

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 Reply 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

STEPHEN L. BRISCHETTO

OSB# 78156

ATTORNEY AT LAW

621 S.W. Morrison St., Suite 1025

Portland, Oregon 97205

Telephone: (503) 223-5814

slb@brischettolaw.com

Attorney for Plaintiffs-Respondents/Petitioners on Review

Attorney for Plaintiffs-Respondents/Cross-Appellants/Petitioners on Review

GEORGE P. FISHER

OSB #910432

Attorney at Law

3635 S.W. Dosch Road

Portland, Oregon 97239

Telephone: (503) 224-7730

George@gpf-law.com

Attorney for Plaintiffs-Respondents/Petitioners on Review

Attorney for Plaintiffs-Respondents/Cross-Appellants/Petitioners on Review

LAW OFFICE OF ROBERT E. FRANZ, JR.

Robert E. Franz, Jr. OSB #73091

PO Box 62

Springfield, Oregon 97477

Telephone: 541-741-8220

rfranz@franzlaw.comcastbiz.net

Attorney for Defendants-Appellants

Cross-Respondents

Respondents on Review

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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). Plaintiffs submit this Reply Brief to respond to arguments raised in defendants Brief on the Merits.

I. SUMMARY OF ARGUMENT

It is appropriate for this Court to refer to preexisting common law to understand the context for the legislature's 1981 enactment and 1985 amendment of ORS 24.303. *Marriage of Denton*, 326 Or 236 (1988). Contrary to defendants' argument, Oregon law has recognized since at least the late 1800's that the violation of a legal duty or legal obligation created by statute that causes harm is enforceable in court as a tort.

In *Urban Renewal Agency v Lackey*, 275 Or 35, 549 P2d 657 (1976), this Court recognized that a "tort" is any breach of a legal duty resulting in damages, other than those duties created by contract, whether the duty is imposed by the common law or by statute. The *Urban Renewal* Court cited *Gray v Hammond Lumber Co.*, 113 Or 570, 576 (1925) and *Morris v City of Sheridan*, 86 Or 224 (1917). *Morris*, in turn, is one of a series of cases from the late 1800-s and early 1900's involving municipalities that issued warrants to contractors or engineers to perform land improvements and then failed to collect the funds necessary to pay the warrants. In these cases, the Oregon courts held that where the law raises a legal obligation to do a particular act,

and there is a breach of that obligation, and consequential damages, the proper form of action is in tort. *Little v Wimmer*, 26 Or 235 (1984).

In the late 70's when actions based upon statutory obligations became more common, this Court set forth a methodology for determining how a defendant's breach of a statutory duty affects civil liability to a plaintiff. This methodology was set forth in *Burnette v Wahl*, 284 Or 704 (1978), *Miller v City of Portland*, 288 Or 271 (1980) and *Bob Godfrey Pontiac Inc. v Roloff*, 291 Or 318 (1981) and has been consistently applied since then.

This pre-existing case law starting in the late 1800's and extending through the early 1980's provides the proper context for considering the legislature's intent in enacting and amending ORS 243.303. In 1981 and 1985, the legislature would be presumed to know that enactment of a statute stating that local governments, "shall insofar as and to the extent possible" provide retirees health insurance would create a "legal duty" or a "legal obligation" to retirees which would be enforceable through a civil remedy;

This pre-existing case law, together with the language and structure of ORS 243.303 and the circumstances surrounding its enactment and amendment shows the legislature intended for retirees to have a civil remedy for the denial of health insurance coverage under ORS 243.303.

This Court should decline defendants' request to overrule *Scovill* and to adopt a rule of law that money damages may not be recovered for the failure to

follow the terms of a statute unless a private civil cause of action is expressly created by the legislature in the statute or by the express terms of another statute.

To determine whether to overrule a prior case, this Court weighs the undeniable importance of stability in legal rules and decisions against the need to correct past errors, the need to depart from precedent when the statutory context for a decision has changed or when a party demonstrates that an earlier case was inadequately considered or wrong when decided. *Farmers Ins. Co. v Mowry*, 350 Or 686 (2011).

In this case, the interest in stability in legal rules and decisions are significant. Oregon cases from the late 1800's and early 1900's establish the principle of law defendants wish to change. The methodology used in *Scovill* which defendants wish to discard has been in use since the late 1970's. Defendants' proposal, if accepted, affects a broad area of the laws of torts including common law claims and claims based upon statutory violations where there is no common law counterpart.

Weighed against this interest, defendants present no evidence that *Scovill* was inadequately considered or wrongly decided. Contrary to defendants' argument, *Scovill* does not depart prior Oregon cases but faithfully applies the methodology set forth in *Burnette*, *Miller*, *Bob Godfrey* and *Nearing*.

Defendants point to *Thompson v Thompson*, 484 US 174 (1988) to show that the law is changing. According to defendants *Thompson* stands for the proposition that the federal courts have “effectively overruled” a case which authorizes the federal courts to imply a right action. However, contrary to defendants’ argument, *Thompson* reaffirms the principle that, even when the legislative history of a statute is silent or ambiguous on the question of whether a civil remedy is intended, legislative intent may appear implicitly in the language or structure of the statute or in the circumstances of its enactment. *Thompson* is consistent with the approach used in *Scovill* and the cases on which *Scovill* is based.

Defendants argue that this Court should consider whether plaintiffs’ claims are preempted by ERISA prior to consideration whether Oregon law provides a civil remedy for breach of ORS 243.303. There are substantial procedural obstacles to defendants’ attempt to raise ERISA preemption before this Court. The question of whether Medford’s health insurance coverage was or wasn’t an employee benefit plan under ERISA or a governmental benefit plan exempt from ERISA is a question dependent upon facts. Under *Staten v Steel*, 222 Or App 17, 26, 191 P3d 778 (2008), the denial of a motion for summary judgment is not reviewable unless the motion was based purely upon legal contentions. Second, even if the question is reviewable, defendants failed to make a factual record in the Circuit Court to support the conclusion that

Medford's health insurance coverage is an employee benefit plan. Third, the controlling law holds that when a governmental entity purchases a benefit plan for its' employees and delegated administration of benefits to a private benefit provider, the plan is a governmental plan excluded from ERISA. *Silvera v The Mutual Life Ins. Co.*, 884 F2d 423, 427 (9th Cir 1989).

II. ARGUMENT

Plaintiffs request leave to file a Reply Brief on the Merits relating to three issues included in Respondents Brief on the Merits which could not be anticipated as a part of plaintiffs' Brief on the Merits. In particular, defendants argue:

(1) This Court should decline to consider whether ORS 243.303 is enforceable through a civil remedy because any such claim will be pre-empted under the Employee Retirement Income Security Act, 29 USC §1144;

(2) This Court should reconsider and overrule *Scovill v City of Astoria*, 324 Or 159, 166, 921 P2d 1312 (1996) and the methodology employed in *Scovill*; and,

(3) If this Court reaches the question, the Court should look solely at whether the legislators specifically had in mind creation of a cause of action when amending ORS 243.303 and this approach to interpreting legislative intent was recognized in case law prior to pre-*Scovill*.

Plaintiffs will reply to each of the arguments raised in defendants' Brief on the Merits below.

I. The Legislature Intended For ORS 243.303(2) To Create A Legal Duty Or Obligation Enforceable Through A Civil Remedy

To determine whether the legislature intended from ORS 243.303 to be enforceable through a civil remedy, defendants argue that the Court should look solely at whether the legislature intended to provide a private cause of action for damages, and particularly require evidence that legislators specifically had in mind creation of such a cause of action. Defendants argue that assessing whether the legislature had in mind creation of a private cause of action for damages is consistent with pre-*Scovill* law. Defendants argue that prior to *Nearing v Weaver*, 295 Or 702, 670 P2d 137 (1983) this Court did not recognize an implied statutory tort and instead left the matter to the legislature. Defendants point to *dicta* in *Burnette v Wahl*, 284 Or 705, 711-712 (1978) and the court's decision in *Farris v United States Fidelity and Guaranty Company*, 284 Or 453, 587 P2d 1015 (1978) to support this argument.

Plaintiffs agree with defendants that it is appropriate for this Court to refer to the preexisting common law to understand the context for the legislature's 1981 enactment of ORS 243.303 and the 1985 amendment. To interpret Oregon statutes, this Court considers the text and context of the statute to discern the intent of the legislature. *PGE v Bureau of Labor and Industries*,

317 Or 606, 610-11, 859 P2d 1143 (1993). “Context” includes other provisions of the same statute and other related statutes as well as the *preexisting common law* and the statutory frame work within which the law was enacted. *In the Matter of Marriage of Denton*, 326 Or 236, 951 P2d 693 (1998). Emphasis added. We disagree with defendants, however, as to the proper preexisting common law context for consideration of the 1981 and 1985 legislative acts with respect to ORS 243.303.

Contrary to defendants’ argument, since at least the late 1800’s Oregon law has recognized that the violation of a “legal duty” or a “legal obligation” created by statute that causes harm is enforceable in court as a tort.

This principle was discussed in *Urban Renewal Agency v Lackey*, 275 Or 35, 549 P2d 657 (1976).¹ In *Urban Renewal*, the Court considered whether a counter-claim based upon an allegation that the plaintiff violated a federal rule constituted a “tort” subject to the Oregon Tort Claims Act. To arrive at its decision, this Court needed to define what constitutes a “tort” under Oregon law. The Court recognized that the definition of a “tort” was a subject of significant disagreement. Nevertheless, the Court stated that “[a]s a general rule... *any breach of a legal duty* resulting in damages, other than those duties created by contract, is a tort, whether *that duty is imposed by the common law*

¹ In *Nelson v Lane County*, 304 Or 97, 743 P2d 692, 698 (1987), this Court recognized *Urban Renewal Agency* as a part of the Court’s history of cases implying a statutory tort remedy where no common law remedy existed.

or by statute. Emphasis added. The *Urban Renewal* Court pointed to *Gray v Hammond Lumber Co.*, 113 Or 570, 576, 232 P 637, 638, 233 P 561, 234 P 261 (1925) as one source of this definition under Oregon law. Under *Gray*,

“When statutes are enacted which undertake to declare rights and establish a standard of conduct for their protection, any acts or omissions in violation of such statute, which destroy the enjoyment of such rights, may be treated as legal wrongs or torts.”

The *Urban Renewal* Court also pointed to *Morris v City of Sheridan*, 86 Or 224, 167 P 593 (1917), cases from Colorado and Oklahoma and Prosser’s Law of Torts §87 for the same proposition.

Morris is one of a series of cases from the late 1800’s and early 1900’s involving municipalities that issued warrants to contractors or engineers to perform land improvements with the warrants payable from funds created through special assessments. When the municipalities failed to collect the funds necessary to pay the warrants, the holders of the warrants sued in tort. *Morris* and the cases upon which *Morris* is based, discuss whether legal obligations created by municipal warrants were actionable as a tort or whether plaintiffs were limited to contractual remedies.

One of the cases on which *Morris* is based, *Little v City of Portland*, 26 Or 235 (1894) sets forth the rule upon which these cases are decided:

“[W]here, from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and consequential damages, there, although assumes it may be maintainable upon a promise implied by law to do the act, still an action on the case, founded, in tort, is the more proper form of action, in which the plaintiff,

in his declaration, states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and damage resulting from the breach.”

Under *Urban Renewal, Gray, Morris and Little*, pre-existing Oregon law held that when a statute created a “legal obligation” or a “legal duty,” a breach of the legal obligation or legal duty was actionable as a tort.

In the 70’s, when actions based upon statutes became more common, this Court set forth a methodology for determining how a defendant’s breach of a statutory duty or obligation affects civil liability to a plaintiff injured as a result of the breach.² This methodology was set forth in *Burnette v Wahl*, 284 Or 705, 711-712 (1978), *Miller v City of Portland*, 288 Or 271, 276-278 (1980) and *Bob Godfrey Pontiac, Inc. v Roloff*, 291 Or 318, 326-328 (1981) and has been consistently applied since then. This Court applied this same methodology to establish liability based upon statutory violations in *Davis v Billy’s Con-Teena, Inc.*, 284 Or 351, 587 P2d 75 (1978); *Brennan v City of Eugene*, 285 Or 401, 591 P2d 710 (1979); and, *Nearing v Weaver*, 295 Or 702, 670 P2d 137 (1983) all decided prior to amendment of ORS 243.303(2) in 1985.

This pre-existing case law starting in the late 1800’s and extending through the early 1980’s provides the proper context for considering the

² Plaintiffs have discussed the substance of the methodology this Court adopted extensively in the Brief on the Merits and will not repeat that discussion here. Brief on the Merits at 16-20.

legislature's intent in enacting and amending ORS 243.303. In 1981 and 1985, the legislature would be presumed to know that enactment of a statute stating that local governments, "shall insofar as and to the extent possible" provide retirees health insurance would create a "legal duty" or a "legal obligation" to retirees which would be enforceable through a civil remedy. This common law context explains why it took the legislature two sessions to enact the mandatory language, why there was opposition to the language as creating a "mandate" and what the legislature's intent was in rejecting the opposition and enacting the mandatory language.

Defendants argue that if the legislature intended that there be a civil remedy, the legislature could have said so. Defendants argue that the existence of other statutes with an express a statutory right of action infers when the legislature wishes a statute to be enforced in court, it says so. However, the legislature would not perceive the need to create an express statutory provision defining the right of action because under Oregon law statutory duties and obligations are traditionally enforceable through a civil remedy. The fact that some statutes specifically define a right of action is consistent with the notion that the legislature may wish to specify particular remedies or particular procedures for some statutory violations while in other circumstances leave to the courts the job of deciding appropriate remedies for statutory violations.

The context of the preexisting common law considered together with the structure and language of ORS 243.303 and the circumstances of its enactment and amendment show the legislature intended to provide a civil remedy for its breach.

II. This Court Should Decline Defendants Invitation To Reconsider *Scovill* And The Cases Upon Which It Is Based

Defendants ask the Court to overrule *Scovill* and to adopt a rule of law that a plaintiff may not recover money damages for the failure to follow the terms of a statute unless a private civil cause of action is expressly created by the legislature in the statute itself or by the express terms of another statute. Respondents Brief on the Merits at 1. Defendants ask the Court to reject the approach set forth in the Restatement (Second) of Torts, §874A (1979) and to reject the methodology set forth in *Scovill*. Respondents' Brief on the Merits at 24

This Court should reject defendants' invitation to overrule *Scovill* as well as defendants' invitation to create the new rule of law proposed in their Brief.

Under *Farmers Ins. Co. v Mowry*, 350 Or 686 (2011), the principle of *stare decisis* applies to Oregon law. *Mowry* sets forth the method this Court employs to consider when prior precedents should be overruled. Following *Farmers Ins. Co.*, applying *stare decisis* the Court assumes that fully considered prior cases are correctly decided. The party seeking to change a precedent must

assume responsibility for affirmatively persuading the Court that prior precedent should be abandoned. To decide whether to follow or overrule prior precedent the Court weighs the “undeniable importance of stability in legal rules and decisions” against the “need...to correct past errors,” the need “to depart from precedent when the statutory context for a particular decision has substantially changed” or when a party affirmatively demonstrates that “an earlier case was inadequately considered or wrong when it was decided.”

Farmers Ins. Co., supra, 350 Or 692.

In this case, the interests in stability in legal rules and decisions are significant. The legal rule that defendants propose to discard has been in effect for an extensive period of time. Notwithstanding defendants’ arguments to the contrary, as discussed in Section I above, Oregon cases from the late 1800’s and early 1900’s establish the principle that “[w]hen statutes are enacted which undertake to declare rights and establish a standard of conduct for their protection, any acts or omissions in violation of such statute, which destroy the enjoyment of such rights, may be treated as legal wrongs or torts.” *Gray, supra*, 113 Or at 576.

The methodology defendants wish to discard has been in effect for an extensive period of time. The methodology the court uses to determine the effect of a statutory violation on claims where there is a corresponding common

law cause of action and on claims where there is no common law counterpart has been established since the late 1970's, a period of more than 30 years.

Defendants' proposal, if accepted, affects a broad area of the law of torts. The methodology used to determine the effect of a statutory violation effects claims where is an underlying common law cause of action,(such as negligence and negligence per se), as well as claims where there is no corresponding common law cause of action.

Second, defendant presents no evidence that *Scovill*, or the cases on which *Scovill* is based, were inadequately considered or wrongly decided. Defendants also present no evidence that the underlying context for any of these decisions has changed

Contrary to defendant's argument, *Scovill* does not depart from prior Oregon cases but faithfully applies the methodology set forth in *Burnette*, *Miller*, *Bob Godfrey* and *Nearing*.

This Court should note that many of the cases on which *Scovill* was based contain concurring and dissenting opinions. See, *Nearing, supra*, 298 Or at 714(J. Jones concurring in result; J. Petersen and Campbell dissenting); *Bob Godfrey Pontiac, supra*, 291 Or at 337 (J. Linde concurring); *Miller, supra*, 288 Or at 281 (J. Howell concurred in result, J. Petersen specially concurred). The existence of concurring and dissenting opinions shows that the body of law on which *Scovill* is based was thoroughly considered by the Court. By the time

Scovill was decided, the *Scovill* opinion was a unanimous opinion of the Court suggesting that the principles which earlier caused some controversy were now settled.

Defendant points to a decision of the U.S. Supreme Court and a California Court of Appeals and appears to argue that a changing legal landscape no longer supports the methodology used in *Scovill*. Neither of the cases defendants cite are sufficient to show a change in case law such that either *Scovill* or the cases upon which *Scovill* is based should be overruled.

Defendants argue that in 1975, the Supreme Court held that the federal courts could imply a federal law cause of action in *Cort v Ash*, 422 US 66, 45 LEd2d 26 (1975). Subsequently, defendants contend that the Supreme Court “effectively overruled” *Cort* in *Thompson v Thompson*, 484 US 174 (1988). Defendants say that this Court should follow the Supreme Court’s lead.

However, defendants misstate the holding and the reasoning in *Thompson*. Contrary to defendants’ arguments, the majority opinion in *Thompson* held that federal courts may continue to infer a private cause of action from a federal statute. *Thompson, supra*, 484 US at 179. Further, the Supreme Court rejected the approach defendants ask this Court to adopt. Namely, the Supreme Court rejected the notion that, to infer a private cause of action, there must be “evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action.” *Id.*

In *Thompson*, the Court's majority opinion cites *Cort v Ash* as good law.

Id. Defendants point to an opinion of Justice Scalia concurring in the judgment as the support for their argument. In his concurring opinion Justice Scalia expresses his view that *Cort v Ash* is no longer good law. Nevertheless, Justice Scalia's concurring opinion was not the opinion of the majority.

To the contrary, *Thompson* reaffirms the principle, even when the legislative history of a statute is silent or ambiguous on the question of whether a civil remedy is intended, legislative intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Thompson, supra*, 484 US at 179. The Supreme Court's approach in *Thompson* is consistent with the approach used in *Scovill* and the cases on which *Scovill* is based.

Defendants request to overrule *Scovill* is little more than a request that the current members of the Court adopt different policy preferences from those of the Court's predecessors who decided *Scovill*. Under *Farmers Ins. Co. v Mowry, supra*, 350 at 697, these are insufficient grounds to overrule prior precedent.

III. This Court should decline to consider the impact of ERISA prior to consideration of whether Oregon law provides a civil remedy for breach of the duty to make group health insurance coverage available to retirees under ORS 243.303(2)

Defendants argue that this Court should consider whether the federal Employee Retirement Income Security Act, hereinafter “ERISA” preempts ORS 243.303(2).

There are substantial procedural obstacles to defendants’ attempt to raise ERISA preemption before this Court. Defendants raised ERISA preemption in the Circuit Court and Judge Schiveley rejected the argument concluding that governmental benefit plans are not governed by ERISA and the City’s benefit plan was a governmental benefit plan. Before the court of appeals, defendants did not challenge Judge Schiveley’s legal conclusion that governmental benefit plans are not governed by ERISA. Rather, defendants argued that Medford’s health insurance coverage was an “employee benefit plan” not a “governmental plan.” Defendants contended that the Circuit Court erred in denying defendants’ motion for summary judgment on ERISA preemption on the grounds that there was no factual dispute as to whether Medford’s health insurance plan was an employee benefit plan.

Defendants faced three obstacles to asserting this challenge in front of the court of appeals. First, the question of whether Medford’s health insurance

coverage was or wasn't an employee benefit plan is dependent upon facts. It is not a pure question of law. Under *Staten v Steel*, 222 Or App 17, 26, 191 P3d 778 (2008), the denial of a motion for summary judgment is not reviewable in the court of appeals unless the motion was based upon purely legal contentions where facts are immaterial. The court of appeals has yet to rule as to whether defendants' assignment of error based on ERISA is reviewable. Second, even if the question were reviewable, defendants failed to make a factual record on summary judgment in the Circuit Court to support its claim that Medford's health insurance coverage was an employee benefit plan, not a governmental plan. In the absence of a factual record to support its claims, defendants could not be entitled to summary judgment. Third, on the merits of the argument, the controlling law holds that when a governmental entity purchases a benefit plan for its employees and delegates administration of benefits to a private benefit provider, the plan is a governmental plan excluded from ERISA. *Silvera v The Mutual Life Ins. Co.*, 884 F2d 423, 427 (9th Cir 1989).

Defendants' arguments before the court of appeals were not reviewable and would not lead to a result different from Judge Schiveley's ruling in the Circuit Court. These arguments should not be a bar to consideration of the question this Court accepted for review.

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 18th day of February 2014

Stephen L. Brischetto OSB #78156
 E-Mail: slb@brischettolaw.com
 Attorney at Law
 621 SW Morrison Street, Ste. 1025
 Portland, OR 97205
 Telephone: (503) 223-5814
 Facsimile: (503) 228-1317
 Attorney for Plaintiffs-Respondents/
 Petitioners on Review
 Attorney for Plaintiffs-Respondents/
 Cross-Appellants/Petitioners on Review

George P. Fisher
 OSB #910432
 Attorney at Law
 3635 S.W. Dosch Road
 Portland, Oregon 97239
 Telephone: (503) 224-7730
George@gpf-law.com
 Attorney for Plaintiffs-Respondents/
 Petitioners on Review
 Attorney for Plaintiffs-Respondents/
 Cross-Appellants/Petitioners on Review

CERTIFICATE OF COMPLIANCE

The word-count of this brief is 4,112 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 this 18th day of February, 2014.

Stephen L. Brischetto
 Attorney for Plaintiffs-Respondents/
 Petitioners on Review
 Attorney for Plaintiffs-Respondents/
 Cross-Appellants/Petitioners on Review

CERTIFICATE OF FILING

PAGE 1 - CERTIFICATE OF SERVICE

STEPHEN L. BRISCHETTO
ATTORNEY AT LAW
 621 S.W. Morrison St., Suite 1025
 Portland, Oregon 97205
 Telephone: (503) 223-5814

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I hereby certify that on February 18, 2014 I directed the submission of the foregoing **PETIONERS' REPLY 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 this 18th day of February, 2014.

()

 Stephen L. Brischetto, UDD 78156
 Attorney for Plaintiffs-Respondents/Petitioners on Review
 Attorney for Plaintiffs-Respondents
 Cross-Appellants/Petitioners on Review

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STEPHEN L. BRISCHETTO
ATTORNEY AT LAW
 621 S.W. Morrison St., Suite 1025
 Portland, Oregon 97205
 Telephone: (503) 223-5814

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2014 I directed the service of the foregoing **PETIONERS' REPLY BRIEF ON THE MERITS ON REVIEW** through the courts electronic filing system on:

LAW OFFICE OF ROBERT E. FRANZ, JR.

Robert E. Franz, Jr. OSB #73091

PO Box 62

Springfield, Oregon 97477

Attorney for Defendants-Appellants

Cross-Respondents

Respondents on Review

☐ HAND DELIVERY

☐ U.S. MAIL

☐ FAX

☒ E-MAIL

☒ ECF

I also emailed an electronic copy of the foregoing to the individual above by emailing to the following email address:

rfranz@franzlaw.comcastbiz.net.

DATED this 18th day of February, 2014.

 Stephen L. Brischetto, OSB 78156
 Attorney for Plaintiffs-Respondents/Petitioners on Review
 Attorney for Plaintiffs-Respondents
 Cross-Appellants/Petitioners on Review

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STEPHEN L. BRISCHETTO
ATTORNEY AT LAW
 621 S.W. Morrison St., Suite 1025
 Portland, Oregon 97205
 Telephone: (503) 223-5814