

FILED: February 21, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ROYSHEKKA HERRING,
Plaintiff-Respondent,

v.

AMERICAN MEDICAL RESPONSE NORTHWEST, INC., an Oregon corporation; and
AMERICAN MEDICAL RESPONSE, INC., a Delaware corporation,
Defendants-Appellants,

and

LANNIE HASZARD; and AMERICAN MEDICAL RESPONSE AMBULANCE
SERVICE, INC., a Delaware corporation,
Defendants.

Multnomah County Circuit Court
071214914

A144168

Judith H. Matarazzo, Judge.

Argued and submitted on July 30, 2012.

James N. Westwood argued the cause for appellants. With him on the briefs were P.K. Runkles-Pearson and Stoel Rives LLP, and James Dumas, Michael J. Estok, and Lindsay Hart Neil & Weigler.

Mark G. McDougal argued the cause for respondent. With him on the brief were Gregory Kafoury and Kafoury & McDougal.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

SCHUMAN, P. J.

Affirmed.

1 SCHUMAN, P. J.

2 After a medical emergency, plaintiff was en route to a hospital in the back
3 of an ambulance operated by defendant American Medical Response Northwest (AMR)
4 when she was sexually abused by one of AMR's employees, a paramedic.¹ She brought
5 this action against AMR alleging, among other things, that she was a "vulnerable person"
6 as defined in ORS 124.100 and that, by permitting the abuse, AMR violated that statute.²
7 A jury agreed and awarded plaintiff \$500,000 in noneconomic damages. Pursuant to
8 another section of the vulnerable person statute, ORS 124.100(2)(b), the court tripled that
9 amount and entered judgment in favor of plaintiff for \$1,500,000. In a supplemental

¹ There were originally four defendants. Only American Medical Response Northwest, Inc., and American Medical Response, Inc., are appellants, and only the former incurred the liability that is at issue in this appeal. Henceforth, "defendant" and "AMR" refer to American Medical Response Northwest, Inc.

² 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 * * * permitted another person to engage in physical or financial abuse. The court shall award the following to a plaintiff who prevails in an action under this section:

* * * * *

"(b) An amount equal to three times all noneconomic damages, as defined in ORS 31.710, resulting from the physical or financial abuse."

ORS 124.100(5) provides:

"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."

1 judgment, the court also awarded plaintiff \$600,000 in attorney fees. On appeal,
2 defendant raises two arguments. First, it argues that, because plaintiff was not
3 incapacitated for an extended period of time, she was not a "vulnerable person" as that
4 term is defined by statute. Second, it argues that, even if she were a vulnerable person
5 subject to the statute, then the court erred in tripling her noneconomic damages; doing so
6 resulted in an award that exceeded a statutorily mandated \$500,000 cap on noneconomic
7 damages, or was excessively punitive, or both. We affirm.

8 We state the facts in the light most favorable to plaintiff because she
9 received a favorable jury verdict. *Brown v. J. C. Penney Co.*, 297 Or 695, 705, 688 P2d
10 811 (1984). She awoke one morning with pain, nausea, and bleeding. When she tried to
11 get out of bed, she fainted. Her son called 9-1-1. Emergency personnel from the
12 Portland Fire Bureau arrived and, shortly thereafter, an AMR ambulance with two
13 paramedics followed. The paramedics helped plaintiff, who had regained consciousness,
14 into the ambulance for transport to Legacy Emanuel Hospital. The trip took
15 approximately 15 minutes, during which Haszard, the paramedic who was not driving,
16 touched plaintiff three times in a sexual manner. None of the touches occurred with
17 plaintiff's consent, and she testified that, during at least one of the touching incidents, she
18 was unable to see, move, or speak.

19 When she arrived at the hospital, plaintiff--visibly upset--reported that she
20 had been sexually abused. A nurse telephoned AMR and relayed that report. The AMR
21 employee who took the call described his reaction as "dumbfounded," because plaintiff's

1 report was "nearly identical" to an earlier report by another female patient regarding
2 sexually abusive behavior by Haszard, the same paramedic. Police were summoned and,
3 two days later, Haszard was arrested. A later investigation revealed at least two earlier
4 incidents of sexual abuse by Haszard, both of which had been reported to AMR.

5 Plaintiff subsequently brought this action. Her operative complaint
6 contained a battery claim against Haszard; a common-law negligence claim against AMR
7 and its parent corporation; and a claim against AMR and its parent corporation under
8 ORS 124.100. Plaintiff dismissed Haszard before trial. She prevailed on the common-
9 law negligence claim and was awarded \$1,750,000 in noneconomic damages. Defendant
10 does not appeal that aspect of the judgment. The court granted AMR's parent corporation
11 a directed verdict on the ORS 124.100 claim, but let that claim against AMR itself go to
12 the jury, which found in favor of plaintiff and awarded her \$500,000 in noneconomic
13 damages. The court subsequently granted plaintiff's motion to triple the ORS 124.100
14 damages as authorized by ORS 124.100(2)(b), set out above. ___ Or App at ___ n 2 (slip
15 op at 1 n 2). Defendant appeals from the adverse ORS 124.100 judgment, arguing as
16 noted, that the court erred in finding that plaintiff was a "vulnerable person" under the
17 statute and that, if she were, then the court erred in tripling her noneconomic damages
18 award.

19 For purposes of ORS 124.100 and as relevant to this case, a "vulnerable
20 person" includes an "incapacitated person." ORS 124.100(1)(e)(C). "'Incapacitated' has
21 the meaning given that term in ORS 125.005." ORS 124.100(1)(c). In turn, ORS

1 125.005--the definition section of the "Protective Proceedings" statute--provides:

2 "(5) 'Incapacitated' means a condition in which a person's ability to
3 receive and evaluate information effectively or to communicate decisions is
4 impaired to such an extent that the person presently lacks the capacity to
5 meet the essential requirements for the person's physical health or safety.
6 'Meeting the essential requirements for physical health and safety' means
7 those actions necessary to provide the health care, food, shelter, clothing,
8 personal hygiene and other care without which serious physical injury or
9 illness is likely to occur."

10 The record contains constitutionally sufficient evidence to support the jury finding that, at
11 the time of one or more of the sexual touchings, plaintiff lacked the capacity to meet the
12 essential requirements for her physical health and safety; defendant conceded as much at
13 oral argument before this court. Defendant's contention, rather, is that plaintiff was not
14 "incapacitated" because that term does not apply to a person who is only temporarily
15 unable to meet her essential health and safety needs. In support of that argument,
16 defendant makes three points.

17 First, it maintains that incapacity necessarily involves "severely impaired
18 perception or communication skills," *Schaefer v. Schaefer*, 183 Or App 513, 516-17, 52
19 P3d 1125 (2002), and that, therefore, an "extreme level of impairment * * * is simply
20 incompatible with the notion of temporary or episodic incapacity." We disagree.
21 Defendant does not explain, and we do not understand, the supposedly inherent nexus
22 between the severity of incapacity and its duration. In fact, there is none. People
23 completely but briefly lose consciousness in any number of situations.

24 Second, defendant notes that the vulnerable person definition of
25 "incapacitated" is the same as the definition of that term in ORS 125.005, applicable in

1 "protective proceedings" such as conservatorships and guardianships. The protective
2 proceedings statutes, defendant maintains, are therefore relevant context, and
3 conservatorships and guardianships could not possibly be established for persons who
4 experience only fleeting incapacity. For several reasons, we are not persuaded by this
5 argument. Nothing in the conservatorship or guardianship statutes establishes that they
6 cannot operate on temporarily incapacitated persons. In fact, the statutes establish that
7 they can: The court may terminate a conservatorship or guardianship if the protective
8 order "was made because the protected person was incapacitated, and the protected
9 person is no longer incapacitated." ORS 125.090(2)(b). Defendant's position would thus
10 have to be that "incapacity" can apply to a temporary condition, but not to one that is so
11 temporary that it could not endure for the time necessary to establish a protective order.
12 We find such an interpretation of the term to be unworkable, far-fetched, and
13 unsupported by anything in the statutory text. Further, although we agree that the
14 provisions in the protective proceedings statute are relevant--if remote--context, they are
15 not *as* relevant as the provisions in the vulnerable person statute itself. Those provisions
16 authorize an action based on assault, menacing, reckless endangering, criminal
17 mistreatment, rape, sodomy, unlawful sexual penetration, sexual abuse, and strangulation,
18 ORS 124.105(1)(a) - (i)--almost all of which can be accomplished during a "fleeting"
19 period of a person's impaired ability to protect his or her health and safety.

20 Third, defendant argues that the legislative history of the vulnerable person
21 statute demonstrates that the legislature intended the statute to protect "longer term

1 vulnerable individuals." Defendant quotes from the testimony of the bill's drafter, "a
2 Bend attorney who specializes in elder law, elder abuse, and estate planning." She
3 testified:

4 "I would like to point out * * * that of the 2200 cases of elder abuse
5 reported in 1993, it is really important to note that most of those cases, the
6 majority of those cases, were committed by relatives of the elder person or
7 incapacitated person or an acquaintance, so this is a person who befriends
8 the elderly person in the community and is taking them to the bank to cash
9 social security checks, all of a sudden moves in with the elderly person and
10 is all of a sudden on a deed or on the title of the elderly person's property.
11 That's the focus of this bill."

12 Testimony, Senate Committee on Judiciary, SB 943, Mar 23, 1995, Tape 68, Side B,
13 Tape 69, Side A (statement of Lisa Bertalan). That testimony cannot bear the weight that
14 defendant would assign it. Although it certainly supports the idea that the statute protects
15 elderly persons, nothing indicates or implies that it was intended to protect *only* elderly
16 persons. The testimony itself distinguishes between elderly persons and incapacitated
17 persons, as does the statute. *Compare* ORS 124.100(1)(a) (defining "elderly person") and
18 ORS 124.100(1)(c) (defining "incapacitated").

19 Finally, none of defendant's arguments addresses, much less explains, the
20 import of the word "presently" in the definition of "incapacitated": "'Incapacitated'
21 means a condition in which a person's ability to receive and evaluate information
22 effectively or to communicate decisions is impaired to such an extent that the person
23 *presently* lacks the capacity to meet the essential requirements for the person's physical
24 health or safety." ORS 125.005(5) (emphasis added). It is at least theoretically possible
25 that, in the context of the protective proceedings statute, "presently" refers to the time

1 when the proceeding is before the court. But in the context of the vulnerable person
2 statute, such a construction makes no sense; the vulnerable person statute focuses on an
3 incident of abuse, not a judicial proceeding. Thus, ORS 124.100 plainly establishes that a
4 person is incapacitated if, *while being abused*, her self-protecting ability is significantly
5 impaired. Nothing in the text requires the duration of that impairment to exceed the
6 period during which the abuse occurs. We conclude that, in protecting "incapacitated"
7 persons, ORS 124.100 protects, among others, persons who are only temporarily and
8 fleetingly unable to protect their own health and safety, from abuse inflicted, at least in
9 part, during that temporary and fleeting period.

10 In a second assignment of error, defendant challenges the court's decision to
11 triple the noneconomic damages that the jury awarded to plaintiff pursuant to ORS
12 124.100(2)(b), which provides that the court "shall" award "[a]n amount equal to three
13 times all noneconomic damages, as defined by ORS 31.710, resulting from the physical
14 or financial abuse." According to defendant, that provision must give way in this case to
15 ORS 31.710(1):

16 "[I]n any civil action seeking damages arising out of bodily injury,
17 including emotional injury or distress, death or property damage of any one
18 person including claims for loss of care, comfort, companionship and
19 society and loss of consortium, the amount awarded for noneconomic
20 damages shall not exceed \$500,000."

21 Plaintiff, on the other hand, relies on the unambiguous language in ORS 124.100(2)
22 *requiring* the court to triple the award of noneconomic damages: "The court *shall* award
23 * * * [a]n amount equal to three times all noneconomic damages." (Emphasis added.)

1 We conclude that plaintiff has the better argument.³

2 We base that conclusion on the plain text of the statute. More
3 fundamentally, the portion of an award under ORS 124.100(2)(b) that results from
4 tripling "all noneconomic damages" is not itself an award of noneconomic damages.
5 Rather, it is an award of "[a]n *amount equal to* three times all noneconomic damages, as
6 defined by ORS 31.710," that is, three times the "subjective, nonmonetary losses"
7 experienced by the vulnerable person. ORS 31.710(2)(b).⁴ Plaintiff's \$1,500,000 award,
8 then, consists of \$500,000 in noneconomic damages to compensate her for her
9 "subjective, nonmonetary losses," plus an additional \$1,000,000 that is more in the nature

³ In *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463 (1999), the Oregon Supreme Court declared that ORS 31.710, then numbered ORS 18.560, violated the guarantee of a jury trial in Article I, section 17, of the Oregon Constitution ("In all civil cases the right of Trial by Jury shall remain inviolate."). The court held that

"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. In any such case, the trial of all issues of fact must be by jury. The determination of damages in a personal injury case is a question of fact."

Id. at 82 (citation omitted). Plaintiff does not argue that the vulnerable person statute is a civil action "of like nature" to a civil action for which the common law provided a jury trial, and that, therefore, the damage cap cannot apply in this case. We do not address those issues.

⁴ ORS 31.710(2)(b) provides:

"Noneconomic damages' means subjective, nonmonetary losses, including but not limited to pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship and society, loss of consortium, inconvenience and interference with normal and usual activities apart from gainful employment."

1 of a fine.⁵

2 Our conclusion is bolstered by the fact that the trebling provision of the
3 vulnerable person statute was added in 2003. Or Laws 2003, ch 211, § 1. At that time,
4 the \$500,000 cap for noneconomic damages had been part of Oregon statutory law since
5 1987. Or Laws 1987, ch 774, § 6. We are unwilling to conclude that the legislature
6 intended to enact a provision that, in many situations, would conflict with a preexisting
7 statute. We conclude that the court did not err in denying defendant's motion to reduce
8 the award of noneconomic damages on the ground that the award violated the cap in ORS
9 31.710.⁶

10 Defendant also argues that the \$1,000,000 component of the damages
11 awarded under ORS 124.100--the amount in excess of the jury verdict--is the functional
12 equivalent of punitive damages and, as such, it was awarded in violation of certain
13 provisions that apply to punitive damages by virtue of ORS 31.730(1)⁷ and the Due

⁵ Defendant argues that, because the amount is nonremedial, it must be punitive, and, as such, must necessarily trigger some of the procedural and substantive protections associated with punitive damages. We address (and reject) that argument below.

⁶ This case does not require us to determine the outcome if a jury were to award a plaintiff in a vulnerable person case noneconomic damages in excess of \$500,000.

⁷ ORS 31.730(1) provides:

"Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others."

1 Process Clause of the Fourteenth Amendment to the United States Constitution. As
2 explained below, we disagree.

3 Defendant's contention is not that plaintiff's award, to the extent that it
4 exceeds the jury's verdict of \$500,000, is in fact punitive damages. If that were the case,
5 it would have been incumbent on defendant to argue that plaintiff's complaint did not
6 conform to the requirements for pleading punitive damages.⁸ Rather, defendant argues
7 that the award is penal in nature, and it therefore should have triggered the procedural and
8 substantive protections that are provided when punitive damages are awarded. In
9 particular, defendant argues that it was entitled to the heightened evidentiary standard
10 ("clear and convincing evidence") and the elevated *mens rea* requirement ("malice" or
11 "reckless and outrageous indifference to a highly unreasonable risk of harm") established
12 in ORS 31.730(1), as well as judicial review for excessiveness of the award under the
13 Due Process Clause of the Fourteenth Amendment.

14 Defendant offers no authority (and no argument) for the proposition that
15 damages under ORS 124.100(2)(b) are governed by any heightened evidentiary standard,
16 and we are prohibited from reading one into the statute as drafted by the legislature. ORS
17 174.010 (judges are not to insert what the legislature has omitted).

⁸ ORS 31.725(2) provides:

"At the time of filing a pleading with the court, the pleading may not contain a request for an award of punitive damages. At any time after the pleading is filed, a party may move the court to allow the party to amend the pleading to assert a claim for punitive damages."

1 In support of the argument that a civil statute with penal consequences must
2 include a heightened *mens rea* requirement, defendant relies primarily on *Holman*
3 *Transfer Co. v. PNB Telephone Co.*, 287 Or 387, 394, 599 P2d 1115 (1979). In that case,
4 however, the court rejected the argument that, whenever a statute imposed treble
5 damages, a violation could occur only if the violation was "willful, wanton, or
6 malicious"; rather, the court concluded that whether a heightened *mens rea* applied
7 depended on whether the legislature that enacted the particular statute intended to impose
8 such limits. *Id.* at 394-95; *see also Springer v. Jenkins*, 47 Or 502, 508-09, 84 P 479
9 (1906) (construing double damages statute to include heightened *mens rea* requirement).
10 Defendant, in fact, "does not suggest that the court should declare a doubling or trebling
11 of damages under *every* statute to require * * * safeguards," but should instead engage in
12 a statute-by-statute inquiry. Under that standard, and employing currently operative rules
13 for discerning legislative intent,⁹ we conclude that ORS 124.100(2)(b) does not contain a
14 *mens rea* requirement. The text does not specify one, and, again, we may not insert what
15 the legislature has omitted. ORS 174.010. Further, nothing in the context or the
16 legislative history of the tripling provision would lead us to conclude that its application
17 was limited to particularly egregious situations involving physical or financial abuse of
18 vulnerable persons; indeed, the subject matter of the statute--the physical or financial
19 abuse of *vulnerable* persons--suggests that the legislature properly concluded that

⁹ Intent is to be determined primarily by text and context, resort to legislative history as relevant, and (if necessary) maxims of statutory construction. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).

1 violations were *per se* sufficiently egregious to justify the enhanced award.

2 In the final analysis, defendant's argument proves too much. Oregon law
3 contains hundreds, if not thousands, of statutes and rules that impose fines on violators; it
4 would be an unprecedented exercise of judicial power if we were to announce that,
5 regardless of what the statutes and rules themselves provide, no fine could be imposed
6 without clear and convincing evidence and proof of malice.

7 Finally, defendant argues that the trebled award violates the Due Process
8 Clause because it is excessive. *Honda Motor Co. v. Oberg*, 512 US 415, 114 S Ct 2331,
9 129 L Ed 2d 336 (1994). Without belaboring the issue, we disagree. Excessive punitive
10 damages violate the Due Process Clause because they serve no legitimate purpose,
11 constitute arbitrary deprivation of property, and violate the "[e]lementary notions of
12 fairness enshrined in our constitutional jurisprudence [that] dictate that a person receive
13 fair notice not only of the conduct that will subject him to punishment, but also of the
14 severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore*,
15 517 US 559, 574, 116 S Ct 1589, 134 L Ed 2d 809 (1996). The validity of a punitive
16 damage award is determined by "three guideposts": the reprehensibility of the conduct,
17 the disparity between the harm and the punitive award, and the difference between the
18 punitive award and "civil penalties" imposed in comparable cases. *Id.* at 574-75. Here,
19 defendant cannot (and does not) argue that it lacked notice that abusing vulnerable
20 persons would result in a tripled award; the risk is express in ORS 124.100(2)(b) itself.
21 Regarding reprehensibility, evidence supports the finding that defendant failed

1 adequately to investigate at least two prior incidents of sexually inappropriate conduct by
2 Haszard, and its response to plaintiff's allegation was evasive. The court found:

3 "It was reasonable for this jury to conclude that [defendant]
4 'permitted' Lannie Haszard to abuse plaintiff by negligently failing to
5 prevent the abuse. Clearly, there was a great deal of evidence at trial that
6 [defendant] knew of other instances of alleged abuse committed by Mr.
7 Haszard."

8 The court also commented on "the lack of credibility of almost every one of [defendant's]
9 witnesses." Further, defendant stipulated to the fact that, of the 108 women who had
10 been transported by Haszard, 18 had been subjected to sexually inappropriate conduct. In
11 these circumstances, the ratio between what defendant characterizes as punitive damages
12 and noneconomic damages--two-to-one--does not reach the "outermost limit of the due
13 process guarantee." *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 US 408, 425,
14 123 S Ct 1513, 155 L Ed 2d 585 (2003). The third guidepost--comparison to civil
15 penalties--reduces to tautology, in that the award in this case *is* a civil penalty.¹⁰ Nor do
16 we find significance in the fact that the jury declined to award actual punitive damages on
17 the common-law negligence claim; the issue is not whether the jury would have awarded
18 treble damages on the vulnerable person statute, but whether, if the jury had done so, the
19 award would have violated the Due Process Clause.

20 In sum, we conclude that the court did not err in determining that plaintiff

¹⁰ It is perhaps due to this tautology and to the fact that statutes imposing doubled or tripled awards always notify prospective defendants of the risk inherent in violations, that defendant does not cite, nor can we find, a case in which a statutorily determined multiple damage award has been found to be excessive in violation of the Due Process Clause.

1 was an "incapacitated person" under ORS 124.100, nor in trebling her noneconomic
2 damages as required by that statute.

3 Affirmed.