IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

JANE COE, JANE POE, JANE ROE, and JANE VOE, *et al.*

Plaintiffs,

v.

DAVID FARLEY, M.D., an individual; WEST LINN FAMILY HEALTH CENTER, P.C., an Oregon Professional Corporation; LEGACY MERIDIAN PARK HOSPITAL, an Oregon Nonprofit Corporation; PROVIDENCE HEALTH & SERVICES – OREGON, an Oregon Nonprofit Corporation doing business as Providence Willamette Falls Medical center, and JOHN AND JANE DOES 1-50, inclusive,

Defendants.

Case No. 20CV37412

DEFENDANT LEGACY MERIDIAN PARK HOSPITAL'S MOTION TO DISMISS

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UTCR 5.050 STATEMENT

Oral argument is requested. Legacy Meridian Park Hospital estimates that two hours will be required for argument on this Motion.

MOTION

Pursuant to ORCP 21A(8), Legacy Meridian Park Hospital moves the Court for an order and judgment dismissing Plaintiffs' claims for intentional infliction of emotional distress (claim 1), negligence (claim 2), fraud/concealment (claim 4), and assault and battery (claim 5) for failure to state a claim. This Motion is supported by the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs are over one hundred women and minors who allege that they were sexually abused by one doctor, David Farley, M.D. ("Farley"), over the course of thirty-two years at three separately-owned medical facilities. Their allegations are upsetting and horrifying. But of the more than one-hundred individual plaintiffs, just three (the "Legacy Plaintiffs") allege that they were abused by Farley at Legacy Meridian Park Hospital ("Legacy"), and each on a single occasion between 1992 and 2017. The remaining 111 individual plaintiffs (the "Non-Legacy Plaintiffs") allege that they were, collectively, abused by Farley hundreds of times between 1988 and 2020 at non-Legacy medical facilities owned by the other Defendants in this case.

Despite the apparent disconnect between Legacy's involvement and virtually all of the abuse allegedly suffered by Plaintiffs, the Third Amended Complaint ("TAC") seeks to hold Legacy jointly liable for more than $500 million in damages. It does so based not on any act taken by Legacy but rather its alleged inaction for failing to either report Farley to the authorities or disclose to each individual plaintiff his propensity for sexual abuse, regardless of whether that plaintiff was ever treated by Farley at Legacy or even known by Legacy to be one of Farley's patients. The Third Amended Complaint also includes conclusory allegations of a broad

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conspiracy between West Linn Family Health, P.C. ("Family Health"), Providence Willamette Falls Medical Center ("Providence"), and Legacy not to disclose Farley's alleged abuse, but it notably fails to allege any facts suggesting that such a conspiracy might exist.

The theory at the core of Plaintiffs' Third Amended Complaint is that hospitals are guarantors of their own patients' safety *as well as* the safety of patients at unrelated medical facilities. This theory, a narrower version of which was roundly rejected by the Oregon Supreme Court in *G.L. v. Kaiser Foundation Hospitals, Inc.*, 306 Or 54 (1988), would give rise to geographically and temporally unbounded liability for hospitals with even the slightest connection to a medical provider who commits negligent or even criminal acts at unrelated facilities for years into the future. Although Plaintiffs attempt to repackage this theory of near-strict liability in various ways—including claims for negligence, intentional infliction of emotional distress ("IIED"), fraud, and conspiracy to commit fraud—their case remains, at base, an invitation for this Court to hold one hospital liable for decades of third-party criminal conduct in which the hospital played no part and the occurrence of which the hospital could not have reasonably foreseen.

This Court should decline Plaintiffs' invitation and dismiss both the Legacy Plaintiffs and Non-Legacy Plaintiffs' negligence, IIED, fraud, and conspiracy claims. It should also dismiss the Legacy Plaintiffs' vicarious liability claims for Farley's alleged acts of assault and battery.

II. FACTUAL BACKGROUND AND LEGACY PLAINTIFFS' ALLEGATIONS

Legacy Meridian Park Hospital is a hospital in Tualatin, Oregon. Legacy, like many other hospitals, permits non-employee health care providers to perform certain procedures and use certain Legacy facilities if they obtain approval from Legacy through a credentialing process. These practitioners are not, and have never been, Legacy employees. This case involves one such practitioner, Farley, who used the facilities and equipment at Legacy to perform a limited range of medical procedures on his patients. At all times, Farley was a provider with his own practice at Family Health—a clinic he founded. TAC ¶ 13.

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Plaintiffs are 114 women and minors who allege that they were sexually abused by Farley while under his care. Although the allegations span nearly forty years, they focus predominantly on abuse alleged to have occurred at two non-Legacy locations: Family Health and Providence. *See generally* TAC. Indeed, of the 114 Plaintiffs, only the three Legacy Plaintiffs (B.V., R.M., and Roe) allege that they were abused by Farley at Legacy.[1] The remaining 111 Non-Legacy Plaintiffs allege that they were abused exclusively at Family Health and Providence—none of them allege that they were abused by Farley at Legacy or even treated by Farley at Legacy.[2]

The three Legacy Plaintiffs each describe a single isolated instance of abuse occurring between 1992 and 2017. Those allegations, which are the only ones specific to Legacy, are as follows:

- Plaintiff B.V. alleges that, in 1992, Farley performed an "incredibly painful and unnecessary placental removal" upon B.V. at Legacy. TAC ¶ 187(d).
- Plaintiff R.M. alleges that, sometime between 2010 and 2016, Farley performed "unnecessary and ungloved pelvic and breast examinations" on her at Legacy. TAC ¶¶ 368–69(a).
- Plaintiff Roe alleges that, after giving birth to her child at Legacy in 2017, Farley forcibly pulled out her placenta for his sexual gratification. TAC ¶ 47(c).

None of the remaining 111 Non-Legacy Plaintiffs allege that they were treated by Farley at Legacy, much less abused by Farley at Legacy. *See generally* TAC. And none of the Legacy

[1] Of the 111 Non-Legacy Plaintiffs, six allege that they were at one time or another "patients" of Legacy. *See* TAC ¶¶ 264 (C.V.), 285 (D.C.), 312 (D.L.), 372 (L.M.), 375 (M.M.), 378 (F.M.). But they do not tie their alleged status as "patients" of Legacy to their alleged abuse by Farley, nor do they specify when or for what reason they were Legacy "patients." Accordingly, these individuals' unrelated dealings with Legacy are not material to the issues presented in this case.

[2] Plaintiffs' counsel has represented to Legacy that unless the Third Amended Complaint explicitly designates Legacy as the site of Farley's alleged misconduct, it should be presumed that the abuse took place at Family Health.

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Plaintiffs or Non-Legacy Plaintiffs allege that they became Farley's patient at Legacy or received treatment from Farley exclusively or even predominantly at Legacy.

III. PLAINTIFFS' CLAIMS

Plaintiffs allege four causes of action against Farley, Family Health, Providence, and Legacy (together, "Defendants"). Specifically, Plaintiffs bring claims for: (1) IIED, (2) negligence; (3) negligent supervision/credentialing,[3] and (4) fraud/concealment. Plaintiffs also bring a fifth claim for assault and battery against Farley, but Legacy understand that the Legacy Plaintiffs seek to hold Legacy vicariously liable on this claim as well. *See* TAC ¶ 15. Legacy now moves to dismiss Plaintiffs' claims for IIED, negligence, fraud/concealment, and assault and battery for failure to state claims for relief.

IV. LEGAL STANDARD

Under ORCP 21A(8), a court must dismiss a claim if the complaint "fail[s] to state ultimate facts sufficient to constitute a claim." ORCP 21A(8). Courts accept as true all well-pleaded factual allegations in the complaint and draw all reasonable inferences from those factual allegations in favor of the plaintiff. *Yanney v. Koehler*, 147 Or App 269, 272, 272 n.1 (1997).

In evaluating whether a complaint states a claim for relief, courts look at the facts pleaded and "disregard any allegations that state conclusions of law." *Gafur v. Legacy Good Samaritan Hospital*, 344 Or 525, 529 (2008). "An ultimate fact is a fact from which legal conclusions are drawn. A conclusion of law, by contrast, is merely a judgment about a particular set of circumstances and assumes facts that may or may not have been pleaded." *Fearing v. Bucher*, 328 Or 367, 375 n.5 (1999). Bald legal conclusions are not sufficient to support a claim. *Walthers v. Gossett*, 148 Or App 548, 558 (1997). Rather, a complaint must allege ultimate facts from which

[3] Plaintiffs bring their Negligent Supervision/Credentialing claim against "Those Clinic Defendants With Which A Patient-Provider Relationship Was Established." TAC at 37. Though Legacy denies a patient-provider relationship with any Plaintiff, Legacy assumes for the purpose of this Motion that this claim is brought against Legacy by the Legacy Plaintiffs.

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the required conclusions are "inferable, not a mere possibility. An inferable conclusion is more than a suspicion, a suggestion, a speculation, or a conjecture; a conclusion is inferable from facts if the conclusion can be logically deduced from the facts." *Jack Doe v. Lake Oswego School Dist.*, 242 Or App 605, 622 (2011), *rev'd on other grounds* 353 Or 321 (2013).

V. ARGUMENT

This Court should dismiss Plaintiffs' negligence, IIED, fraud/concealment, and assault and battery claims because Plaintiffs fail to allege ultimate facts sufficient to state claims for relief. First, both the Legacy Plaintiffs and Non-Legacy Plaintiffs fail to state a claim for negligence because neither the nature of Farley's alleged conduct nor his alleged victims were reasonably foreseeable to Legacy. Second, both the Legacy Plaintiffs and Non-Legacy Plaintiffs fail to state an IIED claim because Legacy did not intend to inflict emotional distress on Plaintiffs and because an employer cannot be liable for IIED if they tolerate sexual abuse by an employee. Third, both the Legacy Plaintiffs and Non-Legacy Plaintiffs fail to state a claim for fraud/concealment because Legacy's act of allowing Farley to conduct medical procedures at one of its facilities did not amount to a misrepresentation about Farley and because Legacy did not have a duty to affirmatively disclose information about Farley to his patients. Finally, the Legacy Plaintiffs fail to state a claim for vicarious liability against Legacy based on Farley's alleged acts of assault and battery because Plaintiffs do not plead facts sufficient to show that Farley was Legacy's employee, actual agent, or apparent agent.

VI. PLAINTIFFS FAIL TO STATE A CLAIM FOR NEGLIGENT FAILURE TO REPORT FARLEY

Plaintiffs are unable to state a negligence claim for failing to report Farley because neither the nature of Farley's alleged conduct nor the overwhelming majority of his alleged victims were reasonably foreseeable to Legacy. Oregon courts generally analyze negligence claims in terms of "reasonable foreseeability." *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 336 Or 329, 340 (2004). Under this approach, "the more traditional duty-breach analysis . . . is supplanted by the

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question [of] whether the defendant's conduct resulted in a foreseeable and unreasonable risk of harm of the kind that the plaintiff suffered." *Towe v. Sacagawea, Inc.*, 357 Or 74, 86 (2015). Thus, in run-of-the-mill negligence actions, a plaintiff need not "prove that the defendant owed [her] a duty[] because—as a general proposition—everyone owes each other the duty to act reasonably in light of foreseeable risks of harm." *Id.* The only exception to this rule is if a plaintiff "invokes a special status, relationship, or standard of conduct." *Oregon Steel Mills*, 336 Or at 341. If a plaintiff invokes a special status or relationship, then that status or relationship "*may* 'create,' 'define,' or 'limit' the defendant's 'duty' to the plaintiff." *Id.* (emphasis added) (quoting *Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 17 (1987)). Because Plaintiffs fail to allege facts from which a jury could find that they were in a special relationship with Legacy or that Farley's decades of abuse were reasonably foreseeable, this Court should dismiss Plaintiffs' negligence claim.

A. Legacy was not in a special relationship with Plaintiffs and, even if it were, any duty owed to Plaintiffs was limited to reasonably foreseeable harms.

Plaintiffs allege that Legacy owed them "an affirmative duty" to report Farley or warn them of his dangerous propensities based on the "special, trusting, confidential, fiduciary relationship" between Legacy and each individual plaintiff. TAC ¶¶ 21, 27, 32, 393. But there is no special relationship between Legacy and Plaintiffs giving rise to such a duty. First, with respect to the Legacy Plaintiffs, no Oregon court has ever recognized a special relationship between a hospital and its patients. Second, with respect to the Non-Legacy Plaintiffs, no Oregon court has ever recognized a special relationship between a hospital and persons treated at *another* hospital. Finally, even if Plaintiffs could establish a special relationship with Legacy, the scope of any duty arising from that special relationship would still be limited to reasonably foreseeable risks of harm.

First, there is no special relationship between Legacy and the Legacy Plaintiffs. A duty arising from a special status or relationship "may be imposed by statute, contract or court-made law." *Fuhrer v. Gearhart-By-The-Sea, Inc.*, 306 Or 434, 439 (1988). This means that, absent a statutory or contractual basis, a duty arising from a special status or relationship must be based in

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precedent or the common law. *Stewart v. Kids, Inc. of Dallas, OR,* 245 Or App 267, 276–78 (2011). Legacy Plaintiffs, however, identify no contract, statute, or other source of law recognizing a special status or relationship between a hospital and those treated there. And no such status or relationship is recognized in Oregon or under any restatement of the law. In fact, the Oregon Supreme Court has forcefully rejected the idea that hospitals and patients are in a "special relationship" that would make hospitals "absolutely responsible for [a] patient's safety." *G.L. v. Kaiser Found. Hosps., Inc.*, 306 Or 54, 61–68 (1988). Although the Legacy Plaintiffs allude to a statutory duty arising from Legacy's "status as a mandatory reporter of sexual abuse," TAC ¶ 27, that "duty" is limited to reporting suspected abuse of minors, ORS 419B.010, and none of the abuse allegedly witnessed by Legacy staff involved a minor.[4] TAC ¶¶ 46–48, 186–88, 368–70.

Second, any special relationship between Legacy and the Legacy Plaintiffs—to the extent the Legacy Plaintiffs could even establish one—would not include the 111 Non-Legacy Plaintiffs. The Non-Legacy Plaintiffs, none of whom were abused or even treated by Farley at Legacy, allege no material connection to Legacy—they are simply members of the public. That omission is critical: a hospital, like any other entity, cannot be in a special relationship with the "general public." *See Buchler v. Or. Corrs. Div.*, 316 Or 499, 505–06 (1993). This is true even if a defendant operates for the sole purpose of protecting public safety, like the jailer of a convicted felon. *See id.* ("[A] jailer has no special relationship to members of the public in general."). That makes sense because to extend a special relationship to all members of the public—regardless of their connection to the defendant—would cause the "duty" exception to swallow the general "foreseeability" rule. Thus, there must be, at the very least, some nexus between the parties for a special relationship to exist. *See* Restatement (Second) of Torts § 314A cmt. c (Am. Law Inst.

[4] It is also clear that Legacy would not owe such a duty. The mandatory reporting statute specifies that the duty to report suspected child abuse is "*personal to the public or private official alone*, regardless of whether the official is employed by, a volunteer of or a representative or agent for any type of entity or organization that employs persons or uses persons as volunteers who are public or private officials in its operations." ORS 419B.010(3) (emphasis added).

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1975) (stating that an affirmative duty to protect "appl[ies] only where [a] relation exists between the parties"). Because the Non-Legacy Plaintiffs fail to allege *any* connection to Legacy as it relates to their alleged abuse by Farley, the Non-Legacy Plaintiffs' negligence claims—like the Legacy Plaintiffs' claims—must be analyzed under the standard of general foreseeability.

Nevertheless, even if Legacy did owe Plaintiffs a "duty" based on a special status or relationship, the *scope* of that duty would still be limited to reasonably foreseeable risks of harm. "[W]hen a plaintiff alleges a special relationship as the basis for the defendant's duty, the scope of that duty may be defined or limited by common-law principles such as foreseeability." *Oregon Steel Mills*, 336 Or at 342. The only time that foreseeability plays no role is "if the special relationship (or status or standard of conduct) . . . *prescribe[s] a particular scope of duty*." *Id.* (emphasis added). That is not the case here: no source of law defines a heightened duty of care based on the relationship between hospitals and patients, let alone one that includes liability for unforeseeable risks of harm. *See, e.g.*, *Cain v. Rijken*, 300 Or 706, 718 (1986) (holding that, although a psychiatric hospital had a statutory duty to "protect members of the public," nothing in the statute expanded liability beyond foreseeable risks of harm). To the contrary, *G.L.* expressly rejected the idea that hospitals are guarantors of patients' physical safety. 306 Or at 61–68. Although *G.L.* left open the possibility that hospitals might owe patients a duty of care analogous to that of an innkeeper, later cases make clear that the scope of even an innkeeper's duty to protect guests is limited to "foreseeable . . . risks of physical harm." *Fuhrer*, 306 Or at 441. Plaintiffs' negligence claims, as such, must be analyzed under the standard of general foreseeability.

B. Farley's decades of alleged abuse were not reasonably foreseeable to Legacy.

Plaintiffs fail to allege facts from which a jury could find that Farley's decades of alleged abuse—all except for three instances of which were perpetrated at non-Legacy facilities—were reasonably foreseeable to Legacy. First, the Non-Legacy Plaintiffs were not reasonably foreseeable targets of Farley's alleged conduct because Plaintiffs fail to allege that Legacy had any knowledge

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of Farley's practice at Family Health or Providence, let alone that he was performing obstetric or gynecological procedures at those facilities. Second, as to all Plaintiffs allegedly abused between 1992 and 2010, the nature of Farley's alleged conduct was not reasonably foreseeable to Legacy based solely on a "painful" placental removal that unidentified Legacy staff allegedly witnessed in 1992. Finally, as to all Plaintiffs allegedly abused between 2010 and 2020, the nature of Farley's alleged conduct was not reasonably foreseeable to Legacy based on two "unnecessary" procedures allegedly witnessed by unnamed Legacy staff and unspecified "complaints" about Farley, both occurring at unspecified times between 2010 and 2020.

Under Oregon law, a risk of harm is not reasonably foreseeable to a defendant unless there is reason to know that the plaintiff falls within a specific and identifiable class of persons at risk of such harm. In *Buchler*, for instance, a member of the public was murdered after a prisoner stole an unattended prison vehicle and escaped from his work crew. 316 Or at 502. The victim, who lived fifty miles from the work site but was a neighbor of the prisoner's mother, alleged that prison officials were negligent in failing to warn people living near the mother. *Id.* at 514. After finding that the prisoner's history of theft, burglary, and "violent temper" did not make the shooting a "legally foreseeable result[]" of the escape, *id.* at 507, the court held that the victim also did not fall within the foreseeable class of plaintiffs, *id.* at 514–16. Specifically, the plaintiff failed to present evidence "that would show *why* defendant knew or should have known that the prisoner would be near his mother's home[] or even that defendant was aware that the prisoner's mother lived in the area." *Id.* at 515. It was not enough that the officials may have known that the prisoner was a danger to the public at large because they had no "reason to know" who, where, or when the prisoner might attack. *Id.* at 515–16. The court therefore concluded that the shooting was not a reasonably foreseeable risk of failing to warn those living near the mother's home. *Id.*

Similarly, Oregon courts have repeatedly warned against describing a harm too generally when assessing whether the risk of that harm is reasonably foreseeable. In *Allstate Insurance, Co.*

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v. Tenant Screening Services, Inc., for instance, a company hired by a landlord to perform a background check on a prospective tenant failed to report that the applicant had a criminal history, including "violent disorderly [and] offensive conduct." 104 Or App 41, 43 (1996). The landlord rented to the applicant and, after another tenant was sexually assaulted, brought an indemnity action against the screening company for its alleged negligence in failing to report the new tenant's criminal record. *Id.* at 43–44. In dismissing the landlord's complaint, the Oregon Court of Appeals held that the risk of the new tenant sexually assaulting another tenant was not a "reasonably foreseeable consequence" of failing to report the tenant's history of property and violent crime. *Id.* at 51. The court explained that, "although it may be generally foreseeable that criminals will commit crimes, nothing in [the assailant's] criminal record . . . foreshadowed his *particular crimes* against [the victim]." *Id.* at 51–52 (emphasis added). That was true, the court reasoned, even though the new tenant's history suggested that he might engage in violent or deviant conduct more generally. *Id.* at 52. The assailant's criminal record did not, it concluded, "suggest an inclination to commit the serious sexual crimes of sodomy and sexual abuse."[5] *Id.*

Here, Farley's alleged abuse of both the Legacy Plaintiffs and Non-Legacy Plaintiffs was not reasonably foreseeable. First, as in *Buchler*, Plaintiffs fail to allege any facts from which to infer that Legacy should have known that Farley would target the Non-Legacy Plaintiffs. Plaintiffs do not allege facts showing, for instance, that Legacy ever knew that Farley had an active practice at Family Health or Providence, let alone that Farley performed obstetric or other gynecological procedures at those facilities. Nor do they allege that Legacy knew that the Non-Legacy Plaintiffs were patients at Family Health or Providence. Instead, like the prison officials in *Buchler* who had

[5] Other cases have reached a similar result. *See, e.g.*, *Chapman v. Mayfield*, 358 Or 196, 208–18 (2015) (urging courts to narrowly define "the type of harm at risk" in cases "involving third-party criminal conduct" and holding that knowledge of an intoxicated patron's impaired judgment did not make it foreseeable that the patron would become violent if served more alcohol); *McAlpine v. Multnomah County*, 131 Or App 136, 139–44 (1994) (holding that a parolee's history of drug crimes did not make his assault on a member of the public a "foreseeable result" of allowing the parolee to remain at large despite an outstanding arrest warrant).

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no reason to know that their escaped prisoner might attack a victim fifty miles away or that the victim would be a target of the prisoner, Legacy had no reason to know that Farley would abuse victims at Family Health and Providence or even that the Non-Legacy Plaintiffs were patients at Family Health and Providence. And whereas the Oregon Supreme Court described the attack in *Buchler* as being too remote in both time and space based on just *two days* having passed between the prisoner's escape and the victim's murder, Farley's alleged abuse of the Non-Legacy Plaintiffs spans *thirty-two years*. Without alleging that Legacy knew that Farley was practicing at Family Health and Providence, or that the Non-Legacy Plaintiffs were patients at either of those facilities, the Non-Legacy Plaintiffs' claims fail as a matter of law.[6]

Second, as to all Plaintiffs allegedly abused between 1992 and 2010, the nature of Farley's alleged misconduct was likewise not reasonably foreseeable to Legacy. Plaintiffs allege that, in 1992, unspecified Legacy staff witnessed Farley perform "an unnecessary and incredibly painful placental removal" on B.V. after she gave birth. TAC ¶ 187(d). Plaintiffs do not allege that any other misconduct—let alone sexual abuse—was witnessed by Legacy staff between 1992 and 2010. *See* TAC ¶¶ 47(c), 186–87, 368–69 (describing the only three instances of abuse alleged to have occurred at Legacy and listing their dates as 1992, sometime between 2010 and 2016, and 2017). It is based on this isolated incident that, according to Plaintiffs, Legacy should have foreseen the risk of all instances of future sexual abuse between 1992 and 2010, whenever and wherever they are alleged to have occurred.[7] But an "unnecessary" or "painful" medical procedure, even if

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[6] To find otherwise would create virtually unbounded liability for third-party criminal conduct that is remote in both time and space. *Cf. Buchler*, 316 Or at 511–12 ("[I]n a general sense, it is foreseeable that anyone whose conduct may in any way facilitate the criminal in committing the crime has played some part in the resulting harm. But, mere 'facilitation' of an unintended adverse result, where intervening intentional criminality of another person is the harm-producing force, does not cause the harm so as to support liability for it.").

[7] Earlier in the Third Amended Complaint, Plaintiffs broadly allege that Legacy staff "witnessed" Farley performing "unnecessary medical procedures as early as 1992," TAC ¶ 27(4), but, as noted above, Plaintiffs later describe only three instances of alleged misconduct at Legacy: one in 1992, one at some point between 2010 and 2016, and one in 2017, TAC ¶¶ 47(c), 186–87, 368–69. Thus,

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suggestive of poor judgment or even carelessness, would not have made Farley's alleged distinct, unrelated, and future acts of sexual abuse a reasonably foreseeable risk of failing to report any concern about the procedure. *Compare* TAC ¶ 187(d) (describing B.V.'s placental removal) *with* TAC ¶ 2 (describing Farley's sexual gratification from forced groping, fondling, penetration, photographs, and rectal exams). It is not enough, as explained in *Tenant Screening Services*, that Legacy may have been aware of potential misconduct or even criminal behavior generally; rather, Legacy would need to have known of specific conduct which "foreshadowed [Farley's] particular crimes" and evidenced "an inclination to commit the serious sexual crimes of sodomy and sexual abuse." 104 Or App at 52. Plaintiffs fail to satisfy that standard.

Finally, the same logic applies to the claims of all Plaintiffs allegedly abused between 2010 and 2020. Plaintiffs allege that, during this period, unspecified Legacy staff witnessed Farley performing a single "unnecessary and ungloved pelvic and breast exam," as well as an unnecessary placental removal.[8] TAC ¶¶ 47(c), 368–69. But an exam or procedure could be "unnecessary" for any number of reasons, and an "unnecessary" exam is, like the general propensity to commit violent crime described in *Tenant Screening Services*, far too broad a category of misconduct to foreshadow Farley's "serious sexual crimes of sodomy and sexual abuse." 104 Or App at 52. Plaintiffs also vaguely allege that Legacy received unspecified "complaints" about "sexually abusive behavior and/or misconduct," TAC ¶ 32, but Plaintiffs do not describe the dates, recipients, substance, number, or disposition of the complaints. Given that only two instances of misconduct

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based on the facts alleged in the Third Amended Complaint, the only incident that Legacy staff could have witnessed between 1992 and 2010 is B.V.'s alleged painful placental removal in 1992.

[8] As with the period from 1992 to 2010, Plaintiffs broadly allege that Legacy staff "witnessed" Farley "performing unnecessary pelvic exams as early as 2010," TAC ¶ 27(5), but Plaintiffs later describe only three instances of alleged misconduct at Legacy: one in 1992, one at some point between 2010 and 2016, and one in 2017, TAC ¶¶ 47(c), 186–87, 368–69. When describing the two instances of abuse between 2010 and 2017, Plaintiffs do not allege that they were witnessed by Legacy staff. *See* TAC ¶¶ 368–69. But, even if they were, the facts as alleged in the Third Amended Complaint confirm that, between 2010 and 2017, Legacy staff could have witnessed no more than two instances of alleged misconduct. TAC ¶¶ 47(c) 368–69.

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are alleged to have occurred at Legacy between 2010 and 2020, it follows that there were, at most, two complaints and that the complaints described the same conduct as that allegedly witnessed by Legacy staff. The complaints, as such, would make Farley's serious sexual crimes no more foreseeable to Legacy, even if this Court were to fill in the unpleaded details of the dates, recipients, substances, number, and disposition of the alleged complaints. *See Chapman*, 358 Or at 212–13 (holding that a court's assumptions cannot replace unpleaded facts when assessing reasonable foreseeability); *Bernards v. Summit Real Estate Mgmt.*, 229 Or App 357, 368 (2009) (holding that a complaint must allege facts from which a required conclusion is "inferable, not a mere possibility," and that "[a]n inferable conclusion is more than a suspicion, a suggestion, a speculation, or a conjecture"). Plaintiffs' claims thus fail as a matter of law.

VII. PLAINTIFFS FAIL TO STATE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiffs also fail to state a claim for IIED. First, Legacy could not have known—much less intended—that Farley would abuse Plaintiffs because Plaintiffs allege no facts showing that Legacy knew that Farley was engaged in sexual misconduct or that the Non-Legacy Plaintiffs even existed. Second, Legacy's conduct in retaining Farley was not outrageous because Oregon courts have repeatedly held that an employer cannot be liable for IIED if they tolerate sexual abuse by an employee. Finally, as to the Non-Legacy Plaintiffs, Legacy's alleged outrageous conduct—retaining Farley as a provider at Legacy—did not cause their severe emotional distress because the Non-Legacy Patients were never abused by Farley at Legacy.

An IIED claim consists of three elements. *Mullen v. Meredith Corp.*, 271 Or App 698, 607–08 (2015). First, a plaintiff must allege facts showing that the defendant "intended to inflict severe emotional distress on the plaintiff" or "[knew] that such distress [was] certain, or substantially certain, to result from his conduct." *McGanty v. Staudenraus*, 321 Or 532, 543, 550 (1995) (first quoting *Sheets v. Knight*, 308 Or 220, 236 (1989), then quoting Restatement (Second) of Torts § 46 cmt. i (Am. Law Inst. 1975)). Second, a plaintiff must allege facts showing that the defendant's

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conduct "constituted an extraordinary transgression of the bounds of socially tolerable conduct." *Id.* at 543 (quoting *Sheets*, 308 Or at 236). "It [i]s for the trial court to determine, in the first instance, whether [a] defendant's conduct . . . [i]s so extreme and outrageous as to permit recovery." *House v. Hicks*, 218 Or App 348, 358 (2008) (quoting *Pakos v. Clark*, 253 Or 113, 132 (1969)). Finally, a plaintiff must allege facts showing that the defendant's conduct was "the cause of [her] severe emotional distress." *McGanty*, 321 Or at 543 (quoting *Sheets*, 308 Or at 236).

In support of their IIED claim, Plaintiffs allege that Legacy (1) "tolerate[d] the sexual harassment, molestation, and abuse of Plaintiffs," (2) "put[] Farley, who was known to [Legacy] to have physically and sexually abused other patients, in a position of care of [sic] Plaintiffs ," and (3) was "incapable of supervising and/or stopping . . . Farley[] from committing wrongful sexual acts with . . . Plaintiffs." TAC ¶¶ 385–87. Plaintiffs maintain that this conduct was "an extraordinary transgression of the bounds of socially tolerable behavior." TAC ¶ 384. Legacy's conduct, Plaintiffs further allege, was "intentional and malicious and done for the purpose of causing Plaintiffs to or having substantial certainty that Plaintiffs would suffer humiliation, mental anguish, and emotional and physical distress." TAC ¶ 388. Plaintiffs conclude that, "[a]s a result of" this knowing or intentional conduct, they have suffered severe emotional distress. TAC ¶ 389.

These allegations do not state a claim for IIED. First, Plaintiffs fail to allege facts showing that Legacy intentionally or knowingly inflicted emotional distress. A defendant cannot be liable for negligently or even recklessly inflicting emotional distress—she must, at the least, be certain that such distress will follow from her conduct. *See Snead v. Metro. Prop. and Cas. Ins. Co.*, 909 F Supp 775, 779 (D Or 1996) ("[T]here is no cognizable claim for the reckless infliction of emotional distress under [Oregon law]."). Moreover, it is not enough for a defendant to direct conduct at a class of persons or know that their conduct will harm a class of persons; rather, a defendant must intend or know that their conduct will harm "a particular victim." *Meagher v. Lamb-Weston, Inc.*, 839 F Supp 1403, 1409 (D Or 1993) (applying Oregon law). Here, there are

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no facts from which a jury could find that Legacy intended or knew that retaining Farley would injure Plaintiffs. With respect to the Non-Legacy Plaintiffs, there are no allegations that Legacy was aware Farley treated patients at Family Health and Providence or that the Non-Legacy Plaintiffs were even patients at those facilities. It is not enough that retaining Farley may have endangered women as a class. *Id.* at 1409. Moreover, as to all Plaintiffs, the nature of Farley's alleged misconduct was not reasonably foreseeable to Legacy based on the three isolated instances of misconduct. But even if Legacy *should have* foreseen that Farley posed a danger to his patients, Plaintiffs allege no facts demonstrating that Legacy did, in fact, *know* that retaining Farley would result in the abuse of his patients. *See McGanty*, 321 Or at 550. And although Legacy allegedly received unspecified "complaints" about Farley's conduct, TAC ¶ 32, Plaintiffs do not describe the dates, recipients, substance, number, or disposition of those complaints, leaving a jury to "speculate" as to whether Legacy could have known that retaining Farley would lead to the abuse of any given plaintiff. *Bernards*, 229 Or App at 368.

Second, Plaintiffs fail to allege facts showing that Legacy's challenged conduct—retaining Farley as a provider at Legacy—constituted an extraordinary transgression of the bounds of socially tolerable conduct. Oregon courts have repeatedly held that "[a]n IIED claim requires more than toleration of misconduct by employees." *Asaro v. Sealy Mattress Mfg., Inc.*, 2010 WL 4812809, at *12 (D Or 2010) (applying and surveying Oregon law). In *Lewis v. Or. Beauty Supply Co.*, for instance, the Oregon Supreme Court unanimously upheld a directed verdict where the defendant employer knew that one of its supervisors had assaulted the plaintiff, called her a "whore," searched her personal belongings, stalked her, and told other employees that she had given him "a venereal disease." 302 Or 616, 618–19, 626–28 (1987). Although the *Lewis* court acknowledged that the employer "failed to respond to the problem," it concluded that this was not "the type of behavior against which the tort was meant to protect." *Id.* at 628. Similarly, in *Wheeler v. Marathon Printing, Inc.*, the Oregon Court of Appeals held that an employer could not be liable

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for IIED even though it knowingly tolerated harassment by one its employees that led the plaintiff to attempt suicide, seek counseling, and medicate. 157 Or App 290, 307–08 (1998). Here, even accepting as true Plaintiffs' conclusory allegations that Legacy knew about Farley's dangerous propensities, TAC ¶¶ 384–86, *Lewis* and *Wheeler* make clear that Legacy's alleged toleration of Farley's misconduct is, as a matter of law, insufficient to support an IIED claim.

Finally, the Non-Legacy Plaintiffs fail to allege facts showing that Legacy's conduct is what caused their severe emotional distress. "Oregon law generally does not permit a party to recover where the causal nexus between the defendant's conduct and the plaintiff's injury is speculative or uncertain." *Classen v. Arete NW, LLC*, 254 Or App 216, 222 (2012); *see also Parker v. Pettit*, 171 Or 481, 490 (1943) ("No recovery can be had where resort must be had to speculation or conjecture for the purpose of determining whether the damages resulted from the act of which complaint is made or from some other cause."). To that end, a plaintiff asserting a claim for IIED must "establish[] a direct causal relationship between [the] defendant's conduct and her [emotional distress]." *Peery v. Hanley*, 135 Or App 162, 165 (1995). Here, however, there is no "causal nexus" between Legacy's alleged conduct and the injuries suffered by the Non-Legacy Plaintiffs. Specifically, the Non-Legacy Plaintiffs allege that Legacy inflicted their severe emotional distress by tolerating Farley's abuse and retaining him as a provider, TAC ¶¶ 385–86, but those acts, at the very most, allowed Farley access to the three Legacy Plaintiffs. Legacy is not alleged to have had control over the other Defendants' staffing decisions, and it would require pure "speculation or conjecture" to find that Legacy's staffing decisions are what caused the Non-Legacy Plaintiffs' emotional distress. *See Parker*, 171 Or at 490. In fact, these plaintiffs do not even allege that they were aware of Farley's work at Legacy. The decision to retain Farley was, as such, neither a "but for" nor "direct" cause of the injuries suffered by the Non-Legacy Plaintiffs.

Because Plaintiffs offer nothing more than a "recitation of the elements" of their IIED claim, the claim should be dismissed. *Huang v. Claussen*, 147 Or App 330, 334 (1997).

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VIII. PLAINTIFFS FAIL TO STATE A CLAIM FOR FRAUD/CONCEALMENT AND CONSPIRING TO ENGAGE IN FRAUD/CONCEALMENT

Plaintiffs fourth cause of action for "Fraud/Concealment" seeks to hold Legacy liable for its own alleged fraud or fraudulent concealment and jointly liable for the fraud of the other "Clinic Defendants." Both claims fail to allege facts sufficient to state a claim for fraud or fraudulent concealment under Oregon law and, therefore, should be dismissed as to both the Legacy Plaintiffs and Non-Legacy Plaintiffs.

A. Plaintiffs fail to plausibly plead Legacy's fraud.

The elements of fraud are: "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury." *Webb v. Clark*, 274 Or 387, 391 (1976) (quoting *Rice v. McAlister*, 268 Or 125, 128 (1974)). In Oregon, fraud must be pled with particularity. *Ingram v. Carlton Lumber Co.*, 77 Or 633, 637 (1915); *see also Great Am. Ins. Co. v. Linderman*, 116 F Supp 3d 1183, 1193 (D Or 2015) (applying Oregon common law of fraud and dismissing fraud claim for lack of particularity). The representation giving rise to an actionable fraud claim may be an affirmative representation, an act of concealment, or, in limited circumstances, nondisclosure. *See Whitlatch v. Bertagnolli*, 45 Or App 985, 989 (1980) (explaining that affirmative statements, concealment, or silence can form basis of fraud action).

Plaintiffs' fraud claim here is best understood as arising from alleged nondisclosure. Plaintiffs' fraud/concealment claim cannot be based on an affirmative representation because it would fail at the very first step, as Plaintiffs have not alleged that Legacy made any representation about Farley, much less that Legacy made any *false* representation about Farley. Plaintiffs' concealment theory fares no better because merely permitting Farley to use Legacy's facility does not constitute an act of concealment. Plaintiffs' fraud claim is therefore only conceivable as one

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for fraud by nondisclosure. However, the allegations supporting this theory fail to state a claim for fraud because Legacy owed no duty to Plaintiffs to disclose Farley's prior sexual abuse, which Legacy never even knew about. Therefore, because Plaintiffs' TAC fails to state a claim for fraud, Plaintiffs' fraud/concealment claim should be dismissed.

1. Plaintiffs do not allege that Legacy made any representation about Farley.

It is foundational—indeed the very first element—to a claim for fraud that a plaintiff must allege that the defendant made a representation. *See Conzelmann v. Nw. Poultry & Dairy Prods. Co.*, 190 Or 332, 350 (1950) (explaining elements and noting that each of the elements "must be proved, and the failure to prove any one or more is fatal to the cause of action."); *Andrews v. Roy Motors*, 204 Or 429, 433 (1955) ("Among the elements of actionable fraud, proof of which is essential to recovery, are that the plaintiff had the right to rely on and did rely on the alleged false representations."). Here, however, Plaintiffs have not pleaded facts sufficient to show that Legacy made any representations, much less false representations, about Farley.

Plaintiffs make no specific allegations that Legacy made any representation about Farley. First, the Non-Legacy Plaintiffs do not make any allegations that Legacy made any representations to them about Farley. *See generally* TAC. As to the Legacy Plaintiffs, Plaintiffs make conclusory allegations that Legacy defrauded the Legacy Plaintiffs through unspecified "representations" about Farley's morality and fitness to provide medical care. *See* TAC ¶ 411. Plaintiffs' theory of liability is based on the idea that Legacy misrepresented Farley's true nature, not through any affirmative communication or publication, but by continuing to permit him to treat patients at Legacy. For instance, Plaintiffs allege that Legacy "made false misrepresentations . . . when [Legacy] represented that [Legacy] had no knowledge that [Farley] was a sex abuser." *Id.* But this is a conclusory allegation without supporting facts and cannot, therefore, sustain a fraud claim. *See Cook v. School Dist. UH3J*, 83 Or App 292, 296 (1987) ("General conclusory allegations . . . in

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the absence of ultimate facts upon which allegation is based are insufficient to withstand a motion to dismiss.")

Plaintiffs fail to allege that Legacy communicated with the Legacy Plaintiffs, Non-Legacy Plaintiffs, or any member of the public about Farley at all. Though Plaintiffs repeatedly allege that Legacy was "holding out" Farley to the public at large, the Third Amended Complaint is devoid of any factual allegation that explains *how*, other than permitting Farley to practice at the hospital, (discussed *infra*) Legacy held Farley out to the public or Plaintiffs.

2. Legacy permitting Farley to use its facility is not an act of concealment sufficient to sustain Plaintiffs' claim for fraud.

Plaintiffs seem to imply that Legacy's mere act of permitting Farley to perform certain medical procedures at Legacy without disclosing his alleged history of sexual abuse constitutes concealment for the purpose of a fraud claim. *See* TAC ¶ 411. There is no basis for this in Oregon law.

First, no Oregon court has endorsed this theory of liability, and doing so here would reflect a novel and expansive approach to fraud liability. Of course, it is true that under Oregon law concealment can be the basis for a fraud action. *See Musgrave v. Lucas*, 193 Or 401, 410 (1951) ("Actionable fraud may be committed by a concealment of material facts as well as by affirmative and positive misrepresentations."). But the concealment of material facts can only form a misrepresentation "where the defendant has made representations which would be misleading without full disclosure." *Elizaga v. Kaiser Found. Hospitals, Inc.*, 259 Or 542, 546 (1971). Here, as explained above, Plaintiffs have not pled any affirmative representation, and therefore, Plaintiff's concealment theory must fail on that basis alone.

Plaintiffs' claim fails for a second reason. Plaintiffs' concealment theory seems to be that Legacy is liable because Legacy credentialed Farley, subsequently permitted Farley to conduct procedures at Legacy, those procedures were illegitimate, and did not disclose general information about Farley's moral character to Plaintiffs. *See* TAC ¶ 411. Even if this were true (it is not), the

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"employment" (here, Legacy's approving Farley to use their facility) of an individual who commits tortious acts does not constitute an affirmative act of "concealment" that can form the basis of a fraud or concealment claim. No Oregon court has endorsed this novel theory, and other jurisdictions have flatly rejected Plaintiffs' concealment-by-employment theory in similar sex abuse cases. *See Doe v. Hartz*, 52 F Supp 2d 1027, 1057 (ND Iowa 1999) (dismissing fraudulent concealment claim against parish based on failure to disclose history of sexual misconduct and employment of priest); *Jane Doe 43C v Diocese of New Ulm*, 787 NW 2d 680, 686–88 (Minn App 2010) (dismissing fraud claim against church based on failure to disclose and alleged concealment of pastor's previous sexual abuse of minors because mere employment and failure to disclose not affirmative act of concealment and claim better packaged as nondisclosure claim). Therefore, Plaintiffs' fraud/concealment cause of action again falls short.

3. Legacy owed Plaintiffs no duty to disclose what Legacy did not know about Farley.

Finally, Plaintiffs' fraud/concealment cause of action cannot advance on a nondisclosure theory because, as a matter of law, Legacy owed no duty to disclose information about Farley to either the Legacy or Non-Legacy Plaintiffs. As to the Non-Legacy Plaintiffs, 105[9] do not allege any facts about Legacy. They do not allege that they were abused by Farley at Legacy, treated by Farley at Legacy, or even treated at Legacy at all. Those Plaintiffs have therefore not alleged a patient-provider relationship with Legacy, and their fraud claims must be dismissed.[10]

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[9] The following Plaintiffs have not made any allegations that they were ever treated at Legacy: Jane Coe, Jane Poe, Jane Voe., A.A., A.B., A.C., A.D., A.E., A.F., A.G., A.H., A.I., A.J., A.K., A.L., A.M., A.N., A.O., A.P., A.Q., A.R., A.S., A.T., A.U., A.V., A.W., A.X., A.Y., A.Z., B.A., B.B., B.C., B.C., B.D., B.E., B.G., B.H., B.J., B.K., B.L., B.M., B.N., B.O., B.P., B.Q., B.R., B.S., B.T., B.U., B.W., B.X., B.Y., B.Z., C.A., C.B., C.C., C.D., C.E., C.F., C.G., C.H., C.I., C.J., C.K., C.L., C.M., C.N., C.O., C.P., C.Q., C.R., C.S., C.T., C.U., C.W., C.X., C.Y., C.Z., D.A., D.D., D.E., D.F., D.F., D.H., D.I., D.J., D.K., D.M., D.O., D.Q., D.R., D.S., D.T., D.U., D.V., D.X., D.Y., D.Z., E.A., E.B., E.C., E.D., E.E., and E.F.

[10] The remaining six Non-Legacy Plaintiffs merely allege that they were patients at Legacy at some point, but not that they were ever treated by Farley at Legacy. Like the other 105 Non-Legacy

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Any remaining claims for fraud must also be dismissed as to the Legacy Plaintiffs because Legacy owed them no duty under Oregon law. Total inaction, or a failure to disclose material facts, generally amounts to fraud only where there is a duty to disclose. *Scoggins v. State Constr.*, 259 Or 371, 376–77 (1971). A special relationship that creates a duty to disclose only arises in rare circumstances, namely when imposed by statute, contract, or at common law. *Stewart*, 245 Or App at 276–78. But Plaintiffs do not allege any contract, statute, or other source of law recognizing a special status or relationship between a hospital and those treated there. This is because they cannot; Oregon courts have never recognized a special relationship between hospitals and their patients, let alone one that would support a fraud claim for nondisclosure. *See Shin v. Sunriver Preparatory Sch., Inc.*, 199 Or App 352, 366–67 (2005) (listing cases). If anything, the Oregon Supreme Court has cautioned against doing so: "We recognize that hospitals have taken on special responsibilities by admitting and providing care for those who may not be able to take full care of themselves. We do not, however, believe that such an act of admission makes the hospital absolutely responsible for a patient's safety." *G.L*, 306 Or at 67. This makes sense because hospitals are not duty-bound to disclose the result of every internal investigation or malpractice claim against every medical professional to each person who walks through their doors. *See Barish v. United Parcel Serv., Inc.*, 837 F Supp 325, 330 (D Or 1993) (employer had no duty to disclose information regarding employee's confidential personnel file or history of making false sexual assault allegation to customers); *see also Jane Doe 43C*, 787 NW 2d at 690 (declining to expand tort liability to include potential fraud claims for failure to disclose information related to employee).

Here, despite what Plaintiffs allege, the Legacy Plaintiffs were not in a special relationship with Legacy that would give rise to a duty to disclose. There is, as noted above, no contract, statute,

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Patients, they allege no facts indicating that Legacy knew or should have known that they were patients of Farley at other facilities. In this way, they were no different than any other members of the public who Farley treated, separate from his connection to Legacy. There would, as such, be no reason for Legacy to have disclosed any information about Farley to these individuals.

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or other source of law recognizing a special status or relationship between a hospital and those treated there. While it is true that Plaintiffs have *alleged* a "special" or "fiduciary" relationship between Legacy and Legacy Plaintiffs, TAC ¶ 409, this is a legal conclusion. No Legacy Plaintiff pleads facts to support this conclusion beyond the assertion that they "relied" on Legacy. TAC ¶¶ 48, 188, 265, 286, 313, 370, 373, 376, 379. No Legacy Plaintiff, for instance, pleads facts showing that Legacy was in "complete control of [Plaintiffs'] . . . person, property, or economic interests" so as to support a fiduciary-like relationship, which could form the basis for a nondisclosure claim. *Eulrich v. Snap-On Tools Corp.*, 121 Or App 25, 36, *rev'd*, 512 U.S. 1231 (1994). And a court may not assume that such a relationship exists simply by virtue of busines or other dealings between the parties. *See Conway v. Pacific Univ.*, 324 Or 231, 239 (1996) (Oregon law only imposes duty arising from special relationship in "certain" professional relationships).

Still, even if the Legacy Plaintiffs were in a special relationship with Legacy—which they were not—Plaintiffs have not pleaded facts showing that Legacy breached its duty to disclose information about Farley. First, the only information related to Plaintiffs' treatment at Legacy that Legacy would have been obligated to disclose was information "material" to its treatment of a patient. *See Lindland v. United Bus. Invs*., 298 Or 318, 322 (1984); *Caldwell v. Pop's Home, Inc.*, 54 Or App 104, 111–12 (1981). As explained above in Part V(B), Plaintiffs allege that in 1992 Legacy witnessed one potentially negligent placental removal. TAC ¶ 187(d). But that is a qualitatively different harm than alleged elsewhere in the Third Amended Complaint, and not a "material" disclosure to every patient then treated at Legacy. Second, although Plaintiffs also allege that Legacy received unspecified "complaints" about Farley and later witnessed "unnecessary" medical procedures, Plaintiffs' fraud-by-nondisclosure theory is still doomed by their failure to plead facts with particularity, as required by Oregon law. *Ingram*, 77 Or at 637. Based on Plaintiffs' allegations, there is no basis upon which a jury could determine what Legacy knew and when—both critical facts for then deciding whether Legacy breached its duty with

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respect to each Legacy Plaintiff. Plaintiffs do not describe, for instance, the dates, recipients, substance, number, or disposition of the alleged complaints, making it impossible to say whether Legacy breached its duty to any given Legacy Plaintiff. Accordingly, as a matter of law, Legacy cannot be liable to Plaintiffs for mere nondisclosure, and both the Legacy Plaintiffs and Non-Legacy Plaintiffs' fraud/concealment claim should be dismissed.

B. There is no basis for joint liability for fraud.

Plaintiffs' fourth cause of action alleges that Legacy and the other Clinic Defendants conspired to hide knowledge of Farley's abuse from Plaintiffs to preserve their own reputations and maintain profits. In *Granewich v. Harding*, the Oregon Supreme Court adopted the theory of joint and common plan liability articulated by Section 876 of the Restatement (Second) of Torts, holding that a person is liable for the tortious conduct of a third party where the person "1) does a tortious act in concert with the other or pursuant to a common design with him, or 2) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself or, 3) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." 329 Or 47, 53 (1999).

Plaintiffs' conclusory and speculative allegations, which seek to hold Legacy responsible for every instance of alleged abuse at facilities with no connection to Legacy over a decades-long period, are baseless and do not come close to showing that Legacy either acted in concert with the other Defendants or provided substantial assistance to them. This Court should therefore dismiss the claim as to all Plaintiffs.

1. Plaintiffs fail to show that Defendants acted "in concert."

For two or more parties to act "in concert," they must have performed "an action that is 'mutually contrived or planned,' 'agreed on,' 'performed in unison,' or 'done together.'" *Slagle v. Hubbard*, 176 Or App 1, 5 (2001) (quoting *Webster's Third New Int'l Dictionary*, 470 (unabridged

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ed 1993)). That is, "the person acting in concert must be connected to the tortious conduct that gives rise to liability." *Mason v. Mt. St. Joseph, Inc.*, 226 Or App 392, 405 (2009); *see, e.g., In re Berjac of Or.*, 538 BR 67, 82–83 (D Or 2015) (rejecting joint liability for banks allegedly breaching regulatory duties where plaintiffs "fail[ed] to indicate which fiduciary duty the banks breached, as well as which statutes, rules, and regulations the banks failed to comply with"). And there must be "proof of some degree of *scienter* among co-actors." *Perry v. Rein*, 187 Or App 572, 580 (2003). As *Granewich* observed, "one is not liable for the acts of another if each is acting independently." 329 Or at 54.

Plaintiffs' conclusory allegations fail to show that Legacy acted "in concert" with the other defendants. Rather, they stand in marked contrast to Oregon cases where courts have found concerted action. For example, in *Slagle*, the Oregon Court of Appeals found that two drivers who were racing on a highway and crashed, killing Plaintiff's husband, acted in concert where they had "agreed to race at excessively high rates of speed" and then in fact did so. 176 Or App at 5 (quotations omitted). Similarly, the Court of Appeals in *Horton v. Nelson*, found joint liability for a fraud claim where Defendants acted together to create a website to induce payments from purported customers, made false statements to the plaintiff, and withdrew money sent by these customers to entities controlled by defendants. 252 Or App 611, 618 (2012); s*ee also Brooks v. BC Custom Constr., Inc.*, 2019 WL 3763769, at *22 (D Or May 21, 2019) (denying motion to dismiss where "Lender knew that [defendant] Builder's conduct constituted a breach of duty" and relied on Builder's false representations to further unlawful residential mortgage lending scheme).

Here, there is simply no specificity as to the alleged concerted action among Legacy and the other Defendants, beyond the bare assertion that they conspired. Plaintiffs allege that the Clinic Defendants "in concert with each other and with the intent to conceal and defraud, conspired and came to a meeting of the minds" to hide Farley's misconduct from Plaintiffs. TAC ¶ 416. The goal of this alleged "meeting of the minds" was to "maintain a façade of normalcy, in order to maintain

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funding and provide further financial growth of the Clinic Defendants" and "avoid any public scrutiny for their misconduct. TAC ¶ 418. These allegations do not explain (and certainly do not show) *how* Legacy and the Clinic Defendants acted together to suppress knowledge of Farley's misconduct — at most, Plaintiffs allege that the Clinic Defendants made money. *See* TAC ¶ 419 ("The Defendants acted intentionally in creating an environment that harbored molesters . . . in order to maintain funding and further financial growth of the Clinic Defendants."). This is not concerted action. *See Perry*, 187 Or App at 580 ("To infer that plaintiff was involved in the fraudulent scheme to take money from [Defendant's account] only because he received money transferred from [another] account is a *non sequitur*"); *Brooks v. Caswell*, 2015 WL 3986157, at *4 (D Or June 30, 2015) (finding no joint liability for fraudulent misrepresentation where Plaintiffs failed to allege that Defendant "benefitted from, or approved of, [the] tortious acts"). And Plaintiffs do not allege that Legacy even knew that Farley was allegedly abusing patients at other facilities. That "suspicion does not translate into evidence that justifies the filing of a claim against [Legacy] as a co-conspirator." *Perry*, 187 Or App at 580.

C. Plaintiffs do not make a colorable claim of substantial assistance.

The Third Amended Complaint similarly does not state a claim for substantial assistance. For substantial assistance to form the basis of joint liability, such assistance "must be directed to the commission of the tort itself," meaning that there is "active complicity, with an actual awareness of the party's role in furtherance of the tortious objective." *Padrick v. Lyons*, 277 Or App 455, 472 (2016); *see also Cohrs v. Salomon Smith Barney, Inc.*, 2005 WL 2104535, at *23 (D Or Aug. 31, 2005) (observing that "it is clear that *Granewich* does not support the proposition that Section 876(b) requires less than actual knowledge"). Moreover, "[t]here are also foreseeability and causation components to substantial assistance." *Padrick*, 277 Or App at 472.

As with the concerted action prong, Plaintiffs' allegations against Legacy fall well short of these standards. The cases in which Oregon courts have found (and not found) joint liability under

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the "substantial assistance" prong all suggest that more is needed than merely asserting that Legacy benefitted monetarily or reputationally from Farley's medical practice. Plaintiffs fail to make any allegation that Legacy agreed (explicitly or otherwise) with the other hospital Defendants to continue granting privileges to Farley in order to benefit themselves much less that Legacy *actually knew* that Farley was abusing patients at other facilities for 28 years after Legacy first allegedly became aware of his misconduct. *See Padrick*, 277 Or App at 473 (finding that it was "simply too speculative and remote" to impose liability for conduct that occurred seven years after Defendant attorney provided legal advice); *see also Bergman v. Holden*, 122 Or App 257, 260 (1993) (holding that a contractor hired by trespassers to remove timber from Plaintiff's land after the trespasser had already removed timber was not jointly liable because he did not know that the timber removal was unlawful, despite (1) knowing that the timber came from Plaintiff's property, (2) being related to the other tortfeasors, and (3) handing over proceeds of the timber sale to them); *Achcar-Winkels v. Lake Oswego Sch. Dist.*, 2015 WL 5522042, at *9 (D Or Sept. 16, 2015) (finding no substantial assistance in negligence claim related to hazing where Plaintiff did not allege that Defendant (1) was present at any of the hazing events, (2) knew that Plaintiff would be subject to hazing at any of those events, or (3) knew that anyone intended to harm Plaintiff). As the Oregon Court of Appeals noted in *Bergman*, the mere fact that the "defendant may have known that the logs he hauled came from plaintiff's property or anyone else's *is not evidence that he knew that the logs were taken from that property illegally*." 122 Or App at 260 (emphasis added). And similarly, the fact that he was related to the defendants and "returned the proceeds of the sale to them does not support the inference that defendant knew of their unlawful conduct." *Id.*

With no allegation that Legacy knew of Farley's misconduct at the other facilities and the 28-year span encompassed within the Third Amended Complaint, there is no basis for finding that Legacy provided substantial assistance to the other Defendants.

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IX. LEGACY CANNOT BE HELD VICARIOUSLY LIABLE FOR FARLEY'S MISCONDUCT AGAINST THE LEGACY PLAINTIFFS

In their fifth cause of action (mislabeled by Plaintiffs as "Count IV" and only asserted against Farley), Plaintiffs allege that Farley committed assault and battery. As to the Legacy Plaintiffs, Plaintiffs allege in paragraph 15 that Legacy is "vicariously liable for his misconduct engaged in with those Plaintiffs," given his alleged role as an agent, apparent agent, servant, and/or employee. TAC ¶ 15. Legacy therefore assumes that Plaintiffs' fifth cause of action is also made by the Legacy Plaintiffs against Legacy on a theory of vicarious liability. Plaintiffs' claim, however, fails for three reasons: (1) Farley was not an employee or agent of Legacy; (2) even assuming he was an employee, Plaintiffs fail to allege that his misconduct was within the scope of his employment; and (3) Plaintiffs fail to allege that Farley's misconduct was within the scope of any potential principal-agency relationship between him and Legacy.

A. Plaintiffs do not allege an employee-employer or principal-agent relationship between Farley and Legacy.

Oregon law differentiates between employees and other agents for the purposes of a principal's tort liability. "All servants are agents and all masters principals. However, all principals and agents are not also masters and servants." *Kowaleski v. Kowaleski*, 235 Or 454, 457 (1963). Oregon common law distinguishes between the two types of agents using a "right-to-control" test; an agent is an employee if the principal has the right to control the physical details of the work being performed by the agent; in other words, the principal directs not only the end result, but also controls how the employee performs the work. *Schaff v. Ray's Land & Sea Food Co., Inc*., 334 Or 94, 100 (2002). In contrast, when the agent retains control over the details of the manner in which he or she performs their duties, that agent is a nonemployee agent. *Vaughn v. First Transit, Inc.*, 346 Or 128, 137 (2009) (citing Restatement (Second) of Agency § 220 cmt. e (Am. Law Inst. 1958)).

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1. Farley was not an employee of Legacy.

Plaintiffs fail to adequately plead that Farley was an employee of Legacy. They do not allege that Legacy was able to control either the ends of Farley's work or how he conducted it. And as Plaintiffs observe in the Third Amended Complaint, Farley had credentials not just to work at Legacy, but also at Providence and Family Health. *See* TAC ¶¶ 396–405. They do not allege how many hours he worked at Legacy, how often he worked there, whether he was required to see a certain number of patients per week, and whether Legacy imposed any conditions at all on his alleged employment. *See, e.g., Tyson v. Or. Anesthesiology Group, P.C.*, 2007 WL 1731475, at *10–11 (D Or June 13, 2017) (holding that Plaintiff was not an employee of Legacy—"even if plaintiff presented a successful Credentialing application"—where "[t]here is no evidence that Legacy would have had any direct control over plaintiff's daily medical practice, or paid a salary or any benefits to plaintiff, or oversee his practice, patients or treatment plans"); *Ponderosa Properties, LLC v. Employment Dep't.*, 262 Or App 419, 426–29 (2014) (finding no employer-employee relationship where maintenance works provided and selected all of their tools, had discretion over the timing of performance, were not required to wear a uniform or follow a dress code, and could hire assistants or replacement without employer approval); *Portland Columbia Symphony v. Employment Dep't*, 258 Or App 411, 422–24 (2013) (no employer-employee relationship over musicians who could select their own instruments, deviate from the dress code, rehearse individually, and decide how much time and effort was needed for preparation despite the orchestra setting professional standards and required group rehearsals). Plaintiffs provide no detail over the conditions of Farley's alleged employment with Legacy, other than Legacy assigning him patients. *See* TAC ¶ 22. They simply allege that Farley was a Legacy employee, a legal conclusion that is entitled to no deference from this Court. *See Schaff*, 334 Or at 99 ("Whether an individual is an employee or an independent contractor is a legal conclusion."); *Walthers*, 148 Or App at 558.

Without more, there is no basis for concluding that Legacy and Farley had an employer-employee relationship.

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2. Farley was not an agent of Legacy.

Plaintiffs similarly fail to allege that a principal-agency relationship existed between Legacy and Farley.

An agency relationship "results from the manifestation of consent by one person to another that the other shall act on behalf and subject to his control by the other so to act." *Vaughn*, 346 Or at 135 (emphasis omitted). The relationship "can arise either from actual consent (express or implied) or from the appearance of such consent," i.e. apparent authority. *Eads v. Borman*, 351 Or 729, 736 (2012) (en banc). Actual authority exists when "the principal ha[s] a right to control the acts of its agent" and "both parties . . . agree that the agent will act on the principal's behalf." There must be "some evidence that the physician and the putative principal mutually agree[] that the former will act on the principal's behalf, and the principal must have a right of control over the physician's acts that caused the injury." *Towner v. Bernardo*, 304 Or App 397, 406 (2020). For an agent to have apparent authority, the principal must have acted in such a way to "cause[] a third party to believe that the principal consents to have the apparent agent act for him on that matter." *Jones v. Nunley*, 274 Or 591, 595 (1976). Whether such consent exists is based on "(1) the principal's representations; and (2) a third party's reasonable reliance on those representations." *Eads*, 351 Or at 736. More specifically, in the hospital-physician context, courts looks to "(1) whether the putative principal held itself out, expressly or implicitly, as a direct provider of medical care so as to lead a reasonable person to conclude that the negligent actor who delivered the care was the principal's employee or agent in doing so; and (2) whether the plaintiff relied on those representations by looking to the putative principal, rather than to a specific physician, as the provider of the care, and not just as a situs in which a physician of the plaintiff's choosing provided the care." *Id.* at 746.

Plaintiffs fail to show that Farley was either an actual or apparent agent of Legacy. There are no allegations that Legacy dictated what patients Farley saw, his schedule, or the scope of his practice. *Compare Bridge v. Carver*, 148 Or App 503, 509–10 (1997) (holding that physician was

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an agent of the county where there was a written agreement evidencing "mutual consent to an agency relationship" and the "county controlled the patients that the physician saw, when he saw them, and the general scope of his treatment within the country program") *with Towner*, 304 Or App at 407 (finding no agency relationship where the hospital "did not pay [Defendant's] regular salary, offer [him] benefits or liability insurance, supply overhead, facilitate patient billing, restrict where [he] could seek and obtain privileges, or directly supervise [his] day-to-day practice of medicine"). They also do not allege anywhere that Farley agreed to act on behalf of Legacy. Plaintiffs simply assert, without any supporting detail, that Farley was Legacy's actual agent — that is not enough.

As to Farley's alleged apparent agency, Plaintiffs fail to allege that Legacy either held itself out as the direct provider of medical care such that a reasonable person could conclude that Farley was Legacy's employee *or* that they looked to Legacy as the provider of care "and not just as a situs in which a physician of the plaintiff's choosing provided the care." *Eads*, 351 Or at 746. Indeed, their allegations suggest the opposite. TAC ¶ 19. Plaintiffs do not allege that Farley occupied a particularly prominent place in Legacy's advertising or within the hospital system itself. *See Towner*, 304 Or App at 413 (finding that defendant physician was apparent agent of hospital he was "featured in advertisements touting Silverton Hospital's surgical program," was held out to the public as the hospital's "chief of surgery," his "photograph hung on a wall in Silverton Hospital with a plaque giving his title," and hospital staff vouched for his competence). Plaintiff Jane Roe, for instance, alleges that she was "a patient of Defendants FARLEY, FAMILY HEALTH, and LEGACY" and her allegations include misconduct that occurred at Family Health, not Legacy. TAC ¶¶ 46–48. Similarly, Plaintiff F.M. alleges that she "began receiving medical treatment from FARLEY in approximately 2016, which continued until 2020," TAC ¶ 378, at both Legacy and Farley's clinic, suggesting again that she looked to Farley as the provider of care, not Legacy.

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None of the Legacy Plaintiffs allege that they ever received care from other Legacy physicians or were treated by Farley only at Legacy. And there are no allegations that any Plaintiff understood that Legacy, not Farley, was coordinating, mandating, or even supervising the medical treatments to any Plaintiff. *See, e.g., Richmond Cnty. Hosp. Auth. v. Brown*, 257 Ga 507, 509 (1987) (the doctrine of apparent authority as applied to hospitals "can seldom apply to the customary situation in which a patient consults his own doctor who then has him admitted to a hospital where the doctor renders negligent medical services. In such a case there is no representation or holding out by the hospital to the patient."). Because Plaintiffs fail to satisfy either of these standards, their vicarious liability claims must be dismissed. *See, e.g., Eads v. Borman*, 234 Or App 324, 334–35 (2010) (affirming summary judgment despite plaintiff's subjective belief that physician was defendant's agent where plaintiff failed "to present some evidence of conduct by *defendant* from which a reasonable jury could conclude that defendant, itself, held [physician] out as its agent and that plaintiff sought treatment from [physician] in reliance on defendant's representations and conduct").

B. Even if Farley was an employee of Legacy, Plaintiffs fail to plead vicarious liability.

Plaintiffs' vicarious liability claims against Legacy still merit dismissal, regardless of any alleged employment relationship.

Under Oregon law, an employer can be held responsible for the torts of its employees committed within the scope of employment. *Stroud v. Denny's Restaurant, Inc.*, 271 Or 430, 437 (1975). For an employee's conduct to be within the scope of employment, (1) the act must have occurred substantially within the time and space limits authorized by the employment, (2) the employee must have been motivated, at least partially, by a purpose to serve the employer, and (3) the act must have been of a kind that the employee was hired to perform. *Stanfield v. Laccoarce*, 284 Or 651, 655 (1978). The scope-of-employment limitation "is designed to ensure that

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employers will be held liable only for the harm resulting from activity from which they were receiving the benefit." *Id*. While an employer can be held vicariously liable for intentional torts committed outside the scope of employment if the previous acts committed by the employee that were within the scope "resulted in" the injurious act, *Chesterman v. Barmon*, 305 Or 439, 441 (1988), only acts that were committed for the benefit of the employer will lead to liability. *G.L.*, 306 Or at 60. That is, "the performance of the employee's duties must be a necessary precursor to the misconduct . . . and the misconduct must be a direct outgrowth of, and have been engendered by, conduct that was within the scope of the employee's employment." *Barrington ex rel. Barrington v. Sandberg*, 164 Or App 292, 295 (1999). In the sexual abuse context, employers are held liable when there is an extended course of employment-related cultivation of trust that culminates in sexual abuse. *See Fearing*, 328 Or at 377 (holding the Archdiocese of Portland vicariously liable for the sexual abuse of one of its priests where the priest's performance of his pastoral duties with respect to plaintiff and his family was "a necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and were engendered by conduct that was within the scope of [the priest's] employment").

Even assuming for the purposes of argument that Plaintiffs sufficiently alleged that Farley was an employee or agent of Legacy and that Farley's misconduct occurred substantially within the time and space limits authorized by his employment,[11] Plaintiffs do not make a colorable showing, much less even allege, that Farley's misconduct was for Legacy's benefit. As Plaintiffs

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[11] As discussed in Part II, *supra*, six of the Non-legacy Plaintiffs allege that they were at one time or another "patients" of Legacy. *See* TAC ¶¶ 264 (C.V.), 285 (D.C.), 312 (D.L.), 372 (L.M.), 375 (M.M.), 378 (F.M.). Because they do not allege that they were abused by Farley at Legacy, they fail to show that his misconduct occurred within the time and space limits authorized by his alleged employment with Legacy. *Compare with Walthers*, 148 Or App at 558 ("The complaint here alleges that Gossett abused plaintiff while administering orthodontia treatment in the corporation's office, during appointments the corporation had arranged . . . satisf[ying] the first prong of *Chesterman* [meaning that the act occurred substantially within the time and space limits authorized by the employment]").

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note throughout the Third Amended Complaint, Farley committed "unlawful sexual conduct in his capacity as a physician for his own personal sexual gratification." TAC ¶ 391; *see also* TAC ¶ 25 ("FARLEY's sexual abuse and harassment of Plaintiffs was done for FARLEY's personal sexual gratification . . . ."). Farley was not motivated by a purpose to serve Legacy when he sexually abused his patients and it is not clear what Plaintiffs believe Legacy gained by it. *See Walthers*, 148 Or App at 557 (holding that the complaint did not state a claim for vicarious liability against a dental office when a dentist sexually abused his patients because the abuse not within scope of the dentist's employment and the acts were not on behalf of the corporation).

Moreover, Plaintiffs do not sufficiently allege that Farley "groomed" them or otherwise committed acts within the scope of his employment that naturally led to his sexual assaults. There is no indication that any of the Legacy Plaintiffs had prior contact with Farley before his misconduct began, that their interactions with him were particularly lengthy, or that the trust they placed in him as a physician "cultivated" over a long period of time before the abuse started. *Compare G.L.*, 306 Or at 66 (defendant-hospital was not liable for a patient's sexual abuse when the hospital employee's attack occurred outside the scope of his employment) *with Lourim v. Swensen*, 328 Or 380 (1999) (reversing dismissal where plaintiff sufficiently alleged that Boy Scout leader cultivated relationship of trust with him and his family to gain opportunity to sexually abuse plaintiff). In fact, based on the allegations, the Legacy Plaintiffs' connection with Farley seems to be that Legacy was nothing more than a place where Farley saw some of his patients.

Farley's status as a physician and ability to be legitimately alone with the patients merely created the opportunity for him to abuse Plaintiffs, which is insufficient as a matter of law to support finding vicarious liability on the part of Legacy. As the Oregon Court of Appeals has observed, "[t]he fact that employment provided an opportunity to engage in tortious conduct, however, is insufficient to establish the request nexus with employment as a matter of law." *Vinsonhaler v. Quantum Residential Corp.*, 189 Or App 1, 6–7 (2003) (rejecting vicarious liability

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for an apartment management company for the sexual harassment of its resident manager where there was no allegation that a relationship had been built between the accused harasser and his victim, there was no purpose of serving the employer, and the work he performed did not result in sexual harassment) (citing *Fearing*, 328 Or at 376).

C. Farley's misconduct was not within the scope of any agency relationship.

Similarly, even if the court were to find that Farley was an actual or apparent agent of Legacy, rather than an employee, Plaintiffs fail to plausibly allege that Legacy sufficiently controlled his agency and do not allege that his misconduct was within the scope of his agency.

In the agency context, a principal ordinarily is not liable in tort for physical injuries caused by the actions of its agents who are not employees. *Jensen v. Medley*, 336 Or 222, 230 (2003). Rather, a principal is only vicariously liable for an act of its nonemployee agent if the principal "intended" or "authorized the result . . . or the manner of performance" of that act. Restatement (Second) of Agency § 250 (Am. Law Inst. 1958); *see also Jensen*, 336 Or at 231 (principal liable for acts of nonservant agents only if those acts "within the actual or apparent authorization of the principal"). In other words, "for a principal to be vicariously liable for the negligence of its nonemployee agents, there ordinarily must be a connection between the principal's 'right to control' the agent's actions and the specific conduct giving rise to the tort claim." *Vaughn*, 346 Or at 139. And because Plaintiffs seek to hold Legacy vicariously liable for Farley's intentional torts, Plaintiffs must show that Legacy actually or apparently had a right to control how Farley performed the injury-causing act in a manner that is characteristic of an employee-employer relationships. *See Towner*, 304 Or App at 410.

Plaintiffs fail to plead any such connection or control on the part of Legacy. As discussed above, Plaintiffs do not allege any details regarding how Legacy controlled Farley's misconduct or how it purportedly benefitted Legacy. The Oregon Supreme Court has observed that vicarious liability will only be found where the principal "had [the] right to control specific conduct . . . on

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which the claim was based." *Eads*, 351 Or at 739 n.7 (citing *Jensen*, 336 Or at 237–39)). For example, in *Towner*, the court denied summary judgment where the plaintiff created a fact issue over whether a hospital "appeared to have a right to control Bernardo as the hospital's designated chief of surgery in the conduct of his surgeries, including his surgery on plaintiff, that was similar to the control existing in an employer-employee relationship." 304 Or App at 415. Farley's abuse was for his "own personal sexual gratification," TAC ¶ 391, an act that Legacy did not retain him to conduct, and Plaintiffs do not allege that Legacy was actually or apparently able to control how Farley managed his procedures. Without more, there is no basis for finding that Legacy is liable for Farley's misconduct as an actual or apparent agent.

X. CONCLUSION

For the foregoing reasons, this Court should grant Legacy's Motion to Dismiss and dismiss Plaintiffs' claims for negligence, IIED, fraud/concealment, and assault and battery against Legacy.

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[X] by **emailing**.

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