WRITTEN TESTIMONY OF SENIOR JUDGE SUZANNE UPTON IN SUPPORT OF HOUSE BILL 3140

To: Chair and distinguished members of the House Judiciary Committee

My name is Suzanne Upton. Having moved to Oregon to attend UO School of Law, I've been fortunate to be an Oregon resident for nearly 40 years. In 1998, I was elected to the Circuit Court in Washington County and served until my retirement in 2017. It has been my great honor to serve as a judge in Oregon and it has also satisfied my desire to serve the public. This testimony springs from my hope to continue that service.

Since my retirement I've served as a senior judge and in that role have presided over all types of matters in fifteen jurisdictions across the state. Despite the many differences in these courts and the populations they serve, some things remain constant. Surely the need for justice is one of them. Although justice is usually thought of in terms of criminal cases, the concept of justice, or even a delay in justice, is one that impacts landlords, businesses, and all enterprises that rely on the courts.

Since my elected years were served in Washington County, I had the opportunity to serve in a jurisdiction that had the greatest population growth in Oregon combined with a bench that had not grown correspondingly. The reason that is pertinent to this discussion is that, like all my colleagues of that period, we processed an extraordinary number of cases and thus became very familiar with a large variety of litigation. By default, criminal cases were first in line, leaving presiding judges little space to schedule civil cases that, although without a constitutional mandate, were and are equally important to the citizens. My own records show I presided over 760 trials including a large number of negligence and injury cases. As such, I am qualified to speak on the issue before you.

In summary, HB 3140 provides:

> That an operator can require a person who seeks to engage in recreational activity to release the operator from claims of ordinary negligence.
>
> Importantly, it also directs the Oregon Business Development Department to study issues facing the recreational industry and report their findings to the Legislative Assembly. It allots a nominal but sufficient amount to conduct this study.

Much could be accomplished by such a reasonable change. As you likely know, unlike all the western states that surround it, Oregon does not allow for such a transaction to be binding. This bill would return our state to the status that existed before the Bagley case was decided by the Supreme Court.

The final Bagley decision illustrates a timeworn legal maxim: Hard cases make bad law. A general law or policy based on a worst case scenario or extraordinary circumstance can often lead to a poor outcome. And, not just for the majority of Oregonians who, in this situation, seek to recreate but also to those who seek to offer such an opportunity.

The history of the Bagley case is important and instructive. Neither this writer nor the proponents of HB 3140, take issue with the fact that the Supreme Court has the last word. Indeed they do.

However, as a former trial judge, I cannot overlook the fact that, prior to the Supreme Court reversal, both the original trial judge AND the Court of Appeals came to the same conclusion. This was not surprising because nothing that the operator did, or failed to do, would have changed the tragic outcome of that day. Yet, despite the reasoning of the lower courts, the Supreme Court reversed the decision in Bagley. In doing so they also eliminated the existing legal framework that had been in place for nearly a century. While their decision was based on the facts of Bagley, it nevertheless created a precedent that created the likelihood, if not the certainty, that such waivers would no longer be enforced. And that is exactly what happened. In fact, the application of the Bagley decision has expanded to waivers in all types of recreation.

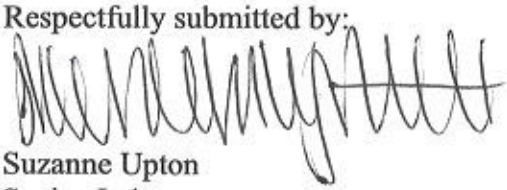
This writer respectfully takes issue with a stated premise in the Supreme Court's Bagley decision. Despite the fact that, like all those who operate recreational activities and thus draft releases and request guests to sign them, a guest is certainly not required to do so! Indeed, they can refuse to sign and suffer only a lack of their desired recreation. It is only a required release for those who affirmatively decide to assume the inherent risks. The issue is not one that is assisted by the concept of which party has the superior bargaining position. A guest has no ability to bargain and is indeed stuck with the release offered by the operator. It is a "Take it or Leave It" situation by design and necessity. Unless the terms are unconscionable, it could not be otherwise.

What is Summary Judgement and why is it important? Although little known or understood outside the legal community, Summary Judgement is a mighty and important tool. Once a lawsuit has been filed, it creates an opportunity for the court to cull cases that should not proceed and, by doing so, provide early justice to entities or individuals that have been sued by a party who cannot prevail in their suit. Although counterintuitive, this does indeed happen. In fact, the lack of enforceable waivers, can tempt both individuals and their lawyers to, in effect, roll the dice with their lawsuit, even when the facts are not or cannot be disputed.

Without a trial, granting judgment for the opposing party ends the lawsuit, but not prematurely, since a case that is not well-founded should not be allowed to proceed. Summary Judgment is a procedural safeguard that can be used by either party but, because of the finality, a party seeking Summary Judgment has to overcome multiple hurdles. The trial court must evaluate the facts of the case as asserted by the party *opposing* summary judgment. No matter their desire to present a case to the jury, they must first allege facts that give rise to liability of the Defendant. Thus, the court must weigh the facts asserted in the light most favorable to the nonmoving party. In other words, assuming all the alleged facts were true, can that party prevail? And, if a material fact remains unknown after that analysis, Summary Judgment is denied and the case proceeds. However, as both lower courts in Bagley concluded, even if the facts were as the Plaintiff argued, it still did not give rise to liability. Thus, the trial court granted Summary Judgment and the Court of Appeals affirmed. By doing so, something important happened. It relieved the defendant from having to defend a case without merit and thus rely on the hope that a jury would separate a terrible injury from their lack of culpability.

For these and all the reasons provided to you, I strongly urge passage of HB 3140. Thank you for your service.

Respectfully submitted by:



Suzanne Upton
Senior Judge