IN THE SUPREME COURT OF THE STATE OF OREGON

EMILY JOHNSON,
Plaintiff-Appellant,

v.

SCOTT GIBSON; and ROBERT STILLSON,
Defendants-Appellees.

United States Court of Appeals for the Ninth Circuit
1335087

S063188

On Certification from the
United States Court of Appeals for the Ninth Circuit

Appeal from the Judgment of the United States District Court for the District of Oregon Dated January 14, 2013
The Honorable John V. Acosta
United States Magistrate Judge

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF THE CASE

Nature of the action and relief sought

Plaintiff-Appellant Emily Johnson brought this action against Defendants-Appellees Scott Gibson and Robert Stillson, employees of the City of Portland, for injuries she suffered as a result of Defendants' alleged negligence.

Nature of the judgment

The nature of the judgment is the dismissal of Plaintiff's complaint based upon the grant of Defendants' Motion for Summary Judgment.

Basis of appellate jurisdiction

The United States Court of Appeals for the Ninth Circuit filed an Order Certifying Questions to this court. Pursuant to ORS 28.200, this court accepted certification of the questions.

Effective date for appellate purposes

The United States District Court for the District of Oregon entered a final Judgment of Dismissal on January 14, 2013. On February 8, 2014, Plaintiff timely filed her Notice of Appeal. On April 21, 2015, the Ninth Circuit filed an Order Certifying Questions to this court. On June 4, 2015, this court accepted certification.

Questions presented on certification

1. Whether individual employees responsible for repairing,

maintaining, and operating improvements on City-owned recreational land made available to the public for recreational purposes are "owners" of land, as that term is defined in the Oregon Public Use of Lands Act, ORS 105.672 to 105.700, and therefore immune from liability for their negligence?

2. If such employees are "owners" under the Public Use of Lands Act, does the Act, as applied to them, violate the remedy clause of the Oregon Constitution, Article I, Section 10?

Summary of argument

Plaintiff suffered injury while running in a public park when she fell into a hole created by an uncovered sprinkler head. Defendants, who are employees of the City of Portland, were responsible for the hole. Plaintiff filed suit for negligence. Defendants claimed immunity under the Oregon Public Use of Lands Act, ORS 105.672, *et seq*. The Act grants immunity to "owners" of land who make their property available to the public for recreational purposes. ORS 105.682. The District Court held that the individual defendants were "owners," granted them immunity, and dismissed Plaintiff's claim.

The District Court erred in its decision because employees of an owner are not "owners" under the Act. A person must be in possession of the property in order to be an "owner." Defendants are not in possession of the public park and therefore are not immune under the Act.

Even if the District Court's immunity decision was correct, and

Defendants are "owners" under the Act, the District Court erred in dismissing the case because it deprived Plaintiff of a remedy, in violation of the Remedy Clause of the Oregon Constitution. The Remedy Clause provides that every person shall have remedy by due course of law for an injury done to him or her. Because Plaintiff had a right at common law to bring negligence claims against City employees, and the legislature abolished that right without providing an adequate substitute remedy, Plaintiff's rights under the Remedy Clause are violated and the District Court should not have dismissed Plaintiff's claim.

Statement of facts

Plaintiff is a 30-year-old female who is legally blind because of macular degeneration she experienced from a congenital condition called Stargardt's Syndrome. *See* Appendix to Appellant's Brief before the Ninth Circuit (hereinafter "ER" for "Excerpt of Record") 97.[1] The degeneration destroyed the central vision in both of Plaintiff's eyes. She is very light-sensitive and identifies most things by shape or color, which allows her to participate in physical activities such as jogging. ER 93-99.

On July 16, 2009, Plaintiff took her normal running route; Tom McCall Waterfront Park, a public park owned by the City of Portland. ER 52-59. During her run, she stepped into an excavated, unmarked, and unbarricaded

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[1] The parties stipulated to designation of all briefing before the Ninth Circuit as part of the record before this court.

hole with a sprinkler head embedded in it, thereby sustaining a serious knee injury. ER 100-105. The excavated hole was in an area regularly used by the public. ER 45, 106-107.

Defendant Gibson is a park technician who has primary responsibility for maintenance of the park. ER 73. Gibson's responsibilities include surveying the park and ensuring there are no safety hazards. ER 78-79. The maintenance headquarters, where Gibson reports to work, is located in Washington Park. ER 73.

Defendant Gibson created the hole in which Plaintiff fell. Gibson found a malfunctioning sprinkler head and dug an approximately 18" hole around the sprinkler head but did not fix it because he lacked the parts. ER 61-64. Gibson did not cover the hole because he thought he would immediately return to fix it; he did not. ER 65-67, 69-70, 89-91. Gibson stated that he had placed an orange cone near the hole; however, when Plaintiff fell in the hole, there was no cone there. ER 67, 89.

Gibson testified that, had he realized he was not going to immediately repair the hole, he would have done a more permanent barricade. Gibson admitted that the hole presented a safety hazard to the public. ER 68-69. Other maintenance workers testified that Gibson should have immediately repaired the hole, identified it with yellow caution tape or stuck three to four orange cones around the hole. ER 110-113.

Defendant Stillson is the Maintenance Supervisor for all Westside parks in the City of Portland. ER 74-76. He oversees approximately 17 to 18 full-time employees and eight seasonal employees during the summer. ER 74. Stillson has never given any guidance, instructions, suggestions, or recommendations to park employees about procedures for covering a ditch, hole, trench, nor instructed them about how to warn the public. The City has no formal safety training for park employees. ER 80-86. Stillson testified that he does not go to Tom McCall Waterfront Park on a daily basis. ER 74, 76.

Plaintiff filed a complaint against the City of Portland, and Gibson and Stillson, alleging against the City a violation of Title II of the Americans with Disabilities Act (ADA), 42 USC § 12131, *et seq.*, and, against all defendants, a negligence claim for her injuries. ER 27. The City filed a motion to substitute itself as the sole defendant, relying on the Oregon Tort Claims Act (OTCA), ORS 30.260, *et seq.*, and a motion for summary judgment. *Id.* The OTCA states in pertinent part that the sole cause of action for any tort of a public body employee "acting within the scope of their employment or duties and eligible for representation and indemnification * * * shall be an action against the public body only." ORS 30.265.

On February 10, 2011, U.S. District Court Judge Robert E. Jones denied the City's motion to substitute itself as the sole defendant in the negligence claim. ER 27; *Johnson v. City of Portland*, CV No. 10-117-JO (D. Or. Feb 10,

2010) (hereinafter "*Johnson I*").[2] While Gibson and Stillson were acting within the scope of their employment, thereby implicating the OTCA, the District Court held that application of the OTCA would violate the "Remedy Clause" in Article I, section 10, of the Oregon Constitution, which provides that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." ER 29-30. The District Court noted that the City was immune from Plaintiff's negligence claim under the Public Use of Lands Act. Had the District Court substituted the City as the sole defendant and dismissed Gibson and Stillson from the case, the District Court would have had to subsequently dismiss the negligence claim against the City, leaving Plaintiff no remedy for her injuries. The District Court held that "elimination of plaintiff's claim against the public employees through application of [the OTCA] would, therefore, violate the remedy clause[.]" ER 29. The District Court allowed the negligence claim to stand against the individual defendants, but dismissed the negligence claim against the City under the Act. ER 30.

On March 14, 2011, District Court Judge Jones issued another Opinion and Order in which he dismissed Plaintiff's ADA claim and declined to retain

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[2] The District Court issued several opinions and orders in this case concerning matters such as diversity jurisdiction and costs. Because most of the opinions and orders do not concern the issues before this court, Plaintiff does not reference them, and for ease of this court, refers to the two applicable decisions as *Johnson I* and *Johnson II*, despite that not being the correct order or number of the decisions.

supplemental jurisdiction over the remaining negligence claim against Gibson and Stillson. ER 31-35; *Johnson v. City of Portland, et al.*, CV. No. 10-117-JO (D. Or. Mar 14, 2011) The District Court dismissed the negligence claim without prejudice in order to allow Plaintiff to pursue it in state court. ER 35.

Subsequently, Plaintiff filed a complaint in federal court under diversity jurisdiction for negligence against Defendants Gibson and Stillson, alleging that as City employees they were responsible for the conditions that resulted in Plaintiff's injury. Defendants filed another motion to substitute the City as the sole defendant under the OTCA. ER 1-2. U.S. District Court Magistrate Judge John V. Acosta agreed with the prior ruling in *Johnson I* that substitution of the City for Gibson and Stillson was not appropriate. ER 12; *Johnson v. Scott Gibson and Robert Stillson*, 918 F Supp 2d 1075 (D. Or. Jan. 14, 2013) (hereinafter "*Johnson II*").

The District Court next considered Defendants' motion for summary judgment in which they argued they were entitled to immunity under the Act. ER 12; *Johnson II*, 918 F Supp 2d at 1084. Plaintiff argued that Defendants did not qualify as "owners" under the Act and therefore were not entitled to its protection. In the alternative, Plaintiff argued that the Act, as applied to Defendants, violates the Remedy Clause because if the individual defendants were "owners" and immune, Plaintiff would be left with no remedy for her injuries.

The District Court held that employees who maintain land qualify as "owners" under the Act. ER 17; *Johnson II,* 918 F Supp 2d at 1085. Plaintiff had argued that such a finding would effectively overrule the court's earlier decision in *Johnson I* that substituting the City for the individual defendants would violate the remedy clause. ER 17-18; *Johnson II,* 918 F Supp 2d at 1085-86. The District Court found that the *Johnson I* ruling was not relevant, because, while *Johnson I* "briefly mentioned the City's immunity under the Act as support for [its] finding that such substitution would leave [Plaintiff] without a remedy in tort, [it] did not specifically consider whether [the individual defendants] would be considered 'owners' under the Act." ER 18; *Johnson II,* 918 F Supp 2d at 1086. The District Court went on to hold in *Johnson II* that, based on Oregon case law, the Act does not violate the Remedy Clause. The District Court granted Defendants' motion for summary judgment and dismissed Plaintiff's case. ER 24-25.

II. FIRST CERTIFIED QUESTION

Individual employees responsible for repairing, maintaining, and operating improvements on City-owned recreational land made available to the public for recreational purposes are not "owners" of land, as that term is defined in the Oregon Public Use of Lands Act, ORS 105.672 to 105.700, and, therefore, not immune from liability for their negligence.

Preservation of Error

Plaintiff preserved the error in her Opposition to Defendants' Motion for Summary Judgment, as evidenced by the District Court's decision in *Johnson II*. ER 13-23. Moreover, this court assumes that when a federal circuit certifies questions to it, the federal circuit has concluded that the issues raised are properly before the circuit. *See Klamath Irrigation District v. United States*, 345 Or 638, 648-649, 202 P3d 159 (2009).

Standard of Review

This court reviews a certified question of law for purposes of providing an answer to that question. *See, e.g., McFadden v. Dryvit Systems, Inc.*, 338 Or 528, 530, 112 P3d 1191 (2005).

Argument

This court has fashioned "rules of statutory interpretation that, in this court's judgment, best serve the paramount goal of discerning the legislature's intent." *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). This court engages in a two-step analytical process for purposes of interpreting a statute. In the first step, this court considers the text and context of the statute. *Id.* As part of that first level of analysis, this court may consider legislative history. *Id.* at 172. After engaging in that first step, if there remains ambiguity as to the legislature's intentions, this court "may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.*

1. *The legislature did not intend for the individual defendants to constitute "owners" under the Act.*

Former ORS 105.682 (2009)[3] provides in pertinent part that:

> "an owner of land is not liable in contract or tort for any personal injury * * * that arises out of the use of the land for recreational purposes * * * when the owner of land either directly or indirectly permits any person to use the land for recreational purposes[.]"[4]

An "owner" is "the possessor of any interest in any land, including but not limited to possession of a fee title. 'Owner' includes a tenant, lessee, occupant, or other person in possession of the land." ORS 105.672(4) (2009).[5] "Land" includes "all real property, whether publicly or privately owned." ORS 105.672(3). The parties do not dispute that the property at issue constitutes "land" under the Act or that Plaintiff was engaged in recreational activity, but instead, the central issue is whether employees of the owner of the real property

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[3] Effective January 1, 2010, the legislature amended ORS 105.682 to include "gardening," which is applicable only to causes of action that arise after the effective date. That amendment has no impact on the case at hand.

[4] ORS 105.682 also provides that: "The limitation on liability provided by this section applies if the principal purpose for entry upon the land is for recreational purposes * * * and is not affected if the injury, death or damage occurs while the person entering land is engaging in activities other than the use of the land for recreational purposes[.]" The parties do not dispute that Plaintiff entered the land solely for recreational purposes, and, therefore, this part of the statute is not in contention.

[5] Effective January 1, 2010, the legislature changed the definition of "owner" to the following: "'Owner' means the possessor of any interest in any land, such as the holder of a fee title, a tenant, a lessee, an occupant, the holder of an easement, the holder of a right of way or a person in possession of the land."

are considered "owners" under ORS 105.672(4). Based on the text and context of the Act, and general maxims of statutory construction, the legislature did not intend the Act to be so expansive as to allow immunity for maintenance workers of the land on which the injury occurred.

In order for a person to be an "owner" under ORS 105.672(4), the person must be either the "possessor of any interest" in the land or "in possession of the land." A "possessor" is "one that possesses: one that occupies, holds, owns, or controls." *Webster's Third New Int'l Dictionary* 1770 (unabridged ed 2002).[6] An "interest" is a "right, title, or legal share in something" or "something [in] which one has a share of ownership or control." *Id.* at 1178. The record contains no evidence that the Defendants occupied, held, owned, or controlled any right, title or legal share to the park. Thus, Defendants are not possessors of any interest in the park.

The next consideration is whether Defendants are tenants, lessees, occupants, or other persons in possession of the park. ORS 105.672(4). The record does not show that the individual defendants are either tenants or lessees of the park. The terms "occupant" and "person in possession" have similar meanings. "Possession" means

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[6] This court prefers *Webster's Third New Int'l Dictionary* for definitions of terms it is interpreting. *Kohring v. Ballard*, 355 Or 297, 304 n 2, 325 P3d 717 (2014).

> "1a: the act or condition of having in or taking into one's control or holding at one's disposal * * * b: actual physical control or occupancy of property by one who holds for himself and not as a servant of another without regard to his ownership and who has legal rights to assert interests in the property against all others having no better right than himself <the locker shall remain in the student's ~ throughout the course> * * * 2: something owned, occupied, or controlled: a thing possessed <his own ~ for which he owes nothing to any man>[.]"

Webster's Third New Int'l Dictionary 1770

Defendants may not dispose of the park as they desire nor do they hold the park for themselves, *i.e.*, "not as a servant of another." Defendants also do not have control over the park. *See id.* at 496 ("control" is "power or authority to guide or manage: directing or restraining domination <under parental ~>"). They may maintain the park grounds and check for safety hazards, but there is no evidence in the record that they have any power or decision-making authority over the park. For example, Defendants can neither open nor close the park to the public for recreational purposes, decide to construct any improvement to the park, nor determine who may or may not hold events on the premises.

Finally, Defendants do not occupy the park nor are they "occupants" as defined in the Act. "Occupy" means to hold possession or control of or to reside in as an owner or tenant. *Id.* at 1561. Defendants do not hold or control the park nor do they reside in it as an owner or tenant. Defendants may attempt to argue that they "occupy" the park because they perform work in the park,

albeit Defendant Stillson does so only on an occasional basis. (Defendants do not have an office in the park, but instead are located in Washington Park.) However, for purposes of the Act, an individual who solely takes up space on the land, without any control over that space, cannot constitute an "owner" as the legislature intended under the Act. Otherwise, a homeless person who hangs out in the park on a daily basis or a member of "Occupy Portland" who spends the night in the park would be "owners" under the Act. The legislature surely did not intend a definition of "owner" that would lead to such absurd results.

Moreover, the legislature provided a list of the types of persons or entity that may constitute an "owner." As previously stated, under the statute, an "owner" is "the possessor of any interest in any land, including but not limited to possession of a fee title. 'Owner' includes a tenant, lessee, occupant, or other person in possession of the land." ORS 105.672(4) (2009). When the terms "include" and "including but not limited to" precede a list of examples, this court gives consideration to those specific examples for purposes of interpreting the general term. *Sather v. SAIF Corp*, 357 Or 122, 133, 347 P3d 326 (2015). Here, the given set of persons all have a common characteristic; they each have some control over the land. Under the principle of *ejusdem generis*, the scope of the statute is limited to the characteristic that those listed have in common. *Waggoner v. City of Woodburn*, 196 Or App 715, 724-725, 103 P3d 648 (2004).

Defendants do not have that characteristic.

In addition to text, the context of the Act supports the conclusion that Defendants are not "owners" under the Act. The policy behind the Act is provided in ORS 105.676.

> "The Legislative Assembly hereby declares it is the public policy of the State of Oregon to *encourage owners of land to make their land available* to the public for recreational purposes * * * by limiting their liability toward persons entering thereon for such purposes and *by protecting their interests in their land* from the extinguishment of any such interest or the acquisition by the public of any right to use or continue the use of such land for recreational purposes[.]"

Emphasis added. The Act must be read in a manner that gives effect to that purpose as delineated by the legislature. *Conant v. Stroup*, 183 Or App 270, 275, 51 P3d 1263 (2002), *rev dism*, 336 Or 126, 81 P3d 709 (2003). The definition of "owner" listed in ORS 105.672(4) is applicable to ORS 105.676. If employees, such as Defendants, are considered "owners" under the Act, as the District Court held, it would make the purpose of the Act nonsensical because those employees do not have authority to open the land to the public. The Act cannot encourage an owner to make his land available if he does not in fact have authority to make that land available. ORS 105.676 further states that the Act is intended to protect an owner's interest in the land. Yet, employees, such as Defendants, have no cognizable interest in the land. ORS 105.676 evidences that the legislature did not intend immunity to extend to such

peripheral individuals.

Nevertheless, the District Court concluded that the policy behind the Act supported granting immunity to maintenance employees because an entity may only maintain its land "through the use of employees[,] and failure to extend immunity to an owner's employees defeats the provision of immunity envisioned by the Act." ER 17; *Johnson II* at 1085. However, the legislature did not include "employees" in its definition of "owner" nor did the legislature state anywhere in the Act that owners *and* their maintenance employees are immune from suit. Thus, the District Court improperly inserted terms into the Act that the legislature did not include. ORS 42.230 ("the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted").

2. *Brewer and Denton do not support inclusion of the individual defendants as "owners" under the Act.*

The District Court held that Defendants were owners under the Act by primarily relying on the Court of Appeals decision in *Brewer v. Department of Fish and Wildlife*, 167 Or App 173, 2 P3d 418 (2000), *rev den*, 334 Or 693, 56 P3d 405 (2002). In *Brewer*, the Court of Appeals considered whether the Swackhammer Ditch Improvement District ("Swackhammer") maintained and operated the real property, where the plaintiffs' injuries occurred, as an "owner" under the Act. The Court of Appeals did not effectuate any statutory analysis

and instead relied on another Court of Appeals decision, *Denton v. L.W. Vail Co.*, 23 Or App 28, 541 P2d 511 (1975), which interpreted "a very similar definition in an earlier version of the Act[.]" *Id.* at 178-179. In *Denton*, the Court of Appeals dismissed a negligence action against the Oregon Department of Transportation ("ODOT") and two road construction contractors who were working on public land owned by the Bureau of Land Management ("BLM"). 23 Or App at 30-31. The *Denton* plaintiff was on the road under construction when he suffered his injuries. Without analysis, the *Denton* court concluded: "We think BLM land, although owned by the federal government, is covered by [the Act] and that the contractors and [ODOT] were persons in possession of the land." *Id.* at 37.

The *Brewer* court, after explaining the facts and holding of *Denton*, and without any analysis stated: "If those who merely construct improvements on land qualify as owners, certainly those who maintain and operate improvements on land also fall within the scope of that definition." *Brewer*, 167 Or App at 179.

Here, the District Court in *Johnson II* summarily stated:

> "[Plaintiff] alleges that Defendants were responsible for the maintenance and/or repair of the sprinkler system in the Park. Accordingly, Defendants are in the same position as Swackhammer, who maintained and operated the dam. Under the teachings of *Brewer*, it is evident that Defendants fall within the scope of the definition of 'owner' as defined in the Act and are entitled to immunity."

ER 17; *Johnson II*, 918 F Supp 2d at 1085.

The District Court erred in relying solely on the *Brewer* decision. First, both *Brewer* and *Denton* failed to interpret the Act according to the guidelines established by this court, and the District Court did not attempt to make that analysis. When the Court of Appeals devises a "rule" without following proper methodology, the resulting opinion is not entitled to any great weight, particularly if that "rule" directly conflicts with the wording of the statute. *State v. Sandoval*, 342 Or 506, 512-13, 156 P3d 60 (2007) (declining to apply case law where prior opinion was "distinctly odd," court failed to utilize proper methodology for statutory interpretation, and decision was not grounded in text of controlling statute).

Second, in *Denton*, the Court of Appeals stated that ODOT and the road contractors were "owners" under the Act because they were in possession of the land. 23 Or App at 37. Neither the court in *Brewer* nor the District Court in *Johnson II* made any determination that the maintenance workers at issue were in possession of the land. Third, Defendants here are *not* in the same position as Swackhammer, as the District Court claims. ER 17; *Johnson II*, 918 F Supp 2d at 1085. As the District Court recognized, Swackhammer was an entity that "maintained and operated the dam." ER 16; *Id.* at 1084. Defendants are individual employees who maintain the park, but there is no evidence in the

record that they operated the park. As evidenced by the definitions listed above, such a distinction, which may indicate control, makes a difference for purposes of determining an "owner" under the Act.

3. *The legislature did not intend for the Act to be interpreted in the context of the OTCA.*

Defendants asserted before the Ninth Circuit that: "It would make no sense to hold that public employees were not 'owners' under the [Act], because, at the time the legislature extended that statute to public lands, it already provided immunity for individual public employees through the OTCA." Answering Brief of Defendants-Appellees Scott Gibson and Robert Stillson before the Ninth Circuit, p 20. The Act provides that an *owner* of land is not liable for a personal injury that arises out of the use of the land for recreational purposes. ORS 105.672-ORS 105.700. The OTCA limits the remedy available to a plaintiff injured by the tortious act of a public body's employee, when acting within the scope of his duties, to "an action against the public body only." ORS 30.265. Thus, Defendants contended that the legislature intended that all public employees be "owners" under the Act, and therefore immune from suit, as otherwise the Act would conflict with the OTCA. In other words, Defendants asserted that if public employees were not immune under the Act, and Plaintiff brought an action against an employee for negligent maintenance of public land, the OTCA would require substitution of the public

employer/owner for the negligent public employee. Because the Act does not allow suit against the owner, Defendants argued that, once substitution occurred, the presiding court would be required to dismiss the case.

Defendants' argument is flawed. The legislature has not evidenced any intent for the Act to be read in the context of the OTCA. First, Defendants neglect to mention that the Act applies to both private and public landowners. ORS 105.672(3) ("'Land' includes all real property, whether publicly or privately owned."). Indeed, offering protection to private landowners who opened their land to the public for recreational purposes was the primary intent of the Act. *Tony v. McPhillips*, 268 Or 378, 385, 521 P2d 340 (1974). The legislature, after amending the Act to make it applicable to public owners of land, made no distinction in the Act's definition of "owner" between public or private owners nor is there any relevant distinction between public and private lands anywhere else in the Act. ORS 105.672(4). Yet, Defendants insert such a distinction by insisting that the legislature intended "owner" to include "both the public body who owns recreational land" *and* "the employees of the public body[.]" Defendants arrive at that conclusion by reading the Act in context of the OTCA, a statute applying solely to public employees. Answering Brief, p 13. Thus, Defendants' argument is faulty in that it creates a different result for public owners versus private owners, despite the complete absence in the text of the Act or the Act's legislative history for such a distinction to be made. *See*

ORS 42.230 ("the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted.").

Second, Defendants ignore the plain language of the Act and the total lack of reference to the OTCA in the text of the Act. The legislature enacted the OTCA in 1967. Or Laws 1967, ch 627, §§ 1-14. In 1971, the legislature enacted the Public Use of Lands Act. Or Laws 1971, ch 780, §§ 1-7. The legislature amended the OTCA in 1991 to provide that the sole cause of action for a tort committed by public employees acting within their scope of duties is a cause of action against the public body. 1991 Oregon Laws, ch 861, § 1(1). The legislature rewrote the Act in 1995 to specify that it applied to both public and private landowners. Or Laws 1995, ch 456, § 1(3), codified at ORS 105.672(3). Yet, despite the fact that at least since 1995 both the Act and the OCTA have been applicable to public bodies, and despite several amendments to the Act subsequent to 1995, the legislature has not once inserted a reference to the OTCA into the Act.

Finally, as evidenced below, the legislature could not have intended the Act to be read in context of the OTCA because such a reading would violate the Remedy Clause of the Oregon Constitution.

III. SECOND CERTIFIED QUESTION

If individual employees responsible for repairing, maintaining, and

operating improvements on City-owned recreational land made available to the public for recreational purposes are "owners" under the Public Use of Lands Act, the Act, as applied to them, violates the remedy clause of the Oregon Constitution, Article I, Section 10.

Preservation of Error

Plaintiff preserved the error in her Opposition to Defendants' Motion for Summary Judgment, as evidenced by the District Court's decision in *Johnson II*. ER 13-23. Moreover, this court assumes that when a federal circuit certifies questions to it, the federal circuit has concluded that the issues raised are properly before the circuit. *See Klamath Irrigation District v. United States*, 345 Or 638, 648, 202 P3d 159 (2009).

Standard of Review

This court reviews a certified question of law for purposes of providing an answer to that question.

Argument

Even if this court determines that Defendants are "owners" under the Act, Plaintiff's claim must still stand because, otherwise, she is left without a remedy, in violation of the Remedy Clause. The Remedy Clause provides that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." Or Const, Art I, Sec 10. The term "remedy" refers "both to a remedial process for seeking redress for injury and to what is

required to restore a right that has been injured." *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 124, 23 P3d 333 (2001).

In *Smothers*, this court prescribed the proper way to determine whether a person has been left without a remedy in the Remedy Clause.

> "[T]he first question is whether the plaintiff has alleged an injury to one of the absolute rights that Article I, section 10 protects. Stated differently, when the drafters wrote the Oregon Constitution in 1857, did the common law of Oregon recognize a cause of action for the alleged injury? If the answer to that question is yes, and if the legislature has abolished the common-law cause of action for injury to rights that are protected by the remedy clause, then the second question is whether it has provided a constitutionally adequate substitute remedy for the common-law cause of action for that injury."

Id. at 124.

1. *Oregon common law recognized Plaintiff's negligence claim against the individual defendants.*

Plaintiff would have had a right at common law to bring an action against city employees for negligently maintaining the park. *See Schlesinger v. City of Portland*, 200 Or App 593, 116 P3d 239, 242 and 244 (Or App 2005) (*citing Bailey v. Mayor*, 3 Hill (N.Y.) 531, 538 (1842) (at common law in 1842, public officer would be held responsible for negligence in discharge of duties); *Platt v. Newberg*, 104 Or 148, 154, 205 P 296 (1922) (those injured by the negligent failure of public employees to discharge their duties at the time had, "and always had," a right of action against the employees); *Mattson v. Astoria*, 39 Or 577, 65 P 1066 (1901) (clause of City charter exempting both City and

employees from liability in connection with injuries sustained on city streets violated Art. I, § 10); *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 118-23, 23 P3d 333 (2001). *See also* Harper, 5 *The Law of Torts* § 29.8 at 653-54 ("The Anglo-American tradition did not include a general theory of immunity from suit or from liability on the part of public officers."); Betty Van der Smissen, *Legal Liability of Cities and Schools for Injuries in Recreation and Parks* § 2.11 at 70-71 (1968) ("Whereas some schools and municipalities can seek refuge in the doctrine of governmental immunity, no such immunity cloaks the individual teacher, coach, maintenance man, or recreation leader."); *id.* § 2.11 at 21 (supp. 1975)).

a. Defendants' "shifting" argument has no merit.

Defendants ignored the breadth of case law evidencing that Plaintiff would have had a cause of action at common law and, instead, argued before the Ninth Circuit that, "in the absence of a statute, charter or ordinance shifting liability from the government to the individual employee, the remedy, if any, would have been only an action against the government." Answering Brief, p 24. Defendants commenced their argument by correctly pointing out that the legislature waived immunity by statute for governments in 1862. *Id.* at pp 26-27; *see also* Chapter IV, Title IV, Section 347 (1862) (action may be maintained against county or public corporations "for an injury to the rights of the plaintiff"). Defendants then misquoted *Ketchum v. State*, 2 Or 103, 105,

1864 WL 530 (1864), for their assertion that before 1862, "holders of such claims had to 'appeal[] to the generosity or justice of the legislature." From the 1862 statute and *Ketchum*, Defendants leapt to the conclusion that "common law generally did not recognize a claim against a government official/employee." Answering Brief, p 27.

Defendants' assertion is wholly without merit. The 1862 statute dealt solely with creating a statutory claim against non-federal government entities and did not pertain to government employees. *Ketchum* involved a suit against the State of Oregon. Contrary to Defendants' contention, the *Ketchum* court was *not* stating that prior to 1862, plaintiffs could *not* bring any action against any government or government employee. Instead, the *Ketchum* court was merely commenting that, prior to 1862, plaintiffs had to appeal to the generosity of the legislature in order to seek redress against "the late territorial government of Oregon, or present State government." 2 Or at 105.

This court has long differentiated between the types of government entities, *i.e.*, state, county, and city, for purposes of determining whether a claim existed at common law. For example, this court has stated that common law did not recognize claims against counties, but has consistently recognized that common law allowed for certain claims against municipalities. *See, e.g., Templeton v. Linn County*, 22 Or 313, 320, 29 P 795, 797 (1892). This court has also consistently recognized that a city employee "who personally neglects

to perform a specific duty was *always* liable irrespective of any statute prescribing such liability." *Colby v. City of Portland*, 85 Or 359, 373, 166 P 537, 542 (1917) (emphasis added); *Caviness v. City of Vale*, 86 Or 554, 565, 169 P 95 (1917) ("It has not attempted to take away the remedy that *always* existed against the officers of the city for failure to cause repair of defects coming to their knowledge[.]"); *Etter v. City of Eugene*, 157 Or 68, 71-72, 69 P2d 1061 (1937) (impliedly recognizing common law claim against city employees for individual negligence for plaintiff's injury sustained at city park).

Defendants claimed that holdings in other cases support their premise that common law generally did not recognize a claim against a government official or employee. Answering Brief, pp 27-31; *see, e.g., McCalla v. Multnomah County*, 3 Or 424, 425, 1869 WL 609 (1869); *Templeton v. Linn County*, 22 Or 313, 29 P 795 (1982); *Rankin v. Buckman*, 9 Or 253, 1881 WL 1378 (1881); *Sheridan v. City of Salem*, 14 Or 328, 12 P 925 (1886). Those cases, however, have no precedential value on the certified question presented here, are distinguishable, or do not stand for the proposition that Defendants asserted.

In *McCalla v. Multnomah County*, this court referenced in *dicta* the county's contention "that at common law there would be no such liability" for the negligence of a county road supervisor. 3 Or at 425. This court indifferently responded without analysis that "*may* be true at common law" but

afforded the contention no consideration because the 1862 statute provided such a remedy. *Id.* (emphasis added). In addition, *McCalla* involved a negligence suit against a county, not a city. This court has held that at common law, an action would not lie against a county. *Templeton v. Linn County*, 22 Or at 314; *Gearin v. Marion Cnty*, 110 Or 390, 393, 223 P 929, 930 (1924).

The case of *Templeton v. Linn County* also involved a county, not a municipality. 22 Or 313. This court stated: "and, inasmuch as the duty which a *county* owed was created by statute only, its repeal destroyed the only foundation upon which an action for negligence could rest." *Id.* at 318 (emphasis added). Defendants read too much into that sentence and inferred that repeal of the statute eliminated all possible negligence actions against both the county and county employees. Answering Brief, p 27. That sentence could just as well mean that repeal destroyed the only foundation upon which an action for negligence could rest *against the county.* Notably, this court referred throughout *Templeton* to "the liability of a county for negligence" but never once referenced the personal liability of a county employee, let alone, a municipal employee.

Defendants also place too much import on this court's use of the term "shift" in the cases of *Rankin v. Buckman* and *Sheridan v. City of Salem.* In those cases, this court considered the question of whether Oregon municipalities could, under the 1862 statute, "shift" liability solely to the city employee who

was "guilty of [the] negligence that occasioned the injury" by reason of a provision in the municipality's charter. *Sheridan*, 14 Or at 335. *See also Rankin*, 9 Or at 257. This court answered in the affirmative and noted under the 1862 statute that, without such a shift, the "tax-payers of public corporations" would continue to be liable for the negligence of their officers. *Sheridan*, 14 Or at 335.

Neither *Rankin* nor *Sheridan* stands for the proposition that plaintiffs did not have a common law action against individual government employees. Indeed, as shown above, there are numerous other decisions in which this court recognized common law claims against municipal employees. Instead, the cases hold that in the absence of a "shift," a plaintiff would have had an action against both the municipality, under the 1862 statute, and against the individual employee.

This court's holding in *Mattson v. City of Astoria*, 39 Or 577, 580-81, 65 P 1066 (1901) underscores that point. In *Mattson*, this court considered whether a city charter that prohibited suit against both the city and its employees for negligent acts or omissions violated the Remedy Clause. This court stated that a provision

> "exempting the city from liability for damages resulting from defective streets is not violative of the constitutional provision referred to, because it does not wholly deny the injured party a remedy for the wrong suffered. The charter provision in question, however, goes further. It provides that neither the city nor any

> member of the council shall be liable, and, if valid, *prevents a common-law action against the members of the council for their negligent acts or omission*, and is practically, therefore, a denial of any remedy, as they are the only officers charged with the duty of keeping the streets in repair.

39 Or at 579-80 (emphasis added). This court went on to state: "[w]hether a municipal corporation was liable to a common-law action or not, its officers were so liable to an individual specially damaged by their negligent act or omission[.]" *Id.* at 580. The same is true here.

Defendants also argued before the Ninth Circuit that Stillson would not have been liable as a supervisor at common law. However, the Oregon courts have long recognized that a supervisor may be liable for an employee's negligence if the supervisor was responsible for hiring the employee or supervising his work. *See, e.g., Colby v. City of Portland*, 85 Or 359, 373, 166 P 537, 542 (1917); *Antin v. Union High School Dist. No. 2 of Clatsop County*, 130 Or 461, 470-471, 280 P 664 (1929).

b. Defendants' acts were ministerial; common law recognized Plaintiff's claims at issue here.

Defendants argued before the Ninth Circuit that common law only recognized claims against public employees for ministerial duties, not discretionary duties. Answering Brief pp 26-27, 30-33. Defendants contended that the duties asserted here were discretionary and thus they would not have been liable at common law. Plaintiff submits that Oregon common law would

have recognized her claims against Defendants, without resort to any distinction between ministerial and discretionary duties. However, even if such a distinction existed, Defendants' acts were ministerial and, therefore, under Defendants' own argument, they would have lacked immunity at common law.

As Defendants recognized:

> "The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender."

Amy v. Desmoines County Sup'rs, 78 US 136, 138-39 (1870); *see also* Answering Brief, pp 28-30. However, the distinction between a ministerial and a discretionary action is vague and uncertain, rather than as cut-and-dry as Defendants proposed. *Antin v. Union High School Dist. No. 2 of Clatsop County*, 130 Or 461, 469, 280 P 664 (1929). A government employee's action only qualifies for discretionary immunity if the duty is the:

> "result of a choice, that is, the exercise of judgment; that choice must involve public policy, as opposed to the routine day-to-day activities of public officials; and the public policy choice must be exercised by a body or person that has, either directly or by delegations, the responsibility or authority to make it."

Ramirez v. Hawaii T&S Enterprises, Inc., 179 Or App 416, 419, 39 P3d 931 (2002).[7] Here, Defendants did not engage in any public policy choice but rather

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[7] *Ramirez* interprets ORS 30.265(3), the statute codifying the common

their actions involved the ministerial duties of repair, safety, and routine day-today activities.

This court has held that the "work of repairing" is "an act ministerial in nature" and does not qualify for immunity. *Wagner v. City of Portland*, 40 Or 389, 397, 67 P 300 (1902); *see also Giaconi v. City of Astoria*, 60 Or 12, 30-31, 118 P 180, 182-183 (1911) ("prosecution of the work is purely of a ministerial character; and the city is bound to see that it is done in a safe and skillful manner"). Defendant Gibson was in the process of repairing a defective sprinkler-head, which required him to dig a large hole. ER 61-64. His work of repairing was a day-to-day activity that does not qualify for immunity. At the very least, the evidence creates a genuine issue of material fact as to whether his act was discretionary or ministerial and therefore not appropriate for determination on summary judgment. *Leonard v. Jackson*, 6 Or App 613, 615, 488 P2d 838 (1971) ("Removal of rocks within the highway right of way might constitute highway maintenance and could be a ministerial act. * * * This can only be determined by the trial judge after he has heard the evidence."). In addition to engaging in the ministerial act of repairing, Defendants also had a

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law immunity granted discretionary functions of government employees at issue here. Defendants recognize the applicability of ORS 30.265 case law in interpreting the common law immunity by citing to such a case for their own argument. *See* Answering Brief, pp 30-31; *Miller v. Grants Pass Irrigation District*, 297 Or 312, 320, 686 P2d 324 (1984).

nondiscretionary duty to see that repairs were done in a safe and skillful manner. *Giaconi*, 60 Or at 30-31.

Defendants seek to characterize the negligent act at issue here as one of deciding the means by which to warn the public of the incomplete repair, in an attempt to avoid their duty to exercise due care in the performance of their work duties. Answering Brief, p 26. They cannot do so. A city employee has a duty to keep city parks safe, "without regard to, or the exercise of, his own judgment upon the propriety of the act being done." *Antin v. Union Highschool Dist. No. 2*, 130 Or 461, 469, 280 P 664 (1929); *see also* Answering Brief, p 30. Thus, while the "how" of making the park safe may be discretionary, the fact that the park must be made safe is not discretionary. *See Lowrimore v. Dimmitt*, 310 Or 291, 296, 797 P2d 1027 (1990) ("Immunity does not shield from liability the routine decisions made by employees in the course of their day-to-day activities, even though those decisions may involve choices among two or more courses of action.").

Here, the evidence shows, particularly for summary judgment purposes, that Defendants had a duty to keep the public safe and failed to do so. Defendant Gibson admitted that the hole presented a safety hazard to the public. ER 68-69. A genuine issue of material fact also exists as to whether Defendant Gibson even took any actions at all to make the aborted repair safe by placing any type of warning sign at the hole or taking any preventative measures. ER

67, 89; *Miller v. Grants Pass Irrigation District*, 297 Or 312, 320, 686 P2d 324 (1984) ("If there is a legal duty to protect the public by warning of a danger or by taking preventing measures, or both, the choice of means may be discretionary, but the decision whether or not to do so at all is, by definition, not discretionary.") Defendants are not shielded from liability because their actions involved repair and routine decisions made in the course of their day-to-day activities. Those actions are ministerial and do not qualify for immunity.

Because Plaintiff would have been able to pursue her claims against the individual defendants at common law, her claims are protected by the Remedy Clause.

2. *The legislature abolished Plaintiff's right to pursue redress for her injuries without providing her a constitutionally adequate remedy.*

Because Plaintiff had a remedy at common law, the next step in analysis is to determine whether the legislature provided her with "a constitutionally adequate substitute remedy for the common-law cause of action for that injury." *Id.* at 124. The legislature has not afforded Plaintiff any substitute remedy. If Defendants are granted immunity under the Act, Plaintiff's right to pursue her cause of action is completely abrogated.

a. The *Johnson II* court erred by engaging in a balancing test, as defined in *Brewer*, rather than following the analysis mandated by *Smothers*.

Rather than applying the analysis mandated by this court in *Smothers* for determining violations of the Remedy Clause, recognized by at least one other

District Court Judge in the District of Oregon as the appropriate methodology,[8] the *Johnson II* court endorsed a balancing test propagated by the Court of Appeals in *Brewer*, a test that predates *Smothers* and should not be used today. ER 19-22; *Johnson II*, 918 F Supp 2d at 1086-1088.

In *Brewer*, the plaintiffs sued several parties for negligence, including Swackhammer for its negligent maintenance and operation of the property. After determining Swackhammer was an "owner" under the Act, the Court of Appeals engaged in a balancing of the parties' interests, reasoning that the legislature can "strike some sort of balance between competing interests by redefining rights, including rights of action, even when such a redefinition alters or *abolishes a remedy under some circumstances.*" *Id.* at 428 (emphasis added). Accordingly, the Court of Appeals held that the legislative choice of

> "permitting recreational landowners to limit their liability in the event that they choose to open their lands to the public for recreational purposes without charge * * * strikes an acceptable balance, by conferring benefits and certain detriments on both the landowners involved, and on the recreational users of that land."

Id. at 190-91. The Court of Appeals concluded that granting Swackhammer immunity under the Act, thereby leaving the plaintiffs wholly without remedy, did not violate the Remedy Clause because the plaintiffs received certain

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[8] In *Pearson v. Reynolds School Dist. No. 7*, 2014 WL 715510 *24 (D. Oregon Feb. 24, 2014), U.S. District Court Judge Anna Brown applied the *Smothers* test for determining whether a Remedy Clause violation occurred through application of the Oregon worker's compensation statutory scheme.

benefits under the Act.

In *Johnson II*, based on *Brewer*, the District Court concluded that the Act, as applied to Plaintiff did not violate the Remedy Clause. In making that decision, the District Court erroneously rejected Plaintiff's argument that the detriment/benefit calculus was not appropriate for determining Remedy Clause violations. ER 20; *Johnson II*, 918 F Supp 2d at 1086. As this court explained in *Howell v. Boyle*, 353 Or 359, 369, 298 P3d 1 (2013):

> "In *Smothers*[,] the court engaged in a wholesale evaluation of its remedy clause jurisprudence. The court engaged in an extended historical analysis of the scope and effect of the remedy clause and *established a new method of analysis of claims arising under it.*"

Emphasis added. In *Howell*, this court reaffirmed the *Smothers* method of analyzing claims and applied that methodology in its determination of whether a Remedy Clause violation had occurred. *Id.* at 371.

The *Howell* court did not apply a benefit/detriment calculus nor is such an analysis compatible with the *Smothers* methodology. *Smothers* mandates that a court first determine if a remedy at common law existed and, if so, whether the legislature provided a substantially adequate substitution. *Smothers*, 332 Or at 91 (holding Remedy Clause phrased in "mandatory terms"). If the legislature failed to provide any substitute remedy, a violation of the Remedy Clause has occurred. There are no exceptions to that rule. It matters not whether the plaintiff received some benefit from the abolishment,

such as the ability to use certain lands for recreational purposes; the plaintiff must be provided with a remedy. *Smothers*, 332 Or at 124 (defining remedy). Yet, *Brewer* impermissibly created an exception by holding that the legislature may engage in a "trade-off" of rights "even when such a redefinition alters or *abolishes a remedy under some circumstances*." *Brewer*, 167 Or App at 188 (emphasis added).

As stated in *Smothers* and reaffirmed in *Howell*, this court has consistently held that the Remedy Clause "is not violated when the legislature alters * * * a cause of action, so long as the party injured *is not left entirely without a remedy*." *Howell*, 353 Or at 10 (internal citation omitted) (emphasis added); *Smothers,* 332 Or at 119 (listing cases so holding). The legislature may limit a right of action but that right "cannot be so abridged by legislation as to deprive the injured party of all remedy." *Humphrey v. City of Portland*, 79 Or 430, 440, 154 P 897 (1916); *see also Greist v. Phillips*, 322 Or 281, 291, 906 P2d 789 (1995) (so stating). Even in cases on which *Brewer* substantially relies, this court stated that legislation violates the Remedy Clause "if the effect of the immunity provisions is to render tort plaintiffs 'without remedy'." *See Neher v. Chartier*, 319 Or 417, 426, 879 P2d 156 (1994); *see also Hale v. Port of Portland*, 308 Or 508, 523, 783 P2d 506 (1989) (no violation occurs if plaintiff is left with a substantial remedy). Despite those cases and the clear admonishment of this court, the District Court chose to apply the Act to

Plaintiff's case, thus leaving Plaintiff entirely without a remedy in violation of the Remedy Clause.

The District Court reasoned that the fact that this court had allowed *Brewer* to remain unquestioned in at least two subsequent cases—*Storm v. McClung*, 334 Or 210, 47 P3d 476 (2002) and *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001)—and denied review of *Brewer*, indicated that "the detriment/benefit calculus on which the *Brewer* court relied in finding that the application of the Act to a private landowner does not violate the Remedy Clause is still good law." ER 22; *Johnson II*, 918 F Supp 2d at 1087-88. The District Court stated that its conclusion was further supported by two Court of Appeals cases rendered after *Smothers* and *Storm*: *Conant v. Stroup*, 183 Or App 270, 51 P3d 1263 (2002) and *Liberty v. Oregon*, 200 Or App 607, 116 P3d 902 (2005).

The District Court's reliance on *Smothers* and *Storm* for the proposition that this court intended *Brewer* to remain good law is misplaced. This court may not have specifically referenced *Brewer* in *Smothers*, however, this court's ruling in *Smothers* specifically prohibits the outcome that occurs as a result of applying *Brewer* abolishment of a common-law action without substitute remedy. The two simply cannot be reconciled. In *Storm*, this court again made no reference to *Brewer*, in part probably due to the fact that *Storm* concerned issues not present in *Brewer*, such as whether the plaintiff had a common-law

cause of action, *Storm*, 334 Or at 222. Regardless, this court reiterated that the Remedy Clause is not violated as long as the plaintiff is left with a substantial remedy. *Id.* at 216-221. Plaintiff here was left without any remedy.

The District Court's reliance on *Conant* and *Liberty* for the proposition that those cases show *Brewer*'s benefit/detriment calculus is still good law is also inappropriate. In *Conant*, the Court of Appeals considered whether a single person who is a specific invitee constitutes "the public" for purposes of applying immunity under the Act. Based on numerous factors, the Court of Appeals held that immunity applied "only when permission is granted to a person as a member of the public generally, not a specific invitee." 183 Or App at 276. In reaching that decision, as one of the *many* factors it relied upon, the Court of Appeals cited to *Brewer* solely for purposes of identifying the policy of Act. *Id.* at 275-76. By making that reference, the *Conant* court by no means endorsed or advocated *Brewer's* benefit/detriment calculus for purposes of determining a violation under the Remedy Clause. Notably, the Remedy Clause was not even at issue in *Conant.*

In *Liberty*, the Court of Appeals considered the definition of "recreational purposes" under the Act. In its analysis, the Court of Appeals cited to the same provision of *Brewer* as the *Conant* court for the policy of the Act. *Liberty*, 200 Or App at 614; *Brewer*, 167 Or App at 188-89. After determining the Act granted immunity to landowners whose property was used as a conduit to land

opened for recreational purposes by other landowners, the Court of Appeals turned to the Remedy Clause. In the last three sentences of the 13-page opinion, the Court of Appeals stated:

> "That leaves plaintiffs' argument that, if [the Act] does apply, it violates the remedies clause[.] We rejected precisely the same argument in *Brewer*[,] and plaintiffs do not explain why we should reconsider our decision in that case. We reject plaintiffs' constitutional argument without further discussion."

Liberty, 200 Or App at 619-20. As evidenced, the *Liberty* court did not discuss or approve the benefit/detriment analysis of *Brewer*, as the District Court implied in its decision in *Johnson II*. *See* ER 22-23; *Johnson II*, 918 F Supp 2d at 1087-88. Moreover, this court reversed the Court of Appeals decision in *Liberty*, holding the Act was not applicable to the landowners at issue and therefore those landowners were not immune from suit. *Liberty v. Oregon*, 342 Or 11, 148 P3d 909 (2006). Because of this court's decision, the Remedy Clause was not implicated, and this court did not need to determine whether a Remedy Clause violation occurred.

Of note, only seven days prior to the Court of Appeals decision in *Liberty* (July 20, 2005), the Court of Appeals issued its decision in *Schlesinger v. City of Portland*, 200 Or App 593 (July 13, 2005). In *Schlesinger*, the Court of Appeals called into question its decision in *Brewer*, recognizing that:

> "part of the analysis in *Brewer* was based on our understanding of the Supreme Court's pre-*Smothers* remedy clause case law. The Supreme Court denied review in *Brewer* and so *Brewer* remains

> good law. However, it is notable that the operative portions of many of the cases that we relied on in our analysis of the plaintiffs' claim against the defendant Swackhammer Ditch Improvement District has been disavowed by the Supreme Court."

Schlesinger, 200 Or App at 600 n 4.

Thus, unlike the District Court held, the Oregon courts have *not* "clearly and consistently determined the Act" as applied to landowners permissibly alters a right of action based on a balancing of interests.[9] *See* ER 23; *Johnson II*, 918 F Supp 2d at 1088. Instead, this court has consistently held that a plaintiff who has a common-law cause of action protected by the Remedy Clause must not be left without a remedy. The legislature may provide a constitutionally adequate substitute remedy but it cannot abolish the plaintiff's remedy in its entirety. If the legislature "redefines rights" to an extent the plaintiff is left without remedy, a violation of the Remedy Clause has occurred, regardless of whether plaintiff receives some type of contrived benefit from the redefinition. As long as that "benefit" is not a constitutionally adequate substitute *remedy*, the "benefit" is of no import for purposes of the Remedy Clause. Thus, the District Court failed to correctly apply the relevant substantive law and its decision must be reversed.

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[9] For example, Judge Henry Breithaupt of Multnomah County Circuit Court recently stated in an opinion: "The court does not believe that the balancing analysis of the *Brewer* is still good law[.]" ER 115. Judge Breithaupt made that statement in a case in which the City of Portland is a defendant.

CONCLUSION

For the aforementioned reasons, Plaintiff requests that this court answer the certified questions as provided by Plaintiff.

DATED this 13th day of August, 2015.

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STATEMENT OF RELATED CASES

None.

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(b)) is 9,911 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I caused to be filed the foregoing APPELLANT'S OPENING BRIEF by causing it to be electronically filed with the Appellate Court Administrator on August 13, 2015, through the appellate eFiling system.

I further certify that I caused to be served the foregoing APPELLANT'S OPENING BRIEF on the following-named counsel on August 14, 2015, via the service function of the appellate eFiling system, and by First Class Mail:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this copy of Appellant's Opening Brief is identical to the PDF version of the brief created from the word processing application, and is not the version found through PACER or the Appellate ECF.

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