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.

Supreme Court Case No. 063000

Court of Appeals Case Nos. A149258 (Control)
A149259, A149260, A149261, A149262, A149263

Petition for Review of Court of Appeals Opinion on Appeal from the
Judgment of the Multnomah County Circuit Court,
Hon. Kathleen M. Dailey, Presiding

Court of Appeals Decision: December 31, 2014
Nakamoto, J.; Armstrong, P.J. and Egan, J., Joining

AMICUS CURIAE OREGON ASSOCIATION OF DEFENSE COUNSEL'S BRIEF IN SUPPORTOF DEFENDANT-RESPONDENT AMERICAN MEDICAL RESPONSE NORTHWEST, INC.'S PETITON FOR REVIEW

Amicus Curiae Oregon Association of Defense Counsel
Intends to File a Brief on the Merits if Review is Granted

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INTRODUCTION

Amicus Curiae Oregon Association of Defense Counsel ("OADC") appears in support of defendant-respondent American Medical Response Northwest, Inc.'s position on review. OADC addresses the proper construction of "permitting" another person to engage in physical abuse within the meaning of ORS 124.100(5). The Court of Appeals' construction of ORS 124.100(5) is erroneous, and review is needed on this important issue of first impression.

OADC also addresses the unprecedented expansion of liability to persons who are not active perpetrators of abuse and who do not have the requisite mental culpability, in other words, knowingly acting or failing to act with awareness that the abuse to the vulnerable person is occurring. The Court of Appeals' construction of ORS 124.100(5) has far-ranging implications for Oregon liability law, Oregon litigation and Oregon defendants, in that it allows the imposition of liability that is punitive in character across the board, to defendants of every nature, businesses and individuals alike, for failure to appreciate and act on a potential risk of harm, even in circumstances where there is no relationship, let alone a special relationship, with the actor or the vulnerable person.

ORS 124.105 provides for an action against an abuser under ORS 124.100 for physical abuse in carefully defined circumstances, primarily involving specified criminal conduct. ORS 124.100(4) ("only for physical abuse described in ORS 124.105"); ORS 124.105(1) ("if the defendant engaged in conduct against a vulnerable person that would constitute any of the following: [delineated crimes]"). ORS 124.100(5) also provides for an action 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."

In its opinion, the Court of Appeals lost sight of the legislative intent to supplement, not supplant, the remedies already available through common law claims for negligent hiring, negligent failure to train and negligent supervision. All of these remedies already encompass failure to appreciate and guard against risks of harm. The legislature's expansion of liability – with penalizing awards of trebled damages and attorney fees for "permitting" another person "to engage in physical abuse", ORS 124.100(2), was directed at different conduct – "knowingly acting or failing to act" in circumstances in which a reasonable person should have been aware of the abuse occurring.

The contextual clues to the intended meaning of ORS 124.100(5) all point to a requirement that liability under ORS 124.100 depends on proof that the defendant knowingly acted or failed to act when objectively aware of the abuse to the vulnerable person plaintiff. Unless the Court of Appeals' construction is corrected, persons of every sort, including individuals, educators, non-profits and businesses have *greater* exposure to liability than the perpetrators of the abuse themselves. Perpetrators of physical abuse are subject to enhanced liability under ORS 124.100 only for actual conduct with a vulnerable person that would constitute delineated crimes, ORS 124.105(1), or otherwise clearly defined acts of abuse, ORS 124.105(2) and (3), whereas those who are alleged to have "permitted" physical abuse are subject to enhanced liability when they fail to perceive a risk – even a substantial one – that abuse might occur to unknown persons in the future.

I. The Intent and Plain Meaning of ORS 124.100(5)

In relevant part, ORS 124.100 provides:

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

> "(5) An action may be brought under this section against a person for *permitting another person to engage in physical * * * abuse if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical * * * abuse*."

(Emphasis added). The question presented is the meaning of the italicized phrase in ORS 124.100(5) that the legislature most likely intended when it adopted ORS 124.100(5). Of course, that provision cannot be read in isolation or out of context. Rather, the court construes the statute "by examining the text of the statute in context, along with any relevant legislative history, and, if necessary, pertinent canons of construction." *Kohring v. Ballard*, 355 Or 297, 303, 325 P3d 717 (2014), *citing State v. Gaines*, 346 Or 160, 171-173, 206 P3d 1042 (2009). The court may not insert what has been omitted or omit what has been inserted. ORS 174.010; *State v. Rogers*, 330 Or 282, 290, 4 P3d 1261 (2000). As the court stated in *England v. Thunderbird*, 315 Or 633, 638, 848 P2d 100 (1993), "[t]he best indication of legislative intent is the words of the statute themselves."

Influenced by plaintiff's arguments in this case, the Court of Appeals construed ORS 124.100(5) contrary to ORS 174.010 and this court's statutory construction paradigm. The court read "knowingly" completely out of the statute while at the same time reading into the statute an awareness of a *potential* for or *likelihood* of a risk of abuse. Thus, the court

erroneously substituted objective awareness of *risk* of abuse, which is nowhere mentioned in the statute, for objective awareness of "*the* physical * * * abuse" in question, meaning the physical abuse to the vulnerable person which forms the basis of the claim.

In reading the temporal, volitional mental culpability of "knowingly acts or fails to act" out of the statute and construing ORS 124.100(5) in this manner, the court ignored the plain text and failed to consider the meaning of "permitting" and "knowingly acts or fails to act" in context. Statutory context includes other provisions of the same statute and related statutes, as well as the statutory framework within which the law was enacted. *State v. Gaines*, 346 Or at 171-173; *Howell v. Willamette Urology, P.C.*, 344 Or 124, 128, 178 P3d 220 (2008) (Court followed the "familiar paradigm" in construing "where the cause of action arose" in ORS 14.080(1)).

In context, the legislature limited actions under the statute against the alleged abuser, as set forth in ORS 124.105. ORS 124.105(1) allows an action for physical abuse against a defendant in those circumstances in which his or her conduct would constitute one of several crimes delineated

in ORS 124.105(1).[1] The crimes all are defined in ORS Chapter 163 and many specify the mental culpability with which the defendant must act, ranging from "intentionally, knowingly or recklessly", *e.g.*, ORS 163.160(1)(a) (assault in 4th degree) to "intentionally", e.g., ORS 163.185(a) (assault by means of a deadly or dangerous weapon is assault in the 1st degree) to "intentionally or knowingly", *e.g.*, ORS 163.185(b) (assault of a child under six is assault in the 1st degree), to "recklessly", *e.g.*, ORS 163.195 (recklessly endangering another person), to "criminal negligence", *e.g.*, ORS 163.200(1) (criminal mistreatment). Each of these words in the criminal context has a different meaning, found in ORS 161.085 (Definitions with respect to culpability). "Knowingly" is defined in ORS 161.085(8) as follows:

> " 'Knowingly' or 'with knowledge,' when used with respect to conduct or to a circumstance described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists."

That definition differs starkly from the definition for "recklessly" found in ORS 161.085(9), which provides:

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[1]Other circumstances in which an action may lie against an abuser are specified in ORS 124.105(2) and (3) as unreasonable physical constraint or restraint, use of unprescribed psychotropic medications and the prolonged or continued deprivation of food or water.

> " 'Recklessly,' when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

The contextual clues all point to a construction of ORS 124.100(5) that depends not on an awareness of risk but on knowingly acting or failing to act when objectively aware of another's abuse of the vulnerable person. The contextual clues from these statutory definitions are that when it chose to define "permitting", the legislature knew that "knowingly" has a distinct meaning and differs significantly from "recklessly". Yet, in construing ORS 124.100(5) the Court of Appeals employed considerations of whether the defendant reasonably should have known a person "would likely be abused" and was "aware of the substantial risk", and ultimately incorporated an uncertain standard "more akin to the standard for reckless conduct." Pet Rev App 19, 27, 23. The legislature could have incorporated those concepts into ORS 124.100(5), but it did not. Rather, it adopted a "knowing" standard when defining "permitting" and stated the obligation in the present, not the past tense, thus indicating a temporal awareness of the abuse as it was occurring and a failure to intervene.

The Court of Appeals' construction simply cannot be squared with the legislature's own definitions of culpability.[2] The legislature limited actions under the statute for permitting *the abuse* to occur to knowing action or failure to act, in other words, failing to intervene in *the* very act of abuse that forms the basis for the claim. ORS 124.100(5). Any construction that reads that component out of the statute ignores legislative intent and elevates ordinary negligence into a statutory tort that carries with it trebled damages with a penalizing aspect, attorney fees and an extended statute of limitations. Nothing suggests the legislature intended that result.

II. The Trouble Ahead If Review is Not Allowed

The import of the Court of Appeals' decision is by no means limited to corporations. It extends to every sort of Oregon business and employer as well as to individuals, and it has an enormous potential for repercussions on liability for Oregon defendants and insurers.

A number of institutional defendants are expressly exempted from actions under ORS 124.100, *see* ORS 124.115, but there is no other statutory

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[2]Nor can it be squared with its own prior construction of ORS 124.100 to focus on the act of abuse occurring: "[T]he vulnerable person statute focuses on an incident of abuse, not a judicial proceeding. Thus, ORS 124.100 plainly establishes that a person is incapacitated if, *while being abused*, her self-protecting ability is significantly impaired." *Herring v. American Medical Response Northwest, Inc.*, 255 Or App 315, 321, 297 P3d 9 (2013) (emphasis in original).

restriction on defendants within its reach. ORS 124.100 does not expressly mandate a supervisory role or special relationship in order to impose liability for "permitting" another's abuse. Employers and corporations not expressly excluded by ORS 124.115 are affected, as are individuals, store keepers, family members, first responders, police officers and other public workers, counsellors, social workers, educators, attorneys, baby-sitters, and non-profit entities engaged in offering full ranges of social services to the public. Each now is subject to liability under ORS 124.100 for failing to perceive a risk of future physical abuse to unknown plaintiffs, although there is no indication in the text, context or legislative history that the legislature intended this massive expansion of tort liability.

The Court of Appeals' opinion sets the stage for claims for "permitting" physical abuse under ORS 124.100 in every case in which a person meeting the definition of "incapacitated", however fleeting,[3] alleges abuse. The liability also extends to other persons who fall within defined categories of "vulnerable persons", to include disabled persons and anyone over 65 years old. ORS 124.100(1)(a)-(d). Most often, the plaintiff

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[3] *See Herring, supra,* 255 Or App at 321-322 (court focused on whether person "presently" lacks capacity and held: "ORS 124.100 protects, among others, persons who are only temporarily and fleetingly unable to protect their own health and safety, from abuse inflicted, at least in part, during that temporary and fleeting period.").

foregoes litigation against the perpetrator, who may already be in jail and judgment proof, or those claims take a back seat to claims against others, including individuals, who are alleged to have permitted the abuse to occur.[4]

Experience with claims against those alleged to have permitted sexual abuse, for example, shows that many allegations of abuse come to light for the *very first time* years after it is alleged to have occurred. Commonly, criminal charges and the arrest of a perpetrator will bring litigation and news coverage, followed by additional claimants coming forward for the very first time, alleging conduct that occurred years in the past. Frequently there is no verifiable evidence of inappropriate behavior and no evidence other than the plaintiff's own account. These claims arise in school settings and employment contexts, as well as against individual supervisors and administrators in the very entities the legislature has exempted from liability.

ORS 124.100(5) focuses on a present awareness of the abuse, not on a failure to perceive a risk from historical facts developed years later, with hindsight. The trial court appreciated what the Court of Appeals did not: imposition of liability under ORS 124.100 for the failure to perceive a risk of abuse from historical facts will "'have far-reaching implications and

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[4]Even though institutional defendants may be exempt from liability under ORS 124.115, some trial courts have allowed claims against supervisors and administrators employed by those entities to go forward.

would expose all Oregon businesses that have employees to heightened damages and a seven-year statute of limitation, even though they did not participate in any abuse and had no knowledge of it happening.'" Pet Rev App 44 (Order on Summary Judgment p 14, quoting Defendant's Motions for Summary Judgment and Motion for Partial Summary Judgment).

CONCLUSION

The Court should grant the Petition for Review and consider petitioner's arguments on the merits so that a correct construction of ORS 124.100(5) will effect the legislature's intent, guide the courts and shape future litigation based on claims that someone "permitted" physical abuse.

DATED this 3rd day of March 2015.

KEATING JONES HUGHES, P.C.

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Certificate of Compliance

I certify that this brief complies with the word count limitation pursuant to ORAP 5.05(2)(b); the word count is 2977 words. I further certify that this brief is produced in a type font not smaller than 14 point in both text and footnotes pursuant to ORAP 5.05(4)(g).

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s/Lindsey H. Hughes
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CERTIFICATE OF FILING AND SERVICE

I certify that on the date below I served the foregoing AMICUS CURIAE OREGON ASSOCIATION OF DEFENSE COUNSEL'S BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT AMERICAN MEDICAL RESPONSE NORTHWEST, INC.'S PETITON FOR REVIEW on the following attorney by means of electronic service through the court's e-filing system.

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