IN THE SUPREME COURT OF THE STATE OF OREGON

RONALD DOYLE; and **BENEDICT MILLER**,
Plaintiffs-Respondents
Petitioners on Review,

and

ROBERT DEUEL; and **CHARLES STEINBERG**,
Plaintiffs-Respondents
Cross-Appellants
Petitioners on Review

v.

CITY OF MEDFORD, an Oregon municipal corporation; and **MICHAEL DYAL**, City Manager of the City of Medford, in his official capacity and as an individual,
Defendants-Appellants
Cross Respondents
Respondents on Review.

Jackson County Circuit Court
Case No. 080137L7
A147497
S061463

Review of the decision of the Oregon Court of Appeals on appeal
from a judgment of the Circuit Court for Jackson County,
the Honorable Mark Schiveley, Judge

Petitioners Brief on the Merits

Opinion Filed: May 15, 2013
Author of Opinion: Hon. Rebecca A. Duncan
Concurring Judges: Hon. David Schuman and Hon. Robert Wolheim

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Counsel Continued on Next Page December 2013

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This case is before the Supreme Court on review of the Oregon Court of Appeals decision in *Doyle, Miller, Deuel and Steinberg v City of Medford and Dyal*, 256 Or App 625 (2013).

I. LEGAL QUESTION PRESENTED ON REVIEW AND PROPOSED RULE OF LAW

A. QUESTION PRESENTED ON REVIEW

Does Oregon law provide retired public employees a civil remedy for breach of the duty to make group health insurance coverage available to retirees under ORS 243.303(2)?

B. PROPOSED RULE OF LAW

Oregon law provides a civil remedy enforceable in Circuit Court for a local government's breach of the duty to make group health insurance coverage available to retirees under ORS 243.303(2).

II. NATURE OF THE ACTION, RELIEF SOUGHT AND JUDGMENT ENTERED

This is an action by four retired employees of the City of Medford. The Complaint alleges four claims for relief for each plaintiff based upon the assertion that, upon retirement, plaintiffs were not allowed to continue in the City's group health insurance program that was available to current City employees. The plaintiffs alleged that the City's conduct violated ORS 243.303, violated Medford Resolution 5715, constituted age discrimination in violation of ORS 659A.030 and breached plaintiffs' employment contracts.

The relief sought was injunctive relief and damages together with an award of attorney fees, expert witness fees and litigation expenses.

The judgment entered in the trial court was a General Judgment. The General Judgment awarded economic damages to all four plaintiffs for breach of contract and awarded economic and non-economic damages to plaintiffs Doyle and Miller on the ORS 243.303 claims. The General Judgment awarded plaintiff Doyle economic damages of $61,142 and non-economic damages of $50,000; plaintiff Miller economic damages of $29,866 and non-economic damages of $50,000; plaintiff Steinberg economic damages of $37,208; and plaintiff Deuel economic damages of $54,586.

The General Judgment also awarded back pay of $42,765.77 to plaintiff Doyle and $8,384 to plaintiff Miller on the age discrimination claim.

III. FACTS OF THE CASE MATERIAL TO DETERMINATION OF REVIEW

A. Historical Facts

ORS 243.303 was originally enacted in 1981 and provided that local governments that make health care coverage available for its officers and employees "may insofar as and to the extent possible," make that coverage available to retired employees and to their spouses and unmarried children under 18. Or. Laws 1981, ch. 240, §1[1]. In 1985, the Oregon Legislature

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[1] The 1981 bill enacted is set forth in the Appendix to the brief at App – 1.

amended ORS 243.303.[2] The 1985 amendment changed, *inter alia*, the word "may" to "shall" resulting in the statute reading "shall insofar as and to the extent possible." The 1985 amendment set a period of 60 days for the retiree to elect continued participation for themselves and their family members. The 1985 amendment provided that health insurance coverage "shall be made available for a retired employee until the retired employee becomes eligible for federal Medicare coverage...and may, but need not, be made available thereafter." Or. Laws 1985, ch. 224, § 1.

In August 1986, the Medford City Council adopted a resolution acknowledging that ORS 243.303 "requires that continuation of health insurance coverage be offered to employees" and enacted procedures to comply with this requirement. Among the procedures set forth in the resolution was a requirement that otherwise qualified retirees may continue on the City's group health insurance program until, *inter alia*, eligible for Medicare. Pl. Ex 3.[3]

Prior to 1990, the City made group health insurance available to all employees through a single provider. Tr. 125 (June 22-24, 2010). The City's group health insurance permitted employees to continue their health insurance upon retirement at their own expense. The City circulated Member Handbooks to employees describing the benefits of the group health insurance program

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[2] The 1985 bill enacted is set forth in the brief at App- 2-3.
[3] All references in the brief to exhibits are Plaintiff's Exhibits in the referenced hearing or proceeding in the Circuit Court.

including the option to continue their group health insurance upon retirement until eligible for Medicare. Pl. Ex. 30.

In 1990, the City switched its Police Officers to the Oregon Teamsters Employers Trust (hereinafter "OTET") health insurance plan. The OTET health plan did not allow retirees to continue their health insurance upon retirement. Tr. 132-133, 199-202 (June 22-24, 2010).

City Attorney Ronald Doyle learned that the Police Department's health insurance did not permit retirees to continue their coverage upon retirement in 2001. Doyle learned these facts when City Manager Michael Dyal proposed to move managers onto the OTET policy. Tr. 96-97 (June 22-24, 2010). Doyle met with Dyal in August 2001 and advised Dyal the proposed move violated ORS 243.303. In an angry, heated exchange, Dyal told Doyle the City would not "spend a dime" on retirees as long as he was City Manager. ER 124-125.[4]

A second City Attorney, Assistant City Attorney Sydney Dreher, undertook to counsel the City's management team in late 2001. Dreher advised the City's management team that OTET's failure to provide retiree health insurance was a major problem for the City. Pl. Ex. 12 A. Dreher advised that contracting with OTET without an option for retirees to continue their group health insurance violated ORS 243.303. Tr. 361 (September 7-9, 2010). As of

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[4] References to "ER" or "SER" are to the Excerpt of Record or Supplemental Excerpt of record in the court of appeals.

November 2001, the City did not have such an option. As a result, Dreher met with the management team to develop such an option. Tr. 366 (September 7-9 2010). Dreher set forth a plan to gather information regarding the availability of health insurance, to meet and discuss going to market with a Request for Proposal for health insurance for retiring City employees covered by OTET, and to evaluate the cost of supplementing retirees' premiums to purchase replacement insurance providing comparable coverage at comparable cost. Pl. Ex. 21A.

Subsequent to the initial meeting, no one gathered the identified information, no meeting was held to discuss options and Dreher never got an answer on her proposal to supplement retirees' premium costs for replacement insurance. Tr. 375-377 (September 7-9, 2010).

In 2001 and early 2002, Dyal entered into agreements moving the City's Public Works employees, its Parks and Recreation employees, its Construction and Maintenance employees, its WRD operators and its management employees to the OTET health insurance. By early 2002, approximately 275 City employees were enrolled in the OTET health insurance program out of a work force of approximately 400. Pl. Ex. 14A.

Subsequent to 2002 and through trial, a group of approximately 135 employees, (the City's firefighters and employees represented by the AFSCME union), continued with different health insurance than OTET. The City

obtained health insurance for these employees permitting retirees to continue their group health insurance coverage upon retirement. The health insurance the City provided for these employees cost the same or less than the OTET coverage. Tr. 140-141 (June 22, 2010).

Robert Deuel worked for the City as the City Engineer for 30 years retiring on January 31, 2003. Tr. 165 (June 22-24-2010). He made requests in both 2003 and 2004 to continue in the City's group health insurance program under ORS 243.303. The City denied both requests. ER 35, 36.

Charles Steinberg worked for 22 years as a City Police Officer retiring on January 21, 2003. Tr. 233 (June 22-24, 2010). He did not know he had legal rights to continued health insurance coverage under ORS 243.303 when he retired. At the time of his retirement, and after, he communicated on several occasions with the City's Human Resources Department. He was not told of ORS 243.303. He learned of ORS 243.303 through a newspaper article in late 2005 discussing Ronald Doyle's assertion of a claim against the City under ORS 243.303.

Ronald Doyle was the City Attorney for the City of Medford retiring from city service on March 31, 2005. At his retirement, he requested continued group health insurance coverage under ORS 243.303 for himself and his wife. Doyle sought continued coverage in part because his wife was seriously ill with

a medical condition that ultimately led to her death. The City denied his request.

Benedict Miller worked as a City Police Officer for 27 years retiring on May 31, 2006. Tr. 261-263 (June 22, 2010). He requested continued group health insurance coverage under ORS 243.303. The City denied his request.

All plaintiffs could not obtain private health insurance coverage either for themselves or for a family member because of pre-existing health conditions. All plaintiffs ultimately obtained more expensive health insurance that provided less coverage either through PERS or through OMIP, a state program available for those deemed uninsurable for private individual coverage. One of the plaintiffs, Mr. Steinberg, went uninsured for periods of time because of the high cost of replacement coverage. Tr. 138-139, 168, 236-237, 263.

B. Procedural Facts Relevant To Review

This case and a related case *Bova v City of Medford* originated in federal court. The federal court dismissed federal claims on summary judgment and dismissed state claims without prejudice with leave to re-file in state court. The federal claims were appealed and resulted in certified questions to the Oregon Supreme Court. This court answered the certified questions in *Doyle v City of Medford*, 347 Or 564, 227 P3d 682 (2010).[5]

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[5] The procedural history of the federal case is set forth in *Doyle v City of Medford*, 606 F3d 667 (9th Cir 2010).

Upon the federal court's dismissal of the state claims, plaintiffs filed this case in Jackson County Circuit Court in January 2008. The complaint alleged claims for relief for violation of ORS 243.303, violation of Medford Resolution 5715, age discrimination in violation of ORS 659A.030 and breach of contract.

Bova v City of Medford, Case No. 08-16637E7, was also filed in Jackson County Circuit Court shortly thereafter. The *Bova* case was filed as a class action for current employees seeking declaratory and injunctive relief for violation of ORS 243.303, for age discrimination under ORS 659A.030 and for breach of contract. The trial court certified the *Bova* case as a class action on behalf of current employees of Medford.

In the trial court in this case, in November 2008, the trial court decided that ORS 243.303(3) was enforceable through a "private right of action" in response to defendant's motion for partial summary judgment. ER 104. Defendant sought partial summary judgment arguing that "[t]here is no Civil Remedy for a Violation of ORS 243.303"; that there are no provisions in the statute that provides for a civil remedy; and, that no penalties or remedies of any kind or nature set forth anywhere in the Oregon Revised Statute for violation of ORS 243.303. SER 16.

Relying upon *Miller v City of Portland*, 288 Or 271, 276-278, 604 P2d 1261, 1264-1265 (1980) and *Scovill v City of Astoria*, 324 Or 159, 165-169, 921

P2d 1312, 1316-1317 (1996), Judge Schiveley denied defendant's motion and found that ORS 243.303 provides plaintiffs with a private right of action. ER 104.

In November 2008, Judge Schiveley granted defendants motion for partial summary judgment dismissing the ORS 243.303 claims of Deuel and Steinberg on statute of limitations grounds. ER 101-102

Plaintiffs Doyle and Miller filed a motion for partial summary judgment in April 2009. In September 2009, Judge Schiveley granted Doyle and Miller partial summary judgment establishing defendant's liability for violation of their rights under ORS 243.303. ER 116.

On June 22, 2010, a jury awarded Doyle and Miller economic and non-economic damages on their claims for violation of ORS 243.303

Although he concluded that ORS 243.303(2) was enforceable through a private right of action, Judge Schiveley did not decide what form of remedy the statute provided. Defendant first raised the question whether ORS 243.303(2) provided tort remedies such as emotional distress on a motion for a directed verdict at the conclusion of trial. Defense counsel asked to renew his argument that there's "no civil remedy under the statute." Defense counsel acknowledged that the law of the case was that there is a civil remedy under the statute, however, defense counsel contended that "there is no emotional distress damages set forth in that statute. The statute is an economic statute. And I

don't think that you get emotional distress damages." Tr. 316-317 (June 24, 2010).

Judge Schiveley denied defendant's motion for a directed verdict concluding that defendant raised the issue "just too damn late." Tr. 319-320.

Defendant did not raise the non-economic damages issue with the court thereafter. Defendant has not appealed the trial court's ruling denying the directed verdict motion on the question of whether the private right of action to enforce ORS 243.303(2) includes within its scope a claim for non-economic damages.

IV. SUMMARY OF ARGUMENT

Criminal or regulatory statutes are frequently enacted to cover situations in which *no common law right of action* has ever been established. When such statutes exist with no express provision for a right of action and where no established common law rights exist, "courts attempt to determine *legislative intent as to civil liability* from whatever sources are available to them and, if determinable, follow that intent." *Miller v City of Portland*, 288 Or 271, 278, 604 P2d 1261 (1980). Emphasis added.

To determine whether to "create" or "recognize" a new tort the court determines (1) whether the plaintiff is a member of the class protected by the statute and whether the harm inflicted is the type intended to be protected against; (2) whether there is explicit or implicit legislative intent that a violation

of the statute should give rise to civil liability; and (3) if no intent is evident, how the legislature would have dealt with the problem had it been considered by the legislature. This last determination is made "by looking at the policy giving birth to the statute and determining whether a civil tort action is needed to carry out that policy." *Bob Godfrey Pontiac, Inc. v Roloff*, 291 Or 318, 630 P2d 840 (1981); *Scovill v City of Astoria*, 324 Or 159, 921 P2d 1312 (1996). In this case, application of the *Miller*, *Scovill* and *Bob Godfrey Pontiac* factors shows that ORS 243.303(3) is enforceable through a private right of action in Circuit Court.

ORS 243.303(2) was first enacted into law in 1981 as a part of House Bill 2430. When enacted the law provided that local governments which make health insurance coverage available to their officers and employees, "may insofar as and to extent possible" make that coverage available to retired employees. The law was amended in 1985. The 1985 amendment made four substantive changes in the statute: (1) replacing the discretionary "may" with the mandatory "shall"; (2) creating a period of 60 days for retirees to elect continued coverage; (3) requiring continued coverage through Medicare eligibility; and (4) replacing "shall" with "may" once eligible for Medicare.

All four legislative changes demonstrate an intention to protect a class of persons of which the plaintiffs are members. The plaintiffs are all retirees of a local government that makes health care coverage available to its officers and

employees and each plaintiff wished to continue their health insurance coverage upon retirement. The plaintiffs are members of the class protected by the statute.

The harms inflicted on the plaintiffs are the type of harms the statute sought to protect against. The plaintiffs suffered denial of individual insurance due to pre-existing medical conditions, one plaintiff's family went uninsured for a period of time, and all plaintiffs were forced to pay high insurance costs or accept reduced coverage to obtain insurance.

The legislative intent to provide a civil remedy is implicit within the text and context of ORS 243.303, the history of amendments to the statute and the legislative history of the 1985 amendment to the statute. Further, recognition of a legislative intent to provide a civil remedy to enforce the statute is implicit within this Court's prior opinion in *Doyle v City of Medford*, 347 Or 564, 227 P3d 683 (2010).

The legislature changed the text of ORS 243.303 from "may" to "shall" and the normal meaning of "shall" is a mandatory duty or obligation. In addition, the 1985 amendment added a provision providing that health insurance coverage "shall be made available" for retirees until they become eligible for Medicare; after that point health insurance coverage "may, but need not," be made available. These two changes side by side show an intent to create an obligation or duty.

Second, the history of the amendments to the statute and the legislative history of 1985 amendment show a legislative intent to provide a civil remedy. Opponents of the 1985 amendment complained that the legislature was enacting an "inappropriate mandate" and that the current "existing permissive law" shouldn't be changed; that health insurance benefits were at the "option" of local government and shouldn't be considered something "owed to all retirees"; and that inclusion of retirees in a local group health plan is currently "negotiable" and should be "left that way." Over this opposition, the legislature enacted the 1985 amendments to ORS 243.303.

Third, this court's prior opinion in *Doyle v City of Medford*, 347 Or 564, 227 P3d 683 (2010) infers that a private right of action exists to enforce ORS 243.303(2). In *Doyle*, this Court made three holdings which implicitly recognize that violation of ORS 243.303(2) is enforceable through a civil remedy. That is, under this Court's decision in *Doyle:*

(1) The legislature imposed upon local government a form of mandatory obligation or duty owing from local government to retirees such as the plaintiffs;

(2) The legislature established a legal standard under which local government could excuse compliance with the mandatory obligation owing to retirees;

(3) The legislature imposed a burden on local government to prove the facts and circumstances to satisfy the legal standard excusing compliance.

By determining that the statute defined a form of mandatory obligation, this Court implicitly recognized the legislature set forth the elements of a claim. By determining that the statute had a legal standard excusing compliance and that the statute imposed a burden on local government to show facts excusing compliance, this Court implicitly recognized the legislature's creation of an affirmative defense.

Judge Schiveley found the existence of a private right of action to enforce ORS 243.303(2) in part because he concluded a private right of action is necessary to effectuate the legislature's intent. ER 104. As with his determination that plaintiffs were members of the class sought to be protected, Judge Schiveley's decision regarding the need for enforcement of ORS 243.303(2) is also correct.

"When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, suing a suitable existing tort action or a new cause of action

analogous to an existing tort action." *Scovill v City of Astoria,* 324 Or 159, 171 (1996).

Under *Scovil*l, Judge Schiveley properly exercised his discretion to provide a remedy under the statute. First, the protective purpose of the statute is important. Second, ORS 243.303(2) does not provide an alternate remedy, such as a civil or criminal penalty. Further, there is no common law remedy for a local government's failure to provide retirees the same health insurance as active employees. In the absence of a civil remedy, the legislature's detailed amendments to ORS 243.303 and this Court's decision in *Doyle* will be rendered ineffective. In this case, there is no risk that recognizing a civil action for violation of the statute might interfere with the total legislative scheme. As discussed above, the scheme the legislature crafted seems designed for a civil action creating a legal standard for liability as well as for an affirmative defense.

The court of appeals erred in its decision of this case. First, the court of appeals limited its consideration of legislative intent to whether the legislature intended to create a "private right of action for damages" rather than considering more generally whether the legislature intended to expose local governments to "liability" for their actions. In *Scovill*, this Court explicitly rejected the argument that there must be an express legislative intent to subject a defendant to a "tort remedy" to find a statutory tort. Second, the court of

appeals erred in concluding that the text, context and legislative history of ORS 243.303(2) does not evidence an intent to create a private right of action. Third, and perhaps most significantly, the court of appeals made no determination on the third question in the *Scovill* template, whether a remedy is "appropriate in furtherance of the purpose of the legislation ad needed to assure the effectiveness of the provision. " *Scovill, supra*, 324 Or at 171.

Finally, defendant failed to preserve for appeal the question of the scope of damages for violation of ORS 243.303. In the trial court, Judge Schiveley made no determination as to what remedies were appropriate to enforce ORS 243.303. This is due to the fact that the City raised the issue, "just too damn late" according to the court. The City has not appealed the judge's ruling on this question.

V. ARGUMENT

This case concerns the question of whether a retiree may enforce ORS 243.303(2) through a civil action in Circuit Court. The court of appeals held that, in enacting ORS 243.303(2) "the legislature did not contemplate a private right of action for damages when a local government fails to carry out the obligation described in the statute" and reversed the trial court judge. *Doyle v City of Medford*, 256 Or App 625 (2013). As such the case concerns the question of whether and in what circumstances a plaintiff may file a civil lawsuit to enforce a violation of a criminal or regulatory statute.

Under Oregon law, this court has recognized that a defendant's violation of a criminal or regulatory statute may affect liability to a plaintiff in a variety of ways. Two of those ways are relevant to the issues on review in this case.

In common law claims for negligence, the court may adopt the conduct required by a statute as the standard of conduct required of a reasonably prudent person under the same or similar circumstances. In such circumstances, the plaintiff may prove liability for damages "on a theory of tort law unfettered by negligence concepts of foreseeability." *Chartrand v Coos Bay Tavern, Inc.,* 298 Or 689, 694 (1985). When the court adopts a statutory standard for a cause of action that would be negligence, the violation of statute is said to be *negligence per se. Miller v City of Portland*, 288 Or 271, 604 P2d 1261 (1980).

Criminal or regulatory statutes, however, are frequently enacted to cover situations in which *no common law right of action* has ever been established. When such statutes exist, "courts must, of course, comply." *Miller, supra*, 288 Or at 278. Criminal or regulatory statutes most often contain no express provision for a right of action. When such statutes exist with no express provision for a right of action and where no established common law rights exist, "courts attempt to determine *legislative intent as to civil liability* from whatever sources are available to them and, if determinable, follow that intent." *Id.* Emphasis added.

To determine whether to "create" or "recognize" a new tort the court determines (1) whether the plaintiff is a member of the class protected by the statute and whether the harm inflicted is the type intended to be protected against; (2) whether there is explicit or implicit legislative intent that a violation of the statute should give rise to civil liability; and (3) if no intent is evident, how the legislature would have dealt with the problem had it been considered by the legislature. This last determination is made "by looking at the policy giving birth to the statute and determining whether a civil tort action is needed to carry out that policy." *Bob Godfrey Pontiac, Inc. v Roloff*, 291 Or 318, 630 P2d 840 (1981).

This court has applied these three factors to impose civil liability on police offers for failing to take an intoxicated person into custody in violation of statute, *Scovill v City of Astoria*, 324 Or 159, 921 F2d 1312 (1995); on a community mental health provider for failing to protect the public from a person conditionally released from a mental hospital, *Cain v Rijken*, 300 Or 707, 717 P2d 140 (1986); on a tavern owner for injuries caused by a visibly intoxicated patron served alcohol in violation of a statute, *Chartrand v Coos Bay Tavern*, 298 Or 689, 696 P2d 513 (1985); on police officers for failing to arrest a person in violation of statute and court order, *Nearing v Weaver*, 295 Or 702, 707, 670 P2d 137 (1983); and, on a city for failing to enforce a city ordinance requiring taxicabs to carry adequate insurance, *Brennan v City of*

Eugene, 285 Or 401, 591 P2d 710 (1979). See also, *Humbert v Sellers*, 300 Or 113, 708 P2d 344 (1985) (imposing liability on landlord for injuries resulting from violation of statute requiring habitable premises).

This Court has declined to impose civil liability in circumstances that are inconsistent with one or more of the *Miller* factors. When creation of a civil remedy was contrary to public interest and inconsistent with the policy of the statute allegedly violated, the Court declined to create a remedy.[6] When the plaintiff failed to prove a violation of the underlying statute or when the conduct alleged did not violate the statute, the Court found no statutory tort.[7] When the plaintiff is not within the class of persons protected by the statute or when the harm is not of the type sought to be protected, the Court has refused to recognize a statutory tort.[8] Finally, the Court has declined to infer the existence of a right of action, when a legislative intent is apparent to deny civil liability.[9]

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[6] *Bob Godfrey Pontiac, Inc v Roloff*, 291 Or 318, 630 P2d 840 (1981) (no remedy for attorneys alleged intentional violation of statutes governing attorney conduct); *Miller v City of Portland, 288 Or 271*, 279, 604 P2d 1261 (no remedy because inconsistent with apparent legislative policy to reward a person who violates statute with a cause of action based upon his or her own prohibited conduct).

[7] *Belikka v Green*, 306 Or 630, 762 P2d 997 (1988) (no remedy Residential Landlord and Tenant Act did not apply to partially concealed hole in lawn); *Nelson v Lane County*, 304 Or 97, 743 P2d 692 (1987)(no remedy because stop and inquire statute did not require police officers to detain intoxicated person).

[8] *Gattman v Favro,* 306 Or 11, 757 P2d 402 (1988) (restaurant owner not liable for violation of statute for serving visibly intoxicated patron who left restaurant and stabbed the plaintiff); *Sager v McClenden*, 296 Or 33, 672 P2d 697 (1983)

In this case, application of the *Miller*, *Scovill* and *Bob Godfrey Pontiac* factors shows that ORS 243.303(3) is enforceable through a private right of action in Circuit Court.

1. The Plaintiffs Are Members Of The Class Protected By The Statute From The Type Of Harm Inflicted

Judge Schiveley concluded that plaintiffs are members of the class protected by the statute and the harm inflicted is of the type intended to be protected against. He found that ORS 243.303 was amended more than 20 years ago to change how municipalities treated their retirees and he found the change was made despite widespread objection that the amendment would "force" local government action. ER 104. Judge Schiveley was correct in his decision.

ORS 243.303(2) was first enacted into law in 1981 as a part of House Bill 2430. When it was originally submitted House Bill 2430 contained the language, "shall, insofar as and to the extent possible." During the legislative process, the mandatory word "shall..." was deleted and replaced with the discretionary word "may..." Chapter 240 Oregon Laws 1981. App 1.

(liquor licensee who served visibly intoxicated patron in violation of statute not liable when intoxicated patron left, fell down and suffered injuries.

[9] *Dunlap v Dickson*, 307 Or 175, 765 P2d 203 (1988) legislature's enactment of two statutes regulating livestock running at large, one of which provides civil remedy and one which does not, shows legislative intent to deny remedy for violation of second statute.

Fours years later in 1985, the Oregon Legislature amended the statute as follows:

> "The governing body of any local government that contracts for or otherwise makes available health care insurance coverage for officers and employees of the local government shall, insofar as and to the extent possible, make that coverage available for any retired employee of the local government who elects within 60 days after the effective date of retirement to participate in that coverage and, at the option of the retired employee, for the spouse of the retired employee and any unmarried children under 18 years of age. The health care insurance coverage shall be made available for a retired employee until the retired employee becomes eligible for federal Medicare coverage, for the spouse of a retired employee until the spouse becomes eligible for federal Medicare coverage and for a child until the child arrives at majority, and may, but need not, be made available thereafter. The governing body may prescribe reasonable terms and conditions of eligibility and coverage, not inconsistent with this section, for making the health care insurance coverage available. The local government may pay none, of the cost of making that coverage available or may agree, by collective bargaining agreement or otherwise, to pay part or all of that cost."

Chapter 224 Oregon Laws 1985. Emphasis added.

The 1985 amendment made four substantive changes in the statute: (1) replacing the discretionary "may" with the mandatory "shall"; (2) creating a period of 60 days for retirees to elect continued coverage; (3) requiring continued coverage through Medicare eligibility; and (4) replacing "shall" with "may" once eligible for Medicare. All four legislative changes demonstrate an intention to protect a class of persons of which the plaintiffs are members.

The plaintiffs are all retirees of a local government that makes health care insurance coverage available to its officers and employees. Each of the plaintiffs wished to continue their health insurance coverage for themselves and

their spouses. Some of the plaintiffs wished to continue their health insurance coverage for their children. The plaintiffs are members of the class protected by the statute.

The harms inflicted on the plaintiffs are the type of harms the statute sought to protect against. The legislative history of the 1985 amendment to ORS 243.303 shows that the legislature intended to protect retiring public employees from unavailability of individual insurance to retirees due to pre-existing medical conditions and the high cost or limited coverage available to retirees due to the same factors.

The proponents of the 1985 amendment informed the legislature of the purpose of the proposed changes in the law. Senator Larry L. Campbell described the purpose of HR 2430 in written testimony. He indicated that insurance is almost a requirement with the high costs of medical care, that individual insurance from retirement to Medicare is expensive and usually inadequate and if any history of medical problems is on record, the premiums can be prohibitive. He indicated that HR 2430 would provide retired employees of local government medical insurance for the employee, spouse and dependent children until eligible for Medicare. App - 4.

The Oregon Education Association presented testimony in support of the bill. The OEA reported to the Legislature the problems faced by retirees were:

(1) Because of the high cost of medical services, it is almost a requirement that individuals have medical insurance. App – 19. Although some individual insurance programs were available to retirees on non-age rated schedules and reduced benefits, these programs require that one must be in good health to enroll and 40% to 50% of retirees in the 55-64 age category could not pass medical underwriting requirements for these policies (App – 5);

(2) One alternative available to retirees was "conversion plans" which do not require medical approval. App – 5. However, conversion plans offer significantly reduced benefits and have greatly increased premiums; and,

(3) A second alternative available to retirees was a health insurance program available through the Public Employees Retirement System (hereinafter "PERS"). However, "because of the undesirable make-up of that group, it is expensive and inadequate." The undesirable make-up of the PERS health insurance plan was due to the fact that healthier retirees opt for other coverage, leaving PERS with a pool of those who cannot obtain other coverage which drives the premiums for PERS higher. App – 19-20.

The type of harms suffered by each of the plaintiffs was the type the legislature sought to protect against. That is, the plaintiffs encountered denials of individual insurance because of pre-existing medical conditions, periods of no health insurance coverage and limited options that were either expensive or resulted in reduced coverage because of the high risk pools of individuals

covered in the programs. (Doyle: significant medical problems at the time of his retirement, was denied life insurance because of his medical history and his spouse was suffering from significant medical problems that ultimately led to her death. Tr. 135-137 (June 22-24, 2010). Because of these conditions, the only option was PERS health insurance the cost of which was "outrageous." Tr. 139; Steinberg: sought individual insurance for whole family and whole family was denied coverage because of significant pre-existing health conditions. Tr. 236-238 (June 22-24, 2010). Steinberg's whole family had a period when they were uninsured. Tr. 239. Steinberg started on PERS but dropped the coverage because he couldn't afford the expense. Tr. 239. Ultimately, he obtained coverage through a state program ("OMIP") composed of a "high risk pool" of individuals rejected for coverage on the open market. Through this program, he obtained reduced coverage. Tr. 239-240; Miller: he and wife both had significant medical problems. Because of both of their medical histories, their only option was the state operated "high risk pool." Tr. 266 (June 22-24, 2010). Ultimately, Miller returned to work on a part-time basis to meet the costs of medical insurance. Tr. 267; Deuel: he and wife sought coverage through PERS and found PERS to be expensive. Tr. 168 (June 22-24, 2101).

2. There Is Explicit Or Implicit Evidence Of Legislative Intent To Provide A Civil Remedy

The legislative intent to provide a civil remedy is implicit within the text and context of the ORS 243.303, the history of amendments to the statute and the legislative history of the 1985 amendment to the statute. Further, recognition of a legislative intent to provide a civil remedy to enforce the statute is implicit within this Court's prior opinion in *Doyle v City of Medford*, 347 Or 564, 227 P3d 683 (2010).

First, the text and context of the statute shows an implicit legislative intent to provide a civil remedy. The text and context of the statute are the best evidence of legislative intent. *Scovill, supra*, 324 Or at 166. The legislature changed the text of ORS 243.303 from "may" to "shall." Ordinarily, use of the word "shall" implies that the legislature intended to create an obligation while "may" generally implies the legislature intended to create only authority to act. "Shall" is used in laws, regulations or directives to express what is mandatory. *Doyle, supra*, 227 P3d at 687 (citing to *Webster's Third New int'l Dictionary* 2085 and *Form and Style Manual for Legislative Measures* 6 (2008).

The context of the statute shows that the legislature intended use to "shall" in its normal meaning. The 1985 amendment to the statute made two significant changes: (1) The 1985 amendment replaced the permissive word "may" with the mandatory word "shall" changing the mere grant of authority to an obligation of some kind on local governments; and (2) The 1985 amendment added a provision providing that health insurance coverage "shall be made

available" for retirees until they become eligible for Medicare; after that point health insurance coverage "may, but need not," be made available. The use of "shall" and "may" side by side shows both that the legislature intended to create a duty and knew what it was doing. *Doyle, supra*, 227 P3d at 689.

Second, the history of the amendments to the statute and the legislative history of 1985 amendment show a legislative intent to provide a civil remedy. The Legislative History shows the Oregon Legislature knew it was creating a mandate. The legislature's enactment of a mandate implicitly infers the legislature intended to create a civil remedy to enforce the mandate.

In the Senate, opponents to HB 2430 argued that many local governments initiated retired employee health insurance plans under the current permissive law; that retiring employees already had access to health insurance through PERS; and that retiring employees could convert their group health insurance to individual insurance, could purchase individual policies on the open market or could obtain coverage through spouses. App - 22. Opponents argued that the current permissive law permitted public employers to negotiate retiree health insurance coverage as a collective bargaining matter and that this flexible process should not be displaced with a mandate. App – 8, 22.

Witnesses opposed to the bill testified that HB 2430 was an "inappropriate mandate" and that the current "existing permissive law" shouldn't be changed:

> "We oppose House Bill 2430 as an inappropriate mandate by the state upon local governments. The fact that local governments have initiated retired employee plans indicates that the existing permissive law has fostered the implementation of such plans when employee groups determined that the issue was a priority bargaining issue. We would urge you to leave the law as it currently exists and the issue of retired employee health care plans as a collective bargaining matter than a mandate."

App - 13. Emphasis added.

Opponents complained that local government had been assured that retiree health insurance benefits were at the "option" of the local government and should be left that way:

> "...it was made clear to local government that the purpose of the legislation was to assure the local governing bodies have the authority to make health insurance coverage available to retired employees. It was made absolutely clear that this was not mandating the coverage, only making it available at the option of the local government.
>
> Now, because a number of local governing bodies responsibly approached the problem and provided the option at the local level, this is being considered as something owed to all retirees of local government employers. This is not fair.
>
> The inclusion of retirees in a local government's group health plan is currently negotiable and it should be left that way."

App - 11. Emphasis added.

In spite of the opposition, the Legislature rejected the opponent's position, enacted HB 2430, and created the statutory mandate that is now ORS 243.303(2).

The legislative history of ORS 243.303(2) confirms the textual and contextual analysis and shows that the legislature intended to create a form of mandate.

Third, this court's prior opinion in the *Doyle* case infers that a private right of action exists to enforce ORS 243.303(2). In *Doyle*, the Ninth Circuit certified the following question to this Court:

> What amount of discretion does [ORS] 243.303 confer on local governments to determine whether or not to provide health insurance coverage to their employees after retirement?"

Doyle, supra, 227 P3d at 685.

Before this Court, defendant argued that the City had complete discretion to choose whether to make health insurance coverage available to retirees and this included the discretion to select an insurer without regard to whether the insurer is willing to offer coverage to retirees. Plaintiff argued ORS 243.303 created a mandate to provide retirees access to health insurance coverage subject to a narrow exception for "actual impossibility." *Doyle, supra,* 227 P2d at 688-689.

This Court found that the proper interpretation of ORS 243.303 lies somewhere between the parties' positions. This Court's holdings from the *Doyle* case were:

(1) ORS 243.303(3) creates an obligation on local governments to make health insurance coverage that they provide to active employees available to

retirees. The statute does not leave the City total discretion to decline to make coverage available to retirees or to choose health insurance coverage for its current employees without regard to whether the insurer is willing to offer coverage to retirees. *Doyle, supra*, 227 P2d at 692.

(2) The statute does not impose an absolute mandate subject only to an exception for actual impossibility. Whether local government has complied with ORS 243.303(2) will depend on whether it has made health insurance coverage available to retirees 'insofar as and to the extent possible" in light of all the facts. The responsibility to demonstrate that it was not possible under the statutory standard to make coverage available rests with the local government. *Id.*

(3) The statutory standard is a legal one and determining whether a local government has demonstrated that it should be excused from making health insurance coverage available to retirees will depend on the facts of each case. *Id.*

The three holdings above implicitly recognize that violation of ORS 243.303(2) is enforceable through a civil remedy. That is, under this Court's decision in *Doyle:*

(1) The legislature imposed upon local government a form of mandatory obligation or duty owing from local government to retirees such as the plaintiff;

(2) The legislature established a legal standard under which local government could excuse compliance with the mandatory obligation owing to retirees;

(3) The legislature imposed a burden on local government to prove the facts and circumstances to satisfy the legal standard excusing compliance.

By defining a form of mandatory obligation the legislature created the elements of a claim. By determining that the statute had a legal standard excusing compliance and that the statute imposed a burden on local government to show facts excusing compliance, this Court implicitly recognized the legislature's creation of an affirmative defense.

There is one additional factor related to this Court's decision in *Doyle* that suggests the Court's implicit recognition that ORS 243.303 creates a private right of action enforceable in Circuit Court. Judge Schiveley's ruling on the private right of action question was made on November 20, 2008, months prior to briefing of the certified question in this court. Plaintiffs informed the court of Judge Schiveley's ruling in describing the procedural history of the case in their Opening Brief and submitted a copy of Judge Schiveley's ruling to the Court in an Excerpt of Record.[10] Thus, this Court knew at the time it made

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[10] See, Appellants' Excerpt of Record and Appendix at 22- 32 in *Doyle, et al v City of Medford,* et al, S057330; Appellants' Opening Brief at 6.

its ruling that Judge Schiveley found ORS 243.303 enforceable through a private right of action.

The text and context of ORS 243.303, the history of amendment of ORS 243.303, the legislative history of ORS 243.303 and this Court's decision in *Doyle* all implicitly recognize that the legislature intended for ORS 243.303 to be enforced through a civil action in Circuit Court.

3. There Is A Need To Recognize A Private Right Of Action To Effectuate The Legislative Purpose Of The Statute

Judge Schiveley found the existence of a private right of action to enforce ORS 243.303(2) in part because he concluded a private right of action is necessary to effectuate the legislature's intent. ER 104. As with his determination that plaintiffs were members of the class sought to be protected, Judge Schiveley's decision regarding the need for enforcement of ORS 243.303(2) is also correct.

To decide whether a statute that imposes a duty also gives rise to a tort claim for breach of that duty is a matter for court decision. *Scovill, supra*, 324 Or at 179. This Court has cited the Restatement (Second) of Torts, §874A (1979) as a beginning point in this discussion. The Restatement provides:

> "When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a

> right of action, suing a suitable existing tort action or a new cause of action analogous to an existing tort action."

Scovill, supra, 324 Or at 171.

The question of whether a tort remedy is needed to enforce a statutory duty may be affected by the fact that a specific remedy, such as a civil penalty, is provided by a statute. In the absence of such, recognition of a statutory tort is governed by the weight that a court finds reasonable to give to the protective purposes in the legislation. *Id.*

If permitting a tort action in the circumstances alleged in the case is consistent with and serves to enforce the legislated duty imposed by the statute, the court may accord a civil remedy to the injured party. *Scovill, supra*, 324 Or at 172.

Following *Scovill*, Judge Schiveley acted within his discretion in according plaintiff's a civil remedy in the circumstances alleged in this case.

First, the protective purpose of the statute is important. That is, ORS 243.303(2) provides legislative recognition that retirees face significant barriers in obtaining health insurance; and that public employee retirees need additional protection to obtain adequate, affordable health insurance.

Second, ORS 243.303(2) does not provide an alternate remedy, such as a civil or criminal penalty. Enforcement of the statute is not delegated to an administrative body authorized to investigate, correct or adjudicate claims of non-compliance.

Further, there is no common law remedy for an employer's or a public employer's failure to provide retirees the same health insurance as active employees. Cases in which liability is based upon a statutory duty when there is also an underlying common law cause of action are treated differently from those when there is no underlying common law cause of action. *Bob Godfrey Pontiac, Inc., supra*, 291 Or at 326.

In the absence of a civil remedy, the legislature's detailed amendments to ORS 243.303 and this Court's decision in *Doyle* will be rendered ineffective. In the absence of a civil remedy, local governments may simply disregard the requirements of ORS 243.303(2) and this Court's opinion in *Doyle* because the statute would not provide for a civil remedy and there is no other way to enforce it.

This Court has declined to create a new cause of action for violation of a statute when there is a risk that invasion into the field by the court's establishment of a civil cause of action might interfere with the total legislative scheme. *Burnette v Wahl*, 284 Or 705, 711-712, 588 P2d 1105 (1978); see also, Restatement (Second) of Torts §874A, Comment h(3). In this case, there is no risk that recognizing a civil action for violation of the statute might interfere with the total legislative scheme. As discussed above, the scheme the legislature crafted seems designed for a civil action creating a legal standard for liability as well as for an affirmative defense.

Finally, while courts often speak of legislative intent in determining whether to establish a civil remedy to protect and enforce a right granted by a statute, the courts frequently use intent in a figurative, rather than a literal sense. The Restatement explained the meaning of intent in comments to Section 874A:

> "'Intent' here has a different meaning. It is sometimes thought of as referring to how the legislative body 'would have dealt with the concrete situation' if it had had the situation before it in the way in which it is now before the court."

Restatement (Second) of Torts § 874A, Comment d (2008).

In the case at bar, Judge Schiveley dealt with a situation of a local government that was violating ORS 243.303(2) in spite of advice from two City Attorneys that its conduct would violate the law. Judge Schiveley found in violating ORS 243.303(2), the City Manager of the City of Medford expressed that he would not "spend a dime" on retirees. Judge Schiveley found that the City was resistant in court in litigating the plaintiffs' claims.

Judge Schiveley acted within the discretion accorded him under the law in concluding that the legislature would have accorded the plaintiffs a civil remedy had they been presented with the concrete situation that was before the court.

4. The Court Of Appeals Erred In Reversing The Trial Court's Decision

The court of appeals erred in its decision of this case. The court of appeals interpreted *Scovill* as setting forth a template and expressed its intent to

apply the *Scovill* template. In its application of the *Scovill* template, the court of appeals clearly defined and correctly applied the first question of that template, erred in interpreting and misapplied the second question and simply ignored the third *Scovill* question.

The court of appeals began its application of *Scovill* addressing the first question:

"[T]he first question to be considered is whether ORS 243.303(2) gives rise to a duty." *Doyle, supra*, 256 Or App at 635. The court of appeals found this question to be substantially answered by this Court's opinion answering the Ninth Circuit's certified question. Specifically, the court of appeals acknowledged that this Court's previous opinion recognized that ORS 243.303 created a duty imposed on local government to make group health insurance programs available to retirees:

> "The Oregon Supreme Court accepted the certified question and answered it in *Doyle v City of Medford*, 347 Or 564, 227 P3d 683 (2010)(*Doyle II*). The court said in *Doyle II* that, by using the word 'shall" in ORS 243.303(2), the legislature intended to imposed on local governments an obligation 'to make the health insurance coverage that they provide to active employees available to retired employees." *Id* at 692.

Upon finding the first *Scovill* factor satisfied, the court of appeals did not clearly define the balance of the *Scovill* template. Rather, the court of appeals focused the balance of its discussion of the ORS 243.303 issue on whether the legislative history of ORS 243.303 contained evidence the legislature intended

to recognize a "private right of action for damages." *Doyle, supra*, 256 Or App at 639.

To assess whether the legislature intended to recognize "a private right of action for damages," the court of appeals considered textual and contextual sources and the legislative history as described in the Supreme Court's opinion. Upon considering these sources and the legislative history, the court of appeals concluded that no private right of action for damages was contemplated by the legislature.

The court of appeals analysis turns on three findings by the court.

(1) First, that statute itself makes no provision for a private right of action. The court found this significant in a state where the legislature knows how to craft explicit employment-related private rights. *Doyle, supra*, 256 Or App at 639 (citing to ORS 659A.885).

(2) Second, the court found no textual or contextual clues that infer the legislature contemplated the possibility of a private right of action or civil liability for failure to make health insurance available. *Id.*

(3) Third, in the absence of some indication that a private right of action was contemplated, the court of appeals found the flexibility and discretion inherent in the "insofar as and to the extent possible" statutory language is inconsistent with an intention that the statute be enforceable "through a private right of action for damages."

The court of appeals erred in three ways. First, the court of appeals limited its consideration of legislative intent to whether the legislature intended to create a "private right of action for damages." Nothing in the prior decisions of this court limits the lower courts ability to recognize a private right of action to circumstances whether the legislature specifically intended to subject a defendant to tort type "damages," as distinguished from more generally subjecting a defendant to "liability" for its actions.

"Statutory liability is not necessarily 'tort' liability, a characterization that might affect issues such as the measure of damages or the statute of limitations..." *Bellikka v Green*, 306 Or 630, 635, 762 P2d 997 (1988). Furthermore, in *Scovill*, this Court explicitly rejected the argument that there must be an express legislative intent to subject a defendant to a "tort remedy" to find a statutory tort:

> "Defendant also argues that, under the statutory construction methodology adopted in *PGE*, we should hold that no statutory tort can arise unless this court can hold that the legislature expressly intended that a tort remedy would arise from the breach of a duty created or imposed by statute. We reject that argument because, as we believe our discussion above has made clear, the legislature did contemplate that there could be *liability in connection with* the authority and duty to take the actions referred to in ORS 426.460(1) and ORS 426.470. Moreover, *no such change in substantive law* follows from the *PGE* case."

Scovill, supra, 324 Or at 170. Emphasis added.

In footnote 8 to the opinion, the Court explained the meaning of this passage,

> "PGE established a methodology as part of the law of statutory construction, not a change in substantive tort law. Rejection of defendant's argument on its merits for the reason stated should not be read as an endorsement of its premise that PGE created a fundamental, substantial shift in Oregon law."

Id.

In short, this Court has previously rejected the argument that, to establish a statutory tort, a plaintiff must show a legislative intent to subject a defendant to a tort remedy and has characterized that argument as seeking a change in substantive law.

Second, the court of appeals erred in concluding that the text, context and legislative history of ORS 243.303(2) does not evidence an intent to create a private right of action. Plaintiffs have set forth at length in Section 2 above, the statutory text, context and legislative history all of which infer a legislative intent to subject local governments to liability for failure to comply with ORS 243.303(2). Plaintiff relies upon that argument here.

The only portion of the court of appeals rationale that has not been discussed in Section 2 above is the significance of the "insofar as and to the extent possible" statutory language limiting local government's obligation to retirees. The court of appeals seemed particularly persuaded that this language somehow suggested that the legislature did not intend to create a right of action for enforcement of the statute stating that the "indefinite nature" of the obligation was inconsistent with a statutory right of action. *Doyle, supra*, 256 Or App at 638-639.

In plaintiffs view, contrary to the court of appeals opinion, the flexible nature of the statutory "insofar as and to the extent possible" language supports and is consistent with the concept of an enforceable private right of action. In *Nearing v Weaver*, 295 Or 702, 670 P2d 137 (1983), the majority decision was criticized as creating a form of strict liability. This Court responded that liability under the statute in question in that case is not absolute, that there may be defenses and that the "governing standard of conduct is set by the statute, not by this decision." *Nearing, supra*, 295 Or at 712.

In this case, as in *Nearing*, the statute in question contains a standard of conduct that sets forth an affirmative defense to liability. The fact that the statute contains an affirmative defense to liability provides support for the notion that the legislature anticipated that local governments could be held liable for violation of the statute. Indeed, the inclusion of the statutory affirmative defense assures that violations of the statute will only be found in egregious circumstances.

Third, and perhaps most significantly, the court of appeals made no determination on the third question in the *Scovill* template. That is, even when the text, context and legislative history of a statute are unclear as to whether the legislature intended to provide recourse, the trial court still has discretion to provide a remedy in furtherance of the purpose of the legislation if a remedy is needed to assure the effectiveness of the provision. The court of appeals

conducted no analysis of this third *Scovill* factor and this failure constituted reversible error.

5. The City Failed To Preserve Questions As To The Proper Remedy For Violation Of ORS 243.303

While Judge Schiveley found a private right of action to enforce ORS 243.303, he did not decide the "scope" of the right: i.e., whether the right included tort type damages or was limited to economic loss. He did not decide this question because defendants did not timely raise the question.

At the conclusion of trial, on a motion for directed verdict, defendant first raised the question of whether plaintiffs' recovery should be limited to economic damages. Judge Schiveley decided this issue as follows:

> "Then the final remaining matter I think that's still pending is this issue of non-economic damages. And I have to be honest with you, we have been battling this case in great detail for two years, and this is the first time that that issue has been raised. It could have been, should have been, would have been dealt with, with all the myriad of other issues that I dealt with before we ever got here. It's too late now. I am going to give that issue to the jury. I'm not going to grant a motion for directed verdict on it. I will deal with this issue after the jury has made its determination whether there are any non-economic damages. I'm not inviting a judgment notwithstanding a verdict, but I know Mr. Franz well enough to know he knows how to file such motions. So I'm not taking it away from the Plaintiff at this point. It's just too darn late."

Tr. 319-320.

Defendant did not raise the non-economic damages issue with the court thereafter. Defendant also did not appeal the denial of the motion for directed verdict on this ground. Defendant has not preserved on appeal the question of

whether the private right of action to enforce ORS 243.303(3) includes within its scope a claim for non-economic damages.

CONCLUSION

On review, the court should reverse the decision of the Court of Appeals on plaintiffs' ORS 243.303 claim, reinstate Doyle's and Miller's judgment on the claim and remand to the court of appeals for consideration of Deuel's and Steinberg's cross appeals.

DATED this 16th day of December, 2013.

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 9.05(3)(a) and ORAP 5.02(2)(d)(i). The word-count of this brief is 9,761 words.

I certify that the size of the type in the text of the brief and the footnotes are not smaller than 14 point and the font is Times New Roman as required by ORAP 5.05(2)(d)(ii)

DATED: December 17, 2013.

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CERTIFICATE OF FILING

I hereby certify that on December 17, 2013 I directed the submission of the foregoing **PETIONERS' BRIEF ON THE MERITS ON REVIEW to the** Appellate Court Administrator, Appellate Court Records Section, 1163 State Street. Salem, Oregon 97301-2563 through the court's electronic filing system.

DATED: December 17, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2013 I directed the service of the foregoing **PETITIONERS BRIEF ON THE MERITS ON REVIEW** through the courts electronic filing system on:

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