

2012 WL 7801358 (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, an Ohio corporation; and New York Life Insurance Co., a New York corporation, Defendants.

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

v.

ONPOINT COMMUNITY CREDIT UNION, an Oregon state-chartered credit union; Ohio National Financial Services, Inc., an Ohio corporation; New York Life Insurance and Annuity Corporation, a Delaware corporation; et al., Defendants.

Nos. 1011-16582, 1105-06352.
June 11, 2012.

**Plaintiff's Response to the O.N. Equity Sales Company's and
Ohio National Financial Services, Inc.'s Motion in Limine**

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I. INTRODUCTION

Plaintiff, the youngest child of the natural plaintiff in the above-captioned consolidated cases, Mary T. Gattuccio Pence (“Mary Pence”), and the Personal Representative of her Estate, hereby responds to the Motion *in Limine* filed by The O.N. Equity Sales Company (“ONESCO”) and Ohio National Financial Services, Inc. (“ONFSI”), through which said defendants seek to prohibit the use of or reference to a Videotaped Examination Under Oath provided by Mary T. Gattuccio Pence on August 13, 2010, three days before her death. The purported bases for ONESCO's and ONFSI's motion are: (1) that the statement itself is supposedly hearsay; and (2) that admission of the statement would violate the prohibition against spoliation of evidence, Mary Pence having since died.

At least insofar as it is based on plaintiff's alleged spoliation of evidence, ONESCO's and ONFSI's motion is wrong-headed and, frankly, offensive. It is entirely unsupported by any accepted concept of spoliation and is premised on the notion that a 95-year-old widow, who discovers the theft of nearly her entire life savings by a previously trusted “friend” and financial advisor, and who successfully presses and pursues criminal charges ultimately resulting in a criminal conviction of and three-year prison sentence for said individual, ought to spend the waning months of her life locked in contentious litigation with the employers of the thief and others, or otherwise undergoing stressful examinations by potential opposing counsel on matters not challenged by the thief herself, lest her story not be allowed to be told in the event she passes prior to trial.

Beyond its base offensiveness, ONESCO's and ONFSI's motion ignores the fact that said entities knew of Mary Pence's claims (and her advanced age) since at least May 27, 2009. It completely disregards ONESCO's and ONFSI's failure to undertake any efforts whatsoever to learn Mary Pence's side of the story at any point prior to her death. And, it fails to acknowledge ONESCO's and ONFSI's in-house counsel's conscious decision to stand on objections to the process surrounding the Examination rather than send local Portland counsel, who was known, identified, and advised of the Examination and the urgent circumstances

surrounding the need for the same, and who has never - either contemporaneously or since - indicated that she was unavailable or otherwise unable to attend.

Further, ONESCO's and ONFSI's motion fails to address the various hearsay exceptions specifically applicable to the Examination, and fails to identify a single prejudicial inconsistency between the testimony provided by Mary Pence during the Examination and those statements previously provided to others investigating the loss. Finally, while ONESCO's and ONFSI's motion is ostensibly aimed at preventing a jury from hearing the details of the underlying crimes committed against her by ONESCO's and ONFSI's agent and former representative, it neglects the fact that they, like the convicted felon herself, are estopped from denying the conduct in question, per [ORS 124.140](#).

II. FACTUAL BACKGROUND¹

Mary Pence was born on XX/XX/1914. In the late 1990's, when she was in her mid-80's, Mary Pence was introduced to Colleen A. Averill ("Averill") by her longtime friend Irene Orselli. At the time, Averill was an agent and registered representative of New York Life Insurance Company ("NYLIC"), New York Life Insurance and Annuity Corporation ("NYLIAC"), and NYLife Securities LLC ("NYLife"), and was engaged in business in that capacity in Portland, Oregon. In the years after first meeting Averill, Mary Pence opened and maintained multiple accounts through Averill. Among others, Mary Pence purchased an annuity through Averill from NYLIAC in 1998 for \$31,250 and another in 2001 for \$35,000. Mary Pence also opened an investment account with MainStay Investments, a proprietor of mutual fund products and assumed business name of New York Life Investment Management LLC ("NYLIM"), in the Spring of 2002. Over the following years, and upon Averill's advice, Mary Pence moved the bulk of her assets and investments to a brokerage account with ONESCO and several mutual fund accounts with MainStay Investments.

As Mary Pence's financial advisor, and based in part on her status (perceived and actual) with NYLIC, NYLIAC, NYLife, ONESCO, and ONFSI, Averill built and nurtured a relationship of trust and confidence with Mary Pence. Mary Pence moved into an assisted living facility in 2005, at the age of 91. Shortly thereafter, upon Averill's advice and with her assistance, Mary Pence sold the home she built with her first husband, netting proceeds of \$452,472.25, after fees and commissions. Mary Pence invested these sales proceeds with Averill, who used some of the funds to open additional investment accounts with MainStay Investments/NYLIM.

In February of 2006, Averill - without Mary Pence's knowledge or consent - added Mary Pence as a joint owner on Averill's checking account at OnPoint Community Credit Union ("OnPoint"). To accomplish this, Averill filled out Mary Pence's portion of the account application and forged Mary Pence's signature thereupon. After doing so, Averill began repeatedly telephoning NYLIM and ONESCO to request dispersals from Mary Pence's investment accounts, and obtaining funds from Mary Pence's annuity accounts with NYLIAC, and her checking account with US Bank under false and fraudulent pretenses. NYLIM, NESCO, and NYLIAC dispersed the money from Mary Pence's accounts pursuant to Averill's instructions. Averill then either stole said checks or obtained them through fraud upon Mary Pence, and deposited them into the OnPoint account.

Averill also frequently advised Mary Pence to purchase certificates of deposit ("CDs"). In reliance upon this advice, Mary Pence gave Averill several checks drawn on her US Bank checking account, with instructions to purchase CDs. Instead, Averill deposited the checks into the OnPoint account and spent the funds for her own use and benefit.

In or around late May of 2009, Mary Pence first discovered at least some of Averill's thefts, when she learned through a phone call with representatives of NYLIAC that one of her annuity accounts had recently and without her knowledge, been surrendered. On May 27, 2009, Mary Pence contacted ONESCO to advise of Averill's wrongful activity. *See* Declaration of Andrew T. Reilly in Support of Plaintiff's Response to ONESCO's and ONFSI's Motion *In Limine* ("Reilly Decl."), filed herewith, at ¶7. Over the subsequent several months, Mary Pence, with the assistance of her children and detectives with the Portland Police Bureau continued to investigate the scope and breadth of Averill's wrongdoing and her own financial losses. Reilly Decl., ¶ 8.

On or about October 23, 2009, Averill was arrested and on November 2, 2009, the Grand Jury returned an indictment charging Averill with 32 counts of theft and aggravated theft (including theft by deception), 32 counts of criminal mistreatment, and 26 counts of forgery, all related to or arising out of her taking of funds held in Mary Pence's investment, annuity, and checking accounts with NYLIAC, NYLIM, ONESCO, and US Bank. Reilly Decl., ¶¶ 9-10. On December 15, 2009, undersigned counsel for, at the time, Mary Pence, sent the first of three letters related to this matter to ONESCO. Declaration of William C. Price, filed with ONESCO's and ONFSI's Motion for Summary Judgment (hereafter "Price Decl."), at ¶ 13. In that letter, counsel for Mary Pence advised ONESCO of his representation and explained the general nature of Mary Pence's grievance with ONESCO. *Id.* That same letter made clear that Mary Pence was looking to ONESCO as a potentially liable party based on its employment/agency relationship with Averill. *Id.*

On December 18, 2009, counsel for Mary Pence received a letter from attorney Chrys Martin, then of the Bullivant Houser Bailey P.C. law firm, acknowledging on ONESCO's behalf receipt of the December 15, 2009 letter, and advising that she or another person would be "in touch" soon. Reilly Decl., ¶ 11. Shortly thereafter, on January 11, 2010, counsel for Mary Pence received ONESCO's reply to the December 15, 2009 letter. Price Decl., ¶ 14. Therein, ONESCO indicated that it had received the December 15, 2009 letter, that it generally disagreed with the statements contained therein, and that a Mr. William Price, Vice President and Assistant General Counsel to ONESCO, was the proper person to contact at ONESCO for all communications related to this matter. *Id.*

On or about March 4, 2010, the criminal prosecution of Averill concluded when she was convicted, based on a no-contest plea, of 16 charges, consisting of: seven counts of aggravated theft in the first degree (including theft by deception); seven counts of criminal mistreatment of an **elderly** person in the first degree; and two counts of forgery in the first degree. Reilly Decl., ¶ 12. In addition to her no-contest plea on 16 of the original 90 charges, Averill agreed to the award and entry of a Compensatory Fine in the full amount of all money stolen by her from Mary Pence's investment, checking, and annuity accounts. *Id.* Averill was thereafter sentenced to three years in prison, and was, until her death on April 3, 2012, incarcerated at the Coffee Creek Correctional Facility in Wilsonville, Oregon. Reilly Decl., ¶ 13.

On May 28, 2010, counsel for Mary Pence mailed a second letter to ONESCO. Price Decl., ¶ 16. In that second letter, counsel advised ONESCO of the outcome of the criminal prosecution of Averill, and conveyed Mary Pence's first actual demand for reimbursement of her losses. Through that letter, counsel for Mary Pence also gave notice that further legal action — including initiation of a lawsuit — had been authorized in the event reimbursement was not made. *Id.*

In response to the May 28, 2010 letter, ONESCO sent a letter dated June 10, 2010, in which it generally denied liability for Mary Pence's damages, and specifically claimed that Averill was acting as an independent contractor, suggesting that ONESCO was thus relieved of liability for Mary Pence's losses as a result. Price Decl., ¶ 17. ONESCO further claimed through that letter that Mary Pence's claims were essentially frivolous and, despite the conviction of its former agent and representative for all manner of wrongdoing and the associated Compensatory Fine, all as set forth above, ONESCO asked for additional support for the amount of damages claimed. *Id.*

At around mid-day, Pacific Time, on Friday, August 13, 2010, undersigned counsel learned for the first time that Mary Pence was gravely ill, had been admitted to the hospital (Providence Portland Medical Center, to be precise), and was not expected to live for more than a few days, at most. Reilly Decl., ¶14. Nevertheless, Mary Pence conveyed to counsel, through her son, Michael Gattuccio, her desire to do whatever she could to preserve her testimony against Averill. *Id.* Upon learning this, undersigned counsel attempted to contact ONESCO through both its local counsel, Chrys Martin, and its Assistant General Counsel in Ohio, William Price, to inform them of the urgency of the situation, and the plan to secure a videotaped examination of Mary Pence as soon as possible. *Id.*

ONESCO's response, conveyed by Mr. Price within less than ten minutes, was not to mobilize its local Portland counsel to attend the examination and make due as best he or she could on admittedly short notice, but to object to the entire process altogether

on procedural grounds. Reilly Decl., ¶ 15. Less than an hour later, after having made arrangements with a court reporter and videographer, and coordinated with the hospital, undersigned counsel again contacted both ONESCO's local counsel and Ohio counsel to inform of the specifics of the planned examination. Reilly Decl., ¶ 16. ONESCO's response, for unknown reasons made only after first checking to see if it had received any response to its request for additional proof of damages - found in its letter of June 10, 2010 - was to reassert and stand upon its procedural objections. See Defendants The O.N. Equity Sales Company and Ohio National Financial Services, Inc.'s Motion in Limine to Prohibit Use of Mary T. Gattuccio Pence's Recorded Statement (hereafter "Defendants' Brief"), at pp. 7; Price Decl., ¶ 19(e).

The Videotaped Examination Under Oath of Mary Theresa Pence commenced at around 4:30 p.m. Pacific Time on Friday, August 13, 2010. Reilly Decl., ¶ 17. No one from or representing ONESCO appeared for the same. *Id.*

Mary Pence passed away on Monday, August 16, 2010, at the age of 96. Reilly Decl., ¶ 18.

Michael Gattuccio was appointed the Personal Representative of the Estate of Mary T. Gattuccio Pence on September 13, 2010, and Letters Testamentary issued on September 16, 2010. Shortly thereafter, on October 12, 2010, Michael Gattuccio, in his capacity as Personal Representative for the Estate, formally retained undersigned counsel to pursue what had then become the Estate's claims against, among others, ONESCO. Reilly Decl., ¶ 19.

On November 9, 2010, undersigned counsel sent a third and final letter to ONESCO demanding settlement and informing ONESCO of the Estate's intent to file suit on November 23, 2010 absent a satisfactory resolution of the Estate's claims. Reilly Decl., ¶ 20. Included with that letter was a copy of the Estate's un-filed Complaint against ONESCO, NYLIC, and Averill. *Id.* Thus, ONESCO was fully aware of the precise nature of the Estate's claims against it and the other defendants. Specifically, ONESCO knew that Averill - an Oregon resident - was included as a defendant and that the suit would therefore not be removable to federal court.

ONESCO did not reply to this last letter in any way except by filing, on November 19, 2010, an action in the United States District Court for the District of Oregon, captioned *The O.N. Equity Sales Company v. Estate of Mary T. Gattuccio Pence*, bearing Case No. CV-10-1426-ST. Reilly Decl., ¶ 20. ONESCO filed that action less than two judicial days before the date plaintiff had promised to file - and did in fact file - the instant action. *Id.*

Through its federal suit brought under the Declaratory Judgment Act, 28 USC §§ 2201-02, ONESCO attempted to wrest the question of its liability for Averill's actions from a duly impaneled jury in the Multnomah County Circuit Court. Not unlike its complaints in the instant motion, ONESCO's asserted basis for such action was its claim that "enough was enough;" it was tired of the supposedly numerous unfulfilled threats of litigation; it was time to seek a resolution of its alleged liability. See Findings and Recommendation, attached to the Reilly Decl. as Exhibit 16, pp. 8-10. The court there, United States Magistrate Judge Janice M. Stewart presiding, disagreed that the facts supported either ONESCO's legal position or its apparent frustration, holding, among other things, that "any delay by the Estate in filing suit against ONESCO was fully justified by circumstances beyond its control and unavoidable, first by the criminal prosecution and eventual conviction and sentencing of Averill, and second by the subsequent death of Pence which necessitated the appointment of a personal representative." *Id.*

In or around May of 2011, counsel for plaintiff learned that the videographer hired to video the August 13, 2010 examination of Mary Pence had apparently lost the disc containing the same. Reilly Decl., ¶ 21. Plaintiff thus provided the written transcript of the Videotaped Examination Under Oath of Mary Theresa Pence to counsel for ONESCO and ONFSI on June 16, 2011, to counsel for NYLIC, NYLIAC, NYLIM, and NYLife on September 1, 2011, and to counsel for OnPoint on January 6, 2012.

On April 26, 2012, counsel for plaintiff learned that the videographer had located the disc containing Mary Pence's August 13, 2010 examination, and shortly thereafter received a copy thereof. Reilly Decl., ¶ 22. On May 8, 2012, counsel for plaintiff informed counsel for all defendants that the video had been located, and that the same was available from the videographer, or for advance viewing in plaintiff's counsel's office. *Id.* Until ONESCO's and ONFSI's filing of the instant motion, no party had

voiced or raised any objection to the use of the Examination as evidence. Reilly Decl., ¶ 21. To date, no defendant has ordered a copy of the video recording or sought to otherwise review the same. Reilly Decl., ¶ 22.

III. ARGUMENT

Even if it is otherwise deemed hearsay,² the August 13, 2010 Videotaped Examination Under Oath of Mary Theresa Pence (“Examination”) is admissible under any one of at least a few exceptions to the hearsay rule, found at [ORS 40.455 \(OEC Rule 802\)](#). The Examination is a statement concerning an act of **elder abuse**, theft, and/or criminal mistreatment of an **elderly** person, made by an **elderly** person, and is therefore not excluded by the hearsay rule. [ORS 40.460\(18a\)\(a\)-\(b\) \(OEC 803\(18a\)\(a\)-\(b\)\)](#). It is consistent with a number of other statements provided by Mary Pence on the subject - some of which were obtained through one or more of the defendant's efforts - and all of which are themselves admissible under the same rule, [ORS 40.460\(8\) \(OEC 803\(8\)\)](#), [ORS 40.460\(28\) \(OEC 803\(28\)\)](#), and/or [ORS 40.465\(3\)\(h\) \(OEC 804\(3\)\(h\)\)](#). It is entirely consistent with the facts and allegations supporting the indictment of Averill on 90 counts of theft, criminal mistreatment, and forgery, and the facts, allegations, and charges that form the basis of Averill's conviction, sentence, and Compensatory Fine - facts, allegations, and charges that Averill herself never challenged at any time in any setting. And finally, the Examination sets out the details of Averill's wrongful conduct for which she was ultimately convicted, and which she, like the rest of the defendants, is therefore estopped from denying per, [ORS 124.140](#).

A. [ORS 40.460\(18a\)](#)

1. The Examination Falls Squarely Within The [ORS 40.460\(18a\)](#) Exception

Insofar as is relevant here, [ORS 40.460\(18a\)](#) provides:

“(18a)(a) A complaint of... **abuse** of an **elderly** person, as those terms are defined in [ORS 124.050](#), or a complaint relating to a violation of [ORS 163.205](#)³ or [164.015](#)⁴ in which a person 65 years of age or older is the victim, made by the witness after the commission of the alleged misconduct or **abuse** at issue [is not excluded by [ORS 40.455](#)]. Except as provided in paragraph (b) of this subsection, such evidence must be confined to the fact that the complaint was made.

(b) A statement made by a person concerning... an act of **abuse** of an **elderly** person, as those terms are defined in [ORS 124.050](#), or a statement made by a person concerning a violation of [ORS 163.205](#) or [164.015](#) in which a person 65 years of age or older is the victim, is not excluded by [ORS 40.455](#) if the declarant either testifies at the proceeding and is subject to cross-examination, or is unavailable as a witness but was chronologically_ or mentally... 65 years of age or older when the statement was made.”

[ORS 40.460\(18a\) \(OEC 803\(18a\)\)](#). Thus, and void of statutory references, if a challenged statement is made by a person over 65 years of age and *concerns* (i.e., relates to, regards, pertains to, or is about) an act or claim of financial or physical **abuse** of an **elderly** person, or criminal mistreatment of or theft from an **elderly** person, it plainly and simply is not barred by the hearsay rule.

The Examination fits this particular bill to a “T”. It is the statement of a 96-year-old woman who herself was the victim of financial **abuse**, theft, and criminal mistreatment at the hands of Averill, and is all and only about the particulars and details of that wrongdoing. It is, in short, precisely the kind of statement meant not to be excluded from the evidentiary record on hearsay grounds. There is no ambiguity or uncertainty about at least this much.

2. The Examination Was Given Under Circumstances That Support, Rather Than Impugn, Its Reliability

While ONESCO and ONFSI almost completely disregard [ORS 40.460\(18a\)](#) in heir brief, and perhaps purposefully ignore its most salient features,⁵ they spend a fair amount of time attempting to impeach the reliability or trustworthiness of the Examination. Of course, they do so having never actually seen (or even asked to see) the video recording, by setting out portions of the Examination devoid of any context, and by making inferential leaps on matters about which they truly have no clue. Most insultingly, however, is the fact that having gone so far as to subpoena the medical records pertaining to the care and reatment of Mary Pence in the days leading up to and immediately following her death, ONESCO and ONFSI make certain speculative and unsupported assertions about Mary Pence's mental state and general level of stress in the period surrounding the Examination that are, in fact, specifically refuted by the very medical records yielded from their wild goose chase. *See* Reilly Decl., ¶ 23.

The reality of the situation is that Mary Pence, faced with her impending death, and having already seen the criminal prosecution of Averill through to fruition, and with literally nothing to personally gain financially or otherwise, so desperately wanted to have those on whose watch and with whose assistance Averill was allowed to run rampant see the err of their ways, that she took a couple of what turned out to be her last hours alive to attempt to preserve her story. Looking to the factors set out at [ORS 40.460\(18a\)\(b\)](#), it is clear that there is no reason to doubt the trustworthiness or reliability of the Examination:

(A) The personal knowledge of the declarant of the event - This is perhaps self evident; Mary Pence was the victim of the event, and aside from Averill herself, is the most knowledgeable about the “event.”

(B) The age and maturity of the declarant - Mary Pence was 96 years old at the time of the Examination; she was certainly and unquestionably mature.

(C) Certainty that the statement was made - The statement was provided under oath, and was recorded by video and stenographic means.

(D) Any apparent motive the declarant may have to falsify or distort the event, including bias, corruption or coercion - Admittedly, as a potential plaintiff in a financial fraud case seeking well over \$2 Million dollars in relief, Mary Pence arguably had a motive to falsify or distort the “event,” however, no more so than any plaintiff in any case, and in light of her impending death, more likely markedly less so. As well, the fact that Averill had by then been convicted for her wrongdoing and was serving time in prison for her crimes without having ever challenged Mary Pence's version of events likely drastically reduced any incentive or compulsion under which Mary Pence might have been operating to lie or exaggerate.

(E) The timing of the statement of the declarant - Mary Pence provided the Examination from, as ONESCO and ONFSI so eloquently put it, her deathbed, three days prior to her ultimate passing. Having never reviewed the video recording itself, or apparently having never reviewed the medical records they insisted on receiving,⁶ ONESCO and ONFSI conclude that this fact alone should call the reliability of Mary Pence's testimony into question. Yet such an assertion reveals a lack of understanding of Mary Pence's actual medical condition, and reflects a naïve belief that all people facing imminent death have, for reasons unknown or unspoken, lost their faculties. Aside from the basic fact that Mary Pence died three days later, there is nothing interesting, unique, or special about the timing of the Examination, other than, again, the fact that Mary Pence wanted to provide it.

(F) Whether more than one person heard the statement - While it is unclear whether this factor is even relevant to a statement of this nature, the transcript of the Examination reflects that at least five people heard Mary Pence provide the Examination: undersigned counsel; Michael Gattuccio, Mary Pence's youngest child and, eventually, the plaintiff; Joyce Bolliger, Mary Pence's daughter; Mick Irwin, the videographer; and Aleshia K. Macom, the court reporter. In the year since first receiving the transcript of the Examination, neither ONESCO nor ONFSI has ever sought or obtained any testimony or statements from the court reporter or the videographer about their perceptions of Mary Pence's mental state or condition, or any of the other circumstances surrounding the Examination. Nor, despite deposing Michael Gattuccio and Joyce Bolliger for a combined 15-16 hours, and their brother Leonard Gattuccio for an additional 6 hours, has ONESCO or ONFSI unearthed a single shred of

evidence that Mary Pence was not, in fact, fully capable of testifying truthfully and accurately about the matters discussed during the Examination. Reilly Decl., ¶ 24.

(G) Whether the declarant was suffering pain or distress when making the statement - No doubt, Mary Pence was functioning under at least a moderate level of distress at the time of the Examination. She was dying, and she knew it. There is no indication and no evidence, however, that any such distress prevented or could even be expected to have prevented Mary Pence from providing accurate answers to the questions posed during the Examination.

(H) Whether the declarant's young age or disability makes it unlikely that the declarant fabricated a statement that represents a graphic, detailed account beyond the knowledge and experience of the declarant - Not applicable.

(I) Whether the statement has internal consistency or coherence and uses terminology appropriate to the declarant's age — While not at all clear that this factor is relevant here, as opposed to situations where the statement itself is testified to by another witness, the Examination is internally consistent and more importantly, consistent with all manner of other related statements provided by Mary Pence in the months prior to her death. It is entirely consistent with the statements provided to the detectives investigating Averill on behalf of the Portland Police Bureau, Reilly Decl., ¶¶ 3-4, 9, and with the various Affidavits of Forgery provided by Mary Pence to NYLIC and others as part of their own investigation. Reilly Decl., ¶¶ 5-6. It parrots almost perfectly with the indictment handed down against Averill based on Mary Pence's statements with police. See Reilly Decl., ¶10.

(J) Whether the statement is spontaneous or directly responsive to questions - The Examination is, by definition, a collection of statements given in response to questions, as is almost all testimony given in court or during depositions.

(K) Whether the statement was elicited by leading questions - ONESCO and ONFSI argue that much of the Examination is tainted by virtue of a supposed plethora of allegedly leading questions. The moving defendants' purported concern in this regard is truly a red herring. Oftentimes, what ONESCO and ONFSI cut and paste in their brief as an allegedly leading question is nothing more than the paraphrasing of prior answers in a lead-up to a new question.⁷ Other times, the supposedly leading question is about mundane and irrefutably true facts that, whether elicited by leading question or not, are and have never been at issue.⁸

Perhaps most bothersome on at least this issue, however, is ONESCO's and ONFSI's reference to a certain line of questioning as a “glaring instance” of supposedly coached testimony, based on the fact that a break was taken when Mary Pence failed to provide the “desired answer,” and then questioning resumed with allegedly markedly different answers. *See* Defendants' Brief, pp. 19-21. Of course, what ONESCO and ONFSI fail to point out, intentionally or not, is that the questioning prior to the supposedly illicit break relates to checks from Mary Pence's ONESCO brokerage account (marked as Exhibit 2 to the Examination), whereas the line of questioning after the break had nothing whatsoever to do with the ONESCO checks, and relates to a different group of checks entirely (US Bank checks, marked as Exhibit 3 to the Examination), and a different type of fraud altogether. *See* Examination, pp. 20-26.

And of course, having never reviewed the video recording, ONESCO and ONFSI jump to the unsupported conclusion that the break - which even a cursory reading of the Examination indicates had nothing to do with the questions related to the ONESCO checks — was part of some nefarious plan to elicit more favorable answers. In fact, a viewing of the video recording demonstrates clearly that the break was necessitated by Mary Pence's ongoing struggle with the congestive heart failure that resulted in her death three days later. If the break was intended, as ONESCO and ONFSI suggest, to coach Mary Pence's testimony on the ultimate disposition of the ONESCO checks, then undersigned counsel did a decidedly terrible job, as the “post-break” line of questioning never returned to that subject.

B. ORS 40.460(28) and ORS 40.465(3)(h)

The Examination is also admissible under either [ORS 40.460\(28\)](#) or [ORS 40.465\(3\)\(h\)](#), which are essentially identical and differ only with respect to when they apply (i.e., declarant's availability immaterial vs. declarant unavailable). Insofar as is relevant here, [ORS 40.460\(28\)](#) (and, for that matter, [ORS 40.465\(3\)\(h\)](#)) provides that, among those statements not barred by the hearsay rule is:

“A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:

(A) The statement is relevant;

(B) The statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and

(C) The general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence.”

[ORS 40.460\(28\)](#).⁹

Aside from the alleged lack of reliability of Mary Pence's testimony, which is addressed in detail above, ONESCO's and ONFSI's primary argument against the admissibility of the Examination is their argument that plaintiff herein, Michael Gattuccio, by not seizing the reigns of his mother's pursuit of her claims and immediately suing ONESCO and ONFSI as his mother's attorney-in-fact, and by allowing his mother to die before she could engage in contentious litigation and related discovery, should be barred from offering the Examination due to his alleged spoliation of evidence. See Defendants' Brief at pp. 11-12.

Aside from being wrong on the law, this argument is offensive. It is premised on the idea that one who has a legal claim against another must immediately dispense with any pre-suit investigation or settlement negotiations and instead do everything in his or her power to initiate litigation at the very earliest opportunity, alert the potential defendant of his or her own version of events, and undergo stressful and potentially contentious interrogation as early as possible, lest he or she die prior to being able to actually file suit. That is not the law of this or any other state.

Even if Michael Gattuccio was empowered as Mary Pence's attorney-in-fact to file and pursue litigation against the defendants, he was under no obligation to wrest this decision from his mother. Nor was Mary Pence or later, Michael Gattuccio as the Personal Representative of her Estate, dilatory in pursuing her claims, as the United States District Court already so held. See Findings and Recommendation, pp. 8-10.

ONESCO and ONFSI knew of Averill's alleged wrongdoing as far back as late May of 2009. ONESCO was put on notice of Mary Pence's intent to pursue litigation against it arising out of Averill's actions, and of the criminal prosecution of its former representative/agent no later than mid-December of that same year. ONESCO was invited to participate in any manner of pre-suit discovery - formal or otherwise - at that same time. ONESCO was reminded of Mary Pence's plans to pursue litigation in late May of 2010, after Averill had been convicted and sentenced for her crimes. And finally, when it became apparent that Mary Pence's health was failing, and that she was likely to pass away within hours or days, ONESCO - including its local Portland legal representatives (and the law office out of which its current counsel was operating at the time) - was advised of the plan to obtain the Examination on an emergency basis, and invited to attend and examine Mary Pence. ONESCO's only response to this invitation was to object to the process.

At the end of the day, the inordinate amount of attention placed on the timing of the Examination is much ado about nothing. No litigation was pending at the time, and none could have been commenced in a timely manner that would have made any difference. Statements falling within the exceptions to the hearsay rule found in [ORS 40.460\(18a\)](#) and [\(28\)](#), and [ORS 40.465\(3\)\(h\)](#) are admissible whether opposing counsel - or any counsel at all - is present or not. The fact that ONESCO was invited

to attend the Examination, on the same advance notice allowed to undersigned counsel, merely further counsels in favor of the Examination's admissibility, as it is clear from the record that Mary Pence, through her counsel, wanted to do everything possible to ensure that there would be no or at least minimal challenges to the admissibility of her Examination.

IV. CONCLUSION

The Examination is and should be deemed admissible at trial in this matter. It fits perfectly within the scope of [ORS 40.460\(18a\)](#) and [\(28\)](#), and [ORS 40.465\(3\)\(h\)](#), and bears no indicia of unreliability or untrustworthiness. It is consistent with other statements provided by Mary Pence on the subject matter at issue, and is entirely consistent with the allegations (based on Mary Pence's statements and the investigating detective's own investigative findings) underlying the indictment, plea, conviction, and sentencing of Averill, who herself never challenged or denied any of the wrongdoing alleged by Mary Pence. There is no valid remaining basis upon which to exclude the Examination, and ONESCO and ONFSI's motion should be denied.

DATED this 8th day of June, 2012.

Footnotes

- 1 As the instant motion challenges the admissibility of certain evidence offered in support of plaintiff's claims, unless specified otherwise, these facts are drawn, without citation, from the Amended Complaint in *Michael Gattuccio v. Colleen Averill, et al.*, Multnomah County Circuit Court Case No. 1011-16582, and the Second Amended Complaint in *Michael Gattuccio v. OnPoint Community Credit Union, et al.*, Multnomah County Circuit Court Case No. 1105-06352. The lack of citation to various paragraphs in the referenced Complaints is intended merely to improve readability, and is premised on the notion that the fact that the allegations exist and were made is beyond dispute.
- 2 A point plaintiff concedes for the purposes of this argument only.
- 3 [ORS 163.205](#) is the portion of the criminal code setting forth the crime of criminal mistreatment.
- 4 [ORS 164.015](#) is the portion of the criminal code setting forth the crime of theft, which is itself incorporated into the crimes of theft in the first degree ([ORS 164.055](#)) and aggravated theft in the first degree ([ORS 164.057](#)).
- 5 E.g., ONESCO and ONFSI pay only passing homage to that portion of [ORS 40.460\(18a\)](#) dealing with **elder abuse**, and ignore altogether those provisions addressing acts of theft or criminal mistreatment. Even then, they simply brush the exception aside because "[q]uite simply, the **elder abuse** claim in this case against ONESCO was already dismissed by this court." Whatever the status of the **elder abuse** claim against ONESCO, there is no dispute that ONFSI continues to face such a claim, and ONESCO and ONFSI go more than a bridge too far in suggesting that statements falling within the ambit of [ORS 40.460\(18a\)](#) are permitted only for the limited purposes of proving the type of claim to which they specifically relate. Nothing in [ORS 40.460\(18a\)](#) suggests that that is the case, or that statements that fit that exception are not simply deemed admissible in any matter to which they might be relevant.
- 6 *See discussion, supra.*
- 7 *See, e.g., Examination, pp. 33-34.*
- 8 For example, whether Mary Pence filed a police report; whether Averill was charged with any crimes; whether the State's case against Averill went to trial or was resolved by plea bargain; or whether Mary Pence has heard recordings of phone calls with New York Life.
- 9 The remainder of [ORS 40.460\(28\)](#) and [ORS 40.465\(3\)\(h\)](#) deal with pre-hearing procedural matters governing the admissibility of such statements, such as the need to provide advance notice of the intent to offer the same. These matters are not at issue and the language is therefore not set out above.