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Oregon

1. **What are the statute of limitations for tort and contract actions as they relate to the transportation industry.**

   In Oregon, actions for personal injury not arising on contract shall be commenced within two years. ORS 12.110. Actions for injury to personal property and contract actions have a six-year statute of limitations. ORS 12.080. The statute of limitations starts to run when the claim "accrues." ORS 12.010 ("Actions shall only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute"). In most instances, accrual is subject to "discovery" – that is, when the person can reasonably be expected to have knowledge of the wrong inflicted upon them. *T.R. v. Boy Scouts of America*, 344 Or. 282, 291, 181 P.3d 758 (2008).

2. **What effects, if any, has the COVID Pandemic had on tolling or extending the statute of limitation for filing a transportation suit and the number of jurors that are sat on a jury trial.**

   In March of 2020, Oregon implemented a state of emergency in response to the COVID-19 pandemic. The Oregon Legislature then passed HB 4212, which implemented a tolling period for all civil actions and appellate proceedings during the state of emergency period. Pursuant to HB 4212, if the deadline to "commence an action or give notice of a claim" expired during the time that an emergency declaration was in place, the deadline extends for 90 days after the emergency declaration, or an extension thereof, expires. HB 4212 § 7.1. Oregon's state of emergency has been extended to June 30, 2022. EO No. 21-36. This executive order is silent on its effect on HB 4212.

   However, Section 8 of HB 4212 states "Sections 6 and 7 of this 2020 special session Act are repealed on December 31, 2021." Although the COVID-19 emergency order has been extended to June 30, 2022, no additional legislation has been passed, and therefore it appears Section 8 repeals Section 7 of House Bill 4212 regarding tolling. No appellate court has interpreted the operative language of HB 4212, and it is possible that an appellate court would find that Section 7 of HB 4212 continues to be in effect given Executive Order No. 21-36. Absent further legislation or judicial interpretation of the statute, plaintiffs will be required to file their lawsuits starting on April 1, 2022.

3. **Does your state recognize comparative negligence and if so, explain the law.**

   Yes. Oregon is a modified comparative negligence state. *See* ORS 31.600-31.820. A plaintiff is barred from recovery if he or she is found to be 51% or greater at fault. ORS 31.600. However, if plaintiff is 50% or less at fault, the plaintiff may recover damages against one or more defendants with the caveat that plaintiff's fault proportionally diminishes his or her right to recover. ORS 31.600(1); *see also Bjorndal v. Weitman*, 344 Or. 470, 184 P.3d 1115 (2008).

   The trier of fact shall compare the fault of the claimant with: (1) the fault of any

party against whom recovery is sought, (2) the fault of third party defendants who are liable in tort to the claimant, and (3) the fault of any person with whom the claimant has settled. ORS 31.600(2). However, there is no comparison if fault with any person who is: (a) immune from liability to the claimant, (b) who is not subject to the jurisdiction of the court, or (c) who is not subject to the action because the claim is barred by a statute of limitation or statute of ultimate repose. *Id.* However, this does not prevent a party from alleging that a person was not at fault because the injury was the sole and exclusive fault of a person who is not a party to the case. ORS 31.600(5).

4. Does your state recognize joint tortfeasor liability and if so, explain the law.

Except for certain environmental torts, liability of each defendant is several only and not joint. ORS 31.610(1). But there are two exceptions to that rule. First, if part of the judgment is uncollectible, a plaintiff may make a motion within one year to reallocate an uncollectible share among the other parties based on each party's respective percentage of fault. ORS 31.610(3). However, reallocation is not available if (a) the party's percentage of fault is 25% or less, (2) the party's percentage of fault is equal to or less than the claimant's percentage of fault, or (3) more than one year has passed since the judgment became final by way of lapse of time for appeal. *Id.*

Second, ORS 31.605(4) provides that "the court may order that two or more persons be considered a single person for the purpose of determining the degree of fault of the persons" among whom the trier of fact may compare fault under ORS 31.600(2). However, to date, no Oregon appellate court has considered the circumstances under which ORS 31.605(4) should be applied.

5. Are either insurers and/or insureds obligated to provide insurance limit information pre-suit and if so, what is required.

There is no requirement for insurers or insureds to provide insurance information pre-suit. However, the Oregon Rules of Civil Procedure require post-suit disclosure as part of discovery if requested by the adverse party. ORCP 36 B. If requested, the insurer or insured must provide the "existence and contents" of any policy that may be used to satisfy all or part of a judgment in the action or the existence of any coverage denial or reservation of rights, and identification of the provisions in the insurance agreement or policy on which such denial or reservation of rights is based. ORCP 36 B(2)(a).

6. Does your state have any monetary caps on compensatory, exemplary or punitive damages.

Oregon used to impose a statutory $500,000 cap on non-economic damages, but the law was recently held unconstitutional by the Oregon Supreme Court. *Busch v. McInnis Waste Systems, Inc.*, 366 Or. 628, 468 P.3d 419 (2020).

There are no statutory limits on punitive damages in Oregon. Punitive damages are recoverable in Oregon where a defendant is proven by clear and convincing evidence to have "acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." ORS 31.730.

Oregon Courts and the United States Supreme Court have held large awards of punitive damages to be unconstitutional when the amount of punitive damages awarded greatly exceeds the amount of economic and non-economic damages awarded. Oregon courts have used the excessiveness review used by the federal Supreme Court. The Oregon Court of Appeals held that a $22.5 million award of punitive damages was unconstitutional under the due process clause when the jury only awarded $500,000 in compensatory damages. *See Bocci v. Key-Pharmaceuticals, Inc.*, 189 Or. App. 349, 76 P.3d 669 (2003). The court held that an award of 7 times as many punitive damages as compensatory damages would be constitutional and reduced

the verdict to $3.5 million in punitive damages and $500,000 in compensatory damages. *Id.* However, in 2015 the Oregon Court of Appeals reduced an award of $125 million in punitive damages to $25 million even though the jury had awarded only $168,514 in compensatory damages. *See Schwarz v. Philip-Morris-USA, Inc.*, 272 Or. App. 268, 355 P.2d 931 (2015). The court probably allowed a large punitive damage award because the conduct of Philip Morris was especially outrageous.

However, the Oregon Constitution prohibits state court judges from reviewing jury decisions for any factual findings. Article VII (Amended) 3. A review for excessiveness of a punitive damages award must inherently review the factual basis. It's possible that in the future, the Oregon Supreme Court will determine that no punitive damages can be constitutional because the federal Supreme Court requires an excessiveness review of punitive damages while the Oregon State Constitution does not allow for excessiveness review.

Seventy percent of the punitive damages awarded must be paid to the State of Oregon. See ORS 31.735. This is because punitive damages are not awarded to compensate the injured party but rather to punish the at fault party.

7. Has your state recently implemented any tort reforms which may affect transportation lawsuits or is your state planning to, and if so explain the reforms.

The Oregon legislature recently passed Senate Bill ("SB") 180, which was proposed by the Oregon State Bar, which took effect on January 1, 2022. SB 180 requires an insurer or its agent to notify a claimant in writing when paying $5,000 or more to settle a third-party liability claim if:

> (A) the claimant is a natural person (i.e., not a business);
> (B) the insurer or an agent or other representative of the insurer, including the insurer's attorney, delivers the payment to the claimant or to the claimant's attorney, agent, or other representative by draft, check, or other form of payment; and
> (C) the claimant or claimant's attorney has provided contact information or a mailing address to the insurer.

The law was enacted to protect claimants from dishonest claimant attorneys and to inform the claimant directly that the case has settled, the settlement amount, and the availability of settlement funds.

If the claimant has an attorney, insurers and their attorneys can comply with SB 180 by sending the claimant a copy of the cover letter accompanying the distribution of the settlement funds. SB 180 authorizes the insurer or the insurer's attorney to communicate with the claimant for purposes of delivering this notice, even if the claimant is represented by counsel.

8. How many months generally transpire between the filing of a transportation related complaint and a jury trial.

Typically, a jury trial occurs between 9 and 12 months after the complaint has been filed. Throughout the COVID-19 pandemic, this range has varied between counties. Each county has handled their docket differently during this time.

9. When does pre-judgment interest begin accumulating and at what percent rate of interest.

Prejudgment interest begins accumulating when (1) payment is due, (2) when money given with permission is then kept longer than is reasonable without the owner's consent, or (3) when a contract payment is due but there no rate specified for the interest owed. ORS 82.010(1). Unless the parties agree otherwise, prejudgment interest is nine percent per annum. *Id.*

10. What evidence at trial are the parties allowed to enter into evidence concerning medical expense related damages.

A defendant will want to obtain discovery of amounts actually billed and paid in order to evaluate and request an appropriate post-verdict deduction of the jury award under Oregon's collateral source rule. Under Oregon's statutory collateral source rule, the trial court may deduct from a jury award certain benefits received from collateral sources, including medical expenses later written off by a medical provider, under an agreement with an insurer. ORS 31.580(1); *White v. Jubitz*, 219 Or. App. 62, 73-74, 182 P.3d 215 (2008), *aff'd*, 347 Or. 212, 219 P.2d 566 (2009).

However, the rule precludes deduction of certain sources of collateral benefits, including benefits which the plaintiff is required to repay, some insurance benefits, and retirement, disability and Social Security benefits. ORS 31.580(1). Additionally, medical expenses billed and later written off by a medical provider under an agreement with Medicare are not subject to post-verdict deduction under the Social Security exception to the collateral source rule. *White v. Jubitz*, 247 Or. 212, 230, 219 P.2d 566 (2009).

Although qualifying collateral benefits can be deducted from the amount of damages, they are still inadmissible as evidence during trial. Instead, evidence of the benefits must be submitted to the court by affidavit after the verdict. ORS 31.580(2). As such, discovery of amounts billed and paid should be obtained.

11. Does your state recognize a self-critical analysis or similar privilege that shields internal accident investigations from discovery?

There is no current statute or case law in Oregon that recognizes the self-critical analysis privilege. *See Union Pacific R.R. Co. v. Mower*, 219 F.3d 1069, 1076 n.7 (9th Cir. 2000). Companies and practitioners should be aware that materials that might otherwise fall under a self-critical analysis privilege are discoverable in Oregon and may be admissible in court so long as foundation and relevance are properly established.

12. Does your state allow independent negligence claims against a motor carrier (i.e. negligent hiring, retention, training) if the motor carrier admits that it is vicariously liable for any fault or liability assigned to the driver?

Yes. Oregon has not yet joined the majority of states that have determined that negligent hiring/supervision/training claims should not be allowed when the employer admits the course and scope of employment, and *respondeat superior* liability is established. *See, e.g. Minnis v. Oregon Mutual Ins. Co.*, 334 Or. 191, 48 P.3d 137 (2002); *Chesterman v. Barmon*, 305 Or. 439, 753 P.2d 404 (1988).

13. Does your jurisdiction have an independent claim for spoliation? If not, what are the sanctions or repercussions for spoliation?

Evidence willfully suppressed creates a presumption that the evidence would be averse to the suppressing party. Or. R. Evid. 311(1)(c). The jury may be instructed that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust. ORS 10.095(8). The trial court has inherent discretion to

award other discovery sanctions, including the above-mentioned adverse inference and presumption, selective preclusion of evidence, monetary sanctions (including award of attorneys' fees), punitive damages, and dismissal, if evidence is found to be suppressed. However, the trend in trial court orders is to not recognize spoliation as a valid affirmative defense because the remedy is an adverse jury instruction regarding the evidence.