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 CV-0503-02553

A135701

S062497

BRIEF ON THE MERITS OF DEFENDANTS GREENWOOD FOREST PRODUCTS, INC., JIM DOVENBERG, AND BILL LEFORS (AMENDED)

On petition for review of the decision of the Court of Appeals
on appeal from the General Judgment entered March 8, 2007
and from the Supplemental Judgment entered May 16, 2007
Multnomah County Circuit Court
Hon. Jerry B. Hodson

Opinion filed: July 2, 2014
Author of opinion: Haselton, C.J.
Concurring judges: Armstrong, P. J. and Duncan, J.

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STATEMENT OF THE CASE

INTRODUCTION

In this breach of contract case defendants Greenwood Forest Products, Inc., Jim Dovenberg, and Bill LeFors and (hereinafter jointly referred to as "defendant") entered into an asset purchase agreement to sell all of its product inventory to plaintiff Greenwood Products, Inc. a wholly-owned subsidiary of plaintiff Jewett Cameron Lumber Corp. (hereinafter jointly referred to as "plaintiff"). Over the course of two years, plaintiff made several payments to defendant in return for separate bulk purchases of defendant's inventory.

After plaintiff made all of the requisite payments and in turn received all of defendant's inventory, plaintiff reviewed its accounting records and determined that approximately $800,000 in inventory that it was supposed to receive was not accounted for in those records. Plaintiff brought a breach of contract claim against defendant, arguing that it must have overpaid defendant $800,000. Plaintiff's evidence to support the overpayment accusation at trial was based entirely on the accounting records. Defendant countered, among other things, that it provided all the inventory no matter what the accounting records suggested and consequently no overpayment occurred. The jury found for plaintiff on this claim.

After the trial and pursuant to ORCP 64 B(4), defendant learned that plaintiff's bookkeeper during the inventory transfer was willing to provide

testimony that plaintiff's vice-president instructed him to delete inventory from the accounting records even though those deletions were not justified by the physical inventory or lawful accounting practices. In other words, the accounting records did not reflect the true inventory and therefore did not provide credible evidence of an overpayment. Because that evidence could not have been obtained and produced at the original trial, defendant moved for a new trial pursuant ORCP 64 B(4). The trial court did not enter a written ruling within 55 days, and accordingly, the motion was deemed denied as required under ORCP 64F(1).

On review, the Court of Appeals reversed and granted a new trial. *Greenwood Products, Inc. v. Greenwood Forest Products, Inc.*, 260 Or App 1, 330 P3d 662 (2014). For the reasons that follow this Court should affirm that decision.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

I. TRIAL FACTS

In December 2001, plaintiff wanted to buy defendant's entire product inventory. Accordingly, plaintiff's auditors determined the value of the inventory to be purchased at $6,911,989. Tr 202. Defendant simultaneously did an actual physical count of the inventory and determined its value at approximately $6.8 million. Tr 504-05. On February 28, 2002, plaintiff entered an Asset Purchase Agreement ("APA") to buy the inventory for cost plus two percent. Tr 162, 164-65, 202; P Ex. 1, ¶ 1.4 (APA). Over the next 14 months, plaintiff purchased the

entire inventory through a series of seven bulk purchases totaling approximately $7,000,000, Tr 68, 504, an amount consistent with plaintiff's original audit of the inventory value at $6.9 million. Tr 202.

Jim Patillo, plaintiff's vice president in charge of finance and accounting, also supervised the accounting for the transfer of the inventory between defendant and plaintiff pursuant to the APA. Tr 206, 210-11. Patillo supervised all monies and banking for defendant and plaintiff during the transfer. Tr 211. He also handled "all aspects of the accounting system, and the bookkeeping," including the supervision of a bookkeeper named James Fahey. Tr 212,1006.

After the inventory transfer was complete, an auditor, who provided expert testimony for plaintiff at trial, reviewed the accounting books of the two companies. Tr 328. He conducted no physical count of the inventory but nonetheless, based solely on the presumed accuracy of the books, determined that plaintiff overpaid approximately $800,000 for inventory it did not receive. Tr 328, 343-44. Plaintiff's expert did not consider whether the discrepancy in the books may have been caused by embezzlement conduct of a nonparty as opposed to an overpayment to defendant. Tr 425-26.

The jury found that plaintiff had overpaid defendant and awarded defendant the overpayment amount.

II. FAHEY'S DEPOSITION

The first day of the trial was on May 8, 2006. Tr 1. Four months before the trial, Fahey had pleaded guilty to ten counts of theft arising out of his embezzlement of monies from defendant Jim Dovenberg. Fahey Deposition: 23:23-24:7.

> "On Friday, May 5, [plaintiff's counsel] had a subpoena served on Fahey for a deposition scheduled for 9:00 a.m. on Saturday, May 6. Fahey received the subpoena at 6:35 p.m. on Friday, approximately 14 hours before the deposition was scheduled to begin. * * * [Plaintiff's counsel], however, did not attempt to notify [Fahey's criminal defense attorney] that he had subpoenaed Fahey."

In re Newell, 348 Or 396, 400-01, 234 P3d 967, 969 (2010).

At the deposition and without Fahey's criminal lawyer being present, plaintiff's counsel asked Fahey many questions about his involvement in criminal embezzlement activity associated with his keeping of plaintiff's accounting books, including embezzlement activity involving Patillo and manipulations to plaintiff's accounting records which was separate from the personal embezzlement of Dovenberg for which Fahey pleaded guilty. *Id*; Fahey Deposition 96:2-100:14.

Fahey explained that he believed that plaintiff actually received all of the inventory from defendant for which it paid. Fahey Deposition: 130:5-131:22. However, the inventory was not appropriately reflected in the accounting records because from March 2002 to February 2003, Patillo repeatedly instructed Fahey to delete inventory from the accounting books even though there was no justification

for doing so. Fahey Deposition 96:2-100:14. Fahey also pleaded the Fifth Amendment privilege against self-incrimination on several matters throughout the deposition. *See, e.g.*, Fahey Deposition at 344:21-35:16.

III. THE SEALING OF FAHEY'S DEPOSITION

Fahey's criminal defense attorney soon learned that plaintiff's counsel had deposed his client on criminal matters outside his presence. Fahey's counsel promptly informed the trial court that plaintiff's counsel had violated the rules of professional conduct in doing so and moved to strike and seal the Fahey deposition transcript so it could not be used in trial or otherwise. Tr 373-78. The trial court granted the motion. Tr. 801. This Court later found that plaintiff's counsel violated RPC 4.2 for deposing Fahey outside the presence of his criminal defense lawyer, and issued a public reprimand. *Newell*, 348 Or 396.

IV. PLAINTIFF'S ATTEMPTS TO PREVENT FAHEY FROM HAVING ANY INVOLVEMENT AT TRIAL

Plaintiff's counsel apparently did not want Fahey to testify nor have any other role at trial because of what he revealed at his deposition. First, plaintiff's counsel moved for a protective order that Fahey not be able to look at plaintiff's accounting documents. Tr 679-80. Further, he moved to "exclude any testimony on the part of" Mr. Fahey, "because he took the Fifth" Amendment at the deposition. Tr 377, 796. The trial court denied those motions.

V. DEFENDANT'S EFFORTS TO PRODUCE FAHEY'S TESTIMONY AT TRIAL

Defense counsel was restricted in his communications with Fahey before trial because of Fahey's representation by a criminal defense attorney. Defendant explained as much to the trial court on the first day of trial:

> "Mr. Fahey has been charged * * * in a criminal prosecution. He has had, and even had and asserted in his deposition on Saturday, various Fifth Amendment rights. He has not been sentenced on the criminal charge yet.
>
> "The ability to communicate with Mr. Fahey and find out a lot of information has been rather guarded, to say the least. [Information that Fahey and Patillo removed inventory from the accounting records] came out for the first time in the deposition of Mr. Fahey on Saturday, which was done [by plaintiff's counsel] against Mr. Fahey's objections, without his lawyer's knowledge, and attending. It came about as kind of a complete surprise[.]"

Tr 9-11.

The revelations of Patillo's and Fahey's accounting deletions only occurred because of the improper communications to Fahey by plaintiff's counsel outside the presence of his criminal attorney. When similar questions were asked of Fahey in the presence of his criminal attorney at trial, the Fifth Amendment was invoked. In particular, defendant called Fahey to testify at trial that Patillo instructed him fraudulently to delete inventory from the books. But, Fahey's criminal attorney interjected on Fifth Amendment grounds and explained that Fahey would not testify to those matters because they involved uncharged criminal conduct:

> "[Defense Counsel]: I'm going to limit my inquiry to a period of time from February 25th of 2002 until December 31st of 2002, okay? You understand the parameters that I'm asking you?
>
> "[Mr. Fahey]: Yes.
>
> "[Defense Counsel]: * * * Was there a time within those two dates when you were instructed to remove inventory off the books of Forest Products?
>
> "[Personal Counsel to Mr. Fahey]: Judge, I advised my client to invoke the Fifth Amendment on that question.
>
> "[The Court]: All right. * * * So this is uncharged conduct?
>
> "[Personal Counsel to Mr. Fahey]: This is uncharged conduct."

Tr 803-04.

Defendant still tried to obtain Fahey's testimony. He asked the trial court to rule that the statute of limitations on the uncharged inventory deletion conduct had run and therefore the Fifth Amendment privilege was not available. Tr 807-09. The trial court declined: "I'm not going to make any findings with regard to the statute of limitations." Tr 808. Ultimately, defendant could not produce Fahey's testimony at trial and had no access to the sealed deposition transcript.

VI. THE MOTION FOR A NEW TRIAL BASED ON FAHEY'S POST-TRIAL WAIVER OF HIS FIFTH AMENDMENT PRIVILEGE AND AFFIDAVIT OF TESTIMONY.

After the trial, Fahey was sentenced and was then willing to provide testimony. He provided an affidavit detailing an embezzlement scheme in which Patillo instructed him to delete inventory from the accounting books even though it

was not justified by lawful accounting practices. 4th SSER-21 (Affidavit of Fahey). The affidavit also provided additional information about the technical ways that Fahey performed these deletions. *Id.* Defendant moved for a new trial under ORCP 64B(4) pointing to that affidavit. 4th SSER-3, 13-15. Defendant's counsel also provided his own affidavit explaining that before the trial "substantial limitations were placed upon the questions [defense counsel] was able to ask Mr. Fahey by his criminal attorney." 4th SSER-19, ¶ 2 (Affidavit of Ferguson). He explained further that because of Fahey's pending criminal matter, defendant's counsel understood that he would not "have been permitted to inquire into the subject matter" brought to light by Mr. Fahey's post-trial affidavit. 4th SSER-20, ¶5 (Affidavit of Ferguson). The trial court denied the motion for a new trial.

SUMMARY OF ARGUMENT

After trial, newly discovered testimonial evidence identified that the accounting books supporting plaintiff's claim of overpayment for inventory were fraudulent. Specifically, plaintiff's vice-president and a bookkeeper, in furtherance of an embezzlement scheme, deleted the inventory amounts from the accounting records even though such deletions were not justified by the actual physical inventory.

ORCP 64B(4) provides that a court may grant a new trial after a verdict upon newly discovered evidence, which defendant could not with reasonable

diligence have "discovered and produced at the trial." Such a motion should be granted if the record shows that the evidence was material to a critical issue decided by the jury, it could not have been produced at trial, it was not cumulative, and there was no alternative evidence available that could have been produced at trial that would have served substantially the same purpose.

Here, the newly discovered evidence showed that the accounting books were deliberately and secretly manipulated. The manipulated books inaccurately conveyed that plaintiff paid defendant for more inventory than plaintiff received. Plaintiff admitted at trial that their case was built exclusively on a forensic accountant's review of the books, not a physical count of the inventory transferred. If plaintiff's vice-president and his bookkeeping accomplice deleted inventory from the books in order to hide embezzlement from plaintiff, the jury could conclude, first, that the books were unreliable and could not support plaintiff's claim and, second, if plaintiff lost money, it was not by overpaying defendant but by the wrongdoing of its own employees. Thus, the evidence was material, critical and non-cumulative to the jury's determination of whether plaintiff overpaid defendant.

Moreover, defendant could not with reasonable diligence have produced the evidence at trial, because it was concealed by the perpetrators of the fraud to avoid discovery and prosecution. In addition, because of the surreptitious nature of the

account changes, there was no alternative evidence other than the testimony of the perpetrators that could have been used at trial to serve substantially the same purpose. Under those circumstances, the trial court should have granted the motion for a new trial.

The fraudulent records that the jury necessarily relied on, and a key witness's invocation of a constitutional privilege, make this the rare case in which an ORCP 64B(4) motion should have been granted. The records unfairly prevented defendant from putting forward a critical defense that went to the heart of the claim against it. Furthermore, the record and reasonable hindsight provide no indication that a defendant could have discovered and produced evidence at trial to expose and counter those fraudulent records. Not until after the trial did such countervailing evidence become available. The manifest injustice of a verdict resting on fraudulent evidence compels a new trial.

ARGUMENT

I. INTRODUCTION

ORCP 64B(4) provides:

> "A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:
>
> "* * * * *

> "B(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial."

This Court has explained that when interpreting a rule of procedure it follows the same methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). *Pamplin v. Victoria*, 319 Or 429, 433, 877 P2d 1196 (1994) (applying statutory construction methodology to rules of civil procedure).[1] A court begins by examining the statutory text in context, along with any legislative history offered by the parties. *Gaines*, 346 Or at 171-72. "[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes." *Id.* at 171. Analysis of the text of ORCP 64 B(4) indicates that the motion for a new trial should have been granted in this case.

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[1] In *State v. Varnornum*, 354 Or 614, 635-36, 317 P3d 889 (2013), the concurrence suggested that when interpreting a rule of procedure promulgated by the Council on Court Procedures one may need to consider an additional analytical step of whether the Council had the authority to promulgate or amend the rule in the first place in light of the statutory context and history. However, such consideration is unnecessary in this case because the Legislature initially promulgated the text of ORCP 64B(4) as a statute and it was merely renumbered as an ORCP in 1977. *See Oberg v. Honda Motor Co.*, 316 Or 263, 272-73, 851 P2d 1084 (1993), *rev'd on other grounds* 512 US 415, 114 S Ct 2331, 129 L Ed 2d 336 (1994) (explaining that ORCP 64B(4) is "materially identical" to its statutory precursors).

II. NEW TRIAL EVIDENCE MUST BE "MATERIAL."

First, the text of the rule requires that evidence can trigger a new trial only if it is "material for the party making the" motion. *Webster's Third New Int'l Dictionary* 1392 (unabridged ed 2002) defines "material" as "being of real importance or great consequence**:** SUBSTANTIAL <found a difference between the two things> <a point of order> <made a correction> <a correction>." Similarly, *Black's Law Dictionary* 998 (8th ed 2004) defines the term "material" as "[h]aving some logical connection with the consequential facts. * * * Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential."

Those definitions comport with this Court's definition of "material evidence" that it applied to new trial motions when they arose under equity before the legislature passed the statutory precursors to ORCP 64 B(4):

> "To entitle a party to a new trial, the evidence 'must be *material to the issue* joined, material to the point to be decided by the verdict, and not collateral; it must go to the merits of the case, and not to discredit or impeach a former witness.'"

Territory v. Latshaw, 1 Or 146, 146-47 (1854) (emphasis in original). Because the Legislature chose to include the requirement that the evidence be "material" to support a new trial, it should be presumed that it was aware of and intended to capture this Court's previous use and definition of that word. *Mastriano v. Board of Parole*, 342 Or 684, 693, 159 P3d 1151 (2007) (when interpreting a statute a

court should "generally presume that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing on those statutes.").

With the above in mind, newly discovered evidence to support a new trial "must go to the merits of the case." Or said differently, "to the point decided by the verdict." *Latshaw*, 1 Or at 146-47; *Black's* ("of such a nature that knowledge of the item would affect a person's decision-making"); *Webster's* ("being of real importance"). Conversely, the evidence cannot be relevant exclusively to a collateral matter such as evidence whose only purpose is to impeach a witness or discredit other evidence. *Latshaw*, 1 Or 146-47; *Watrous v. Salem Brewery Ass'n*, 151 Or 294, 302, 49 P2d 375, 378 (1935) (the evidence "must not be *merely* impeaching") (emphasis added).

In this case, the evidence to justify the new trial is the testimony of Mr. Fahey to explain that he and plaintiff's vice president fraudulently manipulated the accounting records by deleting inventory amounts even though the physical inventory did not support those reductions. That evidence plainly goes "to the merits" of the case (the "point decided by the verdict") because it tends to show that the records were deliberately altered so that they did not account for all the inventory plaintiffs received from defendants. A jury could conclude that the accounts did not, in fact, show an overpayment to defendants.

Plaintiff nonetheless argues that the evidence is merely impeaching because it contradicts the evidence it offered in its case in chief that the accounting books show an overpayment. Certainly, Fahey's testimonial evidence does discredit and impeach plaintiff's evidence that there was an overpayment as shown through the accounting records. But, more critically, Fahey's testimony precisely targets "the point decided in the verdict" because it negates plaintiffs' theory of the case – that the accounts were accurate and reflected an overpayment to defendants.[2]

III. THE EVIDENCE TO SUPPORT A NEW TRIAL COULD NOT WITH REASONABLE DILIGENCE HAVE BEEN DISCOVERED AND PRODUCED AT TRIAL.

A. *"discovered and produced"*

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." In other words,

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[2] Plaintiff argues that defendant did not make this argument to the trial court or the Court of Appeals. Plaintiff's Brief on the Merits at 48. Not so. Defendant's brief in support of a new trial reminded the court of defendant's position at trial: "Defendants denied any responsibility for accounting errors, [and] asserted that the inventory sold did in fact exist," and listed key points that supported that defense from Fahey's affidavit. SSER- 14-15. In its Opening Brief at 38, defendant highlighted its point that Fahey's testimony confirmed that the inventory figures were in fact accurate; at 41 defendant again emphasized the importance of Fahey's testimony, as follows, "Patillo's role in manipulating inventory and other accounts would have confirmed defendants' theory of the case: the inventory amounts were correct all along[.]" The Court of Appeals understood this point. 264 Or App at 23-24.

one requirement for the evidence to be sufficient to support a motion for a new trial is that it could not have been "discovered and produced" at trial.

Plaintiff repeatedly argues that because defendant became aware of Fahey's deposition testimony before trial, the rule precluded defendant from moving for a new trial based on Fahey's testimonial evidence. Defendant learned of Fahey's testimony the Saturday before trial through the deposition conducted by plaintiff's counsel. However, for several reasons, that mere knowledge of the deposition testimony is insufficient to preclude the motion for a new trial.

First, plaintiff's argument necessarily ignores the plain text of the rule that evidence may support the motion as long as the moving party could not have "discovered *and* produced" the evidence at the trial. In *Lommasson v. School Dist No 1*, 201 Or 71, 79, 261 P2d 860, *adh'd to in part on rehearing*, 201 Or 90, 267 P2d 1105 (1954) this Court explained:

> "Courts should exercise circumspection to avoid any effort to amend statutes. * * * Generally, the words 'and' and 'or', as used in statutes, are not interchangeable, being strictly of a conjunctive or disjunctive nature, respectively, and their ordinary meaning will be followed if it does not render the sense of the statute dubious or circumvent the legislative intent, or unless the act itself furnishes cogent proof of the legislative error."

Here, the statute would preclude the motion only if the defendant could have "discovered and produced" the evidence at or before trial. Plaintiff's argument that mere knowledge of the potential testimony precludes the motion for a new trial

incorrectly invites the court to omit the "and produced" phrase from the statute. ORS 174.010 (an interpreting court should not "omit what has been inserted" in a statute).

Second, the text and context of the rule does not suggest the rare circumstance in which "and" could be interpreted in the disjunctive. If the rule was read to require that the evidence could not have been discovered *or* produced at trial, then the "produced" element would be rendered meaningless. ORS 174.0101 (a court should "give effect to all" particulars of a statute). This Court should "give effect to all" the terms chosen by the Legislature. The only way to do so is by reading "and" in the conjunctive: a new trial is appropriate if defendant could not both discover and produce the evidence at trial.

Third, that conjunctive interpretation is in line with the decision in *State v. Arnold*, 320 Or 111, 119-20, 879 P2d 1272, 1277 (1994). In *Arnold*, the defendant learned at trial of evidence that the state's expert witness lied about her qualifications and experience. The defendant moved for a new trial based on the discovery of that evidence during the trial and the further evidence that was developed post-verdict motivated by the new information. This Court explained that the text of ORCP 64 B(4) "does not focus on whether the evidence was discovered before trial; rather, it focuses on whether the party could not with reasonable diligence have discovered *and produced* the evidence at the trial."

(Emphasis added).[3] Ultimately, this Court rejected the request for a new trial. However, its decision did not turn on whether the defendant possessed some awareness of the evidence at the time of trial (as plaintiff would have the Court do here) but instead focused on what other evidence defendant "could have used" at the trial. *Id.* at 122 (rejecting the motion for a new trial because the defendant at trial "could have used what she already knew about [the evidence supporting the motion] for substantially the same purpose").

Here, defendant could not have used or otherwise produced Fahey's testimony at trial. First, to cure plaintiffs' counsel's overreaching in taking the deposition, the trial court sealed Fahey's deposition testimony describing how plaintiff's vice-president instructed him to fraudulently delete inventory from the accounting books. Second, when defendant called Fahey to testify that plaintiff's vice-president instructed him to delete the inventory, Fahey asserted his Fifth Amendment privilege and refused to provide any substantive testimony on the matter. In the post-trial affidavit, defense counsel further explained that because of the criminal nature of Fahey's conduct, before the trial "substantial limitations

[3] Of note, plaintiff offers the incorrect rule in its briefing, that "this court for over a century consistently has required that evidence 'must have been discovered since the trial' potentially to warrant a new trial." Plaintiff's Brief on the Merits at 17. However, in *Arnold* this Court rejected that argument and explained that evidence discovered before the end of trial could be considered in support of a motion for a new trial. 320 Or at 119 (holding that "ORCP 64 B(4) applies to evidence discovered during the trial").

were placed upon the questions [defense counsel] was able to ask Mr. Fahey by his criminal attorney" and he was not "permitted to inquire into the [inventory deletion] subject matter". 4th SSER 19-20, ¶¶ 2, 5 (Affidavit of Ferguson). Defendant simply could not produce the testimonial evidence of Fahey at trial regarding the fraudulent deletions. The testimonial evidence can support a motion for a new trial under the plain terms of the rule.

Plaintiff attempts to avoid the logical conclusion required by the plain text of ORCP 64 B(4) and cites the majority rule of federal circuit courts in their interpretation of Federal Rule of Criminal Procedure 33. That majority rule provides that if the subject matter of the witness testimony is known to a criminal defendant at the time of trial it will not be considered "newly discovered evidence" to support a new trial even if it was unavailable at trial by reason of the witness's Fifth Amendment privilege against self-incrimination. *But see United States v. Montilla–Rivera,* 115 F3d 1060 (1st Cir1997) (recognizing the minority rule that witness testimony that is "newly available" post-trial because the witness no longer exercises his privilege against self-incrimination will be considered "newly discovered evidence" sufficient to support a motion for a new trial). However, those cases necessarily are based on the textual requirements of Fed. R. Crim. P. 33 which is substantively different from ORCP 64. Fed. Rule 33 provides in relevant part:

> "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.
>
> "* * * * *
>
> "*Newly Discovered Evidence.* Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case."

Of particular note, the federal rule does not contain the words "and produced at trial."

Accordingly, the federal decisions that plaintiff relies on emphasize that mere pretrial awareness ("discovery") of the potential evidence precludes the motion for a new trial no matter if the evidence is unavailable for trial. The Third Circuit explained in *United States v. Jasin*, 280 F3d 355, 362-68 (3d Cir 2002):

> "The pivotal issue on appeal is whether the previously known, but only newly available, testimony of a codefendant who invoked his Fifth Amendment privilege against self-incrimination and did not testify at trial qualifies as 'newly discovered evidence' for the purpose of considering a motion for a new trial under Rule 33. After careful consideration of this matter, we join the majority of courts of appeals in concluding that evidence known but unavailable at trial does not constitute "newly discovered evidence" *within the meaning of Rule 33*.
>
> "* * * * *
>
> "[The criminal defendant's] knowledge of the substance of [his co-defendant's] testimony before trial, regardless of * * * unavailability as a witness during trial, is fatal to the Rule 33 motion for new trial."

(Emphasis added).

Because the federal rule does not define "newly available evidence" as that which the party with reasonable diligence could not have "discovered and produced" at trial, it is no surprise that some federal courts have not inserted such an element into the rule. But to adopt the same approach in Oregon would require this Court to omit from the rule what has been inserted.

Federal courts also further justify the mere awareness rule in Fed. R. Crim. Proc. 33 because of concerns unique to the context subsequent criminal prosecutions of co-conspirators, which are not present here. The Third Circuit explains:

> "Courts generally consider exculpatory testimony offered by codefendants after they have been sentenced to be inherently suspect. Indeed, '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 his privilege not to testify.' *United States v. Jacobs*, 475 F2d 270, 286 n 33 (2d Cir1973). The rationale for casting a skeptical eye on such exculpatory testimony is manifest.
>
> "It would encourage perjury to allow a new trial once co-defendants have determined that testifying is no longer harmful to themselves. They may say whatever they think might help their co-defendant, even to the point of pinning all the guilt on themselves, knowing they are safe from retrial. Such testimony would be untrustworthy and should not be encouraged. [*United States v.*] *Reyes–Alvarado,* 963 F.2d [1184,] 1188 [(9th Cir.1992)]."

Jasin, 280 F3d at 367-68.

Those factors are irrelevant to the civil context of this case. In this civil case, defendant is not a criminal co-defendant with the witness that asserted the Fifth Amendment privilege at trial but rather is a victim of that criminal conduct. Moreover, there is no suggestion that Fahey has some special loyalty to defendant over plaintiff that would motivate him to provide perjured testimony post-verdict.

In sum, the federal decisions interpreting Rule 33 not only are governed by different textual requirements but arise in an entirely different context. They provide no guidance, much less authority, as to how this Court should interpret ORCP 64 B(4) in this case.

B. *"reasonable diligence"*

Plaintiff alternatively presents several scattershot arguments that defendant could have produced Fahey's testimony at trial with reasonable diligence.[4] All of those arguments are wrong.

1. *Requesting a continuance for Fahey to be sentenced before trial would not remove his Fifth Amendment privilege to decline to testify.*

[4] This position is somewhat frustrating, because as cited in the Statement of Facts, **plaintiff** moved to exclude Fahey from testifying at trial because he invoked his Fifth Amendment privilege against self-incrimination. If defendant had actually been successful in obtaining Fahey's testimony for trial as plaintiff now says it should have, then plaintiff would probably now assert error because Fahey's testimony was not excluded.

Plaintiff argues that defendant should have asked for a trial continuance until after Fahey's scheduled sentencing for the Dovenberg embezzlement activity. Petitioner's Brief on the Merits at 24. The argument follows that if the trial occurred after that sentencing then Fahey would have no Fifth Amendment privilege to withhold testimony.

What plaintiff fails to appreciate is that the sentencing was for criminal charges against Fahey for embezzlement conduct against Dovenberg, personally -- a wholly separate crime from fraudulent deletions of inventory from plaintiff's accounting books. Fahey was never charged for those fraudulent deletions. Fahey's criminal attorney specifically explained to the trial court that inventory deletions was "uncharged conduct" unrelated to the sentencing. Tr 798-99; 803-809. Accordingly, the 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. So, even if defendant obtained a trial delay until after the sentencing, it would have had no legal effect on Fahey's privilege against self-incrimination for the evidence at issue.

2. *Reasonable diligence did not require defendant to seek out another judge in another county to rule on whether the statute of limitations had run on uncharged conduct.*

Next, plaintiff suggests that defendant should have contacted the Washington County judge presiding over Fahey's pending sentencing to rule that

the statute of limitations on the uncharged conduct had run. Petitioner's Brief on the Merits at 25. The argument follows that if there was a finding that the statute of limitations had run on the uncharged conduct, then Fahey could not assert the Fifth Amendment and refuse to testify. As an initial matter, defendant knows of no procedure in which a trial judge can rule that the statute of limitations on uncharged conduct has run. Nor does plaintiff offer an example of the authority to conduct such a proceeding.

A court's jurisdiction over alleged criminal conduct does not arise until a prosecutor has filed an accusatory instrument (an information, complaint, or indictment) that a person has committed specific criminal acts. *See* 5 *Wharton's Criminal Procedure* 7, § 225 (Torcia, 1976) (recognizing that jurisdiction requires a charging instrument which properly accuses a defendant of the crime). Fahey's sentencing judge had no jurisdiction to rule on whether the statute of limitations had run on uncharged conduct. At best, such a ruling would be an advisory opinion.

Even if reasonable diligence required defendant to obtain such an advisory opinion, the trial judge in this case arguably had just as much jurisdiction over the uncharged conduct as any other judge in the state. For what it is worth, defendant did ask the trial judge in this case to rule that the statute of limitations had run on

the uncharged conduct. Tr 807-09. The trial court correctly declined to make such a ruling. Tr 808.

Moreover, even if such a ruling could be made, a trial court would have been incorrect to rule that the statute of limitations on all potential criminal prosecutions had run. That is because Fahey's fraudulent deletions conduct likely violated the federal crime of wire fraud.[5] That crime has a statute of limitations of 5 years, 18 U.S.C. § 3282, which had not run by the time of the trial.

3. *Reasonable diligence did not require defendant to act contrary to the evidence code.*

Third, plaintiff argues that defendant needed to question Fahey in front of the jury on the issue that plaintiff's vice-president instructed him to fraudulently delete inventory from the accounting books. Plaintiff is wrong again. Oregon Evidence Code 513(2) provides:

> "In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege *without the knowledge of the jury*."

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[5] Plaintiff Jewett-Cameron is a publically traded corporation and the fraudulent accounting records were necessarily transferred by Fahey and Patillo to Jewett-Cameron accountants in Canada, the location of the stock exchange on which Jewett-Cameron is traded. The delivery of those fraudulent accounting records could have been construed as mail fraud and/or wire fraud.

(Emphasis Added); *see also* Legislative Commentary to OEC 513 (2) ("Whether a privilege will be claimed is usually ascertainable in advance and the handling of the entire matter outside the presence of the jury is feasible.").

Here, defendant did what it was supposed to do. Outside of the presence of the jury, defendant asked Fahey whether he was instructed to remove inventory from the accounting books. Tr 803-04. Fahey's attorney immediately asserted his client's Fifth Amendment privilege on that subject matter. *Id.* "Handling the entire matter outside the presence of the jury" is the exact process required by OEC 512(2). Reasonable diligence did not require defendant to act contrary to that rule.

4. *Reasonable diligence did not require defendant to object to the sealing of the deposition testimony.*

Fourth, plaintiff argues that defendant should have objected to the sealing of the deposition testimony. Plaintiff does not address what authority defendant could have relied on for the objection or whether there is any merit to such an objection. Defendant knows of no authority or merit for such an objection.

Plaintiff also does not address that the reason the transcript was sealed was because the deposition was improperly conducted by plaintiff's attorney who obtained the testimony in violation of the rules of professional conduct. *See Newell*, 348 Or 396 (holding that plaintiff's counsel in this case violated the rule of professional conduct in deposing Fahey on criminal matters without notice to and

outside the presence of his criminal defense lawyer). Reasonable diligence does not require that defendant needed to object to the trial court's attempt to cure the professional missteps of plaintiff's counsel.

5. *Reasonable diligence could not have produced substantially similar alternative evidence at trial.*

Plaintiff argues that with reasonable diligence defendant could have produced alternative evidence that could have been used at trial to serve substantially the same purpose as the Fahey testimony. Plaintiff offers only vague suggestions about what such evidence could have been that would have provided similar persuasive force to Fahey's testimony. Those suggestions must necessarily be vague, because upon any serious inspection it becomes clear that there was no alternative evidence to replace Fahey's testimony.

Only Fahey and plaintiff's vice-president Patillo had first-hand knowledge of the inventory manipulations. Fahey's deposition testimony was sealed and he asserted his Fifth Amendment privilege when asked about that conduct at trial. When Patillo testified on rebuttal at trial he simply claimed that such changes in the inventory books would be impossible, Tr 994, and he further denied any knowledge about inaccuracies in the inventory accounting. Tr 1033. Other than Fahey's testimony, there was no other evidence that could substantially replace the value of Fahey's first-hand testimony of manipulating the inventory.

Plaintiff nonetheless makes the vague suggestion that somehow defendant could have had one of its accounting experts testify about the inventory manipulations explained by Fahey in the depositions. Petitioner's Brief on the Merits at 33-34. Those accounting experts did not have first-hand knowledge of Fahey and Patillo's fraudulent removal of the inventory from the accounting books. Any knowledge they could have obtained would have come from Fahey's deposition, which the trial court ordered sealed. Upon that order to seal the deposition, defendant or its counsel was not free thereafter to coach the experts based either on their memory of the subject matter of Fahey's deposition testimony or offer part of the deposition transcript to those experts without violating the order to seal the record.

Also, Fahey's testimony described surreptitious and fraudulent conduct to delete inventory from the accounting books. There was no clear paper trial to show that conduct, because the records were manipulated to hide it. Plaintiff's own accounting expert admitted that the accounting software was so obtuse that it was "designed to hide anything [one] wants" to hide. Tr 411. Nothing in the record suggests that any alternative evidence was available that could have served substantially the same purpose as Fahey's testimony.

In the end, defendant's reasonable diligence did not and could not produce Fahey's testimony before the trial; Fahey's attorney and his Fifth Amendment

privilege prevented it. Defendant's attorney understood this, acted professionally, and did not overreach to obtain information from Fahey. Indeed, the only reason that Fahey's testimony about the fraudulent deletions of the inventory came to light was because plaintiff's trial attorney applied *unreasonable* diligence and obtained Fahey's admissions about that testimony through discovery methods that exceeded the bounds of professional conduct. *Newell*, 348 Or 396.

In the end, the implicit cornerstone of all of plaintiff's arguments, whether regarding reasonable diligence or pre-trial awareness of the evidence, is that somehow defendant had a duty to take advantage of plaintiff's counsel's wrongful discovery of Fahey's testimony and overcome the trial court's reasonable cure of that wrongful discovery. The rule does not erect such insurmountable obstacles.

IV. THE UNAVAILABILITY OF FAHEY'S TESTIMONY AT TRIAL "MATERIALLY AFFECT[ED] THE SUBSTANTIAL RIGHTS OF" DEFENDANT.

ORCP 64 B(4) provides:

> "A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party."

Pursuant to the text of the rule, defendant may receive a new trial if the unavailability of the Fahey testimony at trial "materially affect[ed defendant's] substantial rights."

The standard for granting a new trial under ORCP 64 "is similar if not identical" to the standard in ORS 19.415(2) for granting a new trial based on evidentiary or instructional error. *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 170 n 1, 61 P3d 928 (2003) (so recognizing); *cf.* ORS 19.415(2) (reversal of judgment is warranted if there is an error "substantially affecting the rights of a party"). Accordingly, this Court's previous interpretation of the nearly identical clause in ORS 19.415(2) is instructive in its determination of whether the ORCP 64 standard for a new trial is met here.

When interpreting ORS 19.415(2), this Court has explained that an error "'affecting' a party's rights" is one that "can be said to 'produce a material influence' or 'to have a detrimental influence' on those rights[.]" *Shoup*, 335 Or at 173. In *Purdy v. Deere & Co.*, 355 Or 204, 226, 324 P3d 455, 466-67 (2014), this Court explained further:

> "[T]hat standard asks * * * whether—in an important or essential manner—[there has been a] detrimental influence on a party's rights. It does not pretend to measure mathematical probabilities; rather, it assesses the extent to which an error skewed the odds against a legally correct result. * * * [L]ittle likelihood is not enough, but more—that is, 'some' or a 'significant' likelihood that the [issue] influenced the result—will suffice for reversal."

(Internal citations omitted).

Here, the unavailability of the Fahey testimony created a 'significant' likelihood that * * * influenced the result" of the trial. That testimonial evidence

offered an alternative reason for why the books showed an $800,000 disparity between plaintiffs' payments and the inventory amounts.

There is a significant likelihood that a jury would have considered that evidence and determined that plaintiff did not meet its burden to prove that it overpaid defendant. Instead, the jury could have found that the lesser inventory amounts in the accounting books were the product of the fraudulent deletions of inventory by plaintiff's vice-president and his bookkeeper accomplice in furtherance of surreptitious embezzlement activity.

The unavailability and un-discoverability of that evidence of fraudulent conduct at trial was due to the very nature of the conduct. The conduct was surreptitious and concealed so that the perpetrators could avoid discovery and prosecution. Indeed, the trial court sealed the Fahey testimony so that he could continue to conceal that information to the extent that he had a right to do so under the Fifth Amendment. In sum, defendant could not avail itself of critical evidence to further its defense solely because of the fraudulent and surreptitious acts of others.

This Court has long recognized that the rights of a defendant are materially affected when it is deprived of a defense by fraud. Indeed, it has specifically explained that when a party is "prevented from availing himself of his defence by

fraud" a new trial shall be granted. *Walls, Fargo, & Co. v.Wall*, 1 Or 295 (1860). That is what happened here and a new trial should be granted.

A. "*if believed*"

Plaintiff makes much protest about the Court of Appeals' use of the phrase "if believed" in determining whether a new trial should have been granted. However, an "if believed" view of the record is not an aberration when a reviewing court evaluates whether the "substantial rights" of a party have been "materially affect[ed]." When determining whether there has been "a detrimental influence on a parties rights," a reviewing court should not weigh "probabilities" and make a finding whether it thinks the new evidence or case theory will ultimately win the case, but rather view the evidence or case theory in the light of what a reasonable juror could believe and then determine whether the requisite harm was caused. *See, Purdy*, 355 Or at 226 ("standard does not pretend to measure mathematical probabilities"). Certainly, a court should not grant a new trial if the newly discovered evidence is inconsequential or fantastic. But if the evidence targets an important part of the jury's decision, and a reasonable juror could believe the evidence and use it to reach a decision in favor of the moving party, then the absence of that evidence at trial "affect[s] the substantial rights of such party."

That standard is satisfied here where the evidence of fraudulent inventory deletions undermined plaintiff's claim that the books showed it had overpaid

defendant. Fahey's testimony supported defendants' contrary position that it provided plaintiff all of the inventory for which it had paid.

B. *"probably change the result"*

Plaintiff attempts to steer this Court away from the mandates of the text that the motion should be granted if the substantial rights of the moving party has been affected. Instead, plaintiff suggests an antiquated and confusing standard. Plaintiff specifically cites to *State v. Davis*, 192 Or 575, 579, 235 P2d 761 (1951) in which this Court stated without discussion that a court cannot grant a motion for a new trial based on newly discovered evidence unless the moving party "show[s] a state of undisputed facts which would probably lead an ordinarily reasonable person to a different conclusion from that arrived at by the jury[.]" Plaintiff's Brief on the Merits at 42. However, meaningful inspection of that statement from this Court makes clear that it does not create a standard any different or more stringent than the "substantially affect[] the rights of a party" standard discussed above.

The statement from *Davis* cites to and is a near-verbatim quote from this Court's earlier opinion in *Watrous v. Salem Brewery Ass'n*, 151 Or 294, 302, 49 P2d 375, 378 (1935). In *Watrous*, this Court explained that a motion for a new trial should be granted if the evidence "might" change the outcome "if" a reasonable jury were to find the evidence to be true. *Id.* at 301-303.

Watrous was a personal injury case in which a brewery employee named Charles Watrous injured his leg after falling from a ladder. *Id.* at 297. A critical dispute in the case was whether the plaintiff's leg injury was pre-existing. *Id.* at 297-99. To support his claim that he had no leg injury before the fall, the plaintiff put forward two points of evidence. First, he submitted a discharge document from the Bremerton Navy Yard that stated that "Charles Watrous" was recently discharged in "good health" from the Navy after 12 years of service. Second, the plaintiff called a woman to trial who testified that she was his wife and that he never had "any trouble with his leg" before the fall. *Id.* at 299. The jury found for the plaintiff. *Id.* at 296-97.

After the trial, the defendant moved for a new trial based on newly discovered evidence. *Id.* at 299. In support of the motion, the defendant produced an affidavit of a different woman, who stated that she was the plaintiff's wife for the last 23 years, that they have never been divorced, that the plaintiff's real name was Charlie Gossett, that the plaintiff had abandoned her and their children several years ago, and that he has been living under the assumed name of Charles Watrous ever since. *Id*. She further stated that the plaintiff during their marriage "had trouble with his right ankle which caused him pain and discomfort and some swelling." *Id.* at 300. The above evidence suggested that the Bremerton Navy Yard discharge document which the plaintiff proffered to show that he was in good

health for the 12 years before the injury was fraudulent. The newly available evidence indicated that plaintiff did in fact have a pre-existing leg injury. Nonetheless, the trial court denied the motion.

This Court reversed the trial court and ordered a new trial. It explained that

> "*if the supporting affidavit * * * is true* – and it is not denied – it would appear that [the plaintiff] wished to and did conceal his true identity from [the defendant] and from the court and the jury.
>
> "* * * * *
>
> "No one could say how much discredit such contradictory testimony *might* throw on [the plaintiff's] whole story.
>
> "* * * * *
>
> "Each motion for a new trial on the ground of newly discovered evidence must rest on its own particular facts and circumstances. And if the affidavit shows a state of undisputed facts that would probably lead the ordinarily reasonable person to a different conclusion than that arrived at by the jury, and the other necessary elements being present, the court should set the judgment aside and grant a new trial.
>
> "* * * * *
>
> "[T]his cause must be reversed and the matter remanded for a new trial[.]"

151 Or at 301-303 (Emphasis added).

Two things should be emphasized from the above portion of the *Watrous* opinion. First, similar to the "if believed" phrasing of the Court of Appeals in this case, this Court did not assume a jury role and weigh the evidence, instead it merely considered the hypothetical effect of the evidence "*if* [it] is true." *Id.* at

301. Second, this Court reversed the trial court because the new evidence "might" discredit the plaintiff's claims. *Id*. Although the chosen phrasing in the 1935 case is somewhat antiquated, this Court did not apply a different standard than the current statutory standard described in the many cases of this Court.

V. THE COURT OF APPEALS DECISION TO GRANT A NEW TRIAL DOES NOT INTRUDE ON THE DISCRETIONARY AUTHORITY OF THE TRIAL COURT.

The trial court's decision to grant or deny a motion for new trial has traditionally been described as a matter of the trial court's discretion. *State v. Davis*, 192 Or 575, 581-582, 235 P2d 761 (1951). Plaintiff and defendant both cited an abuse of discretion standard of review in their Court of Appeals briefs. Plaintiff's Answering Br, pp. 28-29; Defendant's Opening Br, p. 35. However, the Court of Appeals below concluded that in the absence of an order denying defendants' motion for new trial – a manifestation that the trial court in fact exercised discretion in reaching its denial decision – a motion deemed denied by the passage of time does not involve the exercise of discretion and must be reviewed for legal error. *Greenwood Products*, 264 Or App at 20.

The standard of review is more nuanced than either of these positions suggest. In *Bennett v. Farmers Ins. Co. of Oregon*, 332 Or 138, 151, 26 P3d 785 (2001) this court stated, "[W]hen the trial court's order of a new trial is based on an interpretation of the law, we review that order for errors of law." Here, defendant

based the new trial motion on ORCP 64 B(4) which allows a new trial when there is "[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."

The issues in dispute in this case implicate interpretation of the rule in several respects. Whether Fahey's testimony was "newly discovered evidence;" whether the testimony was "material" for defendants; whether defendants could have "discovered and produced" Fahey's testimony at trial; and what "reasonable diligence" requires are matters of statutory interpretation in the first instance. This court interprets ORCP 64 B(4) as it does other statutes by reviewing the text and context of the rule's requirements for a new trial. *State v. Arnold,* 320 Or 111, 119-121, 879 P2d 1272 (1994) (deciding that ORCP 64 B applied to evidence first discovered during trial; restating six requirements newly discovered evidence must meet in order to justify grant of new trial).

Moreover, ORCP 64 B requires that the basis claimed for a new trial must be one "materially affecting the substantial rights of" the moving party. ORS 19.415(2) provides in similar language that no judgment shall be reversed or modified "except for error substantially affecting the rights of a party." This is a determination appellate courts make on their own, presumably as a matter of law, before reversing any judgment on appeal. *See Baker v. English,* 324 Or 585, 932

P2d 57 (1997) (discussing this statutory standard for reversal of a judgment on appeal).

In *Oberg v. Honda Motor Co.*, 316 Or 263, 272-273, 851 P2d 1084 (1993), the court interpreted the language of ORCP 64B ("materially affecting * * * substantial rights") as consistent with the inquiry derived from former law whether the evidence would "probably change the result" if a new trial is granted. What standard to apply appears to be a review for error of law. 316 Or at 273 ("We concluded that, first, the trial court did not err in applying that standard to the newly discovered evidence."). The court then reviewed the trial court's conclusion on this point for abuse of discretion. 316 Or at 273. ("Second, having reviewed the evidence, we conclude that the trial court did not abuse its discretion in denying the motion.").

As indicated above, ORCP 64 provides that a new trial "may" be granted, thus signifying a grant of discretion. *Farmer v. Baldwin*, 346 Or 67, 78-79, 205 P3d 871 (2009) (so stating). If the trial court has employed the correct legal standards, then the trial court has discretion to deny the motion, and abuse of discretion will depend on this court's review of the evidence. Here, the evidence shows that the trial court abused its discretion when it denied the motion, for several reasons.

First, if the record adequately reflects that the newly discovered evidence may be cumulative, then a trial court has discretion to deny the motion. *See e.g. State v. Pratt*, 316 Or 561, 853 P2d 827 (1993). Here, there was no other evidence offered at trial to show that Fahey and plaintiff's vice-president had fraudulently deleted inventory from the accounting records to further an embezzlement scheme. As a result, the record is insufficient for the trial court to deny the motion on the grounds that the evidence was cumulative.

Second, if the record indicates that defendant, through reasonable diligence, could have "discovered and produced" Fahey's testimony regarding the fraudulent deletion of inventory from the books, then the trial court had discretion to deny the motion. ORCP 64 B(4). However, defendant had no reasonable means of producing Fahey's testimony at trial. The deposition was sealed and Fahey pleaded his Fifth Amendment privilege to refuse testimony on the matter, which defendant had no means of overcoming. The record is inadequate for the trial court to have discretion to deny the motion on grounds that Fahey's testimony could have been produced at trial through reasonable diligence.

Third, if the record adequately reflected that with reasonable diligence defendant could have produced alternative evidence at trial to serve substantially the same purpose as the Fahey testimony, then the trial court would have discretion to deny the motion. *Arnold*, 321 Or 121-22. However, nothing in this record

indicates that other evidence was available that could have had similar weight or fulfill substantially the same purpose as Fahey's testimony. For example, the accounting records could not communicate the fraudulent scheme without Fahey's simultaneous explanation. Moreover, the records themselves were manipulated to conceal that scheme, so it makes little sense to suggest that those records could substantiate it. Plaintiff's own accounting expert admitted that the accounting records were so obtuse that it was as if they were "designed to hide anything [one] wants." Tr 411. Also, Patillo, Fahey's accomplice and likely the only other person with firsthand knowledge of the fraud, denied any wrongdoing when questioned. The record is insufficient for the trial court to find that defendant with reasonable diligence could have uncovered alternative evidence to serve substantially the same purpose as the Fahey testimony. The trial court did not have discretion to deny the motion on those grounds.

In this case, the high bar of ORCP 64 B(4) was satisfied. Defendant with reasonable diligence could not have produced the evidence because of the fraud of others. The inability to produce that evidence for trial prevented defendant from availing itself of a critical defense against plaintiff's overpayment claim. Defendant's substantial rights were materially affected, and defendant is entitled to a new trial.

VI. THE FACTS AND CIRCUMSTANCES OF THIS CASE ARE UNUSUAL AND AFFIRMING THE COURT OF APPEALS'S DECISION WILL NOT DISTURB THE FINALITY OF JUDGMENTS IN OREGON.

The finality of judgments is important. But Oregon law recognizes a "tension * * * between the desire to achieve reasonable finality of judgments and a desire to provide adequate remedies to correct injustice." *State v. Ainsworth*, 346 Or 524, 534 n 9, 213 P3d 1225, 1231 (2009) (so recognizing that tension in relation to the promulgation of ORCP 71). ORCP 64 B(4) is a rule specifically created to disturb judgments when it is necessary to correct an injustice. This Court has long recognized as much and specifically stated when the new evidence suggests that a party was "prevented from availing [it]self of [its] defence by fraud[ulent]" conduct of others then a new trial should be granted. *Wells, Fargo, & Co.*, 1 Or at 296.

So, just as in *Watrous*, a judgment or verdict should be disturbed when the newly discovered evidence indicates that the verdict was reached through a reliance on fraudulent or criminally manipulated evidence that could not have been exposed at trial. That is what happened here. The same result as *Watrous* – a new trial – should follow.

Reaching that conclusion will not call the finality of judgments into question. The circumstances of this case are unusual. Though every trial involves disputed facts, there are usually effective barriers to protect against fraudulent

evidence at trial. Trial evidence must pass through the credibility crucibles of authentication and other evidentiary rules. There is the threat of perjury prosecution, and the ability of the opposing party to dispute accuracy through expert analysis, additional discovery, subpoenas, and cross-examination. But none of these protections was available to defendant. Here, the jury was allowed to take plaintiff's accounting at face value, while never learning the critical information that the books were altered to hide embezzlement.

In addition, the requirement for reasonable diligence narrows many cases in which the unsuccessful litigant seeks a new trial. Courts require the moving party to discover and produce at trial either the specific evidence cited or alternative evidence that would have substantially served the same purpose. *See supra State v. Arnold.* Indeed, if *Watrous* occurred in the context of modern litigation, the fraudulent navy discharge document used by the plaintiff would have been exposed through the reasonable diligence of the defendant's counsel's discovery efforts and use of authentication objections at trial. This case simply presents the rare exception for which the rule was designed.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Court of Appeals, reverse the judgment in favor of plaintiff on the breach of contract claim, and remand for a new trial.

DATED this 15th day of April, 2015.

Respectfully submitted,

/S/ Travis Eiva .
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Of Attorneys for Defendants Greenwood Forest Products, Inc., Jim Dovenberg, and Bill LeFors

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief including footnotes (as described in ORAP 5.05(2)(a)) is 9,783 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).

/s/ Travis Eiva
Travis Eiva OSB 052440

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the date stated below I filed the foregoing BRIEF ON THE MERITS OF DEFENDANTS GREENWOOD FOREST PRODUCTS, INC., JIM DOVENBERG, AND BILL LEFORS by efiling to the following:

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