2016 Civil Justice Update

by Andrew Cook

September 2017

The Federalist Society

1776 I St., N.W., Suite 300
Washington, DC 20006
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About the Author

As a senior member of Michael Best Strategies, Andrew supports the organization's regional state offices and those in Washington, D.C. He focuses on energy, civil liability, environmental, campaign finance, administrative law and matters before state Attorneys General.

Andrew has an extensive background in regulatory and government relations, and a keen understanding of the intersection between government and business. He has represented clients before state agencies, the legislature, as well as litigated in the court system.

Prior to joining Strategies, Andrew served as Deputy Attorney General of Wisconsin since 2014, the principal advisor to Wisconsin Attorney General Brad D. Schimel. In this position, he oversaw the day-to-day operations of the nearly 700 employees; directed litigation strategy; negotiated, reviewed, and approved settlements; drafted and reviewed attorney general opinions; managed the agency's budget; and oversaw civil and criminal investigations handled by the department.

While in Attorney General Schimel's office, Andrew was responsible for creating the Office of Solicitor General, an elite group of attorneys that includes two former U.S. Supreme Court clerks. Under his direction, the Solicitor General's office was instrumental in drafting several environment-focused briefs and declarations to the U.S. Supreme Court, including challenging the Environmental Protection Agency's Waters of the United States and Clean Power Plan rules.

Prior to his work at the DOJ, Andrew was in private practice where he represented manufacturers and businesses, including electric companies, oil refineries, and the coal industry, before the Wisconsin Legislature and state agencies. He also led a broad coalition of business, insurance, and medical groups in passing major civil liability reforms, including changes to Wisconsin's product liability laws.

Andy received his law degree from The John Marshall Law School in Chicago, cum laude, where he co-founded and served as president of the Habitat for Humanity Chapter. He received his Bachelor of Science degree from University of Wisconsin-Eau Claire, cum laude, and is a member of the Washington State Bar (Inactive) and the State Bar of Wisconsin. Andy is President of the Madison Federalist Society Lawyers Chapter.

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States continued to enact meaningful civil liability reforms throughout 2016. Part I of this paper discusses the most significant civil justice reforms enacted at the state level, including asbestos bankruptcy trust claim transparency legislation. Part II discusses significant state court decisions addressing civil liability, including three cases handed down in 2016 addressing the collateral source rule.

I. State-Enacted Civil Liability Reforms

A. Asbestos Bankruptcy Trust Claim Transparency (Tennessee and Utah)

The number of states enacting asbestos bankruptcy trust claim transparency laws continues to grow; Tennessee and Utah are the latest to join their ranks. Transparency is a significant issue for courts dealing with asbestos bankruptcy trust funds.[1] Legislation enacted in Tennessee and Utah is similar to other states' laws that require transparency in civil lawsuits about claims filed with asbestos bankruptcy trusts. Below is a discussion of the contents of the new laws in Tennessee and Utah.

Both the Tennessee and Utah legislation include a findings section outlining the need for the legislation.[2] According to the legislation:

> [A]pproximately 100 employers have declared bankruptcy at least partially due to asbestos-related liability . . . [and] these bankruptcies have resulted in a search for more solvent companies by claimants, resulting in over 10,000 companies being named as asbestos defendants, including many small- and medium-sized companies, in industries that cover 85 percent of the United States economy.[3]

In addition:

> [S]cores of trusts have been established in asbestos-related bankruptcy proceedings to form a multi-billion dollar asbestos bankruptcy trust compensation system outside of the tort system, and new asbestos trusts continue to be formed. Asbestos claimants often seek compensation from solvent defendants in civil actions and trusts or claims facilities formed in asbestos-related bankruptcy proceedings.[4]

As further background, the legislation cites a 2014 bankruptcy decision that found plaintiffs hiding exposure evidence,[5] and goes on to explain that there is "limited coordination and transparency between these two paths to recovery, civil lawsuits and bankruptcy trusts, which has resulted in the suppression of evidence in asbestos actions and potential fraud."[6] Moreover, the legislation states that "justice is promoted by transparency with respect to asbestos bankruptcy trust claims in civil asbestos actions," and therefore the legislation is enacted to: 1) "provide transparency with respect to asbestos bankruptcy trust claims in civil asbestos actions," and 2) "reduce the opportunity for fraud or suppression of evidence in asbestos actions."[7]

The Utah legislation begins with a definition section before spelling out the required disclosures by plaintiffs.[8] The plaintiff in any asbestos action filed in the state must provide all parties with a sworn statement identifying all asbestos trust claims that have been filed by the plaintiff or by anyone on the plaintiff's behalf.[9] The sworn statement must include the name, address, and contact information for the asbestos trust, along with the amount claimed by the plaintiff, the date the plaintiff filed the claim, the disposition of the claim, and whether there has been a request to defer, delay, or toll the claim.[10] The sworn statement shall also include an attestation from the plaintiff—under penalties of perjury—that the sworn statement is complete and based on good faith investigation of all potential claims against asbestos trusts.[11]

The plaintiff must make all trust claims materials for each claim filed available to all parties.[12] The plaintiff must also supplement the information and materials if the plaintiff files an additional asbestos trust claim or supplements an existing asbestos trust claim.[13] If the plaintiff fails to provide the trust claims materials to all parties, the court may extend the trial date in the asbestos action.[14] The trust claim materials and trust governance documents are presumed to be relevant and authentic and admissible in evidence.[15] Furthermore, claims of privilege may not apply to any trust claims materials or trust governance documents. In addition, a defendant in an asbestos action may seek discovery from an asbestos trust, and the plaintiff may not claim privilege or confidentiality to bar discovery.[16]

The court must stay an asbestos action if it finds that the plaintiff has failed to make the required disclosures within 120 days of the trial date.[17] If a plaintiff identifies a potential asbestos trust claim in the required disclosures, then the judge may stay the

1 *See* Mark A. Behrens & Christopher E. Appel, *2015 Civil Justice Update*, The Federalist Society, p. 4 (July 2015).

2 Tenn. S.B. 2062 (Reg. Sess. 2016) (codified at Tenn. Code Ann. § 29-34-601 (2016)); *see also* Utah H.B. 403 (Reg. Sess. 2016) (codified at Utah Code Ann. § 78B-6-2002 (2016)).

3 *Id.*

4 *Id.*

5 In re Garlock Sealing Techs., LLC, 504 B.R. 71 (Bankr. W.D.N.C. 2014).

6 Tenn. Code Ann. § 29-34-601.

7 *Id.*

8 Utah H.B. 403 (Reg. Sess. 2016) (codified at Utah Code Ann. § 78B-6-2001 (2016)).

9 Utah Code Ann. § 78B-6-2004(1).

10 Utah Code Ann. § 78B-6-2004(1)(b).

11 Utah Code Ann. § 78B-6-2004(1)(c).

12 Utah Code Ann. § 78B-6-2004(2).

13 Utah Code Ann. § 78B-6-2004(3).

14 Utah Code Ann. § 78B-6-2004(4).

15 Utah Code Ann. § 78B-6-2005(1).

16 Utah Code Ann. § 78B-6-2005(2).

17 Utah Code Ann. § 78B-6-2006(1).

asbestos action until the plaintiff files the asbestos trust claim and provides all parties with all trust claims materials for the claim.[18]

The law also provides that the defendant may identify an asbestos trust claim not previously identified by the plaintiff that the defendant reasonably believes the plaintiff can file.[19] The defendant must meet and confer with the plaintiff to discuss why the defendant believes the plaintiff has the additional asbestos trust claim.[20] The defendant may move the court for an order to require the plaintiff to file the asbestos trust claim after the meeting.[21] The defendant must produce or describe the documentation it possesses or knows of in support of the motion.[22] The plaintiff then must do one of the following within 10 days of receiving the defendant's motion: 1) file the asbestos trust claims, 2) file a written response with the court setting forth the reasons why there is insufficient evidence for the plaintiff to file the asbestos trust claim or 3) file a written response with the court requesting a determination that the plaintiff's expenses or attorney's fees and expenses to prepare and file the asbestos trust claim identified by the defendant exceed the plaintiff's reasonably anticipated recovery from the trust.[23] If the court determines that there is a sufficient basis for the plaintiff to file the asbestos trust claim identified by the defendant, the court shall order the plaintiff to file the asbestos trust claim and stay the asbestos action until the plaintiff files the claim and provides the parties with all materials.[24] If the court determines that the expenses to prepare and file the claim identified by the defendant exceed the plaintiff's reasonably anticipated recovery from the asbestos trust fund, the court shall stay the asbestos action until the plaintiff files with the court and provides all parties with a verified statement of the plaintiff's history of exposure, usage or other connection to asbestos covered by the asbestos trust.[25]

In addition, if a plaintiff proceeds to trial in an asbestos action before an asbestos trust claim is resolved, the filing of the asbestos trust claim may be considered as relevant and admissible evidence.[26] Finally, a plaintiff who fails to provide all of the information required under the legislation is subject to sanctions as provided by Utah's Rules of Civil Procedure and any other relief for the defendants that the court considers just and proper.[27]

Tennessee's asbestos bankruptcy trust claim transparency law closely mirrors Utah's, but it also goes further by enacting medical criteria governing nonmalignant asbestos claims. Under this portion of the law, no asbestos action related to an alleged nonmalignant asbestos-related condition may be brought in the absence of prima facie evidence that the exposed person has a physical impairment for which the asbestos exposure was a substantial contributing factor.[28] The plaintiff must make a prima facie showing for each defendant and include a detailed narrative medical report and diagnosis signed under oath by a qualified physician that includes the following:

- Radiological or pathological evidence showing evidence of asbestosis or diffuse pleural thickening;
- A detailed occupation and exposure history from the exposed person;
- A detailed medical, social and smoking history from the exposed person;
- Evidence verifying that at least 15 years have elapsed between the exposed person's date of first exposure to asbestos and the date of diagnosis;
- Evidence from a personal medical examination and pulmonary function testing of the exposed person;
- Evidence that asbestosis or diffuse bilateral pleural thickening, rather than chronic obstructive pulmonary disease, is a substantial factor to the exposed person's physical impairment; and
- The specific conclusion of the qualified physician that exposure to asbestos was a substantial contributing factor to the exposed person's physical impairment and not more probably the result of other causes.[29]

B. Trespasser Liability (Mississippi)

Mississippi has joined roughly half of the states to adopt legislation outlining the duties owed by land possessors to trespassers.[30] Under Mississippi's law, a "possessor of real property owes no duty of care to a trespasser, except a duty to refrain from willfully or wantonly injuring such a person."[31] However, the law provides exceptions to this general rule so that a possessor of real property is exposed to liability for injury to a trespasser if:

- The possessor discovers the trespasser in a position of peril and fails to exercise reasonable care to prevent injury to that trespasser; or
- The trespasser is a child injured by an artificial condition on the possessor's property and all of the following apply:
    - The place where the condition existed was one upon which the possessor knew or had reason to know that a child would likely trespass;
    - The condition is one of which the possessor knew or had reason to know—or the possessor realized or should have realized—would involve

18 Utah Code Ann. § 78B-6-2006(2).

19 Utah Code Ann. § 78B-6-2007(1).

20 *Id.*

21 *Id.*

22 *Id.*

23 Utah Code Ann. § 78B-6-2007(2)(a)-(c).

24 Utah Code Ann. § 78B-6-2007(3).

25 Utah Code Ann. § 78B-6-2007(3)(b).

26 Utah Code Ann. § 78B-6-2008.

27 Utah Code Ann. § 78B-6-2009.

28 Tenn. Code Ann. § 29-34-704.

29 Tenn. Code Ann. § 29-34-704(1)-(7).

30 *See* Behrens & Appel, *supra* note 1 at 7.

31 Miss. H.B. 767 (Reg. Sess. 2016) (codified at Miss. Code Ann. § 95-5-31(2) (2016)).

an unreasonable risk of death or serious bodily harm to a child;

- The injured child because of his or her youth did not discover the condition or realize the risk involved;
- The utility to the possessor of maintaining the condition and the burden of eliminating the danger was slight as compared with the risk of the child; and
- The possessor failed to exercise reasonable care to eliminate the danger or otherwise to protect the child.[32]

C. Appeal Bond Reform (Mississippi)

Mississippi passed a new law providing that, under any legal theory in civil litigation, the appeal bond to be furnished during the pendency of all appeals or discretionary reviews by an appellate court in order to stay the execution of any judgment shall be set in accordance with applicable laws or court rules.[33] The law provides that the total appeal bond or other forms of security that are required of an appellant shall be in the amount of the judgment, but shall not exceed 50 percent of the net worth of the appellant or $35 million.[34] If, however, an appellee proves by a preponderance of the evidence that an appellant is dissipating assets outside the ordinary course of business to avoid payment of a judgment, a court may enter orders that: 1) are necessary to protect the appellee, and 2) require the appellant to post a bond in an amount up to the total amount of the judgment, even if the exceptions would otherwise apply.[35]

D. Medical Liability Reform (New Mexico)

New Mexico's new medical liability law provides that exclusive forum selection and choice of law provisions shall be enforced by the courts of New Mexico for claims or civil actions against a health care provider.[36] This includes claims for negligent medical treatment, lack of medical treatment, or other claimed departures from accepted standards of health care that proximately result in injury to a patient, whether the claim or cause of action is in tort or in contract, including actions based on battery or wrongful death.[37]

E. Transparency in Private Attorney Contracting (West Virginia)

West Virginia became the most recent state to enact legislation placing limits on the attorney general's ability to hire private plaintiff attorneys on a contingency fee basis.[38] The law requires a competitive bidding for private attorneys, and provides that the attorney general may not enter into a contingency fee contract unless he or she makes a written determination that the legal representation is both cost effective and in the best interest of the public.[39] When making such a determination, the attorney general must include a number of specific findings for the following factors:

1. Whether sufficient legal and financial resources exist in the attorney general's office to handle the matter;
2. The time and labor required; the novelty, complexity and difficulty of the questions involved; and the skill requisite to perform services properly;
3. The geographic area where the attorney services are to be provided, along with the costs of providing the services in that geographic area;
4. The amount of experience desired for the provided legal services and the need for a private attorney's experience with similar issues or cases.[40]

All requests for proposals must be posted to the attorney general's website.[41] In addition, the law states that the attorney general may not enter into a contingency fee legal contract unless the following requirements are met throughout the contract period:

1. The attorney general, or deputy or assistant attorney general, shall retain control over the course of the conduct of the case;
2. The attorney general, or deputy or assistant attorney general with supervisory authority, must remain personally involved in overseeing the litigation;
3. The attorney general retains veto power over any decisions made by any appointed private attorneys; and
4. Decisions regarding settlement of the case are reserved exclusively to the discretion of the state, and an appropriate representative of the attorney general must attend settlement conferences whenever possible.[42]

The law places specific limits on the amount of fees the private attorney may receive. For example, the state may not enter

32 Miss. Code Ann. § 95-5-31(3)(a)-(b)(v).

33 Miss. H.B. 1529 (Reg. Sess. 2016) (codified at Miss. Code Ann. § 11-51-31(2) (2016)).

34 Miss. Code Ann. § 11-51-31(2).

35 Miss. Code Ann. § 11-51-31(3)(a)-(b).

36 N.M. H.B. 270 (Reg. Sess. 2016) (codified at N.M. Stat. Ann. § 41-1A-1.A. (2016)).

37 *Id.*

38 W.V. H.B. 4007 (Reg. Sess. 2016) (codified at W.V. Code Ann. § 5-3-3 (2016)).

39 W.V. Code Ann. § 5-3-3(b).

40 W.V. Code Ann. § 5-3-3(b)(1)-(4).

41 W.V. Code Ann. § 5-3-3(d).

42 W.V. Code Ann. § 5-3-3(e)(1)-(4).

into a fee arrangement that allows the private attorney to receive an aggregate fee in excess of:

- 25 percent of the first $10 million recovered; plus
- 20 percent of any portion of the recovery between $10 million and $15 million; plus
- 15 percent of any portion of the recovery between $15 million and $20 million; plus
- 10 percent of any portion of the recovery between $20 million and $25 million; plus
- 5 percent of any portion of the recovery exceeding $25 million.[43]

The law further provides that the aggregate fee may not exceed $50 million for any matters arising from a single event or occurrence, exclusive of reasonable costs and expenses.[44] Moreover, legal fees may not be based on penalties or fines awarded or any amounts attributable to penalties or fines.[45]

The attorney general must also develop a standard addendum to every contract for private attorney services that is to describe in detail what is expected of both the contracted private attorney and the attorney general.[46] In addition, the attorney general's written determination to enter into a contract with a private attorney must be posted on the attorney general's website within 10 business days after the selection of a private attorney.[47]

Any private attorney that contracts with the state under this legislation must maintain detailed records, including documentation of expenses, disbursements, charges, credits, receipts, invoices, and other financial transactions.[48] Any records not subject to attorney-client privilege must be made available to inspection and copying upon request under the West Virginia Freedom of Information Act.[49] The private attorney must also maintain detailed time records for all attorneys and other professionals working on the matter. The attorney general must deliver to the Governor, President of the Senate, and Speaker of the House a report detailing: (1) the state and condition of the cases that involve any private plaintiff attorneys hired on a contingency fee basis, and (2) the name and private attorney with whom the state has contracted; name of the parties to the legal matter; amount of recovery; and amount of any legal fees paid.[50]

II. State Court Decisions

A. Courts Continue Trend of Denying Plaintiffs "Phantom Damages"

Over the past few years, several states, either through legislation or case law, have stopped awarding what are known as "phantom damages." These damages are the amount of medical expenses in a personal injury suit that are billed by the medical provider rather than the amount actually paid to the plaintiff either by private health insurance or the government. Phantom damages allow the plaintiff to recover amounts that are not paid by anyone. In 2016, three state court decisions directly addressed whether plaintiffs are allowed to be awarded the amount billed by the medical provider or only the amount actually paid.

1. Patchett v. Lee

In 2009, the Supreme Court of Indiana held in *Stanley v. Walker* that Indiana's collateral source statute permitted a defendant in a personal injury case to introduce discounted reimbursements negotiated between the plaintiff's medical providers and his private health insurer.[51] In *Patchett v. Lee*, the court extended that holding, finding that the statute applied similarly to government-sponsored health care payments.[52]

The defendant in *Patchett* admitted to causing injuries to the plaintiff in an automobile accident. The plaintiff sued and sought damages, and the defendant contested the reasonable value of medical services to the plaintiff. The parties agreed that the plaintiff could introduce her accident-related bills, which totaled $87,706. The plaintiff, however, objected to the defendant introducing evidence of the amount that was actually paid by the government-sponsored healthcare program.

The court held that the collateral source statute allowed the defendant to introduce evidence of the amount actually paid by the government-sponsored healthcare program.[53] The court explained that Indiana's law is a "middle" ground compared with other state laws because it allows evidence of both the amount billed for medical services *and* what was actually paid in order to prove the reasonable value of medical services.[54] Some states only allow into evidence the amount that was actually paid, not the amount that was billed.[55]

2. Smith v. Mahoney

The issue in Delaware's *Smith v. Mahoney* was whether the collateral source rule should apply when Medicaid pays for an injured party's medical expenses.[56] Citing its earlier decision in *Stayton v. Delaware Health Corp*.[57]—where it refused to extend the collateral source rule when Medicare paid to cover the plaintiff's past medical expenses—the court in *Smith* held that when Medicaid has paid an injured party's medical expenses, the collateral source rule cannot be used to increase the injured party's recovery of past medical expenses beyond those actually paid by Medicaid. The court reasoned that, "once a medical provider looks to Medicaid for payment, the provider must accept the payment according to a fee schedule as a final payment and cannot 'balance bill' the patient for the difference between the amount reimbursed by Medicare or Medicaid and its standard charges."[58] In addition,

43 W.V. Code Ann. § 5-3-3(h)(1)-(5).

44 W.V. Code Ann. § 5-3-3(h).

45 *Id.*

46 W.V. Code Ann. § 5-3-3(i).

47 W.V. Code Ann. § 5-3-3(j).

48 W.V. Code Ann. § 5-3-3(k).

49 *Id.*

50 W.V. Code Ann. § 5-3-4.

51 906 N.E.2d 852 (Ind. 2009).

52 60 N.E. 3d 1025 (Ind. 2016).

53 *Id.* at 1032.

54 *Id.*

55 *Id.*

56 150 A.3d 1200 (Del. 2016).

57 117 A.3d 521 (Del. 2015).

58 *Smith*, 150 A.3d at 1206.

the court noted that "the difference between the Medicaid fee schedule and the medical provider's standard rates, which cannot be charged to the plaintiff once payment is requested from those programs, is not a gratuity bestowed on the injured party or a benefit bargained for by the plaintiff."[59] Therefore, "the difference between payments under the Medicaid fee schedule and standard rates is paid by no one, and is not required to make the injured party whole."[60]

3. Lee v. Bueno

The plaintiff in *Lee v. Bueno* challenged a section of Oklahoma's Evidence Code that limits the admissibility of evidence of medical costs in personal injury actions, claiming that it violated state constitution.[61] The Oklahoma statute provides that in a civil case involving personal injury, the actual amounts paid for any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party shall be the amounts admissible at trial, not the amounts billed for expenses incurred in the treatment of the party.

The injured plaintiff challenged the law claiming: 1) it is a special law prohibited by the Oklahoma Constitution; 2) it denies personal injury plaintiffs access to the courts and their right to a trial by jury under the Oklahoma Constitution; 3) it violates the due process rights of personal injury plaintiffs; 4) it violates the separation of powers limitations under the Oklahoma Constitution by attempting to control the rules of evidence; and 5) it abolishes the collateral source rule for insured victims of torts. The Supreme Court of Oklahoma rejected each of the plaintiff's claims. In reaching its decision, the court noted that the law does not abolish the collateral source rule in its entirety; instead the law explicitly restricts the admissibility of certain types of evidence. Furthermore, the court explained that the legislature has the power to modify or abrogate the common law by statute.

B. Oregon Supreme Court Upholds Tort Liability Limit for State Employees

In *Horton v. Oregon Health & Science University*,[62] the Supreme Court of Oregon upheld the state's Tort Claims Act, which waives the state's sovereign immunity and limits the tort liability of the state and its employees to $3,000,000.[63] The issue in the case was whether the Oregon statute limiting a state employee's tort liability violates either the remedy clause of Article I, section 10 or the jury trial clauses of Article I, section 17 and Article VII, section 3 of the Oregon Constitution.

The court described the facts giving rise to the lawsuit:

> Plaintiff's six-month-old son developed a cancerous mass on his liver. Two doctors at Oregon Health & Science University (OHSU) participated in an operation to remove the mass . . . . During the operation, the doctors inadvertently transected blood vessels going to the child's liver. That act has resulted in the child having to undergo a liver transplant, removal of his spleen, additional surgeries, and lifetime monitoring due to the risks resulting from the doctors' act.[64]

After the trial:

> The jury found that plaintiff's son had sustained and will sustain economic damages of $6,071,190.38 and noneconomic damages of $6,000,000 . . . . OHSU and Harrison filed a motion to reduce the jury's verdict to $3,000,000 based on the Oregon Tort Claims Act. The trial court granted the motion as to OHSU. It ruled that, because sovereign immunity applies to OHSU, the legislature constitutionally may limit the damages for which OHSU is liable.[65]

However, the trial court denied the motion as it applied to the doctor. The trial court ruled that Tort Claims Act limit on damages for state employees violated the remedy clause of Article I, section 10 and the jury trial clauses of Article I and Article VII of the Oregon Constitution.[66]

On appeal, the Oregon Supreme Court reversed. In reaching its decision, the court reversed two prior decisions that involved the state constitution's remedy clause. The first case, *Smothers v. Gresham Transfer*, held that Oregon's workers' compensation statute violated the Oregon Constitution's remedy clause because the law did not provide a remedy for an injured worker that would have been available in 1857 when the constitution was adopted.[67] The court overruled *Smothers* and held that the decision was inconsistent with the history of the remedy clause.[68] The court also overturned its prior decision in *Lakin v. Senco Products*, which had held that a legislative limit on noneconomic damages violated a state constitutional right to jury trial.[69]

III. Conclusion

In civil liability legislation, transparency continued to be the main theme in 2016, with two more states adopting asbestos bankruptcy trust claim transparency statutes and another adopting transparency in private attorney contracting legislation. The major theme in state court civil liability jurisprudence was a continuation of the trend of upholding laws that allow defendants in civil liability cases to introduce evidence of the amount paid by third parties to determine the reasonable value of the plaintiff's medical expenses.

59 *Id.*

60 *Id.*

61 381 P.3d 736 (Okla. 2016).

62 *Horton v. Or. Health & Sci. Univ. v. Ore.*, 359 Ore. 168, 376 P.2d 998 (Ore. 2016).

63 Or. Rev. Stat. § 30.265(1); Or. Rev. Stat. § 30.271(3)(a).

64 *Horton*, 359 Ore. at 171.

65 *Id.* at 171-72.

66 *Id.* at 172.

67 *Id.* at 176-77.

68 *Id.* at 187-88.

69 *Id.* at 250.

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