

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

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

JACK DOE 1, an individual proceeding under a fictitious name; JACK DOE 2, an individual proceeding under a fictitious name; JACK DOE 3, an individual proceeding under a fictitious name; JACK DOE 4, an individual proceeding under a fictitious name; JACK DOE 5, an individual proceeding under a fictitious name; and JACK DOE 6, an individual proceeding under a fictitious name,

Plaintiffs,

v.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a foreign corporation sole registered to do business in the State of Oregon; CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AND SUCCESSORS, a foreign corporation sole registered to do business in the State of Oregon; THE BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in Oregon; and CASCADE PACIFIC COUNCIL, BOY SCOUTS OF AMERICA, an Oregon non-profit corporation,

Defendants.

Case No. 0710-11294

PLAINTIFFS' REVISED AND SUPPLEMENTAL REQUESTED JURY INSTRUCTIONS AND SPECIAL VERDICT

1 Plaintiffs submit revised versions of the following instructions included in Plaintiffs' Requested

2 Jury Instructions:

3 UCJI	30.04E	Scope of Authority (as modified)
4 UCJI	70.03	Damages – Economic (as modified)
No. 1		Definition of “Child Abuse”
5 No. 10		Special Relationship
No. 11		Statute of Limitations
6 No. 12		“Knowingly” Defined

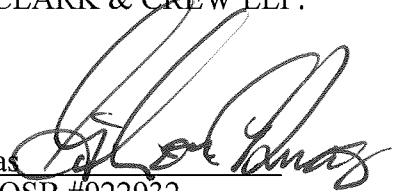
7 In addition to the instructions requested in Plaintiffs' Requested Jury Instructions, Plaintiffs
8 request that the Court give the following instructions:

10 UCJI	73.01	Damages – Avoidable Consequences
No. 17		Failure to Mitigate – Burden of Proof
11 No. 18		Statute of Limitations
No. 19		Withdrawal of Issues
12 No. 20		Knowledge -- Foreseeability
No. 21		“Allow” Defined
13 No. 22		Volunteers as Agents

14 Plaintiff's proposed form of Special Verdict is attached.

15
16
17
18 DATED this 4th day of April, 2010.

19 O'DONNELL CLARK & CREW LLP.

20
21 
22 Gilion C. Dumas
23 Gilion Dumas, OSB #922932
24 *Of Attorneys for Plaintiff*

25 Paul Mones, OSB No. 091342
26 *Associated Trial Counsel*

2 SCOPE OF AUTHORITY

3 The Plaintiff claims that Gordon McEwen and Earl Wiest were the Scout Defendants'
4 agents and were acting within the scope of their authority at the time involved in this case. These
5 Defendants deny that Gordon McEwen and Earl Wiest were their agents. A principal is bound only
6 by the acts of the agent that are within the scope of the agent's actual or apparent authority.
7

8
9
10 AS ORIGINALLY SUBMITTED:

11 The Plaintiff claims that Gordon McEwen and Earl Wiest were the Scout Defendants' agents and
12 were acting within the scope of their authority at the time involved in this case. These Defendants
13 deny that Gordon McEwen and Earl Wiest *were acting within the scope of their authority at the*
14 *time involved in this case.* A principal is bound only by the acts of the agent that are within the
15 scope of the agent's actual or apparent authority.

16 (Emphasis added to show language changed.)
17
18
19
20
21

22 COMMENT: *Taylor v. Werner Enterprises, Inc.*, 329 Or 461, 468, 988 P2d 384 (1999);
23 *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 686–687, 669 P2d 1132 (1983); *Jones v.*
24 *Nunley*, 274 Or 591, 595, 547 P2d 616 (1976); *Checkley v. Boyd*, 198 Or App 110, 134, 107 P3d
25 65, rev. denied, 338 Or 583 (2005); *Houck v. Feller Living Trust*, 191 Or App 39, 43, 79 P3d 1140
(2003); *Kaiser Foundation Health Plan v. Doe*, 136 Or App 566, 573, 903 P2d 375 (1995).

26 For an instruction on scope of employment, see UCJI No. 57.05.

1 UCJI No. 70.03 (as modified)

2 **DAMAGES—ECONOMIC**
3 **(In Claims Subject to ORS 31.710)**

4 Economic damages are the objectively verifiable monetary losses that the plaintiff has
5 incurred or will probably incur. In determining the amount of economic damages, if any,
6 consider the reasonable value of necessary mental health counseling and therapy for treatment of
7 the plaintiff.

8 The total amount of economic damages may not exceed the sum of \$250,000.

9
10
11 AS ORIGINALLY SUBMITTED:

12 Amount claimed was \$750,000.
13
14
15
16
17
18
19
20
21
22
23
24

25 COMMENT: ORS 31.710(2)(a); *DeVaux v. Presby*, 136 Or App 456, 461, 902 P2d 593
26 (1995). See UCJI Nos. 70.08, 70.09, and 70.10 for personal property losses.

No. 1 – Definition of “Child Abuse”

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

Child abuse includes sexual abuse of a child; or any intentional conduct by an adult that causes any mental injury to a child that results substantial impairment of the child’s mental or psychological ability to function caused by cruelty to the child.

AS ORIGINALLY SUBMITTED:

Child abuse includes any intentional conduct by an adult that causes any mental injury to a child that results substantial impairment of the child's mental or psychological ability to function caused by cruelty to the child; or sexual abuse of a child.

ORS 12.117.

1
2
3
4
5
6
7
8
9 **No. 10 -- Special Relationship**

Certain types of special relationships in which one party owes the other a heightened duty of care will support the imposition of liability for emotional harm.

Such a special relationship exists when a person, including a parent on behalf of a minor child, authorizes another party to exercise independent judgment on his behalf and in his interest, and relies on the other party to achieve a desired outcome or resolution.

10 AS ORIGINALLY SUBMITTED:

11 Certain types of special relationships in which one party owes the other a heightened duty of care will support the imposition of liability for emotional harm.

12 Such a special relationship exists when a person authorizes another party to exercise independent judgment on his behalf and in his interest, and relies on the other party to achieve a desired outcome or resolution.

13
14 (Modified by addition of, “. . . including a parent on behalf of a minor child . . .”)

15
16
17
18
19
20
21
22 *Shin v. Sunriver Preparatory School, Inc.*, 199 Or.App. 352, 365, 111 P.3d 762 (2005)
23 (“Certain types of special relationships in which one party owes the other a heightened duty of
24 care, beyond the common-law duty to exercise reasonable care to prevent foreseeable harm, give
rise to a legally protected interest sufficient to support the imposition of liability for purely
emotional harm.”).

25 *Curtis v. MRI Imaging Services II*, 148 Or.App. 607, 619, 941 P.2d 602 (1997), aff'd on
26 other grounds, 327 Or. 9, 956 P.2d 960 (1998) (quoting *Conway v. Pacific University*, 324 Or. 231,
240, 924 P.2d 818 (1996)).

1 **No. 11 – Statute of Limitations**

2 The Scout Defendants contend that this case is barred by the statute of limitations. To
3 prevail on this defense, these Defendants must prove by a preponderance of the evidence that their
4 conduct did not amount to knowingly allowing, permitting or encouraging child abuse.

5
6 AS ORIGINALLY SUBMITTED:

7 The Scout Defendants contend that this case is barred by the statute of limitations. To
8 prevail on this defense, these Defendants must prove by a preponderance of the evidence that their
9 conduct did not amount to knowingly allowing, permitting or encouraging child abuse *that*
occurred when Plaintiff was under 18 years of age.

10
11 (Emphasis added to indicated language omitted.)

12
13
14
15
16
17
18
19
20
21
22
23
24 ORS 12.117; *Holdner v. Columbia County*, 51 Or.App. 605, 615 (1981) (defendant
25 asserting affirmative defense of statute of limitations has the burden of proof); *Scott v.*
26 *Christenson*, 46 Or. 417, 419 (1905).

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

No. 12 – “Knowingly” Defined

The term “knowingly” as used in the phrase “knowingly allowing, permitting or encouraging child abuse” does not require actual knowledge of a particular act of child abuse, or actual knowledge of a particular child being abused.

AS ORIGINALLY SUBMITTED:

The term “knowingly” as used in the phrase “knowingly allowing, permitting or encouraging child abuse” *means actual knowledge of some act of child abuse.* It does not require actual knowledge of a particular act of child abuse, or actual knowledge of a particular child being abused.

(Emphasis added to indicate language omitted. Authority also added.)

Lourim v. Swensen (Lourim I), 147 Or. App. 425, 444, 936 P.2d 1011 (1997), *rev'd on other grounds*, 328 Or. 380, 977 P.2d 1157 (1999) (“the conduct described in the statute is actual, as opposed to constructive, knowing conduct”).

1 **No. 17 -- Failure to Mitigate – Burden of Proof**

2 Defendants must prove by a preponderance of the evidence that Plaintiff failed to exercise
3 reasonable care to avoid increasing any damage he suffered.
4

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24 *Pearson v. Sigmund*, 263 Or. 626, 503 P.2d 702 (1972) (the party who claims that the other
25 party could have mitigated his damages has the burden to prove that such mitigation was possible);
26 *Enco, Inc. v. F.C. Russell Co.*, 210 Or. 324, 339, 311 P.2d 737(1957).

No. 18 – Statute of Limitations

If Defendants knowingly allowed, permitted, or encouraged child abuse, then Plaintiff had until his 40th birthday to file his lawsuit.

ORS 12.117 (2009 amendments).

No. 19 – Withdrawal of Issue

1 Plaintiff's age is not an issue in dispute in this case. Plaintiff turned [turns] 38 on April 6,
2 2010.

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

UCJI No. 13.04 (modified).

1 **No. 20 – Knowledge -- Foreseeability**

2 When determining if the risk of harm to Plaintiff was foreseeable, you may consider any
3 specialized knowledge of the Defendants
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

23 *Fuhrer v. Gearhard By The Sea, Inc.*, 306 Or. 434 (1988).
24
25
26

No 21 – “Allow” Defined

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

To “allow” means to neglect to restrain or prevent.

Webster’s Third New International Dictionary, Unabridged (1986 Ed.).

No. 22 – Volunteers as Agents

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

An agent need not be a paid employee. An agent may be a volunteer.

Lourim v. Swensen, 328 Or. 380, 977 P.2d 1157 (1999).

1
2
3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH

6 KERRY LEWIS,

7 Plaintiff,

8 v.

9 CORPORATION OF THE PRESIDING
10 BISHOP OF THE CHURCH OF JESUS
11 CHRIST OF LATTER-DAY SAINTS, a
12 foreign corporation sole registered to do
13 business in the State of Oregon;
14 CORPORATION OF THE PRESIDENT OF
15 THE CHURCH OF JESUS CHRIST OF
16 LATTER-DAY SAINTS AND SUCCESSORS,
17 a foreign corporation sole registered to do
18 business in the State of Oregon; THE BOY
19 SCOUTS OF AMERICA, a congressionally
20 chartered corporation, authorized to do business
21 in Oregon; and CASCADE PACIFIC
22 COUNCIL, BOY SCOUTS OF AMERICA, an
23 Oregon non-profit corporation,

24 Defendants.

Case No. 0710-11294

SPECIAL VERDICT

25 We, the Jury, find:

26 **1a.** Was Defendant Boy Scouts of America negligent in one or more of the ways the
27 Plaintiff claims?

28 ANSWER: _____ [Yes or No]

29 If your answer is "yes," go on to question 1b.

30 If your answer is "no," your verdict is for Defendant Boy Scouts of America. Go on to
31 question 2a. Do not answer question 1b.

1 **1b.** Was Defendant Boy Scouts of America’s negligence a cause of damages to the
2 Plaintiff?

3 ANSWER: _____ [Yes or No]

4

5 **2a.** Was Defendant Cascade Pacific Council negligent in one or more of the ways the
6 Plaintiff claims?

7 ANSWER: _____ [Yes or No]

8 If your answer is “yes,” go on to question 2b.

9 If your answer is “no,” your verdict is for Defendant Cascade Pacific Council. Go on to
10 question 3a. Do not answer question 2b.

11 **2b.** Was Defendant Cascade Pacific Counsel’s negligence a cause of damages to the
12 Plaintiff?

13 ANSWER: _____ [Yes or No]

14

15 **3a.** Were the Corporation of the Presiding Bishop of the Church of Jesus Christ of
16 Latter-Day Saints and the Corporation of the President of the Church of Jesus Christ of Latter-
17 Day Saints and Successors (“The LDS Church”) negligent in one or more of the ways claimed?

18 ANSWER: _____ [Yes or No]

19 If your answer is “yes,” go to question 3b.

20 If your answer is “no,” go to question 4. Do not answer 3b.

21 **3b.** Was the LDS Church’s fault a cause of damage to the Plaintiff?

22 ANSWER: _____ [Yes or No]

23

24 **4.** What is the percentage of each of the parties’ negligence that caused damage to
25 the Plaintiff? If you determined that any party was not negligent, or did not cause damage to the
26 Plaintiff, assign “0” as that party’s percentage.

1	ANSWER:	Defendant Boy Scouts of America	_____ %
2		Defendant Cascade Pacific Council	_____ %
3		The LDS Church	_____ %
4		TOTAL	100%

5

6 **5.** What are the Plaintiff's damages?

7	ANSWER:	Economic Damages	\$ _____
8		Noneconomic Damages	\$ _____

9 Do not reduce the damages by the LDS Church's percentage of fault, if any, because the
 10 court will do this when entering judgment.

11

12 **6.** Does the statute of limitation bar Plaintiff's claims against Defendant Boy Scouts
 13 of America?

14 ANSWER: _____ [Yes or No]

15 If your answer is "yes," your verdict is for Defendant Boy Scouts of America. Go on to
 16 question 7. Do not answer question 8.

17 If you answer is "no," go on to question 7.

18

19 **7.** Does the statute of limitation bar Plaintiff's claims against Defendant Cascade
 20 Pacific Counsel?

21 ANSWER: _____ [Yes or No]

22 If your answer is "yes," your verdict is for Defendant Cascade Pacific Counsel. If your
 23 answer is "yes," and your answer to question 6 is also "yes," stop here. Do not answer questions
 24 8 or 9. If your answer is "yes," and your answer to question 6 is "no," go on to question 8, but
 25 do not answer question 9.

26 If your answer is "no," and your answer to question 6 is "no," go on to questions 8 and 9.

1 If your answer is “no,” and your answer to question 6 is yes, go on to question 9, but do not
2 answer question 8.

3

4 **8.** Is Plaintiff entitled to punitive damages from Defendant Boy Scouts of America?

5 ANSWER: _____ [Yes or No]

6

7 **9.** Is Plaintiff entitled to punitive damages from Defendant Cascade Pacific Council?

8 ANSWER: _____ [Yes or No]

9

10 DATED this ____ day of April, 2010.

11

12

Presiding Juror

13

14

15

16

17

18

19

20

21

22

23

24

25

26

1
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that I served a true copy of the foregoing: PLAINTIFFS' REVISED AND
4 SUPPLEMENTAL REQUESTED JURY INSTRUCTIONS
5 upon:
6

7 Charles T. Smith
8 Christie L. Moilanen
9 Multnomah County Courthouse
10 1021 SW Fourth Ave.
11 Portland, OR 97204

Paul Xochihua
Nicole M. Rhoades
Multnomah County Courthouse
1021 SW Fourth Ave.
Portland, OR 97204

Attorneys for Defendant The Boy Scouts of America

Attorneys for Defendant Cascade Pacific Council, Boy Scouts of America

12 VIA:

- 13 Facsimile
14 Federal Express Overnight Mail
15 Hand Delivery on April 5, 2010
 U.S. Postal Service First Class Mail
 Email on April 4, 2010

16 on April 4, 2010.

17 **O'DONNELL CLARK & CREW LLP**

18
19 /s/ Gilion C. Dumas
20 Gilion Dumas, OSB No. 922932
21 *Of Attorneys for Plaintiffs*