Multnomah Bar Association

Appellate Law Update

Justice Bronson James
Oregon Supreme Court

Judge David Rees
Multnomah County Circuit Court

Multnomah Bar Association
Continuing Legal Education Seminar

February 12, 2025

372 Or. 27
Supreme Court of Oregon.

Robert TREBELHORN, Petitioner on Review,
and
Attorney General, Judgment Creditor,
v.
PRIME WIMBLEDON SPE, LLC, a Delaware limited liability company; and Prime Administration, LLC, a Delaware Limited liability company, dba Prime Group, dba Wimbledon Square, dba Wimbledon Square Apartments, Respondents on Review,
and
Andrea Swenson, Defendant.

(CC 16CV40959) (SC S069417)
|
Argued and Submitted November 29, 2022
|
February 15, 2024

Synopsis

Background: Apartment tenant brought action against apartment complex's owner and manager, asserting claims of negligence and a violation of the Residential Landlord-Tenant Act, which stemmed from knee injury that tenant suffered at the apartment complex when his leg punched through a section of elevated walkway that had been weakened by dry rot. On post-verdict review following a jury verdict that awarded tenant $45,597.06 in economic damages for medical expenses, $250,000.00 in noneconomic damages for pain and emotional distress, and $10,000,000 in punitive damages, the Circuit Court, Multnomah County, Karin J. Immergut, J., 2019 WL 13274091, reduced the punitive damages to $2,700,000, which was approximately nine times the amount of compensatory damages awarded. The parties cross-appealed. The Court of Appeals affirmed without opinion. Tenant petitioned for review.

Holdings: The Supreme Court, Flynn, C.J., held that:

[1] degree of reprehensibility was high and would support significant punitive-damages award;

[2] jury's determination of actual damages was proper basis to evaluate the ratio guidepost of the analysis of whether $10,000,000 in punitive damages was grossly excessive;

[3] comparable sanctions were severe and supported a significant punitive-damages award; but

[4] $10,000,000 in punitive damages were grossly excessive and thus violated the Fourteenth Amendment's Due Process Clause.

Decision of Court of Appeals and judgment of circuit court affirmed.

Procedural Posture(s): On Appeal; Judgment.

West Headnotes (17)

[1] Federal Courts Punitive or exemplary damages

The question of whether a jury's punitive damages award is constitutionally excessive is entirely governed by federal law because there is no state law excessiveness challenge under the Oregon Constitution.

1 Case that cites this headnote

[2] Constitutional Law Punitive damages
Jury Re-examination or other review of questions of fact tried by jury

The jury's assessment of punitive damages is a determination of fact subject to the prohibition in the Oregon Constitution that no fact tried by a jury shall be otherwise re-examined in any court of the state, but that particular prohibition in the Oregon Constitution must yield to the prohibition of the Due Process Clause of the Fourteenth Amendment against arbitrary deprivations of liberty or property. U.S. Const. Amend. 14; Or. Const. art. VII (Amended), § 3.

2 Cases that cite this headnote

[3] Constitutional Law Punitive damages

The Due Process Clause of the Fourteenth Amendment prohibits states from imposing grossly excessive punitive damages awards. U.S. Const. Amend. 14.

[4] **Constitutional Law** Punitive damages

Damages Measure and Amount of Exemplary Damages

States have considerable flexibility in determining the level of punitive damages that they will allow, and the Fourteenth Amendment's Due Process Clause permits states to impose punitive damages in amounts that are reasonably necessary to vindicate their legitimate interests in punishment and deterrence; only when an award can be fairly categorized as grossly excessive in relation to those interests does it enter the zone of arbitrariness that violates the Due Process Clause. U.S. Const. Amend. 14.

[5] **Constitutional Law** Punitive damages

In determining the factual predicate for the award of punitive damages, as is relevant to determining if the award is grossly excessive so as to violate the Fourteenth Amendment's Due Process Clause, a court views the evidence in the record that is relevant to the award in the light most favorable to the party who won the award. U.S. Const. Amend. 14.

[6] **Constitutional Law** Punitive damages

Whether a particular punitive damages award is grossly excessive so as to violate the Fourteenth Amendment's Due Process Clause is a question that a court resolves by employing the applicable legal criteria—including the *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589, guideposts of (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity or ratio between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases—to determine if, as a matter of law, the jury's punitive damages award is grossly excessive; thus, in determining whether a particular punitive damages award is grossly excessive, a court must in some sense reexamine the evidence in the record—not to redecide the historical facts as decided by the jury, but to decide where, for purposes of the *Gore* guideposts, the conduct at issue falls on the scale of conduct that does or might warrant imposition of punitive damages. U.S. Const. Amend. 14.

[7] **Constitutional Law** Punitive damages

Degree of reprehensibility of defendant's conduct is most important indicium of reasonableness of punitive damages award, as is relevant to determining if award is grossly excessive so as to violate Fourteenth Amendment's Due Process Clause. U.S. Const. Amend. 14.

[8] **Constitutional Law** Punitive damages

Landlord and Tenant Damages

Degree of reprehensibility was high and would support significant punitive-damages award, as was relevant to determine if jury's award of $10,000,000 in punitive damages, when compared with jury's award of approximately $300,000 in compensatory damages, was grossly excessive so as to violate the Fourteenth Amendment's Due Process Clause following verdict for apartment tenant on his claims that apartment complex's owner and manager were liable for negligence and for violating the Residential Landlord-Tenant Act, which claims stemmed from knee injury that tenant suffered at the apartment complex when his leg punched through a section of elevated walkway that had been weakened by dry rot; complex's owner and manager had ignored the safety risks posed by the failing staircases and walkways, and they admitted that the condition of the walkway violated the Act. U.S. Const. Amend. 14; Or. Rev. Stat. §§ 31.730, 90.730(6)(a).

More cases on this issue

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[9] **Constitutional Law** Punitive damages

Action taken or omitted in order to augment profit represents an enhanced degree of punishable culpability, as is relevant to determining if a punitive damages award is grossly excessive so as to violate the Fourteenth Amendment's Due Process Clause. U.S. Const. Amend. 14.

[10] **Constitutional Law** Punitive damages

As is relevant to determining if a punitive damages award is grossly excessive so as to violate the Fourteenth Amendment's Due Process Clause, the reprehensibility guidepost, and the subfactors that go into it, are all qualitative, not quantitative. U.S. Const. Amend. 14.

[11] **Constitutional Law** Punitive damages

Landlord and Tenant Damages

Jury's determination of actual damages was proper basis to evaluate the ratio guidepost when determining if jury's award of $10,000,000 in punitive damages, when compared with jury's award of approximately $300,000 in compensatory damages, was grossly excessive so as to violate the Fourteenth Amendment's Due Process Clause following jury verdict for apartment tenant on his claims that apartment complex's owner and manager were liable for negligence and for violating the Residential Landlord-Tenant Act, which claims stemmed from knee injury that tenant suffered at the apartment complex when his leg punched through a section of elevated walkway that had been weakened by dry rot; evidence of what actually occurred did not permit a reasonable inference that tenant could have, instead, suffered catastrophic injury. U.S. Const. Amend. 14; Or. Rev. Stat. §§ 31.730, 90.730(6)(a).

More cases on this issue

[12] **Constitutional Law** Punitive damages

As is relevant to determining if a punitive damages award is grossly excessive so as to violate the Fourteenth Amendment's Due Process Clause, while it is generally appropriate to compare the amount of punitive damages to the actual and potential harm to the plaintiff, even if that produces a number that is substantially greater than the amount of damages that the jury actually awarded, the extent of potential harm to a plaintiff is a fact that must be based on permissible inferences from the evidence, and potential harm must be closely related to the harm that actually occurred, rather than an alternative injury scenario that is merely conceivable. U.S. Const. Amend. 14.

[13] **Constitutional Law** Punitive damages

As is relevant to determining if a punitive damages award is grossly excessive so as to violate the Fourteenth Amendment's Due Process Clause, court looks at relative severity of comparable sanctions to determine seriousness of misconduct. U.S. Const. Amend. 14.

[14] **Constitutional Law** Punitive damages

As is relevant to determining if a punitive-damages award is grossly excessive so as to violate the Fourteenth Amendment's Due Process Clause, the comparable-sanctions guidepost may militate against a significant punitive-damages award if the state's comparable sanctions are mild, trivial, or non-existent; however, the guidepost will support a more significant punitive-damages award when the state's comparable sanctions are severe. U.S. Const. Amend. 14.

[15] **Constitutional Law** Punitive damages

Landlord and Tenant Damages

Comparable sanctions were severe and supported a significant punitive-damages award, as was relevant to determine if jury's award of $10,000,000 in punitive damages, when compared with jury's award of approximately $300,000 in compensatory damages, was grossly

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excessive so as to violate the Fourteenth Amendment's Due Process Clause following jury verdict for apartment tenant on his claims that apartment complex's owner and manager were liable for negligence and for violating the Residential Landlord-Tenant Act, which claims stemmed from knee injury that tenant suffered at the apartment complex when his leg punched through a section of elevated walkway that had been weakened by dry rot; regulatory action to address the dangerous condition could have cost complex's owner and manager many millions of dollars of lost rents. U.S. Const. Amend. 14; Or. Rev. Stat. §§ 31.730, 90.730(6)(a).

More cases on this issue

[16] **Constitutional Law** Punitive damages
Landlord and Tenant Damages

Jury's award of $10,000,000 in punitive damages, when compared with jury's award of approximately $300,000 in compensatory damages, was grossly excessive and thus violated the Fourteenth Amendment's Due Process Clause following jury verdict for apartment tenant on his claims that apartment complex's owner and manager were liable for negligence and for violating the Residential Landlord-Tenant Act, which claims stemmed from knee injury that tenant suffered at the apartment complex when his leg punched through a section of elevated walkway that had been weakened by dry rot; although degree of reprehensibility was high and comparable sanctions were severe, the evidence did not permit the kind of inferences that could provide a basis for overriding due-process concerns that arose from the jury's assessment of punitive damages that exceeded the damages for harm to tenant by a ratio of 33 to 1. U.S. Const. Amend. 14; Or. Rev. Stat. §§ 31.730, 90.730(6)(a).

More cases on this issue

[17] **Constitutional Law** Punitive damages
Jury Re-examination or other review of questions of fact tried by jury

To the extent that a court determines that Fourteenth Amendment's Due Process Clause requires any reduction to a jury's punitive-damages verdict, which is an act that is otherwise prohibited by the Oregon Constitution's provision that no fact tried by a jury shall be otherwise re-examined in any court of the state, the court must give effect to both constitutional provisions by entering judgment for a reduced amount that is not lower than the reduction that due process requires. U.S. Const. Amend. 14; Or. Const. art. VII (Amended), § 3.

2 Cases that cite this headnote

****345** On review from the Court of Appeals.* (CA A170010)

Attorneys and Law Firms

Kathryn H. Clarke, Portland, argued the cause for petitioner on review. Mark McDougal, Kafoury & McDougal, Portland, filed the brief for petitioner on review. Also on the brief was Gregory Kafoury.

Raffi Melkonian, Wright Close & Barger, LLP, Houston, Texas, argued the cause for respondents on review. Matthew C. Casey, Bullivant Houser Bailey PC, Portland, filed the brief for respondents on review. Also on the brief were Jessica Z. Barger, Raffi Melkonian, and Brian J. Cathey, Wright Close & Barger, LLP, Houston, Texas.

Kristian Roggendorf, The Zalkin Law Firm P.C., San Diego, California, filed the brief for amicus curiae Oregon Trial Lawyers Association.

Before Flynn, Chief Justice, and Duncan, Garrett, James, and Masih, Justices, and Kistler and Balmer, Senior Judges, Justices pro tempore.**

Opinion

FLYNN, C.J.

***29** This case requires us to determine whether the jury assessed a "grossly excessive" amount of punitive damages, contrary to the prohibition of the Due Process Clause of the Fourteenth Amendment against arbitrary deprivations of liberty or property. Plaintiff suffered a serious knee injury

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at his apartment complex when his leg punched through a section of elevated walkway that had been weakened by dry rot. Defendants Prime Wimbledon SPE, LLC, and Prime Administration, LLC, who owned and managed the apartment complex, were aware that the walkway and other structures at the complex had deteriorated to the point that they required "life safety" repairs, but they had chosen not to repair the walkway on which plaintiff was injured. Plaintiff sued defendants for negligence and violation of Oregon's Residential Landlord-Tenant Act and prevailed. In addition to awarding plaintiff just under $300,000 in economic and noneconomic damages, the jury found that defendants' conduct justified imposing punitive damages of $10 million against each defendant.

On post-verdict review of the punitive damages verdict, the trial court concluded that the evidence permitted the jury to find defendants liable for some amount of punitive damages but that imposing $10 million in punitive damages would violate defendants' due process rights. The trial court also determined that the maximum amount of punitive damages that due process will permit on this record is nine times the amount of compensatory damages awarded by the jury and, accordingly, entered judgment for the reduced amount of just under $2.7 million in punitive damages against each defendant. On cross-appeals from the parties, the Court of Appeals agreed with all of the trial court's decisions and affirmed, and this court allowed review.

In briefing to this court, plaintiff argues that the jury's full amount of punitive damages must be reinstated, and defendants urge us to simply affirm the trial court's judgment for the reduced amount of $2.7 million in punitive damages against each defendant. Those arguments frame and narrow ****346** the scope of our inquiry. As we will explain, ***30** the sole question that we answer is whether the trial court correctly concluded that the Due Process Clause precluded the court from entering judgment for the full amount of punitive damages found by the jury. We agree with the trial court that, on this record, $10 million in punitive damages would violate defendants' due process rights. Accordingly, we affirm the judgment of the trial court and the decision of the Court of Appeals.

I. BACKGROUND

We state the facts in the light most favorable to plaintiff because he was the prevailing party before the jury. *Hamlin v. Hampton Lumber Mills, Inc.*, 349 Or. 526, 528, 246 P.3d 1121 (2011). At the time of his injury, in February 2016, plaintiff was 47 years old. He lived an active lifestyle, working as a high school baseball coach and running an after-school sports program for children. He was living in an apartment complex owned and managed by defendants in Portland, Oregon. One night, plaintiff was walking across a second-story concrete walkway, connecting his apartment building to a parking structure, when a portion of the concrete gave way under his right foot, creating a hole in the walkway of approximately nine by 18 inches. Plaintiff's right leg dropped into the hole up to his thigh, and he landed in a sitting position on the walkway. His right knee was in pain, but he was able to lift himself out of the hole and notified apartment staff of the hazard.

The next day, plaintiff's knee remained in pain and was swollen. He went to the hospital and was instructed to return if the swelling did not go down. In the weeks that followed, the swelling did not go down, and the pain and weakness in plaintiff's knee prevented him from participating in his normal activities. After five weeks without improvement, plaintiff returned to the hospital. The doctor diagnosed plaintiff with an acute meniscus tear in his right knee, resulting from his fall at the apartment complex.

Plaintiff tried to improve his knee through physical therapy and activity modification. But nearly a year after the fall, his activities were still significantly limited by knee weakness and instability. He was not able to coach ***31** as he previously had, by demonstrating to the kids how to perform certain actions, and he was no longer able to participate in many of the sports programs that he was tasked with running.

Plaintiff then underwent surgery to repair the injury to his knee, participated in physical therapy, and exercised his knee to improve strength and stability. By the time of trial, in May 2018, plaintiff had largely been able to return to his normal activities, but he still experienced lingering pain and weakness in his knee when engaging in more strenuous physical activities. His coaching career path had been disrupted. And, according to plaintiff's doctor, the surgery left plaintiff with an increased chance of developing arthritis in his knee.

Plaintiff sued defendants for negligence and violation of Oregon's residential landlord-tenant laws, and he sought economic damages of just over $45,000 plus noneconomic damages of $350,000. Plaintiff also obtained leave to amend his complaint to add a claim for punitive damages against

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each defendant in the amount of $10 million. *See* ORS 31.725 (describing process for pleading a request for punitive damages).

At trial, both defendants admitted that they had negligently maintained the walkway through which plaintiff fell and that they had violated the obligations of a landlord under the Residential Landlord-Tenant Act. Specifically, defendants admitted that they were negligent in failing to properly repair or replace cracked concrete on the walkway, in patching the walkway in a manner that was insufficient to withstand the weight of a pedestrian, and in failing to warn plaintiff of the defect in the walkway. Defendants, however, disputed the extent of damages that plaintiff suffered as a result of the incident and specifically denied the claim for punitive damages.

Before the case was submitted to the jury, defendants moved for dismissal of the claim for punitive damages, arguing that the evidence was insufficient to support a punitive damage award. By statute, punitive damages are unavailable "unless it is proven by clear ****347** and convincing evidence ***32** that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." ORS 31.730(1). The trial court rejected defendants' arguments and denied their motion.

At the conclusion of trial, the jury was instructed on the proof required for it to award punitive damages and on how to determine the amount for each defendant, if it decided to award punitive damages. Those instructions included that the jury should consider "separately for each [d]efendant":

> "(a) How reprehensible was that defendant's conduct, considering the nature of that conduct and the defendant's motive?
>
> "(b) Is there a reasonable relationship between the amount of punitive damages and plaintiff's harm? [and]
>
> > "(c) In view of that defendant's financial condition, what amount is necessary to punish them and discourage future wrongful conduct?"

The jury also was instructed that it "may not punish a defendant merely because a defendant has substantial financial resources" and that it could "not award punitive damages to punish the defendant for harm caused to persons other than the plaintiff," but that evidence "of harm suffered by persons other than the plaintiff as a result of the defendant's conduct" could "be considered in evaluating the reprehensibility of defendant's conduct."

After deliberating, the jury found that defendants' conduct caused plaintiff to suffer $45,597.06 in economic damages for medical expenses (the full amount sought) and $250,000.00 in noneconomic damages for pain and emotional distress. The jury also found that plaintiff had proved that both defendants had engaged in conduct that met the statutory standard for punitive damages and awarded $10 million in punitive damages against each defendant.

Following the jury's verdict, defendants asked the trial court to reduce the jury's punitive damages award, arguing that the amount set by the jury was "grossly excessive" ***33** and would violate defendants' rights under the Due Process Clause. The trial court agreed. The trial court concluded that, under the case law of this court and the United States Supreme Court, a punitive damages award that exceeds compensatory damages by a double-digit ratio will violate due process except in exceptional circumstances. Here, the amount of punitive damages that the jury assessed against each defendant was 33 times more than the amount that the jury found to be plaintiff's damages for the harm that he suffered, and the trial court concluded that the facts did not present the type of exceptional circumstances that would justify such a disparity. The trial court concluded that the maximum constitutionally permissible amount of punitive damages for each defendant on this record was nine times the actual damages awarded by the jury—$2,660,373.54—and, accordingly reduced the punitive damages against each defendant to that amount.

Plaintiff appealed the trial court's order reducing the punitive damages award, and defendants cross-appealed, arguing that the evidence was insufficient to support any amount of punitive damages. The Court of Appeals affirmed the trial court's judgment without opinion. *Trebelhorn v. Prime Wimbledon SPE, LLC*, 316 Or App 577, 500 P.3d 675 (2021). Plaintiff filed a petition for review in this court, which we allowed.

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II. ANALYSIS

As indicated above, plaintiff urges this court to conclude that the Due Process Clause requires *no* reduction of the punitive damages in this case. Pointing primarily to what he contends was extremely reprehensible conduct, plaintiff asks that we reinstate the $10 million in punitive damages that the jury assessed against each defendant. Plaintiff does not separately argue that, if due process requires a reduction of the punitive damages verdict, the trial court nevertheless reduced the award more than due process requires. And defendants simply urge us to affirm the reduced amount of punitive damages imposed by the trial court; in this court, they do not dispute that the evidence permitted ****348** the jury to award punitive damages, and they do not contend that the reduced amount imposed by ***34** the trial court is constitutionally excessive given the record in this case. Thus, the single question before us is whether the trial court and Court of Appeals correctly concluded that $10 million in punitive damages exceeds the amount that the Due Process Clause permits in this case. [1]

[1] **[2]** **[3]** The question of whether a jury's punitive damages award is constitutionally excessive is entirely governed by federal law because there is "no state law excessiveness challenge under the Oregon Constitution." [2] *Goddard v. Farmers Ins. Co.*, 344 Or. 232, 256, 179 P.3d 645 (2008) (internal quotation marks omitted). Indeed, under Oregon law, the jury's assessment of punitive damages is a determination of fact subject to the prohibition in Article VII (Amended), section 3 of the Oregon Constitution that "no fact tried by a jury shall be otherwise re-examined in any court of this state." *DeMendoza v. Huffman*, 334 Or. 425, 447, 51 P.3d 1232 (2002). That uniquely Oregon prohibition must yield, however, to the prohibition of the Due Process Clause of the Fourteenth Amendment against arbitrary deprivations of liberty or property. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434-35, 114 S Ct 2331, 129 L Ed. 2d 336 (1994). The Due Process Clause prohibits states from imposing "grossly excessive" punitive damages awards. [3] ***35** *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S Ct 1513, 155 L Ed. 2d 585 (2003). [4]

A. *Framework and Standard of Review*

[4] We have previously emphasized that " '[s]tates necessarily have considerable flexibility in determining the level of punitive damages that they will allow,' " and the Due Process Clause permits states to impose punitive damages in amounts that are " 'reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence.' " *Hamlin*, 349 Or. at 533, 246 P.3d 1121 (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568, 116 S Ct 1589, 134 L Ed. 2d 809 (1996)). Thus, "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Hamlin*, 349 Or. at 533, 246 P.3d 1121 (quoting *Gore*, 517 U.S. at 568, 116 S.Ct. 1589).

There is no easy answer to whether a particular award of punitive damages is "grossly excessive." Indeed, the Supreme Court has repeatedly refused "to set any 'rigid benchmark' beyond which a punitive damages award becomes unconstitutional." *Hamlin*, 349 Or. at 533, 246 P.3d 1121 (citing ****349** *Campbell*, 538 U.S. at 424-25, 123 S.Ct. 1513 and *Gore*, 517 U.S. at 582, 116 S.Ct. 1589). Instead, the Supreme Court has required courts to consider three "guideposts" when reviewing whether a punitive damages award is "grossly excessive": " '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity [or ratio] between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' " *Id.* at 418, 123 S Ct 1513 (citing *Gore*, 517 U.S. at 575, 116 S.Ct. 1589). And the Court has required appellate courts to consider those guideposts without any deference to the determinations of the trial court, in order to "ensure[ ] that an award of punitive damages is based upon an application of law, rather than a ***36** decisionmaker's caprice." *Campbell*, 538 U.S. at 418, 123 S.Ct. 1513 (internal quotation marks omitted).

[5] **[6]** In determining the factual predicate for the award of punitive damages, we view "the evidence in the record that is relevant to [the] award in the light most favorable to the party who won the award." *Goddard*, 344 Or. at 261, 179 P.3d 645; *see also Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 556, 17 P.3d 473 (2001) (court views the historical facts "in the light most favorable to the jury's verdict if there is evidence in the record to support them"). But whether a particular punitive damages award is grossly excessive is a question that we resolve by employing "the applicable legal criteria (including the three *Gore* guideposts) to determine if, as a matter of law, the jury's punitive damages award is grossly excessive." *Goddard*, 344 Or. at 263, 179 P.3d

645; *see also Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437, 121 S Ct 1678, 149 L Ed. 2d 674 (2001) (emphasizing that, under federal due process principles, "the level of punitive damages is not really a 'fact' 'tried' by the jury" (internal quotation marks omitted)). Thus, in determining whether a particular punitive damages award is grossly excessive, we "must in some sense reexamine the evidence in the record—not to redecide the historical facts as decided by the jury, but to decide where, for purposes of the [three] guideposts, the conduct at issue falls on the scale of conduct that does or might warrant imposition of punitive damages." *Goddard*, 344 Or. at 262, 179 P.3d 645.

B. *Guidepost Analysis*

Our analysis, therefore, is framed around the three guideposts that the Supreme Court has identified: reprehensibility, ratio, and civil penalties. We begin by assessing each guidepost separately, based on "the historical facts that a rational juror could find, based on the evidence in the record," and then consider the guideposts together in determining whether the punitive damages imposed by the jury was "grossly excessive." *See Goddard*, 344 Or. at 262, 179 P.3d 645.

1. *Reprehensibility guidepost*

[7] The degree of reprehensibility of a defendant's conduct is "[t]he most important indicium of the reasonableness ***37** of a punitive damages award." *Campbell*, 538 U.S. at 419, 123 S.Ct. 1513 (quoting *Gore*, 517 U.S. at 575, 116 S.Ct. 1589). The Supreme Court has specifically identified five factors to consider in assessing the degree of reprehensibility: whether "the harm caused was physical as opposed to economic; [whether] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [whether] the target of the conduct had financial vulnerability; [whether] the conduct involved repeated actions or was an isolated incident; and [whether] the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* Before analyzing those reprehensibility factors, we describe the historical facts related to reprehensibility that a rational jury could find and the reasonable inferences that the jury could draw from that evidence.

a. Historical facts related to reprehensibility

[8] The hole that formed in the elevated walkway as plaintiff walked across it occurred because defendants had ignored the safety risks posed by the failing staircases and walkways at their property. The property consists of two adjacent apartment complexes known as Wimbledon Square and ****350** Wimbledon Gardens. The two complexes were built in the 1970s and, between them, consist of nearly 600 apartment units in 72 buildings that are two- to three-stories high.

The apartments above the first floor are accessed through exterior staircases and elevated walkways connecting the buildings. Those staircases and walkways were originally constructed by pouring concrete over untreated wooden posts and beams. Over the years, the concrete would settle and wear, leading to cracks that allowed water to enter those structures. The water rotted the untreated wooden posts and beams, compromising the structural integrity of the staircases and walkways, as well as the railings that are intended to prevent people from falling over the sides of the staircases and walkways.

Defendant Prime Wimbledon SPE, LLC, purchased Wimbledon Square in the early 2000s and, soon after, acquired Wimbledon Gardens. Prime Wimbledon SPE, ***38** LLC, as the owner of the properties, contracted with defendant Prime Administration, which provides management services, to run the day-to-day operations at the properties, including maintenance. The maintenance staff had a yearly maintenance budget, but expenses of more than $5,000 required management approval. And larger maintenance projects would be budgeted annually by ownership and management.

The record contains no evidence prior to 2011 of whether defendants knew of potential risks posed by structurally compromised staircases, walkways, and handrails, or whether they took steps to address the structurally compromised conditions. In 2011, defendants brought in a contractor to submit bids to repair some of the staircases and walkways. That contractor later testified that many staircases and walkways needed immediate repair due to dry rot and that he had never seen dilapidation at that scale before. Although the contractor submitted bids, defendants did not hire him to repair the rotted structures.

Instead, defendants hired another contractor, Larsen, to replace a few landings in 2012 and 2013. Those projects revealed some rotted structures in the staircases, raising concerns among Prime Administration, employees that there was severe dry rot in similar structures through-out the property. Employees were concerned that, if the problems

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were not fixed, then someone could fall from a walkway or balcony and get seriously injured or die. Employees testified that Prime Administration's management was aware of the risks but did not take them seriously. For example, the onsite regional manager avoided a certain route to her office because it required crossing an uneven walkway that she joked might collapse. Prime Administration's chief operating officer joked that the property was so dilapidated that they should just burn it down.

Larsen assessed the entire property to identify needed repairs in 2014 and 2015, often accompanied by onsite maintenance staff and members of the upper management who were involved in developing the maintenance budget—namely, Prime Administration's vice president of capital and regional maintenance supervisor. According to ***39** Larsen, "[t]here were a lot of areas that needed to be fixed, more than about any other property that I can recall looking at." He put together a spreadsheet consisting of hundreds of items that needed repairs, including about $750,000 in repairs to address "life safety" issues. According to Larsen, "life safety" issues referred to staircases, balconies, landings, railings, and elevated walkways that were structurally compromised because a collapse of those structures "would cause life-or-death injury." The items covered by the $750,000 proposal addressed only those structures that could be identified as compromised before beginning the repairs. Larsen was certain that they would discover more rotted areas by opening up the concrete.

One of the areas that Larsen specifically identified as needing repairs was the elevated walkway where plaintiff was later injured. Concrete on the walkway was visibly cracked, and there was an area of one- to two-inch depression—like a puddle in the concrete—that was covered with a skim-coat of patching material. Those changes to the concrete indicated that the structural components of the walkway had been compromised. Indeed, when the concrete was removed from ****351** that walkway after plaintiff's injury, it showed that the wood joists underneath were "very rotten" and had been "for quite some time." The joists were covered by plywood with the concrete on top, and the weight of the concrete pushing down had caused compression of the "soft, wet wood" below.

Identifying and restoring all the compromised staircases and walkways would require expenditures well beyond the normal maintenance budget, necessitating approval from both management and ownership. Larsen's proposal was sent to management and ownership as part of the 2015 budgeting process. But defendants rejected most of Larsen's proposed "life safety" repairs. Rather than spending the approximately $750,000 that Larsen recommended for repairs to resolve the "life safety" issues, defendants spent about $225,000 on "life safety" issues and spent another $225,000 on non-"life safety" issues, such as replacing trim and siding. The only reason defendants gave for ***40** rejecting the proposal to address all "life safety" repairs was that the $750,000 cost "was too much."

Although Larsen was directed to replace some of the rotted structures, for others, he was directed to perform superficial repairs that he did not think were adequate to make the structures safe, such as fabricating brackets for the top of rotted posts that supported some walkways. That direction came from Prime Administration's vice president of capital. According to Larsen, those repairs were simply a "Band-Aid" that would provide support for "a year or two, maybe five. You never know." But, because the rot remained, it would continue to grow and eventually compromise the bracketed posts.

Other items identified as posing "life safety" risks did not even receive those superficial fixes. Prime Administration management instead directed staff to paint over rotted wood and rusted metal brackets supporting the staircases, walkways, and handrails. Although painting over rotted wood makes the wood appear to be in sound condition, it accelerates the rate of deterioration by trapping moisture inside the wood. The walkway where plaintiff was later injured was among the proposed "life safety" repairs that defendants did not make. The regional maintenance supervisor instructed onsite maintenance staff to put a skim coat of concrete over the crack in that walkway. That made the walkway look better, but it did nothing to address the structural deterioration that was causing the walkway to sag.

Maintenance staff stated that management consistently preferred putting cheap "Band-Aids" on a problem rather than fixing it, including after plaintiff's injury. Maintenance staff indicated that management did not provide them with the resources to properly fix problems. Instead of addressing the underlying safety risks, the regional manager directed leasing agents to take prospective tenants along certain pathways to avoid dilapidated areas. The onsite maintenance manager left shortly after plaintiff's injury because he was tired of "constantly having to fight to try to get things fixed between upper management." The next onsite maintenance manager encountered ***41** the same resistance. He sent an email

to management in March 2017 raising what he considered to be urgent safety concerns at the property—namely, a sagging elevated walkway that was pulling away from the building. He was reprimanded by the regional supervisor for making an email record of the safety problems. Later that year, the maintenance manager was a second victim of deteriorating conditions at the complex. Approximately a year after plaintiff's injury, the manager injured his back when a deteriorated concrete stair tread broke when he stepped on it.

In 2017, plaintiff described his injury to an acquaintance who worked as a fire code inspector. Concerned about potential fire code violations, the inspector examined the 58 buildings at Wimbledon Square. The inspector identified cracked concrete stairs, sagging elevated walkways, loose railings, and risers on staircases that were rusted or affixed to rotted wood. A maintenance staff member showed the fire inspector a rotted wooden beam that was supporting two stories of elevated walkways. The beam was so rotted that the staff person could push a pin through it. Each of those problems posed risks to tenants attempting to exit the property in an emergency. The fire inspector ****352** testified that he had never seen an occupied building in worse or more dangerous condition. The inspector cited defendants for code violations at each of the 58 buildings, requiring defendants to "repair loose or broken walkways, staircases, stairs, and railings in the exit path."

In preparation for trial, plaintiff hired a building code expert with 35 years' experience, who examined the property in 2018. When asked about the structural integrity of the staircases, railings, and elevated walkways, he testified:

> "This is probably the worst multifamily or occupancy building I have ever seen, as far as the means of egress go in regards to the stairs, the balconies. I just have not seen any worse. I have seen one small area as bad as many of the areas are in this case, but never a totality of dilapidation and rot that I've seen at this building's property."

He pointed to numerous examples of unsafe staircases and walkways, including unsafe conditions that resulted ***42** from the cheap fixes that defendants had carried out. He cited many places where staff had painted over dry rot and rusted metal fasteners and said that it would take many years of neglect to accumulate the amount of dry rot and corrosion that he saw at the property. He testified that there was "imminent danger" in many places at the property, it was one of the "most dangerous" residential properties he had seen in commercial use, and he did not believe that it was "safe for occupancy."

b. The degree of reprehensibility

According to plaintiff, we should conclude that defendants' conduct falls "at the extreme end" of each of the factors that the Supreme Court has instructed us to consider in assessing the reprehensibility of a defendants' conduct. We agree that the evidence permitted the jury to draw factual inferences favorable to plaintiff with respect to at least four of the factors: "the harm caused was physical as opposed to economic"; defendants' "conduct evinced an indifference to or a reckless disregard of the health or safety of others" and "involved repeated actions"; and the harm that plaintiff suffered "was the result of intentional malice, trickery, or deceit."[5] Moreover, viewing the historical facts in the light most favorable to plaintiff, a rational juror could draw reasonable inferences with respect to those factors that place the conduct of both defendants at the high end of reprehensible conduct that a state may punish. But, as we will explain, we are not persuaded by plaintiff's assertion that defendants' conduct falls at the "extreme end" of the range of reprehensible conduct that justifies punitive damages of the magnitude found by the jury.

There is no dispute that defendants caused plaintiff to suffer physical harm. And, given the jury instructions and verdict form, we know that the jury found that each defendant at least had "shown a reckless and outrageous indifference to a highly unreasonable risk of harm and ha[d] ***43** acted with a conscious indifference to the health, safety and welfare of others." *See* ORS 31.730 (describing statutory standard for recovery of punitive damages in a civil action). That statutory threshold for awarding *any* punitive damages describes conduct that is well onto the scale of reprehensible conduct that a state may punish. *See Campbell*, 538 U.S. at 419, 123 S.Ct. 1513 (explaining that whether conduct "evinced an indifference to *or* a reckless disregard of the health or safety of others" informs the degree of reprehensibility of that conduct (emphasis added)). And, viewing the historical facts in the light most favorable to plaintiff, a rational juror would have no difficulty finding that the conduct of both defendants rose to that level—as the trial court concluded.

Moreover, the jury could find that defendants were aware, for at least five years prior to plaintiff's injury, that structurally compromised stairs, balconies, and elevated walkways pervaded the complex and posed a ****353** risk of serious physical injury if not death to the tenants and others using

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the complex. The jury could find that defendants consciously rejected needed repairs to many of the deteriorated structures, including the walkway on which plaintiff was injured. And the jury could find that defendants' tortious conduct put at risk many hundreds of people who lived in the apartment complex over the years, in addition to those who visited, and caused actual injury to a second person after plaintiff was injured. In fact, the jury could find that defendants continued to reject performing other needed repairs for more than a year after plaintiff's injury, leading to a second injury. That actual and threatened harm to others is expressly relevant to our assessment of the degree to which defendants' conduct was reprehensible. *See Philip Morris USA v. Williams*, 549 U.S. 346, 357, 127 S Ct 1057, 166 L Ed. 2d 940 (2007) (emphasizing that, although "the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation, * * * conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few" and that "a jury consequently may take this fact into account in determining reprehensibility"); *see also Williams v. Philip Morris, Inc.*, 340 Or. 35, 55, 127 P.3d 1165 (2006), *vac'd on other grounds*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007), *on remand*, 344 Or. 45, 176 P.3d 1255 (2008) ***44** (explaining that the jury, "in assessing the reprehensibility of [the defendant's] actions, could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct"). And the jury could further infer from that evidence that defendants' decision not to address the deterioration of the walkway on which plaintiff was injured was part of a repeated pattern.

A rational jury also could reasonably infer that the harm that plaintiff suffered "was the result of intentional malice, trickery, or deceit." From the evidence described above, the jury could find that defendants covered up defects to make the structures appear safe to current and prospective tenants even though they knew that the defects actually posed an unreasonable "life safety" risk. Indeed, according to one of defendants' maintenance supervisors, "fresh paint over rotting wood" was "the Wimbledon Way."

[9] And a rational jury could find that defendants were motivated to disguise, rather than repair, the deterioration, because they put their profits ahead of the safety of the residents, believing that the misconduct would not be discovered. As the Supreme Court has emphasized, "[a]ction taken or omitted in order to augment profit represents an enhanced degree of punishable culpability." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 494, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008).

Finally, we highlight defendants' admission that the condition of its walkway violated the Oregon Residential Landlord-Tenant Act. *See* ORS 90.730(6)(a) (specifying that a "common area is considered unhabitable if it substantially lacks," among other things, "[b]uildings, grounds and appurtenances that are kept in every part safe for normal and reasonably foreseeable uses"). As we have previously concluded, "the Oregon legislature's affirmative action to protect qualitatively similar state interests permits us to consider defendant's statutory violation in our reprehensibility analysis." *Hamlin*, 349 Or. at 541, 246 P.3d 1121; *see also Gore*, 517 U.S. at 576-77, 116 S.Ct. 1589 (explaining that "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant ***45** support for an argument that strong medicine is required to cure the defendant's disrespect for the law").

[10] In sum, the evidence permitted the jury to draw reasonable inferences about defendants' conduct that suggest a high degree of reprehensibility. That conclusion "does not generate numerical answers at all, because the [reprehensibility] guidepost itself, and the 'subfactors' that go into it, are all qualitative, not quantitative." *Goddard*, 344 Or. at 257, 179 P.3d 645. But we have emphasized that it can be helpful to "compare the level of reprehensibility exhibited in various cases, and that comparison may lead us to a conclusion that the constitutionally permissible limit in a particular case is 'high' or 'low,' relative to the limit in another case." *Id.* Thus, ****354** although the scale of reprehensible conduct is not exclusively defined by a comparison to past cases, those cases nonetheless provide useful guidance.

At the most extreme end of the range of reprehensible conduct exhibited by defendants in our punitive damages cases is the conduct of the cigarette manufacturer Philip Morris, which the jury in *Williams* found liable for the wrongful death of a smoker. In that case, the jury found $821,485.50 in economic and noneconomic damages, and this court affirmed a $79.5 million punitive damages award as constitutionally permissible based largely on the reprehensibility of the defendant's conduct. *Williams*, 340 Or. at 44, 63-64, 127 P.3d 1165. In upholding the amount as within constitutional limits, we emphasized that "there can be no dispute that [the defendant's] conduct was extraordinarily reprehensible." *Id.*

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at 55, 127 P.3d 1165. As we described, the defendant "knew that smoking caused serious and sometimes fatal disease, but it nevertheless spread false or misleading information to suggest to the public that doubts remained about that issue." *Id.* The defendant had "engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others," even though it "always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number of that group." 340 Or. at 63, 127 P.3d 1165; *see also id.* at 55, 127 P.3d 1165 (noting that the defendant's ***46** "deceit thus would, naturally and inevitably, lead to significant injury or death"). [6]

For cases involving harm to a person, however, the exercise of comparing to other cases is of limited value, because *Williams* provides the only relevant reference point on the scale. Every other case from this court and every case from the Supreme Court has addressed reprehensibility in the context of conduct that caused only economic harm. Given the significance that the Court has placed on the distinction between reprehensible conduct that causes "physical as opposed to economic" harm, a comparison to those cases tells us that defendants' conduct was significantly more reprehensible and could justify a more significant amount of punitive damages. *See, e.g.*, *Goddard,* 344 Or. at 260, 179 P.3d 645 (emphasizing that "reprehensibility depends, to a large degree, on whether the harm caused was physical as opposed to economic" (internal quotation marks omitted)).

On the other hand, a comparison to *Williams* tells us that this case does not fall at the extreme end of reprehensible conduct for which the state may impose punitive damages. Two significant differences between the evidence here and the evidence in *Williams* require a conclusion that defendants' conduct is less reprehensible than the "extraordinarily reprehensible" conduct that allowed us to justify the award in *Williams*. First, although defendant's reprehensible conduct was more than an isolated occurrence, the earliest indication that defendants were aware of the need for "life safety" repairs was 2011—five years prior to plaintiff's injury. Second, although defendants acted with indifference to the risk of life-threatening harm to their tenants, there is no evidence that defendants' conduct had caused ***47** actual harm prior to plaintiff's injury and no evidence that it caused life-threatening harm at any point. Thus, the degree of reprehensibility in this case is not comparable to the "extraordinarily reprehensible" conduct of the defendant in *Williams*. *See* 340 Or. at 63, 127 P.3d 1165 (explaining that, "for two or more decades [the defendant] absolutely knew" that its reprehensible conduct "was ****355** damaging the health of a very large group of Oregonians—the smoking public—and was killing a number of that group"). As indicated above, however, the degree of reprehensibility is high and, accordingly, the constitutionally permissible amount of punitive damages also is high. *Goddard*, 344 Or. at 259, 179 P.3d 645.

2. *Ratio guidepost*

The next guidepost that the Supreme Court has directed us to consider is the "disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." *Campbell*, 538 U.S. at 418, 123 S.Ct. 1513. Although the Supreme Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," *Gore*, 517 U.S. at 582, 116 S.Ct. 1589, the so-called "disparity," or "ratio," guidepost "comes closest to providing numerical limits." *Goddard*, 344 Or. at 257, 179 P.3d 645. That is because the Supreme Court has, "at various times, alluded to specific numerical ratios" that provide a place to start. *Id*. at 257-58, 179 P.3d 645. For example, in one early case involving purely economic harm, the court concluded that a four-to-one ratio might be " 'close to the line,' [but that] it did not 'cross the line into the area of constitutional impropriety.' " *Gore*, 517 U.S. at 581, 116 S.Ct. 1589 (quoting *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S Ct 1032, 113 L Ed. 2d 1 (1991)). In another early case, the Court upheld an award of punitive damages where the "relevant ratio" between punitive damages and potential economic harm from the defendant's conduct "was not more than 10 to 1." *Id*. (describing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)). But the Court in *Gore* readily concluded that due process precluded the jury's finding of punitive damages that was "a breathtaking" 500 times greater than the fraudulently caused economic harm that the defendant caused by selling the plaintiff a new car without ***48** disclosing that the car had been repainted. *Id*. at 583, 585-86, 116 S.Ct. 1589. *Goddard* drew from those cases "a very general rule of thumb" that "the federal constitution prohibits any punitive damages award that significantly exceeds four times the amount of the injured party's compensatory damages, as long as the injuries caused by the defendant were economic, not physical." 344 Or. at 260, 179 P.3d 645.

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As indicated above, the Court has yet to consider a due process challenge to punitive damages in the context of reprehensible conduct that causes physical harm, but the Court has said that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425, 123 S.Ct. 1513. The Court later characterized that holding of *Campbell* as meaning that "a single-digit maximum is appropriate in all but the most exceptional of cases," albeit in the context of deciding a case that did not turn on the due process limitation on an award of punitive damages. *Exxon Shipping*, 554 U.S. at 514-15, 128 S.Ct. 2605; *see Goddard*, 344 Or. at 275, 179 P.3d 645 ("*Campbell* suggests that, except in extraordinary circumstances, a punitive damages award that is more than nine times the amount awarded in compensatory damages violates due process, no matter what the tort.").

[11] That is the guidance that the trial court followed in this case. As noted above, the trial court concluded that $10 million in punitive damages was grossly excessive. The trial court arrived at that conclusion by comparing the amount of punitive damages that the jury imposed against each defendant to the actual damages that the jury awarded—a ratio of 33 to one—and determining that the facts did not present the type of exceptional circumstances to justify that disparity. The court concluded that, on this record, due process required the court to limit punitive damages to an amount nine times more than the damages that the jury awarded for plaintiff's actual harm.

Plaintiff contends that the court erred in calculating the ratio under the second guidepost because it failed to account for the potential harm to plaintiff. In argument to the trial court, plaintiff cited the testimony of Larsen—the contractor that defendants hired to make repairs in 2012 ***49** and 2013—as ****356** permitting an inference that the walkway on which plaintiff was injured, like the other walkways throughout the complex, had deteriorated to a condition that presented "life safety issues." He also insisted that there was no need for evidence of how he potentially could have suffered greater harm because "that's nothing for the jury to decide." Instead, he contended that "the Court is invited, in its wisdom, to take a look at how dangerous this thing was" and conclude that the potential harm could have included death or paralysis. In briefing to this court, plaintiff repeats his argument that the relevant ratio should reflect the potential "that plaintiff could easily have sustained catastrophic injuries from a fall through a second-story walkway." Citing appellate cases involving jury awards of "many millions of dollars" for catastrophic injuries, plaintiff urges this court to conclude that his "potential harm" falls in that range. And he emphasizes that a ratio that takes into account millions of dollars in potential harm would be "vastly reduced" compared to the ratio that the trial court calculated.

Defendants insist, however, that the trial court correctly compared the punitive damages only to the amount of compensatory damages that the jury actually awarded in this case. They contend that plaintiff "misconceives" the law of "potential harm" in seeking to compare punitive damages to harm from injuries that plaintiff "did not suffer at all (but could have)." Defendants also insist that, even if potential harm can be based on injuries that plaintiff did not actually suffer, potential harm must be based on the record, not merely what a reviewing court can conceive of. And the record here, they contend, requires us to reject plaintiff's potential harm argument because there was no jury finding or instruction on potential harm and no evidentiary basis for plaintiff's "catastrophic injury" theory of potential harm.

[12] As we will explain, we agree with plaintiff that it generally is appropriate to compare the amount of punitive damages to the actual *and potential* harm to the plaintiff, even if that produces a number that is substantially greater than the amount of damages that the jury actually awarded. But we agree with defendant that the extent of potential harm to a plaintiff is a fact that must be based ***50** on permissible inferences from the evidence. And potential harm must be closely related to the harm that actually occurred, rather than an alternative injury scenario that is merely conceivable. Ultimately, we also agree with defendants that, on this record, there is no basis to infer that the possibility of plaintiff suffering a catastrophic injury was more than merely a conceivable alternative scenario. For that reason, we conclude that the trial court did not err in using the jury's determination of actual damages to evaluate the ratio guidepost.

a. Potential harm in the ratio in general

Although short-hand descriptions of the ratio guidepost sometimes describe a comparison between the punitive damages and the "compensatory damages," which represent the actual harm to a plaintiff, the Supreme Court has repeatedly emphasized that the relevant constitutional comparison focuses on "the disparity between the *actual*

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or potential harm suffered by the plaintiff and the punitive damages award." *Campbell*, 538 U.S. at 418, 123 S.Ct. 1513 (emphasis added); *see also TXO*, 509 U.S. at 460, 113 S.Ct. 2711 (explaining that the Court had "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages" and that "[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded" (emphasis added)); *Hamlin*, 349 Or. at 534, 246 P.3d 1121 ("[T]he Supreme Court has suggested that reviewing courts may consider not only the compensatory damages awarded by the jury, but also the potential harm that could have resulted from the defendant's acts."). We emphasized in *Goddard* that, "[b]y permitting a punitive damages award to be a multiple of 'potential harm,' the Court [in *Campbell* and *Gore*] demonstrated that the punitive damages award is not limited to some multiple of the compensatory damages actually awarded by the trial court." 344 Or. at 269, 179 P.3d 645.

****357** Defendants, nevertheless, cite this court's decision in *Goddard* for the proposition that "the correct amount to use in calculating the maximum constitutionally permissible punitive damages award under Oregon law" is the amount of compensatory damages that the jury awarded ***51** plaintiff. But our decision in *Williams* makes clear that, under Oregon law as well as under federal law, the amount of punitive damages can be compared to a plaintiff's "potential harm," not just the amount of compensatory damages actually awarded by the jury. There, we described *Gore*'s ratio guidepost as requiring the court to compare a "numerator" that "is fixed by the punitive damages award" to a "denominator" that includes "not only the harm actually suffered by [the] plaintiff, but also the potential harm to [the] plaintiff."[7] 340 Or. at 60, 127 P.3d 1165. And in considering the size of the ratio, we observed that the plaintiff's decedent had died "shortly after being diagnosed with cancer" and that, had he lived longer, his "economic damages could easily have been 10 or more times the amount awarded." *Id.*

Goddard, on which defendants rely, did not change that principle, although we recognize the potential confusion. In *Goddard*, the jury awarded $20 million in punitive damages against an insurance company that had failed to settle a wrongful death action against its insured. The plaintiff argued that the punitive damages were not "grossly excessive" if compared to what the plaintiff understood to be "potential harm"—the amount of damages that the complaint in the underlying wrongful death action had *alleged* against the insured driver. This court rejected that view of "potential harm" and announced, without elaboration, that the concept of potential harm "has nothing to do with the amount that a jury *could* conceivably have awarded to plaintiff." 344 Or. at 268, 179 P.3d 645 (emphasis in original). "Rather," this court emphasized, "the actual and potential harm suffered by a plaintiff is a fact to be decided by the jury." *Id.* at 268-69, 179 P.3d 645.

Defendants rely on *Goddard*'s reference to what a jury "*could* conceivably have awarded" as meaning that the ratio must compare the amount of punitive damages found by the jury to the amount of compensatory damages that the same jury actually awarded for the plaintiff's actual harm. But in context, our reference in *Goddard* to what "a jury *could* conceivably have awarded" was a reference to the ***52** jury in the underlying wrongful death action, which was the source of the harm for which the plaintiff sought damages against the insurer. And, although unexplained, our statement that the amount alleged in the wrongful death case was simply the amount that the jury in that case "*could* conceivably have awarded" reflects the long-established rule that the relevance of the amount alleged as damages in a complaint is to provide notice to the defendant of the maximum amount that could conceivably be awarded. *See* ORCP 67 C ("A judgment for relief different in kind from or exceeding the amount prayed for in the pleadings may not be rendered unless reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered."). Because "the actual and potential harm suffered by a plaintiff is a fact to be decided by the jury," like all facts, "potential harm" must be based on more than the mere assertions of counsel in a pleading. Thus, we disagree with defendants here that the jury's actual award of compensatory damages is "the correct amount to use in calculating the maximum constitutionally permissible punitive damages award under Oregon law."

b. Potential harm as a fact

Goddard, however, presents a problem for plaintiff for a different reason. As we emphasized, "the actual and potential harm suffered by a plaintiff is a fact to be decided by the jury." 344 Or. at 268-69, 179 P.3d 645. Identifying potential harm as a fact to be decided by the jury means that the reviewing court is limited to considering the potential harm "that a rational juror could find, based on the evidence in the record." ****358** *Id.* at 262, 179 P.3d 645; *see also id.* at 263, 179 P.3d 645 (describing the applicable standard of review for

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predicate facts relevant to the three constitutionally prescribed guideposts). Consistent with that principle, in the two cases in which this court or the Supreme Court has upheld a punitive damages award based on "potential harm," the evidence of what actually occurred as a result of the wrongful conduct permitted a reasonable inference that the harm to the plaintiff could have been much worse.

The Supreme Court applied the concept of "potential harm" in affirming the award of punitive damages ***53** in *TXO*. There, the litigation involved allegations that TXO was attempting to interfere with Alliance Resources Corporation's (Alliance) oil and gas development rights. Alliance brought a slander of title claim to prevent the interference from succeeding, and the jury found in favor of Alliance, awarding $19,000 in compensatory damages and $10 million in punitive damages. 509 U.S. at 450-51, 113 S.Ct. 2711. Although the punitive damages award was 526 times greater than the actual compensatory damages award, the Court nevertheless rejected TXO's constitutional challenge to the punitive damages award. *Id.* at 459, 462, 113 S.Ct. 2711.

A plurality of the Court specifically relied on the potential harm that might have resulted had TXO succeeded in its effort to deprive the plaintiff of development rights. *Id.* at 462, 113 S.Ct. 2711. After considering the parties' arguments about evidence in the record, including the full value of the rights with which TXO attempted to interfere, a plurality of the court reasoned that "the jury could well have believed" that the amount potentially at stake was multiple millions of dollars. *Id.* at 461, 113 S.Ct. 2711. As the plurality opinion explains, "[w]hile petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme." *Id.* at 462, 113 S.Ct. 2711. [8] Considering that potential harm, the plurality concluded that "the disparity between the punitive award and the potential harm" did not "jar one's constitutional sensibilities." *Id.* (internal quotation marks omitted).

This court's decision in *Williams* offers another example of a record that provided a basis for including potential harm in the ratio that we consider under the second guidepost. 340 Or. at 60, 127 P.3d 1165. In *Williams*, after emphasizing that *Campbell*'s ratio takes into account "not only the harm actually suffered by [the] plaintiff, but also the potential harm ***54** to [the] plaintiff," we reasoned that the "economic damages could easily have been 10 or more times" the amount of economic damages that the plaintiff actually suffered had the decedent "lived long enough to incur substantial medical bills." *Id.* In explaining that statement, we pointed to evidence that the decedent had "died shortly after being diagnosed with cancer"—the disease caused by the defendant's wrongful conduct—and evidence of the amount of economic damages incurred during the six months that the decedent had lived. *Id.*

Thus, both *TXO* and *Williams* illustrate ways in which evidence of the actual wrongful conduct and the actual resulting harm support using a ratio that takes into account potentially greater harm that the defendant's conduct could have caused to the plaintiff. In other words, both cases illustrate applications of our holding in *Goddard* that "the actual and potential harm suffered by a plaintiff is a fact to be decided by the jury." *See* 344 Or. at 268-69, 179 P.3d 645. And we do not question that holding. But neither *TXO* nor *Williams* supports defendant's suggestion that there must be an express jury finding on "potential harm," because neither *TXO* nor *Williams* relied on an express jury finding regarding potential harm. [9]

****359** c. Conceptual limits on what counts as "potential harm"

The evidence of potentially greater harm to which plaintiff has pointed is the testimony from the contractor who repaired other walkways that had deteriorated to the point that they were at risk of collapsing and causing life-threatening injuries. We agree with plaintiff that the evidence permits an inference that the walkway on which plaintiff was injured also was deteriorated to the point that ***55** it was capable of collapsing and causing catastrophic injury. But defendants insist that plaintiff's theory of catastrophic harm relies on an alternative injury scenario that is too different from what actually occurred to constitute "potential harm" for purposes of the ratio guidepost. We are persuaded by defendants' argument.

Although neither *TXO* nor *Williams* defines "potential harm" or articulates a limitation on what the concept includes, those and other cases make clear that there are limitations. The first is that the ratio takes into account only the potential harm *to the plaintiff*. Although harm (or threatened harm) to others is relevant in assessing the reprehensibility of a defendant's wrongful conduct, we emphasized in *Williams* "that harm to others should not be considered as part of the ratio guidepost." 340 Or. at 61, 127 P.3d 1165 (citing *Campbell*, 538 U.S. at

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426-27, 123 S.Ct. 1513). Considering potential harm in the context of what actually occurred keeps the focus on how the defendant's wrongful conduct has affected the plaintiff.

Another important limitation is described by our emphasis in *Goddard* that the concept of potential harm "has nothing to do with" harm that the plaintiff "conceivably" could have incurred. We recognize that the line between "potential harm" and harm that is merely conceivable could be more clear. But both *TXO* and *Williams* illustrate potential harm that was more than merely conceivable. Those cases, thus, offer some guidance regarding what the conceptual limit means. In both cases, the wrongful conduct set in motion a chain of events that resulted in the actual harm to the plaintiff—in *TXO*, conduct to cause the plaintiff to lose development rights and, in *Williams*, conduct that caused the decedent to smoke and develop lung cancer. And in both cases, those actual events could have ended in far greater harm to the plaintiff. As this court reasoned in *Williams*, the decedent's early death meant that "[o]nly chance saved [the defendant] from" being liable for a much greater amount of economic damages. 340 Or. at 60, 127 P.3d 1165.

In later describing *TXO*, the Supreme Court assigned a label to the relationship between the actual events and the potential harm, which informs our understanding of what we may consider to be "potential harm." According to the ***56** Court in *Gore*, *TXO* endorses a ratio standard that considers the "relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred." 517 U.S. at 581, 116 S.Ct. 1589 (emphasis in original; internal quotation marks omitted).

We do not understand the Court, in describing potential harm as harm likely to result from the defendant's conduct, to mean that the potential harm must have been *more likely than not* to result. Nothing in *TXO*'s discussion of the potential harm to the plaintiff, if the defendant's attempted plan had succeeded, can be understood to suggest that the defendant's success was more likely than the actual result. But *Gore* directs us to understand "potential harm" as "likely" under the circumstances.

The nature of the ratio guidepost suggests a related conceptual limitation on harm that was "likely to result from the defendant's conduct." As we discussed above, the ratio of punitive damages to actual and potential harm is a significant indicator of whether the ****360** jury has found an amount of punitive damages that is a constitutionally permissible punishment. 372 Or. at 46-47, 544 P.3d at 354–55. The ratio "comes closest to providing numerical limits," *Goddard*, 344 Or. at 257, 179 P.3d 645, and as a practical matter, the ratio can easily be dispositive of the due process inquiry. *See Campbell*, 538 U.S. at 425, 123 S.Ct. 1513. But that significance is easily lost if the size of the ratio can be too easily modified, such as by substituting alternative injury scenarios that are too remote from what actually occurred to the plaintiff as a result of the defendant's wrongful conduct.

To some extent, every consideration of "potential harm" involves the proposition "if _____ had happened, then plaintiff's harm could have been greater." Contrasting *Williams* and *TXO* with *Goddard* tells us that, if the variables that must be inserted to complete the proposition are too attenuated from the evidence of what actually happened, then the alternative harm is merely conceivable.

d. Application

That guidance persuades us that the possibility of catastrophic injury that plaintiff identifies does not qualify as "potential harm." The evidence of what actually occurred ***57** is that a portion of a second-story walkway gave way under plaintiff's right foot. Plaintiff describes the incident as his foot "puncturing through" the walkway. And the record documents a hole of approximately nine by 18 inches that was open to the ground below and into which plaintiff's leg slid up to his thigh. The extent to which plaintiff suffered actual harm as a result of that incident is established by the jury's findings regarding compensatory damages. And defendants contend that the record permits no inference that catastrophic injury, and much greater potential harm, was a likely result. We agree with defendants that the evidence of what actually occurred does not permit a reasonable inference that plaintiff could have, instead, suffered catastrophic injury.

It is possible to add variables to the "if _____ had happened" proposition to create a scenario under which plaintiff could have suffered a catastrophic injury. For example, if the hole had been big enough for his body to fall through, if—instead of punching through a hole—plaintiff's weight had triggered collapse of one of the cross-beams supporting a large section of the walkway, or if plaintiff had fallen sideways toward the railing and the railing collapsed under his weight, then plaintiff could have suffered a catastrophic injury. But those scenarios are not what actually happened to

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cause plaintiff's injury. Larsen's testimony, to which plaintiff pointed, may have permitted an inference that the wooden structures supporting the concrete had deteriorated to such a degree that the walkway posed a risk of collapsing under the weight of a person walking across it, and causing catastrophic injury. There is no evidence, however, that the catastrophic injury scenario that Larsen described was any more likely to occur to plaintiff on the night that his foot punched through the concrete than to any other person walking across at any other time. And that generic risk of catastrophic injury, if the walkway had failed in an entirely different way than it failed on the night that plaintiff was injured, depends on the kind of reasoning that we rejected in *Goddard*. It depends on an alternative scenario that is conceivable but too remote from the evidence of what actually happened for us to count it as "potential harm" under the ratio guidepost.

***58** We in no way discount the risk of catastrophic harm that defendants' conduct presented or the actual physical and emotional harm that plaintiff experienced when his foot punched through the walkway. But those are considerations that the jury addresses in awarding actual damages and in assessing the reprehensibility of the defendant's conduct. Thus, we understand that something different is meant by the "potential harm" that we may use in calculating the ratio. On this record, the trial court did not err in concluding that there was no basis for adding catastrophic "potential harm" to the ratio.

3. *Comparable sanctions guidepost*

[13] **[14]** The final guidepost instructs courts to consider "the difference between ****361** the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Campbell*, 538 U.S. at 418, 123 S.Ct. 1513. As this court has previously noted, "comparable sanctions suggest a legislative determination about what constitutes an appropriate sanction for the conduct" and "may give a defendant fair notice of the penalties that the conduct may carry." *Williams*, 340 Or. at 57, 127 P.3d 1165. In assessing comparable sanctions, we look at the "relative severity of the comparable sanctions" to determine the seriousness of the misconduct. *Id.* at 58, 127 P.3d 1165. "The guidepost may militate against a significant punitive damage award if the state's comparable sanctions are mild, trivial, or non-existent. However, the guidepost will support a more significant punitive damage award when the state's comparable sanctions are severe." *Id.*

[15] Plaintiff primarily relies on evidence from the fire inspector, who testified that he had the ability to "shut down" an apartment complex if he determined that the condition was "imminently dangerous" but that he generally does not exercise that authority because doing so at a complex like Wimbledon Square "would immediately displace hundreds of families." Given the 600 rental units at the complex, with an average rent of $1,250, plaintiff argues that the "shut-down sanction would presumably result in many millions of dollars of lost rents." Defendants do not dispute that a fire inspector has the authority to "shut down" an "imminently dangerous" apartment complex, and we agree with plaintiff ***59** that the record permits factual inferences from which to conclude that regulatory action to address the dangerous condition could have cost defendants many millions of dollars of lost rents.

Although that consequence is not technically a penalty for wrongful conduct, defendant also acknowledges that the City of Portland could impose monthly enforcement fees, totaling $643 per unit, for violating Portland's property maintenance regulations. Although defendant argues that such a penalty militates against a significant punitive damages award, we disagree. A fee of $643 per unit multiplied by 600 units easily could add up to multiple millions of dollars. We therefore conclude that the "comparable sanctions are severe" and support a significant punitive damages award. *See Williams*, 340 Or. at 58, 127 P.3d 1165.

C. *Final Considerations*

[16] Our final task is to determine, in light of the three guideposts and other applicable legal criteria, whether the $10 million in punitive damages that the jury assessed against each defendant is grossly excessive in this case as a matter of law. *See Goddard*, 344 Or. at 262-63, 179 P.3d 645 (describing that inquiry). We have concluded that two of the guideposts that govern our due process review of the punitive damages in this case—reprehensibility and comparable civil sanctions—support a significant punitive damages award. But the amount of punitive damages that the jury assessed against each defendant exceeds the approximately $300,000 in actual compensatory damages by a ratio of 33:1. And we have concluded that there is no evidentiary basis for increasing the second term of the ratio by inferring significantly greater "potential harm" to plaintiff, so the relevant ratio of punitive damages to the harm to plaintiff remains 33:1. That disparity is dramatically greater than the "single-digit ratio" that the Supreme Court has suggested is—"except in extraordinary circumstances"—the limit of what due process will permit, "no matter what the tort." *Id.* at 275, 179 P.3d

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645 (describing *Campbell*, 538 U.S. at 425, 123 S.Ct. 1513). Despite our observation above that the Supreme Court's general pronouncements about proportionality limits has never been tested by a case involving wrongful harm to a person, the caution ***60** best reflects that Court's view of the due process limits on a state's interest in punishing and deterring reprehensible conduct. Thus, as we acknowledged in *Goddard*, the second guidepost "suggests that due process normally will not permit a punitive damages award in excess of a single-digit ratio." 344 Or. at 259, 179 P.3d 645.

The qualifier regarding the ratio that due process "normally will not permit," of course, allows that there are limited exceptions. *See id*. at 260-61, 179 P.3d 645 (allowing that, ****362** higher ratios "might be appropriate in unusual circumstances"). *Goddard* catalogs the "few narrow circumstances" in which the Supreme Court or this court has held that due process does not preclude a greater disparity in the magnitude of punitive damage to harm: "(1) when a particularly egregious act causes only a small amount of economic injury; (2) when the injury is hard to detect; (3) when it is difficult to place a monetary value on noneconomic harms; and (4) when 'extraordinarily reprehensible' conduct —roughly comparable to the defendant's conduct in *Williams*—is involved." *Id*. at 270, 179 P.3d 645. The four examples described in *Goddard* share a common theme that, in those circumstances, limiting punitive damages to a single-digit ratio would "risk interfering with legitimate state interests by striking down awards that are reasonably calculated to deter and punish illegal conduct and that are, therefore, constitutionally permitted." *Hamlin*, 349 Or. at 537, 246 P.3d 1121.

The purpose of such examples is "to caution against the categorical use of ratios," not "to set forth an exclusive list of exceptions to a ratio requirement." *Id.* at 535, 246 P.3d 1121. But plaintiff's justification for imposing $10 million in punitive damages against each defendant falls within the fourth category that we identified in *Goddard*. Plaintiff insists that due process permits the unusually great disparity in this case between the amount of punitive damages and the harm to plaintiff, because it serves the state's legitimate interest in deterring and punishing wrongful conduct that easily could have gone undiscovered or unpunished. According to plaintiff, defendants engaged in the "egregious" misconduct of choosing not to pay for "life safety" repairs having "every reason to believe that their conduct would never be subject ***61** to any significant sanctions whatsoever"—because the witnesses who came forward had "nothing to gain and everything to lose from" bringing defendants misconduct to light.

Plaintiff is correct that deterring such misconduct is part of the state's legitimate interest in imposing punitive damages in civil cases. *See Hamlin*, 349 Or. at 533, 246 P.3d 1121. And, as described above, an inference that defendants were motivated to disguise, rather than repair, the deterioration in part because they believed that the misconduct would not be discovered and punished "represents an enhanced degree of punishable culpability." *See Exxon*, 554 U.S. at 494, 128 S.Ct. 2605. Indeed, we pointed to that inference in concluding that defendants' wrongful conduct demonstrates a high degree of reprehensibility. 372 Or. at 43-44, 544 P.3d at 352–53. But we have also concluded that defendants highly reprehensible conduct was, nevertheless, not comparable to the " 'extraordinarily reprehensible' conduct on the part of the defendant" in *Williams*. Thus, we are not persuaded that the evidence in this case permits the kind of inferences that "may provide a basis for overriding" our due process concerns that arise from the jury's assessment of punitive damages that exceed the damages for harm to plaintiff by a ratio of 33:1. *See Goddard*, 344 Or. at 258, 179 P.3d 645.

[17] Although we do not rule out the possibility that some amount greater than (or less than) a nine-to-one ratio might be the maximum constitutionally permitted award in a case like this, neither party has challenged the trial court's determination that $2.7 million in punitive damages against each defendant is the correct reduced amount. Their arguments presented the single question of whether $10 million in punitive damages exceeds the amount that the Due Process Clause permits in this case, and we have answered that question. [10] Accordingly, we affirm.

****363** ***62** The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

All Citations

372 Or. 27, 544 P.3d 342

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Footnotes

* Appeal from Multnomah County Circuit Court, Karin J. Immergut, Judge. 316 Or App 577, 500 P3d 675 (2021).

** Walters, J., retired December 31, 2022, and did not participate in the decision of this case. Nelson, J., resigned February 25, 2023, and did not participate in the decision of this case. DeHoog and Bushong, JJ., did not participate in the consideration or decision of this case.

1 In the course of responding to plaintiff's arguments, defendants suggest that the appropriate punitive damages amount for purposes of our due process analysis inquiry might be $20 million in punitive damages (combining the $10 million that the jury assessed against each defendant). But defendants do not develop a due process argument for that approach and, in any event, do not ask us to correct any aspect of the trial court's due process analysis. Thus, we assume that the trial court correctly framed the due process inquiry as whether $10 million in punitive damages against either defendant is constitutionally excessive given the record of harm that plaintiff suffered.

2 Oregon statutes impose limits on the imposition of punitive damages that are not in dispute in this case. Specifically, ORS 31.730(1) provides that "[p]unitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." And ORS 31.735(1) provides that 70 percent of any assessment of punitive damages is payable to the Attorney General —60 percent "for deposit in the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section" and 10 percent "for deposit in the State Court Facilities and Security Account."

3 The Due Process Clause of the Fourteenth Amendment provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law."

4 *Campbell* is the most recent Supreme Court decision to consider whether a punitive damages award was "grossly excessive" in violation of the Due Process Clause, but this court has subsequently examined that question on multiple occasions. Thus, we rely significantly on those more recent Oregon decisions to explain the governing law.

5 Plaintiff contends that defendants' tenants were financially vulnerable "because all were in low-income housing" and at risk of becoming homeless. Although defendants insist that no evidence supports those assertions, and we are inclined to agree, our assessment of reprehensibility does not ultimately turn on plaintiff's failure to identify the evidence that would permit a reasonable inference that defendants' tenants were financially vulnerable.

6 The Supreme Court later vacated our first *Williams* decision based on its concern that the jury may have punished the defendant for harm that its misconduct had caused to strangers to the litigation. *Philip Morris*, 549 U.S. at 357, 127 S.Ct. 1057. The Court explained that, although the jury may consider the risk of harm to others when determining the reprehensibility of the defendant's conduct, it may not *punish* the defendant for harm caused to others. *Id.* But the Court declined to consider whether the award in *Williams* was "grossly excessive." *Id.* at 358, 127 S.Ct. 1057. And this court on remand adhered to its original decision. *Williams v. Philip Morris Inc.*, 344 Or. 45, 61, 176 P.3d 1255 (2008), *cert. dismissed* 556 U.S. 178, 129 S.Ct. 1436, 173 L.Ed.2d 346 (2009). We therefore treat our reasoning and conclusions in our original *Williams* decision as approved of in the remand decision.

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7 As a mathematical concept, “numerator” and “denominator” generally refer to the terms of a fraction. Although a ratio is sometimes expressed as a fraction, we will refer to the relevant components as the “first term” (punitive damages) and the “second term” (actual or potential harm) of the ratio.

8 At trial, Alliance had introduced evidence that “the anticipated gross revenues from oil and gas development —and therefore the amount of royalties that TXO sought to renegotiate—were substantial.” 509 U.S. at 450, 113 S.Ct. 2711; *see also id.* at 450 n. 10, 113 S.Ct. 2711 (describing the detailed evidentiary record that Alliance created to support its calculation of the size of the income stream for TXO if it succeeded in its effort to acquire Alliance's development rights).

9 The jury in this case was instructed that, in determining the amount of punitive damages, it was to consider whether there was “a reasonable relationship between the amount of punitive damages and the plaintiff's harm.” Although defendants insist that plaintiff's “potential harm” argument must fail because the jury was not specifically instructed to consider “potential harm,” the concept arguably was included within the unqualified reference to “plaintiff's harm” in the given instruction. Because we ultimately conclude that plaintiff's argument fails for other reasons, we leave for another day questions about the extent to which either party must request a jury instruction on “potential harm.”

10 We recognize that, in *Goddard*, we described the methodology for performing a due process review in a way that arguably suggests a court must always determine the maximum constitutionally permitted amount of punitive damages. *See* 344 Or. at 261-62, 179 P.3d 645 (explaining that, “[i]f the court determines that the award *is* grossly excessive, it then uses the same guideposts to determine the highest lawful amount of punitive damages that a rational juror could award, consistent with the Due Process Clause”). And we reiterate, to the extent that a court determines that due process requires any reduction to a jury's punitive damages verdict—an act that is otherwise prohibited by the Oregon Constitution—the court must give effect to both constitutional provisions by entering judgment for a reduced amount that is not lower than the reduction that due process requires. *See Parrott*, 331 Or. at 556, 17 P.3d 473 (explaining that “the federal requirement of judicial review for excessiveness directly conflicts with the re-examination clause of Article VII (Amended), section 3, of the Oregon Constitution”). But, as *Goddard* describes, that is a separate determination the court must make. We reviewed that determination in *Goddard*, because we were presented with arguments that challenged both to the trial court's determination that the jury's punitive damages verdict was grossly excessive (by the plaintiff) and the trial court's determination of the reduced amount that was the maximum amount permitted by due process (by defendant). *Id.* at 251, 179 P.3d 645. Here, neither party has argued that, if the court correctly determined that the jury's punitive damages were grossly excessive, the court nevertheless incorrectly determined that $2.7 million is the maximum, reduced amount of punitive damages that due process permits, and we decline to take up that question unilaterally.

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369 Or. 855
(This disposition is referenced in the Pacific Reporter.)
Supreme Court of Oregon.

MOODY, individually, and in her capacity as the Personal Representative of the Estate of Steven "Troy" **Moody**, Deceased
v.
OREGON COMMUNITY **CREDIT** UNION

(A172844)(S069409)

June 23, 2022

(317 Or App 233)

Opinion
Review Allowed

All Citations

369 Or. 855, 512 P.3d 446 (Table)

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371 Or. 739
Supreme Court of Oregon.

Inez GOLLERSRUD, an individual, and David Gollersrud, an individual, Plaintiffs-Relators,
v.
LPMC, LLC, dba Landmark Professional Mortgage, an Oregon limited liability company, Defendant-Adverse Party,
and
Tyler Westby, an individual et al., Defendants.

(CC 16CV36031) (SC S069796)
|
Argued and submitted May 16, 2023.
|
December 21, 2023

Synopsis

Background: Litigants in lawsuit alleging fraud in a real estate investment relationship moved to quash subpoenas to one of the litigant's former employers that sought to compel production of all of litigant's e-mail messages stored on employers' servers on ground that some of the e-mail messages included material protected by attorney-client privilege. The Circuit Court, Marion County, Audrey Broyles, J., 2022 WL 20054064, denied the motion. Litigants petitioned for writ of mandamus. Alternative writ of mandamus directing the Circuit Court to either vacate its order or show cause why it should not do so was issued, and after Circuit Court declined to vacate its order, parties proceeded to argument.

Holdings: The Supreme Court, James, J., held that:

[1] e-mail messages on litigant's former employers' servers containing communications with attorneys were protected by attorney-client privilege;

[2] in asserting attorney-client privilege, burden is on party asserting privilege to establish (1) communications between a class of persons found in lawyer-client rule of evidence, that (2) were made for the purpose of facilitating the rendition of professional legal services, and when that is established, communications are presumptively confidential;

[3] overcoming presumption of confidentiality in privileged communications requires evidentiary showing, one focused on the circumstances and context of the communications, that must establish more than a risk that privileged communications might be disclosed;

[4] opposing party failed to make adequate evidentiary showing to overcome presumption of confidentiality of e-mails that litigant left stored on former employers' servers; and

[5] litigant did not waive attorney-client privilege by failing to delete e-mail messages containing confidential communications with attorneys from previous employers' servers.

Writ issued.

Baldwin, Senior Judge, did not participate.

Procedural Posture(s): Petition for Writ of Mandamus.

West Headnotes (15)

[1] Mandamus Nature and existence of rights to be protected or enforced

Writ of mandamus may be issued only to enforce a known, clear legal right.

[2] Mandamus Remedy by Appeal or Writ of Error

In most cases, direct appeal is a plain, speedy, and adequate remedy precluding mandamus jurisdiction. Or. Rev. Stat. § 34.110.

[3] Mandamus Modification or vacation of judgment or order

Mandamus Proceedings in civil actions in general

When a discovery order erroneously requires disclosure of privileged communications, a direct appeal may be inadequate, so that mandamus jurisdiction may exist, because, once a privileged communication has been disclosed,

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the harm cannot be undone. Or. Rev. Stat. § 34.110.

[4] **Privileged Communications and Confidentiality** Purpose of privilege

Attorney-client privilege seeks to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. Or. R. Evid. 503.

[5] **Privileged Communications and Confidentiality** Waiver of privilege

Privileged Communications and Confidentiality Absolute or qualified privilege

Privileged Communications and Confidentiality Waiver of privilege

Although the attorney-client privilege is expansive, it is not absolute; rules of evidence allow for waiver of any evidentiary privilege, including the attorney-client privilege. Or. R. Evid. 503, 511.

[6] **Evidence** Rules of Evidence in General

The rules of evidence are adopted by the legislature and the court's construction of them follows the traditional method of statutory interpretation focusing on text, context, and legislative history.

2 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality** Presumptions and burden of proof

Generally, the burden is on the party asserting a privilege to establish that it applies.

[8] **Privileged Communications and Confidentiality** Presumptions and burden of proof

Litigant's declaration in support of objection to opposing party's proposed order requiring disclosure of litigant's e-mail messages to his co-litigant that were stored on his former employers' servers, that such e-mail messages included communications with his attorneys in the case and related cases, and other unrelated family and business legal matters, was sufficient to entitle litigants to presumption of confidentiality in any lawyer-client communications sent from, or stored upon, litigant's employers' servers, and thus, burden shifted to opposing party to overcome the presumption of confidentiality. Or. R. Evid. 503.

More cases on this issue

[9] **Privileged Communications and Confidentiality** Elements in general; definition

Privileged Communications and Confidentiality Presumptions and burden of proof

In asserting the attorney-client privilege, the burden is on the individual asserting the privilege to establish (1) communications between a class of persons found in lawyer-client rule of evidence, that (2) were made for the purpose of facilitating the rendition of professional legal services; when that is established, such communications are presumptively confidential, and at that point, the burden shifts to the proponent of the evidence to overcome the presumption of confidentiality. Or. R. Evid. 503(2)(a) to (e).

[10] **Privileged Communications and Confidentiality** Presumptions and burden of proof

The burden to overcome the presumption of confidentiality falls to the proponent of the evidence allegedly barred by attorney-client privilege; overcoming the presumption requires an evidentiary showing, one focused on the circumstances and context of the communications, that must establish more than

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a risk that privileged communications might be disclosed. Or. R. Evid. 503, 511.

[11] **Privileged Communications and Confidentiality** Presumptions and burden of proof

Opposing party in litigation over alleged fraud in a real estate investment relationship failed to make adequate evidentiary showing to overcome presumption of confidentiality under attorney-client privilege of e-mails that litigant left stored on his former employers' servers; opposing party submitted no evidence that litigant was aware of any employer policies concerning personal use of company equipment or monitoring of employee e-mail, that employers had ever acted on any e-mail monitoring policies, either in their treatment of litigant or other employees, or that employers even had such policies, and further, opposing party submitted no evidence that, whether in accordance with a policy or not, e-mail was, in fact, monitored by employers. Or. R. Evid. 503.

More cases on this issue

[12] **Appeal and Error** Privileged communications and confidentiality

When a court orders disclosure of communication subject to attorney-client privilege based on purported waiver, a reviewing court looks at the record in the light most favorable to disclosure, considering whether there was any evidence to support the factual finding. Or. R. Evid. 104, 503(1)(b), 511.

[13] **Privileged Communications and Confidentiality** Waiver of privilege

When a holder of the lawyer-client privilege voluntarily has disclosed material covered by the privilege, two considerations arise in determining whether a waiver has occurred: (1) whether the disclosure was itself a privileged communication and, if not, (2) whether the disclosure was of a significant part of the matter or communication. Or. R. Evid. 503, 511.

[14] **Privileged Communications and Confidentiality** Waiver of privilege

Was a voluntary disclosure of privileged material established?**No**

Litigant's departure from employment did not, per se, establish voluntary disclosure of material covered by attorney-client privilege in his e-mails that were stored on former employers' servers, for purposes of determining whether privilege was waived. Or. R. Evid. 503, 511.

More cases on this issue

[15] **Privileged Communications and Confidentiality** Waiver of privilege

Litigant's failure to delete e-mail messages containing confidential communications with his attorneys from his previous employers' servers upon severing his employment did not establish an express or implied disclosure to a third party as required for waiver of attorney-client privilege under rules of evidence, where there was no evidence that former employers had ever read, reviewed, or learned the contents of the e-mails, let alone a voluntary disclosure on litigant's part. Or. R. Evid. 503, 511.

More cases on this issue

****866** Original proceeding in mandamus. *

Attorneys and Law Firms

C. Robert Steringer, Harrang Long P.C., Portland, argued the cause for plaintiffs-relators. Julian Marrs filed the briefs. Also on the briefs were C. Robert Steringer and Adina Matasaru.

William Gaar, Buckley Law P.C., Lake Oswego, argued the cause and filed the brief for defendant-adverse party. Also on the brief was Jillian Pollock.

Lisa T. Hunt, Law Office of Lisa T. Hunt, LLC, Lake Oswego, filed the brief for amicus curiae Oregon Trial Lawyers Association.

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Before Flynn, Chief Justice, and Duncan, Garrett, DeHoog, Bushong, James, and Masih, Justices. **

Opinion

JAMES, J.

***741** This mandamus proceeding requires us to decide two issues: (1) whether email messages between a client and their attorney, sent from, and stored on, the client's employer's email system are "confidential communications" as defined in OEC 503(1)(b); and (2) if they are, whether an employee's act of leaving employment and, in turn, leaving those email messages on the employer's email system constitutes a disclosure of communications and a waiver of the attorney-client privilege under OEC 511. As to the first issue regarding confidentiality under OEC 503(1)(b), based on the text, context, and legislative history, we conclude that communications between a client and an attorney, made for the purpose of facilitating the rendition of professional legal services to the client, are presumptively confidential. The client's mere use of an employer's email system, without more, does not overcome that presumption of confidentiality. As to the second issue concerning waiver of privilege under OEC 511, we hold that, at least on this record, leaving the emails on the employers' systems did not establish actual disclosure of communications - a necessary predicate to an OEC 511 waiver analysis. Although we do not foreclose the possibility that a party could make an evidentiary record demonstrating a lack of privilege under OEC 503(1)(b), or that such privilege had been waived through actual disclosure under OEC 511, for email communications sent from and stored on an employer's server, the record here is insufficient. Accordingly, a peremptory writ shall issue.

I. BACKGROUND

We take the facts from the record in the underlying trial court proceedings. *Barrett v. Union Pacific Railroad Co.*, 361 Or. 115, 117 n 1, 390 P.3d 1031 (2017). Relators David Gollersrud and his mother, Inez Gollersrud, alleged fraud, among other claims, in a real estate investment relationship between plaintiffs and several defendants, including ****867** LPMC, LLC (LPMC). Because one of the other defendants was involved in an ongoing bankruptcy proceeding, the parties agreed to informally abate the case pending the outcome of that proceeding. During that abatement period, they agreed to mediate and conduct informal, limited discovery.

***742** LPMC issued subpoenas to three of Mr. Gollersrud's former employers. In those subpoenas, LPMC sought to compel production of all communications, from 2008 to the present, between Mr. Gollersrud's work email addresses and nine other email addresses, among them that of Ms. Gollersrud. Relators sought to quash LPMC's subpoenas on the ground that some of the email messages between Mr. Gollersrud and Ms. Gollersrud included communications with their attorneys and were therefore protected under the attorney-client privilege, codified at OEC 503. [1] They alternatively proposed that the scope of the subpoenas be limited or that the trial court order that their attorneys be permitted to screen privileged documents produced in response to the subpoenas.

In response, LPMC argued that the email messages were not covered by the attorney-client privilege because (1) Mr. Gollersrud had no reasonable expectation of privacy in email communications transmitted using his employers' email systems; and (2) even if the email messages were privileged when transmitted, that privilege had been waived when Mr. Gollersrud failed to delete them from his employers' email systems before severing his employment relationships.

After taking the matter under advisement, the trial court denied relators' motion to quash the subpoenas. In a letter opinion, the trial court concluded that the email messages "between Mr. Gollersrud and [Ms.] Gollersrud to be recovered from the former employers' servers are not privileged." The trial court concluded by requesting that LPMC prepare a proposed order.

Relators objected to LPMC's proposed order and requested that the trial court hold an evidentiary hearing on the attorney-client privilege issue or, in the alternative, clarify its findings. In support of that objection, Mr. Gollersrud submitted a supplemental declaration that stated that (1) it was his "understanding that none of [his] three prior employers monitored the use of [his] computer or e-mail while [he] was employed with them"; (2) he had "received no notices ***743** from any of [his] three prior employers that they were monitoring [his] email use while [he] was employed with them"; (3) "[n]o third parties had a right of access to the computers or e-mail accounts [he] used while [he] was employed with [his] three prior employers"; and (4) his "computers and email accounts with [his] three prior employers were protected by passwords known only to [him]." Mr. Gollersrud's supplemental declaration is the only

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evidence in the record regarding his former employers' email policies.

Shortly after the objection was filed, the trial court action was stayed due to the bankruptcy of another defendant. When the litigation resumed, the trial court issued a letter opinion advising that it would sign LPMC's proposed order and denying relators' request for clarification of its prior ruling. It is not clear from the record whether the trial court considered the material in Mr. Gollersrud's supplemental declaration.

Relators then petitioned this court for a writ of mandamus. This court issued an alternative writ of mandamus directing the trial court to either vacate its order or show cause why it should not do so. The trial court declined to vacate its order. As a result, the parties proceeded to argument in this court.

II. ANALYSIS

A. *Jurisdiction*

[1] **[2]** **[3]** Because this case comes to us on mandamus, we first consider whether this court has jurisdiction to issue the writ. The statutory requirements for mandamus jurisdiction are set out in ORS 34.110. First, the writ may be issued only to enforce "a known, clear legal right." *State v. Moore*, 361 Or. 205, 212, 390 P.3d 1010 (2017). Second, the writ may be issued only if there is no "plain, ****868** speedy and adequate remedy in the ordinary course of the law." ORS 34.110. In most cases, direct appeal is a plain, speedy, and adequate remedy. *See State ex rel Automotive Emporium v. Murchison*, 289 Or. 265, 268-69, 611 P.2d 1169, *reh'g den*, 289 Or. 673, 616 P.2d 496 (1980). However, when a discovery order erroneously requires disclosure of privileged communications, we have held that direct appeal is inadequate, ***744** because, once a privileged communication has been disclosed, the harm cannot be undone. *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or. 476, 485, 326 P.3d 1181 (2014); *State ex rel OHSU v. Haas*, 325 Or. 492, 497, 942 P.2d 261 (1997).

We conclude that the issues presented by this case fall squarely within our mandamus jurisdiction. A peremptory writ of mandamus, if issued, would be used to enforce a legal right: namely, relators' right not to produce privileged communications. If the trial court's ruling requiring the disclosure of Mr. Gollersrud's email messages was erroneous because it did not correctly interpret OEC 503 and 511, then an appeal would not be adequate to remedy the harm caused by the disclosure of those protected communications. Mandamus being an appropriate vehicle to address the issue here, we turn to the merits.

B. *Overview*

[4] **[5]** The attorney-client privilege is one of the oldest and most broadly recognized evidentiary privileges. The privilege, codified at OEC 503,[2] seeks to " 'encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' " *Haas*, 325 Or. at 500, 942 P.2d 261 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)). Although the attorney-client privilege is expansive, it is not absolute; OEC 503 establishes threshold requirements for the privilege, and OEC 511 allows for waiver of any evidentiary privilege, including the attorney-client privilege. *Longo v. Premo*, 355 Or. 525, 533, 326 P.3d 1152 (2014).

OEC 503(2) provides, in part:

> "A client has a privilege to refuse to disclose and to prevent any other person from disclosing *confidential communications* made for the purpose of facilitating the rendition of professional legal services to the client[.]"

***745** (Emphasis added.) That general rule is subject to numerous caveats, but, overall, assertions of the attorney-client privilege in Oregon require (1) a communication between classes of persons described in OEC 503(2)(a) to (e); (2) that the communication be made for the purpose of facilitating the rendition of professional legal services to the client; and (3) that the communication be "confidential" within the meaning of OEC 503(1)(b), which defines a "confidential communication" to mean

> "a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."

The parties agree that resolution of this case hinges on the meaning of confidentiality, and in particular, the interpretation of "not intended to be disclosed" as used in OEC 503(1)(b).

[6] As such, the questions presented in this case are ones of statutory interpretation. The rules of evidence are adopted

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by the legislature and our construction of them follows our traditional method of statutory interpretation focusing on text, context, and legislative history. *Crimson Trace Corp.*, 355 Or. at 485, 326 P.3d 1181; *State v. Gaines*, 346 Or. 160, 171-72, 206 P.3d 1042 (2009). "The principal source of legislative history for the 1981 Oregon Evidence Code is the 1981 Conference Committee Commentary." *State v. Serrano*, 346 Or. 311, 324, 210 P.3d 892 (2009).

****869** C. *The Burden of Proof to Establish a Confidential Communication*

[7] We begin with the predicate issue of which party bears the burden of proving that communications are—or are not—confidential. Generally, the burden is on the party asserting a privilege to establish that it applies. *See Groff v. S.I.A.C.*, 246 Or. 557, 565, 426 P.2d 738 (1967) (regarding assertion of privilege as to disclosure and use of public assistance records under ORS 411.320). Here, relators asserted the attorney-client privilege in their motion to quash, but the support for that assertion initially consisted solely of Mr. Gollersrud's declaration, which stated, in relevant part:

> ***746** "I cannot recall all of the email communications I have sent to, received from or which include my mother over the course of almost ten years. However, I expect many of these communications would involve:
>
> "* * * * *
>
> "Communications including privileged communications with attorneys in this case, related cases, and other unrelated family and business legal matters."

After the court ruled, relators objected to its ruling and submitted Mr. Gollersrud's second declaration, which addressed his lack of knowledge of workplace email monitoring policies. No party here disputes that relators' initial motion to quash was sufficient to meet the first and second prongs of invoking the attorney-client privilege—*i.e.*, the existence of communications between a class of persons found in OEC 503(2)(a) to (e), and that the communications were made for the purpose of facilitating the rendition of professional legal services. The sole issue is whether the communications were confidential, and who bore the burden on that question.

The core of OEC 503(1)(b)'s definition of a confidential communication is a "communication not intended to be disclosed to third persons." It is a phrase framed in the negative. We have interpreted similar wording, in the context of other privileges, to create a presumption of confidentiality. In *Serrano*, this court determined that there can be a presumption of confidentiality when considering marital communications, and that that presumption can only be defeated if the "proponent of the evidence at issue establishes that *** intent to disclose is apparent from the circumstances." 346 Or. at 330, 210 P.3d 892. To reach that conclusion, the *Serrano* court determined that, based on OEC 505(1)(a) Commentary (1981), the legislature intended for communications made during marriage to be presumed confidential under OEC 505. *Id.* at 324-26, 210 P.3d 892. The court further explained that, if the other requirements for the privilege are met, the burden of persuasion shifts to the proffering party to rebut the presumption of privilege "by demonstrating that the communicating spouse did not intend the communication to be confidential." *Id.* at 326, 210 P.3d 892.

***747** We see no reason why the same presumption should not apply to OEC 503.[3] Both evidentiary privileges use the phrase "not intended to be disclosed to" others in their definitions for "confidential communication." OEC 503(1)(b); OEC 505(1)(a). In addition, the commentaries to both OEC 505 and OEC 503 contain nearly identical provisions explaining that the presence of intent to disclose must be apparent for the communications to not be confidential. OEC 503(1)(b) Commentary (1981) ("Unless an intent to disclose is apparent, however, the attorney-client communication is confidential."); OEC 505(1)(a) Commentary (1981) ("Unless intent to disclose is apparent, a communication between [spouses] is confidential."). Further, both privileges share the underlying goal of encouraging open communication between the persons in the protected relationships. *See Serrano*, 346 Or. at 325 n 6, 210 P.3d 892 ****870** (so stating). Although this court has not formally adopted a presumption of confidentiality in attorney-client privilege cases, it has previously found communications to be confidential when the parties merely state that they intended their communications to be confidential. *See Crimson Trace Corp.*, 355 Or. at 490-91, 326 P.3d 1181 (determining that the relevant communications were confidential because the parties intended for them to be confidential).

[8] **[9]** We thus conclude that, in asserting the attorney-client privilege, the burden is on the individual asserting the privilege to establish (1) communications between a class of persons found in OEC 503(2)(a) to (e), that (2) were made for the purpose of facilitating the rendition of professional legal

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services. When that is established, such communications are presumptively confidential. At that point, the burden shifts to the proponent of the evidence to overcome the presumption of confidentiality. In this case, as discussed, no party is disputing that Mr. Gollersrud's first declaration ***748** was sufficient to establish points one and two. As such, that declaration was sufficient to entitle the Gollersruds to a presumption of confidentiality in any lawyer-client communications sent from, or stored upon, Mr. Gollersrud's former employers' servers. The burden to overcome that presumption thus shifted to LPMC.

D. *Did LPMC defeat the presumption of confidentiality?*
It is undisputed that the communications between Mr. Gollersrud and his attorney were sent on Mr. Gollersrud's employers' email systems. LPMC argues:

> "When an employee chooses to use a third-party employer owned work computer and email systems to transmit and receive personal emails with the employee's personal attorney, the attorney-client privilege does not attach to the email communications. There is no legal prohibition that bars a private employer from searching, inspecting, or viewing emails transmitted or stored on the private employer's email system. There is accordingly a risk that the employer will access an employee's personal emails that were transmitted through and saved to the employer's email system. By choosing to use the employer's email system to send, receive, or save personal emails, the employee assumes the risk of disclosure of the personal emails to the employer."

In effect, LPMC argues that any time an email is sent from a system where third parties could potentially discover the contents, that establishes, *per se*, that such communications are not confidential. We decline to adopt LPMC's *per se* approach for a number of reasons.

First, the commentary to OEC 503(1)(b) provides that, "[u]nless an intent to disclose is apparent, *** the attorney-client communication is confidential." OEC503(1)(b) Commentary (1981). The commentary further notes that intent is to be "inferred from the circumstances, *e.g.*, taking or failing to take precautions." *Id*. The rule contemplates a circumstance-specific inquiry, not a one-size-fits-all approach.

Additionally, we have held that confidentiality is not defeated merely from the mere awareness of a risk of disclosure. For example, in *Chaimov v. Dept. of Admin. Services*, 370 Or. 382, 401, 520 P.3d 406 (2022), we rejected ***749** the plaintiff's argument that "the completed request forms at issue * * * were not confidential at any point in time, because [the department] had warned state agencies that the forms could be subject to disclosure at some point in the future." In doing so, we explained that "[c]onfidentiality as defined in OEC 503(1)(b) focuses on the client's intent" and that there was "no evidence that the state agencies or [the department] *intended* to disclose the forms at any time. The state agencies were only warned that the forms *might* be disclosed in the future, which is not the same." *Id.* at 401-02, 520 P.3d 406 (emphases in original).

Requiring something more than just the *possibility* that a communication might be disclosed to overcome the presumption of confidentiality is in keeping with the animating purpose of the privilege. The legislature enacted the current version of the attorney-client privilege in 1981. *See* Or. Laws 1981, ch. 892, § 32. OEC 503 is based on the ****871** federal analog, proposed Rule 503 of the Federal Rules of Evidence. *Longo*, 355 Or. at 534, 326 P.3d 1152; *see also* OEC 503 Commentary (1981) (OEC 503 "is based on proposed Rule 503 of the Federal Rules of Evidence, which was prescribed by the United States Supreme Court and submitted to Congress but not enacted."). Notably, a purpose of OEC 503 was to extend coverage "to areas in which current law [was] silent or unclear." OEC 503 Commentary (1981). As the commentary states, "[i]n the past, substantial authority has allowed an eavesdropper to testify to overheard privileged conversations and has admitted intercepted privileged letters. The evolution of ever more sophisticated techniques of recording and interception calls for the abandonment of that position." OEC 503(2) Commentary (1981). The legislature intended OEC 503 to be adaptive to changing times and changing modes of communication. OEC 503, is, accordingly, a rule grounded in practicalities and pragmatism. OEC 503 was intended to govern how people realistically communicate. *See, e.g.*, OEC 503(1)(b) Commentary (1981) ("The rule allows some disclosure beyond the immediate circle of lawyer and client and their representatives without impairing confidentiality, as a practical matter.").

LPMC's proposed *per se* rule conflicts with the pragmatism of OEC 503 in that it ignores the practical ***750** realities of modern life, and it does not reflect how many Oregonians live and work. For many, a clear divide between work and nonwork does not exist. *See* Leora Eisenstadt, *Data Analytics and the Erosion of the Work/Nonwork Divide*, 56 Am. Bus.

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L.J. 445, 449 (2019). The United States Bureau of Labor Statistics shows that roughly a third of the workforce—34 percent in 2022, worked remotely at least part of the week. U.S. Bureau of Labor Statistics, *American Time Use Survey —2022 Results* (2023), *available at* https://www.bls.gov/news.release/pdf/atus.pdf (accessed Dec 14, 2023). The common practice of telework has brought employer computer systems and employer paid network access into the home, with an accompanying blurring of the lines between private and work communication, and the network infrastructure supporting each. *See* Lawrence E. Rothstein, *Privacy or Dignity?: Electronic Monitoring in the Workplace*, 19 N.Y. L. Sch. J. Int'l & Compar. L. 379, 382 (2000). In short, for many Oregonians, personal and work business is increasingly conducted from devices and accounts that are not clearly delineated.

LPMC argues that any practical concerns are easily solved by requiring a strict adherence to a divide between work and personal email:

> "The employee can eliminate such risk and preserve the attorney-client privilege by taking reasonable precautions to protect communication from disclosure, such as using the employee's personal email account on the employee's personal computer, laptop, or phone, or communicating with the employee's attorney by phone."

LPMC's argument, which, as noted, is grounded in a risk of possible disclosure, presupposes that personal email contains no such risk. That assumption does not bear weight. "Though an employer may have a comparatively broad right to monitor the email messages flowing through its systems, they are not the only party with a qualified right to do so." Anthony Biondo, *Confidentiality and Attorney Client Privilege in the Internet Age: How to Handle Employer Monitoring of Employee Email*, 90 St John's L Rev 441, 443 (2016). Most personal email is hosted by "free" email service providers (Gmail, Yahoo! Mail, AOL Mail, etc.) who ***751** themselves reserve the right to monitor the contents. As an example, Google's current terms of service provide that when a user sends or receives "content," including emails, they provide Google with a "worldwide," "non-exclusive," and "royalty-free" license to "host, reproduce, distribute, communicate, and use"; "publish, publicly perform, or publicly display"; or "modify and create derivative works based on" that content. Google Terms of Service, http://policies.google.com/terms?hl=en-US (accessed Dec. 14, 2023). That reality of email communications, including personal hosted email, is another reason that a mere risk of disclosure cannot suffice, on its own, to overcome the presumption of confidentiality.

****872** In contrast to LPMC's *per se* approach, relators and *amicus* urge us to look to the framework adopted by the United States Bankruptcy Court for the Southern District of New York in *In re Asia Global Crossing Ltd.*, 322 B.R. 247 (Bankr S.D.N.Y. 2005). There, the bankruptcy court held that, to determine an employee's privacy expectations regarding computer files and email on an employer's servers, a court should consider four factors:

> "(1) does the [employer] maintain a policy banning personal or other objectionable use, (2) does the [employer] monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, or the use and monitoring policies?"

322 B.R. at 257.

In *Asia Global*, the court highlighted the similarities between the attorney-client privilege and the right to privacy, and it derived those factors from its right to privacy cases. *Id.* at 256-58. In that case, a bankruptcy trustee moved to compel production of email messages between employees and their outside counsel that were exchanged via the employer's email system. *Id.* at 252-54. The trustee had argued that, because the employees communicated with outside counsel using the employer's email system, the email messages were not protected by attorney-client privilege. *Id.* The court indicated that it presumed the email messages in question to be privileged and that the employees "subjectively intended that they be confidential." ***752** *Id.* at 258-59. Ultimately, after considering the four factors, the court concluded that the email messages were indeed privileged, despite both the employer's ability to access the email messages and the presence of an employer policy against personal email use, because the employer's policy against such use was not communicated clearly to the employees. *Id.* at 259-61. [4]

We also observe that the cases that LPMC cites in support of its argument that this court should adopted a *per se* rule do not, themselves, announce a *per se* rule; they rather rely on the existence of company policies that would make an employee's belief that the email messages were confidential unreasonable. *See, e.g.*, *In re Reserve Fund Sec. and Derivative Litig.*, 275 F.R.D. 154, 158-59 (S.D.N.Y. 2011) (concluding that email messages sent to and from

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the husband's work email address were not protected by the marital communications privilege where employees were regularly reminded that the email account was for business purposes only and email messages contained there were subject to disclosure); *Aventa Learning, Inc. v. K12, Inc.*, 830 F.Supp.2d 1083, 1108 (W.D. Wash. 2011) (finding that the attorney-client privilege did not attach to employee's email messages and communications created and sent or received on the employer's email systems and stored on the employer's servers, where employee had been informed that employer reserved right to access and disclose any file or communication stored on the employee's computer at any time).

[10] We agree with relators and *amicus* that overcoming the presumption of confidentiality must come from a particular evidentiary showing. However, the *Asia Global* factors may not be fully encompassing of all the circumstances that a court properly might consider. Accordingly, we state the rule in more general terms: The burden to overcome the presumption of confidentiality falls to the proponent of the evidence allegedly barred by privilege. Overcoming the ***753** presumption requires an evidentiary showing, one focused on the circumstances and context of the communications, that must establish more than a risk that privileged communications "*might* be disclosed." *Chaimov*, 370 Or. at 402, 520 P.3d 406 (emphasis in original).

[11] Applying the above considerations to the facts before us, we conclude that LPMC ****873** failed to make an adequate evidentiary showing to overcome the presumption of confidentiality. The record here is essentially blank. LPMC submitted no evidence that Mr. Gollersrud was aware of any employer policies concerning personal use of company equipment or the monitoring of employee email. LPMC submitted no evidence that Mr. Gollersrud's prior employers had ever acted on any email monitoring policies, either in their treatment of him, or other employees. Indeed, LPMC submitted no evidence that Mr. Gollersrud's former employers even had such policies at all. Finally, LPMC submitted no evidence that, whether in accordance with a policy or not, email was, in fact, monitored by the companies. Whether such evidence would have been sufficient to overcome the presumption of privilege—a point we do not decide—the record here lacked even that showing and was insufficient to overcome a claim of OEC 503 privilege.

E. *Waiver of Privilege Under OEC 511*

We now briefly address waiver of the attorney-client privilege under OEC 511. LPMC asserts that, even if Mr. Gollersrud's email messages were confidential communications that the attorney-client privilege protects, he waived any privilege when he failed to delete those email messages from his previous employers' servers upon severing his employment.

OEC 511 provides, in part:

> "A person upon whom [OEC 503 to 514] confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person *** voluntarily discloses or consents to disclosure of any significant part of the matter or communication."

[12] Unlike confidential communication under OEC 503(1)(b), which focuses on whether a communication was ***754** "not intended to be disclosed," OEC 511 waiver is centered around an actual disclosure, whether express or implied. *See* Edward J. Imwinkelried, 1 *The New Wigmore: Evidentiary Privileges* § 6.8, 894 (3d ed. 2017) (explaining that waiver of the privilege, in contrast, occurs after initial intent attaches and the holder's subsequent conduct manifests an intent to surrender the communication's confidentiality via disclosure). Accordingly, whether a communication was disclosed is first addressed as a factual inquiry by the trial court. OEC 104(1) (preliminary questions concerning, among other things, the existence of a privilege, shall be determined by the trial court); *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or. 336, 342, 838 P.2d 1069 (1992) (whether waiver of the attorney-client privilege occurred is a preliminary question of fact for the trial court under OEC 104). When a court orders disclosure, we look at the record in the light most favorable to disclosure, considering whether there was any evidence to support the factual finding. *See State ex rel Ware v. Hieber*, 267 Or. 124, 127, 515 P.2d 721 (1973). Whether a disclosure constitutes a waiver under OEC 511 is a question of law, reviewed for errors of law. *Goldsborough*, 314 Or. at 342, 838 P.2d 1069.

[13] In *Goldsborough*, we distinguished our previous decision in *Bryant v. Dukehart*, 106 Or. 359, 210 P. 454 (1922), by noting that, "[i]n *Bryant*, there was no showing that the party claiming the privilege had turned over the privileged material." *Goldsborough*, 314 Or. at 342, 838 P.2d 1069. And as we explained in *Haas*, it is the showing of an actual disclosure that is the predicate for further OEC 511 analysis:

> "[W]hen a holder of the lawyer-client privilege voluntarily has disclosed material covered by the privilege, two considerations arise in determining whether a waiver has

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> occurred: (1) whether the disclosure was 'itself a privileged communication' and, if not, (2) whether the disclosure was of a 'significant part of the matter or communication.' "

325 Or. at 498, 942 P.2d 261 (quoting OEC 511). Finally, in *Chaimov* we noted that "the person must disclose part of the communication itself in order to effect a waiver." 370 Or. at 401, 520 P.3d 406.

[14] **[15]** We have already explained why email messages sent from an employer's email system do not, *per se*, ***755** overcome the presumption of confidentiality. It follows that Mr. Gollersrud's departure from employment ****874** did not, *per se,* establish voluntary disclosure. Nothing in this record establishes even actual disclosure—there is no evidence that Mr. Gollerrud's former employers have ever read, reviewed, or learned the contents of the emails—let alone a voluntary disclosure on the part of Mr. Gollersrud. Without evidence of a voluntary disclosure, an OEC 511 analysis of waiver, on this record, is inapplicable.

In summary, we conclude that any email messages on Mr. Gollersrud's former employers' servers containing communications between relators and their attorneys are confidential communications as defined in OEC 503(1)(b) and are therefore protected under OEC 503, the attorney-client privilege. On this record, the confidentiality of those communications has not been overcome by a showing by LPMC. Similarly, this record is legally insufficient to establish an express or implied disclosure to a third party, as required under OEC 511.

A peremptory writ of mandamus shall issue.

All Citations

371 Or. 739, 541 P.3d 864

Footnotes

* On petition for alternative writ of mandamus from an order of Marion County Circuit Court, Audrey J. Broyles, Judge.

** Baldwin, Senior Judge, Justice pro tempore, participated in oral argument, but did not participate in the consideration or decision of this case.

1 Although relators initially opposed LPMC's subpoenas on several additional grounds, they did not raise those issues in their mandamus petition, and we do not consider them here.

2 The legislature amended OEC 503 in 2023. Or. Laws 2023, ch. 72, § 33. Because those amendments are not effective until January 1, 2024, and, in all events, are not material to our analysis, we cite the current version of the statute.

3 Although the *Serrano* court stated that reference to other evidentiary rules was "of limited value" in that case, 346 Or. at 323, 210 P.3d 892, we do not find the same problem here. In *Serrano*, one of the issues concerned a unique feature of the marital communications privilege: unlike many of the other privileges that are held by one person (attorney-client, psychotherapist-patient, physician-patient, and clergy-penitent privileges), the spousal communication privilege is held by both spouses. *Id.* at 323-24, 210 P.3d 892. The *Serrano* court found the case law on the other privileges unhelpful because it was tasked with deciding whether the "intent to disclose" inquiry focused on the communicating or the non-communicating spouse. *Id.* at 323-25, 210 P.3d 892.

4 *Asia Global*'s approach is similar to that employed in some other jurisdictions. For example, a California appellate court determined that the plaintiff-employee's email messages to her attorney using her business email account were not privileged in light of the employer's policy against personal use of the business email

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account and the employee's awareness of that policy. *Holmes v. Petrovich Development Co.*, 191 Cal.App.4th 1047, 1071, 119 Cal.Rptr.3d 878 (2011).

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KeyCite Yellow Flag - Negative Treatment
Review Allowed by Stone for Estate of Stone v. Witt, Or., August 8, 2024

331 Or.App. 722
Court of Appeals of Oregon.

Jerry C. **STONE**, Personal Representative
for the Estate of Marika Jeanne **Stone**,
an Oregon Resident, Plaintiff-Appellant,
v.
Shante Lynn **WITT** et al., Defendants,
and
Nancy L. Brennan, DO; St. Charles Health Systems, Inc.,
dba St. Charles Family Care, an Oregon Corporation;
High Desert Personal Medicine, LLC, an Oregon
limited liability company; Kevin Rueter, MD;
MosaicMedical, an Oregon Corporation; and Walgreen
Co., a Foreign Corporation, Defendants-Respondents.

A176439
|
Argued and Submitted May 22, 2023
|
April 10, 2024

Synopsis

Background: Personal representative of estate of bicyclist who was struck and killed by a vehicle brought negligence claims against medical providers and pharmacy that treated driver before she hit bicyclist, alleging that their acts of prescribing and dispensing large amounts of addictive drugs to driver violated their statutory standards of care and unreasonably created a foreseeable risk of harm. The Circuit Court, Deschutes County, Jack L. Landau, Senior Judge, granted defendants' motions to dismiss for failure to state a claim, reasoning that, because bicyclist was not defendants' patient, they were under no obligation to avoid creating a foreseeable risk of physical injury to her. Representative appealed.

[Holding:] The Court of Appeals, Aoyagi, P.J., held that professionals were not entitled to an across-the-board "no duty" rule merely because they were not in privity with those whom their negligent conduct affected.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

West Headnotes (7)

[1] **Negligence** Foreseeability

In an ordinary common-law negligence scenario, when a person unreasonably creates a foreseeable risk of physical harm, the class of potential plaintiffs to whom that person may be liable depends on foreseeability of risk to those plaintiffs.

1 Case that cites this headnote

[2] **Health** Duty

Health Duties and Liabilities to Non-Patients

In context of medical negligence claims alleging that a medical provider breached a statutory standard of care to an injured person, foreseeability principles are relevant to claims arising out of a special relationship, and if special relationship, or status or standard of conduct, does not prescribe a particular scope of duty, then common law principles of reasonable care and foreseeability of harm are relevant.

[3] **Negligence** Foreseeability

Negligence Foreseeability

Foreseeability plays a role in at least two overlapping common-law negligence determinations: first, it plays a role in determining whether defendant's conduct unreasonably created a foreseeable risk of harm to a protected interest of plaintiff such that defendant may be held liable for that conduct, and second, it plays a role in determining whether, because risk of harm was reasonably foreseeable, defendant may be held liable to plaintiff for particular harm that befell plaintiff, a

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concept which operates as a legal limit on scope of a defendant's liability for negligent conduct.

1 Case that cites this headnote

[4] **Appeal and Error** Summary Judgment

Appellate court would treat defendant's motion for summary judgment same as, and subject it to same standard of review as, other defendants' motions to dismiss for failure to state a claim, where motion for summary judgment was functionally equivalent to a motion to dismiss for failure to state a claim. Or. R. Civ. P. 21(A)(1)(h), 47(C).

More cases on this issue

[5] **Health** Acts of patients in general

Health Questions of Law or Fact and Directed Verdicts

Pretrial Procedure Fact questions

Trial court erred in dismissing, for failure to state a claim, negligence claims brought by personal representative of estate of bicyclist who was struck and killed by a vehicle, alleging that medical providers and pharmacy that treated driver violated their statutory standards of care and unreasonably created a foreseeable risk of harm by prescribing and dispensing large amounts of addictive drugs to driver; under controlling law of *Zavalas*, 861 P.2d 1026, professionals were not entitled to an across-the-board "no duty" rule merely because they were not in privity with those whom their negligent conduct affected, and it was for jury to decide whether each defendant's conduct unreasonably created a foreseeable risk of driver's subsequent conduct and type of harm that resulted from it. Or. Rev. Stat. § 677.095(1); Or. R. Civ. P. 21(A)(1)(h); Or. Admin. R. 855-115-0105(1).

1 Case that cites this headnote
More cases on this issue

[6] **Negligence** Trades, Special Skills and Professions

Professionals are not entitled to benefit of an across-the-board "no duty" rule merely because they are not in privity with those whom their negligent conduct affects.

[7] **Health** Duty

Health Duties and Liabilities to Non-Patients

Because of special relationship between physicians and patients, a physician's duty to protect a patient extends beyond risks created by the physician, and that affirmative duty also may extend to third parties in some circumstances.

****498** Deschutes County Circuit Court, 18CV14401; Jack L. Landau, Senior Judge.

Attorneys and Law Firms

Kathryn H. Clark argued the cause and filed the briefs for appellant.

Hillary A. Taylor argued the cause and filed the brief for respondents St. Charles Health Systems, Inc., dba St. Charles Family Care and Nancy L. Brennan, D.O.

Ruth A. Casby argued the cause for respondents MosaicMedical and Walgreen Co. Also on the briefs were Janet M. Schroer and Hart Wagner LLP.

Travis A. Merritt, Thomas F. Armosino Jr., and Frohnmayer, Deatherage, Jamieson, Moore, Armosino & McGovern, P.C., filed the brief for respondents High Desert Personal Medicine, LLC, and Kevin Rueter, M.D.

Before Aoyagi, Presiding Judge, and Joyce, Judge, and Jacquot, Judge.

Opinion

AOYAGI, P. J.

***724** While riding her bicycle, Dr. Marika **Stone** was struck and killed by a vehicle driven by Shantel **Witt**. Plaintiff, the personal representative of **Stone's** estate, appeals the dismissal of his negligence claims against Dr. Nancy Brennan and her employer St. Charles Health System, Inc.; Dr. Kevin Rueter and his employer High Desert Personal Medicine, LLC; MosaicMedical; and Walgreen

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Co. (collectively, "defendants"). [1] Defendants are medical providers and a pharmacy that, according to plaintiff, negligently treated **Witt** before she hit **Stone**. In the operative complaint, plaintiff alleges that defendants violated their statutory standards of care by prescribing and dispensing large amounts of addictive drugs to **Witt**, and by not taking steps to prevent **Witt** from misusing those drugs, despite knowing or having reason to know that **Witt** was abusing drugs. Plaintiff further alleges that, as a foreseeable result of defendants' conduct, **Witt** drove a vehicle while under the influence of those drugs and struck and killed **Stone**. The trial court dismissed plaintiff's claims against defendants for failure to state a claim, reasoning that, because **Stone** was not defendants' patient, they were under no obligation to avoid creating a foreseeable risk of physical injury to her.

On appeal of the resulting limited judgments, plaintiff challenges the dismissal of his claims. He argues that defendants' status as medical or pharmaceutical providers does not insulate them from the general obligation to avoid creating foreseeable risks of physical harm to others. As explained below, under these circumstances—where plaintiff alleges that defendants breached their statutory standards of care in treating their patient, and thereby not only created a risk of harm to the patient but also unreasonably created a foreseeable risk of physical injury to a third party—we agree. Accordingly, we reverse and remand.

***725** ****499** I. PLAINTIFF'S ALLEGATIONS

We state the facts as alleged in the complaint. *Tomlinson v. Metropolitan Pediatrics, LLC*, 362 Or. 431, 434, 412 P.3d 133 (2018). Given the nature of the legal issue on appeal, only the basic facts are necessary to our discussion.

Defendants Brennan, St. Charles, Rueter, High Desert, and MosaicMedical are medical providers that treated **Witt** at various times. Plaintiff alleges that they violated their statutory standard of care, ORS 677.095(1), as to **Witt** by prescribing her addictive drugs in excessive amounts and for excessive periods of time without appropriate medical reasons and despite knowing or having reason to know that **Witt** was abusing the drugs. *See* ORS 677.095(1) ("A physician licensed to practice medicine * * * by the Oregon Medical Board has the duty to use that degree of care, skill and diligence that is used by ordinarily careful physicians in the same or similar circumstances in the community of the physician or a similar community."). Plaintiff alleges that defendants' conduct foreseeably caused **Witt** to develop and continue to suffer from a substance abuse disorder and foreseeably created a risk that she would drive under the influence of the prescribed drugs and other drugs and injure a third party like **Stone**.

Defendant Walgreen is a pharmacy where **Witt** filled some of her prescriptions. Plaintiff alleges that Walgreen's pharmacists violated their rule-based standard of care, OAR 855-115-0105(1), as to **Witt** by continuing to dispense drugs to her despite knowing or having reason to know that **Witt** had a substance abuse disorder and was misusing and seeking excessive amounts of the drugs. *See* OAR 855-115-0105(1) (requiring practicing pharmacists to "[u]se that degree of care, skill, diligence and reasonable professional judgment that is exercised by a careful and prudent Pharmacist in the same or similar circumstances"). [2] Plaintiff alleges that Walgreen's pharmacists' conduct also foreseeably contributed to **Witt's** substance abuse disorder and foreseeably created a risk that she would drive impaired and injure someone like **Stone**.

***726** For purposes of this appeal, the parties treat the question of the physician and medical practice defendants' liability to plaintiff and the question of Walgreen's liability to plaintiff as raising the same legal issue. Under the circumstances, we do the same and do not distinguish among the defendants in that regard, using "statutory standards of care" to refer generally to both ORS 677.095(1) and OAR 855-115-0105(1).

II. FORESEEABILITY IN NEGLIGENCE LAW

Before discussing the specific facts of this case further, we pause to provide an overview of certain principles of negligence law that give context to the way in which the issues were framed below and now arise on appeal.

[1] In *Fazzolari v. Portland School Dist. No. 1J*, 303 Or. 1, 17, 734 P.2d 1326 (1987), the Supreme Court summarized the law of negligence:

> "[U]nless the parties invoke a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant's duty, the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff."

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Thus, in an ordinary common-law negligence scenario, when a person unreasonably creates a foreseeable risk of physical harm, the class of potential plaintiffs to whom the person may be liable depends on the foreseeability of the risk to those plaintiffs. *See, e.g.*, *Moody v. Oregon Community Credit Union*, 371 Or. 772, 784, 542 P.3d 24 (2023) (one of the elements of negligence is that the plaintiff " 'was within the class of persons' " the risk to whom made the defendant's conduct unreasonable (quoting *Solberg v. Johnson*, 306 Or. 484, 760 P.2d 867 (1988))).

[2] This case implicates the "unless" clause in *Fazzolari*—"unless the parties invoke ****500** a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant's duty." 303 Or. at 17, 734 P.2d 1326. Oregon courts have grappled with that clause for decades, including in the context of medical negligence claims alleging that a ***727** medical provider breached a statutory standard of care to a patient. In the process, the Supreme Court has made clear that foreseeability principles are relevant to claims arising out of a special relationship. "[I]f the special relationship (or status or standard of conduct) does not prescribe a particular scope of duty, then '[c]ommon law principles of reasonable care and foreseeability of harm are relevant.' " *Piazza v. Kellim*, 360 Or. 58, 73 n 9, 377 P.3d 492 (2016) (quoting *Cain v. Rijken*, 300 Or. 706, 717, 717 P.2d 140 (1986), quoted with approval in *Fazzolari*, 303 Or. at 16-17, 734 P.2d 1326); *see also Sloan v. Providence Health System-Oregon*, 364 Or. 635, 644, 437 P.3d 1097 (2019) (same); *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 336 Or. 329, 342, 83 P.3d 322 (2004) (same).

[3] But exactly *how* foreseeability principles are relevant to claims arising out of a special relationship is less clear. As discussed in *Piazza*, foreseeability "plays a role in at least two overlapping common-law negligence determinations." 360 Or. at 70, 377 P.3d 492. First, it plays a role in determining "whether the defendant's conduct unreasonably created a foreseeable risk of harm to a protected interest of the plaintiff such that the defendant may be held liable for that conduct—formerly described in terms of 'duty' and 'breach' as measures of negligent conduct." *Id.* Second, it plays a role in determining "whether, because the risk of harm was reasonably foreseeable, the defendant may be held liable to the plaintiff for the particular harm that befell the plaintiff"—"a concept that traditionally was referred to as 'proximate' cause and which, in our current analytical framework, operates as a legal limit on the scope of a defendant's liability for negligent conduct." *Id.* at 70, 377 P.3d 492.

Thus, although foreseeability is a single concept under *Fazzolari*, it appears in at least two different places when mapped onto the elements of common-law negligence. *See Fazzolari*, 303 Or. at 14, 734 P.2d 1326 (explaining that the court's decision in *Stewart v. Jefferson Plywood Co.*, 255 Or. 603, 469 P.2d 783 (1970), "made foreseeable risk the test both of negligent conduct and of liability for its consequences without phrasing the test in terms either of causation or of duty"); *accord Piazza* 360 Or. at 70, 377 P.3d 492 (noting that foreseeability's two roles in the common-law negligence framework are "overlapping").

***728** There is a fairly well-developed body of case law regarding the second role of foreseeability in special-relationship cases, *i.e.*, what was once referred to as proximate cause. For example, in *Sloan*, the court explained that "when a physician-patient relationship exists," the physician "has an affirmative duty" to meet the statutory standard of care as to the patient, but "[t]here is nothing in the definition of that duty that precludes foreseeability from being a limit on the scope of liability," and "the fact that physicians have a specified duty of care does not mean that foreseeability is irrelevant in medical negligence cases."[3] 364 Or. at 644-45, 437 P.3d 1097. In *Piazza*, the defendants had a special relationship with the decedent, and the issue was whether the complaint "alleged facts sufficient, if proved, to permit a jury determination that reasonable persons in defendants' positions would have foreseen a risk to [the decedent]'s safety of the kind of harm that befell her." 360 Or. at 73-74, 377 P.3d 492 (internal quotation marks omitted). ****501** In *Oregon Steel Mills, Inc.*, 336 Or. at 343-47, 83 P.3d 322, an accounting firm allegedly breached its duty to a client, resulting in the delayed sale of the client's stock, and the Supreme Court held that the firm could not be held liable for losses caused by a decrease in the stock price during the period of delay, because the price drop was attributable to market forces and not a reasonably foreseeable result of the delay.

The case law is still developing regarding the first role of foreseeability in special-relationship cases, *i.e.*, "whether the defendant's conduct unreasonably created a foreseeable risk of harm to a protected interest of the plaintiff such that the defendant may be held liable for that conduct." *Piazza*, 360 Or. at 70, 377 P.3d 492. This case pertains to that issue. Both below and on appeal, the parties have therefore focused their arguments on two cases that address that ***729** issue

—*Zavalas v. Dept. of Corrections*, 124 Or.App. 166, 861 P.2d 1026 (1993), *rev. den.*, 319 Or. 150, 877 P.2d 86 (1994), and *Tomlinson*, 362 Or. 431, 412 P.3d 133—which we discuss at length in our analysis. [4]

III. THE TRIAL COURT'S RULINGS

[4] We return to the specific facts of this case. As previously described, plaintiff brought negligence claims against defendants relating to **Stone's** death. Except for MosaicMedical, each defendant moved to dismiss the claims against them under ORCP 21 A(1)(h), on the ground that the alleged facts failed to state a claim because **Stone** was a member of the public, not defendants' patient. [5] MosaicMedical filed its motion later than the other defendants and, due to the timing, styled it a motion for summary judgment under ORCP 47 C, but it was "functionally equivalent to a motion to dismiss for failure to state a claim," so it is treated the same and subject to the same standard of review. [6] *Johnson v. Johnson*, 302 Or. 382, 388 n 5, 730 P.2d 1221 (1986).

As grounds for dismissal, defendants argued that the complaint alleges that defendants violated their standards of care as to **Witt**, rather than **Stone**, and that they could not be held liable for **Stone's** death when **Stone** was not their patient and, consequently, they owed no duty to **Stone**.

The trial court granted defendants' motions. In short, the court concluded that, as to professional negligence ***730** claims, foreseeability is not relevant to determining liability in the first instance. The court viewed existing Oregon case law as recognizing a "general rule that medical professionals are not liable to non-patient third parties for their professional negligence"—a no-duty rule—with a narrow exception that turns not on foreseeability but on case-by-case factors that the court identified in *Tomlinson*.

IV. THE PARTIES' ARGUMENTS ON APPEAL

On appeal, plaintiff challenges the dismissal rulings, arguing that there is no general rule that medical professionals are not liable to nonpatient third parties for their professional negligence and that, in these circumstances, defendants can be held liable if ****502** plaintiff proves his allegations. Plaintiff relies on our decision in *Zavalas* and argues that the Supreme Court's later decision in *Tomlinson* is distinguishable on the facts but legally consistent with *Zavalas*. Ultimately, plaintiff contends that defendants' status as medical providers does not insulate them from the obligation that everyone has not to unreasonably create foreseeable risks of physical harm to others.

In response, defendants argue that, except in very limited circumstances, physicians and pharmacists owe a duty only to their patients, that any potential liability to third parties is narrowly circumscribed by *Tomlinson*, and that *Zavalas* is largely irrelevant because it predates *Tomlinson*.

V. LEGAL ANALYSIS

[5] Plaintiff argues that this case is controlled by *Zavalas*, a 1993 decision of this court, and defendant argues that it is controlled by *Tomlinson*, a 2018 decision of the Supreme Court. We therefore proceed to discuss those cases.

In *Zavalas*, Shonkwiler caused a car accident while driving under the influence of Xanax and heroin, causing the death or physical injury of several children. 124 Or.App. at 170, 861 P.2d 1026. The plaintiffs, on behalf of the children, brought claims against Shonkwiler's physician, alleging that he "was negligent in prescribing Xanax to Shonkwiler when she presented symptoms of 'psychotic illness, depression, chronic bipolar ***731** mental disorder and chronic drug use,' and in authorizing the refill of that prescription." *Id.* The physician argued that he had no duty to the children. *Id.* He asserted that, as a matter of law, "a physician has no duty to third parties" and that, consequently, "a physician is shielded from liability to third parties who claim that the physician's negligent treatment of a patient was the foreseeable cause of their harm." *Id.* at 171, 861 P.2d 1026.

[6] We disagreed, rejecting the proposition that "that under no circumstances can a physician ever be liable to a nonpatient third party," and noting that we had found no authority for it. *Id.* at 173, 861 P.2d 1026. To the contrary, we concluded that when a physician prescribes drugs to a patient in violation of their statutory standard of care and, as a result, the patient foreseeably injures third parties, the physician may be liable to the third parties in negligence. *Id.* at 173-74, 861 P.2d 1026. Under *Zavalas*, "professionals are not entitled to the benefit of an across-the-board 'no duty' rule merely because they are not in privity with those whom their negligent conduct affects." *Delaney v. Clifton*, 180 Or.App. 119, 124, 41 P.3d

1099, *rev. den.*, 334 Or. 631, 54 P.3d 1041 (2002) (describing the holding of *Zavalas*); *see also Docken v. Ciba-Geigy*, 86 Or.App. 277, 280-81, 739 P.2d 591, *rev. den.*, 304 Or. 405, 745 P.2d 1225 (1987) (where the plaintiff's decedent died as a result of taking a drug prescribed for his brother, it was error to dismiss the plaintiff's negligence claims against the prescribing physician, pharmacy, and drug manufacturer, because we could not "say as a matter of law that the harm was not foreseeable or that the complaint fails to allege facts from which a jury could find defendants negligent").

This case is directly analogous to *Zavalas* and appears on its face to be controlled by *Zavalas*. However, defendants argue that *Tomlinson* effectively trumps *Zavalas*, so we next consider *Tomlinson*.

In *Tomlinson*, two parents brought negligence claims against several medical providers who had physician-patient relationships with the parents' first child, but not with the parents themselves. 362 Or. at 434, 412 P.3d 133. The parents alleged that the defendants had negligently failed to timely diagnose their first child's genetic disorder; that they would not have ***732** had a second child if they had known of the genetic disorder; that they suffered economic and emotional damages as a result of the defendants' negligence, related to their second child having the same genetic disorder; and that their damages were a foreseeable consequence of the defendants' negligence. *Id.* The trial court dismissed the plaintiffs' claim for failure to state a claim. *Id.*

On review, the Supreme Court reversed. As to the parents' claims, the court identified the primary issue in dispute as being whether the parents "had identifiable interests that ****503** defendants were legally obligated to protect under the facts alleged in their respective claims." *Id.* at 440, 412 P.3d 133. The defendants argued that "a direct physician-patient relationship between the parties" was required and that the plaintiffs could not state negligence claims based "on the foreseeability of the injuries alone." *Id.* at 442, 412 P.3d 133.

The Supreme Court agreed on the latter point—that the plaintiffs' negligence claims could not be based on foreseeability alone—"for two reasons." *Id.* The first reason was that "the parents allege[d] only economic and emotional injuries." *Id.* The court cited cases explaining that "liability for purely economic harm must be predicated on some duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care to prevent foreseeable harm," *Oregon Steel Mills, Inc.*, 336 Or. at 341, 83 P.3d 322 (internal quotation marks omitted), and that liability for emotional injuries cannot be based on foreseeability alone but instead requires "another 'legal source' of liability for the plaintiff to recover emotional distress damages," *Philibert v. Kluser*, 360 Or. 698, 703, 385 P.3d 1038 (2016). *See Tomlinson*, 362 Or. at 442, 412 P.3d 133 (citing those cases).

The second reason was that "the parents allege[d] that their injuries resulted from defendants' failure to take affirmative steps to protect them from a risk of harm that defendants did not create—namely, the reproductive risks associated with the parents' preexisting genetic composition." *Id.* at 442-43, 412 P.3d 133. The court recognized that distinction as one emphasized in the Restatement. "An actor's conduct creates a risk when the actor's conduct or course of conduct results in greater risk to another than the other would have ***733** faced absent the conduct." *Restatement (Third) of Torts: Phys. & Emot. Harm* § 7 comment o. "[A]ctors engaging in conduct that *creates* risks to others have a duty to exercise reasonable care to avoid causing physical harm." *Restatement* § 7 comment a (emphasis added); *see also Fazzolari*, 303 Or. at 17, 734 P.2d 1326 (generally, "the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably *created* a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff" (emphasis added)). By contrast, an actor who did not create the risk has a duty to protect against it only in limited circumstances: "An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38-44 is applicable." *Restatement* § 37; *see id.* § 40 (describing special relationships); *see also Tomlinson*, 362 Or. at 442-43, 412 P.3d 133 (citing *Restatement* § 37).

For those two reasons, the *Tomlinson* court agreed with the defendants that, "without some justification for providing legal protection, a person is not generally required to *affirmatively* protect the *economic and emotional* interests of others." *Tomlinson*, 362 Or. at 442, 412 P.3d 133 (emphases added).

The court disagreed, however, that the parents needed a direct physician-patient relationship with the defendants to state a negligence claim. *Id.* at 443, 412 P.3d 133. "A direct physician-patient relationship can be *one* ground for creating affirmative protections of a plaintiff's economic and emotional interests under negligence law." *Id.* (emphasis in original). However, "[i]t does not necessarily follow

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that a direct physician-patient relationship is the *only* such ground available to the parents." *Id.* (emphasis in original); *see also id.* at 444-45, 412 P.3d 133 (rejecting the defendants' proposition that "the very essence of medical services is to diagnose and treat *patients* and not to benefit nonpatients" (emphasis in original)).

To the contrary, the *Tomlinson* court concluded that, "in carrying out a professional obligation to a client, the professional may be required to protect the interests of a third party as well." *Id.* at 445, 412 P.3d 133. Whether the professional is required to do so must be decided on a case-by-case basis. *Id.* ***734** The court identified three factors that, upon consideration, led it conclude that the defendants *were* potentially liable to the parents in *Tomlinson*: (1) "whether the relationship between the parties is a type of relationship that generally entails a mutual ****504** expectation of service and reliance"; (2) "whether recognizing such a claim would interfere with or impair the loyalties that the professional owes to the client"; and (3) "as in other circumstances involving liability for economic and emotional injuries," "whether the potential plaintiffs were identifiable to the defendant or otherwise could be defined as a class that avoids indeterminate liability." [7] *Id.* at 446, 412 P.3d 133.

We agree with plaintiff that *Zavalas* and *Tomlinson* are not in conflict. The *Tomlinson* court diverged from the foreseeability path laid in *Fazzolari* and went down a different path for two specific reasons—because the parents sought damages only for economic and emotional harm, not physical injury, and because the defendants did not create the risk to which the parents were exposed. *Id.* at 442, 412 P.3d 133. It was each or both of those circumstances that led the court to conclude that more than foreseeability was required for the parents to state a negligence claim against the defendants. Moreover, we understand the factors discussed in *Tomlinson* to be relevant only in such circumstances. That is, when the typical foreseeability framework articulated in *Fazzolari* applies—when the plaintiff alleges that the defendant's conduct *created* a risk to a universally protected interest like the interest in avoiding physical harm—that is the end of the matter, and there is no need to consider the *Tomlinson* factors.

Neither of the circumstances from *Tomlinson* exists in this case. Here, plaintiff seeks damages for physical injury. *See Philibert*, 360 Or. at 703, 385 P.3d 1038 (the interest in being "free from physical harm at the hands of another" is "the simplest legally protected interest" (internal quotation marks omitted)). Further, unlike in *Tomlinson*, defendants allegedly *created* the risk to **Stone** by negligently prescribing ***735** and dispensing drugs to **Witt**. [8] That is a critical distinction under *Tomlinson* and the Restatement.

[7] Ultimately, we understand *Tomlinson* to hold that, because of the special relationship between physicians and patients, a physician's duty to protect a patient extends beyond risks created by the physician—and that affirmative duty also may extend to third parties in some circumstances. We also understand *Tomlinson* to hold that, when only economic or emotional damages are sought, foreseeability alone is not enough. We do *not* understand *Tomlinson* to hold that a physician has no duty to protect nonpatient third parties from risks created by the physician. Nor do we understand *Tomlinson* to hold that more than *Fazzolari* foreseeability is required to hold a physician liable for breaching a statutory standard of care in treating a patient under circumstances that unreasonably create a foreseeable risk of physical injury to a third party. [9]

****505** We emphasize that this is a case in which defendants allegedly breached their statutory standards of care to their patient. It is not a case where, for example, a physician complied with the standard of care for prescribing drugs to a patient and the patient then physically injured a third party—a situation in which imposing liability would create a much greater risk of interfering with or impairing ***736** the physician's duties to the patient. *Cf. Tomlinson*, 362 Or. at 466, 412 P.3d 133 (considering whether the potential for liability to third parties "would interfere with or impair the loyalties that the professional owes to the client"). This case involves defendants' alleged failure to comply with their statutory standards of care in treating and dispensing to their patient, **Witt**, and an allegedly foreseeable resulting physical injury to a third party, **Stone**.

In sum, *Zavalas* is controlling in this case, and *Tomlinson* does not change that. The trial court erred in dismissing plaintiff's negligence claims against defendants. If this case goes to trial, it will be for the jury to decide as to each defendant "whether the defendant's conduct unreasonably created a foreseeable risk of the subsequent conduct [by **Witt**], and the type of harm that resulted from it." *Scott v. Kesselring*, 370 Or. 1, 21-22, 513 P.3d 581 (2022).

Reversed and remanded.

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All Citations

331 Or.App. 722, 548 P.3d 497

Footnotes

1 We use “defendants” in this opinion to refer only to the defendants who appear on appeal. Plaintiff's claims against **Witt** are not at issue in this appeal, nor are plaintiff's claims against other defendants that were dismissed on statute-of-limitations grounds.

2 OAR 855-115-0105(1) contains identical operative language to *former* OAR 855-019-0200, *renumbered as* OAR 855-115-0105(1) (March 1, 2024), so we use the current numbering.

3 In *Fazzolari*, the court explained that “duty” is a conclusory term that stands in for either a circumstance-specific judicial evaluation of foreseeability or a categorical limitation on liability with articulable and reasoned origins. 303 Or. at 17, 734 P.2d 1326 (“ ‘Defendants sometimes deny liability * * * by arguing that although they may have breached a duty to someone, it was not a “duty *to*” the plaintiff. But that argument can be more directly phrased in terms of foreseeability, and perhaps other reasons for extending or limiting the scope of liability for defendant's negligence, than by using the conclusory word “duty” as a premise.’ ” (Quoting *Cain*, 300 Or. at 715, 717 P.2d 140.)). However, as it did in *Fazzolari*, the court has continued to use the word “duty” to describe the obligations imposed by special relationships and other articulable and reasoned limits on liability.

4 The court has also held that foreseeability determines how far liability extends in cases involving a somewhat different special relationship scenario—one in which the defendant's special, usually custodial, relationship with an actor creates an affirmative duty to protect the general public from foreseeable risks arising from the actor's conduct. *See, e.g.*, *Buchler v. Oregon Corrections Div.*, 316 Or. 499, 506-07, 853 P.2d 798 (1993) (risk of physical injury to members of the public arising from negligently allowing an inmate to escape from custody was not foreseeable because the defendant had no knowledge or reason to know that the inmate would be violent); *Cain*, 300 Or. at 709, 717 P.2d 140 (accepting custody of dangerous psychiatric patient pursuant to a statute created a duty to use reasonable care to treat him and control his acts, and, consequently, protect the general public from foreseeable risks that he created).

5 ORCP 21 A(8) was renumbered ORCP 21 A(1)(h) effective January 1, 2022. The relevant language is identical, so we use the current numbering.

6 The form of MosaicMedical's filing is not at issue. However, to promote good practice, we note that, when challenging the sufficiency of a complaint, “the better practice might be to file a motion to dismiss under ORCP 21A[(1)(h)] or for a judgment on the pleadings under ORCP 21B.” *Johnson*, 302 Or. at 388, 730 P.2d 1221; *Payless Drug Stores v. Brown*, 300 Or. 243, 246, 708 P.2d 1143 (1985) (similar statement).

7 Regarding the third factor, the court cited *Philibert*, where it observed that “ ‘[e]motional distress, like economic loss, ripples throughout society as a foreseeable result of negligent conduct. Without some limiting principle in addition to foreseeability, permitting recovery for emotional injuries would create indeterminate and potentially unlimited liability.’ ” *Id.* (quoting *Philibert*, 360 Or. at 704, 385 P.3d 1038).

8 Another case in which the medical providers did not create the risk is *Maltais v. PeaceHealth*, 326 Or.App. 318, 532 P.3d 510, *rev. den.*, 371 Or. 509, 537 P.3d 941 (2023). There, medical providers were allegedly negligent in failing to admit a dangerous patient to the hospital, and that person subsequently injured a third

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party. The medical providers themselves did not create the risk to the third party—rather, the danger existed due to the patient's dangerousness—so we applied the *Tomlinson* factors to determine whether she could state a negligence claim against them. *Id.* at 326-28, 532 P.3d 510.

9 To the extent that defendants rely on *Sloan* and *Mead v. Legacy Health System*, 352 Or. 267, 276, 283 P.3d 904 (2012), those cases are distinguishable because they did not involve third parties. *See* *Sloan*, 364 Or. at 645, 437 P.3d 1097 (discussing a physician's "specified duty of care" and "affirmative duty" to patients in the context of a claim brought on behalf of a patient who allegedly died as a result of medical negligence); *Tomlinson v. Metropolitan Pediatrics, LLC*, 275 Or.App. 658, 366 P.3d 370 (2015), *aff'd*, 362 Or. 431, 412 P.3d 133 (2018) ("the issue in *Mead* was whether the plaintiff—whose negligence claim was premised on the existence of a physician-patient relationship—had demonstrated the existence of that relationship," and "the court had no reason to—and did not—address the cognizability" of a third-party claim). Moreover, as to *Mead*, it cannot be read in a way that conflicts with the Supreme Court's subsequent decision in *Tomlinson*, 362 Or. at 445, 412 P.3d 133.

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373 Or. 270
Supreme Court of Oregon,
En Banc.

Arnold R. HUSKEY, Petitioner on Review,
v.
OREGON DEPARTMENT OF CORRECTIONS,
Colette Peters, Guy Hall, Garrett Laney, and
John and Jane Doe(S) 1-10, individually and in
their official capacities, Respondents on Review.

(CC 22CV21140) (SC S070771)
|
Argued and Submitted November 7, 2024
|
January 30, 2025

Synopsis

Background: Inmate brought action against Department of Corrections and individual defendants for breach of contract and civil rights violations, seeking, in part, economic damages for lost future wages allegedly caused by defendants' breach of their promise, in a settlement agreement that resolved a prior suit brought by inmate, not to retaliate against him. The Circuit Court, Marion County, Erious Johnson, J., granted defendants' motion to dismiss, and inmate appealed. The Court of Appeals, 329 Or App 397, 542 P.3d 66, affirmed. Inmate's petition for review was allowed.

Holdings: The Supreme Court, James, J., held that:

[1] inmate preserved subconstitutional ground for reversing the dismissal of his complaint, and

[2] constitutional provision stating that no inmate had a legally enforceable right to employment was not a barrier to inmate pleading economic damages based on lost future income.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim; Motion to Amend the Complaint.

West Headnotes (12)

[1] **Appeal and Error** Constitutional questions

Inmate preserved for review by Supreme Court the subconstitutional common-law damages analysis on which it reversed trial court's dismissal, for failure to state a claim, of inmate's breach of contract action against Department of Corrections and individual defendants, seeking, in part, economic damages for lost future wages allegedly caused by defendants' breach of their promise, in settlement agreement that resolved inmate's prior suit, not to retaliate against him, even though throughout the litigation, the parties focused heavily on constitutional provision stating no inmate had legally enforceable right to compensation for work; inmate opposed dismissal and argued he pleaded damages, and Court's resolution addressed core issue of whether constitutional provision required dismissal of inmate's complaint. Or. Const. art. 1, § 41(3); Or. R. Civ. P. 21(A)(1)(h).

[2] **Appeal and Error** Dismissal or nonsuit and striking from docket

When the issue on appeal is that the trial court erred in denying dismissal of a claim, the moving party must show that they preserved the error. Or. R. Civ. P. 21.

[3] **Appeal and Error** Dismissal or nonsuit and striking from docket

When the issue on appeal is whether the trial court erred in granting dismissal of a claim, the nonmoving party generally can preserve that error with little beyond simply opposing dismissal. Or. R. Civ. P. 21.

[4] **Appeal and Error** Necessity of presentation in general

Preservation of error is a doctrine rooted in practicality that serves fairness and efficiency—

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affording both opposing parties and trial courts a meaningful opportunity to engage an argument on its merits.

[5] **Contracts** Pleading contract or specifications

Contracts Sufficiency of allegations to show breach

Generally, to state a claim for breach of contract, a plaintiff must, at a minimum, plead facts with sufficient particularity as to allege the existence of a contract, its relevant terms, and a breach by defendant that resulted in damage to plaintiff.

[6] **Contracts** Allegation of damage

Alleging damages is an essential pleading requirement of a breach of contract claim, and a plaintiff is required to plead a specific amount for damages for each claim of relief. Or. R. Civ. P. 18(B).

[7] **Pretrial Procedure** Insufficiency in general

A motion to dismiss for failure to state a claim attacks the sufficiency of the complaint. Or. R. Civ. P. 21(A)(1)(h).

[8] **Pretrial Procedure** Presumptions and burden of proof

Pretrial Procedure Well-pleaded facts

When reviewing a complaint on a motion to dismiss for failure to state a claim, the court accepts as true all well-pleaded allegations of fact in the complaint and give plaintiff the benefit of all favorable inferences that may be drawn from the facts alleged. Or. R. Civ. P. 21(A)(1)(h).

[9] **Pretrial Procedure** Hearing and determination in general

Whether the facts alleged are sufficient to state a claim for relief is a question of law, for purposes of a motion to dismiss for failure to state a claim. Or. R. Civ. P. 21(A)(1)(h).

[10] **Civil Rights** Existence of other remedies; exclusivity

Constitutional provision stating that no inmate had a legally enforceable right to a job or to otherwise participate in work was not a barrier to inmate pleading economic damages based on lost future income in his breach of contract action against Department of Corrections and individual defendants, seeking, in part, economic damages for lost future wages allegedly caused by defendants' breach of their promise, in settlement agreement that resolved inmate's prior suit, not to retaliate against him; provision placed inmate in no different a position than that of at-will employment status of most Oregonians, and while provision may be factor bearing on whether inmate ultimately could prove the alleged retaliation, it did not mean that his complaint did not state ultimate facts sufficient to constitute a claim. Or. Const. art. 1, § 41(3); Or. Rev. Stat. § 31.705(1)(a); Or. R. Civ. P. 18(B).

More cases on this issue

[11] **Pretrial Procedure** Matters considered in general

A motion to dismiss, which evaluates the adequacy of pleadings and legal claims, is not the proper vehicle to evaluate the strength or sufficiency of the evidence in support of those legal claims. Or. R. Civ. P. 21.

[12] **Pleading** Scope of inquiry; questions to be determined

Issues of fact cannot be tried on a motion for judgment on the pleadings. Or. R. Civ. P. 21.

On review from the Court of Appeals. * (CA A180196)

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Attorneys and Law Firms

Edward A. Piper, Angeli Law Group LLC, Portland, argued the cause and filed the briefs for petitioner on review.

Robert M. Wilsey, Assistant Attorney General, Salem, argued the cause and filed the brief for respondents on review. Also on the brief were Ellen Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Kelly Simon, ACLU Foundation of Oregon, Portland, filed the brief for amicus curiae American Civil Liberties Union and American Civil Liberties Union of Oregon.

Opinion

JAMES, J.

****1** ***272** In a civil action brought in the State of Oregon, where the plaintiff alleges economic damages in the form of future lost employment income, must the plaintiff plead an "enforceable right" to that future employment to survive a motion to dismiss for failure to state a claim brought under ORCP 21 A(1)(h)? The trial court and the Court of Appeals answered that question in the affirmative. *Huskey v. Dept. of Corrections*, 329 Or App 397, 542 P.3d 66 (2023). We allowed review, [1] and hold the answer is no. Accordingly, we affirm in part, and reverse in part, the judgment of the trial court and the decision of the Court of Appeals.

I. FACTS

The facts as alleged are straightforward, and we accept them as true for purposes of our review. *See, e.g.*, *Bundy v. NuStar GP, LLC*, 371 Or. 220, 224, 533 P.3d 21 (2023). Plaintiff is an adult in custody (AIC) at an Oregon ***273** correctional institution. Plaintiff sued the Oregon Department of Corrections and others (collectively, "the department") for breach of contract and civil rights violations, seeking, among other forms of relief, economic damages based on lost future wages and employment opportunities.

****2** Years prior, plaintiff had sued the department, resulting in a settlement agreement in which the department purportedly orally agreed to not retaliate against him. That settlement agreement is the contract underlying this breach of contract action. In this case, plaintiff alleged that the department had breached its oral promise of nonretaliation by using negative video footage of plaintiff, without his permission, in department training videos. Plaintiff pleaded that, as a result of that negative portrayal, he suffered $11,640 in economic damages due to lost income under a theory that the department had denied him job assignments, training, and other income-generating opportunities.

The department moved to dismiss under ORCP 21 A(1)(h), arguing that the plaintiff "fail[ed] to allege facts showing that plaintiff suffered economic damages." According to the department, Article I, section 41(3), of the Oregon Constitution, which states that "no inmate has a legally enforceable right to a job or to otherwise participate in work, *** or to compensation for work or labor performed while an inmate," rendered plaintiff unable to plead economic damages, because he had no right to employment. The trial court agreed and dismissed plaintiff's complaint on those grounds.

The Court of Appeals agreed and affirmed, reasoning that, "[i]f an AIC has no legally enforceable right to work assignments or training opportunities, then it follows that an AIC may not sue for breach of contract for lost income associated with the loss of such opportunities." *Huskey*, 329 Or App at 400, 542 P.3d 66. We then allowed plaintiff's petition for review.

On review, the parties and *amici curiae* raise many complex constitutional arguments about the meaning of Article I, section 41(3) and its interplay with another constitutional provision, Article I, section 34(2) (prohibiting ***274** involuntary servitude; adopted by the people in 2022). Although this court appreciates the excellent briefing provided by the parties and *amici* on those constitutional issues, we need not decide them, because, as we explain, this case presents a straight-forward question of pleading damages.

II. ANALYSIS

A. *Preservation*

[1] We begin by addressing an issue of preservation, related to the damages question framed above. Throughout the litigation, the parties have focused heavily on issues of constitutional interpretation—understandably so, given the department's reliance on Article I, section 43. Our resolution today, which eschews the majority of those constitutional questions for a common-law damages analysis, admittedly tracks more closely to arguments raised by *amici*, rather

than the parties themselves. At oral argument, the department questioned whether that subconstitutional argument was properly preserved.

[2] **[3]** We conclude that it was. Upon a trial court's grant of a party's motion to dismiss under ORCP 21, the issue on appeal is whether the trial court erred in granting dismissal—which typically concerns whether the arguments and sources of law adduced by the moving party, and relied upon by the trial court, legally required dismissal of the claim. When the issue on appeal is that the trial court erred in *denying* dismissal of a claim, the moving party must show that they preserved the error. In that context we look to our traditional preservation principles. *See State v. Hitz*, 307 Or. 183, 188, 766 P.2d 373 (1988) ("We have previously drawn attention to the distinctions between raising an issue at trial, identifying a source for a claimed position, and making a particular argument. * * * The first ordinarily is essential, the second less so, the third least." (Emphasis in original.)). However, when the issue on appeal is whether the trial court erred in *granting* dismissal of a claim, the nonmoving party generally can preserve that error with little beyond simply opposing dismissal.

****3** Here, plaintiff, who appeared *pro se* before the trial court, opposed dismissal. He consistently argued that he had ***275** properly pleaded damages, and, further, he disputed that Article I, section 41(3)—relied upon by the moving party and the trial court—required the dismissal of his breach of contract claim. In his response to the motion to dismiss before the trial court, plaintiff wrote that, even if Article I, section 41(3), denied him a right to employment, "[the department] do[es] not dispute that [p]laintiff * * * did in fact work." He then wrote:

> "Plaintiff has [pleaded] in his complaint, as well as submitted facts and evidence demonstrating indisputable proof of *earned monetary income* from his prison work assignment. Plaintiff has further [pleaded] allegations that [the department's] acts, actions intentionally breached the contract and caused [plaintiff] *loss of income and past and future impairment of earning capacity* sufficient to put the issue of fact before the jury."

(Emphases in original.)

[4] Our resolution of this case, although based on subconstitutional arguments of *amici*, addresses that core issue—that is, whether Article I, section 41(3) required the dismissal of plaintiff's complaint. As we recently held in *State v. Skotland*, 372 Or. 319, 329, 549 P.3d 534, 539 (2024), preservation is a doctrine rooted in practicality that serves fairness and efficiency—affording both opposing parties and trial courts a meaningful opportunity to engage an argument on its merits. There, we noted that, "[s]ometimes, the winds of preservation can be gauged by looking to the weathervane of trial court surprise: Would the trial court be taken aback to find itself reversed on *this issue, for this reason*?" *Id.* (emphasis in original). Here, considering the issue and the arguments below, we do not perceive that the trial court would be surprised by our reasoning in reversing its decision today.

B. *Merits*

[5] **[6]** Turning to the merits, generally, to state a claim for breach of contract, a plaintiff must, at a minimum, plead facts with sufficient particularity as to allege the existence of a contract, its relevant terms, and a breach by defendant that resulted in damage to plaintiff. Alleging damages is an essential pleading requirement of a breach of contract ***276** claim, and a plaintiff is required to plead a specific amount for damages for each claim of relief. ORCP 18 B.

[7] **[8]** **[9]** A motion to dismiss under ORCP 21 A(1)(h) attacks the sufficiency of the complaint. When reviewing a complaint in that posture, we "accept as true all well-pleaded allegations of fact in the complaint and give plaintiff[ ] the benefit of all favorable inferences that may be drawn from the facts alleged." *Gafur v. Legacy Good Samaritan Hospital*, 344 Or. 525, 528-29, 185 P.3d 446 (2008). Whether the facts alleged are sufficient to state a claim for relief is a question of law. *See Rowlett v. Fagan*, 358 Or. 639, 651, 369 P.3d 1132 (2016) ("[T]he legal viability of any particular claim under Oregon law * * * is strictly a matter of law.").

[10] In this case, plaintiff alleged lost future income as well as impairment of his future employment opportunities. ORS 31.705(1)(a) defines economic damages as including, among other things, "objectively verifiable monetary losses including *** loss of income and past and future impairment of earning capacity ***." Accordingly, by the clear statutory definition, plaintiff pleaded economic damages, and he did so in a specific amount—$11,640—in compliance with ORCP 18 B.

Nevertheless, both the trial court and the Court of Appeals concluded that plaintiff had not properly pleaded damages because, as the Court of Appeals reasoned:

> **4 "the constitution bars plaintiff from pursuing a claim of [this] nature. *** Here, as already explained, the constitution precludes plaintiff from establishing that he suffered economic damages in the form of lost income. Therefore, based on plaintiff's allegations, we conclude that he cannot seek noneconomic damages for adverse treatment associated with visits and housing and emotional or mental harm."

Huskey, 329 Or App at 400-01, 542 P.3d 66.

However, Article I, section 41(3) does not say that an inmate cannot pursue a claim wherein damages are calculated by looking to lost future economic benefits. The operative language of Article I, section 41(3), reads as follows:

> *277 "[N]o inmate has a legally enforceable right to a job or to otherwise participate in work, on-the-job training or educational programs or to compensation for work or labor performed while an inmate of any state, county or city corrections facility or institution."

Even accepting, for purposes of argument, the department's construction of Article I, section 41(3) as unaffected by Article I, section 34(2), all Article I, section 41(3) states is that inmates have no "right" to employment.[2] But we have, on multiple occasions, rejected the contention that a lack of a "right" to future employment is fatal to a claim alleging economic damages based on future earnings. In *Tadsen v. Praegitzer Industries, Inc.*, 324 Or. 465, 470-71, 928 P.2d 980 (1996), for example, we considered an action for unlawful employment practices, concluding as follows:

> "We next consider whether the fact that employment is 'at-will' prevents recovery of [future earnings] in all cases.
>
> "Before the Court of Appeals, defendant argued that, notwithstanding a discriminatory discharge and its actual causal relationship to a loss of future earnings, an at-will employee cannot recover damages for that loss because, independent of the unlawful firing, the employee has no 'right' to, or assurance of, any future employment with the employer. ***
>
> > "We decline to hold that an at-will employee never can prove the requisite facts for an award of front pay. The fact that at-will employment may be terminated for any non-discriminatory purpose does not necessarily mean that the likely duration of that employment is incapable of proof to the required degree of certainty. *At-will employment may be a factor that bears on whether the proof is sufficient in a particular case, but the right to terminate someone's employment does not establish as a matter of law that an employee cannot prove the existence of front pay damages.*"

Id. (emphasis added).

We reiterated that principle 17 years later in *278 *Cocchiara v. Lithia Motors, Inc.*, 353 Or. 282, 294-95, 297 P.3d 1277 (2013). There, in the context of a claim for fraudulent misrepresentation, we held:

> "[B]oth defendant and the Court of Appeals relied on [an earlier Court of Appeals case] for the proposition that the at-will nature of the corporate job precluded plaintiff from recovering lost wages for that job. However, this court has rejected a similar proposition in [*Tadsen*.] * * * *Similarly, in this case, the fact that the corporate job was terminable at will, standing alone, does not create a conclusive presumption that plaintiff cannot prove damages related to the loss of that job.* Instead, as in *Tadsen*, plaintiff may seek to prove what he would have earned in the corporate job and how long he likely would have remained in that job had he been hired as promised and allowed to start work. Although it may be easier for a plaintiff to prove the likely duration of employment in a wrongful discharge case, where the employee has a history of employment with the employer, a plaintiff is entitled to attempt to make such a showing outside the wrongful discharge context."

**5 *Id.* (emphasis added).

The reasoning of *Tadsen* and *Cocchiara* applies equally here. For purposes of pleading economic damages, the provision in Article I, section 41(3)—that "no inmate has a legally enforceable right to a job or to otherwise participate in work"—places AICs in no different a position than that of the at-will employment status of most Oregonians. The existence or extent of any "right" to future employment is not a barrier to pleading economic damages based on lost future income.

[11] **[12]** An ORCP 21 motion to dismiss, which evaluates the adequacy of pleadings and legal claims, is not the proper vehicle to evaluate the strength or sufficiency of the evidence in support of those legal claims. Challenges to the sufficiency of proof are properly suited to a motion for summary judgment, or a trial. As we have repeatedly cautioned, "[i]ssues of fact cannot be tried on a motion for judgment on the pleadings." *Salem Sand v. City of Salem*, 260 Or. 630, 636, 492 P.2d 271 (1971) (citing *Scott & Payne v. Potomac Ins. Co.*, 217 Or. 323, 341 P.2d 1083 (1959) and *Smith v. Aplanalp et al.*, 126 Or. 213, 267 P. 1070 (1938)).

***279** Here, whatever issue Article I, section 43 might pose for the damages element of petitioner's breach of contract claim, it is, fundamentally, not a pleading issue at all—it is an issue of proof and causation. Paraphrasing *Tadsen*, Article I, section 43, may be a factor that bears on whether plaintiff ultimately can prove, by a preponderance of the evidence, that the department's alleged retaliation against him caused his loss of future income, but the lack of a right to employment does not establish, as a matter of law, that plaintiff cannot prove economic damages in the form of future lost wages. Stated even more simply, any lack of a right to employment does not mean that plaintiff's complaint did not state ultimate facts sufficient to constitute a claim.

For those reasons, we hold that the trial court erred when it granted the department's motion under ORCP 21 to dismiss plaintiff's complaint.

The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to the circuit court for further proceedings.

All Citations

--- P.3d ----, 373 Or. 270, 2025 WL 341447

Footnotes

* Appeal from Marion County Circuit Court, Erious Johnson, Judge. 329 Or App 397, 542 P.3d 66 (2023).

1 Before the Court of Appeals, plaintiff raised four assignments of error, only the first of which we take up here. The second assignment of error concerned the trial court's denial of plaintiff's motion to add an allegation of punitive damages. The Court of Appeals affirmed, and we affirm the Court of Appeals on that issue. The fourth assignment of error concerned whether the trial court had violated state and federal constitutional jury rights by dismissing plaintiff's complaint. The Court of Appeals affirmed the trial court without discussion, and we also affirm the Court of Appeals on that issue.

Plaintiff's third assignment of error challenged the trial court's dismissal of his declaratory judgment claim. Before the Court of Appeals, the department conceded that remand was required because "a declaratory judgment action cannot be dismissed under ORCP 21 A(1)(h)." *Huskey*, 329 Or App at 402, 542 P.3d 66. The Court of Appeals properly accepted that concession, but relied on its precedent in *Doe v. Medford School Dist. 549C*, 232 Or App 38, 221 P.3d 787 (2009), for the proposition that,

> "[w]hen the dismissal of a declaratory judgment action was clearly based on a determination of the merits of the claim, *** our practice has been to review that determination as a matter of law and then remand for the issuance of a judgment that declares the rights of the parties in accordance with our review of the merits."

Huskey, 329 Or App at 402, 542 P.3d 66 (quoting *Doe*, 232 Or App at 46, 221 P.3d 787). Accordingly, the Court of Appeals vacated the judgment of dismissal and remanded for issuance of a judgment that "declares the rights of the parties, including our determination that plaintiff has no legally enforceable right to economic

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damages for lost income." *Id.* In light of that reasoning, when considered together with our reasoning and disposition relating to plaintiff's first assignment of error, we do not perceive a need to remand the third assignment of error to the Court of Appeals. Instead, we reverse the Court of Appeals on that assignment and remand this entire case back to the trial court.

2 To be clear, we are not deciding whether Article I, section 41(3), could properly be construed, in light of the subsequent enactment of Article I, section 34(2), to deny AICs such as plaintiff a right to compensation for work performed. That is the crux of the constitutional issue litigated by the parties, which we need not resolve.

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APPELLATE UPDATE 2024-2025

Judge David Rees

Justice Bronson James

TREBLEHORN V. PRIME WIMBLEDON SPE, LLC; 372 OR. 27 (2024)

- Plaintiff was a tenant in Defendant's apartment complex. He sustained a knee injury (meniscus tear/surgery) when a second story concrete walkway gave way dropping his right foot into a hole up to his thigh. Plaintiff sued for negligence and violation of landlord tenant act seeking $45,000 economic and $350,000 non-economic damages. Plaintiff later received approval to add a claim for $10,000,000 punitive damages against each Defendant.

TREBLEHORN V. PRIME WIMBLEDON SPE, LLC; 372 OR. 27 (2024)

- Jury awards $10 mil punitive against each defendant.
- Judge reduces to 2.7 mil

TREBLEHORN V. PRIME WIMBLEDON SPE, LLC; 372 OR. 27 (2024)

- CASE IS NOT ABOUT HOW TO CALCULATE PUNITIVE DAMGES
- CASE IS NOT ABOUT WHAT WAS THE LIMIT OF PERMISSIBLE PUNITIVE DAMAGES

TREBLEHORN V. PRIME WIMBLEDON SPE, LLC; 372 OR. 27 (2024)

- Issue on appeal is whether the trial court erred in reducing the punitive damage award at all under federal law.

TREBLEHORN V. PRIME WIMBLEDON SPE, LLC; 372 OR. 27 (2024)

- Federal due process reduction in punitives look to 3 guideposts:
  - Reprehensibility of conduct
  - Disparity between award and actual or potential harm to plaintiff
  - Difference between punitive award and civil penalties authorized or imposed in comparable cases.

TREBLEHORN V. PRIME WIMBLEDON SPE, LLC; 372 OR. 27 (2024)

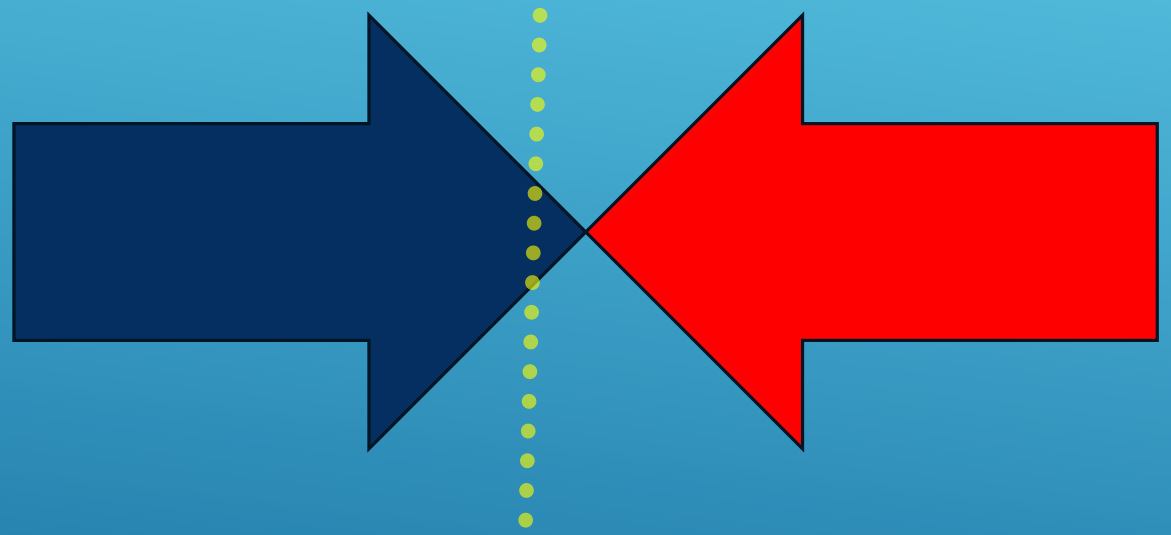
- Federal Due Process cases have mentioned a potential "cap" for a single digit ratio.
  - Somewhat speculative as to whether the single digit limit is, in fact, a cap

- More interesting unresolved question is how we divine the specific single digit ratio

TREBLEHORN V. PRIME WIMBLEDON SPE, LLC; 372 OR. 27 (2024)

- $295.567.00 in econ + nonecon damages
- $10 mil punitives = 33x1 ratio
- 2.7 reduction or 9.13 ratio
- However a 9.999 ratio would equal 2,955.374. A difference of $255,374.00 per defendant.

COLLISION OF STATE AND FEDERAL CONSTITUTIONS AS TO PUNITIVE PRECISION



- Oregon Constitution
- prohibits reduction of jury award

- Due process requires reduction up to a point.



Landmark Decision

Moody v. OCCU/Fed. Ins. Co, 371 Or. 772 (2023)

"*changes the landscape of insurance litigation in Oregon*"
(Garrett, J., dissenting)

4-3 decision

Shorthand for practitioners : "*Moody* bad faith claims"

Facts

- Plaintiff's husband was accidently shot while on a camping trip.
- Plaintiff filed a claim for life benefits –policy benefits of $3,000
- Decedent allegedly had marijuana in his system at time of death.
- Insurer denied claim asserting exclusion for death "*caused by or resulting from …being under the influence of narcotic or other controlled substance*"
- Plaintiff alleged insurer failed to investigate claim reasonably as required by Oregon law

Plaintiff's Lawsuit

Breach of contract ($3,000 damages)

Negligence (noneconomic damages-emotional distress - $47,001) for failure to follow ORS 746.230 (Unfair Claims Settlement Act)

"(a) By refusing to pay the insurance benefits without conducting a reasonable investigation based on all available information, in violation of [ORS] 746.230(1)(d); and
"(b) Not attempting, in good faith, to promptly and equitably settle a claim in which the insurer's liability has become reasonably clear, in violation of [ORS] 746.230(1)(f)."

Does Oregon Allow **First*** Party *bad faith tort claim, including claim for noneconomic (mental distress) damages*?

*First Party –the insured pursues a claim directly against her own insurer for benefits due the insured under the policy (homeowners, life insurance, property damage, etc.).

A LITTLE HISTORY



Farris v. U.S. Fid. & Guar. Co., 284 Or 453, 479 n 4, 587 P2d 1015 (1978).

In *Farris*, the plaintiff/insured's was sued in a business dispute and tendered claim to insurer. Despite clear coverage, insurer denied. Insureds settled the lawsuit and then brought an action against the insurer, seeking damages for economic losses and emotional distress. Insured obtained jury verdict for economic and noneconomic damages.

Oregon Supreme Court reversed noneconomic award, citing the general rule prohibiting emotional distress damages for breach of contract. The "peace of mind" argument for insurance did "not furnish a logical basis for recovery for emotional distress because many contracts for services, materials or financial assistance, as well as insurance contracts, are similarly made for economic and financial peace of mind." *Farris*, 284 Or at 465.

"Forty-five years ago, this court held that an insurer's bad-faith denial of an insurance claim constitutes only a breach of contract and, therefore, cannot support an action in tort to recover damages for emotional distress." Moody, 371 Or at 819 (J. Garrett dissenting)

WHEN DOES OREGON LAW ALLOW EMOTIONAL DISTRESS DAMAGES?

1) Most Common: Defendant physically harms plaintiff;

2) Defendant intentionally causes emotional distress (IIED); or

3) Defendant "negligently causes foreseeable, serious emotional distress and also infringes some other legally protected interest." *Moody,* at 784

Does the insurer's failure to reasonably investigate and promptly pay the claim infringe on a "legally protected interest"?

"…this court is hesitant to permit recovery for solely emotional injury but has nevertheless done so in limited circumstances.

We have not devised a "test" for determining when an interest is so protected; rather we have looked for factors that demonstrate, to our satisfaction, that we will not be creating "indeterminate and potentially unlimited liability," and that the interest in question is "sufficiently important" and sufficiently circumscribed to support the imposition of liability for emotional distress damages."
Moody, at 790

3 FACTORS TO DETERMINE WHETHER THERE IS A “LEGALLY PROTECTED INTEREST”

1. Whether an Oregon statute indicates the existence of the alleged legally protected interest?

2. Is there consistency with other emotional distress damage cases and no undue burden on defendants?

3. Is Plaintiff's Interest “of significant importance.”?

1. Whether an Oregon statute indicates the existence of the alleged legally protected interest?

ORS 746.230 does **not** create a statutory tort; but…

"…the context in which the statute was adopted—an insurance marketplace in which insurers advertise and sell their products as providing "peace of mind" to their policyholders"- shows a legislative intent to prevent adverse economic consequences and stress to policyholders because of insurer bad faith.

2. Consistency with other emotional distress damage cases and no undue burden on defendants?

Prior cases impose liability where relationships are based on “mutual expectation of service and reliance” and that “absent the exercise of reasonable care” there is a foreseeable risk of emotional harm.

Curtis v. MRI Imaging Services II, 327 Or. 9 (1998)(negligently performed MRI)

Rathgeber v. James Hemenway, Inc. 335 Or. 404 (2003)(realtor duties to homebuyer)

Tomlinson v. Metro. Pediatrics ., LLC, 275 Or. 658 (2015)(failure to inform parents)

Hovisv. City of Burns,243 Or. 607 (1966)(mishandled burial remains)

3. Is Plaintiff's Interest “of significant importance?”

“Oregon statutes governing the insurance industry indicate that the legislature has made a public policy choice to protect against the unfair processing and payment of insurance claims, which includes claims made by life insurance beneficiaries.”

CURRENT STATUS OF MOODY CASE

- Plaintiff Amends Complaint seeking **$5,000,000 emotional distress damages**

Trial set in late May 2025 in Lane County with Judge Bassi.

When is there a "*Moody* claim?"

- "We caution that our conclusion here does not make every contracting party liable for negligent conduct that causes purely psychological damage, nor does it make every statutory violation the basis for a common-law negligence claim for emotional distress damages. Far from it. Few contracting parties promise to provide necessary financial resources on the death of a spouse knowing that their obligation to act reasonably in doing so is required by statute. And few statutes impose obligations on contracting parties designed to protect the parties from the type of emotional harm that plaintiff in this case allegedly suffered. Our decision in this case is a narrow one that applies and accords with the limiting principles that have guided our past decisions and does not unfairly expose defendant to liabilities that it could not have expected and guarded against."

- *Moody*, 371 Or 805-806.

Attorney Client Privilege

Gollersrud v. LPMC, LLC, 371 Or. 739 (Dec 21,2023)

Overview

- Plaintiff's files suit alleging fraud in real estate investment.
- Believing that plaintiff communicated about the subject of the suit from his work email, defendant issues subpoenas to plaintiff's former employers asking for all of plaintiff's emails over several years.
- Plaintiff, tacicly acknowledging he communicated about the subject of the suit via his work email moves to quash based in part on Attorney Client Privilege, because some of the emails from his work computer were directed to his lawyer.
- Defendant argues that the email messages were not covered by the attorney-client privilege because(1) Mr. Gollersrud had no reasonable expectation of privacy in email communications transmitted using his employ-ers' email systems; and (2) even if the email messages were privileged when transmitted, that privilege had been waived when Mr. Gollersrud failed to delete them from his employers' email systems before severing his employment relationships.

- Trial Court denies motion to quash; Plaintiff pursues mandamus

Structure of Asserting Attorney Client Confidentiality changed

- Assertions of the attorney-client privilege in Oregon require (1) a communication between classes of persons described in OEC 503(2)(a) to (e); (2) that the communication be made for the purpose of facilitating the rendition of professional legal services to the client; and (3) that the communication be "confidential" within the meaning of OEC 503(1)(b).
- Generally, the burden is on the party asserting a privilege to establish that it applies.

Structure of Asserting Attorney Client Confidentiality changed

- The core of OEC 503(1)(b)'s definition of a confidential communication is a "communication not intended to be disclosed to third persons." It is a phrase framed in the negative. We have interpreted similar wording, in the context of other privileges, to create a presumption of confidentiality. In Serrano, this court determined that there can be a presumption of confidentiality when considering marital communications, and that that presumption can only be defeated if the "proponent of the evidence at issue establishes that * * * intent to disclose is apparent from the circumstances." 346 Orat 330.
- We see no reason why the same presumption should not apply to OEC 503.3. * * * We thus conclude that, in asserting the attorney-client privilege, the burden is on the individual asserting the privilege to establish (1) communications between a class of persons found in OEC 503(2)(a) to (e), that (2) were made for the purpose of facilitating the rendition of professional legal services. When that is established, such communications are presumptively confidential

Practical realities of life

- Defendant's argument:
- "When an employee chooses to use a third-party employer owned work computer and email systems to transmit and receive personal emails with the employee's personal attorney, the attorney-client privilege does not attach to the email communications. There is no legal prohibition that bars a private employer from searching, inspecting, or viewing emails transmitted or stored on the private employer's email system. There is accordingly a risk that the employer will access an employee's personal emails that were trans-mitted through and saved to the employer's email system. By choosing to use the employer's email system to send, receive, or save personal emails, the employee assumes the risk of disclosure of the personal emails to the employer."
- Court summarizes:
- In effect, LPMC argues that any time an email is sent from a system where third parties could potentially discover the contents, that establishes, per se, that such communications are not confidential. We decline to adopt LPMC's per se approach for a number of reasons.

Practical realities of life

- LPMC's proposed per se rule conflicts with the pragmatism of OEC 503 in that it ignores the practical realities of modern life, and it does not reflect how many Oregonians live and work. For many, a clear divide between work and nonwork does not exist * * * The common practice of telework has brought employer computer systems and employer paid network access into the home, with an accompanying blurring of the lines between private and work communication, and the network infrastructure supporting each. * * * In short, for many Oregonians, personal and work business is increasingly conducted from devices and accounts that are not clearly delineated.
- LPMC's argument, which, as noted, is grounded in a risk of possible disclosure, presupposes that personal email contains no such risk. That assumption does not bear weight. * * * Most personal email is hosted by "free" email service providers (Gmail, Yahoo! Mail, AOL Mail, etc.) who themselves reserve the right to monitor the contents. * * * That reality of email communications, including personal hosted email, is another reason that a mere risk of disclosure cannot suffice, on its own, to overcome the presumption of confidentiality.

Showing beyond the TOS

- The burden to overcome the presumption of confidentiality falls to the proponent of the evidence allegedly barred by privilege. Overcoming the presumption requires an evidentiary showing, one focused on the circumstances and context of the communications, that must establish more than a risk that privileged communications "might be disclosed."
- LPMC submitted no evidence that Mr. Gollersrud was aware of any employer policies concerning personal use of company equipment or the monitoring of employee email. LPMC submitted no evidence that Mr. Gollersrud's prior employers had ever acted on any email monitoring policies, either in their treatment of him, or other employees. Indeed, LPMC submitted no evidence that Mr. Gollersrud's former employers even had such policies at all. Finally, LPMC submitted no evidence that, whether in accordance with a policy or not, email was, in fact, monitored by the companies. Whether such evidence would have been sufficient to overcome the presumption of privilege—a point we do not decide—the record here lacked even that showing and was insufficient to overcome a claim of OEC 503 privilege.

Stone v Witt, 331 Or App 722 (2024)

If a medical provider and pharmacy provide allegedly negligent treatment to a drug addicted patient, can the medical provider/pharmacy be held liable to a non privity plaintiff injured by the patient?
Facts:

Plaintiff was fatally injured while riding her bike after being hit by Defendant Witt who allegedly was under the influence of prescribed drugs at the time of the accident. Plaintiff's PR sues Defendant Witt AND two doctors and their employers ("Providers") alleging the doctors "over prescribed" addictive drugs to their patient, Defendant Witt, with knowledge that Witt was abusing the drugs.
A similar claim was made against Defendant Walgreen's (Pharmacy) where Witt filled some of the prescriptions.

STATUS

Trial Court –claims against Providers and Pharmacy dismissed. ("…*general rule that medical professionals are not liable to third parties for professional negligence*.")

COA –reverse and remanded

Or.S.Ct–review granted August 8, 2024.

- ***Fazzolari v. Portland School Dist. No. 1J***, 303 Or. 1 (1987)

"[U]nless the parties invoke a status, a relationship, or a particular standard of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the conduct that creates, defines, or limits the defendant's duty, the issue kind of harm that befell the plaintiff."

NEGLIGENCE CLAIMS DEPEND ON PARTIES' RELATIONSHIP AND TYPE OF DAMAGES SUFFERED

Ordinary negligence

Physical Injuries

Did negligent conduct foreseeably create the risk of harm that befell the plaintiff?

Special Relationships

How does special relationship between plaintiff and defendant change the parameters of the plaintiff's ability to recovery for negligence?

***Onita Pacific Corp. v. Trustees of Bronson*, 315 Or 149, 159–61, 843 P2d 890 (1992).**

Recovery for purely economic losses requires defendant has a special responsibility to avoid harming plaintiff.

Zavalasv. Dept. of Corrections, 124 Or.App. 166, 861 P.2d 1026 (1993),*rev. den.*,319 Or. 150, 877 P.2d 86 (1994).

Liability of physician for injuries caused by alleged negligent prescription of Xanax to patient who drove under the influence and killed 3 children governed by ordinary *Fazzolari* foreseeable risk standards

ORS 471.565—Liability for Providing or Serving Alcoholic Beverages to Intoxicated Person

Precludes liability to a over-serving a plaintiff who voluntarily consumes alcohol and suffers injury. Third parties must prove negligence by clear and convincing evidence.

Tomlinson v. MetropolitanPediatrics, LLC, 362 Or. 431, 434, 412 P.3d 133 (2018)

Plaintiffs allege that defendant failed to correctly diagnose first child's genetic disorder; if parents had knowledge of disorder, they would not have had second child. No physical impact: Special duty required.

CRITICAL ISSUE:

What impact should status of defendant as a medical professional have on ordinary negligence principles?

Should a medical professional be responsible for foreseeable physical harm caused by unreasonable or negligent medical actions caused to a third party (not the patient)?

Former Supreme Court Justice Landau, ruling on Summary Judgment said "NO."

Oregon Court of Appeals has held in *Stone* and *Zavalsv* has said "Yes"

Oregon Supreme Court: TBD

COMPETING CONCERNS

Indeterminate and Unpredictable Liability

v.

Responsibility for Negligently Causing Foreseeable Harm.

Who Decides?

Legislature
Appellate Judges
Juries

Huskey v. Oregon Department of Correction

Overview

- Breach of contract case between AIC and DOC arising out of a previous settlement agreement with non-disparagement provision. Claim of disparagement – use of image in negative training videos resulting in loss of inmate job, promotion, and work opportunities.

- DOC files a Rule 21 motion to dismiss arguing that plaintiff cannot, as a matter of law, plead damages because Article I, on 41(3), of the Oregon Constitution, which states that "no inmate has a legally enforceable right to a job or to otherwise participate in work, *** or to compensation for work or labor performed while an inmate."

Rule 21 motions

- Here, whatever issue Article I, section 43 might pose for the damages element of petitioner's breach of contract claim, it is, fundamentally, not a pleading issue at all—it is an issue of proof and causation. * * * Article I, section 43, may be a factor that bears on whether plaintiff ultimately can prove, by a preponderance of the evidence, that the department's alleged retaliation against him caused his loss of future income, but the lack of a right to employment does not establish, as a matter of law, that plaintiff cannot prove economic damages in the form of future lost wages.

- For purposes of pleading economic damages, the provision in Article I, section 41(3)—that "no inmate has a legally enforceable right to a job or to otherwise participate in work"—places AICs in no different a position than that of the at-will employment status of most Oregonians. The existence or extent of any "right" to future employment is not a barrier to pleading economic damages based on lost future income.

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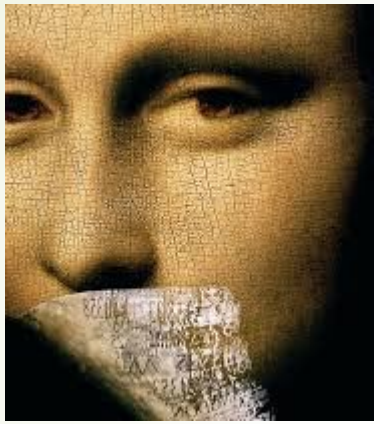
Rule 21 motions

- An ORCP 21 motion to dismiss, which evaluates the adequacy of pleadings and legal claims, is not the proper vehicle to evaluate the strength or sufficiency of the evidence in support of those legal claims. Challenges to the sufficiency of proof are properly suited to a motion for summary judgment, or a trial. As we have repeatedly cautioned, "[i]ssues of fact cannot be tried on a motion for judgment on the pleadings." Salem Sand v. City of Salem, 260 Or. 630, 636, 492 P.2d 271 (1971) (citing Scott & Payne v. Potomac Ins. Co., 217 Or. 323, 341 P.2d 1083 (1959) and Smith v. Aplanalp et al., 126 Or. 213, 267 P. 1070 (1938)).

Rule 21 motions



Oddity




BEHIND
THE
MUSIC


CHICAGO
"The Rest Of The Story"
Paul Harvey Commentary

Oddity

- "**[G]enerally, to state a claim for breach of contract, a plaintiff must, at a minimum, plead facts with sufficient particularity as to allege the existence of a contract, its relevant terms, and a breach by defendant that resulted in damage to plaintiff.** Alleging damages is an essential pleading requirement of a breach of contract claim, and a plaintiff is required to plead a specific amount for damages for each claim of relief. ORCP 18 B.

- First time the Oregon Supreme Court has ever – **ever** – set out the basic elements of a breach of contract claim.

- All previous cases setting forth the elements came from the COA.

History of BOC elements in COA caselaw

- Until 1995, the COA described a breach of contract in the following language, or a paraphrase thereof: "Plaintiff's complaint alleges that it entered into an agreement with defendant, that defendant breached that agreement, and that plaintiff suffered damages as a result of the breach. That pleading states a claim for breach of contract." Premier Tech. v. State By & Through Oregon State Lottery, 136 Or App 124, 129, 901 P2d 883 (1995).
- However, the current language the COA is most commonly using departs from those elements to state: "To state a claim for breach of contract, plaintiff must allege the existence of a contract, its relevant terms, plaintiff's full performance and lack of breach[,] and defendant's breach resulting in damage to plaintiff." Moyer v. Columbia State Bank, 316 Or App 393, 402, 505 P3d 26 (2021), rev den, 369 Or 705 (2022).

History of BOC elements in COA caselaw

- That language appears for the first time in Slover v. Oregon State Bd. of Clinical Soc. Workers, 144 Or App 565, 570, 927 P2d 1098 (1996). Slover derives it from is a Gillette COA opinion from the 80s - Fleming v. Kids & Kin Head Start: "What the complaint does allege is a straightforward breach of contract claim. It sets out the existence of a contract, its relevant terms, plaintiff's full performance and lack of breach and defendant's breach resulting in damage to plaintiff. The complaint is sufficient to state a claim under contract law principles." Fleming v. Kids & Kin Head Start, 71 Or App 718, 721, 693 P2d 1363 (1985).



Other Cases of Note

- *Walton v. NeskowinRegional Sanitary Authority*, 372 Or. 331 (May 23, 2024)(S of Limitations for "taking" is 6 years and accrues when government begins physical occupation of land; Pacific Legal Foundation to petition SCOTUS)

- *Cider Riot, LLC v. Patriot Prayer USA, LLC*. 330 Or. App. 354 (January 31, 2024) (Anti SLAPP Motion and First Amendment)

- *Martineau v. McKenzie-Willamette Medical Center*, 332 Or App 473 (May 8, 2024)(explaining difference between "*demonstrative*" exhibits and "*admitted*" exhibits)

- *Johnson v. Monsanto Company*,333 Or. App. 678 (July 10,2024) (admissibility of expert testimony pursuant to OEC 702 and federal preemption issue)