

2011 WL 10548700 (Or.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Oregon.
Multnomah County

Michael GATTUCCIO, as Personal Representative of the Estate of Mary T. Gattuccio Pence, Plaintiff,
v.

Colleen A. AVERILL, an individual; the O.N. Equity Sales Company, a foreign
corporation; and New York Life Insurance Co., a foreign corporation; Defendants.

No. 101116582.
July 18, 2011.

Oral Argument Requested

Prayer Amount: \$2,267,442.20 Claim not Subject to Mandatory Arbitration

Defendant the O.N. Equity Sales Company's Motion to Dismiss the First Claim for Relief in the Amended Complaint

Immix Law Group PC, Dayna Christian OSB #97336, Telephone: (503) 802-5537, Of Attorneys for Defendant the O.N. Equity Sales Company.

Zeiger, Tigges & Little LLP, [Marion H. Little, Jr.](#) (0042679), [Christopher J. Hogan](#) (0079829), Telephone: 614-365-9900, Of Attorneys for Defendant the O.N., Equity Sales Company, (Admitted Pro Hac Vice).

I. UTCR 5.050(1) STATEMENT

Pursuant to [UTCR 5.050\(1\)](#), Defendant The O.N. Equity Sales Company (“ONESCO”) requests oral argument on its motion. ONESCO estimates that twenty minutes will be required for oral argument. ONESCO requests official court reporting services.

II. UTCR 5.010 CERTIFICATION

Pursuant to [UTCR 5.010](#), ONESCO certifies that it made a good faith effort to confer with counsel for Plaintiff Michael Gattuccio, as Personal Representative of the Estate of Mary T. Gattuccio Pence (“Plaintiff”), concerning the issues raised in its motion and was unable to reach an agreement.

III UTCR 5.020(2) COMPLIANCE

Pursuant to [UTCR 5.020\(2\)](#), a marked copy of the pleading moved against under [ORCP 21](#) is attached to this motion as Exhibit A.

IV. MOTION

Pursuant to ORCP 21A(8), ONESCO moves the Court for an order dismissing Plaintiff's First Claim for Relief, Count II for [elder abuse](#) against ONESCO, for failure to state ultimate facts sufficient to support a claim for relief against ONESCO. Specifically, [O.R.S. §124.115\(1\)\(d\)](#) expressly precludes an [elder abuse](#) claim against ONESCO, a broker-dealer, based on the allegations of Plaintiff's Amended Complaint. The remaining four claims asserted in the Amended Complaint are not challenged by way of this motion.

V. STATEMENT OF PERTINENT ALLEGATIONS

By way of his Amended Complaint, Michael Gattuccio, as Personal Representative of the Estate of Mary T. Gattuccio Pence (“Plaintiff”), seeks to hold New York Life Insurance Co. (“NY Life”) and ONESCO, two wholly-separate entities, jointly and severally liable for the actions of Colleen Averill. Averill allegedly stole funds from Ms. Pence prior to her death.

Five claims are asserted, including claims for **elder abuse** under [O.R.S. §124.100](#), common law fraud, conversion, negligence, and securities fraud under Oregon law. Through these claims, Plaintiff seeks to hold ONESCO, as an “Ohio corporation” and “full-service broker/dealer,” liable for undivided and undifferentiated damages based on the actions of Averill, a former registered representative with ONESCO. (Amended Complaint at ¶¶ 3, 4, 20 (“Am. Compl.”) (emphasis added).) Specifically, with respect to his **elder abuse** claim, Plaintiff asserts that ONESCO is liable based on Averill’s alleged “financial **abuse**....” (*Id.* at ¶36.)

VI. POINTS AND AUTHORITIES

Plaintiff’s allegation that ONESCO is a “broker-dealer” is a judicial admission that this Court must accept as true for purposes of the instant motion. *See Kerr v. Quicehuatl*, 213 Or App 589, 595 (2007) (“A statement of fact in a pleading that has not been superseded is a judicial admission that the fact as stated exists.”). Under the plain statutory language of Oregon’s **Elderly Persons and Persons With Disabilities Abuse** Prevention Act (“**Elder Abuse** Act”), this judicial admission is fatal to Plaintiff’s **elder abuse** claim against ONESCO, as a matter of law.

A. The Court’s Task In Construing A Statute Is To Apply The Legislative Intent Reflected In The Plain And Unambiguous Statutory Language.

At the outset, the Court’s task in construing and applying any statute, such as the Oregon **Elder Abuse** Act, is to “ascertain from the language thereof the intent of the lawmakers as to what purpose was to be served, or what object was designed to be attained.” *Berry Transport v. Heltzel*, 202 Or 161, 166 (1954) (citation omitted). However:

[I]t is only in cases where the language used in a statute is ambiguous and uncertain that resort may be had to rules of statutory construction in ascertaining and declaring the legislative intent. It is elementary that when the legislature, in enacting a law, makes use of plain, unambiguous, and understandable language, it is presumed to have intended precisely what its words imply. There is no occasion to go beyond those words and their plain meaning to ascertain by the application of rules of statutory construction the legislative purpose. The words used speak for themselves.

If the language is plain and unambiguous, if it can be given but one meaning, and that meaning does not lead to an impossibility or an absurdity such as the legislature could not be supposed to have intended, the court must give effect to that meaning if constitutional, even though the result may be, in the court’s opinion, harsh, unjust or mistaken in policy.

Id. at p. 166-67 (citations omitted).

This long-standing, cardinal rule of statutory construction has been statutorily recognized in Oregon at [ORS §174.010](#):

In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.

B. The Plain And Unambiguous Language Of The Pertinent **Elder Abuse Statutes Demonstrates That ONESCO, As A Broker-Dealer, Cannot Be Held Liable For **Elder Abuse**, Under Any Theory.**

In pertinent part, [ORS §24.100](#) recognizes a civil cause of action for a “vulnerable person” who suffers “injury, damage or death by reason of physical **abuse** or financial **abuse**...” An action under that section may be brought against the person “who has caused” the physical or financial **abuse**, as well as a person who has “permitted” another to engage in such **abuse** - a standard that requires “knowing[]” action or inaction. [ORS §124.100\(2\), \(5\)](#).

[ORS §124.115](#), however, provides a significant exception to this cause of action. This statute states that:

(1) Except as provided by subsection (2) of this section, **an action under [ORS 124.100](#) may not be brought against:**

- (a) Financial institutions, as defined by [ORS 706.008](#);
- (b) A health care facility, as defined in [ORS 442.015](#);
- (c) Any facility licensed or registered under ORS chapter 443; or
- (d) **Broker-dealers licensed under [ORS 59.005](#) to [59.541](#).**

(2) An action may be brought under [ORS 124.100](#) against a person listed in subsection (1) of this section if:

- (a) The **person** is convicted of one of the crimes specified in [ORS.124.105 \(1\)](#); or
- (b) The **person** engages in conduct constituting financial **abuse** as described in [ORS 124.110](#), and the **person** is convicted of a crime by reason of the conduct.

[ORS §124.115](#) (emphasis added).

A plain reading of this statute makes clear that the “person” referenced in [Section 124.115\(2\)](#) is the same “person” referenced in [Section 124.115\(1\)](#)—i.e., the “broker-dealer” itself.¹ Thus, where the broker-dealer has not, itself, been convicted of a crime arising from financial **abuse** of an **elderly** person, such broker-dealer cannot be the subject of a claim for **elder abuse** under [Section 124.100](#), whether based on “permitter” liability or otherwise.

Applied here, in light of Plaintiff's judicial admission, this plain statutory language precludes Plaintiff's assertion of an **elder abuse** claim against ONESCO. Plaintiff does not and cannot allege that ONESCO, as a broker-dealer, has been convicted of a crime. As a result, Plaintiff cannot bring an action against ONESCO for **elder abuse** under [ORS §124.100](#).

VII. CONCLUSION

For the reasons set forth above, Plaintiff's First Claim for Relief, Count II against ONESCO, fails to state a claim for which relief can be granted. Therefore, it should be dismissed.

DATED this 8th day of July, 2011.

Footnotes

1 Under [ORS §174.100\(5\)](#), a “person” is defined as including “corporations, associations, firms, partnerships, limited liability companies and joint stock companies.”

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