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

BRIEF OF RESPONDENT ON REVIEW C.O. HOMES, LLC

On review from the decision of the Court of Appeals on January 3, 2019 affirming without opinion the judgment of the Circuit Court for Deschutes County, Hon. Walter Miller.

Before: Armstrong, Presiding, Tookey, J. and Shorr, J.

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Brief of Respondent on Review – C.O. Homes, LLC

Statement of Issues on Review[1]

Question 1:

May a landlord amend its residential eviction complaint on the morning of trial to add a new notice of termination and basis for its claim for recovery, in light of the requirements of ORS 105.124(3) and ORS 105.135?

Proposed Rule of Law 1:

Just as in other civil proceedings, in landlord/tenant proceedings, ORCP 23 allows a court to grant a motion to amend on the morning of trial. ORS 105.124(3) then requires that any notice of termination relied on be attached to the amended complaint. The proceedings here complied with the ORS 105.124(3) requirement because, before the trial started, the amended complaint had attached both the 30 day and 72 Hour Notices of Termination relied on by landlord.

If a new "basis" for the "claim for recovery" were added, trial should be postponed at least 7 days to comply with ORS 105.135. Here, the landlord consistently relied on the same "basis" for its "claim for recovery"

[1] Note that Respondent states the Issues on Review verbatim as this court stated them in the Media Release of May 23, 2019.

– nonpayment of the security deposit. Therefore, no postponement was required under ORS 105.135.

As applied to this case, and grounded in this record, the amendment was proper and ORS 105.124(3) complied with because the applicable notices were both attached to the amended complaint prior to trial. In any event, landlord never changed its "basis for its claim for recovery". The "basis" for landlord's "claim for recovery" always was nonpayment of the security deposit. Because the tenant knew for months (i.e. as soon as she stopped paying the security deposit installments in January 2017 – five months prior to trial) that the "basis" for eviction was nonpayment of the security deposit, ORS 105.135's timing requirements were not violated and any postponement would have been futile.

ORCP 12 – liberal construction of pleadings and disregard of error or defect - also supports the outcome here where the only "amendment" was attachment of a second notice of eviction which tenant admitted receiving. Tenant's rights were not diminished by addition of the second notice of eviction.

Even if it were error to permit the amendment and to deny the motion to postpone, any error was harmless and not reversible. ORS 19.415(2).

Statement of Issues on Review

Question 2:

If a landlord is permitted to amend its residential eviction complaint to add a new basis for recovery on the morning of the trial, is it an abuse of discretion to deny a motion to postpone the trial for a reasonable time to prepare a defense to the new basis for recovery?

Proposed Rule of Law

Proposed Rule of Law 2:

If the amendment relied on added a new "basis for recovery" then the trial court should postpone the trial for 7 days to permit the tenant to prepare a defense. ORS 105.135(2) provides a 7 day window for a tenant to prepare a defense and if, but only if, the amendment changes the "basis for recovery", then a 7 day postponement is required.

As applied to this case, the failure to postpone the trial was not an abuse of discretion because the "basis for recovery" – i.e. failure to pay the security deposit – never changed. Postponement would have been futile. Tenant knew more than 7 days prior to trial (indeed at least 5 months prior to trial) that she was being evicted for her failure to pay the security deposit. She appeared at trial and adamantly, albeit unsuccessfully, defended the eviction claim. She was also allowed to amend her Answer to assert an affirmative defense. She testified extensively in support of her affirmative defense of "excuse" but did not convince the trier of

fact. Rather, the trial court found that her complaints about the condition of the rental unit were overstated and were contradicted by the photographs of her kitchen which the court repeatedly described as "filthy". Appendix A contains photographs (in evidence as trial exhibit 8) showing the current condition of tenant's kitchen including debris on the counter and in the sink and multiple dead flies. These photographs and the testimony provided by landlord led the trial court to question tenant's credibility. (Tr. 246-47)

Nature of the Proceeding and Relief Sought

The proceeding below was a Forcible Entry and Detainer ("FED") proceeding based on the tenant's failure to pay a security deposit. Landlord relaxed the normal requirement of lump sum payment of the security deposit because she felt sorry for tenant (tenant "was in a tough spot") and wanted to allow her to rent the house because "winter was coming". (Tr. 58) Tenant created a payment schedule to come up with the security deposit in installments. (Trial Ex. 1, p. 7, attached as Appendix B) Tenant made the last installment payment in December 2016. Thus, by the time of trial in June 2017, four installment payments were past due as was the "Pet Deposit" due May 20, 2017.

Landlord sought to evict the tenant for her failure to pay the security deposit. It is undisputed that, prior to trial on June 8, 2017, the landlord had provided two different statutory notices to the tenant – one, a 30-day "Notice of Termination

With Cause" dated March 24, 2017 (ER-1) and the second, a "72-Hour Notice of Nonpayment" dated April 24, 2017 (ER-3). Tenant admitted receiving both Notices.

Both parties appeared at trial with counsel. Tenant did not dispute the allegation that she had not paid the required security deposit, but she presented evidence of an affirmative defense – "excuse". The trial court ruled in favor of landlord and issued a judgment of eviction.

Tenant appealed to the court of appeals raising three assignments of error:

1. Challenging the trial court's allowance under ORCP 23 of the amended complaint;
2. Challenging the trial court's denial of the motion to postpone trial; and
3. Urging that the trial court had granted relief on an un-pleaded theory.

The court of appeals affirmed without opinion.

Before this court, tenant again challenges the ORCP 23 amendment which simply attached a second statutory notice to the complaint. Tenant also urges that it was an abuse of discretion not to postpone trial once the second notice was allowed to be attached to the complaint. Tenant argues "substantial prejudice" based on the failure to postpone. Tenant did not challenge the trial court's multiple findings below that tenant was neither surprised nor prejudiced by the amendment to landlord's complaint. (See pp. 10-13 below) That alleged error thus is not

preserved and it is "the law of the case" that the amendment did not result in surprise or prejudice to tenant.

Statement of Material Facts

This FED proceeding resulted in a judgment of eviction based on tenant's admitted failure to pay the required security deposit. (ER-7)

Notices of Termination

Landlord sent, and tenant received, two notices of termination for nonpayment of the security deposit. The first notice was a 30 day "Notice of Termination with Cause" dated March 24, 2017 inviting tenant to "pay security deposit to current $900.00 for Jan. Feb. & March". (ER-8) Tenant received this notice. (Tr. 126) The second notice was a "72-Hour Notice of Nonpayment and Landlord's Intention to Terminate Tenancy". (ER-3 – April 24, 2017 letter from plaintiff's counsel) That notice was posted at the residence and mailed. Tenant received the notice. The 72-Hour Notice referenced "4 months of unpaid security deposit payments at the monthly amount of $300." (ER-3) Tenant was given until April 27 to cure the default. (*Id*.)

Between the two Notices of Termination, tenant wrote a letter to landlord in which she listed her numerous complaints with the property and explaining her theories: that her November rent payment should be transformed into payment

toward her security deposit (Trial Ex. 3, p. 1; Appendix C, p. 1; April 5, 2017 letter); and that she should not have to pay rent for December 2016 "either". (Ex. 3, p. 3; Appendix C, p. 3)

Motions to Amend

Both parties relied on ORCP 23 to amend their pleadings. Landlord filed an appropriate motion to amend the complaint 2 days before trial. The motion was granted. (SER 1-11; Tr. 46) Defendant moved to amend her answer during trial to conform to the evidence of her affirmative defense to the claim of failure to pay the security deposit. (Tr. 138) According to the trial judge: "You just went through all this questioning your client about all the reasons why she didn't pay [the] deposit." (Tr. 141, lines 10-12) Therefore, the court granted defendant's motion to amend her Answer to include her excuse for not paying the deposit. (Tr. 153) The court noted:

> "And as I said earlier, it's my opinion that defense understood the deposit issue at the beginning and all the way up until trial that that was an issue potentially in this case, and it cuts both ways."
>
> "So although it was not included within the answer, there's been a motion to amend it. The testimony itself, I don't believe was of such a surprise and of such a nature that it would - - under the circumstances of this trial - - and how we got to where we're at, I don't believe it was an unfair motion and that's why I've permitted it in part."
>
> (Tr. 153, lines 1-11)

Early in the proceeding, the trial court recognized that the security deposit issue was not a surprise to tenant and that she suffered no prejudice by defending the landlord's claim. (Tr. 14, 15, 17) As further proof, the trial judge pointed out that defendant's trial memorandum recognized and addressed the issue for trial - failure to pay the security deposit. (Tr. 17, 19) The trial memorandum is attached as Appendix D. It repeatedly references the issue for trial – unpaid security deposit.

Tenant's counsel admitted that his client knew the issue for trial would be failure to pay the security deposit. The trial judge asked: "your client can't say she's surprised that they're saying she didn't pay security deposit." (Tr. 21, lines 4-5) Tenant's counsel: "We're not surprised about that, Your honor." * * *. We're certainly not surprised about that." (Tr. 21, lines 6-7 and 9-10)

Tenant's Defense to Nonpayment

Tenant argued that she appropriately withheld rent and the security deposit based on alleged deficiencies with the rental property. (Tr. 22) Tenant testified extensively about the alleged deficiencies. (Tr. 102-131) In part, because the trial court saw photographs of what it described as "filthy" conditions in tenant's kitchen, the trial court questioned her credibility on the alleged deficiencies and the significance of them as justification for withholding payments. (Tr. 246-47; Ex. 8; Appendix A) The court concluded: "But I will say that the evidence [of flies in

the sink and in a bowl] caused me to think about that as opposed to not think about it, that's what I'm going to say. It did - - I went an extra step because of what I saw in those photos, and considered the credibility of the defendant on her testimony * * *." (Tr. 246, line 25 to Tr. 247, line 4)

For the first time, on April 5, 2017, (after receiving the March 24, 2017 eviction notice) tenant informed the landlord that her rental payment for November 2016 should be transformed into a security deposit payment. (Tr. 120; Ex. 3 at Appendix C) She then came to trial and testified extensively about issues with the metal gate, the garage door, missing weather stripping, missing screens on a sliding door and a drip near the master bath toilet. (Tr. 102, 103) Although tenant testified she stopped paying in December 2016, it was not until April 5, 2017 that she wrote the landlord listing her grievances. (Ex. 3; Appendix C)

The trial court considered, but rejected, tenant's evidence that she should not have to pay a security deposit due to the alleged deficiencies in the unit. "So because I don't find the defense adequate enough to withstand the failure to pay security deposit as a basis of - - as a material breach of the agreement, and as a basis for the termination for cause, then [landlord] is entitled to possession." (Tr. 259, line 24 to Tr. 260, line 3)

Requests for Postponement

Both parties requested that the trial court postpone trial. (Tr. 45 – landlord's request; Tr. 53 – tenant's request). The trial court declined to postpone but limited the issues for trial to the nonpayment of the security deposit (Tr. 47) because failure to pay the security deposit has always been the issue and was presented in both notices:

> "I'm not postponing the case. * * *. I'm looking at your answer, affirmative defenses, and counterclaim, and at paragraph 4, it says, 'Defendants deny all allegations not specifically admitted herein.' That means, as I read it, you were also denying all the allegations in the April 24 letter. The April 24 letter talks about deposits. Your client denied those allegations. I assume your client's prepared to defend against those allegations today because she denied them."
>
> "But you can't say that you're surprised about deposit allegations. And if you say to me that you were prepared to only come forward on a notice argument, then you did that at your own peril because the Court might not have ruled in your favor on a purely notice issue, at which point you would have had to proceed and defend against the deposit allegations, the same allegations that your client denies in her answer. So there's no surprise on that."

(Tr. 53, line 15 to Tr. 54, line 9)

Trial Court Findings of No Surprise and No Prejudice

Tenant's counsel argued that the ORCP 23 amendment should be denied because of "severe prejudice". (Tr. 30) The trial court challenged counsel's argument: "Let's be blunt. You didn't have notice that he was going to be arguing

about a notice that he says you client knew about[?] That's what your argument is[?]) (Tr. 31, line 24 to Tr. 32, line 2)

The trial court repeatedly found that tenant suffered no unfair surprise and no prejudice by the ruling allowing landlord's motion to amend to include both Notices.

(Tr. 15: "So the allegations, the factual allegations have not changed.")

(Tr. 17: "What they're saying is security deposit, and that's not rent. You noticed the distinction, you wrote a trial memorandum on this.")

(Tr. 18: The notices allege "failure to pay security deposit. * * * that hasn't changed.")

(Tr. 20: "And so your client can't sit her today and say she didn't realize they were still arguing about a failure to - - alleged failure to pay security deposit.")

(Tr. 21: "You just follow the ball back, at the end of the day your client can't say she's surprised that they're saying she didn't pay security deposit.")

(Tr. 21: "But the fact pattern that they claim is the basis for all of these notices hasn't changed at all.")

(Tr. 25: "Frankly, you're not surprised by the allegations, you seem to be talking about the deposit issue * * * you don't seem surprised by these things, and nor does the Court find a reason to agree that you would be, because again, your

client knew that the argument was a failure to pay deposits, timely deposits. It was stated in the letter, it's been consistent throughout both these documents.")

(Tr. 26: "So to say that you come and you're not prepared to address the merits if you lost on the notice issue makes no sense to me.")

(Tr. 50: "The only claim - - I'm not saying anybody's won yet, I'm saying the only claims or claim that I'm allowing plaintiff to move forward on is a claim related to a failure to pay security deposit, which is what the April 24 letter says.")

(Tr. 52: "The only other thing I'm doing, unrelated to whether I allowed the complaint is, is to say the issues at trial will be confined to * * * whether or not there's been a failure to pay security deposit, which is what your client knew about in the original complaint, based on the allegations contained in the April 24 letter. So, there's no surprise there, and I'm allowing that argument to be made.")

(Tr. 53: "I'm not postponing the case. * * *. Your client denied those allegations [concerning unpaid deposits]. I assume your client's prepared to defend against those allegations today because she denied them.")

(Tr. 134-35 – trial court comment following tenant's testimony on alleged deficiencies: "I want to ask you a question as an officer of the Court, I'm going to make an observation, and it's a pretty straightforward question." "The questions that you asked your client on the stand in defense of these claims seem to be thoughtful, prepared, you had exhibits ready, you seem to be referring to

documents as if you were prepared to put on this defense. Is that a fair assessment?")

(Tr. 135 - The court noted tenant and her counsel were prepared to defend on "this whole deposit issue.")

(Tr. 136: "And as I said, it seemed like that was a prepared defense, that's what you and your client had discussed, and it's - - I got the impression that this wasn't spur of the moment and based on some surprise, that this was in fact the defense.")

(Tr. 137: "The reason I say that is, is that it seems like that's something that was all - - none of that was - - it did not look to me as though that that was put together last minute on a surprise basis.")

(Tr. 139: "[I] did allow the deposit claim to go forward, because that's been consistent throughout.")

(Tr. 141: "You just went through all this questioning your client about all the reasons why she didn't pay [the] deposit.")

(Tr. 153: "defense understood the deposit issue at the beginning and all the way up until trial that that was an issue potentially in this case".)

Trial court ruling

The parties argued and the trial court recognized that the only issue for decision was who is entitled to possession. (Tr. 227-28)

The court considered, but appropriately rejected, tenant's defenses based on the conditions of the rental unit. In part, the court was influenced by the photographs in Exhibit 8, attached as Appendix A. The court commented: "The filthy - - I'm just going to say it - - the pictures indicate - - there's testimony that these pictures, there's before and after, I'm going to call them before and after. * * *. First of all, I'll go out on a limb here, I'm not trying to be derogatory, but I didn't create this, I'm looking at the evidence. It's filthy. It just is. It's a filthy countertop, it's absolutely filthy to see - - I could count the number of flies in the stagnant water in a bowl in the sink. Not saying I know why they got there, maybe it's lack of screen, I don't know. But it's filthy and it's filthy on the fridge, and I see all that." (Tr. 244, line 24 to Tr. 245, line 16)

The court also questioned tenant's credibility on the extent to which the alleged deficiencies troubled her. (Tr. 246-47)

Based on its review of the evidence, the trial court ruled in favor of landlord and ordered tenant evicted.

Tenant's Appeal to Court of Appeals

Tenant raised three assignments of error below. First, tenant challenged the trial court ruling allowing landlord's motion to amend to add the second notice of eviction. Second, tenant challenged the trial court refusal to postpone trial. Finally, tenant urged that the judgment was based on an un-pleaded theory.

Tenant asserts in this court only the ORCP 23 motion to amend and motion to postpone trial. Tenant's brief recognized that the standard of review for both the motion to amend and motion to postpone is "abuse of discretion." (App. Brief, pp. 10, 23)

The court of appeals affirmed without opinion.

Summary of the Argument

Tenant's appeal to this court asks the court to relieve her of the serious consequences of her decision in January 2017 to stop paying required installments on her security deposit. This court should decline the invitation.

Tenants have both rights and responsibilities. Here, tenant chose to avoid her responsibility to pay the security deposit. The natural consequence of that choice is that she became vulnerable in January 2017 to eviction proceedings. Although she chose to stop paying in January 2017, it was not until April, after she received the first of two eviction notices that she informed landlord of the basis for her nonpayment. In January, February and March, she simply chose repeatedly not to make the required installment payments. There is nothing in this record to justify this court's intervention on tenant's behalf and no basis for protecting this specific tenant's rights. The statutory scheme for landlord/tenant proceedings protects tenant rights but also imposes tenant responsibilities.

The statement of the issues on review contains a factual predicate that is not accurate on this record. In both statements, the premise is that landlord changed the "basis for its claim for recovery" which it did not. The "basis," the "claim" and the theory of recovery always was nonpayment of a required security deposit. It never changed and tenant was neither surprised nor prejudiced by the amendment. The trial court properly allowed the amended complaint under ORCP 23(either "A" or "B") because the amendment did not change "the basis for recovery" and the tenant was not prejudiced by being required to defend the claim that she had not paid the security deposit. Indeed, tenant admitted she had not paid but presented testimony about her "excuse" for nonpayment.

Attachment of the second notice of termination was justified under ORCP 23B to conform to the evidence because the notice was admitted into evidence over objection and no challenge was ever raised to that evidentiary ruling. Attachment of the second notice was also justified under ORCP 12 to promote "substantial justice" and because the attachment did not affect the "substantial rights" of tenant.

Attaching both notices of termination to the amended complaint meant that ORS 105.124(3) was satisfied. Nothing in ORS 105.135 required postponement at that point where tenant had notice for months prior to trial that she would be called to answer the allegation of nonpayment of the security deposit. Her counsel

admitted there was no surprise in having to defend the claim based on nonpayment of the security deposit.

Tenant appeared with counsel and defended against the eviction but the trial court simply agreed with landlord and rejected the factual basis for tenant's arguments while questioning her credibility.

Even if the trial court erred in allowing the amendment and/or in not postponing trial, the alleged error was harmless and not a basis for reversal. ORS 19.415(2). Tenant knew in January 2017 that her decision to stop paying the security deposit installments exposed her to eviction – which is the consequence of her decision. There is no error for this court to correct.

Argument

1. ***May a landlord amend its residential eviction complaint on the morning of trial to add a new notice of termination and basis for its claim for recovery, in light of the requirements of ORS 105.124(3) and ORS 105.135***?

Caveat

The statement of the issue presumes two operative facts, only one of which is true. Landlord added "a new notice of termination" as an exhibit to its complaint when it filed the motion to amend two days prior to trial. However, landlord did not add a new "basis for its claim of recovery". Landlord always

relied on tenant's admitted failure to pay the security deposit as the "basis for its claim of recovery." Tenant knew in late March 2017 that she would be evicted if she did not pay the deposit. She decided in January 2017 to stop paying. At trial in June 2017 therefore, it came as no surprise that the landlord's "claim," "basis" and theory of recovery was nonpayment of the security deposit. Therefore tenant suffered no prejudice by the discretionary ruling denying a 7 day postponement of trial. No delay was justified on these facts.

This court's statement of the issue on review must be broken into two parts because there was an amendment to the complaint adding a new notice of termination but there was not a change in the "basis for its claim for recovery". By being precise as to this two-part question, resolution becomes clear – at least as to the facts of **this case.** This is not the type of case where a party completely changed their basis for recovery right before trial.

Compliance with ORS 105.124(3)

In addressing this first legal question, the court is analyzing the interplay between the mandatory language in ORS 105.124 (3) ("A copy of the notice relied upon, if any, must be attached to the complaint") and the specification in ORS 105.135(2) that the first appearance be scheduled "seven days after the judicial day next following payment of filing fees".

Landlord's motion to amend (filed 2 days before trial) attached the "Amended Complaint" (checking the boxes for eviction based on both the 72-hour and 30-day notices) and attached both notices. Thus, the requirements of ORS 105.124(3) were satisfied prior to trial. (SER-1-11 – setting forth the referenced documents)

This court has never interpreted ORS 105.124(3) but the court of appeals did in *Hill v. Evans*, 239 Or App 233, 244 P3d 822 (2010). There, the court of appeals relied on the plain language and held that attaching a copy of the notice was mandatory and reversed a judgment of the trial court based on plaintiff's failure to attach the notice. In a footnote, the court of appeals acknowledged that, a properly amended subsequent filing could have cured the defect. *Hill v. Evans*, 239 Or App at 238, fn 1. That is what occurred here - the amended complaint properly attached both notices relied on by landlord. Thus, there is no violation of ORS 105.124(3) for this court to address. By the time of trial, the relevant complaint attached both the notices of termination for nonpayment of the security deposit.

Compliance with Purpose of ORS 105.135

Tenant knew well prior to trial that her failure to pay the security deposit was the basis for the eviction proceeding. She last made a payment in December 2016 and trial occurred in June 2017. Her trial counsel repeatedly admitted there was no surprise that the issue for trial was the nonpayment of the security deposit.

(Tenant's counsel: "We're not surprised about that, Your honor." * * *. We're certainly not surprised about that." Tr. 21, lines 6-7 and 9-10) Tenant prepared for and defended the eviction proceeding. Her defense was that, due to the allegedly unacceptable conditions of the rental unit, her rent payment for November should be transformed into payment of a security deposit. The trial court rejected her defense, suggesting she was not credible. (Tr. 246-47) In part, the trial court was persuaded by the photographs of tenant's "filthy" unit. (Ex. 8; Appendix A)

No purpose would have been served by delaying trial another 7 days and ORS 105.135 should be interpreted on these facts as not requiring a futile exercise.

ORCP 23

A trial court's allowance of a motion to amend under ORCP 23 is reviewed for abuse of discretion and, as tenant noted in her brief to the court of appeals, "abuse of discretion" has been defined by this court to mean an action which "exceeds the bounds of reason" or which is "clearly against reason and evidence." *Casciato v. Oregon Liquor Control Commission*, 181 Or 707, 717, 185 P2d 246 (1947). See also *J.D. v. Klapatch*, 275 Or App 992, 997, 365 P3d 1169 (2015)(citing *Casciato*: "the Oregon Supreme Court has considered whether discretion is exercised 'to an end or purpose not justified by, and clearly against, reason and evidence.")

Here, the trial court properly granted the motion to amend. It did not act against reason or the evidence. In fact, the court relied on the admission by tenant's counsel that tenant was not surprised she would have to defend her admitted failure to pay the security deposit. Allowance of the motion to amend should be affirmed by this court as it was by the court of appeals.

The amendment approved by the trial judge in this case is authorized under ORCP 23 as either a pre-trial amendment without prejudice to tenant or as an amendment to conform to the evidence. Amendments under ORCP 23 are permitted so long as "the amendment does not substantially change the cause of action and when the evidence on which the amendment is based was received without objection." *Engelcke v. Stoehsler*, 273 Or 937, 944, 544 P2d 582 (1975) The policy of this court is that such amendments are to be liberally allowed. *Engelcke*, 273 Or at 944-45; *Quirk v. Ross*, 257 Or 80, 83, 476 P2d 559 (1970)

The record contains extensive discussion between tenant's counsel and the court about the fact that the notice sought to be attached could easily be introduced into evidence - whether or not it was ultimately attached to a pleading. (Tr. 6-11) The trial court explicitly recognized that what landlord was seeking was an amendment to conform to the evidence. (Tr. 11: "The motion to amend is essentially to - - well, one argument is, is that it conforms to the evidence and that there would be no dispute - - [landlord's counsel] doesn't anticipate a dispute that

the notice he wants to add to his complaint now was sent and received, so as a matter of fact, he would argue and says he's going to argue and present evidence that your client received the notice, the termination for cause, and if that's reality, and he's asking the Court to allow an amendment that conforms to that evidence, why wouldn't that be allowed?")

Tenant's counsel acknowledged that it would conform to the evidence if the document were received into evidence. (Tr. 11, lines 23-25) The document – the 30 day notice of termination with cause dated March 24, 2017 – was received into evidence over tenant's objection. (Ex. 2; Tr. 63) Tenant never challenged that evidentiary ruling in the court of appeals or here.

Tenant cites and relies extensively on *Ballard v. City of Albany*, 221 Or App 630, 191 P3d 679 (2008) in urging that the trial court abused its discretion in permitting the amendment to plaintiff's complaint under ORCP 23. *Ballard* is readily distinguished. In *Ballard*, the proposed amendment added a "different theory of liability" that "would have substantially changed the claim in a way that would have required different rebuttal evidence". The proposed addition would have charged Oregon State Police with controlling City of Albany police during the arrest of plaintiff and the ensuing battery. In *Ballard*, the original complaint had been pending for quite some time based on an incident that occurred in 1998. Depositions and discovery had ensued. Thus, the court of appeals concluded that a

motion to amend on the morning of trial in March 2005 was untimely and there had been "no offered explanation for the delay." 221 Or App at 638-39.

Here, landlord's "basis for its claim for recovery" never changed. The "basis" was always tenant's failure to pay her security deposit. The only thing that changed was the reliance on both notices of termination – one, a 72-Hour notice and, the other, a 30-day Notice. The 72-Hour notice shared common characteristics with the "amended notice" – in that both notices referenced the failure to pay the security deposit as the basis for eviction. The trial court explicitly found that the original complaint had attached the April 24, 2017 letter from landlord's counsel (Tr. 37) and that letter recited as one basis for termination of the tenancy the failure to pay a security deposit. (ER-8, p. 2)("the past due amount represents 4 months of unpaid security deposit payments at the monthly amount of $300.") The 30-day notice dated March 24, 2017 and received by tenant similarly referenced unpaid security deposit which could be cured by "pay[ing] security deposit to current $900 for Jan. Feb. & March". (ER-8, p. 3)

Amendment was appropriately allowed because this is not a case where the "basis" for recovery changed or a new element of damage introduced. *Blanton v. Union P.R. Co.*, 289 Or 617, 627-628, 616 P2d 477 (1980)(Approving amendment to complaint to add claim for herniated disc because the addition did not "substantially" change the cause of action or inject a new element of damage.)

Here, the cause of action – eviction for nonpayment of a security deposit – never changed so amendment was properly allowed. Both the "basis" of recovery and the remedy remained the same – nonpayment of the security deposit justifying eviction.

Amendments are to be "liberally allowed" and will not be disturbed on appeal unless "discretion was clearly abused to the material injury of some substantial right of a party." *Morrill v. Rountree*, 242 Or 320, 324-25, 408 P2d 932 (1965) Here, the amendment was proper and there was no injury to tenant's rights.

Tenant relies on a sentence from *Balboa Apts. v. Patrick*, 351 Or 205, 263 P3d 1011 (2011) taken out of context. *Balboa Apts*. stands for the proposition that failure to strictly comply with ORS 105.135 does not justify dismissal. Rather, the goal of ORS 105.135 is to give an "adequate opportunity to prepare." 351 Or at 213. The issue was "the consequence of plaintiff failing to serve defendant within the one-day requirement set out in ORS 105.135(3)(b)." *Balboa*, 351 Or at 211. This court asked: "what consequence, if any, attends the fact that plaintiff did not serve the summons and amended complaint within one judicial day of paying the filing fee." *Balboa*, 351 Or at 213. The sentence relied on by tenant is not the holding of *Balboa* and merely recites a portion of ORS 105.135.

The factual context of this case illustrates that the policy behind ORS 105.135 – adequate notice to tenant of the issues for trial and "adequate opportunity to prepare" – was served where tenant had months to prepare to defend her intentional nonpayment of the security deposit. No rational purpose and no public policy would have been served by delaying trial another 7 days. The trial court decision to deny motions for postponement was discretionary and, as noted below, even if erroneous, the error was harmless on these facts and should not be reversed.

Tenant argued surprise and prejudice at trial and repeats its argument before this court based on "substantial prejudice". However, as is amply demonstrated above, the trial court explicitly found there was no surprise and no prejudice in having to defend the claim of nonpayment of a security deposit. Tenant did not challenge that finding in the court of appeals and therefore, it is "the law of the case" that the amendment did not prejudice tenant. The record supports that conclusion because tenant appeared and defended, relying on her theory of "excuse" for nonpayment of the security deposit based on the condition of the rental unit.

Factually, the trial court rejected her defense of "excuse" and, instead, made findings that the condition of tenant's unit while she occupied it was "filthy". The trial court repeated that finding numerous times and simultaneously questioned

tenant's credibility. (Tr. 246-47) The trial court suggested tenant may not have been as upset about the conditions of the rental unit where she maintained it in a "filthy" condition. (Tr. 246-47: "does that somehow mean they're really getting too alarmed over these other issues?) Trial court findings on credibility – explicit and implicit - are binding on the appellate courts. *Fay and Fay*, 251 Or App 430, 439, 283 P3d 945 (2012)

The only issue presented on this record is whether the amended complaint adding the notice of termination should have resulted in a postponement of the trial. It is not true on this record that landlord changed "the basis for its claim for recovery". With the original complaint and the amended complaint landlord always based its "claim for recovery" on nonpayment of the security deposit. At ER-3, the April 24, 2017 letter from landlord's counsel to tenant explains the "basis for its claim for recovery" is "unpaid security deposit payments at the monthly amount of $300." The 30-day notice similarly described tenant's default as: "Failure to pay security deposit as per agreement of $300 by 20th of each month". (ER-8)

Tenant admitted not being surprised that nonpayment of the security deposit was the issue for trial on June 8, 2017. (Tr. 21) Tenant's trial memorandum recognized that the April 24, 2017 notice based eviction on tenant's failure to pay the security deposit. (Defendants' Trial Memorandum at p. 2; Appendix D, p. 2)

As noted above, the requirements of ORS 105.124(3) were met prior to trial and no postponement was warranted where tenant knew at least 5 months prior to trial that she would be required to defend her choice to stop making payments on the security deposit. She appeared at trial and defended based on a theory of "excuse" – targeting the alleged poor conditions of the rental unit. The judge heard her evidence but rejected the defense. No purpose would have been served in delaying the trial and ORS 105.135 does not mandate a futile exercise.

As this court noted in *Lexton-Ancira, Inc. v. Kay*, 269 Or 1, 5-6, 522 P2d 875 (1974), an "FED proceeding is a special statutory proceeding of a summary nature designed to secure the speedy restitution of premises forcibly or unlawfully detained." That policy was best served here by the allowance of both amendments – to the complaint and to the answer – and by denial of the futile postponement.

As discussed below, landlord relies on an "as applied" argument as well as a "harmless error" theory in this case. The trial court and court of appeals should be affirmed.

Argument on Question 2

2. If a landlord is permitted to amend its residential eviction complaint to add a new basis for recovery on the morning of the trial, is it an abuse of discretion to deny a motion to postpone the trial for a reasonable time to prepare a defense to the new basis for recovery?

Landlord offers two responses to the Question. First, as with Question 1, the factual premise of the Question is not accurate on this record. Landlord did not "add a new basis for recovery" but rather added a document which was introduced into evidence as Exhibit 2. The "basis for recovery" always was tenant's admitted failure to pay her security deposit.

Second, the abuse of discretion standard is a high bar. This trial judge did not abuse discretion because he acted rationally based on both reason and evidence that tenant knew of her need to defend against the claim of failure to pay. She admitted her failure to pay but provided testimony to support her affirmative defense of "excuse" based on rental unit conditions.

As tenant notes in her brief, the landlord/tenant cases are creatures of statute and, the "process is swift with only a week or so to prepare." (Petitioner's Br., p. 11) Notably, at the First Appearance Hearing, a tenant is given only until 5 p.m. on the same day to file an answer. (ORS 105.113) Tenant argues that ORS 105.135 requires that tenant have at least seven days to "consider the allegations and decide how to proceed". (Pet. Br., p. 12) Here, that statutory standard was met. Tenant was served with a complaint and she filed her answer denying the allegations of the complaint (including the allegation that she had not paid a security deposit). Tenant had more than seven days to consider the allegations and decide how to proceed. Her decision, in consultation with her attorney, was to

appear and defend based on an "excuse" for nonpayment of the security deposit. She also raised a procedural challenge to the 72-Hour notice.

Tenant's brief fails to discuss the fact that there were two successful motions to amend. Landlord's motion simply attached a second document – a 30 day notice which tenant admitted receiving months before trial. Tenant was also granted leave to amend her answer to assert an affirmative defense based on "excuse". (Tr. 153)

Both motions to amend were subject to the discretionary power granted trial judges. There was no abuse of discretion and no basis for reversal.

"As applied"

Although tenant argues that this case creates unfortunate precedent in landlord/tenant cases, it actually is not precedent for anything. There is no opinion from the court of appeals. The facts of this case are unique and really present no important rule of law that could be applied more widely. Landlord thus raises an "as applied" argument that this court should consider.

In the normal landlord-tenant case, ORS 105.124(3) means what it says and the applicable notice should be attached. The trial court's order on landlord's motion to amend meant that both applicable notices of termination were attached to the amended complaint prior to trial. It was not an abuse of discretion to grant

leave to amend prior to trial and therefore this court should affirm. ORS 105.124(3) was fully complied with.

ORS 105.135 also states the desired gap of time for tenant to prepare a defense. As applied to this case, there was no abuse of discretion because landlord did not change its "basis for its claim of recovery" and simply relied on an additional notice of termination which tenant received months prior to trial. Tenant was not surprised by the landlord's "claim," its "basis for recovery" or its theory. (Tr. 21 – her counsel's admission of no surprise). Tenant testified and presented her defense of "excuse" but she simply was unconvincing. In part, the trial judge's ruling relied on the "filthy" conditions of tenant's unit and his explicit and implicit questioning of tenant's credibility.

In the statutory scheme that outlines landlord/tenant rights and liabilities and that provides procedural safeguards, this case is an outlier and provides poor ground for this court's efforts to interpret the statutory scheme. This court should dismiss review or should affirm the trial court and court of appeals.

Harmless Error

This court should affirm because any error, even if it occurred, was harmless where tenant admitted: she was obligated to pay the security deposit; she had not paid the required installments since December 2016; and knew that the June 2017 trial was focused on her failure to pay the security deposit. She was not surprised,

she was prepared to, and did present, her defense of "excuse". She just did not convince the trier of fact – the judge.

"No judgment shall be reversed or modified except for error substantially affecting the rights of a party." ORS 19.415(2). This court applies that standard and thus will not reverse a judgment if there is no showing of harm. *State v. Sperou*, 365 Or 121, __ P3d __ (2019); *Purdy v. Deere & Co*., 355 Or 204, 225, 324 P3d 455 (2014). To require reversal, "an error must – in an important or essential manner – have materially or detrimentally influenced a party's rights; it is insufficient to speculate that the error might have changed the outcome in the case." *Purdy*, 355 Or at 225. Further, the "burden is on the party asserting error to demonstrate that the error had the required prejudicial effect." *Id*.

Here, tenant argues substantial prejudice but the trial court explicitly and repeatedly found there was no prejudice to her ability to defend the claim. That finding was not appealed to the court of appeals and is therefore dispositive of tenant's argument. Tenant did not carry her burden of demonstrating the prejudicial impact of any alleged error.

In *Purdy*, this court cited and discussed *Baker v. English*, 324 Or 585, 932 P2d 57 (1997), *Purdy*, 335 Or at 214-15. *Baker* provides persuasive authority for affirming the trial court judgment in this matter because even if the trial court erred, the error was harmless where tenant knew the basis for the landlord's claim

of recovery and adamantly, albeit unsuccessfully, defended against the claim. In *Baker*, this court interpreted ORS 19.125(2), now ORS 19.415(2) and held that an erroneous discovery ruling did not constitute reversible error because the requirement of error "substantially affecting the rights of a party" had not been met. The trial court denied a defense discovery request and defendant challenged the ruling on appeal. This court held that, because defendant had "information qualitatively indistinguishable from that contained" in the records, the erroneous discovery ruling did not substantially affect defendant's rights. *Baker*, 324 Or at 596.

The same is true here. Tenant knew in January 2017, well before trial on June 8, 2017, that her failure to pay her security deposit was likely to result in her eviction. She stopped making the required installment payment in January 2017 – months before coming to court to defend the eviction. She appeared at trial with counsel and defended on the basis of "excuse". For example, she testified concerning alleged deficiencies in the dwelling and, in a pre-trial communication to landlord, listed her grievances and suggested she should not have to pay rent for November or for December and that her payment should be applied to her security deposit. (Appendix C; Trial Ex. 3 – Tenant's April 5, 2017 letter.) Tenant's grievances detailed in the letter included mouse droppings in the kitchen, a kitchen faucet replacement, a "small leak" near the toilet, cable connections, the mailbox,

the gate and the garage door. Tenant also complained about having to replace a light bulb and the amount of her "power bills".

Tenant testified extensively at trial and landlord's witness countered with detail regarding the efforts to remedy the issues. Landlord also supplied photographs of the current conditions which the trial judge described as "filthy". (Trial Ex. 8, attached as Appendix A)

Tenant knew when she made the decision in January 2017 to stop making required installments on the security deposit that she risked eviction. She received notices to that effect in March and April. She alerted landlord in early April 2017 that she intended to defend her nonpayment based on alleged unacceptable conditions of the unit. She filed an Answer to landlord's complaint on June 1, 2017, appeared at trial on June 8 with her counsel, and testified extensively about the allegedly unacceptable conditions of the rental unit.

Both the motion to amend and motions to postpone are within the trial court's discretion. Even if the discretion had been abused, the case should be affirmed because the error, if any, was harmless.

Attorney Fees

Tenant seeks recovery of attorney fees at trial, on appeal and on review. (Pet. Br., p. 5) However, landlord prevailed at trial and on appeal so there is no

basis for an award in favor of tenant. ORS 90.255 allows attorney fees to the "prevailing party". Landlord should also prevail on review as noted above.

Landlord seeks an award of attorney fees on review. ORS 90.255; ORS 19.440.

Conclusion

Review should be dismissed. In the alternative, the decisions of the trial court and the court of appeals should be affirmed.

Respectfully submitted this 29th day of July 2019

/s/ Helen C. Tompkins

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CERTIFICATE OF COMPLIANCE

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 **7910** words.

I certify that the size of 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 Helen C. Tompkins_____
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Certificate of Service

I hereby certify that on this date I served the foregoing BRIEF OF RESPONDENT ON REVIEW on counsel for Petitioner on Review by notification via the eFiling system:

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and on trial counsel for Respondent on Review:

Alan N. Stewart
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I hereby certify that on this date I filed the foregoing BRIEF OF RESPONDENT ON REVIEW by eFiling, addressed as follows:

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

Dated this 29th day of JULY 2019

_/s/ Helen C. Tompkins_____
Helen C. Tompkins, OSB # 872100
Attorney for Respondent on Review

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2017, I served the foregoing Defendants' Trial Memorandum and Certificate of Service case number **17LT06237** on:

Plaintiff's attorney:
Alan Stewart
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by emailing and mailing, postage prepaid, a true and exact copy thereof, certified by me as such, to the address listed above on said day.

The Law Office of Geoffrey B. Silverman, LLC

s/ Geoffrey B. Silverman

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