

2013 WL 8722288 (Or.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Oregon.
Multnomah County

Patricia N. GIBSON, in her capacity as successor Trustee to the Veryl G. Gibson Trust, Plaintiff,

v.

Sharon BANKOFIER, an individual, Duane Bankofier, an individual, Oregon Realty Company, an Oregon Corporation, Chicago Title Insurance of Oregon, an Oregon corporation and Equity Advantage, Inc., an Oregon corporation, Defendants.

No. 110201781.
January 2, 2013.

**Memorandum in Support of Statement of Attorney Fees and
Cost Bill for Defendants Sharon Bankofier and Duane Bankofier**

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Defendants Sharon and Duane Bankofier (“Defendants” or “Bankofiers”) offer the following points and authorities in support of their [ORCP 68](#) Statement of Attorney Fees and Cost Bill against Plaintiff Patricia N. Gibson, as Successor Trustee to the Veryl G. Gibson Trust (“Plaintiff”).

1. Facts.

Plaintiff is the successor trustee of the Veryl G. Gibson Trust (“Trust”), which Plaintiff’s mother, Veryl Gibson (“Ms. Gibson”), set up to hold Ms. Gibson’s personal and real property. In 2007, while Ms. Gibson was still trustee of the Trust, she made a series of decisions with which Plaintiff disagreed. Specifically, Ms. Gibson negotiated both the sale of her home, which was real property held by the trust, and a 1031 exchange transaction involving four tenants in common (“TIC”) properties. These TIC properties failed to produce the income that Plaintiff hoped they would.

Sharon Bankofier worked as a real estate agent until her retirement in April, 2010. Ms. Bankofier and Ms. Gibson were friends, and Ms. Bankofier represented Ms. Gibson in the 2007 sale of Ms. Gibson’s home.

Plaintiff blames both Bankofiers for the failure of the TIC properties acquired by the Trust to produce the income desired. And despite no factual basis for imposing liability on the Bankofiers for the disappointing performance of the TIC properties, Plaintiff filed suit in an attempt to do so.

In her First Amended Complaint, Plaintiff alleged (1) **elder abuse**, (2) breach of good faith and fair dealing, (3) negligence, (4) unlawful trade practices, (5) fraud, (6) sales of unregistered securities, (7) securities fraud, and (8) sale of securities by an unlicensed broker-dealer or salesperson against both Bankofiers. Plaintiff further alleged a breach of fiduciary duty against Ms. Bankofier, and brought various claims against defendants Oregon Realty, Chicago Title, and Equity Advantage.

The Bankofiers filed eighteen [ORCP Rule 21](#) motions in response to Plaintiff’s First Amended Complaint. Plaintiff then agreed to drop her breach of good faith and fair dealing claim and the Court granted the Bankofiers’ motions to make the remainder of Plaintiff’s claims more definite and certain. (Statement of Atty. Fees and Cost Bill for Defs. Sharon Bankofier and Duane

Bankofier (“Statement”) Ex. 2 at 2-3.)¹ By the time Plaintiff filed her Second Amended Complaint, she had reduced her claims to negligence and **elder abuse**. (Statement Ex. 4.)

After unsuccessful attempts to resolve the dispute, Defendants proceeded with depositions and, based on the depositions, filed a Motion for Summary Judgment, in which they alleged a right to attorney fees pursuant to [ORS 20.105\(1\)](#). (Statement Ex. 6 at 40.) Prior to filing their Motion for Summary Judgment, Defendants notified Plaintiff of the deficiencies of its claims. They did so at least four times in writing. (Statement ¶ 5.) Defendants also discussed the deficiencies of Plaintiff's claims with Plaintiff's counsel during at least two telephone conferences. One telephone conference followed the depositions of the Bankofiers which confirmed their lack of liability for the event that led to the investment losses Plaintiff complained of in its Complaint (Statement ¶ 6.)

The Bankofiers have spent almost two years defending against Plaintiff's claims. The financial and emotional strain that this suit has caused the Bankofiers—two individuals over 65 years old and living on a fixed income—is substantial.

2. Defendants Are the Prevailing Parties.

At oral arguments on August 24, 2012, the Court granted summary judgment in favor of Mr. Bankofier. Specifically, the Court found that

Mr. Bankofier's involvement was *de minimis* and does not support a claim of negligence against him. Mr. Bankofier had no contractual or professional relationship with Veryl Gibson or the Trust... Mr. Bankofier's contact with Veryl Gibson during the real estate transaction appears to be limited to occasionally driving Veryl Gibson and Mrs. Bankofier.

(Statement Ex. 7 at 2.) Also at oral argument, the Court granted summary judgment in favor of both Bankofiers on Plaintiff's **elder abuse** claim. (Statement Ex. 7 at 2-3.)

On November 19, 2012, Judge Dailey filed an Order and Opinion granting summary judgment in favor of the Bankofiers on all claims. The Court found that the elements of the **elder abuse** claim were “inapplicable to the facts of this case.” (Statement Ex. 7 at 2.) The Court also granted summary judgment against Plaintiff on her negligence claim because (1) the Bankofiers did not cause any of Plaintiff's alleged damages and (2) the claim was barred by the statute of limitations.

Pursuant to [ORCP 68](#), the Court has the authority to award attorneys' fees and costs and to “hear and determine all issues of law and fact raised by the statement of attorney fees or costs and disbursements....” [ORCP 68](#) C(4)(c)(i).

3. Defendants' Attorney Fees and Costs Are Reasonable.

[ORS 20.075](#) sets out the factors that the Court must consider when determining the amount of an attorney fee award required by statute. Defendants submit a detailed Statement of Attorney Fees and Cost Bill addressing the [ORS 20.075](#) criteria, filed herewith. As reflected in the Statement of Attorney Fees and Cost Bill, the complexity of the matter, the work performed, and the experience, reputation, and ability of the Bankofiers' counsel justify the fees and costs incurred.

4. There Was No Objectively Reasonable Basis for Plaintiff's Claims.

Under [ORS § 20.105\(1\)](#), the Court “shall award” reasonable attorney fees to a party who defended against a claim and prevailed, upon a finding that there was no objectively reasonable basis for asserting the claim. An “objectively reasonable basis” for a claim is lacking if the party's position is entirely devoid of either legal or factual support. [Williams v. Salem Women's Clinic](#),

245 Or. App. 476, 482 (2011). A party has a continuing duty to evaluate its position throughout the course of litigation because a claim that was objectively reasonable when asserted may become unreasonable when viewed in light of additional evidence or changes in the law. *Dimeo v. Gesik*, 197 Or. App. 560, 562 (2005).

The record is entirely devoid of any factual basis for Plaintiff's negligence claim against Mr. Bankofier. As noted in the Court's Opinion and Order, Mr. Bankofier's contact with Ms. Gibson during the transaction at issue was limited to occasionally driving his wife and Ms. Gibson to presentations and meetings. (Statement Ex. 7 at 2.) Specifically, over a six month period, Mr. Bankofier drove Ms. Bankofier and Ms. Gibson to a mere four presentations and meetings. (Statement Ex. 6 at 28-29.) Furthermore, Mr. Bankofier had no contractual or professional relationship with Ms. Gibson or the Veryl G. Gibson Trust. The Court recognized that this type of de minimis contact cannot support a negligence claim against Mr. Bankofier. (Statement Ex. 7 at 2.) Because this was the extent of the evidence against Mr. Bankofier, the nature of Mr. Bankofier's involvement in this matter was pointed out to Plaintiff and the record is completely devoid of any facts supporting Plaintiffs negligence claims against Mr. Bankofier, he is entitled to reasonable attorney fees incurred in defending against the claim under ORS § 20.105(1).²

The record is similarly devoid of any factual support for Plaintiff's **elder abuse** claim against the Bankofiers. A position is objectively unreasonable if "it is not supported by the law as applied to the facts. *Lenn v. Bottem*, 221 Or. App. 241, 248 (2008) (emphasis in original) (quoting *Mattiza v. Foster*, 311 Or. 1 (1990)). As explained in the Court's Opinion and Order, "the elements of [an **elder abuse**] claim are inapplicable to the facts in this case." (Statement Ex. 7 at 2; emphasis added.) To be liable for **elder abuse**, a person must either cause physical³ or financial **abuse**, or permit another to commit physical or financial **abuse**. ORS § 124.100(2). Financial **abuse** occurs when "a person wrongfully takes or appropriates money or property of a vulnerable person." ORS § 124.110. A person permits another to commit financial **abuse** if the person "knowingly acts or fails to act under circumstances in which a reasonable person should have known of the... financial **abuse**." ORS § 124.100(5). As the Court noted, this case presented no facts applicable to an **elder abuse** claim because Defendants never wrongfully received money or property from Ms. Gibson,⁴ nor did they ever have control over the Veryl G. Gibson Trust money. The Court also found a total lack of evidence that "the conduct of anyone else involved in the TIC investments constitutes **elder abuse** or that Defendants knew or had reason to know of **elder abuse** against [Ms.] Gibson." (Statement Ex. 7 at 3.) The lack of evidence of the any receipt of property or control was pointed out to Plaintiff. Thus, under ORS § 20.105(1), both Bankofiers are entitled to reasonable attorney fees incurred in addressing Plaintiffs **elder abuse** claim.

The record also fails to contain an objectively reasonable basis for Plaintiffs negligence claim against Ms. Bankofier. As noted by the Court, Defendants did not cause any of Plaintiffs damages, and Plaintiff's negligence claim was barred by the statute of limitations because (1) there was no evidence of Ms. Gibson's incapacity during the relevant time period and (2) Plaintiff had "not allege[d] facts supporting tolling of the statute of limitations due to fraudulent concealment." (Statement Ex. 7 at 6-7.)

Whether a party has an objectively reasonable basis for asserting a claim is "a function of the substantive law governing the claim." *Olson v. Howard*, 237 Or. App. 256, 269 (2010) (citation omitted). Accordingly, for a party's claim to have an objectively reasonable basis, the party must produce evidence to support each element of that claim. *Lenn*, 221 Or. App. at 247. The law governing Plaintiff's negligence claim required her to establish that Defendants' actions caused the damages that she may have incurred. See, e.g., *Son v. Ashland Cmty. Healthcare Servs.*, 239 Or. App. 495, 506 (2010) ("a common law negligence claim requires the plaintiff to demonstrate... that [defendant's] conduct was a cause of plaintiff's harm") (citation omitted). The Court found that Defendants did not cause Plaintiff's damages because the only damages were market driven losses (Statement Ex. 7 at 8.), which cannot be attributed to Defendants. See *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 336 Or. 329, 346 (2004) (citing *Movitz v. First Nat'l Bank*, 148 F.3d 760 (7th Cir. 1998)) ("even though the plaintiff would not have purchased the property but for the [bank's negligence], the bank could not be held liable for the decline in the market value of the property that its misconduct did not cause"). Thus, the record contains no evidence supporting the causation element of Plaintiff's negligence claim and the Bankofiers are entitled to reasonable attorney fees incurred in addressing this claim under ORS § 20.105(1).

As noted above, the Court also concluded that Plaintiff's negligence claim was barred by the statute of limitations, a fact which is itself sufficient to establish that Plaintiff lacked an objectively reasonable basis for bringing the claim:

[A] purely procedural defense, such as the assertion that the claim was filed untimely under the applicable statute of limitations, is sufficient to establish not only that the plaintiff cannot prevail, but also to establish, upon an adequate showing, that the claim, when it was made, was devoid of support in the law as applied to the facts—i.e., it was meritless.

McCarthy v. Oregon Freeze Dry, Inc., 334 Or. 77, 86 (2002). In granting summary judgment for Ms. Bankofier on Plaintiff's negligence claim, the Court held that the statute of limitations for that claim had expired no later than December 19, 2009, over a year before Plaintiff filed her initial Complaint. (Statement Ex. 7 at 6.) Plaintiff attempted to circumvent the expiration of the limitations period by arguing that the statute was tolled because Ms. Gibson was incapacitated and/or because Ms. Bankofier fraudulently concealed material facts from Plaintiff and Ms. Gibson. However, as the Court noted, Plaintiff presented “no medical expert testimony regarding incapacity for the relevant time period” (Statement Ex. 7 at 7; emphasis added.), as required to support such an argument. See *Hudjohn v. S&G Machinery Co.*, 200 Or. App. 340, 351 (2005) (citation omitted). As to fraudulent concealment, the Court noted that Plaintiff had not even alleged facts supporting that argument. (Statement Ex. 7 at 7.) Thus, the record contains no evidence supporting either of Plaintiff's tolling arguments and the Bankofiers are entitled to reasonable attorney fees under [ORS § 20.105\(1\)](#).

5. Request for Findings,

Whenever a court considers a request for attorney fees under [ORS § 20.105\(1\)](#), it must make findings sufficient to allow for review, even if it decides not to award attorney fees. *In re Marriage of Sheehan*, 123 Or. App. 449, 452 (1993). Accordingly, the Bankofiers request that the court make findings regarding its decision.

6. ORCP 68 Expressly Allows for Recovery of Costs and Disbursements.

As the prevailing party, Defendants are entitled to recover their costs and disbursements. [ORCP 68 B](#). [ORS § 20.190\(2\)\(a\)](#) (A) also allows a party that prevails before trial to collect a prevailing party award of \$275.00. This amount is included in the \$12,695.02 figure.

7. Plaintiff's Legal Position Was Not Objectively Reasonable.

Defendants also request an enhanced prevailing party fee of up to \$5,000 because Plaintiff's claims for **elder abuse** and negligence were not objectively reasonable under the circumstances. A finding that the non-prevailing party lacked an objectively reasonable basis for asserting its claims pursuant to [ORS § 20.105\(1\)](#) also supports the award of an enhanced prevailing party fee under [ORS § 20.190\(3\)\(b\)](#). *Lenn*, 221 Or. App. at 251 (approving an enhanced prevailing party fee award based on the same facts and analysis that supported the [ORS § 20.105\(1\)](#) attorney fee award). Thus, Defendants request an enhanced prevailing party fee based on the same reasons that they are entitled to attorney fees, discussed above.

There are seven additional factors that a court should consider in awarding an enhanced prevailing party fee pursuant to [ORS § 20.190\(3\)](#):

(a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.

(b) The objective reasonableness of the claims and defenses asserted by the parties.

- (c) The extent to which an award of a larger prevailing party fee in the case would deter others from asserting good faith claims or defenses in similar cases.
- (d) The extent to which an award of a larger prevailing party fee in the case would deter others from asserting meritless claims and defenses.
- (e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.
- (f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.
- (g) Any award of attorney fees made to the prevailing party as part of the judgment.
- (h) Such other factors as the court may consider appropriate under the circumstances of the case.

[ORS § 20.190\(3\)](#). Accordingly, Defendants also base their request for an enhanced prevailing party fee on a desire to discourage others from pursuing meritless suits under factor (d). Defendants request that the Court consider the Bankofiers' repeated communications with Plaintiff's counsel regarding the lack of merit of Plaintiff's claims under factor (e). Defendants also request that the Court consider the nature of the claims alleged, the Bankofiers' respective roles and their advanced age and limited resources, along with the meritless nature of Plaintiff's claims, under factor (h).

8. Conclusion.

For the reasons set forth above and based on [ORCP 68](#), Defendants' Statement of Attorney Fees and Cost Bill is reasonable and justified under the circumstances. Accordingly, Defendants request that the Court award them a sum of \$252,041.50 in attorney fees and \$12,695.02 in costs and statutory fees. Defendants also request an award of an enhanced prevailing party fee, not to exceed \$5,000. Defendants also ask the Court to award a sum of \$7,112.00 for preparing the Statement of Attorney Fees and Cost Bill, accompanying Memorandum, and exhibits.

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Footnotes

- 1 The Court did not rule on the Bankofiers' motions to dismiss Plaintiffs negligence claim or to make Plaintiffs negligence claim more definite and certain, stating that Plaintiff had agreed to drop the negligence claim from her Second Amended Complaint. (Statement Ex. 2 ¶¶ 7-8.)
- 2 Additionally, Plaintiff lacked an objectively reasonable basis for her negligence claim against Mr. Bankofier because she produced no evidence that either of the Bankofiers' actions caused her any damages and because the statute of limitations period had run. See the discussion, *infra*.
- 3 Plaintiff neither alleged nor presented evidence of physical **abuse**.
- 4 The Opinion and Order states that Defendants “did not wrongfully receive money or property from the Plaintiff.” This memorandum assumes that the Court meant to say from Veryl Gibson, rather than from *Plaintiff*.

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