IN THE SUPREME COURT OF THE
STATE OF OREGON

CAROL LEE WOODS, Plaintiff-Appellant, v. CARL KARCHER ENTERPRISES, INC., A California Corporation, dba CARL'S JR. RESTAURANT, Defendant-Respondent.	Multnomah County Circuit Court No. 0209-09609 CA123470 S53160

BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF RESPONDENT ON REVIEW

Appeal from the Final Judgment of the Circuit Court
for the Multnomah County;
Honorable Edward J. Jones, Judge

James E. Mountain, Jr., OSB #75267
Jona J. Maukonen, OSB #04354
HARRANG LONG GARY RUDNICK P.C.
1001 SW 5th Avenue, Suite 1650
Portland, OR 97204-1116
Telephone: (503) 242-0000
Facsimile: (503) 241-1458
Of Attorneys for *Amicus Curiae*
Oregon Association of Defense Counsel

Eric J. Neiman, OSB #82351
David C. Campbell, OSB #03281
Williams, Kastner & Gibbs, PLLC
888 SW Fifth Avenue, Suite 600
Portland, OR 97204
Telephone: (503) 228-7967
Facsimile: (503) 222-7261
Of Attorneys for Respondent
on Review Carl Karcher Enterprises, Inc.

John S. Marandas, OSB #66082
Marandas & Perdue
1500 S.W. First Avenue, Suite 840
Portland, OR 97201
Of Attorneys for Petitioner on Review
Carol Lee Woods

William A. Drew, OSB #95253
Elliot, Ostrander & Preston, PC
707 SW Washington, Suite 1500
Portland, OR 97205
Of Attorneys for Petitioner on Review
Carol Lee Woods

July 2006

INDEX TO BRIEF

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (Continued)

Page(s)

Statutes

Rules

BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL ON THE MERITS IN SUPPORT OF RESPONDENT ON REVIEW

I. STATEMENT OF *AMICUS CURIAE*

The Oregon Association of Defense Counsel ("OADC") seeks leave of this court to file this *amicus curiae* brief in support of respondent on review. OADC is a private, non-profit association of lawyers who specialize in the defense of civil actions. OADC is not related to any parties on review and has no interest of its own in this proceeding, other than to aid the court in determining the correct rule of law. Ultimately, the court's decision may affect interests of parties represented by OADC's members in other cases, now and in the future.

OADC's interest in this case is peaked by plaintiff's suggestion in its brief on the merits that the rule established by the Court of Appeals decision under review, *Woods v. Carl Karcher Enter., Inc.*, 202 Or App 372, 122 P3d 121 (2005), would grant defendants in small claims matters "* * * a new area for gamesmanship." That statement is as wrong as it is ironic. Under the circumstances of this case it appears that if any party had a pretrial "game" on, it was plaintiff who personally and through counsel had dealt directly with defendant's insurer's claims representative before sending off a last minute demand letter "to whom it may concern." ORS 20.080 requires that a defendant pay a plaintiff's attorney fees incurred in litigation of a small claim for personal or property damages if, ten days prior to filing litigation, the plaintiff makes demand on defendant to pay the claim and defendant fails to pay the demand or to make an offer that is greater than what plaintiff ultimately recovers in

litigation. Plaintiff's conduct – rather than defendant's – reasonably may be viewed as "gaming." By dealing less than directly with the concerned representative of defendant, plaintiff reduced the likelihood that defendant's representative would counter with a settlement offer that would defeat any possible claim by plaintiff for attorney fees.

A plaintiff is entitled to attorney fees under ORS 20.080 only if she gives the defendant full and fair notice. If the defendant does not settle the plaintiff's small claim before trial or does not make a settlement offer greater than what the plaintiff later recovers, the defendant will be liable for the plaintiff's attorney fees. This court has explicitly recognized that the purpose of ORS 20.080 is to prompt pretrial settlement of small claims. Settlement – at the risk of suffering a shifting of attorney fees – can be achieved only if the defendant receives the prelitigation demand in a manner that enables it to meaningfully evaluate the plaintiff's claim and the risk of potentially being obligated to pay the plaintiff's attorney fees. This court's prior interpretations of ORS 20.080 and due process considerations dictate that plaintiffs seeking to invoke ORS 20.080 must give putative defendants a level of notice commensurate with the significant risk of an adverse attorney fee award. The appropriate level of notice is high grade – it is notice reasonably calculated under all the circumstances to apprise defendant of the claim. It is notice that defendant in this case did not receive.

II. ARGUMENT

A. Introduction: For purposes of ORS 20.080, a plaintiff must make a prelitigation written demand on defendant for payment in settlement of a small claim by serving defendant with the demand in a manner reasonably calculated under the circumstances to apprise defendant of plaintiff's claim.

Due regard for the particular significance of the specific interest at stake in this matter leads to the proper resolution of the controversy. That interest is framed by the attorney fee shifting statute at issue here, ORS 20.080(1).[1] Pursuant to the terms of that statute, a claimant seeking less than $5,500 in damages will be awarded attorney fees if the putative defendant does not settle with the claimant within as short a period of time as ten days of the claimant having "made written demand for the payment of [the] claim" or, if the defendant does make a settlement offer and the plaintiff obtains a recovery in excess of the settlement amount tendered by the defendant. The statute does not require a specific process for making such written demand. But this court's precedents describing the purpose of the statute and fundamental principles of due

---

[1] ORS 20.080(1) provides:

> "In any action for damages for an injury or wrong to the person or property, or both, of another where the amount pleaded is $5,500 or less, and the plaintiff prevails in the action, there shall be taxed and allowed to the plaintiff, at trial and on appeal, a reasonable amount to be fixed by the court as attorney fees for the prosecution of the action, if the court finds that written demand for the payment of such claim was made on the defendant not less than 10 days before the commencement of the action * * *. However, no attorney fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action * * *, an amount not less than the damages awarded to the plaintiff."

process require that demand be made in a manner reasonably calculated, under all the circumstances, to apprise defendant of the demand and to afford defendant a reasonable opportunity to respond.

In this case plaintiff did not make demand on defendant in a manner that was reasonable under the circumstances. Even though plaintiff and her attorney had been in direct contact with the defendant's insurer's claims representative, she chose to send her demand by regular mail to defendant's restaurant and addressed "To Whom It May Concern." *Woods*, 202 Or App at 374. That was not reasonable because the plaintiff knew that defendant's insurer's adjuster was "who" was concerned about her claim. Plaintiff nevertheless took a tact that was far less likely to put defendant on notice of her small claim and far less likely to put defendant's insurer to the task of making an offer that plaintiff would have had to beat at trial in order to recover an attorney fee.

B. This court's interpretations of ORS 20.080(1) put its text in a context that demonstrates the legislature's intent to require that plaintiff make demand in a manner reasonably calculated under the circumstances to apprise defendant of the claim.

The Court of Appeals majority and dissent relied on the *PGE* framework to interpret ORS 20.080 and to determine what the legislature intended by requiring "written demand * * * made on the defendant." *Woods*, 202 Or App at 376-78, 382-386. Clearly, from the terms of the statute, the required demand must be in writing. Beyond that, the statute does not define what the legislature intended would constitute "demand made." The Court of Appeals filled the interpretative void by considering the Oregon Rules of Civil Procedure as context for construing ORS 20.080, as this

court had done regarding another phrase of ORS 20.080(1) in *Rodriguez v. The Holland, Inc.*, 328 Or 440, 980 P2d 672 (1999), but the Court of Appeals split on whether ORCP 7 (notice reasonably calculated to apprise) or ORCP 9 (notice by mailing) accurately expressed the legislature's intent regarding ORS 20.080. Here, *Amicus* OADC follows another branch of the *PGE* methodology, from text through the context of prior Oregon Supreme Court interpretations of ORS 20.080, to determine what the legislature had in mind for "written demand made on defendant." Those prior interpretations of ORS 20.080 form a proper basis for construing the statute to require a high degree of notice.

This court's decision in *Landers v. E. Texas Motor Freight Lines*, 266 Or 473, 513 P2d 1151 (1973) is determinative. *Landers* confirmed the court's prior interpretations of ORS 20.080 in *Heen v. Kaufman*, 258 Or 6, 8, 480 P2d 701 (1971), *Johnson v. White*, 249 Or 461, 462-63, 439 P2d 8 (1968), and *Colby v. Larson*, 208 Or 121, 297 P2d 1073, 299 P2d 1076 (1956). 266 Or at 476-77. A prior interpretation of a statute by the Supreme Court becomes part of the statute, as if it were written into the statute at the time the statute was enacted. *Holcomb v. Sunderland*, 321 Or 99, 105, 894 P2d 457 (1995). In *Landers*, this court stated that the purpose of requiring demand "is to give a defendant an opportunity to settle before action is commenced." 266 Or at 475. This court elaborated that "it was the legislature's intention, whenever a defendant has notice that a claim will be [the statutory amount] or less, to require him to evaluate the case and to make an offer at the risk of having to pay attorney fees if the offer is inadequate." *Id.* at 477. With

that purpose in mind, the court noted that the legislature put the risk of accurately evaluating claims onto the defendant. *Id.*

Recently this court stated that it "repeatedly has recognized that the legislative purpose underlying ORS 20.080(1) is to encourage settlement of small claims, to prevent insurance companies and tortfeasors from refusing to pay just claims, and to discourage plaintiffs from inflating their claims." *Fresk v. Kraemer*, 337 Or 513, 520, 99 P3d 282 (2004) (internal quotation omitted). A putative defendant can evaluate a claim and assess the risk of failing to settle only when that defendant knows the amount of the claim and feels the threat of the possible sanction. A putative defendant can make an adequate offer – sufficient to prevent the plaintiff from inflating her demand and ample enough to put the plaintiff at risk of being unable to beat the offer in order to earn a fee shifting award – only if the defendant has a high degree of notice. To provide defendant the opportunity that this court has said the legislature intended, plaintiff should be required to make her demand in a manner that is equivalent to the manner required for service of summons by ORCP 7, *i.e.* a method of service reasonably calculated under the circumstances to apprise defendant of the claim.

C. Due process considerations also dictate that plaintiff is required to make demand in a manner reasonable under the circumstances.

The Court of Appeals split over whether ORS 20.080(1) raised "due process concerns." *Woods*, 202 Or App at 377, 385, n 3. Due process, however, plays a significant, time honored role in determining what type of notice of a demand for payment of a claim is required to trigger an attorney fee shifting statute. Due process

requires that demand be made in a manner commensurate with the interest at stake. At stake for a defendant in the process of an ORS 20.080 demand is exposure of the putative defendant to a supplemental claim for attorney fees that very well may exceed the amount of the original claim for damages. To fairly expose a putative defendant to such a significant degree risk of that type of liability, a plaintiff must give the putative defendant a level of notice proportionate to that economic risk. The significant property interest – essentially an additional claim for damages in the form of an attorney fee award – dictates that a high degree of notice is required. The United States Supreme Court has established that notice of a claim satisfies due process only if it is reasonably calculated, under all the circumstances, to apprise defendant of the action.

At the beginning of the last century, the United States Supreme Court observed that due process concerns are raised by a statute that prescribes a shift of attorney fees. *St. Louis, Iron Mountain & S. Ry. Co. v. Wynne*, 224 US 354, 32 S Ct 493 (1912). The Arkansas statute at issue provided that if a railroad company's train killed or injured livestock, and the livestock owner made demand for damages, and the railroad failed to pay damages within 30 days of the plaintiff's demand, and the plaintiff eventually prevailed at trial, the railroad would be liable for double damages and for attorney fees. *Id.* at 358. The court recognized that the statute implicated due process and that a case in which plaintiff's demand was greater than what plaintiff eventually recovered in the lawsuit applying the statute to impose double damages and attorney fees violated due process. *Id.* at 359-60.

The United States Supreme Court has also long recognized that adequate notice of a claim is a fundamental requirement of due process, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 US 306, 314, 70 S Ct 652 (1950), and that due process requires a level of notice commensurate with the interest at stake, *Mathews v. Eldridge*, 424 US 319, 335, 96 S Ct 893 (1976).

In *Mullane*, the Supreme Court held that notice satisfies due process if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." 339 US at 314. This court has characterized the United States Supreme Court decision in *Mullane* as the landmark case determining whether a particular method of providing notice of a claim satisfies due process. *Grant County v. Guyer*, 296 Or 14, 19, 672 P2d 702 (1983). And the drafters of ORCP 7D purposefully incorporated the exact standard established in *Mullane* into the notice required for service of summons. *See Lake Oswego Review, Inc. v. Steinkamp*, 298 Or 607, 610-12, 695 P2d 565 (1985) (discussing history of ORCP 7). Thus, it is appropriate to consider ORCP 7D when assessing the notice requirement of ORS 20.080 because the purpose of the statute and the defendant's interest that it implicates call for the high standard of notice set by the rule and because the rule describes the type of notice that is due when such a substantial interest is at stake.

D. Plaintiff's demand in this case was not made in a manner reasonably calculated under the circumstances to apprise defendant of the claim.

In this case, plaintiff and her attorney had been addressing plaintiff's potential claim with defendant's insurance company for nearly two years. (ER 29-31).

Although there was an extended time period in which plaintiff did not have any contact with the insurer, plaintiff's attorney contacted the insurance company just weeks before filing the lawsuit. (ER 32). In that letter, plaintiff's attorney threatened to sue defendant if the claim was not resolved, but plaintiff's attorney did not make the demand required by ORS 20.080. (ER 32). Rather, later that same month, when the statute of limitations was close to running, plaintiff mailed, by regular mail, a demand to the restaurant addressed "to whom it may concern." (ER 9). Based on her prior interactions with the insurance agent, including communications exchanged earlier that same month, plaintiff knew exactly who was concerned. Rather than serving that person, plaintiff sent the letter to the restaurant with no way of knowing and later establishing whether it had been received. Under the totality of the circumstances, plaintiff's attempt to make demand was not reasonably calculated to apprise defendant of the claim and thus provide defendant an opportunity to make an unbeatable offer to settle.

III. CONCLUSION

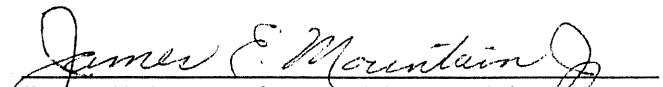
The issue presented on review is what standard of notice is required by ORS 20.080(1) when it calls for a "written demand * * * made on defendant." The rule to be established by this court is that ORS 20.080(1) requires that a plaintiff give a putative defendant prelitigation notice of demand for payment of a small claim that is reasonably calculated under all the circumstance to apprise the defendant of the claim. The Court of Appeals majority correctly concluded that ORS 20.080(1) required this high level of notice of demand and that plaintiff had not given defendant such notice

and therefore did not qualify for an award of attorney fees. The decision of the Court of Appeals affirming the judgment for defendant in the circuit court should be affirmed.

Dated this 27th day of July, 2006.

Respectfully Submitted,

HARRANG LONG GARY RUDNICK P.C.



James E. Mountain, Jr., OSB #75267
Jona J. Maukonen, OSB #04354
Of Attorneys for *Amicus Curiae* Oregon Association of Defense Counsel

CERTIFICATE OF FILING AND SERVICE

I certify that on the 27th day of July, 2006, I filed the original and 12 copies of BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF RESPONDENT REVIEW by causing the same to be deposited in the U. S. Mail at Portland, Oregon, enclosed in a sealed envelope, postage prepaid, and addressed to:

Oregon Supreme Court
State Court Administrator
Appellate Courts Records Section
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

I further certify that on the 27th day of July, 2006, I served two true and exact copies of the foregoing BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF RESPONDENT REVIEW on the parties at the addresses listed below, by causing the same to be deposited in the United States Mail at Portland, Oregon, enclosed in a sealed envelope with postage prepaid, and addressed to:

John S. Marandas, OSB #66082
Marandas & Perdue
1500 S.W. First Avenue, Suite 840
Portland, OR 97201
Of Attorneys for Petitioner on Review
Carol Lee Woods

William A. Drew, OSB #95253
Elliot, Ostrander & Preston, PC
707 SW Washington, Suite 1500
Portland, OR 97205
Of Attorneys for Petitioner on Review
Carol Lee Woods

Eric J. Neiman, OSB #82351
David C. Campbell, OSB #03281
Williams, Kastner & Gibbs, PLLC
888 SW Fifth Avenue, Suite 600
Portland, OR 97204
Of Attorneys for Respondent on Review
Carl Karcher Enterprises, Inc.

Mark Johnson, OSB #87264
Johnson Renshaw & Lechman-Su PC
513 SE Morrison Street, Suite 1200
Portland, OR 97214
Of Attorneys for *Amicus Curiae*
Oregon Association of Trial Lawyers

Amber Frye, OSB #05259
3967 NE 11th
Portland, OR 97212
Of Attorneys for *Amicus Curiae*
Oregon Association of Trial Lawyers

HARRANG LONG GARY RUDNICK P.C.

James E. Mountain, Jr., OSB #75267
Of Attorneys for *Amicus Curiae* Oregon
Association of Defense Counsel