





*Justice immediately after he was rescued*

2.

The Oregon Legislature has expressly recognized that “[a]nimals are sentient beings capable of experiencing pain, stress and fear.” ORS 167.305(1). Similarly, Oregon courts have recognized that animals have their own cognizable legal interests. The Oregon Supreme Court in *State v. Nix*, recognized that animals are properly considered the “victims” of violations of the animal cruelty statutes. 355 Or 777, 797-98, 334 P3d 437 (2014), *vac’d on procedural grounds*, 356 Or 768, 345 P3d 416 (2015); reasoning adopted in *State v. Hess*, 273 Or App 26, 359 P3d 288 (2015), review denied, 358 Or 529, 367 P3d 529 (2016). The Court held that Oregon’s anti-cruelty laws intend to protect animals themselves, because “the legislature’s focus was the treatment of individual animals, not harm to the public generally or harm to the owners of the animals.” *Id.* at 789-90. Similarly, in *State v. Fessenden*, the Court referred to a neglected horse as “the victim of the crime— an animal entitled to statutory protection.” 355 Or 759, 773, 333 P3d 278 (2014).

3.

Oregon courts recognize both that animals are victims and that victims have a right to sue their abusers for the harms they have inflicted. Justice is asking the Court to take these well-

1 established rules to the logical next step and recognize that as a member of the class intended to be  
2 protected by Oregon’s anti-cruelty statute, Justice may bring a negligence *per se* claim based on the  
3 standard of care in the anti-cruelty statute, ORS 167.305 *et seq.*  
4

5 **PARTIES**

6 4.

7 Plaintiff Justice (formerly known as Shadow) is an American Quarter Horse and Appaloosa  
8 cross, currently residing at the Sound Equine Options training barn in Troutdale, Oregon. Justice  
9 brings this negligence *per se* claim as a legislatively-recognized “sentient being,” ORS 167.305(1),  
10 a “victim” of the defendant’s criminal neglect, and as sole beneficiary of the Justice Equine Trust.  
11

12 5.

13 Kim Mosiman is the Executive Director of Sound Equine Options and is Justice’s guardian.  
14 She is the person responsible for Justice’s care and well-being. As such, Justice’s interests are  
15 represented in this suit by and through Ms. Mosiman pursuant to ORCP 27(A).<sup>1</sup>  
16

17 6.

18 Defendant Gwendolyn Vercher resides at 34567 SW Firdale Road, Cornelius, Oregon  
19 97113.

20 **JURISDICTION AND VENUE**

21 7.

22 Subject matter jurisdiction is conferred on this Court by ORS 14.030.

23 8.

24 This Court has personal jurisdiction under ORCP 4, as Defendant is a natural person present  
25 within this state at the time of service.  
26

27 9.

28 Venue is proper in this Court under ORS 14.080 because Defendant resides in Washington  
29 County at the commencement of this action.  
30

31 \_\_\_\_\_  
32 <sup>1</sup> Plaintiff is prepared to file a motion for Ms. Mosiman’s appointment as guardian if the Court  
finds that is the appropriate procedure in this case.

**FACTS**

10.

On information and belief, Defendant had custody and control of Justice, then-named Shadow, throughout the period during which he suffered the neglect described herein.

11.

On March 4, 2017, Oregon Horse Rescue (“OHR”) received a phone call from Defendant’s neighbor requesting that OHR take custody of Justice because he was underfed and emaciated.

12.

On March 7, 2017, Defendant, at the urging of the concerned neighbor, took Justice to be examined by Dr. Victor Alexander of Alexander Equine Veterinary Services, Inc. Dr. Alexander observed that Justice’s penis had prolapsed and could not retract because it was so swollen and heavy. According to Dr. Alexander’s report, Justice’s penis was “red [and] “raw” and “oozing serum” and the “skin was chapped and scabbed.” Dr. Alexander scored Justice a 2 out of 9 on the



*Justice was found extremely emaciated.*

Henneke Horse Body Condition Scale (“BCS”). A BCS score of 2 indicates emaciation, whereas a healthy horse scores between 4 and 6. Dr. Alexander concluded that Justice would need to be housed in a stall or rehomed.

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13.

On March 13, 2017, David Kelly, Co-Executive Director of OHR, left a voicemail and sent an email to Sound Equine Options (“SEO”) with an urgent request for SEO’s assistance in temporarily housing “a very neglected horse.”

14.

On March 16, 2017, Defendant surrendered Justice to Ms. Mosiman of SEO, having been persuaded to do so by her neighbor. Ms. Mosiman transported Justice directly to Eagle Fern Equine Hospital (“the Hospital”) for urgent veterinary care and hospitalization.

15.

Dr. David Asmar of Eagle Fern Equine Hospital examined Justice on March 16, 2017, observing that Justice was lethargic and weak and had significant difficulty walking.

16.

Dr. Asmar found that Justice was 300 pounds underweight, with a BCS of 1 out of 9, indicating extreme emaciation. When offered food, Justice had an excellent appetite and ate quickly without pausing between bites, behavior commonly observed in starved horses. Given Justice’s severely emaciated condition, Dr. Asmar had to wait two days for Justice to be healthy enough for the sedation required for a more thorough examination.

17.

On March 18, 2017, Dr. Asmar examined Justice under sedation. Justice’s penis was swollen, traumatized, infected and prolapsed, with a moderate amount of necrotic tissue that had to be removed. Justice was unable to retract his penis to its normal position inside its sheath, likely due to his severely debilitated body condition. The prolonged penile prolapse had prevented drainage of the tissue, which then caused swelling.

18.

Having been unable to retract his penis and having been exposed to chronic cold temperatures, Justice developed penile frostbite, which led to severe trauma, infection, and scarring.

1 A prolapsed penis may cause nerve damage, resulting in permanent penile paralysis. Justice's  
2 prolapsed penis is the most severe case Dr. Asmar has ever treated.

3  
4 19.

5 During the March 18, 2017 examination, Dr. Asmar noted that Justice also suffered from  
6 lice and rain rot, a bacterial skin infection that irritates a horse's hair and skin and may result in a  
7 continuous painful sheet of scabbing. Lice and rain rot are common in neglected horses and may  
8 generally be avoided with good grooming and adequate nutrition.

9  
10 20.

11 On March 20, 2017, Ms. Mosiman contacted Oregon Humane Society ("OHS") to brief it  
12 on Justice's history and condition.

13  
14 21.

15 During Justice's ten-day hospitalization, Justice's prolapsed penis was placed in a sling to  
16 decrease swelling and to prevent further damage to tissue and nerves. The Hospital followed the  
17 University of California-Davis protocol for refeeding a starved horse.

18  
19 22.

20 By March 26, 2017, Justice had already begun gaining weight and his energy level had  
21 improved significantly. Ms. Mosiman transported Justice from the Hospital to the SEO rescue and  
22 training facility, where Justice continued to receive topical application of silver sulfadiazine cream  
23 according to Dr. Asmar's instructions.

24  
25 23.

26 On May 16, 2017, Dr. Asmar examined Justice at the SEO facility. Justice was bright and  
27 alert and had already gained about 150 pounds. Justice's penis had improved, but remained semi-  
28 prolapsed. The section of necrotic tissue on Justice's penis had healed, leaving a thick layer of scar  
29 tissue. The lice and rain rot had also improved. While Justice was stronger physically, he continued  
30 to show signs of distress such as stall-circling, a form of compulsive behavior resulting from  
31 anxiety.  
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24.

On June 7, 2017, Justice was castrated in order to reduce the frequency of erections, which would then lead to reduced irritation and a greater chance of recovery.

25.

On August 25, 2017, almost six months since Dr. Asmar first treated him, Justice had regained substantial muscle and scored a BCS of 6 out of 9. Justice had considerably more strength and energy than he did previously, and appeared able to run without issue. However, Justice's penis remained semi-prolapsed.

26.

Given the lack of improvement in Justice's penis after almost six months of care, it is likely Justice suffered permanent penile paralysis and prolapse from the trauma and nerve damage caused by his starvation, chronic exposure to cold temperatures, and lack of timely veterinary care. Justice's injury obstructs his ability to retract his penis.

27.

Justice will likely eventually require surgical intervention in the form of a partial amputation of his penis. Placing a horse under anesthesia for surgery comes with substantial risk, such as serious injury and death. Justice will also likely have a lengthy and potentially painful recovery.

28.

Given the length of time it takes to sustain the degree of damage Justice did, it appears he had been suffering from a prolapsed penis for several months prior to receiving treatment at the Hospital. Further, given the extent of Justice's emaciation—over 300 pounds underweight—Justice had been starving for several months prior to receiving treatment. During these months Justice would have been in significant pain and chronically hungry.

29.

As of the commencement of this action, Justice's penis remains prolapsed.

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30.

Justice will require special care in order to reduce the risk of irritation, infection, or injury to his penis. Justice will never have a normal healthy penis and will require special care to prevent the recurrence of a prolapse or aggravation and irritation of the area.

31.

Due to his extensive injuries, Justice will require costly care that he otherwise would not need, including unique sheltering needs, medications, and socialization training.

32.

On July 10, 2017, Defendant pled guilty to neglect of Justice in the first degree.

33.

Pursuant to her criminal plea agreement, Defendant agreed to pay restitution to Sound Equine Options for the costs of Justice’s care incurred prior to July 6, 2017. Defendant failed to pay the restitution by the deadline of August 10, 2017. Defendant’s plea agreement does not include restitution for the cost of Justice’s care after July 6, 2017.

34.

Finding a permanent home for Justice is more difficult, if not impossible, due to the substantial additional costs caused by the Defendant’s neglect.

35.

On August 22, 2017, Ms. Mosiman created the Justice Equine Trust, pursuant to ORS 130.185, of which Justice is the sole beneficiary. Ms. Mosiman created the trust in order to provide, in whole or in part, for Justice’s care from July 6, 2017 until the end of Justice’s life, with any funds obtained in this action against Defendant.

**LEGAL BACKGROUND**

**Oregon’s Anti-Cruelty Statute**

36.

Oregon’s anti-cruelty statute generally protects animals from abuse and neglect.



1 37.

2 A person commits the crime of animal neglect when they intentionally, knowingly,  
3 recklessly, or with criminal negligence fail to provide minimum care for an animal in their custody  
4 or control. ORS 167.325 and 167.330.

5 38.

6 As the laws regarding the treatment and status of nonhuman animals continue to progress  
7 across the country, Oregon in particular has led the way with compassionate legislation and  
8 jurisprudence that recognize animals' "unique position in people's hearts and in the law." *State v.*  
9 *Newcomb*, 359 Or 756, 767-68, 375 P3d 434 (2016); *see also Fessenden*, 355 Or at 767, 333 P3d  
10 278 (recognizing that "Oregon's animal welfare statutes impose one of the nation's most protective  
11 statutory schemes").  
12

13 39.

14 The Legislature has declared that "[a]nimals are sentient beings capable of experiencing  
15 pain, stress and fear" who "should be cared for in ways that minimize pain, stress, fear and  
16 suffering." ORS 167.305(1), (2); *see also Newcomb*, 359 Or at 767, 374 P3d 853. As sentient  
17 beings, animals are the intended beneficiaries of Oregon's animal cruelty laws and therefore are  
18 victims when those laws are violated. *Nix*, 355 Or at 789-90, 334 P3d 437 (finding "the legislature's  
19 focus was the treatment of individual animals, not harm to the public generally or harm to the  
20 owners of the animals");<sup>2</sup> *Fessenden*, 355 Or at 773, 333 P3d 278 (citing *Nix* for the proposition  
21 that "animals are 'victims' for purposes of animal welfare statutes").  
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27 <sup>2</sup> The Oregon Supreme Court's opinion in *Nix* was subsequently vacated on purely procedural  
28 grounds, 356 Or 768, 345 P3d 416 (2015), and is therefore not itself binding precedent. *Hamilton*  
29 *v. Meyers*, 326 Or 44, 55, 943 P2d 214 (1997). However, the *Nix* reasoning was expressly adopted  
30 by the Oregon Court of Appeals in *State v. Hess*, and is therefore binding. 273 Or App 26, 359 P3d  
31 288 (2015). Moreover, a court may rely on or adopt the reasoning of a vacated opinion. *State v.*  
32 *Magana*, 265 Or App 416, 418 n.1, 335 P3d 318 (2014). Further, the Oregon Supreme Court  
subsequently relied on its finding in *Nix* that animals are the victim for purposes of animal welfare  
statutes. *Fessenden*, 355 Or at 773. While the Court's opinion in *Fessenden* was issued prior to it  
vacating *Nix*, the opinion in *Fessenden* has not been disturbed.

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3 40.

4 In *Fessenden*, the Supreme Court of Oregon held that where an officer had “probable cause  
5 to believe that defendants were committing animal neglect under ORS 167.325 by failing to provide  
6 ‘minimal care’ for the ‘victim’ of that crime—the horse,” protecting the horse from unlawful harm  
7 was such “an essential law enforcement responsibility” as to justify a warrantless search under the  
8 “exigent circumstances” exception to the Fourth Amendment of the United States Constitution and  
9 article I, section 9 of the state constitution. *See Fessenden*, 355 Or at 772-73, 333 P3d 278. The  
10 Oregon Supreme Court characterized the Court of Appeals as having gone a step further,  
11 “conclud[ing] that animals were included in the class of ‘persons’ that officers may aid without a  
12 warrant” on private property under the emergency aid exception, given the “interest in protecting  
13 nonhuman animals from unnecessary pain, injury, trauma, and cruel death.” *Id.* at 763 (quoting and  
14 affirming on other grounds *State v. Fessenden*, 258 Or App 639, 649, 310 P3d 1163 (2013)).<sup>3</sup>

16 41.

17 Oregon courts possess expansive powers under the common law and the state constitution  
18 to protect injured parties. *See, e.g., Couey v. Atkins*, 357 Or 460, 355 P3d 866 (2015); *State ex rel.*  
19 *Ricco v. Biggs*, 198 Or 413, 430, 255 P2d 1055 (1953), *overruled in part, State ex rel. Maizels v.*  
20 *Juba*, 254 Or 323, 460 P2d 850 (1969) (discussing courts’ “duty” to exercise their inherent power  
21 for ensuring fairness and justice “whenever public or private interests require”).

23 42.

24 Against this legal backdrop, and under these unique circumstances, where Oregon  
25 recognizes the importance of animals’ interests in avoiding suffering as “sentient beings,” and  
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28 <sup>3</sup> The Oregon Supreme Court based its holding in *Fessenden* on the more narrow exigent  
29 circumstances exception to the Fourth Amendment without considering whether animals are  
30 “persons” under the emergency aid exception. *Id.* at 763, 333 P3d 278. That the Oregon Supreme  
31 Court affirmed on other grounds should not disturb the binding effect of the Court of Appeals’  
32 holding, since the Court of Appeals frequently cites to holdings from opinions that were  
subsequently affirmed on other grounds. *See, e.g., State v. Hendon*, 222 Or App 97, 102, 194 P3d  
149 (2008) (*citing State v. Amaya*, 176 Or App 35, 29 P3d 1177 (2001)).

1 where this Court has broad inherent authority to prevent injustice, a finding that Justice may bring  
2 this action is permissible and necessary.

3  
4 **CLAIM FOR RELIEF**

5 **(Negligence *per se*)**

6 43.

7 Plaintiff re-alleges and incorporates the paragraphs above.

8 44.

9 Oregon recognizes negligence causes of action based on common law. *See, e.g., Deckard*  
10 *v. Bunch*, 358 Or 754, 761, 370 P3d 478 (2016); *Chapman v. Mayfield*, 358 Or 196, 198, 361 P3d  
11 566 (2015).

12 45.

13 “Negligence *per se*” is a special type of negligence “in which the standard of care is  
14 expressed by a statute or rule” rather than by general reference to reasonableness. *Abraham v. T.*  
15 *Henry Construction, Inc.*, 350 Or 29, 35 n.5, 249 P3d 534 (2011).

16 46.

17 A plaintiff may state a claim for negligence *per se* by alleging that “(1) defendants violated  
18 a statute; (2) plaintiff was injured as a result of that violation; (3) plaintiff was a member of the class  
19 of persons meant to be protected by the statute; and (4) that the injury plaintiff suffered is of a type  
20 that the statute was enacted to prevent.” *McAlpine v. Multnomah Cty.*, 131 Or App 136, 144, 883  
21 P2d 869 (1994).

22 47.

23 At all material times, Defendant was required to comply with Oregon’s anti-cruelty statute  
24 enacted for the protection of animals, including Justice. ORS 167.325(1) and 167.330(1).

25 48.

26 Defendant violated the anti-cruelty statute by failing to provide minimum care for Justice as  
27 required by law. ORS 167.325(1) and 167.330(1). Upon examination on March 18, 2017,  
28 Dr. David Asmar determined that Justice had been seriously injured as a result of Defendant’s  
29 criminal neglect. Specifically, Defendant’s failure to provide Justice with “minimum care” caused  
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1 Justice to suffer from starvation, emaciation, skin disease and unimaginable pain, and rendered him  
2 unable to retract his penis to its normal position inside its sheath. Exposed to chronic cold  
3 temperatures, Justice’s penis became traumatized, swollen, infected, and frostbitten.  
4

5 49.

6 Justice was therefore injured as a result of Defendant’s violation of the anti-cruelty statute.  
7 His penile injury, as well as the months of constant hunger and exposure to the cold, caused him  
8 substantial pain and suffering.  
9

10 50.

11 Justice is a member of the class for whose benefit Oregon’s anti-cruelty laws were passed.  
12 As the Oregon Supreme Court concluded after an exhaustive examination of the text, structure, and  
13 history of Oregon’s anti-cruelty laws, “the principal purpose of adopting the [anti-cruelty laws] was  
14 to prevent the suffering of animals. Although early animal cruelty legislation may have been  
15 directed at protecting animals as property of their owners or as a means of promoting public  
16 morality, Oregon’s animal cruelty laws have been rooted—for nearly a century—in a different  
17 legislative tradition of protecting individual animals themselves from suffering.” *Nix*, 355 Or at  
18 796–97, 334 P3d 437; *see also Fessenden*, 355 Or at 772, 333 P3d 278 (citing to *Nix* for the  
19 proposition that “animals are ‘victims’ for purposes of animal welfare statutes”).  
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21 51.

22 The injuries that Justice suffered are of the type Oregon’s anti-cruelty statute was enacted  
23 to prevent. *See Nix*, 355 Or at 790, 334 P3d 437 (finding, under the animal welfare statutes, the  
24 injury is “not . . . to the public generally or . . . the owners of the animals . . . [but] to ‘an animal,’  
25 regardless of who owns it”); ORS 167.305(2) (“Animals should be cared for in ways that minimize  
26 pain, stress, fear and suffering.”).  
27

28 52.

29 As a result of defendant’s negligence, Justice has incurred past and future expenses for  
30 reasonable and necessary medical bills and long-term care in an amount to be determined at trial  
31 but not less than \$100,000.  
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MATTHEW HAMITY (pro hac admission pending)  
LAW OFFICE OF MATTHEW HAMITY  
537 Kains Avenue  
Albany, CA 94706  
Tel: (847) 721-9802  
Email: mhamity@gmail.com

Attorneys for Plaintiff