IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

JUDITH JOY JONES, THROUGH ANGELA BROWN AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JUDITH JOY JONES, Plaintiff, v. ST. JUDE OPERATING COMPANY, LLC, dba HEALTHCARE AT FOSTER CREEK, and BENICIA SENIOR LIVING, LLC Defendants.	Case No. COMPLAINT (Negligence, Negligence *per se*, Statutory Elder Abuse) Amount of Prayer: $1,800,000 Filing Fee: $834 ORS 21.160(d) CLAIMS NOT SUBJECT TO MANDATORY ARBITRATION JURY TRIAL DEMANDED

COMES NOW the plaintiff, Judith Joy Jones ("Ms. Jones"), appearing through Angela Brown as the Personal Representative of the Estate of Judith Joy Jones, who brings this action against the above-named defendants St. Jude Operating Company, LLC ("St. Jude Operating Company") dba Healthcare at Foster Creek ("Foster Creek") and Benicia Senior Living, LLC ("Benicia Senior Living") for negligence and Elder Abuse leading to plaintiff's wrongful death.

INTRODUCTION

1.

Healthcare at Foster Creek, a nursing home facility owned by St. Jude Operating Company and managed by Benicia Senior Living, has had by far the least competent and deadliest response to the COVID-19 virus of any Oregon nursing home. To date, roughly 120 cases and nearly 30 deaths resulting from COVID-19 have been linked to this facility. Foster Creek's negligence and failure to follow basic infection control procedures to stop the spread of

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

COVID-19 led the State of Oregon ("the State") to take the extraordinary step of suspending the facility's operations on May 4, 2020. The State's decision was based upon investigative efforts that had been ongoing since April of 2020, and a finding that Foster Creek's "continued operation poses a serious danger to the public health and safety." Unfortunately, Foster Creek's shut-down came too late for Ms. Jones.

2.

On April 18, 2020 – roughly two weeks before the facility was finally shut down, and in the midst of what State investigators would later identify as Foster Creek's deadly failures – Ms. Jones was transported from Foster Creek to a local hospital emergency room where she tested positive for COVID-19. Ms. Jones remained hospitalized and died on April 25, 2020, from complications of the COVID-19 virus that she contracted due to Foster Creek's gross negligence.

PARTIES

3.

At the time of her death Ms. Jones was a 75-year-old female. She suffered from physical and mental health conditions, including cancer and dementia. Ms. Jones was an elderly person, a person with a disability, and a vulnerable person as defined by the Elder Persons and Persons with Disabilities Abuse Prevention Act (the "Elder Abuse Law"). As an elderly and disabled person living in a nursing home with serious underlying medical conditions, Ms. Jones met all criteria for being at high risk from COVID-19.

4.

Plaintiff Angela Brown ("Ms. Brown") is Ms. Jones's daughter. Ms. Brown served as her mother's medical guardian, and is the personal representative of her mother's estate.

5.

Defendant St. Jude Operating Company is a domestic limited liability company incorporated in Oregon. St. Jude Operating Company does business as, and operated a 114-

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

resident capacity nursing facility known as, Healthcare at Foster Creek. Healthcare at Foster Creek is located at 6003 SE 136th Ave, Portland, Multnomah County, Oregon.

6.

Defendant Benicia Senior Living is a limited liability company authorized to do business in Oregon. On information and belief, Benicia Senior Living managed Foster Creek's operations, including hiring, training, and management of staff, and has had or shared managerial and operational control of Foster Creek since July 1, 2011. Benicia's principal place of business is in West Linn, Oregon, and at least one of its members is a natural person with an Oregon address according to records on file with the Oregon Secretary of State.

7.

St. Jude Operating Company has been the licensed owner of the Foster Creek facility since 2003. Benicia Senior Living has helped manage and operate Foster Creek since 2011. Defendants operate under Oregon DHS license (license #1600506066) pursuant to ORS 441.015 *et seq.* and Oregon Administrative Rules ("OAR") Chapter 411.

8.

The Foster Creek facility is divided into four separate units: Columbia Unit, Sandy Unit, Wilson Unit, and Mt. Hood Unit, a secured Enhanced Care Unit ("ECU") for residents with mental health conditions. At all times relevant to this Complaint, Ms. Jones resided in the secured Mt. Hood ECU.

VENUE

9.

The venue for this action is properly in Multnomah County where the cause of action arose, and where defendants conducted regular, sustained business activity.

/ / /

/ / /

/ / /

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

BACKGROUND FACTS

A. Authorities Sound the COVID-19 Alarm

COVID-19 is a viral respiratory illness which the World Health Organization ("WHO") declared a Public Health Emergency of International Concern on January 30, 2020.

10.

On February 21, 2020, the Centers for Disease Control ("CDC") issued COVID-19 recommendations for health care professionals, which included review of infection prevention and control policies, and CDC recommendations for implementation of precautions.

11.

On March 8, 2020, Oregon Governor Kate Brown issued Executive Order 20-03 finding COVID-19 a threat to public health and safety. The Executive Order declared a state of emergency and empowered the Oregon Health Authority ("OHA") and state agencies to respond and develop procedures to control COVID-19.

12.

On March 10, 2020, the Oregon Department of Human Services ("DHS") sent an Executive Letter to all licensed nursing and residential care facilities specifying immediate policies to limit exposure to COVID-19.

13.

On March 11, 2020, the WHO declared COVID-19 a global pandemic.

14.

The CDC warned that persons at high risk for severe illness or death from COVID-19 include people 65 years and older, people who live in a nursing home or long-term care facility, and people who have a serious underlying medical condition.

/ / /

/ / /

/ / /

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

B. Defendants Failed to Take Necessary Steps to Protect Residents from COVID-19

15.

As the COVID-19 pandemic unfolded, defendants attempted to paint a positive picture of their response. In their communications with certain residents and their families, defendants sought to minimize the degree of COVID-19 infections. Defendants tested residents for COVID-19 but did not timely or accurately inform residents or family members of results. Defendants downplayed the COVID-19 risk, lied about their safety practices, and failed to share crucial information about the dangerous conditions at Foster Creek and the spread of COVID-19.

16.

Defendants failed to adopt or follow adequate infection control guidelines and proper isolation and safety protocols, failed to provide sufficient personal protective equipment ("PPE"), failed to maintain adequate staffing levels and failed to conduct appropriate staff training. These and other failures by defendants caused physical injury and death to Ms. Jones and others.

17.

On April 1, 2020, defendants informed residents and their families that two residents and two staff members had died of COVID-19. In the same letter, defendants lied to residents and their family members in order to falsely reassure them that the care at Foster Creek was good:

> "We are continuing to do everything humanly possible to control the spread of this disease in the community. Staff are continuing to practice isolation techniques per CDC guidelines and additional cleaning and sanitation has been ongoing since mid-March. We are continuing to monitor the situation very closely and are in communication with families concerning those residents with any signs and symptoms of any type of infection."

Nothing could have been further from the truth.

/ / /

/ / /

/ / /

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

C. The State Takes Action

18.

From April 10, 2020 through April 12, 2020, the State conducted an investigation into Foster Creek's infection control practices and mis-handling of COVID-19. The investigation culminated in an April 15 report that concluded Foster Creek had "failed to implement adequate infection control practices to prevent the spread of COVID-19 (Coronavirus)." Among Defendants' many deficient practices were:

- Inadequate staff training regarding COVID-19 infection control;
- Staff failure to follow CDC Long-Term Care Guidelines by treating every resident as potentially infected for COVID-19;
- Staff failure to correctly wear or use Personal Protective Equipment ("PPE");
- Staff failure to change PPE between residents;
- Staff failure to wash hands between residents;
- Defendants failing to provide staff with adequate PPE, *e.g.*, providing only one face mask per shift, with no access to obtain a back-up mask;
- Staff working across units;
- Staff working between rooms with COVID-19 positive residents and COVID-19 negative residents;
- Improper staff social distancing;
- Failure to maintain adequate or accurate medical records regarding COVID-19; and
- Inadequate numbers of staff to meet resident needs.

19.

The State formally cited Foster Creek with the following list of deficiencies directly related to Foster Creek's complete failure to protect residents from infection by COVID-19:

> OAR 411-086-0060(2)(a) Comprehensive Assessment and Care Plan: for failing to assess respiratory changes, for failing to update COVID-19 diagnosis, and failing to update resident care plans;

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

OAR 411-086-0100(3) Nursing Services: Staffing: for failing to provide sufficient staff to prevent staff from going between units in order to prevent the spread of COVID-19;

OAR 411-086-0120(1) Nursing Services: Changes of Condition: for failing to notify residents' physician(s) of change in resident condition that warranted medical or nursing intervention;

OAR 411-086-0140(1)(a)(E) Nursing Services: Problem Resolution and Preventative Care: for failing to prevent the spread of COVID-19; and

OAR 411-086-0330(1) Infection Control and Universal Precautions: for failing to appropriately use personal protective equipment to prevent the spread of COVID-19.

20.

The State went on to find that based upon the above violations, "…Respondent failed to ensure appropriate measures are in place to prevent the spread of COVID-19. This failure presents an immediate risk to the health and safety of all residents in Respondent's facility."

21.

The State went so far as to mandate an immediate infection control training to facility staff in an effort to correct Foster Creek's many deficiencies. The State also placed a condition on defendants' license, such that the facility could not admit any new residents.

22.

Defendants never informed Ms. Jones or her family about the grossly deficient care they were providing to residents, that Ms. Jones's life was in immediate jeopardy based upon those deficient practices, or that the situation was so dire that the facility could no longer admit new residents.

23.

To the contrary, defendants continued to represent to Ms. Jones's daughter a positive yet false picture of defendants' compliance with proper infection control at Foster Creek. They emphasized that Ms. Jones was in the separate and highly secure Mt. Hood ECU within the facility, which afforded Ms. Jones additional protection and safety. By doing so, defendants

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

failed to provide accurate or sufficient information about COVID-19 conditions at Foster Creek to allow Ms. Jones's daughter to make informed decisions regarding her care, including whether to remove or transfer Ms. Jones from Foster Creek.

24.

When Ms. Jones's daughter asked Foster Creek administrators and staff questions about safety precautions and her mother's safety in the ECU, and was reassured that all was well. For example, on April 13, 2020, she asked Foster Creek's administrator if Foster Creek was sharing employees between units, and was told "No. We're isolating employees." That was a false statement, as proven by the State's investigations.

25.

On April 18, 2020, a Foster Creek nurse discovered Ms. Jones had a 101.5 degree fever. Ms. Jones was transferred to the Adventist Medical Center Emergency Room in Portland. There, Ms. Jones was diagnosed with COVID-19. Ms. Jones never left Adventist Medical Center and never returned to Foster Creek.

D. Despite State Assistance, Foster Creek's Failures Persisted

26.

In the wake of its April 15, 2020 report, DHS provided Personal Protective Equipment ("PPE") and technical assistance to Foster Creek. DHS and OHA continued investigating and monitoring defendants, including continuing site observations and infection control assessments. DHS became alarmed by Foster Creek's inability to follow required practices and continued failures including staff cohorting residents, staff working across units, improper training, and not meeting required staffing levels.

27.

On April 18, 2020 – the same day Ms. Jones was transferred to the hospital – the State declared an emergency at the facility and issued a partial evacuation order.

/ / /

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

28.

Over the next week, DHS and OHA continued infection control assessments, surveys, and other information gathering.

29.

On April 24, DHS imposed a finding of immediate jeopardy under federal law.

30.

On April 28, the Centers for Medicare and Medicaid Services issued a notice of involuntary termination of Foster Creek's Medicare provider agreement.

31.

COVID-19 continued to spread at Foster Creek, and the death toll mounted. Foster Creek was unable to comply with the conditions imposed by the Notice and Order.

E. The State Shuts Down Foster Creek

32.

On May 4, 2020, DHS issued an Order of Emergency Suspension ("Emergency Order") against St. Jude Operating Company, LLC d.b.a. Healthcare at Foster Creek ("Respondent" in the Emergency Order).

33.

The Emergency Order's Statement of Violations concluded, "Based on observations, interviews and record review it was determined Respondent failed to implement adequate infection control practices to prevent the spread of COVID-19 (Coronavirus)."

34.

The Emergency Order stated "Respondent failed to ensure appropriate measures are in place to prevent the spread of COVID-19. This failure presents an immediate risk to the health and safety of all residents in Respondent facility."

/ / /

/ / /

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

35.

The Emergency Order further found that the facility's failures constituted violations of the following State rules:

> OAR 411-086-0060(2)(a) Comprehensive Assessment and Care Plan: for failing to assess respiratory changes, for failing to update COVID-19 diagnosis, and failing to update resident care plans;
>
> OAR 411-086-0100(3) Nursing Services: Staffing: for failing to provide sufficient staff to prevent staff from going between units in order to prevent the spread of COVID-19
>
> OAR 411-086-0120(1) Nursing Services: Changes of Condition: for failing to notify residents' physician(s) of change in resident condition that warranted medical or nursing intervention;
>
> OAR 411-086-0140(1)(a)(E) Nursing Services: Problem Resolution and Preventative Care: for failing to prevent the spread of COVID-19; and
>
> OAR 411-086-0330(1) Infection Control and Universal Precautions: for failing to appropriately use personal protective equipment to prevent the spread of COVID-19."

36.

Tragically, these were the exact same violations the State had found in April. Nothing had been remedied by defendants despite the warning in April that residents' lives were in immediate jeopardy due to defendants' failures.

37.

The State's Emergency Order also addressed cross-unit COVID-19 infection control failure with respect to the Mt. Hood ECU:

> "Based on observations and interviews the facility failed to maintain adequate certified and licensed nursing staffing to ensure dedicated staff worked in the four separate and distinct units, failed to ensure staff did not cross units within the facility and failed to ensure staff were in each of the units at all times, resulting in residents being exposed to the COVID-19 virus. This staffing practice resulted in the potential for all residents to be infected with COVID-19 virus with the likelihood of serious illness and death.

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

> On 4/17/20, it was determined a resident tested positive for COVID19 in a unit that previously had no residents with COVID-19. **Due to this being a locked unit, and the fact that residents do not leave the unit, the spread of COVID-19 was more likely that (sic) not to have been caused by staff working across units**.
>
> Staff was observed on at least one occasion to have no facility staff in on (sic) the locked Enhanced Care Unit, leaving residents at risk for serious injury or harm. (emphasis added)"

38.

Upon information and belief, the "locked unit" referenced above is Mt. Hood ECU, where Ms. Jones resided. April 17, 2020 was one day before Ms. Jones developed a fever, was transported to the hospital, and was diagnosed with COVID-19.

39.

The effect of the Emergency Order was to suspend St. Jude Operating Company's nursing facility operating license and completely halt defendants' operations at Foster Creek. All remaining Foster Creek residents were released to family members and caretakers, or transferred to other facilities.

40.

In its Emergency Order, DHS found

> "Based on the violations outlined above, DHS finds that Respondent's actions create a serious danger to the public health and safety. That is because, despite numerous enforcement actions, infection control guidance and oversight, and facility support, Respondent has demonstrated a consistent inability to adhere to basic infection control standards and Oregon Administrative Rules. This has resulted in, and continues to result in, a persistent source and spread of COVID-19 in a facility with extremely vulnerable residents, and in the community at large."

41.

The May 4, 2020 Order of Emergency Suspension went into immediate effect.

/ / /

/ / /

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

42.

Nine days earlier, on April 25, 2020, Ms. Jones had died from COVID-19 she contracted at defendants' facility while under defendants' care.

FIRST CLAIM FOR RELIEF
(Count 1 – Negligence, Against All Defendants)

43.

Plaintiff realleges all of the paragraphs above as if fully set forth herein.

44.

Defendants owed a duty of care to Ms. Jones, who was under defendants' care.

45.

Defendants exposed Ms. Jones to a risk of foreseeable harm and breached their duty of care to Ms. Jones, as described above.

46.

Such breach resulted in harm to Ms. Jones, including injury, damage, or death to Ms. Jones by COVID-19.

47.

The negligence of defendants as outlined above was a proximate cause of Ms. Jones's injuries and death.

48.

As a result of defendants' negligence and fault, plaintiff has been damaged in the amount of $100,000 for economic damages and $500,000 for non-economic damages for pain, suffering, emotional distress, anguish, and mental distress. Plaintiff is entitled to pre-judgment interest on her economic damages at the statutory rate of 9% from April 25, 2020 through entry of judgment.

(Count 2 – Negligence *per se*, Against All Defendants)

49.

Plaintiff realleges all of the paragraphs above as if fully set forth herein.

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

50.

As described above, defendants were negligent *per se* in violating:

OAR 411-086-0060(2)(a) Comprehensive Assessment and Care Plan: for failing to assess respiratory changes, for failing to update COVID-19 diagnosis, and failing to update resident care plans;

OAR 411-086-0100(3) Nursing Services: Staffing: for failing to provide sufficient staff to prevent staff from going between units in order to prevent the spread of COVID-19;

OAR 411-086-0120(1) Nursing Services: Changes of Condition: for failing to notify residents' physician(s) of change in resident condition that warranted medical or nursing intervention;

OAR 411-086-0140(1)(a)(E) Nursing Services: Problem Resolution and Preventative Care: for failing to prevent the spread of COVID-19; and

OAR 411-086-0330(1) Infection Control and Universal Precautions: for failing to appropriately use personal protective equipment to prevent the spread of COVID-19.

51.

The *per se* negligence of defendants as outlined above was a proximate cause of Ms. Jones's injuries and death.

52.

As a result of defendants' negligence and fault, plaintiff has been damaged in the amount $100,000 for economic damages and $500,000 for non-economic damages for pain, suffering, emotional distress, anguish, and mental distress. Plaintiff is entitled to pre-judgment interest on her economic damages at the statutory rate of 9% from April 25, 2020 through entry of judgment.

SECOND CLAIM FOR RELIEF

(Elder Abuse Law – ORS 124.100 and ORS 124.105, Against Benicia Senior Living)

53.

Plaintiff realleges all of the paragraphs above as if fully set forth herein.

54.

Ms. Jones is an elderly person and a vulnerable person.

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

55.

Defendant, as described above, recklessly engaged in conduct which recklessly endangered Ms. Jones by creating a substantial risk of serious physical injury to her.

56.

Ms. Jones suffered injury, damage, or death by reason of physical abuse which defendant caused or permitted its agents to cause.

57.

As a result of defendant's abuse, plaintiff has been damaged in the amount of $100,000 for economic damages and $500,000 for non-economic damages for pain, suffering, emotional distress, anguish, and mental distress. Plaintiff is entitled the treble damages pursuant to ORS 124.100(2)(a) and (b).

58.

Plaintiff is entitled to pre-judgment interest on her economic damages at the statutory rate of 9% from April 25, 2020 through entry of judgment.

ATTORNEYS FEES

59.

Pursuant to ORS 124.100(2)(c), plaintiff is entitled to recover reasonable attorney fees, costs, and disbursements.

PUNITIVE DAMAGES

60.

Defendants have shown a reckless and outrageous indifference to a highly unreasonable risk of harm and acted with conscious indifference to the health, safety, and welfare of Ms. Jones. Pursuant to 31.730(1), plaintiff reserves her right to move for punitive damages.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment against defendants and each of them for the following relief:

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637

1. A judgment in favor of plaintiff and against defendants in the amount of $600,000 on Plaintiff's first claim for relief.
2. A judgment in favor of plaintiff and against Benicia Senior Living in the amount of $1,800,000 on plaintiff's second claim for relief.
3. Plaintiff's reasonable attorney fees, costs, disbursements, and prevailing party fees.
4. Such other relief as the Court deems appropriate.

DATED this 14th day of May 2020.

RICHARDSON WRIGHT LLP

By *s/Bonnie Richardson*

Bonnie Richardson, OSB No. 983331
bonnie@richardsonwright.com
Joseph Franco, OSB No. 073913
joe@richardsonwright.com
Simon Whang, OSB No. 035282
simon@richardsonwright.com
Attorneys for Plaintiff

Trial Attorney: Bonnie Richardson

RICHARDSON WRIGHT LLP
805 SW Broadway, Suite 470
Portland, OR 97205
Telephone: (503) 546-4637