NOT IN, BUT LARGELY ABOUT, THE APPELLATE COURTS IN THE STATE OF OREGON

In Re: A Publication of the Appellate Practice Section of the Oregon State Bar.

Volume 13

OREGON APPELLATE ALMANAC

2023

A Collection of Highly Specific Scholarship, Exuberant Wordplay, and Fond Memories from the Appellate Practice Section

Nora Coon, Editor

OREGON APPELLATE ALMANAC

Volume 13 – 2023

Cite as: 13 Oregon Appellate Almanac ____ (2023)

The Oregon Appellate Almanac is published annually by the Appellate Section of the Oregon State Bar. Copies are archived on our website, http://appellatepractice.osbar.org/appellate-almanac, as well as on HeinOnline.

To contact the editor, send an email:
oregon.appellate.almanac@gmail.com

Publication Information
The Oregon Appellate Almanac is printed by Joe Christensen, Inc.
Past issues may be ordered in print from HeinOnline.
ISSN 2688-5034 (print)
ISSN 2688-5018 (online)

OREGON APPELLATE ALMANAC

Volume 13 (2023)

SUBMISSIONS

The Almanac welcomes submissions of approximately 500 to 2500 words in the following areas:

- Biographies, interviews, and profiles of figures in Oregon law and history
- Court history, statistics, and trivia
- Analysis of intriguing or obscure issues in Oregon appellate law and procedure
- Humor, wit, poetry, and puzzles

The annual submission deadline is **August 1**. In case of pandemic, natural disaster, or other forces beyond everyone's control, extensions will be granted liberally.

Submissions should be lightly footnoted as necessary. In deference to the fact that most contributors and readers are practitioners, citations should conform to the Oregon Appellate Courts Style Manual.

TABLE OF CONTENTS

Introduction 1

In Memoriam: Chief Judge Haselton

Hon. Rebecca Duncan 3

Hon. Paul De Muniz 9

Hon. Mary Deits 13

Hon. Erika Hadlock & Jean Ann Quinn 15

Hon. Jack L. Landau 23

Hon. Ellen Rosenblum 27

Sadie Forzley 31

Alia Miles 33

Shenoa Payne 35

Jeffrey Piampiano 39

Jeremy Rice 43

Josh Ross 45

Erin Severe 47

Laura Walhood 49

H.M. Zamudio 51

Not Quite the Bluebook

Confessions of an Oxford Comma Skeptic.....53
Hon. Meagan Flynn

Anti-(S)hero.....59
Hon. Anna Joyce

The Appellate Court Grammarian
The Oregon Appellate Courts 63

Legal Analysis

Making Lemonade Out of Congressional Lemons 69
Bruce Myers

Correcting the Burden of Proof for Specific Performance of Written Contracts 83
Colin Hunter

Introduction

Welcome to the 2023 edition of the Oregon Appellate Almanac! Thank you to all of our authors for their contributions, and to those who have already started thinking about next year's submissions (write early and write often!). We also greatly appreciate the contributions of Davis Wright Tremaine LLP, Markowitz Herbold PC, Samuels Yoelin Kantor, and Tonkon Torp LLP to the Appellate Practice Section of the Oregon State Bar, which made possible the printing of this year's edition.

Our 2023 edition of the Almanac is dedicated to the memory of former Chief Judge Rick Haselton. In the following pages, you'll find tributes from numerous former colleagues and clerks—a testament to his lasting effect on the Oregon legal community.

We hope that you enjoy this edition of the Almanac, and we welcome your questions, feedback, and submissions for future editions at oregon.appellate.almanac@gmail.com.

—Nora Coon, Editor

We uniquely appreciate the demands of this work and that almost any appellate decision, especially when deconstructed a generation later, can be deemed "incomplete" or otherwise wanting. Consequently, due regard for stare decisis and our predecessors' collegial commitment demands that "plainly wrong" be a rigorous standard, satisfied only in exceptional circumstances.

This is such an exceptional case. The deficiencies in Cox are fundamental, essential, far transcending pointillistic exegesis or second-guessing. Rather, those deficiencies are apparent with even a basic exploration of the text and context of the statute, let alone its legislative history.

State v. Civil, 283 Or App 395, 417–18, 388 P3d 1185 (2017)

Mementos

Hon. Rebecca Duncan[1]

An audio cassette. A snow globe. A book. These are few of the tangible items I hold on to from The Honorable Judge Rick Haselton. To that last sentence, he would say, "Becky, please call me Rick." I would, at one point in my career, come to call him Rick, as he asked. But to me, and many others, he will always be *The Honorable Judge* Rick Haselton. *The Honorable Judge* because that was his way and his work.

The audio cassette dates back to my first appearance as a lawyer in front of Judge Haselton's Court of Appeals panel. I was a new appellate attorney, and, after I completed my oral argument and stepped back to counsel's table, Judge Haselton said something. In my post-argument state, I didn't quite hear it. My supervisor, who attended the argument, told me what Judge Haselton had said and later got an audio cassette recording of argument. What Judge Haselton had said was a compliment; it was simple, but it sounded sincere and was encouraging. Judge Haselton knew that I was new to the court and his words were welcoming. He was presiding over a full oral argument docket that day. He didn't have to say anything after I finished my argument, but he did, and it mattered to me. Since then, I have heard other lawyers tell the very same story about their early experiences arguing before Judge Haselton. Judge Haselton reached out to others; he spoke the encouraging word.

Judge Haselton loved oral argument. He loved the law, the questions presented in appellate cases, and the challenge of

---

[1] Justice, Oregon Supreme Court (2017 to present); Judge, Oregon Court of Appeals (2010 to 2017) (member of Judge Haselton's Department 1, 2010 to 2014).

resolving those questions. And lawyers loved arguing in front of him. We knew he would be prepared and ready to engage. I can picture him smiling, rubbing his hands together, and leaning into the microphone at the start of an argument. He was always ready to get to the heart of the matter. He understood the lawyers' arguments and the pathways to possible resolutions. He could summarize those arguments and pathways succinctly, and he often did so in a manner I've likened to describing the path of a pinball. "Counsel," he might say in my analogy, "if the ball comes out of the chute at this speed, it will hit this bumper, ricochet off this one and then that one, and land here, right?" And he was right. Judge Haselton could cut through a case. He was not distracted by bells or flashing lights. He recognized the dispositive issues, the options for resolving those issues, and the ramifications of those options. A seasoned debater, he enjoyed questioning counsel in a productive way, trying to get the best answers from the lawyers to help the court decide its cases. And he did so in a positive—even fun—way.

Many years after my first oral argument in front of Judge Haselton, I was fortunate to join his panel as a judge. Judge Haselton was a natural and enthusiastic teacher. As a presiding judge, he included all of the panel's clerks in the pre- and post-argument conferences, and he used those conferences not only to discuss the cases that had been argued, but also to teach about effective appellate advocacy; he would highlight examples of strong legal writing and oral argument by the lawyers in the cases that we'd heard. In that setting and others, he shared the lessons he had learned as a lawyer and a judge. As he would tell us, he had been blessed with good mentors; he extended that blessing to us.

Judge Haselton was giving of his time. He was also a giver of trinkets, which brings me to the snow globe. On a shelf in my

office sits a plastic snow globe with a miniature version of the Oregon State Capitol inside. In front of the Capitol stands a beaver, larger than the Capitol's doors. With a shake of the globe, snow falls on the Capitol and the impossibly tall beaver. I received the snow globe from Judge Haselton, who had purchased it from the Capitol's gift shop. Mine was just one of many he handed out over the years, just for fun. To me, the snow globe captures his sense of whimsy and wonder.

The snow globe also reflects how grateful Judge Haselton was for the opportunity to serve in state government. That brings me to the book. Alongside the snow globe on my shelf sits a copy of Judge Haselton's memoir of his life as a lawyer and judge, *Singing in the Mornings*. In the preface, he explains:

> "The Oregon State Capitol has always been a deeply special place for me. It was there that my grandmother of blessed memory, Emily Schantz, first took me, in 1962, to meet then Governor Hatfield. It was there that, as a high school freshman in early 1969, I was introduced from the House floor and met Governor Tom McCall, after winning a local essay contest—and there that, on the same House floor a decade later, flanked by my lifelong friends, Ron Saxton and Jeff Druckman, I took the oath of admission to the Oregon Bar. And it was there that, on a summer morning in August 2015, I delivered my letter informing Governor Kate Brown of my intention to retire at year's end as a judge (and Chief Judge) of the Oregon Court of Appeals."

In that retirement letter, Judge Haselton wrote:

> "Every day since Governor Roberts appointed me in March 1994 has been a privilege and a blessing. Every day, for nearly 22 years, I have looked forward to coming to 'work,' not infrequently singing on a solo commute or as I enter chambers. Every day has been a dream—a life-long dream of serving Oregon and her people—realized anew."

Those words ring true. Those of us who work in the courts, on either side of the bench, know that our work is truly a privilege and a blessing. Judge Haselton embodied that understanding and he spread it with joy. He created a sense of community—or, as he would say, family—in and around the court.

Family was essential to Judge Haselton. He created it at work, in his faith community, and with his lifelong friends. As was said at his memorial, to an overflowing room of people from all the different parts of his life, "Rick loved all of you, and he never thought or spoke of you without delight in his eyes." Most of all, of course, Rick loved his wife Sura and daughter Molly. They inspired him, supported him, and filled his heart. There has never been a husband who felt luckier or a father who felt prouder.

In his memoir, Judge Haselton shares letters he has sent over the years to classmates, colleagues, clerks, and others. As you read them, you notice their closings. You see these phrases:

> "With boundless admiration and fond friendship,"
>
> "With many mazel tovs and great fondness," and
>
> "With abiding gratitude, admiration, and affection."

Judge Haselton cultivated friendships and lived with a spirit of gratitude. In doing so, he enriched the lives of others. He reached out to others, encouraged them, and brought them together. The way he closed his letters is the way he lived his life. It is also the way I close here, thinking of Rick:

> "In the end words fail. Only inexpressible admiration and affection remain."

Rick Haselton, Remarkable Lawyer, Judge, and Person

Hon. Paul J. De Muniz[1]

Rick Haselton served on the Court of Appeals for 21 years, from 1994 to 2015 and was that court's chief judge from 2012 to 2015. I first encountered Rick Haselton in 1993 when he argued on behalf of Ecumenical Ministries in *Ecumenical Ministries v. Oregon State Lottery Commission*, 118 Or App 735 (1993) in the Court of Appeals. I was on the Court of Appeals panel that heard the case. In that case Ecumenical Ministries contended that ORS 461.215 and 461.217 when implemented, would create state-sponsored video poker resulting in casino gambling in violation of Article XV, section 4(7), of the Oregon Constitution. Although Rick ultimately was on the losing side of that case, *Ecumenical Ministries v. Oregon State Lottery Commission*, 318 Or 551 (1994), it was clear to me at that time that he was a uniquely talented and brilliant lawyer. To my great fortune and the people of Oregon, Rick became a colleague on the Court of Appeals in 1994.

It is difficult to choose words that adequately express the intensity of my admiration for Rick as a lawyer, judge, and person. He was person of immense intellect and integrity, and had a capacity for friendship and support that was a constant inspiration to me. I treasure the memories of our time together, sitting on the same Court of Appeals panel, and later working with him in his capacity as the Chief Judge. For Rick Haselton serving as a judge on the Court of Appeals was not just a job, it was a calling. On numerous occasions Rick discussed with me how very fortunate he was to have the honor of serving Oregonians as a judge and how seriously he

---

[1] Chief Justice, Oregon Supreme Court (2006 to 2012); Justice, Oregon Supreme Court (2000 to 2005); Judge, Oregon Court of Appeals (1990 to 2000).

took the responsibility for his rulings that could profoundly impact a person's life. In addition to Rick's support and affection for his judicial colleagues, Rick viewed his relationship with his clerks, as imposing on him a special responsibility to mentor and model for his clerks the highest standards of scholarship, integrity, professionalism, and collegiality. One of those former clerks, Meagan Flynn is now the chief justice of the Oregon Supreme Court. Vivid in my reflection on my years of judicial service with Rick are the thousands of appellate opinions that reveal a vigorous and incisive mind capable of expressing the most complicated legal issues, concisely, thoroughly, and understandably. His written legacy of appellate opinions will guide courts and judges for years to come.

On a very personal level, my life was enhanced by Rick's unflinching support and friendship, that included our many conversations about our lives, our families, politics, and life in general. An illustration of the depth, breath, and intensity of Rick's friendship was exemplified in 1999 when my son Mike was the quarterback of the Sprague High School team that played Beaverton High School for the state football championship at Providence Park on a cold December morning. Because Rick was an observant Jew, he could not ride in a car on that Saturday. Instead, Rick who lived in Multnomah Village, walked from home to Providence Park and back to watch Mike play in that football game.

Although Rick graduated from Stanford University and Yale Law School, (one of his study partners at Yale was United States Supreme Court Justice Sonia Sotomayor) he never forgot his roots in Albany, Oregon. On a visit by the Court of Appeals to hold oral argument at West Albany High School, Rick took the bench wearing his West Albany letterman's jacket.

Finally, as chief judge of the Court of Appeals he distinguished himself as one of that court's most talented and dedicated leaders. Rick's service as chief judge would serve well as the model for future leaders of that court.

Judge Rick Haselton

Hon. Mary J. Deits[1]

I had the privilege of serving on the Oregon Court of Appeals for many years with Judge Haselton. As did Rick, I loved the job. One of the major reasons for that was the opportunity to work with many wonderful and talented colleagues—judges and staff. Rick will always be at the top of my list of great colleagues. He was a thoughtful, curious and enthusiastic student of the law who was willing to consider different perspectives and was always willing to learn and to try to get things right. Rick and I were often on the same Panel on the court and were on many cases together. Not only did I greatly enjoy our discussions of the various cases we were on together, I have no doubt that our many conversations about those cases greatly improved my work.

Rick had remarkable energy. He was very hard-working and consistently was a top producer of opinions by the court and, also, made significant contributions to the work of other judges on the court. That said, he always seemed to have time to devote to his real priorities in life—his faith and his family. I admired that quality greatly. Not surprisingly, Rick's law clerks were devoted to him. It is easy to see why. He appreciated their work, was always willing to engage in lively discussions about issues and treated them with the utmost respect.

As much as I valued Rick as a judicial colleague, I also valued Rick as a friend and greatly enjoyed visiting with him on all kinds of subjects. We often talked about sports which we both had a strong interest in, life experiences—good and bad—and sometimes politics. He was a great storyteller. I think our

---

[1] Chief Judge, Oregon Court of Appeals (1997 to 2004); Judge, Oregon Court of Appeals (1986 to 1996).

favorite topic though was our families. Rick truly lit up when talking about Sura and Molly. He was so incredibly proud of them, enjoyed them both so much and cared deeply. I especially enjoyed hearing about Molly's journey through life which he loved to talk about. He was always sincerely interested in my family as well and I greatly appreciated that. We both had daughters and our conversations about being a parent to a daughter were often therapeutic for both of us. He was truly a generous friend.

Rick had a great smile and the best laugh and he was always willing to laugh at himself. He was fun to be with, even when we were struggling with resolving tough legal issues. Rick was such a fine judge and person. I was honored to know him. His passing came much too soon and was a great loss to us all.

Rick, Rolos, and Relationships

Hon. Erika Hadlock[1] *& Jean Ann Quinn*[2]

Years ago, the Justice Building was blessed—or cursed—with a cafeteria in the basement. The basement then was an ill-lit, low-ceilinged, somewhat dank place with hot cafeteria food to match; snack items were also on sale. Back in the '90s, many people who worked in that building went to the cafeteria around noon, sometimes to buy food, sometimes to chat with colleagues. It was there that one of us first encountered Rick outside of the courtroom.

> *Erika*: Until I saw Rick that day in the cafeteria, I had known only the super-smart, scarily well-prepared judge who always asked me *exactly* the right questions (and which, of course, were occasionally the questions that I had hoped nobody would think of).[3] I was in awe, and I carefully watched his travel through the lunch line. Perhaps I'd discover what fueled all that wisdom and energy. Rick, whose religious convictions gave him a great reason not to eat the rather suspect hot meals on offer, selected his lunch from the array of not-prepared-on-site snack items for sale. Fresh fruit maybe? Packaged, certified kosher nuts and dried

---

[1] Judge, Oregon Court of Appeals (2011 to 2019).

[2] Staff Attorney, Oregon Court of Appeals (2006 to 2023).

[3] Rick had an uncanny ability to push aside what was extraneous to the issues on appeal in a given case and focus oral argument on the precise question that had to be resolved. Unsurprisingly, many of his questions focused on relationships: relationships among the branches of government, or among the different courts in Oregon or in the federal system, or between a lawyer and a client, or among business partners.

> berries? No. Rick's lunch that day was Rolos candy. *Three* tubes of Rolos.
>
> *Jean Ann*: When I started working for the court, the Justice Building cafeteria had already closed. But that did not stop Rick. Whether he brought supplies from home, made frequent runs to the Safeway up the road, or raided the vending machines in that same scary basement, Rick's junk-food lunches remained legendary. I often wondered how somebody could think and write so brilliantly after eating only Doritos for lunch.

Rick was unapologetic about his passion for junk food. He shared his snacks freely with others, in a way that helped people understand him as a real-life person, not only as an extraordinary judge. And Rick—both as a judge and in his outside-the-courtroom life—was all about relationships. Forging them, nurturing them, and maintaining them even in (or especially in) tough times.

Family first, of course. Rick, in his generosity, shared with many of us (both individually and in his compiled writings) some of the less-personally-focused letters and emails that he had sent to his adult daughter Molly over the years. In those messages, Rick mused on history (family, local, state, national), heroes (from Rick's mother, to Molly and Sura themselves, to judicial giants and lesser-known public servants, to all sorts of people who fought the good fight), moral quandaries, and day-to-day happenings at home. The depth, breadth, and sheer volume of that correspondence show not only Rick's love and admiration for Molly, but his sharp attention to the consistent work it takes to grow and deepen relationships over time.

Perhaps that attention was heightened by a warning that Rick received early in his judicial career, during a visit to the court

from a former colleague who apparently feared that Rick's priorities were shifting in an unfortunate way. As Rick wrote, the visitor asked how much time Rick was devoting to his family. When Rick answered by discussing the court's workload, the visitor pointed to volumes of the Oregon Reports and asked "Do you think that * * * will take care of you when you're old? Do you think those will remember you when you're gone?" Rick got the message, and he never lost sight of it.

> *Jean Ann*: Rick subtly conveyed some form of that message—the overriding importance of family and friendships—in his chats with court staff and other judges. Over the years, I watched Rick strive to develop a personal connection with every new person—judge or staff member—who arrived at the court. He expressed genuine interest in discovering what made the person tick, who and what they really cared about, some personal interest or quirk over which they could bond.
>
> With me, it was, among other things, my Irish-Catholic heritage and his Catholic/Jewish heritage (we had A LOT of discussions about religion), my Jesuit education, and the fact that my parents were both from Butte, Montana, making my dad a "Butte Boy" like his great friend Mike Kelley, which delighted him to no end. Rick never, ever failed to ask about my dad and express deep admiration for him, even though they had never met. He was very intentional about developing relationships with his court "family" and that intention encompassed partners, spouses, children, friends.
>
> *Erika*: And when Rick asked about his colleagues' family members, it wasn't only because he genuinely cared about them (although of course he did—he told

> me once that he was terribly sad not to have met Jean Ann's father). In chats with Rick, you could always sense the underlying message about priorities.... When I felt overwhelmed by the court's workload, Rick encouraged me to find a way to adopt a kind of secular Sabbath—a weekend day or other big chunk of time when I would set the work aside to focus on the people in my life.

Whatever the genesis (or rebirth) of Rick's focus on relationships, we all benefited from it. Sometimes Rick focused on individual relationships, as with the law clerks for whom he was a mentor, teacher, and friend. Rick's dedication to forging relationships extended to everybody at the court, as Rick almost daily sent judges messages praising their opinions (even those with which he disagreed, but genuinely respected) and made the rounds to ensure that staff members understood the deep admiration he had for their largely unsung efforts. Sometimes, the focus was more institutional, as Rick ensured that the court gathered for celebrations, that we had silly contests, and that we followed court traditions.

> *Erika*: Rick became nearly angry with me only once, when, as Chief Judge, I approved a petition to change the annual competition for the Weasel Cup from softball to kickball. I apparently had not fully appreciated the sanctity of that particular tradition.

> *Jean Ann*: And I wouldn't say that he was angry, but he certainly let me know how disappointed he was when I declined to participate in a court-wide poll to choose the color of the new department that was created in 2013 when the court got three new judges. (In my defense, I didn't really care for any of the choices!)

As much as was feasible, given that many of the judges and staff commuted to Salem from other areas, Rick did his best to develop *in-person* relationships with (and among) his colleagues.

> *Erika*: When Rick was Chief Judge, he tried to drop by his colleagues' offices frequently, to have face-to-face chats about the court's work instead of sending blast emails. And as he approached retirement, one of his highest priorities was introducing me to all the people with whom I would be working in my new role as the next chief judge.
>
> *Jean Ann*: When I was a staff attorney for Rick's department, I was pleased to be included in some of the gatherings he held at his home (complete with a stunning array of junk food, of course) for his current and former law clerks and their families. He took such joy in introducing people to each other and sharing what they had in common. In Rick's world, all of the people he loved would, naturally, love each other just as much.

You didn't have to be a judge or employee of the court to find yourself the benefit of Rick's efforts at encouraging the creation of new relationships. Rick nudged lawyers from all backgrounds to communicate with each other, did his best as Chief to foster respectful working relationships between the judiciary and other branches of government, and took the time to communicate with students around the state who were curious about courts and what it's like to be a judge.

Rick was also the best and most devoted of friends. He was a dedicated correspondent, not only with Molly, but with friends he had met during all periods of his life. He kept up that correspondence—fiercely maintaining his relationships—even

in the face of hardship and tragedy. After Rick became ill, he accompanied Molly on a cross-country road trip while he still could. During that trip, which must have been physically exhausting for him, he still took the time to send funny messages to friends detailing his adventures with Molly, particularly as they passed through bourbon country. And long ago, when a dear friend of his was dying, Rick sent him loads of letters and emails, knowing that his friend would be able to respond only occasionally. But Rick wanted his friend to have frequent reminders of how much he was loved. It is testament to his abiding dedication to nurturing relationships that, toward the end, many of us tried to do something similar for him.

> *Jean Ann*: His correspondence with friends was prolific, to say the least. In his last months, I would sometimes despair when Rick would respond—maybe within the hour, and always on the same day—to one of my short, cheery (and likely mundane) little notes with a thoughtful, astute, and often humorous tome in return. Even then, he was seemingly indefatigable in his correspondence, and I could never keep up!
>
> *Erika*: What she said. I am unendingly grateful that Rick sent me a long email (taken partly from something that he had sent Molly), only days before he died. It was so *Rick*—funny, personal, and complete with apt historical references.

Another important aspect of the relationships that Rick fostered: They were grounded in respect. Rick wasn't focused on people just *liking* each other (although he didn't object to that!). Rather, he wanted people to understand how much he respected them for their individual qualities and efforts—and

he wanted other people to see those same virtues.[4] Indeed, Rick served as a kind of matchmaker at times, introducing and encouraging friendships between people who he thought would enjoy and thrive on each other's company. He delighted in relationships that better all of the individuals (or institutions) involved—the relationships that result in people *growing*, learning new things, becoming more empathetic, finding more joy in life. Many of us felt a kinship with people in Rick's life whom we had never even met, or had met only in passing, because his belief in them was so strong, and his stories so vivid and heartfelt. It was bittersweet to recognize some of those people in the memories that were shared at his burial.

On the acknowledgements page of his 2021 book, "Singing in the Mornings: A Life in the Law," Rick wrote that "Partnership and friendship are, of course, at the core of so much of what I've written." More than that, partnership and friendship were at the very core of Rick's being, fed by shared stories, drinks, and snacks. May we all raise a toast—or eat a Rolo, or sip a Dairy Lunch milkshake—in Rick's honor, and in honor of the personal and professional relationships he helped build for so many of us.

---

[4] Again, that respectful aspect of Rick's relationships extended to the professional as well as the personal. Much has been, and will be, said about his reverence for our democratic system—and for the roles of, and relationships among, the branches of government. The same is true of the judicial system; Rick's deep respect for trial judges and their roles was part of the reason for his frequently expressed resistance to reversing trial-court decisions on grounds that the trial judges had not had an opportunity to address.

Chief Judge Rick Haselton: A Tribute

Hon. Jack L. Landau[1]

I had the privilege of knowing Chief Judge Rick Haselton for more than 40 years—as a fellow law firm associate, as a partner, as a litigation opponent, as a colleague on the bench, as a carpool buddy, and as one of my closest friends. Throughout the years when we worked together, hardly a day went by that we didn't check in on one another and compare notes about the morning news, a case we were working on, or a recent episode of "Family Guy." And since his passing, hardly a day goes by that I do not miss him.

For me, a number of things stand out about his tenure on the bench. The first is his work ethic. Rick was usually the first person in the office in the morning and the last person to leave. He read his briefs weeks – if not months – in advance, taking copious notes that, back when briefs were printed on paper, literally covered the front and back covers. When Rick was presiding judge, he conducted not one, but two, pre-argument conferences before oral argument. (The first was held a day or two before the usual pre-argument conference and became known as the or "pre-pre" conference.) In my nearly 30 years as a judge, I've met no one who came to the bench as prepared as Rick Haselton.

A second thing that stands out about Rick's work as a judge was his eloquence. No one wrote quite like Rick. His opinions were lively and conversational (sometimes even jaunty). They frequently were studded with interesting asides and were

---

[1] Distinguished Jurist-in-Residence, Willamette University College of Law; Adjunct Professor, University of Oregon School of Law; Justice, Oregon Supreme Court (2011 to 2017); Judge, Oregon Court of Appeals (1993 to 2011).

known as well to include literary references, photos, maps, Venn diagrams, and – on one occasion – a complete table of contents. Rick's writing had its quirks, to be sure. For instance, for reasons that I never understood, he loved inserting "viz." whenever possible. A recent Westlaw search revealed that, of the 1,000 Court of Appeals opinions that Rick authored, 365 of them include at least one reference to "viz."

Third was Rick's absolute integrity, his fearless intellectual honesty. Whether it was his "primal scream" concurrence in *Grijalva v. Safeco*,[2] bucking what he thought were the artificialities of *PGE v. BOLI*,[3] or his heartfelt dissent in *State v. Thorp*,[4] decrying the excessiveness of the state's mandatory minimum sentencing law, Rick unswervingly followed the compass of his conscience.

Fourth, no discussion of Rick would be complete or accurate without acknowledging that he was something of a Luddite. For years, the principal function of Rick's computer was the operation of its aquarium screen saver program. Throughout his more than two decades on the bench, Rick wrote – actually, that's not quite correct, he dictated – all of his own opinions and then edited in old-fashioned pen and ink.

Fifth, there was Rick's humility. He used the same roll-top desk that he brought with him from our firm, along with a couch so old that, if you sat on it for any length of time, you would leave with pieces of it still attached to your clothing.

---

[2] *Grijalva v. Safeco Ins. Co. of Am.*, 153 Or App 144, 157, 956 P2d 995 (1998), *rev'd*, 329 Or 36 (1999).

[3] *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).

[4] *State v. Thorp*, 166 Or App 564, 587, 2 P3d 903 (2000), *rev dismissed*, 332 Or 559 (2001).

When he was elected chief judge, he declined to take the large corner office traditionally set aside for that position, instead moving downstairs to the court's annex to make sure that those who worked on the third floor didn't feel like second-class members of the team.

Finally, there was Rick's heart. No doubt, Rick was intellectually adept as (and likely better read than) anyone who has ever sat on the Oregon bench. But what really set Rick apart is his deep, heartfelt commitment to the Court of Appeals and its work. Rick loved being a judge. He believed in the importance of the courts to our state and its people. He cared about everyone who shared with him the responsibility of deciding each case fairly and impartially, in accordance with the law and the constitution. Rick Haselton was an extraordinary judge who gave so much to the court, his colleagues, and the people of Oregon. He will be deeply missed.

Tribute to Judge Rick Haselton

Hon. Ellen Rosenblum[1]

It is entirely fitting that the 2023 edition of the Oregon Appellate Almanac be dedicated to Judge Rick Haselton. He loved the Almanac and looked forward excitedly to its annual editions. He especially loved its special brand of humor—often only fully appreciated by wonky appellate lawyers and judges!

I served on the Court of Appeals with Judge Haselton from 2005 to 2011. I honestly don't know how I could have been so lucky as to be assigned to Rick's panel for the first four of those years. Every day was a joy—directly attributable to my Presiding Judge.

What do I recall most vividly?

1) Carpool! Imagine starting out your day with an hour-long ride—a small sedan, full of five judges or justices on Oregon's appellate courts, including Rick! He was always full of gossip (the fun kind) and made sure to check in on family members. "How are Cate and Will?" (My kids) "How's your mom?" And so on. Of course, we always got the latest updates on Rick and Sura's amazing daughter—Mols, who's now a captain in the U.S. Marine Corps. Rick was always very much "in the moment" during those carpool rides—never letting on that there might be a big case set for argument that day. But as soon as we hopped out of the car and headed to the third floor of the Justice Building, Rick underwent a magical transformation and, suddenly, was…ALL business!

---

[1] Attorney General, State of Oregon (2012 to present); Judge, Oregon Court of Appeals (2005 to 2011).

2) Briefs and Prep: This is when the transformation occurred. Of course, these were still the days before briefs were read online. Arguments were always in-person. When I looked over at Judge Haselton's brief covers for the day's arguments, they were always full of his tiny (but remarkably legible) handwriting—color-coded, no less, to reflect the opposing sides' positions. No one was better prepared for argument than Rick. Not even the lawyers! Watching him at work was a legal education in itself. Not only did he have every question—and follow-up, since he nearly always anticipated accurately counsel's initial answers—planned in advance, but he had a full "game plan" in his head. This he would lay out at pre-argument conference. These sessions were an amazing gift to those of us who got to sit alongside him.

3) Arguments: PJ Haselton's Pink Department was the quintessential "hot bench!" After we all took the bench as a panel, with the lawyers before us, Rick would literally "hold court" for the first 10 minutes or so, summarizing the cases and key relevant issues well and concisely. Most of the lawyers who appeared before us already knew to expect this routine. Others less experienced with our panel must have wondered when they'd ever get the chance to make their arguments! No question, Rick had his favorite lawyers. But he always let everyone have their opportunity to make their best case. Had he made up his mind already? No! He was always willing—and even wanted—to be persuaded otherwise. Did that happen often? No!

4) Conference: Rick loved post-argument conference. He was a natural-born teacher, which put him in his element! He loved listening to the clerks'—and Judge Rex Armstrong's and my assessments—of the arguments. He would patiently go around the table before giving his views. Then, after deciding which cases we 'd be writing opinions in, he'd ask us which ones we

wanted to write. He rarely picked first, wanting to be fair and considerate of his colleagues.

5) Other recollections:

• Food: I think Rick lived on potato chips and milk shakes! I enjoyed our trips up the street to the Dairy Lunch for the latter. Since his passing, I have had four delicious milkshakes in his honor. The memories they trigger are truly bitter-sweet in the nicest way.

• Clerks, staff attorneys, judicial assistants and courtroom staff were all very special to Judge Haselton, and he treated them all as part of his extended family.

• My political career: Except for running to keep his seat every six years, I don't think Rick ever had any involvement directly in politics at any level. So when he and Sura showed up for my victory party the night I won the Democratic nomination for Attorney General in 2012, I was really touched.

Rick was a dear friend, and I miss him.

May our beloved Judge Haselton's memory be a blessing. And may this tribute issue of the Almanac reflect back fondly on this "mensch" who adored his family, his faith—and the law.

Sadie Forzley[1]

Rick Haselton was the best. He was, among many other things, unabashedly sentimental and a masterful writer and editor. He would love that we are remembering him by writing about him (albeit without the benefit of his edits, scribbled in between lines and in the margins in that chicken-scratch handwriting—and believe me, he would have some edits). Rick possessed incredible focus and dedication and he was a proud public servant. His energy was balanced by his kindness—bringing people together, taking delight in the work, and making time during his frenetic workday for anyone who needed it. For clerks, he was a role model, teacher, and mentor—part boss, part coach, and part shaper of lawyers. He came into my life in a time when I was unsure of myself and what I was capable of. Lesson by lesson during my clerkship, Rick nurtured me until I was ready to fly the nest. I am so grateful that I got to work for him. I never expected to be writing this so soon into Rick's retirement. But he sure did relish life and made the most of every day. I will always treasure my time clerking and the lessons Rick taught me.

[1] Clerk to Chief Judge Haselton (2014 to 2015).

Alia Miles[1]

Oregon was lucky to have Chief Judge Haselton serve on its Court of Appeals for two decades (1996 to 2015), and I was lucky enough to be his clerk for two of those years (1998 to 2000). Clerking for Judge Haselton was an experience like no other.

Rick had high expectations, made clear on day one. Be on time—8 AM means 8 AM. Work hard, do your best, and ask questions. Be ready to discuss and defend your reasoning on a draft opinion and expect lots of red ink.

Rick also had traditions. Morning meetings on oral argument day (Rick's eyes would light up as he recounted the facts and issues of the cases on the docket). Clerk outings for grilled cheese sandwiches and milkshakes. A foot-high pile of carefully selected used books from Powell's on your birthday.

But Rick's clerkship expectations and traditions were just the guardrails and the flourish—the real magic of clerking for Rick happened in the day-to-day. Rick brought his whole heart and soul to his work as a judge, and his dedication and enthusiasm for "getting it right" were both inspiring and just plain fun to be around. He asked a lot of his clerks but gave many times more in return, in the form of engaged mentoring, loyal friendship and support, and genuine joy in sharing in our growth as people (first) and lawyers (second). Rick was a brilliant writer and thinker, but his biggest gift was his generosity of spirit. He truly cared about the people in his life and followed through with acts of kindness. In August 2021, Rick wrote me a note—that I now understand was a good-bye—reflecting on our two years working together "in the

[1] Clerk to Chief Judge Haselton (1998 to 2000).

pursuit (however imperfect) of justice." At the time, I hoped to be seeing Rick again soon—so I'm thankful that his note spurred me to tell him that it was a true honor and privilege to serve as his clerk and count him as a friend. For my part, I will strive to honor Rick's memory by looking for opportunities to "pass the baton" to the next generation of lawyers through mentoring and making time for milkshakes.

Shenoa Payne[1]

Clerking for Judge Haselton was a singular and special experience, one that will never be matched. Rick[2] embodied a passion for the law that is difficult to come by. I can't help but think that his recent professional memoir was appropriately titled *Singing in the Mornings*, as he brought a pep in his step to the Court every morning. Judge Haselton often told me to come into his office in the mornings to "schmooze," where he would then relay old Lindsay Hart war stories and hand down invaluable Court of Appeals history. We would often break in the afternoons for snacks in the Capitol cafeteria or an afternoon coffee at the Governor's Cup. He would also take me to the Capitol gift shop just to see if they had anything new in circulation—which he gleefully would announce they did and purchase me a miniature Goldman or snow globe (which I have prominently displayed at my office).

There were obvious professional benefits gained from clerking for Judge Haselton. I learned to be a significantly better writer. As any of his clerks will tell you, it was extremely humbling getting a draft opinion back from our judge. The dreaded red ink covered every square inch of the page tearing apart our drafts—slicing, dicing, reorganizing, inserting, and deleting. But there was no criticism or harshness to his edits—there was only education, feedback, and golden nuggets. And with every

---

[1] Clerk to Chief Judge Haselton (2008 to 2009).

[2] I will sometimes refer to Judge Haselton as Rick, not out of disrespect but because that's how I knew him and how he insisted that I refer to him, stating that he got enough—actually too much—unhealthy ego reinforcement from those circumstances in which the honorific was necessarily employed. And I think that posthumously, it is only appropriate to continue to respect his wishes.

draft we got better, stronger, more concise, and tailored in our approaches. I was never a better writer than when I worked for (or as he would insist, "with") Judge Haselton. And since I left his clerkship, I always wished I had Rick around to review all my briefs as I knew they inevitably would have been shorter and more persuasive.

But as I reflect on my clerking experience, what I really gained was an invaluable mentor and friend. Judge Haselton had an incredible impact on the lives of so many. I know I don't just speak for myself when I say that the years that I clerked for Rick are some of the most memorable and impactful of my life. As a young woman from an underprivileged background, I often had an imposter feeling, like I did not belong in the world of judges, clerks, or lawyers. But Rick helped me begin my career on the right foot by believing in me and instilling in me a sense of confidence. And, even when he disagreed with me (vehemently), he never stifled my opinions just because I was his subordinate. In fact, he supported my independent thought and even encouraged me to challenge and disagree with him.

How lucky we were as clerks to learn how to be professionals in this field from Judge Haselton—a consummate gentleman. He gave endlessly to his work and invested incredibly in his clerks and staff attorneys in a way that was seemingly unparalleled. And although he never really wanted to be Chief, as he preferred opinion writing to legislative advocacy, he served in that position with grace and honor and shepherded the court through one if its largest transitions—a split between floors, where he gave up his coveted office and volunteered to move down to the third floor simply to create camaraderie and increase morale. Most importantly, he did all of that without asking for attention, accolades, or awards. His impact on others was quiet, though everlasting. As Maya Angelou so aptly

said, "People will forget what you said, people will forget what you did, but people will never forget how you made them feel."

Judge Haselton was more than a mentor and friend to his clerks – he was our family. Period. He officiated our weddings, listened to us cry, and provided constant moral support. Many of us, I'm sure, have saved hundreds of handwritten notes, emails, and letters from Rick that we will treasure forever. Most letters that Judge Haselton wrote to me were signed with "Ever fondly, Rick" and I would write back and reply with "Ever fondly, —S." It's tough to realize he has signed off for good and there will be no more letters, no more phone calls, no more deep conversations over a glass of his favorite—Johnnie Walker Black.

Cheers to you, Rick. I am so grateful to have had you as my judge, mentor, friend, and colleague. You are dearly missed.

Every fondly, —S

Jeffrey Piampiano[1]

My introduction to Judge Haselton came though his good friend and Stanford classmate, Jeffrey Druckman. I got to know Jeff when I was in law school. At the time, he was freshly a solo practitioner, enjoying his second wind as a litigator after a career at Miller Nash. As a law student, I was awed by Jeff's ability to assess the merits of a case even in its infancy, pragmatically settle those cases that could be settled, and, in those cases that did not settle, plan—on his own—for a multi-day trial that he was strategizing to win from day one (and usually did). I regarded him as a mentor, so when he suggested that I apply for a clerkship with Judge Haselton, I jumped.

I was not disappointed. In Judge Haselton, I found another mentor—one who taught me, in his own inimitable way, what it means to be a lawyer. I still remember my first assignment in his chambers. He asked me to do a draft opinion—a task I undertook with great trepidation. When I gave him the draft, I believed it was my best work: pithy prose that was well reasoned and responsive to the arguments of counsel. The next day, Judge Haselton invited me into his office to review the draft. He began by saying I had done a good job, but that he had a "few stylistic changes" to share. We sat on the couch in his office, and he showed me the draft. Above each of my typewritten sentences, there was a new sentence, written in longhand, recasting my draft into an opinion that was unquestionably his.

The message, of course, was multifaceted. In one exercise, he had introduced me to his voice, his view of the law, and the particular cadence and rhythm of his writing. The finished

[1] Partner at Drummond Woodsum in Portland, Maine; Clerk to Chief Judge Haselton (2000 to 2002).

product was clear, fair, and compelling. Judge Haselton never made rulings with the pretension that his word was law simply because he was a jurist. Rather, his rulings, in every case, had to feel right, and be balanced and persuasive. They had to convince his colleagues and litigants alike that the result was right. Anything less dishonored the need for justice among the parties to the appeal, and was not faithful to the law. He was, in that sense, the consummate umpire, calling balls and strikes as he saw them, but doing so with an abiding belief that he was serving the people of Oregon by upholding the rule of law. His "stylistic changes" also taught me the importance of approaching the law with humility, perceptiveness, and adaptability to the needs of one's audience, whether it be a court or a jury. Working for him ultimately gave me great confidence: If my writing and analysis could meet Judge Haselton's expectations, I could be an effective advocate for any issue, in any court.

Over time, I came to know Judge Haselton well. He cherished his family, was active in his congregation, was an avid reader, and loved the drama of a good baseball game. While his pedigree was impressive—Stanford undergrad, Yale law, a Ninth Circuit clerkship, a meteoric rise to partner in a top Portland law firm, and appointment to the Oregon Court of Appeals in his early 40s—those milestones were never how he defined himself. Instead, he was always, at his core, just a kid from Albany whose accomplishments mattered only because they got him to the Court. He regarded the Court as a place of great importance. As the one Oregon court where parties could be heard on appeal as matter of right, he saw the Court of Appeals as, truly, the "people's court," where everyone could come and expect to get a fair shake. In terms of sheer intelligence and gravitas, he belonged on the Oregon Supreme Court or the federal judiciary, but he never aspired to such lofty positions. Instead, the Court of Appeals was his summit

because he saw it as THE place where he could most tangibly benefit the people of Oregon. He was a workhorse, exhaustively preparing for every oral argument, and sometimes drafting several opinions in a single week. I always sensed that he approached his work from a place of duty: He believed, in his heart, that working hard to uphold the law made Oregon a better place for everyone. His work was a gift to the state he loved.

Rick's passing was jarring for me. His intellect and energy made him seem larger than life, so in that sense it is unbelievable that he is gone. But his legacy, his words, live on, and will shape the law, and benefit the people of Oregon, for generations to come. For that, and for his friendship and mentorship, I am grateful. God bless you, Judge Haselton. You will be missed.

Jeremy Rice[1]

To know Rick is to know what he loves.

Rick's office was adorned with baseball and Oregon memorabilia. He had a book in his hands, pretty much always. For breaks, we'd walk to the baseball card shop on 17th street. He had a barber in Salem, and I'm convinced the choice had nothing to do with the quality of cut, and everything to do with the (classic sports) decorations inside.

Rick was a voracious reader. A history buff. A bit of a Luddite (maybe more than a bit). He wore his "State of Oregon" sweatshirt every year on February 14 (Oregon Day). He made kosher brownies every year for his birthday. He would put on his Red Sox cap before leaving the office to drive home.

He loved a good footnote.

Shortly after he retired, I visited Rick at his home. He was so excited to show me the study that he'd set up—like Rick's version of a retirement "man cave." It was full of books, posters, art, pictures. All organized into his favorite topics.

Pointing at different sections, and with a big smile, he said to me, "I've got all my stuff in here: my baseball stuff, my Oregon stuff, my Jewish stuff."

And that's the essence of who Rick was. A guy who absolutely loved what he loved. He loved Judaism. He loved baseball. He loved Oregon. He loved his family. He loved being a lawyer and a judge.

---

[1] Clerk to Chief Judge Haselton (2005 to 2007).

Amazingly, Rick made all of us around him know that he loved us too.

I'm truly grateful to have been one of the people in Rick's circle. He's the greatest. The best judge ever. My mentor and my friend.

Josh Ross[1]

I was hired by Rick in the summer between my 2d and 3d year of law school, to begin a clerkship in fall 2003. After he hired me, Rick made a point to stay in touch during my 3d year. In part, he was checking in on grades and to hear what classes I was taking (he was not thrilled about anything he considered "fluff") and in part, he was just checking in. The night of the last day of the Bar exam, my wife and I went out with some friends to celebrate. At the time, my wife and I lived in a tiny apartment in a complex situated behind a Duncan Donuts on the corner of 39th and Powell in SE Portland. When we got home that night, I found a card and two books sitting on the steps in front of our door. (I still remember exactly which books—*The Brothers K* by David James Duncan, and Chabon's *Amazing Adventures of Kavalier and Clay*). I could not believe that Rick had come to SE, tracked down my little apartment, and left these books for me—the first of many I'd receive from him. The card had classic Rick wishes for a meaningful career, and "doing good and doing right" as an attorney. Did my anxiety around passing the exam double instantly? Yes. But I was so touched by the gesture—on the day I began the rest of my career. The point: It was obvious to me, out the gate, that Rick didn't consider mentoring an obligation or some formality that's assigned to a boss. Rick's mentoring was deeply personal—he really cared about the profession, and he cared about people and relationships.

I clerked for Rick from September 2003 to March 2005. Two memories stick out for me. First, the work. The work was always interesting, and Rick always made sure to hand pick assignments for me so that I'd get a sampling of all kinds of cases. He was thoughtful in staggering assignments by

[1] Clerk to Chief Judge Haselton (2003 to 2005).

difficulty, too—I'd get a difficult, meaty case that would take weeks to complete, and then he'd reward me with a simple case that I could bang out in a day or two, and which he'd edit minimally. Second, the walks around Salem. It seems like once a week Rick would pop in and "suggest" that I take a break for a walk with him—we'd go to the sports card shop, or the book store, or (of course) to get a milkshake. We'd talk about our families, and work, and cases, and he'd also share incredible stories about his life in Oregon, and the legal community he grew up in, and he'd introduce me to judges and lawyers (and even the Governor!) as we'd walk around near the capital. I was always convinced that Rick believed both parts of the job—the legal work, and just hanging out—were important.

Over the roughly 18 years since I left my clerkship, I've turned to Rick again and again and again for advice and guidance. Even after becoming a partner, eventually becoming a managing partner, and feeling well-established in my career, I still turned to Rick as my mentor, and always knew that Rick was there for me for advice, or tips, or just to listen. Rick wasn't the kind of mentor who gave long speeches about "here's how to do things" or "this is how to treat people." He didn't have to say those things. Rick taught those lessons in the way he carried himself, and treated people, and in the way he showed respect and love.

Erin J. Severe[1]

I was one of the lucky few who got to serve as a clerk to Rick, a job that was rewarded not just with great storytelling, books, and exuberant (some might say aggressive) lessons in style, word choice, and punctuation, but with loyalty. Accepting a clerkship with Rick meant being adopted into his judicial family and the opportunity for a familial-like bond with him. That was no small commitment. One of the few things that rivaled his commitment to justice and the law was his abiding concern for those closest to him.

I did not realize then how rare that is, to find in a mentor someone so willing to give not just their expertise, but their sincere caring. And I have not always lived up to his model. It is a daily—sometimes hourly—challenge for me to balance my work commitments with my personal ones, which makes his mastery of both so admirable. For me, his legacy is the example of excellence he set for his life's work and for the relationships in his life.

[1] Research & Writing Attorney, Oregon Federal Public Defender; Clerk to Chief Judge Haselton (2009 to 2011).

Laura Walhood[1]

I have so much gratitude to Judge Haselton as one of his former court of appeals judicial clerks and the recipient of so many of his kindnesses. He was a wonderful judge, boss, and mentor for a new attorney. His excitement for the law was infectious–I can remember sitting in his office for pre- and post-arguments as he explained the main arguments of each case and we discussed the possible outcomes for each. He showed a respect for our beginner lawyer ideas and questions and he was always encouraging and complimentary of our work. His superb writing helped me see the ambiguities in the law and how one could reconcile seemingly contrary holdings.

Anyone who knows Judge Haselton well, knows how much his family means to him. As a new attorney with my own young family, I felt reassured by Judge Haselton's devotion to his wife and daughter that family and a legal career could coexist. Over the years, I have seen that Judge Haselton values his relationships with those outside of his family as well. His support and kindness to so many has given his life a richness that is well deserved. It is something to be a well-respected judge, but it is something greater to be a well-loved human being. Rick Haselton is both. Many thanks for all you do, Rick!

[1] Clerk to Chief Judge Haselton (1996 to 1997).

H.M. Zamudio[1]

I think that some people in our lives are like places to which we travel. They change us and enrich the fabric of our lives. They are important. However, a handful of people, if we are lucky, affect us to the extent that they become landmarks in our lives. We look to these people and our experiences with them to help us orient. Their existence and presence enable us to aim our action in a true direction. I know that Judge Goodwin was one of those landmark people for you. You are one of those landmark people for me. I do not know what happens to a soul when a physical body dies. Whatever happens, I believe that our landmark people continue to help us orient. I hope that these observations, as unrefined and unoriginal as they may be, might help you process your recent loss. May his memory be a blessing.

[1] Clerk to Chief Judge Haselton (2011 to 2014). Excerpted from correspondence from H. M. Zamudio to Hon. Judge Rick T. Haselton expressing condolences on the passing of Hon. Judge Alfred Theodore Goodwin. Judge Haselton clerked with Judge Goodwin from 1979 to 1980.

Most of us who have read transcripts of our own spoken words justifiably cringe at the composition of our sentences.

State v. Hubbard, 297 Or 789, 806, 688 P2d 1311 (1984)

Confessions of an Oxford Comma Skeptic

Hon. Meagan Flynn[1]

My first introduction to the concept of the so-called "Oxford comma," or "serial comma," came in my junior year of high school, when Sister Mary Annette used her red pencil to add a comma to the "and" that linked the penultimate and ultimate terms in my series. I was indignant. As the daughter of a journalist, coached on the grammar rules of the *Associated Press Stylebook*, I had been told many times that a comma before the ultimate item in a series was redundant—that "and" already communicated to the reader that the series was concluding—and that the gratuitous final comma added unnecessary clutter to the written page.

The future lawyer in me was determined to correct the record with my teacher: I understood proper comma usage, darn it. To build my case, I turned to the rules for comma usage set out in my class grammar reference book. I was somewhat surprised to read that the author described both approaches as acceptable, albeit with the caveat never to omit the final comma "if such an omission will make the sentence unclear." *Warriner's English Grammar and Composition Fifth Course* 428 (1977)[2] Still, I had the authority I needed to defend my comma usage, and my teacher grudgingly conceded that I did not deserve the red mark on my paper. (I conveniently disregarded Warriner's additional caveat, "Follow the practice prescribed by your teacher.")

---

[1] Chief Justice, Oregon Supreme Court (2023 to present); Justice, Oregon Supreme Court (2017 to 2022); Judge, Oregon Court of Appeals (2014 to 2017); long-time section member, first-time Almanac contributor.

[2] The copyright date should not be understood as evidence of my age.

I took away from that experience a conviction that there is no single "rule" for comma usage in the context of a series; it is a matter of preference or style, guided only by the ultimate goal of clarity.[3] And I lived the next decades of my life as an Oxford-comma agnostic; I used what I thought of as the "redundant comma" when it aided clarity—making that usage not redundant—or when I was writing for an editor who preferred an Oxford comma. Somehow, I made it through years more of academic and professional writing without being aware of what I now understand to be a heated debate raging in some corners of grammar nerddom. It may come as no surprise that the Supreme Court is one of those corners in which many folks strongly believe that there should be a "rule" regarding the final comma in a series and, moreover, that they believe that "rule" demands consistent use of the Oxford comma.

On a quest to understand that perspective, and for the benefit of readers of the Appellate Almanac, I turned to the internet, and I informally surveyed the judges, staff counsel and clerks with whom I work.[4] It turns out that the amazing resource known as YouTube is a decent starting point for researching questions of grammar. I found "Grammar's great divide: The Oxford comma," which provides an animated introduction to

[3] I recently found and read my Associated Press Stylebook from the mid-1980s, and I can clarify that the *Stylebook* also stresses clarity—its rule against final commas is limited to items in a "simple series" and indicates that, for a more complex series of clauses, the guiding principle is clarity.

[4] Note the lack of a final comma for the series.

the debate.[5] And I learned that the Oxford comma has even earned a place in popular culture through a song by that title by the band Vampire Weekend. In the world of law, the Oxford-comma debate made its way into the national spotlight in 2018, when a Maine wage statute was rendered ambiguous by the lack of an Oxford comma, leaving doubt as to whether dairy truck drivers were exempt from overtime wage law and ultimately leading to a $5 million settlement in favor of the drivers.[6]'

The folks at the Supreme Court who responded to my survey unanimously advocated that clarity is furthered by an "Oxford always" rule. They argued with conviction that the default rule furthers clarity so often that the benefits of consistent use outweigh any intangible benefit of a cleaner presentation. I always have recommended to less experienced writers that there are very few "rules" for writing beyond "Clarity Always," so I read with interest the reasoning proffered by my co-workers and the sources that they recommended. But I feel compelled to offer a contrarian view that explains my continued agnosticism.

---

[5] TED-Ed, *Grammar's great divide: The Oxford comma*, YOUTUBE (March 17, 2014), https://www.youtube.com/watch?v=ptM7FzyjtRk.

[6] *O'Connor v. Oakhurst Dairy*, 851 F3d 69 (1st Cir 2017); *Oxford Comma Dispute Is Settled as Maine Drivers Get $5 Million*, NY Times February 9, 2018. *See Heyliger v. People*, 66 VI 340, 349–54 (2017) ("'[T]he task of statutory interpretation involves more than the application of syntactic and semantic rules,' especially when there is no consensus regarding the appropriate use of the serial comma in English grammar and people can reasonably disagree on the implications arising from its presence or absence.")

The reason cited most frequently for elevating the use of an Oxford comma to the status of "rule" is the well-known risk of ambiguity (and embarrassment for the author) that can arise from failure to use an Oxford comma. Two humorous, but possibly apocryphal, examples make repeated appearances in online discussions of the Oxford comma:

> 1) An unnamed author of an unnamed book supposedly added the unfortunate dedication "To my parents, Ayn Rand and God."[7]
>
> 2) The *Times of London* is sometimes accused of having printed the following unfortunate promotion: "Highlights of his global tour include encounters with Nelson Mandela, an 800-year-old demigod and a dildo collector."[8]

Both examples undoubtedly would be embarrassing for the unfortunate author, but neither example is particularly ambiguous in context. In fact, examples of true ambiguity from the omission of an Oxford comma may be rare. Perhaps the best historical example of the omitted-comma approach is the Declaration of Independence, which declares that we have

---

[7] Further investigation suggests that someone creatively modified the real-life dedication in a rather dry physics tome, *Electromagnetic Slow Wave Systems*, R.M. Bevensee (1964). It reads "To my parents, Ayn Rand, and the glory of God."

[8] The phrase appears in a blurb for the television series *Planet Ustinov*: "By train, plane and sedan chair, Peter Ustinov retraces a journey made by Mark Twain a century ago. The highlights of his global tour include encounters with Nelson Mandela, an 800-year-old demigod and a dildo collector." *Times of London* (Nov. 22, 1998).

been endowed with the unalienable rights of "Life, Liberty and the pursuit of Happiness." In that context, as in many others, the missing comma is irrelevant to clarity.

Indeed, consistent use of the Oxford comma is hardly a guarantee of clarity. Consider the sentence: "I went to lunch with my mother, a witch, and my son." The meaning of that statement depends on whether the final comma is necessary or gratuitous. But if the author consistently employs an Oxford comma, there is no easy way to tell which is witch.

I remain committed to my view that there are very few "rules" for writing beyond "Clarity Always." I am not ready to abandon the contrarian position that I staked out in Junior English. But until I sway enough others to join my side, I will continue mostly to use an Oxford comma in my opinions, because my court values consistency in the use of grammatical conventions in its opinions. *See, e.g., Warriner's* ("Follow the practice prescribed by your teacher.").

Anti-(S)hero

Hon. Anna M. Joyce (she/her)[1]

During a bout of Covid, I watched far too many episodes of Grey's Anatomy. So many that I'm pretty certain that I can perform some (albeit minor) surgeries at this point. But I was struck in particular by an evolution in the use of pronouns somewhere between Season 15 and Season 18 or 19 and I hope it's an evolution that can inspire all of us as well.

In an early season, Dr. Weber and his team were treating a patient whose child identified as non-binary and used they/them pronouns. Upon hearing that, Dr. Weber loses his proverbial stuffing and explains that it's "complicated," "grammatically incorrect," and unnatural to his ear. By Season 18, we are introduced to Dr. Kai Bartley, who uses they/them pronouns. And it's not a thing. It just…is.

Like Dr. Weber, many folks in the legal profession express discomfort with using "they" in the singular. It appears generally accepted that if a person identifies as non-binary and uses they/them pronouns, courts and advocates will follow suit (sorta like Dr. Weber, eventually). *See, e.g., In re Hollister*, 305 Or App 368, 370 n 1 (2020) ("Petitioner uses the pronouns 'they,' 'them,' and 'their'" for self-reference because those pronouns are consistent with petitioner's gender identity as neither male nor female, but rather as nonbinary. We use those pronouns throughout this opinion in reference to petitioner.") But we aren't quite there with the use of "they,"

---

[1] Judge, Oregon Court of Appeals (2021 to present). Judge Joyce thanks Nora Coon for her patience and perseverance in helping me produce this piece. What seemed really obvious and straightforward when I began writing this turned out to be…not so obvious and straightforward.

in the singular, to replace use of "he" or "she or he." No one disputes that using the traditional default of "he" or "him" when we don't know the gender of the person about whom we are writing is grossly underinclusive. And generally, we all agree that using "she or he" or "s/he" is simultaneously (1) clumsy and (2) still underinclusive because it excludes those who use gender-neutral pronouns. Despite consensus on those two points, there is still a perpetual sense that we're running afoul of centuries of grammar by using "they" in the singular because we have been taught that a pronoun cannot be both singular and plural.

To that, I offer this:

1. We are not, in fact, running afoul of centuries of grammatical rules. Using "they" in the singular dates back to the 14th century. Shakespeare and Austen both used singular "they."[2] It wasn't until the late 19th century that the singular "they" was banished and we began referring to hypothetical individuals using the "universal" "he/him."

2. It may be grammatically uncomfortable, but the benefits are worth it. Not only are we decluttering our writing by avoiding the "he/she" but, more importantly, we are not assuming gender.

3. United States Supreme Court justices are doing it! Well, at least one of them is. Justice Sotomayor used the singular "they" way back in 2016 in *Lockhart v. United States*, 136 S. Ct. 958 (2016): "[The code

[2] *See, e.g.*, *A Comedy of Errors* and *Hamlet*. Jane Austen used "they" in the singular in *Pride and Prejudice* somewhere in the number of 75 times (I did not count. The internet did).

section's] list is hardly the way an average person, or even an average lawyer, would set about to describe the relevant conduct if *they* had started from scratch[.]" (Emphasis added).

4. We (the Oregon appellate courts) are doing it too. In fact, our Style Manual provides that "[g]ender-neutral terms are preferred, and gender-based pronouns are avoided except when referring to a specific person. Use 'he or she' only when all other constructions fail."[3] Consistent with that rule, we are seeing a proliferation of using "they" in the singular in opinions. *E.g.*, *State v. Brown*, 327 Or App 592, 594 (2023) ("a defendant cannot use deadly physical force on another unless they reasonably believe that the other person was using or was about to use unlawful deadly physical force against the defendant or was committing or attempting to commit a felony involving the use or threatened imminent use of physical force against the defendant"); *State v C. M. W.*, 324 Or App 564, 565 (2023) ("See ORS 426.005(1)(f)(A) (a person has a 'mental illness' if they are dangerous to self or others because of a mental disorder")); *State v. Lindquist*, 328 Or App 538, 539 (2023) ("For the purposes of ORS 33.015(2), an individual acts 'willfully' if they act 'intentionally and with knowledge that [the act or omission] was forbidden conduct'"). We are seeing it more often in briefing as well.

To the extent that folks are worried that judges will be offput by it, I'm only a single judge but I say bring it on.

---

[3] Oregon Appellate Courts Style Manual 107 (2023).

The Appellate Court Grammarian

The Oregon Appellate Courts[1]

The Oregon appellate courts have opinions on many topics, and, unsurprisingly, grammar is one of them.

On following the rules:

"The argument of the plaintiff is based largely on the rules of grammar—in particular the proximity of the modifying clause to the noun or subject affected. The rules of grammar, however, are technical and, as in the case of statutes, will not be permitted to control construction of a contract when to do so would be to render the language meaningless or absurd."[2]

"Writers—even writers of statutes and constitutions (and of opinions)—do not always follow the rules."[3]

"In addition to violating a 'rule' of grammar that has been officially approved by the Supreme Court, defendant's interpretation * * * also strains logic."[4]

---

[1] Collected and taken out of context by Nora Coon.

[2] *Jarrard v. Cont'l Cas. Co.*, 250 Or 119, 124, 440 P2d 858 (1968)

[3] *Lipscomb v. State By & Through State Bd. of Higher Educ.*, 85 Or App 241, 246–47, 736 P2d 571 (1987), *aff'd*, 305 Or 472 (1988).

[4] *McGarry v. Hansen*, 201 Or App 695, 699, 120 P3d 525 (2005), *rev den*, 340 Or 359 (2006).

On the obvious:

"The court * * * finds that the meaning of [the statute] on this point is obvious given a rudimentary understanding of English grammar."[5]

"Counsel for plaintiffs, being good grammarians as well as good lawyers, would, of course, not adhere to such a position once the error was pointed out to them."[6]

"[T]he one to be satisfied is 'a person of common understanding.' Apparently the courts believe that such a person 'will not be misled by ordinary errors of punctuation when the entire context indicates the meaning of the author of the pleading.'"[7]

"Defendant argues 'is used' is employed as a noun or adjective phrase; it is clearly a verb."[8]

On the passage of time:

"We cannot say with any certainty that the conventions of punctuation most commonly used today also would have been used then. Indeed, anyone familiar with late nineteenth-century prose, whether professional or artistic, would

---

[5] *Dept. of Rev. v. Croslin*, 19 OTR 69, 77–78 (2006), *rev'd*, 345 Or 620, 201 P3d 900 (2009).

[6] *Holman Transfer Co. v. City of Portland*, 196 Or 551, 581–82, 250 P2d 929 (1952).

[7] *State v. Christy*, 131 Or 314, 318–19, 282 P 105 (1929).

[8] *Umatilla Cty. v. Sturtevant*, 9 Or App 55, 58, 495 P2d 287 (1972).

acknowledge that punctuation practices in vogue at the time were not necessarily the same ones that are in use today."[9]

"While English usage changes from time to time, and what was frowned upon 50 years ago may be approved today, just as words of common utterance in the past may now be obsolete (for which see any dictionary), we venture to express a doubt whether there have been radical changes in the rules of elementary grammar during, say, the last century. [10]

"[I]f we assume that [the cited grammar book] is of ancient vintage, if perchance it belongs to the era when counsel and the members of this court were in the primary grades and grammar was really taught, nevertheless, at least so far as perfect participles are concerned—and counsel and the court are agreed that the word 'held' is a perfect participle—we find on examination no difference between *Welch* and *Webster*."[11]

On the power of a single word:

"[T]he word 'or,' in the phrase 'widow or husband' appearing in the federal statute, cannot be construed conjunctively, because in this country it is impossible for a decedent to leave as his survivors both a widow and a husband. Such a situation might

---

[9] *In re Marriage of Crocker*, 332 Or 42, 50, 22 P3d 759 (2001).

[10] *Holman Transfer Co.*, 196 Or at 581–82.

[11] *Id.* (citing *Starr v. Case*, 59 Iowa 491, 13 NW 645, 647 (1882), A.S. Welch, *Analysis of the English Sentence, Designed for Advanced Classes in English Grammar* (1873), available at https://archive.org/details/analysisenglishoowelcgoog and *Webster's New International Dictionary* (2d ed) (1947)).

happen in countries where polygamy or polyandry is in vogue, but not in America."[12]

"A very short word may change the whole meaning of a sentence. Eliminate the little adverb 'not' from the Ten Commandments and there remains an injunction to commit the very offenses there prohibited."[13]

---

[12] *Wilcox v. Warren Const. Co.*, 95 Or 125, 127, 186 P 13 (1919).

[13] *White v. E. Side Mill & Lumber Co.*, 81 Or 107, 116–17, 158 P 527 (1916).

[1]

[1] Randall Munroe, "Mystery Asterisk Destination," https://xkcd.com/2708/. Licensed under Creative Commons Attribution-Noncommercial 2.5 License.

With due respect to the officer's expertise, we note that trouble lighting a pipe (or keeping it lit) appears to be the lot of all those who essay to smoke those devices.[1]

[1] *Including one member of this court, whose pipe seems to be in perpetual peril of going out.*

State v. Chambers, 69 Or App 681, 686 & n 1, 687 P2d 805 (1984)

Making Lemonade Out of Congressional Lemons

Bruce Myers[1]

In the 1950s, Congress enacted a group of statutes that had a devastating effect on Native Americans.[2] Those statutes have fundamentally changed life for indigenous people in this country. They turned treaty rights on their head and drastically reduced—if not entirely extinguished—many reservations.[3] One of those statutes, 18 USC § 1162 (Pub L 280), granted multiple states, including Oregon criminal subject-matter jurisdiction over tribal members on tribal lands. But there may be a way to make some lemonade out of those legislative lemons: Pub L 280 likely did not grant Oregon state courts criminal subject-matter jurisdiction when such jurisdiction would infringe on a treaty right. Accordingly,

---

[1] Bruce Myers is a Deputy Public Defender at the Office of Public Defense Services. He earned his J.D. from Lewis & Clark Law School, B.A. from Washington State University, and A.A. from Clark College. Outside of work, Bruce spends time mentoring law students of color and is a board member on the BIPOC Legal Mentorship & Community Program at Lewis & Clark Law School. In his free time, Bruce enjoys trying new restaurants and taking trips to the coast with his wife, Jordan. Bruce is also a proud (new) father of twins.

[2] Relevant caselaw largely uses the term "Indian" in opinions. So, at times, this author is forced to describe Native Americans in that way.

[3] *See* Brent Leonhard, *Criminal Jurisdiction in Indian Country*, 69 DOJ J. Fed L & Prac 45, 52 (2021) (explaining that Congress passed House Concurrent Resolution 108, which declared a policy that resulted in the termination of over 100 tribes and the removal of over a million acres from trust status) (citing H.R. Con. Res. 108, 83rd Cong. (1953)).

there may be an avenue to challenge subject-matter jurisdiction in such circumstances.

This article first briefly explores the historical backdrop against which Pub L 280 was enacted. Next, it examines the text of that statute and discusses potential limits it imposes on a state's criminal subject-matter jurisdiction. With those limits in mind, this article next applies Pub L 280's framework to a waste crime and highlights an argument for why Oregon courts may lack such jurisdiction. This article concludes with some future questions surrounding this body of law.

The historical backdrop

Between 1854 and 1855, Washington Territorial Governor Isaac Stevens executed nine treaties with 23 tribes.[4] The "text of those treaties is 'identical in all essential elements.'"[5] Each tribe began its relationship with the federal government as a sovereign power, which is recognized by the treaty language itself.[6] Under those treaties, the treaty tribes retained some semblance of sovereignty over their internal affairs and reserved, *inter alia*, certain exclusive rights and privileges to hunt on unclaimed land. Under the Supremacy Clause of the United States Constitution, those treaties are the supreme law of the land.[7]

---

[4] Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1941 ed.)

[5] *Id.*

[6] *See, e.g.*, 1855 Treaty with the Umatilla, Art I, 12 Stat 945.

[7] US Const, Art VI, cl 2., provides: "* * * [A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the

One of the most important aspects of sovereignty is the autonomy to decide when and how to punish citizens for committing crimes. This should come as no surprise, but the scope of criminal jurisdiction over treaty tribes has been inconstant. For much of this country's early history, criminal jurisdiction over tribal members in tribal land was generally shared by the United States government and the tribes themselves. States did not have any jurisdiction over Native Americans within their reserved land—unless the federal government specifically allowed it.[8] If that does not feel like tribes had true sovereignty, it is because it was very conditioned.

That concurrent-jurisdiction framework ended in the 1950s, during a period commonly known as the "termination era," when Congress enacted several statutes terminating governmental supervisory responsibilities over tribes.[9] Pub L 280 was one of those termination-era statutes.

So, what kind of lemon is Pub L 280?

In 1953, Congress enacted Pub L 280, which granted several states criminal subject-matter jurisdiction over Indian country. That statute is codified at 18 USC § 1162(a):

---

constitution or laws of any state to the contrary notwithstanding."

[8] *State v. Columbia Gorge*, 39 Or 127, 147, 65 P 604 (1901) (noting that state courts have never had jurisdiction over Indians within Indian country, except as far as the federal government relinquished supervisory control).

[9] *South Carolina v. Catawba Indian Tribe, Inc*, 476 US 498, 503, 106 S Ct 2039, 90 L Ed 2d 490 (1986); *see also Tavares v. Whitehouse*, 851 F3d 863, 866 (9th Cir 2017) (explaining that the "termination era" generally had "disastrous results.").

> "Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory."

The subsequent table in that code lists six states on which Congress conferred that criminal jurisdiction: California, Nebraska, Minnesota, Wisconsin, Alaska, and Oregon.

By enacting Pub L 280, Congress empowered those six states to enforce state law in Indian country.[10] In so doing, it effected an immediate cessation of federal criminal jurisdiction over Indian country.[11] The term "Indian country" is well-defined by statute as:

> "[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation";
>
> "[A]ll dependent Indian communities within the borders of the United States whether within the

[10] *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 US 463, 471–73, 99 S Ct 740 (1979).

[11] *Id.* at 471–72.

> original or subsequently acquired territory thereof, and whether within or without the limits of a state"; and
>
> "[A]ll Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

18 U.S.C. § 1151.

In Oregon specifically, Pub L 280 extends limited criminal subject-matter jurisdiction[12] to "[a]ll Indian country within the [s]tate, except the Warm Springs Reservation."[13] As a reminder, subject-matter jurisdiction is the scope of proceedings that a court may hear and over which the court may exercise its judicial power.[14] So, Pub L 280 allows Oregon state courts to enforce Oregon's criminal laws against tribal members even in Indian country.

Pub L 280 is not *all* bad. Congress appears to have included an important limitation on that state jurisdiction in Pub L 280:

---

[12] If by now that phrase makes your eyes glaze over because you felt trauma from your 1L civil procedure class, you are not the only one. *Dept. of Human Services v. C.M.H.*, 368 Or 96, 109, 486 P3d 772 (2021) ("[J]udicial opinions have sometimes conflated those distinct topics of jurisdiction[.]"; *see also Arbaugh v. Y & H Corp.*, 546 US 500, 510–11, 126 S Ct 1235 (2006) (stating that "'jurisdiction' * * * is a word of many, too many, meanings.").

[13] 18 USC § 1162(a).

[14] *Multnomah County Sheriff's Office v. Edwards*, 361 Or 761, 777–78, 399 P3d 969 (2017) (explaining that the term "jurisdiction" can refer to "subject-matter jurisdiction," which means that the court possesses "'judicial power to act'" (quoting *State v. Nix*, 356 Or 768, 780, 345 P3d 416 (2015)).

> "(b) Nothing in this section * * * shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

18 USC § 1162(b).

That is, Congress "withdrew federal jurisdiction over offenses committed in specific areas of Indian country" when it granted criminal subject-matter jurisdiction to the states.[15] Congress did so to address perceived "lawlessness" on certain Indian country land due to an "absence of adequate tribal institutions of law enforcement."[16] That state jurisdiction, however, appears to exclude crimes that "deprive any Indian or any Indian tribe" of hunting or fishing rights protected by treaty.[17]

OK, I'm thirsty, where is the lemonade?

Anytime the state charges a tribal defendant with a wildlife violation in Indian country, Pub L 280 is at play. For that reason, both Oregon trial and appellate courts should consider how to interpret that statute. That is because section (b) of Pub L 280 creates a preliminary question of criminal subject-matter jurisdiction for the court.

---

[15] *Anderson v. Gladden*, 293 F2d 463, 466 (9th Cir 1961).

[16] *Bryan v. Itasca County, Minnesota*, 426 US 373, 96 S Ct 2102 (1976) (discussing House Report made contemporaneously with Pub L 280's enactment); *see also State v. Smith*, 277 Or 251, 257–58, 560 P2d 1066 (1977) (discussing Pub L 280 and noting that Congress enacted it to "curtail lawlessness on Indian reservations.").

[17] 18 USC § 1162(b).

Remember those states covered by Pub L 280? Wisconsin is one of them. Following the logic from a Wisconsin Supreme Court opinion, the plain language in section (b) of Pub L 280 expressly limits that jurisdiction so that it does not interfere with treaty-guaranteed hunting and fishing rights.[18]

In that case, the state charged two tribal-defendants for violating a state statute prohibiting, *inter alia*, the use of a loaded firearm in a vehicle; police stopped them on their way to hunt.[19] On review, the court first analyzed the defendants' tribe's treaty language and concluded that it granted the tribe hunting rights.[20] Relying on the Supremacy Clause and section (b) of Pub L 280, the court reasoned that "the question does not turn on whether [the statute] is primarily a hunting or safety regulation * * *, but rather whether the enforcement of [the statute] impermissibly infringes upon treaty-guaranteed hunting rights."[21] The court held that enforcement of the statute against the defendants "would be an impermissible infringement upon treaty-guaranteed hunting rights. Accordingly, the state is without jurisdiction to enforce the citations."[22]

---

[18] *See, e.g., State v. Lemieux*, 110 Wis 2d 158, 167, 327 NW 2d 669 (1983) (holding that Wisconsin lacked subject matter jurisdiction to enforce a firearm statute because it infringed on a defendant's tribal hunting rights); *see id.* at 163–64 (court holding that Pub L 280 conferred limited jurisdiction: "Congress, however, expressly limited that jurisdiction so as not to interfere with treaty–guaranteed hunting and fishing rights.").

[19] *Id.* at 159–60.

[20] *Id.* at 162.

[21] *Id.* at 165–66.

[22] *Id.* at 160–61, 164.

Consider that reading in the context of a waste crime. Waste crimes are defined by several statutes and administrative rules. But basically, a person commits the crime of "waste" if they waste any edible portion of any game mammal, bird, or fish.[23] So, by definition, waste laws regulate hunting activities. Some tribal treaties include language reserving exclusive rights to hunt on unclaimed lands. Therefore, those waste crimes can infringe on treaty-guaranteed rights.[24] If the tribal defendant's treaty reserves such rights, the next inquiry is whether the alleged waste crime occurred *within* Indian country as defined by statute.[25]

If a tribal defendant is charged with a waste crime while hunting in Indian country pursuant to their treaty that reserves an exclusive right to hunt in unclaimed lands, Oregon courts lack subject-matter jurisdiction over the crime because waste crimes infringe on those rights. In that situation, a tribal defendant may challenge a trial court's subject-matter jurisdiction under section (b) of Pub L 280. The defendant will

---

[23] ORS 498.042(3) "No person shall waste any edible portion of any game mammal, game bird or game fish or the pelt of any fur-bearing mammal."); see also, OAR 635-056-0750(2) (similarly describing waste), and ORS 496.992(1) (making a violation of any wildlife law a Class A misdemeanor if committed with a culpable mental state).

[24] Importantly, treaty rights do not belong to the individual tribal member; rather, they belong to the tribe. *United States v. Gallaher*, 275 F.3d 784, 789 (9th Cir 2001). It is that distinction that arguably makes challenges under the statute matters of subject-matter jurisdiction, not a defense or one of personal jurisdiction.

[25] This part is crucial because Pub L 280 does not apply outside of Indian country.

first need to establish that they are a member of a qualifying tribe and that they were exercising those rights in Indian country.[26] Tribal defendants may move to dismiss a charge for lack of subject-matter jurisdiction due to Pub L 280 in the circuit court.[27] And because challenges to subject-matter jurisdiction may be raised at any time, appellate courts may also need to consider Pub L 280. Regardless, a court presented with this question should first determine whether it has subject-matter jurisdiction.[28]

Given Congress's definition of Indian country, Pub L 280's application to tribal defendants will be limited. There are a number of reasons why considering Pub L 280 as discussed above will not open the flood gates to dismissals. But Congress appears to have left a positive nugget for future tribal defendants within Pub L 280 that was otherwise negative to them and their tribes.

Parting thoughts and future questions

As is the case with nearly every legal issue, resolving the above questions creates new ones.

---

[26] Easy enough, right? Well, obviously not. *State v. Hill*, 277 Or App 751, 770–71, 373 P3d 162, *rev den*, 360 Or 568 (2016) (adopting the Ninth Circuit rule, remanding because the issue was not fully litigated).

[27] Jurisdiction over Indian matters is a function of territory, *subject matter*, and race. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 281 (1982 ed).

[28] *Coats v. ODOT*, 334 Or 587, 594, 54 P3d 610 (2002) ("When a question of subject matter jurisdiction presents itself at any stage of a proceeding, * * * it is the court's duty to address it."); *see also* Or Const, Art VII (Original), § 9; Or Const, Art VII (Amended), § 2.

The primary unanswered question is whether, and to what extent, the state's authority to regulate certain wildlife under the "conservation necessity standard"[29] interacts with a challenge of subject-matter jurisdiction under section (b) of Pub L 280. To be sure, versions of the conservation necessity standard have existed for many years.[30] Conservation necessity requires a complicated and fact-intensive inquiry. To satisfy the doctrine, the state must prove three things: (1) "[T]he regulation is a reasonable and necessary conservation measure; (2) the application of the specific regulation to treaty fishers [or hunters] is necessary in the interest of conservation[;] and (3) the regulation does not discriminate against treaty fishers [or hunters]."[31] If the state can establish all three elements, the state has *authority* to enforce wildlife regulations against treaty hunters and fishers.

One interpretation is that conservation necessity applies only to treaty defenses *outside* of Indian country and does not apply to challenges to a court's jurisdiction under Pub L 280 over matters occurring *inside* Indian country.[32] That reading makes

---

[29] *See State v. McCormack*, 321 Or App 551, 561–66, 517 P3d 1033, *rev allowed*, 370 Or 694 (2022) (articulating three-step standard); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 US 172, 205, 119 S Ct 1187, 1205, 143 L Ed 2d 270 (1999). The state can also establish conservation necessity by proving that the tribe criminalizes similar conduct. *State v. Bronson*, 122 Or App 493, 858 P2d 467 (1993).

[30] *See e.g*, *Puyallup Tribe v. Dept. of Game of Wash.*, 391 US 392, 401, 88 S Ct 1725, 1730, 20 L Ed 2d 689 (1968); *People of State of New York ex rel. Kennedy v. Becker*, 241 US 556, 564, 36 S Ct 705, 708, 60 L Ed 1166 (1916).

[31] *State v. Jim*, 81 Or App 177, 181, 725 P2d 365 (1986).

[32] This remains an open question in Oregon. *State v. Wagner*, 323 Or App 369, 372, 524 P3d 564 (2022), *rev*

sense because the alternative would allow a prosecutor to grant a court subject-matter jurisdiction that it does not have by establishing conservation necessity.[33]

But conservation necessity may be used by the state to establish that a crime does not infringe on a tribal defendant's treaty rights exercised *outside* of Indian country.[34] In that scenario, the preliminary question of whether a court *has* subject-matter jurisdiction still must be answered. Part of that determination must be whether the crime occurred within Indian country—to which Pub L 280 applies—or outside of Indian country.[35] If the conduct occurred outside of Indian country, the state may establish that it has satisfied the standard to prove it has authority to regulate the conduct. The issue of conservation, then, may be more of an ancillary issue,

---

dismissed, 371 Or 309 (2023) (Court of Appeals rejecting that argument and Supreme Court allowing review to answer it, but ultimately dismissing as improvidently granted).

[33] *State v. Terry*, 333 Or 163, 186, 37 P3d 157 (2001) (noting that "[u]nder the Oregon Constitution, circuit courts have subject matter jurisdiction over all actions unless a statute or rule of law divests them of jurisdiction.").

[34] *State v. Big John*, 146 Wis.2d 741, 748–52, 432 NW 2d 576 (1989) (discussing potential relationship between jurisdiction and conservation necessity in the context of wildlife crimes occurring off reservation).

[35] Given the language reserving the right to hunt on unclaimed lands, tribal defendants may be able to exercise treaty hunting rights outside of Indian country. *See State v. Begay*, 312 Or App 647, 656–743, 495 P3d 732 (2021) (analyzing the phrase "open and unclaimed" as it applied to the 1855 Yakima and Nez Perce treaties, concluding that negotiators would have understood it to include lands that are not fenced or claimed by settlers).

answered only after the preliminary jurisdictional question is answered.

Finally, there are questions regarding whether the conservation-necessity standard even has a place in state criminal cases. Congress certainly has the power to abrogate treaty rights, but it must explicitly express that intent.[36] And it does not appear to have done so in enacting Pub L 280.[37] Congress also has the power to authorize state regulation for the protection of wildlife resources. But it is unclear whether Congress has ever explicitly authorized states to regulate wildlife in a way that goes against treaty rights.[38]

No doubt these issues will create more unanswered questions. But they will need to wait for another article. At least, now,

---

[36] *South Dakota v. Bourland*, 508 US 679, 687, 113 S Ct 2309, 124 L Ed 2D 606 (1993).

[37] *Menominee Tribe of Indians v. U.S.*, 391 US 404, 409, 88 S Ct 1705, 20 L ED 2d 697 (1968) (explaining that section b of Pub L 280 "protects any hunting, trapping, or fishing right granted by a federal treaty.").

[38] *U.S. v. State of Wash*, 384 F Supp 312 (WD Wash 1974), *aff'd and rem'd*, 520 F2d 676 (9th Cir 1975) (highlighting that state power to regulate off reservation fishing was not yet explained); *see id* at 339 ("This is particularly true because state regulation of off reservation treaty right fishing is highly obnoxious to the Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future."); *but see Oklahoma v. Castro-Huerta*, 597 US__, 142 S Ct 2486, 213 L Ed 2d 847 (2022) (holding, *inter alia*, that Pub L 280 does not preempt existing state jurisdiction over crimes committed by non-Indians in Indian country).

something positive may come out of the termination era that had such a negative effect.

Correcting the Burden of Proof for Specific Performance of Written Contracts

Colin Hunter[1]

I. Introduction

The modern claim for specific performance remains shrouded in an undeserved air of mystery due to its equitable roots.[2] Fundamentally straightforward, the claim is an elegant device that provides the plaintiff the option of compelling performance of contractual obligations rather than accepting money damages in lieu of the bargain actually struck. In essence, specific performance is no more complicated than its sister claim for breach of contract, and—contrary to lingering perceptions—it is more an ordinary than an extraordinary remedy.

If a claim for specific performance of a written contract is relatively ordinary, it follows that a plaintiff ought not to be required to meet any unusual standard of proof to prevail on

---

[1] Attorney, Bradley Bernstein Sands LLP, Portland, OR.

[2] Modern practice in Oregon correctly treats specific performance as a freestanding claim, rather than only a remedy. *See, e.g., Deep Photonics Corp. v. LaChapelle*, 368 Or 274, 282, 491 P3d 60 (2021) (referring to "claim for specific performance"); *McDowell Welding & Pipefitting, Inc. v. United States Gypsum Co.*, 345 Or 272, 289, 193 P3d 9 (2008) (same). Still, courts and litigants sometimes treat it instead as only a remedy available on a claim for breach of contract. *See, e.g., Kazlauskas v. Emmert*, 248 Or App 555, 569, 275 P3d 171 (2012) ("[A] plaintiff may, in theory, plead a breach of contract and alternatively seek the legal remedy of damages or *the equitable remedy of specific performance*" (emphasis added)). For ease of reading, if nothing else, I refer in this article to a "claim" for specific performance.

such a claim. By the early 2000s, that principle—namely, that a plaintiff need prove a claim for specific performance of a *written* contract by only a preponderance of the evidence—was long since established in Oregon. And it was equally well established that, by contrast, a plaintiff must prove a claim for specific performance of an *oral* contract by clear and convincing evidence.

In a series of decisions beginning in 2002, however, the Oregon Court of Appeals conflated these standards by incorrectly holding that even a claim for specific performance of a *written* contract requires proof by clear and convincing evidence. No appellate court has corrected those holdings in the 20 years since, leaving the law in a state of confusion and tilting the scales away from equitable relief that rightly ought to be available.

The Court of Appeals should take the next opportunity to correct its holdings by restoring the correct burden of proof—a preponderance of the evidence—for claims of specific performance of written agreements.

II. Specific Performance Under Oregon Law

The object of specific performance is to compel the responding party to perform some contractual obligation.[3] Under Oregon law, a plaintiff seeking specific performance must prove that they have a "valid, legally enforceable contract," and that they

[3] John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 1400 (4th ed 1918). Pomeroy's treatises on equity are persuasive authority in Oregon. *See, e.g.*, *Percy v. Miller*, 197 Or 230, 241, 251 P2d 463 (1952); *Temple Enterprises v. Combs*, 164 Or 133, 155, 100 P2d 613 (1940).

either have performed or are "ready, able and willing to perform" their own obligations under the contract.[4]

While the contract for the purchase and sale of real property is the archetype, [5] and the personal services contract is an oft-cited exclusion,[6] there are few bright-line rules allowing or disallowing specific performance as to particular forms of contract.[7] Both written and oral agreements—including oral agreements relating to real property, under appropriate circumstances—are subject to specific performance.[8]

---

[4] *Percy*, 197 Or at 239; *see also Gaffi v. Burns*, 278 Or 327, 333, 563 P2d 726 (1977). In cases involving a plaintiff's obligation to pay a certain sum—for example, the down payment on a purchase and sale agreement—the plaintiff may tender money into court to satisfy this requirement, but the Oregon Supreme Court long ago dispensed with requiring a tender in all cases. *Wittick v. Miles*, 268 Or 451, 454, 521 P2d 349 (1974).

[5] *Temple Enterprises*, 164 Or at 155–56 (noting that, in the case of a real property contract, "it is as much a matter of course for a court of equity to decree a specific performance of it as it is for a court of law to give damages for the breach of it" (citing Pomeroy, *Equity Jurisprudence*)).

[6] *Oregon Growers' Co-op. Ass'n v. Lentz*, 107 Or 561, 582, 212 P 811 (1923) (citing with approval rule against compelling a party to "work for or to remain in the personal service of another" as creating a "condition of involuntary servitude").

[7] *See generally Pittenger Equip. Co. v. Timber Structures*, 189 Or 1, 14 –17, 217 P2d 770 (1950) (discussing evolution of the law towards the "liberalization of the rule of specific performance").

[8] *Bennett v. Pratt*, 228 Or 474, 476, 365 P2d 622 (1961) (holding that "equity will not grant specific performance [of an oral lease] unless there is part performance by a lessee in

As with other forms of equitable relief, the plaintiff seeking specific performance must not have an adequate remedy at law.[9] Adding to the claim's extant air of mystery, Oregon courts unpredictably resort to various other equitable bromides depending on the facts of the case: for example, that the contract must be "mutual,"[10] that it must be "sufficiently definite and certain so as to be enforceable,"[11] that the plaintiff must "come into court with clean hands,"[12] or that the plaintiff's claim must not be "stale."[13] At its core, though,

---

reliance on the oral agreement" and the part performance is "referable solely to the contract" (internal quotations omitted)); *Wagonblast v. Whitney*, 12 Or 83, 87, 6 P 399 (1885) ("[I]t is an obvious principle of justice that a contract, although not in writing, when fairly entered into and part performed * * * ought not to be evaded. The hardships and injustice growing out of such cases * * * equity obviates by the specific enforcement of the contract."). *See also Pomeroy, Equity Jurisprudence* § 1409 (noting long-established rule "that a verbal contract for the sale or leasing of land * * * if part performed by the party seeking the remedy, may be specifically enforced by courts of equity, notwithstanding the statute of frauds").

[9] *Alsea Veneer, Inc. v. State*, 318 Or 33, 36, 862 P2d 95 (1993); *see also* Pomeroy, *Equity Jurisprudence* § 1401 (describing circumstances in which legal remedy is either "inadequate" or "impracticable").

[10] *In re Denning's Estate*, 112 Or 621, 628, 229 P 912 (1924).

[11] *Phillips v. Johnson*, 266 Or 544, 554, 514 P2d 1337 (1973).

[12] *Percy*, 197 Or at 242.

[13] *Snider v. Lehnherr*, 5 Or 385, 387 (1875).

specific performance is a straightforward claim the proof of which ought not to be particularly complicated.[14]

III. Shifting Burdens of Proof

The plaintiff is not entitled to specific performance simply by reason of the defendant's breach.[15] However, upon the plaintiff's proof of the elements of the claim, the court has only modest discretion—bounded by well-established equitable principles—to resist making such a decree.[16]

---

[14] *See* Pomeroy, *Equity Jurisprudence* § 1404 (stating that, in the case of the ordinary written contract, "it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach."). As described further below, the court will impose additional requirements—both additional elements and a higher burden of proof—as to claims arising out of oral agreements, and particularly as to oral agreements relating to real property.

[15] *Moore v. Fritsche*, 213 Or 103, 112–13, 322 P2d 114 (1958) ("Specific performance is not granted as a matter of right; its granting must rest solely in judicial discretion, controlled by equitable principles."). *See also* Pomeroy, *Equity Jurisprudence* § 1404 ("[E]ven when a particular contract belongs to such a class, the right to its specific performance is not absolute, like the right to recover a legal judgment.").

[16] *Renard v. Allen*, 237 Or 406, 417–18, 391 P2d 777 (1964) (reversing trial court with instructions to award specific performance, reasoning that "[i]n the present case there are no elements present that would enable a court of equity, acting within the ambit of its discretion, to deny the remedy of specific performance"); *see also Temple Enterprises*, 164 Or at 158 (holding that "the discretion of a court of equity . . . is judicial in its nature" and that "judicial remedies are not in any true sense discretionary but are governed by the established

Given that specific performance is an important tool widely available to the disaffected contracting party, and that the elements of the claim are relatively straightforward, the question becomes by what standard the plaintiff must prove those elements in order to prevail. On that score, Oregon law has been in a state of disarray for the past 20 years.

A. The Well-Established Dichotomy Between Written and Oral Contracts

Historically, it was well established in Oregon that specific performance of a written agreement required proof by only a preponderance of the evidence. In *Phillips v. Johnson*, a case seeking specific performance of a written earnest money agreement for the purchase of real property, the Supreme Court affirmed the trial court's finding—based on a "preponderance of the evidence"—that the plaintiff was entitled to specific performance of the contract.[17] In *Dan Bunn, Inc. v. Brown*, another case regarding a written earnest money contract, the Supreme Court again applied the "preponderance of evidence" standard to evaluate whether the plaintiff was entitled to specific performance.[18] Similarly, in *Martin v. Dillon*, a case regarding specific performance of a written earnest money agreement, the Court of Appeals

---

principles and rules which constitute the body of equity jurisprudence").

[17] 266 Or 544, 554, 514 P2d 1337 (1973). In *Phillips*, the parties had signed an "Earnest Money Receipt" as well as "an attached map" and a partial legal description of the two tracts at issue. *Id.* at 548.

[18] 285 Or 131, 144, 590 P2d 209 (1979) ("In our judgment * * * plaintiff did not prove that contention by a preponderance of evidence.").

affirmed a trial court's findings based on a preponderance of the evidence standard.[19]

Nowhere in these decisions did the Supreme Court suggest a higher evidentiary standard applies to any aspect of a claim for specific performance. Instead, they review the various aspects of the claim—the formation of the contract, as in *Phillips*, or the parties' diligence in performing, as in *Martin*—under a "preponderance" standard.[20] In the years since, the Supreme Court has never suggested that a claim of specific performance of a written contract is subject to proof by clear and convincing evidence.

When the agreement in question is oral, by contrast, Oregon courts have consistently held the plaintiff to a higher standard of proof. Dating to decisions as early as 1879, the Supreme Court so held. In *Brown v. Lord*, the Court stated the rule clearly: "To entitle a party to a decree of specific performance upon a parol contract, the proof must be clear and satisfactory,

---

[19] 56 Or App 734, 739, 642 P2d 1209 (1982) ("Plaintiff failed to prove by a preponderance of the evidence that he exercised good faith and reasonable diligence in obtaining 'suitable financing.'")

[20] *See Phillips*, 266 Or at 555–560; *Martin*, 56 Or App at 739. Of course, appellate decisions do not always specify the applicable burden of proof. *See, e.g., Booras v. Uyeda*, 295 Or 181, 666 P2d 791 (1983); *Seal v. Polehn*, 284 Or 259, 586 P2d 345 (1978); *Odell v. Morin,* 5 Or 96, 98 (1873). And some references to evidentiary standards are less than clear, particularly in older cases. *See, e.g., Usinger v. Campbell*, 280 Or 751, 758, 572 P2d 1018 (1977) (apparently, but not clearly, applying the preponderance standard to a claim for specific performance of a written agreement); *Giroux v. Bockler*, 98 Or 398, 411, 194 P 178 (1921) (same); *Snider*, 5 Or at 387(same).

so as to establish the contract to the entire satisfaction of the court, leaving no room for reasonable doubt; a mere preponderance of the proof will not suffice."[21] The Court consistently confirmed the "clear and convincing"[22] standard of proof over the succeeding century, albeit not always in precisely the same terms.[23]

At least when it comes to oral agreements conveying some interest in real property, the rationale for a more demanding standard is clear: to avoid the statute of frauds (and the policies underlying it), the plaintiff seeking to enforce an oral agreement should reasonably be held to a higher burden than the plaintiff seeking to enforce a written agreement.[24] (Indeed, the plaintiff seeking to enforce an oral agreement must not only meet a higher burden of proof, but must also

---

[21] 7 Or 302, 302 (1879).

[22] Under Oregon law, "'[C]lear' describes the character of unambiguous evidence, whether true or false; 'convincing' describes the effect of evidence on an observer." *Riley Hill General Contractor, Inc. v. Tandy Corp.*, 303 Or 390, 397, 737 P2d 595 (1987).

[23] *Richardson v. Fields*, 270 Or 368, 372, 527 P2d 708 (1974) ("[O]ne of the tests for ordering specific performance of an oral contract is that the proof must be clear, unequivocal and by a preponderance of the evidence."); *Benson v. Williams*, 174 Or 404, 433–34, 149 P2d 549 (1944) ("clear, satisfactory and convincing"); *Le Vee v. Le Vee*, 93 Or 370, 377, 181 P 351 (1919) ("clearly and unequivocally by the preponderance of the evidence"). *See also Bennett*, 228 Or at 477 (discussing articulations of standard).

[24] *Le Vee*, 93 Or at 379 ("The statute of frauds is stringent in its provisions, and to avoid its effect the testimony must be clear and explicit, showing a state of facts referable exclusively to the contract pleaded.")

prove an additional *element*: part performance that is solely referable to the contract.[25])

B. The Court of Appeals Conflates the Burden of Proof for Written and Oral Agreements.

By the late twentieth century, it was equally well established in Oregon courts that a written contract is subject to specific performance on a preponderance of the evidence and that an oral contract is subject to specific performance only on clear and convincing evidence. In the early part of this century, all that changed.

In a series of decisions beginning in 2002, the Court of Appeals conflated these standards, incorrectly holding that the "clear and convincing" standard applies to *all* claims of specific performance—rather than only claims for specific performance of *oral* agreements, as the Supreme Court had long held.

The Court of Appeals first strayed from Oregon precedent in *Murray v. Laugsand*, in which it held that the "clear and convincing standard" applied to a claim for specific performance of a *written* settlement agreement.[26] In *Murray*, the plaintiffs entered into a signed, written settlement agreement to resolve the defendant creditors' claims against them.[27] The settlement agreement required the parties to engage in certain real property transactions, with each party deeding certain property interests to the other. The plaintiffs eventually sued for specific performance, contending that defendants had breached their obligations to allow plaintiffs to exercise certain mineral extraction rights.[28]

---

[25] *Id.*

[26] 179 Or App 291, 294, 39 P3d 241 (2002).

[27] *Id.*

[28] *Id*. at 297–98.

While the Court of Appeals affirmed dismissal of the plaintiffs' specific performance claim without significant discussion—it devoted the large majority of its opinion to the plaintiffs' reformation claim—the court unmistakably held that the "clear and convincing" standard applied to the plaintiffs' specific performance claim. In support of that standard, the court in *Murray* relied on a 1974 Supreme Court case, *Marastoni v. Lucey*, for the proposition that the "[p]laintiffs were required to prove their claims for specific performance and reformation by clear and convincing evidence."[29]

The error in the Court of Appeals' holding—apparently the first time an Oregon appellate court had applied that heightened standard to specific performance of a written contract—is evident from a review of *Marastoni.* In fact, the Supreme Court in *Marastoni* did apply that heightened standard of proof. However, the Court did so because *Marastoni* involved a claim for specific performance of an *oral* agreement—not a claim seeking to enforce a written contract.[30] In particular, the plaintiffs in *Marastoni* sought specific performance of an alleged oral modification to a lease agreement, and the Supreme Court concluded they had failed to prove as much by "clear and convincing evidence."[31]

---

[29] 179 Or App at 294 (*citing Marastoni v. Lucey*, 268 Or 433, 440, 521 P2d 521 (1974)).

[30] 268 Or at 434.

[31] *Id.* at 442. Ironically, the trial court in *Marastoni* apparently applied the "preponderance" standard in concluding that plaintiffs had failed to prove their claim. *Id.* at 435 (quoting trial judge as stating "I do not feel plaintiffs have shown this matter by a preponderance of the evidence. In the Court's opinion, there was no oral contract.").

The Supreme Court's decision in *Marastoni* relied, in turn, on another case regarding specific performance of an *oral* agreement, *Bennett v. Pratt*.[32] And the Court in *Bennett*—considering specific performance of an alleged oral five-year lease—similarly relied on several other cases relating to specific performance of alleged oral agreements to convey interests in real property.[33] As its express language and citations demonstrate, the Supreme Court's application of the "clear and convincing" standard in *Marastoni* and its predecessors undoubtedly resulted from the oral nature of the contracts alleged, an approach consistent with Oregon courts' longstanding recognition of the dichotomy between written and oral agreements.

In relying on *Marastoni* to apply that heightened standard to a written agreement, the Court of Appeals in *Murray* committed a category error that has taken hold in Oregon law in the 20 years since. In a series of subsequent decisions, the Court of Appeals doubled down on its holding in *Murray*—often by citing only to *Murray* itself and ignoring the century of contrary case law that preceded it. In a pair of 2007 decisions regarding written purchase and sale agreements—*Beaty v. Oppedyk* and *View Point Terrace, LLC v. McElroy*—the Court of Appeals cited *Murray* in holding that a party must "[g]enerally" prove a claim for specific performance by "clear and convincing evidence."[34] In 2009, the Court of Appeals did the same, citing *Murray* and applying the "clear and convincing" standard to a claim seeking specific performance of a written

---

[32] *Id.* at 440 (citing *Bennett*, 228 Or at 474).

[33] *See Bennett*, 228 Or at 477–78 (citing cases).

[34] *View Point Terrace, LLC v. McElroy*, 213 Or App 281, 285, 160 P3d 1023 (2007); *Beaty v. Oppedyk*, 212 Or App 615, 621, 159 P3d 1157 (2007).

real property agreement.[35] In the 20 years since, neither the Court of Appeals nor the Supreme Court has corrected the holding from *Murray* and its progeny, leaving Oregon law in a state of confusion.

Assessing the practical impact of the Court of Appeals' conflation of evidentiary standards is a difficult matter. In many cases, Oregon trial court briefing dating to 2002 is either not searchable or not publicly available, meaning it is impossible to determine how frequently the court's erroneous holding in *Murray* and its progeny has been applied at the trial court level. It has been applied in at least one federal district court case relating to specific performance of a written contract,[36] and—to the extent volume is relevant—Westlaw searches indicate that litigants have cited it with some regularity in both trial and appellate briefing over the past 20 years. Even more difficult to assess is the impact the court's holding may have had outside of court—by, for example, dissuading litigants from bringing claims for specific performance of written agreements and instead satisfying themselves to bring more easily proved claims for money damages.

---

[35] *Riverside Homes, Inc. v. Murray*, 230 Or App 292, 296, 214 P3d 835 (2009).

[36] *Univ. Accounting Serv., LLC v. Schulton*, 3:18-CV-1486-SI, 2020 WL 2393856, at *12 (D Or May 11, 2020). In *University Accounting Service*, while Missouri law governed the contract at issue, the parties "agree[d] that there are no material differences between Oregon law and Missouri law regarding relevant contract principles" and—based on the parties' agreement, the court chose to "refer[] * * * to Oregon contract law" in deciding the matter. 2020 WL 2393856 at *12.

IV. Conclusion

Whatever their practical impact to date, the Court of Appeals' decisions have the potential to unfairly impact litigants seeking to enforce their written contract rights by means of specific performance, leading either to the incorrect dismissal of their claims or the granting of only substitute relief—namely, money damages—rather than an award of the contractual subject matter for which that party actually bargained. The Court of Appeals should take the next opportunity to correct its holdings and to restore Oregon law as it existed before the 2002 decision in *Murray*.