2014 WL 7365919 (Or.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Oregon.
Multnomah County

John MARRE, in his capacity as Personal Representative of the Estate of Jacqueline Marre, Plaintiff,

v.

ST. ANTHONY VILLAGE ASSOCIATES LIMITED PARTNERSHIP, an Oregon limited partnership, St. Anthony Management, LLC, an Oregon limited liability company, Village Enterprises, an Oregon nonprofit corporation, and Services for All Generations Enterprises, Inc., an Oregon nonprofit corporation, Karen Marshall, and Jason Schaefer, Defendants.

No. 1303-03185.
August 14, 2014.

Defendants' Trial Memorandum on the Vulnerable Person Claim

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Defendants (hereinafter, collectively "St. Anthony") submits this trial memorandum regarding plaintiffs claim for **Abuse** of a Vulnerable Person. Plaintiff has failed to state a claim that St. Anthony "permitted" **abuse** under ORS 124.100.

The text, context, and legislative history of ORS 124.100(5), along with pertinent case law, shows that the "permitting" standard requires proof of intentional acts or omissions by St. Anthony with knowledge of the very **abuse** being committed on a vulnerable person. At best, plaintiffs evidence may show St. Anthony was negligent.

A. *THE TERM "PERMITTING" REQUIRES INTENTIONAL CONDUCT AND SOME KNOWLEDGE OF THE SPECIFIC ABUSE ON A GIVEN PLAINTIFF*

To determine the meaning of a statute, the Court is to consider the text and context of the statute, as well as its legislative history if useful. *State v. Gaines*, 346 Or 160, 172, 206 P2d 1042 (2009).

1. Text of ORS 124.100.

As noted. ORS 124.100(2) allows a vulnerable person **abuse** claim to be brought against "any person … who has permitted another person to engage in physical or financial **abuse**." *Id.* The plain and ordinary meaning of the term "to permit" suggests intentional and knowing conduct not mere negligence. *See, e.g.*, Black's Law Dictionary, *permit* (9th ed. 2009) (defining "permit" *inter alia* as "[t]o consent to formally" or "[t]o allow or admit of"); Merriam-Webster Online Dictionary,*permit*, at *http:// www.merriamwebster.com/dictionary/permit* (defining "permit" *inter alia* as "to consent to expressly or formally" or "to give leave: authorize"); Dictionary.com, *permit*, at *http://dictionary.reference.com/ browse/permit* (defining "permit" as "to allow to do something" or "to tolerate; agree to").

This plain and ordinary meaning is reinforced by the Legislature's own definition of "permitting" in ORS 124.100(5): "An action may be brought under this section against a person for permitting another person to engage in physical or financial **abuse** if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical or financial **abuse**."

This definition contains two distinct parts that involve different findings: (1) "knowingly act[] or fail[] to act," and (2) "under circumstances in which a reasonable person should have known of the physical or financial **abuse**." *Id.* Both of these parts are directly at odds with the idea that a showing of negligence will suffice. Judge Kathleen Dailey dealt with this very issue in *Terpening et al. v. American Medical Response Northwest, Inc.*, Multnomah County Case No. 0910-14750. A copy of Judge Dailey's order on defendant's motion for summary judgment is attached hereto as Exhibit 1. As Judge Dailey noted, "the plain language of the statute requires that a defendant subjectively 'knowingly act or fail to act" in the objective presence of **abuse** that is uniquely defined by the statute." (*Exhibit 1, p. 7)*

With regard to the first part. ORS 124.100(5) clearly and unambiguously requires "knowing"' conduct by the defendant. *Id.* As Judge Dailey noted. "[i]n its most plain and ordinary usage, a 'knowing' act requires intentional conduct because one has knowledge of the prohibited conduct yet acts or fails to act in the face of it" *(Exhibit 1, p. 6)* This statutory requirement of "knowing"' conduct by itself defeats the contention that the "permitting" standard means negligence, given that Oregon law has never understood the concept of negligence to require "knowing" or intentional conduct by the defendant. *See, e.g.*, UCJ1 20.02 (indicating that a person is "negligent" when that "person does some act that a reasonably careful person would not do, or fails to do something that a reasonably careful person would do under similar circumstances").

With regard to the second part of the ORS 124.100(5) definition, it is important to note what it does *not* say. First, the term "should have known" does not purport to (and cannot be viewed as) replacing the statute's stated requirement that the defendant's misconduct be "knowing." Indeed, that interpretation would render the first part of ORS 124.100(5) superfluous, and so cannot be correct. *See, State v. Stamper*, 197 Or App 413, 418, 106 P3d 172 (2005) ("As a general rule, we assume that the legislature did not intend any portion of its enactments to be meaningless surplusage.").

Second, this part of ORS 124.100(5) does *not* state that a defendant will be liable when it knew or should have known about an **abuser's** "likelihood," "propensity." "risk," or "possibility" to commit such **abuse** based on past events. While the Legislature could have included any or all of those terms, it did not; rather, it referenced only knowledge of "*the* physical or financial **abuse**." *See* ORS 124.100(5) (emphasis added). The Legislature's use of the word "*the"* here is important because it refers back to the term "physical **abuse**" in the first clause of ORS 124.100(5), which necessarily refers to the very same incident of **abuse** that injured the plaintiff.

In contrast, if the Legislature had decided to omit the definite article "*the* " in this statutory definition, then the term "physical **abuse**"' might have referred to *any* physical **abuse**. including **abuse** committed in the past or on other individuals. But the Legislature did not phrase the statute in that matter. *Cf.* ORS 3 74.010 ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted ....").

Turning back to the text of that second part of ORS 124.100(5) "under circumstances in which a reasonable person should have known of the physical… **abuse**." As Judge Dailey notes, this provision means that a defendant must have had some real-time knowledge of the **abuse** "even if she did not know subjectively that the conduct constituted **abuse**." *(Exhibit 1, p. 7)* "In other words, the 'should have known' language was added to create an objective analysis in terms of the specific act of **abuse**." *Id.*

That makes sense because ORS 124.100 did not define "**abuse**" in a general or catch-all manner. Instead, it limited the term "physical **abuse**" to an itemized list of criminal offenses specifically defined in Oregon's criminal statutes. *See* ORS 124.105 (defining physical **abuse** by listing specific criminal violations); *see also* ORS 124.100(4) (noting that an "action may be brought under this section only for physical **abuse** described in ORS 124.105 ....").

Thus, rather than require a plaintiff to prove that the defendant subjectively knew that the **abuse** on the plaintiff amounted to a violation of the Oregon criminal statutes, the Legislature provided for an objective analysis: the plaintiff must prove intentional conduct by the defendant "under circumstances in which a reasonable person should have known" that "physical **abuse**" (as

defined under ORS 124.105) was being committed against the plaintiff. In other words, this provision ensures that a plaintiff need not prove that a defendant subjectively knew at the time that the **abuse** amounted to a crime: it is sufficient if the defendant reasonably should have known that the actions on the vulnerable adult amounted to a crime.

In sum, the text of ORS 124.100(5) requires a plaintiff to prove that the defendant intentionally acted or failed to act with some knowledge about the very **abuse** being committed on the plaintiff. The entirety of ORS 124.100(5) is at odds with a negligence standard.

2. Context of ORS 124.100.

The above interpretation of "permitting" receives overwhelming support from the context of the statute. Notably, ORS 124.100(2)(b) requires the court to impose *mandatory* trebling on all damages awards, regardless of whether the defendant was the one who directly "caused" the **abuse** or one who merely "permitted" it to happen. *See id.* (requiring that the court "shall" treble all economic and noneconomic damages to a prevailing plaintiff). This provision leaves the trial court with no discretion but to treble damages if it finds liability, regardless of the evidence.

This treble damages provision is patently inconsistent with the idea that to "permit" **abuse** includes instances where a defendant is simply negligent. Accepting this contention, the trial court would have no option but to treble damages both against (a) the assisted living facility's management company that innocently but with ordinary negligence failed to adequately investigate a wayward resident; and (b) the management company that encouraged or even directed it's the resident to commit crimes on vulnerable adults. The Legislature could not have intended such a crude and inequitable remedy.

Moreover, in light of the mandatory treble damages provision, the interpretation runs afoul of Oregon constitutional and decisional law. ORS 124.100 is punitive in nature, and a defendant is entitled to substantive and procedural due process protections, including a finding that the defendant acted maliciously and not simply with negligence or recklessness. *See, e.g.*, ORS 31.730; *Chamberlain v. Jim Fisher Motors, Inc.*, 282 Or 229, 237, 578 P2d 1225 (1978) (holding that neither "gross negligence" nor "recklessness"' are sufficient to support a punitive damages award).

Additionally, as noted in Judge Dailey's opinion, Oregon courts have "written in" bad faith requirements into statutory treble damages provisions that are otherwise silent on such proof:
[T]he Oregon Supreme Court has held that in order 'to be entitled to exemplary damages, plaintiff must show malice or guilty intent on the part of defendant or other circumstances of aggravation.' *Green v. Leckington*, 192 Or 601, 609 (1951). Likewise, Oregon Supreme Court has required plaintiffs to show 'willful, malicious, or wanton' conduct for claims brought under statutes that allow multiple damages awards but exclude a *mens rea* requirement. *See Wilson v. Kruse*, 199 Or 1, 6 (1953) (interpreting a statute that allowed the court discretion whether to award treble damages for a person who commits waste of real property without proof of level of intent as requiring proof of willful [], wanton[], or malicioiis[]' conduct); *Springer v. Jenkins*, 47 Or 502, 508 (1906). *overruled on other grounds*, *Swank v. Elwert*, 55 Or 487, 502 (1910) (interpreting a statute that required a court to double a damages award for causing conversion of a deceased person's property irrespective of the level of intent as requiring bad faith). *Exhibit 1, p. 9.*

Judge Dailey went on to distinguish other authorities to confirm that the above analysis is good law in Oregon and that the only reasonable construction of the treble damages remedy in ORS 124.100 is that intentional and wrongful conduct must be proven against a defendant, not just negligence. *See Exhibit 1, pp. 9-12.*

Plaintiff may argue that the Legislature defined "permitting"' in 1995 but did not add treble damages to the statute until 2003. This argument would wholly miss the mark. The Legislature in 1995 established through the text of ORS 124.100(5) that "permitting" **abuse** required intentional misconduct. This original legislative intent was then *reinforced* in 2003 when it added

mandatory treble damages into the statute. If the Legislature understood "permitting" liability as mere negligence, then it would not have included treble damages, let alone mandatory treble damages, in its 2003 amendments, in contravention of Oregon law.

Additional contextual support can be found in how the term "permits" has been used and applied in Oregon's criminal statutes. These criminal statutes have some connection to the vulnerable person **abuse** act given that ORS 124.100 *et seq.* makes express reference to them, *see* ORS 124.105. so it is reasonable to conclude that the Legislature was influenced by such laws in passing ORS 124.100.

For example, under ORS 163.670(1). a "person commits the crime of using a child in a display of sexually explicit conduct if the person employs, authorizes, *permits*, compels or induces a child to participate or engage in sexually explicit conduct for any person to observe or to record ....") (ernphasis added). This crime is a Class A felony regardless of whether one directly engages in the misconduct or "'permits" someone else to do it. ORS 163.670(2). The severity of this sanction is indicative of the fact that the *mens rea* of "permitting" is something much greater than negligence, given that even criminally negligent homicide is only a Class B felony. ORS 163.145(2).

In *State v. Porter*, 241 Or App 26, 249 P3d 139, *rev. denied*, 350 Or 530, 257 P3d 1020 (2011), the Court affirmed a conviction based on "permitting" **abuse** under ORS 163.670(1). In *Porter*, there was no question that the defendant had specific knowledge of the actual **abuse** at the time it was happening, and yet intentionally did not stop it. While it was "undisputed that defendant did not actively participate in that sexual **abuse**." the Court relied on the fact that there were "three occasions when defendant was present in a room [in his own house] while the [child] was being **abused** there." *Id.* at 28. Indeed, the child had 'testified that defendant appeared at times to enjoy watching her being **abused**." *Id.* As the Judge Dailey noted, "*Porter* lends support to an interpretation of ORS 124.100 that 'permitting' requires intentional conduct." *Exhibit 1, p. 12.*

There are many other criminal statutes and cases applying a similar understanding of the term "permits." *See, e.g., State v. McBride*, 352 Or 159, 166-67, 281 P3d 605 (2012) (interpreting child endangerment statute, ORS 163.575. so that the term "'permit' requires the kind of affirmative conduct usually implied by that word, in contrast to 'allow"' which implies "passive tolerance" or mere "failure to prevent" conduct); *State v. Pyritz*, 90 Or App 601, 752 P2d 1310 (1988) (discussing ORS 167.222, which prohibits keeping, maintaining, frequenting. or remaining at a place "while knowingly permitting persons to use controlled substances in such place").

Another relevant example of the term "permitting"' that requires actual knowledge comes from ORS 12.117, which extends the statute of repose for claims of "child **abuse**" or "conduct knowingly allowing, permitting or encouraging child **abuse**." *Id.* In *Sipes v. Sipes*, 147 Or App 462, 936 P2d 1027 (1997), the Court considered whether the plaintiff had adequately pled that the defendant had knowingly allowed or permitted child **abuse** to bring the case within ORS 12.117. *Id.* at 467-68. The Court found the complaint to be adequately pleaded because the plaintiff alleged that the defendant had knowingly allowed and permitted the **abuse** "in seven specified ways, each of which implicitly assumes that she had *actual knowledge* of the **abuse**" at the time that it was occurring. *Id.* at 468 (emphasis added).

Plaintiffs may point to *Schwert v. Myers*, 297 Or 273, 683 P2d 547 (1984), to argue that the statutory term "permits"' has been equated by the courts-at least once-to a finding of ordinary negligence. However, *Schwert* cannot reasonably be viewed as informing the Legislature's intent in passing ORS 124.100. *Schwert* considered a civil claim arising out of Chapter 607, ORS, which regulates "livestock districts." The statute at issue, ORS 607.044, imposed liability on a person who "permits an animal of a class of livestock to run at large" upon the land of another landowner "in a livestock district in which it is unlawful for such class of livestock to be permitted to run at large." *See Schwert*, 297 Or at 275.

However, there is no indication or reason to believe that Oregon's laws on livestock districts were on the Legislature's mind in passing ORS 124.100. Moreover, there is a material distinction between "permitting" the conduct of one's animal compared to "permitting" the criminal behavior of another human being. The two are simply not analogous. Indeed, a person is a "keeper" of his or her animal, *see Hunt v. Hazen*, 197 Or 637, 254 P2d 210 (1953), putting the animal under the owner's direct possession

and control, such that a negligence standard for harm caused by that animal makes sense. It would be absurd to speak of an owner, for example, knowing about his cow's intention to engage in criminal conduct, let alone that owner "permitting" or intentionally authorizing the cow to consummate that crime.

In fact, even a negligence standard for "permitting" a livestock trespass under ORS 607.044 provides a *narrower* remedy for a plaintiff than was provided under the common law, which imposed strict liability against the owner of livestock that had trespassed on the land of another. *See, e.g.*, Restatement (Second) of Torts §504 (1977) (noting that "a possessor of livestock intruding upon the land of another is subject for liability for the intrusion although he has exercised the utmost care to prevent them from intruding").

3. Legislative history of ORS 124.100.

There is no direct legislative history on the term "permitting" as used in ORS 124.100. The standard apparently avoided analysis or comment by the Legislature. Indeed, the "Senate Bill Summary"' presented by the bill's very sponsors omitted any reference to the "permitting" standard (which was contained in the bill) but simply described the bill as authorizing claims "against any person who has caused such **abuse**." *Exhibit 2, attached hereto.*

This absence supports a reading that the Legislature intended "permitting" liability to be narrow and constrained, not a broad negligence standard. [1] For example, there was no discussion about negligence or about potentially applying this statute against negligent employers with wayward employees. Had a negligence standard been intended, one would expect some discussion given that such a law would have far-reaching implications and would expose all defendants to heightened damages and a seven-year statute of limitations, even though the defendant did not participate in any **abuse** and had no knowledge of it happening. Such a law would essentially re-write and enhance the common-law claim of negligence, which result the legislative history here simply does not support.

In fact the focus of the legislature in passing ORS 124.100 was on the increasing rates of **elder abuse** committed by: "the new 'friend' who suddenly cuts the **elderly** person off from family and the rest of the world, phony contractors who sell the **elderly** person substandard services or unnecessary goods, and the acquaintance who suddenly becomes the **elderly** person's live-in caregiver in exchange for the deed to the family home or other property." *Exhibit 3, Testimony Re: Senate Bill No. 943, attached hereto.*

By way of contrast, the sponsors emphasized that the law was "not meant to target institutional providers of care or services such as nursing homes, residential care facilities, banks or brokerage houses." *Id.* Such defendants "most often [are] not where the problem lies and other remedies exist to resolve those **abuses**." such as ordinary negligence claims. *Id.*

The fact that immunity was given to health care providers under ORS 124.115 simply confirms the sponsors' initial statements that the law was "not meant to target institutional providers of care or services." *Exhibit 3, p. 2.*

4. Case law applying ORS 124.100.

Finally, the fact that "permitting" under ORS 124.100 is not akin to negligence is supported by the only case applying that statutory term, *Miller v. Tabor West Investment Co.*, 223 Or App 700, 196 P3d 1049 (2008), *rev. denied*, 346 Or 184, 206 P3d 1058 (2009).

Notably, the *Miller* opinion analyzed the questions of negligence and ORS 124.100 separately and distinctly. It rejected the negligence claim against the landlord because "no reasonable person could conclude that it was reasonably foreseeable that Woods [the assailant and one of the tenants] would become violent and cause bodily harm to another tenant." *Id.* at 714.

In performing this analysis, the Court considered the typical kinds of evidence to support negligence claims, including the broad amount of information available to the landlord about Woods' violent history and propensities in the past. *Id.* The court concluded that the sum total of this evidence remained insufficient to make Woods' attack on the plaintiff "reasonably foreseeable" to the landlord. *Id.* at 716.

In analyzing the ORS 124.100 claim against the landlord, the Court focused on whether the landlord had any specific knowledge about the *very assault* by Woods on plaintiff that gave rise to the plaintiffs claim. *Id.* at 718 (noting that "the 'physical **abuse**' alleged to have been permitted by defendants here is Woods' assault on plaintiff at the 7-Eleven store" and that defendants would only be liable if they knowingly permitted *'that assault"')* (emphasis added).

The Court looked to whether the landlord knew that Woods "would … assault" plaintiff, not to whether Woods "might" assault plaintiff or whether there were any related risks. *Id.* at 719. In answering this question, the Court did not consider any of the evidence relating to Woods's background or prior misconduct, even towards the plaintiff, and the Court did not consider what would have been reasonably foreseeable to the landlord based on Woods' history. *See id.* at 718-19. As a result, the Court affirmed that, as a matter of law, the landlord did not "permit" the **abuse** under the meaning of ORS 124.100. *Id.; see also Fadel v. El-Tobgy*, 245 Or App 696, 703, 264 P3d 150 (2011) (repeating defendant's characterization of the ORS 124.100 "permitting" standard as "bystander liability").

Thus, the fact that "permitting" **abuse** under ORS 124.100 requires intentional conduct in the presence of that **abuse** is supported by the text, context, and legislative history of that statute, as well as by all available case law.

DATED this 14th day of August 2014.

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Footnotes

1 Plaintiff may argue that ORS 124.100 is a remedial statute and so should be "liberally construed." However, there is no text, context, or legislative to support this liberal construction. Moreover, this ignores the fact that at common law, a defendant had no duty to control the conduct of a third person to prevent physical harm. *See* Restatement (Second) of Torts § 315 (1965). Because the concept of "permitting" liability is in derogation of the common law, that definition is to be narrowly construed by the courts. *See Wilcox v. Warren Constr. Co.*, 95 Or 125,143, 186 P 13 (1919).

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