

# COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the  
U.S. District Court for the District of Oregon  
A Court Publication Supported by the Attorney Admissions Fund  
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## Insurance

Judge Ann Aiken construed the terms of a hospital insurance policy to find coverage for an anesthesiologist. An insurance company settled a patient's claim against a hospital for \$10 million. The patient lapsed into a coma following surgery due to post-operative complications that arose from failure to adequately manage his oxygen levels. The insurer's policy with the hospital provides coverage for medical staff members acting within the scope of administrative or supervisory tasks; it excludes coverage for negligence in direct patient care. The insurer filed the action seeking contribution to the settlement from the anesthesiologist.

On cross motions for summary judgment, the parties disputed the meaning and scope of the term "supervisory." The patient claimed that the defendant-doctor failed to relay post-operative nursing instructions to staff. The court found both parties' interpretations of the term "supervisory" plausible and, hence, construed the term against the drafter. The court

concluded that the doctor's acts were therefore covered by the policy. American Continental Ins. Co. v. Fletcher, CV 01-3040-AA ( July, 2002).

Plaintiff's Counsel:

James C. Chaney

Defense Counsel:

Robert L. Cowling;

Thomas Tongue

**7** Mold and water damage that renders a house uninhabitable may constitute "direct" and "physical" loss sufficient to trigger coverage under a disputed home owners policy. Judge Stewart denied a defense motion for summary judgment on claim construction grounds, finding genuine issues of fact relative to the cause of the water damage and the cause of the mold. The court also dismissed an affirmative defense of estoppel raised by the insured. Prudential Property & Casualty Ins. Co. v. Lillard-Roberts, CV 01-1362-ST (Amended Opinion, June 18, 2002).

Plaintiff's Counsel:

Douglas G. Houser

Defense Counsel:

Calvin P. Vance

## Procedure

A party may not rely upon the affidavit of an attorney without direct knowledge to authenticate and otherwise lay a proper foundation for certain exhibits and alleged business records. Judge Anna J. Brown granted a plaintiff's motion to strike exhibits attached to an attorney's affidavit where the attorney failed to alleged sufficient facts to support the requisite personal knowledge for authentication of records. The court declined to infer personal knowledge based solely upon the claim that the attorney was the counsel of record for the corporation. The court also held that the documents were inadmissible hearsay because defendant failed to establish the elements necessary for the business records exception.

A defense motion for summary judgment based upon a claim of ERISA preemption was denied because defendant failed to submit admissible proof of plan terms or that plaintiff's claims were

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implicated by plan terms. Blount v. Connecticut General Life Ins. Co., CV 01-1341-BR (Opinion, July 2, 2002).

Plaintiff's Counsel:

James C. Edmonds

Defense Counsel:

Peter J. Mintzer (WA)

## Costs

Several plaintiffs unsuccessfully pursued a age discrimination claims against their employer. Two plaintiffs voluntarily dismissed their claims at the summary judgment stage; the remaining plaintiffs proceeded to trial and their claims were rejected by a jury. Defendants then filed a cost bill to which the plaintiffs raised numerous objections.

Judge Anna J. Brown rejected plaintiff's objections to copies of deposition transcripts for depositions noticed by the plaintiffs. The court also allowed defense costs for demonstrative exhibits under Section 1920(5). However, the court held that the plaintiffs who dismissed their claims prior to trial should not be liable for defense trial costs. The court directed the parties to submit a plan of apportionment of costs among plaintiffs. Hartung v. Cae News, Inc., CV 00-1400-BR (Opinion, July 2, 2002).

Plaintiffs' Counsel:

Phillip M. Lebenbaum

Defense Counsel:

Courtney W. Wiswall

## Attorney Fees & Costs

A physical education teacher for disabled students filed an action against her former employer claiming that her probationary contract was not renewed in retaliation for public complaints she raised regarding services for disabled children. Plaintiff's claims under the Rehabilitation Act, Section 1983 and Oregon's Whistleblower statute proceeded to an 8-day jury trial and resulted in a jury award of over \$550,000. In post-trial motions, Judge Janice M. Stewart set aside the verdict and entered judgment in favor of the defendant. Defendant then moved for attorney fees of over \$300,000 and costs of over \$11,000 under statutory fee shifting provisions for frivolous and/or bad faith claims. Specifically, defendant urged the court to find, based upon plaintiff's testimony, that her purpose in bringing the action was to pursue a political agenda relative to disabled rights. The court agreed that evidence supported a finding that plaintiff was motivated, in part, by an agenda, but found that this

agenda was related to her underlying claims of retaliation. The court noted that there was no dispute that plaintiff established a prima facie case sufficient to submit the case to a jury. Thus, the court declined to find plaintiff's claims frivolous or in bad faith and denied defendant's request for fees on this basis.

Defendant also sought fees against plaintiff's attorneys by invoking the court's inherent power and 28 U.S.C. Sec. 1927. Judge Stewart recounted her previous findings that plaintiff's trial attorney engaged in numerous instances of misconduct which included direct violations of court orders on limine rulings. Judge Stewart found that while counsel's conduct was "unacceptable," her prior public reprimand was a sufficient sanction. Accordingly, the court denied attorney fees on this basis as well.

Judge Stewart granted the defendant's cost bill in full under 28 U.S.C. Sec. 1920.

Settlegood v. Portland Public Schools, CV 00-313-ST (Opinion, May 16, 2002).

Plaintiff's Counsel:

Gregory Kafoury

Defense Counsel:

Bruce Rubin