IN BRIEF

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Cases of Note

Personal Injury/Medical Expenses: The Oregon Court of Appeals recently decided two cases involving the recoverability of "written off" medical expenses in personal injury actions. In *White v. Jubitz Corp.* (March 26, 2008), the court held that (1) billed amounts later written off by a medical provider pursuant to an arrangement with the plaintiff's insurer are recoverable economic damages under ORS 31.710(2)(a); (2) those written-off amounts are collateral source benefits under ORS 31.580(1) by which a court may reduce a damage award; however, (3) write-offs resulting from Medicare coverage are federal Social Security benefits under ORS 31.580(1)(d) and are thus exempt from post-verdict deduction by the court. You can view the opinion at **www.publications.ojd.state.or.us/A128617.htm**. You can also view the companion case of *Cohens v. McGee* (March 26, 2008) at **www.publications.ojd.state.or.us/A131253.htm**.

Personal Injury/Discovery Rule: The Oregon Supreme Court decided two "discovery rule" cases recently. In applying the rule to an Oregon Tort Claims Act case, *Johnson v. Multnomah County Department of Community Justice* (February 14, 2008), the court held that the availability of a news item in the local media does not, by itself, determine whether a reasonable person would have read or heard that news, "much less what a reasonable inquiry based on that news would have uncovered." The court affirmed the court of appeals and reversed the circuit court, remanding for further proceedings. You can view the opinion at **www.publications.ojd.state.or.us/S054697.htm.**

In applying the discovery rule to a Section 1983 case, *T.R. v. The Boy Scouts of America* (March 13, 2008), the court found that the court of appeals erroneously concluded that (1) the plaintiff's knowledge of his injury necessarily triggered a duty to investigate further; and (2) the duty to investigate alone was sufficient to commence the running of the statute of limitations. The supreme court reversed the court of appeals and remanded for further proceedings. You can view the opinion at **www.publications.ojd.state.or.us/S054071.htm.**

OTCA/Tolling for Minors: In the August 2007 issue of *In Brief*, the Tips, Traps, and Resources included a brief description of *Baker v. City of Lakeside* (June 28, 2007) (**www.publications.ojd.state.or.us/S53925.htm**). While the *Baker* case dealt directly with application of the 60-day relation-back period (ORS 12.020) to the Oregon Tort Claims Act, the court also addressed the application of the minority tolling statute to the OTCA, noting that nothing in the legislative history of ORS 30.275(9) suggested that it was intended to deny minors bringing OTCA claims the advantage of a tolling provision that is available to them in all other actions. At least one Oregon circuit court has since ruled that *Baker* overrules *Lawson v. Coos Co. Sch. Dist. #13*, 94 Or App 387, 765 P2d 829 (1988) (which held that tolling for minors does not apply in OTCA cases).

Negligence/Construction Claims: In *Harris v. Suniga* (March 20, 2008), the Oregon Supreme Court affirmed the court of appeals and held that subsequent purchasers could main-

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tain a negligence action against the original builder for damages related to the physical injury to their property. The court distinguished this type of injury from a purely "economic loss" that would bar plaintiffs' claim, absent a special relationship or contract with defendants, and declined to overrule *Newman v. Tualatin Development Co*., 287 Or 47, 597 P2d 800 (1979). The court also dismissed defendants' concern that this could result in potentially limitless liability, stating that the builder could not be liable to more than one subsequent purchaser for the same damage. You can view the opinion at **www.publications.ojd.state.or.us/S054549.htm**.

Noneconomic Damages/Wrongful Death Claims: In the case of *Hughes v. PeaceHealth* (February 22, 2008), the Oregon Supreme Court upheld the cap in ORS 31.710 on noneconomic damages for wrongful death claims. The court rejected the plaintiff's arguments that the cap violated the constitutional provisions of the "remedy" guarantee and the right to a jury trial and adhered to *Greist v. Phillips*, 322 Or 281, 906 P2d 789 (1995) as good law. Distinguishing *Lakin v. Senco Products, Inc*., 329 Or 62, 987 P2d 463 (1999) and ordinary common law negligence claims, the court reiterated that wrongful death in Oregon is and always has been purely statutory, and thus the legislature retained the authority to establish the nature of recoverable damages. You can view the opinion at **www.publications.ojd.state.or.us/S053447.htm**.

Conferring on Motions to Dismiss: In *Anderson v. State Farm Mutual Auto Insurance Co.* (February 6, 2008), the Oregon Court of Appeals held that "futility" does not excuse compliance with the requirements of UTCR 5.010(1) and (3). A trial court *must* deny a motion to dismiss unless the moving party has filed a certificate stating that the parties have conferred or stating facts showing good cause for not conferring. (According to Judge John Wittmayer of Multnomah County Circuit Court, you need to include facts that permit the judge to conclude that you made a good faith effort to confer, e.g., you called the other lawyer and left a message about the purpose of your call, and he or she did not return your call. *See* "Tips from the Bench," *Multnomah Lawyer*, March 2008.) Because the defendant in *Anderson* did not attempt to confer, the court of appeals reversed the lower court's dismissal of the case and remanded. You can view the opinion at **www.publications.ojd.state.or.us/A130616.htm**.

Jury Instructions/Punitive Damages: In *Williams v. Philip Morris, Inc*. (January 31, 2008), the Oregon Supreme Court adhered to its earlier decision in *Williams v. Philip Morris, Inc*., 340 Or 35, 127 P3d 1165 (2006), affirming the court of appeals, reversing the circuit court, and remanding for further proceedings. The matter was before the court on remand from the United States Supreme Court, *Philip Morris USA v. Williams*, 549 US ___ (2007), directing the Oregon Supreme Court to reconsider its earlier holding that the trial court did not err in refusing to give a particular jury instruction proposed by Philip Morris on punitive damages. The court's task on remand was to apply the Due Process Clause of the Fourteenth Amendment, which requires states to prevent punitive damages from being used to punish for harms to nonparties. However, the court did not reach the federal constitutional question because it found that the requested jury instruction was flawed for other reasons, and therefore an "independent and adequate state ground" existed for affirming the trial court's ruling. You can view the opinion, which describes the procedural history of the entire litigation, at **www.publications.ojd.state.or.us/S051805.htm**.

Fact/Expert Witnesses: The Oregon Supreme Court held, in *Gwin v. Lynn* (January 31, 2008), that a prospective expert witness in a civil action may also be a fact witness who can be deposed before trial pursuant to ORCP 36B. The deposition must be limited to "facts that pertain to the witness's direct involvement in or observation of the relevant events that are personally known to the witness and that were not gathered primarily for the purpose of rendering an expert opinion." The court noted that nothing in *Stevens v. Czerniak*, 336 Or 392, 84 P3d 140 (2004), precluded this result. You can view the opinion at **www.publications.ojd.state.or.us/S055234.htm**.

OJIN/Official Court Register: In the case of *In re Wessels*, 214 Or App 545, 166 P3d 576 (2007), the Oregon Court of Appeals ruled that an ALJ's order was not entered "in the register" until it was entered in the Oregon Judicial Information Network. As support for its statement that the official register for Oregon circuit courts is OJIN, the court cited the October 8, 1990, Order No. 90-129, issued by the Chief Justice of the Supreme Court, which provides that all new entries to the "register," as defined by ORS 7.020 must be maintained in OJIN. See footnote 3 in the opinion. Practitioners should look on OJIN (**www.ojd.state.or.us/ojin/index.htm**) to determine whether a document has been officially filed and entered.

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