

IN THE COURT OF APPEALS OF THE STATE OF OREGON

LAURIE PAUL, Plaintiff,

and

RUSSELL GIBSON and WILLIAM  
WEILLER, DDS, individually and on  
behalf of all similarly-situated  
individuals,

Plaintiffs-Appellants,

vs.

PROVIDENCE HEALTH SYSTEM-  
OREGON, an Oregon corporation,

Defendant-Respondent.

Multnomah County Circuit Court  
Case No. 0601-01059

Court of Appeals  
No. CA A137930

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APPELLANTS' OPENING BRIEF  
AND EXCERPT OF RECORD

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On Appeal from the Judgment entered on January 8, 2008  
in Multnomah County Circuit Court by  
the Honorable Marilyn E. Litzenberger

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## **APPELLANTS' OPENING BRIEF**

### **STATEMENT OF THE CASE**

#### **1. Nature of the Action and Relief Sought.**

Plaintiffs filed this proposed class action seeking equitable relief and money damages against defendant Providence Hospital System (“PHS” “Providence”) after learning that defendant had lost unencrypted computer tapes and disks on which it stored their medical records, financial data, and other personal information. Plaintiffs alleged negligence and violation of the Unlawful Trade Practices Act.

#### **2. Nature of the Judgment.**

Defendant moved to strike the class allegations and to dismiss the complaint for failure to state a claim. The trial court granted both motions and entered a General Judgment.

#### **3. Jurisdiction.**

Plaintiffs served and filed their Notice of Appeal. Accordingly, ORS 19.270(1) vests jurisdiction in this court.

#### **4. Timeliness of Appeal.**

The trial court entered the General Judgment on January 8, 2008, and plaintiffs filed and served their Notice of Appeal on January 25, 2008, which is within the 30-day time period set forth in ORS 19.255.

## 5. Questions Presented on Appeal.

1) May Oregonians state money damage claims in negligence when a medical provider fails to adequately secure and safeguard computerized medical records, and the records are disclosed to a third party?

2) May Oregonians state damage claims for violation of the Unlawful Trade Practices Act when, in offering and providing medical services in this State, defendant represents by conduct that it will securely maintain patient medical records that contain confidential information, even though it knows that it does not do so?

3) May Oregonians state claims for equitable relief in negligence to prevent future harm that are in addition to claims for damages arising out of the original disclosure of medical records?

4) May Oregonians state claims for equitable relief under the Unlawful Trade Practices Act to prevent future harm that are in addition to claims for damages arising out of the original disclosure of medical records?

5) When the trial court struck the class allegations under ORCP 32I, did it err in failing to carve out from its ruling claims seeking equitable relief?

6) When the trial court struck the class allegations under ORCP 32I, did it err in determining that Providence had provided appropriate compensation, correction, or remedy to the class despite the fact that Providence had not paid the class non-economic damages, had not offered credit monitoring for a

sufficient duration, had not told the class that it would pay for credit restoration, and had not paid the class for out-of-pocket losses, for inconvenience, or for lost time?

## **6. Summary of Argument.**

Providence Health Systems maintained on computer disks and tapes 18 years-worth of computerized medical, financial, and personal records on some 365,000 patients. Inexplicably, the records were unencrypted. Providence employees routinely took the computerized data home with them. One night, an employee left the unencrypted disks and tapes in his car. A car prowler took the tapes from the vehicle. Providence eventually notified affected patients and told them that they might want to take steps to protect themselves.

For themselves and those similarly situated, plaintiffs sued seeking equitable relief and money damages. Plaintiffs alleged negligence and violation of the Unlawful Trade Practices Act. Providence eventually filed two motions: 1) a motion to strike class allegations under ORCP 32I based on its assertion that its one-year credit monitoring and restoration package provided an adequate remedy under ORCP 32I; and 2) a motion to dismiss under ORCP 21 based on its assertion that plaintiffs had failed to state claims.

Relying on *Lowe v. Philip Morris*, 207 Or App 532 (2006) *aff'd*, \_\_\_ Or \_\_\_, \_\_\_ P3d \_\_\_, 2008 WL 1903463 (May 1, 2008), the trial court granted the ORCP 21 motions and dismissed both claims. The trial court also struck the

class allegations based on its determination that Providence had adequately remedied the wrong.

The trial court erred in finding that plaintiffs failed to state a claim, particularly in its failure to draw a critical distinction between this case and *Lowe*. In *Lowe*, plaintiff alleged that she had suffered no *present* injury and sought to establish a medical monitoring program to limit the risk of future harm caused by defendants' negligence in designing, marketing and selling cigarettes. Both this court and the Supreme Court refused to extend common law negligence to provide a program of medical screening because of the lack of a present injury.

This case differs from *Lowe* in significant respects. Here, plaintiffs assert injuries by virtue of the disclosure of confidential medical records. As our courts have recognized, disclosure of confidential patient information is an injury to the patient. *Humphers v. First Interstate Bank of Oregon*, 298 Or 706, 709 (1985). This stems in part from the special relationship between medical providers and patients. *Rockhill v. Pollard*, 259 Or 54, 62 (1971) (special duty of physician; tort of outrage); *Curtis v. MRI Imaging Services II*, 148 Or App 607, 618-20 (1997), *aff'd*, 327 Or 9 (1998) (special relationships of allied medical providers). In addition, state and federal law provide that medical records are confidential, setting detailed standards for protection of patients'

privacy. ORS 192.518 and 45 C.F.R. §§160 and 164. This case therefore differs from *Lowe* because here plaintiffs seek relief for a present injury.

The trial court also erred in granting defendant's motion to strike class allegations pursuant to ORCP 32I. On one level, the trial court erred because ORCP 32I applies only to class claims for money damages, whereas the trial court struck all class allegations, including those seeking only equitable relief. On another level, the trial court erred in finding that Providence provided an adequate remedy under ORCP 32I. Despite well-established principles that non-economic damages may be recovered for breach of confidentiality, Providence offered no such compensation. Defendant's remedy was also inadequate because it offered credit monitoring for an insufficient duration, did not tell the class that it will pay for credit restoration, and did not pay the class for out-of-pocket losses or reimburse them for inconvenience or lost time.

Plaintiffs assign error to the granting of the ORCP 21 motion to dismiss and the motion to strike class allegations made under ORCP 32. Plaintiffs seek reversal and remand to the trial court.

## **7. Facts.**

In late December 2005, defendant Providence left more than 350,000 of its current and former patients at an increased risk of identity theft and credit fraud. A Providence employee, with defendant's full knowledge and consent, removed from its premises unencrypted computer backup tapes and disks

containing 18 years of personal patient data. The employee left the tapes and disks in his car overnight. They were stolen in an apparent car prowl. Third Amended Complaint at ¶¶ 1, 7, 27.

Providence admits, “[t]he disks and tapes contained information about the plaintiffs that a person could use to steal the plaintiffs’ identities.”

Defendant’s Motions to Dismiss, p. 2. They contain social security numbers, patient names, addresses, birthdates, and for some class members credit card numbers, banking information, diagnoses, physician names, and insurance information. Third Amended Complaint at ¶ 9; Plaintiffs’ Response to Defendant’s Motion to Strike Class Allegations Pursuant to ORCP 32I and 32E(4) (“Motion to Strike Response”), p. 2.

Defendant first reported the data loss on December 31, 2005. However, it did not inform patients and former patients of the incident until it sent them a letter on January 24, 2006. Third Amended Complaint at ¶ 8. Instead of acting to protect the interests of the class, defendant informed them that they must take steps to protect themselves. *Id.* at ¶ 1.

In January 2006, plaintiffs filed this lawsuit as a proposed class action on behalf of all persons whose information was contained in the disks and tapes. Plaintiffs and the class seek an injunction requiring defendant to set up a system at its expense to request fraud alerts under the Fair Credit Reporting Act, to notify the Social Security Administration of the theft, to fund the monitoring of

patients' credit reports, and to fund the repairs of credit fraud that may occur in the future. Third Amended Complaint at ¶ 1. They also seek to recover for inconvenience, out-of-pocket expense and emotional distress, and for impairment of access to credit. *Id.* at ¶ 1.

Providence offered no credit monitoring or credit restoration services to the class until after plaintiffs filed this lawsuit. Defendant's Motion to Strike Class Allegations, p. 4. Providence provided only one year of credit monitoring to the class. *Id.* at p. 5.

The trial court heard oral argument on these motions on November 3, 2006. At that time, Providence indicated that it would extend the credit monitoring period for a second year. Tr. 53. According to Providence, this extension was not required, but was instead "a gift." Tr. 67, l. 11.

Providence was privately willing to entertain the requests of class members for credit restoration and reimbursement of their out-of-pocket losses and their lost time. Defendant addressed such requests with individual class members who independently contacted it. However, defendant never notified the class that they could seek such relief directly from Providence. Motion to Strike Response at pp. 5-12. In addition, Providence did not offer class members any compensation for non-economic damages because it asserts that class members are not entitled to that relief. Tr. 64.

## **I. PLAINTIFFS' FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' NEGLIGENCE CLAIMS**

### **A. Preservation**

Defendant raised the issue of whether plaintiffs stated a claim for relief in negligence when it filed Defendant's Motions to Dismiss, citing ORCP 21A(8). Plaintiffs preserved the argument when they filed their opposition. The trial court granted the motions in its order, dismissed the complaint, and entered a general judgment.

### **B. Standard of Review**

The court reviews the grant of a motion to dismiss under ORCP 21 for failure to state claim as a matter of law. The court assumes the truth of all allegations in the complaint, as well as any inferences that may be drawn from them, viewing the allegations and inferences in the light most favorable to the plaintiff. *L.H. Moss Electric v. Hyundai Semiconductor*, 187 Or App 32, 35 (2003).

### **C. Argument**

#### **1. Oregon recognizes claims for improper disclosures of medical records.**

In granting the motion to dismiss, the trial court treated this case as a new, cutting-edge claim that had no basis in existing law. Issues of data security, encryption, HIPAA regulations, and identity theft are features of a

technologically complex medical delivery system. However, there is nothing novel in asserting claims arising from the improper disclosure of records.

Indeed, the underlying principles take root in the earliest of common law cases. “A physician's liability for disclosing confidential information about a patient is not a new problem.” *Humphers v. First Interstate Bank of Oregon*, 298 Or 706,709 (1985). The Court in *Humphers* found the antecedents of claims for breach of confidentiality in a 232 year-old Lord Mansfield opinion discussing a surgeon’s disclosure of secrets. 298 Or at 721, 721 n 16 (citing, *R v. Kingston (Duchess)*, (1776) 20 Howell State Trials 355).

The trial court missed the mark by focusing on *Lowe v. Philip Morris*, 207 Or App 532 (2006) *aff’d*, \_\_\_ Or \_\_\_, \_\_\_ P3d \_\_\_, 2008 WL 1903463 (May 1, 2008). This case and *Lowe* share a similarity only in nomenclature. The plaintiff sought equitable relief in *Lowe* for medical monitoring. 2008 WL 19303463, \*1. In this case, plaintiffs seek, among other things, credit monitoring.

The key distinction between the cases is one that proved pivotal in *Lowe* and should be dispositive in this case. In *Lowe*, the plaintiff specifically alleged that she had suffered no present physical injury, and that medical monitoring was necessary to prevent or limit future harm. 2008 WL 19303463, \*1-\*2.<sup>1</sup> In

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<sup>1</sup> While the trial court did not have the benefit of the Supreme Court’s opinion when it decided this case, it cited and relied upon this court’s decision in *Lowe*. This court affirmed the trial court’s dismissal in *Lowe* because the plaintiff in *Lowe* had alleged no present injury. *Lowe*, 207 Or App at 553-54.

this case, plaintiffs repeatedly allege that they did suffer a present injury as a result of defendant's conduct. Third Amended Complaint, ¶¶ 1, 10, 21, 24.

Plaintiffs' position is hardly novel, as other jurisdictions recognize the tort of unauthorized disclosure of medical confidences. In *Biddle v. Warren Gen. Hosp.*, 715 NE2d 518, 86 Ohio St3d 395 (1999), the Ohio Supreme Court conducted a detailed analysis of jurisdictions recognizing the tort of unauthorized disclosure. 715 NE2d at 523 (citations omitted). The Ohio court recognized the independent tort in Ohio in a class action alleging breach of privacy by a hospital's unauthorized disclosure of patient medical records to a law firm that solicited patients for social security claims.

In *May v. Dartmouth Hitchcock Medical Center*, 2003 WL 21488697, \*1 (US Dist Ct D NH 2003) (June 24, 2003), the court in New Hampshire held that a patient could state a claim in negligence for a hospital's failure to train and supervise an employee that disclosed patient confidences. The *May* court recognized that it was the disclosure of information that caused injury. *Id.* The court in *May* relied in part on the great weight of authority from other jurisdictions recognizing the claim. *Id.*, \*2.

In *Fairfax Hospital v. Curtis*, 492 SE2d 642, 254 Va 437 (1997), the Virginia Supreme Court recognized a cause of action for a health care provider's disclosure of confidential medical records. The court in *Fairfax Hospital* held that "a health care provider owes a duty of reasonable care to the

patient,” including, an “obligation to preserve the confidentiality of information about the patient which is communicated to the health care provider....” 492 SE2d at 644.

Providence has previously asserted that no one knows whether the thief actually read the records, accessed the information they contain, or threw the disks and tapes away without reading them. Two answers address this point. First, the standard of review prohibits the argument. Properly drawn inferences establish that disclosure occurred.

Second, the injury to plaintiffs’ privacy rights happened when the thief took the data following defendant’s negligent failure to safeguard it. That is, the injury occurred when an unauthorized third party took possession of the records. Had this case involved the theft of conventional paper medical charts, the injury would have happened when the thief took hold of the file. Disclosure is the injury. The thief’s hypothetical illiteracy or disinterest in them would not change the fact of injury upon disclosure. Possession of the records marks the boundary, even if the thief makes no further use of the information.

In sum, the common law has long recognized that patients’ privacy is a legally protected interest. The trial court erred in dismissing the common law count of the negligence claim.

## 2. Negligence per se

The trial court dismissed both counts of the negligence claim. For that reason, plaintiffs separately address the negligence per se count.

State and federal law set independent standards that govern defendant's conduct. Standards exist to protect patients from unauthorized disclosure and use of private medical information.

As to State law, ORS 192.518 *et seq.* governs the handling of patient medical records. The rules exist to protect patients from unauthorized disclosures of medical records.<sup>2</sup> Under the statute, use or disclosure of private medical records is allowed only under controlled circumstances. ORS 192.520. Confidentiality and non-disclosure are required except as allowed by the statute. The statute explicitly distinguishes between unlawful use on the one hand and disclosure on the other. ORS 192.518; ORS 192.520. Those distinctions are consonant with the common law's long-standing recognition of patients' medical privacy rights. The statutes do not create a new private right of action, ORS 192.524, but do set a standard of care.

Federal regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA) separately fix additional standards of care and

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<sup>2</sup> In pertinent part, the statute provides: "It is the policy of the State of Oregon that an individual has: (a) The right to have protected health information of the individual safeguarded from unlawful use or disclosure;" ORS 192.518(1)(a).

define duties. For example, 45 C.F.R. §164.306 requires a health care provider to:

- 1) “ensure the confidentiality” of electronic information (45 CFR §164.306(a)(1));
- 2) “protect against any reasonably anticipated hazards to the security or integrity of such information.” (45 CFR §164.306(a)(2)); and
- 3) “protect against any reasonably anticipated uses or disclosures of such information that are not permitted (45 CFR §164.306(a)(3)).

Relying on *Scovill v. City of Astoria*, 324 Or 159 (1996), Providence argued that the trial court should dismiss the negligence per se count because there is no right of action under the statute. In *Scovill*, plaintiff asserted that violation of a statute amounted to a statutory tort, which is an express right of action created by statute. *Scovill*, 324 Or at 162. Whether a statute creates a right of action is a separate question from whether a statute or rule sets a standard of care that applies to a particular case. *Scovill*, 324 Or at 163.

Plaintiffs do not assert that they have direct rights of action under either the cited statute or rule. However, that is not the end of the inquiry because a statute or rule may create a standard of care when: i) plaintiffs are among the class of people intended to be protected by the statute or rule; and ii) the harm suffered is of a kind that the statute or rule was intended to prevent. *McAlpine v. Multnomah County*, 131 Or App 136, 144 (1994), *rev den*, 320 Or 507 (1995).

Negligence per se may exist in the absence of a private right of action and vice-versa. *Shahtout v. Emco Garbage*, 298 Or 598, 600-01 (1985); *Scovill*, 324 Or at 166 (negligence per se is a separate inquiry from statutory tort). The absence of an express right of action does not determine whether an injured person may assert a negligence per se claim. As the Court explained in *Shahtout*, 298 Or at 601:

“[T]he question is whether the rule, though it was not itself meant to create a civil claim, nevertheless so fixes the legal standard of conduct that there is no question of due care left for a factfinder to determine; in other words, that noncompliance with the rule is negligence as a matter of law.”

The specific wording of ORS 192.524 is instructive. The statute provides, “Nothing in ORS 192.519 or 192.520 may be construed to create a *new* private right of action against a health care provider or a state health plan.” (Emphasis supplied.) There is nothing “new” about plaintiffs’ cause of action. The trial court erred in dismissing the negligence per se count.

## **II. PLAINTIFFS’ SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS’ UNLAWFUL TRADE PRACTICES ACT CLAIM**

### **A. Preservation**

Defendant raised the issue of whether plaintiffs stated a claim for relief under the Unlawful Trade Practices Act, ORS 646.605 *et seq.* when it filed Defendant’s Motions to Dismiss, citing ORCP 21A(8). Plaintiffs preserved the

argument when they filed their opposition. The trial court granted the motion in its order, dismissed the complaint, and entered a general judgment.

### **B. Standard of Review**

The court reviews the grant of a motion to dismiss under ORCP 21 for failure to state claim as a matter of law. The court assumes the truth of all allegations in the complaint, as well as any inferences that may be drawn from them, viewing the allegations and inferences in the light most favorable to the plaintiff. *L.H. Moss Electric*, 187 Or App at 35.

### **C. Argument**

The Unlawful Trade Practices Act (UTPA) prohibits representations that “services have\*\*\*characteristics\*\*\*or qualities” that they do not have. ORS 646.608(1)(e). The UTPA further prohibits representations that “goods or services are of a particular standard, quality or grade \*\*\*.” ORS 646.608(1)(g). Under the statute, a “representation” is “any manifestation of any assertion by words or conduct \*\*\*.” ORS 646.608(2).

In a separate action, *In the Matter of: Providence Health System Oregon, State of Oregon*, Multnomah County Circuit Court Case No. 0609-1076, Providence entered into an assurance of voluntary compliance with the Oregon Department of Justice for matters at issue in this case.<sup>3</sup> The UTPA creates and

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<sup>3</sup> A copy of the signed assurance of voluntary compliance can be found in the record. Declaration of Brian S. Campf in Support of Plaintiffs’ Response to Defendant’s Motion to Strike Class Allegations Pursuant to ORCP 32I and 32E(4), ¶ 5 and Ex. 3.

defines the assurance of voluntary compliance. ORS 646.632(2). Once approved by the court and filed, the assurance of voluntary compliance acts as a judgment in favor of the State. ORS 646.632.

The UTPA provides that an order signed under ORS 646.632, including an assurance of voluntary compliance, has certain ramifications. Most notably, the order is “prima facie evidence in an action brought under this section that the respondent used or employed a method, act or practice declared unlawful by ORS 646.608, but an assurance of voluntary compliance, whether or not approved by the court, shall not be evidence of the violation.” ORS 646.638(5).

Under the statute, plaintiffs have established a prima facie case, even if the document is not otherwise admissible at trial. Still, the necessary implication of establishing the prima facie case is that plaintiffs have shown that the UTPA applies and that there is evidence from which a jury could conclude that Providence engaged in an unlawful trade practice.

Despite the existence of the assurance of voluntary compliance, the trial court dismissed the UTPA claim for failure to state a claim. The court did not explain its reasoning. To the extent that the trial court intended to rely on its interpretation of *Lowe v. Philip Morris*, 207 Or App 532, the analysis plainly could not apply to the UTPA claim because plaintiffs must show that they suffered an ascertainable loss to state a claim.

Using the appropriate standard of review, it is clear that plaintiffs suffered ascertainable losses. Plaintiffs alleged that they suffered out-of-pocket expenses as a result of the violations of the UTPA. Third Amended Complaint, ¶¶ 34 and 24. Also, when defendant offered medical services that lacked proper confidentiality features, the services were worth less than the amounts charged. *See Scott v. Western Intern. Surplus Sales, Inc.*, 267 Or 512, 515-16 (1973) (ascertainable loss satisfied with purchase of tent sold by defendant that lacked features pictured on promotional materials; tent was presumably worth less than the represented version). The trial court erred in dismissing the UTPA claim.

### **III. PLAINTIFFS' THIRD ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO STRIKE THE PLAINTIFFS' CLASS CLAIMS**

#### **A. Preservation**

Defendant raised the issue of whether the court should strike plaintiffs' class claims when it filed Defendant's Motion to Strike Class Allegations Pursuant to ORCP 32I and 32E(4), citing ORCP 32I and ORCP 32E(4). Plaintiffs preserved the argument when they filed their opposition. The trial court granted the motion in its order, struck all class allegations, and entered a general judgment.

#### **B. Standard of Review**

No Oregon decision sets forth the standard by which an appellate court reviews the grant of a motion to strike class allegations pursuant to ORCP 32I

and 32E(4). Because the court's dismissal under ORCP 32 arose from its determination that defendant complied with ORCP 32I, and because there is no factual dispute, plaintiffs contend that whether defendant met its burden of demonstrating compliance with ORCP 32I is a question of law. The correct standard of review is therefore for errors of law. *See Tompte v. Stone*, 195 Or App 599, 601, 98 P 3d 1171 (2004) ("Plaintiffs assert that the trial court erred in finding that defendant's abandoned property notice substantially complied with the requirements of ORS 90.425. We review for errors of law and reverse."). A less deferential standard of review is appropriate because the trial court's determination cuts off damage claims for 350,000 Oregonians without the benefit of a trial.

### **C. Argument**

The trial court erred in the following respects in granting defendant's motion to strike the class allegations:

1. The trial court made an error of law in applying ORCP 32I to plaintiffs' equitable claims for relief.

ORCP 32I provides that no class action "for damages" may be maintained if, in relevant part, all identified potential class members "have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong," ORCP 32I(2), and that "such compensation, correction, or remedy has been, or, in a reasonable time, will be, given." ORCP 32I(3).

Plaintiffs seek equitable relief in addition to money damages. Plaintiffs seek an injunction requiring defendant to fund the monitoring of patients' credit reports. Credit monitoring acts as a detection device by alerting someone to possible misuses of their credit. Plaintiffs also seek an injunction requiring Providence to set up a system at its expense to request fraud alerts under the Fair Credit Reporting Act, to notify the Social Security Administration of the theft, and to fund the repairs of credit fraud that may occur.

These forms of relief are purely equitable. ORCP 32I does not apply to them. Because ORCP 32I applies only to actions for damages, that rule cannot be used as a basis for dismissing the equitable claims. The trial court states in its opinion that it is granting the motion to strike the "class claims for damages," Order, p. 2 (ER p. 24), but in so holding the court made an error of law in failing to carve out from its ruling plaintiffs' equitable claims for relief.

2. To the extent that the trial court relied upon ORCP 32E(4) as a basis for dismissing the lawsuit it made an error of law.

Providence captioned its motion to strike as a "motion to strike class allegations pursuant to ORCP 32I and 32E(4)." The court granted the motion in its entirety. ORCP 32E(4) permits the Court to order a plaintiff to eliminate class action allegations from a pleadings. At the time this case was dismissed, discovery had been limited to issues concerning ORCP 32I, and did not include class certification discovery and briefing. Appellants had no opportunity to build a record supporting class certification under ORCP 32A and 32B. The

trial court therefore made an error of law in using ORCP 32E(4) as a basis for striking the class claims for damages.

3. The trial court erred as a matter of law in concluding that Providence satisfied its burden of proving that it met the requirements of ORCP 32I.

The trial court held that Providence offered the proposed class the necessary compensation, correction, or remedy to redress the consequences of its data loss, and that as a result defendant satisfied the requirements of ORCP 32I. Providence stated in its reply brief that plaintiffs' letter sent pursuant to ORCP 32H asked for (a) credit monitoring; (b) credit restoration services; and (c) compensation for "injuries suffered" as a result of the theft of the tapes and disks. According to Providence, "[b]ecause Plaintiffs never identified what 'injuries' they suffered as a result of the theft, Providence was left to guess as to what remedies to provide, and responded with a proposal for credit monitoring, credit restoration, and a pledge to compensate any potential class member for any direct financial losses suffered as a result of the theft." Defendant's Reply in Support of Motion to Strike Class Allegations, p. 2.

In fact, plaintiffs were specific in their pleading about both the alleged wrongs and the required remedies. Before the 30 day period of ORCP 32H expired, defendant possessed both plaintiffs' initial pleading and their ORCP 32H letter. The complaint specified that plaintiffs seek an injunction requiring defendant to set up a system at its expense to request fraud alerts under the Fair

Credit Reporting Act, to notify the Social Security Administration of the theft, to fund the monitoring of patients' credit reports, and to fund the repairs of credit fraud that may occur in the future. Complaint at ¶ 1. The complaint also made clear that they would seek damages for inconvenience, out-of-pocket expense and emotional distress. *Id.* at ¶ 12G.

Providence did not need to “guess” about the relief plaintiffs sought. Instead, defendant ignored the pleading, doled out the relief it unilaterally chose to give, and failed to correct the alleged wrongs by disregarding plaintiffs' other claims. Providence brushes past this fact by asserting that plaintiffs' other claims are not “appropriate” relief. Defendant's Reply in Support of Motion to Strike Class Allegations, pp. 3-4. However, the following demonstrates that defendant's response was inadequate under ORCP 32I. Additional relief is necessary. The trial court made errors of law in concluding otherwise.

(a) Providence has not offered the class non-economic damages.

Plaintiffs seek non-economic damages for their inconvenience and emotional injuries. Third Amended Complaint at ¶ 1. Having not offered or provided such compensation to the class, Providence failed under ORCP 32I to satisfy those claims. Defendant incorrectly asserts that it need not offer emotional distress damages because such a claim is not certifiable in a class action. Defendant's Reply in Support of Motion to Strike Class Allegations, pp. 10-11. In fact, it is fundamental to class action jurisprudence that differences in

damages do not preclude certification. *Hurt v. Midrex Div. of Midland Ross Corp.*, 276 Or 925, 930 (1976). Moreover, defendant's argument is misplaced; it belongs in class certification briefing, not in a motion to strike.

Even if the court considers defendant's argument, the argument cannot support the result reached by the trial court, as nothing in ORCP 32 prohibits certification of classes for claims involving non-economic damages. If on other grounds the trial court declined to certify claims for non-economic damages, that decision would not end the inquiry; the trial court still would need to consider whether to certify an issue class of common liability issues. *See generally Shea v. Chicago Pneumatic Tool Co.*, 164 Or App 198 (1999), *rev den*, 300 Or 252 (2000). If the trial court certifies the common liability issues and treats damages as individual issues, many potential damage issues could be avoided. As to their UTPA claims, each consumer would be entitled to recover statutory damages of \$200 merely by showing that he or she suffered some ascertainable loss as a result of the UTPA violation. ORS 646.638(1). *Scott*, 267 Or at 515.<sup>4</sup> Under this scenario, consumers could accept statutory damages upon proof of membership in the class and causation. Alternatively, class members could opt to seek additional damages in later proceedings.

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<sup>4</sup> The limitation on recovery of the statutory penalty under the Unlawful Trade Practices Act applies only to class actions "maintained for the recovery of statutory minimum penalties." ORCP 32K. An issue class addressing only common liability issues and excluding class member damages would fall outside the limitations of ORCP 32K.

- (b) Providence has not offered credit monitoring for a sufficient duration.

Plaintiffs' complaint seeks on-going credit monitoring. Third Amended Complaint at ¶ 22. As part of its failed attempt to remedy the problem, Providence provided one year of credit monitoring. Well after the 30-day remediation period, Providence increased the monitoring to two years. Providence labeled its increase "a gift." Regardless of the label, extending the one year of monitoring by a second year implicitly admits that Providence's initial one year period was insufficient. The tardy "gift" does not meet the requirements of ORCP 32I. When read in conjunction with ORCP 32H, the class action rule allows a defendant 30 days to act, not more.

The legislative history of ORCP 32 supports plaintiffs' position. Senator Keith Burns was one of the principal sponsors of Senate Bill 163 (which became ORCP 32). According to the records of a Senate Judiciary Committee public hearing on April 11, 1973, "Senator Keith Burns pointed out ... that there was a provision for a thirty day notice to correct any violation of the law." Minutes, April 11, 1973, p. 6. On behalf of Legal Aid, Charlie Williamson testified before the Senate Judiciary Committee on May 9, 1973. The minutes state, "Mr. Williamson said the amendments provided for a pre-hearing notice that gave the defendant 30 days to remedy the situation." Minutes, May 9, 1973, p. 6.

Further, two years of monitoring is insufficient according to Providence's own corporate witness. She testified that at least three years of credit monitoring is necessary to reassure the class. Motion to Strike Response, p. 7. Indeed, Providence recognized that the risks from disclosure can last for years by attributing some class members' claims of credit fraud after this December 2005 theft to a 1997 theft of Department of Motor Vehicle records. *Id.*, p. 7. Two years of monitoring is not an "appropriate compensation, correction, or remedy" under ORCP 32I. Providence asserts that a one year monitoring contract is the industry standard, but in obtaining a second year of monitoring Providence has shown that it can add monitoring for the class at its discretion.

- (c) Providence did not tell the class that it will pay for credit restoration.

The assurance of voluntary compliance that Providence signed required it to provide credit restoration services until December 31, 2007 to any patient whose information was on the stolen disks and tapes if, after an investigation by a third party, Providence cannot show that the credit was obtained through an act other than the loss of Providence's records. Yet Providence never informed the class that it will do so. Motion to Strike Response, p. 8. By agreeing to provide a benefit to the class, but then not telling the class of that benefit, Providence did not offer "appropriate compensation, correction, or remedy of the alleged wrong" under ORCP 32I.

- (d) Providence has not offered to reimburse the class for out-of-pocket losses, inconvenience, or time lost.

Plaintiffs' complaint seeks damages for out-of-pocket losses, inconvenience, and time lost from employment. Third Amended Complaint at ¶¶ 1, 24. Providence reimbursed some class members who asked for payment of their expenses in connection with the data loss, including mail charges, death certificates costs, and expenses for credit monitoring class members bought before Providence offered it to the class. Motion to Strike Response, pp. 8-10.

Similarly, Providence's corporate witness testified that defendant declined to reimburse a class member whose hours spent on the matter seemed excessive. However, she added that if this person had presented "additional information" showing that his spent hours were due to the letter Providence sent as a result of the data theft, "we would have talked further" about the amount Providence would be willing to pay. *Id.*, pp. 10-11.

Providence clearly regards such payments as "appropriate compensation" under ORCP 32I(2). However, Providence has never told the class that it would reimburse them for such costs. By not offering the class the opportunity to seek this reimbursement, Providence did not provide "appropriate compensation, correction, or remedy of the alleged wrong" pursuant to ORCP 32I.

Providence attempts to deflect plaintiffs' assertion that reimbursement should have been offered class-wide by emphasizing that it did not seek dismissal under ORCP 32I based on any of those additional remedies.

Defendant's Reply in Support of Motion to Strike Class Allegations, pp. 11-12. In so doing, Providence defines "appropriate" to mean that which it unilaterally elected to offer to the class, with the relief it opted to not offer them being "inappropriate." Providence is applying the wrong standard. The correct inquiry must also consider the relief that plaintiffs contend is appropriate. Otherwise, ORCP 32I would permit a defendant to unilaterally end a proposed class action by itself defining the scope of relief.

4. Reversal on ORCP 32I grounds is necessary.

If this case involved a bank overcharge of \$20 per customer, and plaintiffs had sued to recover \$20 apiece for themselves and a class, the bank could remedy the problem within 30 days and avoid class action litigation. If that were this case, Providence's argument that it should avoid class action litigation because it cured the alleged wrong would make sense.

Here, however, the alleged wrongs raise a need for relief that goes deeper than Providence's one-time offer. Providence's loss of medical, financial and personal data was and remains a significant cause for class-wide alarm. The disclosure violated the doctor-patient trust. Hundreds of thousands of people are at an increased risk of identity theft and are distressed about it. Class members were inconvenienced and spent time and money to protect themselves before Providence lifted a finger to do so. This is not a case where a \$20 credit will

resolve a \$20 overcharge. A band aid will not heal this open wound. Genuine relief is necessary and Providence has refused to provide it to the class.

Plaintiffs' class action complaint made clear they would seek damages for their emotional distress, inconvenience, and out-of-pocket expenses. Complaint at ¶ 12G. Their ORCP 32H letter sought compensation for "injuries suffered" by the class. Emotional injury damages are compensable, as are damages for inconvenience, time lost, and out-of-pocket expenses. So are the forms of injunctive relief that plaintiffs sought and that Providence ignored.

Providence failed to provide an appropriate remedy in refusing to offer such compensation to the class. In reaching a different conclusion, the trial court's opinion omits any discussion of the legal standard by which the court assessed defendant's burden of proof and plaintiff's rebuttal evidence under ORCP 32I. What is clear is that the trial court committed errors of law in construing ORCP 32I and in concluding from the evidence that defendant had met its burden of proof. The trial court's ruling should be reversed.

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**IV. CONCLUSION**

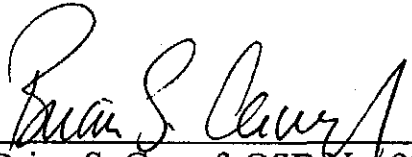
The trial court erred in dismissing this lawsuit and should be reversed.

Dated this 16th day of May, 2008.

Respectfully submitted,



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Of Attorneys for Plaintiffs-Appellants

**APPELLANTS' EXCERPT OF RECORD**

## INDEX TO APPELLANTS' EXCERPT OF RECORD

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Plaintiffs' Third Amended Complaint and Demand for Jury Trial (CR49)	ER-10
Order Granting Defendant's ORCP Motions to Dismiss (CR72)	ER-23
General Judgment (CR73)	ER-26

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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
IN AND FOR THE COUNTY OF MULTNOMAH

LAURIE PAUL, individually and on behalf of  
all other similarly-situated individuals,

Plaintiff,

vs.

PROVIDENCE HEALTH SYSTEMS-  
OREGON, an Oregon non-profit corporation,

Defendant.

Case No.

**COMPLAINT AND DEMAND FOR JURY  
TRIAL**

PERSONAL INJURY  
CLASS ACTION  
(Negligence/negligence per se)

**0601-01059**

**Not subject to mandatory arbitration**

Plaintiff alleges:

**PRELIMINARY STATEMENT**

1.

This is a claim brought by plaintiff Laurie Paul for herself and for the class of similarly-situated current and former patients of Providence Health Systems for negligent loss and disclosure of protected health information. Pursuant to ORCP 32J, plaintiff presently seeks equitable relief but intends to amend her complaint to seek compensatory damages after the expiration of the period set forth in ORCP 32H. Plaintiff claims that defendants were negligent in failing to safeguard protected health information when it allowed an employee to store in his or her car the patient care records of an estimated 365,000 patients. As defendant has admitted,

1 the patient information was stolen. The information in question included social security numbers  
2 and clinical information. As a result of the theft, the affected patients have been put in jeopardy  
3 of identity theft, with potential consequences that include abuse and misuse of confidential  
4 patient information, personal data, financial records, and benefit rights. Defendants have  
5 informed plaintiff and the class of the theft but have failed to take any actions to protect patients  
6 from misuse of this information; rather, defendant has informed plaintiff and the class that they  
7 must take steps to protect themselves. For the present, plaintiff and the class seek an injunction  
8 requiring defendants to set up a system at their expense to request fraud alerts under the Fair  
9 Credit Reporting Act, to notify the Social Security Administration, to fund the monitoring of  
10 patients' credit reports, and to fund the repairs of credit that may occur in the future. At the  
11 expiration of the 30-day notice period set forth in ORCP 32H, plaintiff intends to amend her  
12 complaint to add a claim for money damages.

### 13 PARTIES

14 2.

15 Laurie Paul, plaintiff, resides in Oregon. She is a former patient of the Providence Health  
16 System who received a letter dated January 24, 2006 disclosing that computerized patient records  
17 of 365,000 patients were stolen from an employee's car where they had been stored overnight.

18 3.

19 Defendant Providence Health System-Oregon is a domestic non-profit corporation  
20 licensed to do business and doing business in Oregon.

### 21 JURISDICTION AND VENUE

22 4.

23 All of the claims giving rise to this action accrued in Oregon. Defendant engages in  
24 regular, sustained business in Multnomah County. Further, patients affected by this case reside  
25 in Multnomah County. Defendant's Registered Agent, Data Research, Inc., is also located in  
26 Multnomah County.

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5.  
Plaintiff and similarly-situated class members' claims are based only on State law. Plaintiff makes no federal claims in this case. Based on information and belief, the primary defendants are Oregon corporations and more than two thirds of the class reside in Oregon. Further, no individual's claim in this case is worth more than \$75,000.

**ALLEGATION OF FACTS COMMON TO ALL CLAIMS**

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6.  
On or about December 31, 2005, computer disks and tapes containing patient information were stolen from a car where the data was stored overnight. The car belonged to defendant or to defendant's agent or employee who was, at all material times, acting within the course and scope of his or her agency or employment.

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7.  
Defendant first reported the data loss on December 31, 2005. However, it did not inform patients and former patients of the incident until it sent a letter out on January 24, 2006.

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8.  
The stolen data included social security numbers and patient care information, which is health information that is confidential, as defined by state and federal law. (ORS 192.518 *et seq.*; 45 CFR §§160.103).

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9.  
The theft of data exposed plaintiff and members of the class to loss of privacy, identity theft, with attendant financial losses and future expense of monitoring credit reports, together with repair costs of credit damage caused by the theft of data.

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CLASS ALLEGATIONS

10.

The class consists of current and former patients of Providence Health Systems whose patient information was stored on computer backup disks and tapes that were stolen from an employee or agent of Providence Health Systems and Providence Home Services.

11.

Based on information and belief, plaintiffs estimate that there are more than 375,000 members of the class. Members of the classes are so numerous that joinder of all or most of them is impracticable.

12.

There are questions of fact and law common to the classes in that each class member has suffered an injury as a result of defendants' conduct. Common questions of law and fact predominate over any questions affecting only individual class members.

Common questions include:

- A. Whether defendant was negligent in handling patient information that was stored on computer backup disks and tapes;
- B. Whether defendant complied with the requirements of the Health Insurance Portability and Accountability Act and its implementing regulations;
- C. Whether defendant complied with ORS 192.518, the Protected Health Information Act;
- D. Whether defendant took appropriate steps to secure the stolen information, including encryption and securing the tapes and disks;
- E. Whether plaintiff and members of the class are entitled to equitable relief to require defendant to fund the future costs associated with the monitoring of patient credit information for class members;

- 1 F. Whether plaintiff and class members are entitled to equitable relief to require  
2 defendant to fund the future costs of credit repair for those class members who  
3 suffer financial loss from identity theft; and
- 4 G. Whether plaintiffs and members of the class will be entitled to damages for  
5 inconvenience, out-of-pocket expense and emotional distress caused by  
6 defendant's failure to secure the confidential information.

## 7 13.

8 The claims of the named plaintiff are typical of the claims of the class in that:

- 9 A. All claims involve identical conduct in that the loss arose from a single incident  
10 that occurred on or about December 31, 2005;
- 11 B. Defendant sent identical letters to plaintiff and members of the class advising  
12 them of the loss of data and advising them to take the same precautions to protect  
13 themselves;
- 14 C. The injuries suffered by the named plaintiffs and the class members differ only in  
15 the amount of damage; and
- 16 D. The named plaintiff's claims for relief are based upon the same legal theories as  
17 are the claims of the class members.

## 18 14.

19 The named plaintiff will fairly and adequately protect and represent the interests of the  
20 class in that:

- 21 A. The claims are typical of the claims of the class members;
- 22 B. She is represented by attorneys who are qualified and competent and who will  
23 vigorously prosecute this litigation; and
- 24 C. Her interests are not antagonistic to or in conflict with the interests of the class  
25 members.
- 26

15.

1  
2 A class action is superior to other available methods for the fair and efficient adjudication  
3 of this case in that:

- 4 A. Common questions of law and fact predominate over factors affecting only  
5 individual members;
- 6 B. As far as plaintiffs know, no class action that purports to address this issue has  
7 been commenced;
- 8 C. Individual class members have little interest in controlling the litigation, due to  
9 the high cost of each individual action, the relatively modest amount of damages  
10 suffered by any individual plaintiff, and because plaintiff and their attorneys will  
11 vigorously pursue the claims;
- 12 D. The forum is desirable as defendants do business here;
- 13 E. A class action will be an efficient method of adjudicating the claims of the class  
14 members who have suffered relatively small monetary damages as a result of the  
15 same type of conduct by defendants; and
- 16 F. In the aggregate, class members have claims for relief that are significant in scope  
17 relative to the expense of the litigation.

18 16.

19 Plaintiff has filed only for equitable relief. Plaintiff has also delivered a notice and  
20 demand on defendants as required by ORCP 32H. After 30 days have run, plaintiff intends to  
21 amend the complaint to allege claims for money damages in addition to the claims for equitable  
22 relief.

23 **FIRST CLAIM: NEGLIGENCE**

24 **Count 1: Negligence Per Se**

25 17.

26 ORS 192.518(1) provides that Oregonians have the right to have their protected health

1 information safeguarded. Federal regulations in 45 CFR Parts 160 and 164 set forth standards  
2 for protecting patient information. For example, 45 CFR Section 164.306 provides that patients  
3 are entitled to have their health information protected to ensure confidentiality and integrity,  
4 including against reasonably anticipated threats or hazards to the integrity and continuing security  
5 of such data.

6 18.

7 Plaintiff and members of the class are members of the class of people intended for  
8 protection by the state statute and federal regulations. Theft of data and resulting identity theft  
9 are two of the types of harm that the rules were meant to prevent.

10 19.

11 Defendant was negligent in failing to comply with the standards set forth ORS 192.518 *et*  
12 *seq.* and 45 CFR Parts 160 and 164.

13 20.

14 Defendant's negligence caused or contributed to plaintiff's and class members' injuries.  
15 Plaintiff and class members suffered financial injury in the form of recurring future costs to  
16 monitor credit reports, recurring future costs to notify and re-notify credit bureaus of fraud alerts,  
17 costs of notification to the Social Security Administration and possible future costs of repair of  
18 identity theft.

19 21.

20 Plaintiff and class members lack an adequate remedy at law in that the monitoring needs  
21 are on-going to minimize future harm. Further, monetary damages will not fully and adequately  
22 compensate plaintiff and class members for future harm and on-going monitoring costs.

23 22.

24 Plaintiff and the class are entitled to an injunction that requires defendant to pay for on-  
25 going monitoring of credit reports, notify Social Security of the data loss, fund recurring credit  
26 bureau fraud alerts and pay for the future cost of possible loss and damage due to identity theft.

23.

Plaintiff and class members have suffered non-economic damages as well, in the form of worry and upset over the disclosure of confidential information. After the time set forth in ORCP 32H and 32I has passed, plaintiff anticipates making a claim for non-economic damages.

**Count 2: Common Law Negligence**

24.

Plaintiff incorporates ¶¶1-16; 20-23.

25.

Defendant was negligent in failing to safeguard the data, in failing to encrypt it, in allowing its agent or employee to store such data in his or her car, and in failing to put in place policies that would protect such data from theft and disclosure.

26.

As a result of defendant's negligence, plaintiff and class members suffered the previously-described injuries.

WHEREFORE, plaintiff and the class claims for relief against defendant as follows:

- a. An order certifying this matter as a class action;
- b. An injunction requiring defendant to fund the costs of credit monitoring, credit reporting, benefit reporting and repair damages caused by identity theft; and

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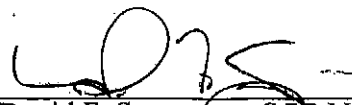
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- c. Judgment in their favor; and
- d. Costs and disbursements incurred in this action.

DATED this 30th day of January, 2006

Respectfully submitted,


PAUL & SUGERMAN, PC

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 E-Mail: dfs@pspc.com  
 Attorneys for Plaintiff and Trial Attorney

Plaintiff demands a jury trial.

DATED this 30th day of January, 2006

PAUL & SUGERMAN, PC

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 Attorneys for Plaintiff and Trial Attorney

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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
IN AND FOR THE COUNTY OF MULTNOMAH

RUSSELL GIBSON and WILLIAM  
WEILLER, DDS, individually and on behalf  
of all other similarly-situated individuals,

Plaintiffs,

vs.

PROVIDENCE HEALTH SYSTEMS-  
OREGON, an Oregon non-profit corporation,

Defendant.

Case No. 0601-01059

**PLAINTIFFS' THIRD AMENDED  
COMPLAINT AND DEMAND FOR JURY  
TRIAL**

**PERSONAL INJURY  
CLASS ACTION  
(Negligence/negligence per se)**

**Not subject to mandatory arbitration**

Plaintiffs allege:

**PRELIMINARY STATEMENT**

1.

This is a claim brought by plaintiffs Russell Gibson and William Weiller for themselves and for the class of similarly-situated current and former patients of Providence Health Systems for negligent loss and disclosure of protected health information and for violation of the Unlawful Trade Practices Act ORS 646.605 *et seq.* Plaintiffs claim that defendant was negligent in failing to safeguard protected health information when it allowed an employee to store in his or her car the patient care records of an estimated 365,000 patients. As defendant has admitted, the patient information was stolen. The information in question included social security

1 numbers, addresses, phone numbers, and patient information. As a result of the theft, the  
2 affected patients have been put in jeopardy of identity theft, with potential consequences that  
3 include abuse and misuse of confidential patient information, personal data, financial records,  
4 and benefit rights. Defendant has informed plaintiffs and the class of the theft but has failed to  
5 take any or sufficient actions to protect patients from misuse of this information; rather,  
6 defendant has informed plaintiffs and the class that they must take steps to protect themselves.  
7 Plaintiffs and the class seek an injunction requiring defendant to set up a system at its expense to  
8 request fraud alerts under the Fair Credit Reporting Act, to notify the Social Security  
9 Administration, to fund the monitoring of patients' credit reports, and to fund the repairs of  
10 credit fraud that may occur in the future. In addition, for themselves and for the class, plaintiffs  
11 seek damages for past and future out-of-pocket losses and past and future non-economic losses  
12 for impairment of access to credit, inconvenience and emotional distress.

### 13 PARTIES

14 2.

15 Plaintiff Russell Gibson resides in Oregon. He is a former patient of the Providence  
16 Health System who received a letter from Providence disclosing that computerized patient  
17 records of 365,000 patients were stolen from an employee's car where they had been stored  
18 overnight.

19 3.

20 Plaintiff, William Weiller, DDS, resides in Oregon. He is a former patient of the  
21 Providence Health System who received a letter from Providence disclosing that computerized  
22 patient records of 365,000 patients were stolen from an employee's car where they had been  
23 stored overnight.

24 4.

25 Defendant Providence Health System-Oregon is a domestic non-profit corporation  
26 licensed to do business and doing business in Oregon.



1 10.

2 The theft of data exposed plaintiffs and members of the class to loss of privacy, to past  
3 and future out-of-pocket losses associated with monitoring credit reports and placing and  
4 maintaining fraud alerts, to credit injuries inherent in credit monitoring and placing and  
5 maintaining fraud alerts, and to repair costs of credit damage caused by the theft of data.

6 **CLASS ALLEGATIONS**

7 11.

8 The proposed class consists of current and former patients of Providence Health Systems  
9 whose patient information was stored on computer backup disks and tapes that were stolen from  
10 an employee or agent of Providence Health Systems and/or Providence Home Services. The  
11 proposed class excludes all officers and directors of defendant, Judge Marilyn Litzenberger and  
12 her judicial staff, and any partner or employee of the law firm of Davis Wright Tremaine.

13 12.

14 Based on information and belief, plaintiffs estimate that there are more than 365,000  
15 members of the class. Members of the classes are so numerous that joinder of all or most of  
16 them is impracticable.

17 13.

18 There are questions of fact and law common to the class in that each class member has  
19 suffered an injury as a result of defendant's conduct. Common questions of law and fact  
20 predominate over any questions affecting only individual class members.

21 Common questions include:

- 22 A. Whether defendant was negligent in handling patient information that was stored on  
23 computer backup disks and tapes;
- 24 B. Whether defendant complied with the requirements of the Health Insurance Portability  
25 and Accountability Act and its implementing regulations;
- 26 C. Whether defendant complied with ORS 192.518, the Protected Health Information Act;

- 1 D. Whether defendant took appropriate steps to secure the stolen information, including  
2 encryption and securing the tapes and disks;
- 3 E. Whether plaintiffs and members of the class are entitled to equitable relief to require  
4 defendant to fund the future costs associated with the monitoring of patient credit  
5 information for class members;
- 6 F. Whether plaintiffs and class members are entitled to equitable relief to require defendant  
7 to fund the future costs of credit repair for those class members who suffer financial loss  
8 from identity theft;
- 9 G. Whether plaintiffs and members of the class will be entitled to damages for past and  
10 future out-of-pocket expenses, impairment of credit, inconvenience and emotional  
11 distress caused by defendant's failure to secure the confidential information;
- 12 H. Whether defendant's sales of medical devices and medical services are subject to the  
13 Unlawful Trade Practices Act, ORS 646.605;
- 14 I. Whether defendant violated ORS 646.608(1)(e) by representing that it would secure,  
15 protect and maintain privileged patient information when it did not;
- 16 J. Whether the requirements of state and federal law that place conditions on the sales of  
17 services create "representations" as defined by ORS 646.608(2) that are inherent in every  
18 covered transaction; and
- 19 K. Whether the trial court's remedial authority set forth in ORS 646.636 includes the power  
20 to order equitable relief in order to prevent or mitigate future harm?

## 14.

22 The claims of the named plaintiffs are typical of the claims of the class in that:

- 23 A. All claims involve identical conduct in that the loss arose from a single incident that  
24 occurred on our about December 31, 2005;
- 25 B. Defendant sent identical letters to plaintiffs and members of the class advising them of  
26 the loss of data and advising them to take the same precautions to protect themselves;

- 1 C. The named plaintiffs seek equitable relief and damages for themselves and the class;  
2 D. The injuries suffered by the named plaintiffs and the class members differ only in the  
3 amount of damage; and  
4 E. The named plaintiffs' claims for relief are based upon the same legal theories as are the  
5 claims of the class members.

6 15.

7 The named plaintiffs will fairly and adequately protect and represent the interests of the  
8 class in that:

- 9 A. Their claims are typical of the claims of the class members;  
10 B. They are represented by attorneys who are qualified and competent and who will  
11 vigorously prosecute this litigation; and  
12 C. Their interests are not antagonistic to or in conflict with the interests of the class  
13 members.

14 16.

15 A class action is superior to other available methods for the fair and efficient adjudication  
16 of this case in that:

- 17 A. Prosecution of separate actions against the defendant creates a risk of inconsistent or  
18 varying adjudications, with incompatible standards of conduct for defendant;  
19 B. Plaintiffs seek equitable relief with respect to the class as a whole;  
20 C. Common questions of law and fact predominate over factors affecting only individual  
21 members;  
22 D. Individual class members have little interest in controlling the litigation due to the high  
23 cost of each individual action, the relatively modest amount of damages suffered by any  
24 individual plaintiff, and because plaintiffs and their attorneys will vigorously pursue the  
25 claims;  
26

1 E. As far as plaintiffs know, no other class action that purports to address this issue has been  
2 commenced against this defendant;

3 F. This forum is desirable as defendant does business here;

4 G. A class action will be an efficient method of adjudicating the claims of the class members  
5 who have suffered relatively small monetary damages as a result of the same type of  
6 conduct by defendant; and

7 H. In the aggregate, class members have claims for relief that are significant in scope relative  
8 to the expense of the litigation.

9 17.

10 Plaintiffs previously filed for equitable relief only and then gave notice and demand on  
11 defendant as required by ORCP 32H. The applicable period has run. Accordingly, plaintiffs  
12 now allege claims for money damages, in addition to the claims for equitable relief.

13 **FIRST CLAIM: NEGLIGENCE**

14 **Count 1: Negligence Per Se**

15 18.

16 ORS 192.518(1) provides that Oregonians have the right to have their protected health  
17 information safeguarded. Oregon common law provides that medical information provided to a  
18 physician or nurse is confidential and privileged. Federal regulations in 45 CFR Parts 160 and  
19 164 set forth standards for protecting patient information. For example, 45 CFR Section 164.306  
20 provides that patients are entitled to have their health information protected to ensure  
21 confidentiality and integrity, including against reasonably anticipated threats or hazards to the  
22 integrity and continuing security of such data.

23 19.

24 Plaintiffs and members of the proposed class are members of the class of people intended  
25 for protection by the state statute, common law rule and federal regulations. Theft of data, threat  
26

1 of identity theft, credit fraud, and other types of fraud are among the types of harm that the rules  
2 were meant to prevent.

3 20.

4 Defendant was negligent in failing to comply with the standards set forth ORS 192.518 *et*  
5 *seq.* and 45 CFR Parts 160 and 164.

6 21.

7 Defendant's negligence caused or contributed to plaintiffs' and class members' injuries.  
8 Plaintiffs and class members suffered financial injury in the form of past and future costs to  
9 monitor credit reports, recurring future costs to notify and re-notify credit bureaus of fraud alerts,  
10 costs of notification to the Social Security Administration, the Immigration and Naturalization  
11 Agency, the Internal Revenue Service, State and Local law enforcement agencies and possible  
12 future costs of repair of identity theft.

13 22.

14 Plaintiffs and class members lack an adequate remedy at law in that the monitoring needs  
15 are on-going to minimize future harm. Further, monetary damages will not fully and adequately  
16 compensate plaintiffs and class members for future harm and on-going monitoring costs.

17 23.

18 Plaintiffs and the class are entitled to an injunction that requires defendant to pay for on-  
19 going monitoring of credit reports, notify Social Security of the data loss, fund recurring credit  
20 bureau fraud alerts and pay for the future cost of possible loss and damage due to identity theft.

21 24.

22 Plaintiffs and class members have suffered economic damages in the form of past out-of-  
23 pocket expenses for credit monitoring services, credit injury, postage, long distance and time loss  
24 from employment to address these issues. Plaintiffs and class members will continue to suffer  
25 these damages in the future, all to their economic damage in an amount to be proved at trial. In  
26 addition, plaintiffs and class members have suffered non-economic damages in the past and will

1 do so in the future in the form of impairment of access to credit inherent in placing and  
 2 maintaining fraud alerts, as well as worry and emotional distress associated with the initial  
 3 disclosure and the risk of any future subsequent identity theft, all to their non-economic damage  
 4 in amounts to be proved at trial.

5 25.

6 Plaintiffs are entitled to recover and recoup fees and costs from any recovery under the  
 7 common fund theory.

8 **Count 2: Common Law Negligence**

9 26.

10 Plaintiffs incorporate ¶¶1-18; 22-25.

11 27.

12 Defendant was negligent in failing to safeguard the data, in failing to encrypt it, in  
 13 allowing its agent or employee to store such data in his or her car, and in failing to put in place  
 14 policies that would protect such data from theft and disclosure.

15 28.

16 As a result of defendant's negligence, plaintiffs and class members suffered the  
 17 previously-described injuries.

18 **SECOND CLAIM FOR RELIEF-UNLAWFUL TRADE PRACTICES ACT**

19 29.

20 Plaintiffs incorporate ¶¶1-17; 22-24.

21 30.

22 In pertinent part, the Unlawful Trade Practices Act ("UTPA") prohibits representations  
 23 that "goods or services have \*\*\* characteristics" that they do not have. ORS 646.608(1)(e). The  
 24 UTPA further prohibits representations that "goods or services are of a particular standard,  
 25 quality or grade\*\*\*." ORS 646.608(1)(g).  
 26

1 31.

2 The UTPA defines a "representation" as "any assertion by words or conduct."  
3 ORS 646.608(2).

4 32.

5 When it offered medical services and products for sale to consumers, defendant  
6 represented by its conduct that it would keep private information confidential because  
7 compliance with federal and state privacy standards is required in order to sell the particular type  
8 of service or business.

9 33.

10 Defendant violated the UTPA in one or more of the following ways that caused injury to  
11 plaintiffs and members of the class:

- 12 A. In representing that all information gathered to sell its services or goods would be  
13 safeguarded and kept confidential when it knew that it lacked adequate means to  
14 safeguard such information; and  
15 B. In representing that the business of sale of services and goods would include privacy and  
16 confidentiality when it knew that the transactions were not confidential due to its  
17 inadequate data protection program.

18 34.

19 As a result of defendant's statutory violations, plaintiffs and the proposed class suffered  
20 the previously-described out-of-pocket damages and will suffer additional future out-of-pocket  
21 damages in amounts to be proved at trial.

22 35.

23 Plaintiffs and the proposed class are entitled to attorney fees. ORS 646.638.

24  
25 WHEREFORE, plaintiffs and the class seek relief against defendant as follows:

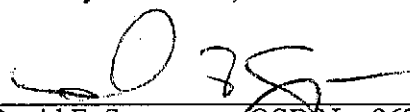
- 26 a. An order certifying this matter as a class action;

Page 10 - PLAINTIFFS' THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

- b. The appointment of the undersigned as counsel of record for the class;
- c. An injunction requiring defendant to fund the costs of credit monitoring, credit reporting, benefit reporting and repair damages caused by identity theft;
- d. Economic damages for themselves and for the class in amounts to be proved at trial;
- e. Non-economic damages for themselves and for the class in amounts to be proved at trial;
- f. Judgment in their favor; and
- g. Attorney fees, costs and disbursements incurred in this action.

DATED this 22nd day of September, 2006

Respectfully submitted,

By:   
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 David Paul, OSB No. 86  
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 520 S.W. Sixth Ave., Ste. 920  
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 Brian S. Campf, OSB No. 92248  
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 bcampf@wdolaw.com

Attorneys and Trial Attorneys for Plaintiffs and the Proposed Class Attorney

24 ///

25 ///

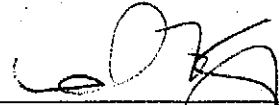
26 ///

1 Plaintiffs demand a jury trial.

2 DATED this 22nd day of September, 2006

3

4

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 bcampf@wdolaw.com

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PLAINTIFFS' THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** on the following persons on this same day:

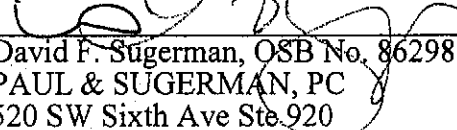
- by hand delivering
- by facsimile transmission
- by electronic mail
- by enclosing a copy in an envelope, properly addressed and with first-class postage, and placing in the mail in Portland, Oregon

John F. McGrory, Jr.  
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 Email douglassross@dwt.com  
 Attorneys for Defendant (pro hac vice)

DATED this 22nd day of September, 2006

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 E-Mail: dfs@pspc.com  
 Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

RUSSELL GIBSON and WILLIAM WEILLER, DDS, individually and on behalf of all other similarly-situation individuals,	)	
	)	
Plaintiffs,	)	Case No. 0601-01059
	)	
v.	)	ORDER GRANTING DEFENDANTS' ORCP MOTIONS TO DISMISS
	)	
PROVIDENCE HEALTH SYSTEM-OREGON, an Oregon non-profit corporation,	)	<i>This case has been specially assigned to Judge Marilyn Litzenberger</i>
	)	
Defendants.	)	
	)	

Defendant Providence Health System-Oregon's ("Providence") Motion to Dismiss pursuant to ORCP 21A (8) and Motion to Strike Class Allegations under ORCP 32I and 32E (4) came before the Honorable Marilyn E. Litzenberger for hearing on November 3, 2006. The parties presented oral argument to the Court through their attorneys of record. Providence appeared by and through its attorneys, John F. McGrory, Jr. and d Gregory A. Chaimov. Plaintiffs Russell Gibson and William Weiller, DDS, appeared by and through their attorneys David Paul, David F. Sugerman, Michael Williams and Brian S. Campf. Thereafter, on February 27, 2007 and February 28, 2007, and the parties submitted supplemental briefing with additional points and authorities for the Court's consideration.

On May 3, 2007, the Court conducted a hearing and announced its rulings on Providence's ORCP 21A (8) motion to dismiss Plaintiffs' claims for relief in the form of money damages. The Court advised counsel of the basis for its ruling and conclusion that the damages prayed for were not compensable under Oregon law. *See Lowe v.*

Philip Morris USA, Inc., 207 Or App 532 (2006), *rev allowed* 342 Or 503( 2007).

Plaintiffs asked the Court to prepare a written opinion setting forth the reasons for its decision. The Court and counsel then discussed whether the Court's ruling effectively operated to moot Defendant's motion to strike the class allegations in Plaintiff's complaint. The Court agreed to consider and announce its ruling on that issue in its written opinion.


The parties met with the Court again on September 11, 2007, for a status conference and it was agreed that counsel would confer on a proposed order of dismissal reflecting the Court's prior ruling. The Court has considered the positions of the respective parties and now being fully advised as to those matters,

IT IS HEREBY ORDERED:

1. Providence Health Systems-Oregon's Motion to Dismiss the plaintiff's first claim for relief for negligence and negligence *per se*, brought pursuant to ORCP 21A (8), is GRANTED.
2. Providence Health Systems-Oregon's Motion to Dismiss the plaintiff's second claim for relief (violation of Unlawful Trade Practices Act) is GRANTED.
3. Providence Health Systems-Oregon's Motion to Strike the plaintiffs' class claims for damages is GRANTED, the Court having concluded that Providence has met its burden under ORCP 32 I to show that all potential class members similarly situation have been identified, that those identified have received notice that upon their request Providence will afford them reasonable compensation, correction or remedy of their alleged wrong, that such compensation, correction or remedy was given in a reasonable time, and that

Providence has ceased from engaging in the acts or practices alleged to have damaged potential class members.

Dated: November 7, 2007

  
Hon. Marilyn E. Litzenberger  
Circuit Court Judge

cc: David Sugerman  
David Paul  
John F. McGrory, Jr.  
Brian Campf

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CIRCUIT COURT  
FOR MULTNOMAH COUNTY

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

RUSSELL, GIBSON and WILLIAM  
WEILLER, DDS, individually and on behalf of  
all other similarly-situated individuals,

Plaintiffs,

v.

PROVIDENCE HEALTH SYSTEM-  
OREGON, an Oregon non-profit corporation,

Defendant.

Case No. 0601-01059

Honorable Marilyn E. Litzenberger

**GENERAL JUDGMENT**

Based on the Order filed November 7, 2007, it is hereby

ORDERED and ADJUDGED that:

1. The action is dismissed with prejudice; and
2. Defendant is entitled to recover its costs and disbursements from plaintiffs.

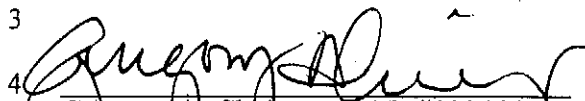
DATED this 30<sup>th</sup> day of December, 2007.



Marilyn E. Litzenberger, Circuit Court Judge

1 SUBMITTED BY:

2 DAVIS WRIGHT TREMAINE LLP

3 

4 Gregory A. Chaimov, OSB #822180  
5 1300 SW Fifth Ave., Suite 2300  
6 Portland, Oregon 97201  
7 503-241-2300

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CERTIFICATE OF SERVICE

I hereby certify that, on December 17, 2007, I served a copy of the foregoing

**GENERAL JUDGMENT** on:

David Paul  
David Sugerman  
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Attorneys for Plaintiffs

by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon.

DAVIS WRIGHT TREMAINE LLP

By  #04363  
for  
\_\_\_\_\_  
Gregory A. Chaimov, OSB #822180  
Of Attorneys for Defendant  
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Trial Attorney, John F. McGrory, Jr.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that I filed the foregoing **APPELLANTS' OPENING BRIEF AND EXCERPT OF RECORD** by mailing the original and twenty copies on this same day to:

State Court Administrator  
Appellate Court Records Section  
1163 State Street  
Salem, OR 97310-2563

I further certify that I served the foregoing **APPELLANTS' OPENING BRIEF AND EXCERPT OF RECORD** on the following persons by enclosing two copies in an envelope, properly addressed to each of the following persons and with first-class postage prepaid, and placing in the mail in Portland, Oregon on this same day to:

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Gregory A. Chaimov, OSB #822180  
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Douglas C. Ross (Pro Hac Vice)  
Davis Wright Tremaine LLP  
2600 Century Square  
1501 Fourth Ave  
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(206) 628-7754

*Of Attorneys for Defendants-Respondents*

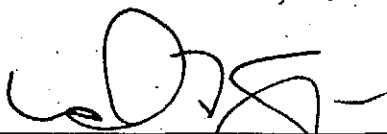
Michael L. Williams, OSB #78426  
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Brian S. Campf, OSB #92248  
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Phone: (503) 849-9899

*Of Attorneys for Plaintiffs-Appellants*

DATED this 16th day of May, 2008.

PAUL & SUGERMAN, PC

By:   
\_\_\_\_\_  
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Of Attorneys for Plaintiffs-Appellants