

2014 WL 7365918 (Or.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Oregon.
Multnomah County

John MARRE, in his capacity as Personal Representative of the Estate of Jacqueline Marre, Plaintiff,

v.

ST. ANTHONY VILLAGE ASSOCIATES LIMITED PARTNERSHIP, an Oregon limited partnership,
St. Anthony Management, LLC, an Oregon limited liability company, Village Enterprises, an
Oregon nonprofit corporation, Services for All Generations Enterprises, Inc., an Oregon nonprofit
corporation, Karen Marshall, an adult resident, and Jason Schaefer, an adult resident, Defendants.

No. 1303-03185.
July 14, 2014.

Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment

Stephen C. Voorhees, OSB No. 794311, Kurt C. Peterson, OSB No. 980065, Kilmer Voorhees & Laurick, P.C.,
svoorhees@kilmerlaw.com, kpeterson @kilmerlaw.com, for defendants

ISSUES PRESENTED

Plaintiff has presented the following issues in its Motion for Partial Summary Judgment:

1. Is there a question of fact as to whether Ms. Marre was mentally incapacitated as required by [ORS 124.100, et seq.](#)?
2. Is there a question of fact as to whether Ms. Marre was **abused** as required under [ORS 124.100, et seq.](#)?
3. Is there a question of fact as to whether St. Anthony permitted the **abuse** as required by [ORS 124.100, et seq.](#)?
4. Is there a question of fact as to whether Ms. Marre was legally capable of consenting to sexual contact?

As will be shown below, there is a question of fact as to whether Ms. Marre was mentally incapable in a way that is contemplated by [ORS 124.100, et seq.](#) There is also a question of fact as to whether the sexual contact cited in plaintiff's motion is **abuse** under [ORS 124.100, et seq.](#) There is also a question of fact as to whether St. Anthony permitted **abuse**, if any. Finally, there is a question of fact as to whether Ms. Marre was capable of consenting to sexual contact. Because there is an issue of fact as to each of the elements of this claim, the court must deny plaintiff's motion.

Oral Argument Requested

Defendants Services For All Generations Enterprises, Inc., Karen Marshall, and Jason Schaefer (hereinafter, collectively "St. Anthony") respond to Plaintiff's Motion for Partial Summary judgment as follows:

STANDARD OF REVIEW

St. Anthony agrees with plaintiff's statement of the legal standard. However, St. Anthony adds that "no genuine issue as to a material fact exists, if based upon the record before the Court viewed in a manner most favorable to the adverse party, no

objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.” ORCP 47 C. Further, “[t]he adverse party may satisfy the burden of producing evidence with an affidavit or declaration under section E of this rule.” ORCP 47 C.

FACTS

St. Anthony is an assisted living facility in southeast Portland. As such, St. Anthony provides certain services to its client-residents. Those services can include assistance with housekeeping, grooming, laundry, medication, the preparation of meals, etc. St. Anthony also provides activities for residents. Ms. Marre was a resident of St. Anthony from approximately August 2009 to May 2011. Within a few months of moving in, Ms. Marre developed a relationship with another resident, Mr. Schumacher.

Ms. Marre has five children from her first husband: John Marre, Marsha Stover, Frank Marre, Rebecca Hollerbach, and Scott Marre.

All members of the Marre family knew of the relationship. Some described the relationship as affectionate. (Dec. of Peterson, Ex. 1, 24:5; Dec. of Peterson, Ex. 2, 28:15-21; Dec. of Peterson, Ex. 3, 62:1-11). In fact, Marsha was under the impression that they had something more than a friendship, something like a dating relationship. (Dec. of Peterson, Ex. 2, 27:24-28:4).

Marre family members observed the couple spending time alone in each other's room (Dec. of Peterson, Ex. 2, 29:10-18), holding hands (Dec. of Peterson, Ex. 1, 29:4-11; Dec. of Peterson, Ex. 2, 28:15-21; Dec. of Peterson, Ex. 3, 62:10-11), placing hand upon shoulder (Dec. of Peterson, Ex. 1, 24:6-15), sitting together (Dec. of Peterson, Ex. 1, 25:3-6), and placing hands on each other's thighs (Dec. of Peterson, Ex. 1, 29:4-11).

One family member took Mr. Schumacher out to dinner with Ms. Marre and her family. (Dec. of Peterson, Ex. 2, 24:24-25:11). The family also knew that Mr. Schumacher's family would occasionally take Ms. Marre off the St. Anthony campus to go to dinner and spend time together.

At some point in 2010, St. Anthony became aware that there may have been intimate contact between the couple. St. Anthony believed that, in 2010, Ms. Marre was capable of choosing to be in an intimate relationship. (Dec. of Peterson, Ex. 4, 67:11-13). St. Anthony was not troubled by the possible intimacy because the two were adults and had the right to be together. (Dec. of Peterson, Ex. 4, 62:7). St. Anthony did not inform the Marre family of the intimacy because Ms. Marre had rights that St. Anthony was obligated to respect. *Id.* Further, there was no guardianship in place for Ms. Marre which required St. Anthony to inform the guardian. (Dec. of Peterson, Ex. 4, 66:8).¹

Mr. Schumacher left the facility due to an injury from September 22, 2010, and returned January 6, 2011, approximately 3 ½ months later. (Dec. of Peterson, Ex. 4, 51:22). When he returned, St. Anthony noted that Ms. Marre's dementia had progressed in the time that Mr. Schumacher was absent. (Dec. of Peterson, Ex. 4, 51:9). Due to the decline, St. Anthony became concerned that Ms. Marre might no longer be able to consent to intimacy and therefore asked Mr. Schumacher to keep his relationship to the level of friendship. (Dec. of Peterson, Ex. 4, 51:22 -52:2). St. Anthony was concerned that it didn't have the right to prevent the relationship between Ms. Marre and Mr. Schumacher and therefore called the state ombudsman for assistance and advice. (Dec. of Peterson, Ex. 4, 66:3-14).

Rather than provide advice, the ombudsman reported the situation to Adult Protective Services as **abuse**.

ARGUMENT

1. There is a genuine issue of material fact as to whether Ms. Marre was mentally incapacitated under ORS 124.100, et seq.

Plaintiff has the burden of proving all of the elements required by ORS 124.100, et seq:

1. That Ms. Marre was a “vulnerable person” under ORS 124.100(1)(e);
2. That Ms. Marre suffered physical **abuse** pursuant to ORS 124.105(1); and
3. That St. Anthony permitted the **abuse** that plaintiff alleges pursuant to ORS 124.100(5).

The Oregon Legislature made it extremely easy for plaintiff to prove that Ms. Marre fits the description of a “vulnerable person” under ORS 124: plaintiff must simply prove that Ms. Marre was over 65 years of age at the time of the alleged incident. ORS 124.100(1)(e)(A). The fact that everyone over the age 65 is considered vulnerable under the statute should, St. Anthony hopes, alert the Court to the importance of careful consideration as to whether the plaintiff in this case has borne his burden of proving the other elements required of him.

Plaintiff also appears to claim that Ms. Marre was a vulnerable person due to incapacity pursuant to ORS 124.100(1)(e)(C). ORS 125.005(5) defines incapacitated as a “condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements of the persons physical health or safety. Meeting the essential requirements of physical health and safety means those actions necessary to provide the healthcare, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur.”

Ms. Marre was not an incapacitated person in this regard. To begin with, there is no evidence before this court that “healthcare, food, shelter, clothing, personal hygiene and other care” were not being provided to Ms. Marre. Indeed, the Marre family combined its efforts with St. Anthony to provide all of these needs.

Further, evidence that Ms. Marre could care for herself upon her move to St. Anthony. Ms. Marre lived with her daughter Rebecca Hollerbach for eleven months just prior to her move to St. Anthony. (Dec. of Peterson, Ex. 3, 16:18). Despite her dementia, Ms. Marre knew how to get herself out of bed, dress herself, come to the kitchen and make breakfast for herself. (Dec. of Peterson, Ex. 3, 32:22 - 33:4).

If the court finds that Ms. Marre was an incapacitated person in this regard, St. Anthony hopes that the low standard of what it means to be a vulnerable person under the statute heightens the Court's awareness of the need for Plaintiff to prove the other elements of ORS 124.

As above, the Oregon Legislature has made this element easy to prove. Indeed, the reason why people become residents of assisted living facilities is because they need assistance with their activities of daily living; assistance with healthcare, food, dressing, personal hygiene, etc. Under this statute, nearly every resident of St. Anthony might be an “incapacitated person.”

Regardless whether plaintiff has met its burden in this regard, plaintiff still must prove there is no issue of material fact whether Ms. Marre was physically **abused** and that St. Anthony permitted the **abuse**.

2. Is there a question of fact as to whether Ms. Marre was **abused as required under ORS 124.100, et seq?**

In order to fall under ORS 124, the **abuse** alleged must be one specified in the statute. An “action may be brought under this section *only* for physical **abuse** described in ORS 124.105” ORS 124.100(4)(emphasis supplied). ORS 124.105 specifies

a number of physical **abuses**, all of which are based upon the criminal code, ORS Chapter 163. Plaintiff's motion for partial summary judgment specifies [ORS 124.105\(l\)\(e\)](#) and [\(l\)\(h\)](#) as the two bases of **abuse** that Ms. Marre allegedly suffered.

[ORS 124.105\(1\)\(e\)](#) is rape in the first degree. That statute requires that there be sexual intercourse and requires that Marre was "incapable of consent by reason of mental defect, mental incapacitation or physical helplessness." [ORS 163.375\(1\)\(b\)](#). Plaintiff has failed to provide any evidence whatsoever that sexual intercourse occurred between Ms. Marre and Mr. Schumacher and has therefore failed to meet his burden of proof regarding physical **abuse** based upon [ORS 124.105\(1\)\(e\)](#).

Look as it might, nowhere in the record will this Court find reference to sexual intercourse. St. Anthony itself has no knowledge that the two had sexual intercourse. (Dec. of Peterson, Ex. 4, 62:20). In fact, St. Anthony argues that plaintiff has failed to provide evidence of sexual contact whatsoever; this will be addressed below. At the very least, there is an issue of fact as to whether sexual intercourse occurred.

Plaintiff also claims that there was **abuse** pursuant to [ORS 124.105\(1\)\(h\)](#). This section specifies sexual **abuse** under [ORS 163.415](#). This section requires plaintiff prove that Mr. Schumacher subjected Ms. Marre to sexual contact and that Ms. Marre was "incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless" [ORS 163.427\(1\)\(a\)\(C\)](#). Sexual contact under this statute is defined by [ORS 163.305\(6\)](#) as "any touching of the sexual, or other, intimate parts of a person or causing such person to touch the sexual or intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party."

A review of the sexual contact that plaintiff alleges occurred is warranted here. What follows is a list of the allegations contained in Plaintiff's Motion For Partial Summary Judgment:

1. A quote from Mr. Schumacher's March 10, 2010 quarterly evaluation and service plan stating that Mr. Schumacher is "known to have been sexually active with one resident."
2. In January 2011, St. Anthony asked Mr. Schumacher to not engage in an "intimate relationship" with Ms. Marre.
3. Mr. Schumacher's February 22, 2011 quarterly evaluation and service plan states that St. Anthony "explained to Howard that (Ms. Marre) was unable to appropriately give consent for sexual relations."
4. On March 10, 2011, Ms. Marre entered a room in which Mr. Schumacher was sitting, sat on his lap, and Mr. Schumacher put his hand on her thigh.²
5. On March 15, Ms. Marre again enters the same room in which Mr. Schumacher was sitting and sat on his lap. There is no allegation of Mr. Schumacher touching Ms. Marre, only that he touched himself.

Testimony of the Marre family does not help. Rebecca, John, Marsha, and Scott have no personal knowledge of sexual contact between Mr. Schumacher and Ms. Marre despite the fact that a family member visited their mother nearly every day. (Dec. of Peterson, Ex. 3. 46:25; Dec. of Peterson, Ex. 2, 51:9-12; Dec. of Peterson, Ex. 5. 54:20-23; Dec. of Peterson, Ex. 6, 35:20). No one from St. Anthony witnessed the two engaged in a sexual act. (Dec. of Peterson, Ex. 4, 62:12-21).

Sexual contact is the touching of the sexual or intimate parts of another person. [ORS 163.305\(6\)](#). The court can examine all of the evidence supplied by plaintiff in support of this motion, but it will not find evidence that Mr. Schumacher touched the sexual or intimate parts of Ms. Marre. There are indeed references to sexual activity or intimacy in Mr. Schumacher's quarterly evaluations. However, there is no evidence confirming sexual activity or describing what was meant by intimacy.

Plaintiff's argument that these entries were made because sexual contact (or even sexual intercourse) occurred is just that, argument. Plaintiff has not presented undisputable evidence that shows sexual contact occurred. As such, plaintiff has failed to

meet his burden that sexual **abuse** occurred pursuant to [ORS 124.100](#). At the very least, there is a genuine issue of material fact as it relates to what contact occurred between Mr. Schumacher and Ms. Marre and whether it was sexual under [ORS 163.305\(6\)](#).

3. Is there a question of fact as to whether St. Anthony permitted the **abuse** as required by [ORS 124.100](#), et seq?

Plaintiff's motion should also be denied because defendants did not permit "**abuse**." Subsection (2) of that statute permits claims as follows:

A vulnerable person who suffers injury, damage or death by reason of physical **abuse** 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**. (Emphasis supplied).

Under subsection (5) of the statute,

An action may be brought under this section against a person for permitting another person to engage in physical or financial **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*. (Emphasis supplied).

Persons in the position of St. Anthony may only be sued under the statute if they have "permitted" another person to engage in physical **abuse**. St. Anthony disputes that plaintiff's evidence demonstrates that Mr. Schumacher committed the crimes of rape and/or sexual **abuse** upon Ms. Marre. Certainly, plaintiff's evidence does not demonstrate that St. Anthony "permitted" Mr. Schumacher to commit **abuse** of Ms. Marre. If anything, plaintiff may have evidence that St. Anthony negligently permitted something.³ However, Oregon law provides that *negligently* failing to prevent **abuse** is not the same as "permitting" it under this statute.

In *Miller ex rel. Miller v. Tabor West Investment Co., LLC*, 223 Or.App. 700, 196 P.3d 1049 (2008), *rev. denied*, 346 Or. 184(2009), a tenant sued her landlords under the statute based on an assault which occurred on property adjacent to her apartment complex. The plaintiff in that case based her claim on the theory that "defendants 'permitted' the **abuse** of plaintiff by failing to take any action to prevent the **abuse** under circumstances in which a reasonable person should have known of the **abuse**." *Id.* 223 Or.App. at 717. The court rejected this interpretation of the statute's requirements: Defendants remonstrate that, under the relevant dictionary definition of the term "permit," defendants cannot be liable because they did not "control, direct, consent to, or authorize the assault on plaintiff." They further argue that they did not "knowingly act[] or fail[] to act" as required under the statute because they [did not witness] the attack *** as required by [ORS 124.105](#).

In construing a statute, our task is to ascertain the intention of the legislature in enacting the statute. In this case, that intent can be easily discerned by reference to the text of the statute itself. As noted, [ORS 124.100](#) authorizes, as relevant here, an action by an incapacitated person (or his or her guardian) against any person "who has permitted another person to engage in physical or financial **abuse**." [ORS 124.100\(1\), \(2\)](#). In subsection (4), the legislature then specifically defined what it meant by that phrase, to wit: "An action may be brought under this section against a person for permitting another person to engage in physical or financial **abuse** *if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical *** abuse*." (Emphasis added.) Given that clear statutory definition, we see no reason to turn to the dictionary to ascertain the statute's meaning.

The "physical **abuse**" alleged to have been permitted by defendants here is Woods' assault on plaintiff at the 7-Eleven store. Thus, defendants could be liable under the statute only if they "*knowingly act[ed] or fail[ed] to act* under circumstances in which a reasonable person should have known of *that assault*. Plaintiff's claim is premised on the latter, that is, defendants' failure to act to prevent the assault. To survive summary judgment, therefore, plaintiff had to submit evidence from which a jury could conclude that defendants failed to act to prevent an assault that a reasonable person should, under the circumstances, have

known that Woods *would commit*. The record does not support such a finding here. *Miller*, 223 Or.App. at 717-718 (citations and footnotes omitted; some emphasis supplied).

The court's opinion makes clear that it is *the specific assault or assaults* that St. Anthony must have actual or constructive knowledge *will occur*. Plaintiff's evidence is clearly inadequate here. Plaintiff could assert a negligence claim based on this factual scenario, since negligence is subject to a much lower standard - reasonable foreseeability of injury. The statutory standard is far more exacting: St. Anthony must have *knowingly* failed to act to prevent the alleged assault at a time when it had constructive knowledge that *that particular assault would occur* - not "might occur," but "would occur." The evidence submitted by Plaintiff falls far short of making out a *prima facie* showing that this statute could apply here.

4. Is there a question of fact as to whether Ms. Marre was legally capable of consenting to sexual contact?

In his motion, plaintiff recognizes that consent is a hurdle over which he must pass in order to prove his case. For there to be physical **abuse** under ORS 124.100, Plaintiff must prove that Ms. Marre was sexually **abused** under either ORS 163.375 (rape) or ORS 163.427 (sexual **abuse**). Both of these criminal statutes have an element of consent that must be addressed in order for the person to be subject to the statute. For either "**abuse**" to have occurred, plaintiff must prove that Ms. Marre was "incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless." ORS 163.375(l)(e) and ORS 163.427(l)(a)(C).

To begin with, plaintiff is wrong in claiming that "[w]hether a person is incapacitated for purposes of the statute is a legal question decided by the trial court." Plaintiff's Motion for Partial Summary Judgment, page 9. The cases plaintiff cites do not hold that incapacity under ORS 124 is a question of law for the court to decide.

For instance, plaintiff cites *Church v. Woods*, 190 Or.App. 112, 118, 77 P.3d 1150 (2003) as holding that "the trial court determines whether a victim is incapacitated." Plaintiff's Motion, page 9. The *Church* trial court did indeed decide this issue because it was a bench trial. *Id.* at 116. Look as it might, this Court will not find a holding or even a reference to the question of incapacity being one of law.

The second case that plaintiff cites is no different. *Classen v. Arete NW, LLC*, 254 Or.App. 216, 294 P.3d 520 (2012). First, the appeal arose from the trial court's granting a motion under ORCP 21 A(8). There was no holding whatsoever that incapacity is a question of law, just that plaintiff had failed to state a claim. Second, the Court of Appeals affirmed the trial court's granting of defendant's motion to dismiss not because it determined as a matter of law that plaintiff was not incapacitated, but because it found that the claim under ORS 124.100 was timed-barred. It is mysterious how plaintiff could come away with the conclusion that *Classen's* holding was "affirming the trial court's ruling that the plaintiff was not incapacitated as a matter of law." Plaintiff's Motion, page 9. In fact the appellate court did not decide the issue at all: "Assuming without deciding that plaintiff qualifies as a "vulnerable person" under ORS 124.100" *Classen*, 254 Or.App. at 223.

The last case also fails to stand for what plaintiff claims. *Herring v. American Medical Response Northwest, Inc.*, 255 Or.App. 315, 297 P.3d 9 (2013). In *Herring*, the court of appeals affirmed because the "record contains constitutionally sufficient evidence to support the jury finding" that plaintiff was a vulnerable person. *Id.* at 319. There is no holding whatsoever that the determination of incapacity is one of law for the court to decide. Plaintiff's reading of these three cases is so grossly incorrect that one has to assume plaintiff did not read them. Regardless, plaintiff misstated the standard to this Court: incapacity is a question of fact, not of law.

Plaintiff argues that Ms. Marre was incapable of consenting to a sexual act, because she was "mentally defective" pursuant to ORS 163.315(1)(b). Plaintiff also cites *Wilson v Tobiassen*, 97 Or.App. 527, 777 P.2d 1379 (1989). for the holding that "a person's incapacity to consent under ORS 163.315(1) extends to civil cases. *Id.* at 534.

If plaintiff is correct that [ORS 163.315](#) applies to this civil case, then plaintiff must also meet that burden in this civil case. Namely, plaintiff must prove that Ms. Marre was “mentally defective” under [ORS 163.315](#), making her incapable of consenting to a sexual act.

It bears pointing out at this point what “incapacity” we are talking about. Plaintiff has already alleged that Ms. Marre was mentally incapacitated under [ORS 124.100\(1\)\(e\)\(C\)](#) and [ORS 125.105\(5\)](#). The Court should not confuse that standard with the standard required under the criminal statutes: they are two completely different standards. Under the criminal statutes “[m]entally defective means a person suffers from a mental disease or defect that renders the person incapable of appraising the nature of the conduct of the person.”⁴ [ORS 163.305\(3\)](#).

The question therefore becomes this: was Ms. Marre incapable of appraising the nature of the alleged sexual contact with Mr. Schumacher? If she was capable of appraising the nature of the sexual contact, then she had the capacity to consent to the sexual activity. If she had the capacity to consent, then plaintiff cannot prove either [ORS 163.375](#) or [ORS 163.427](#). If plaintiff can't prove either one of those crimes were committed, then plaintiff cannot prove that physical **abuse** occurred under [ORS 124.100](#).

To begin with, and most importantly, St. Anthony has retained a qualified expert who is available and willing to testify to admissible opinions creating a question of fact as to Ms. Marre's capacity to consent to sexual contact. (Dec. of Peterson, para. 7; [ORCP 47 E](#)). “The adverse party may satisfy the burden of producing evidence with an affidavit or declaration under section E of this rule.” [ORCP 47 C](#). An affidavit or declaration filed pursuant to [ORCP 47 E](#) alone is sufficient to defeat a motion for summary judgment. *Brownstein, Rask, Arenz, Sweeney, Kerr & Grim v. Pearson*, 166 Or.App. 120, 124-26, 997 P.2d 300 (2000); *Metropolitan Property and Cas. V. Harper*, 168 Or.App. 358, 364, 7 P.3d 541 (2000). “The affidavit [or declaration] does not have to recite on what issues the expert will testify.” *Moore v. Kaiser Permanente*, 91 Or.App. 262, 265, 754 P.2d 615 (1988), *rev. denied*, 306 Or. 661, 763 P.2d 220 (1997). “The facts about which an unnamed expert may testify include those appearing in the summary judgment record, as well as those facts relied on by the expert that are not disclosed in the summary judgment proceeding.” *Varner v. Eves*, 164 Or.App. 66, 78, 990 P.2d 357 (1999). This alone creates a question of material fact and the Court must deny plaintiff's motion.

Beyond the opinion of an expert, the record before the court is sufficient to deny plaintiff's motion. Plaintiff has the burden to “produce affirmative evidence that, at the time of the alleged crimes, the victim had a mental defect and that mental defect had rendered her incapable of consent.” *State v Reed*, 339 Or. 239, 245, 118 P.3d 791 (2005) (en banc). In *Reed*, the court addressed precisely what it means for persons to have a mental defect that would cause the person to be unable to consent to sexual activity. The court concluded that

[ORS 163.305\(3\)](#) refers to a mental defect that prevents one from appraising the nature of one's own conduct. The ‘appraisal’ must constitute exercise of judgment and the making of choices based on an understanding of the nature of one's own conduct. Further, in circumstances such as those presented in this case, we view the standard in the context of interactions with other persons, such as offers and proposals from other persons to engage in certain kinds of conduct. *Id.*

The court went on to note that it

... is also necessary to point out that the statutory definition of mentally defective does not support the notion that a person who has a mental disability is necessarily incapable of consenting to sexual relations under any circumstances. Rather, a person who can understand when another person has initiated some kind of sexual activity with that person may be capable of appraising the nature of the conduct, and thus, may be capable of consenting to a sexual act for the purposes of the statutory provisions at issue here. *Id.*

Plaintiff has presented no evidence whatsoever that Ms. Marre did not understand the nature of the relationship she had with Mr. Schumacher. Plaintiff has presented no evidence that Ms. Marre did not exercise judgment about what she did with him, including any alleged sexual contact. Plaintiff has provided no evidence that Ms. Marre did not understand the nature of intimacy or did not understand what she was doing when she and Mr. Schumacher were together.

There is, in contrast, evidence that Ms. Marre was capable of making her own choices and exercising judgment. Rebecca testified that her mother had opinions and didn't like to be told what to do, such as when to bathe. (Dec. of Peterson, Ex. 3, 19:4-8). One of the reasons for the move to St. Anthony was that Ms. Marre needed her independence. (Dec. of Peterson, Ex. 6, 16:10-16). Ms. Marre chose to go on outings with the Schumacher family, something the Marre family knew of and approved of. (Dec. of Peterson, Ex. 3, 39:23; Dec. of Peterson, Ex. 1, 22:3; Dec. of Peterson, Ex. 5, 92:13-24).

Son Frank testified that he “certainly sought out, you know, mom's opinion or desires about her living situation [even though she was not] in a position to make the best judgments about it.” (Dec. of Peterson, Ex. 1, 38:5-9). Frank is a physician and was not involved in his mother's care because, as a doctor, he might violate his “mom's privacy and her ability to make decisions on her own behalf...” (Dec. of Peterson, Ex. 1, 34:6-10). John testified that his mother expressed that, at times, she didn't want to be with Mr. Schumacher. (Dec. of Peterson, Ex. 5, 84:13-17). Finally, the St. Anthony administrator at the time, Karen Marshall, believed that before January 2011, Ms. Marre had the capability of making the choice to be in an intimate relationship. (Dec. of Peterson, Ex. 4, 67:11). There is an issue of fact about the state of Ms. Marre's ability to make judgments and her ability to appraise the nature of any sexual conduct offered to her.

At most, plaintiff has provided evidence that Ms. Marre had difficulty performing her activities of daily living without assistance and difficulty remembering from day to day what had occurred. However, that is not the question here. The question is whether any evidence that plaintiff has presented shows that Ms. Marre could not exercise judgment and make choices based on an understanding of her own conduct.

At the very least, there is a genuine issue of material fact as to these matters, and the granting of summary judgment in this regard would be inappropriate under the evidence before the court.

CONCLUSION

For the reasons stated above, there is a genuine issue of material fact as to the claim of **abuse** of a vulnerable person and the Court must deny plaintiff's motion.

DATED this 14th day of July, 2014.

KILMER VOORHEES & LAURICK, P.C.

s/ Kurt Peterson

Stephen C. Voorhees, OSB No. 794311

svoorhees@kilmerlaw.com

Kurt C. Peterson, OSB No. 980065

kpeterson@kilmerlaw.com

Of Attorneys for Defendants

Footnotes

- 1 John Marre had the power of attorney over his mother's financial and health care decisions.
- 2 It is worth noting that this is the same behavior that son Frank Marre observed himself while together with Mr. Schumacher and his mother. Frank remembers seeing both of them having their hands on the other's thigh, something Frank described as "affectionate." (Dec. of Peterson, Ex. 1,29:4-11).
- 3 St. Anthony does not admit that it acted negligently and argues this only for the purpose of showing why plaintiff has not met his burden in proving the claim under ORS 124.
- 4 Plaintiff may also claim that Ms. Marre was "mentally incapacitated" under [ORS 163.305\(4\)](#). However, the difference between (3) and (4) is simply that rather than a consistent condition of defect, the person is temporarily rendered mentally defective, such as being drugged or rendered unconscious.

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