IN THE SUPREME COURT OF THE STATE OF OREGON

JAN WYERS as Personal Representative of the Estate of Dianne Terpening, deceased,
Plaintiff-Appellant,
Respondent on Review,
v.

AMERICAN MEDICAL RESPONSE NORTHWEST, INC., an Oregon corporation
Defendant-Respondent,
Petitioner on Review

HAZEL CORNING,
Plaintiff-Appellant,
Respondent on Review,
v.

AMERICAN MEDICAL RESPONSE NORTHWEST, INC., an Oregon corporation
Defendant-Respondent,
Petitioner on Review.

VIOLET ASBURY,
Plaintiff-Appellant,
Respondent on Review,
v.

AMERICAN MEDICAL RESPONSE NORTHWEST, INC., an Oregon corporation
Defendant-Respondent,
Petitioner on Review.

STACEY WEBB,
Plaintiff-Appellant,
Respondent on Review,
v.

AMERICAN MEDICAL RESPONSE NORTHWEST, INC., an Oregon corporation
Defendant-Respondent,
Petitioner on Review.

MICHELE SHAFTEL,
Plaintiff-Appellant,
Respondent on Review,
v.

AMERICAN MEDICAL RESPONSE NORTHWEST, INC., an Oregon corporation
Defendant-Respondent,
Petitioner on Review

NATSUE AKRE,
Plaintiff-Appellant,
Respondent on Review,
v.

AMERICAN MEDICAL RESPONSE NORTHWEST, INC., an Oregon corporation
Defendant-Respondent,
Petitioner on Review

Court of Appeals No. A149258 (Control),
A149259, A149260, A149261, A149262, A149263

Supreme Court No. S063000

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the Court of Appeals Decision on Appeal from the
Judgment of the Multnomah County Circuit Court
Honorable Kathleen M. Dailey, Judge

Date of Decision:	December 31, 2014
Author of Opinion:	Nakamoto, J.
Joining in Opinion:	Armstrong, P.J., and Egan, J.

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June 2015

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Question Presented

On a "vulnerable person abuse" claim brought under ORS 124.100, what level of culpability and involvement is required to hold a defendant liable for "permitting" the vulnerable person abuse caused by a third party on the plaintiff? Or, in other words, does the "permitting" standard under ORS 124.100 require "intentional" conduct (per defendant and the trial court), "negligent" conduct (per Plaintiffs), or something "more akin to reckless" conduct (per the Court of Appeals)?

Proposed Rule of Law

For a defendant to be held directly liable under ORS 124.100 for "permitting" the vulnerable person abuse caused by a third party, the plaintiff must prove that the defendant engaged in an intentional action or failure to act when it had some knowledge of the abuse being perpetrated by the third party on the particular plaintiff.

NATURE OF THE ACTION, RELIEF SOUGHT, AND NATURE OF THE JUDGMENT

This consolidated appeal relates to six[1] lawsuits filed by Plaintiffs against a single defendant, American Medical Response Northwest, Inc.

[1] This appeal will in fact affect eight cases: six of the cases are consolidated into this appeal, and another two later-filed cases sit in abatement at the Multnomah County Circuit Court awaiting resolution of this appeal.

("AMR" herein), asserting a single claim for relief: statutory vulnerable person abuse under ORS 124.100. On June 30, 2011, the trial court judge (Hon. Kathleen Dailey) granted summary judgment in favor of AMR, holding that no genuine issue of material fact could support a finding that AMR had "permitted" the abuse on these plaintiffs. Six general judgments of dismissal were entered on July 12, 2011. On December 31, 2014, the Court of Appeals reversed and remanded. AMR promptly filed a petition to this Court, which allowed review on May 14, 2015.

FACTS

The six lawsuits consolidated in this appeal were filed after years of litigation involving different plaintiffs against AMR. To provide proper context for the cases on appeal, it is necessary to recount this longer history:

A. Paramedic Lannie

AMR employed a paramedic licensed by the State of Oregon, as one of its many paramedics in Multnomah County between November 1991 and December 2007—a period of some 16 years. TCF 104.[2]

Plaintiffs assert that AMR received complaints during last two years that he had inappropriately touched or looked at certain female patients in a sexual manner during his one-on-one encounters with them in the back of an

[2] All references to the Trial Court File herein relate to the file in *Terpening v. American Medical Response Northwest Inc.*, Mult. Cty. Case No. 0910-14750.

ambulance. According to plaintiffs, there were four such complaints made to AMR: patients (February 2006), (March 2006), (December 2006), and (March 2007).

As discussed in more detail below, there are disputes relating to each of these complaints, including whether AMR received the complaint (whether it involved misconduct of a "sexual" nature (who never alleged improper touching); and whether AMR performed an adequate investigation in being unable to substantiate the two complaints of improper touching that it did receive (and

B. Arrest and Conviction of

On December 8, 2007, a woman named Royshekka was transported by to the hospital; once there, she accused him of touching her in an unwanted sexual manner during the transport. AMR took off shift, and he never again transported a patient. TCF 104. later pled guilty to Attempted Sexual Abuse I relating to and two other women who had not previously made complaints.[3]

C. The Eight Initial Lawsuits Against and AMR

In December 2007, filed the first lawsuit against and AMR, alleging common-law claims of battery against both defendants and

[3] *State v.* Mult. Cty. Case No. 071235904.

negligence against AMR only.[4] Another seven plaintiffs (most of whom had not reported their alleged abuse to AMR or anyone else at the time) thereafter filed their own cases against asserting similar common-law claims.[5]

case was tried to a jury in August and September 2009. had voluntarily dismissed and proceeded only against AMR on her theory that it had negligently hired and supervised The jury awarded plaintiff compensatory damages of $2,250,000 but declined to award punitive damages.[6] None of the other seven cases asserting common-law claims have gone to trial (six of them settled, and the seventh is still pending below but is unrelated to the present appeal).

D. The Six Later Lawsuits, at Issue in This Appeal

After the verdict and beginning in October 2009, the six above-captioned Plaintiffs—Dianne Terpening, Hazel Corning, Michele Shaftel, Stacey Webb, Violet Asbury, and Natsue Akre—filed lawsuits against AMR. All six were represented by the Kafoury & McDougal law firm, who had represented seven of the eight original plaintiffs discussed above.

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[4] *v. AMR*, Mult. Cty. Case No. 0712-14914.

[5] *v. AMR*, Mult. Cty. Case No. 0801-00575; *Robbins v. AMR*, Mult. Cty. Case No. 0809-13217; *Howard v. AMR*, Mult. Cty. Case No. 0810-15317; *v. AMR*, Mult. Cty. Case No. 0902-02281; *Hines v. AMR*, Mult. Cty. Case No. 0908-11520; *Lucas v. AMR*, Mult. Cty. Case No. 0910-14325; and *v. AMR*, Mult. Cty. Case No. 0911-16290.

[6] This verdict was affirmed on appeal. *v. American Medical Response Northwest, Inc.*, 255 Or App 317, 297 P3d 9 (2013), *rev. denied*, 353 Or 867, 306 P3d 639 (2013).

The circumstances relating to Plaintiffs' allegations were unusual. Earlier in 2009, during discovery in Kafoury & McDougal successfully moved to compel from AMR a list of names and contact information for the hundreds of women transported by during his last three years of employment. (AMR further opposed this discovery order by filing a Petition for Writ of Mandamus with this Court, which was denied on March 26, 2009. *See* Order Denying Petition for Writ of Mandamus, *v. American Medical Response Northwest, Inc.*, No. S057040.)

After obtaining the patient list, Kafoury & McDougal then called and apparently interviewed hundreds of women. TCF 111, Exh. 41.[7] AMR sought to learn in discovery the questions asked and answers obtained during this process, but Plaintiffs objected based on "work product," and the trial court declined to allow any production or depositions beyond a list stating each Plaintiff's date of retention. TCF 22 & 31.

Regardless, all six Plaintiffs were discovered by Kafoury & McDougal during 2009 in connection with these telephone calls. It is undisputed that none of these Plaintiffs had ever told anyone (including AMR) about alleged abuse

[7] Note that this exhibit was created by Kafoury & McDougal, and it purports to summarize the results of their telephoning project, claiming that it heard 18 reports of undefined "inappropriate sexual behavior" out of 579 transports. *Id.* AMR has no way to verify this information given that Plaintiffs refused to produce underlying records. In any event, AMR does not stipulate to these results; rather, it asserts that this exhibit is patently inadmissible as evidence.

by from the time of their transports in 2006 or 2007 up through their telephone calls with Kafoury & McDougal in 2009. Consequently, the earliest that AMR learned about Plaintiffs' allegations was in late 2009. AMR had no knowledge of their allegations while was an employee. TCF 104.

These six Plaintiffs' allegations have differences, but also share some similarities. All of the alleged incidents happened in the back of an ambulance during one-on-one interactions with The extent of the alleged wrongful touching ranges from touching breasts and genitals (Shaftel) to rubbing a stomach to down below the waistline of fastened pants (Webb) to "brushing his forearm" back and forth over breasts (Akre). TCF 105, Exhs. 8, 9 & 10. Some plaintiffs testified that they said nothing to (e.g., Akre), some said that they used their arms or hands to physically block further touching (e.g., Webb), while one claims that she verbally told him to stop (Terpening). *Id.*, Exhs. 3, 9 & 10. Per their Complaints, the plaintiffs claim that they qualify as "vulnerable persons" under ORS 124.100 either because they were over the age of 65 (Akre, Asbury, Corning), had a disability (Terpening), or else had momentary lapses in their health or state of consciousness (Webb and Shaftel).

However, no Plaintiff contends that there were any eyewitnesses or other participants to the abuse. No Plaintiff reported the incident to AMR, whether to a supervisor or even to the other paramedic driving the ambulance. No Plaintiff

reported the incident to a physician or nurse upon arriving at the hospital at the conclusion of the transport. No Plaintiff reported it to any other authority, such as the local police or Oregon's regulatory agency overseeing paramedics.

Notably, when each of these six Plaintiffs initiated their lawsuits against AMR, *more than two years had passed*. Accordingly, unlike the original plaintiffs, these Plaintiffs were time-barred from asserting common-law claims such as battery and negligence. Instead, Plaintiffs asserted a single statutory claim, ORS 124.100's "vulnerable person abuse," which has a seven-year statute of limitations. They did not sue the alleged abuser, but sued AMR for allegedly "permitting" to abuse them. *See* ORS 124.100(2).

E. AMR's Consolidated Motion for Summary Judgment

Despite factual disputes regarding AMR's knowledge and investigations of prior complaints, AMR moved for summary judgment against Plaintiffs because "permitting" liability under ORS 124.100(5) required evidence of intentional action or failure to act by AMR when it had some actual knowledge of abuse being perpetrated by on any particular Plaintiff. Based on this proposed construction, AMR asserted that Plaintiffs' claims were defeated as a matter of law based on undisputed facts. TCF 103.

On this last point, Plaintiffs did *not* disagree. Indeed, at oral argument, Plaintiffs' counsel *conceded* that their claims would be subject to dismissal if AMR's proposed construction was accepted. Tr. 55:13-16.

Instead, Plaintiffs opposed AMR's motion by asserting a competing legal construction for "permitting," contending it was an "ordinary negligence" standard or, at most, an undefined "negligence plus" standard. *See* TCF 107; *see also* T. Ct. Order at pp. 3 & 7 [App-33 & 37] (characterizing Plaintiffs' arguments). Plaintiffs then submitted a voluminous factual record in an attempt to create genuine issues of material fact *under their proposed legal standard of "negligence" or "negligence plus."* In light of this posture, it was the legal construction for the term "permitting"—and not the substance of the factual record—that became dispositive for the motion.

On June 30, 2011, Judge Dailey granted AMR's motion for summary judgment. In her 15-page opinion, all but one paragraph of it focused on the statutory construction of the term "permitting," *i.e.*, that it required intentional conduct and not mere negligence. In contrast, the factual record was addressed in a single paragraph that simply noted the undisputed fact that AMR had no contemporaneous knowledge about alleged abuse on any of these Plaintiffs. *See* T. Ct. Order at p. 15 [App-45].

F. Reversal by Court of Appeals

The Court of Appeals later reversed this dismissal, holding that "permitting" liability was "more akin to the standard for reckless conduct" (which had not previously been asserted by any litigant). *Wyers v. American Medical Response, Inc.*, 268 Or App 232, 250, 342 P3d 129 (2014) [App-23].

The court then "readily conclude[d]" that all six Plaintiffs submitted sufficient evidence to defeat summary judgment under its new legal standard. *Id.* at 254 [App-28].

G. Summary of Factual Record

In the event that this Court rejects AMR's proposed construction but instead adopts a lesser standard for "permitting" liability, then the factual record below may become relevant to the determination of summary judgment.[8]

1. AMR's lack of knowledge of certain facts

In past briefing, Plaintiffs organized their presentation to suggest a series of 11 women complaining to AMR about inappropriate touching. According to the factual record, however, there were only *at most two* such complaints prior to the transports of any of Plaintiffs. TCF 104.

Of the 11 listed, six of them are the ***Plaintiffs*** in this appeal, who, as discussed above, never made their allegations known to anyone until they filed their lawsuits years after the fact.

The seventh irrelevant allegation is that relating to ***Royshekka*** who (as discussed above) was the last patient ever transported by TCF 104. AMR strongly disputes Plaintiffs' characterizations of fact relating to complaint and subsequent events, but, in any event, it is undeniable

[8] In contrast, as noted above, plaintiffs have conceded that the factual record could not support a genuine issue of material fact under the trial court's construction of the term "permitting." Tr. 55:13-16.

that complaint post-dated all of these Plaintiffs' ambulance transports with Thus, it simply cannot be said that AMR had any notice or knowledge of complaint at the time of the respective transports involving the Plaintiffs in this appeal.

The eighth irrelevant allegation is that relating to *Patricia* who was transported by on February 19, 2006. Plaintiffs have offered no evidence that AMR has any record or knowledge about this complaint; indeed, AMR first learned about her allegations during this litigation. TCF 104.

According to she called AMR's general number to request the name of one of her paramedics so her "biker friends" could "beat him up." TCF 111, Exh. 22 at p. 7. She claims AMR's receptionist responded that she could not provide "confidential" information. *Id.*, Exh. 20. She also contends she told the receptionist at the end of this brief conversation that an unidentified paramedic had touched her inappropriately and "was not safe to transport little girls." *Id.*, Exh. 21. By her own admission, she did not speak with anyone other than the receptionist. *Id.*

There is a dispute of fact regarding whether ever made these statements. AMR's receptionist strongly denied having ever heard such allegations from a caller. TCF 113, Exh. 19. But more importantly here, AMR's receptionist explained that she does not intake complaints from callers on any subject; rather, she simply answers the phone and then routes the call to

an appropriate person within AMR. *Id.* In other words, when a caller wishes to make a complaint, AMR's receptionist does not listen to the complaint but rather connects the caller to the appropriate person, such as an operations supervisor, to receive and record the complaint. *Id.*

In sum, it is undisputed that never identified any paramedic by name; that she never spoke with anyone at AMR who could take down her complaint; that no record of this call exists; and that this matter never came to the attention of anyone at AMR who could have investigated it. In sum, there was no evidence in the record that the alleged complaint could have provided any notice or knowledge to AMR to support a negligence standard, let alone a higher "recklessness" standard.

Lastly, the ninth irrelevant allegation is that relating to *Rabecca* who mailed back a customer survey to AMR in March 2006 indicating some negative (and some positive) comments about TCF 111, Exh. 4. Her complaint alleged that failed to respect her privacy at the hospital by not looking away while a nursing assistant gowned her. *Id.* AMR investigated the complaint, interviewed Ms. concluded that this privacy complaint was "*substantiated*," and accordingly counseled about respecting the privacy of patients. *Id.*, Exh. 2.

While there are some disputed facts about what Ms. allegedly stated in her interview with AMR—including whether she characterized

staring as "sexually menacing"—it remains undisputed that she did *not* make any complaint about any conduct by while in the ambulance, and she did *not* make any complaint of any form of sexual or unwanted touching by him. As a result, complaint cannot be viewed as providing AMR with advance notice of such conduct by

2. AMR's knowledge and investigation of two prior complaints

Prior to transport and the end of employment, AMR had received two complaints alleging unwanted and sexual touching by

TCF 104. Although there are extensive disputed facts in the record regarding both of these complaints, facts which *cannot* be disputed by Plaintiffs are that: (1) AMR performed internal investigations on both complaints; (2) vehemently denied all of the allegations; (3) AMR and its supervisors concluded at the time that they was unable to substantiate either allegation; and (4) after the conclusion of the second investigation, AMR chose to document the allegations by placing a written record about them in personnel file, which warned that AMR "will re-open these cases if more information becomes available." *Id.*; TCF 111, Exh. 15 & 27 at p. 9.

By way of brief summary on each complaint:

Betty This complaint was called in by her adult son to AMR shortly after December 12, 2006 transport. AMR's investigation included interviewing separately interviewing the ambulance driver

(Nick Liedtke), interviewing Ms. and speaking with the son on multiple occasions. TCF 111, Exh. 10, 11 & 12. Following its investigation, AMR concluded that it could not substantiate the allegations of inappropriate or sexual touching, but rather that the incident appeared to be consistent with appropriate patient care. TCF 104. After being informed of AMR's conclusion, Ms. son chose not to report his mother's complaint to the police or to the State.

Paula Ms. was transported to OHSU on March 4, 2007 following an episode of domestic violence. Upon arrival at OHSU, a police officer interviewed her about the domestic violence, but Ms. then informed the officer that had inappropriately touched her during the transport. The officer interviewed and the driver (Lindsi Huff) about these allegations, and then discussed the matter with an AMR supervisor.[9] TCF 111, Exh. 16. The police chose to take no action against AMR also internally investigated the allegations (including separate interviews of and Huff), but it again concluded that it could not substantiate the allegations of inappropriate touching. TCF 104. However, as noted above, given that it was

[9] AMR has multiple supervisors given that it is a 24/7 operation. The supervisor with whom the officer spoke about Ms. allegations—Mike Verkest—had not been involved in AMR's investigation of relating to the complaint three months earlier. As a result, during Verkest's brief call with the officer, the subject of the complaint did not come up, but the police officer did not inquire of Verkest about whether there had been any prior allegations against *See* TCF 111, Exh. 18.

the second such complaint, AMR placed a record about it in personnel file. *Id.*; TCF 111, Exh. 15 & 27 at p. 9.

3. Timing of the Plaintiffs' transports relating to complaints

The six Plaintiffs in this appeal were transported by at different points of time relative to AMR's receipt of the and complaints:

- One Plaintiff (Akre) was transported prior to both complaints.
- Three Plaintiffs (Shaftel, Asbury, and Terpening) were transported after the complaint but before the complaint.
- Two Plaintiffs (Webb and Corning) were transported after the and complaints.

4. Undisputed evidence on AMR's policies and knowledge

Plaintiffs offered no evidence that AMR (or any of its individual supervisors or employees) concluded or believed that had committed any inappropriate or sexual touching prior to receiving complaint. It was undisputed that vehemently denied and allegations to his supervisors. It was undisputed that the paramedic driving the ambulance in both and transports neither saw nor heard anything to corroborate the complaints. It was also undisputed that had worked at AMR for an otherwise uneventful 16 years, receiving average to above-average annual performance reviews from his supervisors. TCF 104.

There was also no dispute regarding AMR's policies and procedures.

AMR expressly forbids its paramedics from engaging in criminal activity, including sexual misconduct toward patients. *Id.*, Exh. 1 (policy signed by

These prohibitions are also enforced by the Department of Human Services, which certifies and monitors every paramedic in the state of Oregon. *See, e.g.*, OAR 333-265-0040 & -0100 (two-year re-certification process); *see also id.* at -0080 (requiring paramedics to notify the state if they have received any "citation, arrest, formal charge, or conviction" for any "sexual offense").

SUMMARY OF ARGUMENT

In creating an enhanced statutory claim for physical abuse of a vulnerable person, the Legislature restricted possible defendants to:

(1) The person who "caused" the physical abuse (which means the person who committed one of the crimes listed in ORS 124.105); and

(2) A person "who has permitted another person to engage in physical * * * abuse." ORS 124.100(2).

The statute treats both defendants—that is, the criminally-liable abuser *and* the person who "permitted" it—as equally culpable: both face *mandatory* trebling of all damages; both face *mandatory* awards of prevailing plaintiff attorney fees; both are subject to restraining orders and TROs; and both face a seven-year statute of limitations. *See* ORS 124.100(2), ORS 124.120 & ORS 124.130.

In defining "permitting", the Legislature stated that such liability exists

"if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical * * * abuse." ORS 124.100(5).

AMR asserts that this is a clear and straightforward definition, which the trial court accepted. However, it has been susceptible to multiple interpretations within this case, and it has no known analogue in the common law. It also contains a potential ambiguity given that the verb root "know" appears *twice* over the course of the definition. This "double" requirement of knowledge separates the definition's first part—which requires *actual* "knowing" conduct—and its second part—which requires *constructive* knowledge ("should have known") about the abuse on the plaintiff.

In the years since ORS 124.100's enactment, appellate courts have not had occasion to interpret the meaning of this definition. However, when full consideration is given to the text, context, and legislative history of ORS 124.100(5), *see State v. Gaines*, 346 Or 160, 172, 206 P2d 1042 (2009), only AMR's proposed construction of "permitting" can be correct. The analysis in support of AMR's construction is well stated by the trial court's Order. *See* T. Ct. Order [App-31 to App-45].

Briefly, the "permitting" standard requires some involvement in the abusive conduct, *i.e.*, that the defendant intentionally acted or failed to act in the presence of the very "abuse" against the Plaintiff. *Cf.* Tr. 30 (trial court

analogizing "permitting" standard to scenario where "the mom * * * lets her kid be abused by the boyfriend and watches it happen"). The enhanced remedies of ORS 124.100 were intended to punish parties involved in the abuse itself even though they never laid hands on the plaintiff. The statute was not designed to punish parties with some lesser level of mental culpability, such as negligence or even recklessness. Thus, similar to how a co-conspirator is equally culpable and liable for a tort performed by another, under ORS 124.100 the person who "permits" the abuse is equally culpable and treated the same as the person who *in fact* committed the abuse.

In contrast, the proposed constructions from the Plaintiffs ("negligence") and the Court of Appeals ("recklessness") cannot be reconciled with the text, context, and legislative history of the statute, but rather require that the statute be judicially re-written.

In sum, AMR requests that this Court accept its proposed rule of law as set forth at the start of this brief, which should result in the reversal of the Court of Appeals' opinion and the reinstatement of the trial court's grant of summary judgment against these six lawsuits.

ARGUMENT

A. The "Permitting" Standard Requires Intentional Conduct with Some Knowledge of the Abuse Being Perpetrated on the Plaintiff.

The question of when a defendant can be liable under ORS 124.100 for "permitting" the abuse of a vulnerable person committed by a third

party is a question of first impression for this Court. Before turning to an analysis of the text, context, and legislative history of the statute, AMR will first discuss the prior case law relied upon by the Court of Appeals.

1. The *Miller v. Tabor West* opinion

The Court of Appeals below described *Miller v. Tabor West Investment Co., LLC*, 223 Or App 700, 196 P3d 1049 (2008), *rev den*, 346 Or 184, 206 P3d 1058 (2009), as "the lone Oregon appellate decision to date that addresses the nature and quantum of evidence that a plaintiff must adduce to prove that a defendant 'permitted' a third-party to abuse a vulnerable person." *Wyers*, 268 Or App at 247 [App-20]. It further opined that *Miller* "undermines defendant's proffered interpretation of ORS 124.100(5)." *Id.* AMR asserts that this reading of *Miller* is mistaken.

Even though *Miller* is not binding authority on this Court, it is important to note that it applied the "permitting" standard but did not seek to better explain the meaning of that definition. *See Miller*, 223 Or App at 718. Such an undertaking was unnecessary because the plaintiff's showing was deficient under *any* interpretation of that term, authorizing summary judgment. *See id.* at 718-19. (Indeed, *Miller* separately affirmed the dismissal of the plaintiff's common-law negligence claim.)

Given this backdrop, *Miller*'s application of the "permitting" standard is predictably subject to multiple interpretations and is therefore of little or no

persuasive value. *Compare* T. Ct. Order at p. 8 [App-38] (trial court reading *Miller* to support its construction) *with Wyers*, 268 Or App at 249 [App-21-22] (appellate court reading *Miller* to support its contrary construction, but acknowledging that *Miller* is susceptible to multiple readings).

In any event, despite the questionable value of *Miller* to the question presented in this appeal, AMR maintains that *Miller*, if anything, supports AMR's proposed construction of ORS 124.100(5), as the trial court held.

Notably, *Miller* analyzed the questions of negligence liability and ORS 124.100 liability separately and distinctly.[10] The court 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." *Miller*, 223 Or App at 714. In conducting this analysis, the court considered typical evidence to support negligence claims, including the information available to the landlord about Woods's violent history in general and past propensities. *Id.* The court concluded that such evidence remained insufficient to make Woods's attack on the plaintiff "reasonably foreseeable" to the landlord. *Id.* at 716.

[10] In contrast, the trial court in *Miller* had rejected the ORS 124.100 claim simply because it had already dismissed the negligence claim. *See id.* at 717. The Court of Appeals affirmed summary judgment on the ORS 124.100 claim, but it did so upon different reasoning. *See id.* at 719 n. 13 ("Although our reasoning differs from that on which the trial court relied, it is nonetheless based on a fully developed record below. *See Outdoor Media Dimensions, Inc. v. State of Oregon*, 331 Or 634, 659-60, 20 P3d 180 (2001) (explaining 'right for the wrong reason' principle).").

In contrast, 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 the plaintiff that gave rise to the plaintiff's claim. *Id.* at 718 (noting that "the 'physical abuse' alleged to have been permitted by defendants here is Woods's assault on plaintiff at the 7-Eleven store" and that defendants would only be liable if they knowingly permitted "*that assault*") (italics added). The court looked to whether the landlord knew that Woods "would" assault the "plaintiff," *not* to whether Woods "might" assault plaintiff or some other person like him. *Id.* at 719. In dismissing the ORS 124.100 claim, the court chose not to reference any of the evidence relating to Woods's background or prior misconduct, and the Court did not even consider what would have been reasonably foreseeable to the landlord based on Woods's 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"). All of this analysis is consistent with AMR's proposed rule of law in this case.

Although the Court of Appeals below claimed to interpret *Miller* in a different manner, its conclusion on this point is betrayed by its own analysis. For example, in summarizing what facts the *Miller* court considered to analyze

"permitting" liability, the Court of Appeals listed the following:

> "the defendant's awareness (or lack of awareness) of (i) the *actual instance* of abuse; (ii) Woods's interaction with *the plaintiff* on the day of the abuse; (iii) Woods's interaction with *the plaintiff* on the day before the abuse; and (iv) past interactions, generally, between Woods and *the plaintiff*."

Wyers, 268 Or App at 249 [App-22] (italics added). This list implicitly recognizes that the *only* relevant knowledge is about the actual instance of abuse or *the actual plaintiff* who is bringing the claim. This list further implicitly recognizes that a "risk" of abuse toward the general public based on Woods's characteristics in general or past dealings with other individuals is irrelevant. (Again, the *Miller* court considered such facts about Woods, but *only* in connection with the plaintiff's negligence claim. *See Miller*, 223 Or App at 702-03 & 713-14.)

The Court of Appeals below summed up the *Miller* holding as follows:

> "[E]vidence of facts regarding the general relationship between a *plaintiff* and an alleged abuser can serve as a basis from which a jury could conclude that a reasonable person should have known that the abuser 'would' commit the specific abuse alleged by *the plaintiff*."

Wyers, 268 Or App at 250 [App-22-23] (italics added). But this very summary—which is limited to foreknowledge about actions toward the specific "*plaintiff*" but toward no one else—is consistent with the construction set forth by AMR and approved by the trial court, and is *not consistent* with the Court of Appeals' own later application of this standard. *See, e.g., id.* at 254 [App-28]

(considering whether AMR had foreknowledge about actions toward "*the same category of victim*" as the plaintiff, as opposed to toward the "*plaintiff*" herself) (italics added). There is simply nothing in *Miller* to support a standard for "permitting" liability based on "the same category of victim." To the contrary, *Miller* confirms that such evidence may be relevant on a common-law negligence claim, but it cannot support liability under the heightened standard of "permitting."

2. The *v. AMR* opinion

The Court of Appeals below also relied upon *v. American Medical Response Northwest, Inc.*, 255 Or App 317, 323-36, 297 P3d 9, *rev. denied*, 353 Or 867, 306 P3d 639 (2013), to challenge the argument that the mandatory treble damages provision of ORS 124.100(2)(b) supports a heightened standard for liability for vulnerable person abuse claims. *See Wyers*, 268 Or App at 250-51 [App-23-24].

The opinion provides no such support. That opinion was limited to two narrow issues:

(1) Whether an under-65 and otherwise-healthy plaintiff could qualify as a "vulnerable person" under ORS 124.100 based on a temporary or fleeting loss of consciousness? (To which the court answered "yes.")

(2) Whether a *trebled* award of non-economic damages under the vulnerable person statute was subject to the $500,000 cap on non-economic

damages set forth in ORS 31.710(1)? (To which the court answered "no.") *See* 255 Or App at 317.

Notably, although the trial court judge in had equated the "permitting" standard of ORS 124.100(5) with ordinary negligence,[11] AMR did *not* appeal that holding in and so the Court of Appeals did not address the meaning of the "permitting" standard. *See id.*

Indeed, when considering the assignment of error in relating to the imposition of mandatory treble damages in that case, the court was careful to limit its holding to the subsection of the statute that imposes treble damages (i.e., ORS 124.100(2)(b)) without referencing any subsection relating to the "permitting" standard for liability. *See id.* at 325.

More specifically, relying on *Holman Transfer Co. v. PNB Telephone Co.*, 287 Or 387, 599 P2d 1115 (1979), the court agreed that "whether a heightened *mens rea* applied depended on whether the legislature that enacted the particular statute intended to impose such limits." 255 Or App at 324. The court then concluded that "*ORS 124.100(2)(b) [i.e., the treble damages subsection]* does not contain a *mens rea* requirement," and that "nothing in the context or legislative history of *the tripling provision*" would support a heightened standard for liability. *Id.* at 325 (italics added).

All of this discussion simply confirms that the court was *not*

[11] *See id.* at 326 (quoting trial court's holding that AMR "permitted" the abuse "by negligently failing to prevent the abuse").

considering or deciding whether the "permitting" standard of ORS 124.100(5) contains a heightened *mens rea* requirement, or whether the presence of mandatory treble damages within ORS 124.100 provides contextual support to such a construction of the statutory term "permitting." did not involve that issue, and the court's discussion confirmed that it was avoiding it.

3. AMR's construction is supported by the text of the statute.

Turning to the present question of first impression—*i.e.*, the meaning of the "permitting" standard—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).

Regarding the text of the statute, a person can be liable for "permitting" another person to engage in 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." ORS 124.100(5).

As noted, the verb root "know" appears *twice* over the course of the definition: it requires both *actual* knowing conduct ("knowingly acts or fails to act") as well as *constructive* knowing conduct ("should have known"). This "double knowledge" requirement is not an ambiguity, surplusage, or a drafting error; to the contrary, it is textual support for AMR's requested construction of the statutory term.

a. "Actual" knowledge requirement

It cannot be disputed that ORS 124.100(5) requires proof that a defendant engaged in "*knowing*" conduct. *See id.* (requiring proof that defendant "knowingly acts or fails to act"). Conduct that is done "knowingly" has a higher degree of mental culpability than conduct performed "recklessly." *Compare* ORS 161.085(8) (defining "knowingly" or "with knowledge") *with* ORS 161.085(9) (defining "recklessly").

Simply put, "reckless" conduct involves disregarding known *risks*, while "knowing" conduct requires actual and subjective knowledge of the misconduct. *Id.*; *see also State v. Jantzi*, 56 Or App 57, 60-61, 641 P2d 62 (1982) (holding that "a person who 'is aware of and consciously disregards a substantial and unjustifiable risk' that an injury will occur acts 'recklessly,' not 'knowingly.'"); *id.* at 60 n 1 (noting that the term "knowingly" is "almost synonymous" with the term "intentionally"); *accord* T. Ct. Order at pp. 6-7 [App-36-37] ("[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").

This textual feature of ORS 124.100(5) was in fact acknowledged by the Court of Appeals below. *Wyers*, 268 Or App at 245 [App-16-17] ("We first conclude, and the parties do not dispute, that the placement of the adverb

'knowingly' immediately before the verb phrase 'acts or facts to act' demonstrates that the adverb modifies that verb phrase").

Thus, ORS 124.100(5) requires proof that the defendant engaged in "knowing" and "intentional" misconduct. This textual requirement *by itself* defeats any competing construction that ORS 124.100(5) requires proof of only "negligent" or "reckless" action.

b. "Constructive" knowledge requirement

The second part of ORS 124.100(5) states an additional "constructive" knowledge requirement: "* * * under circumstances in which a reasonable person should have known of the physical * * * abuse." *Id.* Certain facts are undeniable regarding this portion of the text:

- This constructive knowledge requirement cannot *undo* the actual knowledge requirement stated earlier in the definition.
- As the Court of Appeals below conceded, the term "the physical * * * abuse" in this part of the definition "indicates a reference to *the particular abuse* upon which a plaintiff's claim under ORS 124.100(5) is based, that is, *the abuse of the plaintiff* * * *." *Wyers*, 268 Or App at 245-46 [App-17] (italics added).[12]

[12] To elaborate, the Legislature's use of the article "*the*" here 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 (cont'd)

Thus, the constructive knowledge requirement in ORS 124.100(5) is necessarily limited to knowledge of *the abuse that occurred on the particular plaintiff*. In other words, the defendant must have some degree of actual knowledge of the abuse on the plaintiff. [13] The requirement is *not* met when the constructive knowledge relates to generalized "risks" or "likelihoods" from past history. The legislature could have included phrases like "risk," "likelihood," "substantial risk," or even "other past abuse" in ORS 124.100(5), but it did not.

Given this phrasing of ORS 124.100(5), the standard for "permitting" liability requires that the defendant "subjectively 'knowingly act or fail to act' in the objective presence of abuse that is uniquely defined by the statute." T. Ct. Order at p. 7 [App-37]. In other words, the defendant must have had *some* actual knowledge of the abuse "even if she did not know subjectively that the conduct constituted abuse under the statute." *Id.* This "constructive" knowledge element ensures that a plaintiff need not prove that a defendant subjectively knew at the time that the abuse amounted to one of the enumerated crimes listed in ORS 124.105; rather, it is sufficient if the defendant reasonably should have known that the actions on the plaintiff amounted to a crime.

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definition, then the term "physical abuse" might have referred to *any* physical abuse, including abuse committed in the past or on other individuals.

[13] As noted above, this requirement is consistent with the *Miller v. Tabor West* opinion, including the interpretation of *Miller* set forth by the Court of Appeals below, in which the analysis was focused only on the abuser's actions toward the "plaintiff," and the plaintiff alone.

In sum, the plain text of ORS 124.100(5) requires a plaintiff to prove that the defendant intentionally acted or failed to act with some degree of knowledge about the very abuse being committed on the plaintiff.

4. AMR's construction is supported by context of the statute.

AMR's proposed construction finds compelling contextual support in at least two sources: (a) the Legislature's use of "permitting" in Oregon's criminal code; and (b) the mandatory treble damages provision in ORS 124.100(2).

a. Contextual support from other uses of "permitting"

In creating the statutory claim for vulnerable person abuse, the Legislature expressly linked elements of the claim to Oregon's criminal code. For example, in ORS 124.105, the Legislature defined "physical abuse" by incorporating by reference some 20 criminal statutes. *Id.* Considering that a prior criminal conviction is not a prerequisite to asserting an ORS 124.100 claim based on alleged physical abuse,[14] the Legislature created a claim in which a civil jury would potentially be asked to make factual determinations under the criminal statutes, such as whether a civil defendant had committed all elements of "sexual abuse in the third

[14] ORS 124.105(1) asks not whether the defendant had been convicted of any of the listed crimes, but instead asks whether the "defendant engaged in conduct against a vulnerable person that *would* constitute any" of those criminal violations. *Id.* (italics added). The fact that a conviction is not necessary to assert a claim is also confirmed by ORS 124.115(2)(a) and ORS 124.140.

degree" as defined by ORS 163.415.

Given this high degree of connection between ORS 124.100 and Oregon's criminal code, it is notable that Oregon's criminal code routinely uses the term "permitting" in describing a form of defendant culpability. *See, e.g.*, ORS 163.670(1) (stating that 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") (italics added).

The Court of Appeals below declined to consider the meaning of "permitting" within Oregon's criminal code. *See Wyers*, 268 Or App at 244-45 & n. 10 [App-16]. Its thinking was that because ORS 124.100(5) "specifically define[s]" the term "permitting," the court should only analyze the meaning of the words contained within that definition, and not the word itself being defined. *Id.*

AMR respectfully asserts that this view is mistaken. Although it is true that the word being defined ("permitting") is not within the "*text*" of the definition, it certainly provides "*context*" for the definition, especially where (as here) the definition is susceptible to multiple interpretations. The Texas Supreme Court recently affirmed this rule of construction:

> "Statutory definitions must be interpreted in light of the ordinary meaning of the word being defined. A legislature can define terms however it wants. However, when seeking

> to understand statutory definitions, the word being defined is the most significant element of the definition's context. Courts should not consider the meaning of the term to be defined in total isolation from its common usage. We presume that a definition of a common word accords with and does not conflict with the ordinary meaning *unless the language clearly indicates otherwise*."

In re Ford Motor Co., 442 SW3d 265, 271 (Tex 2014) (italics added) (internal quotation omitted); *see also id.* at 272 (in construing a statutory definition of the term "plaintiff", the court "look[ed] for a high level of linguistic clarity from the Legislature that it intends its statutory definition to depart markedly from the ordinary meaning of 'plaintiff'").

In its ordinary and common meaning, the word "permitting" is not tantamount to "negligently failing to prevent"; rather, it involves some form of conscious or intentional assent to the specific conduct.[15] In that same sense, the term "permitting" as used in Oregon's criminal code requires a highly culpable mental state or *mens rea* by the defendant. Notably, the crime of "using a child in display of sexually explicit conduct," set forth in ORS 163.670 (quoted above), is a Class A felony regardless if one directly engages in the misconduct or if one "permits" someone else to do it. ORS 163.670(2). The severity of this crime is indicative of the fact that the *mens rea* of "permitting" is something far greater than negligence or recklessness, given that both criminally negligent homicide *and* second-degree manslaughter (based on recklessness) are only

[15] *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").

Class B felonies. ORS 163.145(2).

In *State v. Porter*, 241 Or App 26, 249 P3d 139, *rev. denied*, 350 Or 530, 257 P3d 1020 (2011), this 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 on the child 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.*

In the present cases, as the trial court noted, "*Porter* lends support to an interpretation of ORS 124.100 that 'permitting' requires intentional conduct." T. Ct. Order at p. 12 [App-42]. 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).

This authority is strong contextual evidence that the concept of "permitting" in ORS 124.100 is consistent with the Legislature's customary use

of that term in other statutes,[16] as well as the ordinary meaning of that word. Although the legislature chose to provide a statutory definition for "permitting" within ORS 124.100, nothing within the text, context, or legislative history of ORS 124.100 suggests (let alone "clearly indicates") that the legislature here intended to conflict with or depart from the ordinary and typical meaning of that term.

b. Contextual support from mandatory treble damages

As noted above, liability under ORS 124.100 for "permitting" the abuse by a third party is a form of *direct* liability, and the person who "causes" the abuse and the person or entity who "permits" the abuse are treated the same in all respects under the statute. For example, both types of defendants are subject to the expanded and heightened statutory remedies, a significant example of which is the *mandatory* trebling of damages under ORS 124.100(2).

The fact that the Legislature imposed these mandatory enhancements against a defendant who "permits" abuse is strong contextual evidence that it

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[16] In briefing below, Plaintiffs identified a single instance of the term "permitting" being equated with a negligence standard: ORS 607.044, which regulates "livestock districts" and imposes liability on a person who "permits an animal of a class of livestock to run at large" upon another's land. *See id.* & *Schwert v. Myers*, 297 Or 273, 683 P2d 547 (1984). There is no reason to believe that that Oregon's livestock laws were on the Legislature's mind in passing ORS 124.100. There is also a distinction between "permitting" the conduct of an animal compared to the criminal behavior of another human being. *See, e.g.*, *Hunt v. Hazen*, 197 Or 637, 254 P2d 210 (1953) (noting that a person is a "keeper" of his or her animal); Restatement (Second) of Torts §504 (1977) (strict liability for trespass by livestock onto another's land).

understood the term "permitting" to require intentional conduct by the defendant in the face of the abusive actions by a third party, just as the term "permitting" means within the criminal statutes.[17]

ORS 124.100(2) leaves the trial court with no discretion but to treble damages if the jury finds liability, regardless of the evidence. This treble damages provision is inconsistent with any construction of "permit" which requires proof of only negligence or recklessness. Accepting Plaintiffs' contention, a trial court would have no option but to treble damages both against (a) the employer who encouraged or even directed its employee to commit a crime on a particular vulnerable adult; and (b) the employer who innocently but with ordinary negligence failed to adequately supervise a wayward employee. Such a broad and heavy-handed remedy would have excessive and inequitable consequences upon certain defendants, especially those who had *no* knowledge of any abuse on the plaintiff (like AMR here).[18]

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[17] The Legislature enacted ORS 124.100, which defined "permitting", back in 1995, but it did not add treble damages until 2003. AMR is *not* contending that the Legislature "changed" the meaning of "permitting" in 2003; rather, the 2003 amendment reinforces and is consistent with the original legislative intent in 1995 that "permitting" means intentional and specific misconduct.

[18] For example, each of these six Plaintiffs state a prayer for around $1,000,000 against AMR. Under Plaintiffs' construction of "permitting," if Plaintiffs were to show that AMR was negligent in supervising then Plaintiffs would automatically receive treble damages (up to $18,000,000 total) plus attorney's fees, even though AMR expressly forbade such conduct by its employees, had no knowledge whatsoever of any alleged abuse on any of these Plaintiffs, and certainly did not intend for any of it to happen.

The reality is that the Legislature did *not* intend to create such a broad remedy to be mechanically applied both to defendants with very high culpability (intentionally permitting abuse) and with lower culpability (negligence or recklessness); rather, it created this powerful remedy to be imposed against a narrow and highly-culpable class of defendants.[19]

5. AMR's construction is supported by the legislative history of the statute.

In light of the uniformly-compelling support from the text and context of the statute, it is unnecessary to resort to the legislative history for ORS 124.100. But, even if considered, that legislative history is at worst neutral and at best supportive toward AMR's proposed construction.

Most notably, there is no legislative history that discusses or considers the term "permitting" 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 (despite it being contained in the bill at the time) but simply described the bill as authorizing claims "against any person who has caused such abuse." TCF 105, Exh. 2. Thus, in the eyes of the sponsors, this bill was apparently

[19] As also discussed by the trial court, Oregon case law has generally required proof of malice or intent in order to enforce statutory treble or exemplary damages. *See* T. Ct. Order at p. 9 [App-39] (discussing *Green v. Leckington*, 192 Or 601, 236 P2d 335 (1951) and *Wilson v. Kruse*, 199 Or 1, 258 P2d 112 (1953)). But AMR is not asking this Court to "read in" any new requirements into ORS 124.100; rather, such case law provides contextual support for the Legislature's original intent behind "permitting" liability.

directed toward "abusers" and toward no one else. Individuals who "permitted" abuse by third parties were just a sub-category of "abusers."

This absence shows that the Legislature intended "permitting" liability to be narrow and constrained, not a broad negligence standard. For example, there was no discussion about standards of negligence or recklessness fitting into this statute, or about potentially applying this statute against negligent employers with wayward employees. Had such standards been intended, one might expect some discussion given that such a law would have far-reaching implications and would expose all Oregon businesses that have employees to heightened damages and a seven-year statute of limitations, even though the employer 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 negligent supervision, which result the legislative history here simply does not support.

Instead, the focus of the Legislature in passing ORS 124.100 was not on "negligent employers" but 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."

TCF 105, Exh. 1 (testimony on SB 943 by sponsors). 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.* Thus, as the trial court noted, the "statute was not intended to make businesses liable for negligent retention, supervision, or investigation of its employees." T. Ct. Order at p. 14 [App-44].[20]

In response, Plaintiffs have vaguely pointed to a perceived "strong remedial purpose" behind ORS 124.100, which the Court of Appeals below supported by showing that each amendment since 1995 has strengthened rather than weakened the statute's powers and scope. *See Wyers*, 268 Or App at 251 [App-24]. This assertion behind the statute's "strong remedial purpose" is true as far as it goes, but it says nothing about the meaning of the term "permitting." Despite the fact that ORS 124.100 offers "robust protection for vulnerable persons" (*see id.*), the claim has *always* been limited to just two narrow categories of defendants: people who "cause" abuse and people who knowingly

[20] The fact that ORS 124.100 was "not meant to target institutional providers" is *not* to say that institutional defendants can never be liable for "permitting" vulnerable person abuse, regardless of whether or not they fall into the category of institutions who later received a qualified immunity under ORS 124.115. Rather, such liability can be imposed against institutional defendants when they intentionally "permit" the abuse with some knowledge that it is happening against *the plaintiff*. The above legislative history is simply relevant to show that the Legislature was not focusing on institutional defendants as a problem, and that it was certainly not trying to drastically re-write the Oregon tort law of negligent supervision claims against such defendants.

"permit" others to perpetrate it. ORS 124.100 has never been amended to add a third or broader category of defendant.

B. Plaintiffs' Construction of "Negligence" Requires the Statute to Be Re-Written.

Throughout the proceedings below, Plaintiffs contended that "permitting" was nothing more than an ordinary negligence standard, or at most, some undefined "negligence plus" standard. *See* TCF 107 & T. Ct. Order at p. 7 [App-37]. That assertion is not supported by *any* text, context, or legislative history for the statute.

Perhaps most fatally, this proposal entirely reads out the *actual* knowledge requirement stated within the statutory definition of ORS 124.100(5): "*knowingly* acts or fails to act". *Id.* (italics added). Even though Plaintiffs' counsel came close to conceding during oral argument that this portion of the text requires intentional misconduct by the defendant,[21] Plaintiffs seek to delete this text by solely focusing on the later, *constructive* knowledge requirement also contained within the definition ("should have known"). However, such a construction would render the first part of ORS 124.100(5) superfluous, and so cannot be correct. *See State v. Stamper*, 197 Or App 413,

[21] During oral argument, Judge Dailey questioned Plaintiffs' counsel whether he agreed that this part of ORS 124.100(5) required "intentional" conduct by a defendant, to which Plaintiffs' counsel replied: "I think a strong case can be made, without *literally* conceding for appeal purposes, but I think a very strong case can be made that is what it says." Tr. 48 (italics added).

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.").

C. The Court of Appeals' Construction of "Recklessness" Requires the Statute to Be Re-Written.

Similarly, the standard for liability developed by the Court of Appeals (not argued by either party) is not supported under the plain text of the statute.

1. The Court of Appeals failed to articulate a consistent standard.

As an initial matter, the fact that the Court of Appeals endeavored to re-write the statutory definition is perhaps best demonstrated by the fact that it articulated no less than *four* different constructions over the course of its opinion, each containing unique features:

Version #1: The court first stated that ORS 124.100(5) contained a "clear statutory definition", meaning that liability results simply per the statute, *i.e.*, "if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical *** abuse." *See Wyers*, 268 Or App at 244-45 [App-16] (internal quotation omitted).

Version #2: The court then reformulated the definition to find liability "if the defendant acted or failed to act with knowledge that would lead a reasonable person to conclude that the plaintiff was being abused or would likely be abused in the manner alleged by plaintiff." *Id.* at 247 [App-19].

Version #3: Later in the opinion, the court appeared to modify its own reformulation to find liability "if the defendant knowingly acted or failed to act when the defendant was aware of the substantial risk that the abuser would commit the abuse that the plaintiff suffered." *Id.* at 254 [App-27].

Version #4: Lastly, seeking to analogize its formulation to common-law principles, the court characterized it as being "more akin to the standard for reckless conduct than for negligent conduct." *Id.* at 250 [App-23]. *See, e.g.*, *Morehouse v. Haynes*, 350 Or 318, 332-33, 253 P3d 1068 (2011) (DeMuniz, C.J., concurring).

The opinion below should first be reversed due to the uncertainty among these differing formulations stated by the Court of Appeals. Which formulation, for example, should be relied upon by trial courts deciding future directed verdict motions and drafting future jury instructions? More importantly, however, the opinion below should be reversed because its proposed constructions are erroneous.

2. Each standard articulated by the Court of Appeals requires the statute to be rewritten.

"In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms of substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. Here, *all* of the formulations developed by the Court of Appeals

significantly deviate from the plain text of the statute because they (1) omit key words; (2) add new terms and concepts; and/or (3) change the verb tenses. For example:

"Version #2" (*see* App-19)[22]: This reformulation simply *deleted* the requirement for "knowing" misconduct by the defendant. *See id.* Indeed, the court collapsed the statute's two verb roots of the word "know" down to a single use of "know." It eliminated the "actual" knowledge requirement from the statutory definition and left only the constructive knowledge requirement of a "reasonable person," consistent with an ordinary negligence standard. It further added the standard of "would *likely* be abused" (italics added), which is not only absent from the statutory text, but which is contrary to it.

"Version #3" (*see* App-27): The Court of Appeals' next reformulation added back the term "knowingly" to the definition, but it then conjoined it to the new concept of "substantial risk," which is not found in the statute. Through this addition, the court transformed the "knowing" standard into a "recklessness" standard, given that the requisite knowledge was now directed toward "risks" rather than facts. As discussed above on pages 26-28, this standard is contrary to the plain text of the statute, which requires some knowledge of the abuse that occurred on the particular plaintiff.

"Version 4" (*see* App-23): In stating that its new formulation was "more

[22] These versions are quoted on page 38-39, *supra*.

akin to recklessness," the court again read "knowingly" out of the statute, given that "reckless" conduct involves a lower level of culpability than "knowing" conduct. *See, e.g.*, ORS 161.085(8)-(9); *Jantzi*, 56 Or App at 60-61. None of these formulations, then, can be reconciled with the statute's plain text.

In addition, the Legislature wrote the definition of "permitting" in the present tense, which emphasized the contemporaneous or near-contemporaneous involvement or participation of the person "permitting" the abuse to happen. In contrast, in all of its reformulations, the Court of Appeals shifted the verbs to the past tense. That change subtly increased the ambiguity as to when the defendant's conduct in "acting or failing to act" must occur relative to the occurrence of the abuse.

Lastly, the court below did not find any support elsewhere for its construction. For "context," the court below did not discuss any other feature of the statutory scheme, but rather limited its discussion to the *Miller* and *Terpening* opinions,[23] neither of which provides "contextual" evidence as such. *See Wyers*, 268 Or App at 247-251 [App-20-24]. Regarding legislative history, the Court of Appeals only pointed to a perceived "strong remedial purpose," but it did not find any *specific* support in any legislative history for its construction. *Id.* at 251 [App-24]. Thus, unlike AMR's proposed construction, the Court of Appeals' various

[23] These opinions are addressed above on pages 18-24 of this brief.

formulations of the term "permitting" find no support in the text, context, or legislative history of the statute.

3. The Court of Appeals' standard would have far-reaching and negative consequences.

In addition to being the correct construction of ORS 124.100, AMR's proposed rule of law is further supported by sound public policy. Notably, ORS 124.100 did *not* replace or eliminate any common-law relief available to plaintiffs. *See* ORS 124.135. Rather, it is a supplemental statutory claim that applies in limited, defined circumstances against a narrow class of wrongdoers. *Id.*

In contrast, the constructions proposed by Plaintiffs and the Court of Appeals will cause a profound expansion of tort remedies beyond what was authorized, discussed, or even contemplated by the Legislature:

> "The legislative history exemplifies that ORS §124.100 was intended to address a narrow problem with elder abuse against a limited class of defendants. The statute was not intended to make businesses liable for negligent retention, supervision, or investigation of employees… [S]uch a result would have far-reaching implications and would expose all Oregon businesses that have employees to heightened damages and a seven-year statute of limitation, even though they did not participate in the abuse and had no knowledge of it happening."

T. Ct. Order at p. 14 [App-44] (internal quotation omitted).

Indeed, the Court of Appeals' construction of "permitting" is broad and has no temporal restrictions. It will likely lead to an influx of "permitting"

claims being brought against anyone who should have known about a third party's negative traits or characteristics—whether based on past history or even rumors—that could conceivably lead the third party to perpetrate a crime against an unknown victim at some unknown future point in time. Under this expanded version of "permitting" liability, anybody in Oregon—and especially people like social workers, law enforcement officers, employers, family members, and friends—becomes subject to liability for enhanced remedies if they should have known about another person's "risks" or propensities to commit crimes based on past conduct, but failed to take action to prevent *future* crimes on *unknown* victims.

Given that ORS 124.100 does not require any particular relationship between the "abuser" and "permitter," the scope of "permitting" liability as defined by the Court of Appeals may well be broader than what has been available under common-law negligent "failure to protect" or supervision claims. If such an expansion of liability was intended by the Legislature, then one would expect to see *some* comment or debate about it. But there was no such discussion. Such an expansion of liability now is the proper subject for the Legislature, not for the judiciary.

D. Accepting AMR's Proposed Rule of Law, Summary Judgment Should Be Upheld.

As noted above, even Plaintiffs' counsel have conceded that there is

no genuine issue of material fact in support of the Plaintiffs' claims if AMR's proposed rule of law is accepted. Simply put, there is no evidence whatsoever to support intentional or knowing misconduct by AMR while having some knowledge of the abuse being committed on any of these six Plaintiffs. Thus, consistent with the trial court's opinion, these six cases should be dismissed.

E. Alternatively, Even If AMR's Proposed Rule of Law Is Not Accepted, Summary Judgment May Still Be Affirmed.

In the alternative, should this Court disagree with AMR's proposed rule of law and construe the word "permit" to have some lesser standard of mental culpability (such as the Court of Appeals' standard of recklessness), then summary judgment may still be appropriate on some or all of the six cases based on undisputed facts in the record.

By way of example, plaintiff Akre alleges that she was abused by at a time *prior* to AMR having received either the or complaint. As a result, at the time of Akre's transport, AMR had not previously received an allegation of improper or sexual touching by a licensed paramedic who had been an employee in good standing for over 14 years by that point in time. Thus, even if "permitting" was to be construed as "ordinary negligence," the factual record still could not support a claim for plaintiff Akre as a matter of law.

As for the remaining Plaintiffs, three of them (Shaftel, Asbury, and Terpening) allege abuse following AMR's receipt of the complaint, while two of them (Webb and Corning) allege abuse following AMR's receipt of both the and complaints. Although the factual record relating to AMR's investigation of the and complaints could conceivably support a theory of "negligence" against AMR (*e.g.*, by alleging that AMR should have performed additional tasks within its investigations or reached different conclusions), neither incident could result in a finding of "recklessness." In other words, neither the nor complaint caused AMR to become "aware of" and then "disregard" the risk that would engage in sexual touching with any of the plaintiffs. *Morehouse*, 350 Or at 332-33. Indeed, there is no evidence that any supervisor or employee of AMR ever concluded or believed that had engaged in misconduct prior to receiving the complaint made by in December 2007, which was well after the transports of all Plaintiffs. As a result, these five Plaintiffs may have had negligence claims against AMR available to them, but they cannot pursue ORS 124.100 claims against AMR under any reasonable interpretation of that statute.

CONCLUSION

Based on the foregoing, AMR requests this Court to accept its proposed rule of law and construe the term "permitting" in ORS 124.100(5)

to require proof that a defendant engaged in an intentional action or failure to act when it had some knowledge of the abuse being perpetrated by the third party on the particular plaintiff. AMR further requests that the Court of Appeals be reversed and that the trial court's dismissal of these six lawsuits be reinstated.

Dated this 25th day of June, 2015.

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CERTIFICATE OF COMPLIANCE

Brief Length

I certify that (1) this brief complies with the word-count limitation on ORAP 5.05(2)(b); (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 9,775 words; and (3) the size of the type in this brief is not smaller than 14 point for both text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I certify that on June 25, 2015, I filed the foregoing **PETITIONER'S BRIEF ON MERITS** using the eFiling System, with:

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I further certify that on June 25, 2015, I served the foregoing **PETITIONER'S BRIEF ON MERITS** using the eFiling System and via First Class Mail, U.S. Postal Service, by mailing two true copies thereof to the following:

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