IN THE SUPREME COURT OF THE STATE OF OREGON

DONNA BURGDORF,
Plaintiff-Appellant/Respondent on Review,

v.

BRIAN K. WESTON,
Defendant-Respondent/Petitioner on Review

Jackson County Circuit Court Case No. 083428E2
Court of Appeals No. A147599
Supreme Court No. N004237

OREGON ASSOCIATION OF DEFENSE COUNSEL'S AMICUS BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT'S PETITON FOR REVIEW

Opinion Filed December 11, 2013
Duncan, J.; Author of Opinion
Armstrong, P.J., and Brewer, J. pro tempore, concurring
Reversed and remanded

Appeal from the Judgment of the Circuit Court for Jackson County
Hon. G. Philip Arnold
December 20, 2010

Oregon Association of Defense Counsel
will file a brief on the merits if review is allowed.

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(continued on reverse)

March 2014

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INTRODUCTION

Amicus Curiae Oregon Association of Defense Counsel ("OADC") appears in support of defendant's Petition for Review from the Judgment of the Oregon Court of Appeals in *Burgdorf v. Weston*, 259 Or App 755, 316 P3d 303 (2013), and specifically defendant's position regarding the application of ORS 12.110(1). This court should accept review to address defendant's argument that the discovery rule in ORS 12.110(1) requires an objective, not a subjective, assessment of when the plaintiff knows or should have known of the alleged fraud or deceit. The distinctions are important, yet repeatedly lost in the Court of Appeals when reversing summary judgments granted by the trial courts.

In addition, OADC appears in support of defendant's position that a party opposing summary judgment may not, without explaining the inconsistency, be permitted to create a question of fact and thereby defeat summary judgment by submitting an affidavit that conflicts with sworn deposition testimony. *Henderson-Rubio v. May Dept. Stores*, 53 Or App 575, 632 P2d 1289 (1981). Absent clear rules regarding an abrupt change in position by the non-moving party faced with summary judgment, which this court has never squarely addressed, the Court of Appeals decision in this case jeopardizes the continued viability of summary judgments as a meaningful process to determine claims and issues before trial.

I. The discovery rule requires an objective measure of when a reasonable person should have known of the alleged fraud or injury

A frequent basis given by the Court of Appeals for reversing summary judgments granted in the trial courts is that there is a question of fact as to when the plaintiff reasonably should have discovered the injury or fraud alleged. *E.g.*, *Zabriskie v. Lowengart*, 252 Or App 543, 290 P3d 299 (2012) (summary judgment for defendant reversed in claim for medical negligence); *Murphy v.* Allstate *Ins. Co.*, 251 Or App 316, 284 P3d 524 (2012) (court reversed summary judgment for defendant in claim for fraud against homeowner's insurer). Despite ORCP 47 and this court's consistent holdings that the assessment of when the fraud or injury should have been discovered is an objective measure, *e.g. Mathies v. Hoeck*, 284 Or 539, 542, 588 P2d 1 (1978); *Forest Grove Brick Works, Inc. v. Strickland*, 277 Or 81, 86, 559 P2d 502, 505 (1977), the Court of Appeals continues to depart from that standard when there is no genuine issue of fact that a reasonable person would have investigated earlier, and, had he done so would have the information that is available through diligent inquiry. If the statutes of limitation set forth in ORS 12.110 and related statutes that contain, or are construed to have discovery provisions are to have any continued viability, *e.g.*, ORS 12.110(4); ORS 30.275(9); ORS 30.905(1), strict adherence to the standards for an objective inquiry is required. Without it, ORCP 47 can

never meaningfully provide the summary determination this court has recognized it is intended to afford in cases in which the statute of limitations is an affirmative defense:

> "The whole scheme of summary judgment is designed to cut off litigation at an early stage, without subjecting the parties to months or years of extensive and expensive litigation * * *."

Tiedemann v. Radiation Therapy Consultants, 299 Or 238, 245, 701 P2d 330 (1985).

In the present case, the Court of Appeals erred in collapsing the objective inquiry that was required of plaintiff beginning in 2004 into her own subjective belief and suspicion, which she claims she did not develop until 2008. *Burgdorf*, 259 Or at 669-770. Rather than addressing what a reasonably diligent inquiry objectively would have shown, the Court of Appeals determined that the trial court erred because an "objectively reasonable factfinder could determine * * * *plaintiff* was not aware of, and could not reasonably have been aware of, defendant's misrepresentations until June 2008." *Id.* at 770 (emphasis added). What a particular plaintiff with particular vulnerabilities would have done is not the determining question in the application of the discovery rule. The Court should grant review to correct the error and refocus the Court of Appeals' inquiry to require assessment of not just what the particular plaintiff knew or should have known, but, objectively, whether the information a reasonable person

conducting a diligent inquiry would have had was sufficient to trigger the statute of limitations. In the case presented, based on an objective assessment, reasonable minds could not differ.

II. The non-moving party may not create a question of fact in opposition to summary judgment simply based on a change in testimony.

The Court of Appeals also errs in relying on the affidavit plaintiff submitted in opposition to defendant's summary judgment motion to controvert her own sworn testimony that she did not loan money to defendant and he did not directly say he would pay her back for the money. *Burgdorf*, 259 Or App at 774. As the court stated, "in her deposition, plaintiff denied loaning money to defendant, while in her affidavit, she claimed that she had loaned money to defendant." *Id.* at 775. Relying on *Henderson-Rubio*, 53 Or App 575, the court correctly held the latter statement constituted an explicit contradiction. *Id.*, (citing *Knepper v. Brown*, 182 Or App 597, 616, 50 P3d 1209 (2002)). From that point, however, the court took a surprising departure from existing case law and held that the affidavit disclosed the requisite justification or explanation for the inconsistency. *Id.* at 775-776. The court did not find the "explanation" in any claim by plaintiff that she was confused or in any elucidation for the difference in the statements. Instead, the court undertook to read between the lines and supply its own rationale for the difference in the testimony:

> "Thus, the contradiction between the deposition and the affidavit derives from the fact that, in the deposition, plaintiff stated that defendant never promised to repay her when she gave him money, whereas in her affidavit, she clarifies that, despite the absence of defendant's explicit promise to repay her, she expected defendant to repay her, and defendant expected to repay her."

Id. at 776. Based on this reading and the inferred "clarification," the Court of Appeals concluded a genuine issue of material fact exists on plaintiff's unjust enrichment claim because a reasonable factfinder could find that plaintiff reasonably expected defendant to repay her, or that defendant expected to repay her. *Id.*

This is contrary to ORCP 47, which places the burden on the non-moving party to come forward with specific facts to create a question of fact. ORCP 47 C directs the trial court in its role on summary judgment:

> "The court shall grant the motion if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law."

ORCP 47 D further provides:

> "When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of that party's pleading, but the adverse party's response, by affidavits, declarations or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, the court shall grant the motion if appropriate."

Aside from the facts of this case, which the Court of Appeals may have considered to be compelling, the question the court's analysis raises is what limits, then, are there on a non-moving party changing positions when faced with a dispositive motion based on their own sworn testimony. The Supreme Court considered the *Henderson-Rubio* rule in *Stoeger v. Burlington Northern R. Co.* 323 Or 569, 577, 919 P2d 39 (1996). The opinion noted that the court was equally divided as to the validity of the rule. *Id.* The court declined to decide the issue because it found that, whether or not the *Henderson-Rubio* rule applied, the plaintiff in *Stoeger* had created a genuine issue of material fact, and, if plaintiff were required to provide some explanation of the inconsistency between his earlier statement and his affidavit, he provided it.

Until now, at least, the Court of Appeals has not permitted an affidavit that flatly contradicts sworn deposition testimony to raise a genuine issue of fact unless it "discloses the 'requisite justification or explanation'" for the inconsistency. *Knepper*, 182 Or App at 614. At a minimum, this has required that plaintiff provide the explanation or justification. Yet, the Court of Appeals in this case supplied the explanation that plaintiff failed to provide and in doing so reversed the summary judgment in favor of defendant. Review is required for this court to consider and address this surprising new direction and departure from existing law.

III. Conclusion

The Court should grant defendant's petition for review so that it may, at a minimum, address first, the Court of Appeals' serious erosion of the objective standard that governs when a plaintiff should have discovered her claim for purposes of ORS 12.110. Second, the court should grant review to address whether an explanation for a direct contradiction in testimony can be supplied by inference by the court, or whether the party opposing summary judgment has an affirmative obligation to provide the court with an explanation or justification for the difference in testimony. These are significant questions that implicate a broad range of cases, the proper construction of ORCP 47 and the role of summary judgment in civil litigation.

DATED this 5th day of March 2014.

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Certificate of Compliance

I certify that this brief complies with the word count limitation pursuant to ORAP 5.05(2)(b); the word count is 2321 words. I further certify that this brief is produced in a type font not smaller than 14 point in both text and footnotes pursuant to ORAP 5.05(4)(f).

In addition, I certify that this document was converted into a searchable PDF format for electronic filing and was scanned for viruses; it is submitted to the court brief bank virus-free as required by ORAP 9.17(5)(b).

s/Lindsey H. Hughes
Lindsey H. Hughes

CERTIFICATE OF FILING AND SERVICE

I certify that on the date below I served the foregoing OREGON ASSOCIATION OF DEFENSE COUNSEL'S AMICUS BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT'S PETITON FOR REVIEW on the following attorneys:

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by delivering two true and correct copies by means of first class mail address to the attorneys at their most recent addressed and deposited in the U.S. Postal Service at Portland, Oregon.

On the same date, I certified that I filed the foregoing OREGON ASSOCIATION OF DEFENSE COUNSEL'S AMICUS BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT'S PETITON FOR REVIEW with the State Court Administrator, Appellate Records Section, Supreme

Court Building, 1163 State Street, Salem OR 97301 by means of the appellate e-filing system.

DATED this 5th day of March 2014.

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