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

PETITIONER'S REPLY TO RESPONDENTS' BRIEF

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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September 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

PETITIONER'S REPLY BRIEF ON THE MERITS

Petitioner American Medical Response, Inc. ("AMR") replies to several points raised in the plaintiffs' response brief:

A. Plaintiffs Have Deleted "Knowingly" from the Statute's Text.

As discussed in AMR's opening brief, the text of ORS 124.100(5) contains a "double" requirement of knowledge, requiring proof that a defendant had both *actual* knowledge ("knowingly act or fail to act") as well as a form of *constructive* knowledge ("should have known of the physical * * * abuse"). The construction by AMR and the trial court is the only construction that takes into account both of these requirements and reconciles them in a coherent way.

In contrast, in a 36-page response brief, plaintiffs neglected to quote the entirety of the statutory definition; indeed, plaintiffs failed to even mention that ORS 124.100(5) contains the phrase "knowingly act or fail to act" within it. Plaintiffs offer no explanation on how the statutory phrase "knowingly act or fail to act" does *not* require actual knowledge, as it self-evidently does.[1]

Rather, plaintiffs' only solution is to read the word "knowingly" out of the text of ORS 124.100(5). The court of appeals below took the same

[1] In *Sipes v. Sipes*, 147 Or App 462, 936 P2d 1027 (1997), the court considered whether a plaintiff adequately pled that the defendant had knowingly permitted child abuse under ORS 12.117. *Id.* at 467-68. The court found the complaint adequately pled because the plaintiff alleged that the defendant had knowingly permitted the abuse "in seven specified ways, each of which implicitly assumes that she had *actual knowledge* of the abuse" when it was occurring. *Id.* at 468 (italics added).

erroneous approach. *See Wyers v. Amer. Med. Resp., Inc.*, 268 Or App 232, 247, 342 P3d 129 (2014) [App-29]. Perhaps nowhere is plaintiffs' strategy better illustrated than in their (mis)characterization of the "Question presented" on appeal, which asks this Court to only construe the meaning of the phrase "should have known", rather than the meaning of the *entirety* of the statutory definition. *See* Resp. Br. at 1. But a statutory construction that removes an important word from the definition cannot be a correct statutory construction.

B. Plaintiffs Have Also Deleted the Requirement of Knowledge about the Particular Plaintiff.

ORS 124.100(5) also requires some knowledge by the defendant regarding "*the*" physical abuse, which necessarily refers to the physical abuse on the plaintiff bringing the claim. *See* ORS 124.100(5); *Wyers*, 268 Or App at 245-46 [App-17] (so acknowledging). Thus, although a plaintiff does not need to prove that the defendant subjectively knew that the abuser was committing an act of vulnerable person abuse, ORS 124.100(5) does require proof that the defendant had *some* knowledge of the abuser's conduct on the particular plaintiff, such that a "reasonable person should have known" based on those facts that the abuser's conduct was in fact "vulnerable person abuse" as defined by the statute.

Some knowledge by the defendant about the particular plaintiff is therefore required. Plaintiffs' only solution here is to add new text into the

statute, proposing a claim where a defendant has knowledge about misconduct by the abuser toward a "definable group of human beings," but not the plaintiff. *See* Resp. Br. at 24. The court of appeals below took a similar approach. *Wyers*, 268 Or App at 254 (adding term "substantial risk"). As discussed in the opening brief, plaintiffs' proposal simultaneously adds new text into the statute and improperly reduces the standard for liability from "knowing" to "reckless" misconduct, without any support to effect that change from the statute's text, context, or legislative history.

In contrast, the requirement of some knowledge about *the particular plaintiff* is supported not only by the statute's text, but also by the analysis in *Miller v. Tabor West Investment Co., LLC*, 223 Or App 700, 196 P3d 1049 (2008), which made the point of *only* considering facts known to the defendant about the *particular plaintiff* for the ORS 124.100 claim, in contrast to the negligence claim where the court considered the abuser's general history and past actions toward other, similarly-situated individuals. *Id.*

In *Miller*, the defendant in fact had *some* minimal knowledge about the abuser's misconduct toward the particular plaintiff (*e.g.*, an apparently "friendly push" in the past), but the extent of that knowledge was deemed insufficient as a matter of law to state a claim under ORS 124.100. *Id.* at 718-19. Here, AMR had *no* knowledge whatsoever about any action by Mr. toward any of these particular plaintiffs. The logic for dismissal in *Miller* therefore applies

here with even greater force.

C. Plaintiffs Mischaracterize AMR's Proposed Construction.

Plaintiffs criticize AMR's construction as requiring the defendant to be "physically present" during the abuse. Resp. Br. at 1. Likewise, OTLA in its amicus brief asserts that AMR requires the defendant to be "witnessing" the abuse. OTLA Br. at 8. However, AMR has not used these terms in its merits brief. Although "permitting" liability could certainly result when a defendant was "physically present" during the abuse or else "witnesses" it, such liability is not limited to these circumstances.

For example, a defendant can knowingly "permit" abuse where it directs or instructs a third person to commit the abuse, or where it approves of a plan to commit the abuse. While there may be many other examples, none of this eliminates the statutory requirements that the defendant's misconduct be done "knowingly" and with some knowledge about the particular plaintiff.

Indeed, given that ORS 124.100 treats the "abuser" and "permitter" as equally and jointly liable in *all* respects—even though one commits the physical abuse and the other does not—the basis for liability is analogous to that of a conspirator who assisted or acted in concert with another's tort, even if the conspirator was not "physically present" during the commission of the tort or a "witness" to it. *See Granewich v. Harding*, 329 Or 47, 985

P2d 788 (1999) (discussing liability of conspirator).

This analogy also shows plaintiffs' flawed logic in suggesting that a defendant could never know that a future or planned assault "would" take place because the abuser "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." Resp. Br. at 24. As an initial matter, if an abuser does "change his mind" and avoids committing the planned abuse, then there is no tort, and no potential for "permitting" liability.

However, if the abuser *does* end up committing the tort, then a defendant may be jointly liable as a conspirator for "act[ing] in concert" beforehand or giving "substantial assistance or encouragement" to the tortfeasor, even though there was always the possibility that the tortfeasor might not actually go through with it. *Granewich*, 329 Or at 53-54 (quoting Restatement (2d) of Torts §876). In the same way, under ORS 124.100 a defendant could be liable for knowingly "permitting" future or planned physical abuse on a particular plaintiff, despite the fact that the abuser might not consummate the plan. But that is not remotely the situation of this case, where AMR did not engage in any "knowing" misconduct and where AMR had no knowledge whatsoever about any of these plaintiffs.

D. Plaintiffs' Factual Summary Is Rife With Inaccurate and Irrelevant Information.

Plaintiffs' fact presentation is misleading in describing allegations of misconduct by Mr. never reported to AMR, or else not reported to AMR until *after* the transports involving all of these plaintiffs. Such allegations cannot factor into the analysis of whether each plaintiff here created a genuine issue of material fact. *See, e.g., Benjamin v. Wal-Mart Stores, Inc.*, 185 Or App 444, 468, 61 P3d 257 (2002) (allowing evidence of complaints regarding a defective product only to the extent defendant had knowledge of such complaints *prior* to the sale of the product to plaintiff).[2]

In addition, much of plaintiffs' presentation on the complaints that *were* made to AMR ignores key undisputed facts and stretches other facts well beyond what is supported by the record or appropriate inferences drawn from it. An example relates to plaintiffs' assertions about the complaint allegedly made

[2] Plaintiffs argue that subsequent events should be considered under the logic of the four-judge plurality opinion in *Stranahan v. Fred Meyer, Inc.*, 153 Or App 442, 958 P2d 854 (1998), *rev'd on other grounds*, 331 Or 38, 11 P3d 228 (2000). But *Stranahan* involved identical conduct by Fred Meyer managers over time in trying to remove initiative petitioners in front of stores, and the subsequent evidence was offered only to support a "pattern of malicious conduct" for punitive damages, specifically deterrence against Fred Meyer's past and future misconduct. *Id.* at 444-45 & 462-65. The present case does not involve a claim for punitive damages or a sequence of identical behavior by a corporate defendant pursuant to company policy. *See also State v. Deloretto*, 221 Or App 309, 317, 189 P3d 1243 (2008) (requiring "something close to a point-by-point correspondence" for a future bad act to be admissible under OEC 404(3) as evidence of a defendant's intent).

by Patricia *See* Resp. Br. at 2-6. It is undisputed that Ms. spoke only to AMR's front-desk receptionist, who does not intake any complaints from callers. *See* Pet. Br. at 10-11. It is further undisputed that no record of this call exists, including in the complaint database maintained by Cyndi Newton at AMR. *See id.* & Resp. Br. at 3-4.

Despite these undisputed facts, plaintiffs claim that they have offered "circumstantial evidence" that Ms. complaint was in fact received and ignored by AMR's management. *See* Resp. Br. at 5. But plaintiffs' three citations to the record for this point offer no such evidence, whether direct or circumstantial:

1) Plaintiffs first point to AMR's Suzanne Robinson, who testified that her staff in the "Patient Business Services Department" would document and forward any patient complaints they received on a "complaint intake form." *See id.* at 3; *see also* TCF 111, Ex. 23 at 2. The problem, however, is that by Ms. own admission, she never spoke with the "Patient Business Services Department"; rather, she only spoke with the front-desk receptionist, who never intakes complaints from callers. TCF 113, Ex. 19.

2) Plaintiffs next point to AMR's Cyndi Newton, who maintains a database to "collect and track all the complaints" received. Resp. Br. at 4. However, given that this system contains *no* mention of any complaint by Ms. such testimony, if anything, is circumstantial evidence tending to

disprove Ms. allegations. There is no evidence offered, for example, that Ms. Newton failed to capture all of the complaints made to AMR, let alone a supposed complaint made by Ms.

3) Plaintiffs lastly point to the deposition testimony of Randy Lauer, AMR's general manager in Portland, when given a hypothetical question as to what would happen if AMR received a voicemail from a patient claiming sexual assault by a paramedic. Resp. Br. at 4-5. But there is simply no suggestion that Ms. ever left voicemail with AMR, or anyone else.

Plaintiffs point to no other evidence to support their assertion that Ms. complaint was known to but ignored by AMR's management. The evidentiary record is that it was *not* known to them, despite the assertions of plaintiffs' counsel to the contrary.[3]

[3] Without a word limit, AMR could similarly go through plaintiffs' remarks on *all* of the complaints made to AMR to identify key mischaracterizations and omissions of important facts. To provide one more example, in discussing the Pries complaint, plaintiffs assert that supervisor Verkest had been "closely involved" with AMR's prior investigation into the Rotting complaint. *See* Resp. Br. at 14. To support that assertion, plaintiffs do not cite to any testimony by Verkest, or to any correspondence or records created by AMR supervisors in connection with the Rotting investigation. Rather, plaintiffs support their assertion only by citing to the deposition of paramedic Liedtke, who was the other paramedic in the ambulance during the Rotting transport and so was interviewed by AMR during the Rotting investigation. *Id.* But Liedtke did *not* testify that Verkest had been "closely involved" with the Rotting investigation; to the contrary, Liedtke simply testified that he checked in with Verkest at the supervisor's desk when it was time for his interview, but that Verkest simply directed him to another room where Liedtke was interviewed by two other AMR supervisors, Priest and Fowler, who were the people tasked with conducting that interview. *See* TCF, Ex. 19 at 3.

Moreover, even assuming for the sake of argument that AMR's management *had* some knowledge relating to Ms. complaint, ORS 124.100 claims still cannot be asserted against AMR for "permitting" the abuse on any particular plaintiff based on a record of AMR's alleged "negligence" or even "recklessness." *See* ORS 124.100(5). Plaintiffs have offered *no* admissible evidence that would support ORS 124.100 liability under AMR's proposed construction of that statute.

E. The Holdings of Other Trial Court Judges Are Irrelevant.

Plaintiffs next seek to support their proposed construction by referencing the construction made by a different trial court judge (Judge Matarazzo) in a different case, and by referencing the fact that even the trial judge below (Judge Dailey) initially sided with plaintiffs in an earlier motion before later adopting AMR's proposed construction after receiving more comprehensive briefing and argument on summary judgment. *See* Resp. Br. at 25-26. Needless to say, none of these holdings are binding on this Court, which must construe the meaning of "permitting" in ORS 124.100(5) as an issue of first impression.

F. Judicial Estoppel Does Not Apply.

Plaintiffs next argue judicial estoppel based on their view that AMR advanced an inconsistent argument about the meaning of ORS 124.100(5) in AMR's federal court lawsuit for coverage against multiple insurance

companies relating to all of the lawsuits involving Mr. The trial court quickly rejected judicial estoppel given that the issue had not yet been resolved by the federal court (Tr. 56), while the court of appeals declined to reach this issue given its agreement with plaintiffs on statutory construction. *Wyers*, 268 Or App at 242 n.6.

AMR briefed this issue on pages 34 to 38 of its Answering Brief below, incorporated as if set forth here. *See id.*; *see also* ORAP 9.20(4). As noted therein, judicial estoppel cannot be applied here for at least two reasons: (1) AMR has not taken any inconsistent positions;[4] and (2) alternatively, to the extent that an inconsistent position was taken, AMR never received any "benefit" from it given that it was not "successfully asserted" in the federal litigation. *See Hallberg v. City of Portland*, 230 Or App 355, 362, 215 P3d 866 (2009); *Glover v. The Bank of New York*, 208 Or App 545, 552, 147 P3d 336 (2006) (stating judicial estoppel elements, including "benefit in the earlier proceedings").

[4] This federal insurance coverage litigation followed the plaintiff's verdict in *Herring*, in which Judge Matarazzo sided with plaintiff both before and after trial in construing the "permitting" standard of ORS 124.100(5) to be simply a *negligence* standard, and rejecting AMR's competing construction requiring intentional/knowing misconduct. In light of that adverse judgment based on Judge Matarazzo's holdings, AMR simply argued that the judgment is for a covered loss and not that the judgment is correct or that the trial court correctly interpreted ORS 124.100. There is therefore nothing inconsistent about AMR continuing to argue here—as it did originally in *Herring*—that the correct construction of ORS 124.100(5) is not a negligence standard.

The latter ground readily disposes of judicial estoppel here, given that plaintiffs have offered *no* evidence or argument whatsoever to support the existence of a "benefit" to AMR, such as through evidence that AMR's inconsistent position had been "successfully asserted" in the federal litigation.[5] Rather, as plaintiffs admit, the federal court has made no ruling on this issue but is "currently on hold awaiting the outcome of this appeal." Resp. Br. at 29. Per the federal court: "the entire case will be stayed until the Oregon Court of Appeals issues its decision regarding the standard of culpability applicable to violations of the VPA [vulnerable person abuse] statute. *Amer. Medical Resp. Northwest, Inc. et al v. ACE Amer. Ins. Co. et al.*, No. 3:09-cv-01196-JO (D. Or.) at Dkt. #252; *see also id.* at Dkt. #256 (Notice Regarding Oregon Supreme Court Granting Review).

In sum, as to the correct construction of ORS 124.100(5), the federal court has declined to make any ruling, but rather waits for guidance from this Court as to the content of Oregon law. There is therefore no basis for plaintiffs to assert that AMR "successfully asserted" any particular

[5] At most, plaintiffs provide a quotation from *Glover* to suggest that such a requirement is not strictly required to prevail on judicial estoppel. *See* Resp. Br. at 29. But *Glover* unambiguously states the requirement of a "benefit" received by the party that previously asserted the inconsistent position. *See Glover*, 208 Or App at 552-53. Indeed, in *Glover*, from the plaintiff's failure to disclose a potential contract claim in multiple bankruptcy proceedings, the court found "no difficulty concluding that plaintiff *received a benefit* from failing to schedule the breach of contract claim in the prior proceedings" because those omissions directly "enhanc[ed] her ability to continue to delay foreclosure" against her lender. *Id.* at 553 (italics added).

construction of ORS 124.100(5) in that case.

G. Plaintiffs' Arguments Regarding Context and Legislative History.

In their response brief, plaintiffs unsuccessfully seek to minimize or disregard the evidence from context and legislative history set forth by AMR to support its proposed construction of the term "permitting."

For example, regarding the legislature's 2003 addition of mandatory treble damages in *all* cases of "permitting" liability, plaintiffs complain about the lack of legislative history "to support an alleged legislative reinforcement" of the original meaning of that term. *See* Resp. Br. at 31. But why would one expect legislative history about a subsequent "reinforcement" of what a statutory term has always been understood to mean? Rather, the fact that the legislature quickly and without controversy added mandatory treble damages supports the view that it always viewed vulnerable person abuse as an intentional tort.

Plaintiffs next argue in one sentence that any contextual support from mandatory treble damages was defeated by the court's holding in *Herring v. AMR Northwest, Inc.*, 255 Or App 315, 297 P3d 9 (2013). However, as AMR has already pointed out (*see* Pet. Br. at 22-24), the court in *Herring* avoided this issue, as it limited its holding to the statutory requirements of ORS 124.100(2)(b), and not ORS 124.100(5). *See id.* at 325. Plaintiffs do not respond to that distinction.

Plaintiffs then contend that the contextual use of "permitting" in Oregon's criminal statutes is irrelevant because such statutes are "remote" from the vulnerable person abuse act. Resp. Br. at 32. But why, aside from the assertion of plaintiffs' counsel, should these criminal statutes be considered "remote"? Can Oregon's criminal code truly be considered "remote" from Oregon's vulnerable person abuse statute when at least *20* criminal statutes are cited and incorporated by reference within ORS 124.105, and where criminal liability is in fact an *element of proof* in all ORS 124.100 claims based on " physical abuse"? AMR respectfully asserts that common use of the term "permitting" in Oregon's criminal law—in place at the time of enactment of ORS 124.100—is in fact compelling contextual evidence as to its meaning, especially where the legislature apparently had no real discussion as to the meaning or scope of that term.

It is also worth noting that, aside from challenging AMR's proffered contextual and legislative history support, plaintiffs offer *no* contextual support or legislative history that supports a "negligence" or even "recklessness" standard for liability. (Neither did the court of appeals in its opinion, aside from a perceived "strong remedial purpose" behind the statute, unrelated to the meaning of the word "permitting.")

OTLA tries to locate some support from Arizona, considering that Arizona's statute was known to the Oregon legislature and similarly created

liability "for having caused or permitted" vulnerable person abuse. OTLA Br. at 19. But interestingly, even though Arizona has allowed for such liability for over 25 years, OTLA fails to locate a single Arizona case allowing "permitting" liability based on negligence or recklessness.

Rather, OTLA misstates the holding of a 2006 case, *Corbett v. Manor Care of Arizona, Inc.*, 213 Ariz 618, 146 P3d 1027 (Ariz App 2006), to suggest that Arizona applies some lower standard for "permitting" liability. But *Corbett* contains no such holding.

Notably, Arizona vulnerable person abuse claims can only be brought against defendants who were employed or who assumed a legal duty to provide care to the vulnerable adult. *See* Ariz. Rev. Stat. §46-455. *Corbett* was focused on this limitation. It did not analyze the meaning of "permitted" and did not analyze whether the defendant "permitted" any abuse.

Specifically, the *Corbett* defendant moved for summary judgment on narrow grounds that she, as Director of Nursing, did not have a "direct caregiver-patient relationship" with the plaintiff. *Id.*, 213 Ariz at 628. The court rejected that narrow motion because it found an issue of fact on whether the Director of Nursing was in fact employed to provide care to the plaintiff. *Id.* at 629-30. After rejecting that narrow motion, the court added that the Director of Nursing was free to file future summary judgment

motions on other aspects of the claim (which presumably might include an argument that she did not "permit" any abuse). *Id.* at n.11. In sum, neither *Corbett* nor Arizona law provides support for plaintiffs' construction.

H. Plaintiffs' Mistaken Argument regarding "Awkwardness".

As a final argument, plaintiffs assert that AMR's proposed construction cannot be correct because of its "awkwardness" in requiring a 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 particular statute." Resp. Br. at 33-34.

This assertion completely misunderstands the requirements for liability under ORS 124.100. There is no "knowledge" requirement—actual or constructive—for liability against the "abusers" themselves. Nor does ORS 124.100 require the abusers to "permit" their own abuse.

Rather, claims can be brought against physical "abusers" under ORS 124.100 based on a showing that they engaged in conduct that would constitute any of the crimes listed in ORS 124.105. *See id.* Equally and jointly liable with those "abusers" are those parties who knowingly "permitted" such abuse to occur on the plaintiff. Here, AMR did not "permit" abuse on any of these plaintiffs.

Dated this 4th day of September, 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 3,760 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 September 4, 2015, I filed the foregoing **PETITIONER'S REPLY TO RESPONDENTS' BRIEF** using the eFiling System, with:

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

I further certify that on September 4, 2015, I served the foregoing **PETITIONER'S REPLY TO RESPONDENTS' BRIEF** 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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