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## Oregon's Summary Judgment Standard: No Evidence Required

September 01, 2007

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In the 30-plus years since it was first enacted, Oregon's summary judgment rule has been amended many times. Two of those amendments—one in 1995, and another in 1999—sought to re-allocate the burden of production in the context of summary judgment motions. Although the Supreme Court concluded that the 1995 amendment failed to shift the burden of production in any way, the Court of Appeals has ruled that the 1999 amendment completely removed the burden of production from the moving party as to issues on which it would not bear the burden of persuasion at trial. This change means that the moving party is not required to present evidence in support of its motion (unless it has the burden of persuasion), and makes Oregon's summary judgment standard more favorable to moving parties than the federal standard.

### **1. In *Jones v. General Motors*, the Supreme Court concluded that the 1995 amendment to ORCP 47 did not re-allocate the burden of producing evidence in the context of summary judgment motions.**

The Oregon Legislature enacted Oregon's first summary judgment statute, ORS 18.105 (now ORCP 47) in 1975.

For the next twenty years, Oregon courts required parties moving for summary judgment to produce evidence showing that there were no genuine issues of material fact. Then, in 1995, the Oregon Legislature amended ORCP 47 C to say, "No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject" of the summary judgment motion. 1995 Or Laws, ch 618, § 5.

In *Jones v. General Motors*, 139 Or App 244 (1996), the Court of Appeals concluded that the 1995 amendment "brought with it a change in the parties' evidentiary burdens on a motion for summary judgment." *Id.* at 253. Specifically, "the determination of whether or not there is a 'genuine issue of material fact' under the [1995] amendment to ORCP 47 is made on the evidence of *both* parties. That changes the law in Oregon." *Id.* at

256 (emphasis in original).

In *Jones*, the Court of Appeals contemplated that the moving party would present some evidence in support of its motion. The type of evidence needed is outlined in the U.S. Supreme Court's mid-1980s opinions dealing with the

federal summary judgment standard (those opinions—*Matsushita*, *Anderson*, and *Celotex*—were each considered by the Court of Appeals in *Jones*). In the last of those opinions, *Celotex Corp. v. Catrett*, 477 US 317 (1986), Justice Brennan—in a dissenting opinion—identified two ways that a moving party without the burden of persuasion could satisfy its burden of production (he did not take issue with the majority's allocation of the burden of production):

First, the moving party may submit affirmative evidence that negates an essential element of the non-moving party's claim. Second, [it] may demonstrate to the court that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. If the non-moving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.

477 US at 330-31.

So, under the Court of Appeals' interpretation in *Jones*, a moving party would either need to put on evidence negating an essential element of the non-moving party's claim, or it would need to show that the non-moving party's evidence does not establish an essential element of its claim. That would shift the burden to the non-moving party to produce evidence showing that there was a need for trial.

On review, the Supreme Court refused to consider legislative history and, finding that ORCP 47 C was clear on its face, disagreed that the Oregon Legislature intended to effect a burden-shift. *Jones v. General Motors*, 325 Or 404, 420 (1997).

**2. With the 1999 amendment, the Oregon Legislature completely removed the burden of production from moving parties that do not have the burden of persuasion.**

In direct response to the Supreme Court's opinion in *Jones v. General Motors*, the 1999 Oregon Legislature further refined ORCP 47 C. That change—proposed by HB 2721, and codified by Or Laws 1999, ch 815, § 2—provides, "The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial."

The sponsor of HB 2721 was Max Williams, who in 1999 was vice-chair of the House Judiciary Committee on Civil Law (he was also legislative counsel when the 1995 changes to ORCP 47 C were made). In his written comments, Rep. Williams said that HB 2721 "cuts to the heart of 'burden shifting' by requiring the court to enter judgment for the moving party if the submissions to the court fail to contain evidence that would support an essential element of the adverse party's claim or defense and the adverse party would bear the burden of proving that element at trial." (Testimony of Max Williams, Vice-

Chair House Judiciary Civil Law Committee, Hearings Before House Judiciary Civil Law Committee on HB 2721, 70th Leg, Ex I (Apr 21, 1999)).

HB 2721 passed the House and was sent to the Senate Judiciary Committee for consideration. Committee Chair Bryant noted that the legislature intended with the 1995 amendments to ORCP 47 C to include a burden-shifting element. Sen. Bryant hoped that HB 2721 would make it clear to the courts that a burden-shifting element was in ORCP 47 C.

During hearings before the Senate Judiciary Committee, Robert Neuberger presented testimony in opposition to HB 2721. He testified that Oregon law as it existed at that time (prior to the amendment) required the moving party to show an absence of an issue of material fact. Because HB 2721 removed that burden, Mr. Neuberger complained that a defendant could file a summary judgment motion that simply said, "we're entitled to summary judgment because the plaintiff can't prove that the defendant ran the red light." (Testimony of Robert Neuberger, Attorney, Hearings Before Senate Judiciary Committee on HB 2721, 70th Leg, Tape 185A (May 18, 1999)).

Despite Mr. Neuberger's objections, the Senate Judiciary Committee sent HB 2721 to the Senate floor for a vote without amendment. It was passed, signed into law, and became effective on October 23, 1999.

**3. Since 1999, the Court of Appeals has consistently ruled that the burden to produce evidence on any issue raised in a summary judgment motion falls on the non-moving party if it has the burden of persuasion at trial.**

In its decisions since 1999, the Court of Appeals has noted that before the 1999 amendments to ORCP 47 C, parties moving for summary judgment were required to present evidence showing an absence of material fact, but that after the 1999 amendments, parties are not required to make any *prima facie* showing. See, e.g., *Buck v. AcandS, Inc.*, 211 Or App 324 (2007); *Weihl v. Asbestos Corp., Ltd.*, 204 Or App 255 (2006); *JAL Const., Inc. v. Friedman*, 191 Or App 492 (2004). Specifically, the Court of Appeals has said:

Effective with the 1999 amendment to ORCP 47 C, the burden to produce evidence on any issue raised in the motion falls on the party opposing the summary judgment motion if that party has the burden of persuasion at trial. JAL, as the plaintiff in this action, had the burden of persuasion at trial. Thus, it was JAL's burden, not the city's, to produce evidence demonstr