

2010 WL 5821916 (Or.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Oregon.
Multnomah County

Linda BOELEN, individually and in her capacity as trustee of the Linda Boelens Trust, and
Susan Dion, individually and in her capacity as trustee of the Susan Dion Trust, Plaintiffs,

v.

John SCHRAG, Defendant.

Tiffany & O'Shea, LLC, as Successor Personal Representative
of the Estate of Rose M. Schrag, Deceased, Plaintiff-Intervenor,

v.

John A. Schrag, Defendant.

No. 0810-14434.
February 11, 2010.

Plaintiff-Intervenor's Trial Memorandum

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Plaintiff-Intervenor submits this trial memorandum to assist the Court in advance of trial of this matter.

A. Nature of the dispute.

Plaintiff-Intervenor is Tiffany & O'Shea LLC, a Portland professional fiduciary who is the duly-appointed successor personal representative of the estate of Rose M. Schrag, deceased. The defendant, John Schrag and former personal representative was removed by this court over questions having to do with the following: The defendant wrote multiple checks totaling over 1.3 million dollars from his mother's company ("Roseco") to his company ("John A. Schrag & Sons") and called them "loans" on his company's books. After the decedent Rose Schrag died in 2007 defendant closed his company and the loans vanished. The indebtedness to the decedent was not disclosed in the probate proceeding by the then personal representative, the defendant, John Schrag. Plaintiff-Intervenor asserts that these transfers were wrongful; Defendant asserts they were not. That is the crux of the case.

B. Procedural considerations

Plaintiff-Intervenor and defendant agree there is no right to trial by jury pursuant to actions under the **Elderly** Persons and Persons with Disabilities **Abuse** Prevention Act, ORS 124.005 *et seq.* Both Defendant and Plaintiff-Intervenor consent to this matter being tried to the court.

C. Expected proof

Plaintiff-Intervenor will introduce testimony of lay witnesses, a medical expert, and medical records, all to the effect that decedent lacked contractual capacity¹ to knowingly make the transfers to Defendant, and/or was unduly influenced to make

them. Defendant, Plaintiff-Intervenor believes, will rely on lay testimony and the same medical records and argue the opposite conclusion.

D. Elements of Plaintiff-Intervenor's Elder Financial Abuse claim

Plaintiff-Intervenor asserts a straightforward **elder abuse** against Defendant: that due to her age and health problems, Rose Schrag was a “vulnerable person” as defined in ORS 124.100(1)(a), and that the taking of her money constituted a “wrongful tak[ing] or appropriat[ion]” within the meaning of ORS 124.110(1)(a). In this sense, the Court of Appeals has explained that “wrongful” has its well-developed common-law meaning.

Because the trial court dismissed the financial **abuse** claim based on its conclusion that there was no taking of property, it did not reach the fourth element, namely, whether defendant's actions were “wrongful.” That term is not defined by statute. Its ordinary meaning is “full of wrong: INJURIOUS, UNJUST, UNFAIR.” Webster's at 2642. More specifically, it has a well-understood meaning in the law of torts with regard to interference with legal interests. Conduct generally is “wrongful” if it is carried out in pursuit of an improper motive or by improper means. See, e.g., *Empire Fire & Marine Ins. v. Fremont Indemnity*, 90 Or App 56, 62, 750 P2d 1178 (1988) (defining “wrongful” interference with contractual relations in those terms). “Improper means” must be independently wrongful by reason of statutory or common law, beyond the mere fact of the injury complained of. *Conklin v. Karban Rock, Inc.*, 94 Or App 593, 601, 767 P2d 444, *rev den*, 307 Or 719, 773 P2d 774 (1989). Improper means, for example, include “violence, threats, intimidation, deceit, misrepresentation, bribery, unfounded litigation, defamation and disparaging falsehood.” *Id.* The use of undue influence also constitutes an “improper means,” in that it involves the procurement of an unfair advantage. See *Smith v. Ellison*, 171 Or App 289, 294, 15 P3d 67 (2000) (stating that “the emphasis in undue influence cases should be on the unfairness of the advantage which is reaped as a result of wrongful conduct” (internal quotation marks omitted)). That dual meaning of the word “wrongful,” focusing alternatively on the defendant's motives or the means by which property was taken, is sensible in the context of ORS 124.110(1)(a). Accordingly, we adopt it.

Church v. Woods, 190 Or App 112, 118-119, 77 P3d 1150 (2003).

The remedies Plaintiff-Intervenor is allowed under the **Elder Abuse** statute are straightforward. ORS 124.100(2) provides as follows:

(2) A vulnerable person who suffers injury, damage or death by reason of physical **abuse** or financial **abuse** may bring an action against any person who has caused the physical or financial **abuse** or who has permitted another person to engage in physical or financial **abuse**. The court shall award the following to a plaintiff who prevails in an action under this section:

(a) An amount equal to three times all economic damages, as defined in ORS 31.710, resulting from the physical or financial **abuse**, or \$500, whichever amount is greater.

(b) An amount equal to three times all noneconomic damages, as defined by ORS 31.710, resulting from the physical or financial **abuse**.

(c) Reasonable attorney fees incurred by the plaintiff.

Plaintiff-Intervenor, as personal representative of Rose Schrag's estate, has statutory standing to maintain this action. See ORS 124.100(3)(c). Plaintiff-Intervenor here seeks trebled economic damages and attorney fees.

E. CONCLUSION

Plaintiff-Intervenor will ask the judge to find that the taking of decedent's money was wrongful, and to find that decedent's damages were \$1,375,153.43. Plaintiff will then ask that the Court enter judgment in the amount of triple those damages, plus prejudgment interest from the dates the checks were written, and Plaintiff will submit an attorney fee statement pursuant to typical ORCP 68C procedure.

DATED this 11th day of February, 2010.

Footnotes

- 1 “The test of contractual capacity is whether a person is able to understand the nature of his action and apprehend its consequences.” *Uribe v. Olson*, 42 Or App 647, 651, 601 P2d 818, 820 (1979) “Capacity includes the ability to reason and exercise judgment and, in essence, to bargain with the other party.” *Id.*

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