COUNCIL ON COURT PROCEDURES

Saturday, October 13, 1990 Meeting
9:30 a.m.

Oregon State Bar Center
5200 SW Meadows Road
Lake Oswego, Oregon

A G E N D A

1. Approval of minutes of meeting held September 8, 1990

2. Expert discovery

3. Remarks by Bernie Jolles regarding sealing settlement records (see letter attached)

4. Rule 68 C(1) - attorney fees in dissolution cases (Judge Welch) (see attached Executive Director's memorandum dated September 28, 1990)

5. Public comments on proposed amendments (see attached Executive Director's memorandum dated September 28, 1990)

6. Letter from B. Kevin Burgess regarding ORCP 54 A(3) (see attached letter)

7. NEW BUSINESS

# # # #

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of October 13, 1990

Oregon State Bar Center
5200 SW Meadows Road
Lake Oswego, Oregon

Present:	Richard L. Barron	Richard T. Kropp
	Dick Bemis	Robert B. McConville
	Susan Bischoff	Ronald Marceau
	Susan P. Graber	Jack L. Mattison
	John E. Hart	William F. Schroeder
	Lafayette G. Harter	William C. Snouffer
	Maurice Holland	J. Michael Starr
	Bernard Jolles	Larry Thorp
	Lee Johnson	Elizabeth Welch
	Henry Kantor	Elizabeth Yeats
Absent:	John V. Kelly	
	Winfrid K.F. Liepe	
	Paul De Muniz	

Also present were Judge Donald Ashmanskas and Susan Grabe of the Oregon State Bar. The following attorneys were present: Ron Bailey, Jerry Banks, Gene Buckle, Charles Burt, Win Calkins, Tom Cooney, Jr., Jeffrey Eberhard, Robert Fraser, Bill Gaylord, John Holmes, Garry L. Kahn, Jeff Mutnick, Charles Paulson, Peter Richter, Stephen C. Thompson, Charlie Williamson, Don Wilson, and Larry Wobbrock.

Also present were Fredric R. Merrill, Executive Director, and Gilma J. Henthorne, Executive Assistant.

The meeting was called to order by Chairer Ron Marceau at 9:30 a.m.

The Chairer welcomed the visitors and stated they would be given an opportunity to present their views regarding expert discovery.

Agenda Item No. 1: Approval of minutes of meeting of September 8, 1990. The minutes of the meeting held September 8, 1990 were unanimously approved.

Agenda Item No. 2: Expert discovery. Attached as Exhibit 1 is the Chairer's memorandum to the Council (mailed October 8, 1990) with attached memoranda from the Executive Director and

Judge Johnson dated September 18, 1990 and September 28, 1990, respectively. Attached as Exhibit 2 is Henry Kantor's memorandum to the Council dated October 10, 1990. The Executive Director explained the various options (discussed in his September 18, 1990 memorandum) available to the Council on the scope of expert witness discovery, which range from doing nothing to disclosure of virtually everything. Henry Kantor summarized the contents of his memorandum (Exhibit 2). The Executive Director summarized the contents of his memorandum regarding empirical data on expert discovery (Exhibit 3). Further discussion followed.

A letter dated October 10, 1990 from Attorney Phillip D. Chadsey was distributed at the meeting (attached as Exhibit 4). Mr. Chadsey had enclosed with his letter a 30-page memorandum (attached to original minutes) in a case concerning that issue, and the memorandum was circulated among the Council members.

The Chair invited those guests who were proponents of discovery to present their views at this time.

Peter Richter (Attorney, Portland), Jerry Banks (Attorney, Portland), Ron Bailey (Attorney, Portland), Gene Buckle (Attorney, Portland), Jeff Eberhard (Attorney, Portland), and John Holmes (Attorney, Portland) testified as proponents of discovery. They argued that disclosure of experts is one additional step toward resolution of a problem and accomplishing settlement and that court costs and the court's time would be reduced. They said it would promote fairness in preparation for litigation. John Holmes' written testimony is attached as Exhibit 5.

Jeff Foote (Attorney, Portland, and President of the Oregon Trial Lawyers Association), Garry Kahn (Attorney, Portland), Bill Gaylord (Attorney, Portland), Charlie Burt (Attorney, Salem), Jeff Mutnick (Attorney, Portland), Chuck Paulson (Attorney, Portland), and Larry Wobbrock (Attorney, Portland) all testified against allowing any discovery of expert witnesses. Mr. Foote stated that the OTLA is very opposed to expert discovery. Garry Kahn circulated a sheet (from Judge LeMar in Multnomah County) among the Council members showing statistics of the number of cases that went to trial and those that settled during the period January 1988 to June 25, 1990. It was Mr. Kahn's opinion that the defense has the advantage because more time and money can be spent in preparing for trials. Other arguments against discovery of expert witnesses were: it would be an expense to litigants; it would increase overall costs; it would not promote settlement but would only promote more litigation.

Attached as Exhibit 6 is a letter from Attorney Linda Rudnick dated October 12, 1990 with attached STATEMENT OPPOSING HB 3140 (DISCOVERY OF EXPERT OPINION).

After a short recess, a lengthy discussion by the Council ensued. The Chair stated that he would be asking for preference votes on the various options. A vote on option 1 (**DO NOTHING**) resulted in 9 in favor and 11 opposed.

The Council then discussed option 2: **PROHIBIT ANY DISCOVERY OF EXPERT WITNESSES.** After discussion, a vote was taken resulting in 20 opposed and no one in favor.

Larry Thorp had prepared the following proposed Rule 42 on Expert Witness Discovery and suggested it might be considered an option 10:

> **The Court may, upon a showing of good cause, order the discovery of the identity, qualifications, and opinion of expert witnesses. In determining the availability, scope and methods of discovery, the Court shall give due consideration to the convenience, expense and fairness of the discovery to all parties and the expert witness.**

A discussion followed. It was suggested that the language for "good cause" would open up questions. A vote regarding Larry Thorp's proposal resulted in 5 in favor and 15 opposed.

The Council discussed and took action concerning the remaining options as follows:

OPTION 9. ALLOW DISCOVERY OF THE IDENTITY, QUALIFICATIONS, GENERAL SUBSTANCE OF OPINIONS, AND GROUNDS FOR OPINIONS, BUT PROHIBIT DISCOVERY OF IDENTITY OF EXPERT WITNESSES IN MEDICAL MALPRACTICE CASES.

After discussion, a vote was taken and 5 voted in favor of the option, with 14 opposed.

OPTION 3. ALLOW DISCOVERY OF THE IDENTITY OF THE EXPERT WITNESS.

After discussion, a vote was taken and 4 voted in favor of the option, with 16 opposed.

OPTION 4. ALLOW DISCOVERY OF THE IDENTITY AND QUALIFICATIONS OF THE EXPERT WITNESS.

After discussion, a vote was taken resulting in 9 in favor of the option and 11 opposed.

OPTION 5. ALLOW DISCOVERY OF THE IDENTITY, QUALIFICATIONS, AND THE SUBJECT MATTER AND GENERAL SUBSTANCE OF THE EXPERT

WITNESS'S OPINIONS.

A vote resulted in 8 being in favor of option 5 and 14 opposed.

OPTION 6. ALLOW DISCOVERY OF THE IDENTITY, QUALIFICATIONS, SUBJECT MATTER AND GENERAL SUBSTANCE OF OPINIONS, AND GROUNDS FOR OPINIONS.

After discussion, a vote was taken resulting in 6 being in favor of option 6 and 13 opposed.

OPTION 7. ALLOW DISCOVERY OF THE SUBJECT MATTER AND GENERAL SUBSTANCE OF THE EXPERT WITNESS'S OPINIONS AND THE GROUND FOR OPINIONS BUT PROHIBIT DISCOVERY OF THE IDENTITY OF THE EXPERT.

A vote was taken which resulted in no member being in favor of option 7.

OPTION 8. ALLOW DISCOVERY OF THE SUBJECT MATTER AND GENERAL SUBSTANCE OF THE EXPERT WITNESS'S OPINIONS AND THE GROUNDS FOR OPINIONS, BUT PROHIBIT DISCOVERY OF THE IDENTITY OF THE EXPERT.

After discussion, a vote resulted in one member being in favor of option 8 and 18 opposed.

After discussion, it was decided that the Council should reconsider options 1, 4, and 5. The Chair asked for a revote on option 1 (**DO NOTHING**). The vote resulted in 9 being in favor and 10 opposed (one Council member had left the meeting).

The Council again discussed option 4, which would allow discovery of the identity of the expert and the qualifications of the expert witness, and option 5, which would allow discovery of the identity, qualifications, and the subject matter and general substance of the expert witness's opinions. The Chair asked for a vote to allow the court's discretion in both options 4 and 5. The vote resulted in 11 in favor and 8 opposed.

The Chair then asked for a vote on option 4, with the addition of judicial discretion. The vote resulted in 12 in favor and 7 opposed.

The results of a vote on option 5 (which would allow identity, qualifications, subject matter and general substance of the expert witness's opinions) with judicial discretion were 7 in favor and 12 opposed.

The Chair then asked the Executive Director to prepare another version of draft 4 with the addition of judicial

discretion and suggested that if anyone had suggestions regarding time limits, sanctions and costs, those thoughts should be communicated to the Executive Director. The redraft would be considered at the next meeting. A suggestion was made that "discretion" could be subject to 36 C.

Agenda Item No. 5: Public comments on proposed amendments (see Executive Director's memorandum attached to the agenda for the October meeting). Win Calkins, Attorney from Eugene, spoke regarding the Council's proposed amendment to Rule 18 which deleted subsection B(3) from that rule. Mr. Calkins had written to the Council by letter dated August 19, 1990, and that letter was made a part of Agenda Item No. 5 for the September 8, 1990 Council meeting. Mr. Calkins summarized the contents of that letter. Further discussion and action concerning Agenda Item No. 5 was deferred until the next meeting.

Agenda Item No. 3: Remarks by Bernie Jolles regarding sealing settlement records. This agenda item was deferred until the next meeting.

Agenda Item No. 4: Rule 68 C(1) - attorney fees in dissolution cases (see Executive Director's memorandum dated September 28, 1990 attached to the agenda for the October meeting). The Chair stated that the Council's judgment subcommittee had met and that a final proposal regarding Rule 68 would be submitted at the November meeting. The proposed amendment to Rule 68 C(1) (suggested by Judge Welch) set forth in the Executive Director's memorandum of September 28, 1990 was briefly discussed. Henry Kantor made a motion, seconded by Dick Kropp, to adopt that amendment. The motion passed unanimously.

Agenda Item No. 6: Letter from B. Kevin Burgess regarding ORCP 54 A(3). This agenda item was deferred until the November meeting.

The meeting adjourned at 1:06 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

10/8/90

TO: COUNCIL ON COURT PROCEDURE MEMBERS

FROM: RON MARCEAU

RE: EXPERT WITNESS DISCOVERY

Expert witness discovery will be the first order of business at the Council's October 13, 1990 meeting at the Oregon State Bar office (beginning at 9:30 a.m.). Unless someone has a better idea, here is the procedure we will follow:

- Report by Executive Director
- Report by Judge Johnson's subcommittee
- Comments from public
- Discussion and action by Council

I have asked Fred Merrill to set out as simply as possible the various options available to the Council on the scope of expert witness discovery. As you can see from the attached Fred Merrill 9-18-90 Memorandum, there are nine options ranging from doing nothing to disclosure of virtually everything.

I think Fred's Memorandum does a very good job of setting out the scope of expert witness discovery to the Council. Keep in mind that any adoption of an expert witness discovery rule must also consider the time limits within which discovery must be done, sanctions for non-compliance and costs. These refinements can easily be handled once the Council decides on the scope of discovery.

Also attached is Judge Johnson's 9-28-90 draft subcommittee report. As you can see, it submits a procedure which would consider some of the expert witness discovery options.

Exhibit 1 to minutes of
Council meeting held 10/13/90

September 18, 1990

M E M O R A N D U M

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: **Fred Merrill, Executive Director**

RE: **EXPERT DISCOVERY**

In case of need at the October meeting, I am submitting a draft of possible expert discovery rules which reflect the various positions the Council might adopt relating to the scope of expert discovery. From what I could tell at the last meeting, there is no sentiment favoring the federal rule or full discovery by deposition. These drafts only cover the basic question of what is discoverable. They do not deal with other questions such as timing, sanctions, payment of expenses, etc.

The Council could:

1. DO NOTHING. This would require no rule draft. One thing should be pointed out regarding this approach. Most of the people testifying at the last meeting assumed that the rules or existing case law prohibit expert witness discovery. That is simply not true.

The ORCP do not address the subject. In at least two cases prior to the ORCP, the Oregon Court of Appeals upheld trial court orders allowing depositions of expert witnesses. Land Board v. Corvallis Sand and Gravel, 18 Or App 524, 558 (1974), and Farmers Insurance v. Hansen, 46 Or App 377, 380 (1980) [1]. It is true that various privileges, including physician/patient, attorney/client, and work product, may limit the right to discovery in a particular case. Brink v. Multnomah County, 224 Or 507 (1960), and Nielson v. Brown, 232 Or 426 (1962). This does not create an absolute prohibition of discovery of expert witnesses, and privileges must be considered on a case-by-case basis.

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[1]. I am indebted to J. D. Droddy for the citations to these cases. They are contained in a draft of an article on expert discovery in Oregon, which he sent to me. Mr. Droddy believes that expert witness opinions are discoverable in Oregon and that, in some cases, such discovery is constitutionally required.

EX 1-2

The point is that to do nothing leaves the matter for decision by each trial court. Expert witness discovery will be possible in some cases and there will be no uniform rule in the state.

2. PROHIBIT ANY DISCOVERY OF EXPERT WITNESSES. See Draft 2.

3. ALLOW DISCOVERY OF THE IDENTITY OF THE EXPERT WITNESS. See Draft 3.

4. ALLOW DISCOVERY OF THE IDENTITY AND QUALIFICATIONS OF THE EXPERT WITNESS. See Draft 4.

5. ALLOW DISCOVERY OF THE IDENTITY, QUALIFICATIONS, AND THE SUBJECT MATTER AND GENERAL SUBSTANCE OF THE EXPERT WITNESS'S OPINIONS. See Draft 5.

6. ALLOW DISCOVERY OF THE IDENTITY, QUALIFICATIONS, SUBJECT MATTER AND GENERAL SUBSTANCE OF OPINIONS, AND GROUNDS FOR OPINIONS. See Draft 6.

7. ALLOW DISCOVERY OF THE SUBJECT MATTER AND THE GENERAL SUBSTANCE OF THE EXPERT WITNESS'S OPINIONS, BUT PROHIBIT DISCOVERY OF THE IDENTITY OF THE EXPERT. See Draft 7.

8. ALLOW DISCOVERY OF THE SUBJECT MATTER AND GENERAL SUBSTANCE OF THE EXPERT WITNESS'S OPINIONS AND THE GROUNDS FOR OPINIONS, BUT PROHIBIT DISCOVERY OF THE IDENTITY OF THE EXPERT. See Draft 8.

9. ALLOW DISCOVERY OF THE IDENTITY, QUALIFICATIONS, GENERAL SUBSTANCE OF OPINIONS, AND GROUNDS FOR OPINIONS, BUT PROHIBIT DISCOVERY OF IDENTITY OF EXPERT WITNESSES IN MEDICAL MALPRACTICE CASES. See Draft 9.

DRAFT 2

Except as otherwise provided in these rules, there shall be no discovery of facts known and opinions held by persons to be called as expert witnesses except upon stipulation between or among disclosing parties.

DRAFT 3

Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and business address of any person the other party reasonably expects to call as an expert at trial. Except as may be otherwise provided by these rules, by law, or by statute, no other or further discovery of the opinions of expert witnesses shall be permitted except upon stipulation between or among disclosing parties.

DRAFT 4

Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and business address of any person the other party reasonably expects to call as an expert at trial and shall disclose in reasonable detail the qualifications of each expert. Except as may be otherwise provided by these rules, by law, or by statute, no other or further discovery of the opinions of expert witnesses shall be permitted except upon stipulation between or among disclosing parties.

DRAFT 5

Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and business address of any person the other party reasonably expects to call as an expert at trial and shall disclose in reasonable detail the qualifications of each expert, the subject matter on which the expert is expected to testify, and the substance of the facts and opinions to which the expert is expected to testify. Except as may be otherwise provided by these rules, by law, or by statute, no other or further discovery of the opinions of expert witnesses shall be permitted except upon stipulation between or among disclosing parties.

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DRAFT 6

Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and business address of any person the other party reasonably expects to call as an expert at trial and shall disclose in reasonable detail the qualifications of each expert, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Except as may be otherwise provided by these rules, by law, or by statute, no other or further discovery of the opinions of expert witnesses shall be permitted except upon stipulation between or among disclosing parties.

DRAFT 7

Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney stating the subject matter on which each expert whom the other party reasonably expects to call as a witness at trial is expected to testify, and the substance of the facts and opinions to which the expert is expected to testify. Except as may be otherwise provided by these rules, by law, or by statute, no other or further discovery of the opinions of expert witnesses shall be permitted except upon stipulation between or among disclosing parties.

DRAFT 8

Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney stating the subject matter on which each expert whom the other party reasonably expects to call as a witness at trial is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Except as may be otherwise provided by these rules, by law, or by statute, no other or further discovery of the opinions of expert witnesses shall be permitted except upon stipulation between or among disclosing parties.

DRAFT 9

Upon request of any party, any other party shall deliver a written statement signed by the other party or the other party's attorney giving the name and

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business address of any person the other party reasonably expects to call as an expert at trial and shall disclose in reasonable detail the qualifications of each expert, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. In an action for medical, dental, or podiatric malpractice, a party, in responding to a request for a statement, may omit the names and qualifications of medical, dental, or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph. Except as may be otherwise provided by these rules, by law, or by statute, no other or further discovery of the opinions of expert witnesses shall be permitted except upon stipulation between or among disclosing parties.

EX 1-G

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

LEE JOHNSON
JUDGE
DEPARTMENT NO. 10

COURTROOM 528
(503) 248-3165

Date: September 28, 1990

Draft Report of Subcommittee on Pre-trial Discovery of Experts

The Subcommittee agreed on these points:

I. The present rules relating to treating physicians and I.M.E.'s should be retained.

II. If there is to be any further discovery of experts, such discovery should not occur until 30 days prior to trial.

III. If there is to be any further discovery of experts, the rules should contain the following provision:

> "Except as provided by these Rules, no other or further discovery of the identity or opinions of expert witnesses shall be permitted except upon stipulation of the parties."

Question 1 for Council

Do you favor permitting some expanded discovery of expert witnesses or retention of the status quo? Vote "yes" if you favor expansion, Vote "no" if you wish to retain the status quo.

If a majority is "no", then Question 2 shall not be addressed.

Question 2 for Council

A. Do you favor a rule which requires 30 days prior to trial the parties to provide a summary "stating in reasonable detail the subject matter in which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify."

B. Do you favor a rule which requires 30 days prior to trial disclosure of the names and addresses of expert witnesses?

C. If the answer to A is "yes", should the rule include disclosure of experts' resume?

cc: Mike Starr Ron Marceau
John Hart Fred Merrill

Ex 1-7

MEMORANDUM

TO: MEMBERS, COUNCIL ON COURT PROCEDURES
FROM: HENRY KANTOR
DATE: October 10, 1990
RE: EXPERT WITNESS DISCOVERY/MERRILL MEMORANDUM

After our September meeting, Fred Merrill prepared a memorandum dated September 18 regarding alternative positions the Council might adopt relating to expert discovery. This memorandum was circulated by Ron Marceau this week. On the first page of the memorandum, Fred asserted that there is Oregon case law which supports the allowance of expert witness discovery. This memorandum is my response to Fred because I respectfully believe that the holdings of the cases he cites do not support his contention. In other words, the "do nothing" option is a proper and viable alternative because Oregon law does not allow expert witness discovery at the the present time.

State ex rel State Land Board v. Corvallis Sand and Gravel Co., 18 Or App 524, 526 P2d 469 (1974), aff'd as modified on other grounds, 272 Or 545, 536 P2d 517, 538 P2d 70 (1975), vacated, 429 US 363, 97 SCt 582, 50 LEd2d 550 (1977), was cited as one case which upheld a trial court order allowing depositions of expert witnesses. What the court of appeals actually did in that case was to affirm an order denying the defendant's motion to depose the expert but which did allow the defendant to have access to relevant supporting data and information upon which the expert based his opinion. The holding of the court was that the trial court's ruling was the type of discovery ruling within the discretion of the trial court and that there was no abuse of discretion which would be cause for reversal.

The Land Board court did state: "Depositions of expert witnesses are allowed by ORS 45.151." 18 Or App at 558. ORS 45.151 was repealed as part of the legislation which created the Oregon Rules of Civil Procedure and has not been part of the law of this state since 1979. At any rate, the court's reference to ORS 45.151 appears to be dicta as it played no part in the analysis leading to the court's conclusion.

The second case cited by Fred as upholding a trial court order allowing depositions of expert witnesses is Farmers Insurance Co. v. Hansen, 46 Or App 377, 611 P2d 696 (1980). This case cannot support that proposition because the only ruling made by the court of appeals was that, in the absence of any record in the trial court indicating the basis of that court's ruling, the court of appeals has no basis to inquire as to whether the trial court abused its discretion in a discovery matter. By so holding, the court of appeals affirmed a trial court decision which included the granting of a protective order denying the defendants' demand for pretrial discovery of expert witnesses.

Exhibit 2 to minutes of Council meeting held 10/13/90

The defendants' appeal from that order was denied. There is simply no analysis by the court of appeals in Farmers to support the contention that Oregon law allows the discovery of expert witnesses.

I urge you to read the cases Fred and I discuss. The Land Board opinion is very long, so I have attached only pertinent excerpts. The entire, very short Farmers opinion is attached. These cases have never been cited in Oregon for the proposition asserted by Fred. The fact is that there is no case which has held that expert witness discovery is allowable in this state. The fact that there is no case directly prohibiting such discovery means nothing more than the unwritten rule is so strongly based that no party has seen the need to take the issue up to an appellate court since the Oregon Rules of Procedure were promulgated.

lb
Attachment

Argued and submitted March 19, affirmed May 27, 1980

FARMERS INSURANCE GROUP OF OREGON,
Respondent,
v.
HANSEN, et ux,
Appellant.

(No. 77-2525-E-1, CA 15000)

611 P2d 696

Fire insurance carrier brought declaratory judgment action claiming that defendant insureds had caused a fire that damaged their home. After judgment was entered on jury verdict for plaintiff in the Circuit Court, Jackson County, James M. Main, J., defendants appealed, assigning as error trial court's granting of protective order denying their demand for pretrial discovery. The Court of Appeals, Joseph, P. J., held that in absence of transcript of oral argument or other showing of basis of trial court's ruling, it had no basis to inquire whether trial court abused its discretion.

Affirmed.

1. Pretrial procedure—Grant or denial of protective order discretionary with trial court

Granting or denial of a protective order is discretionary with trial court. ORS.41.616(4), 41.618 (Repealed).

2. Appeal and error—In absence of showing of basis of trial court's ruling, Court of Appeals had no basis to inquire as to abuse of discretion

In absence of transcript of oral argument or other showing of basis of trial court's ruling granting a protective order after defendants' demand for discovery of documents and records and identity of witnesses, Court of Appeals had no basis to inquire whether trial court abused its discretion. ORS 41.616(4), 41.618 (Repealed).

CJS, Appeal and Error § 1154.

Appeal from Circuit Court, Jackson County.

James M. Main, Judge.

Alan M. Lee, Klamath Falls, argued the cause and filed the brief for appellant.

John W. Eads, Jr., Medford, argued the cause for respondent. With him on the brief was Frohnmayer, Deatherage, deSchweinitz & Eads, Medford.

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JOSEPH, P.J.

Plaintiff insurance company brought a declaratory judgment action, claiming that defendant insureds had caused a fire in March, 1977, that damaged their own home. After a jury trial and verdict for plaintiff establishing that defendants intentionally caused the fire, defendants appeal and assign as error the granting of a protective order denying their demand for pretrial discovery.

On January 29, 1979, defendant made demand upon plaintiff for discovery of documents and records and the identity of witnesses.[1] At the same time, defendants by cover letter requested to depose plaintiff's expert witnesses regarding the origin of the fire. Plaintiff then filed a motion and affidavit seeking a protective order under ORS 41.616(4) and ORS 41.618, and defendants' attorney filed an affidavit in support of their demand. On March 19, 1979, the court heard arguments on the motion, but the transcript of that hearing has not been made part of the record before us. On March 23, 1979, the court granted *in part* the motion for a protective order, but made no findings of fact or law. The court allowed defendants to discover the names of plaintiff's witnesses but denied access to documents and records.

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[1] The demand for pretrial discovery listed the following in addition to a request for copies of all documents containing evidence relating to any matter within the scope of the case:

"1) Statements of any witnesses or parties having information about the above action or suit.

"2) The existence by identity and definition of any documents, writings, statements, tape recordings, photographs, pictures, moving pictures and video tapes or the like taken in the above of any relevant matter or from any party. The identity, description and location of the same and information as to how the Defendant can obtain the same.

"3) The description, nature, custody and condition and location of any books, documents or other tangible things concerning the above action or suit.

"4) The identity and location of any persons having knowledge of any discoverable matter pertaining to the above action or suit."

Defendants claim that the protective order rendered it impossible to ascertain in advance the basis of the opinion of one of plaintiff's experts that the fire was "disguised arson," and therefore defendants' defense was impaired.[2] The granting or denial of a protective order is discretionary with the trial court. In the absence of a transcript of the oral argument or other showing of the basis of the court's ruling, we have no basis to inquire whether the trial court abused its discretion. *Land Bd. v. Corvallis Sand & Gravel,* 18 Or App 524, 558-59, 526 P2d 469 (1974).[3]

Affirmed.

[2] Defendants also claim that after the protective order was granted in part, it would have been futile to seek to depose plaintiff's experts. The protective order did not by its terms prevent defendant from seeking to depose any of plaintiff's experts in advance of trial.

[3] This case was affirmed as modified on other grounds in 272 Or 545, 536 P2d 517, 538 P2d 70 (1975); that opinion was vacated in 429 US 363, 97 S Ct 582, 50 L Ed 2d 550 (1977), and on remand appears in 283 Or 147, 582 P2d 1352 (1978). The subsequent history of the case does not detract from the validity of the point for which we have cited it.

1, 2.

Argued July 15, affirmed in part; reversed in part September 9, 1974, petition for review pending

STATE ex rel STATE LAND BOARD, *Appellant–Cross-Respondent, v.* CORVALLIS SAND AND GRAVEL COMPANY (No. 21512), *Respondent–Cross-Appellant.*

526 P2d 469

Action at law in ejectment was filed by state to recover possession of 11 described parcels of real property constituting portions of riverbed and to recover damages for reasonable value of use of such parcels. The Circuit Court, Benton County, Richard Mengler, J., entered judgment awarding various parcels to each party, and an appeal and a cross-appeal were taken. The Court of Appeals, Schwab, C. J., held that under either the avulsive theory or the so-called exception to the accretion rule, title to newly submerged lands, after river started to flow through a new channel, remained in former owner and did not pass to state, but state held paramount navigational servitude; that title to various parcels was in state; that state could show value of lost rent through use of royalties based upon amount of material removed from river; fact that defendant admitted dredging operations in certain portions of river did not form an adequate basis for conclusion that it had removed amount found by trial court prior to July of 1963; and that damages for use of parcels of riverbed owned by state were "unliquidated" damages, and thus state was not entitled to interest as part of its damages, and, in light of all litigated factors with respect to damages which had to be determined by finder of fact, it could not be said that damages were a sum to be paid in lieu of performance of contract.

Affirmed in part; reversed in part.

Appeal and error—Evidence

1. On appeal in an action at law from findings of fact by trial court sitting without jury, court cannot place evidence on scales to see which side preponderates, but must confine itself to search of record for some evidence to support findings, and, if evidence is found, those findings cannot be disturbed.

Appeal and error—Credibility of witnesses—Testimony

2. Credibility of witnesses and weight to be given their testimony is matter for trial court, and will not be passed upon again by Court of Appeals in a law action.

Navigable waters—Equal-footing doctrine

3. Under equal-footing doctrine, title to lands beneath navigable waters passed from federal government to state upon its ad-

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basis that if the court chose to disbelieve defendant's testimony that it had not dredged in the area of Parcel 3 prior to July 1, 1963, the court was certainly at liberty to do so. There is no evidence in the record to support the assertion that any materials were taken from Parcel 3 prior to July 1, 1963, the effective date of the lease, let alone the 56,000 cubic-yard total found by the trial court. The fact that defendant admitted operating in certain portions of the river does not form an adequate basis for the conclusion that it removed the amount found by the trial court prior to July of 1963. This portion of the judgment must be reversed.

V. Interest on Damages

The trial court awarded the state $82,500 in damages for the reasonable value of the use of plaintiff's premises by defendant for the period June 7, 1959, to May 19, 1972. Interest was awarded only from the date of judgment because the damages were "unliquidated." The state contends that it was entitled as of right to interest as part of its damages.[Ø]

20, 21. The majority of jurisdictions allow interest as part of the damages for the detention of land in ejectment and other actions to gain possession of the land, such interest to run from the date of taking. Annotation, 36 ALR2d 337, 354 (1954). However, the Oregon courts have specifically stated in *Meyer v. Harvey Aluminum*, 263 Or 487, 501 P2d 795 (1972), that interest

Ø Interest is provided by ORS 82.010:

"(1) The legal rate of interest is six per cent per annum and is payable on:

"* * * * *

"(b) Judgments and decrees for the payment of money from the date of the entry thereof unless some other date is specified therein * * *."

is not allowable on unliquidated damages. Damages are unliquidated

> "* * * where they are an uncertain quantity, depending on no fixed standard, referred to the wide discretion of a jury, and can never be made certain except by accord or verdict." 25 CJS 615, 626, Damages § 2.

While it is not always easy to categorize damages as "liquidated" or "unliquidated," we hold that in the case at bar the damages fall into the "unliquidated" category. In *Rose City Transit v. City of Portland*, 18 Or App 369, 525 P2d 1325 (1974), we allowed interest from the date of the taking of the property in question. However, in *Rose City*, unlike in the case at bar, the amount and nature of the property taken, the time of taking and the ownership prior to the taking were not at issue. Here, there was active litigation on the amount and location of gravel removed and the ownership of the bed from which the gravel was removed, as well as the value of the gravel removed. In light of all these factors which had to be determined by the finder of fact, it cannot be said that these damages were a sum to be paid in lieu of performance of the contract. *See, Medak v. Hekimian*, 241 Or 38, 404 P2d 203 (1965). This portion of the trial court's order is affirmed.

VI. Deposition of the State's Expert

On September 20, 1971, defendant filed a motion seeking an order directing that defendant be able to take the deposition of Ronald McReary, the state's expert witness. Defendant further requested that the expert answer all questions put to him relative to the issues of the case and particularly his opinions as to the grounds on which the state claimed ownership of

Ex 2-5

each of the parcels of real property described in the complaint. Further, defendant sought to have the expert produce for examination all physical material, reports, photographs, and other physical evidence from which he obtained such facts forming the basis of his opinion. Argument on the motion was heard on September 24, 1971. However, defendant has not designated the transcript of said arguments as part of the record before this court. The trial court denied defendant's motion to depose the expert, but did allow it to have access to relevant supporting data and information upon which the expert based his opinion.

Depositions of expert witnesses are allowed by ORS 45.151. However, the right to take a deposition may be limited:

> "After notice is served for taking a deposition upon motion seasonably made by any party * * * and upon notice and for good cause shown, the court in which the action, suit or proceeding is pending may make an order that the deposition shall not be taken * * * or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters * * *." ORS 45.181.

22. It is clear that the federal rules of civil procedure relating to discovery and depositions served as a model for the Oregon rules. *Richardson-Merrell, Inc. v. Main,* 240 Or 533, 402 P2d 746 (1965). Under the federal rules, and, thus, by implication the Oregon rules, the granting or denial of a protective order is within the discretion of the trial court. *See,* 8 Wright and Miller, Federal Practice & Procedure 267, § 2036 (1970). And, since it is discretionary, only an abuse of that discretion would be cause for reversal. *General Dynamics Corp. v. Selb Manufacturing Co.,* 481 F2d

1204 (8th Cir 1973). In the absence of a transcript of the oral argument or a showing of a basis of the court's ruling, there is no way this court can say that the trial court abused its discretion and that "good cause" has not been shown.

VII. Splitting of Area into 11 Parcels

In its original complaint, the state described the disputed property as one tract. In its first amended complaint the state split the disputed property into 11 separate parcels and alleged a separate cause of action as to each parcel. The defendant moved to strike the first amended complaint, demurred to it and set up as affirmative defenses both in bar and abatement of the state's alleged arbitrary splitting of a single cause of action.

23, 24. The "splitting of a cause of action" consists in the commencement of an action for only a part of a cause of action. *Wood et ux v. Baker et ux,* 217 Or 279, 284, 341 P2d 134 (1959). And, as a general rule, an entire cause of action cannot be divided to be made the subject of two or more actions. 1 Bancroft, Code Practice and Remedies 586, § 384 (1927). One reason for the general prohibition against the splitting of a cause of action is stated in 1 Bancroft, supra at 586-87:

> "* * * If the rule were otherwise, one could split his demand into innumerable parts, thereby multiplying litigation and adding indefinitely to the costs. Moreover, the law does not favor a multiplicity of suits, and requires that all the matters in controversy between parties which may fairly be included in one action be so included."

Accord, Wood et ux v. Baker et ux, supra. Likewise, in *Coos Bay Oyster Coop. v. Highway Com.,* 219 Or

October 12, 1990

M E M O R A N D U M

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: **Fred Merrill**

RE: Empirical Data on Expert Discovery

As requested, I have examined the current (post-1960) literature on discovery seeking any empirical data on discovery of expert witnesses. As might be expected, there is little empirical information available.

The best empirical study on discovery generally is a book by William Glaser, Pretrial Discovery and the Adversary System (Russell Sage, 1968). It summarizes the data gathered by Columbia University in a study of discovery in federal courts. These data were used by the Judicial Conference in preparing the 1970 amendments to the federal discovery rules. The data are responses to mail questionnaires and interviews from a random sample of attorneys in the United States. The study concluded that broad discovery does not increase settlements, or reduce the length of cases or trials, or reduce appeals. Broad discovery, however, does lead to an improvement of the quality of trials in the form of a more systematic and complete presentation of the facts to the judge or jury. Glaser, supra, 114-116.

The Glaser report says very little about discovery of expert witnesses. He does say that the amount of expert discovery is divided equally between plaintiffs and defendants and that most disputes about the scope of discovery arise out of discovery attempts by the plaintiffs. Glaser, supra, 126.

The only other empirical study I could find was designed by Professor Michael Graham, then at the University of Illinois Law School. In 1976, Graham sent a questionnaire to all federal judges and a random sample of attorneys in the United States, asking about their experience with Federal Rule 26(b)(4), which had been adopted in 1970. Graham, "Discovery of Experts under Rule 26(b)(4) of the Federal Rule of Civil Procedure: Part Two, An Empirical Study and a Proposal," 1977 University of Illinois Law Forum 169 (1977). In 1985, Professor David Day of the University of South Dakota Law School sent a similar questionnaire to all attorneys practicing in South Dakota and to all state court trial judges in South Dakota. The study was directed to experience in the state trial courts with a state rule identical to FR 26(b)(4). Day, "Expert Discovery Under Federal Rule 26 (b)(4): An Empirical Study in South Dakota," 31

Exhibit 3 to minutes of Council meeting held 10/13/90

South Dakotal Law Review 40, (1985); Day and Dixon, "A Judicial Perspective on Expert Discovery Under Federal Rule 26(b)(4); An Empirical Study of the Trial Court Judges and a Proposed Amendment," 20 John Marshall Law Review 377 (1977). Day's findings agree with Graham's findings in almost every respect.

Federal Rule 26(b)(4)(A)(i) provides that, for each person expected to be called as an expert witness by a party, other parties may, by interrogatories, secure the identity, subject matter of testimony, the substance of facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. It also provides that the court may order further discovery as the court may deem appropriate.

Graham found that in practice the response to the interrogatories did not provide sufficient information to prepare for cross-examination of the expert, and the parties routinely engaged in further discovery of expert witnesses. Graham, supra, 173. He found that in 72% of the cases involving experts, reports prepared by the experts were furnished, in 60% of the cases the expert's deposition was taken, and in 48% of the cases both a report and deposition were used. He calculated that, in 84% of the cases involving experts, there was discovery of experts beyond the interrogatory. Graham, supra, 176. Eighty percent of the respondents also reported that the procedures followed in their state courts were substantially identical to the federal court procedure. Graham, supra, 184.

Questions relating to the timing and sequence of discovery did not produce consistent results. It did appear that frequently depositions and furnishing of reports was mutual and took place after each side had completed its selection of experts. Graham, supra, 179-181. In many cases, however, plaintiff selected its expert first and defendant used the discovery of such expert to decide whether to settle and whether defendant needed to retain an expert. Graham, supra, 184-186. There also was evidence that some attorneys avoided early discovery by postponing final selection of experts until just before trial. Graham, supra, 186-188.

Graham concluded that there was no evidence that attorneys were using discovery unfairly, i.e. taking advantage of the opponent's diligence to prepare their own cases. Graham, supra, 189-192. Graham asked the attorneys and judges whether they thought that the practice in their district permitted adequate preparation for cross-examination and rebuttal at trial. Ninety-four percent of those responding said that it did. Graham, supra, 182. He did not ask whether the respondents thought discovery was abusive, increased expense needlessly, or deterred experts from testifying. He did ask whether the respondents wanted the procedure for discovery of expert witnesses to remain as it was in their district. Ninety-one percent of the

Ex 3-2

respondents responded affirmatively. Most of those responding "no" actually wanted more extensive discovery or stricter sanctions for failure to allow discovery. Graham concluded that 98% of the replies indicated either satisfaction with the current practice or a desire for even more discovery. Graham, supra, 182-183. He also asked if the discovery of medical experts was the same as discovery of experts generally. Seventy-four percent of the respondents said that it was. Graham, supra, 183.

EX 3-3

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October 10, 1990

BY EXPRESS MAIL

Professor Fredric R. Merrill
University of Oregon
School of Law
Eugene, OR 97403

Re: Oregon Council on Court Procedures--Discovery of Experts

Dear Professor Merrill:

I understand the issue of discovery of experts is on the agenda for the meeting this weekend of the Council on Court Procedures. Unfortunately I cannot be there to present my views. A large part of my practice is devoted to defending product liability actions.

I think it is fundamentally unfair to permit plaintiff's counsel to take the depositions of the defendant's engineers and technical personnel as a part of their discovery about a product and at the same time deny the defendant any pretrial discovery of plaintiff's theory of defect other than what is alleged in the complaint. Enclosed is a memorandum which I recently filed in a Honda case concerning this issue.

As far as I can find, there is nothing in the Oregon Rules of Civil Procedure at the present time that prevents taking the deposition of an expert. In fact, the Land Bd. v. Corvallis Sand & Gravel case, 18 Or App 524, 558 (1974), specifically recognizes that expert depositions were allowed by ORS 45.151 which is now ORCP 39 A. In spite of that case, a number of trial court judges refuse to allow such discovery.

In my experience none of them have stated a reason except for Judge Londer who rested his opinion on ORCP 47 E, even though the matter before him did not involve a summary judgment motion.

Exhibit 4 to minutes
of Council meeting held 10/13/90

LTMERRILL

Ex 4.1

I represent an Oregon manufacturer that was recently sued in four different jurisdictions involving one of its products. The first three of the cases were filed in other states. In all three of those cases there was full discovery of the experts. The fourth case was filed by an out-of-state plaintiff against the company in the Circuit Court for Multnomah County. Since the defendant was an Oregon corporation it could not remove to federal court. After successfully defending the first three actions, I had to tell my client's president that in his own state we had to go to trial without knowing who the plaintiff's expert was and we had only a general idea of what the plaintiff was claiming was defective about the product. The client's business is located on Hayden Island and I pointed out to the president that if he moved his operation a mile north across the Columbia River he would not be faced with that dilemma in the future. He is now seriously considering moving his manufacturing operation to Washington for that reason.

Oregon is the only state that does not allow for discovery of experts. Until recently New York also did not allow for such discovery. The argument against discovery in New York was the same one the plaintiffs' attorneys make here. If they have to disclose their experts in medical malpractice cases the experts will be intimidated by their colleges not to testify at trial. In order to remedy that situation New York, when it adopted discovery of experts, carved out an exception in medical malpractice cases so that the plaintiffs do not have to disclose the identity of their experts. They only disclose the expert's qualifications, opinions, and the factual basis for those opinions. If the plaintiffs' counsel have problems in medical malpractice cases in Oregon a similar solution might be adopted here. The plaintiffs' bar certainly has no problem finding experts in other types of cases that are immune to

intimidation. The problems arising in medical malpractice cases should not deny the valid need for discovery of experts in a wide variety of other cases.

Very truly yours,

Phillip D. Chadsey

PDC:jss
Enclosure
cc: Mr. Ronald L. Marceau (By Express Mail)
Mr. John E. Hart

LTMERRILL

EX 4-3

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICKEY C. WEBB, Plaintiff, v. HONDA MOTOR CO., LTD.; HONDA RESEARCH AND DEVELOPMENT CO., LTD.; and AMERICAN HONDA MOTOR CO., INC.; Monte Wiens and Michael Wiens dba BEND HONDA AND MARINE CENTER, Defendants.	Civil No. A8906-03356 HONDA DEFENDANTS' MOTION TO STRIKE COMPLAINT DUE TO THE PLAINTIFF'S FAILURE TO PROVIDE DISCOVERY (Oral Argument Requested)

Pursuant to ORCP Rule 46, defendant American Honda Motor Co. moves the Court for its order striking the plaintiff's complaint and awarding the moving defendant expenses, including its attorneys' fees in bringing this motion, due to the plaintiff's refusal to comply with the attached notice of deposition. See also correspondence attached to the Declaration of Phillip D. Chadsey and the accompanying memorandum of law in support of this motion.

Defendant estimates that 15 minutes will be required for oral argument on its motion. Defendant requests official court reporting services at the hearing.

Dated: September 28, 1990.

Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Defendants
Honda Motor Co., Ltd., Honda Research and Development Co., Ltd., and American Honda Motor Co., Inc.

Trial Attorney:
Phillip D. Chadsey, OSB NO. 66028

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICKEY C. WEBB, Plaintiff, v. HONDA MOTOR CO., LTD.; HONDA RESEARCH AND DEVELOPMENT CO., LTD.; and AMERICAN HONDA MOTOR CO., INC.; Monte Wiens and Michael Wiens dba BEND HONDA AND MARINE CENTER, Defendants.	No. A8906-03356 MEMORANDUM IN SUPPORT OF DEFENDANT AMERICAN HONDA MOTOR CO., INC.'S MOTION TO STRIKE COMPLAINT PURSUANT TO ORCP RULE 46

STATEMENT OF THE ISSUE

The Defendant, American Honda Motor Co., on September 13, 1990, pursuant to ORCP Rules 36 A, 36 B and 39 C served a notice of deposition on the plaintiff's counsel requiring them to produce for deposition those persons retained on behalf of the plaintiff that have knowledge of the allegations contained in the plaintiff's complaints related to alleged defects in the ATV.

On September 18, 1990, Raymond Thomas, one of plaintiff's counsel, sent a letter to Phillip Chadsey, the moving defendant's counsel, objecting to the notice on the basis of ORCP Rule 36 B(3) does not allow for discovery of experts.[1] In response, on September 19, 1990, Mr. Chadsey sent

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[1] Judge Londer, in the case of Vaughan v. Mazda Motor Corp., Multnomah County, held that on the basis of ORCP 47 E, which is not an issue in this case, expert discovery was not (continued...)

to Mr. Thomas a letter pointing out that there is nothing in ORCP Rule 36 B(3), which is identical with FRCP 26(b)(3), which prohibits the taking of an expert's deposition and that the Oregon Court of Appeals has specifically held that a party is entitled to depose the opposing expert. Land Bd. v. Corvallis Sand & Gravel, 18 Or App 524, 558, 526 P2d 469 (1974) ("Depositions of expert witnesses are allowed by ORS 45.151 [now ORCP 39 A].")

Mr. Thomas then responded with a second letter on September 25, 1990, and without stating why the Corvallis Sand & Gravel case was not controlling on this issue or citing any authority which supports that plaintiff's position, merely stated that plaintiff would not produce his expert(s) for deposition because "Oregon state practice does not provide for taking of depositions of expert witnesses."

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[1](...continued)
available in Oregon. Judge Londer's ruling in the Vaughan case is not binding upon this court, which would be responsible for any error on appeal. Highway Comm. v. Superbilt Mfg. Co., 204 Or 393, 403, 281 P2d 707 (1955) ("if error is committed *** that error is chargeable to the trial judge and not the presiding judge."); State ex rel Harmon v. Blanding, 292 Or 752, 756, 644 P2d 1082 (1982) ("the court properly reconsidered its ruling" citing Superbilt; supra, 204 Or 393); Valley Inland Pac. Constructors v. Clack. Water District, 43 Or App 527, 533, 603 P2d 1381 (1979) ("the trial judge is responsible for correcting prior rulings of this sort [lack of discovery] to avoid retrial" again citing Superbilt, supra, 204 Or 393)).

A. Discovery of the Identity and Opinions of Expert Witnesses Is Permitted by the Oregon Rules of Civil Procedure

The scope of discovery in Oregon is governed by ORCP 36 B(1):

> "For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, and other tangible things, and the identity and location of persons having knowledge of any discoverable matter." (Emphasis added.)

1. The Plain Meaning of ORCP 36 B(1) Permits Pre-trial Discovery of Expert Witnesses

Whether the identity and opinion of the expert witness is protected by a privilege is discussed infra at § A. 6 & 7. Limitation to discovery, other than privilege, is governed by ORCP 36 C, which provides that the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Discovery of the identity, knowledge, and opinion of an expert witness cannot logically be said to cause any more annoyance, embarrassment, oppression, or undue burden or expense[2] than discovery of the identity and testimony of any other witness.

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[2] There may be colorable argument that deposing the expert witness would cause an additional expense to the party that employed him/her; however, ORCP 36 C(9) provides a vehicle for transferring that expense to the party seeking discovery in appropriate cases.

Of course, if discovery is allowed, it must be by one of the methods authorized by ORCP 36 A: depositions; production of documents or things, or permission to enter upon the land or other property, for inspection and other purposes; physical and mental examinations; or requests for admission. Of these, the only viable method is a deposition, because, unlike the federal courts, interrogatories are not permitted. Compare ORCP 36 and FRCP 26(b)(4). The Supreme Court has held that such discovery cannot be had by a request for production of a list of the identity and location of any and all persons who have discoverable information concerning this case"; however, it did not rule out discovery of the information by other means, such as a deposition. State ex rel Union Pacific Railroad v. Crookham, 295 Or 66, 68, 663 P2d 763 (1983).

The holding in Crookham was that ORCP 43 could not be used to require an adversary to produce a witness list. 295 Or at 69-70. The Crookham Court noted, however, that the scope of discovery was governed by ORCP 36 B(1). 295 Or at 68. Since neither Rule 36 B(1), nor any other rule, prohibits pretrial discovery of the identity, knowledge, and opinions of expert witnesses, and to the contrary Rule 36 B(1) affirmatively allows discovery, then there is no basis for denying defendants' request for discovery in this case.

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2. There Is Nothing in the Legislative History of ORCP 36 B(1) That Would Negate the Plain Meaning of the Statute

The Council on Court Procedures ("Council"), established by the Oregon Legislature in 1977 to provide a permanent rule-making body for all courts in the state, initially proposed adopting a rule similar to FRCP 26(b)(4), expressly providing for discovery of the identity and opinions of expert witnesses. Wise & Alexander, "Discovery of Experts: A Call for Change in Oregon," 20 Willamette L Rev 223, 238, 241 (1984). But strong opposition caused the Council to modify its proposal to require parties to "merely *** upon request, identify the expert witnesses expected to be called at trial." Id. at 241. The Legislature was unable to agree on a wording for that or any other such provision, and in the end elected to omit entirely any specific reference to expert witnesses. It neither expressly prohibited nor expressly permitted discovery of expert witnesses. The result was to leave the scope of discovery as governed by Rule 36 B(1) unchanged; therefore, expert witnesses who are to testify at trial must be treated the same as any other witness for whom no testimonial privilege exists.

The language recommended by the Council and rejected by the Legislature, rather than expanding the scope of Rule 36 B(1), would have restricted it. The recommended clause was virtually identical to Rule 26(b)(4) of the Federal Rules of

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Civil Procedure, which places restrictions on the otherwise liberal scope of discovery permitted by FRCP 26(b)(1).[3]

> "*** [I]t has been recognized that [Federal] Rule 26(b)(4) was drafted as an exception to the general provisions of Rule 26(b)(1) which permit, without court order, discovery of any matter which is not privileged and which is relevant to the subject matter of the pending action *** and that Rule 26(b)(4) was intended to constitute a limitation upon the more general discovery provisions contained in [Federal] Rules 27 through 37." Annotation, "Pretrial Discovery of Facts Known and Opinions Held by Opponent's Experts Under Rule 26(b)(4) of Federal Rules of Civil Procedure," 33 ALR Fed 403, 414 (1977) (emphasis added).

The Legislature's reasons for not adopting the rule recommended by the Council are matters of pure speculation and perhaps as numerous as there are legislators. There was much confusion among Council members and legislators concerning the state of the law in Oregon at that time regarding discovery.[4]

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[3] The scope of delivery permitted by FRCP 26(b)(1) and that permitted by ORCP 36 (B)(1) are virtually identical.

[4] One member of the Council, Judge Wendell H. Tompkins, Linn County Circuit Court, told the Joint House-Senate Committee on the Judiciary (Joint Committee) that "under Oregon Procedure [then existing] the litigants are not entitled to depose the opposing expert with respect to his expert opinion." Minutes of Joint House-Senate Committee on the Judiciary Hearings on Oregon Rules of Civil Procedure, Mar. 8, 1979 at 2. However, the Executive Director of the Council, Professor Fred Merrill, disagreed with that position. He said that as far as he could read the law of Oregon, such was not the case and that there was no absolute immunity from discovery of an adversary's expert. Minutes of the Joint House-Senate Committee on the Judiciary Work Session Oregon Rules of Civil Procedure, Apr. 5, 1979 at 10.

It would be impossible to state with any degree of certainty the "intent" of the Legislature in declining to adopt a rule comparable to Federal Rule 26(b)(4). It should be noted, however, that 26(b)(4) restricts discovery of experts to interrogatories, unless a court, upon motion, approves discovery by other means. Such a restriction would be inappropriate in Oregon because the rules here do not provide for interrogatories as a discovery device. The 1979 Legislature in adopting the federal rules of civil procedure omitted both FRCP 33 which authorizes interrogatories and the limitation in FRCP 26(b)(4) that expert discovery is usually to be done by interrogatory.

But this court need not concern itself with idle speculation regarding any perceived "intent" of the Legislature. The legislation, as passed, contains the present Rule 36, the plain meaning of which allows broad discovery, including discovery of experts. There are no restrictions placed on discovery of experts. The Oregon Court of Appeals has noted that "[t]he best evidence of the purpose of a statute is its language." Roberts v. Gray's Crane & Rigging, 73 Or App 29, 697 P2d 985 (1985). And this court has said:

> "Whatever the legislative history of an act may indicate, it is for the legislature to translate its intent into operational language. This court cannot correct clear and unambiguous language for the legislature so as to better serve what the court feels was, or should have been, the legislature's intent." Monaco v. U.S.

Fidelity & Guar., 275 Or 183, 188, 550 P2d 422 (1976).

The language of the statute does not provide for a prohibition on discovery of the identity and opinions of expert witnesses and, as the United States Supreme Court has noted, a party "cannot be faulted for taking the legislature at its word." Wardius v. Oregon, 412 US 470, 478, 93 S Ct 2208, 37 L Ed 2d 82, 697 P2d 985 (1973).

3. Oregon Law at the Time the ORCP Was Adopted Permitted Deposition of an Adversary's Expert Witnesses

Despite the apparent confusion of the members of the Legislature concerning the state of Oregon law regarding discovery of experts when the ORCP was adopted, such discovery by deposition was in fact allowed. In Land Bd. v. Corvallis Sand & Gravel, 18 Or App 524, 526 P2d 469 (1974), aff'd as modified, 272 Or 545 (1975), vacated on other grounds and remanded, 429 US 363 (1977), on remand, 283 Or 147 (1978), the court held that "[d]epositions of expert witnesses are allowed

by ORS 45.151 [the predecessor statute of ORCP 39]."[5] 18 Or App at 558.

In Farmers Ins. v. Hansen, 46 Or App 377, 611 P2d 696 (1980), defendants requested to depose the plaintiff's expert witnesses regarding the origin of the fire which formed the basis of the lawsuit. The trial court granted a protective order which partially limited the defendants' access to this discovery, but did not prevent the defendants from seeking to depose any of the plaintiff's experts in advance of trial. Id. at 380 n.2. It is significant and relevant to this case that neither the trial court nor the reviewing court ever suggested that the deposition of an expert witness was improper. Indeed, both the Corvallis Sand & Gravel and Farmers Insurance cases suggest that the Court of Appeals views discovery of experts alongside all other discovery. That is, it is broadly available and limited only by a protective order of the court

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[5] ORS 45.151 provided:

> "In addition to the cases otherwise provided by law, the testimony of any person, witness or party, in or out of this state, may be taken by deposition in an action at law or suit in equity at any time after the service of the summons or the appearance of the defendant, and in a special proceeding at anytime after a question of fact has arisen."

Like the current rules, "[i]t is clear that the federal rules of civil procedure relating to discovery and depositions served as a model for the Oregon rules" in effect at the time of that case. 18 Or App at 558.

for good cause shown. The plaintiff has not sought a protective order in this case, because apparently he has no basis for claiming that there is not good cause for deposing his experts.

4. ORCP 39 Authorizes the Deposition of Expert Witnesses

ORCP 39 A provides that

> "any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C(2) of this Rule." (Emphasis added.)

Not only does ORCP 39 allow the taking of the deposition of any person, including experts, but the person need not be identified by name in the notice of deposition.

> "A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs." ORCP 39 C.

Nothing in Rule 39 restricts the deposition of expert witnesses. The rule is as broad as Rule 36 and Honda should be

able to depose the expert in the same manner as it can depose any other witness.

5. Construing the Rules To Allow Discovery of Expert Witnesses Is Mandated by ORCP 1 B

The Legislature has given the courts guidance regarding the construction of the rules.

> "These rules shall be construed to secure the just, speedy, and inexpensive determination of every action." ORCP 1 B.

Cross-examination of an expert witness, where his theories and factual bases may be tested, is essential to the just determination of an action. And it is generally accepted that "'advanced knowledge through pretrial discovery of an expert witness's basis for his opinion is essential for effective cross-examination.'" Smith v. Ford Motor Co., 626 F2d 784, 793 (10th Cir 1980) (quoting Graham, "Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study," U Ill L F 895, 897 (1976)).

In addition to a just determination, pretrial discovery will also allow for a speedier determination once the trial has begun, because it will allow the cross-examiner to focus on the appropriate areas of the expert's testimony, rather than engaging in a lengthy "fishing expedition" in open court.[6] Although some may argue that allowing pretrial

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[6] ORE 403 provides for the exclusion of relevant evidence due to "surprise." See 1981 Conference Committee Commentary to (continued...)

discovery of expert witnesses would lead to greater expense than if such discovery were not allowed, there are two countervailing factors that negate such argument. First, the expense can be transferred to the party seeking discovery, as mentioned in note 1, supra. Second, the benefits accruing to the "just" and "speedy" aspects greatly outweigh any detriment to the "expense" aspect.

6. Oregon Law Does Not Recognize a Privilege for the Knowledge and Opinions of Expert Witnesses

"Testimonial privileges limit testimony to safeguard and promote certain confidential relationships, but in doing so they inhibit the search for truth and should therefore be strictly construed." State v. Moore, 45 Or App 837, 841, 609 P2d 866 (1980); accord Triplett v. Bd. of Social Protection, 19 Or App 408, 413, 528 P2d 563 (1974). "The burden of showing the applicability of the privileges is on the party seeking to exclude testimony." 45 Or App at 841-42, (citing Groff v.

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[6](...continued)
the rule. This is based on two Oregon Supreme Court decisions. Carter v. Moberly, 263 Or 193, 501 P2d 1276 (1972); Krause v. Eugene Dodge, Inc. 265 Or 486, 509 P2d 1199 (1973). At least one trial judge (now Justice Unis) has recessed a trial after an expert has testified on direct examination to allow the opponent to take a discovery deposition before cross-examination. This is inefficient from a judicial standpoint and still does not give the opponent sufficient time to prepare a rebuttal where the expert has done testing or relies upon scientific data outside the record that is subject to challenge. See 1981 Conference Committee Commentary to ORE Rule 705. Jim Fisher Motors, Inc. v. Pacific Northwest Bell Telephone Company, Multnomah Civ. Co. #A8211-07109.

S.I.A.C., 246 Or 557, 425 P2d 738 (1967)). There is no privilege listed in the Oregon Evidence Code for "experts" or "expert witnesses," although the Code expressly preserves existing common law privileges, unless otherwise repealed by the Legislature. OEC 514. Therefore, if the identity, opinions, and knowledge of the expert are to be protected as privileged, they must either find a place under one of the existing privileges or be clearly established in the common law.

In Nielsen v. Brown, 232 Or 426, 374 P2d 896 (1962) the court was confronted with a situation in which a defendant in a personal injury case employed a physician to examine the plaintiff to determine the extent of her injuries. The plaintiff then sought to have the physician testify at trial as an expert witness. The court held that in such situation, "no attorney-client relationship existed." Id. at 431.

> "*** The plaintiff was not [the defendant's lawyer's] client and [the physician] was not a client, but an agent, of the defendant." Id.

As the court noted in the context of its discussion of the applicability of the work product rule, it was not dealing with a situation where a party was seeking to "compel his adversary to produce the report of an expert employed by the latter"; rather, the "question *** [was] whether the expert can be called as a witness by the party who did not employ him" and compel him "to testify concerning his investigation,

examination, etc., and express his opinion on a question within his professional knowledge." Id. at 436 (emphasis added). The Nielsen court held that the expert could be required to so testify and that the information was not privileged.

7. Discovery of the Opinions and Knowledge of Expert Witnesses Is Not Protected Under the Work Product Rule

Hickman v. Taylor, 329 US 495, 67 S Ct 385, 91 L ed 451 (1947) is the "locus classicus of the 'work product' doctrine." Lacy, supra, 49 Or L Rev at 203. Hickman was the basis for FRCP 26(b)(3), the section pertaining to work product of the attorney.[7] See generally Advisory Committee on [Federal] Rules (1970), "Notes on Rule 26(b)," Federal Civil Judicial Procedure and Rules (West 1988).

Following the Hickman case, there was widespread speculation regarding whether that decision should be extended to protect the mental impressions, opinions, and conclusions of the client or his investigators. Friedenthal, "Discovery and Use of an Adverse Party's Expert Information," 14 Stanford L Rev 455, 471 (1961-62). Many commentators and courts believed that a Third Circuit case, Alltmont v. United States, 177 F2d 971 (3d Cir 1949), did just that. Friedenthal, supra, 14 Stanford L Rev at 471. But that position "was severely criticized by both courts and legal commentators who argued

[7] ORCP 36 B(3) is substantially similar to FRCP 26(b)(3); therefore, cases construing the Federal rule should be equally applicable to the Oregon rule.

that because the observations of experts were distinct from the legal analysis of attorneys, they should not be sheltered from disclosure under the work product doctrine." Wise & Alexander, supra, 20 Willamette L Rev at 233. For example, Professional Friedenthal argued:

> "Whatever the effect of the Hickman doctrine on agents in general, there seems little justification for extending work product to cover expert information. The opinions and conclusions of an expert are not those which Hickman sought to protect. Unlike the attorney's impressions or those of the client or his investigators as to the value of certain evidence or the veracity of a potential witness, the opinions and conclusions of an expert constitute evidence in themselves, and may be the only way in which to establish facts material in the case. Indeed, the report of an expert to the attorney is sought for the very purpose of obtaining such facts and it can hardly be said that once in the hands of the attorney the information becomes 'protected conclusions' any more than does an eyewitness account by any other witness. The demoralizing aspects of discovery foreseen in the Hickman case are certainly not present when a deposition is taken, since the only danger is that the expert might trip himself should he change his testimony at the trial. It is apparent that in this respect the expert is no different from any other witness who has information relevant to the case. Friedenthal, supra, 14 Stanford L Rev at 472-73 (emphasis added; citations omitted; footnotes omitted).

Prior to the adoption of the federal rule governing discovery of expert testimony, at least one federal court had ruled consistent with Friedenthal's position. In allowing discovery of the opinion of appraisers hired by the federal

government to assess the value of property being condemned, the Ninth Circuit rejected the idea that the experts' opinions were protected by the work product doctrine. The court noted:

> "Discovery of this information from the appraisers[8] is not likely to produce the evils against which Hickman is said to be directed. There is neither invasion of the privacy of the attorneys' files or thoughts nor direct interference with the attorneys' preparations for trial, and the attorneys are not cast in the role of witnesses. No grave danger of inaccuracy or untrustworthiness is introduced, for in the main, the appraisers testify to matters within their own knowledge, not to statements taken from others. In any event, if the appraisers have relied upon inaccurate data, that fact itself is highly relevant in evaluating the appraisers' opinion testimony. *** Finally, it is unlikely that discovery will lead either party to refrain from using appraisers in condemnation cases since their testimony is usually essential and cannot be foregone simply to avoid discovery. If a substantial possibility of these or other adverse consequences *** appears to exist in a given case the appropriate reaction is a protective order drawn to prevent the abuse, not a broad foreclosure of discovery." United States v. Meyer, 398 F2d 66, 74-75 (9th Cir 1968) (emphasis added; footnote omitted).

This court took a slightly different approach than Friedenthal in Nielsen, supra, 232 Or at 426. The court's approach is consistent with the wording of the statutory version of the work product rule, which states:

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[8] Although the "expert" in that case was an appraiser, the teachings are equally applicable to experts in products liability cases.

> "Subject to the provisions of Rule 44,[9] a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representatives *** only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions' opinions, or legal theories of any attorney or other representative of a party concerning the litigation." ORCP 36 B(3) (emphasis added).

The Nielsen Court cited with approval the opinion in Grand Lake Drive In, Inc. v. Superior Court, 179 Cal App 2d 122, 3 Cal Rptr 621, 627 (1960), in which the court, referring to the Hickman case said, "[t]here the material sought was wholly from the files of the attorney, all the product of his effort, research, and thought." Nielsen v. Brown, supra, 232 Or at 435-36.

> "*** And so the [Grand Lake Drive In] court held in that case that an engineer who, at the request of the attorney for the defendant in a personal injury case, made an inspection and tests of the premises involved, would be required under the California civil discovery procedures (which are patterned after the Federal rules) to testify in a pretrial deposition as to his observations and his conclusions

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[9] Rule 44 deals with the physical and mental examinations of persons and the reports of those examinations.

> as an expert witness from the making of such tests." Id. at 436 (emphasis added).

In holding that the testimony of the physician in Nielsen would not be protected by the work product rule, the Court said:

> "*** Neither the Hickman case nor any other that we have seen is authority for the proposition that the information and knowledge in the mind of the expert must be kept there and away from the jury on the theory that they are the work product of the lawyer." Id. at 437.

Thus Nielsen is solid foundation for the proposition that Oregon law does not recognize a rule that protects from discovery the information and knowledge in the mind of an expert witness as the work product of the attorney. If discovery were to be denied, it would have to be on some other ground than the work product rule.

B. Denying Discovery of Plaintiff's Expert Witnesses in This Case Would Violate Honda's Constitutional Rights

1. Within the Context of the Oregon Rules of Civil Procedure, Pretrial Discovery of the Opinions and Knowledge of Expert Witnesses is Mandated by the Oregon Constitution

The Oregon Constitution, Article I, §§ 10 and 20, provides guarantees of fundamental fairness to litigants. Section 10 provides that "justice shall be administered openly and *** completely." There can be no plainer meaning of "justice" than fundamental fairness. It is patently unfair to allow a plaintiff in a products liability case to have full access to a defendant's design and manufacturing information so

that he may employ a battery of experts to scrutinize it carefully over an extended period of time in an attempt to build a case and at the same time not allow the defendant adequate information with which to defend itself.[10] For a more detailed discussion of the fundamental fairness issue, see § III-B-2, infra.[11]

Section 20 guarantees that "[n]o law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."[12] If the Oregon Rules of Civil Procedure were to be construed to deny discovery of the identity, opinions, and knowledge of expert witnesses in products

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[10] It has been appropriately noted that "[t]he most convincing evidence [in a products liability case] is an expert's pin-pointing the defect and giving his opinion on the precise cause of the accident after a thorough inspection." Stewart v. Budget Rent-A-Car Corporation, 470 P2d 240, 243 (Hawaii 1970).

[11] Although defendant does not contend that either § 10 or § 20 is identical to the guarantees of the Fourteenth Amendment to the Constitution of the United States, the essence of each is a guarantee of fundamental fairness. Therefore, the discussion, infra, related to fundamental fairness requirements of the Fourteenth Amendment is generally applicable to the same issue under the State Constitution, except, of course, that the authorities cited, while persuasive, are not controlling. The lack of state authorities is not harmful to defendants' cause, however, as the applicability of the fundamental fairness doctrine to the discovery of experts in Oregon is apparently an issue of first impression. Thus, it is appropriate for this court to look to other jurisdictions for guidance.

[12] This wording implies that § 20 is both a "Privileges and Immunities" clause and an "Equal Protection" clause.

liability cases, such construction would render the rule invalid under § 20. The Oregon Court of Appeals has held,

> "In contrast to the analysis under the federal Equal Protection Clause, a balancing test is properly employed in analyzing a constitutional claim presented under Article I, section 20, where, as here, important interests are at stake. In that balancing, the detriment to affected members of the class is weighed against the state's ostensible justification for the disparate treatment." Planned Parenthood Assn v. Dept of Human Res., 63 Or App 41, 58, 663 P2d 1247 (1983), aff'd, 297 Or 562, (1984) (citing Olsen v. State ex rel Johnson, 276 Or 9, 20, 554 P2d 139 (1976); 16 Cooper v. OSAA, 52 Or App 425, 629 P2d 386, rev denied, 291 Or 504 (1981) (emphasis added).

The "important interest" at stake in this case is the interest in justice and fundamental fairness. This cannot be accomplished unless the parties to the litigation are on a "level playing field." The state has articulated no interest of its own that would outweigh this important interest. Therefore, if the Rules of Civil Procedure were interpreted to give an obvious advantage to the plaintiff in a products liability case, the constitutional "balance" would tip heavily in favor of declaring such a provision unconstitutional under § 20. Denying discovery of plaintiff's expert witnesses, the most important aspect of the plaintiff's case, without protecting defendants' design and manufacturing information would give the plaintiff that obvious advantage. The fundamental fairness requirements of this state's constitution will not permit it.

2. Within the Context of the Oregon Rules of Civil Procedure, Discovery of Experts Is Mandated by the Due Process Clause of the Fourteenth Amendment to the Constitution of The United States

> "As a constitutional premise, the phrase 'due process' must refer to [the federal Fourteenth Amendment due process clause] and must be supported by interpretation of the clause in decisions of the United States Supreme Court or of other courts based on such decisions, since the phrase does not appear in the Oregon Constitution." State v. Clark, 291 Or 231, 235 n.4, 630 P2d 810, cert denied, 454 US 1084 (1981).

The Constitution of the United States, Amendment XIV, § 1, states in applicable part: "[N]or shall any State deprive any person of life, liberty, or property without due process of law ***."

The essence of "due process" under the Fourteenth Amendment is "fundamental fairness." See Lassiter v. Department of Soc. Serv., 452 US 18, 24, 101 S Ct 2153, 68 L Ed 6 640 (1981); see also Pedersen v. South Williamsport Area School Dist., 677 F2d 312 (3d Cir 1982), cert denied, 459 US 972 (1983). Or as the Supreme Court has also stated, a state's procedures must be consonant with "traditional notions of fair play and substantial justice." International Shoe v. Washington, 326 US 310, 316, 66 S Ct 154, 90 L Ed 95 (1945).

Due process claims are assessed by the courts under a two-step analysis: First, it must be determined whether a claimant's interest rises to the level of a constitutionally protected liberty or property interest; if so, then there must

be a determination of what procedures are required and whether the governmental body in question violated those procedures. Gaballah v. Johnson, 629 F2d 1191, 1202 (7th Cir 1980). In a case involving the right to appointed counsel, the United States Supreme Court explained the process for determining what procedures are required.

> "The case of Mathews v. Eldridge, 424 US 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18, propounds three elements to be evaluated in deciding what due process requires, viz., the private interest at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." Lassiter v. Department of Soc. Serv. of Durham City, supra, 452 US at 27.

It is beyond dispute that the first step of the two-step analysis outlined by the Gaballah court is met in this case. Defendants in this case are being sued for a great deal of money, and money is the sine qua non of a property interest. If an action by a governmental body, in this case an Oregon Circuit Court, causes defendants to be deprived of their money, then that certainly reaches the level of constitutionally protected deprivation.[13] The only question that remains is

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[13] There are cases indicating that proof of a denial of due process may require a showing of substantial prejudice. See, e.g., Williams v. Taylor, 677 F2d 510, 514 (5th Cir 1982). However, considering the amount of money involved in this, and most other products liability cases, that requirement should be easily met.

A federal district court noted that one "who is condemned to suffer a grievance loss is entitled to procedural due process." Pennsylvania Bank & Trust Co. v. Hanisek, 426 F Supp 410, 414 (WD Pa 1977) (citing Goldberg v. Kelly, 397 US

(continued...)

what procedures are required and whether the Oregon courts violate those procedures if they deny discovery of the identity, knowledge, and opinion of an adversary's expert witness.

The first of the three factors in the Mathews analysis, 424 US 319, supra, is the private interests involved. There is, of course, defendant's property interest in the money sought by plaintiff. But, more than that, each party has an interest in a speedy, just, and inexpensive resolution of the case.[14] This interest can be described in terms of the "fundamental fairness" prescribed by Lassiter, supra, 452 US at 18 and its progeny.

Allowing a party to properly prepare for examination of an adverse expert witness is not only conducive, but essential, to the just resolution of a case. See Norquay v. Union Pacific R. Co., 407 NW2d 146, 153 (Neb 1987); cf.

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[13](...continued)
254, 90 S Ct 1011, 256 L Ed 2d 287 (1970)). It then held that judgement creditors, who had been charged excessive amounts in connection with sheriff sales, had been denied due process. Id. The amounts involved in each sale were relatively small. Id. If the parties in that case had a "grievous loss" substantial enough to invoke the due process right, then a fortiori, these defendants have a substantial enough loss.

[14] Note that ORCP 1 raises that interest to the level of a statutorily mandated rule of construction.

Bradley v. U.S., 866 F2d 120 (5th Cir 1989).[15] This is especially true in a products liability case. As mentioned above "[t]he most convincing evidence [in products liability cases] is an expert's pinpointing the defect and giving his opinion on the precise cause of the accident after a thorough inspection." Stewart v. Budget Rent-A-Car Corp., supra, 470 P2d at 243; accord Wakabayashi v. Hertz Corp., 660 P2d 1309, 1313 (Hawaii 1983). Allowing plaintiff's experts to fully prepare for direct testimony advancing theories as to why a product's design or manufacture is defective without giving the defendant a like chance to prepare for rebuttal of that "most convincing evidence" is fundamentally unfair and this should

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[15] In the Bradley case, tried under the Federal Rules of Civil Procedure, the court held that the conduct of the government in not giving the adversary notice of intent to call an expert witness until three days before the trial put the adversary "at a distinct disadvantage throughout the trial," even though there was a short-notice opportunity to depose the expert. Dictum in the case implied that, had Bradley's attorney not had an opportunity to depose at all, the trial would have been fundamentally unfair.

> "*** Thus, because the Bradleys' counsel responded so quickly to the government's belated announcement that it did indeed intend to call expert witnesses, it is impossible to concluded that the government's conduct rendered the trial fundamentally unfair." 866 F2d at 125.

The necessary implication of the quoted text is clear. If counsel does not have an opportunity to depose the expert witness, the trial will be fundamentally unfair.

weigh exceptionally heavily in the three-factor balancing analysis.

The practical effect of prohibiting pretrial discovery of the expert's identity, knowledge, and opinion, while allowing discovery of other witnesses' knowledge, is to deny reciprocal discovery in this and many other cases. This is comparable to a criminal procedure rule that requires a defendant to give notice of his intention to use an alibi defense without giving defendant any reciprocal discovery rights. The United States Supreme Court held such a statute in Oregon unconstitutional. Wardius v. Oregon, supra, 412 US at 470. The Wardius Court noted,

> "'*** [T]he adversary system of trial is hardly an end in itself; it is not yet a, poker game in which players enjoy an absolute right always to conceal their cards until played.'" Id. at 474 (citation omitted).

> "*** [I]n the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. *** It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." Id. at 475-76.

Although Wardius was a criminal case, that fact does not weigh against the defendants' position here. The due process clause protects deprivation of property as well as liberty; and these defendants may not be deprived of their property interests through a proceeding that is fundamentally

clause is equally applicable to civil and criminal cases. The second factor in the Mathews analysis, the government's interest, also comes down heavily in favor of allowing defendant to discover the knowledge and opinions of plaintiff's expert witnesses. The government has an interest in seeing that all of its citizens are given a full and fair opportunity to be heard. Thus, "fundamental fairness" is equally applicable to the second factor.

Additionally, the government has an interest in speedy and economical resolutions of a controversy. "The purpose of discovery is to explore everything available and narrow down the fact issues in controversy so that the trial process may be efficient and economical." Tabatchnick v. G.D. Searle & Company, 67 FRD 49, 54 (D NJ 1975); accord Norquay v. Union Pacific R. Co., supra, 407 NW2d at 153. In excluding the testimony of an expert witness hired after a jury was drawn, the Tabatchnick court noted that allowing the testimony [of a witness without adequate discovery opportunity] would "have the opposite effect" of allowing the trial process to be efficient and economical because "[i]t would create new fact issues and mushroom or balloon the trial." 67 FRD at 54. Furthermore, the court noted that it would unfairly destroy the means for informative cross-examination on the basis of pretrial preparation." Id. (emphasis added).

The final factor of the Mathews analysis, risk of erroneous decision, also supports pretrial discovery of

plaintiff's expert witnesses. A decision by the trier of fact should be based on as much truthful information as possible; consistent with other public policies, such as are honored through the doctrine of privilege and the work product rule, plus various rules of evidence that exclude information on grounds of public policy. "[T]he liberal discovery of potential testimony of an expert witness is not merely for convenience of the court and litigants, but exists to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact." Norquay v. Union Pacific R. Co., supra, 407 NW2d at 153. It also allows the testimony of the expert to be tested by a properly prepared cross-examiner, thus increasing the probability of exposing erroneous, misleading, or irrelevant evidence.[17]

Using the two-step approach outlined by the Gaballah court, defendants have clearly demonstrated a constitutionally protected interest. And the Mathews analysis, as described above, strongly suggests that where, as here, the plaintiff has

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[17] The cross-examiner of an undisclosed expert is at an even graver risk since Oregon adopted the federal rules of evidence, which allow the expert to give his opinion without disclosing the underlying facts or data on which it is based. ORE 705. On cross-examination, the examiner runs the risk that the expert may base his opinion on highly prejudicial hearsay facts or data that might otherwise not be admissible into evidence. ORE 703. However, unless the cross-examiner seeks out those underlying facts or data, the expert's opinion may be factually flawed and the jury or the court will not know it. See Fletcher v. State Dept. of Roads, 216 Neb 342, 344 NW2d 899 (1984).

virtually unrestricted access to the defendants' technical information in building a case for its experts, then it would be fundamentally unfair to deny defendants the opportunity to discover the identity, knowledge, and opinions of those experts so that they can adequately prepare for trial.

C. Irrespective of the Statutory and Constitutional Requirements, Public Policy Requirements of Fundamental Fairness, Justice, and Judicial Economy Mandate Pretrial Discovery of the Knowledge and Opinions of Expert Witnesses

The Supreme Court has stated, "A wise public policy *** may require higher standards be adopted than those minimally tolerable under the Constitution." Lassiter v. Department of Soc. Serv., supra, 452 US at 33. The policies of fairness, judicial economy, and justice mandate pretrial discovery of the identity, knowledge, and opinions of expert witnesses. As this State's highest court has said, "A trial is no longer a game of wits; it is a search for truth and justice." State of Oregon v. Cahill, 208 Or 538, 582, 293 P2d 13 169, 298 P2d 214 (1955), cert denied, 352 US 895 (1956). ORCP 1 B provides an expression of public policy regarding the Rules of Civil Procedure. It requires the courts to construe the Rules "to secure the just, speedy, and inexpensive determination of every action." OEC 705, which allows expert witnesses to testify without first disclosing in open court the underlying bases of their opinions and inferences, puts the burden of eliciting those bases onto the shoulders of the adversary's attorney, who must do so through cross-examination.

STOEL RIVES BOLEY JONES & GREY
ATTORNEYS AT LAW
900 SW FIFTH AVENUE PORTLAND, OREGON 97204
(503) 224-3380

As noted above, this cannot be done without thorough preparation on the part of the cross-examiner. Smith v. Ford Motor Co., supra, 626 F2d at 793. To carry out the public policy expressed in those two statutes, pretrial discovery of the potential testimony of expert witnesses is essential.

Additionally, as noted above, Rule 36 itself expresses the policy of the Legislature that broad discovery should be allowed, and the Rules in no way otherwise negate that policy.

But, regardless of the technicalities that may or may not be appended to interpretations of §§ 10 and 20 of Article I to the Oregon Constitution, it is clear the policies of fairness and complete justice are the foundation upon which they stand.

Respectfully submitted,

Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Defendants Honda Motor Co., Ltd., Honda Research and Development Co., Ltd., and American Honda Motor Co., Inc.

Trial Attorney:
Phillip D. Chadsey, OSB No. 66028

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICKEY C. WEBB, Plaintiff, v. HONDA MOTOR CO., LTD.; HONDA RESEARCH AND DEVELOPMENT CO., LTD.; and AMERICAN HONDA MOTOR CO., INC.; Monte Wiens and Michael Wiens dba BEND HONDA AND MARINE CENTER, Defendants.	Civil No. A8906-03356 DECLARATION OF PHILLIP D. CHADSEY IN SUPPORT OF DEFENDANT AMERICAN HONDA, INC.'S MOTION TO STRIKE COMPLAINT TO THE PLAINTIFF'S FAILURE TO PROVIDE DISCOVERY

STATE OF OREGON)
) ss.
County of Multnomah)

I, Phillip D. Chadsey, declare the following are attached:

1. As Exhibit 1 is a Notice of Deposition dated September 13, 1990.

2. As Exhibit 2 is a letter dated September 18, 1990 from Raymond F. Thomas to Phillip D. Chadsey.

3. As Exhibit 3 is a letter dated September 19, 1990 from Phillip D. Chadsey to Raymond F. Thomas.

4. As Exhibit 4 is a letter dated September 25, 1990 from Raymond F. Thomas to Phillip D. Chadsey.

Phillip D. Chadsey

SUBSCRIBED AND SWORN to before me this 28th day of September, 1990.

Notary Public for Oregon
My Commission Expires: 4/5/92

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICKEY C. WEBB, Plaintiff, v. HONDA MOTOR CO., LTD.; HONDA RESEARCH AND DEVELOPMENT CO., LTD.; and AMERICAN HONDA MOTOR CO., INC.; Monte Wiens and Michael Wiens dba BEND HONDA AND MARINE CENTER, Defendants.	No. A8906-03356 NOTICE OF DEPOSITION

TO: Plaintiff and his attorney.

Pursuant to ORCP 36 A, 36 B, and 39 C, the defendant American Honda Motor Co., Inc. requires that the plaintiff produce for deposition, at the time stated below, all persons retained on behalf of the plaintiff to give evidence at trial as to the issues alleged in paragraphs 9 and 16 of the plaintiff's Complaint. Such person shall be produced for deposition at the offices of Stoel Rives Boley Jones & Grey commencing at 10:00 a.m. on October 17, 1990. In the event that plaintiff has retained more than one person to testify as to the issues alleged in paragraphs 9 and 16 of plaintiff's Complaint, the deposition of the second person shall commence at 10:00 a.m. on October 18, 1990 and at a similar time on each

subsequent business day until all of plaintiff's experts related to these issues have been deposed.

Dated: September 13, 1990.

Mark J. Fucile OSB No. 82262 for
Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Defendant
American Honda Motor Co., Inc.

Trial Attorney:
Phillip D. Chadsey, OSB No. 66028

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing NOTICE OF DEPOSITION by mail on September 13, 1990, on the following:

William A. Gaylord
Gaylord, Thomas & Eyerman, P.C.
1400 SW Montgomery
Portland, OR 97201-6093
Telephone: (503) 222-3526

Raymond F. Thomas
Royce, Swanson & Thomas
The Waldo Building, Suite 200
215 SW Washington Street
Portland, OR 97204-2605

Attorneys for Plaintiff

Dated: September 13, 1990.

Mark J. Fucile OSB No. 82262 for
Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Defendants

EXHIBIT 1
PAGE 3

MICHAEL D. ROYCE
DOUGLAS A. SWANSON
RAYMOND F. THOMAS
GEOFFREY G. WREN

DAINA UPITE
OF COUNSEL

ROYCE, SWANSON & THOMAS
ATTORNEYS AT LAW

THE WALDO BUILDING
SUITE 200
215 S.W. WASHINGTON STREET
PORTLAND, OREGON 97204-2605
FAX (503) 273-9175

TELEPHONE (503) 228-5222

STAFF:
JANE A. EDIGER
SUZY LAMBERT
VIRGINIA RAYMOND
WENDY A. ROWLAND
MARINA L. YU

September 18, 1990

Mr. Phillip D. Chadsey
Stoel Rives Boley Jones & Grey
2300 Standard Insurance Center
900 SW Fifth Avenue
Portland, OR 97204

Re: WEBB v. HONDA MOTOR CO., LTD. ET AL
CASE NO. A8906-03356

Dear Mr. Chadsey:

You recently sent to us a Notice of Deposition for "... all persons retained on behalf of the plaintiff to give evidence at trial as to the issues alleged in paragraphs 9 and 16 of the plaintiff's Complaint." Since you failed to contact plaintiff's counsel to determine the convenience of the dates in your notice, I assume that your attempt to depose these witnesses has been done merely for the record and not with the serious intention that any such witnesses will be produced. Your Notice of Deposition clearly falls within the prohibition against discovery of trial preparation materials contained in ORCP 36B(3), and we will therefore not be providing any witnesses for you to depose on these points.

However, I assume that you are still intending to proceed with the deposition of the plaintiff on October 17, 1990.

Very truly yours,

ROYCE, SWANSON & THOMAS

Raymond F. Thomas

RFT/mly
cc: William A. Gaylord
Robert D. Maack

EXHIBIT 2
PAGE 1

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICKEY C. WEBB, Plaintiff, v. HONDA MOTOR CO., LTD.; HONDA RESEARCH AND DEVELOPMENT CO., LTD.; and AMERICAN HONDA MOTOR CO., INC.; Monte Wiens and Michael Wiens dba BEND HONDA AND MARINE CENTER, Defendants.	Civil No. A8906-03356 CERTIFICATE OF COMPLIANCE

Defendants have conferred with plaintiff in accordance with UTCR 5.010 but were unable to reach an agreement.

Dated: September 28, 1990.

Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Defendants Honda Motor Co., Ltd., Honda Research and Development Co., Ltd., and American Honda Motor Co., Inc.

Trial Attorney:
Phillip D. Chadsey, OSB NO. 66028

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing HONDA DEFENDANTS' MOTION TO STRIKE COMPLAINT DUE TO THE PLAINTIFF'S FAILRUE TO PROVIDE DISCOVERY; DECLARATION OF PHILLIP D. CHADSEY; and MEMORANDUM OF LAW by ~~mail~~ hand delivery on September 28, 1990, on the following:

William A. Gaylord
Gaylord, Thomas & Eyerman, P.C.
1400 SW Montgomery
Portland, OR 97201-6093
Telephone: (503) 222-3526

Raymond F. Thomas
Royce, Swanson & Thomas
The Waldo Building, Suite 200
215 SW Washington Street
Portland, OR 97204-2605

Attorneys for Plaintiff

Dated: September 28, 1990.

Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Defendants

STOEL RIVES BOLEY
JONES & GREY

ATTORNEYS AT LAW
SUITE 2300
STANDARD INSURANCE CENTER
900 SW FIFTH AVENUE
PORTLAND, OREGON 97204-1268

Telephone (503) 224-3380
Telecopier (503) 220-2480
Cable Lawport
Telex 703455
Writer's Direct Dial Number
(503) 294-9376

September 19, 1990

Mr. Raymond F. Thomas
Royce, Swanson & Thomas
The Waldo Building, Suite 200
215 SW Washington Street
Portland, OR 97204-2605

Re: Webb v. Honda

Dear Mr. Thomas:

We expect you to produce your experts for deposition as noticed unless there is some other mutually agreeable time set for their depositions. If not, we will move for appropriate sanctions under ORCP 46 and to have them barred from testifying at trial under ORE 403. There is nothing in the Oregon rules which prevents the taking of an expert's testimony. ORCP 36 B(3) on which you rely is identical to FRCP 26(b)(3). Neither of those sections prevent the discovery of experts. The only difference is that FRCP 26(b)(4) limits expert discovery in federal court to interrogatories. That limitation was not adopted in Oregon. Oregon law allows for the deposition of any witness having relevant information, including experts. Land Bd. v. Corvallis Sand & Gravel, 18 Or App 524, 526 P2d 469 (1974); Nielsen v. Brown, 232 Or 426, 374 P2d 896 (1962). If you do not wish for us to move for sanctions, you can seek a protective order.

Very truly yours,

Phillip D. Chadsey

PDC:jss
cc: Mr. William A. Gaylord
Mr. Robert D. Maack

bc: Mr. Philip Sugino

EXHIBIT 3
PAGE 1

MICHAEL D. ROYCE
DOUGLAS A. SWANSON
RAYMOND F. THOMAS
GEOFFREY B. WREN

DAINA UPITE
OF COUNSEL

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September 25, 1990

Mr. Phillip D. Chadsey
Stoel Rives Boley Jones & Grey
2300 Standard Insurance Center
900 SW Fifth Avenue
Portland, Oregon 97204

Re: WEBB v. HONDA

Dear Mr. Chadsey:

I have received your letter of September 19, 1990. The authorities you cite do not support your proposition that you may take depositions of our expert witnesses. Oregon state practice does not provide for the taking of depositions of expert witnesses. Therefore, as I stated to you in my last letter on this subject, we will NOT be providing any experts for deposition in this case unless you obtain an appropriate court order.

Very truly yours,

ROYCE, SWANSON & THOMAS

Raymond F. Thomas

RFT/mly
cc: William A. Gaylord
Robert D. Maack

RECEIVED
9/27/90

EXHIBIT 4
PAGE 1

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October 12, 1990

To: Council on Court Procedures

I am attaching comments in support of expert discovery, or more appropriately, in support of expert disclosure in Oregon.

Very truly yours,

HOLMES & FOLAWN

John H. Holmes

JHH/kj
Enclosure

Exhibit 5 to minutes
of Council meeting
held 10-13-90

Ex 5-1

The settlement of litigation is an honorable objective. Three or four years ago, I attended the Oregon Judicial Conference, along with Ralph Spooner and Carl Burnham from the OADC, at the request of Chief Justice Peterson. Bill Barton and other representatives of OTLA were also in attendance. The program presented featured representatives from the Dispute Resolution Center at Willamette and two judges with settlement experience and expertise, Judge Ed Leavy of our Federal bench and Judge Ted Abram of Klamath Falls.

Following the program presentations, the format called for all the judges and lawyers at the conference to break out into smaller groups and go through mock settlement conferences on stipulated facts. When possible, the lawyers were asked to play the role of the judges and the judges to wear the lawyers' hats and to work through a settlement conference. While we are started this exercise with some cynicism, it was to become both enjoyable and informative. I remember working with Judges Londer and Gilroy, and remember the fun we all had in critiquing our proceedings. The meetings were instructive and useful.

Since that time, we have had more emphasis on alternative dispute resolution (ADR) in Oregon. We are seeing much more in the way of arbitration, mediation, and mandatory and voluntary settlement conferences.

During the past several years, I have enjoyed sitting as an arbitrator, and sitting as a "defense expert" in trial settlement conferences. Over the years, I have been involved in many settlement conferences in Federal Court and share with most lawyers a great respect for Judge Ed Leavy and the others who have done such a commendable job assisting in the resolution of litigation. I can remember outstanding settlement conferences with Judge Skopil and Judge Marsh and the other judges in the federal system.

In state court in recent years I have had the pleasure of going through excellent settlement conferences with Judge Kris LaMar in Multnomah County and Judge Alan Bonebrake in Washington County.

Recently, the insurance industry sucessfully promoted a "Settlement Day" in the Portland area. The format was to spend concentrated time at a neutral location in an attempt to resolve litigation. Bernadette Harrington of North Pacific, Roy Duitman of Oregon Mutual, and Lela Christensen of Amica Mutual helped organize a two-day meeting that included 12 insurance companies' participation. The companies rented space and invited plaintiffs and their attorneys to come in over a two-day period to meet with adjusters to personally settle their cases.

All of these efforts of the bench, bar and insurance industry working toward the settlement and resolution of litigation have been commendable. In 1850 Abraham Lincoln, in discussing professionalism, had this advice on the subject of settlement:

EX 5-2

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

"Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it."

The settlement of litigation can be satisfying in many ways. It resolves a problem. It ends expenses to a client. It alleviates the emotional distress and concern of the litigants. It often brings financial reward, or at least financial relief and resolution in the ending of expenditures or the cutting of losses. Most of us get some pleasure out of either buying something or selling it, whether it be a house, a car, a boat, an item of clothing. A sale or purchase involves a determination and a moving on to something new. Often matters are negotiated in a sale, as they are in a settlement.

Unfortunately, we have a problem and an obstacle in settling cases in the state court system in Oregon. Often we are asked to buy or sell or settle or sign off without knowing what we are buying or what we are selling.

Would you buy a car or a house or a boat without looking at it? Would you buy a boat or a car or another vehicle without driving it or operating it? Many would not, and therein lies the problem with the settlement of litigation involving expert witnesses in Oregon.

As we all know, Oregon is the only state in the Union with "trial by ambush" and no discovery of expert witnesses, unless it involves the medical reports of treating medical providers or the medical reports on independent medical examinations.

It has been my experience that it is easier to settle a case in federal court involving expert witnesses where there is discovery of experts and where the attorneys and clients can make informed decisions, rather than being asked to buy a car without a test drive. In attending two recent national conferences of defense bar leaders, I have had the opportunity to discuss expert discovery and/or expert

Ex 5-3

disclosure with bar leaders from throughout the country. I have not talked to any of these lawyers who see any merit in Oregon's "trial by ambush" system.

In addition to impeding efforts to settle litigation, the lack of expert disclosure is unfair with regard to the preparation for litigation. A trial should involve the search for truth, and it should be fair. Any appearance to the public that lawyers are "playing games" should be avoided. That appearance is clearly here in the Oregon state court system with our trial by ambush. Lawyers are playing games, in accordance with the rules.

The unfairness of the hiding of expert witnesses is compounded by the recently-ruled, fast-track trial calendar, mandating that all cases be tried within one year. Since the one year commences from the date of filing and since the plaintiff's attorneys control the date of filing, the plaintiff's attorney are now clearly in control and are clearly dictating to their advantage.

I recently saw a letter from a capable trial attorney to an out-of-state plaintiff client where the attorney commented that since Oregon was on a fast-track trial schedule, it was to the plaintiff's advantage to get its case completely prepared and then filed only at the last minute so that the defendant would be prejudiced by an inadequate length of time to prepare for a trial that had already been completely worked up for the plaintiff. Good strategy, bad rules. Unfair rules. Unfair rules compounded by the lack of expert discovery in Oregon.

Expert discovery is such a good and common-sense idea for fairness in litigation it should not be a partisan issue. And it has not. In recent years former OTLA president David Jensen has come out in support of expert discovery and has written in support of expert discovery. Other prominent and capable plaintiff's attorneys like expert discovery and like operating within the federal court system. However, several plaintiff's attorneys oppose expert discovery as if it were the worst idea anyone had ever brought to any court system. Their arguments are that all of the other states in the Union are wrong and that Oregon is right; that there is no no problem; that there is no unfairness; that expert discovery or expert disclosure would add expense to litigation; and that it would prevent experts from testifying out of fear of disclosure of their names or the opinions they claim to hold.

In my view, there is no validity to any of these arguments. However, there should be concern about the argument that expert discovery or expert disclosure would add expense to litigation. In my view, this argument is nothing but a red herring. It is my opinion that there would be less expense with expert disclosure in that more cases would settle, ending litigation and providing relief to the congestion in our courts. Expenses would also be saved in that the parties would know that the playing field was level and would know the opinions of opposing experts. That has been my experience in our federal court.

I think an argument can be made that full-blown expert discovery could increase expenses. Such full discovery might include interrogatories, which we do not have in Oregon, and could occur if all experts were deposed. A rule currently

being proposed to the Council on Court Procedures would essentially provide for expert witness disclosure; *i.e.*, name, address and qualifications, together with a short statement as to what the expert would be expected to testify, and the substance of the facts and opinions to which the expert would testify. Expert disclosure would be required 30 days prior to trial.

This would provide for limited disclosure and would not provide for further discovery such as interrogatories or depositions of experts. Such a rule would be akin to what we now have with regard to plaintiff's treating physicians in personal injury cases. This proposal is very similar to a rule the Council had originally approved several years ago. The proposal is also very close to legislation supported by the OADC.

It is obvious that what these current proposals provide for is expert disclosure as distinguished from full and open expert discovery. While I personally think that some expert discovery might be appropriate within the discretion of a trial court, I am convinced that the type of limited disclosure of experts currently being proposed would not only be economical, but would save costs and expenses in addition to finally establishing a minimum of fairness to all litigants in civil litigation in Oregon.

Former OTLA president David Jensen had this to say in support of expert disclosure in Oregon:

> "From an artificially narrow view, nothing is wrong with the *status quo* of expert discovery. If I can proceed to trial and ambush my opponent with an unknown expert, (s)he is dramatically hampered in testing that testimony at trial. But this view is artificial, as it ignores the bilaterial aspect of the *status quo* - my opponent may do the same to me. While the *status quo* is bilateral, it is poor judgment for several reasons:
>
> 1. It is contrary to modern jurisprudence which has increasingly provided for more open pretrial discovery because of a widely-held belief that litigation in such a system will produce more just, fair, and accurate results. A plaintiff ought to be able to learn pretrial that, for example, a defense witness has testified hundreds of times for the same firm. Similarly, a defendant should be able to learn pretrial that a plaintiff's expert has published articles *contra* to his/her trial testimony. Presentation of this evidence to a trier of fact is

EX 5-5

necessary so that the fact-finder can properly evaluate expert testimony.

2. The present practice lengthens trial. I always ask for a recess before cross-examining an opposing expert so that I can review his/her chart, file, and notes.

3. More cases would settle, and settle earlier, with such disclosure. I have bought pigs. I never have, nor will, buy a pig in a poke."

David is right. Forty-nine other states are right. It is time in Oregon to do away with trial by ambush and to work toward making the Oregon court system a model for fairness rather than continuing the game of hiding the witness.

* * * * *

Ex 5-6

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October 12, 1990

VIA FAX

Ronald Marceau, Chairer
Oregon State Bar
Council on Court Procedures
5200 SW Meadows Road
Lake Oswego, OR 97034

Frederic R. Merrill
Executive Director
Council on Court Procedures
University of Oregon
School of Law
Eugene, OR 97403

ATTN: Gilma Henthorne

Dear Sirs and Madam:

Because of my inability to attend the October 13, 1990 meeting, I am sending the enclosed statement offered as testimony opposing the proposed expert discovery rule. I am sending this correspondence and statement to your offices via Fax numbers, (503) 388-5410 and (503) 346-3985 and to the Oregon State Bar center via its Fax number, (503) 684-1366. I would most appreciate your submitting my statement to the Committee for its consideration in making its final decision.

In reviewing the exhibits from the September 8, 1990 meeting, I would like to point out that I have also experienced difficulties with improper contact of retained medical experts by a defense attorney in a medical negligence case. In my case which was to be litigated in Portland, an expert retained by my client was inadvertently discovered by the defense attorney who thereafter apparently had numerous conversations with the expert and ultimately persuaded the expert to testify for the defense. The trial judge ruled that the defendant would not be allowed to call this witness.

In reading John E. Hart's written materials dated August 31, 1990 (Exhibit 2), I recognized Mr. Hart's description of the case he refers to on page 4 as a case I

Exhibit 6 to minutes
of Council meeting held 10/13/90

EX 6-1

had plaintiffed. I called Mr. Hart to confirm the reference and he stated that it was, but also was somewhat a compilation of a couple cases. I would like the Committee to know that the case Mr. Hart and I litigated involved a high velocity rear end impact on the Terwilliger curves of I-5 brought about by highway construction activities that abruptly stopped the flow of traffic. My brain damaged 38-year-old client did indeed seek more than one million in damages. Mr. Hart is also correct, although not complete, in listing expert witnesses I called. What Mr. Hart did not report was the fact that the defense skillfully cross-examined each of plaintiff's expert witnesses, called three technical experts of their own (an accident reconstructionist, a highway construction engineer and a highway construction supervisor), called two medical experts for the defense (neurologist and neuropsychologist) and won a defense verdict.

I hope the Committee finds this information of assistance.

Very truly yours,

Linda J. Rudnick

LJR:jid
Enclosure

EX 6-2

STATEMENT OPPOSING HB 3140

DISCOVERY OF EXPERT OPINION

The majority of State Rules of Civil Procedure requiring disclosure of the identity of an expert, while allowing for the deposition of an expert, do not require divulgence of the expert's opinion or a summary of the expert's expected testimony. Any rule which would require production of such a summary would directly violate the work-product doctrine. See Formal Ethics Opinion NO. 530. Even the exception to the work-product doctrine contained in ORCP 36B(3), which allows, upon a showing of substantial need and undue hardship, for the discovery of trial preparation materials explicitly directs the court to protect against

> "* * * disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

An attorney attempting to summarize the expected testimony of retained experts cannot meaningfully do so without revealing the work-product protected impressions, conclusions, opinions and theories of the attorney's case preparation.

I urge this Committee to reject any rule or portion thereof which requires such a disclosure.

HB No. 3140 is silent as to who should bear the cost of expert discovery. Traditionally, the party seeking discovery pays. Any proposed legislation which allows for the taking of expert witness deposition should impose upon the

Ex G 3

requesting party the expense of the expert's time, travel and accommodations to attend the deposition. Expert opinion summaries also carry a price tag in the form of increased expert consulting time and report preparation fees necessary to produce the additional discovery.

Finally, any endorsement for expert witness discovery should not be made under the mistaken belief that discovery of expert opinion will promote settlement and case resolution. It is this writer's experience that settlement offers rarely are made after experts have fully testified at trial and before verdict, or after verdict at trial and before verdict, or after verdict for plaintiff and pending appellate review. Do not be deluded into believing that discovery of expert's identity or opinion before trial would promote settlements.

Respectfully submitted,

Linda J. Rudnick
Attorney at Law

LJR:jid

Ex 6-4

P.5

September 28, 1990

M E M O R A N D U M

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: **Fred Merrill, Executive Director**

RE: **OCTOBER MEETING**

I. Attorney fee procedure for dissolution cases

The following is a draft of ORCP 68 C(1) as suggested by Judge Welch:

> **C. Award of and entry of judgment for attorney fees and costs and disbursements.**
>
> **C.(1) Application of this section to award of attorney fees.** Notwithstanding Rule 1 A. and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof, and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees except where:
>
> [C.(1)(a) ORS 105.405 (2) or 107.105 (1)(i) provide the substantive right to such items; or]
>
> C.(1)[(b)])**(a)** Such items are claimed as damages arising prior to the action; or
>
> C.(1)[(c)]**(b)** Such items are granted by order, rather than entered as part of a judgment.

II. Comments on tentatively adopted rules

A copy of a memorandum regarding the tentative rules from Denny Hubel to Ron Marceau is attached. The other comment letters referred to were either attached to the agenda for the last meeting or distributed at the meeting.

A. RULE 7

1. Craig O. West

Craig West's first point is that the revision of ORCP 7 D(7) requires the plaintiff to "attempt" service by all methods specified in Rule 7 before using DMV service and this will require sending a process server to all addresses known for defendant, whether or not there is any reasonable chance to complete such service. He may have a point. We could add the words **"or if the plaintiff knows that service by such methods could not be accomplished"** at the end of ORCP 7 D(7).

He also argues that regular mail provides better notice than registered or certified mail, return receipt requested. I think the Council members have rather thoroughly reviewed the merits of various forms of mailings for this service over the last three years and settled on the more formal method of service for substantial reasons. One approach that could be used would be to require regular mailing, **in addition to** the more formal mailing.

He suggests that we simply require mailing to the insurer at the time of supplemental mailing to the defendant rather than the language in D(4)(c)(2). The problem with this it would defeat the central idea of making clear that notice to the insurer is not actually part of the service. The statute of limitations is satisfied by DMV service and mailing to the defendant. If you mail to the insurer at that time, you can take a default in 30 days. If you neglect to mail to the insurer, you have to mail and wait 14 days before any default.

Finally, I agree with his complaint that motor vehicle service seems to change every two years. I still think the best idea was that of the first Council which simply eliminated it. Perhaps this revision will get to the heart of the problems and give us some peace.

2. Denny Hubel

Denny Hubel is worried about ambiguity in the staff comments. Depending upon what we do in response to the West comment above, I will try to clarify the staff comment.

I am not sure I understand the problem in the case he refers to with Tom Howes. I assume the defendant, or the defendant's insurance company, got actual notice and appeared. If that had not happened, under the existing rule, no default could have been taken because the plaintiff could not show that inquiry had been made and defendant could not be found at the DMV addresses, which is required by ORCP 7 D(4)(c).

B. RULE 18

1. Denny Hubel, Win Calkins, and Lauren Underwood

All three commentators make the same point about the elimination of the statement of claimed noneconomic damages. They suggest that it will lead to many situations where insurance companies will be forced to send an excess letter to an insured because there is no guarantee that noneconomic damages will be less than policy limits. This argument assumes that, if the statement is retained, it actually limits recovery. That certainly is not clear now and language to that effect would be required. The only question I have about the argument is what insurance companies do in the federal system and the majority of the states where the prayer does not in fact limit damages. Do they always send excess letter? If this is a serious problem, why do these other systems not limit recovery to demand?

2. James Hiller

James Hiller's argument for retaining the statement and making it a limit on damages is based upon the original legislative intent in creating 18 B. If the Council does wish to retain the statement, I like Hiller's suggested language making it a limit on recovery. I would change his suggestion slightly as follows:

> **Once the statement has been given, it can be amended only upon written leave of the court or stipulation of the adverse party and leave shall be freely given when justice so requires. Upon request of any party, the jury shall be instructed as to the amount of the noneconomic damages claimed and any judgment for noneconomic damages shall not exceed the amount claimed.**

This language provides some discretion in the trial judge to avoid the limit by amendment. It also provides a mechanism that inserts the limit into the trial record. Finally, it puts the burden of enforcement of the limitation on the defendant in the form of a requested instruction.

C. RULE 55

1. Nathan McClintock

Nathan McClintock inquired whether the requirement of a 10-day notice to opposing counsel before subpoena of hospital records is clearly spelled out in ORCP 55 H. I think the last sentence of paragraph ORCP 55 H(2)(b) does clearly make this a requirement.

2. P. Conover Mickiewicz

P. Conover Mickiewicz suggests that the requirement of advance notice to the opposing party is not clear and it also is unclear whether the opposing party has a right to be present at production and inspect and copy what is produced. I think the last sentence of 55 D(1) clearly answers the notice problem. Regarding the second problem, she does have a point. We should add the following as a new subsection F(3):

> F.(3) **Books, papers, documents, and tangible things produced.** When books, papers, documents or things are produced in response to a subpoena which does not command appearance for deposition or trial, all parties are entitled to be present and inspect and copy any material produced.

3. Denny Hubel

Denny Hubel correctly points out that our health care facility reference in 55 H(1) should be to ORS 442.015(13)(a) through (d) and not to 442.014.

HARRANG, LONG, WATKINSON, ARNOLD & LAIRD, P.C.

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September 10, 1990

FRED MERRILL, EXECUTIVE DIRECTOR
COUNCIL ON COURT PROCEDURES
UNIVERSITY OF OREGON
SCHOOL OF LAW
UNIVERSITY OF OREGON
EUGENE OR 97403

Re: ORCP 54A(3)

Dear Mr. Merrill and Committee Members:

I would appreciate the Committee's response to the following queries regarding ORCP 54 A(3):

1. Does the use of the word "may" give the court greater discretion in awarding attorney fees when a case is dismissed pursuant to ORCP 54A(1) than it otherwise would have if judgment were entered after a contested hearing; and

2. What "circumstances" justify a determination that the dismissed party is not a prevailing party, and may the court conduct a mini-trial regarding substantive issues in the case to make a determination concerning a prevailing party.

Your prompt consideration is appreciated.

Sincerely,

B. Kevin Burgess

BKB:sp

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September 25, 1990

Judge Lee Johnson
Multnomah County Courthouse
1021 SW 4th
Portland, OR 97204

Subject: Council on Court Procedures
Meeting of September 8, 1990

Dear Judge Johnson:

This is in regard to your comments on disclosure of expert witnesses and specifically the example involving Ford Motor Company which you cited at the last meeting. I was counsel for plaintiff in that case and wish to supply you with some additional facts.

The question you raised was whether Ford lawyers would have drastically altered their defense case presentation or their cross-examination of the witness had they known in advance the identity of the witness. That witness was Mr. Frank Camps.

Mr. Camps had been a key employee in the design department for Ford Motor Company from the late 1950's until the date of his resignation in 1974. During his tenure with Ford Motor Company, Mr. Camps became intimately familiar with the design of the Ford Pinto automobile, which was manufactured between 1971-1980. The reason Mr. Camps resigned from Ford Motor Company was because company executives had instructed employees in the testing departments to destroy results of unsuccessful tests which were being conducted pursuant to federal safety standards then in effect. When those officials told Mr. Camps to "keep his comments to himself" he documented these meetings with both Mr. Ford and Mr. Iacocca and subsequently submitted his written resignation.

In the Multnomah County action tried in 1985, Green v. Denny and Ford Motor Company, Case No. A7910-05164, Mr. Camps was called as a witness by the plaintiff to describe how the Pinto was designed, manufactured and distributed. Officials for Ford were

present in the courtroom and certainly knew who Mr. Camps was. Mr. Camps testified for over two days. Ford's lawyers had more than adequate time to cross-examine Mr. Camps and to establish whatever facts they believed were contrary to his sworn testimony.

The disclosure of Mr. Camps' name to Ford in advance may have contributed to an uneasiness at corporate headquarters, but it would have made no difference on the case.

The important policy reason which exists for maintaining the present rule against the disclosure of potential witnesses such as Mr. Camps is that these courageous citizens are willing to step forward and speak up about corporate wrongdoing. They need to be protected prior to trial. The role they serve in the litigation process is as "whistle blowers", i.e., citizens whose testimony forces government and big business to be accountable for their actions.

So now you have heard the rest of the story.

Sincerely,

Jan Baisch

JB/aa
cc: Professor Fred Merrill