

2013 WL 8722287 (Or.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Oregon.
Multnomah County

Patricia N. GIBSON,
v.
Sharon BANKOFIER, et al.

No. 110201781.
January 16, 2013.

**Plaintiff's Response in Opposition to Oregon Realty Company's and Sharon
and Duane Bankofier's Respective Statements of Attorney Fees and Costs**

Slinde Nelson Stanford, [Darian A. Stanford](#), OSB No. 994491, [Jose A. Klein](#), OSB No. 083845, for plaintiff.

I. INTRODUCTION

Defendants' motions for attorney fees pursuant to [ORS 20.105\(1\)](#) lack merit and are affronts to the judicial process. The evidence indicates that Defendants waged a self-serving campaign to gain the reliance of an 80-something-year-old widow with dementia, and then steered her into risky and inappropriate investments. Defendants benefitted financially from those efforts, and Plaintiff suffered a devastating and unnecessary financial loss. But for Defendants' undue influence, Plaintiff never would have made investments of this nature; nor would Plaintiff have suffered the concomitant loss.

As soon as Patricia Gibson was authorized to act on behalf of the trust in whose name the assets at issue in this case are held, the trust discovered the causes of negligence and financial **abuse** of a vulnerable person that Plaintiff has brought in this action.

Yes, Defendants prevailed at summary judgment. But now they have the temerity to suggest that Plaintiff had “no objectively reasonable basis for asserting the claims” at issue. [ORS 20.105\(1\)](#). Prevailing at summary judgment certainly does not and should not automatically equal “no objectively reasonable basis for claims.” Defendants' motions should be denied. Plaintiff relies on its response to Defendants' motions for summary judgment (Response), and the following points and authorities.¹

II. FACTS

Veryl Gibson was born in 1926. Oregon Realty Company (ORC) agent Sharon Bankofier was acquainted with Mrs. Gibson because she bought Avon Products from her. Sometime around 2005, Mrs. Gibson asked Mrs. Bankofier to represent her in the sale of her property. While the sale ultimately fell through, in the course of the negotiation, Mrs. Bankofier engaged in the type of self-dealing at the expense of her client that informs much of Plaintiff's claims.²

Following that failed sale, Mrs. Bankofier ingratiated herself with Mrs. Gibson and executed a clear and steady escalation of control over Mrs. Gibson's finances. In 2006, Mrs. Bankofier, with the participation of her husband, Duane Bankofier, facilitated Mrs. Gibson's creation of the Veryl G. Gibson Trust, which superseded an earlier family trust. Under the new trust, Mrs. Gibson essentially financially disowned her daughter, Marla Gibson.

In 2007, Mrs. Bankofier arranged the sale and subsequent 1031 exchange of Veryl Gibson's property. Mrs. Bankofier orchestrated the transaction in such a way that \$1,000,000 of Mrs. Gibson's money would be appropriated into risky and illiquid

tenancy-in-common investments, the risk of which Mrs. Bankofier was in no position to understand—let alone advise upon. Throughout the process of her appropriation of Mrs. Gibson's money into TIC investments, Mrs. Bankofier maintained a singular focus on those TICs that would be willing to pay a finders-fee to Mrs. Bankofier (as well as to ORC). Throughout the process, Mrs. Bankofier was aware of Mrs. Gibson's reliance on Mrs. Bankofier to find “properties suitable” for Mrs. Gibson to invest in. “That's why she hired me.”³ Mr. Bankofier played an instrumental role in selecting the TICs into which which Mrs. Gibson's money was appropriated.⁴

Mrs. Gibson's daughters, Patricia Gibson and Janell Youngbluth, grew increasingly concerned that Mrs. Bankofier had irrevocably inserted herself between them and their mother. Eventually, in July 2007, Patricia Gibson told Mrs. Bankofier that she was uncomfortable with the degree of control she was exercising over her mother's finances and did not want Mrs. Bankofier to write checks on her mother's behalf. Following that conversation, Mrs. Gibson informed Patricia that she had hurt Mrs. Bankofie's feelings and made her cry. Mrs. Gibson said that if Patricia ever upset Mrs. Bankofier like that again, she would disinherit Patricia.

Meanwhile, Mrs. Gibson's mental facilities were in marked decline. On July 13, 2007— *only two weeks after the sale of the Property and before any TICs were ever purchased*—a neighbor found Mrs. Gibson laying in her yard completely disoriented, badly sunburned, and partially disrobed. She had collapsed in the yard for several hours and had no idea what had happened. Mrs. Gibson spent several days in the hospital, during which she was diagnosed with [dementia](#). While visiting Mrs. Gibson at the hospital, Mrs. Bankofier had Mrs. Gibson “authorize” a \$250,000 TIC investment in a strip mall in Germantown, Tennessee. The transaction garnered Mrs. Bankofier a \$10,000 commission.

Throughout the 1031 exchange, ORC, through its principal broker, failed to adequately supervise the transaction. Ultimately, four TICs were purchased. The investments proved calamitous to Mrs. Gibson's financial stability. Of the \$1,000,000 of Mrs. Gibson's money appropriated into TICs, Mrs. Gibson has received a return of \$249,183.59, with no possibility of future payments from three of the four TICs. As important, Mrs. Gibson and her family have not had the use of the tied-up TIC money to meet Mrs. Gibson's ongoing and substantial care needs.

nuy, own financial affairs, and pursuant to the terms of the trust, Patricia Gibson became the successor trustee. In February 2011, Plaintiff commenced this litigation.

Counsel for Plaintiff has certified that his law firm has consulted a real estate licensee who is qualified, available, and willing to testify that Mrs. Bankofier's conduct on behalf of ORC was negligent and was the cause of Mrs. Gibson's claimed damages.⁵

III. LEGAL ARGUMENT

A. Legal Standard

[ORS 20.105](#) provides in relevant part:

“In any civil action, suit or other proceeding ***, the court shall award reasonable attorney fees to a *** prevailing party in the proceeding *** upon a finding by the court that the party willfully disobeyed a court order or that there was no objectively reasonable basis for asserting the claim, defense or ground for appeal.”

At the outset, note that there are two factual circumstances identified in the statute where attorney fees are appropriate: (1) willfully disobeying a court order and (2) no objective reasonable basis for a claim. These are high standards reserved for shocking conduct. Indeed, as to the second prong (and the one relevant for present purposes), there is no objectively reasonable basis for asserting a claim “only if the party's position is *‘entirely devoid of legal or factual support at the time that it was made.’*”⁶ Claims that are “extremely weak, but not completely untenable” do not give rise to an award of attorney fees under the

statute.⁷ Indeed, even if a trial court deems a party's litigation strategy as “reckless” in bringing a claim, an award of attorney fees is inappropriate if the record is not entirely devoid of legal or factual support for the claim.⁸ The weight of the evidence is not relevant to the court's inquiry.⁹

The recent case of *Lenn v. Bottem* illustrates the rare circumstances in which an award for attorney fees under [ORS 20.105](#) is appropriate.¹⁰ In that case about a boundary dispute, the plaintiffs advanced a claim for adverse possession, alleging in part that they had an honest belief that the area in dispute had been their property. That alleged honest belief was contradicted by several things in the record, including a water permit application that the plaintiffs had submitted to the state Water Resources Department, in which the plaintiffs depicted the boundary far to the south of what they alleged in the adverse possession claim. Given plaintiffs' own depiction of the boundary in the water permit application, the court held that there was no objectively reasonable basis upon which they could have had an honest belief that they owned the disputed property. “Such a belief, even if subjectively held by plaintiffs, is not objectively reasonable in light of the entirety of their water permit application.”¹¹

This case against Oregon Realty Company and Mr. and Mrs. Bankofier is light years away from the patently meritless claim at issue in *Lenn*. In this case, each claim that Plaintiff advanced had an objectively reasonable basis in law and fact.

B. The record is not entirely devoid of legal or factual support for Plaintiffs negligence claims.

As argued extensively in Plaintiffs incorporated earlier pleadings, there is ample evidence through which a reasonable juror could find that Mrs. Bankofier had assumed a role in Mrs. Gibson's financial affairs that went well beyond those of realtor obligations of [ORS 696.810](#). Mrs. Bankofier conceived as her role to find “properties suitable” for Mrs. Gibson's goal “to provide income for herself and her grandkids and kids.”¹² Additionally, through her relentless pursuit of TIC investments that paid commissions to herself, a reasonable juror could find that Mrs. Bankofier failed to meet her statutory duty of loyalty and obligation to disclose conflicts of interest.¹³

ORC had a duty to supervise the conduct of its agent, Sharon Bankofier. ORC principal broker Cheryl Clunes had a duty to “supervise and control the professional real estate activity” at Bankofier's branch, but testified that she had no idea what a TIC was.¹⁴ Plaintiff had an objectively reasonable basis to advance a claim that ORC was directly negligent.

Plaintiff had an objectively reasonable basis to assert that Mr. Bankofier was negligent. There is evidence that Mr. Bankofier actively participated in the TIC selection process and actively worked to soften Mrs. Gibson's daughters concern about the exotic investments being carried out in their mother's name.¹⁵ Moreover, in script that appears to be consistent with Mrs. Bankofier's handwriting, Mr. Bankofier is specifically listed as a third party with rights to access Veryl Gibson's TIC account. There was ample evidence through which a reasonable juror could find that Mr. Bankofier actively participated in the campaign to influence how Mrs. Gibson's money would be appropriated.

Plaintiff had an objectively reasonable basis for asserting that its negligence claims were timely. Plaintiff refers the Court to its arguments in its Response to Defendants' Motions for Summary Judgment, at 14-18, and its' Supplemental Brief, *passim*.

C. The record is not entirely devoid of legal or factual support for Plaintiffs financial **abuse of a vulnerable person claims.**

Plaintiff also advanced claims against Defendants for financial **abuse** of a vulnerable person, under [ORS 124.110\(a\)](#). While case law on financial **abuse** claims remains underdeveloped, Plaintiff certainly had a reasonable basis to believe that it had satisfied the elements of an **elder abuse** claim. Such a claim requires “(1) a taking or appropriation (2) of money or property (3)

that belongs to an **elderly** or incapacitated person, and (4) the taking must be wrongful.”¹⁶ Relevant to Plaintiff's allegations “to appropriate” means:

“[2] to set apart for or assign to a particular purpose or use <appropriate money for the research program>[;]

“[3] to take or make use of without authority or right.”¹⁷

Relying on that plain and ordinary meaning of appropriate, Plaintiff alleged that \$1,000,000 of Mrs. Gibson's money was appropriated through the 1031 exchange. Plaintiff adduced evidence that Defendants were responsible for the appropriation. The evidence suggests that Mr. and Mrs. Bankofier orchestrated the purchases of TIC properties, and that ORC failed to exercise its obligations to supervise Mrs. Bankofier's actions throughout the transaction. Additionally, there is evidence to support Plaintiff's allegation that the appropriation was wrongful. Throughout the selection of TIC properties, Mrs. Bankofier focused on those TIC offerings that were willing to pay Mrs. Bankofier a referral fee. That prioritization of her own self-interest over her fiduciary obligations to her client, Mrs. Gibson was wrongful. It was done for an improper motive or by improper means.¹⁹

ORC knew or should have known that Mrs. Bankofier was appropriating the proceeds of the sale of her property into exotic TIC investments. They permitted Mrs. Bankofier to engage in that wrongful conduct and profited from that failure to supervise the transaction. Accordingly, Plaintiff had an objectively reasonable basis to assert a claim for financial **abuse** by ORC on a theory of by-stander liability. [ORS 124.100\(5\)](#). That claim is buttressed by the fact that it was through ORC's training and instruction that Mrs. Bankofier learned about TICs and their possible applicability to 1031 exchanges.

D. Lane Powell's rates are exorbitant.

For the reasons previously detailed, the Court should not grant any part of Defendants' Motions. But in the event that the Court chooses to do so, Plaintiff preserves the argument that Lane Powell's rates are outlandish for this case and for the practice of realtor law. Compare the hourly billing rates of Ms. Korach (\$165) with those of Ms. Larson (\$365 in 2011 and \$405 in 2012). Ms. Larson's rates are more than double those of Ms. Korach and are outside the range of other senior attorneys representing realtors.²⁰

Further compare the amount billed by Korach for ORC (\$57,525) with that billed by Lane Powell (in excess of \$250,000). The Lane Powell bill was almost five times that of Hart Wagner, and for the same case. Though the respective clients were not completely similarly situated, they were close.

IV. CONCLUSION

It is one thing for Defendants to prevail at summary judgment. It is entirely another thing entirely for Plaintiff's position is entirely devoid of legal or factual support. Plaintiff submits that Defendants have no objectively reasonable basis for claiming that Plaintiffs claims were devoid of legal or factual support. Accordingly, Defendants' motions should be denied.

DATED this 16th day of January 2013.

SLINDE NELSON STANFORD

By:

Darian A. Stanford, OSB No. 994491

Jose A. Klein, OSB No. 083845

Of Attorneys for Plaintiff

Footnotes

- 1 Plaintiff's Response to Defendants' Motions for Summary Judgment and supporting exhibits is attached as Exhibit A.
- 2 In an email to the company that would be purchasing the property, Mrs. Bankofier stated, "Prior to Veryl's signing of the Purchase Agreement, I want a contract with Pacific Landmark which allows me Sharon Bankofier, Broker with Oregon Realty Co. to have the exclusive listback of the lots/homes the Pacific Landmark ***will develop/construct on the subject property." See Plaintiff's Response to Defendants' Motions for Summary Judgment at 3.
- 3 *See id.* at 19.
- 4 *See id.* at Youngbluth Dep Tr. 105:22-106:16.
- 5 *Id.* at Klein Dec. ¶ 60.
- 6 *Olson v. Howard*, 237 Or App 256, 268-69 (quoting *Mattiza v. Foster*, 311 Or 1, 8 (1990); emphasis added).
- 7 *Rafferty & Towner, Inc. v. NJS Enterprises, LLC*, 235 Or App 286, 290 (2010).
- 8 *Williams v. Salem Women's Clinic*, 245 Or App 476 (2011); see also *Morasch v. Hood*, 232 Or App 392 (2011) (denying motion for attorney fees under ORS 20.105(1) even though evidence related to damages was legally insufficient to support a fraud claim).
- 9 *Dimeo v. Gesik*, 195 Or App 362, 371 (2004).
- 10 221 Or App 241 (2008).
- 11 *Id.* at 250 (emphasis in original).
- 12 *See* Ex A, 19.
- 13 ORS 696.810.
- 14 OAR 863-015-0140 (3)-(4).
- 15 *See* Ex A, at 22-23, Youngbluth Dep Tr. 105:22-106:16.
- 16 *Church v. Woods*, 190 Or App 112 (2003) (emphasis added).
- 17 Miriam Webster Free Online Dictionary, available at [http:// www.miriam-webster.com/dictionary/appropriate](http://www.miriam-webster.com/dictionary/appropriate). Last checked on August 5, 2012.
- 19 *See Empire Fire & Marine Ins. v. Fremont Indemnity*, 90 Or App 56, 62 (1988) (so defining "wrongful" in the context of interference with contractual relations).
- 20 For example, Lee Aronson of Schulte, Anderson, Downes, Aronson and Bittner PC, has been an attorney since 1977 and commonly practices in real estate law. His general billing rate for realtor related matters is \$250 an hour.

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