IN THE COURT OF APPEALS OF THE
STATE OF OREGON

William HUNSINGER,
Personal Representative of
the Estate of Virginia Goodrich, Deceased,
and as sole beneficiary of her Estate,
Plaintiff-Appellant,

v.

Lisa R. GRAHAM
and Jacqueline Whitten,
Defendants,

and

Michael AUTIO,
Defendant-Respondent.

Clatsop County Circuit Court
132149; A156568

Philip L. Nelson, Judge.

Argued and submitted March 1, 2016.

Christine N. Moore argued the cause for appellant. With her on the briefs were Thane W. Tienson, P.C., and Landye Bennett Blumstein LLP.

Michael T. Stone argued the cause and filed the briefs for respondent.

Before DeVore, Presiding Judge, and Lagesen, Judge, and Powers, Judge.*

DeVORE, P. J.

Affirmed.

Lagesen, J., concurring in part, dissenting in part.

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* Lagesen, J., *vice* Flynn, J. pro tempore; Powers, J., *vice* Duncan, J. pro tempore.

DeVORE, P. J.

Plaintiff appeals from a limited judgment after the trial court entered an order on summary judgment to dismiss his claims against an attorney for elder abuse and breach of a fiduciary duty. Plaintiff is the son and personal representative of the elderly person, Goodrich, now deceased. Defendant Autio is the attorney who provided a power-of-attorney form, a promissory note, and a deed for the conveyance of Goodrich's property to Graham, who is plaintiff's daughter and Goodrich's granddaughter.

The trial court dismissed the elder abuse claim because plaintiff failed to offer evidence from which a fact-finder could find that Autio knowingly acted or failed to act under circumstances in which a reasonable person knew or should have known of financial abuse of the sort alleged. ORS 124.100(5). The court dismissed the claim of breach of fiduciary duty because plaintiff failed to commence the action within the two-year period limited by statute, ORS 12.110(1). Plaintiff assigns error to both rulings. Autio cross-assigns error, contending that the trial court erred in ruling that plaintiff's elder abuse claim was not barred by a seven-year statute of limitations, ORS 124.130, or by a one-year tolling statute, ORS 12.190(1). We do not need to reach Autio's cross-assignments, because we reject plaintiff's assignments of error. We affirm.

FACTS

We take the facts from the summary judgment record, viewing the facts and all reasonable inferences that may be drawn from them in the light most favorable to plaintiff as the nonmoving party. *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 336 Or 329, 332, 83 P3d 322 (2004); *see also* ORCP 47 C (record viewed most favorable to the adverse party). The initial facts are uncontested.

Goodrich assumed care for her granddaughter, Graham, after plaintiff and Graham's mother separated and were unable to care for Graham. Goodrich raised Graham in her years from elementary school through college. Plaintiff had three sons with his second wife. In 1988, Goodrich gifted a 21-acre property, known as "the Olney Property," to

Graham. No dispute is raised regarding Goodrich's intent to give Graham the property then. In 1996, however, Goodrich was faced with a timber trespass claim, and she employed attorney Autio to prepare a deed to return the property to Goodrich.

Over twenty years before, Goodrich had executed a will that, upon the death of her husband, made plaintiff, her only child, the beneficiary of her estate. In 1996, Autio was an associate in the firm that had prepared the will. He left the firm for business work and engaged in a part-time law practice.

In August, and again in November 2005, Goodrich fell and fractured her hip. When released from the hospital, she resided at a convalescent center for a number of months. Without remembering the dates, plaintiff recalled his mother "seeing people on the walls." On October 31, 2005, a staff member noted that the family reported that Goodrich had hallucinations of parties outside her door and that the family asked for a review of medications and a reduction in Vicodin.

About two months later, on December 28, 2005, Autio met with Goodrich and Graham at the convalescent center to learn what Goodrich wished to do. Autio's sister was a friend of Graham; but, neither Graham nor Autio remember who asked for the appointment. Autio says that it was not unusual for him to meet with clients at the convalescent center. Autio understood that Goodrich was 82 years old and was at the convalescent center because she had had hip surgery and pneumonia. He did not know the state of her health, nor inquire of her doctors, but, if she suffered from complications, they were not apparent to him. In a deposition, Autio recounted:

> "A. When I spoke with Mrs. Goodrich and she told me why I was there, what she wanted me to do, it made sense to me why [Graham] was there.
>
> "Q. Okay. And what is it that Mrs. Goodrich told you she wanted you to do?
>
> "A. I was told by [Mrs.] Goodrich that she wanted to put that property back in [Graham's] name.

"Q. That property, the Jewell property? The Olney property?

"A. Right."

As was his standard practice, Autio asked Graham to leave the room so he could discuss privately with Goodrich what she wanted to do. With other clients, Autio had engaged an expert to provide a competency evaluation, but he did not feel that was necessary with Goodrich. He asked questions about her property, family, and what would happen to her property on her death, in order to indicate to him whether she was thinking clearly.

Goodrich and Autio "discussed her intent to put this property back in [Graham's] name." Autio recalled that Goodrich was aware that plaintiff, her son, wanted the property, and she did not want plaintiff to know about the transfer. She wanted to give the property to Graham and did not want any money for the property. Autio was concerned that the transaction needed to be done in a way to preserve her prospect for Medicaid eligibility. There was also some discussion that, because Goodrich was not at home so was unable to pay bills, she would provide Graham with power of attorney. Autio carried a laptop computer and made contemporaneous notes referring to the 21-acre property, indicating Goodrich "wants" Graham "to have it," positing a "transfer or sale of property" to Graham, and an issue of Medicaid eligibility.

The next day, December 29, 2005, Goodrich felt a "pop" and felt severe pain in her knee. She was treated in a hospital emergency room and released with a prescription for Oxycodone and a warning about side effects that included impaired mental alertness.

Graham told plaintiff about the plan to arrange a power of attorney and a meeting at the convalescent center on December 30, 2005. Plaintiff agreed with the plan for a power of attorney because he was frequently out of town. When plaintiff arrived at the convalescent center that day, he found Goodrich tired, worn out, not paying attention, and medicated for pain. Plaintiff had no objection to

Graham receiving the power of attorney.[1] After plaintiff left, Goodrich signed the power of attorney form.

At the December 30 meeting, nothing was mentioned about the Olney property in plaintiff's presence, according to Autio, because Goodrich did not want it discussed in plaintiff's presence. In plaintiff's absence, discussion then followed about what to do with the property. Autio advised that the transaction should be set up as a sale with a trust deed and a promissory note that would be forgiven if Goodrich died before a certain date. Graham recalled that Autio had advised to structure the transfer "on paper" as if it were a sale in order to avoid the appearance of a gift that could hinder Goodrich in receiving Medicaid if that ever became necessary for her care. Autio recalled that Goodrich agreed it was a good idea to try to arrange her affairs to qualify for Medicaid.[2]

Although disputed by Autio, Graham later testified that, at the December 30 meeting, she told Goodrich and Autio that she did not have the money to make the payments on the property.[3] According to Graham, Goodrich said that she could give Graham the money, and Autio advised that there was a certain amount of money that Goodrich could give family members to pay for the property. On that same date, Graham wrote a check drawn on Goodrich's account for $20,000. That sum represented $10,000 to herself and $10,000 to her daughter, Whitten.

On January 4, 2006, Autio responded to Graham with an email message that indicated that he was preparing a deed, trust deed, and promissory note. He contemplated a price of $90,000, just above the assessed value, an interest

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[1] Plaintiff did object to an advance directive form that would have made Graham, rather than plaintiff, the decision-maker on health care. That idea was abandoned.

[2] In a declaration, plaintiff stated that Goodrich was philosophically opposed to getting welfare, there was no need for Medicaid, he would have cared for her, if she could not live independently, and he would have opposed Autio's recommendation, if he had heard it.

[3] Autio denies knowing whether Graham had money. Construing the evidence in the light most favorable to plaintiff as the nonmoving party, we credit Graham's account of a conversation about money for such purpose, as does plaintiff.

rate of 6.675 percent, monthly payments of $500, and a debt to be forgiven if Goodrich died within 10 years. He added that "if you are going to do this, you need to get a title insurance policy, to protect you in case your dad does try to sue or something later." Although Autio did not believe that title insurance would cover plaintiff's unhappiness over not getting the property, he was concerned about leases, liens, and whether the Olney property and plaintiff's property, which were adjacent, could be interrelated.

On January 24, 2006, Goodrich signed a bargain and sale deed to convey the Olney property to her granddaughter Graham and great-granddaughter Whitten, and they signed a deed of trust and promissory note payable to Goodrich. When plaintiff was later asked if he had any information about Goodrich's mental capacity on that date, plaintiff replied, "None."

In March 2006, Goodrich left the convalescent center, spent a month living with plaintiff, and then returned to her home. After her return, plaintiff recalled discussing with Goodrich plans for managing the property. He understood he would inherit the property, and he suggested that Graham and his son Otis Hunsinger would be more or less in charge. Otis recalled that, between 2004 and 2006, Goodrich had told him that the Olney property would "belong to all of you kids someday." Again, he recalled that, in 2008 or 2009, Goodrich had said that the property would go to the grandchildren after she and plaintiff died. In July 2009, Goodrich received a call from a legal assistant at the firm that had prepared her will, and she told the caller that the will was still valid.

About four years after leaving the convalescent center, on March 18, 2010, Goodrich died. A few days later, Graham told plaintiff about the property transfer. On June 8, 2010, Graham testified in a probate hearing about the property transfer and the $20,000 sum from Goodrich which Graham used to make "payments" on the property. In 2012, an accountant who was retained by plaintiff, acting as the personal representative, reported on the Goodrich, Graham, and Whitten bank accounts. He reported that, because Graham owed the debt represented

by the promissory note, there was "no benefit" to the estate from Graham's removal of the $20,000 sum. He calculated that Graham and Whitten had paid Goodrich $26,500. He added that Graham had taken $12,578 on Goodrich's long-term care insurance policy.

PROCEEDINGS

On March 7, 2013, plaintiff filed this action against Autio, Graham, and Whitten with claims that included elder abuse and breach of fiduciary duty. In common allegations, plaintiff alleged that "Graham prevailed upon the decedent [Goodrich] to retain defendant Autio *** [to] execute a Power of Attorney *** and to facilitate transfer of real property owned by the decedent to defendants Graham and Whitten." Plaintiff alleged that, for Medicaid reasons, Autio had recommended structuring the transaction as a purported "sale" and "the decedent, while incapacitated and in a vulnerable state, agreed to the above terms." Plaintiff alleged that when Graham and Whitten represented that they could not afford the payments, they "successfully prevailed upon Mrs. Goodrich to further agree to make a gift to defendant Graham of the sum of $20,000 to allow her to have sufficient funds to make the monthly $500 payment to Mrs. Goodrich for several years."

The claim for elder abuse was unfocused insofar as the claim was not alleged in the terms of ORS 124.100(5), as we will discuss, by which a third party who takes no money or property may become liable for permitting another person to engage in financial abuse of a vulnerable person. Instead, plaintiff alleged *joint* liability, with little distinction between Graham and Autio, for "acting in concert under a common plan or design," accusing both persons—among other things—of converting $20,000 and $12,578 to their own use, exercising undue influence over the decedent to transfer the Olney property, and "aiding and abetting" the transfer for no consideration.

The claim for breach of fiduciary duty did distinguish between Autio and Graham. Premised on Autio's role as attorney, plaintiff alleged breaches involving Autio's advice, document preparation, competency, and ethics.

Premised on Graham's role as cosigner on Goodrich's bank accounts and as the agent with the power of attorney, plaintiff alleged breaches—among other things—in Graham's conduct involving her influence over her grandmother, taking the Olney property, and taking money from Goodrich's accounts. As to both claims against Autio, plaintiff sought to recover economic damages of $32,578, comprised of the $20,000 gift with which to make payments and $12,578 from the long-term care insurance policy proceeds.[4] Plaintiff later advised the trial court that plaintiff was not seeking damages from Autio as a consequence of the transfer of the Olney property.

Autio, Graham, and Whitten filed motions for summary judgment, and plaintiff opposed them. Plaintiff proffered a declaration of counsel pursuant to ORCP 47, indicating that plaintiff had retained an expert who would opine on both claims against Autio and Graham.[5] The trial court granted Autio's motion for reasons explained in two letter rulings. Because their reasoning is at issue on appeal, we describe the rulings in selected detail.

In its first letter opinion, the court explained, as to the elder abuse claim, that a "taking" was an element of elder abuse, but, "[o]ther than a fee for preparing documents, [a] plaintiff has provided no evidence that Autio took any property from *** Goodrich."[6] The court continued:

> "Also, I have looked through all the filings in this case multiple times and see nothing to indicate Autio had any knowledge that *** Goodrich suffered from the infirmities plaintiff claims. While it appears the legislature has made the vulnerable person financial abuse statutes broad, ORS 124.100(5) still requires some showing of knowledge to show the financial abuse is taking place. I do not see any evidence that would create any type of fact question."

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[4] As to elder abuse, plaintiff sought treble damages pursuant to ORS 124.100(2)(a).

[5] Plaintiff's counsel declared that plaintiff had retained an expert who would testify that the exception from liability for elder abuse, found in ORS 124.110(2) (transfers to qualify for Medicaid), does not apply under the circumstances of this case.

[6] Autio billed $600 for four hours work.

The court acknowledged plaintiff's allegations that Autio was negligent but concluded that there was "no authority that legal negligence equates to vulnerable person abuse." About a month later, the court revisited the issues and wrote a second letter opinion. Referring to the standard for a third-party's liability (here in italics), the court explained:

> "I wanted to go through all of plaintiff's filings one last time over the weekend to make sure I was making the right decision on the Autio financial abuse claim. In particular, I was concerned about ORS 124.100(5) and *whether there was any evidence to draw an inference whether Autio could be found to have knowingly acted or failed to act under circumstances in which a reasonable person knew or should have known of financial abuse*. Even after I went through all of plaintiff's filings and considered the provisions of the vulnerable person abuse statutes, I did not and still do not see a factual or legal basis to make defendant Autio liable. I did not ignore or overlook plaintiff's allegations regarding the $20,000 'gift' or the fact that defendant Graham indicated that suggestion came from defendant Autio.
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> "* * * What plaintiff has presented in this case is the attorney met Mrs. Goodrich at the care facility, prepared paperwork to carry out her wishes and consulted with the granddaughter on different ways to accomplish that task. The fact that defendant Graham may have used the power of attorney to do something wrong after the fact, a power of attorney plaintiff was aware being prepared, does not make the lawyer who prepared it guilty of elder financial abuse. After going through plaintiff's filings yet another time, I still fail to see any evidence, or any inferences, where defendant Autio knowingly acted to assist defendant Graham in committing financial abuse. I do not think there is a lot to show defendant Graham committed financial abuse but as previously indicated, I can see enough for plaintiff to get past a summary judgment motion."

(Emphasis added.) As to Autio, the court noted that, although an expert might present a question of fact as to a statutory defense involving Medicaid benefits, that dispute was not material because legal negligence does not create liability for elder abuse.

As for the claim involving breach of fiduciary duty, the court concluded that, because Graham testified in the

probate hearing on June 8, 2010 about the property's conveyance, the $20,000 issue, and related events, plaintiff reasonably should have discovered the claim, but plaintiff had failed to commence the claim within two years as required by ORS 12.110(1).

On related matters, the court granted motions of Graham and Whitten against some claims but denied their motion to dismiss the elder abuse claim and other claims. The court entered a limited judgment dismissing the action against Autio. Later, the court dismissed the claims against Graham and Whitten on stipulation of the parties.

On appeal, plaintiff assigns error to dismissal of the elder abuse claim against Autio. He argues that the trial court used the wrong standard of liability for a third-party who permits elder abuse and that, by the right standard, plaintiff presented a question of fact.

THIRD-PARTY LIABILITY FOR ELDER ABUSE

A third-party's liability for permitting financial abuse of a vulnerable person is described in Oregon statute. In relevant part, ORS 124.100(2) provides:

> "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."

A "vulnerable person" includes an incapacitated person or an elderly person (*i.e.*, 65 years of age or older). ORS 124.100 (1)(g). To establish third-party liability, ORS 124.100(5) requires proof of two "mental states":

> "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."

(Emphases added.) The paradox in those terms was recognized and resolved in *Wyers v. American Medical Response Northwest, Inc.*, 360 Or 211, 377 P3d 570 (2016). The Supreme Court recognized that "[t]he statute sets out two different

mental states—one that appears to refer to actual knowledge and the other that refers to constructive knowledge." *Id.* at 220-21.

As to the first mental state, the court determined that "the adverb 'knowingly' modifies *conduct*, namely, acting or failing to act." *Id.* at 221 (emphasis in original). It does not mean "accidental, reckless, or something else." *Id.* "Knowingly" means "what a defendant must know is the character or nature of the defendant's act or failure to act," but the statute does not require that a defendant must have "actual knowledge" of "the effect of that act or failure to act." *Id.* at 222-23. The second "mental state" is a matter of "constructive knowledge." *Id.* at 223. It "applies under circumstances in which a reasonable person should have known of another's abuse, regardless of whether the defendant actually knew of the abuse." *Id.* The statute requires that the "'circumstances' themselves are known or available to the reasonable person." *Id.* The statute "refers to constructive awareness of a particular *fact*—another person's physical or financial abuse[.]" *Id.* (emphasis in original). The statute's reference to constructive knowledge of "the" abuse refers "to the *type* of abuse that the defendant has permitted another to commit," not necessarily the very same incident of abuse. *Id.* at 224, 229 (emphasis in original). Putting those terms back together, the court stated:

> "To summarize: ORS 124.100(5) refers to two different mental states, one referring to actual knowledge and the other to constructive knowledge. The former refers to a defendant's act or failure to act. The latter refers to the circumstances in which that act or failure to act occurs. The statute thus provides that there must be evidence that a defendant knowingly acted or failed to act under circumstances in which a reasonable person should have known that the same sort of abuse of a vulnerable person that occurred would, in fact, occur."

Id. at 230. That explanation of the standard for third-party liability informs our review of plaintiff's first assignment of error.

Plaintiff assigns error to the dismissal of the elder abuse claim against Autio, arguing that the trial court

employed the wrong standard and that, by the right standard, which plaintiff contends is "akin to reckless conduct," plaintiff had presented a genuine issue of material fact that should have precluded summary judgment. Unpacking those arguments, we take them in turn.

First, we are not persuaded that the trial court erred in the standard employed. Plaintiff complains that the court "mandated that plaintiff show Autio 'knowingly acted to assist defendant Graham in committing financial abuse.'" That the trial court included such a statement is unsurprising when plaintiff's elder abuse claim alleged that Autio had acted "in concert under a common plan or design" and that he acted "[b]y aiding and abetting defendants Graham and Whitten in obtaining title to the Olney Property for no consideration."[7] With such allegations, plaintiff seemed to have undertaken the burden to prove Autio's knowledge and intent that abuse result. *See* *Granewich v. Harding*, 329 Or 47, 54, 985 P2d 788 (1999) (claim against attorneys for joint liability for acting in concert with, or providing assistance for, another's known tort). At worst, the court only spoke in terms of what plaintiff undertook to prove. At the time of the trial court's decision, neither this court, nor the Supreme Court, had yet addressed the two mental states described in ORS 124.100(5). *See* *Wyers v. American Medical Response Northwest, Inc.*, 268 Or App 232, 342 P3d 129 (2014) (after trial court's rulings in February and March 2014); *Wyers*, 360 Or 211 (2016) (same). Also, the trial court's shorthand, making reference to one mental state in one sentence, only reflects the conversational nature of two lengthy letter opinions.

In the same letter opinion, the court correctly stated the standard for third-party liability, and the court underscored its effort to get it right. Revisiting the record, the court explained:

> "I wanted to go through all of plaintiff's filings one last time over the weekend to make sure I was making the right decision on the Autio financial abuse claim. In particular,

[7] Plaintiff has not persisted with a joint liability theory based on a common plan or civil conspiracy; rather, plaintiff has pursued third-party liability under ORS 124.100(5).

> I was concerned about ORS 124.100(5) and whether there was any evidence to draw an inference *whether Autio could be found to have knowingly acted or failed to act under circumstances in which a reasonable person knew or should have known of financial abuse.* Even after I went through all of plaintiff's filings and considered the provisions of the vulnerable person abuse statutes, I did not and still do not see a factual or legal basis to make defendant Autio liable."

(Emphasis added.) Given the court's express recital that correctly reflected the requirements for statutory liability, we are not persuaded that the court employed the wrong standard.

Even had it done so, our task would be the same on appeal, as the case was presented. Because the statute was the same then and now, the statute and facts were fully briefed, and summary judgment presents a question of law, the trial court's task then and our task now is the same: to determine whether no genuine issue of material fact prevented judgment as a matter of law for defendant Autio. *See* ORCP 47 C (summary judgment as a matter of law); *see, e.g.*, *Western Prop. Holdings v. Aequitas Capital Management*, 284 Or App 316, 318, 392 P3d 770 (2017) (task on appeal on review of an order on summary judgment the application of the ORCP 47 standard). Thus, the trial court's articulation of the standard does not dictate that we find reversible error. Rather, applying the statutory standard, we evaluate the propriety of summary judgment as a matter of law.

Second, we are not persuaded that the standard of liability, as plaintiff sees it, is the right standard. Referring to ORS 124.100(5), plaintiff argues that a defendant is liable if the defendant knowingly acts or fails to act when the defendant was aware of a "substantial risk" that another person would commit the abuse that plaintiff suffered. Going further, plaintiff argues that the "knowledge requirement" is "more akin to the standard for reckless conduct." That argument is constructed from some of the terms of *this* court's opinion in *Wyers*. *See, e.g.*, *Wyers*, 268 Or App at 250, 253. Our opinion, however, was not the last word. Plaintiff's conflated construct does not reflect the two-part standard articulated by the Supreme Court in *Wyers* on review. To be fair, we note that the Supreme Court had not issued

its opinion in *Wyers* at the time of plaintiff's brief. But the statute did then and now expressly requires actual knowledge as to the defendant's act or failure to act and constructive knowledge as to the kind of elder abuse that occurred. Suffice it to say, "recklessness" or "substantial risk" do not express the "knowledge requirement," nor provide the standard by which to determine liability for permitting abuse of vulnerable person. *See Wyers*, 360 Or at 230 (summarizing standard).

Third, and ultimately, plaintiff's evidence fails to create a genuine issue of fact within the terms of ORS 124.100(5). Plaintiff's problem is not with the first mental state involving whether Autio knowingly acted or failed to act with regard to actual knowledge of preparation of the transaction documents, knowledge of his alleged recommendations as recounted by Graham, or knowledge of the structure of the conveyance with a gift of money with which to make the payments. Plaintiff's problem is with the second mental state involving constructive knowledge. Plaintiff raises disputed facts, but they are addressed to Autio's alleged negligence or recklessness in representing Goodrich, rather than to the circumstances from which a reasonable person should have known that elder abuse would occur.

Plaintiff argues that he offered his attorney's declaration under ORCP 47 E to show that he had retained an expert who would testify that the exception from liability for elder abuse does not apply under the circumstances of this case.[8] However, whether Autio's Medicaid strategy was unnecessary, mistaken, or negligent, does not relate to the question whether, under the circumstances, a reasonable person should have known that Graham would financially abuse Goodrich. The expert's legal opinion that the property transaction is one that is not exempt from the elder

[8] ORS 124.110(2) provides:

"A transfer of money or property that is made for the purpose of qualifying a vulnerable person for Medicaid benefits or for any other state or federal assistance program, or the holding and exercise of control over money or property after such a transfer, does not constitute a wrongful taking or appropriation under subsection (1)(a) of this section or the holding of money or property without good cause for the purposes of subsection (1)(b) of this section."

abuse statute is not probative of whether a reasonable person should have known under the circumstances that abuse would occur. *See LaVoie v. Power Auto, Inc.*, 259 Or App 90, 97-98, 312 P3d 601 (2013) (expert testimony cannot create a question of fact on point where personal knowledge is necessary).

Plaintiff contends that his expert "would have opined on Autio's failure to meet the appropriate standard of care for an attorney," and argues that Autio was negligent in a variety of other ways. According to plaintiff, Autio did nothing to prepare for the first meeting on December 28, 2005 with Goodrich; he did not talk to her doctors; and he did not retain an expert to establish her competency as he had done with some clients. Plaintiff contends that "[a] reasonable attorney exercising the ordinary standard of care would have under those circumstances taken further measures to ensure his client's competency." Plaintiff concludes that expert opinion would have shown Autio's actions were "akin to reckless conduct." However, "reckless conduct" is not the short-form summary of the two-part standard of liability under ORS 294.100(5). Without more, Autio's alleged negligence is not automatically synonymous with third-party liability for permitting abuse of a vulnerable person. *See Wyers*, 360 Or at 221 (not "accidental, reckless, or something else").

That point was illustrated in an analogous case. In *Deberry v. Summers*, 255 Or App 152, 296 P3d 610 (2013), the defendant was an attorney who prepared a will and a revocable living trust for a grandmother who lived in a house that the trust owned. The trust provided for specific distributions of real property to family members. Plaintiff, a granddaughter, was to receive the grandmother's house. Later, however, the grandmother sold the house and bought a replacement home in her own name; the grandmother did not put the replacement house in the trust. When the grandmother died, plaintiff shared in the replacement house only as one of five devisees under a will, rather than receive the grandmother's house outright through the trust.

Plaintiff brought an action against the attorney for professional negligence in failing to better advise the

grandmother or to have included "replacement" language in the trust document. She also alleged a breach of a contract in which plaintiff was a third-party beneficiary. The attorney filed a motion for summary judgment on the basis that there was no evidence of any agreement between the grandmother and attorney to include a provision in a will or trust to distribute any replacement house to plaintiff. Although the plaintiff did not know what, if any, discussion her grandmother had with the attorney, the plaintiff said that her grandmother told her that the replacement house would be given to her on the grandmother's death. *Id.* at 155-56. The plaintiff filed her attorney's declaration under ORCP 47 E advising that plaintiff had retained an expert who would help a jury understand the scope of the attorney's duty, and, therefore, the court must presume that the expert will provide evidence about implied terms of an agreement between the grandmother and attorney. *Id.* at 162.

We held that the plaintiff's evidence of her grandmother's assurances about the property may have reflected the grandmother's mistake or even inadequate legal advice, but those expressions did not permit a reasonable inference that the grandmother asked and the attorney had undertaken to draft such documents. *Id.* at 164-65. Further, although an expert is necessary and helpful to understand an attorney's duty of care to a client, the expert's testimony would not create a question of fact to prevent summary judgment because the existence of an agreement to prepare testamentary instruments to ensure that the plaintiff would inherit any replacement home was "a fact question that requires personal, not expert knowledge." *Id.* at 163. The expert evidence failed because

> "that evidence focused on what plaintiff asserts [the lawyer] should have done but failed to do, including, for example, to advise [the grandmother] about after-acquired property, to recontact her for the purpose of updating the trust, and to do more to discern her intent. The difficulty is that that focus conflates two distinct inquiries; that is, such evidence may support plaintiff's allegations of negligence, but it does not establish the existence of an agreement by defendant to include replacement property in the trust for plaintiff's benefit."

Id. at 164. We affirmed the court's judgment following its order of summary judgment.

For a similar reason here, an expert's affidavit about an attorney's duty of care begs the question about what actually happened as between lawyer and client and whether, from those circumstances, a reasonable person in the lawyer's position should have known that a third-party would financially abuse the client in ways like those alleged. *See id.* (personal knowledge, not expert testimony needed); *see also* *Piskorski v. Ron Tonkin Toyota, Inc.*, 179 Or App 713, 721-22, 41 P3d 1088 (2002) (an expert's "generalized testimony" that an employee driving an employer's demonstration car is never off duty is insufficient to create a disputed issue of fact whether the errant driver was actually within the scope of employment). Accordingly, plaintiff's declaration about an expert does not suffice, in itself, to create a genuine issue of material fact. That is so because Autio's alleged negligence in advising Goodrich says nothing about what a reasonable person should have anticipated Graham would do to Goodrich.

Likewise, plaintiff's declaration about an expert does not suffice to create an issue of fact in light of those facts that are shown as matters of personal knowledge. Ironically, plaintiff proffers Autio's deposition on summary judgment with nothing to contravene Autio's account that, when first meeting with Goodrich, he excused Graham and met privately with Goodrich in order to assess her competency, asking her awareness of her property, family, and matters upon her death, and in order to ascertain her wishes outside the presence of Graham. There is no dispute that Goodrich had previously given the Olney property to Graham, and Autio knew that. In 1996, he had drafted the deed that conveyed the property back to Goodrich, and his notes from that December 28 meeting reflect that the property had been in Graham's name. Right or wrong, Autio saw no need for an expert to establish Goodrich's capacity. His notes reflect that he was aware Goodrich had had hip surgery and suffered pneumonia. His first meeting occurred two months after the last record that had indicated that Goodrich was reported to have suffered hallucinations. That first meeting occurred the day before Goodrich suffered a knee problem, requiring

pain medications and giving her the distracted demeanor that plaintiff later observed on December 30.

Coincidentally, when Autio, Goodrich, Graham, and plaintiff met on December 30, plaintiff agreed with the plan to provide Graham with a power of attorney for Goodrich. With plaintiff showing such trust for Graham, Autio was not given reason to suspect that Graham was untrustworthy. Put in terms of the elder abuse statute, *a reasonable person*, under those circumstances, would not have been given reason to suspect Graham was untrustworthy.

One final fact—about matters several weeks later—is also material to what a reasonable person would anticipate under the circumstances. Plaintiff allowed that he had no information about Goodrich's mental capacity when Goodrich finally signed the documents to convey the Olney property to Graham on January 24, 2006.

On appeal, Autio argues that there was no indication that Goodrich was mentally incompetent on the several days over a month's time when she met with him. He offers that the Supreme Court has observed:

> "We have repeatedly held that neither old age, sickness, debility of body nor extreme distress incapacitates a party from disposing of his property, if he has possession of his mental faculties and understands the business in which he is engaged."

First Christian Church in Salem v. McReynolds, 194 Or 68, 73, 241 P2d 135 (1952). For that reason, mental capacity is measured at the time of the subject transaction, despite problems before or after. *Id*. at 73. Those principles apply here. Given Goodrich's prior gift of the Olney property to Graham, Autio's precautionary meeting with Goodrich to assess her competency and confirm her intent, and plaintiff's trust in Graham with a power of attorney, the circumstances are not circumstances from which a reasonable person should have known, with regard to Goodrich's intent to give the property to Graham again, that Graham would financially abuse Goodrich. That is, the facts are insufficient to permit a reasonable juror to make that finding against Autio as to the land.

Plaintiff insists that the evidence "shows that Autio was aware of the substantial risk that Graham would commit financial abuse, *i.e.*, wrongfully appropriate Goodrich's money." (The money that Graham took from Goodrich comprises the only damages that plaintiff seeks to recover from Autio.) Autio and Graham concur that he recommended structuring the property transaction as a purported sale in order to preserve Goodrich's potential eligibility for Medicaid. Plaintiff criticizes the soundness of that recommendation, but, as part of his theory of the case, plaintiff asserts that the recommendation was made. Autio denies that he knew Graham lacked the money to pay for the property, but plaintiff relies on Graham's testimony to the contrary, and we must construe that conflicting evidence in plaintiff's favor. Graham testified that, when she told her grandmother that she lacked the ability to make payments, Goodrich said she could give Graham the money for that purpose. Plaintiff asserts, relying on Graham's account, that Autio facilitated the idea by advising that there was a sum of money that could be gifted to family members. Graham immediately withdrew $20,000 from Goodrich's account and divided the money between herself and Whitten. Over time, Graham paid $26,000 to Goodrich. Assuming, as plaintiff contends, that the sale was a sham and the subsequent payments were Goodrich's own money, the arrangement is consistent with Goodrich's apparent intent to give the property to Graham again, Autio's recommendation to preserve Medicaid eligibility with the appearance of a sale, and Graham's account that Goodrich offered to give her the money for payments. Plaintiff offered no evidence to dispute Graham's account on that latter point. Instead, plaintiff propounded Graham's explanation of the arrangement, and only criticizes the necessity and soundness of the arrangement. Because that money was part and parcel of an alleged arrangement to disguise a gift as a sale, the evidence does not show circumstances from which a reasonable person should have known that financial abuse would occur.

In his complaint, plaintiff also alleged Autio's liability for $12,578 that Graham received from reimbursement of a long-term care insurance policy. (The insurance proceeds are part of the $32,578 claimed as damages.) The record does not reflect when or how Graham took the $12,578, and

plaintiff has offered no evidence to link Autio to a misappropriation of the insurance proceeds. On appeal, plaintiff makes no argument to tie those proceeds to the standard for third-party liability for elder abuse. Consequently, plaintiff has offered no evidence of circumstances from which a reasonable person should have known, at the time of Autio's preparation of documents, that financial abuse of the sort involving insurance proceeds would occur.

After unpacking plaintiff's arguments, we conclude that, given the correct standard for third-party liability, plaintiff's evidence did not present a genuine issue of material fact on the necessary requirement for constructive knowledge that Graham would financially abuse Goodrich. Therefore, the trial court did not err in dismissing the elder abuse claim as to Autio.

BREACH OF FIDUCIARY DUTY

In his second assignment of error, plaintiff contends that the trial court erred in granting summary judgment against his claim of breach of fiduciary duty. On the merits, the trial court determined that a fact question remained whether Autio had breached a fiduciary duty. But the court determined that a reasonable person should have discovered the potential claim against Autio by the time of Graham's probate proceeding testimony in June 2010, that the "statute of limitations would begin at that time," and that, therefore, plaintiff's March 7, 2013 claim was not filed within the time limited by statute.

On appeal, plaintiff argues that there was a genuine issue of material fact when he should reasonably have discovered his claim. Specifically, he argues that he did not discover a claim for breach of Autio's fiduciary duty until sometime in 2012—after the analysis in July 2012 by an accountant as to the banking activity of Goodrich and Graham and a September review of Autio's legal files.

Under ORS 12.110(1), "[a]n action for *** any injury to the person or rights of another, not arising on contract *** shall be commenced within two years[.]" As to a claim for the breach of fiduciary duty, the applicable standard does not require a plaintiff's "actual knowledge that each element of a

claim is present." *McLean v. Charles Ellis Realty, Inc.*, 189 Or App 417, 425, 76 P3d 661 (2003), *rev den*, 337 Or 34 (2004). Instead, as plaintiff acknowledges, "the record must demonstrate that the plaintiff either actually discovered or, in the exercise of reasonable care, should have discovered that defendant had violated the plaintiff's legally protected interest." *Id.* As relevant here, the statute of limitations under ORS 12.110 commences on "the date when a person exercising reasonable care *should have discovered* the injury, including learning facts that an inquiry would have disclosed." *Greene v. Legacy Emanuel Hospital*, 335 Or 115, 123, 60 P3d 535 (2002) (emphasis in original). Plaintiff agrees that, under ORS 12.110(1), an action for breach of fiduciary duty must be filed within two years from the date that "the plaintiff knows or, in the exercise of reasonable care, should have known facts that would make a reasonable person aware of a substantial possibility that each of the elements of a claim exists." *Kaseberg v. Davis Wright Tremaine, LLP*, 351 Or 270, 278, 265 P3d 777 (2011); *see also Gaston v. Parsons*, 318 Or 247, 256, 864 P2d 1319 (1994).

It is undisputed that plaintiff knew, at the time of the December 30, 2005, meeting that Autio was performing legal services for Goodrich. Shortly after her death in March 2010, plaintiff discovered the property conveyance to Graham. Then, during the probate proceedings in June 2010, plaintiff learned that Graham had taken money from Goodrich's account to make "payments" on the property and that Autio's advice was implicated in the transactions. Graham's testimony revealed that Autio had advised Goodrich that she could not merely gift the Olney property to Graham if she wished to preserve the option to seek Medicaid. Graham asserted that Autio advised that the transaction would need to be set up to appear as a sale and that Goodrich could give Graham a cash gift to cover the "payments" on the property. Graham testified that she had done "as [she] was directed" by Autio. In light of that record, we conclude that the trial court did not err in ruling that the statute of limitations began to run upon those disclosures and that plaintiff's claim for breach of fiduciary duty, commenced on March 7, 2013, was not commenced within the two-year period permitted by statute.

CONCLUSION

In sum, the court did not err granting summary judgment against plaintiff's claims of elder abuse and breach of a fiduciary duty. Therefore, we affirm.

Affirmed.

LAGESEN, J., concurring in part, dissenting in part.

I agree with the majority opinion that defendant Autio is entitled to summary judgment on plaintiff's claim for breach of fiduciary duty on the ground that the claim is time barred. I dissent, however, from the majority opinion's determination that defendant is entitled to summary judgment on plaintiff's claim for elder abuse under ORS 124.100(5). Viewing the evidence in the light most favorable to plaintiff, as we must on a motion for summary judgment, a reasonable factfinder could find that the circumstances were such that "a reasonable person should have known" of the financial abuse that Graham is alleged to have perpetrated against Goodrich within the meaning of ORS 124.100(5), as construed by the Supreme Court in *Wyers v. American Medical Response Northwest, Inc.*, 360 Or 211, 377 P3d 570 (2016).

Plaintiff's theory on appeal, as I understand it,[1] is that Graham committed financial abuse of Goodrich by, among other things, wrongfully "obtain[ing] title to the Olney property for no consideration and through documents that were not authorized by Goodrich and conflicted with her testamentary plan," and also by wrongfully appropriating money from Goodrich's account, ostensibly to use to pay Goodrich for the Olney property. The question is whether the evidence in the summary judgment record, when viewed in the light most favorable to plaintiff, would permit a reasonable factfinder to find that, under the circumstances in which defendant found himself at the time that he arranged

[1] As the majority opinion observes—correctly—plaintiff's theory on appeal as to what the evidence shows appears to have changed. Below, plaintiff focused on demonstrating that defendant conspired with Graham to set up the "sham" transfer of the Olney property. Plaintiff's theory on appeal is predicated on defendant playing a more innocent role.

the transfer of the Olney property and then recommended that Graham get the money from Goodrich to pay for the property,[2] a reasonable person should have known that financial abuse of the type in which Graham ostensibly was engaged was transpiring. *Wyers*, 360 Or at 230.

In my view, the evidence in the record would permit a reasonable factfinder to make that finding. That evidence would permit a factfinder to find that, at the time that defendant arranged for the transfer of the Olney property to Graham, the following circumstances were present and known to defendant:

- That Goodrich was in a particularly vulnerable state because of her health condition, both physically and mentally.
- That, although defendant had done work for Goodrich in the past when employed as an associate at her usual law firm, defendant was not Goodrich's usual lawyer and that, by seeking his assistance, Goodrich was bypassing her usual law firm.
- That the transfer of the Olney property was to be concealed from plaintiff.
- Although defendant met briefly with Goodrich, defendant otherwise communicated solely with Graham.

Having found those circumstances present, a reasonable factfinder could then infer that a reasonable person in those circumstances should have known that, in arranging for the transfer of the Olney property, he was assisting Graham in taking that property wrongfully. Put simply, Goodrich's physical and mental vulnerability during the relevant time period, combined with the secrecy surrounding the transaction, would permit a reasonable factfinder to infer that Graham was enlisting defendant to wrongfully take the property in secret, and that a reasonable person in defendant's circumstances should have recognized

[2] As noted in the majority opinion, there is a factual dispute as to whether defendant recommended that Graham get the money from Goodrich. For purposes of summary judgment, we must assume that the jury would resolve that factual dispute in favor of plaintiff and find that defendant made that recommendation.

that.[3] And, if a factfinder could infer that a reasonable person in defendant's circumstances should have known that Graham's taking of the property itself would be wrongful, the factfinder could also infer that a reasonable person in defendant's circumstances should have known that taking money from Goodrich ostensibly to pay for that property would likewise be wrongful.

In reaching the above conclusion, I have not relied on plaintiff's ORCP 47 E declaration. In his brief, plaintiff explains that the declaration would assist the jury in determining "whether [defendant] in his role as an attorney committed actionable conduct." That is, plaintiff's theory as to why the ORCP 47 E declaration creates a factual issue appears to rest on the proposition that, when a defendant has specialized expertise because of his status as an attorney, that expertise is one of the circumstances that must be taken into account in assessing whether a reasonable person in the defendant's circumstances should have known of alleged financial abuse. But it is not clear to me from the text of ORS 124.100(5) that the legislature intended for a defendant's specialized expertise to be taken into account in that way. The parties have not addressed that question and I express no opinion on it.

One other point warrants discussion. Defendant also sought summary judgment on the ground that the elder abuse claim was barred by the statute of limitations. The trial court concluded that defendant was not entitled to summary judgment on that basis, and defendant cross-assigns error to that determination, arguing that we can affirm the grant of summary judgment on the elder abuse claim for the alternative reason that the claim is time barred. I would conclude that the trial court correctly determined that defendant was not entitled to summary judgment on statute of limitations grounds.

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[3] Although Graham and defendant supplied benign explanations regarding the need for secrecy and using defendant as a lawyer instead of Goodrich's usual law firm, a factfinder would not have to credit their explanations. The two gave conflicting testimony on the point of whether defendant recommended to Graham that she get the money to pay for the property from Goodrich. That conflicting testimony about defendant's role in the transaction could cause a reasonable factfinder to discredit both Graham and defendant.