IN THE SUPREME COURT OF THE STATE OF OREGON

MARK STRAWN, on his own behalf and as representative of a class of similarly situated persons,

Plaintiff – Respondent – Respondent on Review

v.

FARMERS INSURANCE COMPANY OF OREGON, an Oregon stock insurance company; MID-CENTURY INSURANCE COMPANY, a foreign corporation; and TRUCK INSURANCE EXCHANGE, a foreign corporation,

Defendants – Appellants – Petitioners on Review,

and

FARMERS INSURANCE GROUP INC.,

Defendant.

SC No. S057629

CA No. A131605

TC No. 9908-09080

Brief of *Amicus Curiae* Oregon Association of Defense Counsel

---

Review of the opinion of the Court of Appeals,
on appeal from the judgment of the Multnomah County Circuit Court
by the Honorable Jerome E. LaBarre, Judge

Date of Opinion:	May 20, 2009
Author:	Sercombe, J.
Concurring:	Edmonds, P.J.; Wollheim, J.

Thomas M. Christ, OSB No. 834604
Cosgrave Vergeer Kester LLP
805 S.W. Broadway, 8th Floor
Portland, OR 97205
(503) 323-9000

For Oregon Association of Defense Counsel November 2009

James N. Westwood, OSB No. 743392
Stoel Rives LLP
900 S.W. 5th Ave., Suite 2600
Portland, OR 97204
(503) 224-3380

and

Michael D. Hoffman, OSB No. 710853
Hoffman Hart & Wagner, LLP
1000 S.W. Broadway, Suite 2000
Portland, OR 97205
(503) 222-4499

and

Mark E. Olmsted, OSB No. 924156
Mark E. Olmsted, P.C.
One S.W. Columbia St., Suite 1110
Portland, OR 97258
(503) 445-4453

For Petitioners on Review Farmers Insurance Company of Oregon, Mid-Century Insurance Company, and Truck Insurance Exchange

Richard S. Yugler, OSB No. 804167
Landye Bennett Blumstein, LLP
1300 S.W. 5th Ave., Suite 3500
Portland, OR 97201
(503) 224-4100

and

Kathryn H. Clarke, OSB No. 791890
Attorney at Law
P.O. Box 11960
Portland, OR 97211

For Respondent on Review

Fredrick C. Ruby, OSB No. 843345
Department of Justice
1162 Court St., N.E.
Salem, OR 97301
(503) 947-4400

For the State of Oregon

CONTENTS

AUTHORITIES

Cases

Other

I. Introduction

The Oregon Association of Defense Counsel (OADC) – a private association of Oregon lawyers who represent defendants in civil cases – submits this friend-of-the-court brief on just one aspect of the case: the reliance element of the fraud claim. As explained below, OADC is concerned that the lower court rulings dispense with that element.

II. Discussion

People often misspeak. They say one thing when they mean another, and vice versa. They are not always clear, precise, and accurate, even when trying to be. And sometimes, of course, they're not even trying. Misstatements, then, abound.

Most of the time that's not a problem, because no one gets hurt. The misstatement is not noticed – or, if noticed, not believed. No one acts upon it. Sometimes, however, people rely on a misstatement to their detriment. They are induced to act, or to forebear from acting, and suffer some financial loss as a consequence. In that event, the law should provide a remedy, and it does, through a claim for fraud.

They key here is reliance. A misrepresentation should not be actionable when no one hears it, believes it, or acts upon it. Otherwise the chilling effect of tort liability would raise some serious free speech concerns, since fraud is an historic exception to the constitutional right to "speak, write, or print freely on any

subject whatever." Or Const Art I, § 8; *see State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982).

For these reasons, reliance has always been part of a fraud claim in Oregon. In what might be its first reported fraud case, *Rolfes v. Russel*, 5 Or 400, 401-02 (1875), this court said:

> "The gist of this class of actions being fraud, in order to maintain them it is necessary to aver and prove: 1. That the representations made were false; 2. That defendants knew them to be false; 3. That they were made with intent to de fraud; and 4. *That plaintiff, relying upon the representations was induced to enter into the contract*." (Emphasis added.)

Twenty five years later, in *Martin v. Eagle Creek Development Co.*, 41 Or 448, 455, 69 P 216 (1902), the court said:

> "As essential elements to sustain [an action for fraud], there must have been false representations of material import concerning the subject-matter of the contract, the plaintiffs knowing them to be false, or representations as of their own knowledge, not knowing the truth whereof they spoke, for the purpose of misleading and deceiving the development company; *and the company must have relied upon such representations, believing them to be true, and was misled thereby to its injury*. (Emphasis added.)

A half century after *Martin*, in *Conzelmann v. N.W.P & D. Prod. Co.*, 190 Or 332, 350, 225 P2d 757 (1950), the court provided this oft-quoted list of the elements of fraud:

> "Comprehensively stated, the elements of actionable fraud consist of: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) *his reliance on its truth*; (8) his right to rely thereon; (9) and his consequent and proximate injury." (Emphasis added.)

In *Briscoe v. Pittman*, 268 Or 604, 610, 522 P2d 886 (1974), the court suggested that *Conzelmann* might have "unduly fractionalize[d]" the elements of fraud, because, for example, the right to rely on a representation is a conclusion of law, not an allegation of fact. Thus, "more recent cases have employed a more abbreviated list" of the elements. *Knepper v. Brown*, 345 Or 320, 329, 195 P3d 383 (2008). But those lists still include reliance. For example, in Riley *Hill General Contractor v. Tandy Corp.*, 303 Or 390, 737 P2d 595 (1987), the court said that actionable fraud requires:

> "1. A false representation made by the defendant. In the ordinary case, this representation must be one of fact.
>
> "2. Knowledge or belief on the part of the defendant that the representation is false – or, what is regarded as equivalent, that he has not a sufficient basis of information to make it. This element often is given the technical name of 'scienter.'
>
> "3. An intention to induce the plaintiff to act or to refrain from action in *reliance* upon the misrepresentation.
>
> "4. Justifiable *reliance* upon the representation on the part of the plaintiff, in taking action or refraining from it.
>
> "5. Damage to the plaintiff, resulting from such *reliance*."

303 Or at 405 (quoting Prosser & Keeton, *The Law of Torts*, § 105, p 728 (5th ed 1984)) (emphasis added); *see also Meader v. Francis Ford, Inc.*, 286 Or 451, 456, 595 P2d 480 (1979).

In sum, a false representation, made to a party, has never been enough to impose liability. "A necessary element of fraud is" – and always has been – "that

the party was injured by relying on the representation." *Bramwell v. Rowland*, 123 Or 33, 45, 261 P2d 57 (1927).

At least until this case. As explained below, the Court of Appeals ruling on plaintiff's fraud claim appears to dispense with the reliance requirement.

That claim, brought by plaintiff Strawn, for himself and others similarly situated, alleges that the auto policy he purchased from defendants (collectively, Farmers) falsely represented that Farmers would pay "personal injury protection" (PIP) benefits for all "reasonable and necessary" medical expenses incurred by an insured as a result of an auto accident. According to Strawn, that representation was false when made, because Farmers did not intend to pay *all* reasonable and necessary expenses, but only the expenses that were less than a certain percentage (initially, 80 percent, later 90 percent) of the range of expenses charged for the same services by health care providers in the same locale. In other words, Strawn alleged that Farmers falsely represented in the policy that it would *not* use some percentile of the range of local charges to determine whether any given charge is reasonable.

At trial, Farmers moved for a directed verdict on this claim, arguing that, even if the policy misrepresented how Farmers would determine which charges are reasonable and necessary and thus payable, there was no evidence that Strawn or any other class member relied to his or her detriment upon the misrepresentation. In denying the motion, the trial court said there is evidence of

reliance because there is evidence of "omissions," "nondisclosures," and "half-truths":

> "Defendants contend that plaintiffs have failed to prove that all of the class members relied on material misrepresentation by defendants. And I deny the motion on that ground. The – there are omissions and nondisclosures of material fact that are involved here. There are – looking at plaintiffs' evidence in the light most favorable to plaintiffs, there were half-truths involved here, again, using the same standard which the jury could choose to believe that evidence. So the defendant's motion fails on that ground."

Strawn v. Farmers Ins. Co., 228 Or App 454, 470, ___ P3d ___ (2009)

On appeal, Farmers argued that the trial court had, in effect, eliminated the reliance requirement for actionable fraud. *Id.* The Court of Appeals rejected that characterization of the trial court's ruling. But, in explaining its decision, the court didn't refer to any evidence of reliance, only to evidence of a misrepresentation:

> "Here, plaintiffs offered evidence that, viewed in the light most favorable to plaintiffs, established that Farmers (1) promised to pay all reasonable and necessary medical expenses as part of its PIP coverage; (2) selected an arbitrary percentile cutoff that would increase its profits at the expense of insureds; and (3) continued to collect premiums from its insureds without informing them that it had decided not to pay all reasonable and necessary expenses. From that evidence, a reasonable trier of fact could conclude that the payment of reasonable and necessary PIP-related expenses was a material part (and, in fact, a statutorily required part) of the insurance policy and could therefore reasonably infer that plaintiffs relied on Farmers' [sic][1] misrepresentation that it would pay reasonable and necessary PIP-related expenses when they continued to pay their premiums. That is, on this record, a reasonable trier of fact could conclude that plaintiffs acted to their detriment in paying

[1] "Farmers" is a singular noun, short for Farmers Insurance Company. The possessive of a singular noun is formed by adding *'s*, even when the noun ends in *s*. *See* W. Strunk and E. B.White, *The Elements of Style* 1 (3rd ed 1979); Oregon Appellate Courts Style Manual 69 (2002).

> premiums for PIP coverage that Farmers never intended to provide. * * *"

Id. at 470-71.

Unpack that paragraph and you will see that all the Court of Appeals is really saying is what the trial court said: There is evidence of a misrepresentation, so there is also evidence of reliance. Proof of one is proof of the other. The jurors could find, from the evidence presented, that Farmers misrepresented how it would determine "reasonable" charges for PIP purposes. Ergo, they could also find that Strawn and the other class members relied to their detriment upon that misrepresentation.

That just doesn't follow. As noted earlier, it's possible to misspeak without misleading. Misstatements sometimes pass unnoticed, and even when noticed, they are sometimes ignored. That's certainly true in the insurance setting. Few people read their policies. Even fewer read them in time to rely to their detriment upon any misstatements they might include. Indeed, most insureds don't even see the policy before buying it. It's almost always delivered after the purchase, usually weeks after.

This case is not out of the ordinary. There is no evidence that Strawn studied his policy before buying it. It's simply not believable that he knew about the reasonable-and-necessary-expenses provision beforehand, let alone that he relied upon that provision in making the purchase.

In any event, this is not a matter for belief, but proof. To recover on his fraud theory under this court's precedents, some of which are cited above, Strawn had to prove that the misrepresentation in the policy caused him to buy it. As explained in *Gardner v. Meiling*, 280 Or 665, 671, 572 P2d 1012 (1977), which involved a claim for fraud in the sale of a business,

> "[i]mplicit in the element of reliance is a requirement [that] the plaintiff prove a causal relationship between the representation and his entry into the bargain. In other words, if he fails to prove that the fraudulent misrepresentations induced him to make the agreement he has failed to establish the element of reliance."

There is no evidence of that sort here. At trial, Strawn explained his understanding of the provision about payment of reasonable and necessary expenses; he thought it meant that Farmers would pay *all* expenses in the event of an accident, reasonable or not. Tr 1559. But he didn't say *when* he arrived at that understanding. Nor did he say that he relied on that understanding in buying the policy. Most likely he didn't even see this provision until after he had his accident and incurred some medical expenses.

Several other insureds testified about their understanding of the policy. They, too, thought that Farmers would pay all of their expenses, whether or not reasonable. But, like Strawn, they didn't say when they came to that conclusion. And, unlike Strawn, they didn't even relate their understanding to the allegedly fraudulent policy language.[2]

[2] The evidence in question is cited in plaintiff's Court of Appeals brief at pages 38-39.

On this record, there is no basis for a finding that Strawn and the other class members relied to their detriment on the alleged misrepresentation in the policy. Accordingly, the trial court should have directed a verdict for Farmers on the fraud claim.

The Court of Appeals ruled otherwise because, as noted, it concluded that proof of a misrepresentation is proof of reliance. This court rejected the same conclusion in *Newman v. Tualatin Development Inc.*, 287 Or 47, 597 P2d 800 (1979), which, like this case, was a class action. The owners of some townhouses sued the builder for defects in construction. This court affirmed the trial court's order certifying the class, but only with respect to the plaintiff's negligence claim, not also their warranty claim, because, the court said, the latter claim "requires proof of reliance upon the warranty by the plaintiffs and this in turn requires proof of the state of mind of each individual in the class." 287 Or at 53. The alleged warranty was contained in a brochure that, according to the plaintiffs, was given to everyone who bought a townhouse. *Id.* at 54. This court concluded, however, that "[e]ven if plaintiffs can prove the brochure was given to all members of the class in this case, that would not establish that every member of the class read, was aware of, and relied upon each of the representations in the brochure." *Id.* "Reliance upon the express warranty," the court said, "is not proved merely by evidence that the warranty was contained in a sales brochure given to all class members." *Id.*

So too here. Reliance upon the misrepresentation in Farmers's policy is not proved merely by evidence that there was in fact a misrepresentation there. The statements to the contrary in the Court of Appeals opinion are mistaken and should be disavowed.[3]

That is not to say that the misrepresentation in the policy is not actionable – just that it is not actionable as fraud. An insured could still sue Farmers for breach of contract – for promising to pay all reasonable and necessary medical expenses, but not doing so. That promise would be enforceable under the law of contract, even by people who didn't see the promise before buying the policy. But the promise, sight unseen, would not support a fraud claim, where reliance is required. Thus, plaintiff's contract claims should survive, and the verdicts on those claims should hold up, unless the trial court erred in some other respect not addressed in this brief.

[3] The court in *Newman* noted that the alleged warranty was just one of many statements in the brochure about the construction of the townhouses. It was, the court said, a "small part of the item purchased and the representation is interspersed with many other descriptive statements." 287 Or at 54. The same could be said, of course, about the misrepresentation in the insurance policy at issue here. It was a small part of the PIP coverage, which was itself a small part of the policy as a whole, which also provided liability coverage, uninsured motorist coverage, underinsured motorist coverage, collision coverage, and comprehensive coverage.

III. Conclusion

Reliance should be, is, and always has been a key element of actionable fraud, separate from the misrepresentation element. Thus, as a matter of fact and law, proof of a misrepresentation does not constitute proof of reliance. The trial court and Court of Appeals erred in concluding otherwise.

Respectfully submitted,

_____

Thomas M. Christ
Cosgrave Vergeer Kester LLP

For *Amicus Curiae* OADC

Certificate of Service

I certify that I mailed two copies of the attached brief to each of the following lawyers, by first class mail, with postage pre-paid, on November 25, 2009:

James N. Westwood
Stoel Rives LLP
900 S.W. 5th Ave., Suite 2600
Portland, OR 97204

Richard S. Yugler
Landye Bennett Blumstein, LLP
1300 S.W. 5th Ave., Suite 3500
Portland, OR 97201

Michael D. Hoffman
Hoffman Hart & Wagner, LLP
1000 S.W. Broadway, Suite 2000
Portland, OR 97205

Kathryn H. Clarke
Attorney at Law
P.O. Box 11960
Portland, OR 97211

Mark E. Olmsted
Mark E. Olmsted, P.C.
One S.W. Columbia St., Suite 1110
Portland, OR 97258

Fredrick C. Ruby,
Department of Justice
1162 Court St., N.E.
Salem, OR 97301

_____
Thomas M. Christ