

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

APPELLANTS' REPLY BRIEF
AND REPLY EXCERPT OF RECORD

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

David F. Sugerman, OSB #86298
David Paul, OSB 86260
PAUL & SUGERMAN, PC
520 S.W. Sixth Ave., Ste. 920
Portland, Oregon 97204
(503) 224-6602

John F. McGrory, Jr., OSB #813115
Gregory A. Chaimov, OSB #822180
DAVIS WRIGHT TREMAINE LLP
1300 SW 5th Ave Ste 2300
Portland, OR 97201-5682
(503) 778-5204

(Additional counsel listed on reverse)

September 2008

Michael L. Williams, OSB #78426
WILLIAMS LOVE O'LEARY
CRAINE & POWERS
9755 SW Barnes Rd., Suite 450
Portland, OR 97225
(503) 295-2924

Brian S. Campf, OSB #92248
BRIAN S. CAMPF, PC
7243 SE 34th Ave.
Portland, OR 97202
Phone: (503) 849-9899

Of Attorneys for Plaintiffs-Appellants

Douglas C. Ross (Pro Hac Vice)
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Ave
Seattle WA 98101-1688
(206) 628-7754

Of Attorneys for Defendants-
Respondents.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. REPLY TO FIRST ASSIGNMENT OF ERROR	1
1. Plaintiffs state a claim in negligence	1
2. Plaintiffs adequately alleged causation and non-economic damage from the disclosure	4
3. Plaintiffs' negligence per se count states a claim	5
4. Plaintiffs did not abandon their negligence claims for damages	6
III. REPLY TO RESPONSE TO SECOND ASSIGNMENT OF ERROR	7
IV. REPLY TO THIRD ASSIGNMENT OF ERROR	10
A. Standard of review	10
B. The trial court erred in dismissing equitable relief claims	11
C. The trial court erred in finding compliance with ORCP 32I	12
D. The trial court erred in striking class allegations under ORCP 32E	13
IV. CONCLUSION	14
APPELLANTS' EXCERPTS OF RECORD ON REPLY	RER-1
CERTIFICATE OF FILING AND SERVICE	

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES</u>	
<i>Adamson v. WorldCom Communications, Inc.</i> , 190 Or App 215 (2003), <i>rev den</i> 336 Or 657 (2004)	8
<i>Alsea Veneer, Inc. v. State</i> , 117 Or App 42 (1992) <i>rev'd in part on other grounds</i> , 318 Or 33 (1993)	10
<i>Buchler v. Oregon</i> , 316 Or 499 (1993)	4-5
<i>Chouinard v. Health Ventures</i> , 179 Or App 507 (2002)	3
<i>Curtis v. MRI Imaging Services II</i> , 148 Or App 607 (1997), <i>aff'd</i> , 327 Or 9 (1998)	2-3
<i>Ettinger v. Denny Chancler Equip Co.</i> , 139 Or App 103 (1996)	6
<i>Humphers v. First Interstate Bank of Oregon</i> , 298 Or 706 (1985)	1, 2, 3
<i>Lomax v. Carr</i> , 194 Or App 518 (2004)	7
<i>Lowe v. Philip Morris</i> , 344 Or 403, 409-10 (2008)	3
<i>Meadler v. Francis Ford, Inc.</i> , 286 Or 451 (1979)	9
<i>Rockhill v. Pollard</i> , 259 Or 54 (1971)	2
<i>Shahtout v. Emco Garbage</i> , 298 Or 598 (1985)	5

<u>Table of Authorities, continued</u>	<u>Page</u>
<i>Sanders v. Francis</i> , 277 Or 593 (1971)	9
<i>State v. Hargreaves</i> , 92 Or App 113 (1988)	7
<i>State v. Norris</i> , 182 Or. App. 547, 50 P.3d 595, 598 (2002)	11
<i>Wolverton v. Standwood</i> , 278 Or 709 (1978)	9
<u>STATUTES, RULES, AND REGULATIONS</u>	
45 CFR §164.406	2
OEC 504-I	2
OEC 504-2	2
ORCP 21	1, 5, 7, 10
ORCP 21A(8)	7
ORCP 32	1, 10
ORCP 32C	13
ORCP 32E	13
ORCP 32E(4)	13
ORCP 32H	13
ORCP 32I	1, 10, 11, 12-13
ORCP 32I(2)	12
ORCP 32I(3)	13
ORS 174.010	5
ORS 192.518	3, 6
ORS 192.524	5, 6
ORS 646.605, <i>et seq.</i>	<i>passim</i>
ORS 646.608(2)	7
ORS 646.632	9
ORS 646.638(5)	10
ORS 677.190(5)	1

I. INTRODUCTION

According to Providence, the theft of unsecured patient information is not a present injury. The patients disagree. If the patients are correct, then this court must reverse the trial court because this single error in reasoning led the trial court to erroneously grant Providence's motions to dismiss. Providence advances several bases to support the trial court's dismissal. None of the arguments support the court's rulings or judgment.

In addition to the dispute over whether the patients suffered present injury, the parties disagree about how to apply the standard of review on ORCP 21 motions. The parties disagree about the adequacy of pleadings, the parties disagree about the standard of review of a motion to dismiss under ORCP 32, and the parties disagree on whether Providence met the standards set forth in ORCP 32I.

II. REPLY TO FIRST ASSIGNMENT OF ERROR

1. Plaintiffs state a claim in negligence

Citing *Humphers v. First Interstate Bank*, 298 Or 706 (1985), Providence asserts that plaintiffs cannot prevail on their negligence claim because Oregon law only recognizes a claim for relief for intentional disclosure of patient information. Nothing in *Humphers* limits the claim to intentional conduct. The *Humphers* Court made clear from the outset of the opinion that the case turned on whether a patient could state a claim when a physician reveals confidential information. 298 Or at 708. As the Court recognized, the right to pursue a claim arose out of the physician's duty to keep patient confidences. 298 Or at 720, citing ORS 677.190(5) (providing that physicians may not willfully or negligently disclose patient confidences). The result did not turn on the physician's knowledge or intent.

Providence also misplaces its reliance upon *Stevens v. First Interstate Bank*, 167 Or App 280, 286 (2000). Providence fails to address critical differences between medical patient information and bank customer information. Patient information provided to a medical provider is subject to a wide range of protections from disclosures because of the special relationship between patient and medical provider. These include common law recognition of the nature of the relationship,¹ legislative enactments evincing the fundamental nature of confidentiality and the special relationship between patient and physician,² federal regulations,³ and evidentiary privileges.⁴

There is no banker-borrower privilege, and Providence points to no analogous special relationship between lender and borrower. The omission is not inadvertent, as this court specifically rejected the argument that the relationship between lender and borrower rises to the level of a special relationship. *Stevens*, 167 Or App at 287; see also, *Flowers v. Bank of America Nat. Trust*, 67 Or App 791, 793-94 rev den, 297 Or 601 (1984).

The nature of the underlying injury—disclosure of patient confidences—distinguishes this case from the litany of financial cases on which Providence relies. Response Br., pp. 11-17. Oregon case law consistently re-affirms the guiding principle: Emotional distress damages are recoverable in cases involving a special

¹ *Humphers v. First Interstate Bank*, 298 Or at 706 *supra*, *Rockhill v. Pollard*, 259 Or 54, 62 (1971), *Curtis v. MRI Imaging Services II*, 148 Or App 607, 618-20 (1970), *aff'd*, 327 Or 9 (1998).

² ORS 192.518 (medical records) and ORS 677.190(5) (physician duty of confidentiality).

³ Health Insurance Portability and Accountability Act (HIPAA) 45 CFR §164.406.

⁴ OEC 504-I (physician-patient privilege), OEC 504-2 (nurse-patient privilege).

relationship, when a tortfeasor's negligent conduct causes emotional distress. *Lowe v. Philip Morris*, 344 Or 403, 409-10 (2008). In this case, damage to patients' relationships with medical providers occurred on the day of the disclosure.

Providence attempts to circumscribe its liability by re-interpreting *Curtis v. MRI Imaging*, 148 Or App at 622 (Providence Br., p. 16). According to Providence, emotional distress damages are recoverable only when the health care provider should know based on "unique knowledge of 'medical procedures' and their psychological 'consequences'" that psychological harm might result. (Providence Br., p. 16, internal quotations, referring to *Curtis, supra*, in the original). Remarkably, Providence even disclaims a special "obligation to guard against possible adverse psychological reactions" that might result from the data theft. Providence Br., p. 16.

These arguments flatly ignore the Court's detailed review of common law precedents in *Humphers v. First Interstate, supra* and—more important—the holding in that case. The case clearly established that medical providers must indeed guard against emotional distress that might result from disclosures of patient confidences. And in the intervening years, the Legislature codified the common law rule, making clear that Oregon patients have an independent right to the safeguarding of medical information. ORS 192.518.

Providence also relies upon *Chouinard v. Health Ventures*, 179 Or App 507, 511 (2002), for the proposition that plaintiffs must establish physical injury to recover emotional distress damages. The case provides little or no support for Providence. As this court noted in *Chouinard*, 179 Or App at 513-14:

"[I]t is important to note what she does not argue. Plaintiff does not argue that she is entitled to recover emotional distress damages in the absence of any physical impact; that is, she does not argue that she

comes within any of the three recognized exceptions to the physical impact rule.”

In the present case, plaintiffs claim injury by virtue of the disclosure of confidential information. Multiple sources of the law, including ancient common law rule, privileges, statutory standards and regulations reflect the importance of medical confidentiality. The sanctity of confidentiality rules grows out of the special relationship between medical provider and patient. Providence essentially argues that it can trample on those interests without having to account to its patients for its conduct.

2. Plaintiffs adequately alleged causation and non-economic damage from the disclosure

Providence asserts that plaintiffs failed to adequately allege causation because the conduct alleged would “establish, at most, that Providence facilitated a future injury, which is insufficient as a matter of law to establish causation.” (Providence Br., p. 19). To the contrary, in seeking non-economic damages, plaintiffs specifically alleged that they suffered worry and emotional distress, “associated with the initial disclosure and the risk of any future subsequent identity theft ***.” Third Amended Complaint, ¶24. ER-17. Plaintiffs alleged that Providence’s negligence “caused or contributed” to their injuries and to the injuries of proposed class members. Third Amended Complaint ¶21. ER-17.

Providence cites *Buchler v. Oregon*, 316 Or 499 (1993), in support of its causation argument. But the case is of no assistance for two reasons. First, it dealt with foreseeability and not causation. Second, it stands for the unremarkable proposition that general foreseeability is not met in a long drawn out chain of consequences that starts with a negligent failure to safeguard van keys, followed by a

theft of the vehicle, a burglary that included a second theft of firearms some 50 miles away, culminating in homicide two days later.⁵ By its very terms, *Buchler* starts with a finding absent here. In *Buchler*, the Court found an absence of a special relationship between decedents and the Department of Corrections. But here, Providence cannot avoid a fact of crucial significance. Providence and its patients stand in a special relationship. For purposes of an ORCP 21 motion, the allegations in the complaint are viewed in the light most favorable to plaintiffs, with inferences drawn in their favor. Plaintiffs adequately alleged that Providence's negligence caused injury, which occurred when a third party took possession of the unencrypted medical records.

3. Plaintiffs' negligence per se count states a claim

Providence over-reads ORS 192.524. The statute provides that it does not "create a new private right of action." But that language does not foreclose the inquiry on whether a statute or rule so fixes a standard of care that its violation is negligence. Statutes and rules that do not create causes of action may still so fix the standard of conduct that their violation is negligence per se. *Shahtout v. Emco Garbage*, 298 Or 598, 601 (1985). Providence points to the text of ORS 192.524, which it interprets to mean that the statute establishes no standard of care. That interpretation inserts words into the statute that are not there, contrary to the directives of ORS 174.010. The

⁵ It is instructive to compare the remote and tenuous chain of consequences in *Buchler* with those alleged here. Plaintiffs allege that Providence's agent or employee stored computerized patient records in his car overnight and the records were stolen from the car. Third Amended Complaint ¶¶7-10 ER-12 - Er-13. Plaintiffs allege that the data was not encrypted and that Providence lacked necessary policies to secure patient information. The injury occurred at the time of the theft, not days later. Third Amended Complaint, ¶27 ER-18. The facts here are a far cry from the chain of consequences in *Buchler*.

language in the statute provides that it creates no “new” private rights of action. The right of action, however, existed before the enactment of ORS 192.524.

Plaintiffs have not here alleged that ORS 192.524 creates a statutory right of action. Instead, they simply point to the statute and federal rules as sources that fix a standard of care violated by Providence. Providence relies on *Ettinger v. Denny Chancler Equip Co.*, 139 Or App 103, 107 (1996), for the proposition that language purporting to create no private right of action forecloses a negligence per se count. The short answer is that in *Ettinger*, the rules in question failed to make clear who fell within the class of people to be protected. 139 Or App at 107.

Here, the applicable statutes and rules make clear that plaintiffs—as patients—fall within the class of people intended to be protected. The statutes and rules regulate the disclosure of confidential medical records and thus are intended by their very terms to prevent this type of harm. That the state statutes and federal rules create no new cause of action provides no answer because the claim for relief exists by virtue of state common law rights that pre-date the enactment.

Providence also argues that ORS 192.518 does not create a duty. However, plaintiffs cited various regulations that create standards of care requiring specific duties and responsibilities. Third Amended Complaint, ¶20 ER 17; Opening Brief, p. 13 (citations omitted).

4. Plaintiffs did not abandon their negligence claims for damages

Providence makes the curious argument that this court can otherwise affirm the trial court because plaintiffs have not made any arguments on their entitlement to economic or emotional distress damages. Providence moved only to dismiss for failure to state a claim for the negligence and UTPA claims. It did not separately

move to strike damage claims. Reply ER (“RER”) RER-1 – RER-2. The trial court dismissed both counts of the negligence claim on motions to dismiss for failure to state a claim, pursuant to ORCP 21A(8). ER-24. It did the same for the UTPA claim. In their opening brief, plaintiffs argued that the court erred in granting the ORCP 21 motions and argued each ruling. As the court did not specifically strike damage claims or elements on the ORCP 21 motions, there was never any need to separately argue the elements of damages because the error arises from the ruling on failure to state a claim.

Providence relies on *Lomax v. Carr*, 194 Or App 518 (2004). However, in that case appellant failed to provide argument on an alternative basis for reversal. Here, by contrast, plaintiffs assigned error to both negligence rulings and argued each in their brief. (Opening Br., pp. 8-14).⁶

III. REPLY TO RESPONSE TO SECOND ASSIGNMENT OF ERROR

For purposes of the Unlawful Trade Practices Act (UTPA) an actionable representation includes, “any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact.” ORS 646.608(2). This would include the provision of medical care, which carries with it the implicit representation of confidentiality. ORS 646.608(2).

Providence argues about the adequacy of the allegations in plaintiffs’ UTPA claims. However, employing the proper standard of review, it is clear that plaintiffs adequately alleged the elements of a UTPA claim. Providence filed a motion to

⁶ Providence also cites *State v. Hargreaves*, 92 Or App 113, 117 (1988), but that case is even further off point because it involved waiver by raising new issues on appeal that were not presented to the trial court. Providence does not assert that plaintiffs here are making new arguments not presented to the trial court.

dismiss. It did not alternatively seek to have the proposed class make their allegations more definite and certain.

Providence first claims that plaintiffs failed to allege willful misconduct. Providence acknowledges that “willful” is a legal term, and that the text of the UTPA sets the standard. ORS 646.605(10). As to both allegations of violation, plaintiffs alleged: 1) that it sold medical services “when it knew that it lacked adequate means to safeguard such [medical] information”; and 2) in representing that it would maintain privacy and confidentiality, “when it knew that the transactions were not confidential due to its inadequate data protection program.” Third Amended Complaint, ¶33, ER-19. Plaintiffs separately alleged that the information was confidential by virtue of various state and federal laws. Third Amended Complaint, ¶9, ER-12. Actual knowledge that conduct violates the UTPA is sufficient to meet the willfulness standard. ORS 646.605(10).

It is true that plaintiffs did not specify that Providence acted willfully, but doing so would have been a pleading of a legal conclusion. *Adamson v. WorldCom Communications, Inc.*, 190 Or App 215, 222-23 (2003) *rev den* 336 Or 657 (2004). In the context of willfulness, an allegation of actual knowledge suffices to meet the pleading standard. *Id.*

Providence separately argues that plaintiffs failed to allege that they relied upon or could have relied upon Providence’s omissions. Plaintiffs are not required to prove reliance in UTPA failure to disclose cases. The patients alleged that Providence did not disclose the data problems until January 24, 2006. Third Amended Complaint, ¶¶7-8. ER-12. The patients specifically alleged that the representation was by

conduct, not by an actual affirmative statement. Third Amended Complaint, ¶32. ER-19.

Providence cites *Meader v. Francis Ford, Inc.*, 286 Or 451 (1979). However, *Meader* is a fraud case that did not include a UTPA claim. The elements of a UTPA claim are distinct from common law fraud claims. *E.g., Wolverton v. Standwood*, 278 Or 709, 713 (1978). A violation of the UTPA is easier to establish. *Id.* In failure to disclose UTPA cases, a plaintiff need not allege or prove reliance. *Sanders v. Francis*, 277 Or 593, 598-99 (1971).

Providence separately argues that plaintiffs failed to allege an ascertainable loss of money or property as a result of the violations. It is true that plaintiffs did not use the legal conclusion “ascertainable loss.” Instead, they alleged that as a result of the violations of the UTPA, they suffered out-of-pocket losses described in the complaint. Third Amended Complaint ¶¶33 and 34 ER-19. Plaintiffs specifically alleged the nature of those out-of-pocket losses. Third Amended Complaint, ¶24 ER-17. Providence baldly asserts that plaintiffs suffered “no loss as a result of the theft of the tapes and disks.” Providence Br., p. 27. The assertion ignores the allegations of the complaint and improperly draws inferences in favor of Providence.

Providence argues that its Assurance of Voluntary Compliance (“AVC”) is irrelevant to the UTPA claim. The point is that while moving to dismiss for failure to state a claim in this case, Providence stipulated in another case that the UTPA applies to its conduct. That stipulation is at odds with the arguments Providence made in this case. Providence asserts that the AVC is inadmissible in any event because the UTPA provides that it shall not be treated as evidence of a violation. To the contrary, an “order” made pursuant to ORS 646.632 is prima facie evidence of a UTPA violation.

ORS 646.638(5); Providence Brief, p. 28. The AVC is an order. SER 18-23. It establishes the prima facie case.

Plaintiffs offered the AVC into the record in opposition to the ORCP 32I motion to dismiss, which was also granted by the court. (Opening Br., p. 15, n6). Providence should not be heard to admit in one court that the UTPA applies to its conduct while arguing down the hall that the UTPA does not apply. Regardless of whether the court should consider the AVC in its disposition of the ORCP 21 motions, the trial court erred in dismissing the UTPA claim.

IV. REPLY TO THIRD ASSIGNMENT OF ERROR

A. Standard of review

Defendant is incorrect on the standard of review. No case law provides an answer to the question of the correct standard of review under ORCP 32I. Indeed, there is no single standard of review for decisions made under ORCP 32. Whether to certify a class, for example, is a mixed question of fact and law with multiple standards of review.

This court reviews the factual findings for substantial evidence and the legal determinations for errors of law, while the utility of a class action is committed to the sound discretion of the trial court. *Alsea Veneer, Inc. v. State*, 117 Or App 42, 52 (1992) *rev'd in part on other grounds*, 318 Or 33 (1993). The issues before the trial court included legal determinations and factual questions. The factual questions are undisputed. The legal determinations should be reviewed for errors of law.

B. The trial court erred in dismissing equitable relief claims

Plaintiffs seek both equitable relief and money damages. By its terms, ORCP 32I applies to actions “for damages.” The rule does not apply to claims for equitable relief; however, the court dismissed the equitable claims under ORCP 32I.

Providence asserts that despite plaintiffs’ allegations in the complaint, their request for equitable relief claims is really a damage claim. Resp. Br., 42-43. The equitable relief the proposed class seeks includes injunctions requiring defendant to fund credit monitoring, to set up a fraud alert system, to notify the Social Security Administration of the data theft, and to fund repairs of credit fraud. To be sure, that would cost Providence money; however, plaintiffs are not asking that the check be written to them in the form of payment to compensate them for damages. *See State v. Norris*, 182 Or. App. 547, 552 50 P.3d 595, 598 (2002) (distinguishing lawsuits based in law and equity). Rather, plaintiffs seek an injunction to prevent future harm. Third Amended Complaint, ¶¶22-23; ER-17.

Providence mistakenly relies on cases that treat medical monitoring as damage claims. Providence Br., 43. The term “monitoring” is not determinative; the nature of the relief sought, not the label given to a claim, is the critical factor in deciding if a matter is one at law or in equity. *Norris*, 182 Or. App. at 547.

Providence argues in the alternative that the issue is moot because it offered the class free credit monitoring and repair services. Providence Br., 43-44. In fact, defendant has not provided the necessary requested relief. Two years of credit monitoring is too short even as determined by Providence’s own measure that three years is necessary. Providence also did not inform the class that it will pay for credit restoration services required under the Assurance of Voluntary Compliance (“AVC”)

it entered with the Department of Justice. App. Br., 24. Nor did Providence offer the class non-economic damages or reimbursement for out-of-pocket losses, inconvenience, or time lost. App. Br., 21-22, 25-26. The issue is not moot.

C. The trial court erred in finding compliance with ORCP 32I

The underlying trial court error manifests on this issue. As plaintiffs have explained in detail, Oregon law treats the disclosure of medical confidences as a present injury. The trial court erroneously concluded otherwise. Providence offered no compensation whatsoever for non-economic damages. This shortcoming ends the inquiry on ORCP 32I. If plaintiffs were entitled to any non-economic damages, even Providence must concede that the remedy provided was insufficient.

Providence now relies on the September 2006 AVC in asserting that this action was properly dismissed. Providence never informed the class about the AVC's requirements. The evidence defendant offers to the contrary is a letter between counsel for the parties, a February 2006 letter sent by Providence to potential class members offering to "restore your name and credit," and a press release by the Attorney General. Resp. Br., 39-40. Neither the letter to counsel nor the press release are notice to absent class members. As well, the letter, which was mailed seven months *before* the AVC, cannot now become a part of the compromise with the Attorney General.

Providence admits that it selectively reimbursed some class members who requested more. Providence does not deny that it failed to tell class members that more relief was available upon request. ORCP 32I specifically requires that 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).

Providence failed to meet the requirements when it did not convey the availability of reimbursement to class members.

Separately, Providence failed to meet the timeliness requirement of ORCP 32I. Plaintiffs sent defendant a notice pursuant to ORCP 32H on January 30, 2006, and agreed to extend the notice period to March 15, 2006. Resp. Br., SER-4. Defendant entered the AVC six months later in September 2006, and announced its “gift” of a second year of monitoring in November 2006, at oral argument on these motions that occurred some 11 months after the original theft. The relief failed to comply with timeliness requirements.

ORCP 32I mandates that the “compensation, correction or remedy has been, or, in a reasonable time, will be given.” ORCP 32I(3). Providence never explains why it took 11 months to give its “gift” of a second year of monitoring. Regardless, Providence did not comply with timing requirements of ORCP 32I(3) that are evident when it is read in conjunction with ORCP 32H.

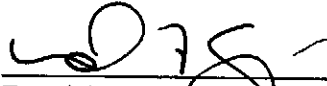
D. The trial court erred in striking class allegations under ORCP 32E

Providence attempts to defend the trial court’s action by pointing to the court’s authority to order amendment of pleadings pursuant to ORCP 32E(4). Providence Br., 45-46. In fact, the trial court limited all discovery and all proceedings to whether defendant complied with ORCP 32I. Order on Discovery Matters May 18, 2006, CR 28, p. 1. The trial court had no basis for the complex determination of whether a class could be maintained, and plaintiffs were prohibited from even taking up the question. Nor did the trial court make the special findings regarding a class determination as required by ORCP 32C.

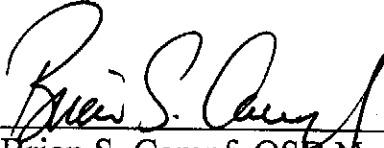
CONCLUSION

The trial court erred in concluding that the patients failed to state a claim for lack of present injury. The court should reverse the trial court's judgment.

Dated this 14th day of September, 2008



David F. Sugerman, OSB No. 86298
Paul & Sugerman, PC
520 SW Sixth Ave Ste 920
Portland, OR 97204
Telephone: (503) 224-6602



Brian S. Campf, OSB No. 92248
Brian S. Campf, P.C.
7243 SE 34th Ave.
Portland, OR 97202
Telephone: (503) 849-9899

Of Attorneys for Plaintiffs-Appellants

**APPELLANTS' EXCERPT OF RECORD
ON REPLY**

INDEX TO APPELLANTS' EXCERPT OF RECORD
ON REPLY

Page

Defendant's Motions to Dismiss (Excerpt) (April 17, 2006)
(CR20)

RER-1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

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
**DEFENDANT'S MOTIONS TO
DISMISS**

UTCR 5.050 INFORMATION

Defendant requests oral argument and official court reporting services. Defendant estimates that one hour is necessary for oral argument.

UTCR 5.010 CERTIFICATION

The undersigned certifies that counsel for plaintiffs and counsel for defendant have conferred as to the substance of these motions but were unable to resolve their differences.

MOTIONS

Defendant submits the following motions against the second amended complaint:

Motion No. 1. Pursuant to ORCP 21A (8), to dismiss the first claim for relief for negligence and negligence per se on the ground that the allegations fail to state ultimate facts

IV. CONCLUSION

For the reasons stated above Providence respectfully asks the Court to grant Providence's motions to dismiss and to dismiss the Second Amended Complaint with prejudice.

DATED this 17th day of April, 2006.

Davis Wright Tremaine LLP

By J.F.McGrory, Jr.
John F. McGrory, Jr., OSB #81311
Gregory A. Chaimov, OSB #82218
Douglas C. Ross, *pro hac vice* pending
Of Attorneys for Defendant
Providence Health System-Oregon
Phone: 503-778-5204
Fax: 503-276-5704
Email: johnmcgrory@dwt.com
Email: gregorychaimov@dwt.com
Email: douglasross@dwt.com

Trial Attorney, John F. McGrory, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **DEFENDANT'S MOTIONS TO DISMISS** on:

David Paul
David Sugerman
PAUL & SUGERMAN, P.C.
520 SW Sixth Avenue, Suite 920
Portland, OR 97204
Telephone: 503-224-6602
Facsimile: 503-224-2764
E-mail: dp@pspc.com

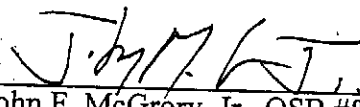
Michael L. Williams
WILLIAMS LOVE O'LEARY CRAINE & POWERS P.C.
9755 SW Barnes Road, Suite 450
Portland, OR 97225
Telephone: 503-224-6602
Facsimile: 503-224-2764
E-mail: mwilliams@wdolaw.com

Of Attorneys for Plaintiffs

by causing a copy thereof to be hand-delivered to said attorney's address as shown above on the date set forth below.

Dated this 17th day of April, 2006.

DAVIS WRIGHT TREMAINE LLP

By 
John F. McGrory, Jr., OSB #81311
Of Attorneys for Defendant
Providence Health System-Oregon
Phone: 503-778-5204
Fax: 503-276-5704
Email: johnmcgrory@dwt.com

Trial Attorney, John F. McGrory, Jr.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that I filed the foregoing **APPELLANTS' REPLY 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' REPLY 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:

John F. McGrory, Jr., OSB #813115
Gregory A. Chaimov, OSB #822180
Davis Wright Tremaine LLP
1300 SW 5th Ave Ste 2300
Portland, OR 97201-5682
(503) 778-5204

Douglas C. Ross (Pro Hac Vice)
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Ave
Seattle WA 98101-1688
(206) 628-7754

Of Attorneys for Defendants-Respondents

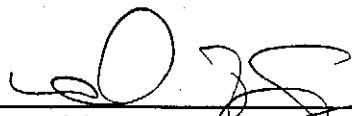
Michael L. Williams, OSB #78426
Williams Love O'Leary Craine & Powers
9755 SW Barnes Rd., Suite 450
Portland, OR 97225
(503) 295-2924

Brian S. Campf, OSB #92248
Brian S. Campf, PC
7243 SE 34th Ave.
Portland, OR 97202
Phone: (503) 849-9899

Of Attorneys for Plaintiffs-Appellants

DATED this 17th day of September, 2008.

PAUL & SUGERMAN, PC

By: 
David F. Sugerman, OSB No. 86298
PAUL & SUGERMAN, PC
520 S.W. Sixth Ave., Ste. 920
Portland, Oregon 97204
(503) 224-6602
Of Attorneys for Plaintiffs-Appellants