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

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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1. Can an affidavit given after a verdict is rendered that elaborates on facts that the affiant informed the parties of before trial qualify as newly discovered evidence under ORCP 64 B(4)?

2. In reviewing the trial court's denial of defendants' motion for a new trial under ORCP 64 B(4), did the Court of Appeals correctly apply the "abuse of discretion" standard of review?

3. In reviewing the trial court's denial of defendants' motion for a new trial under ORCP 64 B(4), did the Court of Appeals properly analyze whether the alleged new evidence could have been discovered before the trial by the exercise of "reasonable diligence"?

4. Does an affidavit signed after trial, containing evidence that the affiant did not provide at trial because the affiant invoked a Fifth Amendment privilege against self-incrimination and was asked no further questions, constitute newly discovered evidence under ORCP 64 B(4)?

5. For newly discovered evidence to justify a new trial under ORCP 64 B(4), is it sufficient to show that the newly discovered evidence, "if believed, will probably change the result"?

II. PROPOSED RULES OF LAW

An affidavit given after trial elaborating on facts known to the parties before trial, although in less detail, cannot qualify as "newly discovered

evidence" under ORCP 64 B(4). The evidence at issue was "newly discovered" when first made known to the parties before trial. Additional detail regarding the core facts already known before or during trial is not "newly discovered evidence."

Applications for a new trial based on newly discovered evidence are not favored and the trial court's decision regarding whether the moving party has satisfied the requirements for a new trial is within the sound discretion of the trial court. This does not change into a legal determination if a written order is not entered within 55 days of entry of judgment, particularly where the trial court actually heard and decided the motion.

Reasonable diligence requires the party to take all reasonable steps necessary to discover material facts and to assure that facts discovered are produced at trial, including requesting a trial continuance, investigating to expand on the known facts, obtaining and presenting relevant documentary evidence, calling available witnesses with knowledge to testify at trial, and asking the witnesses questions at trial designed to elicit the probative evidence.

An affidavit signed after trial, containing evidence the affiant refused to provide at trial because the affiant invoked a Fifth Amendment privilege against self-incrimination or that was not produced at trial because the offering party speculated that the affiant would have invoked the privilege if asked the questions, does not constitute newly discovered evidence under ORCP 64 B(4).

To obtain a new trial based on newly discovered evidence, the moving party must demonstrate a state of *undisputed* facts which would probably lead an ordinarily reasonable person to a different conclusion than the jury.

III. STATEMENT OF THE CASE

A. Nature of the action and relief sought.

Plaintiffs-Respondents-Cross-Appellants, Petitioners on Review Greenwood Products, Inc. and Jewett-Cameron Lumber Corp. sued Defendants-Appellants-Cross-Respondents, Respondents on Review Greenwood Forest Products, Inc. ("Forest Products"), Jim Dovenberg, and Bill LeFors for breach of contract. ER 1-3. Plaintiffs sought $1,023,213.98 in damages incurred as a result of Forest Products' erroneous accounting in connection with inventory plaintiffs purchased from Forest Products under an Asset Purchase Agreement. ER 6. Plaintiffs also asserted claims for reformation and rescission, and defendants asserted various counterclaims, none of which are at issue here. ER 4-5, 11-16.

B. Nature of the judgment.

On March 8, 2007, following a jury trial, the trial court entered a General Judgment and Money Award in favor of plaintiffs for $872,323.77 based on the jury's verdict on plaintiffs' breach of contract claim. ER 31-33, 37-38. The general judgment also disposed of the other claims not at issue before this court. ER 32, 34-36. On May 16, 2007, the trial court entered a supplemental judgment awarding plaintiffs $146,672.00 in attorneys' fees on their claim and

awarding defendants $72,209.50 in attorneys' fees on their counterclaims. ER 42-46. The Court of Appeals reversed the general judgment on plaintiffs' breach of contract claim, holding that the trial court should have granted defendants' motions for a directed verdict. *Greenwood Prods., Inc. v. Greenwood Forest Prods., Inc.*, 238 Or App 468, 242 P3d 723 (2010) ("*Greenwood I*"). This court reversed, holding that the Court of Appeals relied on an argument that was not preserved and that the trial court correctly denied defendants' motions for directed verdict, and remanded to the Court of Appeals to address the remaining assignments of error. *Greenwood Prods., Inc. v. Greenwood Forest Prods., Inc.*, 351 Or 604, 273 P3d 116 (2012) ("*Greenwood II*"). On remand, the Court of Appeals again reversed the jury verdict, holding that the trial court should have granted defendants' motion for a new trial based on newly discovered evidence, and also reversed the supplemental judgment awarding attorneys' fees to plaintiffs. *Greenwood Prods., Inc. v. Greenwood Forest Prods., Inc.*, 264 Or App 1, 330 P3d 662 (2014) ("*Greenwood III*" or "Decision").

IV. STATEMENT OF FACTS

A. The Asset Purchase Agreement.

Defendant Forest Products processed and sold industrial wood and other products, principally to original equipment manufacturers. ER 18.[1] Forest Products maintained inventory at over 80 locations throughout the United States to allow for prompt deliveries to customers. ER 18; Tr 1007. Plaintiff Greenwood, a manufacturer and wholesale distributor of lumber and other building materials, agreed to purchase all of Forest Products' inventory (and some of Forest Products' other assets). ER 18-20; Tr 154-55. Forest Products was "willing to stage the sale of its inventory to a purchaser of the business over a two-year period to assist in the financing of the purchase of the business." ER 18. To that end, the parties entered into the Asset Purchase Agreement ("APA").

Under the APA, Greenwood purchased Forest Products' inventory in two ways. First, the parties agreed to separate Forest Products' inventory into "seven discrete units by location." ER 19. Greenwood would then purchase one unit every three months until it had purchased all inventory locations over a

[1] Consistent with the party name references in the Court of Appeals, due to the similarity of the corporate party names, plaintiff Greenwood Products, Inc. and defendant Greenwood Forest Products, Inc. are referred to as "Greenwood" and "Forest Products," respectively. *See Greenwood III*, 264 Or App at 3 n 1.

two-year period. ER 19.[2] The parties would agree upon what specific locations would be sold in "bulk transfers" at the end of each three-month period, perform a physical inventory count for those locations, and then Greenwood would purchase that inventory "for a price equal to [Forest Products'] cost (including transportation, processing and storage) plus a premium of 2%." ER 19. The parties ultimately agreed to accelerate the time period for the bulk transfers of inventory, which were completed 13 or 14 months after the closing date of February 28, 2002. Tr 164-65; ER 21.

Second, Forest Products sold inventory to Greenwood on a per-order basis from those Forest Products inventory locations not yet sold to Greenwood as part of a bulk sale. Greenwood employees would sell lumber to customers, and Forest Products agreed to sell inventory exclusively to Greenwood to allow Greenwood to fill those customer orders. ER 20. Greenwood agreed to pay 102% of Forest Products' costs for all such ongoing sales. ER 20. There were hundreds of these ongoing sale transactions per week. Tr 318.

B. The post-closing sale period.

1. The inventory replenishment process.

In light of these ongoing sales, Forest Products was required to keep its "business substantially intact, including its present operations, physical

[2] The APA refers to Forest Products as "Greenwood" and to Greenwood, the entity formed to operate as the buyer under the APA, as "Jewett-Cameron." ER 18-27. For consistency of reference, quotations from the APA are modified to refer to the party named as used in the briefing.

facilities, and relationships with suppliers, and customers." ER 23. Forest Products agreed to "replenish, process and maintain inventories in keeping with its past practice at each of the locations where the inventory has not yet been sold[,]" *i.e.*, the locations that had not yet been part of a bulk sale. ER 20. However, Forest Products paid Greenwood to supply most of the manpower to satisfy Forest Products' obligations in this regard. The APA says that Greenwood would "provide [Forest Products] with all management and administrative services associated with purchasing, processing, and maintaining [Forest Products'] inventory at each such location for a fee * * *." ER 20.

As a result, during the sale period, employees being paid by Greenwood spent part of the day "wearing a Greenwood hat" and the other part of the day "wearing a Forest Products hat"—"[b]uying product, having the product treated, or otherwise remanufactured, having it transported, having it ultimately delivered * * * to one of the inventory locations, from which it would then be sold to Greenwood, the new company." Tr 155-56. "The activities of both companies had to function more or less in parallel." Tr 155. However, Greenwood's agreement to provide administrative and management services for replenishing inventory did not mean that Forest Products was relieved of all responsibilities for its books and financial records. Tr 286.

2. Accounting for ongoing sales.

Both the bulk and ongoing sales of inventory were tracked through an "intercompany account." Tr 315-17. That account was essentially two sets of books (Greenwood's and Forest Products') side by side, connected by a "conduit" through which sales passed. Tr 315-16. During the sale transition period, whenever a Greenwood trader made a sale from inventory that Greenwood had not yet purchased in a bulk sale, the trader assistant would enter a sales number and some inventory to be sold into the accounting system, the software would say "sales of inventory," and the system would automatically create amounts in Greenwood's and Forest Products' books. Tr 310; 316. The accounts would show the amounts of inventory passing through and add two percent to the cost. Tr 310-11, 315-16.

James Fahey was the person who performed most of the accounting work under the agreement for Greenwood to provide Forest Products with administrative services. Tr 311, 433; ER 20. Jim Patillo supervised Forest Products' finances, and Patillo "and the people underneath him" handled the accounting. Tr 211-12. Defendants admit Patillo was vice-president of both Greenwood *and Forest Products*. Br 34 (citing Tr 210). Forest Products' owners Jim Dovenberg and Bill LeFors retained the authority to direct the accounting work, remained involved in the business, and hired an accounting

firm to come onto its premises every three months to go over Forest Products' books. Tr 160-61, 217, 573, 1038.

C. Discovery of Greenwood's overpayment.

In August 2003, CPA Steven Schmidt reviewed Greenwood's books in connection with the 2002-2003 fiscal year audit and discovered an account that had no balance at the beginning of the year and a balance of nearly $1.2 million at the end of the year, after the transfer of inventory was complete, but did not show purchases or sales of inventory. Tr 294, 296-97, 300, 303, 306-07, 309-10. Schmidt also found many unusual journal entries in Greenwood's books, including entries that were "unrelated to normal inventory activity." Tr 308-09. This led Schmidt to suspect "that there was a major problem with the inter-company account, and that we needed to do something to look at the complete books of Forest Products." Tr 321.

Schmidt received permission from Forest Products to review its books. Tr 173, 321, 323. Schmidt concluded that "the best way to proceed would be to take all the raw data that happened since the beginning of this sale and reconstruct the books[.]" Tr 322. Schmidt obtained a read-only copy of Forest Products' accounting database (which ran in software called Navision), and then took the starting balance as of the effective date of the APA and reconstructed the books using checks, bank records showing cash transactions, bills, invoices, and the like. Tr 323-25; 412; 414. Schmidt "looked at every

invoice that was paid" and "accounted for it almost exactly, as they accounted for it." Tr 450. As part of the process, Schmidt considered whether the inventory cost for each transaction had been calculated properly. Tr 450. By the nature of the transactions, the reconstruction also reconstructed the inter-company account. Tr 414.

When analyzing his reconstruction, Schmidt discovered that Fahey had been embezzling from Forest Products. Tr 447-48. Schmidt also discovered, from his review of Forest Products' books, that "there was an amount in the inter-company account that showed that Greenwood had overpaid Forest Products for inventory that it didn't receive" in the amount of $819,731.68. Tr 328, 435, 451-52; SER 4-5. This error was exclusively in Forest Products' books, and is based on the amount of cash Forest Products received from Greenwood for ongoing and bulk sales. Tr 443, 451, 457. The entries on Greenwood's books that first raised Schmidt's suspicions and prompted him to review the intercompany account ultimately had no relationship to Greenwood's overpayment shown on Forest Products' books. Tr 441-43. Fahey's embezzlement also was not a component of Greenwood's overpayment. Tr 431-32.

The jury rendered a verdict that Forest Products engaged in erroneous accounting that caused Greenwood to overpay Forest Products by $819,731.68 for inventory that Greenwood did not receive. ER 37.

D. Fahey's testimony.

1. Fahey's deposition testimony.

Leading up to trial, defendants had been working with Fahey to obtain information regarding his accounting work. Tr 585-86. Fahey had pled guilty to theft four months before trial, but sentencing was delayed until May 31, 2006, *for defendants' benefit*. Deposition of James Fahey ("Dep"), 23:23-24:7; 36:6-19; Tr 585-86. Forest Products also subpoenaed Fahey to testify on Forest Products' behalf at trial. *Greenwood III*, 264 Or App at 7. When plaintiffs learned shortly before trial that Fahey was on defendants' witness list, plaintiffs subpoenaed Fahey for a deposition. *Id.* The deposition occurred on the Saturday before the Monday trial. *See id.* at 9. Fahey invoked the Fifth Amendment as to some questions. *E.g.*, Dep 34:21-35:16. Fahey nonetheless testified, in short, that he believed Greenwood did not overpay because payments were generated from Greenwood's sales records, not Forest Products' inventory records, Patillo supposedly directed Fahey to remove inventory from Forest Products' books, and Patillo initialed documents showing the inventory removal. Dep 97:20-98:6; 98:19-99:10; 100:11-101:5; 131:4-22. At least three months before trial, Fahey told several people about the alleged removal of inventory from Forest Products' books, including Forest Products' owners Jim Dovenberg and Bill LeFors. Dep 102:10-25. Fahey also had spoken with defendants' counsel. Dep 74:16-19.

Defendants' counsel was present during the deposition; Fahey's criminal attorney, Coit, was not. *Greenwood III*, 264 Or at 7. For that reason, Coit moved to seal the deposition transcript, which was granted. *Id.* at 9; TCR 34. Defendants did not object to sealing the deposition. *Greenwood III*, 264 Or at 7.

2. Fahey at trial.

Defendants asked Fahey *one question* out of the presence of the jury, and Coit advised Fahey to invoke the Fifth Amendment. Tr 803. Fahey neither answered the question nor invoked the privilege. The trial court declined to rule that Fahey had no privilege. Tr 809. Defendants then elected not to call Fahey as a witness. Tr 809.

3. Fahey's post-trial affidavit.

On May 31, 2006, Fahey executed an affidavit regarding his accounting work for Forest Products.[3] 3rdSER-6-11. Defendants filed a motion for new trial under ORCP 64 B(4) based on Fahey's affidavit as "newly discovered evidence." TCR 69. The affidavit's content is discussed at length below, but essentially provides detail regarding Patillo's supposed involvement in Fahey's embezzlement scheme and technical detail regarding the manner in which Fahey manipulated the accounting software to effect the removal of

[3] Page two of the affidavit is not in the trial court record. 3rdSER-6-7.

inventory—the same removal of inventory about which Fahey testified at his deposition and previously confessed to Forest Products' owners. 3rdSER-6-11.

V. SUMMARY OF ARGUMENT

The Court of Appeals reversed the jury's verdict on the ground that defendants presented "newly discovered evidence" warranting a new trial, but ***defendants knew the substance of that evidence before trial began.*** Even if Fahey's affidavit contains "new" evidence, defendants could have discovered and produced Fahey's evidence at trial had they exercised reasonable diligence: Defendants could have actually called Fahey as a witness, opposed sealing Fahey's deposition, used documentary evidence or other witnesses to elicit the evidence, or sought a continuance to allow time to eliminate any purported Fifth Amendment issue. The Decision did not account for these and other avenues that reasonable diligence required defendants to pursue. Instead, the Decision improperly countenances defendants' choice to gamble at trial and then, having lost, to seek a new trial based on evidence they already knew and, in the exercise of reasonable diligence, could have presented to the jury.

Defendants' *actual knowledge* of the substance of Fahey's testimony precludes the characterization of Fahey's affidavit as "newly discovered evidence" simply because he *might* have exercised his Fifth Amendment rights at trial. At most, Fahey's testimony was "newly available," not "newly discovered." "Newly available" evidence does not satisfy ORCP 64 because it

is known at trial and because it could have been discovered and produced at trial with reasonable diligence.

The Decision also erred by rewriting this court's criteria for granting a new trial. By allowing a new trial where new evidence "*if believed*, will probably change the result," the Decision created a standard that is at odds with the text of ORCP 64 and with deference to jury verdicts. The Decision's standard improperly presumes credibility and favors a moving party invoking a decidedly disfavored procedural mechanism. This "if believed" standard allows the grant of a new trial where the jury's verdict *might* have been different, and the Decision thus improperly reverses the jury's verdict without being able to state that defendants' substantial rights were affected. Newly discovered evidence warrants a new trial only if it shows a *state of undisputed facts* that would probably change the result (which Fahey's affidavit does not do).

Applying the improper standard, the Decision found that the "new evidence" (which was known to defendants before trial) would, if believed, change the jury's conclusion because Fahey's affidavit showed "that Greenwood had not overpaid Forest Products for inventory." *Greenwood III*, 264 Or App at 22. Defendants never made that unpreserved argument to the trial court. In the trial court, defendants argued that Fahey's affidavit showed that Greenwood (through Patillo) knew of and directed Fahey's inventory manipulations. But the jury heard and rejected the argument that Greenwood

was responsible for the errors on Forest Products' books. Even if the Decision's characterization were preserved, Fahey's affidavit does not state or support that *all* of the inventory purchases were accurate because it does not account for the hundreds of weekly transactions that occurred through the intercompany account—transactions separate from the bulk sales addressed in Fahey's affidavit. The affidavit does not undermine the jury's conclusion that Forest Products' books contained accounting errors that resulted in Greenwood's overpayment.

The Decision also erroneously determined that three of the factors used by this court for over a century (that the new evidence be: (1) material, (2) not merely cumulative, and (3) not merely contradictory or impeaching) are no longer required to grant a new trial. The Decision then incorrectly found that the Fahey affidavit's contradiction of plaintiffs' evidence, and its corroboration of defendants' evidence, were reasons to *grant* defendants' motion.

Finally, the Decision transforms the applicable standard of review from abuse of discretion into de novo review of "legal determinations," usurping the trial court's unique position to evaluate whether the proffered new evidence could have been discovered and produced through reasonable diligence, is cumulative or impeaching, or probably would have changed the result. These determinations—which the trial court is particularly well-suited to make—are discretionary, not legal, determinations. The trial court exercised sound

discretion in denying defendants' motion for a new trial. The Court of Appeals improperly substituted its judgment for the trial court's and ultimately the jury's, and should be reversed.

VI. ARGUMENT

"Motions for a new trial based on newly discovered evidence are not favored." *Lane Cnty. Escrow Serv., Inc. v. Smith*, 277 Or 273, 288, 560 P2d 608 (1977). Accordingly, such motions "are viewed with distrust and are construed with strictness." *State v. Ellis*, 232 Or 70, 89, 374 P2d 461 (1962); *see also Marshall v. Martinson*, 264 Or 470, 477, 506 P2d 172 (1973) ("Efficient judicial administration dictates that motions for new trials because of newly discovered evidence be granted sparingly. Otherwise, there would never be any finality to judicial proceedings."); *Territory v. Latshaw*, 1 Or 146, 147 (1854) ("In deciding motions for new trials, on account of newly discovered evidence, courts have found it necessary to apply somewhat stringent rules, to prevent the almost endless mischief which a different course would produce."). The Decision made no mention of the longstanding "distrust" of "not favored" motions for a new trial based on newly discovered evidence, and the Court of Appeals' multiple errors show that the Decision paid no heed to the principle in application. Those errors warrant reversal of the Decision and reinstatement of the jury's verdict and resulting judgment.

A. Defendants' "new evidence" must meet all requirements for a new trial based on newly discovered evidence.

Under ORCP 64 B(4), a new trial may be granted based on "*[n]ewly discovered evidence*, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial" and that "materially affect[s] the substantial rights of such party[.]" (Emphasis added.) The statute plainly does not allow for a new trial based on evidence that is not "newly discovered," *i.e.*, that was known before the end of trial.

1. The *Arnold* requirements for a new trial.

Consistent with the text of ORCP 64 B(4) and of its statutory predecessors, this court for over a century consistently has required that evidence "must have been discovered since the trial" potentially to warrant a new trial. *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) (quoting *State v. Davis*, 192 Or 575, 579, 235 P2d 761 (1951)); *State v. Hill*, 39 Or 90, 94-95, 65 P 518 (1901). In its most recent treatment of a motion for new trial under ORCP 64 B(4), this court held:

> "[E]vidence that may justify a court in granting a new trial must meet the following requirements:
>
> "(1) It must be such as will probably change the result if a new trial is granted;

> "(2) It must be such as, with reasonable diligence, could not have been discovered before or during the trial;
>
> "(3) It must be such that it cannot, with reasonable diligence, be used during trial;
>
> "(4) It must be material to an issue;
>
> "(5) It must not be merely cumulative;
>
> "(6) It must not be merely impeaching or contradicting of former evidence."

State v. Arnold, 320 Or 111, 120-21, 879 P2d 1272 (1994) (footnote omitted). The statutory requirement that evidence be "newly discovered" is not expressly enumerated.

The court's unexplained exclusion of the requirement that the evidence "must have been discovered since the trial" appears antithetical to the core requirement that evidence be newly discovered. But *Arnold* addressed whether ORCP 64 B(4) applies to evidence first discovered during trial, and ultimately holds that evidence that in the exercise of reasonable diligence could have been discovered either before or during trial cannot support a new trial. 320 Or at 120-21. This standard logically excludes as a potential basis for a new trial all evidence actually known before the end of trial. *Arnold* thus limits application of ORCP 64 B(4) to evidence discovered since the trial, just as the statute requires and as *Oberg* and its predecessors did. To the extent *Arnold* could be read otherwise, it is contrary to the plain language of the statute.

2. Defendants must meet *each* requirement for a new trial.

For over a century, this court has treated each listed element of the new trial analysis as a *requirement* that "evidence which will justify a court in granting a new trial *must meet* * * *." *Oberg*, 316 Or at 272 (emphasis added) (citation omitted); *Arnold*, 320 Or at 120-22 (assuming "probably change the result" prong was met and affirming denial of motion for new trial based on analysis only of "reasonable diligence" elements). The Decision, however, cited *State v. Acree*, 205 Or App 328, 334, 134 P3d 1069 (2006), for the idea that "[a]lthough the first three requirements are independently essential, the last three are closely related to the first." *Greenwood III*, 264 Or App at 19 (internal quotation and alteration omitted). The Decision then concluded that meeting the first three *Arnold* requirements warrants a new trial, without regard to the fourth through sixth requirements.

The genesis of this error appears to be *State v. Williams*, 2 Or App 367, 372-73, 468 P2d 909 (1970), which stated:

> "Any application for new trial must meet the first three requirements: (1) (probably change the result), (2) (discovered since trial) and (3) (could not have been discovered before the trial by due diligence). Requirements (4) (material to the issue), (5) (not cumulative) and (6) (not merely impeaching or contradictory of former evidence) should only be considered part of requirement (1). If the answer to requirement (1) is affirmative, requirements (4), (5) and (6) should not prevent the granting of a new trial, for to do otherwise would be letting procedure and form trample over merit and substance."

(Internal citation omitted). That is plainly at odds with this court's clear statements, both before and after *Williams*, that newly discovered evidence must meet all six requirements.

This error was not merely academic. As discussed below in Section VI.F, having eliminated the requirements that the new evidence not be merely contradictory, impeaching or cumulative, the Decision relied on the ideas that Fahey's affidavit contradicted evidence at trial and that the affidavit would make the jury "more likely to credit" other testimony supporting defendants' theory (*i.e.*, the evidence was cumulative) as *support* for granting a new trial. *Greenwood III*, 264 Or App at 23-24. That conclusion is inconsistent with this court's longstanding jurisprudence.

B. The Court of Appeals did not properly analyze the "reasonable diligence" requirement, and a proper analysis shows that defendants failed to exercise reasonable diligence.

Fahey's affidavit is not newly discovered evidence. Defendants knew the information contained in Fahey's affidavit before trial. Notwithstanding this, the Decision incorrectly concluded that "defendants, in the exercise of reasonable diligence, could not have discovered and presented Fahey's putative testimony[.]" *Greenwood III*, 264 Or App at 21. The Decision based that conclusion on the notions that: (1) Fahey's criminal attorney, Coit, placed limits on pretrial discussions with Fahey; (2) Coit's successful efforts to seal the deposition transcript "demonstrate that Coit would not have permitted

defendants to inquire into this subject matter either before or during trial[;]" and (3) "the trial court effectively precluded defendants from eliciting testimony from Fahey" because Coit advised Fahey to invoke the Fifth Amendment privilege in response to the single question defendants asked, and because the trial court would not rule that Fahey had no privilege. *Id.* at 21-22. The record does not support those conclusions, and the Court of Appeals committed several other errors that warrant reversal.

1. The Court of Appeals disregarded the wealth of information *defendants already knew* from the deposition of Fahey.

As the Decision recognizes, defendants knew from Fahey's deposition specific details that were later included in his affidavit. *Greenwood III*, 264 Or App at 8. Defendants knew Fahey had testified to the following assertions:[4]

- Fahey believed Greenwood received physical inventory commensurate to its payments because payments for ongoing inventory sales were generated from Greenwood's sales records, not Forest Products' inventory records. Dep 131:4-22.
- Patillo directed Fahey many times between March 2002 and early 2003 to remove inventory from Forest Products' books.

[4] The Decision emphasized the ethical issues raised in connection with the deposition. *See, e.g.*, *Greenwood III*, 264 Or App at 21. Those issues are irrelevant. Defendants, through their counsel, knew the information, and did not "unknow" it at the time of trial merely because a bar complaint was filed.

Dep 97:20-98:6; 100:11-101:5. Patillo directed Fahey to remove all inventory for an entire location. Dep 98:7-13.

- Fahey always "requested a note or something signed or initialed before [Fahey] would do anything" in terms of removing inventory from Forest Products' books and filed those notes in Forest Products' books. Dep 98:19-99:10.
- Fahey described in detail the notes documenting the removal of inventory, and identified several people who helped file those notes. Dep 99:11-100:10.
- In February 2006—three months before trial—Fahey told several people about removal of inventory from Forest Products' books, including Forest Products' owners Jim Dovenberg and Bill LeFors. Dep 102:10-25.

The Decision downplayed defendants' knowledge of this evidence, incorrectly characterizing the affidavit as presenting "qualitatively different information" and then failing to address the evidence *defendants knew* from the deposition, but failed to exercise reasonable diligence to produce. *Greenwood III*, 264 Or App at 20.

Ignoring the fact that defendants' counsel heard every word of Fahey's testimony, the Decision improperly limited its analysis to a comparison of the affidavit and defendants' *other* pretrial discussions with Fahey, relying on

counsel's vague statement that "'a significant amount of information' in Fahey's affidavit 'was not know[n] to [him].'" *Greenwood III*, 264 Or App at 21 (alteration in original). In fact, defendants' counsel admitted at the hearing on the motion that he had not "taken the time to compare what's in the deposition" and instead apparently relied on the affidavit and, incorrectly, on his memory of the deposition ten months before. April 30, 2007 Hearing, 45:7-13. The Decision also relied on defendants' counsel's *belief* regarding what he could have asked Fahey in pretrial discussions. *Greenwood III*, 264 Or App at 21. The very fact that defendants speak only in terms of belief shows the absence of reasonable diligence—efforts to actually obtain the information are not detailed in the record. *Cf. State v. Asplund*, 86 Or 121, 138-39, 167 P 1019 (1917) ("The least that can be said is that if the defendant desired her testimony, he should have gone as far as to subpoena her and offer her as a witness when, if she had claimed the privilege of silence, it would have been time enough to decide that matter."); *Lander v. Miles*, 3 Or 40, 44-45 (1868) ("It is not sufficient that he depose in terms 'that he has made diligent inquiry;' the affidavit should state facts. * * * The question must be determined by a consideration of specific acts deposed to."). The Decision treated information defendants *already actually knew* as evidence that somehow could not have been discovered in the exercise of reasonable diligence, and substituted speculation regarding the inability to obtain additional information for

diligence. Because defendants knew the substance of Fahey's testimony before trial, Fahey's affidavit is not "newly discovered evidence" under ORCP 64 B(4).

2. The Court of Appeals failed to consider what defendants could and should have done in the exercise of reasonable diligence.

In concluding that Fahey's evidence was undiscoverable, the Decision failed to consider the myriad options available to defendants to discover and produce all available evidence. *Greenwood III*, 264 Or App at 21. "Reasonable diligence," requires an analysis of both what defendants did and of *what they could have done* to discover and produce the evidence. The Decision, however, is devoid of any discussion of efforts defendants could have made, but did not make, that would have resulted in the evidence being discovered (to the extent it was not already known) and produced at trial.

a. Defendants should have sought a continuance.

As this court has discussed as far back as 1868, the most obvious act in the exercise of reasonable diligence would have been for defendants to request a postponement of trial. *See Lander*, 3 Or at 44 ("A party should be free from *laches* in not having moved for a continuance."); *Cox v. Rand*, 155 Or 258, 264, 61 P2d 1240 (1936) ("It will also be observed that plaintiff did not ask for any further continuance of time in which to have the witnesses brought into court."). At Fahey's deposition, defendants heard evidence that defendants now say is so significant it would probably change the jury's verdict. A continuance would

have allowed defendants more time to investigate. More importantly, it would have allowed time for Fahey to proceed to sentencing, which would have removed any arguable impediment to Fahey's testimony. Notably, sentencing had been delayed *at Forest Products' request* so Fahey could continue to work with Forest Products and the prosecutor to provide evidence with respect to Patillo. Indeed, Fahey executed his affidavit immediately following sentencing, and barely three weeks after the start of trial. Alternatively, in the months preceding trial, defendants could have asked the judge presiding over Fahey's criminal matter to rule that the statute of limitations had run on uncharged conduct, the principle Fifth Amendment hurdle defendants believed existed at the time of trial. Tr 797-98.

b. Defendants should have actually questioned Fahey.

Reasonable diligence required defendants actually to question Fahey before the jury. The fact that defendants subpoenaed Fahey to testify at trial (without having taken his deposition) shows that they knew Fahey had relevant evidence and understood he would provide at least some evidence at trial. Indeed, at the start of trial, defendants represented that Fahey had information as to which he would testify:

> "I'm sure he's going to probably assert some Fifth Amendment on some areas. He was – He's able to testify as to a lot of stuff, and he did in his deposition, until you get to the specific acts of embezzlement. He has a lot of relevant knowledge that doesn't – and he actually talks somewhat about the embezzlement.

> "I have never heard him not invoke the Fifth Amendment when you get to the very specific acts of his embezzlement, although – And I can't answer this question. He may very well waive that Fifth Amendment right and talk about that in this trial. I don't know the answer to that question."

Tr 11-12. To this day, no one knows the answer to that question, because defendants elected not to call Fahey, never asked about the "lot of stuff" to which Fahey could testify and which defendants thought they could elicit, Tr 11-12, 797, and never explored whether Fahey would testify notwithstanding an earlier claim to Fifth Amendment privilege, Tr 809.

Instead, defendants asked Fahey a single question out of the presence of the jury: "Was there a time within [February 25, 2002 until December 31, 2002] when you were instructed to remove inventory off the books of Forest Products?" Tr 803. Coit then *advised* Fahey to invoke his Fifth Amendment privilege. *Id.* A colloquy with the trial court followed, and Fahey never actually invoked the privilege. Fahey might have answered the question, ***having done so in deposition and having told Dovenberg, LeFors, Schmidt and others about the inventory removal three months before trial***. Dep 97:20-98:6; 100:11-101:5; 102:10-23. Reasonable diligence required pursuing the evidence at least up to an actual invocation of the privilege. *Cf.* OEC 804 1981 Conference Committee Commentary ("unavailability" "requires an affirmative ruling by the court that a privilege exists, *which presupposes a claim*" (emphasis added)).

Even if Fahey invoked his privilege as to the question posed, Fahey likely would have testified to some information relevant to the alleged manipulation of Forest Products' books. Neither the trial court nor Coit asserted any blanket restriction on Fahey's testimony. The trial court noted simply that Coit would "advise his client to invoke the Fifth in areas where he's uncomfortable because he doesn't know whether or not the statute is run," and Coit made no statements to the contrary. Tr 809.

In fact, defendants called Fahey outside of the hearing of the jury solely to elicit a ruling regarding the statute of limitations on Fahey's criminal conduct, because they apparently *already knew* what evidence Fahey would provide (consistent with subpoenaing Fahey as their witness). Defendants' counsel said he was trying to "anticipate problems" and that "I basically have it worked out on the testimony that I think I can elicit from this witness" but that there were "two questions" where he had been told that the witness would invoke the Fifth Amendment and defendants believed the statute of limitations had run. Tr 797-98. Defendants posited that the best way to present that issue was to put Fahey on and ask the question. Tr 798. The Decision's conclusion that "the trial court effectively precluded defendants from eliciting testimony from Fahey about" inventory manipulation, *Greenwood III*, 264 Or App at 21, is unsupportable. Apart from asking one question to "tee up" the statute of limitations issue for the judge, defendants *never tried* to elicit the testimony.

Similarly, the Decision's conclusion that "Coit's successful efforts at the time of trial in this case to seal Fahey's deposition testimony * * * demonstrate that Coit would not have permitted defendants to inquire into this subject matter either before or during trial," *Greenwood III*, 264 Or App at 21, is contrary to the record. Coit's motion was based solely on the argument that the deposition was taken without Coit present on a subject on which Coit represented Fahey, without reference to Fifth Amendment issues. TCR 34. What Coit and Fahey would have done if defendants had actually questioned Fahey is pure speculation.

In the end, as a result of defendants' lack of reasonable diligence, defendants cannot establish what part, if any, of Fahey's testimony could not be discovered and produced at trial. Defendants' decision not to actually call Fahey as a witness is fatal to their motion. *See Lewis v. Nichols*, 164 Or 555, 571, 103 P2d 284 (1940) ("[A] party is required to call at the trial not only all witnesses of whom he has express knowledge, but also all those whom he would have found had he exercised reasonable diligence; that is, he must either call them or forever forego their use."); *Asplund*, 86 Or at 138-39 (assumption that witness would invoke privilege at trial did not make post-trial affidavit newly discovered where defendant never actually called the witness).

c. Defendants should have tried to use Fahey's deposition testimony.

Reasonable diligence required that defendants attempt to use Fahey's deposition testimony, which could have been available to defendants even if Fahey invoked the Fifth Amendment at trial. Defendants did not object to the sealing of Fahey's deposition. *Greenwood III*, 264 Or at 9. The sealing of the deposition does not change that defendants *knew* the information and thus that the evidence could not later be "newly discovered," but the failure to object to sealing of the transcript shows a lack of the requisite reasonable diligence with respect to the use of that information.

d. Defendants should have attempted to obtain evidence from other known sources.

Defendants did not attempt to elicit information from sources known to have information regarding the alleged inventory scheme. Although defendants asked Patillo whether he directed the removal of inventory (and he responded that he directed adjustments to inventory), Tr 1031-32, they did not question Dovenberg or LeFors at trial regarding their knowledge of the alleged inventory removal—both of whom Fahey testified he spoke with regarding the inventory scheme. Dep 102:10-25.

Defendants also could have asked Schmidt regarding the effect of inventory removal on his conclusion that Greenwood overpaid Forest Products. Yet defendants asked only *one* question:

> "Q. If someone was taking inventory off of the books of Forest Products before the inventory was sold to Greenwood * * * could that affect the trial balance?
>
> "* * * * *
>
> "A. -- it would affect [Forest Products'] trial balance at that point."

Tr 426. Reasonable diligence required exploring the effect of inventory removal further, if in fact removal from Forest Products' books somehow showed that Greenwood did not overpay.

e. Reasonable diligence required defendants to use documentary evidence.

Defendants also could have used at trial documentary evidence of the alleged inventory removal. Fahey testified that Patillo initialed documents reflecting each removal of inventory and that those documents were filed among *Forest Products'* records. Dep 98:19-100:10. Those documents presumably provided detailed information regarding each inventory removal. Forest Products could have reviewed those documents long before trial. On the morning of trial, defendants asked for access to the documents, which were apparently in Schmidt's possession, for the specific purpose of looking for the initialed documents, Tr 8-10, and the trial court granted the request, Tr 21. Defendants nonetheless did not offer at trial the documents about which Fahey testified. If that is because defendants needed more time to investigate,

reasonable diligence required that they seek a continuance in order to so, not claim—after losing at trial—that evidence of inventory removal was new.

The Court of Appeals ignored all of these available avenues to pursue the supposedly newly discovered evidence in favor of artificially narrowing the scope of the known evidence and speculating regarding the outcome of efforts never made, apparently drawing inferences *against* the parties in whose favor the jury found. Defendants did not act with reasonable diligence, and the Decision erred in concluding to the contrary.

C. Elaboration on facts known before trial does not constitute "newly discovered evidence" under ORCP 64 B(4).

1. Evidence that serves substantially the same purpose as known evidence is not "new."

A trial court may set aside a jury verdict and grant a new trial only where there is material "[n]ewly discovered evidence" that the moving "party could not with reasonable diligence have discovered and produced at the trial" and other requirements are met. ORCP 64 B(4); *see also Arnold*, 320 Or at 120-21. Information actually known before trial cannot serve as the basis for a new trial. ORCP 64 B(4); *Oberg*, 316 Or at 272 (new evidence must "have been discovered since the trial"). When a party knows of *some* evidence before trial that may materially affect the outcome of the trial but does not diligently pursue additional detail or the use of the known evidence at trial, the party cannot later claim that the additional detail is "newly discovered."

In *Arnold*, this court addressed "a dispute over *how much* evidence had to be known and had to be usable during trial to make the balance of the evidence not such as would justify the award of a new trial." *Arnold*, 320 Or at 121 (emphasis in original). The defendant was accused of sexual abuse of a child, and the state offered the incriminating testimony of a Children's Services Division ("CSD") social worker, Jenkins, who testified that she "came to CSD 'with a background in child development'" and that she possessed an associate's degree in early childhood education from Citrus College in California. *Id.* at 113, 114. Her CSD application, however, stated that she only had a high school diploma and had audited seven college courses in child development, and defense counsel cross-examined Jenkins regarding the discrepancy. *Id.* at 114.

Before the end of trial, defense counsel learned that Citrus College had no record of Jenkins attending the school at all, but did not raise the issue with the trial court, ask for a continuance to subpoena the records, or recall Jenkins as a witness. *Id.* at 115. Instead, after the jury returned a guilty verdict, the defendant moved for a new trial based on the "newly discovered evidence" that Jenkins never attended Citrus College, had not audited any college classes, and did not even have a high school diploma. *Id.* at 115-16.

This court held that the evidence "was not 'newly discovered' after the trial within the meaning of ORCP 64 B(4)," *id.* at 118 n 8, and announced the

following standard: "Even if some additional evidence is discovered after trial, it does not justify the award of a new trial if 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." *Id.* at 121. In *Arnold*, the defendant could have used what she already knew about Jenkins' education for "substantially the same purpose" as the "new" evidence. *Id.* at 122. Although not expressly identified, presumably that purpose was not merely to impeach Jenkins, but to call into question Jenkins' competency as a social worker and thus the manner in which she elicited the victim's alleged statements.

2. Defendants knew of evidence that could have been used for substantially the same purpose as Fahey's affidavit.

Arnold's "substantially the same purpose" standard necessarily requires a qualitative examination of the previously known evidence and of the later elaboration. Performing that analysis here shows that Fahey's affidavit at best provides additional detail regarding facts defendants already knew and could have used at trial for the same purpose, and thus does not constitute "newly discovered" evidence.

The evidence defendants knew from Fahey's deposition is detailed above. In essence, defendants had detailed evidence regarding the alleged fact of Patillo's direction regarding inventory removal, how it was documented, and who else Fahey told about it. Compare that to what the Decision said Fahey's

affidavit "if believed, established": "After the closing date of the APA in February 2002, Patillo (1) directed Fahey to manually manipulate inventory in Forest Products' computer system in a way that 'was not in accordance with regulations governing accounting practices and procedures' and (2) gave Fahey documents 'sign[ing] off' on those inventory manipulations." *Greenwood III*, 264 Or App at 14. ***Defendants knew that information at least from Fahey's deposition.*** *See* Dep 97:20-98:13; 98:19-101:5. Even if Fahey's assertion that the known inventory manipulations were not in accordance with accounting principles is material and new with respect to Fahey, that testimony could have been elicited from Forest Products' accounting expert Gregson Parker (or from CPA Jim Peters or CPA Steven Schmidt, both of whom also testified).

The Decision nonetheless concluded that Fahey's affidavit provided "qualitatively different" information compared to Fahey's deposition because it was the first time "defendants had (1) evidence of the specific database coding and search queries that demonstrated *how* the removal of phantom inventory occurred and (2) evidence of the specific transactions for which checks were issued for the removed inventory." *Greenwood III*, 264 Or App at 20 (emphasis in original). It is difficult to understand (and the Decision did not explain) how highly technical minutia such as which screens to use and which keys to hit in the accounting system to change the inventory amounts serves a substantially different purpose than the known assertion that Patillo directed Fahey to remove

inventory from that software system. This is particularly true where the *fact* of inventory removal, not how it was done, is the only arguably salient evidence.

The Decision also failed to explain the relevance of "evidence of the specific transactions for which checks were issued for the removed inventory," *id.*, nor have defendants ever done so. Forest Products issued those checks to its *suppliers*. 3rdSER-10. The testimony at trial was that the overpayment arose from erroneous accounting in *the intercompany account* between Greenwood and Forest Products. Tr 327-28.

Moreover, full payments to suppliers makes sense because there is no evidence that suppliers did not provide all inventory to which those payments apply. To the contrary, discrepancies between physical inventory counts and accounting records commonly occur due to other causes:

> "Shrinkage (or overage) is the difference between the inventory determined from the perpetual inventory records and the amount of inventory actually on hand. * * * There are many causes of shrinkage, including employee theft, customer theft, vendor theft, damage, breakage, spoilage, accounting and recording errors, errors in marking retail prices, cash register errors, markdowns taken and not recorded, errors in accounting for customer returns, and errors in accounting for vendor receipts and returns."

Wal-Mart Stores, Inc. & Subsidiaries v. C.I.R., 153 F3d 650, 653 (8th Cir 1998); *see also* 2 Mertens Law of Fed. Income Tax'n § 16:31 ("Where a taxpayer maintains book inventories in accordance with a sound accounting system, the net value of the inventory will be deemed to be the cost basis of the

inventory, provided that such book inventories are verified by physical inventories at reasonable intervals and adjusted to conform therewith."). Further, inventory accounts must be adjusted to match the physical inventory account (just as Patillo directed). *See, e.g.*, *Wal-Mart*, 153 F3d at 652 ("The Taxpayer performed physical inventories to confirm the accuracy of the inventory as stated in the books, and made adjustments to the books to reconcile the book inventory with the physical inventory."). The fact that Forest Products' physical inventory did not later match accounting inventory does not mean the original suppliers were not entitled to full payment.

Ultimately, the "qualitative differences" the Decision identified consist of irrelevant details regarding information already known to defendants which could have been used for substantially the same purpose. The mere provision of that additional detail cannot qualify as "newly discovered evidence" and does not entitle defendants to a new trial.

D. A post-trial affidavit by an affiant who invoked a Fifth Amendment privilege at trial does not constitute new evidence under ORCP 64 B.

Nor does removal of the Fifth Amendment privilege make Fahey's affidavit "newly discovered evidence." At most, Fahey's testimony is "newly available" as opposed to "newly discovered" and, as such, cannot support a new trial.

Plaintiffs find no Oregon case that addresses whether evidence available after a witness invoked the Fifth Amendment constitutes newly discovered

evidence.[5] Several other jurisdictions addressing this issue, however, properly distinguish between newly *discovered* evidence and newly *available* evidence, and hold that the latter is insufficient to constitute newly discovered evidence either because it was discovered before trial, or because reasonable diligence would have allowed the party to produce the evidence at trial. This is consistent with ORCP 64 B(4), which requires that evidence be discovered since the trial and that the evidence "with reasonable diligence, could not have been discovered before or during trial." *Arnold*, 320 Or at 120.

Whether an affidavit from a witness who refused to testify at trial based on his Fifth Amendment privilege constitutes "newly discovered evidence" arises most frequently in criminal trials of co-defendants. Where the substance of the testimony is known before or during trial, the affidavit fails the test for newly discovered evidence—it was not newly discovered, only *newly available*. Under those circumstances, nearly every federal circuit has held the evidence

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[5] In *Lane Co. Escrow Serv.*, 277 Or at 287-88, a witness exercised Fifth Amendment rights at trial and later provided testimony claimed to be "newly discovered evidence." Defendant Smith initially gave a statement where he acknowledged embezzling money and passing the money to Defendant Coe, but asserted his Fifth Amendment privilege at trial. *Id.* at 284, 287. After his conviction, defendant Coe submitted an affidavit stating that Smith was willing to testify and moved for a new trial. *Id.* The trial court ordered Smith's deposition to be taken, examined the contents of the deposition, and denied the motion. *Id.* On review, this court did not consider whether the deposition constituted "new evidence," and did not apply the traditional six-factor test. Instead, the court found that the new testimony was incredible and cumulative, and that, in any event, a motion for a new trial was not applicable to a suit in equity. *Id.* at 288-89.

insufficient to warrant a new trial under the parallel federal criminal rule, Fed R Crim P 33, which has requirements similar to ORCP 64 B(4). *See, e.g., United States v. Freeman*, 77 F3d 812, 817 (5th Cir 1996) ("When a defendant is aware of a co-defendant's proposed testimony prior to trial, it cannot be deemed newly discovered under Rule 33 even if the co-defendant was unavailable because she invoked the Fifth Amendment."); *United States v. Jasin*, 280 F3d 355, 362-65 (3d Cir 2002) (adopting the majority rule that evidence known but unavailable at trial does not constitute "newly discovered evidence" and collecting cases); *United States v. Lockett*, 919 F2d 585, 592 (9th Cir 1990) ("[A] court must exercise great caution in considering evidence to be 'newly discovered' when it existed all along and was unavailable only because a co-defendant, since convicted, had availed himself of the privilege not to testify." (quoting *United States v. Jacobs*, 475 F2d 270, 286 n 33 (2d Cir 1973)). *But see United States v. Montilla-Rivera*, 115 F3d 1060, 1066 (1st Cir 1997) ("newly available" evidence in form of affidavit produced by a witness who took the Fifth Amendment at trial constitutes "newly discovered" evidence under Rule 33).

Even if "newly available" evidence can be considered "newly discovered," unavailability of particular evidence requires the party to exercise reasonable diligence to utilize procedural mechanisms to make that evidence available. The reasonable diligence requirement is particularly important where the party knew of the witness but asserts it did not know the *substance* of the

newly available testimony. For example, in *People v. Rao*, 815 NW2d 105, 112-13 (2012), the Michigan Supreme Court described the relationship between the "newly discovered" and "reasonable diligence" factors of its newly discovered evidence test (parts one and three, respectively),[6] and the argument that "newly available" evidence constituted "newly discovered" evidence.

> "When evidence is known to the defendant at the time of trial, but is claimed to have been unavailable, the third part of the * * * test is necessarily implicated because it requires a showing that the defendant 'could not, using reasonable diligence, have discovered and produced the evidence at trial[.]' In other words * * * when a defendant is *aware* of evidence before trial, he or she is charged with the burden of using *reasonable diligence* to make that evidence available and produce it at trial. A defendant who fails to do so cannot satisfy the first and third parts of the * * * test."

Id. at 112-13 (internal citations omitted) (emphasis in original). The *Rao* court reasoned that "when the evidence is claimed to be unavailable because of a codefendant's assertion of the Fifth Amendment privilege, reasonable diligence might include requesting a severance or pursuing other procedural remedies to admit the testimony." *Id.* at 113.

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[6] Under Michigan law, "[f]or a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *Rao*, 815 NW2d at 110-11 (internal quotation marks and citation omitted).

Similarly, in *Waddell v. Hendry Co. Sheriff's Office*, 329 F3d 1300, 1309-10 (11th Cir 2003), the court reasoned that even if new testimony from a witness who had taken the Fifth Amendment in a deposition prior to summary judgment was "newly discovered," it did not constitute new evidence sufficient to warrant a new trial under Fed R Civ P 60 because "[p]laintiffs failed to demonstrate due diligence *in obtaining the substance of this information*. * * * Plaintiffs could have sought to depose [the witness], or, in the alternative, request a continuance * * * until after [the witness's] criminal trial." (Emphasis added).

Holding that "newly available" evidence does not constitute "newly discovered" evidence is consistent with this court's jurisprudence under ORCP 64 and its predecessors. Where a party already knows the substance of the evidence, its unavailability is insufficient to qualify it as new evidence—it is not "newly discovered." *Asplund*, 86 Or at 139 (despite witness's informal invocation of privilege before trial, "the evidence given by the young woman was not newly discovered. What she knew was within the knowledge of the defendant at all times"). Similarly, even where a party does not know the *substance* of particular evidence, if the party has reason to believe that a witness has relevant evidence, reasonable diligence requires the party to attempt to discover and obtain it. *Lewis*, 164 Or at 571; *Larson v. Heintz Const. Co.*, 219 Or 25, 75, 345 P2d 835 (1959). Any other rule would allow a party to have an

insurance policy against a verdict any time a witness aligned with the party invoked the Fifth Amendment at trial—a rule squarely at odds with the finality of judgments and one reason motions for new trial are disfavored and distrusted. *Lewis*, 164 Or at 570.

Whether judged under the "newly discovered" or "reasonable diligence" requirements for a new trial, Fahey's affidavit does not constitute "newly discovered evidence" under ORCP 64 B(4). First, the evidence was not evidence that "with reasonable diligence, could not have been discovered before or during trial." To the contrary, as discussed above in section IV.C, the evidence was not "newly discovered" because defendants *already knew* the substance of Fahey's testimony from his extensive deposition testimony, given without asserting his Fifth Amendment rights. Second, even assuming that the nuance presented in Fahey's post-trial affidavit was "newly discovered," *that evidence* could have been discovered and produced had defendants exercised reasonable diligence, as discussed above. The speculation that Fahey would have invoked the Fifth Amendment and refused to testify does not make Fahey's post-trial affidavit newly discovered evidence.

E. To merit a new trial, new evidence must show a state of undisputed facts that would probably lead to a different result.

1. The Decision's "if believed" standard is inconsistent with this court's jurisprudence and with ORS 19.415.

Even if Fahey's affidavit contains "newly discovered evidence," new evidence that "if believed, will probably change the result" is insufficient to merit a new trial. To justify a new trial under ORCP 64 B(4), the affidavits supporting the motion must "show a state of undisputed facts which would probably lead an ordinarily reasonable person to a different conclusion from that arrived at by the jury[.]" *Davis*, 192 Or at 579.

This standard makes sense because it limits the guesswork involved in deciding the effect of new evidence and respects the jury that heard and decided the case in the first instance. Any standard that allows consideration of *disputed* evidence would require the trial court (and, on review, the appellate courts) to speculate regarding whether the jury would give new evidence greater weight than competing existing evidence. No other procedural mechanism requires or allows the trial court to usurp the jury's role in this way. *Jacobs v. Tidewater Barge Lines, Inc.*, 277 Or 809, 811, 562 P2d 545 (1977) (court may not weigh the evidence in reviewing a grant of JNOV, but rather accepts as true all evidence and inferences in favor of the party who prevailed before the jury); *Godell v. Johnson*, 244 Or 587, 590-91, 418 P2d 505 (1966) (on motion for directed verdict, court does not weigh evidence and only decides sufficiency);

Alt v. City of Salem, 306 Or 80, 88, 756 P2d 637 (1988) (court may not weigh evidence on summary judgment). And automatically crediting the new evidence with a presumption of credibility, as the Decision's "if believed" standard seems to require, skews the analysis even further in favor of the party who *lost* at trial. That is wholly inconsistent with this court's new trial jurisprudence, which makes clear that motions for new trial are strongly *disfavored*. By contrast, to the extent that requiring a state of undisputed facts greatly limits the grant of new trials, *see Greenwood III*, 264 Or App at 22 n 18, that limitation is *consistent* with disfavoring new trials based on newly discovered evidence and with preserving jury verdicts.

Holding that new evidence, "if believed," is sufficient to warrant a new trial is particularly inappropriate on review considering the requirement in ORS 19.415(2) that "[n]o judgment shall be reversed or modified except for error substantially affecting the rights of a party." *Compare* ORS 19.415(2), *with* ORCP 64 B (court may grant new trial for listed causes, including newly discovered evidence, "materially affecting the substantial rights of" the party). In *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 61 P3d 928 (2003), this court concluded that ORS 19.415(2) means "[t]he possibility that an error *might have resulted in a different jury verdict is insufficient under the statute*. Instead, the court must be able to conclude, from the record, that the error 'substantially affect[ed]' the rights of the losing party." *Id.* at 173 (emphasis added; alteration

in original). The standard embodied in ORS 19.415(2) is "similar, if not identical" to the standard that a trial court uses in evaluating a motion under ORCP 64. *Id.* at 170 n 1, 177. "A mere showing that the outcome of the trial 'might' have been different absent the error is insufficient [to grant a new trial under ORCP 64]." *Id.* at 177 n 5.

The Decision's "if believed" standard wrongly allows a reviewing court to grant a new trial where new evidence "*might* have resulted in a different jury verdict." The jury in fact might *not* believe the new evidence in light of former contrary evidence. The "if believed" presumption thus impermissibly relies on the notion that the jury *might* give the evidence sufficient credence over contrary evidence such that the new evidence *might* produce a different result. Neither *Shoup* nor any other of this court's cases countenance such speculation.

In contrast, requiring a state of undisputed facts ensures that the trial court need only determine, in its discretion, the impact of those undisputed facts, *i.e.*, whether those undisputed facts "will probably change the result if a new trial is granted." *Arnold*, 320 Or at 120. It is also consistent with the separate requirement that the newly discovered evidence "not be merely * * * contradicting of former evidence." *See id.* In other words, if the new evidence is disputed by evidence presented at the trial, it cannot be said (without improperly determining some evidence has more weight than other evidence)

that the evidence will probably change the result or that it is not merely contradicting of evidence presented at trial.

Here, Fahey's affidavit does not show the requisite state of undisputed facts. Patillo testified that (1) he did not know that Fahey was embezzling money from Forest Products (Tr 1035); (2) he did not have a discussion with Fahey about the ability to embezzle (Tr 1035); and (3) Patillo did not instruct Fahey to "remove" inventory from Navision, as opposed to making adjustments for proper purposes (Tr 1031-33). Fahey's affidavit merely disputes Patillo's testimony at trial (and, as discussed below, thus also fails to meet the separate requirement that the new evidence not be merely "contradicting of former evidence," *see Arnold*, 320 Or at 121).

2. Even under the "if believed" standard, Fahey's affidavit would not probably change the result of the jury's verdict.

Even if the jury believed Fahey, a convicted felon, over Patillo, Fahey's evidence would not probably change the result. The Decision initially characterized the new evidence in Fahey's affidavit as establishing that inventory manipulations were not in accordance with accounting standards and that Patillo gave documents signing off on the inventory manipulations. *Greenwood III*, 264 Or App at 14. The Decision is devoid of any discussion regarding how *that* evidence would be so significant that it would have changed the result of the trial, because it cannot plausibly be argued.

Instead, the Decision later recharacterized the affidavit, "if believed," as "demonstrate[ing] that Greenwood had not overpaid Forest Products for inventory or at least substantially subverted plaintiffs' evidence to the contrary[.]" *Greenwood III*, 264 Or App at 22. Defendants never argued in the trial court that Fahey's affidavit demonstrates this, nor does the affidavit actually do so. Moreover, under the theory defendants actually presented, the Fahey affidavit would not probably have changed the result.

a. Defendants did not preserve the argument that Fahey's affidavit demonstrates accurate inventory sales.

The Decision should be reversed because its "will probably change the result" conclusion rests on an argument that defendants did not make and is not preserved. Defendants did not argue at trial that Fahey's affidavit demonstrated Greenwood did not overpay for inventory. Defendants argued to the trial court that the affidavit established that Patillo, not Forest Products, was to blame for the inventory overpayment:

> "A. Witness Patillo knew of Mr. Fahey's embezzlement (para. 5) [of Fahey's affidavit].
>
> "B. Witness Patillo would keep quiet about Fahey's theft if Fahey did not protest or object to accounting irregularities or practices directly resulting from Patillo's orders or activities (para. 5).
>
> "C. Witness Patillo signed off and acknowledged all funds involved in the embezzlement (para 6).
>
> "D. Witness Patillo was directly involved in removing inventory off the computer system of the company (para. 18).

> "E. Witness Patillo's manipulation of the inventory system was not in accordance with regulations governing accounting practices and procedures (para 19.)
>
> "F. Inventory was removed by Fahey from the accounting system at the request of Patillo, and in exchange for Patillo ignoring transfers of Defendants' money to Fahey's personal account (para. 20).
>
> "G. Fahey also describes substantial other allegations that show manipulation of the accounting system and inventory by representatives of the Plaintiffs."

Defs. Motion for JNOV and for New Trial (TCR 69) at 15; *see also* Defs. Reply (TCR 79) at 5 (focusing on Patillo's knowledge of Fahey's inventory manipulations and noting that Fahey's affidavit details how the manipulations occurred).

Although this was the only argument defendants made to the trial court, the Decision seized on two unsupported sentences in defendants' appellate briefing.[7] In their summary of argument in their opening brief, defendants stated that the new "evidence would almost certainly have changed the outcome at trial. Plaintiffs would not have been able to blame defendants for Fahey's acts. The jury would have understood that there may well have been no inaccuracy at all with the inventory amounts transferred between the companies

[7] This court previously reversed the Court of Appeals because the Court of Appeals decided the case on an argument that defendants had not made. *See Greenwood II*, 351 Or at 619-20 ("[D]efendants offered three arguments to the trial court for directing a verdict for defendants on the breach of contract claim. The argument that the Court of Appeals advanced was not one of them.").

* * *." Br 5-6 (quoted at *Greenwood III*, 264 Or App at 18). In their reply brief, defendants stated that the affidavit "gave a thorough explanation of the accounting errors and how those may not have implicated at all the accuracy of the inventory transferred to and paid for by Greenwood." Reply at 15 (quoted at *Greenwood III*, 264 Or App at 17-18).

Defendants never explained to the trial court *how* the affidavit supposedly shows that inventory may have been correct, because they did not make that argument at all. Nor did defendants explain this to the Court of Appeals. Like in the trial court, defendants' argument on appeal focused on the notion that "Fahey's evidence probably would have changed the outcome" because

> "Greenwood would not have been able to present Patillo as Fahey's innocent supervisor. It would not have been able to attribute inventory discrepancies solely to Fahey and solely to negligent supervision by Forest Products shareholders. The jury would likely have concluded that Forest Products was not liable to Greenwood for inventory discrepancies directed by Greenwood's own vice-president."

App Supp Br 6-7; *see also id.* at 8 ("Here, if the jury had the benefit of Fahey's testimony, it probably would not have concluded that Forest Products was responsible for the deliberate accounting manipulations directed by Greenwood's vice-president."); Br 38 (arguing the "new evidence" shows

Patillo was responsible for the accounting errors).[8] The Court of Appeals again reversed the jury verdict based on an argument defendants never made in the trial court.

b. Fahey's affidavit does not support the argument that Greenwood did not overpay for inventory.

Fahey's affidavit does not support the Decision's unexplained conclusion that the affidavit "demonstrated that Greenwood had not overpaid Forest Products for inventory * * *." *Greenwood III*, 264 Or App at 22. Presumably, the Decision relied on the statement that the inventory manipulations resulted in the accounting system matching the physical count of inventory. As described above, a discrepancy between physical inventory count and book value is a common problem that is properly accounted for through adjustments to a company's books. It does not show that erroneous accounting did not occur or eliminate the possibility of overpayment.

Indeed, Fahey does not address the hundreds of ongoing sales per week, where accounting errors could have arisen. Greenwood purchased inventory under the APA both via periodic bulk sales by location unit and via ongoing sales of inventory from locations where a bulk sale had not yet occurred. ER 19-20. Fahey's affidavit discussed only physical counts of inventory before

[8] Defendants' only argument regarding the accuracy of the inventory was cited *deposition testimony* regarding the *promissory notes on which defendants' counterclaims were based and on which the jury found in favor of defendants*. Br 38.

each bulk inventory sale and the removal of "excess inventory" from the accounting system in connection with those bulk sales. 3rd SER 7-9.

Schmidt's reconstruction of the books, by contrast, covered *every* transaction that passed through the intercompany account used to track those ongoing, daily sales (as well as bulk sales). After reconstructing Forest Products' and Greenwood's books—by looking at the underlying raw data and documents, not merely the Navision entries, Tr 324-26—"there was an amount in the inter-company account that showed that Greenwood had overpaid Forest Products for inventory that it didn't receive." Tr 328. Even if "Greenwood had not overpaid Forest Products for inventory" in connection with each bulk sale addressed in Fahey's affidavit, *Greenwood III*, 264 Or App at 22, Fahey does not account for the thousands of day-to-day sales that passed through the intercompany account. Indeed, the notion that Forest Products correctly accounted for some inventory transactions, giving rise to defendants' counterclaims on the promissory notes, but incorrectly accounted for other inventory transactions, giving rise to plaintiffs' claim, is exactly how the trial court reconciled the jury's verdict, in light of evidence the jury heard that the final bulk transfer was accurate. *Id.* at 11 n 12. There is no reason to believe that evidence that the other bulk transfers were also accurate would have changed the jury's view of the accounting discrepancies documented via Schmidt's reconstruction of the intercompany account.

c. Fahey's affidavit would not probably change the result under the theory defendants actually advanced.

The thrust of defendants' "probably change the outcome" argument to both the trial court and on appeal was that "if the jury found that Patillo, too, was involved in account manipulation, as Fahey claimed, it would almost certainly not have found that defendants were responsible for plaintiffs' accounting problems." Br 39. This argument ignores *the undisputed evidence that the "accounting problems" appear in Forest Products' books, not Greenwood's*. SER 4-5; Tr 451-52. It also ignores that the jury knew that Fahey, like Patillo, was an employee of Greenwood. Defendants argued at trial that because Greenwood employed Fahey, Greenwood was responsible for the erroneous accounting on Forest Products' books. Plaintiffs argued that Forest Products was responsible for the erroneous accounting because Forest Products retained the right to control its own books, and Fahey acted as a loaned servant to Forest Products when working on Forest Products' books. The jury accepted plaintiffs' argument. ER 37. There is no reason to believe that the jury would be swayed by evidence that Patillo, another person employed by Greenwood (as well as Forest Products), worked alongside Fahey on Forest Products' books. Fahey's affidavit suggests only that a second person wearing "two hats" was involved in providing Forest Products' accounting.

Moreover, evidence regarding Patillo's involvement with Forest Products' accounting is not new: "Patillo was vice-president of Greenwood *and*

Forest Products," Br 34 (citing Tr 210) (emphasis added), and his role as *corporate officer of Forest Products* included handling the accounting of Forest Products' books, along with "the people underneath him," Tr 211-13. To the extent Patillo directed manipulations to Forest Products' books, he did so in his capacity as a corporate officer of Forest Products or as a loaned servant to Forest Products. Even if Patillo directed accounting manipulations as an employee of Greenwood (which nothing in Fahey's affidavit supports), the jury already heard and rejected defendants' arguments that Forest Products was not responsible for the accounting errors on its own books because employees of Greenwood performed the accounting work under the APA. And this court previously held that evidence of Forest Products' right to control its own accounting, along with divided responsibilities of Greenwood employees, was sufficient to create a jury question. *Greenwood Products II*, 351 Or at 617. Even if Fahey were manipulating Forest Products' books at Greenwood's direction (through Patillo), nothing in Fahey's affidavit undercuts the jury's conclusion that *Fahey* was wearing a "Forest Products" hat.

F. Defendants' motion does not meet the other requirements for a new trial based on newly discovered evidence.

The Decision ignored the requirements that new evidence *not* be merely cumulative and *not* be merely impeaching or contradicting of former evidence. Even worse, the Decision concluded that a new trial is proper *because* Fahey's affidavit contradicted some of plaintiffs' evidence and corroborated some of

defendants' evidence. The Decision stated that Fahey's affidavit (1) "would have *contradicted* Patillo's rebuttal testimony concerning the impossibility of someone removing inventory from Forest Products' books"; (2) "would have *corroborated* defendants' evidence that the amounts of the final inventory purchases were accurately reflected in the notes" (which the jury concluded and, as such cannot merit a new trial); (3) "*directly rebutted* plaintiff's theory that Schmidt's reconstruction demonstrated that Greenwood overpaid for inventory as a result of Fahey's manipulation of the books to hide his own embezzlement from Forest Products" (an argument defendants never made to the trial court and that is not supported by the affidavit), and (4) made the jury "more likely to *credit other testimony supporting defendants' theory*." *Id.* at 23-24 (emphasis added; internal quotation omitted).

The Decision correctly found that Fahey's affidavit contradicts existing evidence and purports to impeach Patillo. The affidavit is also cumulative regarding the accuracy of the final bulk sale, Tr 1014, and regarding the fact that a Greenwood employee providing services to Forest Products under Section 1.5 of the APA committed accounting errors (ignoring the evidence that Patillo was Forest Products' corporate officer). The Decision erroneously reversed the jury verdict while essentially finding that Fahey's affidavit fails to meet two of the requirements for a new trial.

G. The Court of Appeals erroneously applied de novo review notwithstanding the long-standing abuse of discretion standard applicable to motions for new trial.

1. The Decision erroneously treated assessment of the *Arnold* factors as a "legal determination."

The abuse of discretion standard applicable to motions for new trial goes back more than a century. *See, e.g.*, *Stern v. Volz*, 52 Or 597, 598, 98 P 148 (1908) (motion for new trial based on newly discovered evidence "is addressed to the sound discretion of the trial court, and a refusal of a new trial will be reversed only for manifest error or abuse of discretion"). Indeed, the general concept appears in Oregon's case law from even before statehood. *See, e.g.*, *Cline v. Broy*, 1 Or 89, 90 (1854) ("When a new trial will be productive of more injury than advantage to the party applying therefor, the court, in the exercise of a sound discretion, may refuse to grant such new trial.").

Notwithstanding this consistent and longstanding precedent, the Court of Appeals essentially held that the trial court has no discretion to grant or deny a new trial under ORCP 64 B(4) because "*Arnold* teaches us that the decision to be made by the court under ORCP 64 B(4) is initially a legal determination about the adequacy of the movant's grounds for a new trial." *See Greenwood III*, 264 Or App at 19-21 (*quoting Mitchell v. Mt. Hood Meadows Oreg.*, 195 Or App 431, 457, 99 P3d 748 (2004) (internal citation omitted)). In the discussion in *Arnold* upon which the Court of Appeals relied, however, this court was responding to the state's *argument* that the trial court did not have any

discretion to exercise because the newly discovered evidence there would not justify a new trial. *Arnold*, 320 Or at 121. The *Arnold* court did not state that it agreed with that argument or characterize application of the new trial requirements as "legal determinations."

To the contrary, the nature of the requirements suggests that the trial court has discretion in determining whether the six requirements for a new trial are met. For example, whether evidence is cumulative, or merely impeaching or contradicting, is akin to the evidentiary determinations typically left to the trial court's discretion. *See, e.g.*, *State v. Pratt*, 316 Or 561, 573, 853 P2d 827 (1993) (affirming trial court's discretion to exclude cumulative evidence). Concepts such as "will probably change the result" and exercise of "reasonable diligence," *see Arnold*, 320 Or at 120-21, also inherently implicate discretionary judgment, which the trial court is best positioned to exercise. *See Newbern v. Exley Produce Exp., Inc.*, 208 Or 622, 633, 303 P2d 231 (1956) ("It is obvious that upon this question [of whether new evidence would probably change the result] the trial judge was in a much better position than are we. * * * In a matter such as that now before us, we would hesitate long before substituting our judgment based upon a cold record for his decision on a matter with which he was personally familiar."); *Marshall v. Martinson*, 264 Or 470, 477-78, 506 P2d 172 (1973) (affirming denial of a motion for new trial based on newly discovered evidence because "[t]here was an adequate basis for [the trial judge]

to find that the evidence could have been found by the exercise of due diligence and, in such a situation, his decision will not be disturbed").

Arnold is consistent with allowing the trial court discretion: whether "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, allows for a range of determinations, which the trial court, having heard the evidence at trial, is best situated to make. In any event, if this court had intended in *Arnold* to overturn a century of jurisprudence emphasizing that the new trial determination lies within the trial court's sound discretion, it would have done so expressly.

2. The Court of Appeals erroneously concluded that the new trial determination presented a legal question based on the conclusion that the motion was denied by operation of ORCP 64 F(1).

The Decision's tacit application of de novo review was also based on the implicit supposition that the trial court had not exercised any discretion because the order was deemed denied by operation of ORCP 64 F(1). *Greenwood III*, 264 Or App at 16 (citing ORCP 64 F(1)), 20. The judgment was entered on March 8, 2007, ER 31, and the trial court timely heard and ruled on defendants' motion on April 30, 2007, expressly stating "I'm denying the Motion for Judgment Notwithstanding the Verdict and for a new trial." April 30, 2007 Hearing, 67:22-24. The written order denying the motion was not entered until after the passage of the 55-day period described in ORCP 64 F(1), however.

TCR 84. The motion therefore was technically deemed denied by operation of ORCP 64 F(1). *McCollum v. Kmart Corp.*, 347 Or 707, 712-13, 226 P3d 703 (2010) (under ORCP 64 F(1), a motion for new trial is not "heard and determined" until a signed order is entered).

Here, even though the motion was later "deemed" denied, the trial court actually heard the motion and exercised its discretion to deny it. Plaintiffs find no Oregon case holding that a motion for new trial is reviewed de novo where ORCP 64 F(1) operates to deny the motion. The actual decision of the trial court—having sat through the trial in the first instance and therefore being best positioned to judge whether the supposedly new evidence warranted a retrial—should not be cast aside without an appellate finding of abuse of discretion.

Ultimately, the Court of Appeals did not apply the abuse of discretion standard at all, but rather converted the test for determining a motion for new trial based on newly discovered evidence into a test consisting of six (or, as the Decision rewrote the test, three) legal determinations. That was error, but for the reasons set forth above, defendants' "new" evidence does not meet the test for a new trial under any standard. The Decision therefore should be reversed, and the jury verdict should be reinstated.

VII. 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 Greenwood 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 4th day of February, 2014.

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 13,558 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: February 4, 2015.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 4, 2015, I directed the **BRIEF ON THE MERITS** to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system.

I further certify that on February 4, 2015, I directed the **BRIEF ON THE MERITS** to be served upon attorneys for Appellants/Cross-Respondents, Respondents on Review, by mailing two copies, with postage prepaid, in envelopes addressed to:

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