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OREGON MOLD LITIGATION

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Oregon mold cases are a relatively recent development, which seems strange when you consider the long rainy winters and the construction industry's longstanding proclivity to build year-round here. I suspect that many people that suffered from mold exposure in the past had blamed their symptoms on other things, like seasonal allergies. There is a great deal of grass seed farming in Oregon, particularly in the Willamette Valley. Oregon, particularly Western Oregon, is a land of lush vegetation and many Oregonians come down with hay fever and allergies in the spring and fall. But recently we have begun to suspect that not all of these hay fever-like symptoms are caused by allergies.

There is a growing awareness in the Northwest that shoddy construction practices and landlords who refuse to properly maintain their apartment houses may be responsible for an increase in mold problems in recent years. In the case of a mold problem arising in a landlord-tenant context, landlords often benefit from the fact that tenants do not have sufficient funds to hire experts to conduct testing and to testify in court that the apartment or rental home made them ill. If a tenant had those kinds of assets, they could own their own homes. Many times tenants who consult an attorney are most concerned with getting their security deposit back if they break their leases. But that may be the least of their worries. They may have sick children and a need to relocate to new quarters, often immediately.

With homeowners who are the victims of shoddy construction, it is sometimes, but not always, a different story. Many times homeowners with considerable equity in their houses find

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themselves having to move out of a house that makes them ill, and into temporary rental quarters. Often, they have the financial ability to hire necessary experts, but not to repair their homes. Most Oregon homeowners insurer's policies have exclusions for faulty and defective construction or repairs. This means they have to look towards the construction contractor who built their homes for a remedy.

A latent defect can go undiscovered for many years, however, and Oregon has a ten year statute of repose which bars any claims against the contractor ten years after the house was built. In addition, under a new "Right to Repair Law"² Oregon homeowners are required to give written notice of the defects in the house to the contractor and provide the contractor an opportunity to inspect and repair the damage, or offer a settlement. Most homeowners dislike the new law. They feel that the contractor is the cause of the problem and do not trust him to correct his own mistake. In fact, by this time, the contractor has moved on to new jobs and views going back to repair former work as an inconvenience. For that reason, many contractors either inspect and offer no solution, or offer a minor repair instead of what may be necessary to correct the problem and prevent it from recurring. The more "old school" contractors who still take pride in their workmanship are less likely to build a house with water intrusion problems and more willing to correct the problem if it arises. But those contractors are rare these days. They have been replaced by a new breed that emphasizes new methods and materials that promote speedier work and greater volume. That often leads to corner cutting as they continue to work in wet winter weather and hurry towards completion without making certain that the building materials are thoroughly dried.

Homeowners who move out of their homes and end up filing a lawsuit find to their dismay that it takes time for the case to make its way through the court system. They may end up paying rent for their new abode and their house payment for many months or even a year or two. Homeowners who do not have significant equity in their homes may turn the keys in to their lenders, damaging their credit for years. Homeowners who have greater equity and a greater interest in repairing the house may still lose the house as the cost of litigation eats up their financial assets.

² ORS 701.560 et. seq.

A. Insurance issues affecting Oregon mold claims.

Many other cases arise in the context of first party insurance claims, where a homeowner has suffered a loss from a roof leak or a burst water pipe which may or may not be covered by their homeowner's policy. Their insurer may investigate the problem, then send them a letter saying the loss is not covered. Many homeowners receiving such a denial letter are shocked. Like many of us, they probably did not read their policy thoroughly and expected almost any damage to their house to be covered. Even when a claim against a contractor is involved, the contractor who is sued may tender the defense to his insurer, only to find out that his insurer says that mold claims are not covered.

Most homeowners policies contain "all risk" coverage for damage to the dwelling itself and "named perils" coverage for damage to personal property or contents. Typically the coverage for the dwelling is found in the "Coverage A" part of the policy and the contents coverage is found in the "Coverage C" part of the policy. Where a loss is to the dwelling itself, the loss is presumed covered unless specifically excluded somewhere in the policy. This is the definition of "all risk" coverage. Therefore, the "default setting" (for all you computer users), is coverage and a policy has to have a specific exclusion to defeat coverage for damage to the structure. However, where the loss relates to personal property in the house, the property must usually be specifically named as a covered item or category of items to be covered under the policy's personal property coverage. This is "named perils coverage." Personal property loss is presumed to be excluded unless specifically listed as one of the "named perils."

Oregon law has not traditionally recognized third party bad faith at all. It has recognized first party bad faith against the insurer only in the narrowest of circumstance, such as the situation where an insurer has undertaken to defend its insured in a liability action and then puts its interests ahead of its insured. That is a conflict of interest. Most often that arises where it rejects an offer to settle a claim within policy limits and then a verdict exposes the policyholder

to liability above his coverage limits.³ But there are other situations where an insurer can have a conflict of interest and act on its own behalf, while ignoring its obligations to its insured. For example, when a claim is made against a liability policyholder, the insurer sometimes denies its customer the protection of a defense, even though the policy says that the insurer will defend the insured against any claim that arguably might be covered under the policy. If the policy supporting a bad faith claim in a “failure to settle” contest is that the insurer wrongly exposes its insured to personal expense, then would not that same policy consideration also apply where the insured has to spend thousands to defend himself against a claim when his insurer should have stepped up and provided a defense free of charge? Unfortunately, Oregon cases seem to view this later example as merely a breach of contract. It is unquestionably that. But there are cases where the breach is so egregious that the Oregon Appellate Courts will hopefully be presented with an opportunity to revisit this issue in a context where they can broaden the rule. Perhaps the increase in personal injury mold claims Oregon courts may present the occasion to expand this strict view of insurance bad faith.

Oregon has adopted the “efficient proximate cause” doctrine. An “efficient proximate cause” is “an action that sets in motion a train of events and which brings about a result without the intervention of any force, starting and working actively and efficiently from a new and independent source.” Couch on Insurance 2d, § 74:711 (Rev ed. 1983). In *Gowans v. N.W. Pac. Indem. Co.*, 260 Or. 618, 621, 489 P.2d 947, 491 P.2d 1178 (1971), the court said:

"It is an established rule of insurance law that where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss."

Oregon courts have also adopted the “substantial factor” causation standard in cases where there are multiple defendants. *See, e.g., Dewey v. A. F. Klaveness & Co.*, 233 Or 515, 541, 379 P2d 560 (1963) (causation standard was whether the defendant's conduct was a “substantial

³ *Georgetown Realty v. The Home Ins. Co.*, 313 Or 97, 106, 831 P2d 7 (1992); *Farris v. U.S. Fidelity & Guar. Co.*, 284 Or. 453, 587 P2d 1015 (1979); *Employers' Fire Ins. Co. v. Love It Ice Cream Co.*, 64 Or. App. 784, 670 P2d 160 (1983).

factor” in physically producing the injury).⁴ In *McEwen v. Ortho Pharmaceutical*, 270 Or 375, 407-21, 528 P2d 522 (1974), the court held that “[t]he respective liability of multiple defendants depends on whether the negligence of each was a substantial factor in producing the complained of harm.” *Id.* at 418. The court also explained that the plaintiff need not show that each defendant's negligence was “sufficient to bring about plaintiff's harm by itself; it is enough that [each defendant] substantially contributed to the injuries eventually suffered by [the plaintiff.]” *Id.* This issue can crop up where a number of defendants are sued or where a general contractor is sued and he then joins one or more subcontractors as third party defendants.

The issue of insurance coverage for mold claims is a hotbed of litigation nationally. Insurers began writing mold exclusions to their policies around 2002, after the celebrated Texas verdict in the *Ballard* case against Farmers Insurance. But a few courts held that policies which excluded coverage for damage caused by mold would still cover damage caused by a covered peril, even though mold was the result of the loss. In those cases, mold was both the damage and a cause, and at least some courts held that the policy covered the loss. In the wake of these rulings, some insurers have changed their policies to say that they cover mold, but only up to some small amount, such as \$ 10,000.⁵ Other insurers have revised their mold exclusions to say that they exclude any coverage for mold, regardless of cause. I have not seen reported decisions nationwide showing whether that change in the exclusion will be enforced. But theoretically, such exclusions could render the policy ambiguous if it purports to cover one kind of loss while excluding it if mold is involved. We attorneys representing homeowners and mold victims watch for future rulings on the issue. I am sure the other side does as well.

There is a generation of Oregon insurance policies that were in effect in the early 2000s which still might be relevant in currently undecided litigation. Therefore, I will mention a ruling here that may still have some impact.

⁴ *see also Babler Bros. v. Pac. Intermountain*, 244 Or 459, 463, 415 P2d 735 (1966) and *Stewart v. Jefferson Plywood Co.*, 255 Or 603, 606, 469 P2d 783 (1970).

⁵ Perhaps a wise decision, as this avoids spending much more than that on attorneys litigating coverage.

Fleming v. United Service Automobile Association, 329 Or. 449, 988 P2d 378 (2000)

This case was, strictly speaking, not really a mold case, but it deserves mention here because of the way it impacted, or at least had a potential to impact, mold coverage cases in Oregon. It was a case seeking to apply a statutory remedy that the legislature created, ORS 742.246(2), which responded to a practice by insurers conducting business in Oregon, where they employed misleading policy language. The statute provides:

(2) Any provision restricting or abridging the rights of the insured under the policy must be preceded by a sufficiently explanatory title printed or written in type not smaller than eight-point capital letters.

The case involved a pollution exclusion clause which appeared under a title--- "PERILS INSURED AGAINST." In this case, the policy contained a section under a bold heading entitled "PERILS INSURED AGAINST" which consisted of two statements that the policy insures against "risk of direct loss to property described in Coverages A and B," and "direct physical loss to the property described in Coverage C." Those statements were followed by a list -- almost two pages long -- of losses that were *not* covered. A person who did not read the policy carefully would assume that the list of items under that heading would be a list of *covered* items, not excluded items. The title "PERILS INSURED AGAINST" in this policy did not explain that there are provisions appearing under that title that restrict or abridge an insured's right to coverage. Therefore, the policy violated ORS 742.246(2).

ORS 742.038(2) provides:

"Any insurance policy issued and otherwise valid which contains any condition, omission or provision not in compliance with the Insurance Code, shall not be thereby rendered invalid but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy been in full compliance with the Insurance Code.

That statute required courts to construe an otherwise valid policy to bring the invalid part of the policy into full compliance with the Code. The pollution exclusion clause in this case limited the right to coverage, but appeared under that title, "PERILS INSURED AGAINST." The insurer relied on that clause in denying coverage for plaintiff's loss. In this circumstance, construing the policy as though it did not contain the pollution exclusion clause was the remedy

imposed by the Oregon Supreme Court. In other words, the policy was applied as if the pollution exclusion did not exist.

Interestingly, despite the seemingly clear mandate of the statute, the plaintiffs lost at every step of the case, including at the trial court level, before the Court of Appeals and even the Supreme Court. Plaintiff's counsel, after receiving an adverse decision at the Supreme Court filed a motion for reconsideration, which almost never succeeds in reversing a decision. Here it did. Insurers have been forced to re-write their policies to comply with the statute or risk having their exclusions being held unenforceable.

Practice tip: Read any relevant homeowner's insurance policies fully when you get them, if you are a consumer. If you are an attorney, always analyze the client's homeowner's policy before asserting any claim in court if time permits. In the *Cippolone* case mentioned below, I was able to negotiate an insurance payment to my client who then used it to finance the construction defect litigation against his builder. If you are not well versed on insurance coverage issues, consult someone who is. If you are pursuing a third party claim against a contractor or landlord, always serve requests for production under ORCP 36 for all insurance policies and reservation of rights letters or coverage denial letters. Conduct your own analysis of whether or not the claim is covered by some policy. As shown in the *Cippolone*, *Prudential* and *Lillard v Red Shield* cases mentioned below, a settlement can be made or coverage can be found even though the insurer initially denies coverage.

B. Standard of proof for experts in Oregon

The standard for admissibility of expert and scientific evidence and testimony has been greatly liberalized in Oregon in recent years. *See e.g. Jennings v Baxter Healthcare Corp*, 331 Or 285, 14 P3d 596 (2000) (trial court committed reversible error in excluding expert testimony of causation concerning neurological injuries from breast implants). Oregon trial courts have permitted introduction of scientific evidence associated with toxic mold on several occasions. Unfortunately, some attorneys have been prevented from introducing expert testimony in their cases due to their inability to understand its relevance and explain it to the court. In my opinion, relevancy of expert testimony concerning mold exposure and illness should not even be a close question at this point.

In the Lane County Circuit Court case of *Paul Hawks, Karen Hawks, Ralph Weeldreyer, Fiberglass Specialties, Inc., dba The Pellet Center v Margaret C. Hartley*, Case no. 16-99-08461, the court considered a challenge to Plaintiffs' medical expert, industrial hygienist, and environmental health expert made the day before trial. He denied all three challenges on July 13, 2000. First Judge Rasmussen stated that not all expert testimony is "scientific" testimony for 104 purposes, and on this basis denied defendant's challenges to the hygienist and environmental health experts based on his review of their qualifications.⁶ The court also found *Brown v Boise-Cascade Corp.*, 150 Or App 391 (1997), rev den 337 Or 317 (1998), where trial court exclusion of industrial hygienist was reversed, as controlling on the admissibility of the hygienist testimony. Dr. James Craner of Reno, Nevada was plaintiff's medical expert. Judge Rasmussen allowed him to testify to make a preliminary showing of admissibility. The defense in the *Hawks* case relied on a doctor from OHSU to attack the admissibility of scientific evidence concerning the toxicology of mold. This OHSU doctor is a frequent defense expert and he invariably says that there is no logical explanation for the plaintiffs' symptoms, and that they were not caused by mold exposure. After the direct and cross of Dr. Craner was completed, Judge Rasmussen denied the motion outright and this OHSU doctor was not even allowed to testify at the 104 hearing.

In another toxic mold case in Lane County, *Dr. Mark O'Hara, Mary Jane O'Hara et. al v Michael Cockram, Jeff Stangland dba Stangland Construction and Harvey & Son Heating and Air Conditioning, Inc.*, Case No 16-00-12848, the court allowed the same Dr. James Craner to testify concerning that toxic mold in the O'Hara's home was a cause of their medical and health problems.

Section 702 of Oregon's Evidence Code sets the standard for admission of scientific evidence:

⁶ The key case he relied on was *State v. Trager*, 158 Or App 399, rev den 329 Or 358 (1999). That opinion lays out the differences between scientific testimony and other expert testimony, with an easier standard of admissibility for non-science evidence.

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

According to *State v. Brown*, 297 Or 404, 409, 687 P2d 751 (1984), expert testimony is admissible if it is relevant under OEC 401, would assist the trier of fact under OEC 702, and is not subject to exclusion under OEC 403. Scientific evidence "draws its convincing force from some principle of science, mathematics and the like. Typically, but not necessarily, scientific evidence is presented by an expert witness who can explain data or test results and, if necessary, explain the scientific principles which are said to give the evidence its reliability or accuracy." *Brown*, supra, 297 Or at 407- 408. The *Brown* court utilized a number of factors in determining whether scientific evidence is probative under OEC 401 and OEC 702. Those factors are:

- (1) The technique's general acceptance in the field;
- (2) The expert's qualifications and stature;
- (3) The use which has been made of the technique;
- (4) The potential rate of error;
- (5) The existence of specialized literature;
- (6) The novelty of the invention; and
- (7) The extent to which it relies on the subjective interpretation of the expert.⁷

Those seven factors are not an exclusive checklist. Clinical diagnoses (differential diagnosis) and the process of elimination also bear the marks of scientific inquiry. A medical doctor gathers information from a patient from an interview and an objective physical examination to develop a working diagnosis (a hypothesis). He then uses that working diagnosis to gather further information or to conduct specify tests that will confirm or refute the working diagnosis. Certain possible causes can be eliminated as the list of possible maladies is winnowed down to eliminate certain suspect causes that do not produce given symptoms.

"The goal of the clinician is to arrive at a diagnosis that can be used to develop a rational plan for further investigation, observation, or treatment, and ultimately to

⁷ *Id.* at 417 (fn 8)

predict the course of the patient's illness * * *. To do this, the clinician must verify or validate the diagnostic hypothesis." ⁸ *Reference Guide on Medical Testimony* at 463-64.

In *Jennings, supra* at page 308, the Supreme Court noted:

“Grimm testified that he performed "a classic neurological examination" on each of the women in his study group. Grimm's hypothesis is based on his own experiences and observations, as well as on scientific methodology. . . . Grimm conducted his evaluations by using neurological examination techniques generally accepted by the scientific community and with an error rate of five to seven percent. In each case, Grimm made personal observations and conducted a medical record review. He proceeded in conjunction with other specialists involved in the women's care. Grimm also studied the scientific and medical literature about silicone-related subjects.”

“Grimm eliminated other potential causes of plaintiff's conditions through differential diagnosis, which is a generally accepted form of scientific inquiry.”

Grimm's study and conclusions had not been subjected to peer review and had not been published. However, the court found that neither peer review nor publication is a *sine qua non* for the admissibility of scientific evidence.⁹

Practice Tips: The plaintiffs' practitioner should cite this *Jennings* decision, especially if your medical expert is not “published” or has not written many papers that have been submitted to peer review.

While one would think that *Jennings* made admissibility of expert testimony pretty much a given and any challenges to the evidence being reduced to consideration of weight rather than admissibility, an Oregon attorney representing plaintiffs should be ready to respond to a blitzkrieg of defense motions to exclude medical experts. It is a common defense tactic and

⁸ *Id.* at 464. *See also O'Key*, 321 Or at 292 ("The scientific method is a validation technique, consisting of the formulation of hypotheses, followed by observation or experimentation to test the hypotheses.").

⁹ *See O'Key*, 321 Or at 304 ("In some cases valid but innovative theories or propositions will not have been published, either because they are too particular, too new, or of limited interest.").

many judges, like people generally, do not know anything about mold and are prone to defense argument that these many studies documenting mold's association with human health problems are "junk science." The unwary mold attorney who does not understand mold science will likely not be able to explain it to the judge and overcome the defense. The plaintiff's attorney should file a pretrial motion *in limine* to obtain a ruling that defense counsel and his experts be precluded from using the term "junk science" when referring to plaintiffs expert reports and sources that back them up. The practitioner should also become thoroughly familiar with the science of mold intoxication and exposure and not merely rely on their experts to explain it all. Sometimes, as shown below in the *O'Hara* case, the expert has completed his testimony and goes home – usually out of state. In others, as shown below in the *Haynes* case, counsel finds himself having to explain the concept of, for example, the blood tests used, to the trial judge to show that the tests are within mainstream medical science.

C. Oregon law on negligence, breach of contract and the "economic loss rule."

In *Securities-Intermountain, Inc. v. Sunset Fuel Co.*, 289 Or. 243, 611 P2d 1158 (1980) the question of whether certain construction defect claims sounded in tort or contract was important to a statute of limitations analysis. The first and third counts of the complaint in *Securities*, alleged breaches of the agreement. The second count alleged breach of the common law duty of workmanship. The court noted that an allegation of breach of this common law standard could state a claim in either contract or tort. "By inclusion of the phrase "unworkmanlike manner," this allegation appears to invoke a negligence standard or general professional duty of due care and skill rather than a contractual standard." *Id* at 263. The court then allowed the claim to be construed as a contract claim, and therefore subject to the six year limitations period for contract rather than the shorter two year period for tort claims. *Id*. Notably, the defendant argued that the allegation of breach of the duty to construct the building in a "workmanlike manner" sounded in negligence.

Since that case, many defense attorneys have tried to argue that plaintiffs cannot sue a contractor in negligence for construction defects. That battle is frequently fought at the trial level in both Oregon and Washington. In fact, it had become almost routine for Oregon attorneys defending builders in construction negligence claims to argue that plaintiffs must show a "special relationship" between themselves and a defendant in order to proceed. Defense counsel also

made that argument in the *Haynes* case, discussed below. Plaintiffs usually argued that this was also a misperception of the law of negligence, and showed that decisions imposing the special relationship doctrine had gotten off track by confusing a negligence claim (where the elements are duty, breach, causation and damages) with a negligent misrepresentation claim (where the added elements of detrimental reliance on a representation and right to rely must also be shown).

The special relationship doctrine is an offshoot of the old “economic loss doctrine” announced in cases such as *Onita Pacific Corp. v Trustees of Bronson*, 315 Or 149, 159, 843 P2d 890 (1992). In *Onita* the question was whether Oregon was going to recognize a negligent misrepresentation claim in a commercial context involving parties dealing at arms length. It was significant to both the court’s approach and the result of that case that the alleged damages were *purely economic*, as distinguished from property damage or personal injury. The court noted that negligence cases between contacting parties involving purely economic losses are more limited than the latter type of cases, stating that one “ordinarily is not liable for negligently causing a strangers purely economic loss *without injuring his person or property*. . . .” *Id* at 159, citing *Hale v Groce*, 304 Or 281,284, 744 P2d 1289 (1987). (Emphasis added).

The reason that a court will take a different approach to commercial litigation involving pure economic loss is because in most commercial cases a breach of contract theory provides an adequate remedy. For example, if a developer is building a shopping mall and the contractor walks off the job, leaving it unfinished, the developer can hire a replacement contractor and sue for any increase in the cost of completion under a breach of contract theory. The developer’s losses are purely economic and a breach of contract theory provides an adequate remedy as it gives the developer the benefit of his bargain or his “expectation damages.” He may compel the contractor to pay for the result the owner expected when he hired the contractor. Obviously, this same expectation theory does not as neatly fit a situation where a contractor builds negligently and the owner suffers property damage or personal injury to his wife or children due to contamination by toxic mold. In those types of cases the customer could not fairly be said to have “expected” such a terrible result when he signed the contract. Therefore, the remedy must necessarily include any damages flowing from the breach, including medical expenses, pain and suffering and replacement of contaminated personal property. These are the sort of damages that were not contemplated to be precluded in *Onita*’s economic loss doctrine.

Onita specifically cited *Securities-Intermountain* and reaffirmed that a “professional or contractual relationships may also give rise to a tort duty to exercise reasonable care on behalf of another's interests” *Id.* at 160. In fact, the court observed that construction professionals such as architects and engineers “may be subject to liability to those who employ (or are the intended beneficiaries of) their services and who suffer losses caused by professional negligence. . . .”¹⁰ Having acknowledged the tort of negligent misrepresentation, the court then distinguished the tort of negligent misrepresentation, which connotes elements of fraud and detrimental reliance, from general negligence. The tort of negligent misrepresentation depends upon a statement made by another and the receiver’s justifiable reliance on the statement. The court noted that one may rely upon advice given by an agent, realtor, or an insurer engaged in protecting an insured from excess liability, because all of those actors are seeking to further the economic interests of the client. The court distinguished these fiduciary like relationships from one involving parties in an arms length commercial dealing governed by principles of *caveat emptor*. The court noted that one commercial party ordinarily would not have a right to rely upon a statement made by the adverse party in an arms length contract without some basis upon which the right to rely could be established.

Cases following *Onita* have been inconsistent. Some decisions have noted the pure economic loss rule while permitting cases to proceed because the claims also involved property damage or personal injuries. Most decisions have ignored the *Onita* distinction between the types of damages suffered altogether and have focused on the fact that the claim was based on a duty outside of the contract as in *Securities, supra*, or *Georgetown Realty v. The Home Ins. Co.*, 313 Or 97, 106, 831 P2d 7 (1992).

Georgetown noted that the law had long allowed an “action on the case” for what now is called negligence. The existence of the contract “is laid as mere inducement” establishing the background for the duty the defendant violated. The duty itself, however, emanates from the common law of negligence which “is the gravamen of the action.” *Id.* at 102-103. The court noted the irony that in most cases raising the issue, it was the defendant that asserted that it

¹⁰ (citing *Ashley v. Fletcher*, 275 Or 405, 550 P2d 1385 (1976) (architect); *Bales for Food v. Poole*, 246 Or 253, 256, 424 P2d 892 (1967) (engineer)).

committed a tort, because it hoped to impose a shorter statute of limitations period (2 years) instead of the longer period for a contract claim (six years).¹¹ The court noted that the context in which a dispute arises does not control, but rather it was the wrong or breach of the duty that gave rise to the claim. The court in *Georgetown Realty* then reaffirmed the holding in *Securities-Intermountain v. Sunset Fuel*, 289 Or 243, 611 P2d 1158 (1980) and explained the state of the law as follows:

The lesson to be drawn from this court's cases discussing the choice between contract and tort remedies is this: When the relationship involved is between contracting parties, and the gravamen of the complaint is that one party caused damage to the other by negligently performing its obligations under the contract, then, and even though the relationship between the parties arises out of the contract, the injured party may bring a claim for negligence if the other party is subject to a standard of care independent of the terms of the contract. If the plaintiff's claim is based solely on a breach of a provision in the contract, which itself spells out the party's obligation, then the remedy normally will be only in contract, with contract measures of damages and contract statutes of limitation. That is so whether the breach of contract was negligent, intentional, or otherwise. In some situations, a party may be able to rely on either a contract theory or a tort theory or both.

Georgetown Realty emphasized that an insurer who controls the defense could be subject to liability for bad faith for how it handled the defense.¹² Defense attorneys seized upon that part of the decision as imposing some kind of extra requirement in negligence cases – a requirement that a defendant be in control or stand in a fiduciary capacity to plaintiff in order for a negligence claim to lie. The defense bar portrayed the decision as establishing some kind of new brand of immunity based on contracting status. According to many defense attorneys, if you have a contract with your victim you are immune from being sued in negligence unless the contract imposes some kind of “special relationship” akin to a fiduciary duty. This ignored the fact that the special relationship doctrine arose out of negligent misrepresentation cases because one must prove a right to rely upon statements made to hold the speaker liable in such cases. Because

¹¹ *Id* at 103 (citing cases).

¹² Note the tie in to the previous discussion of insurance bad faith issues.

liability in a negligent misrepresentation case depends on whether you have a right to rely on advice given by trusted insiders, the duty to avoid causing foreseeable injury cited in *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1, 17, 734 P.2d 1326 (1987), is replaced in those cases by seeing if the injured party had a right to rely upon the negligent statement because of the special relationship between speaker and his victim.

The court in *Conway v Pacific University*, 324 Or 231, 924 P2d 818 (1996). reaffirmed the special relationship doctrine from *Onita* but found no such relationship in an arms length negotiations for an employment contract. *Conway* actually reaffirmed previous cases finding liability for negligence if the duty arose outside of the contract terms. *Id.* at 238. The *Conway* court stated that the “duty in tort does not arise from the terms of the contract, but from the nature of the parties’ relationship.” This was a true statement because any legal duty arises from the relationship between the parties and the obligation to avoid causing another foreseeable harm. But this comment was taken out of context and led to later cases in the Oregon Court of Appeals erroneously scrutinizing the nature of the relationship as an immunizing factor instead of recognizing, as cases had for a century before, that the existence of an extra-contractual duty is the gravamen of a negligence claim.

Unfortunately, defense attorneys took the Conway decision as opening the door to expanding the special relationship doctrine to apply to situations in which one party has hired the other in a professional capacity, as well as the previously recognized situations where there was a principal-agent and other fiduciary relationship. Defense counsel in Oregon began arguing that a person having a contract with a wrongdoer cannot sue for general negligence, unless there is a special fiduciary like relationship. That is precisely the type of “one size fits all” black letter pronouncement the *Onita* court had sought to avoid when it stated:

“But for the reasons that follow, rather than adopting a black letter “rule,” we opt to develop the scope of the duty and the scope of recovery on a case-by-case basis, in the light of related decisions of this court.” *Onita, supra* 315 Or at 159.

This confusion has resulted in several aberrational decisions such as *Gladhart v Oregon Vineyard Supply Co.*, 164 Or App 438, 994 P2d 134 (1999) rev’d on other grounds 332 Or 226, 26 P3d 817 (2001) involving allegations of negligence and negligent misrepresentation. *Onita* was relevant to the latter claim as there was the need to show some special relationship upon

which detrimental reliance could be pinned in a negligent *misrepresentation* theory. But the Court of Appeals in *Gladhart* threw the baby out with the bathwater. It confused the “independent duty” doctrine of *Georgetown Realty* and ignored a century of decisional law in concluding, erroneously, that there was a need to show a special relationship in *all negligence cases*. That was a mistake and a departure from settled case law. The relationship between the parties is merely one factor that goes into the analysis of whether there may be a duty outside the contract. Unfortunately, the Oregon Court of Appeals held to this view of the law in *Strader v. Grange Mut. Ins. Co.*, 178 Or App 329, 39 P3d 903 (2002) (discussed in more detail below).

Eventually, this confusion had to be clarified by the Oregon Appellate Courts. Lawyers for the plaintiffs were asserting *Securities* and *Georgetown Realty* in support of their plaintiffs’ rights to assert negligence claims against builders, while defense attorneys were asserting *Strader* and *Gladhart*. On March 20, 2008 the Oregon Supreme Court, in *Harris v Suniga, CA 125316, SC S054549*, made it clear that the “economic loss doctrine” did not prevent an action in negligence against a contractor. The court stated, in part:

Here, plaintiffs seek recovery because defendants' negligence caused dry rot in the apartment building that plaintiffs own. The allegations in the complaint are thus quite different from the kinds of damages that this court has characterized as "economic losses" in other cases -- the reduced stock price in *Oregon Steel Mills*, the monetary gift to a beneficiary in *Hale*, or the "indebtedness incurred or return of monies paid" in *Onita Pacific Corp.* Plaintiffs here seek recovery for physical damage to their real property, and this court's cases generally permit a property owner to recover in negligence for damages of that kind. (Emphasis added).

The distinction between what is and what is not an economic loss depends upon the nature of the damage which occurred. *Id.* If, for example, a contractor walked off the job so that the owner had to hire another contractor at greater expense, any increased cost would be viewed as an economic loss recoverable under a breach of contract theory. The owner did not receive the benefit of his bargain because he did not receive the building for the original contract price but had to pay more for the same building. However, when a contractor, through his negligence, damages the building or contaminates its contents because of ensuing mold growth, the cost to repair and other consequential damages are not perceived as economic losses but property damage properly recoverable in tort.

Practice tip: An attorney should analyze his case and the type of damages his client suffered before pleading a complaint. If there is a construction contract, look to see if the contractor breached it or breached the warranty. If he breached a contract provision (remember, most contracts incorporate the plans and specifications into the contract) the claim is for breach of contract as regards to the damage resulting from that breach. Where there are defects that would not be, strictly speaking, a breach of the contract, then allege a negligence cause of action. Also, if a person suffered property damage or personal injury, those items can be included in a negligence claim. Don't forget to analyze whether there is an attorney fee clause in the contract. I have seen attorneys fail to include a claim for attorney fees in their complaint and end up losing their client's right to reimbursement for their attorney fees after the case. I know of one recent case where a defense attorney received a defense verdict but had neglected to plead a right to defendant's attorney fees. His client then had a malpractice claim against him for failing to do so.

If you commit this kind (or any kind) of mistake, notify your client immediately in writing and advise him or her to consult independent counsel to analyze and advise whether there is a viable claim for malpractice. Do not try to bull your way thorough. Do not try to cover up your mistake. You can be disbarred for dishonesty but usually not for committing an honest mistake. Most clients will forgive an attorney for making an honest mistake, but never for covering one up.

D. Reported Oregon Decisions.

The following is a brief summary of reported Oregon decisions involving toxic mold cases.

Strader v. Grange Mutual Ins. Co., 179 Or. App. 329, 39 P3d 903 (2002).¹³

Plaintiffs sued their insurer for breach of contract and for personal injury arising from their insurer's handling of a first party insurance claim. The trial court granted defendant's motion for partial summary judgment on the personal injury claim. The breach of contract claim

¹³ This author admits to a little subjectivity in expressing an opinion on this decision. The case is listed after the *Haynes* case because the author addresses the issues raised in *Haynes* in greater detail, having first hand familiarity with it and it seemed appropriate to address the construction defect case first because the facts were more similar to the *Securities* case.

went to trial, where plaintiffs prevailed and were awarded damages plus prejudgment interest but not attorney fees. On appeal, the Oregon Court of Appeals decided, *inter alia*, whether plaintiffs could base a personal injury claim on conduct that was a breach of contract.

Plaintiffs bought a home in September 1995 and insured it under a homeowners' policy issued by defendant. Three months later, a windstorm caused extensive water damage to the house and its contents. The insurer arranged for temporary repairs, which did not prevent further water damage or allow existing moisture to evaporate. Permanent repairs to the roof were finished a year after the storm, in December 1996, but defendant and plaintiffs could not agree on the amount due under the policy. During the winter Kathy Strader began having health problems which her physician diagnosed as asthma aggravated by mold spores. He also advised her to reduce exposure to her home. Plaintiffs informed defendant of this diagnosis and showed their insurer the areas of the house containing mold. Despite this, the insurer continued to refuse to pay the amount requested to repair the water damage and get rid of the mold. The Straders sued.

Plaintiffs alleged breach of contract in that the insurer had not met its obligation under the policy to pay compensation sufficient to cover repair of the roof and water damage. They also asserted a negligence claim for their insurer's unreasonable delays in repairing the roof and its failure to correct the moisture problem and remove the mold. The trial court granted summary judgment to defendant on the personal injury claim. The case went to trial on the breach of contract claim, and the jury awarded plaintiffs \$195,500 in damages. Plaintiffs appealed.

On appeal, the *Strader* court began its decision by correctly stating that a party seeking to assert a tort claim based on conduct that is also breach of a contract must allege that the defendant's conduct violated some standard of care that is not part of the defendant's contractual obligations. But the court went beyond *Securities* which recognized tort liability based on breach of the implied covenant of workmanship and held that there could be no tort liability for breach of either an explicit or implied covenant. The *Strader* court then opined "that the independent standard of care stems from a particular special relationship between the parties." As discussed above, this confused the elements of a negligence cause of action with a cause of action for negligent misrepresentation, which requires the additional elements of detrimental reliance and right to rely on the defendant's representations. But *Securities Intermountain* and *Georgetown*

Realty considered the implied duty of care to perform in a workmanlike fashion, which was implicit in the contractual relationship but which is present regardless of whether the parties have a fiduciary relationship, as an element of a tort claim. *Securities, supra* at 263.

Instead of finding, as Oregon courts had for years, that a tort duty of care can be based on the existence of duties outside of the contract, such as common law duties, statutory duties or duties implied by the relationship of the parties, the *Strader* Court moved an implied covenant (such as the implied covenant of workmanship recognized in *Securities* as supporting tort liability) into the area of tort immunity. The result was that *Strader* unwittingly departed from prior precedent and seemingly immunized contracting parties that were negligent and who for over a century would have been held accountable under the law of negligence.

The *Strader* court then focused on the relationship of the parties and found that the tort of negligence could only be asserted if there was a “special relationship” thus importing the element of a negligent misrepresentation claim (right to rely because of the relationship) that had been confused since *Conway*. The court then held that the relationship between an insurer and insured is special only in the context where an insurer defends a claim that is covered under a liability policy.¹⁴ However, it opined that in a first party claim setting the relationship was necessarily adversarial in nature, because the parties assumed adverse postures in court. The court wrote:

More to the point, the relationship between an insurer and its insured is special with respect to the insurer's performance of its duty to defend, so that negligent performance of that duty gives rise to a tort claim, but the same relationship is not special with respect to the insurer's refusal to settle within policy limits, which sounds only in contract; in the former context, the insurer is in something resembling a fiduciary role, whereas in the latter it and the insured are adversaries. *Id.* At 334.

The court seemed confused about the nature of the insurance relationship. It tried to opine that the insurer-insured relationship was special in some contexts but not others. It focused on the relationship as it existed -- not when it was formed and during its duration -- but on how it

¹⁴ The *Strader* court also ignored *Crosby v. SAIF Corp.*, 73 Or.App. 372, 378, 699 P.2d 198 (1985) where the Oregon Court of Appeals recognized a special relationship in a first party insurance setting.

was after it had deteriorated. A relationship is defined not by how it ends but by how the parties defined it when it was formed. Certainly, the fact that half of all marriages ends in divorce does not make the marriage relationship adversarial (feel free to insert joke here). A relationship is special because of the expectations that each side creates in each other and the promises that each side makes to each other when the relationship is formed. Thus, when State Farm says it will be there for you in times of trouble “Like a Good Neighbor” or when Allstate tells you that you are “In Good Hands” with Allstate or when Farmers tells you that if you have a claim they will put you “Back Where you Belong” they create expectations that they will treat you as a trusted friend. They promise to protect you against loss. These promises define the special nature of an insurer-insured relationship because the insurer promises to treat you better than a merchant treats just another customer.¹⁵

The court appeared to confuse the concept of bad faith in failing to settle within policy limits in a liability defense scenario with that of a special relationship when a homeowner suffers catastrophic loss and looks to the insurer to honor its policy. As noted above, where an insurer refuses to settle within policy limits and then exposes its insured to excess liability is one scenario in Oregon where an insurer can be sued for bad faith.¹⁶ The court focused on the insurer’s duty to defend and ability to control the defense as connoting a special relationship in a liability defense situation but then said that there was “no mandate to exercise independent judgment for the sole benefit of plaintiffs” in a situation where an insurer undertakes a duty to adjust a claim and pay for repairs. But an insurer has a duty to restore an insured’s house to pre-loss condition when a covered claim is submitted. So there is a mandate to pay under the contract if the loss is covered and an implied duty do so in a way that will avoid causing foreseeable injury to the insured similar to the implied covenant that supported tort liability in *Georgetown* and *Securities*. Unfortunately, plaintiffs counsel apparently did not make that

¹⁵ Can you imagine how it would affect sales if an insurer said “We’ll stand behind you unless you have a claim, then you are on your own because we have an adversarial relationship?”

¹⁶ Oregon bad faith law is limited to scenarios where an insurer refuses to settle within policy limits thus exposing its insured to excess liability. See e.g. *Farris v. U.S. Fid. and Guar. Co.*, 284 Or. 453, 587 P2d 1015 (1978).

argument or appeal the *Strader* case further. In any event, the *Harris v Suniga* decision may end up clarifying the law so that such injustices will not be repeated in the future.

O'Hara v. David Blain Construction, Inc., Lane County Case no. 160417923; Oregon Ct of Appeals Case No A130545 (2007)

The Mark O'Hara family of Eugene, Oregon had brought a toxic mold/construction defect case against the builder who remodeled their home. They asserted that, due to a defective remodeling of their previous home, they were exposed to toxic mold and micro-toxins. The case settled confidentially during trial.¹⁷ In 2002, they decided to build a new house, taking special care to protect against toxic mold growth. They hired a construction consultant and a builder to design and oversee the construction of the new house. Their contractor began constructing the house late in 2002. However, the house was not finished when Oregon's seasonal winter rains arrived. They began experiencing medical problems after they moved in and discovered mold in the house. They hired remediation specialists to remove the mold and remedy other defects.

Plaintiffs sued their builder and building consultants for personal injury and property damage in September 2004. They alleged defective construction that resulted in their damages and breach of the agreements for the construction and consulting services. They alleged that their consultant breached the duty to inspect and ensure that the residence was constructed as designed. The case went to trial in July and August 2005. The jury returned a verdict finding that the builder defendants were negligent, but that the consultant was not negligent. The jury also found that the builder had not breached the contract. Plaintiffs obtained judgment against the builder defendants in the amount of \$31,620, and the trial court also awarded costs in the amount of \$6,215. Plaintiffs appealed, arguing that the trial court erred when it denied their motion to file a second amended complaint approximately 30 days before the date of trial. The proposed amendment sought to add a claim for damages of \$2.5 million for loss of income and the increased cost of obtaining similar housing. It also would have added nine new specifications of negligence against some of the defendants. The trial court denied the motion to amend, holding

¹⁷ This is the case mentioned above in the discussion of medical evidence and expert admissibility. This discussion is about a second case that followed after the *O'Hara v Stangeland* case.

that the timing and scope of the amendment would "make it really impossible to try this case in the time frame that it will be tried in." On appeal, the Court of Appeals affirmed the trial court decision, stating that the trial court did not abuse its discretion in denying the late amendment.¹⁸

Plaintiffs also argued that the trial court erred in excluding evidence that Blain did not carry insurance providing coverage for toxic mold damage. Plaintiffs' contract with the Berry defendants included the requirement that Berry obtain a certification that Blain carried such insurance. After leave to file a second amended complaint was denied, plaintiffs tried to claim that this allegation was alleged within a previous version of their complaint. The trial court and Court of Appeal disagreed, finding that the prior version of the complaint did not include such allegation.¹⁹

Plaintiffs argued that the trial court erred in excluding testimony by any witness offering an opinion as to whether Katelyn O'Hara's endometriosis was a result of exposure to toxic mold. But defendants had asked plaintiffs to produce medical records in December 2004 and January 2005. Plaintiffs provided some documents but no information that indicated that endometriosis was a condition that resulted from defendants' alleged negligence.²⁰ Under ORCP 44 D(2), a trial court has the discretion to exclude a physician's testimony for a party's failure to comply with ORCP 44 C. The trial judge excluded evidence of whether plaintiff Katelyn O'Hara's endometriosis was a result of exposure to toxic mold and the Court of Appeal held that it was within the trial court's discretion to do so.

Plaintiffs also assigned error to the trial court's refusal to reopen evidence after both sides had rested to allow their medical expert, who had returned to Arizona, to testify by telephone.

¹⁸ Citing *Safeport, Inc. v. Equipment Roundup & Mfg.*, 184 Or.App. 690, 699-701, 60 P.3d 1076 (2002), *rev den*, 335 Or. 255 (2003) (setting out applicable abuse of discretion standard).

¹⁹ Oregon's code pleading system embodied in ORCP 18 requires a plain and concise statement of the ultimate facts constituting a claim for relief and not simply notice pleading followed in other jurisdictions and federal courts. If you are an out-of-state attorney not familiar with code pleading, you should associate an Oregon attorney to navigate this dangerous area of the case.

²⁰ Under ORCP 44 C, in a civil action where a claim is made for damages for injuries to a party, "upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports and existing notations of any examinations relating to injuries for which recovery is sought."

Defendants had cast doubt on the validity of the testing procedures relied on by plaintiffs' expert, Dr. Michael Gray in the defense's case-in-chief. Plaintiffs sought leave to allow Gray to testify by telephone from Arizona in rebuttal and to present a letter from him explaining why the issues raised by defendants in their case-in-chief had no bearing on the specific subject matter of his testimony. The trial court denied plaintiffs' motions and, again, the Court upheld that decision as lying within the trial court's discretion to regulate the conduct of a trial.

Plaintiffs argued on appeal that the trial court erred when it entered a verdict for \$31,620 instead of that amount for each Mark and Mary Jane O'Hara. The Court of Appeals noted that the verdict form was patently ambiguous. It could be reasonably interpreted to inquire "what are each individual plaintiff's damages" or to inquire "what total damages should plaintiffs, as a group, receive." But the Court of Appeals found that plaintiffs' failure to object to the verdict before the jury was discharged deprived the trial court of the opportunity to address that question to the jury, so the issue was not preserved for appeal.

Practice tip: Figure out your case early and anticipate any defense expert strategy that the defense may use. Vet your own experts and the laboratories they use. These days business interests and insurers think nothing of trying to discredit a doctor who testifies for the plaintiffs. Do not rely on a last minute amendment or attempt to re-open your case to save you after you have been caught flat footed.

E. Unreported trial court cases.²¹

Many cases settle before or during trial and that is a good thing. Settlements bring certainty. Juries are unpredictable and the cost of a trial can be staggering. In this chapter you will see that settlements are discussed after stating the gist of a claim. That is not meant to imply that a claim is proven or that the settlement was based on an admission of liability. Often, settlements are made to avoid further expense or for other reasons. In fact, usually a settlement agreement or release contains a specific denial of liability. The following reports should not be taken as a statement that claims were proven in court or at arbitration, or that the defendant was actually liable.

Hawks v Hartley, Lane County case no. 16-99-08461.

This case is generally considered to be the first toxic mold case in the State of Oregon. The case arose from contaminated wood pellet stoves that the mold victims imported from overseas to sell in a retail distributorship. The store owner and his wife became ill after being around the contaminated stoves. This case resulted from that exposure. The case settled in trial for an undisclosed sum. But the case was significant far beyond that result in that it opened the door to future mold litigation and provided cases that followed with trial court rulings on the admissibility of expert testimony from physicians who treat mold patients, as discussed above. Mr. and Mrs. Hawks, like many other mold victims, also shared their accumulated knowledge about mold with their attorney and many other mold victims, including Mark and Mary Jane O'Hara, who also passed on that knowledge to others.

²¹ There are many cases that are filed each year and either dismissed or settled. This author is aware of what happened in most of the following cases because they were handled by the author or were cases on which he consulted, spoke to counsel and/or client or observed first hand. Case numbers are provided for some of the cases where a party might want to obtain copies of documents having some bearing on future cases. Case numbers are not provided in arbitration cases with no value as precedents or cases where the facts or issues are limited in applicability to the case itself. The author has solicited input from other attorneys handling mold cases in Oregon, but very few have responded to his requests for information. The *Hawks*, *O'Hara* and *Johnson v Miller* cases were handled by other counsel, but the clients have informed the author of what happened.

O'Hara v Cockram and Stangeland Construction et al. Case No 16-00-12848

The Mark O'Hara family of Eugene, Oregon hired a building contractor to remodel their house. They brought a toxic mold/construction defect case against the builder who remodeled their home. They asserted that, due to a defective remodeling of their previous home, they were exposed to toxic mold and micro-toxins. Defendant Stangeland filed a petition in bankruptcy before trial, which led to the imposition of the automatic stay provisions of the U.S. bankruptcy code. Plaintiffs had to go to the bankruptcy court and obtain relief from that stay to be able to proceed in their case against the defendants. The defense then moved to exclude certain evidence, claiming spoliation. Plaintiffs moved pretrial to exclude a number of the defendant's affirmative defenses. There were also motions filed concerning whether disclosure of some expert witness information led to waiver of the attorney client privilege and work product doctrine. The case also involved pretrial challenges to plaintiffs' experts, as noted above. Plaintiffs overcame most of these hurdles but the case settled confidentially during trial.

The Cipollone case.

The Cipollone family of West Linn, Oregon, built a large complex multi-level house. Unfortunately, there were many things wrong with the house once it was completed, including instances where flashing was omitted from virtually every spot where a vertical wall or surface would attach to a horizontal surface. In addition, the roof system was defectively constructed and leaked substantially. The house was severely contaminated by several types of mold. The laminated support beams experienced extensive dry rot, as did other parts of the house.

The homeowners made a claim against their insurer for coverage under their homeowners policy and sued the general contractor and several of his subcontractors for negligence, among other claims. The insurer eventually decided to pay out a substantial settlement, knowing that the construction defect claim was being prosecuted and that it could receive subrogation from the money recovered in that case for the monies it paid under the homeowner policy. Somewhat unusually, the insurer did not even require a release for the money it advanced its policyholder, because it felt so confident about the construction defect claim, and its subrogation rights. The construction defect claim later settled for an undisclosed sum.

Prudential v Lillard

In February 1998, Mike and Pamela Dalton owned a two story home in McMinnville. Mr. Dalton attempted to repair the roof of the house before selling the house to Mrs. Lillard in March 1998, but he neglected to install flashing around the chimney and dormers to prevent roof leaks. That mistake left gaps in the roof through which rainwater would pass during 1998 and afterward. Approximately 48.5 inches of rain fell in McMinnville in 1998, but it was not until a large storm on Thanksgiving 1999 that Mrs. Lillard discovered water dripping from the ceiling of her downstairs dining room. She contacted a roofer and other experts to determine the scope of the problem. She also advised her insurer, and her agent told her it would not be covered, even though he had earlier promised her that the policy he sold her covered such water damage. Plaintiff had a witness to the discussion between her and her agent who testified at a deposition that he heard he agent promise to sell her a policy that covered water damage from rainfall.

Her insurer, Prudential, sued her in a declaratory judgment action to obtain a ruling that the claim was not covered. She counter-sued, alleging that the claim was covered and, if not, then her agent was negligent for failing to procure the coverage he had promised he would sell her. Prudential relied on a “faulty workmanship” exclusion, claiming that the leak resulted from faulty or defective repair. However, the policy also contained an “ensuing loss” clause that stated that if the loss was excluded any ensuing loss would still be covered so long as it was not excluded elsewhere in the policy. The policy contained a mold exclusion in the section of the policy that extended coverage. Under the *Fleming v USAA* case cited above, Mrs. Lillard argued that the mold exclusion was invalid and that she had coverage under the ensuing loss clause for everything but the repair to the roof itself.

The federal judge granted Prudential’s motion for summary judgment, stating that the roof leaked due to a defective repair, which was excluded. Plaintiffs asked the court to consider staying the decision and allowing an interim appeal to the Ninth Circuit on the issue of whether the ensuing loss clause extended coverage notwithstanding the faulty repair exclusion. This issue was also up on appeal in the Fifth Circuit. Otherwise, plaintiff was prepared to go forward on the negligent failure to procure claim against Prudential’s agent. The trial judge appeared willing to stay the case pending appeal of the ensuing loss issue, and Prudential then offered a settlement sufficient to cover most of the costs of repairs. Personal injury was not an issue in the case as a

typical homeowner policy covers property damage, not personal injury. Mrs. Lillard's and her daughter's personal injury claims are addressed below.

Johnson v Dykehouse

This case involved a modest two bedroom house in North Portland of the type that would appeal to first time homebuyers. Defendant purchased the house in March 2004 for \$63,900 and, after remodeling it, sold it several months later for \$154,900. The house had a defectively constructed roof and other defects, a few of which were caught by the Johnson's home inspector. But the real essence of the claim was that defendant covered up a considerable mold problem and then sold the house under a disclaimer, saying he was unaware of any problems.²² Neighbors familiar with the house explained that for a number of years previous owners had a hot tub in the unvented family room. The humidity in that room caused extensive visible mold to grow on the inside walls of the room and throughout other areas of the house. There was also mold in other areas of the house from a leaking roof. During defendant's upgrades, a new layer of drywall was installed over the existing moldy sheetrock.

The Johnsons moved in and began having symptoms. Luckily for them, they detected the problem very early in their ownership period and moved out of the house before they became very ill. Mr. Johnson discovered the two layers of drywall after responding to a roof leak. The inner layer (new layer) was mold free. The layer closest to the stud wall was covered in mold. He took pictures of the new layer of drywall over the moldy old layer and contacted a mold investigator who tested the house and found a number of marker taxa molds that have been implicated in human health problems. They commenced an arbitration pursuant to their earnest money agreement's arbitration provision. In discovery, the defendant was compelled to produce his invoices for the repairs he made to the house. These included invoices for many sheets of new drywall.

²² Like many states, Oregon has a Real Property Disclosure Act which requires a seller to disclose known defects in a house, including mold growth. One of the exceptions to the statute is where a seller can say that he has never lived in the house and is unaware of any specific defects. In such cases, a seller uses a disclaimer form. But I argued that a seller who has never lived in a house, but who does an extensive remodel, should not be able to hide behind a disclaimer.

The case settled in mediation in early 2007 after the Johnsons revealed their evidence. The Johnsons elected the remedy of rescission and restitution over money damages. The defendant agreed to buy back the house and pay the Johnsons \$ 32,500 for their personal property, which was presumed to be contaminated.

George v Western Homes, U.S. District Court (Eugene Or.), Case No. 05-6150 AA

Buddy and Mary George bought a Silvercrest manufactured home from a dealer in McMinnville in 1995. They had many problems with the house, usually from cracked drywall. In the first couple of years that they owned the house, the dealer sent out a man to repair the drywall cracks which the company blamed on the house “settling.” The dealer later went out of business and the Georges began dealing with the manufacturer, Western Homes. Later, further instances of cracked drywall resulted in the manufacturer sending a repairman out to the house. As with the dealer, the drywall cracks were blamed on the house “settling.” In the summer of 2003 the George’s developed symptoms consistent with mold exposure. They were unaware of the possibility of mold contamination until after the roof developed leaks in April 2004. They contacted the manufacturer who sent out an employee to inspect the roof. He removed a roof vent and replaced it. Later, when the leaks worsened, they again reported this to the manufacturer, which sent out an inspector who determined that the roof was installed improperly and that the manufacturer’s representative who has previously removed the roof vent must have cracked it as he tried to replace it on the roof.

The Georges also called their insurer, Allied Insurance, which arranged to have an inspection performed by a local contractor. The insurer’s inspector opened up the ceiling in the family room during his inspection, without first installing a containment field of protective plastic sheeting. When he opened up the ceiling, black slimy mold was found on the ceiling drywall and the rafters above it. Upon discovering the mold, the insurance inspector begged off the job and left. The Georges then hired a mold investigator and a construction defect expert and engineer. They determined that the mold had contaminated the inside of the home, and that the roof was incorrectly installed for a number of reasons.

Western Homes initially agreed to repair the roof and a time was set to have the company come to the house to fix the damage. By this time, however, the George’s mold expert suspected

that the damage went beyond damage to the roof. When I asked to reschedule the repairs so that the Georges' mold expert could be present to observe the repairs, Western Homes refused to repair the roof and accused me of canceling the repairs. The Georges were forced to file suit and did so in Douglas County, Oregon. Western Homes then removed the case to federal court and the Georges also joined their homeowner's insurer under the theory that the insurer was obliged to cover the loss and was negligent in hiring someone with no mold training to inspect a water infiltration claim.

Western Homes' own roofing expert admitted that the roof was improperly installed. Its engineer also noted in his report that the roof beams at the marriage line of the double wide house may not have had a sufficient number of bolts holding the two sections of the house together. But the defense experts also opined that the rain gutters may have been plugged and the free standing garage may have weighed down on the house, causing the roof leaks. The latter two theories did not explain why the roof leaked dozens of feet away from the garage on the other side of the house or why the windows on the other side of the house leaked. We prepared for trial.

A mediation was held on November 22, 2006 but was a non starter as neither the insurer nor Western Homes made a significant offer. The insurer later settled with the Georges for the cost of repairing the roof, drywall and carpeting. Western Homes would not settle and, instead, filed a motion for summary judgment asserting that the Georges had waited too long to sue; that although they filed suit within 2 years of discovering the leak and mold damage, the case involved a product (manufactured home) rather than construction defects. Western Homes argued that the 8 year statute of ultimate repose for product liability cases applied rather than the 10 year period for construction defects. The trial judge agreed with Western that this manufactured home was a product and not a constructed home, but also found that because the Georges discovered their damage within two years of filing suit, their claim fell within a narrow exception to the products liability statute of repose. The court ruled that they needed to show that the mold damage was occurring between May and September 2003 for the suit to be timely. As it happened, Buddy George had testified in his deposition that he and his wife began having symptoms in the summer of 2003, so the facts were within that narrow window of time established by the court. A few months later, in a mandatory settlement conference, Western

finally agreed to add to the amount the George's had previously recovered against their insurer, so the case settled, thanks to the efforts of Federal Judge Tom Coffin.²³

Haynes v Adair Homes, Inc., Clackamas County case no. CCV0211573

Perhaps the most significant mold cases in Oregon, from the standpoint of a notable jury verdict, is *Haynes v Adair*, believed to be the first cases in the Northwest that actually went through a full jury trial to a significant verdict for the plaintiffs. Most cases before and since have either resulted in a settlement, a defense verdict, or a relatively small jury verdict for property damage but not personal injury. The jury in the *Haynes* case awarded damage not only for property damage and personal injury but also neurological damage to the Haynes children. That made it one of the first verdicts in the country to recognize neurological damage from mold intoxication.²⁴

Paul and Renee Haynes were the owners of five acres in Sandy, Oregon on which they had an older and smaller house. They contacted Adair Homes, Inc., a company that markets lower cost “starter” homes and which builds hundreds of houses a year in the Northwest. The Haynes family planned to upgrade into a somewhat larger house. Adair Homes, Inc. showed them a house package that costs around \$ 67,000 to erect on site. Adair's program usually requires the homeowner to provide the land and do certain finish work such as painting and final landscaping.

Adair commenced construction in the winter of 2001, one of the wettest winters in recent memory. The Hayneses videotaped the house and took many photos during construction, never expecting that they were documenting evidence to be used against Adair in court later. Their photos and videos showed standing water on the floor decking. At trial they were able to prove that Adair closed up and insulated the walls before the house was thoroughly dried out. As a result, mold began to grow inside the wall cavities. When the Haynes family moved into the

²³ The case may be of interest to others because there were briefs filed concerning which insurer held coverage and amended pleadings. There was also the briefing concerning whether a product liability statute of repose applied or the construction defect statute.

²⁴ Because of the author's familiarity with this case, having been the Haynes's attorney, a more thorough discussion of what transpired is possible here.

house in March, they began to feel ill and their symptoms worsened with time. Finally, they discovered the mold in what Renee Haynes described in court as a “happy accident.”

In July 2002 Mr. Haynes used a small backhoe to landscape around the house. He was momentarily distracted by his son’s scream while playing with his brother and accidentally rammed the machine into the wall, knocking a stud off center and popping open a panel of drywall inside a bedroom. Upon assessing the damage, he discovered slimy mold growing inside the wall cavity. Further inspection revealed that the home was contaminated by toxigenic mold, including *Stachybotrys chartarum*, *Chaetomium*, *Curvularia*, *Cladosporium*, *Alternaria*, *Aspergillus niger*, various forms of *Penicilium* and other forms of toxigenic fungi. Moisture tests of the framing wood at floor level revealed a moisture content of 32 percent, in July 2002, months after the house was completed, and after several months of hot, dry weather.

The Haynes family put the contractor on notice and asked it to honor the warranty. When the builder refused, the Haynes filed suit. At that point, Adair commenced an arbitration claim against them with Construction Arbitration Services (“CAS”) out of Dallas, Texas and moved to stay the court case pending arbitration. Adair claimed that the Haynes family was contractually bound to arbitrate their dispute, but the contract had both an arbitration clause and an attorney fee provision allowing fees for any pretrial, trial or appellate work. Mr. and Mrs. Haynes submitted affidavits saying that their Adair salesman represented to them (and other Adair customers) that Adair’s arbitration clause only applied to disputes that occurred in the course of construction and that any disputes that occurred after the house was completed were to be resolved in court. Adair’s arbitration claim alleged that they breached their contract by not arbitrating and sought unspecified damages of \$ 15,000. Adair had been fully paid for its contract work. In the year between when the house was completed and the dispute arose, Adair never once asserted that it was due any money from the homeowner.

The court stayed part of the case involving claims between Mr. and Mrs. Haynes and Adair, but allowed the claim by Michael Haynes to proceed in court. On August 21, 2003, Adair and the Hayneses attended an arbitration hearing, at which Adair’s alleged “damages” were shown to be nothing but a claim for attorney fees incurred in connection with the motion to stay. Since Adair had requested those fees at the court hearing, but had not received an award, the Haynes’s counsel was able to show that the court had already rejected Adair’s “damages.” The

arbitrator said during the hearing that he viewed Adair's dispute resolution provision as applying only to disputes which arose during construction, and not to post construction disputes. On August 26, 2003, before the arbitrator could issue a written decision, Adair voluntarily withdrew from arbitration and CAS refused to proceed.

After Adair withdrew from the arbitration, the Hayneses learned that an affidavit filed by the owner of CAS, Mr. Marshall Lippman, contained false information. Mr. Lippman is one of two principal owners of CAS. In his affidavit dated *February 11, 2003*, Mr. Lippman claimed to be an attorney admitted before all courts in the District of Columbia. In fact, he had previously been disbarred in that jurisdiction several months before his affidavit for convictions he received while being disbarred in New York.

The State Bar of New York disbarred Mr. Marshall Lippman for ethics violations involving five clients. The convictions included two charges of stealing from clients, three charges of "conduct involving dishonesty, fraud deceit or misrepresentation," as well as convictions for "conduct prejudicial to the administration of justice," perjury during the ethics investigation and "conduct reflecting adversely upon his fitness to practice law." The District of Columbia imposed a reciprocal disbarment on *September 26, 2002*, nearly five months before Adair filed his affidavit in the Haynes case.

After learning the truth about Mr. Lippman's disbarment, the Haynes family moved to strike his affidavit and to reinstate the case into court. Plaintiffs pointed out in the motion that defendant had used the perjured Lippman affidavit to abate the case. Plaintiffs also provided evidence that Mr. Lippman had also falsely claimed on a web site that he was once Dean of the New York University Law School. The Ralph Nader group, Public Citizen, had opined in a report to several states that CAS's modus operandi, and that of other arbitration companies that cater to a specific industry, may create an institutional bias in favor of contractors because they give it repeat business. Plaintiffs also provided evidence to the court that Adair had withdrawn from the arbitration, and that the arbitration company had refused to proceed.

Presiding Judge Selander granted the motion to strike the Lippman affidavit and motion to reinstate the case on September 1, 2004. In a written order dated October 6, 2004, he made specific findings that Mr. Lippman had knowingly given false testimony in his affidavit and that

his statements were unreliable. Judge Selander reinstated the case in court and the Haynes family prepared for a jury trial. A number of plaintiffs' attorneys across the country have used the information about CAS uncovered in *Haynes v Adair* to avoid arbitrating before CAS. That arbitration company has since moved to Michigan.

Before trial, Adair sued the Haynes for defamation, based on a few news reports about the case. But of the three news stories, two did not even mention Adair by name. Adair withdrew the defamation claim on the first day of the trial.

The trial resulted in a jury verdict for plaintiffs and a general money judgment in their favor for an aggregate \$ 498,417.94. The Haynes family also received a supplemental judgment for their attorney fees and costs in the amount of \$ 291,353.77. Adair's appeal on the merits was dismissed but the appeal of the fee award is pending as of this writing. The prevailing party on appeal is also entitled to attorney fees.

Issues in Haynes v Adair

There were many issues raised in this case, besides the question of arbitrability. One of the issues raised by Adair before trial was whether a claim for negligent construction was barred under the economic loss doctrine. As discussed above, that doctrine had held, *inter alia*, that a party who had a contract with a defendant must seek his contract damages by way of a breach of contract claim, instead of a negligence claim. But the negligence claim in *Haynes v Adair* did not merely include claims that Adair breached provisions of its contract or warranty. The negligence claim asserted by the Haynes family fell outside the four corners of the agreement. The allegation that Adair failed to perform to the standard of care or workmanship prevailing in the construction industry was based not on the specific terms of the contract, but upon standard imposed by the law and which is implicit in every contract. The Hayneses relied upon *Securities-Intermountain, Inc. v. Sunset Fuel Co.*, discussed above.

The judge made an interesting decision, which predated *Harris v Suniga* by three years. He decided to allow any claim for property damage or cost of repair to be pursued on a breach of contract theory, and any claim for tort damages, such as personal injury, other personal property damage or consequential losses to be pursued on a negligence theory. This essentially split the Hayneses' causes of action and the various categories of damages they had suffered. The judge

seemed to agree that the negligence claim was not defeated by the seeming lack of any special relationship between the Haynes family and their builder. The Oregon Supreme Court has apparently ratified this approach in *Harris v Suniga*, discussed above.

Challenging plaintiffs' medical expert

The defense attorney in the *Haynes* case, as most defense counsel are wont to do, tried to exclude plaintiffs' medical experts from testifying. The lead medical expert was the late Dr. Vincent Marinkovich, a renowned immunologist formerly of Stanford University Medical School. Dr. Marinkovich had treated thousands of mold victims over his career and was well qualified to render an expert opinion based on his experience and training. The defense seized upon the idea that he had invented a new kind of blood test for mold antibodies, using a thread upon which mold antigens were imbedded. Other blood tests utilized different means to introducing the blood to mold antigens, such as a porous jell or plastic plate. But the essence of all bloods tests was to see if the blood reacted with the antigens. If a reaction occurred, then the body had been exposed to the mold because it had started developing an immunological response (antibodies). Dr. Marinkovich had developed this thread test and sold it to a private entity because he did not want to be accused of having a conflict of interest when he used his own test. That company had not marketed it effectively, leading defense to claim that the test was not genuinely accepted in the medical community.

Overcoming the challenge

We pointed out that, regardless of methodology, all of the various types of blood tests did essentially the same thing: they introduced blood to mold antigens held in some place to see if antibodies formed. The tests all looked to see if antibodies to certain molds were formed in the blood. If so, then mold was present in the blood and the body had developed an immunological response to those substances. It made no difference how we introduced the blood to the antigens, because any one of the blood tests used would lead to the same result. My argument went like this: The court can observe for itself, that we are all here today. But you do not know how we got here. Maybe we drove a car, took a bus, got a ride from someone or even walked. But the proof that we are here is that you can observe us with your own eyes. These blood tests represent different means of transporting the blood to the antigens, but the issue is whether or not there are

antibodies present, not how you introduced the blood to the antigens. The trial judge agreed that there was not a significant difference from the Marinkovich blood test to other tests. He also noted that Dr. Marinkovich had performed a medical examination to document symptoms, had conducted medical diagnostic work that was clearly mainstream and that his qualifications were “superior.”

The Haynes family introduced several different blood tests from different doctors who were mold experts and who used different labs to interpret the results. All of the plaintiffs’ blood tests were off-the-chart high for several kinds of mold found in the house. The defense used OHSU in Portland and its blood tests came back negative. The jurors rejected the OHSU test results and one juror was physically angry when the defense expert introduced the negative result. During the defense expert’s testimony, not one juror was taking notes. In a rare expression of trust in the jury’s collective wisdom, we did not ask the defendant’s medical expert a single question.

Sometimes you get lucky

After the verdict, we executed on the judgment and moved for attorney fees. In the battle over that execution and the size of the appellate bond to be posted, the defense moved for a new trial asserting that it was error to allow Dr. Marinkovich to testify. But defense counsel spent so much time dealing with the fact that we were executing on the judgment that he was one day late in filing his motion for a new trial.

The court considered the motion even though it was filed a day late, but denied the motion for a new trial. In the wake of that decision, the Oregon Court of Appeals noted that the late motion for new trial did not toll the 30 day window to file an appeal, which would have been the case had the motion been timely filed. The Oregon Court of Appeals held that the defendant’s appeal on the merits was, therefore, untimely and dismissed it. I feel confident that the verdict would have been upheld on appeal, but this dismissal prevented the Haynes family from having to wait two years or so for a decision affirming the trial court. Sometimes you get lucky.

Practice tip: Anticipate challenges to your medical expert by “shadow boxing” your own case. Think about how the defense might attack your experts. Also please note that there is a

need for a medical doctor to not merely rely on blood testing, but to perform an evaluation and objective medical examination to document symptoms common to mold victims, like decreased lung capacity, reddened sinus passages, fluid behind the eardrum etc.

Another tip: Never give up and never let up. I received a telephone voicemail from defense counsel after we served a writ of garnishment on a number of banks in execution of the judgment. He condescendingly told me that it wasn't going to do me any good to try to execute. In fact, it did tremendous good because it distracted him from getting his motion for a new trial in on time. In fact, he blew his appeal because of it.

Yet another tip: It is a mistake to plead a damages case so high that you make the jury think your plaintiffs are greedy. Most jury verdicts in Clackamas county before the Haynes case where the plaintiffs sought in excess of \$1 million resulted in defense verdicts. Don't be greedy. Choose an appropriate number you can defend and expect and request that the jury will be fair.

Attorney fees issues

The Haynes family was entitled, as prevailing parties, to an award of their reasonable attorney fees. The defense objected to the amount requested, but conceded that the plaintiffs were entitled to some fee award. After briefing and a full evidentiary hearing, the court awarded the Haynes family every penny of their documented costs and fees.²⁵ One of the reasons for this was that the Haynes's attorney charged a very modest rate (\$ 170 to \$190 per hour) compared with other attorneys (defense counsel billed \$ 225) and wrote off almost 70 hours of time to try to relieve financial pressure on his clients. The plaintiffs expert at the attorney fee hearing testified that, in his experience, a plaintiff attorney usually has twice as much time into a case than defense counsel because plaintiffs' counsel have to do more work to sustain their burden of proof. I billed only slightly more than the defendant's attorney in the *Haynes* case.

On appeal, Adair claims that the trial court should not have awarded the Haynes children any fees because the children were not parties to the contract. The trial court at the attorney fee hearing pointed out that Adair's attorney fee clause is extremely broad and authorizes an award of fees for claims that arise out of "the construction of the structure." Therefore, Mrs. Haynes

²⁵ A cautionary tale to mold victims everywhere is when you litigate against a big defense firm, expect the fees to escalate dramatically. The fee award was in the amount of \$ 291, 353.77.

had a right to fees related to prosecuting the negligence claim and any work involving the children also arose out of construction of the structure. The work performed by plaintiffs' counsel in furtherance of the negligence claim was also common to the contract claim, for which Adair admits fees are recoverable. Under Oregon law²⁶ the trial court need not apportion fees between claims involving common issues. Adair's second assignment of error on appeal was that mediation and filing a claim in arbitration was a condition precedent to a right to seek an attorney fee award. This argument was not preserved below and will likely be dismissed because Adair cannot raise it for the first time on appeal.²⁷ We anticipate the Court of Appeals will affirm the award by the trial court and award further attorney fees on appeal.

Rutherford v Suniga, arbitration case

This case arose out of a real estate sale transaction. Plaintiffs bought a home from the Respondent who did not disclose that the house had mold problems. After buying the house, they learned that the house had twice been inspected and found to have mold problem. The seller had allegedly painted over spots of mold and concealed the mold contamination. Plaintiffs sued for among other things fraud by concealment. They alleged a claim for punitive damages and the case then settled for low six figures.²⁸

Johnson v Miller, Curry County Case No. 06CV0045

This case came two years after the *Haynes* verdict. Plaintiffs, husband and wife, alleged personal injuries including neurological damage from exposure to toxic mold in their rental home. They also alleged substantial monetary damages from loss of income and damaged and contaminated personal property. The total claim was for \$ 5 million.²⁹ Defense counsel attacked all of plaintiffs' experts, including the late Dr. Vincent Marinkovich, at an OEC 104 evidentiary

²⁶ *Bennett v Baugh*, 164 Or App 243, 248, 990 P2d 917 (2000)

²⁷ *State v. Wyatt*, 331 Or 335, 344-46, 15 P3d 22 (2000)

²⁸ The author interviewed the claimants personally but they chose other counsel. New counsel consulted the author during the case and the author reports based on his first hand knowledge of the claim. The author did not negotiate the settlement, however, and can only say that the settlement was low six figures.

²⁹ See preceding practice tip.

hearing. The effort to exclude plaintiffs' experts failed, but defense counsel persisted in his effort to discredit plaintiffs' experts throughout trial. Defense counsel objected to the testimony of plaintiffs' neurological expert, claiming that he did not receive the neurologist's report and most recent chart notes until just before trial and was prejudiced in his ability to generate a response. Plaintiffs' attorney did not ask that the 104 hearing be rescheduled for a time that the neurologist would be available in court to testify and, instead, offered to have the neurologist testify by telephone. The trial court refused to allow certain neurological evidence into evidence, including the most recent chart notes from the neurologist. The jury returned a verdict on March 23, 2007 for the defense.

Practice tip: I hate to see a client harmed because an attorney did or didn't do something properly or promptly. Make sure that when you receive ongoing medical records from a treating physician or expert that you date stamp them in and send a copy out to defense counsel immediately by fax. This will allow you to say that "defense counsel got them the day we got them." This should forestall defense claims of unfair surprise. When defense counsel claims he was sandbagged or prevented from mounting a defense, you have proof that he got the records as soon as you did. Also, argue that the proper remedy is not exclusion of an expert that can help the jury understand the facts, but to give the defense attorney extra time if he needs it, to confer with his own expert about the recent records. In my experience, if the court asks the defense lawyer how much time he needs, he will have to admit that he'd need, at most, a day or so. The testimony of other witnesses can be taken during that time. This may cost more to keep the expert around, but it is better than losing his testimony altogether.

F. Cases pending resolution and stil in court

Lillard v Dalton and Lehmann, Yamhill County Case No. CCV 00055

This case arose out of the water leak described in *Prudential v Lillard* above. Mrs. Lillard sued the Daltons for, *inter alia*, negligent repairs. The Daltons, who had since moved to Nevada, ³⁰ filed bankruptcy. After the bankruptcy was concluded, Mrs. Lillard was allowed to go forward against the Daltons to the extent of available insurance. She had also sued her building inspector, Mr. Lehmann who failed to detect the lack of flashing and other defects in the house. The

³⁰ Interestingly, this is where Ms. Lillard had lived before moving to Oregon.

inspector tendered the defense to his insurer which refused to defend him and denied coverage. He later confessed judgment in favor of Mrs. Lillard and her daughter for \$ 400,000, admitted liability and assigned all of his rights against his insurer to Ms. Lillard and her daughter. Mrs. Lillard agreed to file a declaratory judgment action against the insurer to obtain a ruling that their claims were covered by the liability policy and that the insurer had breached its duty to defend the insured and extend coverage. In addition to assigning his rights against his insurer to Lillard and her daughter, Lehmann paid \$ 10,000 towards the cost of the declaratory judgment proceeding. The Dalton case was placed into abatement pending the resolution of the declaratory judgment case. Which is....

Lillard v Red Shield Insurance, Yamhill County Case No. CV050291

Mrs. Lillard and her daughter brought suit as judgment creditors against Red Shield Insurance Company, Mr. Lehmann's liability insurer. Lehmann made judicial admissions to both liability and damages in his answer, and cross claimed against the insurer for a declaration alleging, *inter alia*, that it had breached its duty to defend. The trial court entertained motions for summary judgment on the issue of coverage and whether the insurer breached its duty to defend its principal. In a decision on December 4, 2007, the trial court held the insurer breached its duty to defend and that the claims were covered. It denied Red Shield's cross motion asserting that the claims were not covered. The court deferred the issue of damages and whether the settlement was reasonable.³¹ We are now at the stage of the case where we determine the insurer's obligation to pay. Further motions are currently pending. This case appears destined to be a reported decision.

Harrington v Avion Water Co. and Serv Pro et. al., Deschutes County Case No. 06CV0065MA

Avion Water Company provides water service to Bend, Oregon, where the Harrington's reside. On November 1, 2004, Avion's water system malfunctioned, sending 150 pounds per square inch of water through the Harringtons' plumbing system, which was rated for 90 PSI.

³¹ See e.g. *Northwest Pump & Equipment Company v American States Insurance Company*, 141 Or App 210, 217, 917 P2d 1025 (1996) for a discussion of what comes after an insurer denied a defense to its insured and the insured settles the claim.

This blew out the Harringtons' plumbing system, flooded the Harrington's crawlspace and destroyed their furnace. Bob Harrington had just gone through back surgery and was hospitalized. When Mrs. Harrington arrived home after visiting her husband, she discovered that the house had no heat and no water. She then peered into the crawl space where the furnace was located and discovered the flooded crawlspace. She immediately called Avion and asked it to turn off the water to her house. Roto-Rooter filled a 10,000 gallon tank truck to capacity with the water from the crawl space and there was still water remaining. The Harringtons hired a local Serv Pro franchise owned by a person they knew to dry the house and remedy the damage caused by the flood.

On November 16, 2004, about two weeks later, Avion again sent high pressure water through its system, this time blowing out the pressure release valve on the Harrington's hot water heater. Mr. Harrington was home convalescing from his back surgery and witnessed this first hand. Later, while talking to a neighbor, he was informed that the same thing had happened to the neighbor's house. Mr. Harrington testified at his deposition that he called Avion, which admitted that it was responsible for both the initial crawl space flood and the second water heater blowout

Avion sent a check for \$ 11,910.55 as payment for the furnace and the Serv Pro franchisee's emergency services, its check transmittal said the check was "partial payment of property damage." Later, Avion sent a second check to cover the second November 16, 2004 incident causing damage to the Harrington's water heater and kitchen floor on the main floor of the house. Avion also sent the Harringtons a document with this second check, that it later portrayed as a universal release of both claims. Mrs. Harrington did not sign the document. Mr. Harrington did sign it, but testified that he believed it was merely a release of a dispute over Avion's willingness to pay only the depreciated value of his furnace and flooring. Mr. Harrington testified that he did not intend this document to release any issues concerning the crawl space or subsequent health problems associated with mold exposure. Mrs. Harrington testified she did not intend this to be a release of all claims. She did not sign the document.

Avion moved for summary judgment asserting the release as a final release of all claims, even if Mr. Harrington did not intend it to be so. Serv Pro filed a motion for summary judgment asserting that a limitation of liability provision on the back of one of its forms that it portrays as a

contract limits the Harrington's remedies. Mr. Harrington did not sign that form, only Mrs. Harrington did. The court denied both motions for summary judgment. It denied summary judgment on the release issue because of the presence of questions of fact concerning the issues surrounding the release. It denied summary judgment on the limitation of liability issue for similar factual disputes.

The Harringtons incurred economic damage to repair their house, for loss of use of their house and for medical expenses in the amount of \$ 125,715.16. They also seek damages for pain and suffering. As of this writing we have a December 2008 trial date.

Other Mold Cases

The following mold cases have been reported to me (without a lot of details) by the attorneys who represented the plaintiffs or in some cases by the plaintiffs themselves.

1. *Sanders v Farmers, Benton County, Oregon, Circuit Court Case No 990-10109*

- a. Amount claimed: > \$1,000,000
- b. Types of claims: contract, negligence
- c. Result: confidential settlement

2. *Stone v Safeco, Clark County, Washington, Superior Court Case No 02-2-04464-0*

- a. Amount claimed: > \$500,000
- b. Types of claims: contract, negligence
- c. Rulings: Defendant prevailed on summary judgment

3. *Schumacher v Thompson, Multnomah County, Oregon, Circuit Court No 0308-08064*

- a. Amount claimed: \$100,000
- b. Types of claims: contract, negligence
- c. Result: confidential settlement

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