PERSPECTIVES ON THE LAW

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The OTHER New Chief

— by **Brian S. Ruff**

The Marion County Bar Association's Christmas Party is regionally famous for two reasons. First, it is a rare opportunity to rub shoulders with legal giants and political newsmakers from the hub of government in Salem. Second, and perhaps more importantly, is the obscene mountain of fresh shrimp, which seems to grow each year.

A few years ago, at one such party, as I was shoveling tasty shellfish onto my party plate, I bumped into, and started chatting with, a friendly gentleman whose face was familiar, but whose name tag said simply, "Wally." We chatted briefly and he asked polite questions about the small office that I had just opened. However, when I asked where he practiced, he said, "Oh, over there," and nodded toward the window and the white marble building across the street. Wally, it turned out, was Wallace P. Carson, Chief Justice of the Oregon Supreme Court.

With all of the recent commotion coming out of Washington, Roberts replacing Rehnquist, and the nomination of Alito to replace O'Conner, the news that Oregon is about to loose its own steady-handed Chief has not made the top headlines. So, many people will be surprised to learn that Chief Justice Carson has decided that he will retire at the completion of his current term, in 2007.

Unlike the life-time appointments of the federal bench, Oregon judges are elected, and have to campaign to keep their jobs. If an Oregon justice ends his or her tenure before their term is up, the Governor can then appoint a successor. However, by serving out the end of his term, Chief Justice Carson has opened up his seat to a general election.

Carson has been on the Court since 1982, and has been Chief since 1991. While he will remain on the bench until 2007, he has chosen to step down as Chief to facilitate a smooth transfer of authority. Oregon law provides that the Chief Justice be selected among the justices of the court, and be elected by a majority vote of the justices themselves. Earlier this month, the Supreme Court selected Chief Carson's successor by a unanimous vote.

On January 1, 2006, Justice Paul J. DeMuniz will begin his term as the next Chief Justice of the Oregon Supreme Court. The selection has been widely met with praise from his colleagues and the legal community, but what does it mean for the insurance industry in this sate?

The Chief Justice is the administrative head of the Judicial Department and the State Courts. The Chief has the authority to appoint the Chief Judge of the Court of Appeals and the presiding judges of the various circuit courts around the state. He also has the power to make and adopt court rules and procedures.

Justice DeMuniz is well known as an advocate for alternative dispute resolution (ADR). As Chief, he will likely push to support and expand the mediation and arbitration practices within the state court system.

In order to get a better feeling for the new chief, and what direction he will likely steer the Oregon judiciary, it would be helpful to examine a brief survey of recent injury-related cases written by him.

The Supreme Court decided Minnis v. Oregon Mutual in 2002. Justice DeMuniz wrote for the majority. Plaintiff in this case was the owner of a pizza restaurant who filed suit against his insurer for indemnity following the settlement of a sexual harassment law suit. The insurer had denied coverage in part because the offending acts were performed by

(Continued on next page)

an employee off premises. In the opinion, Justice DeMuniz followed a methodical and exhaustive examination of the express terms of the insurance contract. In the end, he concluded that there was no *respondeat superior* liability under the facts of the case, and that the policy afforded no coverage for the offending employee's actions.

The next pertinent case was decided in 2003. In Woodbury v. CH2M Hill, plaintiff was the employee of subcontractor who sued the general contractor of the work-site where he was injured. Plaintiff brought his claim under the Employer Liability Law (ELL), which imposes a higher standard of care on persons in charge of or responsible for work involving risk or danger. As we saw in the last case, Justice DeMuniz took a methodical approach to examining the specific elements of the ELL. Plaintiff prevailed in this decision and the ELL was found to encompass the general contractor under the specific facts of the case. However, the decision did not seem to be so much a case of judicial expansion as it was a strict interpretation of statutory language.

In Barackman v. Anderson, 2005, plaintiff sued defendant for injuries to her neck, back, and teeth, which were allegedly sustained in an automobile accident. Plaintiff initially engaged in arbitration with her PIP carrier over the denial of her dental claims. The arbitration panel concluded that the dental injuries were not accident-related, and defendant raised Issue Preclusion as a defense in the liability action.

Justice De Muniz began this opinion by outlining the methodical five-point analysis, established in prior cases, for dealing with questions of issue preclusion. He then chastised both sides for failing to address the five-point method in their arguments. Both, plaintiff and defendant limited their arguments to an interpretation of the PIP arbitration statute, and the constitutional right to trial by jury. He dispensed with plaintiff's arguments in his familiar analytical style, holding that it was possible for a binding arbitration decision to lead to issue preclusion. He then remanded the case back to the circuit court for the parties to address the omitted five-point analysis.

Barackman reveals two important things about our new Chief. First, it demonstrates his commitment to established legal authorities. It is clear from the language and tone of the opinion that he wanted the parties to go back and address the questions established in prior precedent. Second, his discussion of the arbitration and the arbitration panel's decision, revealed his commitment toward ADR as a legitimate function of the legal system.

The most interesting case in this short survey, however, is Lawson v. Hoke, which the Supreme Court just recently handed down, and which was more fully discussed in this column in September. Plaintiff in this case was driving without insurance at the time of her collision with defendant. The trial court found that ORS 31.715, which precludes non-economic damages to uninsured drivers, violated the remedies clause of the Oregon Constitution, and plaintiff was awarded non-economic damages.

Plaintiff relied on the Court's policy of looking at absolute common law rights at the time of the framing of the Oregon Constitution in 1857, as outlined in Smothers v. Gresham Transfer. The Court, in Lawson, found that there were, in fact, exceptions to absolute common law rights, and upheld the statutory preclusion of non-economic damages. While that decision was a victory for the insurance industry, it was a narrow victory, and Justice Demuniz actually wrote for the three-vote dissent.

In his dissenting opinion, Justice DeMuniz held to the analysis in Smothers, a decision in which he did not originally participate. True to form, however, he carefully and methodically followed the historically exhaus-

(Continued on page 3)

tive analysis from Smothers, and argued that the right to recover non-economic damages for injuries was an absolute common law right without exception.

Overall, the pattern that we see from these few cases is that the new Chief Justice is a thoughtful, careful and fundamentally methodical decision maker. He displays respect for prior authority, and a preference for the strict interpretation of contractual and statutory language. His opinions appear to be balanced and he has displayed no obvious bias toward either plaintiffs of defendants. In fact, the only bias that we have seen is his support of ADR, which is good news for all of us.

Of course, the bigger concern is who will fill Justice Carson's seat when he leaves the court next year. That vacancy will be filled by the voters next November, so only time will tell who the next justice will be. ❖