to analyze an assault and battery exclusion in an insurance contract
- Claim involved a shooting at a bar and a Dram Shop claim against a gambling parlor that served the shooter alcohol earlier in the night.
- The policy had a Dram Shop endorsement, but contained an assault and battery exclusion.
- Plaintiff argued that the claim did not arise out of an assault, but instead it arose out of overservice of alcohol.
- The Court of Appeals disagreed. I got the opinion in record time from Justice Kistler.

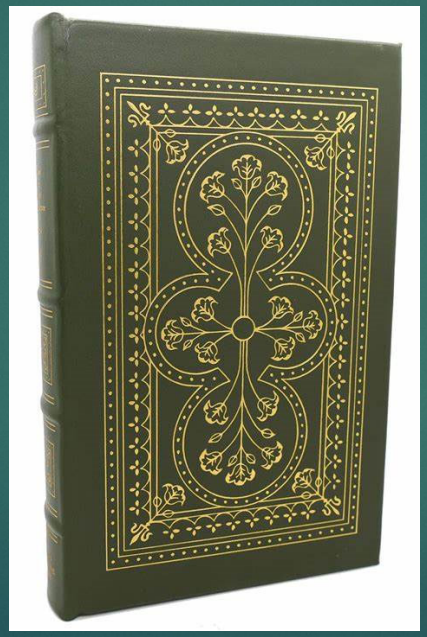
Doe v. First Christian Church of the Dalles, 328 Or App 283, 537 P.3d 954 (2023)

- This was a sexual tort claim against a church for alleged abuse by one member of a youth group against another, much younger member of the youth group.
- Trial was a month long in the Dalles, Oregon, in the same courtroom that the infamous Rajneeshee trial.
- A jury returned a verdict in favor of the defendant finding no causation.
- One of the issues on appeal was whether but for causation applied or substantial factor causation.
- The plaintiff's bar is always arguing in favor of the substantial factor test, and for good reason, for it is so nebulous that it is easier to meet.
- Defendants argue for but-for causation.

Doe v. First Christian Church of the Dalles

- The Court of Appeals agreed with me that but for causation applied.
- There was another evidentiary issue involving impeachment with prior convictions that was interesting.
- There, the issue was whether the trial court committed reversible prejudicial error when it permitted introduction of 2 prior convictions but excluded a couple other convictions. I conceded that the trial court erred, but argued that the error was harmless because Plaintiff was still able to impeach with the convictions that were introduced.
- The Court of Appeals agreed.

Martineau v. McKenzie-Willamette Med. Ctr., 332 Or App 473(2024)



Martineau v. McKenzie-Willamette Medical Center

- The last piece of this case, which has gone up to the Supreme Court and back down on other issues.
- Here the issue was whether the trial court erred by not introducing as substantive evidence portions or a learned treatise for the jury to take with it for deliberations.
- The Court of Appeals concluded that the trial court did not err when it refused to admit the demonstrative evidence as substantive evidence.
- Treatises are hearsay and may be used to impeach an expert, but are generally not publishable to the jury.

Fagan v. Salem Brain & Spine, LLC, 330 Or App 516 (2024)

- This was an unpublished decision that reaffirmed that the jury instruction that states "Physicians are not negligent merely because their efforts were unsuccessful. A physician does not guarantee a good result by undertaking to perform a service" is a proper instruction under Oregon law.
- The Court of Appeals had held that this was an incorrect or confusing instruction in *Martineau*, and the Court of Appeals agreed in that case. But the Supreme Court reversed and remanded on that issue as well as others.

Ritchie v. Strike a Cord

- This case, as well as one other, Fisher v. Lee, involve constitutional challenges to the statutory wrongful death noneconomic damages cap.
- The cap was amended to apply only to claims for wrongful death after the Supreme Court's decision in *Busch*. This change was in direct response to the *Busch* decision.
- Plaintiffs have now challenged the statute under the same constitutional provisions at issue in *Busch,* namely the remedy clause of the Oregon Constitution.
- The issues comes down largely to whether the remedy clause constrains the legislature with regard to legislatively created causes of action, or whether it applies only when the legislature seeks to modify or limit recovery on a common law claim

Ritchie v. Strike a Cord

- Because wrongful death claims have always been statutory claims, the argument is that the legislature is free to limit recovery on such claims without running afoul of the remedy clause.
- Plaintiffs argue, again, that there really is a wrongful death cause of action and always has been one. The problem with this is that the Oregon Supreme Court has repeatedly said since 1892 that there has never been a common law claim for wrongful death in Oregon.
- There has also nearly always been limitations on the recovery for wrongful death, with only a 20 year exception from the mid-60's to the mid-80's.