
P R E S I D E N T ' S M E S S A G E

B Y D A N I E L R. S C H A N Z

Is *Stare Decisis* Dying In Oregon?



Around the year 2000, there was a growing concern in the Montana State Bar that its Supreme Court rulings were inconsistent. Cases were being overturned at an alarming rate, and it was considered malpractice not to appeal. The Montana Court was purportedly the most active in the state's history—rewriting law at an unprecedented rate.¹ One commentator on the situation in Montana noted that predictability had been lost, and the inevitable consequences when that occurs are that “Businesses cannot feel confident in their business decisions. Lawyers cannot give reliable advice. Individuals cannot act secure in the belief that their actions comply with the law. After all, the law’s interpretation may change next week.”² It was the Montana Court’s unwillingness “to stand beside things decided”—or in Latin, *stare decisis*—that had caused the storm for which no one could find a harbor.

Over the past several months, those of us who follow the listserv have seen a growing list of cases, assembled by Tom Christ,³ in which the Oregon appellate courts have reversed lower courts with sweeping statements “disavowing” and “overruling” earlier precedents.⁴

From a distance, it appears that our appellate courts are retreating from earlier established precedent at an ac-

celerated rate. Which raises the question, “Is *stare decisis* dying in Oregon?” And perhaps more importantly, “Should we, as members of the civil defense bar, care?”

Stare decisis is a doctrine firmly established in Oregon law and relied upon in our earliest reported cases.⁵ The doctrine, although now riddled with exceptions, is still applied today, as evidenced by the relatively recent case of *Farmers v. Mowry*.⁶ In *Farmers v. Mowry*, the Oregon Supreme Court applied *stare decisis*, but further softened its application as it relates to statutory interpretation. Since 2011, *Farmers v. Mowry* has become the most frequently cited authority in those cases where our appellate courts have “overruled” or “disavowed” established precedent.

As members of the civil defense bar, *stare decisis* is as important to our respective practices as it is to our clients’ efforts to conduct their businesses with a level of certainty. A primary purpose behind *stare decisis* is to promote predictability and stability within the law. Our Supreme Court has stated that “Stability and predictability are important values in the law; individuals and institutions act in reliance on this court’s decisions, and to frustrate reasonable expectations based on prior decisions creates the potential for uncertainty and unfairness.”⁷

Our clients want to conduct their

businesses and professional practices so as to comply with the law and to avoid unforeseen liability. Insurers spend significant amounts of time and money predicting their exposure based upon settled principles within the law so that premiums can be determined. We rely upon precedents in advising our clients, asserting legal positions, and settling and trying cases. When uncertainty is introduced into the equation, costs go up, clients are left with unanswerable questions, and future decisions are delayed or impacted. The doctrine of *stare decisis* promotes stability.

Adherence to the doctrine of *stare decisis* also promotes slow, incremental changes in the law, rather than revolutionary or “erratic change.”⁸ Our Supreme Court has noted that it “will not depart from established precedent simply because the ‘personal policy preference[s]’ of the members of the court may differ from those of our predecessors who decided the earlier case.”⁹ None of us want what purportedly happened in Montana to occur in Oregon jurisprudence. Slow, metered, and regulated changes in the law allow for our clients to plan and meet their customers’ needs accordingly. Respect for the law and the legal process is also furthered when clients and attorneys see consistency and constancy in decisions by our appellate courts.

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A commitment to the doctrine of *stare decisis* also creates efficiency within our legal process. Judge Cardozo noted that without an active application of the doctrine of *stare decisis* "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him [or her]." ¹⁰

The Oregon Court of Appeals consistently ranks as one of the busiest appellate courts in the nation. Over the past 10 years, the range of new appeals filed per year is between 3,200 and 4,100. ¹¹ *Stare decisis* is one of the tools that allows our appellate courts to hear and resolve the volume of cases presented. Our clients benefit in having a case heard within months, as opposed to years, after an appeal is filed.

Finally, when courts make decisions based upon reasoned judgments from the law and not current social, personal, or political preferences, the public's perception of the process is enhanced. Our Supreme Court has consistently recognized that to frustrate reasonable expectations based on prior decisions creates the potential for uncertainty and unfairness. Moreover, lower courts depend on consistency in this court's decisions in deciding the myriad cases that come before them. The *Mowry* Court observed: "Few legal principles are so central to our tradition as the concept that courts should '[t]reat like cases alike' . . . and *stare decisis* is one means of advancing that goal." ¹²

As members of the Oregon State Bar and the OADC, it is our aspiration to improve the image of the legal profession in the eyes of the public and to promote

respect for the courts. ¹³ Application of the doctrine of *stare decisis* helps us to advance that goal.

Is the doctrine of *stare decisis* dying in Oregon? It is too early to tell, but this is an issue that deserves our attention. Early identification of any potential problem is essential to effective intervention. At the trial court level, we need to create a record underscoring the importance of precedent and the policy reasons behind the doctrine of *stare decisis*. The Supreme Court has provided strong language in support of the doctrine, and we need to continue to urge its application. At the appellate level, the doctrine and its application continue to evolve. The U.S. Supreme Court has a four-step rubric that it applies before a precedent is abandoned. ¹⁴ Such a formal rubric does not exist in Oregon, but it may be time to urge its creation, when the appropriate case presents itself.

Thanks again to all of our astute members who have alerted us to this issue.

Endnotes

- 1 See Jeffrey Key Rents, "Stare Decisis in Montana," *Montana Law Review*, Vol. 65, Issue 1, Article 3, p. 2.
- 2 *Id.* at 43.
- 3 I thank Tom Christ for preparing the list and other observant members who have added to it. With that said, this article and the positions asserted are only my own.
- 4 *Purdy v. Deere and Co.*, 2014 WL 1600467 (Or 2014); *In re Marriage of Heald and Steadman*, 355 Or 104 (2014); *Evergreen West Business Center, LLC v. Emmert*, 354 Or 790 (2014); *Klutchkowski v. PeaceHealth*, 354 Or 150 (2013); *Robinson v. Harley-Davidson Motor Co.*, 354 Or 572 (2013);

State Olive, 259 Or App 104 (2013); *State v. Mills*, 354 Or 350 (2013); *Hagler v. Coastal Farm Holdings, Inc.*, 354 Or 132 (2013); *State v. Savastano*, 354 Or 64 (2013); *State v. Christian*, 354 Or 22 (2013); *State v. Hemenway*, 353 Or 129 (2013), vacated as moot by *State v. Hemenway*, 353 Or 498 (2013); *Hostetter v. Board of Parole and Post-Prison Supervision*, 255 Or App 328 (2013); *State v. Garner*, 253 Or App 64 (2012); *Association of Unit Owners of Timbercrest Condominiums v. Warren*, 352 Or 583 (2012); *State v. Mullins*, 352 Or 343 (2012); and *State v. Torres*, 249 Or App 571 (2012).

5. See e.g. *Multnomah County v. Sliker*, 10 Or 66 (1881).
- 6 350 Or 286, 261 P3d 1 (2011).
- 7 *Farmers v. Mowry*, 350 Or at 697.
- 8 Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 137 (2011) ("[A] strong doctrine of *stare decisis* is consistent with a judiciary characterized by steadiness and gradualism rather than erratic change.")
- 9 *Farmers v. Mowry*, 350 Or at 697.
- 10 See *Administrative Change*, *supra* at 149.
- 11 Oregon Court of Appeals Web Site; informational page (<http://courts.oregon.gov/COA/Pages/index.aspx>)
- 12 *Farmers v. Mowry* at 698, internal citations omitted.
- 13 See "Statement of Professionalism," Adopted by the Oregon State Bar House of Delegates and Approved by the Supreme Court of Oregon effective December 12, 2011.
- 14 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).