OSB Professional Liability Fund presents

Avoiding Malpractice Claims When Filing and Serving a Complaint

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OSB Professional Liability Fund

Materials

- Service Issues and Avoiding Claims
- PowerPoint Slides
- A Process Server's Handbook
- Dingus v. City of Portland, 2006 WL 8459002 (2006)
- Murphy v. Price, 131 Or.App. 693 (1994)
- Vergara v. Petal, 305 Or.App. 288 (2020)
- Otnes v. PCC Structurals, Inc., 299 Or.App 296 (2019)
- Senate Bill 378
- Senate Bill 813A
- House Bill 4212
- PLF Practice Aid, "Service Process Checklist - Oregon Courts"
- PLF Practice Aid, "Filing and Serving - Tips, Traps, and Resources"

SERVICE ISSUES AND AVOIDING CLAIMS

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I. An Action is Commenced by Filing and Service

ORS 12.010 and ORS 12.020

ORS 12.020 provides:

> "**12.020 When action deemed begun.** (1) Except as provided in subsection (2) of this section, for the purpose of determining whether an action has been commenced within the time limited, an action shall be deemed commenced as to each defendant, when the complaint is filed, and the summons served on the defendant, or on a codefendant who is a joint contractor, or otherwise united in interest with the defendant.
>
> "(2) If the first publication of summons or other service of summons in an action occurs before the expiration of 60 days after the date on which the complaint in the action was filed, the action against each person of whom the court by such service has acquired jurisdiction shall be deemed to have been commenced upon the date on which the complaint in the action was filed."

Other than for purposes of statutes of limitations, an action is commenced by filing a complaint with the clerk of the court. ORCP 3. To avoid any time bars, however, the action must be timely filed *and* served. The action is commenced as to each defendant for statutes of limitations purposes upon service within sixty days of timely filing. ORS 12.020.

A. Know How to Compute Time

ORCP 10
ORS 174.120
ORS 187.010(3)

B. Know the Applicable Statutes of Limitations and Repose

ORS 12.010 provides that actions shall be commenced only within the times prescribed in ORS Chapter 12, after the cause of action shall have accrued, unless a different limitation is prescribed by statute.

When the case involves multiple claims for relief, the complaint should be filed with the trial court not later than the time provided by the shortest statute of limitations that applies. Also, keep in mind that the time limits specified in statutes of repose are considered to be absolute, and they will bar claims regardless of whether the statute of limitations on the claim has run. *E.g.*, ORS 12.110(4), barring claims for medical negligence filed more than five years from the date of treatment, omission or operation.

See generally, Bell v. Tri-Met, 247 Or App 666, 271 P3d 138 (2012), for discussion of distinction in statutes of limitation and repose and interplay with OTCA limitations.

When preparing to file a case, counsel should try to build in adequate time to address problems that may arise, whether in filing the complaint, or in serving the defendant(s).

C. Providing Tort Claims Notice to a public body defendant

ORS 30.275 provides that notice must be given within one year after the alleged loss or injury for wrongful death claims, and within 180 days after the alleged loss or injury for all other claims. Watch out. Neither ORCP 10 nor ORS 174.120 applies to the requirement for notice of a claim under a provision of the Oregon Tort Claims Act. In *Tyree v. Tyree*, 116 Or App 317, 320, 840 P2d 1378 (1992), *rev den*, 315 Or 644 (1993), the court held that the one-year limit applicable at the time was a "substantive condition precedent to recovery," not a procedural requirement. Thus, the court held that notice received on a Monday was untimely because Saturday was the last day of the time period.

As of the date these materials were prepared, Oregon Senate Bill 378 is pending before the Senate Committee on Veterans and Emergency Preparedness. The bill would amend ORS 30.275 to allow for a 2 year notice period for claims arising from violations of ORS 408.230 (Veteran Preference in Public Employment) and ORS 408.237 (Interview of Veteran Applicants).

In *Cannon v. Dept. of Justice*, 261 Or App 680 (2014), the court held that

one option for giving notice of a claim is commencement of an action on the claim. For purposes of the OTCA's notice provision, an action is "commenced" as of the date the complaint was filed so long as the summons is served within 60 days after the complaint was filed.

D. Filing Complaint with the Circuit Court Clerk

ORCP 9 E defines filing with the court. *But see Stull v. Hoke*, 326 Or 72, 948 P2d 722 (1997) (Court examined the meaning of "filing" under ORS 12.020(1), and, construing former ORS 12.020, held that the "operative moment for 'filing' an action is when the court clerk or person exercising the duties of that office receives the complaint."). Avoid problems by filing before the end of the statute of limitations.

Beware that the clerk is not required to receive any document for filing if the required information is not correct. Rejected documents may not be accepted until problems with the document are corrected. Documents, including complaints, not accompanied by the correct filing fee will be rejected.

Electronic filing requires familiarity with UTCR Chapter 21. The court considers a document submitted for an electronic filing when the electronic filing system receives the document. UTCR 21.080(3). The electronic system will send an email noting receipt of the filing, and date and time of the receipt, and if the document is accepted for filing, the date and time of entry into the register will relate back to the date and time of receipt by the court's electronic filing system. UTCR 21.080(3) & (4). If a document submitted electronically is rejected, an e-mail will be sent explaining the reason. The filer has three days from the date of rejection to request that the date of filing the resubmitted document relate back to the date of submission of the original. UTCR 21.080(5)(a). A filer seeking relation back to the date of original submission must comply with the requirements of UTCR 21.080(5). However, the court has no discretion to deny relation back of the filing providing the procedure is followed. *See Otnes v. PCC Structurals, Inc.*, 367 Or 787, 799-800 (2021).

Filing fees are required, as set forth in ORS 21.100 *et. seq.* Filing fees for tort and contract actions are specified in ORS 21.160, for domestic relations proceedings in ORS 21.155, and for probate matters in ORS 21.170. Documents submitted without the correct filing fee may be rejected.

E. Service by Person Over 18 Who is Neither a Party nor Attorney or Agent for a Party

Service may be made by any competent person 18 years or older who is a resident of Oregon or the state where service is made and is not a party to the action, nor an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. ORCP 7 E. Exceptions are found in ORS 180.260 and when service is made by mail, as specified in ORCP 7 D(2)(d)(i). ORCP 7 E.

F. Methods of Service in Oregon State Courts

The specifications for a summons in Oregon state courts are set out in ORCP 7.

1. ORCP 7 D(2) – Service Methods

The acceptable methods of service are found in ORCP 7 D(2). They include personal service, substituted service, office service and service by mail. ORCP 7 D(2)(a)-(d).

Care should be taken to familiarize yourself and your staff with the specific requirements of the method of service chosen. Note specifically that substituted service and office service require follow-up mailings, and that service is technically not effected until the mailing is completed. ORCP 7D(2)(b) and (c). Service by mail, ORCP D(2)(d)(i) is complete only as specified in the rule.

The methods of service permitted depend on the nature of the particular defendant. ORCP 7 D(3). Be prepared to substantiate that the prerequisites for service on a particular defendant have been met, whether a minor, an incapacitated person, corporation, a tenant of a mail agent, or the state of Oregon or other public bodies. See ORCP 7D(3)(a)-(i).

2. ORCP 7 D(4) – Motor Vehicle Accidents

The Oregon rules provide for a particular method of service when the action arises out of any "accident, collision, or other event giving rise to liability in which a motor vehicle may be involved" while being operated on streets, roadways, or premises open to the public. In such claims, service may be made as specified in ORCP 7D(4)(a) as follows:

3. D(4)(a) Actions arising out of use of roads, highways, streets, or premises open to the public; service by mail.

"D(4)(a)(i) In any action arising out of any accident, collision, or other event giving rise to liability in which a motor vehicle may be involved while being operated upon the roads, highways, streets, or premises open to the public as defined by law, of this state, if the plaintiff makes at least one attempt to serve a defendant who operated such motor vehicle, or caused it to be operated on the defendant's behalf, by a method authorized by subsection (3) of this section except service by mail pursuant to subparagraph (3)(a)(i) of this section and, as shown by its return, did not effect service, the plaintiff may then serve that defendant by mailings made in accordance with paragraph (2)(d) of this section addressed to that defendant at:

"(A) any residence address provided by that defendant at the scene of the accident;

"(B) the current residence address, if any, of that defendant shown in the driver records of the Department of Transportation; and

"(C) any other address of that defendant known to the plaintiff at the time of making the mailings required by (A) and (B) that reasonably might result in actual notice to that defendant.

"Sufficient service pursuant to this subparagraph may be shown if the proof of service includes a true copy of the envelope in which each of the certified, registered or express mailings required by (A), (B) and (C) above was made showing that it was returned to sender as undeliverable or that the defendant did not sign the receipt. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, service under this subparagraph shall be complete on the latest date on which any of the mailings required by (A), (B) and (C) above is made. If the mailing required by (C) is omitted because the plaintiff did not know of any address other than those specified in (A) and (B) above, the proof of service shall so certify."

The courts require that strict compliance with the elements of ORCP 7 D(4) in order for service under that rule to be effective. *Roberts v. Laughlin*, 176 Or App 227, 235, 31 P3d 453 (2001) (The rule prescribes three sets of mailings, the first two of which – including subparagraph 7 D(4)(a)(i)(B) – are mechanical and do not require or permit the exercise of judgment. We are not free to rewrite the rule to infuse it with a futility exception that the drafters and the legislature omitted".

4. ORCP 7 D(5) – Service in a Foreign Country

Service on a party in a foreign country is also sufficient if service is effected pursuant to the law of that foreign country, or as directed by order of the court or by the foreign authority, so long as the service shall be reasonably calculated to give actual notice. ORCP 7 D(5).

5. ORCP 7 D(6) – Court Order for Service and Service by Publication

The rules also provide that the court, at its discretion, and upon a showing that service cannot be made by any method otherwise specified, may order service "by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action. ORCP 7 D(6)(a). The court may order service by publication under this rule, or by other means. See ORCP D 7(6)(a)-(g). The court may also order the time for response if the order under this section is for service other than by publication. ORCP 7 D(6)(a).

If relying on service by publication, be aware that, upon good cause shown, a defendant served by publication, or his representative, may "be allowed to defend after judgment and within one year after entry of judgment," and if collection has commenced, restitution may be ordered if the defendant is successful in the defense.

G. Does HB 4212, COVID-19 legislation, impact the time for filing and service?

On June 30, 2020, House Bill 4212 was signed into law. The bill authorizes the Oregon Supreme Court to suspend or extend time periods that apply to court proceedings, including most civil matters, including tolling the period of commencement of civil actions. Specifically, Section 7 of HB 4212

states: “If the expiration of the time to commence an action or give notice of a claim falls within the time in which any declaration of a state of emergency issued by the Governor related to COVID-19…the expiration of the time to commence the action or give notice of the claim is extended to a date 90 days after the declaration and any extension is no longer in effect.”

On April 29, 2021, Oregon Governor Kate Brown extended the state-issued Executive Order No. 20-03 and the COVID-19 State of Emergency for an additional 60 days through June 28, 2021. This extension of the State of Emergency through June 28, 2021, will extend the statutes of limitation as stated in ORS Chapter 12 and ORS 30.020. If the Governor does not extend the emergency further, the statutes of limitations in Chapter 12 and ORS 30.020 will extend to 90 days after June 28, 2021.

As of the date these materials were prepared, Oregon Senate Bill 813-A is pending before the House Judiciary Committee. The bill would make it clear that the legislature intended HB 4212 to apply retroactively to the Governor’s first Executive Order on March 8, 2020 declaring the COVID-19 State of Emergency.

II. Common Mistakes to Avoid with Filing and Service

Top tips to help ensure a good defense:

1. Waiting until the last minute to file the complaint;
2. Failing to include filing fee with complaint;
3. Waiting until the last minute to have the summons and complaint served and failing to follow up with the process server when the time for service is expiring;
4. Naming the wrong defendant, or serving the wrong defendant, or both;
5. Failing to update address information with DMV or other services;
6. Failing to serve proper corporate or other business representative;
7. Failing to obtain sufficient information to effect substitute or office service in compliance with ORCP 7 D (2)(b) or (c);
8. Failing to see that necessary follow up mailings are made timely;

9. Failing to mail to all three addresses specified in ORCP 7 D(4) when relying on mail service in motor vehicle accident cases;

10. Failing to review and file proofs of service with summons. ORCP 7 F(1);

11. E-filing mistakes, such as failure to know dates when system unavailable, failure to select the correct document name or fee, and failure to confirm receipt and filing by court;

12. Failure to check if defendant deceased;

13. Failure to check for bankruptcy;

14. Failure to include statutory notices, such as ORS 408.515 (Notice to Veterans in eviction filings).

III. Challenges to Service to help avoid potential problems in your case based on defects in service

Defendants may raise objections to service in any variety of ways. You may receive a request for a copy of the proof of service that was made. Defendant may identify in a letter that the action has been filed against the wrong defendant. Defendant may simply wait for the applicable time periods to run and then file an answer asserting affirmative defenses. Alternately, the defendant may file a motion to dismiss or motion for summary judgment.

To help avoid potential problems in your case based on defects in service:

1. Carefully read defense counsel's letters advising that they have been retained to represent the defendant and will file an appearance.*See Williams v. Jett*, 183 Or App 611, 54 P3d 624 (2002).

2. Consider requiring that defendant file its responsive pleading or conditioning any extension in which to file on the assurance that no issue about service exists and will not be raised in any motion or responsive pleading.

3. Review defendant's answer carefully; does it assert a service or

statute of limitations defense, or raise an issue of improper party? Why is that defense alleged?

4. Understand that defendant may file a motion for summary judgment months after the litigation has been filed, or even bring a motion to dismiss later in the case.

5. Do not assume that the issue is not a real one just because the defense has not actively litigated it.

6. Develop your legal responses and arguments in opposition to the likely motion.

7. See that proofs of service are filed, conduct necessary discovery and be prepared to respond to the affirmative defense with admissible evidence if the court has not made a dispositive ruling before trial.

8. Remember that the PLF may be able to offer assistance if you run into trouble. Let them know there is a potential problem and consider any potential conflict you may have.

IV. Effective Service Despite Technical Non-Compliance

Although some problems simply cannot be corrected, frequently all is not lost when a defendant raises an argument or defense or files a motion based on insufficiency of service. Be an advocate. Look for legal arguments that the defendant waived the service issues, had actual notice of the lawsuit or that the statute of limitations is tolled.

In addition, develop the factual record about the efforts that were made and argue why the attempted service should be considered sufficient under ORCP7D(1). The courts have a stated pre-disposition to allow litigants their day in court. If a problem with service is identified, consider picking up the phone andconferring with defense counsel about curing the problem and avoiding the expense of motions.

A. Know and Utilize the Rules of Statutory Construction in Responding to Defense Motions

The Oregon Rules of Civil Procedure are construed as statutes. *See State v. Arnold*, 320 Or 111, 119, 879 P2d 1272 (1994) (construing ORCP 64 B(4)).

The statutory construction methodology can be very helpful to your arguments about service. The court frequently has explained:

> "In interpreting a statute, this court's task is to discern the intent of the legislature. ORS 174.020. To do that, this court examines both the text and context of the statute. The text of the statute is the starting point for interpretation and is the best evidence of the legislature's intent. If the legislature's intent is clear after an inquiry into text and context, further inquiry is unnecessary."

Arnold, 320 Or at 119, citing *PGE v. Bureau of Labor & Ind.*, 317 Or 606, 610-611, 859 P2d 1143 (1993). As the court stated in *England v. Thunderbirds and SAIF*, 315 Or 633, 638, 848 P2d 100 (1993), "[t]he best indication of legislative intent is the words of the statutes themselves." The court should not insert what has been omitted or omit what has been inserted. ORS 174.010; *Raudebaugh v. Action Pest Control, Inc.*, 59 Or App 166, 171-172, 650 P2d 1006 (1982). The court has the obligation to arrive at the correct construction of the statute. *Salinas v. One Stop Detail*, 194 Or App 457, 460, 95 P3d 745, *rev den*, 337 Or 556 (2004).

State v. Gaines, 346 Or 160, 206 P3d 1042 (2009), provides the current framework for statutory construction.

ORCP 7 D(1), and a plain reading of that rule, frequently affords a savings for defective service. ORCP 7D(1) provides, in relevant part:

> "**D Manner of service.**
>
> "D(1) **Notice required.** Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. * * * "

Frequently, as discussed below, defective service may be saved by arguing that service was sufficient under "all the circumstances."

B. Consider Whether Defendant Has Waived Sufficiency of Service as an Affirmative Defense

Has the defendant waived the defenses of sufficiency of summons, sufficiency of service, and the statute of limitations by failing to raise them in a responsive pleading or motion to dismiss under ORCP 21? ORCP 21 G provides that these defenses are waived if not raised in a responsive pleading, and that they may not be raised by amendment.

C. Examine Whether Any Tolling Provisions Apply, Potentially Extending the Period in Which the Action May Be Commenced

Under ORS 12.160, for example, an action may be tolled if, at the time the cause of action accrues, the person is under 18 years old or has a disabling mental condition. The timeof such disability is not considered part of the time limited for the commencement of the action, but the action shall not be extended more than five years by such disability, or in any case longer than one year after such disability ceases. ORS 12.160. *See also*, ORS 12.150 (suspension of statute of limitations by absence from state or concealment within the state); ORS 12.170(disability must exist when right of action accrued). Further, see ORS 12.180, 12.190, 12.195, 12.200, and 12.210 and related statutes.

Another potential tolling provision is ORS 12.155. This statute applies most often in motor vehicle accident cases, although it is not limited to those cases. It provides:

> "**12.155 Effect of notice of advance payment on running of period of limitations.** (1) If the person who makes an advance payment referred to in ORS 31.560 or 31.565 gives to each person entitled to recover damages for the death, injury or destruction, not later than 30 days after the date the first of such advance payments was made, written notice of the date of expiration of the period of limitation for the commencement of an action for damages set by the applicable statute of limitations, then the making of any such advance payment does not suspend the running of such period of limitation. The notice required by this subsection shall be in such form as the Director of the Department of Consumer and Business Services prescribes.
>
> "(2) If the notice required by subsection (1) of this section is not given, the time between the date the first advance payment was made and the date a notice is actually given of the date of

> expiration of the period of limitation for the commencement of an action for damages set by the applicable statute of limitations is not part of the period limited for commencement of the action by the statute of limitations."

See Blanton v. Beiswenger, 195 Or App 335, 97 P3d 1247 (2004) (applying ORS 12.155). *See e.g., Humphrey v. OHSU*, 286 Or App 344, 398 P3d 360 (2017) (allegations of hospital's provision of free or discounted medical care after patient complained could satisfy notice requirement of OTCA notice and constitute a "payment" to toll statute of limitation).

D. Arguments That Service Was Effective, Either Because it Complied Technically with Rule 7, or, in the Totality of Circumstances, it Was Reasonably Calculated to Afford a Reasonable Opportunity to Appear and Defend

The trial court acquires jurisdiction under ORS 12.020 when the requirements of ORCP 7 are satisfied. *Baker v. Foy*, 310 Or 221, 224, 797 P2d 349 (1990); *Paschall v. Crisp*, 138 Or App 618, 622, 910 P2d 407, *rev den*, 424 Or 176 (1996). ORCP 7 D(1) is frequently critical to a response to a motion to dismiss based on inadequate service. It provides:

> "D(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statue on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: Personal service of summons upon defendant or an agent of defendant authorized to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; office service by leaving with a person who is apparently in charge of an office; service by mail; or, service by publication."

In *Baker v. Foy*, the Supreme Court stated a two-part test for determining the adequacy of service under ORCP 7. First, if "service was accomplished in accordance with one of the methods specifically described in the rule, then we

[the court] presume[s] that service was adequate, and, if nothing in the record overcomes that presumption, the inquiry ends." *Mitchem v. Rice*, 142 Or App 214, 217-18, 920 P2d 1121, *adhered to as modified*, 143 Or App 546 (1996). Second, if service was not accomplished in compliance with one of the methods specified under the rule, the court "must determine whether the method that the plaintiff did employ nevertheless was reasonably calculated to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend." *Id*. at 218. *See* ORCP 7D(1). *Baker*, 310 Or at 228-29; *Paschall v. Crisp*, 138 Or App 618, 624, 910 P2d 407, *rev denied*, 324 Or 176 (1996). In *Williams v. Jett*, 183 Or App 611, 617, 54 P3d 624 (2002), the court held that the "totality of circumstances" is not limited to the point of service; rather, for the purposes of ORCP 7 D(1), "all of the circumstances" includes all circumstances occurring during the period in which steps necessary to effect service – in that case follow-up mailing – could have been accomplished.

Recently, a Multnomah County Circuit Court granted a defendant's motion to dismiss based on lack of personal jurisdiction despite a proof of service claiming that the individual defendant had been personally served. Defendant introduced evidence that it would have been impossible for personal service due to the 92 year-old defendant's incapacity that would have prevented her from coming to the door of her residence. The Court of Appeals affirmed without opinion. *Triplet v. Baker, individually and as Trustee of the Nina M. Hinton Trust, as Successor in Interest,* Multnomah County Circuit Court Case No. 18CV43516, *aff'd without opinion* 310 Or App 382 (2021).

Look for cases with facts similar to yours, develop arguments showing why, in a particular case, the service made – for example, substitute service – was sufficient under all the circumstances. If the person who accepted service at defendant's residence lived there but was three days shy of his fourteenth birthday, should service nonetheless be considered adequate? What about the college student who maintains his parents' address on his license at DMV, but actually lives elsewhere, at least most of the time? How do you show that the address where substitute service was made was his actual residence, or, at a minimum, that plaintiff reasonably believed that service at that address was likely to apprise him of the action? *See also Benavidez v. Benavidez*, 161 Or App 73, 984 P2d 307 (1999) (father trying to protect his pregnant daughter who lived elsewhere misrepresented to process server that the defendant daughter lived with him; service considered adequate in all the circumstances).

Of course, technical compliance with Rule 7 is best. Short of that, plaintiff will need to develop a factual record that demonstrates why, although not technically proper, service was designed to afford defendant a reasonable opportunity to appear and defend. ORCP 7 D(1). In some instances, it helps when the efforts to serve actually accomplished its purpose and, within a few days of service, defense counsel notifies plaintiff of the intent to appear. *See generally, Williams v. Jett*, Or App 611, 59 P3d 624 (2002); *Beckett v. Martinez*, 119 Or App 338,343, 850 P2d 1148, *rev denied* 317 Or 583 (1993); *Duber v. Zeitler*, 118 Or App 597, 848 P2d 642, *rev denied* 316 Or 527 (1993) (court held service wasadequate under ORCP 7D(1) because it was reasonably calculated to give defendant notice of the lawsuit); *Marriage of Boyd*, 131 Or App 194, 884 P2d556 (1994) (same). However, actual notice will not automatically render service adequate if it was not done in a manner reasonably calculated to apprise defendant of the action. See *Murphy v. Price*, 131 Or App 693, 695, 886 P2d 1047, 1048 (1994), *rev den*, 321 Or 137 (1995) (defect in service resulting from service by mail with unrestricted delivery was not cured by actual notice).The Oregon federal courts apply a similar view. In *Travelers Cas. & Sur. Co. of Am. v. Brennecke*, 2006 U.S. Dist. LEXIS 67956 (D. Or. Sept 6, 2006),service on the defendant was held sufficient when the process server left the documents on the doorstep after the defendant answered his intercom and thenrefused to answer the door, but stood at the window in the front door as the server held out the complaint and summons and announced, "You are served."Even if the defendant was not personally served, the court said there could be no dispute that he and his counsel had known of the existence of the action since his notice of appearance was filed.

As with Oregon state courts, however, actual notice may not excuse noncompliance with the requirements in ORCP 7D. See *Dingus v. City of Portland*, No. CV-05-1298-ST, 2006 WL 8459002 at *3 (D. Or. Feb 8, 2006).

E. Relation Back to the Date of Original Filing Under ORCP 23 C

When the argument is that plaintiff named and/or served the wrong defendant, plaintiff's counsel should consider whether there is any possibility that an amended complaint naming the right defendant will relate back to the date of filing of the original complaint.

The trial court has broad discretion to allow an amended complaint to be filed under ORCP 23 A. ORCP 23 A provides that leave to amend "shall be freely given when justice so requires." *See Franke v. Oregon Dep't of Fish & Wildlife*, 166 Or App 660, 2 P3d 921 (2000) (Court held trial court abused its

discretion in refusing amendment where record contained no evidence of prejudice).

Relation back is governed by ORCP 23 C, which provides that:

> "For an amendment changing a party defendant to relate back to the filing of a prior pleading, three conditions must be met: (1) the cause of action asserted against the new party must have arising out of the condition, transaction, or occurrence described in the prior pleading; (2) within the period of the statute of limitations, the new party must have received notice of the litigation; and (3) within the period of the statute of limitations, the new party must have known or had reason to know that, but for a mistake in identity, he was an intended party defendant."

Johnson v. MacGregor, 55 Or App 374, 637 P2d 1362, 1364 (1981).

Several reported decisions have permitted relation back when the elements of ORCP 23 C are met. *See, e.g.*, *McLain v. Maletis Bev.*, 200 Or App 374, 115 P3d 938 (2005*); Waybrant v. Clackamas Cty*., 54 Or App 740, 746, 635 P2d 1365 (1981); *Mitchell v. The Timbers*, 163 Or App 312, 319-320, 987 P2d 1236 (1999) (court held plaintiff's proposed second amended complaint related back to his original complaint because defendant, although misnamed, should reasonably have understood, and in fact did understand, that he was the entity intended to be sued.); *Johnson v. Manders*, 127 Or App 147, 152, 872 P2d 420, *rev denied*, 319 Or 149 (1994) (amended complaint related back and was timely where defendant was adequately identified in the body of the complaint). The rationale is that the party opposing the amendment has received the notice that the statute of limitations was intended to insure. *See Welch v. Bancorp Mgt. Advisors, Inc.*, 296 Or 208, 221, 675 P2d 172 (1983).

Richlick v. Relco Equipment, Inc., 120 Or App 81, 852 P2d 240, *rev denied*, 317 Or 605 (1993), and the cases that follow it, hold that it is not sufficient to show that the new defendant named in the amended complaint knew of the action within the sixty days for service permitted by ORS 12.020. Rather, in order for relation back to apply, the defendant to be added had to know about the action on or before the date the statute of limitations would expire. *See Smith v. American Legion Post 83*, 188 Or App 139, 71 P3d 136, *rev denied*, 336 Or 60 (2003).

The death of a defendant remains a tricky area, as demonstrated in *Worthington v. Estate of Milton E. Davis*, 250 Or App 755, 282 P3d 895 (2012). The day before the statute of limitations ran, plaintiff filed an action for

negligence, naming the driver of the other vehicle. When plaintiff learned that the driver had died more than a year earlier, plaintiff filed an amended complaint naming the personal representative of the driver's estate and the estate itself as defendants. The trial court granted the PR's motion to dismiss on the ground the amended complaint was filed outside the two-year limitations period and did not relate back to the original complaint. ORCP 23 C. The Court of Appeals rejected plaintiff's misnomer argument, that the amended complaint did not change the party against whom she had filed suit, and agreed with defendant that plaintiff had chosen the wrong person to sue. Substituting the personal representative for the decedent in the amended complaint changed the party, and the amended complaint did not relate back.

In determining whether the additional notice requirements should apply to an amended complaint, Oregon Courts have divided ORCP 23 C cases into "misnomer" and "misidentification" cases. *Vergara v Patel*, 305 Or App 288, 295 (2020); *Worthington v. Estate of Davis*, 250 Or App 755, 760 (2012); *see also Harmon v. Meyer*, 146 Or App 295, 298 (1997); *Kowalski v. Hereford L'Oasis*,190 Or App 236, 240 (2004); *Krauel v. Dyers Corp*, 173 Or App 336 (2001).

A misnomer triggers just the first sentence of ORCP 23 C, and a plaintiff only needs to demonstrate that the amended pleading arises from the same conduct, transaction, or occurrence as the original pleading. *Vergara at* 295; *Worthington* at 759; *Harmon* at 298. On the other hand, a misidentification constitutes a change in party and triggers the additional notice requirements for relation back as imposed in the second part of ORCP 23 C. *Worthington* at 759; *Kowalski* at 240-241.

A misidentification occurs when plaintiff makes "a mistake in choosing *which* person or entity to sue." *Vergara* at 295 (citing *Worthington* at 760 (italics in original)); *Smith v. American Legion Post 83*, 188 Or App 139, 141 (2003) (Plaintiff initially filed suit against the wrong entity and served the summons and complaint on that wrong entity); *Herman v. Valley Ins. Co.*, 145 Or App 124 (1996) (Plaintiff initially filed suit against the wrong insurance company).

V. Potential for Refiling the Action Under ORS 12.220

A plaintiff may have a good faith basis to re-file his action if dismissed for procedural defects such as insufficient service. ORS 12.220 allows a plaintiff, whose action is dismissed on procedural grounds, including ineffective service or lack of jurisdiction, to re-file *within 180 days of the dismissal* without

being barred by the statute of limitations. The conditions to re-filing are that:

(1) the original action was timely filed;

(2) the case was dismissed without prejudice on any ground not adjudicated on the merits;

(3) if dismissed with prejudice, the case was dismissed on the ground that plaintiff failed to properly effect timely service of the summons and the statute of limitations expired; and

(4) the defendant had actual notice of the action within sixty days of the original filing.

The legislative history demonstrates a desire to allow cases to be determined on their merits when the dismissal is based on procedural grounds and the defendant knew of the action within 60 days of the date of original filing. The legislative history indicates that in these circumstances, the defendant has received the notice of the action that the statute of limitations is designed to afford, and, once service is effected, defendant should be required to answer the claim.

Of course, all defenses that would have been available had the original action been timely commenced, ORS 12.020, are available in a new action commenced under ORS 12.220.

ORS 12.220 applies only when the original action is involuntarily dismissed. A plaintiff may not file a new claim pursuant to the savings statute if that same plaintiff, at any time, has voluntarily dismissed the original claim.

Filing & Service Issues and Avoiding Malpractice Claims

May 25, 2021

Amy Hoven, PLF Claims Attorney
Hillary A. Taylor, Keating Jones Hughes, P.C.

OSB

Hillary A. Taylor
Partner
Keating Jones Hughes, P.C.

Amy Hoven
Claims Attorney
Professional Liability Fund

Rebecca Lundin
Manager
Malstrom's Process Serving Co.
and Barrister Support Service Inc.

I. An Action is Commenced by Filing & Service

ORS 12.010 & ORS 12.020

- When the complaint is filed and the summons served on the defendant
- Service must be completed within 60 days of filing of the complaint

OSB

I. An Action is Commenced by Filing & Service

A. Know how to compute time

ORCP 10
ORS 174.120
ORS 187.010(3)

ORCP 10 A sets forth the days that are counted while 10 B provides for additional time when service by mail, fax, email or other electronic means. ORCP 10 B does not apply to service of summons. Use ORS 174.120 for statutory time computations. Legal holidays are found in ORS 187.010(3).

OSB

I. An Action is Commenced by Filing & Service

B. Know the Applicable Statutes of Limitations and Repose

Carefully check on the statute of limitations and statute of ultimate repose for each claim. For some claims, the statute of ultimate repose will bar the claim regardless of the statute of limitations. Be sure to factor in time needed for filing and service problems that may arise.

OSB

I. An Action is Commenced by Filing & Service

C. Providing Tort Claims Notice to a public body defendant

One year from loss or injury for wrongful death

180 days from loss or injury for all other claims

ORCP 10 and ORS 174.120 do not extend OTCA notice deadline.

Tips: Carefully research if defendant comes within OTCA. Also, watch out for minors!

OSB

I. An Action is Commenced by Filing & Service

D. Filing Complaint with the Circuit Court Clerk

Most initiating documents must be e-filed. Be sure to select the correct document and pay the correct filing fee.

Check the rules about documents required to be filed conventionally, *e.g.* contempt petition. UTCR 21.070(3)

OSB

I. An Action is Commenced by Filing & Service

E. Service by Person Over 18 Who is Neither a Party nor Attorney or Agent for a Party

ORCP 7 E

- Any competent person;
- 18 years or older;
- Resident of Oregon or the state where service is made; and
- Not a party to the action, nor an officer, director, or employee of, nor attorney for, any party corporate or otherwise.

Always check the exceptions!

OSB

I. An Action is Commenced by Filing & Service

F. Methods of Service in Oregon State Courts

Four Methods of Service in Oregon:

1. Personal service
2. Substituted service
3. Office service
4. Service by mail

OSB

I. An Action is Commenced by Filing & Service

F. Methods of Service in Oregon State Courts

You and your staff should know the rules.

Review ORCP D(3) for particular defendants like minors, tenants, corporations.

Substituted and office service require follow up mailing.

Be prepared to show your work!

OSB

I. An Action is Commenced by Filing & Service

F. Methods of Service in Oregon State Courts

2. ORCP 7 D(4) – Motor Vehicle Accidents

You must make at least one attempt at service under ORCP D(3) but not mail service. Keep the return!

Remember to so certify if there is no other known address under (C).

OSB

I. An Action is Commenced by Filing & Service

F. Methods of Service in Oregon State Courts

4. ORCP 7 D(5) – Service in a Foreign Country

The Hague Convention: Use a foreign process server.

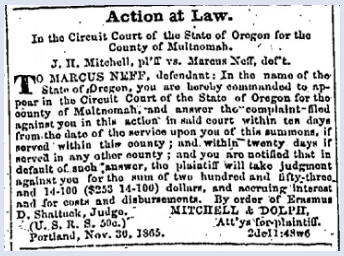
OSB

I. An Action is Commenced by Filing & Service

F. Methods of Service in Oregon State Courts

5. ORCP 7 D(6) – Court Order for Service and Service by Publication

Factor in the time to bring a motion. Defendant may be allowed to defend after judgment and up to one year after entry of judgment even if collection occurred.



Action at Law.

In the Circuit Court of the State of Oregon for the County of Multnomah.

J. H. Mitchell, pl'f vs. Marcus Neff, def't.

TO MARCUS NEFF, defendant: In the name of the State of Oregon, you are hereby commanded to appear in the Circuit Court of the State of Oregon for the county of Multnomah, and answer the complaint filed against you in this action in said court within ten days from the date of the service upon you of this summons, if served within this county; and within twenty days if served in any other county; and you are notified that in default of such answer, the plaintiff will take judgment against you for the sum of two hundred and fifty-three and 14-100 ($253 14-100) dollars, and accruing interest and for costs and disbursements. By order of Erasmus D. Shattuck, Judge.

MITCHELL & DOLPH,
(U. S. R. S. 50c.) Att'ys for plaintiff.
Portland, Nov. 30, 1865. 2del1:48w6

I. An Action is Commenced by Filing & Service

G. Does HB 4212, COVID-19 legislation, impact the time for filing?

HB 4212 signed June 30, 2020

Current end of COVID-19 Emergency Declaration: June 28, 2021

Expect technical issues with e-filing and overwhelmed clerks around the deadline of 90 days after declaration ends. Don't wait until the last minute!

II. Common Mistakes to Avoid – Filing & Service

Top tips to help ensure a good defense (1-5)

1. Waiting until the last minute to file the complaint
2. Failing to include filing fee with complaint
3. Waiting until the last minute to have the summons and complaint served and failing to follow up with the process server when the time for service is expiring
4. Naming the wrong defendant, or serving the wrong defendant, or both
5. Failing to update address information with DMV or other services

OSB

II. Common Mistakes to Avoid – Filing & Service

Top tips to help ensure a good defense (6-10)

6. Failing to serve proper corporate or other business representative
7. Failing to obtain sufficient information to effect substitute or office service in compliance with ORCP 7 D (2)(b) or (c)
8. Failing to see that necessary follow up mailings are made timely
9. Failing to mail to all three addresses specified in ORCP 7 D(4) when relying on mail service in motor vehicle accident cases
10. Failing to review and file proofs of service with summons. ORCP 7 F(1).

OSB

II. Common Mistakes to Avoid – Filing & Service

Top tips to help ensure a good defense (11-14)

11. E-filing mistakes, such as failure to know dates when system unavailable, failure to select the correct document name or fee, and failure to confirm receipt and filing by court;
12. Failure to check if defendant deceased;
13. Failure to check for bankruptcy;
14. Failure to include statutory notices, such as ORS 408.515 (Notice to Veterans in eviction filings).

OSB

III. Challenges to Service to help avoid potential problems in your case based on defects in service

Incoming! Request for proof, conferral letter, answer, motion to dismiss or summary judgment motion.

Do not assume that you properly completed service. Ask if there are any defects or if defendant intends to challenge service. Pay attention to the details.

OSB

IV. Effective Service Despite Technical Non-Compliance

A. Know and Utilize the Rules of Statutory Construction in Responding to Defense Motions

ORCP 7 D(1) **Notice required.**

Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend.

OSB

IV. Effective Service Despite Technical Non-Compliance

B. Consider Whether Defendant Has Waived Sufficiency of Service as an Affirmative Defense

If it was not part of a responsive pleading or motion to dismiss, then it cannot be later added via amendment.

OSB

IV. Effective Service Despite Technical Non-Compliance

C. Examine Whether Any Tolling Provisions Apply, Potentially Extending the Period in Which the Action may be Commenced

If relying on HB 4212 tolling, then affirmatively plead it in the complaint to avoid a motion to dismiss.

OSB

IV. Effective Service Despite Technical Non-Compliance

D. Arguments That Service Was Effective, Either Because it complied Technically with Rule 7, or, in the Totality of Circumstances, it was Reasonably Calculated to Afford a Reasonable Opportunity to Appear and Defend

Remember: Actual notice will not automatically render service adequate if it was not done in a manner reasonably calculated to apprise defendant of the action.

But, remember that actual notice is required for the savings statute.

OSB

IV. Effective Service Despite Technical Non-Compliance

E. Relation Back to the Date of Original Filing Under ORCP 23 C

Know the difference between a misnomer and misidentification.

Misnomer: You aimed properly but missed the target. Triggers first sentence of ORCP 23 C. Relation back if rule requirements met.

Misidentification: You chose the wrong party. You're doomed!

OSB

V. Potential for Refiling the Action Under ORS 12.220

The Savings Statute

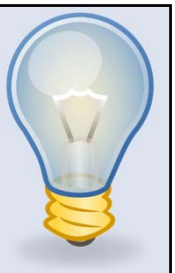
Do not use it routinely. Try to keep it in your back pocket for emergencies.

Do not wait until the last minute *again*.

Discovery can be used to try and establish actual notice but it may be expensive and challenging.

OSB

VI. Thoughts from a Process Server in the trenches



We will now turn it over to Rebecca Lundin, Manager of Malstrom's Process Serving Co. and Barrister Support Service Inc.

OSB

KJH KEATING JONES HUGHES P.C. ATTORNEYS AT LAW

OSB Professional Liability Fund

Questions?

Thank you!

Amy Hoven | amyh@osbplf.org
Hillary A. Taylor | htaylor@keatingjones.com

Rebecca Lundin

Manager of
Malstrom's Process Serving Co.
And
Barrister Support Service Inc.

Statutes of Limitations

- When action deemed begun:
  - "when the complaint is filed *and* the summons is served on the defendant" (ORS 12.020)
  - Service deadline
  - Time is of the essence

Bona Fide Effort

- DECLARATION OF BONA FIDE EFFORT

I, Plaintiff, have made a bona fide effort to collect this claim from the defendants before filing this claim with the court clerk.

Commencing a Case

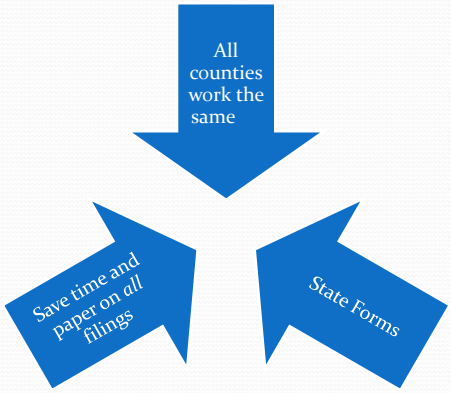
- Small Claims and Notice of Small Claims
- Civil Complaint
- Eviction (FED forcible entry detainer)

Electronic Filing

- Must have an account https://oregon.tylerhost.net/
- Mandatory Attorney E-file
- Deadlines
- Time Sensitive documents

Electronic Filing

Myth



Fact

- Each county working *their* way
- Forms are county specific
- E-file, go to courthouse to get documents

Method of Service

Personal Service

Substitute Service

Alternative Method of Service

Serving during a Pandemic

Safety

House Bills

Most Affected Services

City/County Shutdowns

Process Server's Viewpoint

Client perspective

vs.

Reality

Process Server's Viewpoint

- No Trespassing
- Unmarked homes
- Language barriers
- Never a dull moment

A PROCESS SERVER'S HANDBOOK

A BASIC GUIDE TO THE SERVICE
OF PROCESS

By Terry Sheldon
Barrister Support Service, Inc.
11349 SW 60th Ave.
Portland, OR 97219

Document Type	Manner/Rule	Statute	Explanation
Complaint	Personal Service Substitute Service Office Service Service by Mail Tenant of Mail Agent	ORCP 7D(2)(a) ORCP 7D(2)(b) ORCP 7D(2)(c) ORCP 7D(2)(d) ORCP 7D(3)(a)(iv)	Service of Process: Serve Within 60 days from the date of filing. Response Time: 30 days from the date of service or mailing, if applicable.
(Particular Defendants) Minors	Service upon a minor under the age of 14 years, by service upon such minor AND also the minor's father, mother, conservator, or, if there be none, then upon any person having the care of control of the minor or with whom such minor resides, or in whose services such minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27A(2).	ORCP 7D(3)(a)(ii)	ORCP 7H allows that a summons and complaint may be transmitted by telegraph as provided in Rule 8D (12-14-96) Rule 8D Telegraphic transmission of writ, order, or paper, for service: Any writ or order in any civil action, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy as defined in ORS 165.840, of such writ, order or paper so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose.
Incapacitated Person	Service upon a person who is incapacitated or financially incapable, by service upon the conservator of such person's estate or guardian, or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B(2).	ORCP 7D(3)(a)(iii) ORS 125.065 (3)	
Corporation Limited Partnership	Primary service method. By personal service or office service upon a registered agent, officer, director, general partner, or managing agent of the corporation or limited partnership, or by personal service upon any clerk on duty in the	ORCP 7D(3)(b)(i)	

	office of a registered agent.		

Document Type	Manner/Rule	Statute	Explanation
FED- Commercial	Personal Service Posting of Commercial FED: Even if the business/Defendant cannot be found, the documents must be posted on the door, as the eviction has to do with the premises.	ORCP 10(3)(b) ORS 105.135	An initial hearing date is set by the court clerk, minimum of 8 days, or maximum 14 days from the date of filing (if requested by the Plaintiff). Court Clerk is required to mail a copy of the Summons and Complaint to the Defendants.
FED- Residential	Personal Service- to any occupant 14 years or older) **Posting**- to main entrance of premises. Sub-service does not apply to "All Other Occupants" for an FED.	ORS 105.135 ORS 105.158	Service must be made by the end of the next judicial day, (from the date of filing or date accepted by E-File).
Notice of Restitution	Personal Service(Any occupant 14 years or older) **Posting**- to main entrance of premises.		**Notice of Restitution:** The process server or sheriff serving the restitution must mail a copy of the restitution to the defendant at the premises. The affidavit/proof of service must be filed with the court by the end of the next judicial day following service.
Order (Requiring Appearance or written response less than 30 days)	Personal Service Only	ORCP 7D(2)(a)	As per ORCP 9b, service of any notice or other paper to bring a party into contempt may only be served upon the party personally.
Order (Appearance not required or written response required is 30 days or more)	Personal service Substitute Service	ORCP 7D(2)(b)	Orders should, as a general rule, be served 10 days prior to any court date but courts shall have discretion to

			modify these stated times.
Petition	Personal service Substitute service	ORCP 7D(2)(a) ORCP 7D(2)(b)	ORCP 37A(2) provides that petitions shall be served in the same manner as a summons in ORCP 7.
Petition and Notice; Conservatorship/Guardianship	Personal service Only upon the proposed protected person, or parent of a minor. (try to have a witness present at the time of service)	ORS 125	The proposed protected person then has **15** days to respond, from the date of service.

Document Type	Manner/Rule	Statute	Explanation
Small Claim	Personal Service Substitute Service Office Service Service by Mail Tenant of Mail Agent	ORCP 7D(2)(a) ORCP 7D(2)(b) ORCP 7D(2)(c) ORCP 7D(2)(d) ORCP 7D(3)(a)(iv)	Service of process should be within 60 days from the date of filing. Service by Mail MUST be Certified Return Receipt, Restricted Delivery and MUST be signed for by the Defendant PERSONALLY to be valid. Defendant Response time: 14 days from the date of service or mailing, if applicable.
Subpoena: (Appearance Required) Name Person	Personal Service Only	ORCP 55D(1)	Service must be made as to allow the witness a reasonable time for preparation and travel to the place of attendance.
Subpoena: Organization	Personal service: By personal service or office service upon a registered agent, office, director, general partner, or managing agent of the corporation of limited partnership of by personal service upon any clerk on duty in the office of the registered agent. Personal service: Upon any county, incorporated city,	ORCP 7D(3)(b)(i) ORCP 7D(3)(d)	Must be served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(d), D(3)(e), or D(3)(f).

	school district, or other public corporation, commission, board or agency, by personal service or office service upon office, director, managing agent or attorney thereof. Personal service: Upon any general partnership by personal service upon partner or any agent authorized by appointment or law to receive service for the partnership. Personal service: Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service.	ORCP 7D(3)(e) ORCP 7D(3)(f)	

Document Type	Manner/Rule	Statute	Explanation
Subpoena: Records Production	Personal Service Substitute service Office service	ORCP7 D(3)(b)(i) ORCP D(3)(d) ORCP D(3)(e) ORCP D(3)(f)	ORCP 55D(1)a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period. ORCP 55D(3)(d) Service of subpoena by mail may not be used for a subpoena commanding production of records, not accompanied by a command to appear at trial.
Subpoena: Law Enforcement Agency Police Officer, State Policeman, etc.	Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made.	ORCP 55D(2)(a)(b)	If under the **10 days** prior to the date attendance is sought, the subpoena must be PERSONALLY served upon the officer

	A Subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer no later than **10 days** prior to the date of attendance is sought.		unless the agency will accept.

Document Type	Manner/Rule	Statute	Explanation
Subpoena Via Mail	**Service by Mail:** Under the following circumstances, service of a subpoena to a witness by mail shall be of the same legal force and effect as personal service otherwise authorized by this section. It is certified that the attorney or the attorney's agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial. Arrangements for payment to the witness of fees and mileage	ORCP 55D(3) ORCP 55D(3)(a) ORCP 55D(3)(b)	Conditions of this type of service provide that the mailing needs to be done 10 days prior and signed for 3 days prior in order for service to be valid.

	satisfactory to the witness. The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.	ORCP 55D(3)(c)	

Document Type	Manner/Rule	Statute	Explanation
Trustee's Notice of Sale	Personal Service Substitute Service: to an occupant 14 years or older, after confirming residency. Posting- to the main entrance of premises, i.e. front door, gated entry way, etc.	ORS 86.774 (renumbered in 2013) ORCP 7D(2) ORCP 7D(3)	Service must be made by serving an occupant (pursuant with ORCP 7D) 120 days prior to sale date. If no one is available on first attempt, documents must be posted. After at least 48 hours, service is attempted again, if no one is available- documents are posted. After at least another 48 hours, a third attempt is made to serve an occupant. If no one is available, a copy of the documents along with the statement of the time and manner of service should be mailed to the premises addressed to "OCCUPANTS" at address service was attempted. Service on an occupant is effected on the earlier (first attempt) date that the notice is served.

Document Type	Manner/Rule	Statute	Explanation
Writ of Garnishment Individual	Personal service: A writ may be delivered to an individual having possession of the property.	ORS 18.655(1)(a)	Writs of Garnishment are valid 90 days from the date they are issued by the clerk of the court or an attorney. Writs need to be re-issued every 90 days for employers.
Limited Partnership	Personal service: To any person designated by the partnership to accept delivery of a writ or any partner, if the property is in the possession of a partnership; provided however that the partnership is limited.	ORS 18.655(1)(b)	Writs must be served within 60 days of being issued to be valid. Writs are a singular writ and the garnishee withholds the property on a one-time basis.
Corporation	Personal service: To any person designated by the corporation to accept delivery of a writ, or any officer or any managing agent of the corporation, if the property is in the possession of the corporation.	ORS 18.655(1)(c)	Following delivery of a writ of garnishment to a garnishee, the person who delivered the writ must mail or deliver promptly the following documents to the debtor whose property is being garnished by the writ: (a) A copy of the writ of garnishment. (b) The original of the debt calculation form. (c) A notice of exemptions (d) A challenge to garnishment with the names and addresses of the garnishor and garnishee entered by the garnishor.
Financial Institution	Personal service: If the property(funds) is held by a financial institution as defined in ORS 706.005, the manager, assistant manager or other designated person at any office or branch where deposits are received or that has been designated by the institution as a place for the delivery of writs. Financial institution require a search fee as outlined in ORS 29.377 and have to be included with the writ at the time of service in the amount of $15.00. Search fee does not apply to employee's of the financial institution.	ORS 18.655(1)(e)	As stated in ORS 18.652 writs can only be delivered by the sheriff or process server if they have errors and omissions insurance with limits not less than $100,000.00 per occurrence from a company authorized to do business in this State.

Personal Service ORCP 7D(2)(a)

Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

Substitute Service ORCP 7D(2)(b)

Substituted service may be made by delivering true copies of the summons and the complaint at the dwelling house or usual place of abode of the person to be served, to any person 14 years of age or older residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, substituted service shall be complete upon such mailing.

Office Service ORCP 7D(2)(c)

If the person to be served maintains an office for the conduct of business, office service may be made by leaving true copies of the summons and the complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, office service shall be complete upon such mailing.

Tenant of Mail Agent ORCP 7D(3)(a)(iv)

Upon an individual defendant who is a "tenant" of a "mail agent" within the meaning of ORS 646.221 by delivering true copies of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:**(A)** the plaintiff makes a diligent inquiry but cannot find the defendant; **and**
(B) the plaintiff, as soon as reasonably possible after delivery, causes true copies of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copies of the summons and the complaint.
Service shall be complete on the latest date resulting from the application of subparagraph D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.

Required Mailing

The plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the documents to the defendant to the address where service was completed together with a statement of the date, time, and place at which service was made. For the purpose of computing any period of time prescribed or allowed by these rules, service shall be completed upon such mailing.

2006 WL 8459002
Only the Westlaw citation is currently available.
United States District Court, D. Oregon.

Douglas DINGUS, Plaintiff,
v.
CITY OF PORTLAND, Portland Police Bureau, State of Oregon, Officer Honl, Officer McIntyre, and Officer Chin, Defendants.

CV-05-1298-ST
|
Signed 02/08/2006

Attorneys and Law Firms

Lynne Ann Dickison, Squires & Lopez, P.C., Portland, OR, for Plaintiff.

James G. Rice, City of Portland, Portland, OR, for Defendants.

FINDINGS AND RECOMMENDATION

STEWART, Magistrate Judge:

INTRODUCTION

***1** Plaintiff, Douglas Dingus, filed this action initially in state court on May 24, 2005, seeking damages under 42 USC § 1983 against defendants for using excessive force and illegally arresting and imprisoning him on May 27, 2003, in violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution. Defendant, the City of Portland, timely removed the action to this court on August 19, 2005. On October 14, 2005, plaintiff filed a First Amended Complaint. This court has jurisdiction pursuant to 28 USC §§ 1331 and 1343.

The City of Portland has filed a Rule 12 Motion Against Plaintiff's Complaint (docket #7) seeking to dismiss the action against Officers Honl, McIntyre and Chin for failure to serve them within the applicable statute of limitations[1] and against the City of Portland for failure to state a claim. For the reasons set forth below, that motion should be granted.

DISCUSSION

I. Claim Against Officers Honl, McIntyre and Chin

The statute of limitations for § 1983 actions is determined by state law. *Harding v. Galceran*, 889 F2d 906, 907 (9th Cir 1989), *cert denied*, 498 US 1082 (1991). For statute of limitations purposes, § 1983 actions are characterized as personal injury actions. *Id.* In Oregon, the statute of limitations for personal injury actions is two years. ORS 12.110(1); *Cooper v. City of Ashland*, 871 F2d 104, 105 (9th Cir 1989).

According to ORS 12.020(1), an action "shall be deemed commenced as to each defendant when the complaint is filed, and the summons served on the defendant." A party has 60 days in which to accomplish service in order for the complaint to relate back to the date of filing. ORS 12.020(2). If service is not completed within 120 days, then under FRCP 4(m), the court shall dismiss the action without prejudice, direct that service be effected within a specified time or, upon a showing of good cause, extend the time for service.

Because plaintiff's alleged injuries occurred on May 27, 2003, the two year statute of limitations for his claim expired on May 28, 2005. Plaintiff filed his Complaint on May 24, 2005, just prior to the expiration of the statute of limitations. However, he had 60 days, or until July 23, 2005, to complete service. Because July 23 was a Saturday, ORCP 10A extended the date to the following Monday, July 25, 2005.

At the time the City of Portland filed its motion to dismiss, plaintiff had not filed any returns of service of any summons with the court. However, in response to the motion, plaintiff filed returns of service of Summons on Officer Honl on July 24, 2005, and on Officer McIntyre on July 22, 2005; both service dates are within 60 days after the Complaint was filed. Nevertheless, the City of Portland contends that neither Officer Honl nor McIntyre were properly served with a copy of the summons and

complaint and that no attempt of service has been made on Officer Chin. Plaintiff concedes lack of proper service on Officer Chin, but contends that Officers Honl and McIntyre were properly served.

***2** The laws of the state in which service was effected prior to removal govern challenges to the sufficiency of service of process. FRCP 81(c); *Lee v. City of Beaumont*, 12 F3d 933, 936-37 (9th Cir 1993) ("The issues of the sufficiency of service of process prior to removal is strictly a state law issue ....", citing *Anderson v. Allstate Ins. Co.*, 630 F2d 677, 682 (9th Cir 1980)). According to FRCP 4(e)(1), service may be effected "pursuant to the law of the state in which the district court is located, or in which service is effected." Because service was originally effected in Oregon prior to removal, this court will evaluate the challenge to service of process under Oregon law.

To determine whether service of process was proper, Oregon engages in a two-part inquiry:

> First, if service is accomplished in accordance with one of the specific methods allowed in ORCP 7, including substituted service, then it is presumptively adequate. If nothing in the record overcomes that presumption, the inquiry ends. Second, if service was not accomplished by one of those specific methods, the court must determine whether the manner of service used satisfies the more general requirement of ORCP 7 D(1), which provides, in part: "Summons shall be served * * * in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend."

Pham v. Faber, 152 Or App 634, 637, 955 P2d 257, 259, *rev den*, 327 Or 484, 971 P2d 408 (1998) (summarizing the methodology of *Baker v. Foy*, 310 Or 221, 228-29, 797 P2d 349, 354 (1990)).

Plaintiff's returns of service indicate that an attempt was made to accomplish office service in accordance with ORCP 7D(2)(c):

> **Office service.** If the person to be served maintains an office for the conduct of business, office service may be made by leaving a true copy of the summons and the complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, a true copy of the summons and the complaint to the defendant at the defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, office service shall be complete upon such mailing.

The process server left a summons and complaint for Officer Honl on July 24, 2005, with an "Officer Estes," the person "apparently in charge" at the Portland Police Bureau East Precinct, during "normal working hours" at 10:25 pm, and left a summons and complaint for Officer McIntyre on July 22, 2005, with an "Officer Jones," the person "apparently in charge" at the Portland Police Bureau Identification Division Central Precinct, during "normal working hours" at 10:07 pm. However, nothing in the record reveals that plaintiff completed office service by mailing a "true copy of the summons and the complaint to the defendant at the defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action." ORCP 7D(2)(c). The failure to complete office service by mailing renders this method of substitute service presumptively inadequate.

***3** Therefore, this court must proceed to the second step of the inquiry and determine whether the method of service satisfies the more general requirement of ORCP 7D(1). "[The reasonable notice standard of ORCP 7D(1) is satisfied by examining the totality of the circumstances as they were known to the plaintiff at the time of service. The burden is on the plaintiff to show adequate service of summons if the manner chosen is not one of those presumptively valid forms of service listed in ORCP

7D(2)." *Pham*, 152 Or App at 642, 955 P2d at 261. Plaintiff contends that its service of process on Officers Honl and McIntyre was adequate because they received actual notice and, in fact, joined in removal of this case from state court.

This contention must be rejected.
Actual notice does not excuse noncompliance with the requirements of ORCP 7D. The inquiry "focuses not on the defendant's subjective notice, but instead on whether the plaintiff's conduct was objectively, reasonably calculated ... under the totality of the circumstances then known to the plaintiff to apprise the defendant of the pendency of the action." *Davis Wright Tremaine, LLP v. Menken*, 181 Or App 332, 337, 45 P3d 983, 985 (2002). A defendant's "actual notice is, essentially, irrelevant." *Id* at 335, 45 P2d at 986.

Plaintiff's reliance on *Williams v. Jett*, 183 Or App 611, 54 P3d 624 (2002), is misplaced. In that case, the plaintiff took the first step towards presumptively sufficient office service by delivering the summons and complaint to the person "apparently in charge" at defendant's office, but failed to complete service with a follow-up mailing. However, two business days later, the defendant's counsel informed the plaintiff's counsel that he had received a copy of the complaint and would respond accordingly. Because the plaintiff's attorney received that letter within the permissible time period for making a follow-up mailing, the court concluded that an objectively reasonable person would have understood during the relevant time period that a follow-up mailing was no longer necessary to reasonably apprise the defendant of the pendency of the action and the need to appear. As a result, the court held that the plaintiff's service efforts complied with ORCP 7D(1).

As in *Williams*, plaintiff delivered the summons and complaint to persons "apparently in charge" of the locations where Officers Honl and McIntyre worked,[2] but failed to make the follow-up mailing. However, unlike *Williams*, plaintiff's attorney received no communication from any attorney representing Officers Honl and McIntyre confirming their receipt of the summons and complaint. Plaintiff has presented no facts which would lead a reasonable person to conclude that Officers Honl and McIntyre knew about the action and would be appearing. On the same basis, other cases upholding service under ORCP 7D(1) are distinguishable.

***4** In *Korgan v. Gantenbein*, 74 Or App 154, 702 P2d 427 (1985), the summons and complaint were left with a person over the age of 14 at the defendant's residence, but plaintiff never made a follow-up mailing of the summons and complaint to the defendant's residence. Less than two weeks later, the defendant's attorney wrote to the plaintiff's attorney requesting an extension of time to appear. The court concluded that this method of service was sufficient under ORCP 7D(1) because the plaintiff had reason to believe that the defendant had received actual notice as evidenced by his attorney's letter. In contrast, plaintiff in this case received no communication from Officers Honl and McIntyre or their attorney concerning receipt of the summons and complaint.

In *Stull v. Hoke*, 153 Or App 261, 957 P2d 173, *rev den*, 327 Or 621, 971 P2d 413 (1998), the process server left the summons and complaint with a receptionist at defendant's law office. A short time later, the process server returned and asked if defendant had received the summons. The receptionist replied that she had delivered the papers to defendant who was reading them. However, the plaintiff did not make the follow-up mailing, and there was no evidence that the receptionist had authority to accept service for the defendant. The court held that under the totality of the circumstances, the service complied with ORCP 7D(1):

> Those facts demonstrate that the actions of the process server, in light of what was known to her at the time, were "reasonably calculated" to provide notice of the pendency of the action and that it was not a mere "happenstance" that [defendant] received notice of the pending litigation.

Id at 268, 957 P2d at 177.

The same is not true here. Plaintiff has submitted no facts demonstrating that he or the process server had any reason to believe that the summons and complaint were actually delivered to either Officer Honl or Officer McIntyre.

Although the failure to do a follow-up mailing was not fatal in *Williams*, *Korgan*, or *Stull*, this case is devoid of any facts permitting this court to conclude that plaintiff's efforts were "reasonably calculated, under all the circumstances" to afford Officers Honl and McIntyre notice of the pending action. ORCP 7D(1).

The agreement by Officers Honl and McIntyre to remove

this case from state court is not sufficient to infer compliance with ORCP 7D(1). As plaintiff correctly notes, paragraph 2 of the City of Portland's Petition for Removal states that "[e]ach of the named defendants in this case agrees this action should be removed from state to federal court." To comply with 28 USC § 1446(a), all defendants who may properly join in the removal notice must join. *Hewitt v City of Stanton*, 798 F2d 1230, 1323 (9th Cir 1986). However, removing an action from state to federal court does not waive a defendant's defense of lack of process or lack of service of process. *See* *Phillips v. Mfrs. Trust Co.*, 101 F2d 723, 727 (9th Cir 1939) (holding that the "validity of the service [is] ... not waived by removal"). In other words, a removing party does not waive objection to the mode of service of process solely by removing a case to federal court. *See* *Kiro v. Moore*, 229 FRD 228, 232 (D NM 2005). Therefore, by agreeing to join in the City of Portland's removal, Officers Honl and McIntyre did not waive their right to contest the sufficiency of service of process.

Furthermore, the City of Portland removed this action after the 60-day period for effecting service on Officers Honl and McIntyre expired. The fact that Officers Honl and McIntrye agreed to removal of this case from state court by the City of Portland does not necessarily mean that the summons was properly served on them under ORCP 7D(1). Instead, they may have learned about the pendency of this action after the 60 days expired from some source other than plaintiff's presumptively inadequate service attempt.

***5** Accordingly, Officers Honl and McIntyre have not yet been properly served, and more than 60 days have passed since the filing of the Complaint. No good cause has been shown for extending the deadlines for completing service under FRCP 4(m). Even if this court extended the time for service under FRCP 4(m), such service would be too late to deem this action commenced as of the date it was filed pursuant to ORS 12.020(2). As a result, plaintiff's claims against Officers Honl, McIntyre, and Chin are time-barred and should be dismissed with prejudice.

II. City of Portland

The City of Portland seeks dismissal for failure of the Amended Complaint to allege any basis for potential liability under § 1983. A municipality cannot be held vicariously liable for the unconstitutional acts of its employees based upon a *respondeat superior* theory. *Monell v. Dep't of Social Serv. of the City of New York*, 436 US 658, 691 (1978). A plaintiff must identify a municipal policy or custom that actually caused the injury to plaintiff. *Id* at 693. In the Ninth Circuit, "a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss 'even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice.' " *Karim-Panahi v. Los Angeles Police Dep't*, 839 F2d 621, 624 (9th Cir 1988), citing *Shah v. County of Los Angeles*, 797 F2d 743, 747 (9th Cir 1986).

Despite this liberal standard for pleading municipal liability under § 1983, the First Amended Complaint is deficient. It fails to allege any policy or custom by the City of Portland that violated plaintiff's constitutional rights. The City of Portland seeks dismissal with prejudice on the basis that any amendment would be futile because a new cause of action will not relate back to the filing of the original Complaint.

Whether an amended complaint relates back for the purposes of imposing a statute of limitations is controlled by state law. *See* *Merritt v. County of Los Angeles*, 875 F2d 765, 768 (1989) (state's relation back doctrine governs in § 1983 claims). ORCP 23C provides as follows:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, such party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining any defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the

> proper party, the action would have been brought against the party brought in by amendment.

Under the first sentence of ORCP 23C, the claims in both pleadings must arise out of the same "conduct, transaction, or occurrence." The City of Portland claims that the § 1983 claim in the original Complaint was directed only against the individual defendants and sought to include the City of Portland only on an impermissible *respondeat superior* claim. The actions of individual officers, without more, does not create liability for a municipal government. Any new claim alleged against the City of Portland must be premised on a policy, practice or procedure promulgated or ratified by the City of Portland. The original Complaint alleges no policy, ordinance, regulation or decision connecting the City of Portland to plaintiff's injury.

***6** Nevertheless, any claim against the City of Portland clearly arises out of the same "occurrence" on May 27, 2003, as the claims against the individual defendants. The City of Portland was named as a defendant in the original Complaint, even though the claim alleged against it was defective. Allowing an amendment to the Complaint to cure that defect is not futile because it will relate back to the original Complaint under ORCP 23C. Thus, the City of Portland's motion to dismiss should be denied, and plaintiff should be allowed leave to file an amended complaint to allege a violation of a custom or policy by the City of Portland.

However, plaintiff's proposed Second Amended Complaint[3] alleges no claim against the City of Portland and instead alleges only one state law tort claim labeled "assault and battery" against Officers Honl, McIntyre and Chin (even though paragraph 18 also alleges an unreasonable search and seizure in violation of the Fourth Amendment). If the court allows this proposed amendment, then plaintiff intends to move to remand this action back to state court. However, if a claim arising under federal law exists at the time of removal, the federal court has jurisdiction to adjudicate even though the federal claim is later dropped. *Carnegie-Mellon Univ. v. Cohill*, 484 US 343 (1988); *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F2d 709, 715 (9th Cir 1990). A "plaintiff may not compel remand by amending a complaint to eliminate the federal question upon which removal was based." *Sparta Surgical Corp. v Nat'l Ass'n of Securities Dealers, Inc.*, 159 F3d 1209, 1213 (9th Cir 1998). Instead, the federal court may exercise its discretion whether to remand "depending upon what will best accommodate the values of economy, convenience, fairness and comity." *Harrell v. 20th Century Ins. Co.*, 934 F2d 203, 205 (9th Cir 1991).

At this juncture, the court should not allow the filing of plaintiff's proposed Second Amended Complaint because any claim against Officers Honl, McIntyre and Chin is time-barred. Instead, this court should only allow the filing of an amended complaint that alleges a properly pled § 1983 claim against the City of Portland.

RECOMMENDATION

Defendant City of Portland's Rule 12 Motion Against Plaintiff's Complaint (docket #7) should be GRANTED as to defendants Officers Honl, McIntyre, and Chin with prejudice and GRANTED as to defendant the City of Portland without prejudice and with leave to amend within a specified period of time in order to properly plead a § 1983 claim against the City of Portland.

SCHEDULING ORDER

Objections to the Findings and Recommendation, if any, are due February 28, 2006. If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

If objections are filed, then a response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under advisement.

All Citations

Slip Copy, 2006 WL 8459002

Footnotes

[1] It is not clear why the City of Portland is filing a motion to dismiss the claim against Officers Honl, McIntyre, and Chin. Instead, those individual defendants may appear and make a motion to dismiss under FRCP 12(b)(5) for insufficiency of service of process. However, plaintiff has not challenged the standing of the City of Portland to make this motion, and, in any event, the court may raise defective service on its own motion under FRCP 4(m).

[2] The City of Portland also argues that the service of process failed because the individual who received the summons and complaint did not have authority to accept service or any duty to tender the summons and complaint to Officers Honl and McIntyre. However, "service on a third person may be adequate under ORCP 7 D(1) if the process server has reason to believe that the person with whom the summons and complaint have been left has regular, frequent and predictable contact with the defendant." *Schwabe, Williamson & Wyatt*, 149 Or App 607, 617, 945 P2d 534, 549 (1997) (process server was not obligated to establish affirmatively that the law office receptionist had a business duty to receive service where regular contact between attorney and office staff member could be inferred). Here the record does not reveal what the process server may have believed about contact between Officers Honl and McIntyre and the persons with whom she left the summons and complaint.

[3] The proposed Second Amended Complaint is attached to plaintiff's Sur-Reply which incorporates a Motion to File Amended Complaint. Because the Motion to file an Amended Complaint was not separately filed as required by Local Rule 7.1(b), it was not docketed as a separate motion.

131 Or.App. 693
Court of Appeals of Oregon.

Marla MURPHY, Appellant,
v.
Steven Ray PRICE, Respondent.

9211–07951; CA A81633.
|
Argued and Submitted April 13, 1994.
|
Decided Dec. 14, 1994.

Synopsis
Passenger brought personal injury action against other driver, and the Circuit Court, Multnomah County, Lee Johnson, J., granted other driver's motion for summary judgment. Passenger appealed. The Court of Appeals, Landau, J., held that: (1) service by certified mail but with unrestricted delivery did not provide other driver with reasonable notice, and (2) actual notice did not cure such defect in service.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

****1048 *694** Thomas A. Bittner, Portland, argued the cause for appellant. With him on the briefs was Schulte, Anderson, DeFrancq, Downes & Carter, P.C.

William J. Martin, Portland, argued the cause for respondent. With him on the brief was Cavanagh & Zipse.

Before WARREN, P.J., and EDMONDS and LANDAU, JJ.

Opinion

***695** LANDAU, Judge.

Plaintiff appeals from a summary judgment granted in favor of defendant on the ground that plaintiff failed to adequately serve defendant with a summons and complaint. ORCP 7. We affirm.

The facts are undisputed. On December 8, 1990, defendant's car collided with a vehicle in which plaintiff was a passenger. Defendant exchanged information, including his mailing address, with the driver of the other vehicle. Defendant and his landlord share the same mailbox and have authorized each other to pick up the other's mail. Defendant did not tell plaintiff, however, about the shared mailbox and the understanding with his landlord.

On November 19, 1992, plaintiff filed this personal injury action. On that day, plaintiff mailed to the address given by defendant, a true copy of the summons and complaint by certified mail, return receipt requested, unrestricted delivery.[1] Before mailing the summons and complaint, plaintiff had confirmed defendant's current address with the Motor Vehicles Department (MVD).

On November 20, 1992, defendant's landlord signed the receipt for the summons and complaint and gave it to defendant the following day. Plaintiff never tried to serve defendant by personal service, substituted service or office service. On February 5, 1993, defendant filed his answer and affirmative defense, alleging improper service and the expiration of the statute of limitations. Both parties moved for summary judgment on the affirmative defense. The trial court denied plaintiff's motion, granted defendant's motion and entered judgment for defendant. Plaintiff appeals, assigning error to the trial court's order granting defendant's summary judgment motion and denying plaintiff's motion.

Summary judgment is appropriate when there is no issue of material fact and the moving party is entitled to judgment as a matter of law. *Gaston v. Parsons,* 318 Or. 247, 251, 864 P.2d 1319 (1994). Because there is no dispute as to any material fact, we determine the adequacy of service on defendant as a matter of law.

***696** Plaintiff contends that service by mail in this case was reasonably calculated to apprise defendant of the pendency of the action and to afford defendant a reasonable opportunity to appear and defend. Plaintiff also argues that, because defendant received actual notice and was not prejudiced by the manner of service, the alleged error must be disregarded pursuant to ORCP 7G and ORCP 12B. Defendant asserts that service by mail, under the circumstances of this case, failed to provide adequate notice. We agree with defendant.

In *Baker v. Foy,* 310 Or. 221, 228–29, 797 P.2d 349 (1990), the Supreme Court articulated a two-part test for determining the adequacy ****1049** of service under ORCP 7. First, we must decide whether the method by which

service of summons was made was one of the methods described in ORCP 7D(2), was specifically permitted for use upon the particular defendant by ORCP 7D(3), and was accomplished in accordance with ORCP 7D(2). If those requirements are met, then service is presumed to be adequate. If the method of service does not meet those requirements, then we must determine whether service is otherwise adequate, because it meets the "reasonable notice" standard set forth in ORCP 7D(1). 310 Or. at 228–29.

Plaintiff concedes that service in this case does not meet the requirements of ORCP 7D(2) and (3). Accordingly, we must decide whether defendant received reasonable notice as required by ORCP 7D(1).

ORCP 7D(1) provides, in part:

> "Summons shall be served * * * in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend."

Service by mail may, under appropriate circumstances, be reasonably calculated to apprise a defendant of the existence and pendency of an action. Plaintiff, however, has the burden of establishing the adequacy of service by mail; such service is not presumed to be adequate. *Edwards v. Edwards*, 310 Or. 672, 678–79, 801 P.2d 782 (1990). We determine whether the reasonable notice standard of ORCP 7D(1) is satisfied by examining the totality of the circumstances as they were ***697** known to the plaintiff at the time of service. *Baker v. Foy, supra*, 310 Or. at 225 n. 6, 797 P.2d 349; *Beckett v. Martinez*, 119 Or.App. 338, 343 n. 3, 850 P.2d 1148, *rev. den.* 317 Or. 583, 859 P.2d 540 (1993).

In this case, the only facts known to plaintiff were that defendant gave the eventual location of service as his address and that MVD confirmed that defendant listed that location as his address. Plaintiff did not know if other persons resided at that address. Likewise, plaintiff did not know that defendant's landlord was authorized to pick up mail for defendant. Plaintiff mailed the summons and complaint to defendant by certified mail, return receipt requested, but by *unrestricted delivery*. Accordingly, anyone at that address—a roommate, a neighbor, defendant's landlord—could have signed for the receipt of the summons and complaint, with no assurances that defendant would ever see the papers. In other words, plaintiff did not know who would actually receive the summons and complaint once they were delivered to the location that defendant listed as his address. Under the circumstances, the attempted service did not comport with the reasonable notice requirement of ORCP 7D(1).[2]

Citing *Lake Oswego Review v. Steinkamp*, 298 Or. 607, 695 P.2d 565 (1985), and *Luyet v. Ehrnfelt*, 118 Or.App. 635, 848 P.2d 654 (1993), plaintiff insists that service under the circumstances of this case was nevertheless adequate. Neither case supports plaintiff's argument.

In *Lake Oswego Review v. Steinkamp, supra*, the plaintiff mailed the summons and complaint, using restricted delivery, to the defendant at a particular address. The letter carrier, who knew the defendant, delivered the mail to the defendant at a different address and had him sign for it. The Oregon Supreme Court held that service in that case was adequate, because the plaintiff had sent the summons and complaint by certified mail, return receipt requested, *restricted delivery*. The court drew a distinction between restricted and unrestricted delivery. In the case of unrestricted delivery, the court noted, the letter may be signed for by someone other than the addressee. Only where restricted ***698** delivery is used, the court said, must the letter be signed for by the addressee. Therefore, the court concluded,

> "[u]nless the summons and complaint are returned by the post office as undeliverable, restricted delivery mail addressed to an individual defendant is more likely to result in adequate notice"

****1050** than is service by unrestricted delivery. 298 Or. at 614, 695 P.2d 565. In this case, in contrast with *Lake Oswego Review v. Steinkamp, supra*, plaintiff did not use restricted delivery and, not surprisingly, it was signed for by someone other than defendant.

Plaintiff acknowledges that important distinction, but argues that it makes no difference in this case, because defendant had authorized his landlord to sign for his mail. Plaintiff, however, ignores the fact that, at the time of service, she did not know of that authorization. Because the adequacy of service is determined by examining the circumstances known to the plaintiff at the time of

service, *Beckett v. Martinez, supra,* 119 Or.App. at 343 n. 3, 850 P.2d 1148, defendant's arrangement with his landlord is of no consequence in evaluating the adequacy of service.

Luyet v. Ehrnfelt, supra, is similarly unavailing. In that case, the plaintiff had attempted service under ORCP 7D(4)(a)(i), which, under limited circumstances, permits service by serving the Administrator of the Motor Vehicles Division, as the defendant's statutorily appointed agent for service, followed by mailing a copy of the summons and complaint to the defendant at his or her last known address. The defendant argued that, because the plaintiff had mailed the summons and complaint to him before serving the MVD Administrator, service was defective. We held that, even assuming the service did not technically comport with the requirements of ORCP 7D(4)(a)(i), it nevertheless was adequate under the reasonable notice requirements of ORCP 7D(1). 118 Or.App. at 639, 848 P.2d 654.

In this case, plaintiff did not serve the MVD Administrator. She simply mailed a copy of the summons and complaint to defendant. *Luyet v. Ehrnfelt, supra,* is inapposite.

Alternatively, plaintiff argues that because defendant received actual notice, any defect in service must be disregarded. Defendant responds that actual notice does not ***699** make service adequate if the summons and complaint were not served in a manner reasonably calculated to apprise defendant of the action. Again, we agree with defendant.

ORCP 7G directs the court to "disregard any error in the * * * service of the summons that does not materially prejudice the substantive rights of the party against whom summons was issued." Adequate service, however, "is, itself, a prerequisite to disregarding errors in the content or service of a summons under the authority of the second sentence of ORCP 7G." *Edwards v. Edwards, supra,* 310 Or. at 681, 801 P.2d 782; *see also Lake Oswego Review v. Steinkamp, supra,* 298 Or. at 614 n. 2, 695 P.2d 565. "[A]ctual notice is not enough to trigger the application of ORCP 7G." *Levens v. Koser,* 126 Or.App. 399, 404, 869 P.2d 344 (1994); (quoting *Jordan v. Wiser,* 302 Or. 50, 58, 726 P.2d 365 (1986), *overruled on other grounds by Baker v. Foy, supra,* 310 Or. at 228, 797 P.2d 349); *see also Luyet v. Ehrnfelt, supra,* 118 Or.App. at 639 n. 8, 848 P.2d 654; *Campos v. Chisholm,* 110 Or.App. 158, 161, 821 P.2d 1121 (1991). Because service was not reasonably calculated to apprise defendant of the action, ORCP 7G is inapplicable.

ORCP 12B provides that "[t]he court shall * * * disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." There is *dictum* in *Duber v. Zeitler,* 118 Or.App. 597, 601 n. 2, 848 P.2d 642, *rev. den.* 316 Or. 527, 854 P.2d 939 (1993), suggesting that ORCP 12B applies to defects in service of process. We do not address whether that *dictum* accurately states the law. Whether it does or not, the rule applies only to defects that do not affect the "substantial rights" of the parties. Consistent with the case law concerning the parallel language of ORCP 7G, we conclude that the right to receive adequate service is a substantial right. Because defendant did not receive adequate service, ORCP 12B does not aid plaintiff.

Affirmed.

All Citations

131 Or.App. 693, 886 P.2d 1047

Footnotes

1 "Restricted delivery" requires that a specified individual sign for the mail.

2 We do not address whether there exist any circumstances under which unrestricted delivery could satisfy the reasonable notice requirement of ORCP 7D(1).

305 Or.App. 288
Court of Appeals of Oregon.

Margarita VERGARA, an individual,
Plaintiff-Appellant,
v.
Komal PATEL, an individual; Jay Maharaj, Inc., an Oregon corporation, dba University Inn & Suites; and Alko 100 LLC, an Oregon limited liability corporation, dba Eugene University Inn & Suites, Defendants-Respondents.

A167209
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Argued and submitted March 27, 2019
|
July 8, 2020

Synopsis
Background: Housekeeper brought statutory employment claims and a common-law wrongful discharge claim against business agent for hotel that terminated her after she complained about being required to work without gloves. After housekeeper filed an amended complaint, naming as defendants the business entities that operated the hotel where she worked, the Circuit Court, Lane County, Curtis Conover, J., granted defendants' motion for summary judgment. Housekeeper appealed.

Holdings: The Court of Appeals, Ortega, J., held that:

registered agent for business entities that operated hotel should reasonably have understood that business entities were the intended defendants in original complaint filed by housekeeper that named only the agent, doing business as the business entity, as a defendant;

housekeeper's amended complaint corrected a misnomer in her original complaint, and thus related back to the date of the original complaint for purposes of statute of limitations; and

the existence of adequate statutory remedies, and absence of a substantial public duty, precluded housekeeper's wrongful discharge claim.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

****143** Lane County Circuit Court, 17CV35103; R. Curtis Conover, Judge.

Attorneys and Law Firms

Kate Suisman argued the cause and filed the briefs for appellant.

Alexandra P. Hilsher, Eugene, argued the cause for respondents. Also on the brief were Lillian Marshall-Bass and Hershner Hunter, LLP.

Before Ortega, Presiding Judge, and Powers, Judge, and Linder, Senior Judge.

Opinion

ORTEGA, P.J.

***290** After being terminated as a hotel housekeeper, plaintiff brought this action against defendants, alleging statutory employment claims under ORS 654.062(5) and ORS 659A.199 and a common-law wrongful discharge claim. She timely filed the original complaint naming an individual as the defendant, but her amended complaint, naming two business entities as defendants, was filed after the limitations period had ran on the statutory claims. Defendants moved for summary judgment on all of the claims, on the grounds that the statutory claims were time-barred and that the wrongful discharge claim was unavailable to plaintiff. The trial court granted defendants' motion in its entirety. On appeal, plaintiff challenges the trial court's dismissal of all of her claims.

We conclude, with respect to the statutory claims, that plaintiff's amended complaint relates back to her original complaint under ORCP 23 C, because the business entities should reasonably have understood from the original complaint that they were the intended defendants. With respect to the wrongful discharge claim, we conclude that the existence of functionally adequate statutory remedies precludes plaintiff from pursuing that common-law remedy. Accordingly, we reverse and remand the trial court's dismissal of plaintiff's statutory claims but affirm its dismissal of plaintiff's wrongful discharge claim.

****144** I. FACTUAL AND PROCEDURAL HISTORY

In reviewing the trial court's grant of summary judgment to defendants, we view the record and all reason-able inferences drawable therefrom in the light most favorable to plaintiff, the nonmoving party, to determine whether any genuine issue of material fact exists and whether defendants are entitled to judgment as a matter of law. ORCP 47 C; *Jones v. General Motors Corp.*, 325 Or. 404, 408, 939 P.2d 608 (1997).

Plaintiff was employed as a hotel housekeeper from January to August 2016. In that capacity, she frequently came into contact with syringes, drugs, blood, vomit, and toilet facilities. Plaintiff complained to her supervisor and ***291** hotel management many times about being provided with inadequate or no gloves to safely perform her work. After contracting a serious infection that her doctor believed was likely due to exposure at work, plaintiff spoke to her supervisor again about needing gloves to protect herself. She believed that working without gloves would be unsafe and detrimental to her and others' health. Despite the insistence of her supervisor and the hotel manager that she work without gloves, plaintiff refused, and she was subsequently fired.

At the time of plaintiff's termination, the hotel was registered to Jay Maharaj, Inc., under the assumed business name "University Inn & Suites." In December 2016, Alko 100 LLC replaced Jay Maharaj, Inc., as registrant of the hotel and amended the assumed business name to "Eugene University Inn & Suites."[1] Komal Patel was a shareholder and the registered agent of Jay Maharaj, Inc., and she was a managing member and the registered agent of Alko 100 LLC. One other person was a shareholder of Jay Maharaj, Inc., and member of Alko 100 LLC.

Plaintiff filed her original complaint alleging two statutory employment claims on August 14, 2017, one day before the applicable limitations period ran.[2] The caption of that complaint named as the defendant "Komal Patel, an individual, *dba* University Inn & Suites," a factually incorrect statement. In the body of the complaint, plaintiff alleged that, at all material times, "Defendant Komal Patel[ ] was an individual doing business as University Inn & Suites." The original complaint did not otherwise refer to Patel by name. Rather, in setting out the substantive allegations underlying her claims, plaintiff asserted that "Defendant" ***292** employed her "as a housekeeper in Defendant's hotel" and that "Defendant unlawfully discharged [her]." The original complaint also did not mention the business entities by name. On September 8, 2017, plaintiff served Patel with a copy of the original complaint and a summons addressed to "Komal Patel."

Plaintiff's counsel averred that, on October 3, 2017, defendants' counsel informed plaintiff that "she believed the individual defendant, Komal Patel, had been incorrectly sued and that the entities, Jay Maharaj and Alko 100, as the operator of the Hotel during [plaintiff's] employment and the successor operator, were the correct defendants." Plaintiff thereafter served copies of the original complaint and summonses on "Komal Patel, Registered Agent of Jay Maharaj, Inc., *dba* University Inn & Suites" and "Komal Patel, Registered Agent of Alko 100 LLC, *dba* Eugene University Inn & Suites."[3]

****145** On October 9, 2017, plaintiff filed the amended complaint, the caption of which named the defendants as follows: "Komal Patel, an individual, Jay Maharaj, Inc., an Oregon corporation, *dba* University Inn & Suites, and Alko 100 LLC, an Oregon limited liability corporation [*sic*], *dba* Eugene University Inn & Suites." The amended complaint included allegations that:

> "2. During plaintiff's employment, Defendant Jay Maharaj, Inc., was an Oregon corporation doing business as University Inn & Suites.
>
> "3. University Inn & Suites (the 'Hotel') is a hotel located in Eugene, Oregon, in Lane County.
>
> "4. Defendant Komal Patel is a natural person who has owned, managed, and operated the Hotel since at least 2006.
>
> "5. Prior to the incorporation of Defendant Jay Maharaj, Defendant Patel owned, managed and operated ***293** the Hotel as an individual using the assumed business name University Inn.
>
> "6. Defendant Jay Maharaj is a successor in interest to Defendant Komal Patel.
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> "7. In or around December 2016, Defendant Alko 100 LLC registered the assumed business name of Eugene University Inn & Suites. Defendant Alko 100 continued operating the Hotel.
>
> "8. Defendant Alko 100 is a successor in interest to Defendants Jay Maharaj and Komal Patel.
>
> "9. Defendant Patel was a shareholder of Defendant Jay Maharaj and is a managing member of Defendant Alko 100.

> "10. Defendant Patel continues to own, manage, and operate the Hotel."

The amended complaint did not otherwise refer to any of the defendants by name, and plaintiff's allegations on the statutory claims were largely unchanged, except that the amended complaint used the plural term "Defendants" where the original complaint had used the singular term "Defendant."

The amended complaint also added a common-law wrongful discharge claim. Under that claim, plaintiff alleged that defendants terminated her after she complained about workplace health and safety conditions and the risk of the spread of communicable diseases. Plaintiff also alleged that Oregon law recognizes the important public policies of protecting a worker's right to a healthy and safe workplace and preventing the spread of communicable diseases.

Defendants moved for summary judgment, contending (1) that plaintiff's statutory claims were time-barred because the amended complaint was untimely and did not meet ORCP 23 C's requirements for relating back to the filing date of the original complaint; (2) that the adequacy of statutory remedies precluded the common-law wrongful discharge claim; and (3) that Patel was not a proper defendant, because plaintiff had made no allegations in the original or amended complaint "against Patel, individually, related to ***294** plaintiff's working environment or the circumstances surrounding her termination."

Plaintiff countered that summary judgment was inappropriate as a matter of law or, alternatively, that the trial court should grant a continuance so that she could engage in discovery to develop the facts of the case.

After a hearing on the matter and taking it under advisement, the trial court granted defendants' motion for summary judgment in its entirety and without explanation.

II. ANALYSIS

Plaintiff appeals from the ensuing general judgment, arguing that defendants were not entitled to summary judgment, because (1) her statutory claims were timely commenced under ORCP 23 C and (2) she was not precluded from asserting the wrongful discharge claim. On appeal, both parties essentially reprise their arguments below.

A. *Timeliness of Statutory Claims*

With respect to the timeliness of the statutory claims, the parties dispute whether plaintiff "changed the parties" when she explicitly named the business entities as defendants for the first time in the amended complaint. That question affects how ORCP 23 C, ****146** which governs the relation back of amended pleadings, applies in this case.

ORCP 23 C provides in full:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, such party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining any defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party brought in by amendment."

***295** The first sentence of that rule states the general provision that an amended pleading relates back to the filing date of an original pleading so long as the claims arose out of the same conduct, transaction, or occurrence. *Harmon v. Fred Meyer*, 146 Or. App. 295, 298, 933 P.2d 361 (1997). The second sentence of that rule imposes additional notice requirements and "applies only to amendments 'changing the party against whom a claim is asserted.' " *Id.* (quoting ORCP 23 C).

In determining whether an amendment changes a party, we have distinguished between "misnomers" and "misidentifications." *Worthington v. Estate of Milton E. Davis*, 250 Or. App. 755, 760, 282 P.3d 895, *rev. den.*, 352 Or. 565, 291 P.3d 737 (2012). A "misnomer" is a plaintiff's mistake "in naming th[e] person or entity [to sue], that is, an error in stating what the [correctly chosen] defendant is *called*." *Id.* (emphasis in original). A

"misidentification," on the other hand, is a plaintiff's mistake "in choosing *which* person or entity to sue." *Id.* (emphasis in original). An amendment to correct a misidentification changes the party and, therefore, triggers the second sentence of ORCP 23 C; an amendment to correct a misnomer does not, but rather relates back in accordance with the first sentence of ORCP 23 C. *Id.* at 759-60, 282 P.3d 895. Plaintiff argues that this is a case of misnomer. As we explain, we agree.

Plaintiff primarily relies on *Harmon*, 146 Or. App. at 297, 933 P.2d 361, a "misnomer" case in which the plaintiff, intending to sue The Interlake Companies, Inc., named in the original complaint "Interlake, Inc., a Delaware Corporation," although no such entity operated in Oregon at that time. However, the plaintiff correctly served the complaint on The Interlake Companies, Inc. *Id.* Afterward, he filed an amended complaint to replace "Interlake, Inc., a Delaware Corporation," with "The Interlake Companies, Inc., a Delaware corporation, aka Interlake, Inc." *Id.*

In holding that the amended complaint merely corrected a misnomer and did not "chang[e] the party" so as to trigger the second sentence of ORCP 23 C, we stated the following test:

> "If a plaintiff states a name other than defendant's, but serves the correct entity with a copy of the original ***296** complaint, and the correct entity *should reasonably have understood from the pleadings that it is the entity intended to be sued*, then an amendment of the pleadings to correct the misnomer does not bring in a new entity and is not a change in party."

Id. at 299-300, 933 P.2d 361 (emphasis added). As we further explained, for the purpose of identifying the sued party, "the court must consider the complaint as a whole, including the allegations," and a "natural extension of that analysis requires that the summons also be considered." *Id.* at 300, 933 P.2d 361. Applying that analysis in *Harmon*, we made several observations: (1) the name shown in the caption of the original complaint was substantially similar to the defendant's correct name; (2) the allegations in the complaint correctly described the defendant's business and its relationship to the plaintiff; (3) the summons correctly stated the defendant's name and was properly served; and (4) there was no dispute that the plaintiff intended to sue the defendant when he filed and served his original complaint. ****147** *Id.* at 301, 933 P.2d 361. Based on the foregoing factors, we concluded that the original complaint had brought in The Interlake Companies, Inc., as a defendant, but merely misnamed it; as such, the amendment to correct its name did not constitute a change in parties. *Id.*

We agree that *Harmon* supplies the applicable legal test for determining whether there has been a change in the parties. *See* *Mitchell v. The Timbers*, 163 Or. App. 312, 318-19, 987 P.2d 1236 (1999) (applying "the rule set forth in *Harmon*" to determine whether an amendment to correct a defendant's name relates back to the original complaint). That inquiry focuses on whether, when served with a copy of the original complaint, "the correct entity should reasonably have understood from the pleadings that it is the entity intended to be sued[.]" *Harmon*, 146 Or. App. at 299, 933 P.2d 361. Applied to the present case—in which the individual named in the original complaint was the registered agent for the business entities named in the amended complaint—the question before us becomes whether Patel, when served with the original complaint naming as the defendant "Komal Patel, an individual, *dba* University Inn & Suites," should reasonably have understood from the pleadings that the business entities Jay Maharaj, Inc., and Alko 100 LLC were the intended ***297** defendants. We conclude that Patel should reasonably have so understood.

"[T]he caption of a complaint is not dispositive," and one may look to "the allegations in the body, among other things," to determine the intended defendant. *Johnson v. Manders*, 127 Or. App. 147, 149-50, 872 P.2d 420, *rev. den.*, 319 Or. 149, 877 P.2d 86 (1994). Here, aside from the caption and a body paragraph, the original complaint made no other reference, implicit or explicit, to Patel.[4] Rather, the allegations were against a generically termed "Defendant" and unquestionably concerned plaintiff's employment at and termination from "Defendant's" hotel, "University Inn & Suites." The words in the caption naming the defendant might have started with "Komal Patel, an individual," but the rest of the complaint made clear that the operative words were those that followed: "*dba* University Inn & Suites." Put differently, viewing the complaint in its entirety, it is implicit that the intended defendant of plaintiff's employment action was the entity doing business as the hotel from which she was fired, rather than Patel individually, regardless of whether Patel was doing business as that hotel. We also note that defendants do not contend that the allegations were insufficient for them to identify the implicated hotel. *Compare* *Mitchell*, 163 Or. App. at 319, 987 P.2d 1236 (observing that there was no suggestion of "any actual confusion about the nature or identity" of the tavern where the plaintiff sustained his injury—a factor that supported the conclusion that the defendant, who

owned that tavern, in fact understood that he was the entity intended to be sued).

Defendants argue that, even if Patel knew that she was factually not an individual doing business as "University Inn & Suites," as the original complaint alleged, she would reasonably not understand from the original complaint that the intended defendants were, specifically, Jay Maharaj, Inc. (operator of the hotel at the time of plaintiff's termination) ***298** and Alko 100 LLC (operator of the hotel at the time that this action was commenced). However, the record indicates that Patel, or at least her attorney, in fact believed that plaintiff had incorrectly sued Patel individually and that she should have sued the business entities Jay Maharaj, Inc., and Alko 100 LLC instead. That demonstrates that "the four corners of the original complaint" contained information sufficient for identifying the business entities as the intended defendants. *See* *Krauel v. Dykers Corp.*, 173 Or. App. 336, 341, 21 P.3d 1124 (2001) (examining "the four corners of the original complaint" to determine against whom the claim was asserted).

Defendants stress that Patel was a layperson; even if her attorney could identify the ****148** correct defendants from the original complaint, she should reasonably not be expected to have that ability. Leaving aside the business sophistication that is suggested by the many corporate hats that Patel wore, we are still not persuaded. Patel first learned about plaintiff's employment concerns when she received notice of plaintiff's BOLI complaint, which had been filed prior to commencement of this action. When Patel viewed the original complaint in this case, she should have understood it with the BOLI complaint serving as context.

That context includes that the allegations in the BOLI complaint and in the original complaint were similar; that the respondent in the BOLI matter was identified as "Komal Patel Dba University Inn"; and that BOLI had copied "Komal Patel, Registrant" and "Komal Patel, Authorized Representative/Agent" in correspondences. The BOLI record also shows that "Respondent" participated in the proceeding, denying plaintiff's allegations on the merits. Given that the caption "Komal Patel Dba University Inn" did not prevent Patel from identifying the correct respondent and participating on the merits before BOLI, the substantially similar caption of the original complaint in this case ("Komal Patel, an individual, *dba* University Inn & Suites") likewise should not prevent Patel from understanding who the intended defendants were, thereby procedurally barring plaintiff's claims. We conclude that Patel should reasonably have understood that plaintiff had intended to sue the legal ***299** entities doing business as "University Inn & Suites" rather than to sue her individually.

Defendants raise two other arguments for why Patel would reasonably not have understood from the original complaint that Jay Maharaj, Inc., and Alko 100 LLC, rather than Patel individually, were the intended defendants. First, defendants point to the fact that plaintiff continued naming Patel as an individual defendant in the amended complaint. Second, defendants argue that Patel was confusingly served with copies of the original complaint three times, each time accompanied by a summons addressed to Patel differently—once in September 2017 in her individual capacity and twice in October 2017 in her capacity as registered agent of the business entities after Patel's attorney contacted plaintiff. Both arguments are flawed as a matter of law for the same reason.

The *Harmon* test asks whether the entity served with a copy of the original complaint "should reasonably have understood *from the pleadings* that it is the entity intended to be sued[.]" *Harmon*, 146 Or. App. at 299, 933 P.2d 361 (emphasis added). That analysis is concerned with the context that existed at the time the entity considered the original pleadings, such as the earlier BOLI proceeding here. Conversely, immaterial to the analysis is "hindsight" based on events subsequent to the original pleadings, such as the amended complaint and the October 2017 services of the original complaint on Patel in her capacity as registered agent of the business entities. Otherwise, the question whether an entity should reasonably have understood that it was the entity intended to be sued would always be a moving target that depends on when it is asked.

Moreover, in this case, plaintiff amended the complaint and served Patel in her "registered agent" capacities only after defendants' counsel had stated that the business entities, rather than Patel individually, were the correct defendants. In other words, defendants had already formed the understanding that the business entities were the intended defendants; plaintiff's subsequent filing of the amended complaint and service of summonses on those entities merely confirmed as much.

***300** We also reject defendants' contention that *Krauel v. Dykers Corp.*, 173 Or. App. at 336, 21 P.3d 1124, a "misidentification" case, is materially indistinguishable from the present case. In *Krauel*, the plaintiff was injured in a bowling alley and brought a negligence claim against "Dykers Court [*sic*], dba Grand Central Bowl[.]" *Id.* at 338, 21 P.3d 1124 (alteration in

original). The complaint alleged that Dykers operated the bowling alley, but in fact, it simply owned the premises on which the bowling alley was located. *Id.* After the statute of limitations ran, the plaintiff filed amended complaints to correct the spelling of Dykers' name and to add as a defendant "Cascade Entertainment," the entity ****149** that actually operated the bowling alley. *Id.* The plaintiff then served both Dykers and Cascade with summonses and copies of the original and amended complaints. *Id.* at 338-39, 21 P.3d 1124.

We affirmed the trial court's dismissal of that case based on our conclusion, "[a]fter viewing the four corners of the original complaint," that the "plaintiff's original complaint state[d] a claim only against Dykers." *Id.* at 341, 21 P.3d 1124. But that conclusion was unaccompanied by any discussion about what was contained in the complaint that helped to identify the intended defendant. Here, as we explained above, the allegations of plaintiff's original complaint were such that Patel should reasonably have understood that the intended defendant was the operator of the hotel that had fired plaintiff. Furthermore, *Krauel* is factually inapposite, because Dykers and Cascade were "unrelated" parties, *id.*, whereas here, Patel was indisputably the central figure linking together the named defendants in the original complaint (herself) and amended complaint (business entities of which she was shareholder, managing member, and registered agent).

Finally, to the extent that defendants rely on our description of *Krauel* as a case involving a plaintiff's failure "to identify all of the potentially liable defendants," *Worthington*, 250 Or. App. at 762, 282 P.3d 895, to argue that a similar failure here makes this also a misidentification case, that argument is unavailing. The original complaint, as discussed above, effectively identified the business entities in substance, even though it did not correctly name them. ***301** Therefore, if plaintiff had failed to identify any defendant in the original complaint, that would have been Patel the individual, because, despite the caption, the complaint asserted no claims or ultimate facts against her individually. And defendants do not contend that it was the addition of *Patel* as a defendant that prevents the amended complaint from relating back.[5]

Because we conclude that Patel should reasonably have understood from the original complaint that plaintiff intended to sue Jay Maharaj, Inc., and Alko 100 LLC, the amended complaint merely corrected a misnomer. Accordingly, the amended complaint did not change the parties, and it relates back to the original complaint under the first sentence of ORCP 23 C. The trial court erred in granting summary judgment to defendants on plaintiff's statutory claims. Given our conclusion, we do not address plaintiff's alternative argument that the trial court abused its discretion in denying her request for a continuance to engage in discovery.

B. *Availability of Wrongful Discharge Claim*

We next address the trial court's dismissal of plaintiff's wrongful discharge claim. Plaintiff argues that the facts alleged in her amended complaint give rise to a cause of action for wrongful discharge, because she was terminated not only for acting to protect her individual health and safety in the workplace, but also for acting to fulfill an important societal obligation: preventing the spread of a communicable disease to the public. In plaintiff's view, no adequate statutory remedy exists to vindicate the wrong that defendants committed when they terminated her for fulfilling that societal obligation, and defendants have made no showing of a legislative intent to preclude the common-law remedy for wrongful discharge. Plaintiff essentially takes the position that, unless there exist *both* an adequate statutory remedy for the allegedly wrongful conduct *and* a legislative intent to preclude the common-law remedy, she may bring the wrongful discharge claim.

***302** By contrast, defendants contend that the sole relevant question is whether an adequate remedy exists for the allegedly wrongful conduct, and they urge us to answer that question in the affirmative. Defendants also assert that the case law does not support plaintiff's distinction between protected action that is motivated by concern for her own safety and action that is motivated by concern for the safety of others; in defendants' view, recognition of such a distinction would ****150** significantly expand the tort of wrongful discharge.

To facilitate our analysis, we begin with a review of the relevant case law. The common-law tort of wrongful discharge is a public-policy exception to Oregon's general rule of "at-will" employment. *Babick v. Oregon Arena Corp.*, 333 Or. 401, 407, 40 P.3d 1059 (2002); *see also* *Patton v. J. C. Penney Co.*, 301 Or. 117, 120, 719 P.2d 854 (1986), *abrogated on other grounds by* *McGanty v. Staudenraus*, 321 Or. 532, 901 P.2d 841 (1995) ("at-will" rule permits an employer to "discharge an employe[e] at any time and for any reason, absent a contractual, statutory or constitutional requirement" to the

contrary). The Oregon Supreme Court first recognized the common-law tort of wrongful discharge in *Nees v. Hocks*, in which the employee was discharged for fulfilling jury duty obligations. 272 Or. 210, 218, 536 P.2d 512 (1975) (discharge of an "at-will" employee may be actionable when it is "for such a socially undesirable motive that the employer must respond in damages for any injury done"). Soon after *Nees*, the court considered whether a claim for wrongful discharge was available to the plaintiffs in two cases: *Walsh v. Consolidated Freightways*, 278 Or. 347, 563 P.2d 1205 (1977), and *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978). The parties' primary disagreement—over whether the availability of a wrongful discharge claim depends on the adequacy of existing remedies alone (as defendant posits) or on a legislative intent to preclude the common-law remedy as well (as plaintiff urges)—traces back to those two decisions.

In *Walsh*, notwithstanding its acknowledgment that "the community has a strong interest in maintaining safe working conditions[,]" the court determined that the employee (a dockworker who had been discharged for ***303** complaining to his supervisors about workplace safety violations) could not pursue a wrongful discharge claim, because he already had "a remedy under existing law for his wrongful discharge." 278 Or. at 351, 563 P.2d 1205. The adequacy of that alternate remedy, the court explained, was the "one decisive difference" between *Walsh* and *Nees*. *Id.* Notably, *Walsh* did not inquire whether the legislature had intended, in providing the statutory remedy, to preclude the common-law remedy.

However, a year later in *Brown*, the court revisited the question whether the plaintiff (this time, an employee who had been discharged for filing a workers' compensation claim) may pursue a wrongful discharge claim, and it framed the "primary focus of the problem" thus: "whether by the enactment of [a later] statute the Oregon legislature abolished a previously existing common law cause of action." 284 Or. at 602, 588 P.2d 1087. The *Brown* court stated:

> "As a general rule, if a statute which provides for a new remedy shows no intention to negate, either expressly or by necessary implication, a pre-existing common law remedy, the new remedy will be regarded as merely cumulative, rather than exclusive, with the result that a plaintiff may resort to either the pre-existing remedy or the new remedy. This rule is particularly applicable when the new statutory remedy is not an adequate one."

Id. at 610-11, 588 P.2d 1087 (footnotes omitted). Applying that rule, the court concluded that the statutory remedies available at the time of the plaintiff's discharge were not exclusive, because the legislative history did not evince the legislature's express or implied intent, in adopting the statutory provisions, to abrogate or supersede preexisting common-law remedies. *Id.* at 611-12, 588 P.2d 1087.

In thus shifting the focus of the inquiry—from the adequacy of existing remedies to the legislative intent behind the enactment of a particular remedy—the court appeared to take a different approach in *Brown* than it did in *Walsh* to address the same legal question. The court attempted to reconcile the decisions, however, stating:

> "We do not believe that our decision in this case is necessarily inconsistent with our decision in [*Walsh*]. Not only was the alleged reason for the discharge of the plaintiff in ***304** that case different from the alleged reason for the discharge of this plaintiff, but this court concluded in *Walsh* (at 352 [563 P.2d 1205]) that existing remedies then available to him under federal ****151** statutes (under which he had, in fact, also filed a complaint) were 'adequate to protect both the interests of society * * * and the interests of employees' in such cases, within the meaning of the rule as previously stated in [*Nees*]."

Id. at 613, 588 P.2d 1087 (omission in original). The court also intimated that the statutory remedies available at the time of the plaintiff's discharge were inadequate. *Id.* at 612, 588 P.2d 1087. Thus, although *Brown* began by shifting the analysis to focus on "legislative intent to abrogate," it seemed to return to "adequacy of existing remedies" as the dispositive factor.

Later Oregon Supreme Court decisions continued with that seeming analytical tension. *Compare* *Delaney v. Taco Time Int'l.*, 297 Or. 10, 16, 681 P.2d 114 (1984) ("[W]here an adequate existing remedy protects the interests of society[,] *** an additional remedy of wrongful discharge will not be accorded.") *with* *Holien v. Sears, Roebuck and Co.*, 298 Or. 76, 689 P.2d 1292 (1984) (an employee discharged for resisting sexual harassment may bring a wrongful discharge claim, "unless the provisions of ORS chapter 659 demonstrate

the legislature's intent not only to provide what it considered to be adequate remedies to an employe[e] such as plaintiff, but by implication show a legislative intent to abrogate or supersede any common law remedy for damages").

As it did in *Brown*, the court in *Holien* first concluded that nothing evinced that the legislature, in providing a statutory remedy for the wrongful conduct, intended to eliminate the common-law remedy for wrongful discharge. 298 Or. at 96, 689 P.2d 1292. Then notably, as it had in *Brown*, the court proceeded to address the issue of the adequacy of existing statutory remedies, concluding that they "fail[ed] to capture the personal nature of the injury done to a wrongfully discharged employe[e] as an individual and *** to appreciate the relevant dimensions of the problem." *Id.* at 97, 689 P.2d 1292. Again, despite placing the primary focus of its analysis on "legislative intent to abrogate," the court returned to "adequacy of existing remedies" as a component of the analysis.

***305** This court's attempts to adhere to the foregoing precedents have further entrenched the inconsistency in Oregon's wrongful discharge law. Two cases relied on by the parties in this case are illustrative. First, in *Olsen v. Deschutes County*, 204 Or. App. 7, 127 P.3d 655, *rev. den.*, 341 Or. 80, 136 P.3d 1123 (2006), we considered whether public employees who were fired for raising concerns about safety violations at a respite care facility may bring a wrongful discharge claim. Citing *Holien*, we stated that, to preclude the plaintiffs' claim, the defendant "must demonstrate *both* that the remedy for violation of ORS 659.035 is adequate in comparison to the remedy available under a common-law tort action *and also* that the legislature intended the statute to abrogate the common law." *Id.* at 14, 127 P.3d 655 (emphases added). Thus, in *Olsen*, we expressly stated—where the Oregon Supreme Court arguably has not—that both the requirements of "adequate existing remedies" and "legislative intent to abrogate the common-law remedy" must be present. Applying that rule, we concluded that the defendant met the first but not the second requirement; therefore, the plaintiffs' wrongful discharge claim was not precluded as a matter of law. *Id.* at 14-17, 127 P.3d 655.

Then, in *Deatherage v. Johnson*, 230 Or. App. 422, 215 P.3d 125 (2009), we considered whether an employee who had been fired in retaliation for reporting workplace safety violations to the Oregon Occupational Safety and Health Division may pursue a wrongful discharge claim. Although the plaintiff argued that *Olsen* controlled, we rejected that case's applicability, stating that it "does not address a claim under the statute at issue in this case, ORS 654.062." *Id.* at 425, 215 P.3d 125. Ultimately, we adhered to *Walsh*'s singular focus on the adequacy of statutory remedies and held that, "unless the Supreme Court repudiates or modifies its holding in *Walsh*, a plaintiff alleging retaliatory termination must bring that claim, if at all, under either a federal or a state statute." *Id.* at 426, 215 P.3d 125.

Returning to the present case, plaintiff argues that *Olsen* governs and defendants contend that *Deatherage* controls. ****152** For two reasons, we agree with defendant. First, we observe that wrongful discharge was not intended to be a tort of general application; rather, it is "an interstitial tort, ***306** designed to fill a gap where a discharge in violation of public policy would otherwise not be adequately remedied." *Dunwoody v. Handskill Corp.*, 185 Or. App. 605, 613, 60 P.3d 1135 (2003). The *Olsen* majority's conclusion that both adequate statutory remedies and a legislative intent to abrogate the common-law remedy are required to preclude a claim for wrongful discharge would seem to enlarge the tort in a way that contravenes that principle.

Second, as in *Deatherage* and unlike in *Olsen*, one of the statutes at issue in this case is ORS 654.062. The *Walsh* court stated:

> "We feel that existing remedies are adequate to protect both the interests of society in maintaining safe working conditions and the interests of employees who are discharged for complaining about safety and health problems. We also note that ORS 654.062(5) now provides a similar remedy under state law although, admittedly, these provisions were not in effect at the time of the conduct in question. Therefore, we find it unnecessary to extend an additional tort remedy to cover this kind of situation."

278 Or. at 352-53, 563 P.2d 1205 (footnote omitted). *Walsh* is directly on point, and we are bound by that decision. Therefore, we conclude that adequate statutory remedies exist under ORS 654.062 to vindicate the wrongful conduct that plaintiff alleges here, and that factor alone precludes her wrongful discharge claim.

Finally, we address plaintiff's argument regarding the significance of the dual motivations behind her refusal to

work without protective gloves—to protect individual health and safety and to prevent the spread of communicable diseases. Essentially, she posits that, even if ORS 654.062 functions as an adequate remedy to protect her personal interest in a safe workplace, it does not function as an adequate remedy to protect the public interest in disease prevention. To the extent that the different motivations underlying an employee's singular protected action matters, and assuming that ORS 654.062 is inadequate to vindicate the wrong that defendants caused in terminating plaintiff for acting to fulfill a societal obligation, plaintiff still has not established a wrongful discharge claim.

***307** Our courts have recognized two bases for a wrongful discharge claim: (1) "when the discharge is for exercising a job-related right that reflects an important public policy" and (2) "when the discharge is for fulfilling some important public duty[.]" *Babick*, 333 Or. at 407, 40 P.3d 1059 (citations omitted). Plaintiff argues that this is a "public duty" case, because she was fulfilling an important societal obligation by acting to stop the spread of diseases.[6] In reviewing wrongful discharge claims, courts "must *find* a public duty, not create one, using constitutional and statutory provisions and case law." *Id.* at 407-08, 40 P.3d 1059 (emphasis in original; citation and internal quotation marks omitted); *see also Lamson v. Crater Lake Motors, Inc.*, 346 Or. 628, 637, 216 P.3d 852 (2009) (stating same). In *Babick*, the Oregon Supreme Court considered the viability of the wrongful discharge claim of private security guards who were fired for arresting concert-goers engaging in assaultive behaviors and illicit substance possession. The court explained that it was "concerned here with a duty to perform a specific act (the arrest of lawbreakers by private citizens or private security personnel), and the statutes cited have nothing to say about that kind of act." *Babick*, 333 Or. at 409, 40 P.3d 1059.

The same lack of specificity prevents plaintiff from pursuing her wrongful discharge claim based on the "public duty" theory in this case. Examining the statutes that plaintiff cites as relevant—namely, ORS 431.110, ORS 431.142, ORS 431.155, and ORS 433.010—we acknowledge that those provisions evince a general public policy in favor of healthy communities and preventing communicable diseases. However, ORS 431.110, ORS 431.155, and ORS 431.142 concern, respectively, ****153** the general powers of the Oregon Health Authority (OHA), the enforcement powers of the OHA, and the functions of communicable disease control programs. None of those statutes impose any duty on plaintiff to prevent the spread of communicable diseases. Lastly, although ORS 433.010(1) provides that "[n]o person shall willfully cause the spread of any communicable disease within this state[,]" plaintiff did not allege any such willful action here.

***308** III. CONCLUSION

In sum, as to plaintiff's statutory claims, we conclude that Patel should reasonably have understood from the original complaint that plaintiff intended to sue the business entities Jay Maharaj, Inc., and Alko 100 LLC. Therefore, the amended complaint merely corrected a misnomer and did not change the parties, and it relates back to the timely filing of the original complaint under the first sentence of ORCP 23 C. Furthermore, we conclude that the existence of adequate statutory remedies precludes plaintiff's wrongful discharge claim.

Portion of judgment dismissing plaintiff's statutory claims reversed and remanded; otherwise affirmed.

All Citations

305 Or.App. 288, 471 P.3d 141

Footnotes

1 Neither party argues that Alko 100 LLC's status as successor registrant to Jay Maharaj, Inc., affects this appeal.

2 Before initiating this action, plaintiff had filed a complaint with the Oregon Bureau of Labor and Industries (BOLI). Defendants requested that the trial court take judicial notice of the BOLI record. Although the court did not expressly do so, it discussed details of the BOLI proceeding with the parties at the hearing on the summary judgment motion. Therefore, we consider the BOLI record to be a part of the summary judgment record.

That record indicates that BOLI dismissed plaintiff's complaint and, pursuant to ORS 659A.880, gave her 90-day notice of her right to file this action in state court. The parties do not dispute that that placed the filing deadline at August 15, 2017.

[3] Although the trial court case register shows that service on the business entities occurred on October 11, 2017, the affidavits of service state that service occurred on October 7, 2017. In any event, it is undisputed that all defendants were served with the original complaint within 60 days of its filing. *See* ORS 12.020(2) (action deemed commenced on date of filing of complaint if service effected within 60 days of the filing).

[4] Defendants recognized as much when they argued on summary judgment that Patel was not a proper defendant, because the original complaint stated no allegations "against Patel, individually, related to plaintiff's working environment or the circumstances surrounding her termination": "[T]here are no claims asserted against her. There'[re] no ultimate facts alleged against her individually."

[5] Plaintiff's opening brief notes that, by not appealing the trial court's judgment in Patel's favor, she has effectively dropped Patel from this case.

[6] Although plaintiff also pleaded this as a "job-related rights" case in her amended complaint, on appeal, plaintiff appears to rely solely on the "public duty" theory.

Filed: April 8, 2021

IN THE SUPREME COURT OF THE STATE OF OREGON

KATRINA OTNES,

Petitioner on Review,

v.

PCC STRUCTURALS, INC.,
an Oregon corporation,

Respondent on Review.

(CC 16CV32466) (CA A167525) (SC S067165)

En Banc

On review from the Court of Appeals.*

Argued and submitted September 23, 2020.

Matthew J. Kalmanson, Hart Wagner LLP, Portland, argued the cause and filed the briefs for petitioner on review. Also on the briefs was Ruth A. Casby.

Crystal S. Chase, Stoel Rives, Portland, argued the cause and filed the brief for respondent on review. Also on the brief was Karen O'Connor.

NELSON, J.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further proceedings.

*On appeal from Multnomah County Circuit Court,
John A. Wittmayer, Judge.
299 Or App 296, 450 P3d 60 (2019).

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioner on Review.

[ ] No costs allowed.
[X] Costs allowed, payable by: Respondent on Review.
[ ] Costs allowed, to abide the outcome on remand, payable by:

NELSON, J.

Plaintiff submitted a motion for a new trial to the trial court on the last permissible day for filing such a document. The clerk rejected the filing for failure to pay the filing fee. Plaintiff corrected that deficiency the next day, immediately upon notification of the problem, and requested that the filing relate back to the original submission date under Uniform Trial Court Rule (UTCR) 21.080(5).[1] The trial court, the Appellate Commissioner, and the Court of Appeals determined that plaintiff's motion was untimely, each on a different basis. For the reasons we discuss below, we conclude that plaintiff's motion for a new trial was timely under UTCR 21.080(5). We therefore reverse the decision of the Court of Appeals.

The relevant facts are few and undisputed. Plaintiff alleged employment discrimination claims against defendant PCC Structurals, Inc. After a trial, the jury returned a verdict in defendant's favor. The trial court entered a general judgment on January 19, 2018. Under ORCP 64B F(1), plaintiff was permitted to file a motion for a new trial within 10 days of that judgment, by January 29. At 11:31 p.m. on January 29, plaintiff submitted a motion for a new trial through the trial court's electronic filing (eFiling) system. On January 30, 2018, the trial court clerk informed plaintiff that the motion had been rejected because plaintiff had failed to include the applicable filing fee

[1] UTCR 21.080(5) authorizes the trial court to permit the filing date of a document to relate back to the original date that the document was tendered for filing if the trial court clerk rejects the filing and the party cures the deficiency identified by the trial court within three days. We set out UTCR 21.080(5) later in this opinion.

when she submitted the motion. Plaintiff determined that resubmission was permissible under UTCR 21.080(5), which provides, as pertinent here:

> "(5) If the court rejects a document submitted electronically for filing, the electronic filing system will send an email to the filer that explains why the court rejected the document * * *.
>
> "(a) A filer who resubmits a document within 3 days of the date of rejection under this section may request, as part of the resubmission, that the date of filing of the resubmitted document relate back to the date of submission of the original document to meet filing requirements. * * * A filer who resubmits a document under this subsection must include:
>
> "(i) A cover letter that sets out the date of the original submission and the date of rejection and that explains the reason for requesting that the date of filing relate back to the original submission, with the words 'RESUBMISSION OF REJECTED FILING, RELATION-BACK DATE OF FILING REQUESTED' in the subject line of the cover letter[.]"

In accordance with that rule, on January 30, 2018, plaintiff resubmitted the motion with the appropriate fee and a cover letter with the following in the subject line:

> "SUBJECT: 'RESUBMISSION OF REJECTED FILING, RELATION-BACK DATE OF FILING REQUESTED' Otnes v. PCC STRUCTURALS, INC. UTCR 21.080(5)"

The body of the letter stated,

> "The original submission date of Plaintiff's Motion for a New Trial under ORCP 64B and filing date for this filing was January 29, 2018. UTCR 21.080(5)(a)(i).
>
> "The resubmission of this filing is made on January 30, 2018.
>
> "The filing was rejected because of non-payment of the filing fee, which is now included."

The trial court administrator accepted the corrected motion and related the filing date back to the original date of submission, affixing a filing date stamp of January 29, 2018, to the motion and recording January 29, 2018, as the date of the filing in the court

registry.

Defendant filed a response to plaintiff's motion for a new trial, objecting to the motion on the merits. In that response, defendant also objected to plaintiff's request for relation back under UTCR 21.080(5)(b) ("A responding party may object to a request under subsection (a) of this section within the time as provided by law for the type of document being filed."). Defendant argued that plaintiff was not entitled to relation back and, therefore, her motion was untimely:

> "The Court should deny plaintiff's request to excuse her untimely submission (which apparently resulted after she attempted to file the motion on January 29, but failed to pay the filing fee) pursuant to UTCR 21.080(5)(a)(i). That rule provides that 'the court may, upon satisfactory proof, permit the filing date of the document to relate back to the date that the eFiler first attempted to file the document to meet filing requirements' *only if* 'the eFiling system [was] temporarily unavailable or if an error in the transmission of the document or other technical problem prevent[ed] the eFiling system from receiving a document.' UTCR 21.080(6). Late filings are generally not excused if they result from '[t]echnical problems with the filer's equipment or attempted transmission within the filer's control.' *Id*. Plaintiff's non-payment of the filing fee was an issue entirely within her control and does not justify, explain or excuse her late filing. Plaintiff's motion should be denied on timeliness grounds alone."

(Emphasis in original.) In other words, notwithstanding that plaintiff had cited UTCR 21.080(5) as her basis for requesting relation back and that defendant acknowledged that fact in the first sentence quoted above, defendant went on to quote from a different subsection of the rule, UTCR 21.080(6), which applies in situations in which the eFiling system is temporarily unavailable or an error in the document or other technical problem prevents the eFiling system from accepting the document.[2] Defendant then went on to

[2] UTCR 21.080(6) provides, in pertinent part:

argue that the requirements of UTCR 21.080(6) for relation back had not been met. Notably, defendant did not offer any specific reason for denying plaintiff's request under UTCR 21.080(5).

In reply and at the hearing on the motion, plaintiff argued that the motion was originally submitted within the proper timeframe but was rejected for non-payment of the fee, that the trial court rule provides for relation back in that circumstance, and that the requirements for relation back had been met: the filing fee had been paid and the motion was timely resubmitted. Plaintiff also argued at the hearing that the error was due to the failure of the eFiling system to indicate that the fee was required. The trial court denied the motion from the bench, "both because it was untimely under ORCP 64 and UTCR 21.080(6), and on the merits."

Plaintiff filed a notice of appeal within 30 days of the denial of her motion for a new trial, but more than 30 days after the trial court's entry of judgment in her case. Defendant then moved to dismiss the appeal for lack of jurisdiction, arguing that, because the motion for a new trial was untimely, the 30-day period for filing an appeal was not

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> "(6) If the eFiling system is temporarily unavailable or if an error in the transmission of the document or other technical problem prevents the eFiling system from receiving a document the court may, upon satisfactory proof, permit the filing date of the document to relate back to the date that the eFiler first attempted to file the document to meet filing requirements. Technical problems with the filer's equipment or attempted transmission within the filer's control will not generally excuse an untimely filing.
>
> "(a) A filer seeking relation-back of the filing date due to system unavailability or transmission error described in this section must comply with the requirements in subsection (5)(a) of this rule."

tolled by ORS 19.255(2) (providing that notice of appeal must be filed within 30 days of judgment, but when motion for new trial is filed, party must file notice of appeal within 30 days of disposition of motion for new trial). Therefore, defendant argued, the notice of appeal also was untimely, and the Court of Appeals lacked jurisdiction.

In July 2018, the Appellate Commissioner dismissed plaintiff's appeal. The commissioner first acknowledged that the matter was governed by UTCR 21.080(5), and not UTCR 21.080(6), because the trial court clerk had rejected the motion for new trial and sent plaintiff a notice to that effect. *See* UTCR 21.080(5) ("If the court rejects a document submitted electronically for filing, the electronic filing system will send an email to the filer that explains why the court rejected the document * * *."). The commissioner agreed with plaintiff that, on its face, UTCR 21.080(5) appears to permit relation back if the trial court clerk rejects a filing for any reason, when the party promptly cures the deficiency identified by the clerk in the notice of rejection. However, the commissioner ruled, under ORS 21.100, the trial court has no authority to grant relation back when the deficiency identified as the basis for rejection is the failure to pay a filing fee. ORS 21.100 provides, in relevant part:

> "A pleading or other document may be filed by the circuit court only if the filing fee required by law is paid by the person filing the document[.]"

The commissioner reasoned that ORS 21.100 legally bars the trial court clerk from accepting a motion for new trial without the accompanying filing fee, which was the reason for the rejection notice. Here, plaintiff did not tender payment of the filing fee until the 11th day after the date of the entry of judgment, and, according to the

commissioner, that date was, therefore, the earliest date that the trial court clerk could lawfully accept the motion for new trial for filing. As that date was outside the ten days permitted for filing such motions, the motion was untimely. According to the commissioner, the trial court does not have authority to waive the requirements of ORS 21.100, and, therefore, because the motion for new trial was untimely, plaintiff also did not timely file her notice of appeal.

Plaintiff then filed a motion for reconsideration of the Appellate Commissioner's order. In September 2019, the Court of Appeals affirmed the decision of the Appellate Commissioner, on still another basis. The Court of Appeals concluded that, even assuming that ORS 21.100 does not bar relation back under UTCR 21.080(5) when a filing is rejected for nonpayment of a filing fee, the trial court could not be found to have erred, because, in the court's view, plaintiff failed to give a sufficient reason for her request for relation back and thus did not comply with UTCR 21.080(5). That is, according to the court, that rule gives the trial court "discretion to consider the nature of the reason for rejection, the reasonableness of an excuse offered, and the type of document to be filed." *Otnes*, 299 Or App at 302-03. The court further stated that the filer must prove that the filing failure is "excusable" or that relation back is "critical," "justified," or "warranted." *Id*. at 303. However, the court stated, plaintiff had offered no such proof:

> "She did not * * * explain that she had made an error in coding or format. Plaintiff did not suggest that she had tried to pay at the time of filing. She did not explain why relation back was critical or warranted. Instead, plaintiff simply said that she had paid the fee. With only that showing, plaintiff seemed to expect relation back as an entitlement due to payment."

Id. (footnotes omitted). The court thus agreed with defendant that plaintiff had not provided the trial court with any basis upon which to excuse her failure to pay the fee or to justify the court's exercise of discretion to order relation back. Consequently, it concluded that the trial court had not abused its discretion in rejecting plaintiff's request for relation back. *Id*. at 303-04. Finally, the court held that, because the motion for new trial was late, it did not extend the time for filing a notice of appeal after judgment, and, therefore, plaintiff's appeal also was untimely, and the court lacked jurisdiction to entertain it. *Id*. at 304.

We begin by observing that the trial court erroneously based its ruling denying plaintiff's request for relation back on plaintiff's supposed failure to meet the requirements for relation back set out in UTCR 21.080(6). That subsection applies when "the eFiling system is temporarily unavailable or if an error in the transmission of the document or other technical problem prevents the eFiling system from receiving a document." Here, however, plaintiff's filing was received on January 29, but the clerk rejected the filing the following day because the filing fee had not been submitted with the motion. Because the clerk rejected plaintiff's motion, UTCR 21.080(5) is the applicable rule. The trial court thus erred as a matter of law in relying on UTCR 21.080(6) to deny plaintiff's request for relation back,[3] and its ruling must be reversed

[3] Defendant suggests that plaintiff invited the trial court's error at the hearing by failing forcefully enough to correct defendant's and the court's erroneous application of UTCR 21.080(6) to her request for relation back. Plaintiff cited the correct rule and discussed the correct standards for deciding whether to grant her request. Plaintiff did not invite the error.

unless denial of the motion was "right for the wrong reason." *See State v. Edmonds*, 364 Or 410, 415, 435 P3d 752 (2019) ("Under the 'right for the wrong reason' doctrine, a trial court's ruling can be affirmed based on a ground that the trial court did not consider" if certain conditions are met.).

Defendant presses two theories on which this court could find that the trial court's ruling was correct notwithstanding its erroneous reliance on UTCR 21.080(6): (1) the Court of Appeals' theory that plaintiff had not provided a sufficient reason for requesting relation back under UTCR 21.080(5), and (2) the Appellate Commissioner's theory that UTCR 21.080(5) does not apply when a document is rejected for failure to pay a filing fee.

As noted, the Court of Appeals held that the trial court could not be said to have abused its discretion in ruling that plaintiff's motion for a new trial was untimely, because plaintiff had not adequately explained reasons justifying or excusing the filing failure, which the court concluded was required by UTCR 21.080(5). As a preliminary matter, we observe that the Court of Appeals erred in reviewing the trial court's ruling for abuse of discretion. The trial court erred as a matter of law in denying plaintiff's motion on the basis of her supposed failure to meet the requirements of UTCR 21.080(6). We turn to consider whether plaintiff met the requirements of UTCR 21.080(5).

Plaintiff asserts that the Court of Appeals erred in holding that UTCR 21.080(5) demands that a person requesting relation back "justify" or "excuse" the filing failure. She contends that the plain wording of the rule requires only that a reason -- any reason -- be given for the request for relation back, and she provided a reason. She

argues further that the adoption history of the rule confirms her understanding that the rule requires relation back as a matter of course unless the opposing party provides a reason for denying it.

In interpreting a provision of the UTCR, we borrow the statutory construction methodology that we apply to statutes. *See Lindell v. Kalugin*, 353 Or 338, 349, 297 P3d 1266 (2013) (to determine the meaning of a court rule, "we apply the precepts that ordinarily apply to the interpretation of statutes and rules"). That is, we discern the meaning of the words used by examining the text of the rule in its context, along with any adoption history that we find relevant, in an effort to give effect to the intent of the body that promulgated the rule. *Id*.; *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (explaining methodology). In the case of the UTCRs, the promulgater of the rule is the Chief Justice of this court. ORS 1.002(1)(a) (the Chief Justice of the Supreme Court may make rules and issue orders to facilitate its authority as administrative head of the judicial department); Chief Justice Order 12-050 (adopting wording in UTCR 21.080(5) that is at issue in this case).

UTCR 21.080(5)(a)(i) provides that, when a document is rejected for filing, the filer who later resubmits the document must include "[a] cover letter that sets out the date of the original submission and the date of rejection and that explains the reason for requesting that the date of filing relate back to the original submission[.]" Whether the Court of Appeals' reasoning is correct turns on the meaning of the requirement in that rule that a cover letter "explain[] the reason for requesting" relation back.

We begin by examining the text. We observe that the rule does not

establish any standard for deciding whether to accept the request for relation back. Unlike UTCR 21.080(6), it does not require a party to provide "satisfactory proof" of the reasons for the request.[4] It does not expressly require a party to explain why the filing failure is excusable or why relation back is critical, justified, or warranted. Indeed, UTCR 21.080(5)(a)(i) does not expressly require even a *good* reason for making the request. Rather, on its face, it appears that any reason at all would suffice to permit the court to grant relation back, including simply explaining that the filing was rejected for non-payment of an applicable fee and that the fee had been paid.

Turning to context, both the Court of Appeals and defendant find UTCR 21.080(5)(b) relevant. That paragraph provides that a responding party may, within a certain time frame, object to the request for relation back:

> "A responding party may object to a request under subsection (a) of this section within the time limits as provided by law for the type of document being filed. For the purpose of calculating the time for objection provided by law under this subsection, if applicable, the date of filing is the date that the document was resubmitted to the court under subsection (a) of this section."

UTCR 21.080(5)(b). The Court of Appeals determined that, because the rule permits objections to relation back, it necessarily gives the trial court discretion to allow or disallow relation back to cure a failed filing. *Otnes*, 299 Or App at 302. The court stated that relation back is not a matter of right, because "the rule gives the trial court discretion to consider the nature of the reason for the objection, the reasonableness of the excuse

[4] UTCR 21.080(6) provides that a court may permit relation back if "satisfactory proof" is provided that eFiling was unable to be completed due to an error in transmission of the document or other technical problem.

offered, and the type of document." *Id*. For its part, defendant contends that that paragraph confirms that relation back is not automatic. Defendant argues that the inclusion of the opponent's right to object shows that the Chief Justice intended to require the requesting party to explain why relation back is critical, justified, or warranted, because, without such a requirement, the opposing party's opportunity to object would be meaningless. We disagree that the opportunity for objecting means that a requester is not entitled to relation back as a matter of course if he or she meets the requirements of UTCR 21.080(5).

Although UTCR 21.080(5)(b) does provide an opportunity for the opposing party to provide a reason for denying the request for relation back, nothing in the text or context of the rule describes the nature of the objections that can be made. And, as we have said, on its face, UTCR 21.080(5)(a) appears to permit relation back as long as any reason at all is given for the request. It does not require the requestor to prove that he or she is blameless in the filing failure. The Court of Appeals' view that the inclusion of a right to object gives the trial court discretion to consider the "nature of the reason for the objection [or] the reasonableness of the excuse offered" is, thus, at odds with the text of UTCR 21.080(5)(a). Moreover, we observe that UTCR 21.080(5)(a) does not require the requester to prove that the statements made in the cover letter are correct or even to attest to their veracity. In those circumstances, the purpose of providing an opportunity to object may simply be to permit the opposing party to dispute whether the requirements of UTCR 21.080(5), such as they are, have been met -- namely, that the document was refiled within three days and the deficiency was corrected. In that situation, an

opponent's right to object would not be meaningless.

Finally, an interpretation of UTCR 21.080(5) that requires a filer to establish that the filing failure was "excusable" or that relation back is "critical," "justified," or "warranted" would necessarily also require the court to reject any request for relation back that does not rise to that standard, whether the opposing party objects or not. Nothing in the rule gives the court that authority. And, as we have stated, the rule does not expressly require even a good reason for requesting relation back.

Examination of the adoption history of UTCR 21.080(5) does not change our view, based on our consideration of text and context, that the rule permits relation back if any reason at all is given. The parties agree that the 2008 version of UTCR 21.080(5) unambiguously provided for automatic relation back of rejected electronic filings upon timely resubmission.[5] UTCR 21.080(5) (2008) provided:

> "If the court rejects a document submitted electronically for filing, the court will affix the date and time of rejection on the document and return the document to the filer with a notice that explains why the court rejected the document. The court may require a filer to resubmit the document to meet the filing requirements. *If the court requires a filer to resubmit the document, the date and time of filing of the resubmitted document relates back to the date and time of the filing of the original document.* The court may, by order, strike the document from the court's file in the action if the filer receives notice from the court and does not resubmit the document within the time period specified by the court."

(Emphasis added.) As set out in the emphasized passage, if the court required resubmission because a document was rejected, "the date and time of filing of the resubmitted document relates back to the date and time of the filing of the original

[5] Before 2008, electronic filing did not exist.

document."

The rule was amended in 2011, as relevant here, to provide a time frame for resubmission of the rejected document, but the 2011 version continued to provide for automatic relation back:

> "If the court rejects a document submitted electronically for filing, the court will affix the date and time of rejection on the document and electronically return the document to the filer with a notice to all parties who have been provided notice of filing under UTCR 21.100(2) that explains why the court rejected the document. The court may give a filer the opportunity to resubmit the document within 3 days of the day and time of rejection to meet the filing requirements. *If the court gives a filer the opportunity to resubmit the document and the filer does so within the time allowed, the date and time of filing of the resubmitted document relates back to the date and time of the filing of the original document* and the time to respond is extended by the number of full or partial elapsed days from the time of the rejection notice to the time of the resubmission of the document to the court. The court may, by order, strike the document from the court's file in the action if the filer receives notice from the court and does not resubmit the document within the time period specified by the court."

UTCR 21.080(5) (2011) (emphasis added).

In 2012, UTCR 21.080(5) was amended to adopt its present wording, requiring a party to request relation back and to do so in a cover letter "that explains the reason" for requesting relation back. Chief Justice Order 12-050.[6] Defendant argues that the background to the 2012 amendments -- specifically, statements in certain emails and memoranda by a member of the Law and Policy Work Group who helped draft the proposed amendments -- reflect the Chief Justice's intention to require a party requesting relation back to provide "good cause" for doing so in the cover letter explaining the

[6] UTCR 21.080 was amended again in 2014, in ways not relevant to our resolution of this case. Chief Justice Order 14-049.

reason for relation back. In support of that argument, defendant points to two statements in the rule's adoption history. In one, the minutes from the May 31, 2012, workgroup meeting state that "[i]t was suggested that the rule more closely reflect the similar rule in the appellate system, which allows relation-back only upon request and a showing of good cause." In another, an email from one of the workgroup members stated that the group had

> "talked about narrowing the rule so that a party must request a 3-day relation-back (for instances in which the filed date mattered) & that a court would decide the request (submitted in letter form) as part of resolving the merits of the underlying document. We also discussed that a responding party could object to the relation-back request, and we generally discussed the 'time for response' rules set out in the ORCPs."

Those statements do not persuade us that the Chief Justice intended to require a filer to prove that good cause exists for permitting relation back. For one thing, no requirement that a party establish the existence of good cause for relation back ultimately was included in the amended rule. Moreover, defendant concedes that the adoption history contains no substantive discussion of the proposed requirement in subsection (5)(a) requiring a party to explain the reason for the relation-back request.

Defendant nonetheless contends that relation back was no longer automatic after the 2012 amendments. We disagree. It is true that, unlike in the earlier versions of the rule, the 2012 amendments required parties to specifically request relation back by attaching a cover letter that included the words 'RESUBMISSION OF REJECTED FILING, RELATION-BACK DATE OF FILING REQUESTED' in the subject line and that "explain[ed] the reason" for requesting relation back. In addition, from 2012 on, as

we have discussed, an opposing party has had the right to object to the request for relation back. However, the adoption history of the rule suggests that those changes were intended to provide clarity to the trial court as to when relation back was needed and to simplify the process for filers and the courts, because, in most instances, the date the document is entered is not critical and, in the absence of a relation back request, the filing date would be the date that a document was resubmitted to the court and not the date that it was originally submitted. Nothing that defendant has pointed to in the adoption history suggests that the workgroup intended to or did incorporate the concept of a "good cause" showing in the text of UTCR 21.080(5). Nor do we find anything in the adoption history to suggest an intent to give the trial court discretion to deny requests for relation back.

In short, we conclude that nothing in the text, context, or adoption history of UTCR 21.080(5) suggests that, in requiring the filer to timely request relation back, and in permitting the opposing party to object, the Chief Justice intended that section to require a filer to provide good cause for requesting relation back.

As noted, defendant also contends, alternatively, that, even if plaintiff's cover letter was sufficient to satisfy the requirements of UTCR 21.080(5), relation back is not available when the reason for the rejection of the filing was the failure to pay a required filing fee. Defendant adopts the reasoning of the Appellate Commissioner to argue that UTCR 21.080(5) cannot grant a trial court authority to permit the filing date of a document to relate back to the original date that the document was tendered for filing if the document was not originally accompanied by the required filing fee, because, under ORS 21.100, a document is not "filed" until the filing fee is paid.

To repeat, ORS 21.100 provides, in relevant part:

> "A pleading or other document may be filed by the circuit court only if the filing fee required by law is paid by the person filing the document[.]"

Defendant argues that the plain text of that statute bars the trial court clerk from legally accepting a document for which a filing fee is required by law until the party submitting the document tenders payment of the filing fee. In addition, it points out that ORS 21.200(1)(c) requires a filing fee for motions for a new trial, and ORS 21.200(4) provides that "[t]he clerk shall file a motion or response that is subject to a fee under this section only if the fee required by this section is paid when the motion or response is submitted for filing."

Defendant explains that, under ORS 1.002(1) and (4), the uniform trial court rules promulgated by the Chief Justice must be "consistent with" applicable provisions of law. Here, defendant contends, ORS 21.100 and 21.200(1)(c) are two such provisions of applicable law. Therefore, it argues, UTCR 21.080(5), which permits the clerk to relate the filing date of a rejected document back to the date it was submitted if the deficiency is cured within three days of the filer receiving notice of the deficiency, cannot confer authority on the clerk to "file" any document that was rejected for failure to pay the filing fee on any date before the fee was paid.

Defendant is correct that ORS 21.100 and 21.200(4) require payment of the appropriate filing fee as a condition for the trial court's acceptance of a document for "filing." However, we disagree with defendant's characterization of the court rules as permitting the trial court to legally accept a document for filing without payment of a

required fee. In fact, UTCR 21.050(1) incorporates and implements the requirement of fee payment as a condition of filing in the electronic filing context; that rule provides that "a filer must pay the fee for filing a document electronically at the time of electronic filing." And UTCR 21.080(5) applies to *rejected* filings, including those that are rejected because of nonpayment of fees.[7]

It does not follow from the fact that a clerk cannot accept a filing without a fee that a filing cannot relate back to the original submission date once the fee is paid. Neither ORS 21.100 nor ORS 21.200 address relation back, and neither statute prohibits application of that doctrine when payment of a required fee is received. As we have explained, UTCR 21.080(5)(a) provides a three-day grace period to cure a filing error. That rule is not inconsistent with ORS 21.100, which merely provides that the court clerk may not accomplish the legal act of filing a document until payment is received. ORS 21.100 is silent as to the date of filing. It does not establish a deadline for filing. It does not impose a time limitation for the receipt of payment. And it does not address what relief may be granted when an attempted filing is delayed because of a payment error. In short, nothing in ORS 21.100 prohibits, allows, or even addresses relating back a filing date to meet a time restriction or deadline.

Plaintiff's electronic submission of the motion for a new trial was received by the trial court on January 29, 2018. But, consistent with ORS 21.100 and UTCR

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[7] *See* Oregon Judicial Department Policy and Standards for Acceptance of Electronic Filings in the Oregon Circuit Courts § (2)(f) (2015) (circuit court will reject a filing if a party fails to pay any fee for a filing that requires a specific statutory filing fee).

21.050, it was not accepted for "filing" that day because of plaintiff's failure to pay the filing fee. In permitting relation back after plaintiff paid the filing fee within the three-day grace period, UTCR 21.080(5) permitted the constructive alteration of the date of "filing" to reflect the date of the original attempted filing. It did not permit the trial court to "file" plaintiff's motion before the fee was paid in violation of ORS 21.100.

To summarize, we hold that ORS 21.100 does not render relation back unavailable when the reason that a document was rejected was the nonpayment of a required fee. We also hold that, in requiring a filer to "explain the reason" for requesting relation back, the rule merely requires the filer to provide a reason for the request. Plaintiff explained that she was requesting relation back because her motion for a new trial had been rejected for filing because of a failure to pay the filing fee and the filing fee had been paid. That explanation was sufficient to comply with the requirements of UTCR 21.080(5), and Court of Appeals erred in holding that it was not. Defendant objected to plaintiff's request for relation back under UTCR 21.080(6), but it did not provide any reason for objecting under UTCR 21.080(5). Therefore, the trial court erred in ruling in defendant's favor and denying plaintiff's request.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further proceedings.

Senate Bill 378

Sponsored by Senator BOQUIST (at the request of former Senator Herman Baertschiger, Jr.) (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Provides that, when interview is element of process of selecting candidate for civil service position from eligibility list, public employer must interview each veteran applicant who meets qualifications for position and shows transferable skills if duties of position are performed by only one person within public employer's organization.

Requires public employer to provide written notice to veteran who is eliminated from consideration for vacant civil service position.

Provides right to jury trial and permits awards of noneconomic damages in civil suits for violation of veterans' employment preference statutes. Modifies period for notice of tort claim against public body for violation of veterans' employment preference statutes.

Directs Department of Veterans' Affairs to establish program for investigation and nonbinding arbitration of alleged violation of veterans' employment preference statutes.

Requires public employers to conduct annual training related to veterans' employment preferences. Provides that conducting approved annual training is affirmative defense to claim for violation of veterans' employment preference statutes.

A BILL FOR AN ACT

Relating to veterans' employment preferences; creating new provisions; and amending ORS 30.275, 408.230 and 408.237.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 408.237 is amended to read:

408.237. (1) As used in this section:

(a) "Eligibility list" means a list of ranked eligible candidates for a civil service position who have become eligible for the position through a test or series of tests and who will be considered for the civil service position in ranked order.

(b) "Transferable skill" means a skill that a veteran has obtained through military education or experience that substantially relates, directly or indirectly, to the civil service position for which the veteran is applying.

(2) When an interview is a component of the selection process for a civil service position or for an eligibility list for a civil service position, a public employer shall interview each veteran:

(a) Whom the public employer determines meets the minimum qualifications and special qualifications for the civil service position or eligibility list; and

(b) Who submits application materials that the public employer determines show sufficient evidence that the veteran has the transferable skills required and requested by the public employer for the civil service position or eligibility list.

(3)**(a) Except as provided in paragraph (b) of this subsection,** a public employer is not required to comply with subsection (2) of this section if the employer conducts interviews only as part of the process of selecting a candidate for a civil service position from an eligibility list.

(b) The exemption in paragraph (a) of this subsection does not apply to a civil service position if the duties of that position are performed by only one person within the public

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

employer's organization.

(4) A public employer may consult with the Oregon Military Department and the Department of Veterans' Affairs to determine whether certain military education or experience produces a transferable skill.

(5) The Department of Veterans' Affairs shall provide training to veterans on how to show evidence of transferable skills in an application for a civil service position or eligibility list.

(6) Violation of subsection (2) of this section is an unlawful employment practice under ORS chapter 659A.

(7) A veteran claiming to be aggrieved by a violation of subsection (2) of this section may file a complaint under ORS 659A.820.

SECTION 2. ORS 408.230 is amended to read:

408.230. (1) A public employer shall grant a preference to a veteran or disabled veteran who applies for a vacant civil service position or seeks promotion to a civil service position with a higher maximum salary rate and who:

(a)(A) Successfully completes an initial application screening or an application examination for the position; or

(B) Successfully completes a civil service test the employer administers to establish eligibility for the position; and

(b) Meets the minimum qualifications and any special qualifications for the position.

(2) The employer shall grant the preference in the following manner:

(a) For an initial application screening used to develop a list of persons for interviews, the employer shall add five preference points to a veteran's score and 10 preference points to a disabled veteran's score.

(b) For an application examination, given after the initial application screening, that results in a score, the employer shall add preference points to the total combined examination score without allocating the points to any single feature or part of the examination. The employer shall add five preference points to a veteran's score and 10 preference points to a disabled veteran's score.

(c) For an application examination that consists of an interview, an evaluation of the veteran's performance, experience or training, a supervisor's rating or any other method of ranking an applicant that does not result in a score, the employer shall give a preference to the veteran or disabled veteran. An employer that uses an application examination of the type described in this paragraph shall devise and apply methods by which the employer gives special consideration in the employer's hiring decision to veterans and disabled veterans.

(3) Preferences of the type described in subsection (1) of this section are not a requirement that the public employer appoint a veteran or disabled veteran to a civil service position.

(4) A public employer shall appoint an otherwise qualified veteran or disabled veteran to a vacant civil service position if the results of a veteran's or disabled veteran's application examination, when combined with the veteran's or disabled veteran's preference, are equal to or higher than the results of an application examination for an applicant who is not a veteran or disabled veteran.

(5) If a public employer eliminates a veteran from consideration for a vacant civil service position, the public employer shall, within three business days of the elimination, provide written notice to the veteran.

[*(5)*] **(6)** If a public employer does not appoint a veteran or disabled veteran to a vacant civil service position, upon written request of the veteran or disabled veteran, the employer, in writing, shall provide the employer's reasons for the decision not to appoint the veteran or disabled veteran

to the position. The employer may base a decision not to appoint the veteran or disabled veteran solely on the veteran's or disabled veteran's merits or qualifications with respect to the vacant civil service position.

[*(6)*] **(7)** Violation of this section is an unlawful employment practice.

[*(7)*] **(8)** A veteran or disabled veteran claiming to be aggrieved by a violation of this section may file a verified written complaint with the Commissioner of the Bureau of Labor and Industries in accordance with ORS 659A.820.

[*(8)*] **(9)** For purposes of this section, "disabled veteran" includes a person who is receiving service-connected compensation from the United States Department of Veterans Affairs under 38 U.S.C. 1110 or 1131.

SECTION 3. The amendments to ORS 408.230 and 408.237 by sections 1 and 2 of this 2021 Act apply to civil service positions that are first advertised or solicited on or after the effective date of this 2021 Act.

SECTION 4. ORS 30.275 is amended to read:

30.275. (1) No action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be maintained unless notice of claim is given as required by this section.

(2) Notice of claim shall be given within the following applicable period of time, not including the period, not exceeding 90 days, during which the person injured is unable to give the notice because of the injury or because of minority, incompetency or other incapacity:

(a)**(A)** For wrongful death, within one year after the alleged loss or injury.

(B) For violation of ORS 408.230 or 408.237, within two years after the alleged violation.

(b) For all other claims, within 180 days after the alleged loss or injury.

(3) Notice of claim required by this section is satisfied by:

(a) Formal notice of claim as provided in subsections (4) and (5) of this section;

(b) Actual notice of claim as provided in subsection (6) of this section;

(c) Commencement of an action on the claim by or on behalf of the claimant within the applicable period of time provided in subsection (2) of this section; or

(d) Payment of all or any part of the claim by or on behalf of the public body at any time.

(4) Formal notice of claim is a written communication from a claimant or representative of a claimant containing:

(a) A statement that a claim for damages is or will be asserted against the public body or an officer, employee or agent of the public body;

(b) A description of the time, place and circumstances giving rise to the claim, so far as known to the claimant; and

(c) The name of the claimant and the mailing address to which correspondence concerning the claim may be sent.

(5) Formal notice of claim shall be given by mail or personal delivery:

(a) If the claim is against the state or an officer, employee or agent thereof, to the office of the Director of the Oregon Department of Administrative Services.

(b) If the claim is against a local public body or an officer, employee or agent thereof, to the public body at its principal administrative office, to any member of the governing body of the public body, or to an attorney designated by the governing body as its general counsel.

(6) Actual notice of claim is any communication by which any individual to whom notice may be given as provided in subsection (5) of this section or any person responsible for administering tort

claims on behalf of the public body acquires actual knowledge of the time, place and circumstances giving rise to the claim, where the communication is such that a reasonable person would conclude that a particular person intends to assert a claim against the public body or an officer, employee or agent of the public body. A person responsible for administering tort claims on behalf of a public body is a person who, acting within the scope of the person's responsibility, as an officer, employee or agent of a public body or as an employee or agent of an insurance carrier insuring the public body for risks within the scope of ORS 30.260 to 30.300, engages in investigation, negotiation, adjustment or defense of claims within the scope of ORS 30.260 to 30.300, or in furnishing or accepting forms for claimants to provide claim information, or in supervising any of those activities.

(7) In an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300, the plaintiff has the burden of proving that notice of claim was given as required by this section.

(8) The requirement that a notice of claim be given under subsections (1) to (7) of this section does not apply if:

(a)(A) The claimant was under the age of 18 years when the acts or omissions giving rise to a claim occurred;

(B) The claim is against the Department of Human Services or the Oregon Youth Authority; and

(C) The claimant was in the custody of the Department of Human Services pursuant to an order of a juvenile court under ORS 419B.150, 419B.185, 419B.337 or 419B.527, or was in the custody of the Oregon Youth Authority under the provisions of ORS 419C.478, 420.011 or 420A.040, when the acts or omissions giving rise to a claim occurred.

(b) The claim is against a private, nonprofit organization that provides public transportation services described under ORS 30.260 (4)(d).

(9) Except as provided in ORS 12.120, 12.135 and 659A.875, but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be commenced within two years after the alleged loss or injury.

SECTION 5. Sections 6, 7 and 9 of this 2021 Act are added to and made a part of ORS 408.225 to 408.237.

SECTION 6. For a civil claim alleging a violation of ORS 408.230 or 408.237:

(1) At the request of any party, the claim shall be tried to a jury;

(2) A prevailing plaintiff is entitled to recover noneconomic damages, as defined in ORS 31.710; and

(3) A court may not award attorney fees or costs to a public employer.

SECTION 7. (1) The Department of Veterans' Affairs shall establish a program, as described in this section, for investigation and nonbinding arbitration of claims for violations of ORS 408.230 or 408.237.

(2) A veteran claiming to be aggrieved by a violation of ORS 408.230 or 408.237 may file a written complaint with the department describing the alleged violation. The complaint must be signed by the complainant. The complaint must be filed within one year of the alleged violation.

(3) A complaint may not be filed under this section if:

(a) A civil action has been commenced in state or federal court alleging the same matters; or

(b) A complaint has been filed with the Commissioner of the Bureau of Labor and Industries alleging the same matters.

(4) The public employer against whom the complaint was filed may file an answer to the complaint.

(5) Upon receipt of a complaint, the department shall investigate the complaint. The department may request pertinent documents, testimony and other evidence from relevant parties. The department shall establish a process for requesting, receiving and analyzing such evidence. The department may establish a process to enable direct dialogue between the complainant and the public employer against whom the complaint was filed.

(6) The department shall issue a written determination, based on the preponderance of the evidence, of whether a violation of ORS 408.230 or 408.237 occurred. The determination of the department does not affect the rights or liabilities of any party.

(7) All public bodies, as defined in ORS 174.109, are directed to cooperate with and assist the department in investigations under this section.

(8) The department shall adopt rules necessary for the administration of this section.

SECTION 8. (1) Section 7 of this 2021 Act becomes operative on July 1, 2022.

(2) The Department of Veterans' Affairs may take any action before the operative date specified in subsection (1) of this section that is necessary for the department to exercise, on and after the operative date specified in subsection (1) of this section, all of the duties, functions and powers conferred on the department by section 7 of this 2021 Act.

SECTION 9. (1) A public employer shall conduct, or cause to be conducted, annual training on the requirements of ORS 408.230 and 408.237.

(2) A public employer may submit training materials to the Department of Veterans' Affairs for approval. The department shall approve the materials if the department finds that the materials accurately convey the requirements of ORS 408.230 and 408.237 and are likely to improve compliance with those requirements.

(3) Compliance with this section is an affirmative defense to a claim for violation of ORS 408.230 or 408.237, if the materials used in the most recent training are approved by the Department of Veterans' Affairs.

A-Engrossed
Senate Bill 813

Ordered by the Senate April 29
Including Senate Amendments dated April 29

Sponsored by COMMITTEE ON JUDICIARY AND BALLOT MEASURE 110 IMPLEMENTATION

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

[*Directs State Court Administrator to study civil proceedings. Requires report to interim committee of Legislative Assembly related to judiciary.*]

[*Sunsets January 2, 2023.*]

Clarifies applicability of provisions extending time to commence action or give notice of claim when expiration of time falls within state of emergency related to COVID-19.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to civil proceedings; amending section 7, chapter 12, Oregon Laws 2020 (first special session); and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 7, chapter 12, Oregon Laws 2020 (first special session), is amended to read:

Sec. 7. (1) If the expiration of the time to commence an action or give notice of a claim falls within the time in which any declaration of a state of emergency issued by the Governor related to COVID-19, and any extension of the declaration, is in effect, or within 90 days after the declaration and any extension is no longer in effect, the expiration of the time to commence the action or give notice of the claim is extended to a date 90 days after the declaration and any extension is no longer in effect.

(2) Subsection (1) of this section applies to:

(a) Time periods for commencing an action established in ORS chapter 12;

(b) The time period for commencing an action for wrongful death established in ORS 30.020;

(c) The time period for commencing an action or giving a notice of claim under ORS 30.275; and

(d) Any other time limitation for the commencement of a civil cause of action or the giving of notice of a civil claim established by statute.

(3) Subsection (1) of this section does not apply to:

(a) Time limitations for the commencement of criminal actions;

(b) The initiation of an appeal to the magistrate division of the Oregon Tax Court or an appeal from the magistrate division to the regular division;

(c) The initiation of an appeal or judicial review proceeding in the Court of Appeals; or

(d) The initiation of any type of case or proceeding in the Supreme Court.

(4) Subsection (1) of this section applies to expirations of the time to commence an action or give notice of a claim occurring:

(a) On or after March 8, 2020, and on or before the date 90 days after the declaration of

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

a state of emergency issued by the Governor on March 8, 2020, and any extension of the declaration, is no longer in effect; or

(b) During the time in which any other declaration of a state of emergency issued by the Governor related to COVID-19, and any extension of the declaration, is in effect, or within 90 days after the declaration and any extension is no longer in effect.

SECTION 2. This 2021 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2021 Act takes effect on its passage.

Enrolled
House Bill 4212

Sponsored by Representative KOTEK; Representatives KENY-GUYER, LEIF, NERON, NOSSE, PRUSAK, REARDON, SCHOUTEN, SOLLMAN, WILLIAMS (at the request of Joint Committee on the First Special Session of 2020)

CHAPTER .....

AN ACT

Relating to strategies to protect Oregonians from the effects of the COVID-19 pandemic; creating new provisions; amending ORS 18.784, 93.810, 194.225, 194.290, 194.305, 194.400 and 458.685; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

LOCAL GOVERNMENT AND SPECIAL GOVERNMENT BODY PUBLIC MEETINGS AND OPERATIONS

SECTION 1. (1) Notwithstanding ORS 192.610 to 192.690, the governing body of a public body may hold all meetings by telephone or video conferencing technology or through some other electronic or virtual means. When a governing body meets using telephone or video conferencing technology, or through other electronic or virtual means, the public body shall make available a method by which the public can listen to or observe the meeting. If a governing body meets using telephone or video conferencing technology, or through other electronic or virtual means:

(a) The public body does not have to provide a physical space for the public to attend the meeting; and

(b) If the telephone or video conferencing technology allows the public body to do so, the public body shall record the meeting and make the recording available to the public. This paragraph does not apply to executive sessions.

(2) If the governing body of the public body elects not to use telephone or video conferencing technology or other electronic or virtual means to conduct meetings, all persons attending meetings held in person must maintain social distancing, including maintaining intervals of six feet or more between individuals, wherever possible.

(3) For any executive session at which the media are permitted to attend, whether conducted in person or using electronic or virtual means, the governing body shall provide a means for media to attend the executive session through telephone or other electronic or virtual means.

(4) Notwithstanding ORS 192.610 to 192.690 or any other applicable law or policy, any public testimony or comment taken during a meeting need not be taken in person if the public body provides an opportunity to submit testimony or comment by telephone or video conferencing technology, or through other electronic or virtual means, or provides a means

of submitting written testimony, including by electronic mail or other electronic methods, and the governing body is able to consider the submitted testimony in a timely manner.

(5) Notwithstanding any requirement that establishes a quorum required for a governing body to act, the minimum number of members of a governing body required for the body to act shall exclude any member unable to attend because of illness due to COVID-19.

(6) If the public health threat underlying the declaration of a state of emergency issued by the Governor on March 8, 2020, or compliance with an executive order issued under ORS 401.165 to 401.236 in connection with that emergency, causes a municipal corporation or council of governments to fail to comply with ORS 294.305 to 294.565 or 294.900 to 294.930, the municipal corporation or council of governments may make reasonable expenditures for continued operations within the existing or most recently adopted budget, provided that any failure to comply with ORS 294.305 to 294.565 or 294.900 to 294.930 is cured as soon as is reasonably practicable.

(7) Notwithstanding ORS 221.770, a city may satisfy the requirements of holding a public hearing under ORS 221.770 (1)(b) and (c) by holding the hearing in accordance with this section and by making certification to the Oregon Department of Administrative Services as soon as is reasonably practicable after the city adopts its budget.

(8) As used in this section:

(a) Terms used in this section have the meanings given those terms in ORS 192.610, except that "public body" excludes the state or any board, department, commission, council, bureau, committee, subcommittee, advisory group or other agency of the state.

(b) "Budget" and "municipal corporation" have the meanings given those terms in ORS 294.311.

(c) "Council of governments" has the meaning given that term in ORS 294.900.

SECTION 2. Section 1 of this 2020 special session Act is repealed 30 days after the date on which the declaration of a state of emergency issued by the Governor on March 8, 2020, and any extension of the declaration, is no longer in effect.

GARNISHMENT MODIFICATIONS

SECTION 3. ORS 18.784 is amended to read:

18.784. (1) Except as provided in subsection (6) of this section, if a writ of garnishment is delivered to a financial institution that has an account of the debtor, the financial institution shall conduct a garnishment account review of all accounts in the name of the debtor before taking any other action that may affect funds in those accounts. If the financial institution determines from the garnishment account review that one or more payments described in subsection (3) of this section were deposited in an account of the debtor by direct deposit or electronic payment during the lookback period described in subsection (2) of this section, an amount equal to the lesser of the sum of those payments or the total balance in the debtor's account is not subject to garnishment.

(2)**(a)** The provisions of this section apply [*only*] to payments described in subsection (3)**(a) to (f)** of this section that are deposited during the lookback period that ends on the day before the day on which the garnishment account review is conducted and begins on:

[*(a)*] **(A)** The day in the second calendar month preceding the month in which the garnishment account review is conducted, that has the same number as the day on which the period ends; or

[*(b)*] **(B)** If there is no day as described in [*paragraph (a) of this subsection,*] **subparagraph (A) of this paragraph,** the last day of the second calendar month preceding the month in which the garnishment account review is conducted.

(b) The provisions of this section apply to payments described in subsection (3)(g) of this section that are deposited during the lookback period that ends on the day before the day on which the garnishment account review is conducted and begins on March 8, 2020.

(3) The provisions of this section apply only to:

(a) Federal benefit payments;

(b) Payments from a public or private retirement plan as defined in ORS 18.358;

(c) Public assistance or medical assistance, as defined in ORS 414.025, payments from the State of Oregon or an agency of the State of Oregon;

(d) Unemployment compensation payments from the State of Oregon or an agency of the State of Oregon;

(e) Black lung benefits payments from the United States Department of Labor; [*and*]

(f) Workers' compensation payments from a workers' compensation carrier[.]**; and**

(g) Recovery rebate payments made under section 2201(a) of the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136) deposited in an account of the debtor at any time, unless:

(A) The writ of garnishment is issued to collect:

(i) A judgment in a criminal action that requires the defendant to pay restitution; or

(ii) A civil judgment against a person who has been convicted of a crime if the civil judgment is based on the same underlying facts as the conviction; and

(B) The writ of garnishment contains the following statement: "This Garnishment Has Been Issued to Collect a Criminal Money Judgment that Awards Restitution or a Civil Judgment Based on a Criminal Offense."

(4) The provisions of this section apply only to a payment that a financial institution can identify as being one of the types of payments described in subsection (3) of this section from information transmitted to the financial institution by the payor.

(5) A financial institution shall perform a garnishment account review only one time for a specific garnishment. If the same garnishment is served on a financial institution more than once, the financial institution may not perform a garnishment account review or take any other action relating to the garnishment based on the second and subsequent service of the garnishment.

(6) A financial institution may not conduct a garnishment account review under this section if a Notice of Right to Garnish Federal Benefits from the United States Government or from a state child support enforcement agency is attached to or included in the garnishment as provided in 31 C.F.R. part 212. If a Notice of Right to Garnish Federal Benefits is attached to or included in the garnishment, the financial institution shall proceed on the garnishment as otherwise provided in ORS 18.600 to 18.850.

(7) The provisions of this section do not affect the ability of a debtor to claim any exemption that otherwise may be available to the debtor under law for any amounts in an account in a financial institution.

SECTION 4. ORS 18.784, as amended by section 3 of this 2020 special session Act, is amended to read:

18.784. (1) Except as provided in subsection (6) of this section, if a writ of garnishment is delivered to a financial institution that has an account of the debtor, the financial institution shall conduct a garnishment account review of all accounts in the name of the debtor before taking any other action that may affect funds in those accounts. If the financial institution determines from the garnishment account review that one or more payments described in subsection (3) of this section were deposited in an account of the debtor by direct deposit or electronic payment during the lookback period described in subsection (2) of this section, an amount equal to the lesser of the sum of those payments or the total balance in the debtor's account is not subject to garnishment.

(2)[*(a)*] The provisions of this section apply **only** to payments described in subsection (3)[*(a) to (f)*] of this section that are deposited during the lookback period that ends on the day before the day on which the garnishment account review is conducted and begins on:

[*(A)*] **(a)** The day in the second calendar month preceding the month in which the garnishment account review is conducted, that has the same number as the day on which the period ends; or

[*(B)*] **(b)** If there is no day as described in [*subparagraph (A) of this paragraph,*] **paragraph (a) of this subsection,** the last day of the second calendar month preceding the month in which the garnishment account review is conducted.

[*(b) The provisions of this section apply to payments described in subsection (3)(g) of this section that are deposited during the lookback period that ends on the day before the day on which the garnishment account review is conducted and begins on March 8, 2020.*]

(3) The provisions of this section apply only to:

(a) Federal benefit payments;

(b) Payments from a public or private retirement plan as defined in ORS 18.358;

(c) Public assistance or medical assistance, as defined in ORS 414.025, payments from the State of Oregon or an agency of the State of Oregon;

(d) Unemployment compensation payments from the State of Oregon or an agency of the State of Oregon;

(e) Black lung benefits payments from the United States Department of Labor; **and**

(f) Workers' compensation payments from a workers' compensation carrier[*; and*]**.**

[*(g) Recovery rebate payments made under section 2201(a) of the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136) deposited in an account of the debtor at any time, unless:*]

[*(A) The writ of garnishment is issued to collect:*]

[*(i) A judgment in a criminal action that requires the defendant to pay restitution; or*]

[*(ii) A civil judgment against a person who has been convicted of a crime if the civil judgment is based on the same underlying facts as the conviction; and*]

[*(B) The writ of garnishment contains the following statement: "This Garnishment Has Been Issued to Collect a Criminal Money Judgment that Awards Restitution or a Civil Judgment Based on a Criminal Offense."*]

(4) The provisions of this section apply only to a payment that a financial institution can identify as being one of the types of payments described in subsection (3) of this section from information transmitted to the financial institution by the payor.

(5) A financial institution shall perform a garnishment account review only one time for a specific garnishment. If the same garnishment is served on a financial institution more than once, the financial institution may not perform a garnishment account review or take any other action relating to the garnishment based on the second and subsequent service of the garnishment.

(6) A financial institution may not conduct a garnishment account review under this section if a Notice of Right to Garnish Federal Benefits from the United States Government or from a state child support enforcement agency is attached to or included in the garnishment as provided in 31 C.F.R. part 212. If a Notice of Right to Garnish Federal Benefits is attached to or included in the garnishment, the financial institution shall proceed on the garnishment as otherwise provided in ORS 18.600 to 18.850.

(7) The provisions of this section do not affect the ability of a debtor to claim any exemption that otherwise may be available to the debtor under law for any amounts in an account in a financial institution.

SECTION 5. (1) The amendments to ORS 18.784 by section 4 of this 2020 special session Act become operative on September 30, 2020.

(2) The amendments to ORS 18.784 by section 3 of this 2020 special session Act apply to garnishments issued on or before the operative date specified in subsection (1) of this section.

JUDICIAL PROCEEDING EXTENSIONS AND ELECTRONIC APPEARANCES

SECTION 6. (1)(a) Notwithstanding any other statute or rule to the contrary, during the time in which any declaration of a state of emergency issued by the Governor related to COVID-19, and any extension of the declaration, is in effect, and continuing for 60 days after the declaration and any extension is no longer in effect, and upon a finding of good cause, the Chief Justice of the Supreme Court may extend or suspend any time period or time requirement established by statute or rule that:

(A) Applies in any case, action or proceeding after the case, action or proceeding is initiated in any circuit court, the Oregon Tax Court, the Court of Appeals or the Supreme Court;

(B) Applies to the initiation of an appeal to the magistrate division of the Oregon Tax Court or an appeal from the magistrate division to the regular division;

(C) Applies to the initiation of an appeal or judicial review proceeding in the Court of Appeals; or

(D) Applies to the initiation of any type of case or proceeding in the Supreme Court.

(b) The Chief Justice may extend or suspend a time period or time requirement under this subsection notwithstanding the fact that the date of the time period or time requirement has already passed as of the effective date of this 2020 special session Act.

(2)(a) Notwithstanding ORS 133.060 (1), during the time in which any declaration of a state of emergency issued by the Governor related to COVID-19, and any extension of the declaration, is in effect, and continuing for 90 days after the declaration and any extension is no longer in effect, the date specified in a criminal citation on which a person served with the citation shall appear may be more than 30 days after the date the citation was issued.

(b) During the time in which any declaration of a state of emergency issued by the Governor related to COVID-19, and any extension of the declaration, is in effect, and continuing for 60 days after the declaration and any extension is no longer in effect, the presiding judge of a circuit court may, upon the motion of a party or the court's own motion, and upon a finding of good cause, postpone the date of appearance described in paragraph (a) of this subsection for all proceedings within the jurisdiction of the court.

(3)(a) Notwithstanding ORS 136.290 and 136.295, and subject to paragraph (b) of this subsection, during the time in which any declaration of a state of emergency issued by the Governor related to COVID-19, and any extension of the declaration, is in effect, and continuing for 60 days after the declaration and any extension is no longer in effect, the presiding judge of a circuit court may, upon the motion of a party or its own motion, and upon a finding of good cause, order an extension of custody and postponement of the date of the trial beyond the time limits described in ORS 136.290 and 136.295.

(b) Notwithstanding paragraph (a) of this subsection, for a defendant to whom ORS 136.290 and 136.295 applies, the presiding judge may not extend custody and postpone the defendant's trial date if, as a result, the defendant will be held in custody before trial for more than a total of 180 days, unless the court holds a hearing and proceeds as follows:

(A) If the defendant is charged with a violent felony, the court may deny release upon making the findings described in ORS 135.240 (4), notwithstanding the fact that a court did not previously make such findings; or

(B) If the defendant is charged with a person crime, the court may set a trial date that results in the defendant being held in custody before trial for more than a total of 180 days, but not more than a total of 240 days, if the court:

(i) Determines the extension of custody is based upon good cause due to circumstances caused by the COVID-19 pandemic, public health measures resulting from the COVID-19 pandemic or a situation described in ORS 136.295 (4)(b) caused by or related to COVID-19; and

(ii) Finds, by clear and convincing evidence, that there is a substantial and specific danger of physical injury or sexual victimization to the victim or members of the public by the defendant if the defendant is released, and that no release condition, or combination of release conditions, is available that would sufficiently mitigate the danger.

(c) The result of a hearing held pursuant to this subsection does not affect the ability of a party to request a modification of the release decision under ORS 135.285.

(d) This subsection does not authorize a defendant to be held in custody before trial for a period longer than the maximum term of imprisonment the defendant could receive as a sentence under ORS 161.605 and 161.615.

(e) If the court proceeds under paragraph (b)(B) of this subsection, the defendant shall continue to be eligible for security release and the court may maintain, lower or raise the security amount at the hearing.

(f) As used in this subsection:

(A) "Good cause" means situations described in ORS 136.295 (4)(b), circumstances caused by the COVID-19 pandemic or public health measures resulting from the COVID-19 pandemic.

(B) "Person crime" means a person felony or person Class A misdemeanor, as those terms are defined in the rules of the Oregon Criminal Justice Commission.

(C) "Release decision" has the meaning given that term in ORS 135.230.

(4)(a) Notwithstanding any other statute or rule to the contrary, during the time in which any declaration of a state of emergency issued by the Governor related to COVID-19, and any extension of the declaration, is in effect, and continuing for 90 days after the declaration and any extension is no longer in effect, the Chief Justice may direct or permit any appearance before a court or magistrate to be by telephone, other two-way electronic communication device or simultaneous electronic transmission.

(b) If an appearance is set to occur by electronic means as described in paragraph (a) of this subsection, a presiding judge may instead order that the appearance be in person if, upon the request of a party, the presiding judge determines that there is a particular need for an in-person hearing or that a party has a constitutional right to an in-person hearing.

(5) The Chief Justice may delegate the exercise of any of the powers described in this section to the presiding judge of a court.

(6) Nothing in this section affects the rights of a defendant under the Oregon and United States Constitutions.

SECTION 7. (1) If the expiration of the time to commence an action or give notice of a claim falls within the time in which any declaration of a state of emergency issued by the Governor related to COVID-19, and any extension of the declaration, is in effect, or within 90 days after the declaration and any extension is no longer in effect, the expiration of the time to commence the action or give notice of the claim is extended to a date 90 days after the declaration and any extension is no longer in effect.

(2) Subsection (1) of this section applies to:

(a) Time periods for commencing an action established in ORS chapter 12;

(b) The time period for commencing an action for wrongful death established in ORS 30.020;

(c) The time period for commencing an action or giving a notice of claim under ORS 30.275; and

(d) Any other time limitation for the commencement of a civil cause of action or the giving of notice of a civil claim established by statute.

(3) Subsection (1) of this section does not apply to:

(a) Time limitations for the commencement of criminal actions;

(b) The initiation of an appeal to the magistrate division of the Oregon Tax Court or an appeal from the magistrate division to the regular division;

(c) The initiation of an appeal or judicial review proceeding in the Court of Appeals; or

(d) The initiation of any type of case or proceeding in the Supreme Court.

SECTION 8. (1) Sections 6 and 7 of this 2020 special session Act are repealed on December 31, 2021.

(2) The repeal of section 6 of this 2020 special session Act by subsection (1) of this section does not affect the release status of a defendant determined under section 6 (3) of this 2020 special session Act.

EMERGENCY SHELTER

SECTION 9. ORS 446.265 and sections 10 and 11 of this 2020 special session Act are added to and made a part of ORS chapter 197.

SECTION 10. (1) As used in this section and section 11 of this 2020 special session Act, "emergency shelter" means a building that provides shelter on a temporary basis for individuals and families who lack permanent housing.

(2) A building used as an emergency shelter under an approval granted under section 11 of this 2020 special session Act:

(a) May resume its use as an emergency shelter after an interruption or abandonment of that use for two years or less, notwithstanding ORS 215.130 (7).

(b) May not be used for any purpose other than as an emergency shelter except upon application for a permit demonstrating that the construction of the building and its use could be approved under current land use laws and local land use regulations.

SECTION 11. (1) A local government shall approve an application for the development or use of land for an emergency shelter on any property, notwithstanding ORS chapter 195, 197, 215 or 227 or ORS 197A.300 to 197A.325, 197A.405 to 197A.409 or 197A.500 to 197A.521 or any statewide land use planning goal, rule of the Land Conservation and Development Commission, local land use regulation, zoning ordinance, regional framework plan, functional plan or comprehensive plan, if the emergency shelter:

(a) Includes sleeping and restroom facilities for clients;

(b) Will comply with applicable building codes;

(c) Is located inside an urban growth boundary or in an area zoned for rural residential use as defined in ORS 215.501;

(d) Will not result in the development of a new building that is sited within an area designated under a statewide land use planning goal relating to natural disasters and hazards, including floodplains or mapped environmental health hazards, unless the development complies with regulations directly related to the hazard;

(e) Has adequate transportation access to commercial and medical services; and

(f) Will not pose any unreasonable risk to public health or safety.

(2) An emergency shelter allowed under this section must be operated by:

(a) A local government as defined in ORS 174.116;

(b) An organization with at least two years' experience operating an emergency shelter using best practices that is:

(A) A local housing authority as defined in ORS 456.375;

(B) A religious corporation as defined in ORS 65.001; or

(C) A public benefit corporation, as defined in ORS 65.001, whose charitable purpose includes the support of homeless individuals and that has been recognized as exempt from income tax under section 501(a) of the Internal Revenue Code on or before January 1, 2017; or

(c) A nonprofit corporation partnering with any other entity described in this subsection.

(3) An emergency shelter approved under this section:

(a) May provide on-site for its clients and at no cost to the clients:

(A) Showering or bathing;

(B) Storage for personal property;

(C) Laundry facilities;

(D) Service of food prepared on-site or off-site;

(E) Recreation areas for children and pets;

(F) Case management services for housing, financial, vocational, educational or physical or behavioral health care services; or

(G) Any other services incidental to shelter.

(b) May include youth shelters, veterans' shelters, winter or warming shelters, day shelters and family violence shelter homes as defined in ORS 409.290.

(4) An emergency shelter approved under this section may also provide additional services not described in subsection (3) of this section to individuals who are transitioning from

unsheltered homeless status. An organization providing services under this subsection may charge a fee of no more than $300 per month per client and only to clients who are financially able to pay the fee and who request the services.

(5) The approval of an emergency shelter under this section is not a land use decision and is subject to review only under ORS 34.010 to 34.100.

SECTION 12. Sections 10 and 11 of this 2020 special session Act are repealed 90 days after the effective date of this 2020 special session Act.

SECTION 12a. The repeal of sections 10 and 11 of this 2020 special session Act by section 12 of this 2020 special session Act does not affect an application for the development of land for an emergency shelter that was completed and submitted before the date of the repeal.

SECTION 13. (1) Notwithstanding ORS 203.082 (2), a political subdivision may allow any person to offer any number of overnight camping spaces on the person's property to homeless individuals who are living in vehicles, without regard to whether the motor vehicle was designed for use as temporary living quarters. A religious institution offering camping space under this section shall also provide campers with access to sanitary facilities, including toilet, handwashing and trash disposal facilities.

(2) A local government may regulate vehicle camping spaces under this section as transitional housing accommodations under ORS 446.265.

SECTION 14. Section 13 of this 2020 special session Act is repealed 90 days after the effective date of this 2020 special session Act.

SECTION 15. Section 16 of this 2020 special session Act is added to and made a part of ORS 458.600 to 458.665.

SECTION 16. (1) As used in this section:

(a) "Low-barrier emergency shelter" means an emergency shelter, as defined in section 10 of this 2020 special session Act, that follows established best practices to deliver shelter services that minimize barriers and increase access to individuals and families experiencing homelessness.

(b) "Navigation center" means a low-barrier emergency shelter that is open seven days per week and connects individuals and families with health services, permanent housing and public benefits.

(2) The Oregon Department of Administrative Services may award grants to local governments to:

(a) Plan the location, development or operations of a navigation center;

(b) Construct, purchase or lease a building for use as a navigation center;

(c) Operate a navigation center that has been constructed, purchased or leased under paragraph (b) of this subsection; or

(d) Contract for the performance of activities described in this subsection.

SECTION 17. Section 16 of this 2020 special session Act is repealed on January 2, 2022.

NOTE: Section 18 was deleted by amendment. Subsequent sections were not renumbered.

NOTARIAL ACTS

SECTION 19. Section 20 of this 2020 special session Act is added to and made a part of ORS chapter 194.

SECTION 20. (1) As used in this section:

(a) "Communication technology" means an electronic device or process that:

(A) Allows a notary public and a remotely located individual to communicate with each other simultaneously by sight and sound; and

(B) When necessary and consistent with other applicable law, facilitates communication with a remotely located individual who has a visual, hearing or speech impairment.

(b) "Foreign state" means a jurisdiction other than the United States, a state or a federally recognized Indian tribe.

(c) "Identity proofing" means a process or service by which a third person provides a notary public with a means to verify the identity of a remotely located individual by a review of personal information from public or private data sources.

(d) "Outside the United States" means a location outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands and any territory, insular possession or other location subject to the jurisdiction of the United States.

(e) "Remotely located individual" means an individual who is not in the physical presence of the notary public who performs a notarial act under subsection (3) of this section.

(2) A remotely located individual may comply with ORS 194.235 by using communication technology to appear before a notary public.

(3) A notary public located in this state may perform a notarial act using communication technology for a remotely located individual if:

(a) The notary public:

(A) Has personal knowledge under ORS 194.240 (1) of the identity of the remotely located individual;

(B) Has satisfactory evidence of the identity of the remotely located individual by a verification on oath or affirmation from a credible witness appearing before and identified by the notary public as a remotely located individual under this section or in the physical presence of the notary public under ORS 194.240 (2); or

(C) Has obtained satisfactory evidence of the identity of the remotely located individual by using at least two different types of identity proofing;

(b) The notary public is reasonably able to confirm that a record before the notary public is the same record in which the remotely located individual made a statement or on which the individual executed a signature;

(c) The notary public, or a person acting on behalf of the notary public, creates an audiovisual recording of the performance of the notarial act; and

(d) For a remotely located individual who is located outside the United States:

(A) The record:

(i) Is to be filed with or relates to a matter before a public official or court, governmental entity or other entity subject to the jurisdiction of the United States; or

(ii) Involves property located in the territorial jurisdiction of the United States or involves a transaction substantially connected with the United States; and

(B) The act of making the statement or signing the record is not prohibited by the foreign state in which the remotely located individual is located.

(4) If a notarial act is performed under this section, the certificate of notarial act required by ORS 194.280 and the short form certificate provided in ORS 194.285 must indicate that the notarial act was performed using communication technology.

(5) A short form certificate provided in ORS 194.285 for a notarial act subject to this section is sufficient if it:

(a) Complies with rules adopted under subsection (8)(a) of this section; or

(b) Is in the form provided in ORS 194.285 and contains a statement substantially as follows: "This notarial act involved the use of communication technology."

(6) A notary public, a guardian, conservator, trustee or agent of a notary public, or a personal representative of a deceased notary public shall retain the audiovisual recording created under subsection (3)(c) of this section or cause the recording to be retained by a repository designated by or on behalf of the person required to retain the recording. Unless a different period is required by rule adopted under subsection (8)(d) of this section, the recording must be maintained for a period of at least 10 years after the recording is made.

(7) Before a notary public performs the notary public's initial notarial act under this section, the notary public shall notify the Secretary of State that the notary public will be performing notarial acts with respect to remotely located individuals and identify the technologies the notary public intends to use. If the Secretary of State has established standards

under subsection (8) of this section or ORS 194.360 for approval of communication technology or identity proofing, the communication technology and identity proofing used by the notary public must conform to those standards.

(8) In addition to adopting rules under ORS 194.360, the Secretary of State may adopt rules under this section regarding the performance of a notarial act. The rules may:

(a) Prescribe the means of performing a notarial act involving a remotely located individual using communication technology;

(b) Establish standards for communication technology and identity proofing;

(c) Establish requirements or procedures to approve providers of communication technology and the process of identity proofing; and

(d) Establish standards and a period for the retention of an audiovisual recording created under subsection (3)(c) of this section.

(9) Before adopting, amending or repealing a rule governing the performance of a notarial act with respect to a remotely located individual, the Secretary of State shall consider:

(a) The most recent standards regarding the performance of a notarial act with respect to a remotely located individual promulgated by national standard-setting organizations and the recommendations of the National Association of Secretaries of State;

(b) Standards, practices and customs of other jurisdictions that have laws substantially similar to this section; and

(c) The views of governmental officials and entities and other interested persons.

SECTION 21. ORS 194.225 is amended to read:

194.225. (1) A notarial officer may perform a notarial act authorized by this chapter or by law of this state other than this chapter.

(2) A notarial officer may not perform a notarial act with respect to a record to which the officer or the officer's spouse is a party, or in which either the officer or the officer's spouse has a direct beneficial interest. A notarial act performed in violation of this subsection is voidable.

(3) A notarial officer may certify that a tangible copy of an electronic record is an accurate copy of the electronic record.

SECTION 22. ORS 194.225, as amended by section 21 of this 2020 special session Act, is amended to read:

194.225. (1) A notarial officer may perform a notarial act authorized by this chapter or by law of this state other than this chapter.

(2) A notarial officer may not perform a notarial act with respect to a record to which the officer or the officer's spouse is a party, or in which either the officer or the officer's spouse has a direct beneficial interest. A notarial act performed in violation of this subsection is voidable.

[*(3) A notarial officer may certify that a tangible copy of an electronic record is an accurate copy of the electronic record.*]

SECTION 23. ORS 194.290 is amended to read:

194.290. **(1)** The official stamp of a notary public must:

[*(1)*] **(a)** Include the notary public's name, jurisdiction, commission expiration date and other information required by the Secretary of State by rule; and

[*(2)*] **(b)** Be a legible imprint capable of being copied together with the record to which it is affixed or attached or with which it is logically associated.

(2) The official stamp of a notary public is an official notarial seal for all purposes under the laws of this state.

SECTION 24. ORS 194.290, as amended by section 23 of this 2020 special session Act, is amended to read:

194.290. [*(1)*] The official stamp of a notary public must:

[*(a)*] **(1)** Include the notary public's name, jurisdiction, commission expiration date and other information required by the Secretary of State by rule; and

[*(b)*] **(2)** Be a legible imprint capable of being copied together with the record to which it is affixed or attached or with which it is logically associated.

[*(2) The official stamp of a notary public is an official notarial seal for all purposes under the laws of this state.*]

SECTION 25. ORS 194.305 is amended to read:

194.305. (1) A notary public may select one or more tamper-evident technologies to perform notarial acts with respect to electronic records. A person may not require a notary public to perform a notarial act with respect to an electronic record with a technology that the notary public has not selected.

(2) Before a notary public performs the notary public's initial notarial act with respect to an electronic record, a notary public shall notify the Secretary of State that the notary public will be performing notarial acts with respect to electronic records and identify the technology the notary public intends to use. If the Secretary of State, by rule, has established standards pursuant to ORS 194.360 for approval of technology, the technology must conform to the standards. If the technology conforms to the standards, the Secretary of State shall approve the use of the technology.

(3) A county clerk may accept for recording a tangible copy of an electronic record containing a notarial certificate as satisfying any requirement that a record accepted for recording be an original, if the notarial officer executing the notarial certificate certifies that the tangible copy is an accurate copy of the electronic record.

SECTION 26. ORS 194.305, as amended by section 25 of this 2020 special session Act, is amended to read:

194.305. (1) A notary public may select one or more tamper-evident technologies to perform notarial acts with respect to electronic records. A person may not require a notary public to perform a notarial act with respect to an electronic record with a technology that the notary public has not selected.

(2) Before a notary public performs the notary public's initial notarial act with respect to an electronic record, a notary public shall notify the Secretary of State that the notary public will be performing notarial acts with respect to electronic records and identify the technology the notary public intends to use. If the Secretary of State, by rule, has established standards pursuant to ORS 194.360 for approval of technology, the technology must conform to the standards. If the technology conforms to the standards, the Secretary of State shall approve the use of the technology.

[*(3) A county clerk may accept for recording a tangible copy of an electronic record containing a notarial certificate as satisfying any requirement that a record accepted for recording be an original, if the notarial officer executing the notarial certificate certifies that the tangible copy is an accurate copy of the electronic record.*]

SECTION 27. A tangible copy of an electronic record containing a notarial certificate that is accepted for recording by a county clerk before the effective date of this 2020 special session Act satisfies any requirement that the record be an original, if the notarial officer executing the notarial certificate certifies that the tangible copy is an accurate copy of the electronic record.

SECTION 28. ORS 93.810 is amended to read:

93.810. The following are subjects of validating or curative Acts applicable to this chapter:

(1) Evidentiary effect and recordation of conveyances before 1854.

(2) Evidentiary effect and recordation of certified copies of deeds issued by the State Land Board before 1885 where the original deed was lost.

(3) Defective acknowledgments of married women to conveyances before 1891.

(4) Foreign instruments executed before 1903.

(5) Deeds of married women before 1907, validity; executed under power of attorney and record as evidence.

(6) Conveyances by reversioners and remainderpersons to life tenant.

(7) Decrees or judgments affecting lands in more than one county.

(8) Irregular deeds and conveyances; defective acknowledgments; irregularities in judicial sales; sales and deeds of executors, personal representatives, administrators, conservators and guardians; vested rights arising by adverse title; recordation.

(9) Defective acknowledgments.

(10) Title to lands from or through aliens.

(11) An instrument that is presented for recording as an electronic image or by electronic means and that is recorded before June 16, 2011.

(12) A tangible copy of an electronic record containing a notarial certificate that is accepted for recording by a county clerk before the effective date of this 2020 special session Act.

SECTION 29. ORS 93.810, as amended by section 28 of this 2020 special session Act, is amended to read:

93.810. The following are subjects of validating or curative Acts applicable to this chapter:

(1) Evidentiary effect and recordation of conveyances before 1854.

(2) Evidentiary effect and recordation of certified copies of deeds issued by the State Land Board before 1885 where the original deed was lost.

(3) Defective acknowledgments of married women to conveyances before 1891.

(4) Foreign instruments executed before 1903.

(5) Deeds of married women before 1907, validity; executed under power of attorney and record as evidence.

(6) Conveyances by reversioners and remainderpersons to life tenant.

(7) Decrees or judgments affecting lands in more than one county.

(8) Irregular deeds and conveyances; defective acknowledgments; irregularities in judicial sales; sales and deeds of executors, personal representatives, administrators, conservators and guardians; vested rights arising by adverse title; recordation.

(9) Defective acknowledgments.

(10) Title to lands from or through aliens.

(11) An instrument that is presented for recording as an electronic image or by electronic means and that is recorded before June 16, 2011.

[*(12) A tangible copy of an electronic record containing a notarial certificate that is accepted for recording by a county clerk before the effective date of this 2020 special session Act.*]

SECTION 30. ORS 194.400 is amended to read:

194.400. (1) The fee that a notary public may charge for performing a notarial act may not exceed $10 per notarial act**, except that a notary public may charge a fee not to exceed $25 per notarial act for a notarial act performed under section 20 of this 2020 special session Act**.

(2) A notary public may charge an additional fee for traveling to perform a notarial act if:

(a) The notary public explains to the person requesting the notarial act that the fee is in addition to a fee specified in subsection (1) of this section and is in an amount not determined by law; and

(b) The person requesting the notarial act agrees in advance upon the amount of the additional fee.

(3) If a notary public charges fees under this section for performing notarial acts, the notary public shall display, in English, a list of the fees the notary public will charge.

(4) A notary public who is employed by a private entity may enter into an agreement with the entity under which fees collected by the notary public under this section are collected by and accrue to the entity.

(5) A public body as defined in ORS 174.109 may collect the fees described in this section for notarial acts performed in the course of employment by notaries public who are employed by the public body.

SECTION 31. ORS 194.400, as amended by section 30 of this 2020 special session Act, is amended to read:

194.400. (1) The fee that a notary public may charge for performing a notarial act may not exceed $10 per notarial act[*, except that a notary public may charge a fee not to exceed $25 per notarial act for a notarial act performed under section 20 of this 2020 special session Act*].

(2) A notary public may charge an additional fee for traveling to perform a notarial act if:

(a) The notary public explains to the person requesting the notarial act that the fee is in addition to a fee specified in subsection (1) of this section and is in an amount not determined by law; and

(b) The person requesting the notarial act agrees in advance upon the amount of the additional fee.

(3) If a notary public charges fees under this section for performing notarial acts, the notary public shall display, in English, a list of the fees the notary public will charge.

(4) A notary public who is employed by a private entity may enter into an agreement with the entity under which fees collected by the notary public under this section are collected by and accrue to the entity.

(5) A public body as defined in ORS 174.109 may collect the fees described in this section for notarial acts performed in the course of employment by notaries public who are employed by the public body.

SECTION 32. (1) Sections 19, 20 and 27 of this 2020 special session Act are repealed on June 30, 2021.

(2) The amendments to ORS 93.810, 194.225, 194.290, 194.305 and 194.400 by sections 22, 24, 26, 29 and 31 of this 2020 special session Act become operative on June 30, 2021.

NOTE: Section 33 was deleted by amendment. Subsequent sections were not renumbered.

ENTERPRISE ZONE TERMINATION EXTENSIONS

SECTION 34. Section 35 of this 2020 special session Act is added to and made a part of ORS 285C.050 to 285C.250.

SECTION 35. (1) Notwithstanding ORS 285C.245 (2):

(a) An enterprise zone that would otherwise terminate on June 30, 2020, shall terminate on December 31, 2020.

(b) If this section takes effect after June 30, 2020, the sponsor of an enterprise zone that terminated on June 30, 2020, may rescind the termination and the enterprise zone shall terminate on December 31, 2020.

(2) Notwithstanding ORS 285C.250 (1)(a), the sponsor of an enterprise zone described in subsection (1) of this section may redesignate the enterprise zone under ORS 285C.250 on any date before January 1, 2021. The redesignation may not take effect before December 31, 2020.

(3) All other deadlines that relate to the termination date and redesignation of an enterprise zone described in subsection (1) of this section shall be interpreted as relating to December 31, 2020.

INDIVIDUAL DEVELOPMENT ACCOUNT MODIFICATIONS

SECTION 36. ORS 458.685 is amended to read:

458.685. (1) A person may establish an individual development account only for a purpose approved by a fiduciary organization. Purposes that the fiduciary organization may approve are:

(a) The acquisition of post-secondary education or job training.

(b) If the account holder has established the account for the benefit of a household member who is under the age of 18 years, the payment of extracurricular nontuition expenses designed to prepare the member for post-secondary education or job training.

(c) If the account holder has established a savings network account for higher education under ORS 178.300 to 178.360 on behalf of a designated beneficiary, the funding of qualified higher education expenses as defined in ORS 178.300 by one or more deposits into a savings network account for higher education on behalf of the same designated beneficiary.

(d) The purchase of a primary residence. In addition to payment on the purchase price of the residence, account moneys may be used to pay any usual or reasonable settlement, financing or

other closing costs. The account holder must not have owned or held any interest in a residence during the three years prior to making the purchase. However, this three-year period shall not apply to displaced homemakers, individuals who have lost home ownership as a result of divorce or owners of manufactured homes.

(e) The rental of a primary residence when housing stability is essential to achieve state policy goals. Account moneys may be used for security deposits, first and last months' rent, application fees and other expenses necessary to move into the primary residence, as specified in the account holder's personal development plan for increasing the independence of the person.

(f) The capitalization of a small business. Account moneys may be used for capital, plant, equipment and inventory expenses and to hire employees upon capitalization of the small business, or for working capital pursuant to a business plan. The business plan must have been developed by a financial institution, nonprofit microenterprise program or other qualified agent demonstrating business expertise and have been approved by the fiduciary organization. The business plan must include a description of the services or goods to be sold, a marketing plan and projected financial statements.

(g) Improvements, repairs or modifications necessary to make or keep the account holder's primary dwelling habitable, accessible or visitable for the account holder or a household member. This paragraph does not apply to improvements, repairs or modifications made to a rented primary dwelling to achieve or maintain a habitable condition for which ORS 90.320 (1) places responsibility on the landlord. As used in this paragraph, "accessible" and "visitable" have the meanings given those terms in ORS 456.508.

(h) The purchase of equipment, technology or specialized training required to become competitive in obtaining or maintaining employment or to start or maintain a business, as specified in the account holder's personal development plan for increasing the independence of the person.

(i) The purchase or repair of a vehicle, as specified in the account holder's personal development plan for increasing the independence of the person.

(j) The saving of funds for retirement, as specified in the account holder's personal development plan for increasing the independence of the person.

(k) The payment of debts owed for educational or medical purposes when the account holder is saving for another allowable purpose, as specified in the account holder's personal development plan for increasing the independence of the person.

(L) The creation or improvement of a credit score by obtaining a secured loan or a financial product that is designed to improve credit, as specified in the account holder's personal development plan for increasing the independence of the person.

(m) The replacement of a primary residence when replacement offers significant opportunity to improve habitability or energy efficiency.

(n) The establishment of savings for emergency expenses to promote financial stability and to protect existing assets. As used in this paragraph, "emergency expenses" includes expenses for extraordinary medical costs or other unexpected and substantial personal expenses that would significantly impact the account holder's noncash assets, health, housing or standard of living if not promptly addressed.

(2)(a) [*If an emergency occurs,*] An account holder may withdraw all or part of the account holder's deposits to an individual development account for [*a purpose not described in subsection (1) of this section. As used in this paragraph, "emergency" includes making payments for necessary medical expenses, to avoid eviction of the account holder from the account holder's residence and for necessary living expenses following a loss of employment.*] **emergency expenses as defined in subsection (1)(n) of this section, without regard to whether the account was established for emergency savings.**

(b) The account holder must reimburse [*the account*] **an account established for a purpose listed under subsection (1)(a) to (m) of this section** for the amount withdrawn under this subsection [*within 12 months after the date of the withdrawal. Failure of an account holder to make a timely reimbursement to the account is grounds for removing the account holder from the individual*

development account program]. Until the reimbursement has been made in full, an account holder may not withdraw any matching deposits or accrued interest on matching deposits from the account **except under this subsection**.

(3) If an account holder withdraws moneys from an individual development account for other than an approved purpose, the fiduciary organization may remove the account holder from the program.

(4)(a) If the account holder of an account established for the purpose set forth in subsection (1)(c) or (j) of this section has achieved the account's approved purpose in accordance with the personal development plan developed by the account holder under ORS 458.680, the account holder may withdraw, or authorize the withdrawal of, the remaining amount of all deposits, including matching deposits, and interest in the account as follows:

(A) For an account established for the purpose set forth in subsection (1)(c) of this section, by rolling over the entire withdrawal amount, not to exceed the limit established pursuant to ORS 178.335, into one or more of the savings network accounts for higher education under ORS 178.300 to 178.360, the establishment of which is the purpose of the individual development account; or

(B) For an account established for the purpose set forth in subsection (1)(j) of this section, by rolling over the entire withdrawal amount into an individual retirement account, a retirement plan or a similar account or plan established under the Internal Revenue Code.

(b) Upon withdrawal of all moneys in the individual development account as provided in paragraph (a) of this subsection, the account relationship shall terminate.

(c) The rollover of moneys into a savings network account for higher education under this subsection may not cause the amount in the savings network account for higher education to exceed the limit on total contributions established pursuant to ORS 178.335.

(d) Any amount of the rollover that has been subtracted on the taxpayer's federal return pursuant to section 219 of the Internal Revenue Code shall be added back in the determination of taxable income.

(5) If an account holder moves from the area where the program is conducted or is otherwise unable to continue in the program, the fiduciary organization may remove the account holder from the program.

(6) If an account holder is removed from the program under subsection [*(2),*] (3) or (5) of this section, all matching deposits in the account and all interest earned on matching deposits shall revert to the fiduciary organization. The fiduciary organization shall use the reverted funds as a source of matching deposits for other accounts.

NOTE: Sections 37 through 39 were deleted by amendment. Subsequent sections were not renumbered.

RACE AND ETHNICITY DATA COLLECTION AND REPORTING DURING COVID-19 PANDEMIC

SECTION 40. (1) As used in this section:

(a) "COVID-19" means a disease caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

(b) "Encounter" means an interaction between a patient, or the patient's legal representative, and a health care provider, whether that interaction is in person or through telemedicine, for the purpose of providing health care services related to COVID-19, including but not limited to ordering or performing a COVID-19 test.

(c) "Health care provider" means:

(A) An individual licensed or certified by the:

(i) State Board of Examiners for Speech-Language Pathology and Audiology;

(ii) State Board of Chiropractic Examiners;

(iii) State Board of Licensed Social Workers;

(iv) Oregon Board of Licensed Professional Counselors and Therapists;

(v) Oregon Board of Dentistry;

(vi) State Board of Massage Therapists;

(vii) Oregon Board of Naturopathic Medicine;

(viii) Oregon State Board of Nursing;

(ix) Oregon Board of Optometry;

(x) State Board of Pharmacy;

(xi) Oregon Medical Board;

(xii) Occupational Therapy Licensing Board;

(xiii) Oregon Board of Physical Therapy;

(xiv) Oregon Board of Psychology; or

(xv) Board of Medical Imaging;

(B) An emergency medical services provider licensed by the Oregon Health Authority under ORS 682.216;

(C) A clinical laboratory licensed under ORS 438.110; and

(D) A health care facility as defined in ORS 442.015.

(d) "Telemedicine" means the delivery of a health service through a two-way communication medium, including but not limited to telephone, Voice over Internet Protocol, transmission of telemetry or any Internet or electronic platform that allows a provider to interact in real time with a patient, a parent or guardian of a patient or another provider acting on a patient's behalf.

(2) The authority shall adopt rules:

(a) Requiring a health provider to:

(A) Collect encounter data on race, ethnicity, preferred spoken and written language, English proficiency, interpreter needs and disability status in accordance with the standards adopted by the authority under ORS 413.161; and

(B) Report the data in accordance with rules adopted under ORS 433.004 for the reporting of diseases.

(b) Prescribing the manner of reporting.

(c) Ensuring, to the extent practicable, that the data collected and reported under this section by health care providers is not duplicative.

(d) Establishing phased in deadlines for the collection of data under this section, beginning no later than October 1, 2020.

(3) The authority may provide incentives to health care providers and facilities to help defer the costs of making changes to electronic health records or similar systems.

(4) Data collected by health care providers under this section is confidential and subject to disclosure only in accordance with the federal Health Insurance Portability and Accountability Act privacy regulations, 45 C.F.R. parts 160 and 164, ORS 192.553 to 192.581 or other state or federal laws limiting the disclosure of health information.

SECTION 41. Section 40 of this 2020 special session Act may be enforced by any means permitted under the law by:

(1) A health professional regulatory board specified in section 40 of this 2020 special session Act with respect to a provider under the jurisdiction the board.

(2) The Oregon Health Authority or the Department of Human Services with regard to health care facilities under each agency's respective jurisdiction.

(3) The authority with regard to emergency medical services providers licensed under ORS 682.216 and clinical laboratories licensed under ORS 438.110.

SECTION 41a. Section 40 of this 2020 special session Act is amended to read:

Sec. 40. (1) As used in this section:

(a) "COVID-19" means a disease caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

(b) "Encounter" means an interaction between a patient, or the patient's legal representative, and a health care provider, whether that interaction is in person or through telemedicine, for the

purpose of providing health care services related to COVID-19, including but not limited to ordering or performing a COVID-19 test.

(c) "Health care provider" means:

(A) An individual licensed or certified by the:

(i) State Board of Examiners for Speech-Language Pathology and Audiology;

(ii) State Board of Chiropractic Examiners;

(iii) State Board of Licensed Social Workers;

(iv) Oregon Board of Licensed Professional Counselors and Therapists;

(v) Oregon Board of Dentistry;

(vi) State Board of Massage Therapists;

(vii) Oregon Board of Naturopathic Medicine;

(viii) Oregon State Board of Nursing;

(ix) Oregon Board of Optometry;

(x) State Board of Pharmacy;

(xi) Oregon Medical Board;

(xii) Occupational Therapy Licensing Board;

(xiii) Oregon Board of Physical Therapy;

(xiv) Oregon Board of Psychology; or

(xv) Board of Medical Imaging;

(B) An emergency medical services provider licensed by the Oregon Health Authority under ORS 682.216;

(C) A clinical laboratory licensed under ORS 438.110; and

(D) A health care facility as defined in ORS 442.015.

(d) "Telemedicine" means the delivery of a health service through a two-way communication medium, including but not limited to telephone, Voice over Internet Protocol, transmission of telemetry or any Internet or electronic platform that allows a provider to interact in real time with a patient, a parent or guardian of a patient or another provider acting on a patient's behalf.

(2) The authority shall adopt rules:

(a) Requiring a health provider to:

(A) Collect encounter data on race, ethnicity, preferred spoken and written language, English proficiency, interpreter needs and disability status in accordance with the standards adopted by the authority under ORS 413.161; and

(B) Report the data in accordance with rules adopted under ORS 433.004 for the reporting of diseases.

(b) Prescribing the manner of reporting.

(c) Ensuring, to the extent practicable, that the data collected and reported under this section by health care providers is not duplicative.

[*(d) Establishing phased in deadlines for the collection of data under this section, beginning no later than October 1, 2020.*]

(3) The authority may provide incentives to health care providers and facilities to help defer the costs of making changes to electronic health records or similar systems.

(4) Data collected by health care providers under this section is confidential and subject to disclosure only in accordance with the federal Health Insurance Portability and Accountability Act privacy regulations, 45 C.F.R. parts 160 and 164, ORS 192.553 to 192.581 or other state or federal laws limiting the disclosure of health information.

SECTION 41b. (1) Section 41 of this 2020 special session Act becomes operative on December 31, 2020.

(2) The amendments to section 40 of this 2020 special session Act by section 41a of this 2020 special session Act become operative on December 31, 2021.

SECTION 42. Section 43 of this 2020 special session Act is added to and made a part of the Insurance Code.

SECTION 43. An insurer transacting insurance in this state may not consider any information collected and reported under section 40 of this 2020 special session Act to:

(1) Deny, limit, cancel, rescind or refuse to renew a policy of insurance;

(2) Establish premium rates for a policy of insurance; or

(3) Establish the terms and conditions of a policy of insurance.

PHYSICIAN ASSISTANTS

SECTION 44. Section 45 of this 2020 special session Act is added to and made a part of ORS 677.495 to 677.535.

SECTION 45. (1) Notwithstanding any other provision of ORS 677.495 to 677.535, a physician assistant may, without entering into a practice agreement, perform services and provide patient care within the physician assistant's scope of practice in accordance with subsection (2) of this section.

(2) A physician assistant may perform services and provide patient care as described in subsection (1) of this section only in compliance with guidelines and standards established by one or more supervising physicians.

(3) A physician assistant who performs services and provides patient care under this section is exempt from any chart review and onsite supervision requirements described in ORS 677.495 to 677.535 or rules adopted by the Oregon Medical Board pursuant to ORS 677.495 to 677.535.

(4) The board may adopt rules to carry out this section.

SECTION 46. (1) As used in this section:

(a) "Physician assistant":

(A) Has the meaning given that term in ORS 677.495; and

(B) Means a person licensed to practice as a physician assistant in another state or territory of the United States.

(b) "Telehealth" means the use of electronic and telecommunications technologies to provide health care services.

(2) A physician assistant may use telehealth to perform services for and provide patient care to a patient who is located across state lines from the physician assistant if the services and patient care are within the physician assistant's scope of practice.

(3) The Oregon Medical Board may adopt rules to carry out this section.

SECTION 47. Sections 45 and 46 of this 2020 special session Act are repealed on the date on which the declaration of a state of emergency issued by the Governor on March 8, 2020, and any extension of the declaration, is no longer in effect.

CAPTIONS

SECTION 48. The unit captions used in this 2020 special session Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2020 special session Act.

EMERGENCY CLAUSE

SECTION 49. This 2020 special session Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2020 special session Act takes effect on its passage.

Passed by House June 26, 2020

.....
Timothy G. Sekerak, Chief Clerk of House

.....
Tina Kotek, Speaker of House

Passed by Senate June 26, 2020

.....
Peter Courtney, President of Senate

Received by Governor:

.....M.,....., 2020

Approved:

.....M.,....., 2020

.....
Kate Brown, Governor

Filed in Office of Secretary of State:

.....M.,....., 2020

.....
Bev Clarno, Secretary of State

SERVICE OF PROCESS CHECKLIST— Oregon Courts

(Use in conjunction with litigation time limitations chart and litigation checklist available from the Professional Liability Fund)

Case Name:	**Date Complaint Filed:**
Attorney:	**60 Day Service Deadline:**
Date Statute Expires:	**Date Service Completed:**

Action	Suggest Timeline	Tickler	Due
Prepare complaint and identify parties for service. For tips in avoiding common mistakes in filing and serving a complaint, see the PLF CLE, *Avoiding Malpractice When Filing and Serving a Complaint,* available at https://www.osbplf.org/cle_classes/avoiding-malpractice-when-filing-and-serving-a-complain/view/.	One week before anticipated filing date.		
Review ORCP 7 to determine the appropriate manner of service for each defendant being sued. Review *A Process Server's Handbook* for service requirements of complaints, petitions, notices of sale, orders, subpoenas, and other documents. This handbook also discusses the special requirements that apply when serving minors, incapacitated persons, partnerships, FEDS, notices of restitution, small claims, notices of sale in foreclosures, and protected persons in guardianships and conservatorships. This resource is part of the program materials for the PLF CLE, *Avoiding Malpractice When Filing and Serving a Complaint,* available at https://www.osbplf.org/cle_classes/avoiding-malpractice-when-filing-and-serving-a-complain/view/.	One week before anticipated filing date.		
Obtain funds for filing and service fees, file complaint, prepare summons and true copies, deliver to process server or sheriff, and transmit courtesy copy of complaint to client.	See PLF Civil Litigation Checklist for details.		
Follow-up with sheriff or process server re status of service on each defendant. Service should be made within 60 days from the date the complaint is filed.	See PLF Civil Litigation Checklist for details.		

SERVICE OF PROCESS CHECKLIST— Oregon Courts

Action	Suggest Timeline	Tickler	Due
If personal service obtained: • Obtain Return of Service from process server or sheriff • File Return of Service with court • Docket deadline for first appearance by defendant See ORS 12.020 and UTCR 7.020(2).	Immediately following service.		
If substituted or office service obtained: • Obtain Return of Service from process server or sheriff • File Return of Service with court • Follow-up with service by first class mail • File Affidavit documenting proof of follow-up mailing Service is complete upon such mailing. See ORCP 7 D(2)(b) and ORCP 7 D(2)(c).	Immediately following service. Mailings must be completed within 60 days of the filing of the complaint.		
Primary service by mail: • See ORCP 7 D(2)(d) and ORCP 7 D(3) for restrictions • Not available if the defendant is a minor or incapacitated • Requires two mailings—one by first class mail and one by certified or registered mail, return receipt requested or U.S. Postal Service express mail. Restricted delivery is advised.[1] • Service is not effective until the defendant or "other person authorized by appointment or law" signs a receipt for the mailing • File proof of service	Initiate same day as complaint is filed. Tickle follow-up re mailings for 10 days after date complaint is filed.		
Motor vehicle cases/accidents on premises open to the public as defined by law: • Plaintiff must make at least one attempt to serve the defendant by another method (not mailing) • Requires multiple mailings to multiple addresses • Affidavit of compliance must be timely filed • Service on the Motor Vehicles Division is no longer permitted	Initiate immediately when other service method(s) fail. Service is completed on the latest day on which any of the required mailings is made. Service must be accomplished within 60 days of filing complaint.		

[1] See ORCP 7 D(3)(a)(i) and *Edwards v. Edwards*, 310 Or 672, 680-81, 801 P2d 782 (1990).

SERVICE OF PROCESS CHECKLIST— Oregon Courts

Action	Suggest Timeline	Tickler	Due
See ORCP 7 D(4).			
Tenants of Mail Agents See ORCP 7 D(3)(a)(iv) and ORS 646A.340	Initiate immediately when other service methods fail.		
Service by Publication: • Available only upon court order when all other methods exhausted • Publication must be in a newspaper of general circulation • Notice must be published 4 times in successive calendar weeks See ORCP 7 D(6).	Initiate immediately when other service methods fail. No later than 3 weeks after complaint is filed.		
File Return of Service. UTCR 7.020(2).	No later than 63 days after filing of complaint.		
First Appearance due for each defendant. ORCP 7 C(2).	Within 30 days of service unless extension obtained.[2]		

[2] Extensions should be conditioned on the defendant agreeing to waive any potential defects in filing, service, timeliness, etc., if there is any possible statute of limitations issue.

All tickler dates must be entered in the firm's calendar or docket.

IMPORTANT NOTICES

FILING AND SERVING

Tips, Traps, and Resources

SAFE FILING

ORCP 9 E states that pleadings and other papers shall be filed with the "clerk of the court or the person exercising the duties of that office." To avoid mistakes, stamp every document for the court with the designation ORIGINAL or COPY. The visual impact of ORIGINAL catches the eye of every person in the legal system. It always gets a second look and due consideration. **ALWAYS** file the original with the court clerk. Delivery of documents to the judge, the judge's clerk or staff is **NOT** filing according to ORCP 9 E. *See Averill v. Red Lion,* 118 Or App 298, 846 P2d 1203 (1993).

FILING AND SERVING

Don't wait until the last minute! Investigate the case and identify the proper parties as soon as possible. This will eliminate the risk of the time limitation running before you discover that you served the complaint on the wrong defendant. An action is deemed commenced when a complaint is filed and summons served. ORS 12.020(1); ORCP 3. In order for the case to be considered commenced on the day the complaint is filed, the summons must be served before the expiration of 60 days after the date the complaint is filed. ORS 12.020(2); ORCP 7.

ARE YOU SUING A CORPORATE DEFENDANT?

Many legal malpractice claims are caused by naming the wrong corporate defendant. Often, the lawyer received an inaccurate corporate name very close to the correct corporate name.

There are two common ways to obtain information about entity names: searching on the Secretary of State's website or asking the Corporation Division to do it for you. The Corporation Division charges a fee to perform a search in the Business Registry. If you want them to do the search for you, you can download the order form "Request for Special Search 603" in Adobe PDF format from the website or call the Custom Searches & Lists department at (503) 986-2343.

Searching on the Secretary of State's website is free and easy. Go to the Oregon Secretary of State's website, look for "Find a Business" on the menu, and then "Business Name Search." Or you can cut and paste this link to go straight to the registry:
http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.login

The site offers various search options, ranging from very restrictive (*Exact words in exact word order***)** to a less-restrictive, broader search (*Extended search in any word order*.) Selecting the "Extended search in any word order" is the broadest because it provides you with the names of business entities that contain the words spelled exactly as keyed, in any order, and combined with any other words. In addition, synonyms and words with similar sounds are included in the search. Use this search when you are unsure of the name. For example, if you search only for a specific name, such as Valley Inn, you will get only information on "Valley Inn." By conducting a less restrictive search, you may learn there is a "Valley Inn Restaurant," which might be your defendant.

The site also lists registry numbers for each business. These registry numbers can be used to "*Search for Associated Names.*" This search will find all entities associated with that business entity. You can choose the specific associated name types you are interested in or choose all types, such as agent, general partner, member, managing partner, partner, or authorized representative. Additionally, you will have the option of choosing to search for active businesses, inactive businesses, or both.

To search using other parameters, consider an online subscriber service such as Thompson Reuters' Clear, www.clear.thompsonreuters.com (formerly AutoTrack XP, www.autotrackxp.com), Loislaw, www.loislaw.com, Westlaw, www.westlaw.com, LexisNexis, www.lexisnexis.com, or, for solo attorneys, LexisONE, www.lexisone.com.

All public companies, foreign and domestic, must file registration statements, periodic reports, and other forms electronically through the SEC Filings and Forms (EDGAR). Anyone can access and download this information for free. Search EDGAR at www.sec.gov/edgar.shtml.

Public records research firms are also available to conduct your searches. Two examples are GKL Corporate/Search, Inc. and Uni-Search. Contact GKL Corporate/Search, Inc. at www.gklcorpsearch.com or call 1-800-446-5455. Contact UniSearch at www.unisearch.com or call their Oregon office at 503-399-9500 or 1-800-554-3113.

OTHER GOVERNMENT DATABASES
The Secretary of State has a helpful list of other government databases at:
http://sos.oregon.gov/business/pages/government-databases.aspx

That site contains links to other common databases, such as **"Construction Contractor Name Search", "Department of Justice Charity Search", "Employment Department Business Name Search", "Landscape Contractor Name Search", or "Workers' Compensation Insurance Coverage Search,"** as well as "**Uniform Commercial Code Search",** and **"Securities & Exchange Commission Database"** among others.

IMPORTANT NOTICES