

IN THE COURT OF APPEALS OF THE STATE OF OREGON

RECEIVED

JOSEPH BOVA,
Plaintiff-Respondent,

JUL 19 2010

v.

BALL JANIK LLP

CITY OF MEDFORD, an incorporated Subdivision of the State of Oregon, and
MICHAEL DYAL, City Manager of the City of Medford, as an individual,
and in his official capacity,
Defendants-Appellants.

Jackson County Circuit Court No.081663E7

Court of Appeals No. A144254

**RESPONSE TO MOTIONS OF GROUP OF RESPONDENT CLASS
MEMBERS AND INTERESTED PERSONS OUTSIDE THE CLASS**

Appeal from the Limited Judgment entered on December 7, 2009
Jackson County Circuit Court
of the State of Oregon
The Honorable Mark Schiveley, Circuit Court Judge

Mr. Stephen L. Brischetto OSB #78156
E-Mail: slb@brischettolaw.com
Attorney at Law
621 SW Morrison Street, Ste. 1025
Portland, OR 97205
Telephone: (503) 223-5814
Facsimile: (503) 228-1317

Of Attorneys for Plaintiffs-Respondents

Continued on next page

Mr. George P. Fisher OSB #91043
E-Mail: george.fisher@gpf-law.com
Attorney at Law
3635 S.W. Dosch Road
Portland, OR 97239
Telephone: (503) 224-7730
Facsimile: (503) 227-2429

Of Attorneys for Plaintiffs-Respondents

LAW OFFICE OF ROBERT E. FRANZ, JR.
Robert E. Franz, Jr. OSB #73091
E-Mail: robertfranz@qwestoffice.net
Jerome P. Larkin OSB #83269
E-Mail: robertfranz@qwestoffice.net
P.O. Box 62
Springfield, OR 97477
Telephone: (541) 741-8220
Facsimile: (541) 741-8234

Of Attorneys for Defendants-Appellants

A Group of Respondent Class Members (hereinafter, “the Group”) and a group of Interested Persons Outside the Class (hereinafter, “the Interested Persons”) have now filed Motions to participate in the appeal in this case. The Group asks the Court of Appeals to permit the filing of additional authorities in support of the City’s Motion to Stay the Circuit’s Court’s Limited Judgment or alternatively asking leave to appear as Amicus Curiae. The Interested Persons ask leave to appear as Amicus Curiae to present their private interests. Both groups claim that they have a good faith belief that compliance with the Limited Judgment will result in substantial changes to their health insurance benefits including changes in co-pays, out of pocket costs and increases in premium costs.

Respondent opposes the Group’s Motion to participate in the City’s Emergency Motion to Stay the Limited Judgment. Respondent wishes to set forth the circumstances that led to the two groups motions because those circumstances are relevant to the court’s determination of the two groups’ motions. Respondent opposes the group’s motions for three reasons: (1) the two groups motions will delay resolution of the Emergency Motion to Stay and the delay causes harm both to Class Members as well as to members of the two groups; (2) the two groups motions are a product of the dissemination of improper, false communications by the City to Class Members and acts in contempt of the Circuit Court’s Limited Judgment; and (3) the two groups should make any concerns about changes in health insurance and the potential for increases in premiums known to the Circuit Court.

Appellant, the City of Medford, filed its Notice of Appeal on December 7, 2009 appealing a Limited Judgment entered by the Jackson County Circuit Court.

After the Circuit Court denied the City's motion for a stay pending appeal, the City filed an Emergency Motion to Stay in this court on February 15, 2010. On February 19, 2010, this court granted the City a temporary stay to permit respondents an opportunity to respond to the Motion and to permit the court to give careful consideration of the parties' arguments. Briefing of the Emergency Motion was completed on March 11, 2010 and oral argument held on April 30, 2010. The Emergency Motion remains under advisement.

Subsequent to obtaining a temporary stay from this court the City has raised a number of obstacles which appear designed to delay this court's decision of the Emergency Motion. The City initially objected to the assignment of the Appellate Commissioner to hear the appeal. When the City's objection was rejected, the City filed Petition in the Oregon Supreme Court seeking the issuance of a Writ of Mandamus to stop oral argument. After oral argument of the Emergency Motion was held, the City filed a Petition for Review asking the Supreme Court to review the Court of Appeals decision rejecting the City's objection.

The Group's and the Interested Persons' Motions will delay resolution of the Emergency Motion to Stay causing harm both to Class Members as well as to members of the two groups. If the two groups' motions are granted, resolution will be delayed while the groups present their private interests or additional authorities. The two groups provide no explanation why resolution of the Emergency Motion should be delayed at this late juncture. The two groups received notice of the class action in January 2009 and took no action to participate in the Circuit Court in determining liability or in intervening on the City's motion to stay the limited judgment pending

appeal. There is no reason that resolution of the Emergency Motion should be delayed at this late date.

Delay in enforcement of the Circuit Court's Limited Judgment harms members of the Class and members of the two groups. Class members are harmed by delay in enforcement because Class Members who retire are denied the opportunity to elect continuation of their group health insurance for periods of time that can extend more than 20 years. Members of the two groups are harmed because the two groups have been provided false, misleading information by the City and their actions and statements based upon this false and misleading information are prejudicial to preserving their legal rights under ORS 243.303.

Class counsel believe the two groups concerns that they should be able to maintain their current health insurance and that they should not have to bear increased costs due to the City's violation of the law should be heard. However, the Circuit Court is the proper forum for the two groups concerns to be heard. The Circuit Court, at present, has made no decision as to whether compliance with ORS 243.303 requires a change in health insurance providers and has made no decision as to who should bear the costs, if there are any, of the City's violation of ORS 243.303. Further, the Circuit Court is the proper forum to correct the harms visited by the City's dissemination of false, misleading information to the Class.

Second, the two groups' motions are the product of improper conduct by the City in disseminating false, misleading information to members of the Class. The two groups' motions are the product of a letter the Medford Director of Human Resources, Douglas Detling, presented to the Medford City Attorney, John Huttli,

advising that 90% of the managers had signed a petition opposing the Circuit Court's injunction and asking the City to finance legal representation for managers to make their views known. Mr. Detling represented that the injunction would financially harm members of the class as well as the taxpayers of Medford in the form of hundreds of thousands of dollars in premiums for health insurance. Detling asserted that hiring an attorney to represent the managers would be "in the long-term financial interests of the City." *Brischetto Aff, Ex A.*

Mr. Detling is a member of the management team that made the decisions that placed the City in violation of ORS 243.303. In his role as one of the City's decision-makers with respect to health insurance, Mr. Detling is represented by Mr. Franz, the City's defense counsel in this case. *Brischetto Aff, Ex B.*

Mr. Detling's communication with Mr. Huttl resulted in the Medford City Council adopting a Resolution approving expenditure of \$25,000 in taxpayer funds for the managers to obtain representation. The City's Resolution asserts that the Circuit Court's judgment for an injunction "would require the City to provide coverage different from the current OTET coverage"; that the City has opposed the suit and the injunctive relief; that the employees "wish to maintain the status quo of health care benefits coverage with OTET"; and that "success by the employees in obtaining legal relief to maintain the status quo would be a benefit to the City" in the lawsuit. *Brischetto Aff, Ex C.*

The representations the City made to managers concerning the Circuit Court's Limited Judgment are false. While the City appears to have disseminated information to managers that the Limited Judgment will require coverage different

from the current OTET coverage and will financially harm managers, nothing in the Limited Judgment requires the City to select or reject any health insurance provider and the Limited Judgment says nothing about who bears responsibility for increases in premiums. Rather, the Limited Judgment requires that “[t]he City, its officers, employees and attorneys shall take all actions necessary to comply with ORS 243.303...” and that the City shall create a written plan for compliance with ORS 243.303. Since the entry of the Limited Judgment, the existence of the temporary stay on appeal has precluded the Circuit Court from determining whether compliance with ORS 243.303 requires a change in health insurance providers and who will bear any costs resulting from bringing the City into compliance.

The communications between the City and the Class Members are improper. Under ORCP 32E, the Circuit Court has authority to manage class actions. Under ORCP 32E(2) and (3), the Circuit Court may make appropriate orders for protection of the class including placing conditions on parties, intervenors and class members. While there is little state court authority on point, it is well settled in federal court that “[b]ecause of the potential for abuse, a ...court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and the parties.” *Gulf Oil Company v Bernard*, 452 US 89, 101 SCt 2193, 68 LEd2d 693 (1981). If the class and the class opponent are involved in-an going business relationship, communications from the class opponent to the class may be coercive. As a result, the court may consistently with the First Amendment tailor limitations on communications with the class. *Kleiner v First Nat. Bank of Atlanta*, 751 F2d 1193, 1206 (11th Cir 1985). One form

of prohibited communication is "communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential court orders therein...". *Waldo v Lakeshore Estates, Inc.*, 433 F Supp 782, 786 (ED La. 1977). The City's misrepresentation of the court's order in this case is a coercive act that is improper.

The City's actions also appear to be in direct contempt of the court's Limited Judgment which requires "all officers, employees and attorneys" to take "all actions necessary to comply with ORS 243.303." Circulating false information to managers about the litigation and hiring a lawyer for managers to maintain the status quo and oppose the court's injunction are not actions to "comply with ORS 243.303."

Finally, the actions of the attorneys for the City appear to be unethical. Under Rule 4.2 of the Oregon Rules of Professional Conduct, in "representing a client or the lawyer's own interest, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject..." Mr. Huttel's action assisting managers (who were represented by Class Counsel) in communicating with the City concerning the subject of representation appears to violate ORPC 4.2 on its face.

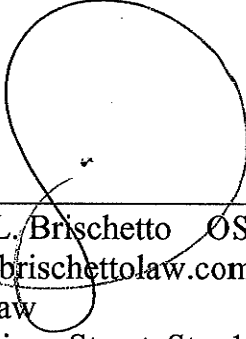
Furthermore, Mr. Franz filed a Supplemental Exhibit in Support of Motion to Stay in this case on June 8, 2010 prior to Class Counsel even knowing of the existence of the petition. Mr. Franz could not have obtained a copy of the petition absent improper communications with members of the Class.

Class counsel brings these circumstances to the attention of the Court of Appeals because the two groups' motions present the potential for further delay in

decision of the Emergency Motion. Class counsel have filed motions in the Circuit Court to seeking authorization to publish an additional notice to Class members and are in the process of preparing an additional motion seeking further relief for the improper conduct.

Class counsel request that the court issue a decision on the Emergency Motion to Stay. The two groups' Motions demonstrate that the City's resistance to the Circuit Court's Limited Judgment harms the interests of the Class Members.

DATED this 15th day of July, 2010.



Mr. Stephen L. Brischetto OSB #78156
E-Mail: slb@brischettolaw.com
Attorney at Law
621 SW Morrison Street, Ste. 1025
Portland, OR 97205
Telephone: (503) 223-5814
Facsimile: (503) 228-1317

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2010 I filed with the Oregon Court of Appeals an original and 1 copy, and served 1 copy of the foregoing **RESPONSE TO MOTIONS OF GROUP OF RESPONDENT CLASS MEMBERS AND INTERESTED PERSONS OUTSIDE THE CLASS** on:

Robert E. Franz, Jr.
LAW OFFICE OF ROBERT E. FRANZ, JR.
PO BOX 62
Springfield OR 97477

Of Attorneys for Defendant

- HAND DELIVERY
- U.S. MAIL
- FAX
- E-MAIL
- ECF

George P. Fisher
Attorney at Law
3635 S.W. Dosch Road
Portland OR 97239

Of Attorneys for Plaintiffs-Respondents

- HAND DELIVERY
- U.S. MAIL
- FAX
- E-MAIL
- ECF

✓ Lisa M. Umscheid
Ball Janik
101 SW Main St, Ste 1100
Portland OR 97204

- HAND DELIVERY
- U.S. MAIL
- FAX
- E-MAIL
- ECF

Of Attorneys for Interested Persons and Group of Respondent Class Members

by delivering this date to said attorney(s) a true copy thereof as stated above. I further certify that said documents were contained in sealed envelopes, addressed as above stated, to the last-known addresses of said attorney(s). Documents delivered by mail were deposited in the post office at Portland, Oregon with postage thereon prepaid.

DATED: July 15, 2010.



Stephen L. Brischetto, OSB 78156
Of Attorneys for Plaintiffs-Respondents
(503) 223-5814