

2014 WL 7365913 (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, an adult resident, and Jason Schaefer, an adult resident, Defendants.

No. 1303-03185.
August 8, 2014.

Plaintiff's Motions in Limine

Bonnie Richardson, OSB No. 983331, Courtney C. Dippel, OSB No. 022916, Bonnie@FARlawfirm.com, Courtney@FARlawfirm.com, for plaintiff

ORAL ARGUMENT REQUESTED

Plaintiff makes the following motions *in limine*,

I. MOTIONS

1. Ms. Marre's Previous Marriages; Ms. Marre as Sexually Promiscuous or Aggressive

Pursuant to OEC 402, 403, and 412, plaintiff moves to exclude any evidence, statements or arguments relating to Ms. Marre's multiple marriages and divorces or arguments that Ms. Marre was sexually active, promiscuous or sexually aggressive. Such evidence is not relevant to the questions of defendants' negligence or liability for **elder abuse**, is unfairly prejudicial, will confuse the issues, and is prohibited by Oregon's Rape Shield Law, codified in OEC 412.

Ms. Marre was widowed at the age of 41. She subsequently remarried twice and divorced twice. The fact that she has been married and divorced multiple times is not relevant to whether or not defendants were negligent or are liable for statutory **elder abuse**.

Plaintiff believes defendants will try to bring in evidence or argue that Ms. Marre was sexually aggressive with Mr. Schumacher and other men, both at St. Anthony and at the facility she later moved into, implying that Ms. Marre is to blame, not the facility. This is exactly the type of "evidence" prohibited by Oregon's Rape Shield Law, OEC 412. While the express terms of OEC 412 only apply to criminal prosecutions for sex offenses, other jurisdictions apply the Rape Shield Law in civil cases. *See FRE 412* (explicitly applying the law to both criminal and civil cases); *M.L. v. S.N.*, 2014 Mass. App. Unpub. Lexis 354, 6-7 (Mass. 2014) ("Although the Massachusetts rape shield statute, *G. L. c. 233, § 21B*, by its terms does not apply in this civil context, the principles that it articulates are also embodied in our rule that evidence may be excluded where its potential for unfair prejudice outweighs its probative value.")

OEC 412 recognizes that this type of evidence has the potential to be unfairly prejudicial. While the rule does not explicitly apply to civil cases, the principles behind the rape shield laws are the same principles behind the rule that evidence should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice.

Under the **elder abuse** statute, plaintiff has to prove that Services for All Generations Enterprises, Inc.'s ("SAGE") employees knew that Mr. Schumacher was having prohibited sexual contact with Ms. Marre as described in the sex offense statutes in Chapter 163. ORS 124.100(5); ORS 124.105.

Ms. Marre was diagnosed with progressive **dementia** and cognitively declined throughout her residency at St. Anthony. Ms. Marre was mentally incapable of consenting to any sexual contact at any time because of that mental defect. In Oregon, consent is not a defense to sexual contact in civil cases when the victim is mentally incapacitated. ORS 163.315; *Wilson v. Tobiassen*, 97 Or. App. 527, 533-534 (1989) ("[W]e hold that a person's incapacity to consent under ORS 163.315(1) extends to civil cases."); *Z v. Worley*, 2001 U.S. Dist. Lexis 9476, *4-5 (D. Or. 2001) (in a civil sexual battery case involving a minor plaintiff, the court granted plaintiff's motion for summary judgment as to defendants' liability because consent as a defense to liability was unavailable under Oregon law).

Ms. Marre was the victim of unwanted sexual contact with Mr. Schumacher due to her mental defect/mental incapacity/dementia. The jury is going to have to make findings regarding Ms. Marre's capacity and whether she was capable of consenting to any contact with Mr. Schumacher. Any commentary or evidence solicited by defendants regarding Ms. Marre's sexual behavior with other men at the facility or at the facility she later moved into is improper. The probative value of any such evidence is substantially outweighed by the danger of unfair prejudice and confusion of the issues.

2. Defendants' Attempts to Evict Howard

Plaintiff moves to exclude any evidence relating to defendants' attempts to evict Mr. Schumacher from St. Anthony pursuant to OEC 402 and alternatively pursuant to OEC 403.

After the APS investigation in March, St Anthony gave Mr. Schumacher notice that they intended to evict him. Mr. Schumacher notified St. Anthony that he intended to contest the eviction.

After Ms. Marre left St. Anthony, defendants rescinded their eviction notice to Mr. Schumacher. Defendants attempted to evict Mr. Schumacher in August 2011 *after* Ms. Marre left the facility. That eviction proceeded to a contested case hearing before an administrative law judge ("ALJ"). On November 30, 2011, the ALJ reversed St. Anthony's decision requiring Howard to move out of the facility. The ALJ found that:

The Facility failed to meet its burden of proof that [Howard]'s conduct on August 4, 2011 [regarding other residents] was conduct that repeatedly and substantially interfered with the rights, health, or safety of residents or others. The Facility failed to show that [Howard], at the time of the August 4th incident, violated a known and reasonable standard of conduct. The Facility did not meet the requirements of OAR XXX-XX-XXXX(3) prior to issuing the August 18, 2011 Move-Out Notice.

ALJ Opinion and Order, November 30, 2011.

Plaintiff believes that defendants intend to use this failed eviction and ALJ opinion to suggest that they couldn't do anything about Mr. Schumacher and that his conduct was not bad towards Ms. Marre. Such an argument is irrelevant and will only confuse the issues before the jury. This evidence should be excluded.

3. Criminal Investigation

Plaintiff moves to exclude any evidence relating to the criminal investigation that was conducted pursuant to [OEC 402](#) and [403](#).

The Portland Police investigated but no criminal charges were ever filed against Mr. Schumacher. Defendants will point to the lack of criminal charges as some evidence that Howard did nothing wrong and argue to the jury that because there were no criminal charges, they could not possibly find that Howard committed any physical **abuse** as defined under the **elder abuse** statutes since those statutes incorporate the criminal sex offense statutes.

Defendants are collapsing and confusing distinct issues. This is a civil case in which plaintiff has the burden of proof on its claims, including the **elder abuse** claim, by a preponderance of the evidence. Police and district attorneys' reasons for not charging people with crimes can be complex and varied. Furthermore, criminal cases are subject to a completely different evidentiary standard - beyond a reasonable doubt. Any argument regarding the lack of criminal charges or any evidence relating to the criminal investigation is irrelevant and will only unfairly prejudice plaintiff and confuse the issues.

4. Oregon Board of Nursing Complaints and Lack of Disciplinary Action

Plaintiff moves to exclude any evidence relating to the Oregon Board of Nursing complaints and subsequent actions pursuant to [OEC 402](#) and [403](#).

After the APS investigation, one of the APS investigators made a formal complaint to the Oregon Board of Nursing regarding the conduct of Karen Marshall and Angela McAllister, both registered nurses employed at St. Anthony at the time of the underlying events. The Oregon Board of Nursing took no public or private disciplinary action against either nurse.

Similar to the arguments that defendants will make regarding the lack of criminal charges, plaintiff expects defendants to make similar arguments about the Board of Nursing complaints. Defendants will argue that the lack of disciplinary action against the nurses is some evidence that defendants did not do anything wrong or that somehow, defendants' conduct satisfied the standard of care. Additionally, defendants will argue that since the APS investigator made a complaint that resulted in no discipline, the APS investigator must be wrong in his findings and conclusions about St. Anthony.

The fact of the outcome of the nursing board complaints is irrelevant. If relevant, its probative value will be substantially outweighed by the danger of unfair prejudice.

5. Plaintiff's Timing of Filing the Lawsuit

Plaintiff moves to exclude any reference to the time difference between the underlying events and plaintiff's filing of the lawsuit or any argument or statements relating to "plaintiff's delay in filing the lawsuit," pursuant to [OEC 402](#).

The timing of plaintiff's complaint is completely irrelevant to the merits of the lawsuit or defendants' defenses. Defendants have not alleged any time-based defenses such as laches or statute of limitations. If defendants are concerned that witnesses' memories are affected by the passage of time, the passage of time is self-evident. However, defendants should not be able to suggest that it's plaintiff's fault for considering the timing of the lawsuit when witnesses' memories are affected.

Thus, any mention or reference to when plaintiff elected to file his lawsuit is not relevant to the issues before the jury and should be excluded.

6. Limiting Instruction for Financial State of Defendants and No Reference to Estate's Net Worth

Plaintiff moves to exclude any mention of plaintiff's net worth or any suggestion that defendants' "non-profit" status insulates them from liability or that they should be held to any differing standards because of such non-profit status pursuant to [OEC 402](#).

The financial condition of a party is inadmissible except in cases where the party may be liable for punitive damages. *Brooks v. Bergholm*, 256 Or. 1, 6 (1970) (ruling that failure to give limiting instruction to jury against considering defendant's wealth in determining compensatory damages was prejudicial error); *see also Hicks v. Lilly Enterprises*, 45 Or.App. 211,217 (1980) ("The evidence [a party's financial worth] is relevant to allow the jury to assess punitive damages in an amount which would constitute a penalty in relation to defendant's wealth.").

The value of Ms. Marre's estate is irrelevant and defendants should be excluded from mentioning it or presenting any evidence indicating it, pursuant to [OEC 402](#) and [ORS 40.155](#). Furthermore, defendants' financial status is only relevant if the jury considers awarding punitive damages. Defendants should not be able to argue that their non-profit status in any way exempts them for liability for any compensatory damages.

7. John Marre's OHSU Employment/Personnel File or Reference to a "Medically Sophisticated Family."

Plaintiff moves to exclude any evidence relating to John Marre's employment at OHSU as a surgical nurse in cardiac care or any references to the medical backgrounds of any of the Marre siblings pursuant to [OEC 402](#). John Marre's is one of Ms. Marre's sons and the personal representative of her estate. His siblings include a physician, nurse practitioner, and respiratory therapist.

After a contested motion to compel, the Court ordered plaintiff to produce John Marre's personnel file from Oregon Health and Science University where he's been employed for many years. Plaintiff produced those records in accordance with the Court's order.

Plaintiff moves to exclude any evidence or documents from Mr. Marre's employment file relating to Mr. Marre's employment at OHSU or any arguments that the children are a "medically sophisticated family," and therefore, somehow should have known about their mother's **abuse**. There are no allegations of comparative negligence or fault by Mr. Marre or his siblings and their professional backgrounds are not relevant to the matters at trial and should be excluded.

8. Father Maslowsky's Mother Residing at St Anthony

Plaintiff moves to exclude any evidence relating to the fact that Father Michael Maslowsky's mother resides at St, Anthony pursuant to [OEC 402](#). Father Maslowsky is the Chief Executive Officer for defendant Services for All Generations Enterprises, Inc. ("SAGE") and his own mother resides at St. Anthony. Plaintiff anticipates that defendants will solicit testimony from Father Maslowsky regarding his mother residing at St. Anthony in order to show or infer that St. Anthony is safe for the **elderly** population. Plaintiff has no access to Father Maslowsky's mother's records at St. Anthony to compare her treatment to Ms. Marre's treatment. Such evidence or arguments are not relevant and should be excluded,

9. No References to Howard Schumacher by Name

Plaintiff moves to exclude any evidence, documentary or testimonial, referring to Mr. Schumacher by name pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

Pursuant to the HIPAA Privacy Rule, individuals' medical records and other personal health information is protected from general disclosure. The Rule requires appropriate safeguards to protect the privacy of personal health information, and sets

limits and conditions on the uses and disclosures that may be made of such information without patient authorization. 45 CFR § 160 and § 164 A and E.

This case is about defendants' failure to keep Ms. Marre safe while she resided at St. Anthony. It's not about Mr. Schumacher's actions or behavior. Mr. Schumacher passed away this past June. In plaintiff's third amended complaint (and earlier versions of the complaint), plaintiff referred to Mr. Schumacher as "the male resident." APS repeatedly refers to Mr. Schumacher as "RV1." Out of respect for his privacy and that of his family, plaintiff suggests that the parties and the witnesses refer to Mr. Schumacher as "RV1" or the "male resident." throughout the public trial.

10. References to Estate Beneficiaries as "Greedy," or other Oblique References Such as "Where will the money go," or "Money won't bring back Ms, Marre," and the Like.

Plaintiff moves to exclude any statements, commentary or argument regarding the fact that any jury award will go to the Estate and, thus, by inference pass on the Estate's heirs and beneficiaries pursuant to [OEC 402](#).

The jury has to decide whether defendants are liable for the claims alleged by plaintiff, and if liable, an appropriate compensatory award based on the harm Ms. Marre suffered. Defendants should not be allowed to suggest that because Ms. Marre has since passed away, any award will not ultimately compensate her, but rather, go to the Estate's heirs. Such arguments are irrelevant to the questions of liability and damages.

11. Stipulated Motion in Limine Regarding Individual Defendants

The parties have agreed to dismiss the individual defendants. Karen Marshall and Jason Schaefer. The parties also agreed to a stipulated motion in limine that neither side would make statements, present evidence, or argument that those individuals were parties to the litigation and were subsequently dismissed.

DATED this 8th day of August 2014.

FOLAWN ALTERMAN & RICHARDSON LLP

By <<signature>>

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