Since the Oregon Supreme Court first endorsed the discovery rule in 1966, the rule has judicially evolved through a series of logical forward steps. For example, although the rule initially applied only to medical malpractice cases, it has gradually evolved to include most—and arguably, all—tort claims. This means that it’s virtually certain that a tort-claim litigant will invoke the discovery rule if a statute of limitations defense is raised.

What it means to have “discovered” a claim has also evolved. At first, the Supreme Court held that a litigant discovers a claim when it knows or should know that a tort was committed. Later, the Supreme Court clarified that a litigant is deemed to have discovered a claim when it knows or should know facts necessary to support a “right to judgment.” Next, the Supreme Court explained that discovery occurs only when a litigant knows or should know facts that would make a reasonable person aware of a “substantial possibility” that a claim exists. Finally, the Court of Appeals considered the meaning of “substantial possibility,” and concluded that it means “high degree of certainty.”

When the discovery rule is considered in the context of summary judgment motions, the Court of Appeals has held that a trial court cannot rule that a claim is time-barred unless every rational juror would be compelled to reach that conclusion—although in a recent opinion considering the issue in the context of a motion for directed verdict, the Supreme Court phrased the issue in terms of what a reasonable jury would be compelled to conclude.

Together, the Supreme Court and Court of Appeals have created a summary judgment standard for discovery-rule cases that is almost impossible to meet. Under that standard, a trial court can enter summary judgment on a discovery-rule claim only if a reasonable jury would be compelled to conclude that the litigant had a high degree of certainty about facts that would support its right to judgment by the relevant date.

This article discusses the judicial evolution of what “discovery” means, and how that evolution has made summary judgment motions—in the author’s opinion—an exercise in futility in most discovery-rule cases.

A. The early development of Oregon’s discovery rule.

The Supreme Court first endorsed the discovery rule in Berry v. Branner, 245 Or 307 (1966), a medical malpractice case. In Berry, the Supreme Court held that although plaintiff had a claim when her doctor left a surgical needle in her body, the statute of limitations didn’t begin to run on that claim until she discovered or reasonably should have discovered the “tort committed upon her person by defendant.” Id. at 316. The Court pointed out that the rationale for this “discovery rule” is simple: “To say to one who has been wronged, ‘You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,’ makes a mockery of the law.” Id. at 312.

Twelve years later, the Supreme Court explained—in a products liability case—that a litigant is deemed to know that a tort was committed when a reasonable person would associate “his symptoms with a serious or permanent condition and at the same time perceive [ ] the role” defendant played in causing that condition. Schiele v. Hobart Corp., 284 Or 483, 490 (1978). In other words, under Schiele, the statute of limitations doesn’t begin to run on a discovery-rule claim until a reasonable person would become aware of the causal relationship between defendant’s conduct and the resulting harm.
B. In the early 1990s, the Supreme Court clarified that a litigant discovers a claim when it knows or should know facts that would make a reasonable person aware of a “substantial possibility” that a “right to judgment” exists.

The next developments in the meaning of the term “discovery” occurred in the early 1990s—when the Supreme Court made two significant changes to the discovery rule. First, the Court held that a litigant doesn’t discover a claim until it knows or should know “every fact which it would be necessary for [the litigant] to prove . . . in order to support [its] right to judgment.” Stevens v. Bispham, 316 Or 221, 227 (1993). Second, the Court clarified that discovery occurs only when a litigant learns “facts which would make a reasonable person aware of a substantial possibility” that a claim exists. Gaston v. Parsons, 318 Or 247, 256 (1994).

Taken together, these changes mean that the statute of limitations begins to run on a discovery rule claim only when a litigant knows or should know about facts that would make a reasonable person aware of a “substantial possibility” that a “right to judgment” exists. So from the perspective of discovery-rule-claim litigants, the Stevens and Gaston decisions marked a welcome shift in evaluating when discovery-rule claims are “discovered.”

Since Stevens and Gaston have guided recent discovery-rule jurisprudence, a brief examination of those decisions will help the reader understand the subsequent judicial evolution of the rule.

The first case involved a plaintiff who took his criminal-defense attorney’s advice and pleaded no contest to various criminal charges. Stevens, 316 Or at 225-26. That turned out to be a bad idea. Soon after plaintiff began serving his sentence, another person confessed to the crimes and plaintiff’s convictions were vacated. So plaintiff sued his attorney, arguing that he would have been acquitted or the charges would have been dismissed if the attorney had represented him adequately. Id. at 226.

The criminal-defense attorney moved for and was granted summary judgment based on a statute of limitations defense. 316 Or at 226. On appeal, the Supreme Court noted that it had previously decided that a litigant discovers a claim only when it knows or reasonably should know “every fact which it would be necessary for [the litigant] to prove . . . in order to support [its] right to judgment.” Id. at 227 (quoting). Since plaintiff hadn’t been harmed until his convictions were vacated (i.e., he had no “right to judgment” before then), his lawsuit was timely and “must be defended on the merits.” Id. at 238-39.

In the second case, plaintiff received an injection to treat muscle spasms in his lower body. Gaston, 318 Or at 251. Soon after receiving the injection, plaintiff noticed numbness and loss of function in his left arm (his only functioning limb), but the doctor who gave him the injection told him that those problems were temporary and that he would regain the use of his arm in six months to two years. Three and one-half years later, plaintiff filed a malpractice claim against the doctor. Id.

The doctor moved for summary judgment, arguing that the claim was barred by the two-year statute of limitations. The trial court agreed, and dismissed the claim. But on appeal, the Court of Appeals reversed, and the Supreme Court affirmed that reversal. 318 Or at 250. The Supreme Court concluded that whether a litigant should have discovered its claim more than two years before filing suit depended on whether it knew or “should have known facts which would make a reasonable person aware of a substantial possibility” that the elements of a claim existed. Id. at 256 (emphasis added). The Court explained that a litigant need not know each element of its claim with absolute certainty, but it must have more than a “mere suspicion” in order to have discovered the element. Id. at 255-56.

C. In 2005, the Oregon Court of Appeals interpreted Gaston’s “substantial possibility” threshold to require a “high degree of certainty” about facts necessary to support a “right to judgment.”

According to Gaston, the requisite level of certainty needed for a litigant to discover a claim is awareness of a “substantial possibility” that the relevant elements exist. 318 Or at 256. In 2005, the Court of Appeals addressed—in an 8-2 en banc opinion—what “substantial possibility” means in the context of discovery rule cases; in other words, how much certainty the available facts must provide before it can be said that a reasonable person “should have” discovered a claim. Keller v. Armstrong World Indus., Inc., 197 Or App 450 (2005), aff’d, 342 Or 23 (2006). The Court of Appeals concluded that “substantial possibility” is a demand-
ting threshold that is crossed only when a litigant learns—with a “high degree of certainty”—about facts needed to support its “right to judgment.” Id. at 463.

So, in light of Keller’s interpretation of the meaning of “substantial possibility,” Gaston’s holding can be restated as follows: A discovery rule statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care should have known facts which would make a reasonable person aware to a high degree of certainty that each of the three elements (harm, causation, and tortious conduct) exists.

This “high degree of certainty” threshold avoids forcing potential plaintiffs to choose between two evils: sanctions, attorney fees, and civil liability if they file too early—or forfeiture of their legal rights if they file too late. As such, it’s a logical forward step in the continuing evolution of Oregon’s common-law discovery rule.

D. Under the “high degree of certainty” threshold, whether a litigant “should have” discovered a claim sooner should rarely be decided on summary judgment.

(1) Discovery rule issues are generally left to the jury.

Trial courts traditionally leave discovery rule issues to the jury because questions regarding reasonableness and diligence are highly fact-intensive and the facts are rarely undisputed:

“Though the summary judgment procedure is freely available in all types of litigation, it is obvious that some kinds of cases lend themselves more readily to summary adjudication than do others. It usually is not feasible to resolve on motion for summary judgment cases involving questions such as when knowl-

edge is discoverable by reason-

able diligence of plaintiff and concealment by defendants.

Forest Grove Brick Works, Inc. v. Strickland, 277 Or 81, 87-88 (1977); see also Gaston, 318 Or at 256 ("Whether a rea-

sonable person of ordinary prudence would be aware of a substantial possibility of tortious conduct is a question of fact"); Peterson v. Multnomah County School Dist., 64 Or App 81, 85 (1983) (fact question as to whether or not plaintiff discovered or should have discovered claim more than two years before filing suit).

In other words, it’s “seldom, if ever, possible for a judge to determine summarily when the injured person . . . became fully aware that he or she had been victimized. An appraisal of the full testimony is generally called for." Strickland, 277 Or at 88 n 9. This is the rule because resolution of discovery rule issues usually depends on inferences that a litigant should have known about a claim at a specific time. But those inferences can be drawn only by the jury and are not an appropriate basis for summary judgment, where all reasonable inferences are made in the non-moving party’s favor. See, e.g., Jones v. General Motors Corp., 325 Or 404, 420 (1997).

The Keller case involved a plaintiff who worked in an auto repair shop in the early 1960s—where he was exposed to asbestos while doing muffler and exhaust work. In the 1980s, after he began experiencing shortness of breath, a doctor told plaintiff that asbestos “might” be the cause of his symptoms, but also said that exhaust fumes and smoking could be the culprits. Five years later, in 1991, plaintiff saw another doctor, who concluded that he had “mild pulmonary fibrosis, possibly related to asbestos exposure.” Later that year, plaintiff applied for social security disability benefits, stating that the cause of his lung problems was exhaust fumes, dust, and asbestos. 197 Or App at 454.

In 1994, plaintiff resubmitted his claim for social security benefits, stating that his shortness of breath had worsened and that a doctor had advised him that he should stop working because of his “asbestos lungs.” The next year, plaintiff filed a workers’ comp claim, asserting that he had “asbestos lung” from asbestos exposure. 197 Or App at 455-56.

Then, in 2000, a new doctor concluded that plaintiff had asbestosis.

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Later that year, plaintiff sued multiple defendants—two of whom moved for summary judgment, arguing that plaintiff’s claims were barred by the two-year statute of limitations. The trial court granted those motions, but the Court of Appeals reversed. 197 Or App at 456, 470.

In reaching its decision, the Court of Appeals concluded that although “a reasonable juror could conclude that plaintiff had access to sufficiently certain facts to make him aware of a substantial possibility that his [injury] was caused by asbestos,” the court did not agree “that a reasonable juror would be compelled to reach that conclusion.” 197 Or App at 470 (emphasis in original). Summary judgment was therefore inappropriate.

In Johnson v. Mult. Co. Dept. Cnty. Justice, the Court of Appeals went one step further, holding that discovery rule issues may be resolved on summary judgment “only if every rational juror, asked whether plaintiff should reasonably have known [by the relevant date] that defendant was probably responsible for her [harm], would answer in the affirmative.” 210 Or App 591, 597-98 (2007), aff’d, 344 Or 111 (2008) (emphasis added).

Finally, in T.R. v. Boy Scouts of America, the Supreme Court clarified that the discovery rule should be analyzed from the perspective of a reasonable jury. 344 Or 282 (2008). In T.R., plaintiff sued the City of The Dalles for abuse he had suffered by a city police officer. After the trial court denied the city’s directed verdict motion, “the specific question presented [on appeal was] whether the only conclusion that a reasonable jury could have reached was that plaintiff’s knowledge in 1996 should have alerted him to the possibility that the city played a causal role in his abuse, that a reasonable person in plaintiff’s circumstances would have investigated that possible role, and that such an investigation would have disclosed facts indicating the city’s role.” 344 Or at 296. The Supreme Court noted, “Although we agree that a reasonable jury could have reached that conclusion, we do not agree that that was the only conclusion a reasonable jury could have reached.” 344 Or at 297 (emphasis in original).

**E. Conclusion.**

Under Stevens and Gaston, as interpreted by Keller, Johnson, and T.R., Oregon trial courts can enter summary judgment on discovery-rule claims only if a reasonable jury would be compelled to conclude that the litigant had a high degree of certainty about facts that would support its right to judgment before the statute of limitations cut-off date. In the author’s opinion, that standard precludes summary judgment in virtually every case where the discovery rule applies.

But given the Supreme Court’s starting point in 1966—where it dismissed as “patently inconsistent and unrealistic” the notion that a claim could be time-barred before a litigant even knows of it—the gradual evolution of Oregon’s judicially created discovery rule is not surprising. Whether it creates as many problems as it solves, however, is a question for another day.

**Endnotes**

1 Although the Oregon Legislature adopted a discovery rule in connection with fraud claims in 1919, this article only discusses the *judicially created* discovery rule.


3 Although Berry involved a medical malpractice claim, the Supreme Court based its decision on its interpretation of the word “accrued”—found at ORS 12.010. The Court concluded that the Oregon Legislature, by using the term “accrued” in ORS 12.010, meant to incorporate a discovery rule. Berry, 245 Or at 315-16; Gladhart v. Oregon Vineyard Supply Co., 332 Or 226, 231 (2001). So, since ORS 12.010 says that claims must be “commenced within the periods prescribed in this chapter, after the [claim] shall have accrued,” a persuasive argument can be made that any claim with a statute of limitations set out in ORS Chapter 12 is subject to a discovery rule. See, e.g., *U.S. Nat’l Bank v. Davies*, 274 Or 663, 669 n 1 (1976) (malpractice); *Oregon Life and Health Ins. Guar. Ass’n v. Inter-Regional Financial Group, Inc.*, 156 Or App 485, 492 (1998) (negligence and breach of fiduciary duty); *Allen v. Lawrence*, 137 Or App 181, 189 (1995) (negligent misrepresentation).


5 See ORCP 17 (authorizing sanctions for premature or insufficiently supported filings); ORS 20.105 (requiring trial courts to award attorney fees to a defendant “upon a finding . . . that [plaintiff had] no objectively reasonable basis for asserting the claim”); *Roop v. Parker NW Paving Co.*, 194 Or App 219, 237-38 (2004) (noting possible civil liability for filing claims without an objectively reasonable basis).