IN THE SUPREME COURT OF THE STATE OF OREGON

GREENWOOD PRODUCTS, INC., an Oregon Corporation; and JEWETT-CAMERON LUMBER CORP., an Oregon corporation, Plaintiffs-Respondents, Cross-Appellants, Petitioners on Review, v. GREENWOOD FOREST PRODUCTS, INC., an Oregon corporation; JIM DOVENBERG, an individual; and BILL LEFORS, an individual, Defendants-Appellants, Cross-Respondents, Respondents on Review.	Multnomah County Circuit Court No. 050302553 CA A135701 S062497

PETITIONERS ON REVIEW'S REPLY BRIEF ON THE MERITS

Petition for review of the decision of the Court of Appeals on appeal from the General Judgment and Supplemental Judgment of the Circuit Court for Multnomah County, Jerry B. Hodson, Judge
Opinion Filed: July 2, 2014
Author of Opinion: Haselton, Chief Judge
Concurring Judge(s): Armstrong, Presiding Judge, and Duncan, Judge

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I. ARGUMENT

A. The "newly discovered" evidence would not probably change the result.

Forest Products[1] says that the affidavit of James Fahey (the "new" evidence at issue) shows that "the accounting records did not reflect the true inventory and therefore did not provide credible evidence of an overpayment." Defs Br 2. That argument may have some surface appeal, but goes no deeper—Forest Products has *never* explained *how* the "deletion" of inventory from Forest Products' accounting records in connection with *some* of the sales of inventory under the parties' Asset Purchase Agreement ("APA") shows the absence of an overpayment, especially given that Greenwood's evidence of overpayment was *not* based on some simple statement of inventory in Forest Products' accounting system. Fahey's affidavit would not probably change the jury's verdict because (1) it at most shows accurate payment only as to the bulk sales of inventory; (2) Schmidt's reconstruction of the books effectively accounted for and makes irrelevant the described inventory deletion; and (3) Fahey's affidavit says nothing about the ongoing sales that made up the

[1] Plaintiff Greenwood Products, Inc. and defendant Greenwood Forest Products, Inc. are referred to herein as "Greenwood" and "Forest Products," respectively.

majority of inventory sales under the APA and where erroneous accounting could have occurred.[2]

1. Fahey's affidavit does not show that Greenwood received inventory that was not reflected on Forest Products' books.

Forest Products refers to "lesser inventory amounts in the accounting books" resulting from Fahey's deletions as "an alternative reason" for Greenwood's overpayment. Defs Br 29-30. Fahey's affidavit on its face disproves any argument that Greenwood received *more* inventory than it paid for as a result of inventory deletions. Forest Products says inventory deletions "were not justified by the actual physical inventory." Defs Br 8; *see also id.* at 13. In fact, Fahey's affidavit says that for each bulk sale of inventory, the actual physical inventory was counted and then, "[i]f the inventory for the physical count was less than the inventory registered on the computer accounting system," Fahey "remove[d] the excess inventory from Navision, so that the Navision accounting of inventory would *match the physical count of inventory*." 4th SSER-22 (Fahey Aff ¶ 18) (emphasis added). In other words,

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[2] Forest Products' argument that Fahey's affidavit shows accurate payment also is not preserved. For preservation, Forest Products relies on one sentence from its motion for a new trial (as well as citations to its appellate briefing, which are irrelevant to preservation in the trial court). Defs Br 14 n 2. That single sentence was not speaking about Fahey's affidavit, but rather characterized Forest Products' previous themes before the trial court. As shown in Greenwood's opening brief, Forest Products did not argue that the affidavit shows the absence of overpayment. *See* Pl Br at 46-47.

Fahey did not delete inventory that actually existed. He deleted inventory from Forest Products' books that the physical count showed *did not actually exist*.[3] Fahey's affidavit thus does not support any suggestion that Forest Products' books underreported inventory *actually received* by Greenwood. At most, Fahey's affidavit confirms, and thus is cumulative of, what witness Jim Patillo testified to at trial—that errors did not occur in connection with the bulk sales. Tr 1014-15.

2. Forest Products mischaracterizes Schmidt's reconstruction of the books.

Forest Products incorrectly states that Greenwood's accounting expert, Schmidt, relied "solely on the presumed accuracy of the books" in concluding that Greenwood paid for inventory it did not receive. Defs Br 3. Forest Products argues as if Schmidt took a single set of "books" showing the amount Greenwood paid for inventory under the APA and subtracted the value of a fixed amount of physical inventory that existed at the outset of the parties' transaction, and concluded that the difference was $819,731.68 more in payments than inventory received. Forest Products tries to bolster this argument by referring throughout its brief obliquely to "*the* accounting books" or "*the* accounting records." *See*, *e.g.*, Defs Br 4, 8, 17, 27, 30, 39. But there were separate books for each company, plus an intercompany account, not one

[3] This is a standard way to account for inventory "shrinkage." Pl Br 35-36.

set of "books," and the undisputed evidence at trial was that the accounting errors at issue occurred *in Forest Products' books*. Tr 442-43, 451, 457. Indeed, Fahey's affidavit refers only to manipulation of *Forest Products' books*. 4th SSER-21-26 (referring to Forest Products as "Greenwood" and discussing manipulations to "Greenwood's" books).[4]

Moreover, the record makes clear that Schmidt did not rely "on the presumed accuracy of the books." Schmidt used underlying raw data such as invoices, purchase orders, copies of checks, and bank statements to conduct a painstaking cash reconstruction of Greenwood's and Forest Products' books and of the intercompany account. Pl Br 9-10; Tr 322-26; 412; 414; 879. Because Schmidt *rebuilt* the parties' books and the intercompany account using the *underlying raw data*, his reconstruction accounted for the value of all inventory actually purchased and sold (via both bulk and ongoing sales), without regard to what the Navision records previously showed. That was the whole point of Schmidt's reconstruction—the books were so rife with errors that rather than rely on those books and "spend time immortal just going through and trying to unwind journal entries," Schmidt decided that "the best

[4] Forest Products cites Fahey's deposition testimony as relating to manipulations to *Greenwood's* accounting records when in fact Fahey testified about manipulations to *Forest Products'* books. *Compare* Defs Br 4 (citing Fahey Deposition 96:2-100:4) *with* Fahey Deposition, 96:4-5 (referring to "Greenwood Forest Products' books" and phantom inventory), 96:12, 96:17-18, 98:5-6, 99:9-10 (all referring to Forest Products' books).

way to proceed would be to take all the raw data that happened since the beginning of this sale and reconstruct the books[.]"[5] Tr 321-22. Fahey's alleged deletion *in Navision* of inventory amounts had no effect on the reconstruction *from the underlying raw data*. Fahey's testimony would not change the result because it has no impact on Schmidt's reconstruction and resulting conclusion.

3. Forest Products incorrectly treats the APA as involving only bulk sales of inventory.

Fahey's affidavit also would not probably change the result because the affidavit (and Forest Products' brief) ignores altogether the hundreds of ongoing sale transactions per week, totaling millions of dollars of inventory transactions. Tr 203; 318. Forest Products incorrectly presents the APA as consisting solely of "several payments to defendant in return for separate bulk purchases of defendant's inventory." Defs Br 1; *see also id.* at 3. Forest Products ignores Section 1.5 of the APA, under which, *in addition to bulk sales*, Forest Products sold exclusively to Greenwood to fill Greenwood's customer orders in the regular course of business. ER 20. Given the ongoing sales, the value of Forest Products' inventory as of December 31, 2001 (two months before the APA), on which Forest Products relies, Defs Br 2-3, is irrelevant.

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[5] Forest Products says that Schmidt did not consider whether embezzlement may have caused the "discrepancy in the books." Defs Br 3. That is not true. Tr 431-32.

Inventory amounts at the outset of the APA did not matter, because the APA contemplated "an ongoing transaction, and that's why [Greenwood] ended up buying $32,000,000 worth" of inventory, as opposed to the $6.8 million Forest Products held before the APA. Tr 203.

As described in Greenwood's opening brief, Fahey's affidavit addresses only bulk sales (referred to in the affidavit as "Inventory Sales"). Pl Br 49-50. Because the jury in fact heard evidence regarding the accuracy of bulk sales, Tr 1014-15, the jury could have, and likely did, find that the erroneous accounting occurred in connection with the ongoing sales. As such, the "new" evidence cannot undermine Schmidt's reconstruction of *the entire transaction*, which accounted for *both* bulk sales and ongoing sales, and cannot show that Greenwood actually received all inventory for which it paid. Fahey's testimony would not probably change the result, because it does not address the key point on which the jury most likely based its verdict.

4. Forest Products cannot impute Patillo's conduct to Greenwood.

Forest Products argues that Fahey's affidavit shows that "if plaintiff lost money, it was not by overpaying defendant but by the wrongdoing of its own employees." Defs Br 9. Indeed, Forest Products repeatedly refers to Patillo as "plaintiff's vice-president," presumably in an attempt to impute to Greenwood any conduct Patillo undertook with respect to Forest Products' books. *See* Defs Br 2, 3, 8, 9, 13, 17, 24, 26, 30, 38. But it is undisputed that Patillo was Forest

Products' vice-president as well as Greenwood's vice-president. Tr 210. Moreover, the jury concluded that *Forest Products* was responsible for the errors in *its* books, and this court has already affirmed the jury's right to reach that conclusion. *See Greenwood Prods., Inc. v. Greenwood Forest Prods., Inc.*, 351 Or 604, 617, 273 P3d 116, 123 (2012) ("Although defendants introduced evidence that Greenwood and its employees were solely responsible for any errors in Forest Products inventory accounts, plaintiffs' evidence about the divided responsibilities of Greenwood employees and the continuing right of control of Forest Products' principals was sufficient to create a jury question."). Forest Products' "new" evidence that a second person—who like Fahey had divided responsibilities—was involved in purported inventory manipulations on Forest Products' own books would not likely change the result because it is cumulative of the evidence and argument Forest Products already put before the jury.

B. Forest Products misstates legal standards.

1. Known but "unavailable" evidence cannot satisfy ORCP 64 B(4).

a. Forest Products' textual analysis fails.

Forest Products argues that the text of "ORCP 64 B(4) requires that the evidence be 'newly discovered evidence' *and further defines* such as evidence that the moving party 'could not with reasonable diligence have discovered and produced at the trial.'" Defs Br 14 (emphasis added). Forest Products treats

"discovered and produced" as "one requirement" effectively meaning only "produced." Defs Br 14-16. As Forest Products would have it, the inclusion of "and produced" means that if a party could not have *produced* the evidence at trial (even if it was already discovered), it qualifies as newly discovered evidence. In *State v. Arnold*, however, this court made clear that "discovered" and "produced" are *separate* requirements, and the failure of either defeats a motion for new trial. 320 Or 111, 120-21, 879 P2d 1272 (1994).

Forest Products' construction both eliminates altogether the fundamental requirement that evidence be "newly discovered" and reads out of ORCP 64 B(4) "discovered" in "discovered and produced." "Newly discovered evidence" is a threshold requirement; the evidence must have been discovered since trial, not before or during trial. "[C]ould not with reasonable diligence have discovered" means that even if the evidence is newly discovered, the motion will fail if the evidence *could have been discovered* before or during trial with reasonable diligence. Under Forest Products' argument, the rule requires *only* that the proponent was unable to produce the evidence at trial, without regard to discovery. Forest Products invents this new construct because it is undisputed that Forest Products *knew* the substance of Fahey's testimony *before* trial, and therefore the evidence is not "newly discovered" at all. Defs Br 15.

Arnold also addresses the independent meaning of "and produced" in ORCP 64 B(4). In *Arnold*, the court equated the phrase "and produced" with "be used during trial." *See* 320 Or at 120. Under *Arnold*, evidence could be "produced" (and thus cannot be the basis of a new trial motion) if the evidence could actually "be used during trial" or, "[e]ven if some additional evidence is discovered after trial, * * * the evidence that was known during trial *could have been used* during trial for substantially the same purpose as the additional evidence that is not discovered until after trial." 320 Or at 121 (emphasis added).

This construction gives meaning to all terms in the rule. Evidence justifying a new trial under ORCP 64 B(4) must in all instances be newly discovered, *i.e.*, discovered *after* trial. If it is not, it fails at the threshold. Even if the evidence *is* newly discovered, it will not satisfy the rule if it could have been discovered before or during trial through reasonable diligence. Finally, even if it could *not* have been discovered through reasonable diligence, evidence will not satisfy the rule if it could have been "produced," meaning that it could have been actually "used" at trial or that "the evidence that was known during trial could have been used during trial for substantially the same purpose." *Arnold*, 320 Or at 121.

Here, Forest Products' fails all three requirements. First, the evidence was not newly discovered. Second, to the extent any of the detail in Fahey's

affidavit is new it could have been discovered before or during trial with reasonable diligence. Third, the evidence Forest Products already knew or could have discovered before the end of trial with reasonable diligence could have been used for substantially the same purpose as the new detail, and thus the "new" evidence could have been produced at trial.

b. Forest Products provides no authority consistent with its interpretation of ORCP 64 B(4).

That the evidence supporting a new trial motion be "newly discovered," *i.e.*, discovered since trial, has been an independent requirement since at least 1901. *See Oberg v. Honda Motor Co.*, 316 Or 263, 272, 851 P2d 1084 (1993), *rev'd on other grounds* 512 US 415, 114 S Ct 2331, 129 L Ed 2d 336 (1994); *State v. Hill*, 39 Or 90, 94-95, 65 P 518 (1901). Forest Products chides Greenwood for this statement, positing that *Arnold* somehow altered the requirement such that "evidence discovered before the end of trial could be considered in support of a motion for a new trial." Defs Br 17 n 3. *Arnold* did not change the rule that only evidence discovered since the trial qualifies as newly discovered evidence under ORCP 64 B(4). *Arnold*, 320 Or at 120-21 (evidence justifying relief under ORCP 64 B(4) must be such as "with reasonable diligence, could not have been discovered before or during the trial"). Evidence *actually discovered* before or during trial cannot constitute evidence that "could not have been discovered." Instead, known but "unavailable" evidence puts the onus on its proponent to exercise diligence to

produce the evidence. Pl Br 38-39. Any other rule allows the proponent to lie in the weeds and then request a new trial at the first moment the evidence becomes available.

2. Forest Products was not reasonably diligent.

a. Fahey never invoked his Fifth Amendment rights and was not generally unavailable.

Forest Products repeatedly states that it was reasonably diligent in attempting to produce Fahey's testimony, but Fahey's invocation of the Fifth Amendment thwarted its attempt to produce the evidence. *See, e.g.*, Defs Br 6, 17. This argument misconstrues the record, ignoring that Fahey himself *never actually invoked* his Fifth Amendment rights. Tr 803, 809. To this day, the court is left to speculate regarding what questions Forest Products would have asked had it been diligent and whether Fahey would have invoked his Fifth Amendment rights in response to any particular question. Pl Br 25-27.

Forest Products never responds to this argument, instead attacking Greenwood's statement that Forest Products should have "question[ed] Fahey before the jury." Defs Br 24-25. Greenwood's argument is not that Forest Products should have asked questions that counsel suspected raised privilege issues in front of the jury. Greenwood's counsel stated that there was a "lot of stuff" that Fahey *would* answer, Tr 11-12, but Forest Products never asked *those questions* in front of the jury, instead presuming, contrary to the record, that Fahey's lawyer's advice to invoke the Fifth Amendment in response to *one*

question made Fahey wholly unavailable as to all subjects. *See* Tr 797-98 (counsel's statement that there were only two questions as to which Fahey would invoke his privilege). Reasonable diligence does not countenance such speculation. *State v. Asplund*, 86 Or 121, 138-39, 167 P 1019 (1917).

b. Reasonable diligence required requesting a continuance.

Forest Products speculates that requesting a continuance would have been futile because "sentencing on the unrelated conduct would have had no effect on Fahey's right to claim a Fifth Amendment privilege to decline testimony on the fraudulent inventory deletion conduct."[6] Defs Br 22. According to Forest Products, this potential outcome absolved it of the obligation *to even request* a continuance to obtain Fahey's testimony. But in this instance, the court need not speculate regarding the effect of sentencing. As a matter of historical fact, Fahey executed his affidavit in front of the sentencing judge immediately after sentencing. 4th SSER-20; *see also* Defs Br 7 ("After the trial, Fahey was sentenced and was then willing to provide testimony."). Forest Products cannot plausibly argue that requesting a continuance until sentencing would have had no bearing on Fahey's willingness to testify when, in fact, he provided his testimony immediately afterwards.

[6] Forest Products argued the opposite to the trial court, *i.e.*, that "Fahey had no Fifth Amendment privilege to invoke. * * * [W]itness Fahey was not susceptible to criminal prosecution because the limitation period had run, and had no Fifth Amendment privilege to assert." 4th SSER-14.

c. No fraud was perpetrated preventing Forest Products' exercise of reasonable diligence.

Forest Products' invocation of "fraud" as a justification for granting a new trial is not supported by the factual record or by Forest Products' authority. Defs Br 30-31, 39-40. Although not clear, Forest Products apparently contends that the hidden accounting manipulations themselves constituted a "fraud" that prevented their discovery. But Greenwood's *entire case* was based on the premise that Forest Products' books were inaccurate due to Forest Products' erroneous accounting, and Fahey's embezzlement and related accounting manipulations were fully aired at trial. Moreover, both parties knew *before trial* that Fahey had testified that he adjusted inventory on Forest Products books, that Fahey told Forest Products' owners about those manipulations, and that Fahey documented the manipulations on hard copies initialed by Patillo. Pl Br 9-11. Ultimately, the notion that Forest Products' lack of diligence can be excused by "fraud" is a red herring because Forest Products knew before trial substantially all of the evidence presented Fahey's affidavit.

Forest Products cites *Wells, Fargo & Co. v. Wall*, 1 Or 295 (1860), for its "fraud" argument, but that case does not stand for the blanket proposition that any new evidence constitutes "fraud" entitling a party to a new trial. That case in fact supports Greenwood; the *Wells* court affirmed the denial of a new trial based in part on lack of diligence where the movant argued its crucial evidence was unavailable at trial:

> "The key to all the evidence, which is referred to, but omitted to be produced on the trial, was, or ought to have been, in the possession of the complainants. * * * They allege that such testimony was of importance to them, and we grant that it was; but we cannot admit that any diligence was used, when it is stated that they could not find a witness, by whom to prove it during the pendency of the suit at law."

Wells, 1 Or at 297. As in *Wells*, Forest Products' inability (due to its own lack of diligence) to "find a witness, by whom to prove" matters within its knowledge does not constitute "fraud," and does not entitle Forest Products to a new trial.

d. Forest Products had alternative evidence available.

Forest Products' assertion that *only* Fahey could have explained the inventory manipulations is incorrect. *See* Defs Br 26. Forest Products knew before trial that there was a paper trail documenting and tying Patillo to every inventory deletion about which Fahey would have testified. Pl Br 11; Defs Br 15. Forest Products could have offered those documents as evidence, could have used those documents to cross-examine Patillo or Schmidt, or could have had its own accounting expert testify regarding the significance of the documents. Moreover, Fahey *told Dovenberg and Lafors* about the inventory manipulations, but Forest Products did not put on that evidence, even though both Dovenberg and Lafors testified at trial. Focusing properly on the *evidence* rather than the specific *vehicle* for presentation of the evidence, the evidence (having already been discovered) was plainly available had Forest Products

used reasonable diligence. *Cf. Arnold*, 320 Or at 121 (ORCP 64 B(4) motion fails where known evidence could have been used for substantially the same purpose as the "newly discovered" evidence).

3. Forest Products misconstrues the abuse of discretion standard of review.

The parties appear to agree that at some level, the denial of a motion for a new trial is reviewed for abuse of discretion. Defs Br 37-38.[7] But Forest Products places the standard of review on its head, assuming a default position of *granting* a new trial motion by arguing that if the record adequately reflects that the movant *does not* meet a factor, "then a trial court *has discretion to deny the motion*," but that if the record is *insufficient* to conclude a new trial factor is not met, then the court has *no discretion* to deny a motion for new trial. Defs Br 38-39 (emphasis added). That is the diametric opposite of the law.

> "'Motions for new trials based upon claims of newly discovered evidence are not favored. A fundamental requirement to invoke the court's discretion to grant such a motion is a showing *by the moving party that he could not, with reasonable diligence*, have discovered and produced this evidence at the trial.'"

Marshall v. Martinson, 264 Or 470, 476-77, 506 P2d 172 (1973) (quoting *N.W. Ice & Cold Storage v. Multnomah Co.*, 228 Or 507, 365 P2d 876 (1961)) (emphasis added) (internal citation omitted). *Forest Products* had the burden to

[7] For the reasons stated in its opening brief, Greenwood does not agree that every review a motion for a new trial includes some level of *de novo* review. Pl Br 54-57.

create a sufficient record to allow the trial court discretion to *grant* a disfavored motion. Forest Products failed to show that it could not, through reasonable diligence, have discovered Fahey's evidence, or that the other requirements for a new trial are met. Forest Products cannot avoid its failure by inverting the burden and the abuse of discretion standard.

II. CONCLUSION

This court should reverse the decision of the Court of Appeals, affirm the judgment of the trial court, entered on the jury's verdict, awarding plaintiffs a judgment in the principal amount of $872,323.77, and affirm the trial court's supplemental judgment awarding plaintiffs' their attorney fees and costs.

Dated this 1st day of May, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(D)

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 3,749 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).

Dated: May 1, 2015.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 1st day of May, 2015, I filed the original of the foregoing **PETITIONERS ON REVIEW'S REPLY BRIEF ON THE MERITS** by using the court's electronic filing system, and I served the same on:

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