IN THE SUPREME COURT OF THE STATE OF OREGON

Jan Wyers as Personal Representative of the Estate of Dianne Terpening, Plaintiff-Appellant, Respondent on Review, v. American Medical Response Northwest, Inc., an Oregon corporation, Defendant-Respondent, Petitioner on Review.	Multnomah County Circuit Court Case No.: 0910-14750 Supreme Court No. S063000 Court of Appeals No. A149258 (Control)
Hazel Corning, Plaintiff-Appellant, Respondent on Review, v. American Medical Response Northwest, Inc., an Oregon corporation, Defendant-Respondent, Petitioner on Review.	Multnomah County Circuit Court Case No.: 0911-16570 A149259
Violet Asbury, Plaintiff-Appellant, Respondent on Review, v. American Medical Response Northwest, Inc., an Oregon corporation, Defendant-Respondent, Petitioner on Review.	Multnomah County Circuit Court Case No.: 0911-16571 A149260,

Stacey Webb, Plaintiff-Appellant, Respondent on Review, v. American Medical Response Northwest, Inc., an Oregon corporation, Defendant-Respondent, Petitioner on Review.	Multnomah County Circuit Court Case No.: 0911-16572 A149261
Michele Shaftel, Plaintiff-Appellant, Respondent on Review, v. American Medical Response Northwest, Inc., an Oregon corporation, Defendant-Respondent, Petitioner on Review.	Multnomah County Circuit Court Case No.: 0912-16650 A149262
Natsue Akre, Plaintiff-Appellant, Respondent on Review, v. American Medical Response Northwest, Inc., an Oregon corporation, Defendant-Respondent, Petitioner on Review.	Multnomah County Circuit Court Case No.: 1002-02934 A149263

BRIEF OF AMICUS CURIAE THE OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT ON REVIEW

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

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I. INTRODUCTION

Amicus Curiae Oregon Trial Lawyers Association (hereinafter "OTLA"), respectfully submits this brief to assist the Court in reaching its decision in *Wyers et al. v. American Medical Response Northwest, Inc.*, S063000.

This case presents an issue of the meaning of ORS 124.100(5), which allows a statutory claim for Abuse of a Vulnerable Person to be brought "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." Because of the significance of this issue in future cases, OTLA wishes to assist the Court in interpreting the term "permitting" consistently with the history and purpose of Oregon's statutory claim for Abuse of a Vulnerable Person.

In this case, the Court of Appeals correctly concluded that the trial court set the bar too high when it held that plaintiffs must prove the defendant had knowledge of the specific abuse that each plaintiff suffered. Such a conclusion is inconsistent with the text, context, and legislative purposes of ORS 124.100 *et seq*.

II. CONCISE STATEMENT OF FACTS

Prior to the incidents at issue in this case, in February of 2006, Patricia reported to American Medical Response Northwest, Inc. (hereinafter "AMR") that

Lannie a paramedic attending to her, had molested her while she was being transported via ambulance. Exh. 20, pp. 1-2; Exh. 21, pp. 141-142.[1]

In March of 2006, Rebecca reported to AMR that had sexually exploited her while he was attending to her during an ambulance transport. Exhs. 1-4 and Exh. 26, p. 73.

AMR also received reports in December of 2006 and March of 2007 from Betty and Paula that had molested them during ambulance transports. Exhs. 7, p. 22-29, Exh. 8, Exh. 9, pp. 34-35, Exh. 11, Exh. 14, pp. 30-37, Exh. 15.

The plaintiffs named below allege in their operative complaints that they were sexually abused by during ambulance transports on the following dates:

Natsue Akre - April 7, 2006

Michele Shaftel - January 13, 2007

Violet Asbury - February 5, 2007

Dianne Terpering - February 23, 2007

Stacey Webb - April 19, 2007

Hazel Corning - August 7, 2007

[1] Exhibits referenced herein were those attached to TCF 111, the "Declaration of Gregory Kafoury," filed June 3, 2011, in support of plaintiffs' "Response to Defendants' Motion for Summary Judgment."

Royshekka who is not a party to this case, was sexually abused by on December 8, 2007, which she promptly reported. was removed from his shift, and did not thereafter transport a patient for AMR. Exh. 27, pp. 1401-1410; Exh. 18, p. 89. He was arrested on December 11, 2007, and subsequently pled guilty to Attempted Sexual Abuse in the First Degree for crimes committed against and two others not identified above. *State v. Lannie Lee* Multnomah County Case Nos. 071235904, 101033902.

AMR learned of plaintiffs' allegations of abuse in August of 2009 or later. Petitioner's Brief, pp. 5-6.

III. CONCISE HISTORY AND PROCEDURAL POSTURE

Plaintiffs brought statutory claims for Abuse of a Vulnerable Person under ORS 124.100(5) against AMR. The complaints alleged that AMR had "permitted" to sexually abuse them because AMR had previously received at least three complaints by women who reported that had molested or sexually exploited them during their ambulance rides, and yet AMR took no action to prevent from having access to other vulnerable women, including plaintiffs.

The trial court (Dailey, J.) granted a motion for summary judgment brought by AMR on the grounds that:

> "Plaintiffs have failed to create a genuine issue of material fact that Defendant[] 'permitted' abuse to any six of the Plaintiffs because

> Defendant[] had no knowledge about the alleged abuse. AMR did not obtain knowledge of the specific acts of abuse allegedly committed on each plaintiff until August 2009 * * *."

Tr. Ct. Order 15 [App-45]. The trial court entered a general judgment of dismissal, and plaintiff appealed that judgment.

The Court of Appeals (Nakamoto, J.) reversed the trial court's ruling, finding that "on the record here, there is sufficient evidence from which a reasonable juror could find that defendant 'permitted' to sexually abuse plaintiffs." *Wyers v. American Medical Response, Inc.*, 268 Or App 232, 255 (2014).

This Court granted review.

IV. SUMMARY OF ARGUMENT

The Court of Appeals correctly held that there was sufficient evidence in the summary judgment record for a reasonable juror to find that the defendant "permitted" Lonnie to sexually abuse plaintiffs, as the legislature has expressly defined that term. Defendant's requested interpretation, which would require real-time knowledge of abuse as it was occurring, is contrary to the legislature's broad, remedial purpose in enacting and amending ORS 124.100 *et seq*.

V. ARGUMENT

A. ORS 124.100(5) Does Not Require Knowledge of a Specific Act of Abuse.

The provisions of the statutory claim for Abuse of a Vulnerable Person that are at issue in this appeal provide as follows:

> "(2) A vulnerable person who suffers injury, damage or death by reason of physical abuse or financial abuse may bring an action against any person who has caused the physical or financial abuse or who has permitted another person to engage in physical or financial abuse. * * *"
>
> * * *
>
> "(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."

ORS 124.100.

AMR argues that the imposition of liability under ORS 124.100(5) requires that it had knowledge of the abuse of each plaintiff *as it was occurring*, but took no action. In support of its argument, AMR posits that the word "the" in the phrase "should have known of *the* physical abuse" means AMR can only be liable under ORS 124.100(5) if its agents or employees knew that each plaintiff was being molested by Lannie when the abuse was occurring, and then failed to act. The trial court agreed with AMR's argument, stating that to conclude

otherwise would "transform an ORS 124.100 claim into a negligence claim, which * * * is not what the legislature intended." Tr. Ct. Order 8 [App-38].

The Court of Appeals rejected the trial court's interpretation, concluding that "the legislature most likely intended that 'permitting' abuse requires that the defendant have knowledge of facts establishing that it knew of the substantial risk of the abuse actually suffered by the plaintiff." *Wyers v. American Medical Response, Inc.*, 268 Or App at 247. The Court of Appeals' conclusion is consistent with both the text of ORS 124.100(5) and with its broad remedial purpose.

Liability may be imposed under ORS 124.100 against a person (including a corporation) "*who has permitted another person to engage in physical * * * abuse.*" ORS 124.100(2) (emphasis added). "Permitting" another person to engage in abuse is expressly defined in subparagraph (5) to mean to "knowingly act[] or fail[] to act *under circumstances in which a reasonable person should have known of the physical * * * abuse*." ORS 124.100(5) (emphasis added). Although this Court has not previously interpreted the meaning of ORS 124.100(5), the Court of Appeals has previously concluded that a fact-finder may properly find liability under ORS 124.100(5) against a defendant who "failed to act to prevent an assault that a reasonable person should, under the circumstances, have known that [the perpetrator] would commit." *Miller v. Tabor West*

Investment Co., 223 Or App 700, 718 (2008), *rev den*, 346 Or 184 (2009). *See also*, *Fadel v. el-Tobgy*, 245 Or App 696, 703-704 (2011) (rejecting without discussion the appeal of a jury finding that wife had "permitted" her husband to engage in financial elder abuse because she knew her husband was misappropriating money from his 93 year-old mother, who lived with them, and did nothing to stop or prevent it). While "the circumstances" may vary, it would defy common sense to conclude that such "circumstances" may not, as a matter of law, include a defendant's prior knowledge that one of its employees would molest an incapacitated patient when given the opportunity.

The legislature's purposes in creating statutory civil liability for the abuse of vulnerable persons included both the deterrence of physical and financial abuse and the compensation for those who suffered abuse. The breadth of those protections is exemplified by the range of legal and equitable remedies available, which include treble damages for economic and non-economic losses, attorney fees, fiduciary fees, restraining orders, injunctive relief, receiverships, divestiture of interests or contact with persons or enterprises, and "prohibiting any person from engaging in the same type of endeavor or conduct to the extent permitted by the Constitution of the United States and this state." ORS 124.100 – ORS 124.120. Moreover, the enumerated remedies "are in addition to any other

remedy, civil or criminal, that may be available under any other provision of law." ORS 124.135.

The trial court's interpretation of "permitting" in ORS 124.100(5) as requiring intentional conduct and knowledge of specific acts of abuse as they are occurring cannot be squared with the express language of the provision. ORS 124.100(5) defines "permitting" as knowingly acting or failing to act under circumstances in which a reasonable person should have known of the abuse. Imposition of liability on a person who "should have known" of abuse is facially inconsistent with a requirement of actual, "real-time" knowledge of abuse. That is because a person who is witnessing an act of abuse as the act is taking place "knows" of the abuse, and only a person who is not witnessing the act as it is taking place "should have known" of the abuse. The trial court's interpretation of ORS 124.100(5) renders meaningless the words "should have known," which is a construction that does not "give effect to all" provisions. *See* ORS 174.010 (a construction of a statute "is, if possible, to be adopted as will give effect to all" provisions).

The defendants' suggested interpretation of ORS 124.100(5) would mean that only a person witnessing an act of sexual abuse as it is occurring is liable under ORS 124.105, and not one who knows abuse will happen in the future.

This is not what the legislature intended -- persons who sexually and financially abuse vulnerable persons rarely get caught in the act.

Finally, whether AMR's conduct was "knowing" is a question of fact, not one of law. *C.f. Sipes v. Sipes*, 147 Or App 462, 468 (1997) (complaint contained sufficient allegations that the defendant "knowingly" allowed, permitted or encouraged her husband to abuse plaintiff within the meaning of ORS 12.117 by failing to take action in response to past abuse). Therefore, the Court of Appeals was correct in concluding that a reasonable juror could find that AMR knowingly permitted the plaintiffs' abuse by allowing Lannie to remain in a position to molest patients after receiving first-person reports that he had done it before.

B. Judicially-Created Definitions from the Criminal Code Do Not Provide Context for the Meaning of "Permitting" in ORS 124.100(5) Because It Is Expressly Defined.

Despite the legislature's definition of "permitting" to mean "knowingly act[ing] or fail[ing] to act under circumstances in which a reasonable persons should have known of the physical * * * abuse[,]" defendant argues that for context, this Court should look to appellate decisions interpreting the undefined meaning of "permitting" in provisions of the criminal code.

Uses of "permitting" in the criminal code do not provide context for the use of the same word in ORS 124.100(5). Where the legislature has statutorily defined a term, the Court's focus is on the statutory definition. *SAIF v. Lewis*,

335 Or 92, 97 (2002); *c.f. State v. Porter*, 241 Or App 26, 29, *rev den*, 350 Or 530 (2011) (judicial interpretation of "permits" as used in ORS 163.670(1) was necessary because the word "is not defined in the pertinent statutory scheme."). Here, as in *SAIF v. Lewis*, there is no contextual support outside the statutory framework containing the definition,[2] because "the meaning of [the] statutory definition is clear and arises from the ordinary meaning of the terms that the legislature used in enacting that statute." *Id.* at 101.

While it is true that the legislature expressly defined "physical abuse" by incorporating the statutory references to numerous criminal offenses, there was no similar incorporation by reference to the criminal code for the word "permitting." Indeed, the legislature's choice to expressly define "permitting" in ORS 124.100(5) when it had not expressly defined the same word in the criminal statutes using the same word evidences its intent that the courts look no further for a definition. *See State v. Couch*, 341 Or 610, 618-19 (2006) (development of the definition of "wildlife" over time based on legislature's determination of the state's policy needs, together with considerations within the text of the definition, "lead us to conclude that the term 'wildlife' means whatever the legislature says it means.").

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[2] Here, unlike in *SAIF v. Lewis*, 335 Or 94 n. 1, there is no pre-existing version of the definition of "permitting" to serve as context since the definition originated as part of the original statutory framework in 1995. Or Laws 1995, ch 671, § 1(4).

For the foregoing reasons, the Court of Appeals' rejection of criminal code uses of the word "permitting" as context for its use in ORS 124.100(5) was proper.

C. The Court of Appeals' Decision is Consistent With the Public Policy Behind ORS 124.100 *et seq.*

1. Overview of Legislative History of ORS 124.100 *et seq.*

ORS 124.100 *et seq.* originated as Senate Bill 943 during the 1995 legislative session. It was drafted by Lisa Bertalan,[3] a Bend elder law practitioner, with input from an elder abuse task force that had been formed in 1994 by then-Attorney General Hardy Myers.

As introduced, SB 943 did not contain exceptions for any class of person or entity. However, Ms. Bertalan emphasized in her testimony that the targets of the bill were not heavily-regulated nursing and residential care facilities, but individuals and less regulated entities such as adult foster homes. Ms. Bertalan cited 2,200 non-facility elder abuse cases that were reported to Adult Protective

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[3] Ms. Bertalan's inspiration was an egregious financial exploitation case she had worked on for several years on behalf of an elderly, disabled client. The client's life savings had been stolen by acquaintances armed with the client's durable power of attorney, leaving the thieving acquaintances with plenty of funds to fight the fraud claim brought by Ms. Bertalan and ensuring that the victim would be left with considerably less than what had been taken from her after she paid her attorney's contingent fees and advanced litigation costs. Tape Recording, Senate Judiciary Committee, SB 943, March 23, 1995, Tape 69, Side A (statement of Lisa Bertalan).

Services in 1993, and she also referred to an AARP report showing similar statistics across the country. She testified before the Senate Judiciary Committee that "elder abuse is not committed by service providers, it's not committed mostly in the nursing homes and foster care homes, although those are the cases that get the media's attention, but they're actually committed by the son, the daughter, who gets the power of attorney and robs the elderly person's bank account, the phony contractor, the door-to-door salesman who's selling unneeded services or goods." Tape Recording, Senate Judiciary Committee, SB 943, March 23, 1995, Tape 69, Side A (statement of Lisa Bertalan).

Following the introduction of the bill, the Oregon Health Care Association's lobbyists quickly proposed exclusions for nursing facilities, residential care facilities, and assisted living facilities.[4] In response, Ms. Bertalan introduced an amendment to exclude "owners, employees, and agents" of those facilities during the following work session. Minutes, Senate Judiciary Committee, SB 943, April 12, 1995, Exh. E (proposed amendment). In the discussion of those proposed

[4] Lobbyists for the broker-dealers and financial institutions had also contacted Senate Judiciary Committee Chair Neil Bryant, and their requested amendment to exclude their constituents was ultimately incorporated into the approved bill and enacted as ORS 124.115(1)(a) and (d). *See* Minutes, Senate Judiciary Committee, SB 943, April 12, 1995, Exh. E (proposed amendment) and Tape Recording, Senate Judiciary Committee, SB 943, April 12, 1995, Tape 101, Side B (statements of Lisa Bertalan, Sen. Neil Bryant).

amendments, the following exchange occurred between Sen. Ken Baker, Ms. Bertalan, and Chair Neil Bryant:

SEN. BAKER: Before you bang the gavel Mr. Chair, again, what was the reason for the addition of Section 9? I understand we want to get the question of adult foster care, which is where the abuse seems to have happened, but we're excluding a huge group of people here – owners, employees, and agents -- even though the size of the institution may be quite large. That essentially don't have this cause of action.

MS. BERTALAN: Unless they're criminally convicted. Those facilities are heavily regulated through administrative rule. Their licenses and abuses are investigated through Senior and Disabled Services Division currently, and there are mechanisms to take away their licenses, or shut them down, if abuses are occurring within the home. My rationale was, from the statistics, it showed that most abuses were not occurring in those settings as you stated. I didn't want the bill. . .

SEN. BAKER: Because people are not isolated.

MS. BERTALAN: . . . I didn't want the bill not to go through because the nursing home industry would lobby heavily against this bill, and I didn't think, as a percentage of abuses occurring, it was worth jeopardizing the entire bill.

SEN. BAKER: Thank you.

CHAIR BRYANT: We'd also, then, if we left them in, probably have to change some of the other language that right now is not a problem, such as, a reasonable person should have known, that type of thing, that would probably [have] required some more work and definition when you're dealing with that larger institution. I think it's a good first step, and it's better than what we have now, so we appreciate your hard work.

Tape Recording, Senate Judiciary Committee, SB 943, April 12, 1995, Tape 102, Side B.

After the April 12, 1995 work session at which Ms. Bertalan's proposed amendments were discussed, the language of Ms. Bertalan's proposed amendments was changed. In their final form as filed on April 27, 1995, the Senate Amendments to SB 943 did not include the exemption discussed at the April 12, 1995 work session -- no longer were "owners, employees and agents of licensed nursing facilities" to be exempt from liability for violations of ORS Chapter 124, but rather, only the institutions themselves. Senate Amendments to SB 943, April 27, 1995)

Senate Bill 943A was passed to the full Senate with the April 27, 1995 amendment, and the full Senate thereafter passed Senate Bill 943A by a 30-0 vote. The House passed it 49-0 with no material changes, and it was signed with an emergency clause so that it went into effect September 9, 1995. Senate Journal 1995, p. S-177. As originally enacted, the law applied only to "[a]n elderly or incapacitated person who suffers injury, damage or death by reason of physical abuse or fiduciary abuse * * *." Or Laws 1995, ch 671, § 1(1).

Since its 1995 enactment, the legislature has not limited or narrowed the scope of ORS 124.100 *et seq.* in any way. Rather, in the ensuing eighteen legislative sessions, the categories of persons protected by the law, persons with

standing to bring statutory claims, and the available remedies were expanded. The post-1995 changes are summarized as follows:

In 1997, the definition of "incapacitated person" was redefined to incorporate both "incapacitated" and "financially incapable" persons as those terms are defined in ORS 125.005. Or Laws 1997, ch 249, § 41.

In 1999, in response to the Court of Appeals' decision in *White v. McCabe*, 159 Or App 189 (1999), the legislature changed "fiduciary abuse" to "financial abuse," expressly eliminating the requirement of a fiduciary relationship between the abuser and the victim. Or Laws 1999, ch 305.

Also in 1999, the legislature expanded the means by which financial abuse could be committed to include unlawful sweepstakes promotions. Or Laws 1999, ch 875, § 8.

In 2001, personal representatives of the estates of victims were added as persons with standing to bring claims under ORS 124.100 *et seq.* Or Laws 2001, ch 843, § 3.

In 2003, one amendment gave the Attorney General and district attorneys authority to issue and enforce investigative demands on suspicion that a person is engaged in physical or financial abuse as described in ORS 124.105 or ORS 124.110. Or Laws 2003, ch 265.

Another 2003 amendment added the crime of strangulation to crimes that constitute "physical abuse" for purposes of ORS 124.105. Or Laws 2003, ch 577, § 4.

A third 2003 amendment, and undoubtedly the one with the greatest effect to date, added the requirement that a court enter an award of treble damages to a prevailing plaintiff for economic and non-economic damages found by the court or jury. Or Laws 2003, ch 211. The treble damages amendment, which was introduced by Rep. Mark Haas as House Bill 2449, was the subject of considerable testimony before the House Judiciary Committee in support of the amendment; no testimony was presented in opposition to the amendment. Tape Recording, House Judiciary Committee, HB 2449, March 25, 2003, Tape 102, Side A & Tape 103, Side A (statements of Rep. Mark Hass, Col. Ken Reusser, Virginia Mitchell, Steven Schneider, Jim Davis, Grady Tarbutton, and Rep. Lane Shetterly). In his written testimony, Rep. Hass noted that (1) prosecutors often lacked the resources and/or admissible evidence to prove cases involving the financial exploitation of elderly and incapacitated persons; (2) no disincentive to steal from them existed "because the thief is liable for only what was stolen"; and (3) the added treble damages would encourage settlement and avoid costly and painful litigation while increasing the likelihood of recovery for the victim. Testimony, House Judiciary Committee, HB 2449, March 25, 2003, Ex A (statement of Rep. Mark Hass).

House Bill 2449 sailed through both legislative chambers without a single “no” vote. House Journal 2003, p. H-82.

In 2005, the legislature added "[a] trustee for a trust on behalf of the trustor or the spouse of the trustor who is incapacitated or 65 or more years of age" to the list of those with standing to bring claims under ORS 124.100 *et seq*. Or Laws 2005, ch 87. Additionally, the class of persons protected was expanded to include “persons with disabilities,” and all classes of persons protected by the law were collectively defined as “vulnerable persons.” Or Laws 2005, ch 386.

By its amendments, the legislature has left no doubt that ORS 124.100 *et seq.* is intended to cast a wide net of protection to elderly and vulnerable Oregonians. Indeed, all of the amendments since 1995 have expanded the protections afforded to vulnerable persons, while no amendment has limited the liability or classes of persons who may be sued under the law.

2. Liability for Failure to Act Under ORS 124.100(5).

ORS 124.100(5) imposes liability for the physical or financial abuse of a vulnerable person on any “person [who] 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). The text of ORS 124.100(5) has not changed since its 1995 enactment, other than the substitution of the term “financial” for

"fiduciary" in 1999 as a result of the Court of Appeals' decision in *White v. McCabe*, *supra*. Or Laws 1999, ch 305.

There is no legislative history specific to ORS 124.100(5) other than the brief reference by Chair Bryant to "reasonable person should have known" language during the 1995 Senate Judiciary Committee work session.

The only clue to the source of the provision is found in a public hearing before the House Judiciary Committee during a brief exchange between Ms. Bertalan and Rep. Eileen Qutub during which Ms. Bertalan stated that she and other drafters had looked at the laws of California and Arizona[5] when drafting the bill. Tape Recording, House Judiciary Committee, SB 943A, May 12, 1995, Tape 33, Side A (statement of Lisa Bertalan). At the time, California had a statutory cause of action for the abuse of elderly or dependent adults, one component of which was liability for physical abuse or neglect. CA Welf. & Inst. Code § 15657. While California's law did not contain the term "permitting," it did authorize liability against any defendant for neglect when it was proven that "the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of

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[5] The minutes of the House Judiciary Committee say that Ms. Bertalan stated that the drafters looked at Arizona and Florida laws when drafting SB 943. Minutes, House Judiciary Committee, SB 943A, May 12, 1995, 2. That is an error – in the recording, Rep. Qutub asked Ms. Bertalan if the drafters had looked at Arizona and Florida laws, and Ms. Bertalan responded that they had looked at California and Arizona laws. Tape Recording, House Judiciary Committee, SB 943A, May 12, 1995, Tape 33, Side A (statement of Lisa Bertalan).

this abuse[.]" *Id.* California's law also clearly contemplated *respondeat superior* liability by limiting the imposition of punitive damages against employers based upon the acts of an employee. CA Welf. & Inst. Code § 15657(c).

Although California's elder and dependent abuse law did contemplate liability against persons and entities other than the abuser himself, it is likely that ORS 124.100(5) was modeled after Arizona's statutory civil cause of action for elder physical abuse. Arizona's law, which had been enacted in 1989, provided that:

> "An incapacitated adult whose life or health is being or has been endangered, injured, or imperiled by neglect, abuse or exploitation may file an action in superior court against any person or enterprise that has been employed to provide care, that has assumed a legal duty to provide care or that has been appointed by a court to provide care to such incapacitated or vulnerable adult for having caused ***or permitted*** such conduct."

1989 Ariz. Sess. Laws, ch 118, § 1 (emphasis added), codified as Ariz. Rev. Stat. § 46-455(B). Arizona's law was thus intended to reach both individuals and enterprises who either cause or permit the abuse, neglect, or exploitation of a vulnerable adult. *Id.* (emphasis added).

Arizona's highest court did not interpret Ariz. Rev. Stat. § 46-455(B) prior to the enactment of ORS 124.100(5), and therefore, there are no Arizona decisions that provide binding context. *See State v. Stockfleth*, 311 Or 40, 50, 804 P2d 471 (1991) ("when Oregon adopts the statute of another jurisdiction, the legislature is

presumed also to adopt prior constructions of the statute by the highest court in that jurisdiction."). Only the Arizona Court of Appeals has construed the imposition of liability on the basis of "permitting" abuse under Ariz. Rev. State §46-455, concluding that while employees of a nursing facility's parent company who had never met the vulnerable elder could not have "permitted" her abuse, the same was not true for the facility's director of nursing, Elie. Elie "was responsible for managing the daily operations of the department of nursing services at the Tucson facility, which included overseeing patient care and staff education, 'helping to direct . . . the clinical aspects of resident care,' managing the staff, and ensuring that federal and state regulations were followed." Therefore, the Court concluded that Elie was not entitled to judgment as a matter of law on whether she had "permitted" the vulnerable adult to be abused and neglected by other facility employees. *Corbett v. Manor Care of America, Inc.*, 213 Ariz 618, 630, 146 P3d 1027 (Ariz App 2006). In reaching its conclusion, the court determined that its interpretation of the statute must be consistent with legislative intent: "The legislature's intent and the policy behind the elder abuse statute are clear. Arizona has a substantial population of elderly people and the legislature was concerned about elder abuse." *Id.* at 628-29, quoting *In re Guardianship/Conservatorship of Denton*, 190 Ariz 152, 156, 945 P2d 1283, 1287 (1997).

While the *Corbett* decision is not binding context for this Court, its construction of the Arizona statute that guided the drafters of ORS 124.100(5) is illustrative, and OTLA urges this Court to construe ORS 124.100(5) with similar breadth.

VI. CONCLUSION

The Court of Appeals properly rejected the trial court's interpretation of ORS 124.100(5), which would allow companies entrusted with the care of vulnerable persons to ignore information that their employees are sexually abusing persons in their care without fear of liability under ORS 124.105. The Court of Appeals' decision is consistent with the language and history of ORS 124.100 *et seq.*, and with its broad, remedial purpose.

For the foregoing reasons, Amicus Curiae Oregon Trial Lawyers Association urges this Court to affirm the Court of Appeals' decision, and to reinstate plaintiffs' claims against AMR.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 4,846 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that I filed the foregoing *Brief of Amicus Curiae The Oregon Trial Lawyers Association in Support of Respondent on Review* and this certificate using the eFiling system this 23rd day of July, 2015, with:

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