

IN THE SUPREME COURT OF THE STATE OF OREGON

MARK STRAWN, on his own behalf
and as representative of a class of
similarly situated persons,

Petitioner on Review,
Respondent on Review,

v.

FARMERS INSURANCE
COMPANY OF OREGON, an Oregon
stock insurance company; MID-
CENTURY INSURANCE
COMPANY, a foreign corporation;
and TRUCK INSURANCE
EXCHANGE, a foreign corporation,

Respondents on Review,
Petitioners on Review,

and

FARMERS INSURANCE GROUP
INC., a foreign corporation,

Defendant.

Supreme Court
No. S057520 (Control),
No. S057629

Court of Appeals
No. A131605

Multnomah County Circuit Court
No. 9908-09080

RESPONSE TO PETITION FOR RECONSIDERATION

On Review of the Decision of the Court of Appeals
May 20, 2009; Opinion by Sercombe, J.
Edmonds, P.J., and Wollheim, J.

In an appeal from the Judgment and Supplemental Judgment of the
Multnomah County Circuit Court
The Honorable Jerome E. LaBarre, Judge

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TABLE OF CONTENTS

RESPONSE TO PETITION FOR RECONSIDERATION	1
(1) Farmers mischaracterizes this Court’s ruling as imposing an “irrebuttable” presumption, and for the first time complains that it offends due process to find that plaintiffs sufficiently proved reliance	1
(2) Similarly, Farmers has waited too long to be heard to contend that Oregon’s well-established procedural rules regarding preservation of error offend due process.....	4
CONCLUSION.....	6

TABLE OF AUTHORITIES

Cases

<i>State ex rel Juv. Dept. v. Charles</i> , 299 Or 341, 343 P2d 1052 (1985)	5
<i>State v. Terry</i> , 333 Or 163, 37 P3d 157 (2001)	3,6
<i>Jensen v. Medley</i> , 336 Or 222, 82 P3d 149 (2003).....	5

Statutes

ORS 3.070.....	5
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RESPONSE TO PETITION FOR RECONSIDERATION

Plaintiffs submit this Response to Farmers' Petition for Reconsideration for the following reasons:

(1) As discussed briefly below, Farmers in its Petition asserts constitutional questions that were never mentioned previously in the long history of this litigation.

(2) In the last section of its Petition (Pet Recon at 13), Farmers seeks the same relief it requests in its currently pending Motion Regarding "*Ex Parte*" Communications. So that the record is complete, plaintiffs incorporate by reference into this response the facts and arguments stated in their Response to Farmers Motion, including the Declaration of Richard S. Yugler and appended exhibits that were submitted with that Response.

(1) Farmers mischaracterizes this Court's ruling as imposing an "irrebuttable" presumption, and for the first time complains that it offends due process to find that plaintiffs sufficiently proved reliance.

Plaintiffs disagree, as in the past, with Farmers' use of the term "presumption," much as the majority opinion disagreed with the dissent regarding its use. Slip Op at 29 n. 18. However, when Farmers contends that plaintiff's evidence of reliance, whether involving the use of an "inference" or the employment of a "presumption," is "irrebuttable," it mischaracterizes

both the issue and the holding.¹ Farmers never complained that it wasn't allowed to rebut plaintiff's evidence; it complained that plaintiff's evidence wasn't sufficient to survive a motion for directed verdict. And this Court held only that plaintiff's evidence was sufficient to create a question of fact for the jury; it never suggested that Farmers was foreclosed from offering evidence to the contrary.

Farmers now contends that this Court's affirmance of the trial court's denial of its directed verdict motion violates due process. Pet Recon at 2, 8-9. To the extent that contention is premised on the idea that Farmers was foreclosed from offering evidence in opposition to plaintiffs', it is inconsistent with the record and with this Court's opinion. In any event, the Petition for Reconsideration is the first time Farmers has raised any contention that a ruling approving the sufficiency of plaintiffs' evidence of reliance would violate its due process rights. It is simply too late for Farmers to inject such a constitutional issue into the analysis. *Cf. State v. Terry*, 333 Or 163, 167, 37 P3d 157 (2001).

¹ Farmers did complain that the trial court had made the statutory presumption that the medical bills were reasonable "irrebuttable" by improperly rejecting certain evidence Farmers offered. This Court rejected Farmers' argument. Slip Op at 8-15. Farmers' preoccupation with the "irrebuttable" has now been refocused to the question of plaintiff's proof of reliance.

(2) Similarly, Farmers has waited too long to be heard to contend that Oregon’s well-established procedural rules regarding preservation of error offend due process.

Farmers misrepresents the record when it states that “[n]either the trial court’s written order nor its oral ruling * * * provided any rationale for its decision” denying Farmers’ challenge to the punitive damages award. Relying on the transcript (SER 103-104), this Court in its opinion stated otherwise:

During the hearing, the trial court stated that it was denying Farmers’s motions and briefly explained its reasons on the record, including its waiver determination. The court then signed – in open court – an order denying Farmers’s motions[.] Slip Opinion at 37.

This misrepresentation is the latest version of Farmers’ consistent attempts to ignore the trial court record on its post-trial motions. In the Court of Appeals, Farmers took the position that the trial court never ruled and the motion was “deemed denied.” *See* App Br at 49 (stating that “the trial court did not act” and Farmers’ motion “was deemed denied” by expiration of time). Farmers chose not to acknowledge the trial court’s written order, the rationale for it that was stated on the record, or the later-entered findings and conclusions, much less to explain why Farmers believed they were ineffective, until plaintiffs raised the issue. Resp Br at 49; Reply Br at 13.

And Farmers also chose not to assign error to the trial court's alternative reasons; it gambled that it didn't have to, that it could simply ignore the ruling the trial court had unquestionably made. It misapplied established law when it did so. ORS 3.070, the statute that gives judges permission to conduct judicial business in chambers, also creates special rules for orders signed in chambers; by its express terms, those rules do not apply to orders signed in open court. ORS 3.070 has been in effect for decades, and provides no "novel" procedural hurdle. The rule that requires a litigant to challenge alternative grounds is equally well-established, not one invented for application to this case; indeed as this Court noted, Farmers did not question it. Slip Op at 35; *see Jensen v. Medley*, 336 Or 222, 240, 82 P3d 149 (2003); *State ex rel Juv. Dept. v. Charles*, 299 Or 341, 343 P2d 1052 (1985).

Plaintiffs raised in the Court of Appeals the procedural hurdle to excessiveness review, and it was the first question presented in Plaintiffs' Petition for Review. Not until this Petition for Reconsideration has Farmers ever suggested that a ruling in Plaintiffs' favor on this question would violate its due process rights. Once again, it is too late for Farmers to inject a constitutional dimension into a question that has consistently been

analyzed and discussed with no mention of a constitution. *Cf. State v. Terry, supra.*

Conclusion

Farmers Petition should be denied.

Respectfully submitted,

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