



Recent Case Notes

Kevin Sasse, Dunn Carney
Case Notes Editor

TRIAL PRACTICE

Indirect Chemical Drift Is Not a Basis for Timber Trespass Double or Treble Damages

In *Sunshine Farm, LLC v. Glaser, et al.*, 331 Or App 429, --- P3d --- (Mar 6, 2024), the Oregon Court of Appeals held the trial court did not err in granting defendants' ORCP 21 A(1)(h) motion to dismiss plaintiff's timber trespass claim.

Plaintiff operated a pesticide-free hemp farm using "organic inputs and aquaponic fertilizer." Defendants, who own property adjacent to plaintiff's hemp farm, sprayed a mixture of chemicals, including herbicides and pesticides, on their own property. The spray drifted and fell on plaintiff's land and hemp crop. Plaintiff brought an action alleging defendants damaged plaintiff's property and crop when they sprayed chemicals on their own land that in turn drifted onto plaintiff's land. Plaintiffs asserted claims for intentional timber trespass under ORS 105.810 and involuntary timber trespass under ORS 105.815.

ORS 105.810 provides treble damages when "any person, without lawful authority, willfully injures or severs from the land of another any produce thereof or cuts down, girdles or

otherwise injures or carries off any tree, timber or shrub on the land of another person.” ORS 105.815 provides that “if, upon the trial of an action included in ORS 105.810, it appears that the trespass was casual or involuntary . . . judgment shall be given for double damages.”

The trial court concluded plaintiff could not sustain a cause of action under either statute because, pursuant to established case law, they do not apply to claims involving indirect chemical drift. Specifically, in *Meyer v. Harvey Aluminum*, 263 Or 487, 501 P2d 795 (1972), plaintiffs brought an action against an aluminum plant alleging its fluoride emissions damaged their apricot crop and trees. The Oregon Supreme Court, without much discussion, concluded ORS 105.810 was meant “to deter the cutting of another person’s timber,” and does not apply to claims based on chemical drift.

About a year and a half later, the Oregon Supreme Court decided *Chase v. Henderson*, 265 Or 431, 509 P2d 1188 (1973). *Chase* addressed whether plaintiff could claim double damages under ORS 105.815 for harm to its pole bean crop caused by chemical drift from a helicopter applying chemical spray to defendant’s pasture. Relying on its reasoning in *Meyer*, the Oregon Supreme Court concluded double damages were not available for chemical drift under ORS 105.815.

Although plaintiff argued such cases were decided prior to the current form of statutory interpretation, the trial court concluded the fact that a decision predates the current method of statutory interpretation is not a basis for disregarding precedent.

The Court of Appeals affirmed the trial court’s decision based on these prior decisions and plaintiff’s failure to identify any allegations that defendants willfully or directly applied chemicals to plaintiff’s crop and land.

Submitted by Ramon Henderson
Hodgkinson Street Mephram

Stability, Predictability, and Finality in the Law Weigh Against Motion to Vacate

In *Parker v. Burnes, et al.*, 331 Or App 58, --- P3d --- (Feb 22, 2024), the Oregon Court of Appeals held the Oregon Rules of Civil Procedure required denial of plaintiff’s motion to vacate, despite the court’s recognition that “stability, predictability, and finality in the law can . . . operate to deny people . . . the opportunity to prove their allegations in court.”

In 1987, plaintiff was accused, among other things, of improperly soliciting money from lobbyists to start a business. Following three failed attempts to indict plaintiff, the district attorney’s investigation file was sent to the Oregon Government Ethics Commission’s Executive Director, who prepared a report that

included “highly inflammatory, prejudicial, derogatory, and irrelevant personal and private information about plaintiff.”

In 1988, plaintiff filed defamation lawsuits in state and federal court. Plaintiff voluntarily dismissed the state case and settled the federal case. In 1990, plaintiff was denied admission to the Oregon State Bar for failure to pass his character and fitness examination, which plaintiff alleges was related to these false allegations.

In 2021, the Oregon legislature passed Senate Concurrent Resolution 22, issuing a formal apology to plaintiff for the role that “racism and discrimination had played in the ultimately unfounded investigations.”

In 2021, the Oregon legislature passed Senate Concurrent Resolution 22, issuing a formal apology to plaintiff for the role that “racism and discrimination had played in the ultimately unfounded investigations.” Plaintiff then filed motions to vacate and set aside the judgment of dismissal and reinstate the 1988 defamation claim in Multnomah County Circuit Court pursuant to ORCP 71 B and C. On appeal, plaintiff argued the trial court did not give appropriate weight to SCR 22 in evaluating his motion and had erred in determining the time limitations of ORCP 71 precluded relief.

ORCP 71 B(1) permits a trial court to relieve a party from judgment due to newly discovered evidence. However, motions must be made within one year of the judgment. Accordingly, the trial court held plaintiff’s motion was untimely. In response, plaintiff argued the one-year limitation was tolled due to defendants’ fraudulent concealment of evidence. The court stated it had never applied equitable tolling based on fraudulent concealment to ORCP 71 B. However, assuming without deciding fraudulent concealment could toll the one-year limit, the court concluded plaintiff did not submit evidence that could support a finding of fraudulent concealment. Thus, even if fraudulent concealment could toll ORCP 71 B’s one-year limit, plaintiff had not met the requirement for fraudulent concealment.

The Court of Appeals also concluded ORCP 71 C does not provide a basis for relief. Plaintiff argued defendants lied about the purposes of the investigations against him. Relying on its prior

decisions, the court held this type of “intrinsic fraud” does not provide grounds for setting aside the judgment.

In concluding the trial court did not err, the court acknowledged: “Indeed, this case may demonstrate that the law, as it stands, is an imperfect instrument in the pursuit of racial justice. Nevertheless, given the law and the record, we are compelled to affirm the trial court’s ruling.”

Submitted by Ramon Henderson
Hodgkinson Street Mepham

LAND USE/ ADMINISTRATIVE LAW

Counties Not Allowed to Expand Delegated Authority Through “More Stringent” Definition

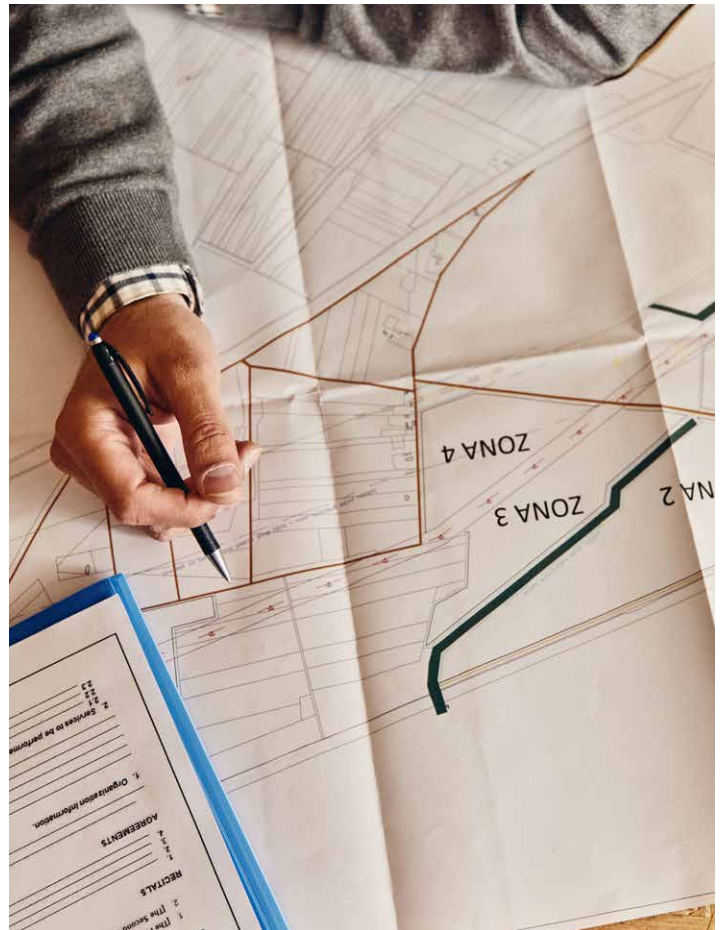
In *Jenkinson v. Lane County*, 329 Or App 372, 540 P3d 1126 (Dec 6, 2023), the Oregon Court of Appeals held that the county’s regulation of divided property went beyond its delegated scope of authority and reversed the Land Use Board of Appeals’ (“LUBA”) final order affirming the county’s denial of petitioners’ application for Legal Lot Verification (“LLV”).

Petitioners applied for LLV of their adjoining lots in Lane County to verify they were lawfully established. To obtain that verification, the lots must have been created in compliance with all applicable planning, zoning, and subdivision or partition ordinances and regulations. Reviewing petitioners’ application, the county determined that at the time the lots were divided, such division required county approval—which had not occurred. The county denied the application.

Petitioners challenged whether the county had the authority to impose such subdivision approval requirements on lots of five or more acres (which the lots at issue are), despite the State defining “subdivide land” to mean creating plots less than five acres. The county found the legislature had authorized counties to impose more restrictive regulations than those set forth in the statute, and LUBA affirmed the decision on appeal.

The parties agreed the county was authorized to adopt its own standards for approval of land subdivision to the extent such authority was delegated by the legislature. The legislature had authorized counties to adopt approval standards for the subdivision of land, and Lane County subsequently adopted an ordinance that required county approval for subdividing land.

The statutory definition of “subdivide land” in 1961 was “to partition a parcel of land into four or more parcels of less than five acres each for the purpose of transfer of ownership or building



development, whether immediate or future when such parcel exists as a unit or contiguous units under a single ownership as shown on the tax roll for the year preceding the partitioning.” The county definition of “subdivide land” in 1961 was “to partition, plat, or subdivide land into four (4) or more lots, blocks, or tracts, or containing a dedication of any part thereof as a public street or highway, for other than agricultural purposes.”

The court found the county ordinance would apply to the extent it did not contravene state law. Reviewing the county’s authority, LUBA cited ORS 92.044(1) (1961), which authorized regulation by the county, and concluded the county had the authority to regulate land division “more stringently than state law, including applying a different and more restrictive definition of ‘subdivide land.’”

The court found LUBA’s interpretation of the statute and the ordinance to be incorrect. ORS 92.044(1) authorizes counties to adopt approval standards for land divisions specifically defined in ORS 92.010(2) (1961) with time and acreage limits. However, the statute did not authorize counties to change the definition of the land divisions they could regulate, effectively expanding their authority.

Submitted by Paul L. Hathaway IV
Lorber Greenfield & Olsen

CONTRACTS

Mutual Non-Disparagement Found to Be Sufficient Waiver of Constitutional and Statutory Speech Rights

In *Lowes v. Thompson*, 331 Or App 406, --- P3d --- (Mar 6, 2024), the Oregon Court of Appeals held that a mutual non-disparagement clause in a contract operated as a waiver of constitutionally and statutorily protected speech rights.

Plaintiff and defendant divorced and entered into a settlement agreement that included the following mutual non-disparagement agreement: “Neither party shall make or knowingly encourage any other person to make any public or private statement, whether written or oral, that disparages, defames, is derogatory about, or misrepresents the other party or one of their business interests.”

Subsequent to the execution of the settlement agreement, defendant made disparaging remarks to a reporter that

plaintiff had abused her, which were later published in an article. Plaintiff then brought a claim for breach of contract. In response, defendant filed a special motion to strike under Oregon’s anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute, and a motion to dismiss for failure to state a claim. The trial court granted both. Plaintiff appealed, arguing defendant had expressly waived the rights she intended to vindicate.

The anti-SLAPP statute protects against lawsuits brought to chill participation in public affairs and to provide a way to challenge claims that might infringe on the right to speak on public issues. It works on a two-step process that analyzes whether: 1) defendant has met the burden to show the claim against which the motion is made arises out of protected activities; and 2) if that burden is met, whether plaintiff has met the burden to establish a probability they will prevail.

The court examined step one and found the statements being challenged were made in connection with an issue of public interest and were protected by ORS 31.150(2)(c) and (d). Before proceeding

to the second step, the court examined whether defendant had waived anti-SLAPP protections. Plaintiff offered unchallenged evidence that defendant waived the right to make the statements at issue, by virtue of the non-disparagement clause. Defendant acknowledged that she entered into the agreement and that the constitutional and anti-SLAPP rights can be waived, but argued that the provision at issue did not waive those rights.

The court reiterated the general rule that “waivers of constitutional and statutory rights may be expressed through contractual terms.” *Assn. of Oregon Corrections Emp v. State of Oregon*, 353 Or 170, 183, 295 P3d 38 (2013). It accordingly held that plaintiff had previously agreed not to engage in the very speech at issue in the motion. Accordingly, defendant’s showing of plaintiff’s waiver of protected rights was sufficient to defeat the anti-SLAPP motion.

The court also reversed the trial court’s granting of the motion to dismiss for failure to state a claim, finding that plaintiff had sufficiently pleaded causation and damages by alleging that defendant’s actions caused the specified harm, and that he had suffered financial and reputational harm as a result.

Submitted by Paul L. Hathaway IV
Lorber Greenfield & Olsen

PUNITIVE DAMAGES

33:1 Ratio on Punitive Damages Award Is “Grossly Excessive”

In *Trebelhorn v. Prime Wimbledon SPE, LLC*, 372 Or 27 (February 15, 2024), the Oregon Supreme Court held that an award of \$10 million in punitive damages against each defendant was “grossly excessive” in comparison to the \$300,000 compensatory damages award.

Plaintiff lived in an apartment complex owned and managed by defendants. In 2016, while walking on an elevated





walkway, his leg punched through a section of elevated walkway that had been weakened by dry rot. He suffered a meniscal tear that required surgery and physical therapy.

At trial, plaintiff presented evidence that defendants were aware of ongoing dry rot throughout the complex since 2011. Managers and executive officers made jokes about the walkways and safety concerns. Evidence suggested that the defendants “preferred putting cheap ‘Band-Aids’ on a problem” and showed that defendants had rejected safety repair estimates from two contractors.

The jury awarded \$45,000 in economic damages, \$350,000 in noneconomic damages, and \$10 million in punitive damages against each defendant. Post-trial, the trial court reduced punitive damages to \$2.7 million, finding that \$10 million was “grossly excessive.”

The Oregon Supreme Court acknowledged that “[t]here is no easy answer to whether a particular award of punitive damages is ‘grossly excessive.’” The court relied on three factors to evaluate punitive damages: (1) degree of reprehensibility; (2) disparity or ratio between plaintiff’s harm and the punitive award; and (3) comparable sanctions.

The court first observed that there was evidence to suggest a “high degree of reprehensibility” by showing that “defendants were motivated to disguise, rather than repair, the deterioration,” and put “profits ahead of safety.” The court compared the facts to *Williams v. Philip Morris, Inc.*, 340 Or 35, 55, 127 P3d 1165 (2006), where Philip Morris “spread false or misleading information” on smoking hazards, despite “for two or more decades absolutely”

knowing that “smoking caused serious and sometimes fatal disease.” Here, defendants were aware of safety hazards for five years and the conduct did not cause life-threatening harm. “[H]owever, the degree of reprehensibility is high and, accordingly, the constitutionally permissible amount of punitive damages also is high.”

Next, the court noted that punitive damages are not “marked by a simple mathematical formula.” Following the guidance of the Supreme Court of the United States, the court observed that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”

Third, the court considered comparable sanctions. Notably, the City of Portland could impose \$643 in monthly enforcement fees for each unit. Because the complex had 600 units, comparable sanctions were severe, and could support a significant punitive damages award.

The Oregon Supreme Court found that the degree of reprehensibility and comparable sanctions supported a significant punitive damages award. However, the court found no evidentiary basis for punitive damages exceeding actual compensatory damages by a ratio of 33:1. Consequently, the court upheld the trial court’s decision to reduce punitive damages to \$2.7 million.

Submitted by Ross Van Ness
Wilson Elser

CIVIL PROCEDURE

Free Speech Defense to Civil Litigation

In *Cider Riot, LLC v. Patriot Prayer USA, LLC*, 330 Or App 354, 544 P3d 363 (Jan 31, 2024), the Oregon Court of Appeals clarified the bounds of protected First Amendment activity within the confines of a special motion to strike based on Oregon’s anti-SLAPP statute.

Plaintiffs’ claims arose from a 2019 altercation between patrons of Cider Riot associated with a local anti-fascist group and others associated with a group known as Patriot Prayer. The clash “began as a heated exchange of political viewpoints” and resulted in injuries to some of plaintiffs’ patrons and, as alleged by plaintiffs, a “range of economic and noneconomic losses.” Several days after the incident, one of the defendants urged people to report Cider Riot to the OLCC. Later on, some individuals made online comments disclosing the names and addresses of plaintiffs’ business partners.

Plaintiffs brought four separate claims: negligence, trespass, intentional infliction of emotional distress (“IIED”), and intentional interference with economic relations (“IIER”). Defendants filed

special motions to strike under ORS 31.150 (anti-SLAPP statute), on the basis that their activities were protected by the First Amendment.

Several individual defendants filed answers before they filed motions to strike. The court denied those motions as untimely, which ruling the Court of Appeals affirmed. Two defendants timely filed special motions to strike, defendant Joseph “Joey” Gibson and Patriot Prayer USA, LLC (the sole member of which was defendant Gibson). The court held that, because plaintiffs did not make a prima facie case against Patriot Prayer USA, LLC, even though its sole member was defendant Gibson, the special motion to strike should have been granted.

With respect to defendant Gibson, the court of appeals engaged in a claim-by-claim analysis on plaintiffs’ negligence, trespass, IIED, and IIER claims.

The court first agreed that “a reasonable jury could find that it was foreseeable that Gibson’s anti-Antifa advocacy, together with his comments associating Cider Riot with Antifa, would lead to violent or unlawful acts against plaintiffs.” However, “the First Amendment does not allow for imposition of liability for speech or for protest organization based on a negligence standard.” Accordingly, the court found that plaintiff did not establish a prima facie case of actionable negligence against defendant Gibson.

Next, the court observed that trespass requires a showing of intentional entry. Because plaintiffs had identified no evidence that Gibson entered the Cider Riot property, the court determined that the trial court erred in denying defendant Gibson’s motion to strike.

The court’s analysis of the IIED and IIER claims was similar. Notwithstanding the protections of the First Amendment, the court emphasized that defendant Gibson encouraged and told a co-defendant to engage in a street fight, and noted that “[d]irecting a person to engage in physically

assaultive conduct is not protected activity.” Accordingly, the court found that defendant Gibson’s conduct and statements could have caused emotional distress and interference with plaintiffs’ business relationships. Consequently, the court upheld the trial court’s denial of defendant Gibson’s special motion to strike plaintiffs’ IIED and IIER claims.

Submitted by Dmitriy Golosinskiy
Wilson Elser

GOVERNMENT LIABILITY

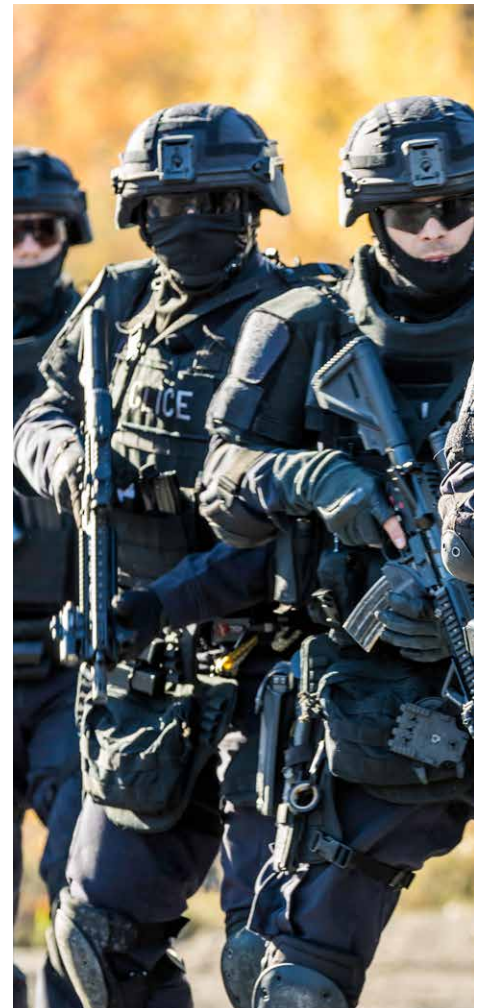
Qualified Immunity: Deadly Force and PIT Maneuvers

In *Sabbe v. Washington County Board of Commissioners, et al.*, 84 F4th 807 (9th Cir Oct 17, 2023), the Ninth Circuit held that Washington County and its law enforcement officers were entitled to qualified immunity when they used deadly force during a PIT maneuver.

On January 12, 2018, police responded to 911 calls from a neighbor who first reported that a pick-up truck was tearing up an open field and that the driver had a rifle and was drunk and belligerent, and then called back saying he thought he had heard a gunshot.

When the police arrived on the scene, the suspect, driving erratically, reversed his pick-up into an open field, parked the vehicle, and appeared to take up position aiming his rifle in the direction of a nearby intersection. The location was an 84-acre parcel just outside the City of Sherwood.

Washington County’s tactical team responded and were informed that the driver was an owner of the property. The driver’s wife further informed them that he was drinking, had anger issues, did not like police, and had a history of eluding. The tactical team stayed in place and observed for over an hour to de-escalate, waiting for a safe opportunity to resolve the encounter, and when the truck later



moved, pursued in a V-150 (a military-style, amphibious, armored vehicle), intending to arrest based on probable cause for unlawful use of a weapon.

After entering the property, the driver of the pick-up turned, drove directly at the V-150, and rammed it. The tactical team attempted two PIT (Pursuit Intervention Technique) maneuvers to disable the vehicle, both of which failed. After the second attempt, the pick-up slowed, and the V-150 pushed the vehicle sideways and forward.

An officer with the tactical team then opened the turret of the V-150 and pointed his gun in the driver’s direction. At trial, the officer testified that as he came out of the turret, he saw the driver pointing a rifle through the rear passenger-side window of the truck, heard a gunshot, and saw glass

exploding from the rear passenger-side window. He responded by firing multiple rounds. Video footage was recorded, but did not clearly indicate who had fired first. The driver died from his gunshot wounds.

In a civil suit brought by the driver's widow against the county board of commissioners and law enforcement officers involved in the incident, the district court granted summary judgment for the defendants, holding that their conduct had not violated the decedent's constitutional rights or exceeded the scope of the officers' qualified immunity. Defendants appealed, arguing they were entitled to qualified immunity with regard to use of deadly force.

To resolve that the issues on appeal, the Ninth Circuit Court considered: (1) whether there was a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct. Ultimately, the court affirmed the district court's ruling granting summary judgment, concluding that once the driver had escalated the encounter by ramming the V-150 and then attempting to drive away, it was reasonable for the officers to respond with a PIT maneuver to apprehend him, and that the officers' use of deadly force was reasonable based on their perception that he was a lethal threat.

Submitted by Chris Gilmore
Multnomah County Attorney's Office

Statute of Limitations: Court of Appeals Holds the Line

In *Mouton v. TriMet*, 331 Or App 247, --- P3d --- (Feb 28, 2024), the Court of Appeals held, in three separate cases consolidated for opinion, that the temporary legislation enacted early in the COVID-19 pandemic extending the statute of limitations for civil actions set a hard end date of December 31, 2021.

The temporary legislation at issue, HB 4212, was originally enacted in June 2020 to respond to the COVID-19 pandemic and included multiple temporary provisions to allow for social distancing and to manage the realities of conducting business during a national crisis. Among its provisions were sections 7 and 8, which concerned the statute of limitations in civil actions.

Section 7 provided that if a deadline to file or give notice of a claim fell within the time that a declaration of a state of emergency was in effect, or within 90 days after it ended, the deadline would be extended until 90 days after the declaration (and any extension) was no longer in effect. Section 8 stated that section 7 was "repealed on December 31, 2021."

Plaintiffs in the three consolidated actions filed various claims against various defendants after December 31, 2021, and after their ordinary deadlines would have passed. Plaintiffs argued that

HB 4212's extended deadline ended on either March 31, 2022 (90 days after the repeal date in section 8) or June 30, 2022 (90 days after the COVID-19 state of emergency ended). Defendants argued that the deadline ended on December 31, 2021—the repeal date explicitly set forth in section 8. The trial courts all agreed with the defendants and dismissed all three cases. The plaintiffs appealed.

The Court of Appeals affirmed. It held the statute was not ambiguous and that the extension deadline ended on December 31, 2021. The court explained: "Essentially, reading sections 7 and 8 together, the effect of the legislation was to extend the statutes of limitation for civil actions such that, if the statute of limitations for an action would have normally expired between March 8, 2020, and December 30, 2021, it did not expire until December 31, 2021."

Significantly, the Court of Appeals reached its conclusion by reasoning that the temporary measure was not ambiguous in spite of the wording of section 7, which standing alone could have left some readers "confused." The inclusion of section 8 made the result clear.

Submitted by Louisa McIntyre
Multnomah County Attorney's Office

