

**SAMPLE ACCEPTABLE
APPELLANT'S OPENING BRIEF
CIVIL CASE**

(updated January 1, 2011)

Disclaimer: This sample brief is adapted from a real brief filed in a real case. Identifying information, including names, addresses, and telephone numbers, has been altered or omitted. The substance is either unchanged or, in only a few places, slightly modified or shortened. The court does not offer this brief for or otherwise endorse the substance of the arguments. This brief is presented only as a sample brief that acceptably complies with the form and format requirements of the Oregon Rules of Appellate Procedure (ORAP).

[Note: this page (the "cover") must be blue paper
of at least 65 lb. weight]

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JACK DOE AND JILL DOE,)	
)	
Plaintiffs-Appellants,)	Eden County Circuit
)	Court No. 97C-00000
v.)	
)	CA A000000
EDEN COUNTY,)	
)	
Defendant-Respondent.)	

APPELLANTS' OPENING BRIEF AND EXCERPT OF RECORD

Appeal from the Judgment of Dismissal of
the Circuit Court for Eden County
dated September 29, 1997
The Honorable Adam Jurist

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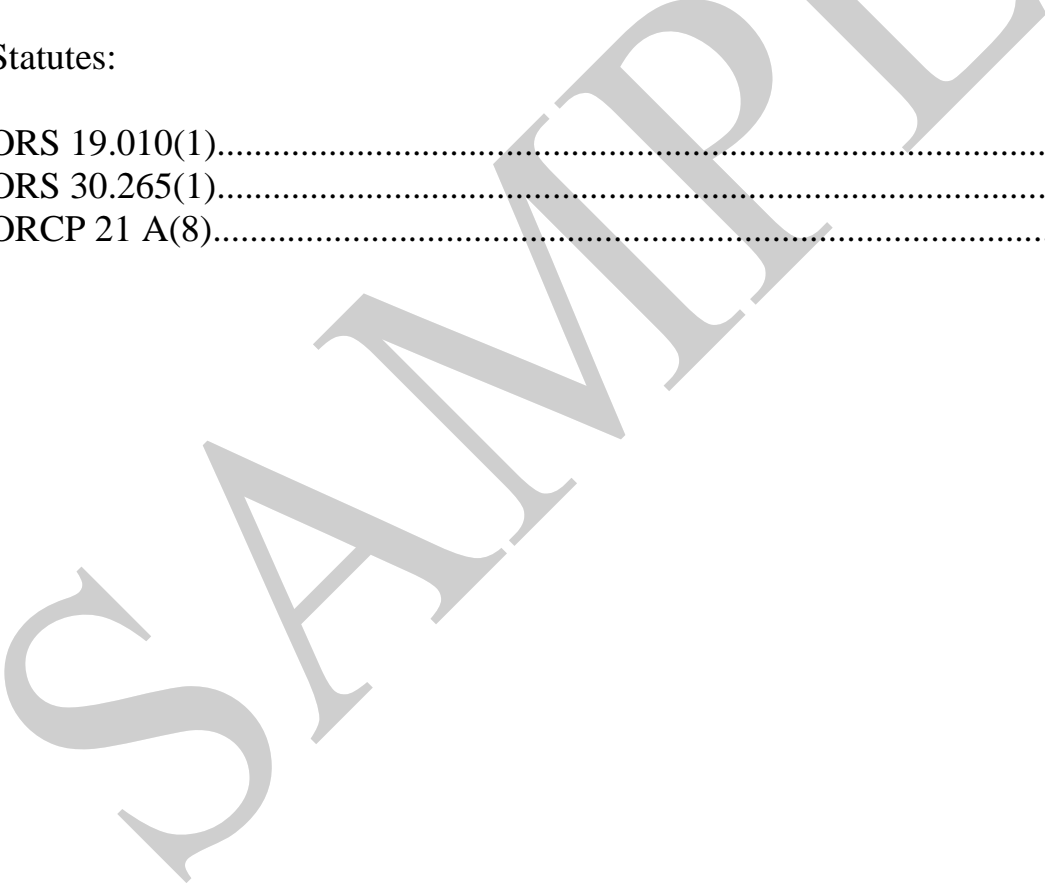
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APPELLANTS' OPENING BRIEF AND EXCERPT OF RECORD

STATEMENT OF THE CASE

Nature of the action and relief sought

This is an action against Eden County for property damage to plaintiffs' motor vehicle, which plaintiffs allege was damaged as a result of defendant's negligence. The trial court granted defendant's motion to dismiss plaintiffs' Second Amended Complaint under ORCP 21 A(8) for failure to state ultimate facts sufficient to constitute a claim. Plaintiffs seek reversal of the judgment dismissing the Second Amended Complaint.

Nature of the judgment

The nature of the judgment is the dismissal of plaintiffs' pleading for failure to state ultimate facts sufficient to constitute a claim.

Basis of appellate jurisdiction

Appellate jurisdiction is based on ORS 19.010(1).

Effective date for appellate purposes

The Judgment of Dismissal was signed September 29, 1997 and was entered October 2, 1997. The Notice of Appeal was served and filed on October 31, 1997.

Questions presented on appeal

a. Did the trial court err in ruling that as a matter of law defendant did not have a duty to halt the sanding truck prior to passing plaintiffs' vehicle?

b. Did the trial court err in ruling that as a matter of law defendant did not have a duty to halt the sanding process while passing plaintiffs' vehicle?

Summary of argument

Neither the parties nor the trial court invoked a status, a relationship, or a particular standard of conduct that creates, defines or limits defendant's duty in this case.

The allegations in plaintiffs' pleading do not place this case in a category of claimants or claims that require denial of plaintiffs' claim as a matter of law.

A rational factfinder could find defendant's conduct unreasonably posed a foreseeable risk to plaintiffs.

The allegations in plaintiffs' pleading are sufficient to state a common law negligence claim.

Statement of facts

The facts are from the Second Amended Complaint. (ER-2.) Plaintiff (plaintiff Jack Doe was operating the vehicle; plaintiff Jill Doe was a passenger) was driving westerly, and defendant was operating a road sanding truck easterly. Conditions were snowy and icy, and defendant was sanding the highway. As the

two vehicles approached each other, plaintiff observed that the sanding truck was throwing sand onto his lane of traffic, so he stopped the vehicle in his lane of traffic in an attempt to avoid damage to the vehicle from the sand. Plaintiff was unable to safely move the vehicle off the road because there were ice ruts along the road, and there was a danger of driving into the ditch that ran parallel along plaintiffs' lane of traffic. Defendant continued sanding as it passed plaintiffs' stationary vehicle, and sand from defendant's truck was sprayed onto plaintiffs' vehicle, thereby damaging it. Plaintiffs further allege in their pleading that defendant knew or reasonably should have known about plaintiffs' perilous circumstances, including the ruts in the road and the ditch along the road; that plaintiffs' vehicle had come to a halt in their lane of traffic; that defendant's truck was throwing sand onto plaintiffs' lane of traffic; and that the sand likely would damage vehicles in plaintiffs' lane of traffic. (Second Amended Complaint, ER-2.)

ASSIGNMENT OF ERROR

Preservation of Error

Plaintiffs assign as error the trial court's granting of defendant's Motion to Dismiss. Defendant moved to dismiss plaintiff's Second Amended Complaint. (ER-3). Plaintiffs preserved their claim of error by opposing the motion. (ER-4) The trial court granted the motion, as reflected in the judgment of dismissal. (ER-5).

Standard of Review

"Whether the complaint states a claim is a question of law." *Hansen v. Anderson*, 113 Or App 216, 218, 831 P2d 717 (1992). "In considering the sufficiency of plaintiffs' complaint, we accept all well-pleaded allegations of the complaint as true and give plaintiffs the benefit of all favorable inferences that may be drawn from the facts alleged." *Stringer v. Car Data Systems, Inc.*, 314 Or 576, 584, 841 P2d 1183 (1992).

ARGUMENT

In *Fazzolari v. Portland School Dist. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987), the Oregon Supreme Court said that,

"unless the parties invoke a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant's duty, the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff. The role of the court is what it ordinarily is in cases involving the evaluation of particular situations under broad and imprecise standards: to determine whether upon the facts alleged * * * no reasonable factfinder could decide one or more elements of liability for one or the other party."

In *Buchler v. Oregon Corrections Div.*, 316 Or 499, 504, 853 P2d 798 (1993), the Oregon Supreme Court further said:

"The general allegations of the complaint require this court first to analyze whether a special relationship between the plaintiff and the defendant is alleged to exist due to 'a status, a relationship, or a particular conduct which creates, defines or limits the defendant's duty.' *Fazzolari v. Portland School Dist. No. 1J, supra*, 303 Or at 19.

It is only when there is no such special relationship, status, or conduct that *Fazzolari's* general foreseeability principle * * * comes into play. *Ibid.*"

Public bodies are ordinarily liable for the torts of employees acting within the scope of employment under ORS 30.265(1). Plaintiffs in this case did not invoke a special relationship, status, or conduct which creates, defines, or limits defendant's duty. Defendant in this case did not invoke a special relationship, status, or conduct which creates, defines, or limits defendant's duty. The trial court in this case did not invoke a special relationship, status, or conduct which creates, defines, or limits defendant's duty.

Plaintiffs are not aware of special rules defining how a public body must go about attempting to make roads safer during inclement weather. Plaintiffs are not aware of special rules about whether or not a public body has a duty to try to avoid doing damage to the property of others while going about its job. If there are such rules, no one to date has raised them in this case.

In *Donaca v. Curry Co.*, 77 Or App 677, 714 P2d 265 (1986), the Court of Appeals held that a county did not have a common law duty to maintain the grass height along a county road so as not to obstruct the vision of drivers at an intersection with a private road. That decision was reversed in *Donaca v. Curry Co.*, 303 Or 30, 734 P2d 1339 (1987). The complaint in *Donaca* had been

dismissed by the trial court for failure to state ultimate facts sufficient to constitute a claim for relief. The Supreme Court said:

"[U]nless the plaintiff invokes such a specific legal source, 'no duty' is only a defendant's way of denying legal liability for conduct that might be found in fact to have unreasonably caused a foreseeable risk of harm to an interest of the kind for which the plaintiff claims damages.

"'No duty' defenses are argued broadly or narrowly, as the occasion demands. Sometimes 'no duty' excludes whole categories of claimants or of claims, for instance economic or psychic loss caused by physical injury to another person. At other times 'no duty' refers narrowly to an aspect of the particular circumstances before the court. This often amounts to a claim that no rational factfinder could find defendant's conduct unreasonably to pose a foreseeable risk to the plaintiff but does not really assert any categorical rule."

303 Or at 32-33 (citations and footnotes omitted).

According to the Supreme Court in *Donaca*, the Court of Appeals was apparently persuaded at least in part by policy considerations of the cost of controlling vegetation at intersections. This resulted in the Court of Appeals adopting the categorical "no duty" defense. The Supreme Court said, however, that these were ordinary issues of negligence liability. That is, they were empirical questions to be decided by the factfinder.

To summarize the Supreme Court's guidance from *Donaca*, if the pleadings do not constitute a basis for invoking the "special relationship" rule under *Fazzolari*, "no duty" defenses are either broad, seeking exclusion of categories of claimants or claims; or narrow, amounting to a claim in a particular case that no

rational factfinder could find a defendant's conduct unreasonably to pose a foreseeable risk to the plaintiff.

It is possible that the trial court in this case felt there were "cost" or "necessity" factors, implicitly reasoning along the lines articulated by the Court of Appeals in the *Donaca* case. If so, although such factors may be considered by the factfinder, they seem to have been rejected by the Supreme Court in *Donaca* in the context of whether a claim has been stated.

If the basis for the trial court's "no duty" ruling was that no rational factfinder could find defendant's conduct unreasonable to pose a foreseeable risk to the plaintiffs, it appears to have been in error. Although a factfinder is free to reject imposing liability on hearing the evidence, it cannot be said that no rational factfinder, on the allegations in plaintiffs' pleading, could find defendant's conduct unreasonably to pose a foreseeable risk to plaintiffs:

"A negligence complaint, to survive a motion to dismiss, must allege facts from which a factfinder could determine (1) that defendant's conduct caused a foreseeable risk of harm, (2) that the risk is o an interest of a kind that the law protects against negligent invasion, (3) that defendant's conduct was unreasonable in light of the risk, (4) that the conduct was a cause of plaintiff's harm, and (5) that plaintiff was within the class of persons and plaintiff's injury was within the general type of potential incidents and injuries that made defendant's conduct negligent. *Fazzolari v. Portland School Dist. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987); *Stewart v. Jefferson Plywood Co.*, 255 Or 603, 469 P2d 783 (1970)."

Solberg v. Johnson, 306 Or 484, 490-91, 760 P2d 867 (1988); *see also Slogowski v. Lyness*, 324 Or 436, 441, 927 P2d 587 (1996).

Plaintiffs have pleaded facts from which a factfinder could make a determination in plaintiffs' favor in accordance with the foregoing requirements.

CONCLUSION

The trial court erred when it ruled that the Second Amended Complaint failed to state ultimate facts sufficient to constitute a claim. The Judgment of Dismissal should be reversed.

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EXCERPT OF RECORD

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Second Amended Complaint (TCF 10).....ER-2
Defendant's Motion to Dismiss (TCF 15).....ER-3
Plaintiffs' Memorandum in Opposition to Motion (TCF 19).....ER-4
Judgment of Dismissal (TCF 22).....ER-5

SAMPLE

SECOND AMENDED COMPLAINT

[A copy of the second amended complaint was included with this brief. *See* ORAP 5.50.]

SAMPLE

MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

[A motion to dismiss plaintiffs' amended complaint was included with this brief.

See ORAP 5.50.]

SAMPLE

MEMORANDUM IN OPPOSITION TO
MOTION TO DISMISS PLAINTIFFS' COMPLAINT

[A copy of the memorandum in opposition to the motion to dismiss plaintiffs' amended complaint was included with this brief. *See* ORAP 5.50.]

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JUDGMENT OF DISMISSAL

[A copy of the judgment of dismissal was included with this brief. *See* ORAP

5.50.]

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APPENDIX

[A copy of ORCP 21 A(8) was included with this brief. *See* ORAP 5.52.]

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**CERTIFICATION OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 1,747 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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PROOF OF SERVICE

I certify that I directed the original and 13 copies of the Appellants' Brief and Excerpt of Record to be filed with the Appellate Court Administrator, Appellate Courts Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on May 1, 1998.

I further certify that I directed the Appellants' Brief to be served on the attorney for respondent on May 1, 1998, by mailing two copies, with postage prepaid, in an envelope addressed to:

Susan Attorney
Assistant Eden County Counsel
[address]

Victor Lawyer (OSB No. 000000)
Attorney for Plaintiffs-Appellants