THE DRAMATIC EXPANSION OF OREGON'S ABSOLUTE LITIGATION PRIVILEGE

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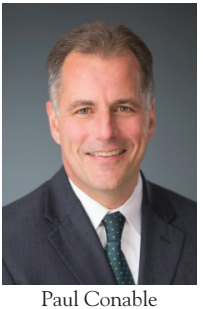

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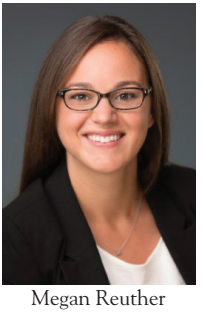

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Oregon courts have long recognized the absolute litigation privilege as a bar to claims for defamation based on statements made in the course of or incident to judicial and quasi-judicial proceedings. In recent years, however, Oregon's absolute litigation privilege has expanded dramatically, well beyond the scope originally contemplated. It exists now largely unchecked, immunizing a wide variety of statements and conduct, including those made outside judicial proceedings, against claims sounding in every kind of tort.

The origin of the absolute litigation privilege in Oregon.

As originally conceived, Oregon's absolute litigation privilege protected statements made in the course of litigation. Like the analogous legislative (or parliamentary) privilege, the litigation privilege grew out of recognition of the importance of protecting the right to speak freely on important matters in the public fora. Thus, the privilege was described in terms of a right to speak without fear of reprisal: "A communication made by an attorney in a judicial proceeding is absolutely privileged if it is pertinent and relevant to the issues, although it may be false and malicious." *Irwin v. Ashurst*, 158 Or. 61, 68 (1938). Its primary function was "the promotion of the public welfare, the purpose being that members of the legislature, judges of courts, jurors, lawyers and witnesses may speak their minds freely and exercise their respective functions without incurring the risk of a criminal prosecution or an action for the recovery of damages." *Moore v. Sater*, 215 Or. 417, 420 (1959).

This focus on immunizing potentially defamatory in-court communications is also reflected in Sections 586 and 587 of the *Restatement (Second) of Torts* (1977), and in the law of the many states that follow the *Restatement*. Indeed, Sections 586 and 587 are listed under defenses to actions for defamation, implicitly limiting the reach of the absolute privilege. Section

586 states, "An attorney at law is absolutely privileged to publish *defamatory* matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." (Emphasis added.) Section 587 extends the same privilege to "[a] party to a private litigation." *See Lee v. Nash,* 65 Or. App. 538, 542 (1983), *rev. den.,* 296 Or. 253 (1984) (citing *Restatement* Section 586 with approval).

The scope and evolution of Oregon's absolute litigation privilege.

From the beginning, Oregon courts identified two threshold requirements that a statement must satisfy before qualifying for the privilege. The statement (1) must have "some reference to the subject matter of the pending litigation," and (2) must be made "in connection with a judicial proceeding." *Wollam v. Brandt,* 154 Or. App. 156, 162 (1998); *Chard v. Galton,* 277 Or. 109, 112 (1977). Over time, Oregon courts have expanded and stretched these requirements, thereby widening the application of the privilege by liberalizing the threshold inquiries.

To satisfy the first requirement, a communication need only have "some relation" to the litigation or any issue involved therein. *Chard*, 277 Or. at 112-15. This is not a searching inquiry. Rather, the privilege "embraces anything that may possibly be pertinent." *Irwin*, 158 Or. at 70; *Levegue v. Paulson*, 126 Or. App. 12, 16 ("All doubt should be resolved in favor of its relevancy or pertinency."). In fact, under Oregon's broad interpretation of the "some relation" requirement, it is hard to imagine a communication by a party or lawyer that could not be characterized as having some reference to a judicial proceeding.

Likewise, to satisfy the second requirement, a communication need only have some connection with a judicial or quasi-judicial proceeding. Originally, the requisite connection mainly included defamatory statements made in pleadings, in the courtroom, or in correspondence between opposing parties or their attorneys. *See, e.g., Moore,* 215 Or. at 420 (privilege applies to statements made in pleadings); *Chard,* 277 Or. at 114 (privilege applied to statements in letter from attorney to insurance company regarding settlement of clients' claims). However, over time, the privilege has been extended to certain unsworn, out-of-court statements. *See Moore v. West Lawn Mem'l Park, Inc.,* 266 Or. 244, 251 (1973) (privilege extended to letter written to State Board of Funeral Directors and Embalmers regarding plaintiff's qualifications for funeral director's license); *Ramstead v. Morgan*, 219 Or. 383, 400-01 (1959) (privilege extended to unsolicited letter sent by defendant to grievance committee of Oregon State Bar); *Cushman v. Edgar*, 44 Or. App. 297, 302 (1980) (privilege extended to defendant's letter to the Governor requesting an investigation into an incident involving police). In so doing, Oregon courts have made an express decision to break with the *Restatement* and extend the privilege to nearly anything that may be at some point related to a judicial proceeding. *Ducosin v. Mott*, 292 Or. 764, 768 (1982).

Significantly, the absolute litigation privilege can apply *even in the absence of an actual judicial or quasi-judicial proceeding*. For example, in *Ramstead*, the court applied the privilege to a letter to the Oregon State Bar written by a former client complaining about his lawyer's bad behavior, even though the bar never commenced any formal investigative proceeding based on the letter. 219 Or at 396 ("Considering the purpose of the rule, we think that relevant statements made in a complaint designed to initiate such quasi-judicial action should also be protected."). To the same effect, the Court in *Wollam* applied the privilege to a threatening letter between counsel, even though the threat never matured into a lawsuit. 154 Or. at 156. This application of the privilege outside an actual, existing proceeding is a crucial feature of Oregon's absolute litigation privilege jurisprudence that, taken together with Oregon's departures from the *Restatement*, helps explain the breadth of Oregon's privilege.

The further expansion of the absolute litigation privilege in Oregon.

In *Franson v. Radich*, 84 Or. App. 715 (1987), the Court of Appeals "further, and dramatically, extended the application of the absolute privilege in two respects." *Mantia v. Hanson*, 192 Or. App. 412, 425 (2003) (describing *Franson*). First, the Court extended the privilege beyond statements, declaring that it also applies to conduct undertaken in connection with litigation. *Franson,* 84 Or. App. at 719. Since then, Oregon courts have extended the absolute litigation privilege to such non-testimonial acts as obtaining and publishing allegedly privileged and confidential material from a litigation opponent. *See, e.g., Yeti Enters. Inc. v. NPK, LLC*, 2015 WL 3952115, at *5 (D. Or. June 29, 2015).

Second, the *Franson* court expanded the privilege to torts outside the defamation and false light categories. *Franson*, 84 Or. App. at 719; *see also Wollam,* 154 Or. App. at 162 n.5 (stating, "absolute privilege applies not only to defamation actions, but to any tort action based on statements made in connection with a judicial proceeding"). Although the litigation privilege originated as a bar to defamation claims, Oregon courts now have extended the privilege to all tort actions. *See, e.g., Wollam,* 154 Or. App. at 162 n.5 (invasion of privacy, intentional interference with contract); *Hiber v. Creditor's Collection Serv. of Lincoln Cty., Inc.*, 154 Or. App. 408, 410 (1998) (false imprisonment); *Yeti Enters.,* 2015 WL 3952115, at *5 (invasion of privacy, intentional interference with contract, intentional infliction of emotional distress).

Oregon's absolute litigation privilege check: wrongful initiation suits.

Although it is referred to as the "absolute litigation privilege," there is one exception recognized in Oregon. Oregon courts have explained that the privilege does not protect conduct that constitutes wrongful initiation of civil proceedings. *See Mantia*, 192 Or. App. at 412. A plaintiff need not actually bring a wrongful initiation claim to circumvent the privilege. Rather, the plaintiff can proceed on a theory of tortious interference, so long as the alleged tortious conduct would satisfy the elements of wrongful initiation. *Id.* at 414. *See also Top Serv. Body Shop, Inc. v. Allstate Ins. Co.,* 283 Or. 201, 210 (1978).

To adequately plead a claim for wrongful initiation, a party must show that

> (1) the plaintiff in the antecedent proceedings lacked probable cause to prosecute those proceedings; (2) the primary purpose of those proceedings was something other than to secure an adjudication of the claims asserted there; and (3) the antecedent proceedings were terminated in favor of the party now asserting the tortious interference claim.

Mantia, 190 Or. App. at 429 (citing to the *Restatement* for clarity). Obviously, this is an extremely difficult standard to satisfy.

First, the plaintiff must prove that the party invoking the privilege lacked probable cause to initiate the prior proceeding. Generally, the standard for probable cause to bring a civil action is less stringent than that required to prosecute a criminal action. *Blandino v. Fischel,* 179 Or. App. 185, 190, *rev. den.*, 334 Or. 492 (2002). "Evidence that the underlying action was undertaken upon the advice of counsel, relied on in good faith, that the action had a reasonable probability of success is enough to establish probable cause." *Roop v. Parker Nw. Paving Co.*, 194 Or. App. 219, 238 (2004).

Second, "[t]o subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based." *Restatement (Second) of Torts* § 676 (1977) (cited favorably by *Wroten v. Lenske*, 114 Or. App. 305, 308 (1992)). The *Restatement* provides several examples of proceedings initiated for purposes other than securing the proper adjudication of the claim on which they are based, including "instituting a civil proceeding when one does not believe his claim to be meritorious"; "when the proceedings are begun primarily because of hostility or ill will"; or "when the proceedings are initiated solely for the purpose of depriving the person against whom they are brought of a beneficial use of his property." *Id.*

Finally, the prior civil proceedings must be terminated in favor of the person against whom they were brought. This can occur by "(1) the favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) the dismissal of the proceedings because of his failure to prosecute them." *Restatement (Second) of Torts* § 674 (1977). Significantly, "If an appeal is taken, the proceedings are not terminated until the final disposition of the appeal and of any further proceedings that it may entail." *Id.* (cited favorably in *Portland Trailer & Equip., Inc. v. A-1 Freeman Moving & Storage, Inc.*, 182 Or. App. 347, 357 (2002)).

This final requirement is particularly difficult in Oregon because, as noted above, Oregon courts will recognize the absolute litigation privilege even without the initiation of civil proceedings. Thus, how can a party plead and prove that an antecedent proceeding has been terminated in its favor when no antecedent proceeding was ever commenced? Consider, for example, an unscrupulous party that files a lien without having a valid property interest to support the lien, and thereby encumbers property to the detriment of the owner. The filing of a lien is, at least arguably, as much an act of litigation as were the letters in *Ramstead* and *Wollam*. As a result, the party filing the wrongful lien could hide behind the litigation privilege. And, the only avenue available to circumvent the

litigation privilege is by filing a wrongful initial claim, a claim that is unavailable to our injured property owner because filing the wrongful lien did not actually initiate proceedings.

Conclusion.

Oregon's absolute litigation privilege is powerful. It currently immunizes (1) conduct or testimony; (2) made in connection with an actual or potential judicial or quasi-judicial proceeding, even if no actual proceeding materializes; (3) against claims brought under any tort. As a result, the privilege has outstripped its check: the availability of a wrongful initiation suit. Accordingly, statements or conduct made outside of an actual proceeding are in many instances untouchable, representing a dramatic expansion of a privilege originally intended to bar claims of defamation based on statements made in court. Thus, the absolute litigation privilege in Oregon – a privilege originally recognized to reflect the high value our legal system places on free speech in public fora – could be used to immunize bad-faith actions by non-litigants, even where those actions damage innocent parties.