2011 WL 10893823 (Or.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Oregon.
Multnomah County

Dianne TERPENING, Plaintiff,
v.
AMERICAN MEDICAL RESPONSE NORTHWEST, INC., an Oregon Corporation, Defendant.
Violet ASBURY, Plaintiff,
v.
AMERICAN MEDICAL RESPONSE NORTHWEST, INC., an Oregon Corporation, Defendants.
Hazel CORNING, Plaintiff,
v.
AMERICAN MEDICAL RESPONSE NORTHWEST, INC., an Oregon Corporation, Defendants.
Michele SHAFTEL, Plaintiff,
v.
AMERICAN MEDICAL RESPONSE NORTHWEST, INC., an Oregon Corporation, Defendant.
Stacey WEBB, Plaintiff,
v.
AMERICAN MEDICAL RESPONSE NORTHWEST, INC., an Oregon Corporation, Defendants.
Natsue AKRE, Plaintiff,
v.
AMERICAN MEDICAL RESPONSE NORTHWEST, INC., an Oregon Corporation, Defendants.

Nos. 100202934, 0910-14750, 0911-16571, 0911-16570, 0912-16650, 0911-16572.
January 6, 2011.

Plaintiff's Response to Defendant's Motions for Bench Trials

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I. The Legislature Intended to Maintain Jury Trials Under ORS 124.000.

1. *The text of ORS 124.100 Supports the Right to a Jury Trial.*

The text of ORS 124.100 expressly supports a harmed individuals' right to a jury trial. The text of the statute limits the courts role to trebling any amount awarded to the plaintiff in a case under the statute. The current language of the statute is as follows:

The court shall award the following to a plaintiff who prevails in an action under this section:

(a) An amount equal to three times all economic damages, as defined in ORS 31.170, resulting from the physical or financial **abuse**, or $500, whichever is greater.

(b) An amount equal to three times all noneconomic damages, as defined by ORS 31.170, resulting from the physical or financial **abuse**.

(c) Reasonable attorney fees incurred by the plaintiff. ORS 124.100(2) (emphasis added)

The simple meaning of the text quoted above is that it is the court's responsibility is to treble any economic and non-economic damages awarded to plaintiff by a jury.

As defendant correctly points out, the text of the original statute contained the following language:

The court shall award the following to a plaintiff who prevails in an action under this section:

(a) All economic damages, as defined in ORS 18.560, resulting from the physical or fiduciary **abuse**, or $500, whichever amount is greater.

(b) All noneconomic damages, as defined by ORS 18.560, resulting from the physical or fiduciary **abuse**.

(c) Reasonable attorney fees incurred by the plaintiff. See former ORS 124.100(1) (emphasis added).

The 2003 amendments to the statute omitted the language that a court decide economic and noneconomic damages. “The court cannot insert into a statute what has been omitted.” *Schmitt v. State Tax Commission*, 1962 WL 115 (Or. Tax), 1 Or. Tax 25, 28, citing *Cook v. Hill*, 224 Or. 565, 568 (I960). [1] “In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted....” ORS 174.010.

“Whether we believe the legislature may have inadvertently omitted the phrase ... is not important. The fact remains that the proviso lacks this phrase. We are not authorized to read into it those things which we conceive the legislature may have left out unintentionally .... We must assume thelegislature meant what it said.” *Jepson v. Department of Labor and Industries*, 89 Wash.2d 394 (1977). “This court's duty, however, is to ascertain what the legislature has done, not what it should have done.” *Thornton v. Hamlin*, 41 Or.App. 363, 366 (1979).

However, given the legislative history of the 2003 amendment (Section 3, herein), it appears the legislature was already under the belief that economic and noneconomic damages were being determined by juries in vulnerable person **abuse** cases. An originator and sponsor of the 2003 amendment, Oregon attorney Virginia Mitchell informed the legislature that she had an Oregon vulnerable person case that was currently pending in which she was seeking punitive damages. She told the committee that the punitive damage award would require a jury trial. There was no doubt or discussion about whether or not a jury trial would occur with regard to a vulnerable person **abuse** claim. Rather, Ms. Mitchell sought the treble damage amendment to remove the uncertainty of whether or not the court would allow a pleading of punitive damages, and whether or not a jury would award punitive damages. The purpose was to have the undeniable club of treble damages, i.e., the certainty of an enhanced award. *[See*, Declaration of Virginia Mitchell, submitted herewith.)

Nonetheless, the technical aspects of statutory construction require a court to treat omissions as intentional changes, and this results in the conclusion that the 2003 amendments of ORS 124.100 strengthen the plaintiffs' right to a jury trial. This is so even if the legislature already believed these cases were going to jury trials before they made the above referenced omission.

As of the time of the 2003 amendment, it was not unusual for statutory causes of action to be tried before juries, even though a jury trial was not expressly provided. Courts had found a legislative intent for a jury trial when one was not expressly provided for by statute.

The fact that the statute does not expressly provide for a jury trial for plaintiff is not fatal, as AMR Northwest would suggest.

In *Goodyear v. Tualatin Tire & Auto, Inc.*, 322 Or. 406 (1995), the court held that a jury trial was allowed under the Oregon Franchise Act. The court held that the legislature's intent to parallel the "blue sky laws" gave them an indication as to their intent with respect to jury trials. *Goodyear* at 419. The statute at issue, ORS 650.020, as with ORS 124.100, did not expressly provide for a trial by jury, but specifically mentioned what damages the court could award:

(1) Any person who sells a franchise is liable as provided in subsection (3) of this section to the franchisee if the seller:

(a) Employs any device, scheme or artifice to defraud; or

(b) Makes any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

(2) It shall be an affirmative defense to any action for legal or equitable remedies brought under subsection (1) of this section if the franchisee knew of the untruth or omission.

(3) The franchisee may recover any amounts to which the franchisee would be entitled upon an action for a rescission. Except as provided in subsection (4) of this section, the court may award reasonable attorney fees to the prevailing party in an action under this section.

(4) The court may not award attorney fees to a prevailing defendant under the provisions of subsection (3) of this section if the action under this section is maintained as a class action pursuant to ORCP 32. ORS 650.020.

As the court in *Goodyear* points out, the damages sections of the "blue sky laws" and the franchise statute in question provided the same result - restitution damages - however the court held that since the blue sky laws provided for a jury trial pursuant to case law, and the legislature intended ORS 650.020 to parallel those laws, that a jury trial was required.

Further, cases have routinely gone to trial by jury in the State of Oregon under ORS 124.000. In *Hoffart v. Wiggins*, 226 Or.App. 545 (2009), a vulnerable couple brought various claims against an investment broker. The circuit court granted the defendant summary judgment. On appeal, the Court held that whether the investment broker acted in bad faith in keeping the plaintiffs' money was a question for *a. jury*. In *Landauer v. Landauer*, 221 Or.App. 19 (2008), the Court of Appeals heard plaintiffs appeal of the lower court's judgment on the *jury's verdict* for one of the defendants, (the case involved one son, as conservator and guardian for the parents, bringing claims under ORS 124 against other family members). See also, *Knudsen v. Elite Trading Group, Inc.*, 2000 WL 488481 (D.Or., 2000) where, in a case against a brokerage firm including claims under ORS 124.100, the court held that Oregon, versus another state, was the proper venue for the action because "Oregon has a much stronger interest in the case and imposition of jury duty on its citizens is more appropriate than on those in Illinois."

Let us not forget how deep AMR Northwest was into litigation before they suggested a jury trial was not available.

2. *The incorporation of definitions from the protective proceeding statutes and treble damages does not suggest the legislature intended bench trials*.

AMR Northwest first argues that the notion of a right to jury trial within ORS 124.100 is defeated by the incorporation of definitions from Chapter 125 governing protective proceedings. AMR correctly states that Chapter 125 contains provisions for the appointment and oversight of guardians and conservators to protect the interests of incapacitated persons. Had the legislature wished to require vulnerable person **abuse** claims to be brought within such judicial oversight, it would have been very easy to do so. The legislature simply would have required a guardian or conservator to pursue a vulnerable person **abuse** claim.

Instead and to the contrary, the legislature expressly allows an action to be brought by "a vulnerable person." Vulnerable person includes an **elderly** person, a financially-incapable person, an incapacitated person, and a person with a disability. ORS

124.100(3)(a) grants a vulnerable person the right to bring an action and, in the alternative, ORS 124.100(3)(b) allows a guardian or conservator for a vulnerable person to bring an action. The legislature plainly provided that an action could be brought without the need for the judicial appointments set forward in Chapter 125.

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The vulnerable person **abuse** statute also applies to an **elderly** person and a person with a disability. Both of those definitions are contained with ORS 124.100(a) and (d). There is absolutely no reason to construe a statute granting a cause of action for **abuse**, based on reference to chapter 125, when Chapter 125 definitions are irrelevant to half the categories of persons authorized to bring an action as a vulnerable person.

Finally, chapter 163 of the Criminal Code has far more definitions incorporated in the vulnerable **abuse** statute than chapter 125. If defendants' argument about incorporation by reference is correct, then a jury trial is required given the fact that each of the criminal elements incorporated in 124.105(l)(a)-(h) from chapter 163 (rape, menacing, sexual **abuse**, etc.) would give rise to a right to a jury trial.

AMR Northwest also argues that the allowance of treble damages requires that a court determine actual damages. AMR Northwest suggests that if the trier of actual damages is separated from the "entity trebling the damages," the result is unworkable, unfair, and unconstitutional, as treble damages would be imposed even if the fact finder had no intent to do so. The obvious problem with the defendants' argument is that the legislature has made the determination that there shall be a trebling of damages. The legislature has done so as a deterrence, a club to make people think before they engage in the type of behavior prohibited by this statute.

Regardless of whether a jury or a court determines the actual damages, the legislature has dictated that treble damages *shall* be awarded. ORS 124.100(2)(a) and (b). A court could not find damages and then refuse to treble them.

Treble damages are statutory and differ from punitive damages. As one court has recently noted:

An award of treble damages, although penal in nature, does not require a finding of a culpable mental state. *See Greeson v. Ace Pipe Cleaning, Inc.*, 830 S.W.2d 444, 448-49 (*Mo.App.1992*). The purpose of requiring a culpable mental state to award punitive damages is to ensure that defendants have fair notice that their conduct will subject them to a penalty as well as the severity of the penalty. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633, 635 (Mo. banc 2004). A statutory imposition of penal damages is different from jury imposed punitive damages to the extent that the statute defines the prohibited conduct and sets out the legislative prescribed penalty. *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697 (2008).

AMR Northwest's argument that treble damages show a legislative intent for a bench trial is misplaced. At the time that the legislature amended the vulnerable person **abuse** statute to allow for treble damages in 2003, there was a long and expansive history of juries determining actual damages and a court trebling the damages found by the jury. *Holman Transfer Co. v. Pacific*

Northwest Bell Telephone Co., 287 Or 387 (Or 1979) (jury award trebled by court under public utility statute); *Wampler v. Sherwood*, 281 Or 261 (Or 1978) (timber trespass statute, a jury found actual damages, court trebled damages); *Winans v. Valentine*, 152 Or 462 (Or 1936) (under statute allowing treble damages for waste to real property, jury found damages, court trebled damages); *Sweeney v. SMC Corp.*, 178 Or App 576 (Or App 2002) (lemon law, jury found damages, court trebled damages).

3. *The legislative history supports a jury trial.*

AMR Northwest argues that the 2003 amendment regarding treble damages has a legislative history requiring vulnerable person **abuse** claims to be tried by a court.

A. *The Arizona Court of Appeals Decision.*

AMR Northwest's first argument is that the *2003* amendment adding treble damages was based on a similar Arizona statute that a *2008* decision by the Arizona Court of Appeals interpreted as not providing a right to jury trial. [2]

First, the defendant in that case argued that he had a "statutory right to a jury trial ... created by language in ... the vulnerable adult statute." Arizona's statutory construction with regard to whether or not the statute allows for a jury trial is different than Oregon's. In Arizona, a court will not consider or even look at legislative history to see whether or not there is a right to a jury trial. Rather, in Arizona, claims based on a statute will only support a jury trial if the statute itself expressly provides the right to a jury. Here, it did not out of the same set of facts for which there is a jury trial right." *In re: Estate of Newman*, 219 Ariz at 272.

Contrary to AMR Northwest's assertions, the Arizona court did not apply an analysis and rule on whether or not there was a constitutional right to a jury trial on a vulnerable adult claim. However, had the court reached the issue, undoubtedly, Arizona courts would hold that there is no constitutional right to a jury trial under Arizona's vulnerable adult statute, as Arizona's constitutional protection of a jury trial is much more limited than Oregon's. Arizona's constitution preserves a right to a jury trial only in those actions that existed at common law. As the court is well aware, in Oregon a litigant has a right to a jury trial for actions that existed at common law and in cases "of like nature."

Finally, all that the Oregon legislature relied upon or referenced with regard to the Arizona statute was the concept of treble damages. Notably, AMR Northwest does not point to any document, tape, draft, or other evidence that the *text* of the Arizona statute or Arizona case law was actually known to any legislator voting on the 2003 amendment.

B. *The addition of treble damages — comments by Virginia Mitchell.*

What is known is that Virginia Mitchell, who originated and testified in favor of the bill, is an attorney who had also done a case in Arizona which allowed for treble damages. As attorney Mitchell explained, treble damages are a club to pressure the other side into settling, that is, there would be no uncertainty as to whether or not a defendant had to pay an amount far greater than the amount they stole or the amount of damage they caused. The reason why punitive damages did not work as well was because punitive damages did not have certainty. That is the plain effect of Ms. Mitchell's comments. Consider:

One of your questions may be why wouldn't punitive damages work in this type of case? Well, in fact I did put in my [Oregon] complaint a request for punitive damages. As you know here in Oregon we have to request of the judge to ask for punitive damages. But our fear as attorneys is that first of all, of course, it comes too late - it comes at the conclusion of the legal process. It requires a trial, ***it requires a jury, it requires judicial resources. See***, *http://www.leg.state.or.us/listn/* (House Judiciary Committee public hearing on HB 2449, March 25, 2003, Testimony of Virginia Mitchell, minute 16:00) (emphasis added by AMR Northwest).

The point was not to abolish a jury trial, the point was to have a penalty added to the statute that was not even within a jury's discretion.

4. *The Constitutional right to a jury trial.*

The starting point for determining whether plaintiff has a right to a jury trial in his or her civil action is to examine the nature of the plaintiffs action and then determine whether it is within "those classes of cases in which the right to a jury trial is customary at the time the Oregon Constitution was adopted or in cases of like nature." *Lakin v. Senco Products, Inc.*, 329 Or. 62, 82, 987 P2d 463, *clarified on recons*., 329 Or. 369, 987 P2d 476 (1999), ("Article I, section 17, guarantees a jury trial in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857 *and in cases of like nature.")* *See also State v. 1920 Studebaker Touring Car, et at*, 120 Or. 254, 263, 251 P. 701 (1926) ("[T]he constitutional right of trial by jury is not to be narrowly construed, and is not limited strictly to those cases in which it had existed before the adoption of the Constitution, but is to be extended to cases of like nature as they may hereafter arise.").

The defense places great weight on its claim that "the Oregon Supreme Court has held that there is no right to a jury trial in a wrongful death claim...." Defense Memorandum, pg. 13, citing *Hughes v. PeaceHealth*, 344 Or. 153-54 (2008). The defense brief goes on to claim that the plaintiff in *Hughes* asserted that her "wrongful death action is 'of like nature'to an ordinary common-law personal injury action." The defense brief quotes a section from the *Hughes* case noting that "there was no clear common-law tradition with respect to the necessary elements of a wrongful death action, or who might bring such an action, or what sorts of damages would be recoverable...." *Id.*

The defense then summarizes the case as follows:

Thus, even though wrongful death actions under ORS 30.020 seek monetary damages and involve similar evidence as common-law tort claims, they cannot be deemed "of like nature" to each other for the purposes of applying the Oregon Constitutional right-to-jury protections. Defense Memorandum, pg. 13-14.

Yet while the defense has claimed that in *Hughes*, the Supreme Court "held that there is no right to a jury trial in a wrongful death claim," the *Hughes* court said nothing of the kind. In fact, the court rather strongly suggests that the plaintiff is entitled to a jury trial as a matter of right in all wrongful death cases.

In its analysis, the *Hughes* court considers *Lakin v. Senco Products, Inc.*, 329 Or. 62 (1999), which held that the damages cap violates Article 1, section 17 in a common law negligence claim because "it interfered with a plaintiffs right to have a jury assess damages." *Lakin*, *supra*, at 154. The court then went on to distinguish *Lakin* from *Griest v. Phillips*, 322 Or. 281 (1995), in its holding that wrongful death claims were subject to the cap, "[e]ven accepting the premise that a wrongful death action is 'of like nature'to a personal injury action." *Griest*, 294. The reasoning in the *Griest* case was that Oregon courts were empowered to limit what they believed to be excessive damages at the time the constitution was adopted. This was, however, incorrect as demonstrated by *Lakin*. The *Hughes* case then went on to distinguish *Lakin* from *Griest* because "*Griest* was a wrongful death case, the parameters of which are subject to legislative adjustment from time to time." *Hughes*, 154.

The issue in *Hughes* was *not* the right to a jury trial, but the damages cap in a wrongful death case. When the plaintiff in *Hughes* suggested that the wrongful death action was "of like nature" to a common law personal injury action, and that therefore the damages cap should yield, the court disagreed, citing a string of cases holding that Article 1, section 17 neither "creates [n]or retains a substantive claim or theory of recovery in favor of any party." Continuing, "under that rule, plaintiff is entitled to *a jury's determination* of her damages, both in type and amount, only to the extent that the substantive law, i.e., the statute, pertaining to her claim so provides." *Hughes*, 155 (emphasis supplied).

The *Hughes* opinion goes on to say that when the wrongful death action was created by the legislature in 1862, "[n]o issue arose respecting trial by jury, because that has always been, as a matter of practice, the way such cases have been tried." The court

continued the thought in a footnote: "No separate question arises respecting trial by jury in this case, inasmuch as plaintiff had such a trial. Moreover, so far as we are aware, wrongful death cases always have been tried to a jury." *Id*, 156 and fn 12.

In summary, the *Hughes* court held that the right to a jury trial under Article 1, section 17 was a *separate question* from whether the statutory damages cap could be imposed on a particular statutory claim. That is our case. ORS 124.100 sets statutory damage limits, and the plaintiff does not contest those. Whether plaintiff is entitled to a jury trial under that statute and Article 1, section 17 is a separate question. And since the present claim is even closer to a common law claim than wrongful death claim at issue in *Hughes, Hughes* is rather strong authority for the right of the plaintiff in this case to prevail on her request for a jury trial.

Finally, AMR Northwest also relies upon *Salem Decorating Center, Inc. v. National Council on Compensation Insurance*, 116 Or App 166 (1993), where the court found no constitutional right to a trial by jury on a statutory audit dispute. In that case, the Court of Appeals simply held that ah audit dispute under a statutory procedure could not be characterized as a "contract dispute" entitled to a jury trial. In doing so, the Court of Appeals noted that, "there may be contract issues between the parties here that could be resolved in some other proceeding." 116 OrApp at 170. Although AMR Northwest states at page 15 of its motion that the court found "no constitutional right to a jury trial" even though "the underlying nature of the action was akin to a contract dispute," such language does not seem to appear in the decision.

B. ***A vulnerable person abuse claim is of like nature to a negligence/tort claim that existed at common law in 1857.***

Plaintiffs here have brought an action under ORS 124.100(5) which provides:

(5) 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**.

The statutory language imposing liability if a "person knowingly acts or fails to act," coupled with the "reasonable person" standard of the statute, plainly "is of like nature" to the standard of the common law negligence action.

At the time of the adoption of the Oregon Constitution, a litigant had a right to have a jury determine a negligence claim:

This is as far as the rule ought reasonably to be extended, and in cases where the negligence of the defendant is to be determined, notwithstanding there may be no conflict in the testimony, that party, in our judgment, is entitled, under the organic law of the state (Const. Or. art. 1, § 17), to the verdict of a jury, unless waived, to the effect that he has not exercised that degree of care that the law exacts under all the circumstances of the case, before he can be compelled to respond in damages.

At the time of the adoption of the Oregon Constitution, a litigant also had a right to have a jury determine damages in a personal injury case:

In actions for injuries not willfully inflicted, compensation is the fundamental principle of the law of damages. *See Oliver v. North Pacific Transportation, Co.*, 3 Or. 84, 88 (1869) (if entitled to anything, plaintiff "is entitled to such a sum of money as will fully compensate him for all loss and injury to him, caused by the negligence or wrongful act"). The purpose of awarding money for pain and suffering caused by another person is to give "the sufferer a pecuniary satisfaction." 3 W. Blackstone, *Commentaries* 1112. Blackstone also wrote that, if a civil verdict were for the plaintiff, the jurors "assess the damages also sustained by the plaintiff in consequence of the injury upon which the action is brought." *Id.* at 1339. In his treatise on damages, McCormick wrote that

> The amount of damages ... from the beginning of trial by jury, was a "fact" to be found by the jurors.

Charles T. McCormick, *Handbook on the Law of Damages*, 24 (1935). *See also Molodyh*, 304 Or. at 297-98, 744 P.2d 992 (the right to jury trial "includes having a jury determine all issues of fact, not just those issues that remain after the legislature has narrowed the claims process"); *1920 Studebaker Touring Car*, 120 Or. at 259, 251 P. 701 ("[I]t is not within the power of the legislature to enact any law which deprives any litigant of [the right of jury trial guaranteed by the Oregon Constitution].").

There can be no doubt that each one of the plaintiffs could have sued AMR under a common law cause of action for injuries they sustained when AMR allowed Lannie Haszard to continue to operate in the back of the ambulance after having received reports of sexual **abuse** by him. As this Court is well aware, Charlesetta Lucas maintained such an action. ORS 124.100 simply grants vulnerable persons some additional remedies, such as attorney fees and treble damages, when they suffer specific types of physical or financial **abuse**. Because each plaintiff could have maintained a common law cause of action, their claims are necessarily "in those classes of cases in which a right to a jury trial was customary at the time the Oregon Constitution was adopted or in cases of like nature."

There is the recent case of *Foster v. Miramontes*, 236 Or App 381 (Or App 2010), relied upon heavily by AMR Northwest. The *Foster* case involved a statutory claim for stalking pursuant to ORS 30.866. That statute created an action for civil damages based on unwanted contacts. Notably, the unwanted contact could be coming into a person's visual or physical presence, and the contact did not have to require an imminent apprehension of a touching. No such concept of unwanted contacts existed at common law.

Contrast the "unwanted contacts" that give rise to a cause of action in *Foster*, with the knowingly act of failing to act and the "reasonable person" standard that gives rise to each of the plaintiffs' claims.

The second reason why a civil action for stalking was not viewed as being of like nature to a common law action was because the unwanted contacts that formed the basis of the stalking claim could be brought by a person other than the person being stalked. The statute allows a civil action by members of the stalked person's immediate household. At common law, only the injured person could bring a cause of action for assault or battery, not members of the household.

Each of the plaintiffs in the vulnerable **abuse** cases are the persons who were actually damaged by AMR Northwest's knowingly acting or failing to act as a reasonable person in light of the danger that each plaintiff would be **abused**.

Notably, the damages that plaintiffs will recover are noneconomic damages, the exact same category of damages that would be recovered in a common law tort action.

The difference between the stalking statute in *Foster* and the vulnerable person **abuse** statute is that each one of the plaintiffs could have brought an action in common law for what happened to them. The vulnerable person **abuse** statute merely enhances damages for a refined set of plaintiffs who suffer damages from refined types of conduct (certain physical or financial **abuse**). Unlike *Foster*, each one of the current plaintiffs could have maintained an action for assault or battery against Mr. Haszard, or likewise for assault or battery against AMR for negligence in overseeing Mr. Haszard. The differences are the treble damages and the attorney fees that the vulnerable person **abuse** statute allows.

The question is not whether the concept of protected classes existed at common law, **elderly** persons or vulnerable persons, the question is whether or not such persons could recover under common law. [3]

Finally, the fact that the legislature provided that the remedy granted by the vulnerable person **abuse** statute was in addition to any other remedy, civil or criminal, does not assist in applying the test of whether or not something is of like nature to the common law. [4]

Plaintiffs have a right to a jury trial given the wording of the statute and the history and context of the 2003 amendment. Alternatively, plaintiffs have a constitutional right to a jury trial under Article 1, section 17 and/or Article VII amended, section 3.

Dated: January 4, 2011.

<<signature>>

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Footnotes

1 See, also, "Any material change in the language of a statute usually indicates a change in its legal effect." *Swearingen v. Haas Automation, Inc.*, 2010 WL 1495204, (S.D. Cal.)(2010) (quoting *Davis v. Harris*, 61 *Cal.App.4th* 507, 511, 71 Cal.Rptr.2d 591 (1998). "[T]he mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one." *Swearingen v. Haas Automation, Inc.*, quoting *Froid v. Fox*, 132 Cal.App.3d 832, 837, 183 Cal.Rptr. 461 (1982). "This presumption applies where the legislature deletes an express provision of a statute." *Swearingen v. Haas Automation, Inc.*, quoting *City of Irvine v. Southern California Ass'n of Gov'ts*, 175 *Cal.App.4th* 506, 522, 96 Cal.Rptr.3d 78 (2009).

2 *In re: Newman* involved a vulnerable person **abuse** claim for forfeiture of benefits due under a will. Notably, Arizona's vulnerable adult statute provided and provides: "The court or jury may order the payment of punitive damages under common law principles that are generally applicable to the award of punitive damages in other civil actions." Arizona's Court of Appeals interpreted the above language as "merely acknowledging the principle we have already explained — that some claims for which there is no independent entitlement to a jury may be heard by a jury because they are consolidated with a claim arising *In re: Estate of Newman*, 219 Ariz 260 (2008) was decided five years after the treble damage amendment and can have no bearing on legislative history from 2003.

3 The fact that a different statute of limitations period is allowed has nothing to do with whether or not the claims are of a like nature to common law. Common law claims, themselves, are subject to statutes of limitations.

4 To do so would suggest the legislature has the wherewithal or ability to make such a finding, and to do so would also give meaning to a rather common statutory provision. One would certainly expect such language to accompany almost all remedial statutes. The legislature wishes to be providing greater protection when enacting a remedial statute, legislators are no doubt mindful that they might accidentally take away rights of aggrieved persons.

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