

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

KARI NELSON, individually, and KIONO NELSON as the Personal Representative for the ESTATE OF FREDDY NELSON, JR.,

Plaintiffs,

vs.

TMT DEVELOPMENT CO., LLC, an Oregon Corporation; D. PARK CORPORATION, an Oregon Corporation dba HAYDEN MEADOWS; MATTHEW CADY, dba CORNERSTONE SECURITY GROUP; JEFFREY JAMES, dba CORNERSTONE SECURITY GROUP; TJ LATHROM, dba CORNERSTONE SECURITY GROUP; and LOGAN GIMBEL,

Defendants.

Case No. 21CV40742

PLAINTIFFS’ OMNIBUS REPLY TO DEFENDANTS’ RESPONSE/ OPPOSITION TO PLAINTIFFS’ MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT INCLUDING CLAIM FOR PUNITIVE DAMAGES

REPLY

Plaintiffs reply to Cornerstone Defendants’ Response, Defendant Logan Gimbel’s Response in Opposition, and Defendants TMT Development Co., LLC and D. Park Corporation’s Opposition to Plaintiffs’ Motion for Leave to File Second Amended Complaint Including Claim for Punitive Damages as follows. For the convenience of the Court and parties, Plaintiffs submit this omnibus reply addressing all three of the briefs filed by Defendants in response and opposition to Plaintiffs’ motion. In support of this reply, Plaintiffs rely on the court file in its entirety, the previously filed Motion and supporting Declaration of Ben Turner

{00611706;7}

1 (“Turner Decl.”), the Supplemental Declaration of Ben Turner in Support of Plaintiffs’ Omnibus
2 Reply (“Supp. Turner Decl.”), and the following points and authorities.

3 ARGUMENT

4 I. PLAINTIFFS’ AMENDMENTS DO NOT UNDULY PREJUDICE THE 5 DEFENDANTS

6 In arguing that Plaintiff’s Motion to Amend will cause them prejudice, Defendants
7 mischaracterize the standard that this Court must apply.¹ The Oregon Supreme Court has
8 explained that “the key inquiry driving the exercise of discretion under ORCP 23A is the **extent**
9 **of prejudice** to the adverse party. *Eklof v. Persson*, 369 Or 531, 538, 508 P3d 468 (2022), *citing*
10 *C.O. Homes, LLC v. Cleveland*, 366 Or 207, 216, 460 P3d 494 (2020) (“[T]he gravamen of the
11 inquiry [under ORCP 23 A] is whether allowing a pretrial amendment would **unduly prejudice**
12 the opposing party.”) (emphasis added) (internal quotation marks omitted).

13 In evaluating whether a party is unduly prejudiced, the Court may consider a variety of
14 factors “such as whether the party opposing the motion had ‘a reasonable opportunity to research
15 appropriate law, move against the pleading, avail [himself or her]self of discovery procedures,
16 and prepare requested instructions.’” *C.O. Homes*, 366 Or at 216, *quoting Or. P.O. Bldg. Corp.*
17 *v. McVicker*, 246 Or 526, 529, 426 P 2d 458 (1967)) (brackets in original). The defendants do not
18 and cannot allege that the five months between now and trial is not ample time to research law,
19 bring motions, propound discovery, or draft appropriate instructions. Perhaps because such an
20 argument would lay bare how little defendants have done so far to build their defense and

21 ¹ The TMT Defendants attempt to argue that *Ramsey v. Thompson*, 162 Or App 139, 986 P2d 54
22 (1999), *rev den*, 329 Or 589, 994 P2d 130 (2000), and *Herinckz v. Sanelle*, 281 Or App 869, 879,
23 385 P3d 1190 (2016) have been overruled by the *Eklof* Court. Except nowhere in the opinion
24 does the Oregon Supreme Court abandon the *Ramsey/Herinckz* factors. Rather, at issue was the
fourth factor – whether the amendments lacked “colorable merit.” 369 Or at 536. The *Eklof*
Court expanded upon these factors and “clarify[ied] that merit is relevant only insofar as ORCP
23 A permits leave to be denied for futile amendments.” *Id.* at 533.

1 prepare for trial. To date, no defendant has filed an answer, served requests for production or
2 admissions, or noticed the deposition of any person. (See Supp. Turner Decl. ¶ 4.) Defendant
3 TMT Development Co. issued two document subpoenas only two weeks ago; the remaining
4 defendants have issued none. If Defendants truly believe they do not have time to prepare for
5 trial, it is because they have done little to litigate this case so far. Such argument is better suited
6 for a motion to reset trial before the Presiding Judge rather than in response to a motion seeking
7 to amend a complaint half a year before trial.

8 The Oregon Supreme Court explained that at the pretrial stage, whether amendment
9 would “unduly prejudice the opposing party” is the correct standard to apply. *C.O. Homes*, 366
10 Or at 216. Yet the defendants attempt to rely on a stricter standard reserved for amendments
11 made *during* trial. In *Cutsforth v. Kinzua Corp.*, 267 Or 423, 434, 517 P2d 640 (1973), the
12 Oregon Supreme Court stated that “[o]ne factor the court should consider in determining whether
13 to permit an amendment **after both parties have rested their cases** is whether the movant knew
14 or reasonably should have known earlier in the case of the need to amend his pleadings.”
15 (Emphasis added.) Then and only then would “a slight chance that the other party will be
16 prejudiced * * * justify a refusal of the requested amendment.” *Id.*, quoting *Quirk v. Ross*, 257
17 Or 80, 83-84, 476 P2d 559 (1970). Quite clearly, Plaintiffs are not seeking to amend their
18 complaint in the middle of trial; mere inconvenience is simply not a factor to be considered at
19 this stage of proceedings.

20 II. PLAINTIFFS’ MOTION TO AMEND IS TIMELY

21 Plaintiffs have moved to add a defendant, alter the amounts of their claims, add a claim
22 for personal injury by Plaintiff Kari Nelson, make alterations to existing legal and factual
23 alterations, and add claims for punitive damages. The evidence to support these changes was a

24 {00611706;7}

1 result of document discovery that began in September of 2022 and continued through April
2 2023. Further evidence was produced for the very first time in the criminal trial,² which was
3 prosecuted from April 25, 2023, until May 8, 2023. *See State v. Gimbel*, Multnomah Cnty. Cir.
4 Ct. Case No. 21CR58706. The jury rendered a verdict on May 9, 2023. *Id.* Plaintiffs’ motion was
5 brought nineteen days later on May 26, 2023.

6 **A. Plaintiffs’ motion was brought shortly after the conclusion of Defendant
7 Gimbel’s criminal trial.**

8 Defendant Gimbel’s criminal trial and subsequent conviction for the murder of Freddy
9 Nelson and unlawful use of pepper spray against Kari Nelson are a driving force behind
10 Plaintiffs’ motion to amend their complaint. The issues decided against Defendant Gimbel in the
11 criminal proceeding – that he acted knowingly, recklessly, and with malice when he harmed the
12 Nelsons – are conclusive against Defendant Gimbel in this civil proceeding. *Casey v. Nw. Sec.*
13 *Ins. Co.*, 260 Or 485, 491-92, 491 P2d 208, 211 (1971). Punitive damages are warranted without
14 question.

15 Further, beyond claim preclusion against Defendant Gimbel, his conviction is admissible
16 evidence to prove any facts that were essential to the jury’s reaching that conviction. *See* OEC
17 803(22). The fact that Defendant Gimbel intends to appeal his conviction has no bearing on its
18 preclusive effect or admissibility, although such pendency may also be introduced. *Id.*

19 **B. Discovery received from Defendants has been incomplete, potentially in part
20 due to the criminal trial.**

21 Additionally, some of the defendants have failed to produce discovery that would have
22 assisted Plaintiffs in evaluating and moving to amend their complaint earlier. On November 1,

23 ² Some evidence introduced at trial was formally requested by Plaintiffs, but Defendants did not
24 produce as required and its existence was unknown to Plaintiffs until the criminal trial. *See*
discussion *infra*.

1 2022, Plaintiffs requested that Defendant TMT produce “any and all documents and
2 correspondence between any employee * * * of TMT Development Co. and any employee * * *
3 of Lowe’s Home Improvement regarding Freddy Nelson.” (Supp. Turner Decl., Ex. 17, Pl.’s 1st
4 RPD to Def. TMT, Req. No. 8.) Although Defendant TMT responded that it would “produce to
5 the extent responsive documents are in its possession,” no such documents were produced. (*Id.*,
6 Ex. 18, Resp. to Pl.’s 1st RPD to Def. TMT, Req. No. 8). Yet at the criminal trial, the State
7 introduced several e-mails sent by a Lowe’s employee to a TMT employee discussing Freddy
8 Nelson. (*Id.*, ¶ 7, Ex 19.) Similarly, Cornerstone Defendants claim that “[a]t this point in the
9 litigation, defendants still have not been given access to all relevant documents from the police
10 due to the criminal investigation and trial.”

11 In short, Plaintiffs have not had access to all relevant documents despite being the only
12 parties to propound any discovery. Defendants cannot have it both ways – claiming Plaintiffs are
13 moving to amend too close to trial while acknowledging that Plaintiffs do not have all documents
14 or withholding documents that would allow Plaintiffs to amend at an earlier date. To the extent
15 defendants have responded to Plaintiffs’ discovery requests, the evidence demonstrates that the
16 Defendants’ actions were egregious, that Freddy Nelson’s death was traumatic, and that the
17 Plaintiff Kari Nelson’s own assault and witnessing her husband’s death were harrowing. This is
18 reflected in the documents filed in support of Plaintiffs’ Motion, and they offer a strong
19 justification for amendment.

20 **C. There is no legal support for denying amendments proposed nearly half a
21 year before trial.**

22 Lastly, it is commonplace for plaintiffs to increase or otherwise amend the amount of
23 damages sought over the course of litigation as new evidence surfaces and trial strategies
24 solidify. In *Stranahan v. Fred Meyer, Inc.*, 153 Or App 442, 462, 958 P2d (1998), *rev’d on other*

{00611706;7}

1 grounds, 331 Or 38 (2001), the trial court allowed the plaintiff to increase her damages on the
2 day of trial. The Court of Appeals affirmed the trial court’s decision, finding that it did not abuse
3 its discretion because the defendant could “point[] to **no particular prejudice** that it suffered as
4 a result of the amendment.” *Id.*, citing *Hagan v. Shore*, 140 Or App 393, 398, 915 P2d 435
5 (1996) (emphasis added). Plaintiffs have provided reasonable explanations for the timing of its
6 amendments, but Defendants cannot provide with any specificity how the increase in damages
7 prejudices them or alters their ability to defend this action. In fact, the TMT Defendants argue
8 that the “Plaintiffs are not in a position to opine on how [they] might have defended this case”
9 differently in light of the amendments, but then cannot provide more than an abstract explanation
10 of how they have been prejudiced.

11 The increase in noneconomic damages “does not substantially change the cause of action
12 or interject an entire new element of damage.” *Stranahan*, 153 Or App at 462, citing *Cutsforth*,
13 267 Or at 433. Plaintiffs have actually eliminated an element of damages – economic. Such
14 damages can be difficult to defend as extensive discovery into financials and expert testimony
15 from an economist are often involved. If anything, the net effect of the amendment is less written
16 discovery, fewer depositions, and streamlined litigation for all parties.

17 In contrast, the cases relied on by defendants in support of denying amendment are
18 factually distinct. For instance, in *Sanford v. Hampton Resources, Inc.*, 298 Or App 555, 577,
19 447 P3d 1192 (2019), the trial court denied amendment where “[d]iscovery in the case was
20 closed”; “the case had been pending for nearly five years;” trial “had been reset more than once,
21 [and] the court was unwilling to reopen discovery (and other deadlines).” *Id.* This is simply not
22 the case in this instance. Defendants have conducted zero discovery and trial has never been
23 reset. The other cited cases involve amendments on the eve of trial or during trial. *See Cutsforth*,

24 {00611706;7}

1 267 Or at 434 (during trial after the parties had rested); *Deep Photonics Corp. v. LaChapelle*,
2 368 Or 274, 302, 491 P3d 60 (2021) (during trial); *Humbird v. McClendon*, 281 Or 83, 86, 573
3 P2d 1240 (1978) (during trial); *Baker v. Brookmead Diary, Inc.*, 230 Or 384, 386, 370 P2d 235
4 (1962) (morning of trial). Defendants point to no case where amendment was denied over five
5 months before trial, where the defendants had conducted no discovery, or where a criminal trial
6 delayed access to information or produced newly discovered evidence. The record here warrants
7 amendment at this time, and there is no legal authority to find otherwise.

8 **D. New evidence supports adding Lowe’s as a party to this action.**

9 As aforementioned, previously undisclosed evidence involving Lowe’s was revealed
10 during the criminal trial of Defendant Gimbel. Additionally, Plaintiffs served a subpoena upon
11 Lowe’s in October 2022, to which Lowe’s initially refused to respond. (Supp. Turner Decl., Ex.
12 20) After much conferral, Lowe’s finally produced responsive documents on April 14, 2023.
13 (*See id.*, Ex. 21.) Plaintiffs brought their motion approximately six weeks later. This recently
14 obtained evidence supports adding Lowe’s as a defendant to this action now.

15 **III. PUNITIVE DAMAGES ARE WARRANTED AGAINST CORNERSTONE DEFENDANTS**

16 **A. It is undisputed that Defendant Gimbel’s conduct warrants punitive damages.**

17 As a preliminary matter, Cornerstone Defendants do not dispute that they are vicariously
18 liable for Defendant Gimbel’s actions, including all punitive damages. The application of Oregon
19 law to the facts of this case are clear: Defendant Gimbel was acting within the course and scope
20 of his employment when he recklessly discharged mace against the Nelsons and intentionally
21 killed Freddy Nelson. Cornerstone Defendants are liable for the compensatory and punitive
22 damages resulting from Defendant Gimbel’s tortious conduct. *See Stroud v. Denny’s Rest., Inc.*,
23 271 Or 430, 437, 532 P2d 790, 793 (1975).

24 {00611706;7}

1 Likewise, although Defendant Gimbel states that he will appeal his conviction, this has
2 no bearing on the conviction's admissibility or conclusive effect. The jury's unanimous finding
3 that Defendant Gimbel intentionally, recklessly, and maliciously harmed the Nelsons collaterally
4 estops Defendant Gimbel from relitigating the issue in this subsequent civil matter. *See Casey*,
5 260 Or at 491-92. The issues in the criminal and civil matter against Defendant Gimbel are
6 identical, the issues were fully litigated before a jury, and Defendant Gimbel had a full and fair
7 opportunity to be heard. *See Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 104, 862 P2d
8 1293 (1993).

9 **B. Cornerstone Defendants' reckless hiring, training, supervision, and retention**
10 **of Defendant Gimbel also warrants punitive damages.**

11 While the effect of Defendant Gimbel's conviction operates differently on Cornerstone
12 Defendants, it is still admissible and relevant evidence to prove any fact essential to sustain the
13 criminal judgment. *See OEC 803(22)*. Defendant Gimbel's criminal conduct, including the jury's
14 rejection of his affirmative defense of self-defense, has a direct bearing on how he was trained,
15 supervised, and otherwise employed by Cornerstone Defendants.

16 Cornerstone Defendants, however, ignore the admissible evidence Plaintiffs submitted in
17 support of their motion and instead rely on their own evidence to argue compliance with DPSST
18 regulations, Defendant Gimbel's efforts to receive licensure as an armed security guard, and the
19 fault of other parties. Evidence submitted by a defendant in response to a motion to add punitive
20 damages is considered by the court "as it would in ruling on a motion for a directed verdict—that
21 is, to the extent that it establishes that a defendant is immune or enjoys some other exemption or
22 complete defense to a punitive damages award." *Bolt v. Influence, Inc.*, 333 Or 572, 582, 43 P3d
23 425, 430 (2002). The evidence relied upon by Cornerstone Defendants neither establishes

1 immunity nor a complete defense to a claim for punitive damages – it merely indicates that there
2 may be a factual question for the jury on whether their conduct was reasonable or reckless.

3 In granting a motion to add punitive damages, the Court looks at whether the plaintiff has
4 submitted “some evidence” to support the elements of the claim. *Id.* at 580. The court reviews
5 such evidence in the light most favorable to the plaintiff and grants the motion unless it finds that
6 no reasonable person could find for the plaintiff. *Mark v. Hutchinson*, 132 Or App 613, 617, 889
7 P2d 361 (1995). Additionally, in analyzing a motion to add punitive damages under the reverse
8 directed verdict standard, “a court must not weigh the evidence.” *Bolt*, 333 Or at 578. Therefore,
9 it is not within the purview of this court to weigh the evidence submitted by both parties to
10 determine the culpability of Cornerstone Defendants. Instead, the court must determine whether
11 the *Plaintiffs* have submitted some evidence to support their claim that Cornerstone Defendants
12 acted with “a reckless and outrageous indifference to a highly unreasonable risk of harm” and “a
13 conscious indifference toward the health, safety, and welfare of others,” including the Nelsons.

14 The contracts, correspondence, training materials, incident reports, and internal
15 memoranda attached in support of Plaintiff’s motion demonstrate that they did act with
16 recklessness. The Cornerstone Defendants provided exclusively armed security at Delta Park
17 Center and repeatedly used excessive force on its patrons in violation of DPSST regulations.
18 (*See, e.g.*, Turner Decl., Exs. 1-6.) The Cornerstone Defendants began a campaign of harassment
19 and intimidation against the Nelsons that culminated in Freddy Nelson’s death and the assault of
20 Kari Nelson. (*Id.*, Exs. 7-9.) Then, less than five months before Defendant Gimbel’s attack on
21 the Nelsons, Cornerstone Defendants issued a policy memorandum that trained its employees to
22 see everything and everyone as a potential fatal threat. (*Id.*, Ex. 16.) Defendant Gimbel carried
23
24

{00611706;7}

1 through with this directive from his employer, killing Freddy Nelson and injuring Kari Nelson on
2 May 29, 2021.

3 There is strong and substantial evidence – not merely *some* evidence – that Cornerstone
4 Defendants’ conduct meets Oregon’s punitive damages standard. Defendants can present
5 evidence at trial that their conduct is appropriate security guard conduct and training, but
6 disputes of fact are not proper for evaluation at this stage. Plaintiffs’ motion should be granted,
7 and they should be permitted to submit such evidence and the question of punitive damages to a
8 jury.

9 CONCLUSION

10 For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs’
11 Motion for Leave to File a Second Amended Complaint adding Lowe’s as a defendant, adding a
12 personal injury claim on behalf of Plaintiff Kari Nelson, amending damages, updating the factual
13 and legal allegations in their complaint, and adding punitive damages.

14
15 DATED this 14th day of June, 2023.

16 D’AMORE LAW GROUP, P.C.

17 By: s/ Thomas D’Amore

18 Thomas D’Amore, OSB No. 922735

Email: tom@damorelaw.com

19 Benjamin J. Turner, OSB No. 144503

Email: ben@damorelaw.com

Amy Bruning, OSB No. 175811

Email: amy@damorelaw.com

20 4230 Galewood Street, Suite 200

Lake Oswego, OR 97035

21 Telephone: 503-222-6333

22 *Of Attorneys for Plaintiffs*

23 {00611706;7}

CERTIFICATE OF SERVICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I hereby certify that on the below date, I served a true and correct copy of the foregoing **Plaintiffs’ Omnibus Reply to Defendants’ Response/Opposition to Plaintiffs’ Motion For Leave to File Second Amended Complaint** on the following in the manner(s) described below:

Carey Caldwell
cpc@hartwagner.com
Joe R. Traylor
JRT@hartwagner.com
1000 SW Broadway Ste 2000
Portland, OR 97205
Of Attorneys for Defendants TMT
& D. Park

- Odyssey File and Serve
- Email
- First Class Mail
- Facsimile
- Hand Delivery

Kirsten L. Curtis
kirsten @thenelllawgroup.com
12909 SW 68th Pkwy Ste 290
Portland, OR 97223
Of Attorneys for Logan Gimbel

- Odyssey File and Serve
- Email
- First Class Mail
- Facsimile
- Hand Delivery

Steven Wraith
sgw@leesmart.com
Lee Smart PS Inc.
701 Pike St. Ste 1800
Seattle, WA 98101
Of Attorneys for Cornerstone
Defendants

- Odyssey File and Serve
- Email
- First Class Mail
- Facsimile
- Hand Delivery

CJ Martin
cjm@mrlegalteam.com
Maloney, Laursdorf, Reiner P.C.
1111 E. Burnside St. Ste 300
Portland, OR 97214
Of Attorneys for Cornerstone
Defendants

- Odyssey File and Serve
- Email
- First Class Mail
- Facsimile
- Hand Delivery

DATED this 14th day of June, 2023.

D’AMORE LAW GROUP, P.C.

By: s/ Daniel C. Doede
Daniel C. Doede, Paralegal