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OREGON COURT OF APPEALS EMPHASIZES BREADTH OF INSURERS' DUTY TO DEFEND IN CONSTRUCTION CONTEXT

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In recent years, Oregon courts have emphasized the broad nature of an insurer's duty to defend claims arising from allegedly defective construction work. *See, e.g., Bresee Homes, Inc. v. Farmers Ins. Exch.*, 353 Or 112 (2012) (holding that a duty to defend exists when the date of alleged property damage is not expressly pled); *Fred Shearer & Sons, Inc. v. Gemini Ins. Co.*, 237 Or App 468, 477-78 (2010); *QBE Ins. Corp. v. Creston Court Condo., Inc.*, 58 F Supp 3d 1137 (D. Or. Sept. 23, 2014); *Seneca Ins. Co. v. James River Ins. Co.*, 2014 U.S. Dist. LEXIS 97156, *20 (D. Or. July 16, 2014) ("the allegations of third-party pleadings are irrelevant as to the insurer's original duty to defend"). *But see Sunset Presbyterian Church v. Andersen Constr. Co.*, 268 Or App 309, 314-16, 318-20 (Dec. 31, 2014) (holding that ORS 30.140 limits a subcontractor's duty to defend a general contractor).

That trend continued in the recent decision by the Oregon Court of Appeals in the case of *West Hills Dev. Co. v. Chartis Claims, Inc.*, 273 Or App 155 (Aug. 19, 2015) ("*West Hills*"). In *West Hills*, a homeowners' association filed an action against a general contractor seeking damages for alleged construction defects. 273 Or App 155, 157 (2015). Among other subcontractors employed on the project, the general contractor relied on a subcontractor to install porch columns. *Id*. The homeowners' association's original complaint contained rather vague allegations that "defects in the building envelope . . . have resulted in water intrusion and property damage to, among other things, siding, trims, sheathing, framing, and interior finishes." *Id*. at 158. The complaint also contained references to "insufficient weatherproofing . . . at wood posts supporting the soffits" and suggested remediation such as "[r]e-clad columns with moisture tolerant assemblies." *Id*.

The general contractor, in turn, tendered defense of the construction defect claim to Oregon Auto, asserting that the general contractor was an additional insured under the insurer's policy with the subcontractor. *Id*. at 159. Months later, Oregon Auto declined the tender of defense because the insurer read the complaint to mean that the damages had occurred after the subcontractor had completed its work. *Id*. With its tender denied, the general contractor filed a third-party complaint against the subcontractor. *Id*. Oregon Auto defended the subcontractor against the general contractor's claims (and Oregon Auto eventually contributed to the settlement of the homeowners' association's claims). *Id*.

While the construction defect action was pending, the general contractor filed an action against Oregon Auto seeking a declaration that the insurer had breached its contractual obligation to defend West Hills. *Id*. After the coverage case was initiated, the homeowners' association amended the complaint in the underlying

construction defect case to include specific allegations about the defective construction, which highlighted problems with the porch columns. *Id*. at 160. In the coverage case, the trial court concluded that Oregon Auto had breached its duty to defend the general contractor because the original and later complaints created a possibility that the general contractor could be liable for work performed by the subcontractor. *Id*.

On appeal, Oregon Auto insisted that it had no duty to defend because the original complaint did not identify the subcontractor, did not mention improperly installed porch columns, and did not assert that damage occurred during subcontractor's work on the project. *Id*. at 161. The Court of Appeals rejected these arguments and upheld the trial court (albeit, on narrower grounds). *Id*.

The Court explained that, in Oregon, "[a]n insurer has a duty to defend an action against its insured if the claim against the insured stated in the complaint could, without amendment, impose liability for conduct covered by the policy." *Id.* at 161, *quoting Ledford v. Gutoski*, 319 Or 397, 399-400 (1994). "The insurer has a duty to defend if the complaint provides *any basis* for which the insurer provides coverage." *Id.* at 164, *quoting Ledford*, 319 Or at 400 (emphasis in original).

In this case, even though the subcontractor was not specifically named in the underlying construction defect complaint, the fact that the underlying complaint had the possibility to create liability was sufficient to trigger the duty to defend. Although the trial court examined the later pleadings, which were more specific with respect to defects caused by the subcontractor, the Court of Appeals found that the original complaint was sufficient to trigger the duty. *Id*. at 166. The Court rejected a rigid application of the "so-called four corners rule" (under which one looks only to the four corners of the complaint and the insurance policy to determine whether coverage exists), and considered extrinsic evidence, including the general contractor's tender letter, to identify the subcontractor and its scope of work. *Id*. at 162 (also noting that "[t]he insurer is charged with the responsibility to recognize the insured's exposure that the complaint presents.").

The recent trend among Oregon courts has been to emphasize and elaborate on the broad nature of an insurer's duty to defend. The *West Hills* decision serves as a strong reminder to insurance companies that even vaguely or poorly worded complaints may trigger the duty to defend if there is *any possibility* for recovery against an insured. The decision alerts would-be insured parties as to the applicable standards and potentially broad range of evidence that may be utilized in demanding coverage. And, the decision provides guidance for plaintiffs' attorneys about how to strategically draft their pleadings.

OREGON CONSTRUCTION CASE LAW UPDATE 2015

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IMPROPER INDEMNITY CLAUSES: When the indemnity provision of a contract conflicts with ORS 30.140, it is voided to the extent that it conflicts with the statute, but no more. Such provisions can remain partially valid and enforceable.

***Montara Owners Assn. v. La Noue Development, LLC*, 357 Or 333, 353 P3d 563 (2015).** Owner brought claims against contractor for construction defects and damage relating to the construction of 35 townhouses. Contractor then brought third-party claims against more than 20 subcontractors for breach of contract and indemnity. Before trial, contractor settled with all but one subcontractor.

The subcontract contained an indemnity provision requiring subcontractor to indemnify contractor for losses arising out of subcontractor's work, including losses caused in part by contractor's own negligence. The trial court ruled

that the indemnity clause was void under ORS 30.140(1). The court of appeals overturned the trial court, finding that "[a]n indemnity clause that offends ORS 30.140(1) because it requires a subcontractor to indemnify a contractor for the contractor's own negligence remains enforceable to the extent that it also requires the subcontractor to indemnify the contractor for the subcontractor's negligence."

The supreme court affirmed the court of appeals decision. The court noted that "the legislature appears to have been more concerned about the practical outcome of the contract provisions: essentially, that the "[sub]contractor [should] be responsible for the [sub]contractor's actions, and the [general contractor should] be responsible for the [general contractor's actions]."

COMMON-LAW INDEMNITY: Common-law indemnity claims, including for attorney fees, are incompatible with the comparative-fault system established in ORS 31.160.

***Eclectic Investment, LLC v. Patterson*, 357 Or 25, 346 P3d 468, *modified*, 357 Or 327 (2015).** After runoff from a hill damaged owner's property, owner sued the contractor who had excavated the hillside for the owner, along with the county that had issued the contractor's permit. The jury found the owner more than 50 percent at fault. The county then pursued a common-law indemnity claim against the contractor for the attorney fees it incurred defending against the owner's suit. The county's indemnity theory relied on the framework of active/passive and primary/secondary tortfeasors discussed in *Astoria v. Astoria & Columbia River R. Co.*, 67 Or 538, 136 P 645 (1913). The trial court ruled in favor of the contractor because the county had inspected the site and approved the work. The court of appeals affirmed.

The supreme court rejected the entire theory of active/passive and primary/secondary tortfeasors and found common-law indemnity claims incompatible with the comparative-fault system established in ORS 31.610. ORS 31.610 provides that each defendant is only severally liable, and that damages are awarded based on the defendant's percentage of fault. Thus, as long as a tortfeasor is liable for the tortfeasor's liability alone—and not jointly liable for the conduct of other tortfeasors—the tortfeasor has no ability to pursue indemnity from other tortfeasors. The court also noted in its modifying opinion that it found the county's argument unpersuasive that indemnity for attorney fees should be considered differently from other types of indemnity.

INDEMNITY/STRICT PRODUCTS LIABILITY: Common-law indemnity claims remain compatible with defense against strict products liability claims.

***Wyland v. W. W. Grainger, Inc.*, No. 3:13-CV-00863-AA, 2015 WL 3657265 (D Or June 11, 2015).** The plaintiff was injured on the job as a mechanic after a cut-off wheel—sold at various points in the supply chain by the defendant-distributor and third-party defendants-suppliers—malfunctioned. The plaintiff brought suit against the distributor for negligence and strict products liability, and the distributor sought indemnity from the suppliers. Following issuance of the supreme court's decision in *Eclectic Investment, LLC v. Patterson*, 357 Or 25, 346 P3d 468, *modified*, 357 Or 327 (2015), the suppliers moved for summary judgment. The suppliers argued that *Eclectic* precluded the distributor from recovering common-law indemnity.

The court agreed with the suppliers' argument with respect to the negligence claim, "provided a jury is asked to apportion fault." The court disagreed with respect to the strict products liability claim. *Eclectic* does not extend to strict liability claims because "the rationale behind Oregon's strict liability is not based on negligence or fault" and Oregon courts typically hesitate to apportion fault in strict liability cases. Thus, common-law indemnity claims remain available in strict liability cases.

INDEMNITY: Third-party indemnity claims are moot if the third-party plaintiff is found not liable in the original action and the judgment takes final effect.

***Liberty Oaks Homeowners Assn. v. Liberty Oaks, LLC*, 267 Or App 401, 341 P3d 109 (2014).** Owner sued its developers for construction defects. The developers filed third-party complaints against their subcontractors for indemnity. The trial court dismissed the underlying claims and the third-party claims as time-barred. Separate judgments were entered, one in favor of the developers as to the claims by the association, and the other in favor of the subcontractors as to the third-party claims by the developers. The owner and developers appealed their respective judgments. The owner and developers then settled their dispute. The owner accordingly dropped its appeal. As part of the settlement, the developers assigned their rights to the owner, and the owner took up the developers' appeal, pursuing the subcontractors for indemnity.

The subcontractors argued before the court of appeals that the appeal was moot because the developers were found not liable and that judgment took final effect. Because there was no basis for the developers' liability, they argued, there was no basis for them to indemnify the developers. The court agreed, noting that "because the judgment dismissing the primary complaint establishes that developers are not liable to the [owner] on the claims alleged in the primary complaint, the derivative claims alleged in the third-party complaint are moot, as is this appeal."

INDEMNITY: A third-party indemnity claim may be ripe even though its outcome is contingent on the disposition of the underlying claim.

***Riverview Condo. Assn. v. Cypress Ventures*, 266 Or App 612, 338 P3d 755 (2014) (*Riverview Condo. II*).** Owner sued its contractor for a variety of claims, including construction defects. Contractor then filed third-party claims against its subcontractors, seeking indemnity. The trial court dismissed the owner's claims as time-barred and then dismissed the third-party claims as well. The parties appealed their respective claims. In a companion decision, *Riverview Condo. Assn. v. Cypress Ventures*, 266 Or App 574, 339 P3d 447 (2014) (*Riverview Condo. I*), the court reversed in part and affirmed in part the dismissal of the owner's claims.

The subcontractors on appeal resisted reversal, arguing that the third-party claims for indemnity were not justiciable because the general contractor had not yet paid a sum to the association or otherwise discharged a duty. According to the subcontractors, common-law indemnity claims and statutory contribution claims do not accrue until the party seeking indemnity or contribution has actually made a payment to a third party. The court disagreed. "We are not persuaded by the subcontractors' ripeness arguments, which would unreasonably restrict the ability of courts to decide what are genuine and present controversies between potentially liable parties. * * * The fact that a controversy might involve some unsettled questions or contingencies does not, by itself, render the case 'unripe' or mean that the controversy as a whole is 'contingent' and therefore not justiciable."

MARY CARTER AGREEMENTS/ JUSTICIABILITY: A claim remains justiciable despite the parties' reaching an agreement that the defendant will pay the plaintiff a minimum sum but provides that the defendant will pay no more than a maximum sum, given that the range of possible payments has not absolutely established the defendant's financial exposure. (Under Review.)

***Rains v. Stayton Builders Mart, Inc.*, 264 Or App 636, 336 P3d 483 (2014), rev allowed, 357 Or 111 (2015).** A subcontractor's construction worker was severely injured when the board he was walking on gave way. He and his wife brought claims for strict products liability and loss of consortium against the general contractor, the direct supplier of the board, and the up-the-chain supplier of the board. The general

contractor was defaulted, and the case proceeded with the direct supplier and the up-the-chain supplier.

The plaintiffs and the direct supplier reached a pretrial agreement that guaranteed the direct supplier would pay the plaintiffs $1.5 million if the jury verdict was against the plaintiffs or for the plaintiffs with a damages award up to that amount. If the damages award was greater than $1.5 million, the direct supplier would pay the full amount of damages up to $2 million. After accounting for the worker's share of fault, the jury awarded the plaintiffs just over $7 million.

On appeal, the up-the-chain supplier argued that the parties were no longer in controversy, particularly because the direct supplier had an incentive to be found liable for $1.5 million so that it could pursue the up-the-chain supplier for indemnity for the full amount of its minimum payment. The court noted that this agreement, as with similar agreements, "ha[s] the potential to distort the adversarial process." However, the agreement did not absolutely establish the direct supplier's potential financial exposure because every dollar above $1.5 million that the jury awarded plaintiffs against the direct supplier, up to a maximum of $2 million, equaled an additional dollar that the direct supplier had to pay to plaintiffs. Therefore, unless a party has absolutely "'no interest' in the outcome of a case because it could 'neither gain nor lose anything as a result of the trial,'" a justiciable controversy remains.

SUBCONTRACTOR NEGLIGENCE: A general contractor's oversight of a construction project does not create a duty owed to a subcontractor's employees, nor does it establish that the general contractor has control over a subcontractor's dangerous activities for purposes of Oregon's Employer Liability Law, ORS 654.305 to 654.336.

***Yeatts v. Polygon Northwest Co.*, 268 Or App 256, 341 P3d 864 (2014).** The plaintiff was injured when he leaned on a third-floor guardrail, the guardrail gave way, and he fell to the ground below. Plaintiff worked for a subcontractor but brought suit against the general contractor for violations of Oregon's Employer Liability Law (ELL) and common-law negligence. The contract between the general contractor and the subcontractor provided that the subcontractor "'shall, at all times, be responsible for providing a safe work site and be responsible for the safety' of its employees and equipment." Even so, the general contractor's employees provided general oversight to make sure the subcontractor adhered to safety measures.

The general contractor moved for summary judgment on the negligence claim, arguing that it did not owe a duty to the plaintiff because it was entitled to rely on the subcontractor's knowledge and expertise. The court agreed, holding that the general contractor's right to require additional safety measures or to terminate the contract for repeated violations did not establish a right to control the subcontractor's carrying out safety requirements, especially given the contract's placement of safety responsibility on the subcontractor.

The general contractor also moved for summary judgment on the ELL claim, arguing that it did not have control over the dangerous activity—a requirement to establish liability under the ELL. The court agreed, noting that "ELL liability is not triggered under the actual control test when a defendant merely directs the plaintiff or the plaintiff's employer to do dangerous work. Rather, it is only triggered if the defendant actually controls the manner or method—*i.e.* *how*—the plaintiff or the plaintiff's employer performs that work."

ECONOMIC LOSS DOCTRINE: Damage to a building's potable water system caused by defective plumbing may be considered property damage and not just economic loss.

***Benson Tower Condo. Owners Assn. v. Victaulic Co.*, No. 3:13-cv-01010-SI, 2014 WL 5285475 (D Or Oct. 15, 2014) (*Benson Tower I*).** The plumbing that the defendant manufactured was used in the association's building. It degraded and caused damage to the building's potable drinking water system. The defendant asserted that association's claims were barred by the economic loss doctrine because the only damage suffered by the plaintiff was damage to the product itself. Plaintiff, conversely, claimed that there was damage to the entire potable water system, including contamination to the water system, and, therefore, "property damage" existed independent of the damage to the defective product. To support its position, the plaintiff submitted expert testimony that water entering the system would be contaminated by black particles as a result of the defective product.

The court sided with the plaintiff, noting that under Oregon law, contamination of water is considered "property damage." "Although not identical to the [water damage caused by faulty construction work that the Oregon Supreme Court recently held to be property damage in *Harris v. Suniga*, 344 Or 301, 180 P3d 12 (2008),] the contamination of the [building's] potable water system and the residents' clogged filters and appliances are the type of physical damage that 'can be ascertained, assessed, and paid,' and the concern for 'potentially limitless economic impacts of negligent conduct' is not present." Thus, because the plaintiff introduced evidence from experts showing that the defective plumbing damaged more than just itself, the claims survived the defendant's motion for summary judgment.

ATTORNEY FEES/PREVAILING-PARTY STATUS: The trial court may implicitly designate a litigant as the prevailing party. However, a prevailing party does not have a categorical entitlement to attorney fees.

***State ex rel Stewart v. City of Salem*, 268 Or App 491, 343 P3d 264 (2015).** A relator sued the city after it allegedly failed to act on his land use application in a timely manner. The relator sought a writ of mandamus ordering the city to approve the application under ORS 227.179. The trial court denied the writ, but the relator obtained it on appeal. The court of appeals also awarded the relator attorney fees related to the appeal. On remand, the trial court granted approval of the relator's application with conditions and awarded costs, but not attorney fees. The trial court did not expressly name a prevailing party. The relator appealed the trial court's decision not to expressly name a prevailing party and not to award it attorney fees.

The court of appeals held that, based on the award of costs, "it is evident that, in substance, it so characterized [the] relator" as the prevailing party. Even so, the decision to award attorney fees is discretionary, according to ORS 34.210(2). "While the statutory text explicitly makes 'prevailing party' status a prerequisite to any recovery of attorney fees, fee entitlement is permissive, predicated on the trial court's exercise of discretion." Thus, even as the prevailing party, the relator was not entitled to an award of attorney fees.

ATTORNEY FEES: Attorney fees incurred by a third-party plaintiff defending against the original claimant are recoverable as consequential damages against a third-party defendant even though the fees arise out of the same action. Evidence of such fees may not, however, be presented at trial but rather may be sought only through ORCP 68's post-trial procedure.

***Montara Owners Assn. v. La Noue Development, LLC*, 357 Or 333, 353 P3d 563 (2015).** The general contractor sought recovery of attorney fees related to its defense against an owner's claims as consequential damages in its third-party claims against the subcontractors. The trial court made a pretrial ruling that the general contractor could not submit the attorney fees to the jury. After the trial, the trial court denied the general contractor's petition for attorney fees under ORCP 68 because the attorney fees had been incurred in the same action and, therefore, were not recoverable as consequential damages.

The supreme court agreed that evidence of attorney fees incurred by a third-party plaintiff should not be presented in a trial between the third-party plaintiff and third-party defendant. Even though the original plaintiff had left the litigation, the court held that the third-party claim was part of the same action as the original plaintiff's claim and, therefore, governed by ORCP 68's post-trial procedure for petitioning the court for attorney fees.

The supreme court held that the trial court had erred in denying the general contractor's post-trial petition. "If the post-trial ruling was based on the trial court's conclusion that it could not consider the substance of [the developer's] request under ORCP 68, that ruling was erroneous. ORCP 68 was not intended to affect any substantive right of a party to attorney fees as consequential damages for a breach of contract." Thus, the court held that the third-party litigation exception to the American rule of attorney fees extends to instances in which the attorney fees were incurred in the same, not a separate and prior, action.

INSURANCE/SETTLEMENT: A settlement agreement that releases an insured liability cannot be subsequently modified by amendment to reinstate liability for purposes of pursuing a claim against the insurer.

***A&T Siding, Inc. v. Capital Specialty Ins. Corp.*, 358 Or 32, ___ P3d ___ (2015)**. Owner sued contractor for construction defects. Owner and contractor entered into a settlement agreement that included a stipulated judgment, an unconditional release and a covenant not to execute. Owner then garnished contractor's insurer, who objected. During a garnishment proceeding, the insurer moved for summary judgment on that ground that the insured's liability had been extinguished by the settlement agreement. The trial court agreed.

During the pendency of the appeal of the state court garnishment proceeding, the owner and contractor modified the settlement agreement to eliminate the unconditional release and covenant not to execute. The contractor then brought suit against the insurer in a separate proceeding, which was later removed to federal court. The district court held that the insurer was not liable because the contractor could not create new insurance obligations by amending the settlement agreement with the owner. The contractor appealed, and the Ninth Circuit certified the question to the Oregon Supreme Court.

The court held that the owner and contractor had failed to meet the requirements necessary for reformation of the settlement agreement. Reformation requires a mistake in drafting that fail to express the terms of the agreement. Here, the "mistake" in the settlement agreement was a mistake in the legal consequence of the agreement. Put simply, there was no mistake in the drafting, but rather the parties' mistaken assumption about how the court would interpret the settlement agreement. "Equity, at least as it is exercised under the doctrine of reformation, has no role in remedying the parties' mistaken prediction of court decisions."

INDEMNITY/DUTY TO DEFEND: A subcontractor's duty to defend based on contractual indemnity extends only to claims that implicate the subcontractor's negligence. In other words, there is no "defend-one-defend-all" rule in contractual indemnity. The indemnitee (typically the general contractor) seeking to recover defense costs bears the burden of allocating those costs between the various indemnitors (subcontractors). Failure to allocate defense costs may result in no award.

***Sunset Presbyterian Church v. Andersen Construction*, 268 Or App 309, 341 P3d 192 (2014).** A church sued the general contractor of its building for construction defects. The general contractor filed third-party claims against its subcontractors. The church and the general contractor reached a settlement in which the general contractor assigned its breach-of-contract claim against one of the subcontractors to the church. The breach was premised on the subcontractor's failure to defend the general contractor. The church prosecuted the breach-of-contract claim against the subcontractor, seeking damages of the full amount of attorney fees that the general contractor had accrued.

The court held that the subcontractor was liable under the indemnity provision of the subcontract, but awarded no damages because the church (which had been assigned the claim by the general contractor) failed to distinguish between defense costs related to claims having to do with that subcontractor's scope of work and other types of claims. The trial court found that the subcontractor had a duty to defend only those claims implicated by the subcontractor's scope of work. The trial court repeatedly told the church to specify what portion of the attorney fees involved claims that implicated the scope of the subcontractor's work. The church instead submitted the general contractor's full amount of attorney fees to the trial court. The trial court designated the church as prevailing party but awarded no damages because of its inability to determine the subcontractor's liability.

DUTY TO DEFEND: An insurer's duty to defend exists even when the allegations of the complaint support the conclusion that the damage at issue occurred outside the policy period. In order to deny defense, the allegations of the complaint must conclusively demonstrate no coverage.

***Seneca Ins. Co. v. James River Ins. Co.*, No. 3:14-cv-00108-HU, 2014 WL 3547376 (D Or July 17, 2014).** A condominium association sued its contractor for construction defects. The contractor tendered its defense to its insurers. One of the insurers defended the contractor; the other did not. The defending insurer brought suit against the nondefending insurer, seeking declaratory judgment that the nondefending insurer had a duty to defend.

The nondefending insurer argued that it had no duty to defend based on the possibility that the damage had occurred before the policy period. It noted that the policy period did not begin until late September, yet hiring for the work took place in July. The nondefending insurer also pointed to weather conditions before the policy period that could have caused damage. The district court considered this insufficient. "[The nondefending insurer] could not eliminate the possibility that the alleged damage occurred during the policy period based on the allegations of the Complaint. Accordingly, the court finds [the insurer's] duty to defend was triggered by the allegations in [the association's] original Complaint * * *."

DUTY TO DEFEND/KNOWN-LOSS EXCLUSION: Insurer's known-loss provision applies when the underlying cause of property damage was known to the insured before the policy period and the new signs of damage that developed during the policy period were of the same type. The duty to defend does not arise if the allegations of the complaint conclusively show that the known-loss provision applies.

***Alkemade v. Quanta Indem. Co.*, 28 F Supp 3d 1125 (D Or 2014).** A contractor built plaintiffs' house in 1994. Over the next ten years,

plaintiffs experienced recurring damage due to shifting soil. The contractor attempted many different repairs over the course of ten years. After the final repair did not work, the plaintiffs brought suit against the contractor. The plaintiffs then reached a settlement with the contractor and the two insurers that had covered the contractor when the damage and shifting soil were first discovered and when the contractor completed a major, ultimately unsuccessful, repair effort. As part of the settlement, the contractor assigned to the plaintiffs its breach-of-contract claims against the contractor's other insurers that later covered the contractor after the last repairs.

The district court granted summary judgment to the insurers, ruling that they had no duty to defend. The policy provided that coverage did not apply to property damage that the contractor knew of before the policy period. Even though new cracks in the walls continued to form and new instances of damage arose during the policy period, the court explained that the damage to the plaintiffs' house was known to the contractor because the underlying cause of shifting soil was already known. Thus, because the "second amended complaint clearly alleges that [contractor] knew of 'symptoms of movement of the home'" prior to the policy period, the insurer had no duty to defend.

KNOWN-LOSS EXCLUSION: An insured's knowledge of certain property damage to a structure prior to purchasing an insurance policy does not eliminate coverage under the known-loss exclusion for additional property damage to the same structure of a different type.

***Kaady v. Mid-Continent Cas. Co.*, 790 F3d 995 (9th Cir June 25, 2015).** A subcontractor took part in a large remodeling project in May 2006. In September 2006, the owner called the subcontractor back to inspect cracks that had developed in the stone and masonry caps installed by the subcontractor. In December 2006, the subcontractor purchased a commercial general liability insurance policy.

In June 2007, the building owner sued the general contractor for deterioration of the deck posts and wall sheathing behind the manufactured stone that the subcontractor had installed. The general contractor filed a third-party claim against the subcontractor. The subcontractor subsequently settled with the building owner and general contractor and tendered the settlement to his insurer for indemnity. The insurer refused to indemnify the subcontractor based on the known-loss exclusion because the subcontractor had been aware of cracks in the manufactured stone and masonry caps before purchasing the insurance policy. The trial court granted the insurer's motion for summary judgment, and the Ninth Circuit reversed.

The court reasoned that because the policy didn't define "physical injury" and "tangible property," it should apply the definition of an ordinary individual who would distinguish between different types of damage to property. Therefore, the court held that the policy allowed for damage to be known before the policy period without precluding indemnity for other types of damage discovered during the policy period.

INSURANCE POLICY INTERPRETATION: If an insurer brings a declaratory action against an insured, it bears the burden of proving noncoverage. If a court can determine whether a party is an insured under the terms of the policy and the allegations of the complaint, extrinsic evidence will not be considered.

***QBE Ins. Corp. v. Creston Court Condo., Inc.*, 58 F Supp 3d 1137 (D Or 2014).** A condominium association brought suit against its developer for construction defects. The developer tendered its defense to the insurer. The insurer accepted the tender under a reservation of rights and initiated this action, seeking declaratory judgment that it had no duty to defend the developer.

The parties tangled about who carried the burden of proving or disproving coverage. The

district court recognized that the "general rule in Oregon is that the insured, rather than the insurer, bears the initial burden of proving coverage." It nonetheless held that the insurer bore the burden because it had initiated the declaratory action.

The parties disputed whether the developer was a named insured under the policy. The insurer sought to introduce extrinsic evidence to show that the developer was not a named insured, citing the exception to the four-corners rule set forth in *Fred Shearer & Sons, Inc. v. Gemini Ins. Co.*, 237 Or App 468, 240 P3d 67 (2010). The court held that the exception did not apply because it was possible to determine whether the defendant was an insured based on the terms of the policy and the allegations in the complaint. When the issue of determining the identity of the insured can be determined on the face of the policy, it "is one of contract interpretation and, consequently, extrinsic evidence is not permitted."

The district court ultimately held that the defendant was not a named insured. However, because the policy covered the named insured's real estate manager, and because the underlying complaint alleged that the defendant acted as the insured's real estate manager, the court held that the plaintiff had a duty to defend.

POLICY REFORMATION/BROKER AGENCY: Neither former ORS 701.105 nor former OAR 812-003-0015 provides a basis to reform a general contractor's insurance policy that failed to provide sufficient coverage. An insurance broker does not act as an agent for the insurer by operation of ORS 744.078(4) when the broker solicits policy applications on behalf of a party seeking to become insured.

***5 Star, Inc. v. Atlantic Casualty Ins. Co.*, 269 Or App 51, 344 P3d 467 (2015).** A subcontractor's employee was severely injured when working on a job for 5 Star, the general contractor. The general contractor settled with the plaintiffs and agreed to pursue its claim against its insurer on behalf of the plaintiffs. The insurer denied coverage and cited the policy's exclusion of coverage for claims arising out of the actions of subcontractors. While the plaintiff continued to pursue his claims against the other parties in *Rains v. Stayton Builders Mart, Inc.*, 264 Or App 636, 336 P3d 483 (2014), the general contractor initiated a suit against its insurer for reformation of the policy and for negligent procurement of insurance. The trial court granted the insurer's motion for summary judgment.

The court of appeals upheld the trial court's grant of summary judgment. The general contractor argued that both former ORS 701.105 and former OAR 812-003-0015 placed a mandate on contractors to acquire coverage that satisfied certain requirements, including a requirement that the policy cover acts by subcontractors. And because the general contractor's policy was deficient, it should be reformed to meet the statutory requirements. The court disagreed, reasoning that those requirements applied to the general contractor, and there was no obligation by the insurer to provide sufficient coverage.

The general contractor also argued that the insurer was liable because its agent, the insurance broker, secured a deficient policy. The court again disagreed, holding that the general contractor's insurance broker was not acting as an agent for the insurer by operation of ORS 744.078(4). "ORS 744.078(4) provides unambiguously that any person who solicits or procures an application for insurance *as an agent for the insurer* is the agent of the insurer in all matters relating to the application for insurance and the policy issued as a result of the application."

INSURANCE/ATTORNEY FEES: Under ORS 742.061(1), an insured has not obtained "recovery" against an insurer for purposes of entitlement to attorney fees where the insured accepted settlement payment by the insurer and summary judgment is granted in favor of the insurer because the claim became moot. "Recovery" is obtained by an insured only when a money judgment is granted against the insurer.

***Triangle Holdings, II, LLC v. Stewart Title Guaranty Co.*, 266 Or App 531, 337 P3d 1013 (2014).** The plaintiff-lender loaned money to a builder and in exchange received a trust deed to certain real property. The lender obtained a title insurance policy from defendant-title company. After construction liens were placed on the real property, the lender notified the title company, paid the liens, and sought reimbursement. After non-payment by the title company, the lender filed suit to collect reimbursement for the liens it paid. Approximately nine months later, the lender accepted payment from the title company for the full amount of the liens plus interest. The title company moved for summary judgment arguing that the lender's claim was moot. The trial court granted the title company's motion and denied the lender's request for attorney fees. The lender appealed.

The lender argued it was entitled to attorney fees under ORS 742.061(1) because it met the three requirements of the statute: (1) there was no settlement within six months of proof of loss, (2) the lender brought action on the policy, and (3) the lender's "recovery" exceeded the amount of any tender made by the title company within the six-month period following proof of loss (i.e., none). The title company argued that the lender did not satisfy the requirements because it did not "recover" through a money judgment. The court held that the lender had no "recovery" because an insured must recover a money judgment against the insurer, and that this interpretation upheld the statutory purpose of ORS 742.061(1). Important to the court's analysis was that the lender had accepted payment, which it did not have to do. Rather, the lender could have negotiated payment of attorney fees or a stipulated judgment as part of accepting the payment or proceeded to trial to obtain a money judgment.

STATUTE OF LIMITATION/ACCRUAL CLAUSE: The statute of limitation for a claim for injury to an interest in real property, including a construction defect claim for negligence, begins to accrue at the time the injured party knew or should have known of the injury.

***Tavtigian-Coburn v. All Star Custom Homes, LLC*, 266 Or App 220, 337 P3d 925 (2014).** The homeowner brought suit against the contractor for negligent construction of a home. The trial court granted the contractor's motion for summary judgment on the grounds that the claim was untimely under ORS 12.080(3). ORS 12.080(3) establishes a six-year statute of limitation for claims involving injury to any interest in real property. The homeowner appealed, claiming that the trial court erred by concluding that ORS 12.080(3) does not embody a discovery rule.

While the case was under advisement, the Oregon Supreme Court issued its decision in *Rice v. Rabb*, 354 Or 721, 320 P3d 554 (2014), which held that unless otherwise specified, a statute of limitation begins to accrue at the time the injured party knew or should have known of the injury. The court of appeals held that the reasoning in *Rice* governed the court's analysis of ORS 12.080(3). Based on that analysis, the court reversed the trial court's order because the contractor presented no evidence that the homeowner discovered or reasonably should have discovered their claims more than six years before filing them.

STATUTE OF REPOSE/ACCRUAL CLAUSE/STATUTE OF LIMITATION: The statute of repose does not begin to accrue until the construction is fully complete *and* the owner accepts the new construction as complete. The proper statute of limitation for a

construction defect claim is ORS 12.080(3), which provides a six-year period that accrues at the time the claimant knew or should have known of the injury. Non-defect claims for economic damages are governed by ORS 12.110.

***Riverview Condo. Assoc. v. Cypress Ventures, Inc., et al.*, 266 Or App 574, 339 P3d 447 (2014).** A condominium association brought suit against the developer and the contractor for negligent construction. The contractor completed construction in early 2000, and the building received final permits and the contractor received final payment in May of that year. The association filed the lawsuit in July 2010. The trial court granted the contractor's motion for summary judgment on the grounds that the 10-year statute of repose under ORS 12.115, as opposed to ORS 12.135, applied. The statute of repose under ORS 12.115 begins to accrue at the time of the act or omission complained of, whereas the statute of repose under ORS 12.135 begins to accrue at the time of substantial completion.

During the appeal, the court issued its decision in *Sunset Presbyterian Church v. Brockamp & Jaeger*, 254 Or App 24, 295 P3d 62 (2012), *aff'd on other grounds*, 355 Or 286, 325 P3d 730 (2014), which held that ORS 12.115 is inapplicable for claims arising from construction of an improvement to real property. Under ORS 12.135, the statute of repose begins to run at the time the construction is fully complete, not just sufficiently complete for its intended purpose. Further, the period of repose does not begin until the owner has accepted the construction as complete. Here, based on the evidence offered, a reasonable trier of fact would not be compelled to conclude that the developer had accepted the construction. Accordingly, the court reversed.

STATUTE OF LIMITATION: Affirming *Riverview Condo. Assn. v. Cypress Ventures* and *Tavtigian-Coburn v. All Star Custom Homes, LLC*, the court held that construction-defect claims live under ORS 12.080(3), which incorporates a discovery rule. (Under Review.)

***Goodwin v. Kingsmen Plastering, Inc.*, 267 Or App 506, 340 P3d 169 (2014).** The plaintiffs sued for construction defects. The trial court granted summary judgment based on the defendants' alternative argument that ORS 12.080(3) did not incorporate a discovery rule. The defendants' primary argument had been that ORS 12.110 applied to their claims.

The court of appeals reversed holding that ORS 12.080(3) applied to construction-defect claims and that the statute incorporated a discovery rule. The court relied on *Riverview Condo. Assn. v. Cypress Ventures*, 266 Or App 574, 339 P3d 447 (2014) (*Riverview Condo. I*) (holding that ORS 12.080(3) applies to construction-defect claims) and *Tavtigian-Coburn v. All Star Custom Homes, LLC*, 266 Or App 220, 337 P3d 925 (2014) (holding that ORS 12.080(3) incorporates a discovery rule).

CONSTRUCTION LIENS: A blank "Notice of Right to Lien" form attached to a construction contract does not satisfy the notice requirement under ORS 87.021. Engineering services provided on a commercial construction project are not performed "on site" for purposes of the exception to the notice requirement under ORS 87.021.

***Multi/Tech Eng'g Servs., Inc. v. Innovative Design & Const., LLC*, No. 11C10868, 2015 WL 5951011 (Or App Oct. 14, 2015).** Plaintiff provided engineering services on a commercial construction project. Plaintiff entered into a written contract with the owner's agent, which included a blank "Notice of Right to Lien" form as an appendix to the contract for engineering services. Plaintiff performed under the terms of the contract, which included some minor on-site work taking measurements and soil

samples. The owner failed to pay and plaintiff sued to foreclose its construction lien. The trial court held that plaintiff's lien was valid and that plaintiff was entitled to a judgment of foreclosure on its construction lien.

The court of appeals reversed. The record did not explain the basis for the trial court's conclusion that plaintiff's lien was valid. However, because there was no evidence in the record that the statutory notice had been given, the court of appeals held that the plaintiff did not meet the notice requirement in ORS 87.021(1) even though plaintiff's contract with the owner's agent contained an "Appendix B", which was a sample fill-in-the-blank form for a "Notice of Right to Lien". Therefore, plaintiff's lien was not perfected.

The court of appeals further held that plaintiff did not meet the requirements under ORS 87.021(3) to be exempt from the notice requirement. ORS 87.021(3) provides an exception to persons who provide labor or materials *at the site* of the commercial improvement. Plaintiff's on-site work, consisting of taking measurements and samples, was incidental to the engineering work provided by plaintiff, which was primarily performed off-site at the plaintiff's offices. Therefore, plaintiff was not exempt from the notice requirement.

PLEADING: A claimant seeking recovery under the Little Miller Act does not have to assert contract or quasi-contract claims against the surety in order to recover on the bond. A claimant is entitled to recover on the bond so long as it pleads a claim on the bond under ORS 279C.600 and obtains recovery against the contractor.

***State v. Ross Bros. & Co., Inc.*, 268 Or App 438, 342 P3d 1026 (2015).** A subcontractor in a public-works project brought suit against the project's general contractor and the general contractor's bond surety for uncompensated services under the Little Miller Act. The trial court found for the subcontractor in quantum meruit and awarded judgment against the contractor, but not the surety. The trial court explained that it had not awarded judgment against the bond surety because the subcontractor failed to explicitly incorporate its quantum meruit claims into its bond claims.

The court of appeals held that the subcontractor could be awarded judgment against the bond surety without having directly incorporated a theory of quantum meruit into its bond claims. "[T]here is no requirement that, as part of a claim under the Little Miller Act, the claimant must incorporate its contract or quasi-contract claims into its bond claims." It is enough that the claimant pleaded a claim under ORS 279C.600 to recover on the bond.

NOTICE REQUIREMENT: A primary subcontractor's assignment of its Miller Act claim to its secondary subcontractor for amounts owed is ineffective when the primary subcontractor did not provide notice to the general contractor that its claim was for its secondary subcontractor and the notice was not provided within 90 days.

***United States ex rel. Nw. Cascade Inc. v. Colamette Constr. Co.*, No. 3:13-cv-01498-AA, 2014 WL 5092253 (D Or Oct. 8, 2014).** A general contractor led the construction of a building for the U.S. Department of Veterans Affairs. The general contractor hired a primary subcontractor that hired a secondary subcontractor to work on the building's shoring. The secondary subcontractor completed work on August 29, 2012. On January 8, 2013, the primary subcontractor completed its work on the project, and it submitted a claim under the Miller Act on January 24, 2013. On August 2, 2013, the primary subcontractor amended its claim to provide notice for the first time that the claim was premised on the unpaid work of the secondary subcontractor.

The district court held that the primary subcontractor's assignment of its claim for the secondary subcontractor's work was ineffective because the Miller Act contains notice

requirements for secondary subcontractors that were not met. Specifically, secondary subcontractors must provide notice of any Miller Act claims within 90 days of completing work. Here, the notice was provided well beyond 90 days after the secondary subcontractor completed work. "[T]he Court finds that the notice requirement is a condition precedent to recovery under the Miller Act irrespective of whether [the primary subcontractor] assigned its financial rights to [the secondary subcontractor]."

COMMON LAW INDEMNITY HAS BEEN ABOLISHED FOR NEGLIGENCE CLAIMS: NOW WHAT?

Vicki Smith
Bodyfelt Mount

Earlier this year, the Oregon Supreme Court eliminated common law indemnity claims in cases involving comparative negligence. This ruling will likely result in defendants with less fault having to pay their own defense costs because they will not recover their attorney fees and costs from their fellow joint tortfeasors.

For over 100 years, Oregon defendants have employed common law indemnity to attempt to hold each other or a third-party wholly responsible for damages paid to a claimant. In construction defect litigation it is common practice for general contractors to bring indemnity claims against subcontractors primarily responsible for damage to a construction project, or for subcontractors to use the claims to shift liability to other subcontractors. Common law indemnity was a handy tool to bring in other parties not yet involved in the litigation but whose work was implicated. Perhaps even more important, common law indemnity claims were a key to recovering a defendant's attorney fees when there were no contract remedies for fees.

All that changed when the Oregon Supreme Court held that common law indemnity was not compatible with a comparative fault system where each defendant is severally liable only. *Eclectic Investment, LLC v. Patterson*, 357 Or 25, 346 P3d 468 (March 19, 2015).

In *Eclectic*, the defendants prevailed on the plaintiff's claim against them because the plaintiff was over 50% at fault. The defendants, the county and its contractor, were each minimally at fault (7% and 4% respectively). The trial court rejected the county's indemnity claim against its contractor. On appeal, the Supreme Court held that when the legislature did away with joint liability and permitted a party to be severally liable only for its own negligence, the need for common law indemnity disappeared. *Id.* at 35-36.

> "In cases in which the Oregon comparative negligence statutes apply and in which jurors allocate fault—and thereby responsibility—for payment of damages between tortfeasors, and each tortfeasor's liability is several only, a judicially created means of allocating fault and responsibility is not necessary or justified." *Id.* at 38.

The *Eclectic* holding applies only to cases where the factfinder allocates fault under the comparative negligence statutory scheme. Indemnity claims arising under other legal theories are still valid, such as contract, breach of warranty, or strict liability. Also, a strict reading of *Eclectic* indicates that if a tortfeasor is not a defendant and, therefore, not subject to the jury's allocation of fault, a defendant in the lawsuit may still seek indemnity from the non-party tortfeasor.

The detrimental ramification of the *Eclectic* decision is that it eliminates a tortfeasor's right to recover attorney fees from a more-liable tortfeasor in the absence of contractual indemnity. The Supreme Court explicitly declined to address whether a tortfeasor could recover its defense costs and attorney fees under a theory other than common law indemnity. *Id.* at 39, fn 9. One option may be to file a contribution claim against the more-liable tortfeasor and seek the attorney fees incurred in defending against the claimant's

claims as consequential damages. The less-liable tortfeasor can argue that it was only involved in the lawsuit brought by the claimant because of the more-liable tortfeasor's wrongful conduct. This is the "third-party litigation exception" to the general rule that precludes a party from recovering attorney fees unless authorized by statute or contract. *See Montara Owners Assn. v. La Noue Development, LLC,* 357 Or 333, 353 P3d 563 (2015).

Another effect of the *Eclectic* decision is that it removes the leverage that a less-liable tortfeasor had to convince a more-liable tortfeasor to accept a tender of defense. Now, without a contractual indemnity provision, there is virtually no consequence for a tortfeasor to reject another tortfeasor's tender of defense.

In the construction context, where does that leave a contractor who does not have contractual indemnity protection and who is forced to defend itself in a lawsuit due to another contractor's work? Certainly, any defendant contractor will need to strongly consider whether to bring third-party claims against any non-party contractor in the current suit. Also, the defendant contractor should consider whether it can seek its defense costs and fees incurred in the plaintiff's claim as consequential damages against the more-liable contractor. Finally, and most importantly, contractors need to pay close attention to their contracts. They should re-examine their contracts and consider whether to add or revise indemnity agreements. Contractors must ensure they receive signed contracts from subcontractors and keep those contracts beyond the length of the project. Having a valid and enforceable contract is the best way to ensure a "fair" allocation of damages awarded to a claimant, and for avoiding the *Eclectic* decision.

RISKY AND UNCONVENTIONAL: TRYING TO APPLY THE PROVISIONS OF ORS 205.450-470 TO CHALLENGE A CONSTRUCTION LIEN

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Consider the following scenario.

A subcontractor provides labor, materials and equipment for a large multi-use project in Oregon. After the subcontractor has worked on the project for several months, the general contractor falls behind substantially in progress payments owing to the subcontractor. Following a discussion of the amounts that are owed, the general contractor terminates the subcontractor.

The subcontractor exchanges correspondence with the general contractor over the next several weeks in an effort to get paid. The general contractor ultimately expresses the opinion that the subcontractor performed defective work on the project and that damages allegedly caused by the subcontractor substantially outweigh any monies owed by the general contractor to the subcontractor. The subcontractor mentions to the general contractor that there was little to no indication from either the owner or general contractor during the project that any of subcontractor's work was defective, but the general contractor does not change its stance.

The subcontractor hires a lien service to record a construction lien against the project. The lien service properly records the lien under ORS 87.035 and properly provides notice of the lien under ORS 87.039.

Subsequently, the owner serves on the subcontractor an order to appear and show cause why the construction lien should not be stricken under ORS 205.460, as "an invalid claim of encumbrance." The order, obtained ex parte under ORS 205.460 (1), sets a hearing date two weeks from the date of the order. The owner's stated basis for its petition filed with the order to show

cause is the allegation that the lien service recorded the lien more than seventy-five days after the subcontractor's last day of work on the project.

The subcontractor hires counsel to represent it in the proceeding. At the outset of the proceeding, the subcontractor's counsel argues to the judge assigned to hear the matter that the provisions of ORS 205.450 to .470 do not apply to construction liens. The subcontractor points out that the provisions of ORS 205.450 *et seq*. were enacted in response to claims of encumbrance being recorded against the property of federal, state, or local government employees arising out of the performance or non-performance of their duties. ORS 205.455 in fact provides that no person shall accept for filing any such claim of encumbrance against such government officials or employees. Further, ORS 205.465 provides that a claim of encumbrance against the property of such government officials or employees arising out of the performance or non-performance of their duties is invalid unless an order from a court authorizing the filing accompanies the filing of the claim.

In addition, the subcontractor argues that its construction lien cannot be an invalid claim of encumbrance and points to the definition in ORS 205.450 (8) stating that a valid claim of encumbrance includes "an encumbrance authorized by statute." The subcontractor emphasizes that its construction lien is authorized by statute, namely ORS 87.010.

Assume for purposes of this scenario that the court determines that because the definition of "encumbrance" under ORS 205.450 (1), by its literal terms includes a "lien", the provisions of ORS 205.450 to .470 may apply to a construction lien. Assume also in this scenario that the court rules that should it be shown that the lien service did not record the lien within the 75-day limit, the lien may be an encumbrance that is not authorized by statute.

The owner's attorney proceeds to call four witnesses to testify, each employed by the general contractor, and each claiming (despite job records and other evidence showing the subcontractor's last day of work was the day that the subcontractor had contended) that the subcontractor's last day of work on the project was an earlier date, a date more than 75 days before the date of recording of the lien.

The general contractor's witnesses however admit on cross-examination that they have limited knowledge of the subcontractor's last day of work. Also, a degree of bias of the general contractor's witnesses in favor of the owner is shown, as it is established that the general contractor and the project owner are owned and controlled by the same individual.

The subcontractor, in addition to having filed declarations of witnesses, calls four witnesses to testify in court, including two individuals who testified that they, along with their co-workers, were on site working on the day the subcontractor claims was its last day of work. They testify regarding the amount of work they did on the project site on that last day. One of the other witnesses testifies that he travelled to the project site on that last day and observed the workers and observed their equipment on site. The fourth witness testifies regarding the billing records and job records showing the work on that last day.

After closing arguments on the second day of the proceedings in court, the court rules that the subcontractor's lien was timely filed, thereby rejecting the project owner's attempt to have the lien declared invalid. The court also rules that the subcontractor is to be awarded its reasonable attorney fees under ORS 205.460 (6), to be paid by the project owner. The court enters an order stating that the lien was timely filed, thereby precluding any challenge by the owner on that issue in the subsequent lien foreclosure action. The court also enters a judgment in favor of the subcontractor for its attorney fees and costs.

Discussion

A project owner's first obstacle in trying to use ORS 205.450 *et seq*. towards a construction lien is of course trying to convince the court that those statutes apply. The type of encumbrance that those statutes are designed to prevent—an

encumbrance filed against a public official's property and arising out of the performance or non-performance of official duties—is not an encumbrance authorized by any statute. In contrast, ORS 87.010 authorizes a construction lien to be filed by those persons who fit within one of the six subsections of that statute.

The legislature long ago recognized the right of a lien claimant to be paid and to record a lien to secure that right. In contrast, the legislature has never granted any right to someone who is allegedly upset with an action or inaction of a public official to record a lien against that official's property.

There is one reported appellate court case construing ORS 205.450 *et seq*.—*Vukanovich v. Kine*, 251 Or. App. 87, 285 P.3d 733 (2012) *rev. den*. 353 Or. 203 (2013). At issue in the *Vukanovich* case was a lis pendens recorded in connection with the plaintiff's suit against an individual named Kine. Plaintiff alleged that Kine had breached an agreement providing that plaintiff and Kine were to invest in a limited liability company to purchase certain real property, a residential subdivision, from Umpqua Bank with each contributing 50% of the funds to purchase the property. The agreement also provided that the parties were to split equally the profits derived from the property.

Plaintiff alleged that approximately six months after the parties' agreement, Kine formed a limited liability company, Stonecrest Properties LLC ("Stonecrest"), with two others, and that Stonecrest had agreed to purchase from Umpqua Bank the same property that plaintiff and Kine had agreed to purchase through their limited liability company. One of plaintiff's claims in his suit was for specific performance to compel Kine and Stonecrest to convey to plaintiff a 50% interest in Stonecrest, as by the time of suit Stonecrest had acquired the subject real property from Umpqua Bank. *Id*. at 738.

Stonecrest petitioned for an order to show cause under ORS 205.450 *et seq*. to strike the lis pendens, contending that plaintiff only had a speculative claim for a future interest in the property rather than a present interest in the property which was needed to support the basis for the filing of a lis pendens. The trial court agreed with Stonecrest and entered a judgment striking the lis pendens, and the Court of Appeals affirmed. *Id*. at 739.

The *Vukanovich* court noted that because plaintiff lacked an actual interest in the real property, plaintiff could not come within the terms of the lis pendens statute, ORS 93.740, which requires that the subject of the suit be an actual interest in real property. *Vukanovich*, 251 Or. App. at 738-39.

The holding of *Vukanovich* cannot not be extended to the case of a construction lien claimant whose lien arises under ORS 87.010. If a lien claimant fits within one of the six categories under ORS 87.010, the lien is authorized. The lien claimant's interest in the liened property is an actual interest in real property, not a speculative future interest as in the *Vukanovich* case.

Further, the *Vukanovich* court's holding focused on the substantive requirements of the underlying statute, and did not address the issue of whether the alleged failure to meet procedural requirements of the underlying statute meant that the encumbrance was not authorized by statute. Thus, the *Vukanovich* decision, aside from being irrelevant to a construction lien case because the underlying statute, ORS 87.010, authorizes the lien, would not be relevant to a case where procedure was at issue, where for example, the owner claimed a construction lien claimant did not timely file the lien.

Other issues

1. Burden of persuasion and production

If a court were to ever permit ORS 205.450 *et seq* to be applied to a construction lien, one of the practical, and important, issues would be the issue of which party has the burden of persuasion and production. There is no reference in ORS 205.460 as to whether the property owner must establish that the encumbrance is invalid, or whether the holder of encumbrance must establish that the encumbrance is valid.

ORS 40.105 (Evidence Rule 305) provides some guidance. That rule provides: "[A] party has the burden of persuasion as to each fact the existence or nonexistence of which the law declares essential to the claim for relief or defense the party is asserting." (As to the burden of production, see ORS 40.115 (2) which places the initial burden of production on the party that has the burden of persuasion).

In relation to a proceeding under ORS 205.450 *et seq*. the issue is the alleged invalidity of the encumbrance. The owner is the proponent of the proposition that the encumbrance is invalid. In fact, one of the averments that is required in the owner's affidavit required under ORS 205.460 is the averment that "[T]he encumbrance is not authorized by statute."

Thus, in a proceeding under ORS 205.460 *et seq*., a court would in all likelihood place the burden of persuasion and production on the property owner.

As to the standard of persuasion and proof, there is no indication in ORS 205.450 et. seq that the standard is anything other than a preponderance of evidence standard.

2. Live testimony or affidavits.

The statutory form of order prescribed by ORS 205.460, if granted, requires the holder of the encumbrance to appear. However, the statute is silent as to whether testimony of those other than the holder of the encumbrance may be through affidavit. As a practical matter, if the judge is going to allow live testimony and the property owner is going to present live testimony, it is advisable for the holder of the lien or encumbrance to also present live testimony. Depending on the witness of course, live testimony is typically more persuasive than testimony through affidavit.

In the scenario set forth at the outset of this article, the subcontractor both filed declarations of witnesses and called witnesses to testify in court.

3. Issue Preclusion

Another concern for the property owner is the preclusive effect in a lien foreclosure action of rulings made by the judge in the ORS 205.460 proceeding. In the above scenario, the owner would be precluded from litigating the lien timeliness issue in the foreclosure action since that issue had been litigated. Broader issues may be decided in the ORS 205.460 proceeding, and be given preclusive effect in the lien foreclosure action.

If the judge takes the position that a question of fact exists as to an issue of the validity of the lien or the applicability of the statute, the judge would not grant the owner the relief requested, and there would not be a determination of an issue with preclusive effect. However, under the language of ORS 205.460 (6), the judge is to actually determine if the encumbrance is valid or if it is invalid. Accordingly, if the proceeding has made it that far in the process without the judge dismissing the owner's petition, there will in all likelihood be a determination made that will have preclusive effect.

Conclusion

There are substantial risks to an owner in trying to apply ORS 205.450 *et. seq* to a construction lien, with an uncertain outcome. The most uncertain outcomes pertain to whether a judge will apply the provisions of ORS 205.450 *et. seq* to a construction lien, and the outcome of an owner's argument that a lien created and authorized by ORS 87.010 is not authorized by statute. Further, if the property owner fails in his or her attempt, they will be assessed attorney fees and there will be a determination made in the proceeding that will have a preclusive effect in the lien foreclosure action.

The property owner who believes they have a basis to contest a lien is better served to utilize ORS 87.076 for bonding around a lien.

DESIGN PROFESSIONAL LIENS REVISITED: ISSUES RAISED BY *MULTI/TECH*

Doug Gallagher

A recent case concerns an Oregon construction lien claimed by an engineer. *Multi/Tech Engineering Services, Inc. v. Innovative Design & Construction*, LLC, 274 Or App 389 (Oct. 14, 2015) The case is important because it raises at least two important issues about the potential Oregon lien rights of architects, landscape architects, land surveyors and registered engineers (together referred to in this article as "Design Professionals").

1. Who is an "agent of the owner?" To claim a lien, a Design Professional must provide the services described in ORS 87.010(5) [1] "at the request of the owner *or an agent of the owner*." "*Agent of the owner*" is not defined in ORS Chapter 87[2] and this author is not aware of any reported case law that construes this statutory phrase.

The facts of *Multi/Tech*, however, provide at least one trial court's view. In *Multi/Tech*, an owner of real property enlisted Innovative Design & Construction, LLC[3] under an oral agreement to perform "all [of] the [initial] ground work" for development of the property, including obtaining design work, City approvals, and project financing. *Multi/Tech*, 274 Or App at 392. Innovative then hired Multi/Tech, a registered engineer, to perform the design services for the development approvals. *Multi/Tech*, 274 Or App at 393. On these facts, the Appeals Court affirmed the trial court's finding that Innovative was the "agent in fact" of the property owner, but only in the context of affirming that the owner was liable to Multi/Tech on a breach of contract claim. *Id.* at 399. Therefore, the Court's acceptance of Innovative as an agent of the owner is dicta insofar as analyzing lien rights.

While *Multi/Tech* did not specifically address the definition of "agent" for purposes of ORS Chapter 87, sources of law from other contexts, however, may provide guidance. For example, in *Vaughn v. First Transit, Inc.*, 346 Or 128 (2009), the Court evaluates the term "agent" used (but not defined) in the Oregon Tort Claims Act ("OTCA")[4] and declares:

> To be an "agent" — using the well-defined legal meaning of that term — two requirements must be met: (1) the individual must be subject to another's control; and (2) the individual must "act on behalf of" the other person. *Vaughn*, 346 Or at 137.

[1] ORS 87.010(5) provides: "An architect, landscape architect, land surveyor or registered engineer who, at the request of the owner or an agent of the owner, prepares plans, drawings or specifications that are intended for use in or to facilitate the construction of an improvement or who supervises the construction shall have a lien upon the land and structures necessary for the use of the plans, drawings or specifications so provided or supervision performed."

[2] An "agent of the owner" described in ORS 87.010(5) should not be confused with a "construction agent" defined by ORS 87.005(3) who is relevant to most other construction liens by contractors and suppliers under ORS 87.010(1).

[3] Interestingly, Innovative is referred to as an "unlicensed contractor" in the case caption without any discussion in the opinion.

[4] In *Vaughn*, the issue was whether a company that provided airport shuttle bus drivers to the Port of Portland was an "agent" of the Port, such that the shuttle bus company was entitled to protection under the Oregon Tort Claims Act from third party claims. *Vaughn*, 346 Or at 131; ORS 30.265(1) (Agents of a public body who commit torts while acting within the scope of their employment or duties are entitled to indemnification from third party claims.).

Of particular significance, the court assigned importance to the ability of the principal to give "interim" instructions to distinguish "agents" from independent contractors:

> The power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents. (citing RESTATEMENT (THIRD) OF AGENCY § 1.01 comment f (2006)).

Vaughn, 346 Or at 136.

Courts may also look to other statutes that define or characterize certain persons or entities as having attributes consistent with agency. *See e.g.* ORS 67.090(1) ("Each partner is an agent of the partnership for the purpose of its business"); ORS 63.140(1) (Subject to certain qualifications, "each member is an agent of the limited liability company"); ORS 100.405 ((1)(a) ("An association of unit owners shall * * * serve as a means through which * * * [condominium] unit owners may take action).

2. Notice of Right to a Lien. A second significant issue in *Multi/Tech* is that the Court of Appeals held the construction lien was invalid because the trial court record did not establish whether the lien claimant either provided a Notice of Right to a Lien ("Notice") (as required by ORS 87.021(1)) or avoided the requirement to provide a Notice under the "commercial improvement" exception in ORS 87.021(3).

In order to perfect a valid lien, ORS 87.021(1) requires a Design Professional to provide a Notice (in substantially the form required by ORS 87.023) to the owner of the site if "material, equipment, services or labor" is provided at the request of someone other than the owner.[5] A Notice is <u>not</u> required, however, if the lien claimant "performs labor upon a commercial improvement or provides labor and material for a commercial improvement." See ORS 87.021(3).

The lien claimant Multi/Tech argued that the trial court record shows the lien claimant provided a Notice to Innovative as an attachment to its agreement for services, and therefore, Multi/Tech served the notice upon the owner. *Multi/Tech*, 274 Or App at 397 n.5. Implicitly, the lien claimant apparently argued that notice provided to Innovative as an agent of the owner discharged the obligation to provide Notice to the owner (i.e. that notice to agent constitutes notice imputed to the principal). Of course, such an argument contradicts the plain language of the statute – that if a Design Professional does not contract with the owner, a Notice must be given to the owner of the site under ORS 87.021(1). The Court side-stepped the lien claimant's argument simply by focusing on the fact the Notice of Right to a Lien form attached to the lien claimant's contract had not been filled out with the information required by ORS 87.023, so the notice failed to substantially comply with ORS 87.023 as required by ORS 87.021(1). *Multi/Tech*, 274 Or App at 398 n.6. Had the lien claimant properly filled out the Notice, however, the Court would have had to confront a more interesting issue: Can notice given to the agent be imputed to the owner under common law agency principles or does ORS 87.021(1) trump agency principles by explicitly requiring a lien claimant give notice to the owner, not the agent?

As noted above, the Court also disallowed the lien because Multi/Tech did not provide labor on a "commercial improvement" as required to avoid the Notice requirement under ORS 87.021(3). The Court held that the onsite activities of Multi/Tech were too incidental to qualify Multi/Tech as a person who "performs labor upon" or "provides labor and materials" to a "commercial improvement" as is necessary to avoid the Notice of Right to a Lien requirement under the ORS 87.021(3) exception. *Id.* at 395-396 (citing *Teeny v. Haertl Constructors, Inc.*, 314 Or 688, 597-599 (1992)). Multi/Tech's onsite activities consisted of digging some test holes,

[5] ORS 87.021(1) also contains a prohibition against a Design Professional claiming a lien under ORS 87.010(5) or (6) if services are provided for an owner-occupied residence at the request of an agent of the owner.

taking measurements, conducting "field exploration work" and taking a soil sample. *Id.* at 398.

The court failed to note, however, that the term "services" – explicitly mentioned in the rule requiring the Notice in ORS 87.021(1) – is not mentioned anywhere in the "commercial improvement" exception to providing Notice in ORS 87.021(3). Had the "labor" performed onsite by Multi/Tech been more than incidental, ORS 87.021(3) still does not provide an exception to the requirement that a lien for "services" provide a Notice of Right to a Lien. The seemingly best result Multi/Tech could have obtained is a lien for the onsite "labor" – the test holes, measurements and field exploration under ORS 87.010(1).[6]

3. Conclusion. The *Multi/Tech* case raises some interesting questions that Design Professional lien claimants face, but ultimately falls short of providing clear guidance to interpretation of the statutes associated with Design Professional liens.

[6] Note that "labor" and "services" is not defined in ORS Chapter 87, however, labor is clearly described in reference to ORS 87.010(1) and (2) liens, so by elimination, "services" must refer to those liens claimed under ORS 87.010(5) by Design Professionals. See 87.021 (1) ("Except when material, equipment, *services* or labor described in ORS 87.010 (1) to (3), *(5) and (6)* is furnished at the request of the owner, a person furnishing any materials, equipment, *services* or labor described in ORS 87.010 (1) to (3), *(5) and (6)* for which a lien may be perfected under ORS 87.035 shall give a notice of right to a lien to the owner of the site. * * *").

NEW EDITOR

Alan Mitchell

After being editor for this Section's newsletter since 1999, I am now handing these reins off to Justin Monahan of the Ball Janik firm. Thank you to all of the authors over the years. Please be sure to treat Justin as wonderfully as you have treated me. And remember: Retirement is wonderful!

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