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

S063000

RESPONDENTS' BRIEF ON THE MERITS

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RESPONDENTS' BRIEF ON THE MERITS

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question presented: Does the phrase "should have known" in the definition of "permitting" in the vulnerable person abuse statute refer to whether or not a defendant should have known of the abuse? Or, as argued by AMR Northwest, does the phrase "should have known" require a defendant (a) to be physically present during the abuse, and (b) know that the abusive conduct constituted a crime enumerated under the statute or, alternatively, any crime?

Proposed rule of law: For a defendant to be held liable for vulnerable person abuse caused by a third party, the plaintiff must prove that a 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.

FACTS OF THE CASE

While the vulnerable person statute contains the unambiguous language of negligence, i.e., "should have known," there is also abundant evidence from which a reasonable juror could conclude that defendant was aware that would

molest female ambulance patients, and knowingly permitted him to exploit his position.

Patricia and Rabecca complained to AMR Northwest.

Certain representations of "non-complaints" in the Petitioner's Brief cannot be ignored.

Patricia

On February 19, 2006, Patricia was attended to by Lannie in the back of an AMR Northwest ambulance. She awoke from a state of unconsciousness to find her hand on crotch. hand was over her hand, "pressing down, and he was rocking back and forth." TCF 111, Ex. 20, Decl. of Patricia p. 1. When she realized what was doing, she screamed at him, and when the driver asked what was going on, replied that she was delirious. She protested claim and cursed him. *Id*., p. 2. Days later, she called the business number for AMR Northwest in Portland, provided the information regarding her transport, and asked for the name of the man who had been in the back of the ambulance with her. The woman at the other end of the line said she could not give out such information, saying that it was confidential. reported to the woman that "the guy was a freak, he touched me inappropriately, that he was not safe to transport little girls, and they needed to take him out of the ambulance." *Id*., p. 2. The woman replied that she regretted

that Ms. was having a bad day, and hung up on her. *Id*., p. 2; TCF 111, Ex. 21, Patricia Depo., p. 2.

Ms. call to AMR Northwest was witnessed by her sister, Roberta a CNA. TCF 111, Ex. 22, Roberta Orrick Depo., p. 2. Ms. testified that her sister told her that she wanted to find out who the ambulance attendant was, "because she was gonna have some biker friends of hers beat him up." *Id*., p. 6-7.

testified that she heard her sister's phone call to AMR Northwest, and said that her sister had identified herself to the person on the phone. *Id*., p. 8. She essentially confirmed description of the conversation, including that "her main concern" was that "she was afraid he was touching little girls." *Id*. She also confirmed that the conversation ended when her sister hollered, "That fucking bitch hung up on me." *Id*.

AMR Northwest witnesses have testified that in the ordinary course of business, the content of that phone call would have been passed on to management, and would have led to an investigation. Suzanne Robinson, the customer service director for the defendant, supervised those "answering inquiries from customers related to . . . any . . . questions they may have." TCF 111, Ex. 23, Suzanne Robinson Depo., p. 2. Complaints regarding the performance of an ambulance attendant would be documented in a "complaint intake form" and then "forwarded

to the CES department (Clinical Education Services) where the person in charge was Cyndi Halaas [aka, Cyndi Newton]." Further, Ms. Robinson testified that a complaint regarding sexual misconduct would require the operator to "document that complaint or find somebody that the customer could talk to," which would be "an operations department head first or a human resources department head." *Id*., p. 3. Ms. Robinson said she did not recall receiving any such complaint. *Id*.

Cythia Newton, fka Halaas, was "the person in charge of quality assurance for AMR Northwest," and a key part of her role was to "collect and track all the complaints" received by the company. TCF 111, Ex. 24, Cythia Newton Depo., p. 2. She testified that all complaints were to be entered in a database, and that upon receiving any kind of sexual misconduct complaint, she would gather all relevant information on the substance of the complaint and "forward it on to the operations manager for the area." *Id*., p. 2 and 5. The operations manager for the complaint would have been Rocco Roncarati. *Id*., p. 4.

Furthermore, in the ordinary course of business, Patricia complaint should have wound up in the lap of Randy Lauer, general manager for AMR Northwest in Oregon. Lauer testified that not only would he receive such a report, but that even "an incomplete message . . . would eventually come to me," from the quality assurance department, and that all efforts would be made to "identify the person who called and to call them back and to get more information." TCF 111,

Ex. 25, Randy Lauer Depo. as Corporate Representative, p. 1. Lauer confirmed that a request for identifying information of an EMT would not be given out to a caller. *Id*. Further, any calls suggesting an EMT should not be "in the back of an ambulance with children would be typically recorded as a complaint" and "any kind of identifying information" would be used "to track down" the caller. *Id*.

Regarding Patricia telephone report to AMR Northwest that was "a freak," that he touched her "inappropriately," and that he was "not safe to transport little girls and [that] they needed to take him out of the ambulance," the defendant's brief states the following as a fact:

> . . . AMR first learned about her allegations during this litigation.

Petitioner's Brief on the Merits, p. 10.

As detailed above, in the ordinary course of business, Patricia complaint should have wound up in the lap of Randy Lauer, General Manager for AMR Northwest.

Nonetheless, the defense further declares:

> Plaintiffs offered no evidence that AMR has any record or knowledge about this complaint . . . .

Petitioner's Brief, pg. 10.

Such a declaration could only have merit in a universe where circumstantial evidence is unrecognized.

Reasonable jurors could conclude that conveyed information which indicated was a sexual predator, that the information was appropriately passed up the line, and that a management-level decision was made to ignore it. In coming to such a conclusion, a jury would be allowed to take into consideration the later conduct of AMR Northwest when confronted with credible claims of sexual misconduct by Rabecca Betty Paula and Royshekka

Rabecca

In March of 2006, Rabecca was transported to a hospital by an AMR Northwest ambulance. Ms. had no recollection of the ambulance ride, but she described conduct at the hospital as sexually menacing. Subsequently, Ms. spoke to Paul Priest, a manager for AMR Northwest, regarding Lannie conduct. Ms. told Priest that as she was being disrobed to change into a hospital gown, was staring at her, leaning forward, panting, with sweat on his forehead. TCF 111, Ex. 1, Declaration of Rebecca p. 1-4. Ms. has testified that was obviously sexually "aroused." TCF 111, Ex. 26, Deposition (July 31, 2009), p. 1.

Priest's response was to tell her that she must have been "imagining things." TCF 111, Ex. 1, Declaration of Rebecca p 3. Ms. explained how wrong and degrading the experience was. Nonetheless, Priest wrote up an incident

report for AMR Northwest's file stating that indicated her care was "excellent", though "she felt that there was not enough consideration for her privacy". Priest wrote that he thanked Ms. for her "feedback" and assured her that he "had a good talk with Lannie and the message was well received". The file was closed. TCF 111, Ex. 2, AMR Incident Number 631; TCF 111, Ex. 3, AMR Incident Summary.

As to Rabecca AMR Northwest claims that her written report to AMR Northwest contained "some positive . . . comments about Petitioner's Brief, p. 1. This is simply false. TCF 111, Ex. 4.

Natsue Akre

Natsue Akre, 77, was transported by in an AMR Northwest ambulance on April 7, 2006. TCF 111, Ex. 32. She had trouble breathing, was choking, and thought she was going to die. TCF 111, Ex. 33, Natsue Akre Depo., p. 2. During transport, repeatedly brushed her bare breasts while placing leads on her chest. She was terrified, afraid to say anything, "because he might do something to kill me, kind of IV machine and all that stuff." *Id*., p. 2-4.

Betty

On December 9, 2006, Betty 73, was Christmas shopping when she developed terrible chest pain, and could not walk. She was taken to Kaiser Sunnyside. On December 12, she was transferred to St. Vincent for heart surgery.

While Ms. was restrained on a gurney during her transport, attendant flipped her hospital gown up over her waist. Her knees were up in the air, and she described how then "began to stroke on the inside of my left thigh, stroke slowly down." TCF 111, Ex. 7, Depo., p. 7. She grabbed his hand and stopped him. *Id*. He told her she was "getting excited." TCF 111, Ex. 8, Affidavit of Betty p. 3. put his hand inside the neckline of her gown, explaining that he needed to find a loose wire. He put his hands all over Ms. breasts, going back and forth, rolling his fingertips over her nipples. *Id.*

Upon arrival at St. Vincent, Ms. told the nurse, her daughter, and her husband about the sexual touching in the back of the ambulance. TCF 111, Ex. 7, Depo., p. 25. Ms. later told her son, what had happened. was a former EMT with law enforcement experience. He called AMR Northwest and reached Paul Priest. He told Priest of his mother's incident. Mr. Priest called Ms. and she told him what had happened. TCF 111, Ex. 7, Depo. p. 7. Priest promised Ms. that there would be an investigation, and that he would get back to her. *Id*; TCF 111, Ex. 27, transcript, p. 3. There was no further investigation. *Id*.

Betty complaint was received at about 1:00 a.m. in a phone call from her son. Twelve hours later, at 12:53 p.m., the AMR Northwest computer entry reads:

> Allison Fowler and Paul Priest met with Lannie to discuss the accusation. Allegation is unfounded.

TCF 111, Ex. 27, p. 3.

AMR Northwest's general manager for Oregon, Randy Lauer, swore he was "absolutely sure this date and time is wrong," blaming "the computer system" that was "not very reliable." *Id*.

A comparison with other documents confirmed that the entry date and time were correct. TCF 111, Ex. 27, Tr. p. 5.

Despite having quickly closed the case, AMR Northwest executives later told the family that the case was being actively investigated, and AMR Northwest personnel testified that Randy Lauer was receiving "regular reports" on the progress of the investigation. TCF 111, Ex. 27, Tr. p. 6.

On December 18, 2006, Allison Fowler, the Division Human Resources Manager for the Division AMR Northwest and an employee of AMR, Inc., sent out an email stating that Ms. son had called again and talked to Paul Priest. TCF 111, Ex. 40, Lauer Depo. as Corporate Rep., p. 2. The email continued that the son was urging that "we should get the police involved and seems more insistent than he had earlier. I wonder if one of you should call him?" TCF 111,

Ex. 11, p. 1. Paul Priest had said he would call Ms. back in 5-7 days. AMR Northwest never called back. Ms. assumed that AMR Northwest had taken action. TCF 111, Ex. 7, Depo., p. 8-9. What AMR Northwest and AMR, Inc. did behind the scenes concerning the complaint was to notify Risk Management in Seattle, and then develop a plan to contact the Oregon Human Resources Department, Emergency Medical Service Section, by phoning the head of that section and giving her a "heads up" that a complaint might be filed there concerning Defendants intended to give the regulator their version of the potential complaint before it arrived, per their "usual practice." TCF 111, Ex. 10, Lauer Depo., p. 11 and 12; TCF 111, Ex. 11, p. 1-2. In fact, Roncarati made the call to the head of EMS at the state, but "she was out of town and . . . [he] never followed up with her . . . never sent her anything." TCF 111, Ex. 12, Roncarati Depo., p. 5. So, the state was never contacted with the required report of elder abuse. TCF 111, Ex. 12, Roncarati Depo., p 4-5. Mrs. was 73 years old, and Priest and the other local managers of AMR Northwest had a mandatory duty to report this abuse to the police or to the Department of Human Services. They did neither. *Id*.

Michelle Shaftel

Michelle Shaftel was transported by on January 13, 2007. TCF 111, Ex. 43. She was in and out of consciousness during the ride because of

extreme alcohol intoxication. TCF 111, Ex. 39; TCF 111, Ex. 6, Shaftel Depo., p. 80. She was sexually molested by *Id*., p. 136.

Violet Asbury

Violet Asbury, 73, was transported by AMR Northwest on February 5, 2007. During her ambulance transport, Lannie put his hands between her legs, next to her crotch, and would not move them. Ms. Asbury tried to move them, but could not do so. She estimated that this lasted at least 15 minutes. TCF 111, Ex. 29, Asbury Depo., p. 2-3. He had a tight grip on her. Mr. did not let go until the ambulance pulled up at the hospital and Ms. Asbury was moved out of it. TCF 111, Ex. 29, Asbury Depo., p. 2.

Dianne Terpening

On February 23, 2007, Diane Terpening was transported by Lannie sexually abused her in the ambulance, manipulating her breasts and shoving his hand down her pants. Ms. Terpening, profoundly deaf, was unable to convey her distress to either Mr. or the driver. TCF 111, Ex. 42; TCF 111, Ex. 38, Disk 2 of Deposition of Dianne Terpening, p. 75-76.

Stacey Webb

Stacey Webb had an injection of an anesthetic and a steroid for her injured shoulder at her doctor's office on April 19, 2007. The next thing she recalled was being on the floor with "a lot of people standing over me." She was thereafter "in

and out" of consciousness. TCF 111, Ex. 13, Stacey Webb Depo., p. 2-3. During transport, she recalls rubbing her abdomen in a circular motion, brushing up against her breasts, and putting his hand beneath her pants, "to the top of [her] pubic bone, pushing and rubbing." *Id*., 7-8. In the emergency room, stayed close to her as they waited for her to be assigned to a cubicle, and she testified that "he just kept staring at me, and he wouldn't break eye contact." *Id*., 10.

Paula

On March 4, 2007, an AMR Northwest ambulance transported knife wound victim Paula When the police questioned her about her injuries, Ms. said that Lannie had sexually abused her in the ambulance by taking her left hand and placing it inside her pants and manipulating it. Although the officer at the scene spoke with an AMR Northwest supervisor, Christopher Verkest, the officer was not told of prior allegations against TCF 111, Ex. 14, Fowler Depo., p. 9-10.

After Paula complaint was relayed to AMR Northwest by the Portland Police, it led to a rather frenzied gathering the next day. A Risk Management official from Seattle attended. TCF 111, Ex. 14, Fowler Depo., p. 4. Allison Fowler of HR was relieved when she "learned that the police didn't find the person credible." Her source for that allegation was a fellow attendee of the meeting, one

Lannie TCF 111, Ex. 14, Fowler Depo., p. 8-9. Supervisor Verkest agreed, claiming that the police officer had told him that accuser, Paula was not to be believed. "He said, as far as his investigation, he found no basis for the claim, and that's quoted." TCF 111, Ex. 18, Verkest Depo., p. 3. At trial, Officer Miller strongly disputed Verkest's testimony, denying that he had told Verkest anything of the sort. TCF 111, Ex. 27, Tr. p. 7. He testified that he was in fact much disturbed at the allegation, and found it "frustrating" that he had no further evidence, because he felt Ms. has no motivation "to make this up." *Id.*

Further, AMR Northwest never made any effort to contact Ms. never even requested the police report, and no one at AMR Northwest ever told the police about the prior allegations of sexual misconduct on part. TCF 111, Ex. 14, Fowler Depo., p. 8-10. Allison Fowler, who took the notes for the management meeting the day after the incident, could offer no rational explanation for why the group never even discussed telling the police what they knew about prior allegations against TCF 111, Ex. 14, Fowler Depo., p. 6. As Officer Miller testified, "It would have been good information to have." TCF 111, Ex. 27, Tr. p. 8.

Rocco Roncarati attended the meeting. He was the general manager of AMR Northwest, Inc.; Verkest was one of Lannie supervisors. TCF

111, Ex. 17, Sorenson Depo., p. 5. Allison Fowler was the Human Resources Manager for AMR, Inc. (TCF 111, Ex. 40, AMR NW Depo., p. 2-3; TCF 111, Ex. 10, Lauer Depo., p. 7). Rocco Roncarati reported to Randy Lauer with regard to Lannie TCF 111, Ex. 14, Fowler Depo., p. 3. Paul Priest, of course, knew of Ms. complaint, since he was the one who told her that she was "imagining things." Further, Rocco Roncarati was aware of when he closed the case. When asked if he made "any connection between the incident and the incident," he replied simply, "Not at all." TCF 111, Ex. 12, Roncarati Depo., p. 6-7. Verkest testified that when he was called by the police about Ms. he did not tell them about the complaint that Betty had made four months earlier, because he had never heard of the complaint. TCF 111, Ex. 18, Verkest Depo., p. 3. In fact, he was closely involved with the "investigation" of regarding Ms. complaint. TCF 111, Ex. 19, Liedke Depo., p. 3-6.

At this point, a jury could find that AMR Northwest had learned of the predatory behavior on part from Patricia Rabecca Betty and now Paula Yet, rather than giving any of this information to the police or contacting Ms. or even getting Officer Miller's report on the incident, AMR Northwest instead sent a memo to Lannie that said that AMR Northwest was considering the Betty and Paula "complaints

closed because you [Lannie] have told us that these events did not happen and we have no further evidence or witness statements that they did." TCF 111, Ex. 12, Roncarati Depo., p. 3; TCF 111, Ex. 15.

Hazel Corning

Hazel Corning, 86, was transported on August 7, 2007. Lannie was in the back of the ambulance with her. During transport, he was rubbing her abdomen under her pajama bottoms. He was, as she reported, "on my flesh." TCF 111, Ex. 31, Corning Deposition, p. 2. His hand was "on top of . . . [her] pubic hair." *Id*. She explained she was upset because "I didn't want him to. He had no business down there." *Id*., p. 3.

The leading case on the question of post-event evidence being received as circumstantial evidence of intent at the time of the incident is *Stranahan v. Fred Meyer*, 153 Or App 442, 462-63 (1998), *reversed on other grounds*. This was a false arrest case brought by a petitioner against Fred Meyer. The Court of Appeals approved the trial court's ruling that abusive conduct toward a different petitioner at a different store *two years later* could properly be received as evidence of the corporation's hostility towards petitioners, including the plaintiff. The issue was, in essence, the state of mind of the corporation. This is precisely what we have here. However, the evidentiary links in our case to the attitude of the corporation are far more focused, involve precisely the same persons, and are much closer in

time. To assist the Court, we need to describe the events of December, 2007, in some detail.

Royshekka

Royshekka was transported on December 8, 2007. had put his hand on hers and shoved it down the front of her pants. TCF 111, Ex. 27, Tr. p. 10. Ms. went into a panic attack at the hospital; she was screaming for help, for someone to get out of her room. When she tried to tell the nurse what had happened, the nurse told her that had simply been conducting an abdominal exam, and that she was "acting crazy." TCF 111, Ex. 27, Tr. p. 11. When Ms. declared that she no longer felt safe in the hospital, and that she was going to leave, the nurse told her she was not allowed to leave, and that if she tried, security would be called. was insistent; the nurse called security. Huge men armed with restraining equipment arrived, but were too intimidated by Ms. screams to enter the room. *Id*. Eventually, another nurse took control of the situation, and called AMR Northwest. Supervisor Verkest took the call. Verkest has testified that he did not know then about the incident, but, in fact, he was involved in AMR Northwest's inquiry of and his driver. TCF 111, Ex. 19, Depo. of Nick Liedtke, p. 6. Verkest acknowledges that he knew about the complaint, having taken the call from Officer Miller. Verkest went to the hospital to interview Ms. As she told

her story, Verkest interrupted her: "You don't have to convince me." TCF 111, Ex. 27, Tr. p. 12. But testified that Verkest nonetheless flatly refused to call the police, telling her that she could call the police if she wanted to, but that he would not do it. TCF 111, Ex. 27, Tr. p. 12. The police report confirms her version. TCF 111, Ex. 35, Report of Det. Rumble. Verkest later that day called the police nonemergency number. A disk of the call is TCF 111, Ex. 37. Verkest began by chatting, asking the dispatcher how she was doing, then told her that he was doing "Fantastic!" In signing off, he declared with equal enthusiasm, "Cool!" In between, he mentioned that a Ms. wished to make a complaint about one of the EMTs (whose name he did not mention) and that she was claiming merely "assault." Further, Verkest made sure that he was nowhere near the hospital by the time the police arrived.

Over the next 48 hours, no one at AMR Northwest made any effort to contact the police, or to let the police know about the string of prior accusations against

It was only through running a computer program available only to the police that officers found a reference to a sexual abuse claim involving with the complainant being listed as Paula TCF 111, Ex. 35, Report of Detective Rumble, p. 1. Armed with that knowledge, the police went to AMR Northwest headquarters on December 10 to arrest While there, they were told by Mr. Lauer that an older woman's son had made a complaint the year before

(referring to the case) but that "the elderly woman . . . said did not inappropriately touch her." In fact, Mrs. had confirmed that she had been inappropriately touched. When confronted with this description of what he told the officer as written by the officer himself, Lauer insisted that the officer had written something which he had never said. TCF 111, Ex. 27, Tr. p. 13.

Plaintiff contends that from the time of the first complaint of sexual misconduct against Ms. complaint, AMR Northwest was focused on protecting the corporation, rather than the public. Ms. complaint was—to say the least—not dealt with in the manner supposedly required by defendant's protocols. A jury could find that the complaint was passed immediately to management-level personnel as required, and that it was recognized for the risk it presented, and then it was deliberately ignored. Ms. complaint was investigated by supervisor Paul Priest, who told her that she was "imagining things." TCF 111, Ex. 27, Tr. p. 1. He then wrote a report which Ms. testified bore no relationship to what she had actually told him. As Ms. described it, "You would think it was two different conversations." TCF 111, Ex. 27, Tr. p. 2.

While AMR Northwest officials went to some length to deny it, their own records show that Betty case was closed—as plaintiff's counsel told the jury—"almost in time for lunch."

The day after the Paula incident, top officials, including a Risk Management officer from Seattle, had a meeting, allegedly "to find out what happened." However, a jury could find that learning the truth was not an agenda item.

Third, the defense asserts:

> Plaintiffs offered no evidence that AMR (or any of its individual supervisors or employees) concluded or believed that had committed any inappropriate touching or sexual misconduct on a patient prior to receiving Ms. complaint.

Petitioner's Brief, pg. 14.

On the contrary, as set forth herein, there is abundant evidence that the top officials at AMR Northwest wrote grossly misleading reports about complaints, repeatedly lied to complaining witnesses, conducted sham investigations of conduct, withheld crucial information from the police, and lied to the police.

Finally, a jury could reasonably conclude that would have never been arrested for molesting Royshekka except for the fact a detective came across a computer entry about Lannie in a report made seven months earlier regarding Ms. Paula

ARGUMENT

The question presented on appeal is whether there is any evidence from which a reasonable juror could conclude that AMR Northwest failed to act to prevent Lannie from physically abusing the plaintiffs when a reasonable person, under the circumstances, should have known that Lannie would do so. What the phrase "should have known" means is central to the question.

AMR Northwest argued, and the trial court agreed, there must be evidence that AMR Northwest "had knowledge of the specific acts of abuse against a plaintiff." This simply is not the standard. First, the "should have known" language in ORS 124.100 necessarily must be construed as extending liability to one who may *not* have known. By creating the standard of what a reasonable person "should have known," the legislature has created liability for those who were on notice but deliberately failed to make reasonable investigation, and to those who knowingly failed to acknowledge the significance of facts which were staring them in the face.

The Court of Appeals opinion below construed the statute as such:

> . . . [W]e conclude that, under the plain text of ORS 124.100(5), the legislature intended to impose 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 the plaintiff. From that, we conclude 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. That conclusion is supported by the context and legislative history of ORS 124.100.

Wyers v. AMR Northwest, Inc., 268 Or.App. 232, 247 (2014).

The above construction of the phrase "a reasonable person should have known" is hardly novel as it relates to the vulnerable person abuse statute, consider:

A. The Court of Appeals had previously applied the phrase "should have known" to the evidence, in holding "there is no evidence from which a jury could conclude that a reasonable person under those circumstances 'should have known' that would follow plaintiff off the premises and assault him." *Miller v. Tabor West Investment Co., LLC*., 223 Or.App. 700, 702, 196 P3d 1049 (2008).

B. The trial court also held that "permitting" under ORS 124.100 "appears to create a duty to act when one knows or should have known a qualifying vulnerable person is being physically or financially abused, holding further, "the claim is still negligence, but the action is analyzed under a different framework." TCF 70, Order on Bench Trial Motion, pg. 10.

C. Honorable Judge Matarazzo construed the statute in a similar manner in a case against AMR Northwest.

D. Indeed, AMR Northwest argued the very proposition that the phrase "a reasonable person should have known" creates merely a negligence standard in

insurance litigation in federal court concerning coverage for the claims at issue before this Court.

While none of these earlier constructions are binding on this Court, they demonstrate the frequency with which the interpretation has been used as opposed to the awkward construction urged by AMR Northwest.

A. The significance of the *Miller v. Tabor* case.

The *Miller v. Tabor West Investment Co., LLC*, 223 Or.App. 700, *rev. den*, 346 Or. 184 (2009), opinion does not support AMR Northwest's construction. The opinion does not mention constructive knowledge of a crime, nor suggest "should have known" references a crime.

In discussing whether the plaintiff in *Miller* had presented evidence sufficient to survive summary judgment on the vulnerable person abuse claim, the *Miller* court looked at the following types of evidence:

> On the day of the assault, did not witness any physical altercation or interaction between and plaintiff. Instead, saw plaintiff knock on apartment door; when did not answer, plaintiff stood in front of the window for a few minutes and then left. Indeed, the only evidence of possibly negative interaction between the two men of which was aware was a "push" the day before. However, the only indication of the nature of that event came from who testified that it likely was "a friendly push." Indeed, testified that plaintiff and often talked together and visited plaintiff's apartment "two or three times a day."

After summarizing the evidence, the *Miller* court concluded:

> There is no evidence that reacted negatively to any of those visits or from which to infer that knew that felt animosity toward plaintiff. *In short, there is no evidence from which a jury could conclude that a reasonable person under those circumstances "should have known" that would follow plaintiff off the premises and violently assault him.* For those reasons, we conclude that summary judgment for defendants on plaintiff's claim under ORS 124.100 was appropriate.

Miller, supra, 718-9 (emphasis added).

The opinion's rather painstaking analysis of the factual detail in *Miller* cuts the heart out of the defense argument that the abuse must take place "in the presence" of the defendant. Since the question is whether "a reasonable person . . . would have anticipated would follow plaintiff off the premises and violently assault him," we see that the opinion contemplated liability where the "permitting" takes place first, and the abusive conduct follows at some point in the future.

Furthermore, the opinion dispenses with the second major argument of the defense, i.e., that "should have known" means should have known that abuse amounting to a crime was then and there occurring. Instead, the *Miller* opinion applies the phrase "should have known" to whether a reasonable person should have known that the eventual assault would take place.

It remains for us to consider what the phrase "would commit" allows in the way of liability.

Clearly, in the *Miller* case, if the tenant had told the landlord he was going to follow plaintiff off the premises and batter him, and had the landlord done nothing to deter him, the Court would have allowed liability. Of course, the landlord could not have known the assault "would take place" since might have changed his mind, or been unable to find the plaintiff, or any number of other intervening events might have prevented the assault from taking place. Whenever we are dealing with the future, we are dealing with varying degrees of likelihood.

In the present case, there is considerable evidence that AMR Northwest officials left on the job knowing he was extremely likely to sexually abuse any women who might have the misfortune to be alone with him in the back of their ambulance. Such conduct falls into the well-worn path of institutions from the Catholic Church to Penn State and the Boy Scouts.

Sexual predators are the ultimate opportunists. A jury could reasonably find that AMR Northwest knew its acts – and failures to act – were placing a definable group of human beings at great risk of being hideously violated, and their culpability is in no way lessened by the fact that as they gave implicit permission to carry on, they did not happen to know the names of those whom he would encounter.

B. Initially, the trial court correctly interpreted the vulnerable person abuse statute.

Prior to AMR Northwest filing for summary judgment, AMR Northwest had argued that plaintiffs were not entitled to a jury trial under the vulnerable person abuse statute. The trial court agreed that there was no statutory right to a jury trial, but held that an action under the vulnerable person abuse statute was "of like nature" to the common law negligence claims under which plaintiffs had a right to a jury trial. The court reasoned, in part, as follows:

> [T]he elements of ORS 124.100 are not separate and distinct from common law negligence . . . .
>
> First, "permitting" another person to engage in abuse is not a distinct element from common law negligence. ORS 124.100 appears to create a duty to act when one knows or should have known a qualifying "vulnerable person" is being physically or financially abused. The establishment of a statutory duty does not create an additional and distinct action from that of a negligence claim. Rather, the claim is still negligence, but the action is analyzed under a different framework. See Fazzolari v. Portland School District No. 11, 303 Or 1, 10 (1987) (explaining that "duty plays an affirmative role when an injured plaintiff invokes obligations arising from a defendant's *particular status or relationships, or from legislation*, beyond the generalized standards that the common law of negligence imposes on persons at large" (italics added)).

TCF 70, Order on Bench Trial Motion, p. 10 (emphasis in original).

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C. Judge Matarazzo's holding in *v. AMR*.

Judge Matarazzo expressly held that "[a] person violates the Vulnerable Person Abuse statute when they negligently fail to prevent another from abusing a vulnerable person," and on that basis affirmed the jury's verdict. Tr. 110, Exh. A at p. 5.

D. AMR Northwest first argued that the vulnerable person abuse statute merely requires a showing of negligence; the trial court erred in failing to hold that AMR Northwest was judicially estopped from seeking summary judgment under a different standard.

The first position that AMR Northwest took with regard to the *Terpening, et al*, cases was in a federal action concerning insurance coverage, where they described the standard of liability under the vulnerable person abuse statute as mere negligence. Whether it is called judicial estoppel, or judicial admission, AMR Northwest's federal court position should prohibit it from arguing that permitting liability requires "real-time, intentional misconduct in the face of abuse[1]." *AMR Northwest intentionally took inconsistent positions that gave rise to the risk of inconsistent results in separate proceedings*.

AMR Northwest further stated that the "allegations of vulnerable person abuse in the five underlying complaints relevant to the National Union Policy

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[1] Answering Brief, pg. 30.

conform to this *minimal negligence* standard" (emphasis added). TCF 110, Ex. A, p. 5. The underlying complaints referenced in AMR Northwest's federal court briefing include the present complaints of Terpening, et al. TCF 110, Ex. A, p. 2 and 4; Ex. B p. 2-3.

Meanwhile, AMR Northwest simultaneously argued in the lower court summary judgment proceeding in this case that the law requires a heightened standard of actual knowledge for conduct to constitute "permitting," and that plaintiff was required to prove AMR Northwest "participated in or knowingly allowed the very abuse committed against" each plaintiff. TCF 103, Defendant's Motion for Summary Judgment, p. 6.

The federal court briefing even references and emphasizes in bold the "should have known" allegation in plaintiff Shaftel's vulnerable person abuse complaint, and language from the Asbury and Terpening vulnerable person abuse complaints, and characterizes them as "allegations of negligence." AMR Northwest's federal court briefs plainly stated that the "underlying claims clearly involve allegations of negligence, which does not require a subjective intent to injure" in specifically describing the vulnerable person abuse claims brought by the plaintiffs herein. TCF 110, Ex. B, p. 2 and 3.

In the federal court proceeding, AMR Northwest unambiguously refers to the sole claim of violation of the vulnerable person abuse statute in the *Terpening*,

et al, cases presently before this Court as "negligence." Consider the following excerpt from AMR Northwest's brief before the Ninth Circuit:

> The underlying lawsuits allege negligence, which does not require subjective intent to injure:
>
> * * *
>
> "AMR Northwest, by and through its agents and employees, . . . ***should have known*** that had and was likely to again abuse ill or injured female patients . . . ." ER0395 (Mederos Decl., Ex. 10 (*Shaftel* Compl. ¶6 (emphasis added))).
>
> "AMR Northwest . . . ***knew and had reason to know*** that had and was likely to again abuse ill or injured female patients . . . ." ER0401 (Mederos Decl., Ex.11 (*Asbury* Compl. ¶6 (emphasis added))); ER0407 (Mederos Decl., Ex. 12 (*Terpening* Compl. ¶6)); ER0437 (Mederos Decl., Ex. 15 (*Webb* Compl. ¶6)); ER0464 (Mederos Decl., Ex. 18 (*Corning* Compl. ¶6)).
>
> Because negligence qualifies as an occurrence, these allegations mandate denial of the insurer's summary judgment motion.

APP 1-3.

The cases involving a party being judicially estopped from taking an inconsistent position usually involve a situation where the party is taking a position contrary to their position taken in an earlier proceeding. The federal court proceeding was simultaneously ongoing with the state court summary judgment proceeding. AMR Northwest took utterly contrary positions in state and federal court, and since AMR Northwest's first judicial statements regarding the standard of proof regarding the plaintiffs herein was that of mere negligence, the trial court

should have disregarded AMR Northwest's briefing that sought to characterize the burden of proof as requiring proof that AMR Northwest have "knowingly allowed" the abuse[2, 3]. Oregon courts have observed that "the doctrine of judicial estoppel 'has a twofold purpose: to preserve the sanctity of the oath and to protect the integrity of the judicial system by preventing inconsistent results in separate proceedings.'" *Glover v. Bank of New York*, 208 Or.App. 545, 147 P.3d 336 (2006). The Oregon Court of Appeals has further noted:

> In sum, we disagree with plaintiff's argument that in order for the doctrine of judicial estoppel to apply, a court must have relied or acted upon an inconsistent position. Our Supreme Court has not described the doctrine in terms of a rigid formula, but rather has emphasized that judicial estoppel is appropriate to protect the integrity of the judicial process.

208 Or.App. 545, at 558.

Accordingly, the trial court erred in failing to hold that AMR Northwest was judicially estopped from arguing that the vulnerable person abuse statute requires more than a showing of negligence. AMR Northwest should have been subject to the standard of liability urged to the federal court, and summary judgment should have been denied.[4]

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[2] All are plaintiffs before this Court.

[3] TCF 103, Defendant's Motion for Summary Judgment at p. 6, line 25.

[4] The Ninth Circuit remanded the case to district court. The coverage action is currently on hold awaiting the outcome of this appeal.

E. The absence of legislative history.

AMR Northwest argues the absence of legislative history shows that the legislature intended permitting liability to be narrow and constrained. AMR Northwest argues that subjecting Oregon businesses to "permitting" liability would have generated discussion at the legislature. Perhaps so, or perhaps the legislature had no reluctance in exposing Oregon businesses to liability for the physical or financial abuse of *vulnerable persons* under the standard set forth in the statute.

AMR Northwest also advances an argument similar to that advanced and rejected in *v. AMR Northwest, Inc.*, 255 Or.App. 315 (2013). AMR Northwest quotes a passage in the legislative history regarding protecting the elderly from supposed "new friends" who then financially abuse them. That the legislature sought to protect the elderly from financial abuse by "a new friend" does not indicate the statute was intended to only extend to the "new friend." [5]

AMR argues the immunity given to some health care providers supports its argument that ambulance companies are immune. The language defining "permitting" was submitted as part of a bill that covered all institutions. Thereafter, some institutional medical providers lobbied for exemptions. AMR

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[5] *See, v. AMR Northwest, Inc.*, 255 Or.App. 315 (2013):

> That testimony cannot bear the weight that defendant would assign it. Although it certainly supports the idea that the statute protects elderly persons, nothing indicates or implies that it was intended to protect *only* elderly persons.

Northwest does not explain how the successful lobbying efforts of other types of businesses should influence the interpretation of "permitting." The lobbying by some institutions suggests that the Vulnerable Person Abuse Act created broad liability for those not specifically excluded.

The Petitioner's Brief at p. 34 notes that the Senate Bill Summary "simply described the bill as authorizing claims 'against any person who has caused such abuse.'" That is the point. Anyone who actually commits the foul deed, and anyone who causes such a foul deed, is liable. Being a cause of a wrong is much broader than actually committing the wrong.

Finally, what is most absent from the legislative history is any reference to liability being conditional upon constructive knowledge that a crime was being committed.

F. Reply to AMR Northwest's argument on context.

AMR Northwest asserts that the 2003 treble damage amendment provided context for the meaning of "permitted" as enacted in 1995. AMR Northwest offers no legislative history to support an alleged legislative reinforcement of the term "permitting." AMR Northwest cites to no authority that context can include legislative enactments some eight years later. Even if AMR Northwest could somehow establish the treble damage amendment provides context, *v. AMR Northwest, Inc.*, 255 Or.App. 315 (2013), rejected AMR Northwest's

argument that treble damages are punitive in nature and must be accompanied by a *mens rea* requirement.

AMR Northwest next argues that contextual support can be found in how the term "permits" has been used and applied in Oregon's criminal statutes. AMR then discusses statutes that ORS 124.100 *does not* reference. In discussing criminal statutes as applied, AMR Northwest references *State v. Porter*, and *State v. McBride*, decided in 2011 and 2012, involving statutes not referenced in the Vulnerable Person Abuse Act. These remote criminal statutes and court decisions are not context for the term "permitting," which was enacted in 1995:

> [A]s we understand the meaning of "context" in *PGE* and related cases, it contemplates a substantive relationship between the provision being interpreted and the putatively contextual provision in which the latter reflects in some meaningful way on the intended meaning of the former; a provision does not constitute "context" for another in that sense simply because the two are connected in some amorphous way that amounts to little more than their common authorship and general subject.

Department of Land Conservation and Development v. Jackson County, et al, 151 Or.App. 210, 220, 948 P2d 731 (1997).

> Defendant's second argument, to the extent that we understand it, is incorrect. Merely because conduct is knowing does not necessarily mean that, as a matter of law, it also cannot give rise to liability in negligence. A grocery store owner, for instance, who has actual knowledge of a slippery substance on the store floor may be held liable * * * when a patron slips on it.

Sipes, 147 Or.App. 462 at 467.

Finally, AMR Northwest suggests that plaintiffs were arguing that the case of *Schwert v. Myers*, 297 Or 273, 683 P2d 547 (1984) provided context for a statutory interpretation of the meaning of the word "permitted." AMR Northwest reflected its own view of context, reasoning "there is no indication to believe that Oregon's livestock districts were on the Legislature's mind in passing ORS 124.100."[6] Plaintiffs did not so suggest. Plaintiffs simply noted that if one were to look at case law in interpreting a civil statute, one would look at civil cases rather than criminal cases interpreting the term "permitting." In the same paragraph that plaintiffs cite to *Schwert v. Myers*, plaintiffs point out that there is no need to look at other definitions of permitting, given the vulnerable person abuse statute defines "permitting."

G. AMR's unique construction of the statute.

AMR Northwest's proposed construction of the phrase "should have known" refers to whether a defendant reasonably should have known at the time that the abuse amounted to one of the enumerated crimes listed in ORS 124.105. Petitioner's Brief, p. 27. AMR Northwest recognizes the awkwardness of a construction which would require the plaintiff to prove that someone who committed such acts as rape, sodomy, and unlawful sexual penetration have actual knowledge of the fact that such offenses were specifically enumerated in the

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[6] Petitioner's Brief at pg. 27.

particular statute. We are dealing with heinous acts. AMR Northwest fails to answer the obvious question of why the legislature would condition liability on a defendant's potential awareness that the inherently heinous acts will happen to be in violation of a criminal statute. In dealing with how a plaintiff would be expected to prove such specific knowledge, AMR Northwest argues that "it is sufficient if the defendant reasonably should have known that the actions on the plaintiff amounted to a crime." *Id*. AMR Northwest's position appears to be that "should have known" only requires that a defendant should have known that the conduct towards the plaintiff amounted to a crime--not one of the specific crimes enumerated in ORS 124.105.

AMR Northwest's unique construction of the statute conditions a defendant's civil liability on constructive knowledge that conduct amounted to a crime. Criminal defendants do not have to know that their conduct constituted a crime to be convicted. It is difficult to think of other types of civil liability that require a defendant have constructive knowledge that conduct constitutes a crime.

Meanwhile, the phrase "should have known" is routinely used as a liability standard in civil litigation as referring to <u>facts</u> that a defendant reasonably "should have known."

H. The Court of Appeals ruling below.

AMR Northwest characterizes the Court of Appeals as having four different formulations of liability under the vulnerable person abuse statute. This is simply not the case. When the language that AMR Northwest points out as "formulations" are read in context, the Court of Appeals holding makes sense.

AMR Northwest next argues that the Court of Appeals opinion would require the statute to be rewritten. Using differents words to explain the effect of the statute does not require a statute to be rewritten. Instead, it is AMR Northwest's unique formulation that would require the statute to be rewritten, and have words to the effect of "knowledge that a crime was being committed" inserted somewhere in the statutory language.

Finally, AMR Northwest argues that the Court of Appeals opinion will cause a profound expansion of tort remedies that one would have expected to see some comment or debate about in the legislative history. The Court of Appeals opinion provides the common sense construction of the statutory definition of "permitting." Would the legislature really want to be against providing strong protection for vulnerable persons, and want to debate that when somebody should have known that a vulnerable person was going to be abused, they should not be subject to liability? Meanwhile, AMR Northwest argues that such an expansion of liability is the proper subject for the legislature, not for the judiciary. However, if the Court

of Appeals gave the statute its plain meaning, what AMR Northwest is really arguing is that this Court should disregard the legislature's definition and severely limit the scope of liability to those present and watching abuse happen.

I. Summary judgment may not be affirmed on the alternative grounds of a lack of evidence.

As this Court is well aware, the "any evidence" standard applies to summary judgment. The Court of Appeals restated the facts and concluded that there was sufficient evidence to survive summary judgment. While that Court's opinion is not binding on this Court, the evidence described herein meets the "any evidence" standard.

CONCLUSION

Based on the foregoing, Respondents request that this Court affirm the Court of Appeals opinion, or alternatively hold that AMR Northwest is judicially estopped from arguing the vulnerable person abuse statute requires a heightened standard, and reverse the trial court's dismissal of these six lawsuits.

Dated: August 14, 2015.

KAFOURY & McDOUGAL

/s/ *Mark McDougal*

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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)(b) is 8,407 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).

Dated: August 14, 2015.

KAFOURY & McDOUGAL

/s/ *Mark McDougal*

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 14, 2015, I filed the foregoing RESPONDENT'S BRIEF ON THE MERITS via eFiling:

Appellate Court Administrator
Appellate Court Records Section
1163 State Street
Salem, Oregon 97301-2563.

I further certify that on August 14, 2015, I served the foregoing RESPONDENT'S BRIEF ON THE MERITS to:

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