

2012 WL 10998454 (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 Company of Oregon, an Oregon corporation and Equity Advantage, Inc., an Oregon corporation, Defendants.

No. 110201781.
July 16, 2012.

ORS 21. 200(1)(a)
(Oral Argument Requested)

Defendants Sharon Bankofier's and Duane Bankofier's Motion for Summary Judgment

Lane Powell PC, [Janet K. Larsen](#), OSB No. 950279, [Mathew S. Kirkpatrick](#), OSB No. 083820, docketing-pdx@lanepowell.com, for defendants Sharon Bankofier and Duane Bankofier.

I. [UTCRC 5.050\(1\)](#) STATEMENT

Pursuant to [UTCRC 5.050\(1\)](#), defendants Sharon Bankofier and Duane Bankofier (collectively, “Defendants” or “the Bankofiers”), request oral argument on their motions. The Bankofiers estimate that 60 minutes will be required for oral argument and request official court reporting services.

II. MOTION

As of July 22, 2010, Plaintiff Patricia Gibson (“Plaintiff”) became the successor Trustee of the Veryl G. Gibson Trust (“the Trust”), a trust that Plaintiff’s mother, Veryl G. Gibson (“Mrs. Gibson”) set up to hold her personal and real property. In 2007, Mrs. Gibson was the trustee of the Trust. While acting as trustee of the Trust and with the knowledge of Plaintiff and her other daughter, Janell Youngbluth (the two beneficiaries of the Trust), Mrs. Gibson negotiated the sale of her home and real property in the Trust and a 1031 exchange transaction involving four tenants in common (“TIC”) properties (“the 1031 Exchange Real Estate Transaction”). Plaintiff and her sister, Janell Youngbluth, knew that Mrs. Gibson intended to engage in the 1031 Exchange Real Estate Transaction before the 1031 Exchange Real Estate Transaction was completed in 2007. While Plaintiff and her sister opposed the 1031 Real Estate Exchange Transaction, Plaintiff did nothing to stop her, standing by without action, during and after the negotiations of the 1031 Exchange Real Estate Transaction, even accepting gifts of money from her mother that resulted from the 1031 Exchange Real Estate Transaction.

Plaintiff waited for nearly four years until 2010, before taking steps to become the successor trustee of the Trust. Plaintiff then began to blame Mrs. Gibson’s friend and realtor, Sharon Bankofier (“Mrs. Bankofier”) and Sharon’s husband, Duane Bankofier, for Mrs. Gibson’s 1031 Exchange Real Estate Transaction. Duane Bankofier and Sharon Bankofier are collectively referred to as “the Bankofiers.”

Sharon Bankofier worked as a real estate agent for 30 years, and was with Oregon Realty for over 10 years until her retirement in April 2010. Duane Bankofier, a civil engineer with the U.S. Army Corps of Engineers for 31 years, retired in 2007, and

through the years was known to occasionally drive his vision-impaired wife to her personal and professional appointments. The Bankofiers have been married for 50 years and are both over 65 years old. Duane Bankofier never worked in real estate or as a professional financial advisor. Sharon worked as a real estate agent, but never held herself out as a professional financial advisor.

Plaintiff's claims against the Bankofiers fail as a matter of law, and the Bankofiers are entitled to summary judgment because:

1. Plaintiffs Second Claim for Relief (Negligence) is barred by the two-year limitations period of [ORS 12.110\(1\)](#);
2. Plaintiffs Second Claim for Relief (Negligence) is not supported by the undisputed facts;
3. Plaintiffs First Claim for Relief (**Elder Abuse**) is not supported by the undisputed facts;
4. Plaintiff is estopped from complaining of transactions that she stood by and permitted when she could have prevented them; and
5. Plaintiff did not comply with the requirements of [ORS 31.350](#) before bringing this action.

The Bankofiers also move the Court, pursuant to [ORS 20.105](#), to award their reasonable attorney fees incurred in this action. In 2007, Plaintiff knew that Mrs. Gibson hired Sharon Bankofier to assist with the 1031 Exchange Real Estate Transaction. There is no evidence that Mrs. Bankofier ever held herself out as a financial advisor, nor did she contract to provide such services or receive compensation for providing such services. Likewise, Duane Bankofier is a retired civil engineer who drove his vision-impaired wife to appointments, but otherwise had no involvement in Mrs. Gibson's 1031 Exchange Real Estate Transaction. Plaintiff never had an objectively reasonable basis for asserting claims against the Bankofiers.

This motion is supported by the record in this action and the Declaration of Janet K. Larsen ("Larsen Decl.") with attached deposition testimony and certain deposition exhibits: Second Amended Complaint filed by Plaintiff in the above-captioned matter on or about October 14, 2011, attached as Exhibit 1; the deposition transcript of Sharon Bankofier taken on May 17, 2012 and May 21, 2012 ("S. Bankofier Depo."), attached as Exhibit 2; the deposition transcript of Duane Bankofier taken on May 21, 2012 ("D. Bankofier Depo."), attached as Exhibit 3; the deposition transcript of Janell Youngbluth taken on March 23, 2012, ("Youngbluth Dep. Tr."), attached as Exhibit 4; the deposition transcript of Cheryle Clunes taken on May 24, 2012, ("Clunes Dep. Tr."), attached as Exhibit 5; selected deposition exhibits marked by Plaintiff attached as Exhibit 6; and selected deposition exhibits marked by Defendants attached as Exhibit 7. The motion is also supported by the Declaration of Greg Bowen and Exhibits ("Bowen Decl.") filed herewith, and the below points and authorities.

III. POINTS AND AUTHORITIES

A. Facts.

1. Mrs. Gibson solicits Mrs. Bankofier while selling Avon. It is ironic that Plaintiff alleges the Bankofiers "ingratiated themselves" on Mrs. Gibson in light of the history of the relationship between the Bankofiers and Mrs. Gibson. Mrs. Gibson was the one who solicited a relationship with Mrs. Bankofier as an Avon customer in the 1980s. (Larsen Decl. Ex. 1¶ 8; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. at 64:17-65:19; 240:10-242:10; Larsen Decl. Ex. 7; Def. Dep. Ex. 40; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. at 240:10-244:18); Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. at 37:5-8.) At first, Ms. Bankofier was not interested in Mrs. Gibson's solicitations because Ms. Bankofier's mother was an Avon representative and Ms. Bankofier bought products from her mother. (Id. at 38:15-39:6.) Mrs. Gibson persisted in her visits to Mrs. Bankofier's home, even offering to fulfill Mrs. Bankofier's immediate needs for products. (Id. at 39:2-22.) When Mrs. Bankofier's mother retired from selling Avon in approximately 1988, Mrs. Gibson took over as Mrs. Bankofier's Avon representative. (Id. at 39:25-40:5, 42:9-12.) For approximately 30 years, Mrs. Gibson paid monthly visits to Mrs. Bankofier's home to sell her Avon. (Id. at 37:6-8.) In those

early years, Duane Bankofier's relationship with Mrs. Gibson was limited to writing checks to Mrs. Gibson for his wife's Avon purchases. (Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 7:24-8:17.)

Through these monthly sales calls, Mrs. Gibson and Mrs. Bankofier became friends. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 43:10-44:6.) Mrs. Gibson often brought her daughters along on her monthly sales calls to see Mrs. Bankofier. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 64:17-65:4.) In addition, she often sought information from Mrs. Bankofier regarding the value of properties in Mrs. Gibson's neighborhood, including her own. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 45:18-24.) Mrs. Bankofier was happy to provide Ms. Gibson the information she requested, but never solicited Mrs. Gibson as a real estate client. (Id. at 45:18-46:2.)

Sometime in the 1990s, Mrs. Gibson invited Mrs. Bankofier and her husband, Duane Bankofier, to a presentation offered by one of Mrs. Gibson's daughters, Marla, who was a sales representative for a company selling revocable living trusts. The Bankofiers attended the seminar, but did not purchase a living trust from Marla. (Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 8:19-9:9.) Well before Mrs. Bankofier acted as Mrs. Gibson's real estate agent, Plaintiff and her sisters invited Mrs. Bankofier to a surprise birthday party planned for Mrs. Gibson. This was the first of a series of social events that the Bankofiers enjoyed with Mrs. Gibson, including hosting Mrs. Gibson for Christmas dinner on at least three occasions. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 45 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 239:15-247:20); Id. at 60:19-61:19, 241:6-19; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 39:10-22.)

2. 2005 failed sale of Ms. Gibson's home and property. Ironically, Mrs. Gibson was the one who solicited Mrs. Bankofier as her real estate agent. In December 2005, a real estate agent/developer, David Hill ("Hill") approached Mrs. Gibson on behalf of Pacific Landmark Development to see if she was interested in selling her home and property for a neighborhood development contemplated by Pacific Landmark Development. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 1 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 50:1-55:16.); Id. 50:9-25, 48:16-24.) Mrs. Gibson directed Mr. Hill to contact Mrs. Bankofier to discuss the sale of her home and property, then contacted Mrs. Bankofier to inform her of David Hill's call and her desire to have Mrs. Bankofier discuss the terms with Mr. Hill. (Id. at 48:8-49:8, 50:9-16.) In December 2005, Mrs. Gibson signed a one-party fee agreement with Mrs. Bankofier, confirming representation of Mrs. Gibson in the sale of her home and property to Pacific Landmark Development by Mrs. Bankofier and Oregon Realty. This was the first time that Mrs. Gibson enlisted Mrs. Bankofier's services as a realtor. (Id. at 46:4-11, 47:12-48:11.) After extensive negotiations, the 2005 sale to Pacific Landmark Development ultimately failed when the City of Portland decided not connect Mrs. Gibson's house to the public sewer system. (Id. at 64:5-16.)

3. The 2007 Sale of Ms. Gibson's property and life estate in home. In January 2007, Mr. Hill again contacted Mrs. Bankofier. This time, Mr. Hill contacted Mrs. Bankofier on behalf of Mrs. Gibson's neighbor, Scott Campbell, to inquire regarding whether Mrs. Gibson had any interest in selling her home and property to Mr. Campbell. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 66:6-17.) Mrs. Bankofier relayed the inquiry to Mrs. Gibson. Mrs. Gibson agreed to consider an offer, but made clear to Mrs. Bankofier that she did not want to pay taxes on a sale. (Id. at 66:18-67:2; Larsen Decl. Ex. 6; Pl. Dep. Ex. 53 (Id. at 269:9-22.); Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 111:17-112:8.) On March 21, 2007, Mrs. Gibson executed an Oregon Realty one party fee agreement, confirming Mrs. Bankofier's representation of Mrs. Gibson in the real estate transaction. (Larsen Decl. Ex. 7; Def. Dep. Ex. 7 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 109:22-110:5).) On April 13, 2007, Mrs. Bankofier advised Hill that Mrs. Gibson was interested in the sale, but that Mrs. Gibson intended to discuss the purchase and sale agreement with her attorney and her accountant. (Def. Ex. 8 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 115:17-116:18); Id. at 116:23-117:7; 117:22-25.) Mrs. Gibson's attorney, Larry Beck ("Beck") reviewed and approved the sales documents for Mrs. Gibson. (Larsen Decl. Ex. 7; Def. Dep. Ex. 9 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 116:19-117:14); Larsen Decl. Ex. 7; Def. Dep. Ex. 10 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 117:19-118:20).) The terms of the sale allowed Mrs. Gibson to remain in her home for her lifetime, if she wished. (Larsen Decl. Ex. 7; Def. Dep. Ex. 11 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 121:21-128:16); Id. at 121:21-122:4, 92:10-14.) Mrs. Gibson also had her accountant, Jerry Pollard, CPA ("Pollard"), review the wording of the lease-back provision in the purchase and sale agreement (which effectively gave Mrs. Gibson a life estate in her home) and the structure of the 1031 Exchange Real Estate Transaction, to ensure it fulfilled Mrs. Gibson's goals of not paying taxes on the

transaction. (Larsen Decl. Ex. 7; Def. Dep. Ex. 8; Larsen Decl. Ex. 7; Def. Dep. Ex. 11 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. at 121:21-122:4); Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 255:16-256:4.)

The purchase and sale agreement, dated May 16, 2007, confirms that a 1031 exchange involving TIC Properties was part of the contemplated real estate transaction. (Larsen Decl. Ex. 7; Def. Dep. Ex. 11.) On or about May 18, 2007, the sales documents were signed and an escrow was opened with escrow officer Mic Howe ("Howe") at Chicago Title. (Larsen Decl. Ex. 7; Def. Dep. Ex. 21 (Howe Declaration-including exhibits to same (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 147:9-150:7).) The escrow documents also confirm Mrs. Gibson's intention to complete the 1031 Exchange Real Estate Transaction. (Larsen Decl. Ex. 7; Def. Dep. Ex. 21; Larsen Decl. Ex. 6; Pl. Dep. Ex. 10 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 100:20-101:14).)

4. Mrs. Gibson researches 1031 Exchange options. Every Tuesday morning at Oregon Realty's Clackamas office, Cheryle Clunes, Mrs. Bankofier's principal broker, held office meetings attended by most of the agents, including Mrs. Bankofier. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 20:6-20, 21:5-20, 22:3-5.) The purpose of these Tuesday morning meetings was to provide training to Oregon Realty's agents, who were strongly encouraged to attend. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 26:10-28:9, 30:23-31:2.) Outside presenters would come in to speak on topics of interest to Oregon Realty's agents. An agenda was distributed in advance. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 27:23-29:10.) On more than one occasion, 1031 exchanges were a training topic at Oregon Realty's Tuesday morning training meetings. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 33:6-34:4.) Prior to the date of Mrs. Gibson's purchase of TIC properties, the use of TIC properties as part of a 1031 exchange was also the subject of at least one of these Tuesday morning training meetings offered by Oregon Realty for its agents. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 35:14-17, 35:21-36:3; Larsen Decl. Ex. 5; Clunes Dep. Tr. 42:9-43:4.)

Mrs. Bankofier first learned that TICs could be used as exchange properties in 1031 exchange real estate transactions through the Spectrus seminar held by Oregon Realty during Oregon Realty's Tuesday morning meetings and the subsequent seminar she attended with her husband Duane Bankofier in 2005/2006. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 73:21-74:20.) After Mrs. Bankofier learned of Spectrus at an Oregon Realty sponsored Tuesday morning training meeting, the Bankofiers attended a Spectrus sponsored seminar sometime in 2005 or 2006, to educate themselves on TIC Properties. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 68:25-70:6, 74:9-20; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 19:8-20:21.) Prior to Mrs. Gibson's 1031 Exchange Real Estate Transaction, Mrs. Bankofier assisted another Oregon Realty client with a real estate transaction involving a 1031 exchange using TIC properties as the replacement properties. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 70:15-71:4, 73:16-20, 78:14-80:1.)

After Mrs. Gibson indicated her desire to accomplish the 1031 Exchange Real Estate Transaction, Mrs. Bankofier invited Mrs. Gibson to a seminar presented by American Investment Exchange ("AIE") a TIC provider. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 8 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 89:19-91:13); *Id.* at 70:7-72:18, 74:1-4.) The Bankofiers learned of the presentation through Mrs. Bankofier's Oregon Realty client who previously accomplished a 1031 exchange real estate transaction, using TIC properties. (*Id.* at 70:15-71:4, 73:16-20, 79:10-80:1.) The Bankofiers attended the seminar for their own purposes. (*Id.* at 72:23-73:3; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 23:18-25:1.)

In early March, Mrs. Bankofier invited Mrs. Gibson to attend a second seminar. The second seminar was presented by Spectrus. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 70:7-9, 74:5-8.)

In May of 2007, Plaintiff and Mrs. Bankofier discussed various TIC properties, and Mrs. Bankofier kept notes regarding Plaintiff's research on these companies. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 7 (Duplicate of Larsen Decl. Ex. 7; Def. Dep. Ex. 13.); Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 88:14-89:18; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 131:4-13, 132:17-133:2.) In May of 2007, Mrs. Gibson chose to complete her 1031 Exchange Real Estate Transaction by utilizing TIC properties. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 86:10-25.)

On May 22, 2007, Mrs. Bankofier forwarded to Equity Advantage, the 1031 qualified intermediary, the certification of trust required for Equity Advantage to serve as a 1031 qualified intermediary. She also notified Chicago Title that Equity Advantage

would serve as the intermediary for the 1031 exchange. On May 31, Equity Advantage notified Chicago Title that Mrs. Gibson intended to engage in a 1031 exchange and provided escrow instructions to Chicago Title. (Larsen Decl. Ex. 7; Def. Dep. Ex. 21; Larsen Decl. Ex. 6; Pl. Dep. Ex. 12 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 104:20-108:11).) On June 5, 2007, Mrs. Bankofier advised Chicago Title that \$1,000,000 would be allocated to a 1031 exchange, and the remaining \$250,000 in proceeds would be given to Mrs. Gibson at closing. (Larsen Decl. Ex. 7; Def. Dep. Ex. 21; Plf. Dep. Ex. 10 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 100:20-101:14).) Equity Advantage provided Mrs. Bankofier with a list of TIC issuers it had worked with in the past. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 9 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 91:14-93:25).) ON behalf of Mrs. Gibson, Mrs. Bankofier contacted the various TIC issuers on the list, including AIE, Financial Benefits Resources, and FirstWest Group, and asked them to provide information directly to Mrs. Gibson. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 8; Larsen Decl. Ex. 6; Pl. Dep. Ex. 13 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 108:18-110:24); Larsen Decl. Ex. 6; Pl. Dep. Ex. 15 (Id. at 114:1-115:22); Larsen Decl. Ex. 6; Pl. Dep. Ex. 16 (Id. at 115:24-119:5); Larsen Decl. Ex. 6; Pl. Dep. Ex. 19 (Id. at 131:19-134:6); Larsen Decl. Ex. 6; Pl. Dep. Ex. 20 (Id. at 134:7-143:9); Larsen Decl. Ex. 6; Pl. Dep. Ex. 21 (Id. at 143:11-147:14); Larsen Decl. Ex. 6; Pl. Dep. Ex. 25 (Id. at 153:17-154:10); Larsen Decl. Ex. 6; Pl. Dep. Ex. 26 (Id. at 159:15-165:19); Larsen Decl. Ex. 6; Pl. Dep. Ex. 54 (Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. at 16:4-18:5); (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. at 84:23-85:8, 89:19-91:10; 131:23-132:13, 134:11-135:14, 136:15, 159:15-161:4.)

Financial Benefits Resources (“FBR”) was on the list of TIC providers provided by Equity Advantage. (Larsen Decl. Ex. 7; Def. Dep. Ex. 9; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 93:14-25.) On June 21, 2007, Mrs. Gibson met with financial advisors Greg Bowen and Douglas Perry of Financial Benefits Resources. (Larsen Decl. Ex. 7; Def. Dep. Ex. 14 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 134:19-135:19); P Dep. Ex. 43 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 235:19-237:14); Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 94:1-22, 95:1-7, 145:2-15, 169:21-170:1; 235:19-236:8; Bowen Decl. ¶ 5.) Mr. Bowen is a certified financial planner who is also a licensed securities registered representative with over 19 years of experience in financial services. (Bowen Decl. f 2.) Mrs. Gibson asked Mrs. Bankofier to attend the meeting with her. Mr. Bankofier drove Mrs. Bankofier and Mrs. Gibson to the meeting and went along to learn and listen to Perry and Bowen. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 94:1-96:16, 145:5-18; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 33:25 34:12; Bowen Decl. ¶ 5.) The meeting involved a discussion of the “investments that Veryl could purchase” and her qualifications. Perry and Bowen discussed with Mrs. Gibson her investment goals which included the deferral of capital gains tax and the generation of income for herself and possibly her children and grandchildren. (Larsen Decl. Ex. 7; Def. Dep. Ex. 15; Larsen Decl. Ex. 6; Pl. Dep. Ex. 43; Bowen Decl. ¶5.) Bowen and Perry had not met Mrs. Gibson or the Bankofiers prior to this 90 minute meeting with Mrs. Gibson on June 21, 2007. (Bowen Decl. ¶ 5.) Bowen observed that Mrs. Gibson was sharp, seemed to understand the substance of the discussions and showed no signs of incompetence or duress. (Bowen Decl. ¶5.) Perry and Bowen interviewed Mrs. Gibson and completed a Substantive Relationship Form that summarized her financial portfolio, investment experience, and investment goals. (Larsen Decl. Ex. 7; Def. Dep. Ex. 15; Larsen Decl. Ex. 6; P Dep. Ex. 43; Larsen Decl. Ex. 6; P Dep. Ex. 27 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 166:14-175:24); Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 96:5-19, 145:19-146:8, 171:8-172:3; Bowen Decl. ¶ 6, Ex. 2) Perry and Bowen concluded that Mrs. Gibson was an accredited investor and that TICs were suitable for her needs as 1031 replacement properties. (Larsen Decl. Ex. 7; Def. Dep. Ex. 15; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 167:6-21; Bowen Decl. ¶ 13, Ex. 9.) Mrs. Gibson explained to Bowen and Perry that she was not limiting her options to those TICs offered through FBR to complete her 1031 Exchange Real Estate Transaction. (Bowen Decl. ¶ 7.) During the meeting, Perry and Bowen also told Mrs. Gibson about FBR's TIC offerings and provided her with a folder full of TIC properties to consider, which included the Noble Royalties oil and gas TIC. (Pl. Dep. Exs. 27 and 43; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 97:9-13, 168:6-169:5; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 35:19-36:8; Bowen Decl. ¶.) Mrs. Gibson received publications from FBR that defined what a TIC is and explained that TICs can provide tax benefits when used as replacement properties in a 1031 exchange, materials explaining the pricing of oil and gas for investment purposes, as well as FBR's recent news letter regarding retired investors. (Larsen Decl. Ex. 7; Def. Dep. Ex. 16 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 138:8-10.), Def. Dep. Ex. 17 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 139:12-14.), Def. Dep. Ex. 18 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 140:6-7.) and Def. Dep. Ex. 19 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 140:15-16.); Bowen Decl. Exs. 3, 4, 5 and 6.) Mrs. Bankofier was not paid a referral fee or commission in connection with Mrs. Gibson's purchase of the Noble Royalties oil and gas TIC. (Bowen Decl. ¶ 18.)

5. Closing of Mrs. Gibson's sale. The sale of Mrs. Gibson's property to the Campbells closed on June 29, 2007. (Larsen Decl. Ex. 7; Def. Dep. Ex. 21.) Chicago Title's Buyer's Final Settlement Statement dated June 29, 2007 reflects a \$1,250,000 credit on behalf of Mrs. Gibson and a \$1,000,000 wire transfer to Equity Advantage Incorporated ("Equity Advantage"), Mrs. Gibson's 1031 exchange accommodator. (Id.) Mic Howe, Chicago Title's escrow officer, had handled thousands of transactions in her 26 years in the escrow business, including transactions involving **elderly** persons and 1031 exchanges. At the closing, she observed no evidence of incompetence, duress, unwillingness to sign the documents, or any indication that Mrs. Gibson did not understand what she was doing. (Id.; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 146:22-147:8.)

Ms. Gibson's daughter, Janell Youngbluth ("Youngbluth") was in Portland for her high school reunion and was staying with Mrs. Gibson when Mrs. Gibson closed on the sale of her home and property through the 1031 Exchange Real Estate Transaction. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 17 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 119:6-124:18); Larsen Decl. Ex. 6; Pl. Dep. Ex. 21 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 143:11-147:14); Larsen Decl. Ex. 7; Def. Dep. Ex. 40; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 90:3-91:25, 94:3-17.) After signing the closing documents at Chicago Title on June 28, Mrs. Gibson conceded to the Bankofiers that she had not told her daughter about the 1031 Exchange Real Estate Transaction and she asked the Bankofiers to talk with Ms. Youngbluth about the 1031 Exchange Real Estate Transaction. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 17; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 94:18-95:25, 111:17-112:9, 115:17-116:4, 127:22-128:12; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 122:13; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 28:3-23.) Ms. Youngbluth, Mrs. Gibson and the Bankofiers sat at the kitchen table at Mrs. Gibson's home for 10 to 30 minutes discussing the 1031 Real Estate Exchange Transaction. During the discussion, Ms. Youngbluth reviewed the brochures Mrs. Gibson had received on the TIC properties she was considering for her 1031 exchange. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 54; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 97:16-4, 105:10-106:18, 109:1-5, 131:7-10, 145:21-146:1; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 123:3-124:18; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 14:23-15:15, 16:4-19:5, 28:18-25.)

6. Daughters fail to exercise control over Mrs. Gibson's finances. In mid-2007, Mrs. Gibson told Plaintiff and Ms. Youngbluth that she had amended the Gibson Family Trust and set up a new trust to replace the Gibson Family Trust. She arranged for Plaintiff and Ms. Youngbluth, the two beneficiaries of the new trust, to meet with John Larson, Mrs. Gibson's trust and estate lawyer. Mrs. Gibson also gave them each a copy of the Trust documents for their review. (Larsen Decl. Ex. 7; Def. Dep. Ex. 3 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 39:1-40:24); Larsen Decl. Ex. 7; Def. Dep. Ex. 4 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 41:1-53:14.); (Larsen Decl. Ex. 7; Def. Dep. Ex. 5 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 53:16-64:11); Id. at 41:1-42:6, 43:1-44:12, 55:4-56:21, 57:12-21.)

The Trust documents provided Plaintiff and Ms. Youngbluth the ability to gain control over the Trust. (Def. Dep. Exs. 3 and 4.) Later, Mrs. Bankofier also instructed Plaintiff and Ms. Youngbluth regarding how to gain control as successor trustee of the Trust. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 31 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 184:9-188:25); Id. at 188:6-188:17.)

Ms. Youngbluth and Plaintiff disagreed with Mrs. Gibson's 1031 Exchange Real Estate Transaction. (Larsen Decl. Ex. 7; Def. Dep. Ex. 24 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 170:22-177:22.) They also disagreed with Mrs. Gibson's desire to stay in her home rather than move into assisted living facility. (Id.) They also disagreed with Mrs. Gibson's decision to use TICS to accomplish the 1031 Exchange Real Estate Transaction. They expressed their concerns to Mrs. Bankofier. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 102:5-16, 114:15-19, 131:7-10, 132:17-133:2, 184:11-185:14, 188:16-190:9.) Mrs. Bankofier relayed to Mrs. Gibson the concerns expressed by her daughters. (Id. 184:5-185:14.)

During her deposition, Mrs. Youngbluth acknowledged that she could have gained control over their mother's Trust in 2007, but they "weren't interested in gaining control" because it was not time to "jump in there and take control." (Id. at 248:8-249:15.) Ms. Youngbluth decided not to get involved because "it was my mother's money." (Id. at 133:3- 134:8; 100:19-101:4.) According to Ms. Youngbluth, her mother was "a strong individual. She wants to make her own decisions. She doesn't want to be bossed around." (Id. at 159:3-19.) Ms. Youngbluth acknowledged that her mother had threatened to disinherit them if they tried to control her decisions or interfere with her plans. (Larsen Decl. Ex. 7; Def. Dep. Ex. 24; Larsen Decl. Ex. 7; Def. Dep. Ex. 25 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 178:7-186:13); Larsen Decl. Ex. 7; Def. Dep. Ex. 27; Larsen Decl. Ex. 7; Def. Dep.

Ex. 37 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 231:22-235:11); Larsen Decl. Ex. 7; Def. Dep. Ex. 40; Id. at ¶ 180:25- 185:24.) They knew she was capable of doing that, because she had already disinherited her other daughter, Marla. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 45:15-46:14.) Plaintiff and Ms. Youngbluth, did not take steps to stop the transaction because they understood that their mother was in charge of her own affairs. More significantly, they did not want to take on the responsibility of their mother's finances because they understood that “it was ***mother's money.” (Larsen Decl. Ex. 7; Def. Dep. Ex. 40; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 100:19-101:4; 132:17-133:17, 134:5-8; 240:20-22, 248:8-249:15.)

7. 1031 exchange identification period. On July 5, 2007, Equity Advantage advised Mrs. Gibson that she must identify the exchange properties no later than August 13, 2007, and that the exchange must be completed by December 26, 2007, if it was to qualify as a 1031 exchange. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 22 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 147:15-149:20).)

On July 14, Plaintiff called Mrs. Bankofier to tell her that her mother had been found in her yard after taking a fall and she was in the hospital. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 155:11-156:11.) On or about July 24, 2007, Mrs. Bankofier informed Bowen's partner, Doug Perry, of Ms. Gibson's hospitalization. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 43; Bowen Decl. 112, Ex. 1) Doug Perry reminded Mrs. Bankofier of the deadline for Mrs. Gibson's 1031 exchange selections. Mrs. Bankofier relayed to Mrs. Gibson that she needed to identify the properties for the 1031 exchange, within 45 days of the sale, or August 13, 2007. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 22; Pl. Dep. Ex. 26; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 164:15-165:9.) As of that date, Mrs. Gibson had selected FBR's Noble Royalties oil and gas TIC property. Mrs. Gibson instructed Mrs. Bankofier to confirm her choice with FBR. (Pl. Dep. Ex. 27; Id. at 97:16-24, 164:24-165:19.)

During this same time frame, Ms. Youngbluth was educating herself about TIC properties. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 130:20-131:2.) On July 18, 2007, Ms. Youngbluth conferred with her financial advisor, Neil Nichols, Vice President of Intentional Wealth, Inc., who had “no recommendation one way or the other re TICs.” (Larsen Decl. Ex. 7; Def. Dep. Ex. 28 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 199:14-202:24), Id. at 186:18-190:9.) Nichols provided Ms. Youngbluth with a checklist of “a few things to be aware of with TICs” and advised that they “Double check the property make sure it's something you all are OK investing in[.]” (*Id.*) He also informed Ms. Youngbluth that when she and Plaintiff inherited the TICs, they would have to pay taxes on a stepped-up basis, which may be higher than the 15% tax Mrs. Gibson would otherwise pay on her capital gain. (*Id.*)

Sometime after Mrs. Gibson's fall, Plaintiff and Youngbluth spoke with her longtime primary care physician, Dr. Wells, about their concerns regarding their mother. Dr. Wells refused to provide them with any written confirmation that Mrs. Gibson's mental state prevented her from managing her own finances. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 165:15-168:11, 190:10-12.)

On August 10, 2007, Mrs. Bankofier notified Equity Advantage of Mrs. Gibson's purchase of the FBR's Noble Royalties oil and gas TIC in the amount of \$300,000. (Larsen Decl. Ex. 7; Def. Dep. Ex. 35 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 228:4-230:16).) Mrs. Gibson met with Perry and Bowen again in August to finalize the purchase of her Noble Royalties oil and gas TIC. (Pl. Exs. 27 and 43; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 95:9 12, 97:5-8, 97:16-21; Bowen Decl., Ex. 1.)

8. Ms. Gibson's daughters investigate Mrs. Bankofier but fail to take action to become successor trustees of their mother's trust. Between August 2007 and December of 2009, Ms. Youngbluth and Plaintiff continued to task Mrs. Bankofier with caring for their mother, including acting as an intermediary between them and their mother; asking about their mother's trust documentation, depositing TIC proceeds into their mother's bank accounts, helping them convince her to go voluntarily into an assisted living facility; taking her to medical and dental appointments, collecting her mail, driving her to run errands so she would not have to drive herself; and checking in on her and reporting back to Plaintiff and Ms. Youngbluth, both of whom lived out of state. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 31 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 184:9-190:3); Larsen Decl. Ex. 6; Pl. Dep. Ex. 34 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 192:5-193:20); Larsen Decl. Ex. 6; Pl. Dep. Ex. 39 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 207:9-208:25); Larsen Decl. Ex. 6; Pl. Dep. Ex. 40 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 209:10-218:24), Larsen Decl. Ex. 6; Pl. Dep. Ex. 45; Larsen Decl. Ex. 7; Def. Dep. Ex. 41 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 244:19-245:4); Larsen Decl. Ex. 6; Pl. Dep. Ex. 49 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 258:23-261:11); Def. Dep.

Ex 42 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 245:6-249:15); Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 155:3-156:16.) At the same time, Plaintiff and Ms. Youngbluth were increasingly suspicious of Mrs. Bankofier's involvement in Mrs. Gibson's life. (Def. Dep. Exs. 22, 25 and 30; Larsen Decl. Ex. 7; Def. Dep. Ex. 33 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 220:22-224:13); Larsen Decl. Ex. 7; Def. Dep. Ex. 34 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 224:15-228:2); Larsen Decl. Ex. 7; Def. Dep. Ex. 39 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 237:14-240:6); Larsen Decl. Ex. 7; Def. Dep. Ex. 40; Larsen Decl. Ex. 7; Def. Dep. Ex. 43 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 249:17-254:11); Id. at 238:15-239:21; 242:24-243:17.) Ms. Youngbluth hired a private investigator to investigate Mrs. Bankofier's background. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 154:9-155:2, 223:5-224:13, 230:18-231:20; Larsen Decl. Ex. 7; Def. Dep. Ex. 33 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 220:22-224:13); Larsen Decl. Ex. 7; Def. Dep. Ex. 36 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 230:18-231:20); Larsen Decl. Ex. 7; Def. Dep. Ex. 39.) On August 11, 2007, Ms. Youngbluth confirmed that private investigator found nothing amiss. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 154:9-17, 234:25-235:5; Def. Dep. Exs. 36 and 37.)

Meanwhile, on August 12, 2007, Ms. Youngbluth confirmed to her aunt that the hospital TIC “looked okay, and there really wasn't anything I could say.” (Larsen Decl. Ex. 7; Def. Dep. Ex. 40) She recognized and acknowledged to her aunt that “this is mom's money to do what she wishes,” “it is not ours and we can't control mom.” (Id.; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 240:14-22.) Ms. Youngbluth conceded “the trust locks the trustees out until the “actual event of guardianship” (which we are not there yet) or death.” (Larsen Decl. Ex. 7; Def. Dep. Ex. 39) The following day, Ms. Youngbluth e-mailed her second cousin, Aaron Sanstrum, President of Sanstrum & Associates, Inc., who managed about \$700,000 in assets for her mother—to advise him that “I and Nan are trustee, fyi.” However, “Nan and I cannot take charge unless we take guardianship and that is out of the question with her current progress ***.” (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 81:25-82:14, 84:13-19, 115:13-15, 250:2-16; Larsen Decl. Ex. 7; Def. Dep. Ex. 43.) She asked Sanstrum to “keep this inquiry confidential for now, “please do not mention we talked, mom would be upset.” (Id.) “Please remember to not let her know I put you on “keen eye” alert status. She is very protective of her independence and decisions.” (Id.) Sanstrum confirmed to Ms. Youngbluth that the certification of trust provided to him by Mrs. Gibson listed Mrs. Gibson as trustee and that “the only person I'm legally able to receive instructions from is your mom.” (Id.) Sandstrum told Ms. Youngbluth that she could become successor trustee by having Mrs. Gibson's physician declare her incompetent. (Id.; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 250:25-251:4, 251:16-24.) This was consistent with Mrs. Bankofier's advice to Ms. Youngbluth. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 31; Id. at 188:6- 188:17.) Neither Plaintiff nor Ms. Youngbluth took steps to do so. (Larsen Decl. Ex. 4; 5 Youngbluth Dep. Tr. 252:5-9.)

9. Ms. Gibson selects four TIC properties to affect her 1031 exchange. Through the process of reviewing the materials received from the TIC providers, Mrs. Gibson selected four TIC properties to purchase. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 83:9-84:18, 84:24-85:18.) On August 15, 2007, Mrs. Gibson purchased a \$300,000 TIC interest from Noble Royalties (aka Concord Royalties). (Larsen Decl. Ex. 6; Pl. Dep. Ex. 27; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 97:16-21, 166:14-167:5; Bowen Decl. ¶ 17.) Mrs. Gibson has received a total of \$117,000 in monthly payments from Noble Royalties since that time. (Bowen Decl. ¶19.)

On October 1, 2007, Mrs. Gibson purchased a \$100,000 TIC interest in The Oaks at Riverstone Terrace. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 33 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 190:16-192:3).) Mrs. Gibson received monthly payments from Riverstone Terrace until June 2008. (Id. at 204:25-206:8.) In December of 2010, Plaintiff, as trustee, was offered to settle with the bankruptcy receiver of the management company for The Oaks at Riverstone Terrace and accepted the offer to cash out her TIC interest. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 42 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 231:8-235:17), Larsen Decl. Ex. 6; Pl. Dep. Ex. 48 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 255:12-258:22.)

Mrs. Gibson purchased a \$250,000 TIC interest in Parkway Place. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 28 (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 176:1-178:20); Id. at 177:5-8, 177:19.)

On October 23, 2007, Mrs. Gibson purchased a \$350,000 TIC interest in the New Albany Medical Center. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 140:16-25; 177:5-8.)

IV. LEGAL ARGUMENTS

A. Plaintiff's Second Claim (Negligence) is Barred by the Statute of Limitations.

During Mrs. Gibson's tenure as trustee of the Trust, Veryl Gibson knew all the facts that led her to sell her home and property and seek replacement properties to accomplish the 1031 Exchange Real Estate Transaction she desired to avoid taxes. Mrs. Gibson was well aware that she chose TIC properties to fulfill the 1031 exchange transaction and while she was Trustee of the Trust, she chose not to bring a claim within two years of accrual. A negligence claim must be brought within two years from the date a cause of action accrues. [ORS 12.110\(1\)](#); [Richlick v. Relco Equipment, Inc.](#), 120 Or. App. 81, 83, 85, 852 P2d 240 (1993); [Duyck v. Tualatin Valley Irrigation Dist.](#), 304 Or. 151, 161, 742 P2d 1176 (1987). A claim accrues “when the party owning it has a right to sue on it.” *Id.*; see also [Davis v. Bostick](#), 282 Or. 667, 674, 580 P2d 544 (1978) (plaintiff cannot “ride out the storm and lump her grievances”); [Boardmaster Corp. v. Jackson County](#), 224 Or. App. 533, 552, 198 P3d 454 (2008) (claim accrued when plaintiff knew defendant's letter caused it harm) (discussing Duyck and Davis). If Plaintiff believed that the Trust was harmed in some way, she had to take steps to assume the role as successor trustee and bring the negligence claim within two years of the date when she (or Mrs. Gibson, the original trustee of the Trust) knew “facts that would make a reasonable person aware of a substantial possibility that each of the three elements of the claim—harm, causation, and tortious conduct—exist[ed].” [Bramel v. Brandt](#), 190 Or. App. 432, 441, 79 P3d 375 (2003).

Plaintiffs negligence claim is based on the Bankofiers alleged:

- a) Failure to exercise reasonable care and diligence in the research and evaluation of whether TICs were an appropriate and safe investment for Veryl Gibson;
- b) Failure to advise Veryl Gibson that TICs were beyond their level of expertise, education and knowledge, and to therefore seek the opinion of a qualified expert;
- c) Failure to evaluate or to instruct someone else to evaluate whether Veryl Gibson met the requisite accredited investor criteria to invest in TICs;
- d) failure to advise Gibson to diversify and Gibson's ultimate investment of 100% of the Trust Money into TICs;
- e) Failure to advise Veryl Gibson that at least one or more of the four TICs in question was then involved in litigation;
- f) Influence that caused Veryl Gibson and the Trust to invest the Trust Money into TICs; and
- g) negligent structure of the transaction involving the sale of the Property to facilitate the 1031 exchange and the TIC Investment.

(Larson Decl., Ex. 1 ¶ 41.) There can be no doubt that, in 2007, Veryl Gibson knew all the facts on which Plaintiff's claim is based.

The facts confirm that Mrs. Gibson planned to do a 1031 exchange real estate transaction from the outset because Mrs. Gibson did not want to pay taxes. Before the sale of her home and property was complete, Mrs. Gibson was investigating TIC properties as potential replacement properties for the 1031 Exchange Real Estate Transaction. (Pl. Dep. Exs. 13, 15, 16, 19, 20, 21, 25, 26 and 54; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 83:9-84:18, 84:24-85:18, 131:19-132:6, 134:11-135:14, 136:15-137:11, 159:15-161:4; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 95:10-17.) Mrs. Gibson did not want her daughters to know about the sale of the property or the TIC purchases because it was “her money and she'll do what she wants.” (Larsen Decl. Ex. 6; Pl. Dep. Ex. 17; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 122:4-23.) Pursuant to the Buyer Agreement, Mrs. Gibson directed Mrs. Bankofier to provide her with “income” properties to fulfill the 1031 exchange. (Larsen Decl. Ex. 7; Def. Dep. Ex. 12 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 128:18-19.) She also knew that Mrs. Bankofier identified TIC properties as potential

replacement properties for the Trust's 1031 exchange. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 118:15-119:5.) Mrs. Gibson knew that Mrs. Bankofier recommended that she consult with her attorney and accountant regarding the 1031 Exchange Real Estate Transaction, and she also met with financial advisors who were informed of the TIC transactions. (Def. Dep. Exs. 9, 10, 14, 15, 16, 17, 18 and 19; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 169:21-170:7, 255:22-256:4; Bowen Decl.)

Before the TICs were purchased, Ms. Youngbluth expressed to Mrs. Gibson her concern that Sharon and Duane Bankofier were not financial advisors. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 220:13-17.) Ms. Youngbluth asked her mother to consult with a financial advisor and she did. (Id.; at 102:13-16, 114:15-19; Larsen Decl. Ex. 7; Def. Dep. Ex. 40; Bowen Decl.) Mrs. Gibson also knew that her daughters, Plaintiff and Ms. Youngbluth did not believe TICs were a good choice for the Trust's 1031 exchange replacement properties. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 102:13-16.) Mrs. Gibson told Ms. Youngbluth that "everything is a risk, and so be it." (Larsen Decl. Ex. 7; Def. Dep. Ex. 40.) Ms. Youngbluth was advised that her mother had amended the Gibson Family Trust and set up a new trust. Mrs. Gibson arranged for Plaintiff and Ms. Youngbluth to meet with John Larson, her trust and estate lawyer, in mid 2007. Mrs. Gibson gave them each a copy of the Trust documents for their review. (Larsen Decl. Ex. 7; Def. Dep. Ex. 3 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 39:1-40:24.); Larsen Decl. Ex. 7; Def. Dep. Ex. 4 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 41:1-42:6, 43:1-44:12.)) The Trust documents provided Plaintiff and Ms. Youngbluth the ability to gain control over the Trust. (Def. Dep. Exs. 3 and 4.) Mrs. Bankofier also instructed them regarding how to gain control of her finances through the Trust. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 31; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 187:24-188:17.) Mrs. Youngbluth acknowledged she could gain control over their mother's trust, but they "weren't interested in gaining control" because it was not time to "jump in and take control." (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 248:8-249:15.)

While Mrs. Gibson's knowledge is the only relevant knowledge, because she was the trustee during the two year limitations period, Plaintiff and Ms. Youngbluth also knew all of the above facts before the TIC purchases had closed. In May of 2007, Plaintiff discussed Mrs. Gibson's plan to complete a 1031 exchange and her purchase of TICs as replacement properties with Mrs. Bankofier. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 7; Larsen Decl. Ex. 7; Def. Dep. Ex. 13 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 131:4-134:18.); Id. at 131:4-10, 132:17-133:2; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 88:14-18, 89:6-8.) In June of 2007, Plaintiff and Ms. Youngbluth learned of the four specific TICs that her mother planned to purchase. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 105:10-106:18, 109:1-5, 131:7-10.) Ms. Youngbluth decided not to share her concerns about the transaction directly with Mrs. Gibson or ask Mrs. Gibson to wait until she could further investigate the TICs because "It's her money ***I did not tell my mother what to do with her money." (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 100:19-101:4.) Plaintiff knew the actual purchase of the TICs—the harm alleged in the Second Amended Complaint—no later than November 11, 2007 (Larsen Decl. Ex. 7; Def. Dep. Ex. 22 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 150:8-165:14.); Def. Dep. Exs. 41 and 42.)¹ Plaintiff knew that Mrs. Bankofier was not a financial advisor and Ms. Youngbluth knew that Mrs. Gibson had the opportunity to consult with her financial advisors regarding the TIC transaction. (Larsen Decl. Ex. 7; Def. Dep. Ex. 43; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 102:13-16, 115:5-9, 250:6-16.)

On July 19, 2007, Plaintiff e-mailed Ms. Youngbluth that an "auditor [and] lawyers should be watching these investments." (Larsen Decl. Ex. 7; Def. Dep. Ex. 25.) "I think they are in all of our best interests...but we would be stupid to not check it out ***even though Mom threatened to disinherit us if we did." (Id.) Plaintiff was already "talking about hiring an attorney" as of August 12, 2007, before the first TIC was purchased. (Larsen Decl. Ex. 7; Def. Dep. Ex. 40.) Rather than hire an attorney or anyone to monitor the investments, they decided to let the TIC transactions take place and hoped and prayed that the TIC purchases would turn out for the best. (Larsen Decl. Ex. 7; Def. Dep. Ex. 30 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 207:3-210:22); Id. at 102:24-103:2, 185:25-186:10.) Ms. Youngbluth believed that, in 2007, her mother had the right to make her own decisions, even if they were bad decisions. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 254:2-11.)

Moreover, Mrs. Gibson and Plaintiff both knew that the TICs were not performing as promised soon after their purchase. In a December 19, 2007, e-mail, Plaintiff told Ms. Youngbluth that she had talked with Mrs. Gibson and "asked her if the amount is coming in that Sharon thought she said, no, it is less ***but would not say more ***." (Larsen Decl. Ex. 7; Def. Dep. Ex. 40.) One of the TICs stopped making monthly interest payments entirely in June of 2008. (Larsen Decl. Ex. 2; S. Bankofier

Dep. Tr. at 204:25-206:8.) This date reflects the latest possible point of the accrual of Plaintiff's claim. The fact that different TICs are involved, or that other TICs did not [have any issues] until a later time does not suspend the statute of limitations. [Duyck, 304 Or. at 164.](#)

The undisputed facts show that Veryl Gibson and Plaintiff knew of the alleged harm, causation, and tortious conduct that are the basis for Plaintiff's claim by at least mid to late 2007, but no later than June of 2008. Yet Plaintiff did not file this action until February 8, 2011, more than two years later. Accordingly, Plaintiff's negligence claim is barred by [ORS 12.110\(1\)](#) and the Bankofiers are entitled to summary judgment on Plaintiff's Second Claim (Negligence).

B. The Undisputed Facts Do Not Support Plaintiff's Negligence Claim.

Oregon's realtor licensee statutes and the June 7, 2007, Exclusive Buyer Service Agreement ("Buyer Agreement") between Mrs. Bankofier and Mrs. Gibson define and limit Mrs. Bankofier's duties to Mrs. Gibson. The undisputed facts show that Mrs. Bankofier fulfilled her duties to Mrs. Gibson.

1. The statutory duties in [ORS 696.810](#) are exclusive. In order to evaluate a negligence claim, the court must first analyze whether a special relationship exists due to "a status, a relationship, or a particular conduct that creates, defines or limits the defendant's duty." *Buckler v. State By and Through Oregon Corrections Div.*, 316 Or. 499, 504, 853 P2d 798 (1993) (quoting *Fazzolari v. Portland School Dist. No. 1J*, 303 Or. 1, 19, 734 P2d 1326 (1987)). Whether there is a special duty is a question of law. *SFG Income Fund, LP v. May*, 189 Or. App. 269, 278, 75 P3d 470 (2003) (citing *Conway v. Pacific Univ.*, 324 Or. 231, 239, 924 P2d 818 (1996)). Mrs. Bankofier's duties to Mrs. Gibson were controlled by [ORS 696.810](#), which defines and limits a buyer's agent's duties to his or her client. Under [ORS 696.810\(2\)](#) and (3), Mrs. Bankofier owed Mrs. Gibson the following duties as a real estate agent:

[2] (a) To deal honestly and in good faith;

(b) To present all written offers, written notices and other written communications to and from the parties in a timely manner without regard to whether the property is subject to a contract for sale or the buyer is already a party to a contract to purchase;

(c) To disclose material facts known by the buyer's agent and not apparent or readily ascertainable to a party.

[3] (a) To exercise reasonable care and diligence;

(b) To account in a timely manner for money and property received from or on behalf of the buyer;

(c) To be loyal to the buyer by not taking action that is adverse or detrimental to the buyer's interest in a transaction;

(d) To disclose in a timely manner to the buyer any conflict of interest, existing or contemplated;

(e) To advise the buyer to seek expert advice on matters related to the transaction that are beyond the agent's expertise;

(f) To maintain confidential information from or about the buyer except under subpoena or court order, even after termination of the agency relationship; and

(g) Unless agreed otherwise in writing, to make a continuous, good faith effort to find property for the buyer, except that a buyer's agent is not required to seek additional properties for the buyer while the buyer is subject to a contract for purchase or to show properties for which there is no written agreement to pay compensation to the buyer's agent.

[ORS 696.810.](#)

The legislative history of [ORS 696.810](#) makes clear that the legislature intended the statute to replace the common law and to limit a buyer's agent's duties. Before 2001, [ORS 696.855\(1\)](#) provided that [ORS 696.810](#) “shall not directly, indirectly or by implication limit or alter any preexisting common law or statutory right or remedy including actions for fraud, negligence or equitable relief.” [ORS 696.855\(1\) \(1997\)](#). In 2001, however, the legislature enacted a “comprehensive revision of Oregon's real estate licensing laws [.]” including [ORS 696.810](#) and [ORS 696.855\(1\)](#). (April 9, 2001, Bill Summary for 2001 SB 446.) Significantly, the 2001 legislature revised [ORS 696.855\(1\)](#) to take [ORS 696.810](#) off its list of statutes that do not “directly, indirectly or by implication limit or alter any preexisting common law or statutory right or remedy including actions for fraud, negligence or equitable relief.” 2001 Oregon Laws, Chapter 300, Section 49a.

The legislature may negate pre-existing common law remedies either expressly or by necessary implication. *Farrimond v. Louisiana-Pacific Corp.*, 103 Or. App. 563, 566-68, 798 P2d 697 (1990) (discussing, inter alia, *Brown v. Transcon Lines*, 284 Or. 597, 610, 588 P2d 1087 (1978)). Confirming its intention to limit the duties under [ORS 696.810](#) and make [ORS 696.810](#) exclusive, the 2001 legislature added the provision, now found in [ORS 696.810\(6\)](#), that:

Nothing in this section implies a duty to investigate matters that are outside the scope of the real estate licensee's expertise unless the licensee or the licensee's agent agrees in writing to investigate a matter.

Id. at § 46. Removing any doubt about its intention to limit a buyer's realtor's duties, in 2005, the legislature amended [ORS 696.810\(6\)](#) by adding the bolded text:

Nothing in this section implies a duty to **investigate matters that are outside the scope of the real estate licensee's expertise, including but not limited to investigation of the condition of the property, the legal status of the title or the owner's past conformance with law**, unless the licensee or the licensee's agent agrees in writing to investigate a matter.

2005 Oregon Laws, Chapter 393, Section 7 (emphasis added). The legislature expressly did so in order to clarify “that a real estate licensee does not have the duty to investigate the condition of a property, the legal status of the property's title, or the owner's conformance with law.” Bill Summary for 2005 HB 2604.

2. **Mrs. Bankofier undertook no duties beyond these in [ORS 696.810](#).** Mrs. Bankofier did not agree, “in writing” or otherwise, to investigate any matters regarding the 1031 exchange involving TIC properties, as required for her to have such a duty, under [ORS 696.810\(6\)](#). To the contrary, the Buyer's Agreement expressly provides that Mrs. Bankofier did not agree to “render specialized professional services to [Mrs. Gibson] such as detailed property inspection, land use or title analysis, tax advice, environmental risk evaluation or legal services. Buyer shall be expected to engage and pay for such professional services separately.” Accordingly, there is no basis for the specifications of negligence in subparagraphs 41(a) or 41(c) through (g) of the Second Amended Complaint, all of which fail as a matter of law under [ORS 696.810](#).

3. **Mrs. Bankofier satisfied her statutory duties.** The undisputed facts show that Mrs. Bankofier satisfied each of her duties as a buyer's agent. In the Buyer Agreement, Mrs. Bankofier agreed to “use best efforts to locate and bring to [Mrs. Gibson's] attention [income real properties].” (Larsen Decl. Ex. 7; Def. Dep. Ex. 12) TICs are “real property” and are intended to produce income, exactly as the Buyer Agreement specified. [ORS 696.010\(16\)](#) (“Real estate” includes “any and every interest or estate in real property ***whether held separately or in common with others”). Mrs. Bankofier fulfilled her obligations as a buyer's agent by identifying a number of TIC properties as potential replacement properties for the Trust's 1031 Exchange Real Estate Transaction, as Mrs. Gibson had instructed.

The undisputed facts also establish that Sharon Bankofier fulfilled her duty, under [ORS 696.810\(3\)\(e\)](#), to advise Mrs. Gibson “to seek expert advice on matters related to the transaction that are beyond [her] expertise[.]” Mrs. Bankofier advised Mrs. Gibson to retain experts regarding the key aspects of the 1031 exchange and referred Mrs. Gibson to attorneys, tax advisors,

and financial advisors to obtain such advice. (Def. Dep. Exs. 9, 10, 14, 15, 16, 17, 18 and 19; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 169:21-170:7, 255:22-256:4; Bowen Decl.)

After Mrs. Gibson told Mrs. Bankofier that she wanted to avoid paying taxes on the sale of her home and property, Mrs. Bankofier advised Mrs. Gibson to have her attorney review the sales documents. (Larsen Decl. Ex. 7; Def. Dep. Ex. 8.) Mrs. Gibson directed Mrs. Bankofier to provide her attorney, Lawrence Beck, with the purchase and sale agreement for his review. Mr. Beck had previously represented Mrs. Gibson on other matters. (Def. Dep. Exs. 8 and 9; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 116:23-117:7; 117:22-25.) Mr. Beck reviewed and approved the agreement's provisions, and noted that Mrs. Gibson intended to consult with her CPA or tax advisor regarding tax issues and “exploring alternate investments of the sale proceeds to reduce your tax burden based on the sale.” (Larsen Decl. Ex. 7; Def. Dep. Ex. 10)

Mrs. Bankofier also advised Mrs. Gibson to consult with a CPA regarding the tax implications of the contemplated 1031 exchange. Mrs. Gibson consulted with CPA Jerry Pollard of Jarrard, Seibert & Pollard. He approved the exchange as proposed. (Def. Dep. Exs. 8 and 11; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 255:17-256:4.)¶

Mrs. Bankofier also suggested that Mrs. Gibson consult a financial advisor to discuss the TIC transactions. On June 21, 2007, Mrs. Gibson met with financial advisors Greg Bowen and Douglas Perry. (Larsen Decl. Ex. 7; Def. Dep. Ex. 14; Pl. Dep. Ex. 43; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 94:1-22, 95:1-17, 145:2-18, 169:21-170:1; Bowen Decl. ¶ 5, Ex. 1.) As required by SEC Regulation D, Mrs. Gibson completed their Substantive Relationship Form, listing her financial qualifications, objectives, and risk tolerance. (Larsen Decl. Ex. 7; Def. Dep. Ex. 15; Larsen Decl. Ex. 6; Pl. Dep. Ex. 43; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 96:5-19, 145:19-146:8, 171:8-172:3; Bowen Decl. ¶ 6, Ex. 2.) The financial advisors, not Mrs. Bankofier, reviewed the information Mrs. Gibson provided to them, evaluated her financial goals and the suitability of completing her 1031 exchange with a TIC property, in light of her goals and qualifications. (Larsen Decl. Ex. 7; Def. Dep. Ex. 15; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 96:17-19, 146:3-21, Bowen Decl. and Exhibits.) Her advisors recommended that Mrs. Gibson purchase at least three different TICs in order to diversify her holdings. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 111:20-25.) Given her investment goals, they recommended that she consider an oil and gas TIC. (Bowen Decl. ¶ 10, Ex. 7.) Mrs. Gibson decided to purchase the oil and gas TIC they recommended and eventually purchased a total of four TIC properties in order to diversify the Trust holdings, as they had advised. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 28; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 111:2-25; 165:10-21, 177:5-19.) Mrs. Bankofier clearly satisfied [ORS 696.810\(3\)\(e\)](#)’s requirement to advise Mrs. Gibson to seek expert advice on matters beyond her expertise.

The undisputed facts show that Mrs. Bankofier performed her duties under the Buyer Agreement and referred Mrs. Gibson to professional experts for professional advice beyond her expertise. Accordingly, there is no basis for Plaintiffs negligence claims against Mrs. Bankofier and summary judgment should be granted in her favor.

4. Duane Bankofier did nothing to warrant plaintiff bringing a negligence claim against him. There is no evidence of conduct by Duane Bankofier that even remotely supports Plaintiffs negligence claim against him. Plaintiff alleges only that Mr. Bankofier acted as Mrs. Bankofier's and Oregon Realty's “*de facto* agent” and that Mrs. Gibson relied on his “advice and counsel” in making the TIC purchases. (Larsen Decl. Ex. 1, SAC at ¶¶ 10, 13.) The duty of care arising from such a special relationship requires facts (*Lewis-Williamson v. Grange Mutual Ins. Co.*, 179 Or. App. 491, 495, 39 P3d 947 (2002)), not unfounded allegations, and there is not one shred of evidence to support Plaintiffs allegation that Mr. Bankofier advised Mrs. Gibson to invest in TICs.

The deposition testimony from Mr. Bankofier is illuminating and leaves no question that the claims alleged against Mr. Bankofier lack a reasonable objective basis. The undisputed facts confirm that Mr. Bankofier had no contractual or professional relationship of any sort with Mrs. Gibson or the Trust. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 81:3-24.) He did not act as Mrs. Gibson's attorney, tax advisor, financial advisor, or buyer's agent. (Id.; Pt. Dep. Ex. 11 (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 121:21-128:16.) Mr. Bankofier is not and never has been a real estate agent. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 36:17-20, 37:3-4; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 7:14-25.) When Mrs. Gibson hired Mrs. Bankofier as her real

estate agent, Mr. Bankofier occasionally drove Mrs. Bankofier to appointments when her long term vision issues prevented her from driving herself. (Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 9:15-10:4, 10:11-14.) Mr. Bankofier's only contact with Mrs. Gibson prior to Mrs. Bankofier's involvement in Mrs. Gibson's real estate transaction, was writing her an occasional check for the Avon products she sold to Mrs. Bankofier. (Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 7:24- 8:17.) The sum total of his contact with Mrs. Gibson during the real estate transaction in dispute consists of the following events:

1. Mr. Bankofier, who was also interested in purchasing a TIC property as a replacement property for the sale of his duplex, drove himself, Mrs. Bankofier and Mrs. Gibson to a presentation on TIC properties, presented by AIE in January of 2007. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. at 70:7-71:4, 72:23-73:3; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 23:18-25:1.)
2. In March of 2007, Mr. Bankofier drove Mrs. Bankofier and Mrs. Gibson to attend another presentation on TIC properties, presented by Spectrus. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 70:7-9, 74:5-8, 80:5-8.)
3. He drove Mrs. Bankofier and Mrs. Gibson to Mrs. Gibson's meeting with Doug Perry and Greg Bowen of Financial Benefit Resources. He was present during the meeting because he had driven there, but said nothing during the meeting. (Id. at 94:1-96:16; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 33:25-34:12; Bowen Decl. ¶ 5)
4. On June 28, 2007, he drove Mrs. Bankofier and Mrs. Gibson to the closing for the sale of Mrs. Gibson's home (Mr. Bankofier waited in the car during the closing) and back to Mrs. Gibson's home. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 122:24-123:10; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 15:2-3.)
5. After the closing for the sale of Mrs. Gibson's home, he drove Mrs. Gibson back to her house. Mr. Bankofier, Mrs. Bankofier and Mrs. Gibson met with Mrs. Youngbluth, for approximately 10 to 30 minutes. During that time they sat at Mrs. Gibson's table, discussed the sale of Mrs. Gibson's property and looked through brochures provided to Mrs. Gibson by the TIC property issuers. (Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 14:23-15:15; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 97:16-24, 106:24-107:5, 145:21-146:1; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 123:3-17, 123:24-124:12.) Ms. Youngbluth admitted that Mr. Bankofier never held himself out to be an investment advisor and admitted she did not know if he made any decisions regarding her mother's TIC investments just because they discussed them. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 96:23-97:1, 217:13-24.) Ms. Youngbluth did not ask whether or not her mother had consulted with any accountants, lawyers or financial advisors. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 108:3-11.) During the meeting, she learned that Ms. Gibson had consulted with Greg Bowen, a financial planner. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 137:25-138:3.) After the Bankofiers had left, Mrs. Gibson showed Ms. Youngbluth the Purchase and Sale Agreement and was happy to be able to stay in her home. (Larsen Decl. Ex. 7; Def. Dep. Ex. 11; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 121:21-122:13, 127:22-128:12.)

That is the extent of Mr. Bankofier's involvement and the facts provide no objectively reasonable basis for Plaintiffs claim against him. As a matter of law, such conduct did not cause any injury to Plaintiff, both because the TIC purchases would have occurred with or without Mr. Bankofier's involvement and because his conduct was so insignificant, and non-existent, that it was not a factor at all in the purchases. *Joshi v. Providence Health Sys. of Oregon Corp.*, 342 Or. 152, 164, 149 P3d 1164 (2006); *Towe v. Sacagawea, Inc.*, 246 Or. App. 26, 40-42, 264 P3d 184 (2011) (summary judgment proper where defendant did not substantially influence plaintiff's decision).

Plaintiff alleges that Mr. Bankofier “actively participated with Sharon Bankofier and Oregon Realty in providing Veryl Gibson and the Trust with financial and investment advice.” (Larsen Decl Ex. 1, SAC at ¶ 3.) In order for one to be liable for aiding and abetting a breach of duty, one must (1) know of the breach and (2) provide “substantial assistance” or encouragement. *Granewich v. Harding*, 329 Or. 47, 55-56, 985 P2d 788 (1999) (discussing Restatement (Second) of Torts (“Restatement”) § 876). Mr. Bankofier cannot be liable for any breach of duty by Mrs. Bankofier because he did not know of one (and because there was no such breach, as discussed above). Likewise, he is not liable for the TIC providers' purported sale of TIC properties to Mrs. Gibson. He only knew of one TIC property she was considering purchasing and, as to that one, he did not know of any breach of duty by that TIC provider. Id.; *Cooper Industries, Inc. v. Lagrand Tire Chains*, 205 F.Supp.2d 1157, 1168 (D Or. 2002)

(“Mere participation in a scheme that results in a tort does not result in joint liability if the participant had no reason to suppose that a tort would be committed.”) (citing [Granewich](#), 329 Or. at 58 n.6 and Restatement § 876). Nor could his de minimus acts of providing transportation constitute the required “substantial assistance” needed to support aider/abettor liability. See [Reynolds v. Schrock](#), 341 Or. 338, 353, 142 P3d 1062 (2006) (merely acting as scrivener does not constitute substantial assistance); Restatement § 876, comment d (“The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other.”)². Mr. Bankofier is entitled to summary judgment in his favor on Plaintiff’s negligence claim.

5. The Bankofiers did not cause plaintiff’s damages. There also can be no liability where a defendant’s conduct “facilitated an unintended adverse result” of the “intervening action of ***[a] harm-producing force” that defendant’s negligence did not cause. [Oregon Steel Mills](#), 336 Or. at 345. “[E]ven though the plaintiff would not have purchased the property but for the negligent evaluation, the bank could not be held liable for the decline in the market value of the property that its misconduct did not cause.” *Id.* at 346 (citing [Movitz v. First Nat’l Bank](#), 148 F3d 760 (7th Cir 1998)). To the extent the TICs declined in value, the declines were caused by general market declines or the unforeseeable actions of others, not by Mrs. and Mr. Bankofiers’ actions as, respectively, buyer’s agent and occasional chauffeur. (Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 9:15-10:4, 10:11-14.)

C. The Undisputed Facts Do Not Support Plaintiff’s Elder Abuse Claim.

According to Plaintiff’s Complaint, the Bankofiers are alleged to have committed **elder abuse** through the following acts:

Under [ORS 124.100](#), a vulnerable person who suffers injury, damage or death by reason of physical or financial **abuse** may bring an action against any person who has caused the physical or financial **abuse** or who has permitted another person to engage in physical or financial **abuse**. [ORS 124.100\(2\)](#). [ORS 124.110](#) specifically defines the financial **abuse** subject to the statute to the following circumstances:

- (a) When a person wrongfully takes or appropriates money or property of a vulnerable person, without regard to whether the person taking or appropriating the money or property has a fiduciary relationship with the vulnerable person.
- (b) When a vulnerable person requests that another person transfer to the vulnerable person any money or property that the other person holds or controls and that belongs to or is held in express trust, constructive trust or resulting trust for the vulnerable person, and the other person, without good cause, either continues to hold the money or property or fails to take reasonable steps to make the money or property readily available to the vulnerable person when:
 - (A) The ownership or control of the money or property was acquired in whole or in part by the other person or someone acting in concert with the other person from the vulnerable person; and
 - (B) The other person acts in bad faith, or knew or should have known of the right of the vulnerable person to have the money or property transferred as requested or otherwise made available to the vulnerable person.
- (c) When a person has at any time engage in conduct constituting a violation of a restraining order regarding sweepstakes that was issued under [ORS 124.020](#).

The sparse case law on this statute confirms that, at a minimum, a financial **elder abuse** 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.” [Church v. Woods](#), 190 Or. App. 112, 117, 77 P3d 1150 (2003). In addition, the statute makes clear that a person permitting another person to engage in physical or financial **abuse** is only liable 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**. [ORS 124.100\(5\)](#).

1. The Bankofiers did not “take or appropriate” Trust Property. As a starting point, the Bankofiers are entitled to summary judgment on Plaintiffs **elder abuse** claim, first, because Plaintiff has not established through the evidence that the Bankofiers committed financial **abuse** as described above in [ORS 124.110](#). There is no evidence that the Bankofiers had control of and “took” or “appropriated” any property belonging to the Trust as would be required for the Bankofiers to be liable under [ORS 124.110\(a\)\(b\) or \(c\)](#), for causing financial **abuse** to a vulnerable person. While ORS chapter 124 does not specifically define “take” or “appropriate”, “[t]he ordinary meaning of ‘take’ is ‘to transfer into one’s own keeping or to enter into or arrange for possession, ownership, or use of *Church*, 190 Or. App. at 117 (quoting *Webster’s Third New Int’l Dictionary* 2330 (unabridged ed. 1993) (interior alterations incorporated)). Similarly, the ordinary meaning of “appropriate” is “3 a: to make peculiarly the possession of someone ***b: to claim or use as if by an exclusive or preeminent right ***6: to take without permission ***.” *Webster’s Third New Int’l Dictionary* 106 (unabridged ed. 2002).

The undisputed evidence confirms that the Bankofiers did not take or appropriate any Trust property. The Bankofiers had no control over the Trust money from the sale of Mrs. Gibson’s home and property. To the contrary, Chicago Title Company of Oregon (“Chicago Title”) received the proceeds of the sale of Mrs. Gibson’s property and then wired those proceeds totaling \$1,000,000 to Equity Advantage, Mrs. Gibson’s 1031 exchange facilitator. (Larsen Decl. Ex. 7; Def. Dep. Ex. 21; Plf. Dep. Ex. 10)

If there was any doubt that the Bankofiers had control over any of Mrs. Gibson’s Property, Ms. Youngbluth confirmed they did not, when she hired a private investigator to investigate the Bankofiers and she found no wrongdoing by the Bankofiers. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 154:9-155:2, 223:5-224:13, 231:4-20; 234:25-235:5 Def. Dep. Exs. 36 and 39.) Plaintiff has no evidence that the Bankofiers had control of their mother’s funds or took or appropriated Trust money or property owned by Mrs. Gibson, as would be required under [ORS 124.110\(a\)](#). Likewise, Plaintiff does not allege nor can they prove a claim under [ORS 124.110 \(b\) or \(c\)](#). Accordingly, Bankofiers are entitled to summary judgment in their favor on that basis.

2. The Bankofiers did not “Permit” the TIC Issuers to Commit Elder Abuse. A person may be liable for permitting **elder 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**.” [ORS 124.100\(5\)](#). This requires Plaintiff to prove that the Bankofiers knew or had reason to know about the **abuse** itself, not the risk of **abuse**. *Herring v. American Medical response Northwest, Inc.*, 2009 WL 3516385, Mult. No. Circuit Court, Case Nos. 0712-149140801-00575, 0809-13217, 0810-15317 (July 8, 2009).³ Plaintiffs evidence also does not support a claim against the Bankofiers for **elder abuse** for permitting another to engage in financial **abuse**. There is no evidence that the conduct of the TIC providers, or anybody else involved in the 1031 Exchange Real Estate Transaction resulting in Mrs. Gibson’s purchase of four TIC properties, constitutes **elder abuse**, for which the Bankofiers could be held liable as “permitters” under the statute. The undisputed facts confirm that Mrs. Gibson decided to engage in the 1031 exchange and selected four TIC properties as replacement properties to accomplish the 1031 exchange. The TIC transactions were arms’ length transactions that were negotiated by the TIC issuers—not the Bankofiers—and that were consummated at the direction of Mrs. Gibson (Larsen Decl. Ex. 7; Def. Dep. Ex. 35; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 180:25- 185:24; 228:4-230:16; 240:20-22; 253:23-254:11.) Chicago Title controlled the Trust money and Mrs. Gibson directed Chicago Title to send the Trust money to the TIC facilitators, who subsequently purchased the TICS identified by Mrs. Gibson. There are no facts to support that the Bankofiers had any control or ability to control Mrs. Gibson’s money. The Bankofiers were not financial advisors and they were not hired by Mrs. Gibson to invest the Trust money or advise her on suitable investments. (Larsen Decl. Ex. 7; Def. Dep. Ex. 12.) “Legitimate business transactions” do not constitute a basis for **elder abuse**. See *Hoffart v. Wiggins*, 226 Or. App. 545, 204 P3d 173 (2009).

In *Hoffart*, plaintiffs entrusted their investment broker with money and allowed him to invest the money on their behalf. 226 Or. App. at 547. Later, the plaintiffs requested that their money be returned and defendants failed to do so. *Id.* The trial court granted summary judgment for the defendants on the **elder abuse** claim after determining that such an arm’s length transaction—that of investing money on behalf of another—was a “legitimate transaction,” and therefore not a wrongful taking under the statute. *Id.* In other words, there was no “wrongful taking” associated with the act of investing money on another person’s behalf, even if that money was in the defendant’s possession. *Id.* The Court of Appeals did not disturb this ruling.⁴

As discussed above, a legitimate business transaction cannot be the basis for **elder abuse**. Moreover, the facts fail to show that the Bankofiers knew or had reason to know of any **elder abuse** by the TIC issuers or anyone else involved in Ms. Gibson's TIC transactions. To the contrary, the Bankofiers not only believed that TIC property purchases were legitimate business transactions, they sought to purchase TIC properties themselves, including the New Albany TIC, which was one of the TICs that Mrs. Gibson selected on behalf of her Trust. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 154:14-20; Larsen Decl. Ex. 6; Pl. Dep. Ex. 20; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 24:21-25:13, 29:1-30:13, 39:1-5; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 97:2-9.) Ms. Youngbluth recalled discussing this particular TIC option, a medical facility, and testified that it appeared to be a legitimate investment and she did not see anything suspicious when she reviewed the paperwork. (Larsen Decl. Ex. 7; Def. Dep. Ex. 40; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 241:20-242:6.) The Bankofiers had no reason to believe that Mrs. Gibson's purchase of the TICs would constitute **elder abuse**.

As discussed above in section 1, the Buyer Agreement and [ORS 696.810](#) imposed no duty on Mrs. Bankofier to investigate the TIC properties. (Larsen Decl. Ex. 6; Pl. Dep. Ex. 11.) The Bankofiers had no preexisting relationship with any of the TIC issuers, no control over them, and no inside information regarding their properties. The Bankofiers had the same information about the four TICs as Mrs. Gibson; the information that the TIC issuers provided directly to Mrs. Gibson in response to Mrs. Gibson's requests. (Pl. Dep. Exs. 13; 15, 16, 19, 20, 21, 25, 26 and 54; (Larsen Decl. 2; S. Bankofier Dep. Tr. at 84:23-85:8, 131:23-132:13, 134:11-135:14, 136:15-137:11, 159:15-161:4.) Plaintiff and Ms. Youngbluth had full access to all that information and more which enabled them to investigate these potential investments and they had the ability to take steps to stop the transactions, if they believed their mother was not acting in the best interest of the Trust. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 95:2-25, 114:11-14, Bowen Decl. ¶20, ex. 15.)

The undisputed facts establish as a matter of law that the Bankofiers did not know and had no reason to know of any **elder abuse** by the TIC issuers. Accordingly, the Bankofiers could not have "permitted" and are entitled to summary judgment in their favor.

3. There was no conduct by Duane Bankofier that constitutes Elder Abuse. It is ironic that the primary defendants in this case are two individuals who are over 65 years old. The allegations state that they have engaged in **elder abuse**, when it is clear such allegations are clearly unfounded factually. There is no evidence of any conduct by Duane Bankofier that might support Plaintiff's **elder abuse** claim against him. As discussed in greater detail above, Mr. Bankofier had no contractual or professional relationship with Mrs. Gibson or the Trust. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 81:3-24.) He did not act as Mrs. Gibson's financial advisor; Greg Bowen, Douglas Perry, and Larry Lanzrath did. (Bowen Decl.; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 169:22-170:4.) Mr. Bankofier has never held himself out as a professional advisor on investments or finances. Mr. Bankofier worked as a civil engineer with the department of U.S. Army Corps of Engineers from the day he graduated from Oregon State University, until he retired in April of 1994. (Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 36:21-37:2; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 6:24-7:10.)

Ms. Youngbluth concedes that she only met Mr. Bankofier once. She further admits that Mr. Bankofier never held himself out to be an investment advisor to her. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 96:23-97:1) He never spoke to Plaintiff. His contact with Mrs. Gibson was minimal, as well.

There are no facts that support the allegation that he was an agent of Oregon Realty or acting as Mrs. Gibson's buyer's agent, Mrs. Bankofier did. (Larsen Decl. Ex. 7; Def. Dep. Ex. 12.) Rather, Mr. Bankofier's only connection to this lawsuit is that he was Mrs. Bankofier's husband and he drove Mrs. Gibson and his wife to two third party sponsored TIC presentations (that he attended for his own purposes), a meeting with Bowan, and to the closing and back to her home. (Pt. Dep. Ex 43; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 72:23-73:20, 85:19-21; Larsen Decl. Ex. 3; D. Bankofier Dep. Tr. 15:2-3, 23:18-25:1, 33:25-34:12.)

Such de minimus activities do not come close to the type of serious intentional conduct—violence, threats, intimidation, deceit, misrepresentation, bribery, unfounded litigation, defamation, disparaging falsehood, or undue influence—that is required to

prove an **elder abuse** claim. [Church](#), 190 Or. App. at 118. In fact, the list above raises questions whether the Plaintiff and the Bankofiers should switch roles as Plaintiff and Defendants in the **elder abuse** context.

D. Plaintiff is Estopped from Second-Guessing TIC Purchases She Could Have Prevented Mrs. Gibson from Making.

The Bankofiers are entitled to summary judgment on Plaintiffs claims. Despite knowing all the facts at the time of the transactions, Plaintiff stood by and let her mother purchase the four TIC properties of which she now complains. “Where one who ***has an interest in [] property, with full knowledge of his rights, suffers another to deal with it as his own by selling or pledging it, or otherwise disposing of it, he will be estopped to assert his title or right as against a third person who has acted on the faith of, and has been misled by, his acquiescence.” *Belleville v. Davis*, 262 Or. 387, 397, 262 P2d 744 (1972). “It arises where the party ‘stands by’ and allows another to deal with his property, or to incur some liability toward him, without informing the other of his mistake.” *Id.* at 397 n.6 (quoting Prosser, Torts § 105 (4th ed)). Estoppel “prevents a person ‘from taking an inequitable advantage of a predicament in which his own conduct has placed his adversary.’” *IKON Office Solutions, Inc. v. American Office Products, Inc.*, 178 FSupp2d 1154, 1164 (D Or. 2001) (quoting Prosser, Torts § 105 (5th ed)).

It is undisputed that Plaintiff (and Ms. Youngbluth, the other residual beneficiary of the Trust) knew Mrs. Gibson sold her house and was engaging in the 1031 Exchange Real Estate Transaction involving TIC properties. Plaintiff and Ms. Youngbluth knew the TICs their mother selected, and knew of the Bankofiers' limited role. (Def. Dep. Exs. 13 and 28; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 131:4-10, 199:14-202:13; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 83:9-85:18.) Plaintiff also knew the Trust's terms, and that its provisions allowed Plaintiff and Ms. Youngbluth to become successor trustee if they felt Mrs. Gibson was unfit to continue as trustee. (Def. Dep. Exs. 3 and 4; Larsen Decl. Ex. 6; P Dep. Ex. 31; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 41:1-42:6, 43:1-44:12; Larsen Decl. Ex. 2; S. Bankofier Dep. Tr. 188:623.) Plaintiff also, at all relevant times, had a financial power of attorney for Mrs. Gibson. (Larsen Decl. Ex. 7; Def. Dep. Ex. 5.) In mid-2007 when Ms. Youngbluth met with Ms. Gibson's trust and estate attorney, she was aware that plaintiff had a financial power of attorney and that her sister could write checks and “take care of my mom if she needed it,” control her finances and manage all of their mothers affairs, including make investments and changes of investments that Mrs. Gibson had entered into. (Def. Dep. Exs. 4 and 5; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 41:1-42:6, 43:1-44:12, 53:16-64:11, 55:4-56:21, 57:12-21.) Yet Ms. Youngbluth has never even had a discussion with Plaintiff about using the financial power of attorney to manage their mother's affairs. (Larsen Decl. Ex. 7; Def. Dep. Ex. 5; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 56:22-24, 199:14-202:23.) Plaintiff and Ms. Youngbluth took no action to stop Mrs. Gibson from engaging in the 1031 Exchange Real Estate Transaction involving TIC properties. They knew Mrs. Gibson was independent and made her own decisions. (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 248:8-249:15, 133:17-134:8, 181:20 182:19.) Plaintiff and Ms. Youngbluth also knew that her longtime physician believed she was capable of making her own financial decisions. (*Id.* at 165:15-168:11, 190:10-12.) Plaintiff then waited for years, until July 22, 2010, to take the steps necessary to become successor trustee. Plaintiff and her sister stood by and did nothing to prevent Mrs. Gibson as trustee from purchasing the TICs of which they now complain despite full knowledge of the facts and the ability to prevent the purchases before they were made. The reason they did so, as stated by Jane Youngbluth, they did not think it was time to “jump in there and take control ***.” (Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 248:21-249:15.) Plaintiff should be estopped from holding the Bankofiers liable for any harm allegedly caused by the 1031 Exchange Real Estate Transaction

E. Plaintiff Violated ORS 31.350.

Under [ORS 31.350](#), a plaintiff cannot bring a professional negligence claim against a real estate professional unless: [T]he claimant's attorney certifies that the attorney has consulted a real estate licensee who is qualified, available and willing to testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the real estate licensee. The certification required by this section **must be filed with or be made part of the original complaint**, ***. The certification must contain a statement that a real estate licensee who is qualified to testify as to the standard of care applicable to the alleged facts, is available and willing to testify that:

- (a) The alleged conduct of the real estate licensee failed to meet the standard of professional care applicable to the real estate licensee in the circumstances alleged; and
- (b) The alleged conduct was a cause of the claimed damages, losses or other harm.

ORS 31.350(2) (emphasis added).

[T]he court shall enter judgment dismissing any complaint, cross-claim, counterclaim or third-party complaint against any real estate licensee who fails to comply with the requirements of this section.

ORS 31.350(4) (emphasis added).

Plaintiff did not satisfy the requirements of ORS 31.350 so the Bankofiers are entitled to summary judgment and dismissal of the complaint against them.

F. Plaintiff Failed to Comply with ORS 124.100(6).

Pursuant to ORS 124.100(6), “[A] person commencing an action under this section must serve a copy of the complaint on the Attorney General within 30 days after the action is commenced.” ORS 124.100(6). The time in which Plaintiff “shall” comply has passed. Plaintiff did not satisfy the requirements of ORS 124.100(6) within the time required by statute so the Bankofiers are entitled to summary judgment on the **elder abuse** claim.

G. Plaintiff's Claims have no Objectively Reasonable Basis

ORS 20.105(1) requires a court to award “reasonable attorney fees to a party against whom a claim, defense or ground for appeal or review is asserted, if that party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense or ground, upon a finding by the court *** that there was no objectively reasonable basis for asserting the claim.”

As discussed above, Plaintiff knew all of the facts on which her present claims are based in 2007, before Mrs. Gibson purchased the TIC properties of which Plaintiff now complains. (Def. Dep. Exs. 24, 25, 27, 28, 30, 33, 34, 36, 39, 40 and 43; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 102:13-16, 114:15-19, 130:20-131:2, 131:4-10, 132:17-133:2, 154:9-155:2, 181:13190:9, 234:25-235:5.) Plaintiff considered finding an attorney and bringing an **elder abuse** claim against the Bankofiers in August 2007. (Larsen Decl. Ex. 7; Def. Dep. Ex. 30 and 40.) Plaintiff even hired a private investigator to check on the Bankofiers but, “as I figured, she is clean” (Larsen Decl. Ex. 7; Def. Dep. Ex. 37; Larsen Decl. Ex. 7; Def. Dep. Ex. 39; Larsen Decl. Ex. 4; Youngbluth Dep. Tr. 154:6-155:2, 231:4-20.) Instead of bringing a claim against the Bankofiers in 2007—or doing anything to prevent their mother from purchasing the TICs—Plaintiff and Ms. Youngbluth did nothing. Because, based on all the facts they knew as of August 2007, Plaintiff and Ms. Youngbluth believed that the Bankofiers had Veryl Gibson's and the Trust beneficiaries' best interests in mind. (Larsen Decl. Ex. 7; Def. Dep. Ex. 25.); Ms. Youngbluth stated: “I feel 95% sure my instincts are right, that Sharon is fine and doing all of this just because she feels mom needs someone helping her.” (GIBSON006691); “I truly feel she has mom and us in her best interest.” (GIBSON006685); “my gut tells me we will be okay” (GIBSON006686); and “it is in God's hands...we tried...now we hope that it all turns out well.” (GIBSON006680); Plaintiff “wonder[ed] how this will turn out as everyone pussy foots around mom noone ever stands up to her...and I hope that we will not have to pay for it someday....I will be the first to thank Sharon if it turns out well years from now[.]” (GIBSON006697).) Plaintiff never learned anything since that time that might give her a reasonably objective basis for bringing this lawsuit.

Only two relevant things have changed since 2007: (1) Some of the TICs declined in value during the economic downturn and (2) Mrs. Gibson was declared incompetent in 2010. In 2010, Plaintiff brought these claims against the Bankofiers because

she did not like her mother's decisions as trustee, but lacked the courage in 2007, to confront her mother or do anything to stop her. Plaintiff has no objectively reasonable basis at this time to bring this action against the Bankofiers. There are no facts to support her claims against the Bankofiers. The financial and emotional strain Plaintiff has caused the Bankofiers, two individuals, over 65 years old themselves, living on a fixed income, has been substantial. Whether Plaintiffs conduct constitutes **elder abuse** against the Bankofiers is a question for another day. At this time, however, the Court should sanction Plaintiff for her unwarranted and unsupportable claims. Accordingly, the Bankofiers requests their attorney fees and costs incurred in this action, under [ORS 20.105\(1\)](#).

V. CONCLUSION

Plaintiff brought these claims against the Bankofiers because she did not like her mother's decisions as trustee, but lacked the courage to do anything to stop her. Instead, years later, after some of the TIC properties failed to perform as desired; Plaintiff brought this action without regard to the applicable statute of limitations, the statutory limits on a buyer's agent's duties, or the lack of evidence that the Bankofiers did anything wrongful under the **elder abuse** statutes. Plaintiff also failed to comply with the clear dictates of [ORS 31.350](#). Accordingly, defendants Sharon Bankofier and Duane Bankofier are entitled to summary judgment on Plaintiffs claims against them.

DATED: July 16, 2012

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Footnotes

- 1 Plaintiff does not allege that the Bankofiers caused the TIC properties to decline in value. The Bankofiers cannot be liable for their decline in value, as discussed in more detail in section B5_below. *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 336 Or 329, 345, 83 P3d 322 (2004).
- 2 Likewise, the summary judgment record is devoid of evidence that Mrs. Bankofier gave the type of "substantial assistance" that would be required to support aider/abettor liability related to any purported scheme by a scheme by a TIC provider.
- 3 A copy of The Honorable Judith H. Matarazzo's opinion in *Herring* is attached.
- 4 The Court of Appeals did overturn the trial court, however, holding that plaintiffs could maintain their **elder abuse** claim under [ORS 124.110\(1\)\(b\)](#), based on the failure to return the money in defendant's possession. But there are no facts here that implicate such a basis for Plaintiff's **elder abuse** claim.