IN THE SUPREME COURT OF THE STATE OF OREGON

C.O. HOMES, LLC,
Plaintiff-Respondent,
Respondent on Review,

v.

NANCY CLEVELAND, and occupants,
Defendant-Appellant
Petitioner on Review.

Court of Appeals
A165208

S066504

PETITIONER'S BRIEF ON THE MERITS

This is a petition for review of the decision of the Court of Appeals on appeal from a judgment of the Deschutes County Circuit Court, Honorable Circuit Court Judge Walter Miller. On January 3, 2019, the Court of Appeals affirmed the judgment without opinion.

Before: Armstrong, Presiding Judge, Tookey, Judge and Shorr, Judge

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PETITIONER'S BRIEF ON THE MERITS

I. Questions Presented on Review and the Rule of Law Proposed

A. ORCP 23 A – the Motion for Leave to Amend

Did the trial court abuse its discretion granting a landlord's motion for leave to amend its Residential Eviction Complaint which amendment presented a new theory of the case, substantially changed the cause of action and interjected a new basis for the residential landlord's claim for relief the morning of the trial?

The rule of law proposed is it would be an abuse of discretion to grant a landlord's motion for leave to amend a Residential Eviction Complaint the morning of trial where a new theory of the case is presented which substantially changes the cause of action or interjects a new basis for the claim of eviction.

B. ORS 105.135 – Second First Appearance Hearing

Where a residential landlord is granted leave to amend a Residential Eviction Complaint the morning of trial, was it legal error to not set the matter for a second First Appearance Hearing at least 7 days later as required by Oregon Revised Statues (ORS) 105.135 and *Balboa Apartments v. Patrick*, 351 Or. 205, 263 P.3d 1011 (2011)?

The rule of law proposed is that it would legal error to not set the matter for a second First Appearance Hearing where an amended Residential Eviction Complaint is filed by a residential landlord less than 7 days before the First

Appearance Hearing.

C. The Motion to Postpone the Trial

Where a landlord is granted leave to amend a Residential Eviction Complaint the morning of trial and the amendment presents a new theory of the case, substantially changes the cause of action or interjects a new basis for the claim, was it an abuse of discretion to deny a residential tenant's motion to postpone the trial for good cause to prepare a defense to the new theory?

The rule of law proposed is that it would be an abuse of discretion to deny a residential tenant's motion to postpone a trial and not provide a residential tenant a reasonable opportunity to prepare a defense where a new basis for recovery is made by a residential landlord through an amendment allowed the morning of trial.

II. <u>The Nature of the Action, Relief Sought, and Nature of the Judgment</u>

A. Nature of the Action

This is a residential eviction case governed by the Residential Landlord Tenant Act (RLTA) where the Landlord alleged that the Tenant's tenancy terminated based on a 72-hour Notice of Termination of Tenancy for Nonpayment of a Security Deposit (the "72-hour Notice") pursuant to ORS 90.394. Then, on the morning of trial, the Landlord was granted leave to amend to include a second notice of termination; a 30-day Notice of Termination of Tenancy for Cause (the "30-day Notice") pursuant to ORS 90.392.

The initial Residential Eviction Complaint (Complaint) filed by the Landlord alleged a single basis for the claim for restitution of the rental premises which is at issue in this matter (the "Premises"). The claim was based on the 72-hour Notice which was attached to the Complaint as required by statute.

The issues on review relate to the Trial Court's allowance of landlord's motion for leave to amend the Complaint pursuant to Oregon Rule of Civil Procedure (ORCP) 23 A the morning of trial which added a new basis for the claim of restitution of the Premises. The new basis for the claim was the 30-day Notice.

The allowance of the amendment the morning of the trial prejudiced the Tenant because she was not permitted any time to subpoena witnesses and prepare a defense to the new basis for the claim of restitution in the Amended Complaint. ER-8. Defending the 30-day Notice required consideration of different legal issues than were required to defend the 72-hour Notice, such as statutory waiver and proper service of the 30-day Notice. These new issues required different legal arguments, evidence and witnesses that were not able to be subpoenaed the morning of the trial. The 72-hour Notice was obviously invalid and only required limited legal argument to defeat and no witnesses. As such, the addition of the 30-day Notice was a substantial game changer.

After the court ruled in favor of the Landlord allowing the motion for leave to file the Amended Complaint, the Tenant motioned the court to postpone the trial

based on the Amended Complaint being allowed and the addition of the 30-day Notice. Although the trial court initially indicated it would postpone the trial, the motion to postpone the trial was ultimately denied. The trial proceeded that morning as scheduled.

The Tenant defeated the 72-hour Notice by a motion to dismiss at the close of the Landlord's evidence. However, the Landlord was permitted to proceed on the 30-day Notice, and the Trial Court found in favor of the Landlord on the new basis for the claim granting restitution of the Premises to the Landlord.

B. Relief Sought

The Tenant requests that the Trial Court's allowance of the motion for leave to amend based on ORCP 23 A be reversed, that the General Judgment of Restitution (ER-7) be vacated and that a General Judgment of Dismissal be entered in the Tenant's favor.

Alternatively, if the Trial Court's ruling on the amendment is affirmed, the Tenant requests that the denial of the Tenant's motion to postpone be reversed, the General Judgment of Restitution be vacated, and the case be remanded. The case should be set for a second First Appearance Hearing and new trial on the 30-day Notice if required after the First Appearance Hearing where parties are encouraged to come to an agreement to resolve the dispute. If it is decided that a second First Appearance Hearing is not required, the Tenant simply requests that the matter be

remanded and set for a new trial where the Tenant has a reasonable time to prepare.

The Tenant also seeks her reasonable attorney fees at trial, on appeal and on review pursuant to ORS 19.440 and ORS 90.255.

C. Nature of the Judgment

The court awarded landlord a General Judgment of Restitution of the Premises. ER-7. The General Judgment of Restitution was affirmed by the Court of Appeals without opinion.

III. Statement of Historical and Procedural Facts Relevant to Review

A. Introduction

The plaintiff is the owner of the Premises and is the defendant's landlord (the "Landlord"). The parties agreed that, prior to the Tenant moving into the Premises, the Landlord would make certain repairs that were requested by the Tenant. Upon moving into the premises in November 2016, the Tenant found that many of the agreed upon repairs were not completed. When the Landlord refused to complete the agreed upon repairs, the Tenant withheld payments she owed toward her security deposit but continue to pay rent. Tr. 120, Ln 6-12.

The 30-day Notice dated March 24, 2017, was delivered to the Tenant. ER-1. The Landlord testified that the 30-day Notice was posted and mailed to the Tenant on March 24, 2017. Tr. 75, Ln 1-14. The testimony was that the 30-day

Notice was mailed to the Tenant by placing it in a mailbox inside the main post office in Bend, Oregon immediately after posting the notice on the door of the Premises, at about 3:16 PM on March 24. Id. The notice the Tenant received arrived in an envelope with a March 27 postmark. ER-2.

The 30-day Notice states that it was served on March 24 and that the Tenant had until April 7 to cure the lease violations stated in the notice or her tenancy would terminate on April 30. ER-1. The lease violations included not paying the full amount of her rent when due and not making payments on the security deposit as agreed. Id.

As stated in the 30-day Notice, the Landlord accepted partial rent for January, February and March and accepted the rent even though the security deposit payments had not been paid. ER-1. The last security deposit payment was in December 2016. Tr. 59, Ln 21-23. After serving the 30-day Notice for Cause, the Landlord accepted April's rent payment from the Tenant. Tr. 64, Ln 17-19 (referring to letter dated April 5, Tr. 64, Ln 11-13).

Then, on April 24, 2017, Landlord served the 72-hour Notice. ER-3. The 72-hour Notice states that it is a notice of termination of tenancy for nonpayment of a security deposit. Id. The notice states that the Tenant has 72-hours to pay the past due security deposit or her tenancy will terminate on April 27. Id.

Both notices demand the payment of the security deposit. The 72-hour Notice for non-payment of the security deposit was served on the Tenant more than two weeks after the time to cure the 30-day Notice for non-payment of the security deposit had passed thereby waiving that deadline and giving the Tenant an additional 72 hours to pay the security deposit.

B. Pre-trial

When the Tenant did not pay the security deposit, on May 1, 2017, the Landlord filed the Complaint for restitution of the Premises. ER-4. The Complaint alleges that the Tenant's tenancy terminated based on the 72-hour Notice. Id. at page 2. As required by ORS 105.124 (3), the Landlord attached a copy of the 72-hour Notice to the Complaint. The 72-hour Notice was the only notice attached to the Complaint.

ORS chapter 105 governs eviction proceedings. ORS 105.135 and 105.137 require the parties to an eviction proceeding appear at a First Appearance Hearing before the matter is set for trial. As such, both parties in this case appeared at the First Appearance Hearing set on May 10, 2017. The parties conferred about resolving the matter, but when an agreement could not be reached, the parties asked the court to set the matter for trial at which time the Tenant was ordered to file an answer to the allegations in the Complaint by 5:00 PM the same day which

she did. ER-5. The Tenant filed and served an answer on the Landlord on May 10, alleging the statutory defense that the 72-hour Notice was wrong.

A Pre-Trial Hearing was set for June 1, 2017. This was almost 3 weeks after the Landlord had been served with the Tenant's answer alleging the 72-hour Notice was wrong. At the Pre-Trial Hearing, both parties appeared and reported ready to proceed to trial the following week on June 8, 2017 as previously ordered at the First Appearance Hearing. ER-6.

C. The Trial

The morning of trial, June 8, the Landlord motioned the court for leave to amend the Complaint. Tr. 3, Ln 8-13. The Landlord wanted to add an entirely new basis and theory for its claim of eviction and restitution of the Premises. It wanted to add a new termination notice; the 30-day Notice.

Instead of solely relying on the 72-hour Notice which was attached to the Complaint, the Landlord wanted to also rely on an additional notice of termination which was attached to the Amended Complaint; the 30-day Notice. ER-1.

The Tenant objected to the motion for leave to amend arguing that the proposed amendment added an entirely new notice of termination and an entirely new basis for the claim of restitution of the Premises. The tenant argued that the amendment should not be allowed because it would change the nature of the case from just defending the 72-hour Notice to also defending the 30-day Notice. Tr.

12, Ln 13-15. The Tenant argued she was prejudiced by the amendment allowed the morning of trial and that the statute prohibited such an amendment. Tr. 8, Ln 22 – Tr. 11, Ln 9; Tr. 52, Ln 16 – Tr. 53, Ln 6.

Over the Tenant's objection, the motion for leave to amend was granted. The Trial Court reasoned that the Tenant had been served with the 30-day Notice and was therefore aware of the 30-day Notice, so it was not a surprise. Tr. 52, Ln 9-10. The Tenant does not dispute she was aware of the existence of the 30-day Notice. The issue is that the 30-day Notice was not previously alleged as a basis for the Landlord's claim for restitution of the Premises, and therefore, the Tenant was not prepared to defend on that basis.

In response to the ruling on the motion for leave to amend, the Tenant requested that the trial be postponed so she could prepare a defense to the new basis for the claim which included briefing procedural defects with the 30-day Notice and which required different witnesses that had not been subpoenaed because the testimony was not relevant to the 72-hour Notice. Tr. 53, Ln 8-14. The request to postpone the trial was denied. Tr. 53, Ln 15.

At trial, the Landlord put on its case. At the close of the Landlord's evidence, the Tenant motioned the court for a judgment of dismissal on the 72-hour Notice pursuant to ORCP 54 B(2) (the Tenant improperly referred to the motion as a motion for directed verdict). Tr. 84, Ln 13-22. The motion to dismiss,

or strike, the 72-hour Notice was granted. Tr. 98, Ln 2-8.

The trial then proceeded on the 30-day Notice included in the Amended Complaint. ER-1. The Tenant renewed her request to postpone the trial to prepare to defend the new notice. Tr. 100, Ln 20-25. The motion was again denied. Tr. 101, Ln 1.

Subsequently, the Tenant testified disputing the merits of the 30-day Notice, but without third-party witnesses and time to prepare arguments related to legal defects with the 30-day Notice, including waiver and untimely service, the Trial Court ruled in favor of the Landlord on the 30-day Notice and entered a General Judgment of Restitution in favor of the Landlord.

IV. Summary of the Argument

A. ORCP 23 A – The Motion for Leave to Amend

The Tenant's objection to the Landlord's motion for leave to amend should have been sustained because the amendment to the Complaint the morning of trial added a new basis for the claim of restitution of the Premises. The amendment presented a new theory of the case and substantially changed the cause of action. The initial basis was the 72-Hour Notice pursuant to ORS 90.394. The new basis is the 30-day Notice pursuant to ORS 90.392 served at a different time by a different person. Service of the notice of termination in cases governed by the RLTA is highly technical and often a source of mistakes made by landlords that

result in tenants not being evicted.

The Tenant was substantially prejudiced by the amendment, was denied the process set forth in ORS chapter 105 and was not given time to prepare a defense to the new basis for the claim because her request to postpone the trial was denied. The Tenant was substantially prejudiced by the amendment allowed the morning of trial, and denial of the motion to postpone, because her defense was severely impaired by the timing of the amendment.

B. ORS 105.135 – Second First Appearance Hearing

The Tenant's motion to postpone the trial should have been granted because the Amended Complaint was served on the Tenant the morning of trial. In that situation, the trial should have been canceled and the case set for a second First Appearance Hearing at least 7 days later.

C. The Motion to Postpone the Trial

The Tenant's motion to postpone the trial for good cause should have been granted because the amendment allowed the morning of trial interjected a new basis for relief.

V. <u>The Argument</u>

Residential evictions are a creature of statute, and the procedure is prescribed by ORS chapter 105. The process is swift with only a week or so to prepare.

A. The Eviction Procedure

The statute directs that when a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and possession is held by force, the person entitled to the premises may maintain in the county where the property is situated an action to recover the possession of the premises in the circuit court or before any justice of the peace of the county. ORS 105.110.

This is what the Landlord has done here. The Landlord filed an action to recover possession of the Premises.

Except as provided in ORS 105.130 and ORS 105.135, 105.137 and 105.140 to 105.161, an action pursuant to ORS 105.110 shall be conducted in all respects as other actions in courts of this state. ORS 105.130 (underline supplied). Said another way, the normal rules of court, including ORCP 23 A, apply except as modified by one of the enumerated statutes including ORS 105.135.

ORS 105.135 specifies is that service of the Summons and Complaint (which must include a copy of the notice relied on per ORS 105.124) must occur at least seven judicial days before the first appearance date (eight judicial days from the filing of the complaint), to give the defendant an adequate opportunity to consider the allegations and decide how to proceed before having to file an answer. See ORS 105.135 (2) and (3).

The statute requires that an amended complaint also be served at least seven

judicial days before the first appearance date as confirmed in *Balboa*, 351 Or. at 214, 263 P.3d 1011,1016 (2011), interpreting ORS 105.135, this Court reasoned that "What [ORS 105.135] does require is that an amended complaint be served at least seven judicial days before the first appearance date."

The eviction procedure requires this because when a landlord files a residential eviction, the matter is set for a First Appearance Hearing right away. The clerk enters the First Appearance Hearing date on the Summons. ORS 105.135 (2). That date must be seven days after the judicial day next following payment of filing fees unless no judge is available for the First Appearance Hearing at that time, in which case the clerk may extend the First Appearance Hearing date for up to seven additional days. Id.

By the end of the judicial day next following the payment of filing fees to start the eviction: (a) The clerk shall mail the Summons and Complaint by first class mail to the tenant at the premises, and (b) The process server shall serve the tenant with the Summons and Complaint at the premises. See ORS 105.135 (3).

In the case of premises to which the RLTA applies, the Summons shall inform the tenant of the procedures, rights and responsibilities of the parties as specified in ORS 105.137 (Effect of failure of party to appear at First Appearance Hearing). See ORS 105.135 (6).

If the tenant is unable to contest the notice and fails to appear at the First

Appearance Hearing, a default judgment is entered in favor of the landlord for restitution of the premises and for costs and disbursements but not for attorney fees. ORS 105.137 (1) (underline supplied). This procedure provides tenants with an incentive to not pursue defenses that may not be successful since the RLTA provides attorney fees to the prevailing party in a residential eviction pursuant to ORS 90.255.

However, if after reviewing the Complaint and attached Notice of Termination the tenant wishes to defend the claim, they must appear at the First Appearance Hearing. If both parties appear at the First Appearance Hearing, the court shall set the matter for trial as soon as practicable, unless advised by the parties the matter has settled. ORS 105.137 (6). Unless the landlord agrees, the trial shall be scheduled no later than 15 days from the date of the First Appearance Hearing. Id.

At the First Appearance Hearing, the court orders the tenant to file an Answer by 5:00 PM the same day as the First Appearance Hearing as prescribed in the Summons. ORS 105.113. Thereafter, attorney fees are at issue and the prevailing party at trial is normally entitled to the reasonable attorney fees incurred.

B. ORCP 23 A – The Motion for Leave to Amend

In evaluating whether a trial court abused its discretion in ruling on a motion

to amend, there are four relevant factors: (1) the proposed amendment's nature and its relationship to the existing pleadings; (2) the prejudice, if any, to the opposing party; (3) the timing of the proposed amendment; and (4) the colorable merit of the proposed amendment. *Safeport, Inc. v. Equipment Roundup & Mfg*., 184 Or.App. 690, 699, 60 P.3d 1076 (2002), rev. den., 335 Or. 255, 66 P.3d 1025 (2003).

Here, the amendment is related to the initial complaint in that the subject of the notice attached to the Complaint and the new notice are the same; that the Tenant's tenancy may terminate. However, the two notices are separate and distinct. The notices are based on separate statutes, were served at different times by different people, contain different deadlines and require different things to cure the breaches alleged in the notices. The addition of the new notice was substantially prejudicial to the Tenant particularly considering the timing. The Tenant had no time to prepare a defense to the new theory of the case and, according to ORS 105.135 and *Balboa*, the allowance of the amendment necessitated postponing the trial. Further, the new theory of the case does not have colorable merit based on the numerous defenses explained herein.

1. Separate and Distinct

In reviewing a denial of a motion to amend, the Court of Appeals considered an amendment that plead a different theory of liability than was contained in the initial pleading. *Ballard v. City of Albany*, 191 P.3d 679, 684, 221 Or. App. 630,

638 (Or. App., 2008). The Court of Appeals reasoned that the different theory of liability would have substantially changed the claim in a way that would have required different rebuttal evidence and that could have necessitated a postponement of trial. *Id*.

In another case, where a plaintiff's amendment interjected an entire new element of damage, substantial in its nature, without any advance notice whatsoever to his adversary, this Court held that the trial court committed prejudicial error permitting the same. *Wood v. Southern Pac. Co.*, 337 P.2d 779, 784, 216 Or. 61, 73 (Or., 1959).

Likewise, in *Newton v. Peay*, 196 Or. 76, 85, 245 P.2d 870, 874 (Or., 1952), this Court reasoned that it would have been error on the part of the court had it allowed the proposed amendment to the complaint that would have introduced an entirely new cause of suit, one very materially different from that alleged.

This Court reasoned that the trial court has "ample discretionary authority to allow amendments, provided the proffered amendment does not substantially change the cause of action or interject an entire new element of damage." *Cutsforth v. Kinzua Corp.*, 267 Or. 423, 433-34, 517 P.2d 640 (1973) (citation omitted).

This is so because a party is entitled to rely on the theory pleaded to frame the issues to be tried. *Navas v. City of Springfield*, 122 Or. App. 196, 201, 857 P.2d 867 (1993) (in absence of agreement of parties under ORCP 23 B to try case on

issues not raised in pleadings, trial court abused its discretion in allowing amendment of complaint on day of trial to include new theory of recovery).

2. The Amendment presented a Different Theory of Recovery

In this case, the amendment presented a new and different theory of the case, substantially changed the cause of action, interjected a new theory of the case and was the difference between winning and losing. The amendment interjected an entirely new basis for the Landlord's claim the morning of the trial and resulted in a judgment in favor of the Landlord on the new theory. The initial basis is the 72-Hour Notice. The new basis is the 30-day Notice.

The statutory form of Residential Eviction Complaint is in ORS 105.124. There are 13 reasons listed for which a landlord may be entitled to restitution and possession of a premises. ORS 105.124. There are boxes a landlord may check for each different basis as to why the landlord is entitled to possession. Each box is a different basis.

Possession may be based on any of the 13 reasons including a 72-Hour Notice of Termination for Nonpayment and a 30-day Notice of Termination for Cause, each a different basis as confirmed by the statutory form of complaint. See Id.

The two notice are entirely different reasons for the termination based on different statutes. The 72-Hour Notice is based on ORS 90.394. The 30-day

Notice is based on ORS 90.392.

Here, the 72-Hour Notice (ER-3) and the 30-day Notice (ER-1) are two separate basis and theories for the Landlord's claim of right to possession of the premises. The theories are authorized by different statutes. The separateness is evident from looking at the different statutes and the statutory form of complaint in ORS 105.124 as explained above.

The Amended Complaint substantially changed the cause of action and interjected an entirely new basis for the Landlord's claim by including a new termination notice. The Trial Court focused on overlap of the two notices (both notices included allegations of an unpaid security deposit) but failed to give due weight to the distinct legal issues each notice presented, including time and manner of service of the notice, and that the Landlord was presenting separate theories for recovery which each had different defenses requiring different evidence. Tr. 48, Ln 22-24.

Many FED cases are won or lost based on technical or legal deficiencies in the notice of termination or in the service of the notice. For example, a defendant may agree that rent was not paid as a notice demands but could still prevail because the notice was not properly served, was given too soon, or failed to contain some information required by statute. The fact that rent, or a security

deposit in this case, may, or may not, have been paid, can be immaterial, as it was here with respect to the 72-Hour Notice.

When the Landlord added the new basis for the claim and the new termination notice, it substantially changed the cause of action because the new notice presented distinct defenses not applicable to the initial notice. The defenses include statutory waiver of the right to evict and failure to serve the 30-day Notice as alleged, thereby not giving the Tenant the full 30 days required by statute.

3. Substantial Prejudice

The Tenant was substantially prejudiced by the amendment. She was denied the process set forth in ORS chapter 105 and was not given any time to prepare a defense to the new basis for the claim because her request to postpone the trial was denied. The Tenant suffered harm by allowing the amendment the morning of trial because she had a valid statutory defense to the new theory of the case that she failed to argue because of the extremely little time she had to prepare a defense to the new theory of the case.

i. Tenant Protections in ORS chapter 105

The RLTA and ORS chapter 105 are designed to give residential tenants certain protections by knowing what they are facing so they can make an informed decision about proceeding to trial. When a tenant files an answer and contests the claim based on the notice of termination of tenancy which is required to be

attached to the complaint, they become liable for landlord's attorney fees if they do not prevail. ORS 105.137.

When the trial court allows an amendment the morning of trial that substantially changes the basis for the claim, fails to cancel the trial and set the matter for a second First Appearance Hearing and denies a request to postpone the trial to prepare a defense, the trial court takes away those protections written into the statute.

If the Tenant had been given the time allotted by the statute to prepare her case, she would have successfully defended the 30-day Notice with the statutory waiver argument. She would have also attacked the merits of the notice, its legal effect and whether it was properly served. The 30-day Notice demanding payment of the security was waived by the Landlord's acceptance of rent for 3 or months in January, February, March and April 2017 knowing that the security deposit payments had not been paid since December 2016. As such, the Landlord waived the right to evict on that basis; failure to pay the security deposit. ORS 90.412.

If the Tenant had the time permitted by the statute, the Tenant could have had time to plan for the worst if she was less confident defending the 30-day Notice than the facially invalid 72-hour Notice. The notice added through the amendment did not contain the same obvious defects as did the 72-Hour Notice.

The 72-Hour Notice was facially defective. The Tenant did not subpoena

witnesses or prepare arguments related to attacking the merits of the 72-Hour Notice because it was unnecessary to defend the allegations in the Complaint. The Tenant was correct that the legal arguments attacking the 72-Hour Notice would be enough to prevail on that theory of the case.

It would unreasonable to spend a great amount of time briefing legal arguments, preparing for witness testimony, subpoenaing witnesses and preparing to defend theories of recovery that are not presented by the allegations in the pleadings. It would not be ethical to perform unnecessary work such as preparing to defend a theory that has not been pled. Attorneys would not even be able to recover these fees unless they guess right, and the unpled theory emerges. Otherwise, the work would likely be deemed unreasonable. This would have a chilling effect on residential tenants finding attorneys to represent them on a contingent basis which is how most tenants obtain counsel. It would also have a chilling effect on a tenant's ability to protect the rights afforded by the RLTA.

Had the Tenant been given reasonable notice of the new theory of the case, she would have prevailed. The Tenant had valid defenses to the 30-day Notice that she was not able to properly present to the Trial Court.

ii. Defenses to the 30-day Notice

Did the Landlord waive its right to proceed on the 30-day Notice when it served the 72-hour Notice for the same issue after the time to cure the defect in the 30-day Notice had passed and was not cured?

Here, the Landlord testified that the 30-day Notice was served on March 24. The notice states that that the security deposit must be paid by April 7 or the tenancy will terminate on April 30. When the Tenant failed to pay the security deposit by April 7 as required by the 30-day Notice, instead of proceeding on that notice, it served a new notice, the 72-hour Notice.

The 72-hour Notice also required the Tenant to pay the security deposit. The plain reading of the 72-hour Notice appears to give the Tenant an extension to pay the security deposit until April 27 thereby voiding the earlier 30-day Notice and April 7 deadline.

Because the 72-hour Notice gave the Tenant additional time to pay the security deposit, until April 27, the deadline in the 30-day Notice, and the notice itself, was waived by the service of the subsequent 72-hour Notice.

Although this issue was not argued, it is plain error where the Trial Court had the 72-hour Notice and 30-day Notice and was able to compare the two notices.

Did the Landlord Waive its Right to Terminate based on the Nonpayment of the Security Deposit by Accepting Rent for Four Months after the Security Deposit Payment was Past Due?

The RLTA contains a statutory waiver provision. Except as otherwise provided in ORS 90.412, a landlord waives the right to terminate a rental agreement for a particular violation of the rental agreement or of law if the

landlord, during three or more separate rental periods, accepts rent with knowledge of the violation by the tenant. ORS 90.412 (a)(2).

The last security deposit payment made was in December 2016. The Landlord was aware of this violation but continued to accept rent for January, February, March and April 2017.

The 30-day Notice confirms that rent was paid for January, February and March. (The notice complains that rent is not being paid in full at the beginning of the month but says, "…January was pd 1/27/17, Feb. pd …, March pd…."). The Landlord testified that rent for April 2017 was paid. Tr. 64, Ln 17-19. The 30-day Notice also confirms that the security deposit payments had not been paid.

Because the landlord accepted rent for three or more separate rental periods with knowledge of the violation related to the security deposit payments, it waived its right to terminate the Tenant's tenancy for that reason. The 30-day Notice is invalid because it has been waived pursuant to ORS 90.412.

Although this issue was not argued, it is plain error where the Trial Court had the 30-day Notice and was able to determine by reviewing the notice that the Tenant's rent payments had been accepted for at least 3 months during which time the security deposit had not been paid.

Was the 30-day Notice Properly Served?

The Landlord's testimony was that the 30-day Notice was mailed on Friday

March 24 at 3:16 PM by placing it in the mail slot at the main branch of the US Post Office. The envelope the Tenant received the notice in had a post mark of March 27.

If the notice was mailed after March 24, instead of on March 24, as the Landlord testified, the deadline to cure the defects and termination date would fall short of the 30-day period required to be given in the statute.

If the 30-day Notice was at issue, the Tenant would have subpoenaed the postmaster to explain the post mark. She would have inquired whether a letter deposited in the mail at the main branch of the post office in Bend at 3:16 PM on Friday March 24 would receive a post mark that day, on Saturday or be delayed three days until Monday March 27. Even a letter deposited after hours on a Friday would normally receive a Saturday postmark.

This is important because if the notice was deposited on Saturday or at anytime after Friday, March 24, the notice would not give the Tenant the full 30-days' notice required by ORS 90.392 and would be invalid.

Was the Cure Overstated in the 30-Day Notice?

The 30-day Notice says that rent must be paid in full in one installment instead of two installments as the Landlord had accepted for at least the past two rental periods as evidenced in the 30-day Notice ("…January was pd 1/27/17, Feb. pd $700 on 2/10 + $700 on 2/17, March pd $700 3/6 + $700 on 3/17."). The

Landlord testified rent was current, but it was being paid in multiple payments instead of a single lump. Tr. 69, Ln 1-5.

A such, The Landlord waived its right to evict the Tenant as stated in the notice by demanding payments be made in full in a single payment instead of two equal payments as had been accepted previously on three or more occasions. The 30-day Notice overstated what it would take to cure the defect and, therefore, the notice is invalid.

Did the Tenant have a basis for an Offset?

The Tenant testified about the deficiencies with the condition of the Premises and why she believed she was entitled to withhold the security deposit payments but was not able to properly prepare her defense related to this matter. The Tenant would have prepared photographs of the issues with the Premises and subpoenaed witnesses to explain the repairs that were required, the repairs that were made and how long she had to wait before certain repairs were completed.

The tenant would have also subpoenaed a witness that could testify about the diminished rental value which the Trial Court noted was missing from our case and necessary to show offset damages. Tr. 247, Ln. 6-9.

If the Tenant could prove she did not owe the Landlord the security deposit because she was due an offset, the notice would be invalid, and the Tenant's tenancy would not terminate.

4. The Timing of the Amendment

The Amended Complaint was allowed the morning of the trial. The Tenant did not receive the due process rights afforded by the statute to be served at least seven days before the First Appearance Hearing, was not able to prepare a defense to the new theory of the case and was not given time to prepare an answer, consider counterclaims that could offset the amounts alleged as owing and allege affirmative defenses. The Tenant was substantially prejudiced by the late submission as described above.

In *Ballard*, the Court of Appeals considered the timing of a request to amend. The court reasoned, "the timing of the request, with no offered explanation for the delay, also weighed against allowance of the amendment." *Id*. 221 Or. App. at 639.

In this case, the Landlord offered no explanation for the delay. Almost an entire month elapsed between the Landlord receiving the Tenant's answer on May 10, alleging the 72-hour Notice was defective, and the date of the trial, June 8, when the motion for leave to amend was made.

Where the party seeking the amendment has reasonable means of learning or has knowledge prior to trial of the circumstances which make it desirable for him to amend, a slight chance that the other party will be prejudiced will justify a refusal of the requested amendment. *Quirk v. Ross*, 476 P.2d 559, 561, 257 Or. 80,

83-4 (Or., 1970). Here, the Landlord was well aware of the 30-day Notice because she created it and served it on the Tenant. If the Landlord intended to rely on that notice, it should have been attached to the Complaint when the case was filed.

The trial courts are given broad discretion to allow or deny motions to amend, but the discretion is not without limits. Like this Court said in *Navas,* "A party is entitled to rely on the theory pleaded to frame the issues to be tried." *Navas*, 122 Or. App. at 201. In absence of agreement of parties under ORCP 23 B to try case on issues not raised in pleadings, a trial court abuses its discretion if it allows an amendment of a complaint on the day of trial to include new theory of recovery. *See id*.

The Tenant relied on the theory pled by the Landlord in the Complaint. The Trial Court should have sustained the Tenant's objection to the motion for leave to amend because the amendment included a new theory of the case that was not raised in the initial pleading. There was no agreement to try the issue of the 30-day Notice. The issue was permitted to be tried over lengthy objection and argument by the Tenant.

5. Conclusion

Because the amendment substantially prejudiced the Tenant, the motion for leave to amend was made the morning of trial, and the new theory did not have colorable merit based the defenses including the waiver defenses, the Tenant's

objection to the motion for leave to amend should have been sustained.

C. ORS 105.135 – Second First Appearance Hearing

Where a residential landlord is granted leave to amend a Residential Eviction Complaint less than 7 days prior to the First Appearance Hearing, the trial should be cancelled, and the matter set for a second First Appearance Hearing.

One reason for this rule is that the tenant has a right to know what the eviction is based on in order to make an informed choice about challenging the claim and to avoid the consequences of a ruling in favor of the landlord including attorney fees. The landlord is also required to allege the basis for the termination and attach a copy of the notice of termination which it relies on to the complaint. ORS 105.124. If after having reviewed the complaint and notice of termination a tenant does not wish to contest the issue, the landlord may get a default judgment but is not allowed attorney fees against the tenant. ORS 105.137 (3).

To effectuate this procedure, the law requires that as soon as the case is filed that the tenant get notice of the lawsuit by service of the summons and complaint within one judicial day of filing and that the First Appearance hearing be seven days from the date of service. ORS 105.135.

In *Balboa*, 351 Or. at 214, 263 P.3d at 1016, interpreting ORS 105.135, this Court reasoned that "What [ORS 105.135] does require is that an amended complaint be served at least seven judicial days before the first appearance date."

That did not happen in this case. The Amended Complaint was served after the First Appearance Hearing, on the morning of trial, and a new First Appearance Hearing was not set. The Tenant was forced to proceed to trial with almost no notice of the amendment and no time to reasonably prepare a defense.

The Tenant was prejudiced by the amendment because she was not able to prepare her defense and was not able to prepare for a loss since the 30-day Notice initially seemed to be a more viable claim than the 72-hour Notice. The Tenant was not able to evaluate the claim she was facing until the morning of trial leaving her no time to find another place to live.

Because the Amended Complaint was served less than 7 days before the First Appearance Hearing, the trial should have been cancelled and a second First Appearance Hearing should have been set at least 7 days later.

D. Motion to Postpone

Based on the Trial Court's allowance of the Amended Complaint the morning of trial which alleged a new theory of the case and included a new notice of termination that was not previously part of the case and the Tenant's counsel explained that the Tenant was not prepared to defend the new theory, the Tenant presented good cause for her request to postpone the trial. Tr. 11, Ln 8-9. The Tenant was substantially prejudiced by the denial of the motion to postpone. The motion to postpone for good cause should have been granted.

E. Public Policy

The consequence of the decision in this matter is important to the public because it would help level the playing field when it comes to residential landlords and tenants. Landlords would not be allowed to sidestep the statutory protections created for residential tenants by making amendments at the last minute to deprive tenants of time to prepare a defense.

The present case law is also inconsistent among Supreme Court cases because it is contrary to this Court's interpretation of ORS 105.135 in *Balboa*, 351 at 214.

The decision below is also inconsistent with the Court of Appeal's decision in *State v. Kindler*, 277 Or. App 242 (2016). That case stands for the proposition that a fair chance to review and respond the claims presented benefits the judiciary as well as the litigants. The opinion below has fiercely negative implications for future litigants whose opponents pile on late what was required much earlier.

This case is like *Kindler*, where defense counsel did not have time to prepare a defense. In *Kindler*, the Court of Appeals reasoned, "It is precisely because of the trial court's precipitous action in sua sponte directing a suppression hearing six days after the indictment was filed and on the same morning that defendant was arraigned that we can never know (at least on this record) what additional arguments and proof defense counsel might have developed if the court had

allowed a reasonable continuance consonant with defendant's constitutional rights to present a defense." *Id*. at 252.

Defense counsel in *Kindler*, explicitly informed the court that, with respect to the 403 case, "I am not prepared; I cannot provide constitutionally adequate representation to [defendant], and it would effectively deny him his right to counsel[.]" *Id*. at 252-3. The court found that, "Given that representation in the totality of these circumstances, defendant established prejudice from the denial of a continuance…." *Id*. at 253. The conviction was reversed. *Id.*

Similarly, here, the Tenant's counsel explicitly informed the court that, with respect to the 30-day Notice, "So we're certainly not prepared to defend that other notice." Tr. 11, Ln 8-9. The most promising defense to the new theory, waiver, was only discovered after the trial had concluded because there was no time to prepare.

The decision in this case would have a chilling effect on tenants wishing to vindicate their rights under the RLTA. The purpose of ORS 90.255 is to encourage litigants in landlord-tenant disputes to vindicate their statutory rights. *Barbara Parmenter Living Trust v. Lemon*, 345 Or 334, 348 (2008). The attorney fee provision is a mechanism used by the Legislature to assist tenants with finding an attorney to represent tenants on a contingent basis against usually sophisticated landlords. Attorneys review the pleadings and attached notice and decide to

represent tenants largely based on that review.

If landlords can remain silent at the First Appearance Hearing and Pre-Trial Conference and then appear the morning of trial and amend their complaints to allege an entirely new basis for recovery, it makes it less likely that an attorney would take a risk and represent a tenant even with an excellent defense because there is no certainty the alleged claim is the same claim the tenant would be facing at trial. The risk is that residential tenants will not be able to find attorneys to represent them, particularly rural tenants outside the Portland metropolitan area like in this case where the Tenant's counsel's office is in Portland and the Premises is in Deschutes County.

Further, it is not feasible or reasonable for a party to subpoena witnesses, prepare evidence, prepare legal briefs and prepare for trial on issues and or theories that have not been pled. Attorney fees incurred preparing for defending claims that have not been pled would likely not be recoverable. Litigants should be able to prepare their case based on the claims alleged in the pleadings and not be required to engage in speculation as to what claims might be pled or interjected at the last minute.

VI. Conclusion

The Tenant's objection to the motion for leave amend should have been sustained based on the substantial prejudice. The judgment should be vacated and

a judgment of dismissal in the Tenant's favor should be entered.

In the alternative, if the allowance of the motion for leave to amend is affirmed, the case should be remanded and set for a second First Appearance Hearing based on ORS 105.135 and *Balboa*. If the parties are not able to settle the matter at the First Appearance Hearing, the case should be set for a new trial so the Tenant can reasonably present her defenses to the 30-day Notice as explained above.

However, if it is decided that a second First Appearance Hearing is not required, the matter should simply be remanded for a new trial so the Tenant can reasonably present her defenses to the 30-day Notice as explained above.

Respectfully submitted July 3, 2019.

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CERTIFICATION 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) and (2) the word count of this brief (as described in ORAP 5.05 (2)(a)) is 7,870 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).

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July 2019

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I electronically filed the Petitioner's Brief on the Merits and Excerpt of Record with the Appellate Court Administrator, Appellate Courts Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on July 3, 2019 by filing it in the appellate court eFiling system under ORAP 1.35 (1).

I further certify that I directed the Petitioner's Brief on the Merits and Excerpt of Record to be served on the attorneys for Respondent on July 3, 2019, by email at the address below and by mailing two copies on said day, via the US Mail, with postage prepaid, in an envelope addressed to:

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