

**FILED: September 13, 2023**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

DONALD RICARD, an individual, and REUBEN GARCIA, an individual,  
Plaintiffs-Appellants,

v.

KLAMATH FALLS FOREST ESTATES HOMEOWNERS' ASSOCIATION, INC.,  
("KFFEHOA"), an Oregon mutual benefit corporation; JAMES VAUGHAN;  
MICHELLE VAUGHAN; ERIC GORITZ; SAM MARQUEZ; and CYNTHIA  
WILSON, as individuals and as members of the KFFEHOA Board of Directors,  
Defendants-Respondents.

Klamath County Circuit Court  
18CV25995

A176668

Alycia E. Kersey, Judge.

Submitted on January 06, 2023.

Michael W. Franell filed the briefs for appellants.

Elizabeth W. Armitage, Thomas F. Armosino, and Frohnmayer, Deatherage, Jamison,  
Moore, Armosino & McGovern, P. C. filed the brief for respondents Eric Goritz and  
James Vaughan.

Michael D. Montag and Vial Fotheringham LLP filed the brief for respondents Klamath  
Falls Forest Estates Homeowners' Association, Inc., James Vaughan, Michelle Vaughan,  
Eric Goritz, Sam Marquez, and Cynthia Wilson.

Before Shorr, Presiding Judge, and Mooney, Judge, and Pagán, Judge.

SHORR, P. J.

Judgment on IIED claim as to defendants James Vaughan, Eric Goritz, and Sam Marquez  
in their individual capacities reversed and remanded; otherwise affirmed.

---

**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Appellants

- No costs allowed as to Respondents Klamath Falls Forest Estates Homeowners' Association, Inc., Michelle Vaughan, and Cynthia Wilson.
  - Costs allowed, payable by Respondents James Vaughan, Eric Goritz, and Sam Marquez.
  - Costs allowed, to abide the outcome on remand, payable by
-

1 SHORR, P. J.

2 This case originated when plaintiffs, Donald Ricard and Reuben Garcia,  
3 filed a complaint against their homeowner's association, the Klamath Falls Forest Estates  
4 Homeowners' Association (HOA), as well as board members both in their individual  
5 capacities and as members of the HOA Board of Directors. Plaintiffs alleged that under  
6 ORS 659A.421(2)(c) defendants discriminated against them and also caused intentional  
7 infliction of emotion distress (IIED). Specifically, plaintiffs alleged that defendants  
8 discriminated against them due to their disabilities by withholding or revoking keyed  
9 access to a community well, and that defendants' conduct in withholding well access, as  
10 well as other alleged incidents, constituted IIED. Defendants moved for summary  
11 judgment on plaintiffs' claims, and the trial court granted the motion and dismissed  
12 plaintiffs' claims in their entirety. Plaintiffs now appeal that ruling. We affirm in part  
13 and reverse in part.

14 As we explain below, we affirm the trial court's grant of summary judgment  
15 on the statutory discrimination claim because plaintiffs presented no disputed issues of  
16 fact that they were discriminated against based on their source of income as required to  
17 prove plaintiffs' claim under ORS 659A.421(2)(c). We reverse, however, on the trial  
18 court's grant of summary judgment to certain individual defendants on plaintiffs' IIED  
19 claim because those individual defendants did not contest that issue before the trial court  
20 in their summary judgment motion.

21 We review a trial court's grant of summary judgment to determine whether

1 there is no genuine issue of material fact and the moving party is entitled to judgment as a  
2 matter of law. ORCP 47 C. That standard is satisfied if, viewing the record and all  
3 reasonable inferences that may be drawn from it in favor of the nonmoving party--here,  
4 plaintiffs--"no objectively reasonable juror could return a verdict for [plaintiffs] on the  
5 matter that is the subject of the motion for summary judgment." *Id.*; *Robinson v. Lamb's*  
6 *Wilsonville Thriftway*, 332 Or 453, 455, 31 P3d 421 (2001).

7           Before proceeding, we cabin our discussion and the issues on appeal,  
8 because plaintiffs do not assign error to every aspect of the trial court's summary  
9 judgment ruling. First, plaintiffs raise no argument that the trial court erred in granting  
10 summary judgment to defendants on plaintiffs' claim for injunctive relief, and thus that  
11 aspect of the court's ruling is affirmed. Likewise, plaintiffs raise no argument that the  
12 trial court erred in dismissing plaintiffs' claims against defendant board members  
13 Michelle Vaughan and Cynthia Wilson as individuals for failure of service pursuant to  
14 the court's inherent authority under ORCP 54 B(3). That aspect of the court's ruling,  
15 which occurred at the same time as its summary judgment rulings, is likewise affirmed.  
16 Plaintiffs only raise arguments regarding the court's grant of summary judgment to the  
17 remaining defendants--HOA, all five board members in their capacities as officers and  
18 directors, and Eric Goritz, Sam Marquez, and James Vaughan as individuals--on  
19 plaintiffs' first and second claims of relief for discrimination and IIED. Thus, we only  
20 consider the court's rulings as to those defendants and claims.

21           We begin with plaintiffs' discrimination claim. Plaintiffs alleged in their

1 operative complaint that, although defendants had told plaintiffs that they were not  
2 eligible for "water keys" under the 2013 HOA bylaws, the true reason that plaintiffs had  
3 been denied keys was because defendants had animus for plaintiffs due to their  
4 disabilities. In their complaint, plaintiffs alleged discrimination under ORS 659A.421.  
5 Defendants moved for summary judgment on that claim on two bases: (1), that ORS  
6 659A.421 does not prohibit discrimination based on disability, and (2) that plaintiffs were  
7 not entitled to water keys under the valid and enforceable 2013 HOA bylaws, which  
8 limited access to "legal residents with legal residences and legal addresses." In  
9 defendants' view, that provision limited water keys to residents with county-permitted  
10 dwellings and septic systems. Plaintiffs filed a memorandum in opposition to summary  
11 judgment, which contended that the 2013 bylaws were not validly adopted, and that  
12 plaintiffs were entitled to water keys under the last validly adopted HOA bylaws. The  
13 memorandum also contended, *for the first time*, that they were actually asserting a claim  
14 for discrimination based on plaintiffs' *source of income* as disability benefits under ORS  
15 659A.421.<sup>1</sup> In reply, defendants argued that plaintiffs had not presented evidence of  
16 discrimination based on source of income. The trial court granted defendants' motion,  
17 concluding that, even accepting plaintiffs' recharacterization of the claim as a "source of

---

<sup>1</sup> Plaintiffs also argued, for the first time, that they had "pled facts from which a trier of fact could find the Defendants operated in violation of 42 USC § 3604(f)(2)," which they also alternatively listed as 42 USC § 3404 in other areas of their memorandum. The trial court rejected that argument, as plaintiffs had not raised a violation of federal law in their complaint or at any earlier point of the litigation. Plaintiffs do not raise any arguments under federal law on appeal.

1 income" discrimination claim, "[n]either plaintiff produced any evidence that defendants'  
2 actions were based on discrimination of plaintiff[s'] sources of income."

3           On appeal, plaintiffs contend that the trial court erred in that ruling.  
4 Specifically, they repeat their arguments about the validity of the 2013 bylaws, and also  
5 argue that plaintiffs created a sufficient record to avoid summary judgment on their  
6 source-of-income discrimination claim. For our purposes, we need not decide the  
7 validity of the 2013 bylaws, or whether some earlier version of the bylaws control. That  
8 is because, even assuming without deciding that the 2013 bylaws limiting water keys to  
9 "legal residents with legal residences and legal addresses" are unenforceable, plaintiffs  
10 failed to present sufficient evidence to defeat summary judgment on their source-of-  
11 income discrimination claim.

12           We briefly summarize the summary judgment record as to plaintiffs'  
13 discrimination claim, beginning with plaintiff Garcia. Garcia owns two lots within the  
14 HOA. One lot has a home on the property, although it does not have an occupancy  
15 permit, while the other lot contains no structures. Garcia lives in a recreational vehicle  
16 on the empty lot. Garcia had keyed access to the community well for about three years.  
17 In January 2018, HOA notified him that he would need to return his key because he did  
18 "not meet the proper requirements to qualify as a valid address." However, Garcia  
19 testified that the board "made it very clear" that he could not have a water key "because  
20 of how my disability, they have been targeting me." Garcia receives Social Security  
21 Disability benefits. However, there is no direct evidence in the record, nor any

1 reasonable inferences from the record, that defendants knew or believed that Garcia  
2 received disability income, and Marquez testified that he did not know where Garcia  
3 "gets his money."<sup>2</sup> Garcia also testified regarding two incidents that he contended  
4 supported his discrimination claim: (1) an incident in April 2018 by board member  
5 defendants, Marquez and James Vaughan, as well as other individuals, during which  
6 Vaughan made fun of Garcia for "having a cane" and called Garcia "crippled" and "a  
7 gimp fuck" and Marquez told Garcia that he did not "deserve a key you, fucking gimp  
8 fuck"; and (2) an incident in June 2018 in which a man named Dennis Gibbs--who is not  
9 a board member or a defendant in this case--assaulted Garcia and accused him of "faking  
10 [his] disability."

11 Plaintiff Ricard owns one lot within the HOA that contains some  
12 unpermitted structures but no house and no septic system. He lives in a "fifth wheel" on  
13 that property. In December 2017, in response to Ricard's request for well access, HOA  
14 notified Ricard that his request had been denied because he did not have a "legal  
15 residence \* \* \* with no associated legal physical address established, nor Klamath  
16 County building permits for occupancy." Ricard testified that "most \* \* \* if not all" of  
17 the board members had "made comments about [him] being a disabled old contractor"  
18 and that "all" of the board members told him he would never get a water key because he

---

<sup>2</sup> Plaintiffs contend that Garcia "shared with Sam Marquez that he was receiving social security disability." However, that contention was not alleged in the complaint and is not supported by the summary judgment record.

1 was a "gimp old fuck." The summary judgment record does not indicate Ricard's source  
2 of income, or whether any of the defendants knew or believed that Ricard received  
3 disability income.

4 Finally, plaintiffs submitted Klamath County records regarding all  
5 properties within the HOA that had received "final approval on residential structures,"  
6 "final approval on installation of septic systems," and "legal addresses" as support for  
7 their argument that "[d]efendants treated other similarly situated  
8 individuals differently" by granting water keys to board members and other residents who  
9 were not "legal residents with legal residences and legal addresses." Plaintiffs contended  
10 that the records provided evidence that "[n]one of the current Board members" had "final  
11 approval" or "final occupancy" on their residences, and that in fact only five properties in  
12 the entire subdivision were "completed on septic and building."

13 As noted, the court granted summary judgment to defendants, concluding  
14 that, even accepting plaintiffs' recharacterization of the claim as a "source of income"  
15 discrimination claim, the record did not contain evidence of Ricard's source of income at  
16 all, and

17 "[n]either plaintiff produced any evidence that defendants' actions were  
18 based on discrimination of plaintiff[s'] sources of income. Defendant  
19 Marquez stated in his deposition that he did not know the source of income  
20 for Plaintiff Garcia. No evidence in the record supports an inference that  
21 that any of defendants' alleged actions (kicking a cane, yelling, throwing a  
22 chair, or denying the water key) were based on plaintiffs' sources of  
23 income."

24 Pursuant to ORS 659A.421(2),



1            "[a] person may not, because of the race, color, religion, sex, sexual  
2 orientation, gender identity, national origin, marital status, familial status or  
3 source of income of any person:

4            "\* \* \* \* \*

5            "(c) Make any distinction, discrimination or restriction against a  
6 purchaser in the price, terms, conditions or privileges relating to the sale,  
7 rental, lease or occupancy of real property or in the furnishing of any  
8 facilities or services in connection therewith."

9 In other words, a person may not discriminate against a purchaser of real property  
10 because of the purchaser's source of income. That includes discrimination in the  
11 privileges of occupancy or furnishing of facilities or services, and access to the HOA's  
12 community well is undoubtedly a privilege of occupancy or a furnished facility or service  
13 under the statute. Further, pursuant to ORS 659A.421(1)(d),

14            "(A) 'Source of income' includes federal rent subsidy payments  
15 under 42 USC 1437f and any other local, state or federal housing  
16 assistance.

17            "(B) 'Source of income' does not include income derived from a  
18 specific occupation or income derived in an illegal manner."

19 A plaintiff to a discrimination claim must show either direct evidence of discriminatory  
20 intent or at least indirect evidence from which a reasonable factfinder could infer  
21 discriminatory intent, such as evidence that other similarly situated individuals who were  
22 not in the protected class were treated more favorably. *See Miller v. Racing Commission*,  
23 298 Or App 70, 90, 445 P3d 371 (2019) (discussing "disparate treatment" discrimination  
24 claims); *Groshong v. Mutual of Enumclaw Ins. Co.*, 143 Or App 450, 457, 923 P2d 1280

1 (1996), *aff'd*, 329 Or 303, 985 P2d 1284 (1999) (same).<sup>3</sup>

2           Assuming without deciding that a "source of income" discrimination claim  
3 under ORS 659A.421(2) may rely on discrimination because of a plaintiff's receipt of  
4 disability benefits, we agree with the trial court that plaintiffs did not present any  
5 evidence that would permit the inference that defendants withheld water keys from  
6 plaintiffs because of plaintiffs' disability benefit income. As to Garcia, plaintiffs present  
7 no direct evidence of discrimination against Garcia based on his *source of income*,  
8 despite plaintiffs' allegations that Garcia was denied a well key due to his *disability*.  
9 However, a claim of discrimination based on *disability* involves a different statute that  
10 was not raised in plaintiffs' complaint or on summary judgment.<sup>4</sup> Therefore, Garcia  
11 needed to present some indirect evidence of source-of-income discrimination.

12           But the record does not support a reasonable inference of source-of-income  
13 discrimination against Garcia. First, even viewing the record and all reasonable  
14 inferences in favor of plaintiffs, as we must, it is not reasonable to infer that a defendant  
15 who discriminates against persons based on their disability by denying them a property

---

<sup>3</sup> Because of the limited nature of defendants' summary judgment motion and the trial court's ruling on plaintiffs' discrimination claim, we need not determine the precise elements of a *prima facie* source-of-income discrimination claim under ORS 659A.421.

<sup>4</sup> See ORS 659A.145(2)(c) (providing that a person "may not discriminate because of a disability of a purchaser" by "[m]aking any distinction or restriction against a purchaser in the price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property or the furnishing of any facilities or services in connection with the real property").

1 privilege such as a water key and then assaulting or mocking them has discriminated  
2 against them because of their *source of income*.

3           Additionally, there is no evidence in the record that defendants knew or  
4 believed that Garcia received disability income. The only incident that could potentially  
5 infer some sort of animus based on Garcia's source of income, comments by Dennis  
6 Gibbs that Garcia was "faking his disability," occurred after Garcia was denied a water  
7 key and cannot be attributed to any of the defendants. Gibbs is not a board member or  
8 defendant in this case.<sup>5</sup> Similarly, we cannot infer source-of-income discrimination from  
9 plaintiffs' evidence that other residents and board members who were not "legal residents  
10 with legal residences and legal addresses" were granted water keys, because plaintiffs  
11 failed to create a sufficient record to support the inference that those differences in  
12 treatment were based on source of income.

13           Finally, as to plaintiff Ricard, plaintiffs failed to create any record regarding  
14 Ricard's source of income, so the contention that defendants discriminated against him  
15 because of his disability income is completely unsupported by the record. Plaintiffs'  
16 contentions to the contrary are unsubstantiated. As a result, the trial court did not err in  
17 granting defendants' summary judgment motion on plaintiffs' discrimination claim.

18           We turn to plaintiffs' second claim for relief for IIED and reach a different

---

<sup>5</sup> Plaintiffs contend on appeal that Goritz filed a police report that also accused Garcia of faking his disability. However, that claim was not alleged in plaintiffs' complaint, and is not supported by the summary judgment record.

1 conclusion. Plaintiffs contended that defendants intentionally subjected plaintiffs to  
2 extreme emotional distress when defendants denied plaintiffs access to the community  
3 well for discriminatory reasons. Plaintiffs also alleged that the individual defendants  
4 intentionally subjected plaintiffs to extreme emotional distress when they subjected  
5 plaintiffs to the assaults and insults described in plaintiffs' discrimination claim, as well  
6 as when they engaged in several additional acts, including defendants Marquez and  
7 James Vaughan telling Ricard that he "better watch his back"; James Vaughan filing a  
8 petition for a stalking order against Garcia that was dismissed by the court; and defendant  
9 Marquez filing a "falsified assault charge" against Garcia. Plaintiffs contended that all of  
10 the above actions were done with the intent of causing plaintiffs severe emotional distress  
11 and did cause plaintiffs severe emotional distress.

12           Defendants' motion for summary judgment on the IIED claim argued only  
13 that the "HOA Defendants," meaning the HOA and the board member defendants in their  
14 capacities as officers and directors of the HOA, were entitled to summary judgment in  
15 their favor, because the only conduct attributable to the HOA or its officers and directors  
16 the denial of water keys, was done in accordance with the valid 2013 bylaws, and that  
17 evidence was legally insufficient to support an IIED claim. Although defendants  
18 Marquez, James Vaughan, and Goritz joined and adopted that motion "in their individual  
19 capacit[ies]," they did not raise any separate argument that they were entitled to summary  
20 judgment as to the alleged non-HOA conduct as well. In other words, no defendant  
21 developed any legal argument that the individual defendants were not directly liable for

1 IIED for their individual conduct. Further, no defendant raised a factual issue as to  
2 plaintiffs' IIED claims related to the individual defendants' conduct. As noted, the only  
3 argument was that withholding a water key, which was alleged to be the only conduct  
4 done by defendants in their HOA capacity, could not support an IIED claim. In opposing  
5 the motion, plaintiffs seemed to concede that the HOA defendants could not be liable for  
6 IIED, but argued that "summary judgment is absolutely inappropriate for [the individual  
7 defendants'] individual liability."

8           Despite defendants' limited summary judgment argument, the trial court  
9 concluded that, "[i]n the record before the court, plaintiffs have failed to allege any  
10 evidence that defendants' acts caused them severe mental or emotional distress." In  
11 addition, the court ruled that the denial of a water key "is not an extraordinary  
12 transgression of the bounds of socially tolerable conduct and does not exceed any  
13 reasonable limit of social toleration." Finally, the court concluded:

14           "Other allegations of socially intolerable conduct by individual  
15 defendants James Vaughan, Marquez, and Goritz are not supported by the  
16 facts in the record. For instance, there is no evidence in the record that any  
17 of the reports made by these individuals to the Klamath County Sheriff's  
18 Office were in fact falsely made. The most egregious act alleged--knocking  
19 Mr. Garcia's canes out from underneath him, is attributable to Mr. Gibbs,  
20 who is not a party to this case."

21 On those grounds, the trial court granted the motion.

22           On appeal, plaintiffs contend that the trial court erred in dismissing their  
23 IIED claim as to defendants James Vaughan, Goritz, and Marquez for their individual

1 conduct. We agree.<sup>6</sup> Defendants' summary judgment motion only raised arguments  
2 pertaining to the HOA defendants--the HOA and its officers and directors in their  
3 *capacities as HOA representatives and officers*. It did not raise any argument for  
4 summary judgment as to the individual defendants. Plaintiffs only had a burden to  
5 produce evidence on the matters raised in defendants' motion--they were not required to  
6 create a record on their mental or emotional distress, and they were not required to create  
7 a record on the allegations against the individual defendants more generally. *See* ORCP  
8 47 C. Under ORCP 47, a court is not empowered to grant summary judgment on an issue  
9 that is not raised by the moving party's motion. *Eklof v. Steward*, 360 Or 717, 730, 385  
10 P3d 1074 (2016); *Two Two v. Fujitec America, Inc.*, 355 Or 319, 325-26, 325 P3d 707  
11 (2014); *Woodroffe v. State of Oregon*, 292 Or App 21, 27, 422 P3d 381 (2018).  
12 Relatedly, we cannot affirm a grant of summary judgment on a ground not raised by the  
13 motion, because "the opposing party had no reason to adduce evidence on an issue that  
14 was not raised in the summary judgment motion." *Eklof*, 360 Or at 736. For those  
15 reasons, the trial court erred in dismissing plaintiffs' IIED claim as to the individual  
16 defendants.

17 Judgment on IIED claim as to defendants James Vaughan, Eric Goritz, and  
18 Sam Marquez in their individual capacities reversed and remanded; otherwise affirmed.

---

<sup>6</sup> Plaintiffs no longer pursue a claim against the HOA for IIED. We express no opinion on that claim.