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Appellate Court Records

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

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff was injured while jogging in Tom McCall Waterfront Park, a public park owned by the City of Portland, when she stepped in a hole, 18" in circumference and 12" deep, which was dug in the process of repairing a malfunctioning sprinkler head and then left uncovered and unmarked. The District Court determined that the City employees who negligently created the hazard were "owners" of the Parks who "permitted" plaintiff to jog in it, and therefore were entitled to immunity under Oregon's Public Use of Lands Act (also known as the recreational immunity statute).[1] The District Court further held that application of the statute to the City employees would not violate the Remedy Clause of Article I, Section 10, of the Oregon Constitution. Plaintiff appealed, and the Ninth Circuit certified those questions of Oregon law to this Court.

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[1] The District Court had previously held that the City was immune from liability under the recreational immunity statute. *Johnson v. Gibson*, 918 F Supp 2d 1075 (D Or 2013). Portland's Waterfront Park is an improved outdoor facility, which the public is invited (not merely "permitted") to use, not merely for recreational purposes but as a thoroughfare for pedestrians and bicyclists, and which is available for private events and as a venue for commercial events. http://www.portlandoregon.gov/parks/finder/index.cfm?action=ViewPark&ShowResults=yes&PropertyID=156. *See also* the City's User Guide to Major Parks at 4-6, explaining the usage fees for parks including Waterfront Park, http://www.portlandoregon.gov/parks/article/261040. OTLA believes that the City, as a proprietor of an outdoor establishment, should not be able to escape responsibility for negligently maintaining it by invoking the recreational immunity statute. The District Court's decision that the City was protected by the recreational immunity was, OTLA believes, an error, one that unfortunately is not before this court.

The Oregon Trial Lawyers Association appears as *amicus curiae* in this case to urge this Court to hold that the recreational immunity statute does not extend to employees of landowners and, if it does, that leaving plaintiff entirely without a remedy violates the Remedy Clause.

First, this Court should hold that employees are not "owners" entitled to invoke immunity under the recreational immunity statute. The legislature intended to limit immunity under the statute to "owners" and defined the term "owners" narrowly to those with possessory interests in the land – holders of fee titles, tenants, lessee, occupants, holders of easements, holders of rights of ways, or persons in possession of the land. The right to exclude others from the property is the hallmark of those with possessory interests in the land. Because employees simply do not have that ability, the legislature did not intend to include them in the scope of immunity. Furthermore, cloaking employees with immunity does not further the purposes of the statute, because employees cannot "open" the land to the public. Finally, whether the Oregon Tort Claims Act serves to substitute a public body for *some* public employees acting within the scope of their employment has no bearing on whether the legislature intended to include *all* employees within the scope of the recreational immunity statute. For those reasons, OTLA urges this Court to hold that the legislature did not intended to include employees within the scope of immunity under Oregon's recreational immunity statute and to answer "no" to the first certified

question presented by the Ninth Circuit Court of Appeals.

If this court determines that these employees are "owners" entitled to invoke the immunity, then that statute as applied deprives plaintiff of her common law remedy. Regardless of whether the public entity was immune, the individual public employee has always been liable for negligent conduct under the circumstances presented here. Because application of the statute to immunize these employees would leave this plaintiff "entirely without a remedy," it violates Article I, Section 10.

CERTIFIED QUESTIONS AND PROPOSED RULES OF LAW

Certified Questions

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?

Proposed Rules of Law

1. No. The legislature intended to limit immunity to individuals who have a possessory interest in the land.

2. Yes. As applied to this case, the Act deprives plaintiff of a common law remedy against these defendants, and leaves her "entirely without a remedy," thus violating the remedy clause of Article I, Section 10.

ARGUMENT

I. The Immunity Afforded By Oregon's Recreational Immunity Statute Should Not be Extended to Employees of Landowners

A. The legislature intended to limit immunity to individuals who have a possessory interest in the land.

Oregon's recreational immunity statute, ORS 105.682(1), provides, in part:

"[A]n *owner of land* is not liable in contract or tort for any personal injury, death or property damage 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 * * * ."

(Emphases added.) "Owner" is defined as follows:

> "'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."

ORS 105.672(4) (emphasis added).

The legislature enacted the definition of "owner" under the recreational immunity statutory scheme in 1971. *See* Or Laws 1971, ch 780, § 1. As originally enacted, the definition stated "'Owner means the possessor of a fee title interest in any land, a tenant, lessee, occupant or other person in possession of the land." *Id.* (emphasis added). In 1995, the legislature amended the

definition of "owner" to "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." Or Laws 1995, ch 456, § 1. In 2009, it was further amended to its current version. Or Laws 2009, ch 532, § 1.

To qualify as an "owner" under the current definition of Oregon's recreational immunity statute, the individual must be a "possessor of any interest in any land." ORS 105.672(4). Because the phrase "possessor in any interest in any land," is a *general term* followed by a list of specific examples, this Court should use the principle of *ejusdem generis* to find, if it can, a common characteristic among the listed examples. *Schmidt v. Mt. Angel Abbey*, 347 Or 389, 405, 223 P3d 399 (2009).

The general phrase "possessor of any interest in any land" and the specific examples that follow it are terms not defined by the statute. Nonetheless, those terms are terms of art in the field of property law. *See Powerex v. Dep't of Revenue*, 357 Or 40, 61, 346 P3d 476 (2015) (when the legislature has not defined a word or phrase, the court assumes it has its ordinary meaning except when the words are "terms of art" drawn from a specialized trade or field).

When the legislature in 1995 chose to use the phrase "possessor of any interest in any land," that phrase was defined under property law to mean an

exclusive right to the property – *i.e.*, the right to exclude others from the property. *Sproul v. Gilbert*, 226 Or 392, 407-08, 359 P2d 543 (1961); *see also* *Restatement (First) of Property* § 7 (1936) (a possessory interest in land exists when an individual has a certain degree of physical control over the land and intent to exercise such control as to *exclude other members of society* from occupying the land). Since 1971, and through the amendments to the statute in 2009, the legislature's specific examples of those with possessory interests confirm a common characteristic among them – individuals with *a possessory interest* and some *right to exclude others*: holders of fee title, tenants, lessees, occupants, holders of easements, holders of rights of way, and persons in possession of the land.

An employee simply does not fall within the general term "the possessor of any interest in any land" and does not have any common characteristic among the specific examples that the legislature gave. That is, one of these things is not like the other. Although an employee may have some *interest* in the land, an employee's interest is not a "possessory" one. *Restatement* § 7 Comment a. That is so because an employee does not have any right to exclude other members from occupying the land. Other states generally hold that traditional employees – those that do not live on the land – do not have possessory interests in land. *See, e.g.*, *Bollant Farms, Inc. v. Scenic Rivers Energy Co-op*, 337 Wis 2d 427, 805 NW 2d 734, *4 (unpublished), *rev den*,

338 Wis 2d 323, 808 NW 2d 715 (2011) (while employees who lived on the land had a possessory interest, other employees who merely worked on the farm lacked the relationship to the land necessary to have possessory interest in the land).[2]

The legislature's decision to extend immunity only to those with a possessory interest in the land makes sense in light of the policy purposes behind the enactment of Oregon's recreational immunity statutory scheme. The policy behind the statute is "to encourage owners of land to make their land available to the public for recreational purposes * * * ." ORS 105.676. The purpose behind the statute simply is not met by broadening immunity to include employees. The statute does not "encourage" employees to make land available to the public for recreational purposes because they have no power to do so. Therefore, an employee simply does not need immunity under the statute to further the statute's intent.

In summary, the legislature's decision to limit immunity only to those with *possessory* interests in the land supports the conclusion that the legislature did not intend to extend immunity under the statute to employees of owners of the land.

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[2] *Accord* *Johnson v. State*, 583 SW2d 399, 401 (Tx 1979) (employee's access to property did not create possessory interest); *People v. Barela*, 234 Cal App 3d Supp 15, 20 (1991) (only employees who have right to exclude others have a possessory interest in workplace); *People v. Garchow*, No. 223641, 2000 WL 33405379, *1 (MI Oct 27, 2000) (defendant was an employee with no possessory interest in the place of business) (unpublished).

B. Oregon's recreational immunity statute is uniquely narrow in its definition of "owner."

Oregon is unlike other states in its definition of "owner" under the recreational immunity statutes. Oregon's limitation of the scope of "owner" to those with possessory interests is unique.

First, several other states, including Alabama, Arizona, Illinois, Kansas, Maine, Montana, and Vermont, expressly extend immunity to employees or agents of owners.[3] The fact that several other states have expressly included employees, managers, or agents in the scope of immunity, while Oregon has not, is further evidence that the Oregon's statute was not intended to extend immunity to employees.

Second, the majority of states that have not expressly included employees in the definition of owner in their recreational immunity statutes define "owner"

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[3] Ala Code 35-15-21(1) (defining owner under Alabama's recreational immunity statute to expressly include an *employee or agent* of the owner); ARS § 33-1551 (expressly extending Arizona's recreational immunity to *managers* of premises); 745 ILCS 10/3-106 (expressly extending Illinois' recreational immunity to *public employees*); KSA 75-6104(o) (expressly extending Kansas's recreational immunity governmental employees acting within the scope of the employee's employment); 14 MRSA § 159-A(2) (expressly extending Maine's recreational immunity to managers of the premises); MCA 70-16-302(1)(c) (defining landowner under Montana's recreational immunity statute to include landowner's agent); NCGSA § 38A-2(4) (defining "owner" under North Carolina's recreational immunity statute to include "employee or agent" of owner); 12 VSA § 5792(3) (defining "owner" under Vermont's recreational immunity statute to expressly include any *employee or agent* of owner).

more broadly than Oregon to include persons "in control of the premises."[4] Of those states, a few have extended immunity to employees or agents, but have relied on their broad textual language in doing so. *See, e.g.*, *Roach v. Hedges*, 419 SW 3d 46, 48 (Ky App 2013) ("By adopting a broad definition of 'owner' and including the provision 'in control of the premises,' we believe the legislature intended to eliminate negligence liability * * * by removing the duty of care from individuals who have sufficient control to render them liable absent the statute's application."); *Bourn v. Herring*, 225 Ga 67, 67-69, 166 SE 2d 89 (1985) (concluding that the corporation's general manager met Georgia's Recreational Property Act's definition of "owner" to the extent he served as the corporation's agent and *exercised control of the premises*); *Manning v. Barenz*, 221 Conn 256, 262, 603 A2d 399 (1992), *overruled on other grounds by Conway v. Town of Wilton*, 238 Conn 653, 675, 680 A2d 242 (1996) (holding that employees fall within Connecticut Recreational Immunity statute's

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[4] *See* Ark Code § 18-11-302(4); Conn Gen Stat § 52-557f(3); 7 Del Code § 5902(3); Ga Code § 51-3-21(3); Haw Rev Stat § 520-2; Idaho Code § 36-1604(b)(3); Iowa Code § 461C.2(2); Ky Rev Stat § 411.190(1)(b); La Rev Stat § 9:2795(A)(2); Minn Stat § 604A.21(4); Miss Code § 89-2-21(b); Neb Rev Stat § 37-729(2); ND Cent Code § 53-08-01(4); 76 Okl Stat § 10.1(A)(2)(c); 68 Pa Stat Ann § 477-2(2); RI Gen Laws § 32-6-2(3); SC Code § 27-3-20(c); SD Codified Laws § 20-9-12(5); Tenn Code § 70-7-101(2); Utah Code 1953 § 57-14-102(5); Va Code § 29.1-509(A); W Va Code § 20-14-2(f); Wyo Stat § 34-19-101(a)(ii).

definition of "owner" if they are in *control of the premises* at time of injury). Because Oregon does not have that broad language, there is no justifiable reason to extend Oregon's recreational immunity under the reasoning of those states.

Oregon made a policy choice to limit its immunity to those individuals with a *possessory* interest in the land. No other state that limits its definition of owner to a mere "possessory" interest in land has extended immunity to employees or agents of an owner of property. Oregon should not be the first state to do so.

C. Whether or not the OTCA applies does not govern whether the legislature intended for *recreational immunity* to apply to employees of landowners, whether public or not.

Defendants' main argument for extending immunity to employees of an "owner" under the recreational immunity statute is that the statute must be read in context with the Oregon Tort Claims Act (OTCA). (Ans Br of Defs' Gibson and Stillson, Dkt 21-1 (9th Cir Jul 30, 2014) at 20-22).

Since 1991, the OTCA has provided that "the sole cause of action for any tort of *officers, employees or agents* of a public body acting within the scope of their employment * * * shall be an action against the public body only." ORS 30.265(1) (emphasis added); Or Laws 1991, ch 861, § 1. According to defendants, the legislature need not expressly include governmental employees in the plain text of the recreational immunity statute, because when read in

context of the OTCA, such employees are effectively included under the scope of immunity.

Defendant's argument, though inviting, begs the question. It matters not whether the OTCA has the effect of substituting the public body for *certain* governmental employees in certain circumstances. Simply put, whether the legislature intended for the recreational immunity statutes to apply to the employees of *all* landowner's, public or private, is a separate question entirely.

The OTCA does not always protect governmental employees from individual liability – some employees are not acting within the scope of their duties or substitution is not permitted because a plaintiff alleges damages in amount greater than the damages caps permitted against a public body under the OTCA. *See* ORS 30.265(4) (action may be brought and maintained against officer, employee, or agent of public body when damages alleged in amount greater than the damages allowed under the OTCA). ORS 30.265(4) is meant to avoid leaving a plaintiff without a remedy in violation of the Remedy Clause of Article I, section 10, of the Oregon Constitution. *See Clarke v. OHSU*, 343 Or 581, 610, 175 P3d 418 (2007) (elimination of cause of action against public employees under OTCA violated the Remedy Clause when the plaintiff's damages exceeded $5,000,000 and plaintiff was limited to recovering $200,000 from public body).

Even if the OTCA always had the effect of substituting the government

for public employees, to accept defendant's argument, this Court would have to interpret the definition of "owner" differently depending on whether the landowner is a public or private entity. The statute, however, makes no such distinction.

Furthermore, if defendants' argument were correct, the legislature would never *need* to extend immunity to governmental employees. However, it has done just that in several circumstances. *See, e.g.*, ORS 79.0528 (immunizing the Secretary of State and her *officers and employees* for claims related to administering ORS chapter 79 or ORS 80.100 to 80.130); ORS 339.870 (immunizing school employees who administer nonprescription medication under certain circumstances); ORS 368.031 (immunizing counties and their *officers, employees or agents* for failing to improve local access roads or keep it in repair); ORS 453.912 (immunizing *agents and employees* of the state and any local government for loss or injury resulting at a site used from the presence of any chemical or controlled substance used to manufacture illegal drugs except for liability for damages from gross negligence or intentional misconduct); ORS 475.465 (immunizing the State, EQC and DEQ and its *employees and agents* for identification, cleanup, storage or disposal of chemicals by the DEQ). All of those statutes remain in effect and some have been amended after the relevant provision of the OTCA went into effect in 1991. *See* Or Laws 1997, ch 144, § 2 (amending ORS 339.870); Or Laws 2001, ch 445, § 157 (amending

ORS 79.0528).

Thus, the legislature has demonstrated that it knows how to extend immunity to employees and agents when it wants to (and that it has continued to do so even after the legislature decided to substitute public bodies for public employees acting within the scope of their employment under the OTCA). The fact that the legislature has expressly extended immunity to "employees and agents" in other statutes, but not in the Oregon recreational immunity statute, indicates that the legislature purposefully omitted employees and agents from the scope of the recreational immunity statute.[5] That is, had the legislature wanted to extend immunity to employees agents in the recreational immunity statute, it could have said so. *See* *Griffin By and Through Stanley v. Tri-County Metropolitan Transp. Dist. of Oregon*, 318 Or 500, 508-09, 870 P2d 808 (1994) ("Had the legislature intended the limit on 'liability' to apply only to liability for tort damages, it could have said so."); ORS 174.010 (stating that the office of the judge is "not to insert what has been omitted, or to omit what has been inserted"). Therefore, defendant's argument that governmental employees should be inserted into the recreational immunity statute simply due to the OTCA is unconvincing.

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[5] The current definition of "owner" under Oregon's recreational immunity statute went into effect in 2009. *See* Or Laws 2009, ch 532, § 1. All the statutes cited above were enacted prior to 2009 and appropriately are considered as context. *Stull v. Hoke*, 326 Or 72, 79-80, 948 P2d 722 (1997) (later-enacted statutes are not context for what the legislature intended an earlier-adopted statute to mean).

In conclusion, there is no evidence to support defendant's argument that the legislature intended to include employees in the definition of "owner" under Oregon's recreational immunity statute. To the contrary, its limitation to possessory interests, its narrow definition when compared to other states, and its omission of employees from the express definition when compared to other waiver of liability statutes all supports a conclusion that the legislature did not intend to include employees in the definition of "owner" under Oregon's recreational immunity statute. For that reason, this Court should answer "no" to the Ninth Circuit's first certified question.

II. Extending the Immunity to City Employees Deprives Plaintiff of a Common Law Remedy and Violates the Oregon Constitution.

The district court held that the individual city employees who created the hazard must also be regarded as "owners" who are also immunized from liability by the recreational immunity statute; as already explained, OTLA disagrees with that proposition. However, even if the employees can reasonably be re-categorized as "owners," their conduct cannot be immunized without violating the Oregon Constitution.

Article I, section 10, of the Oregon Constitution provides in relevant part:

> "[E]very man shall have remedy by due course of law for injury done him in his person, property or reputation."

In *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 124, 23 P3d 333 (2001), this court held that 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." That approach to the clause was well-anchored in history. Matthew Deady, one of the drafters of the Oregon Constitution, also saw the clause as providing a substantive guarantee, not simply a remedial process. Writing as a federal circuit court judge in *Eastman v. Clackamas County*, 32 F 24, 32 (D Or 1887), he said the following about a county's liability[6] for failing to maintain a bridge:

> "But whatever injury the law, as it then stood, took cognizance of and furnished a remedy for, every man shall continue to have a remedy for by due course of law. When this constitution was formed and adopted it was and had been the law of the land, from comparatively an early day, that a person should have an action for damages against a county for an injury caused by its act or omission. If this then known and accustomed remedy can be taken away in the face of this constitutional provision, what other may not? Can the legislature, in some spasm of novel opinion, take away every man's remedy for slander, assault and battery, or the recovery of a debt? And, if it cannot do so in such cases, why can it in this?"

A. Regardless of the public body's immunity, or its scope, the individual tortfeasor has always been liable.

It is virtually axiomatic, and has been since the beginning of the State, that sovereign immunity "does not extend to the agent": "An agent of the state * * *, by virtue of his character simply, possesses no such immunity from being sued." *Dunn v. The University of Oregon*, 9 Or 357, 362 (1881).

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[6] In *Templeton v. Linn County*, 22 Or 313, 29 P 795 (1892), the Oregon Supreme Court subsequently held that at common law a county was not liable for injuries due to negligence, because it was an instrumentality of the state and was therefore entitled to the state's sovereign immunity.

In *Gearin v. Marion County*, 110 Or 390, 396-97, 223 P 929 (1924), the court recognized that even though there was no remedy available against the county because it was an instrumentality of the sovereign state, an action against the individual public employee tortfeasor was available -- indeed, must remain available -- in order to satisfy the constitutional guarantee:

> "When a tort is thus committed, the person committing it is personally liable for the injury resulting therefrom. * * * *It is the remedy against the wrongdoer himself*, and not the remedy which may or may not be imposed by statute against the state or county for the torts of its officers or agents, *to which the constitutional guaranty applies*."

(Emphases added.)

In *Mattson v. Astoria*, 39 Or 577, 579, 65 P 1066 (1901), the court held that the remedy clause was violated by a charter provision which exempted both the city and its employees from liability for poor maintenance of public thoroughfares because to do so would leave plaintiff "wholly without remedy." The court required that a shift of tort liability away from a municipality must preserve the liability of the negligent actor. The remedy clause, the court said,

> "was intended to preserve the common-law right of action for injury to person or property, and while the legislature may change the remedy or the form of procedure, attach conditions precedent to its exercise, and perhaps abolish old and substitute new remedies, it can not [*sic*] deny a remedy entirely."

Id. at 580 (citations omitted). The court went on to state:

> "Whether 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; and the charter

> provision under consideration attempted to take away the remedy against the officers, as well as against the city, and is therefore void."

Id. at 580-81.

Similarly, in *Batdorff v. Oregon City*, 53 Or 402, 100 P 937 (1909), the court held invalid a city charter provision which eliminated city and city officer liability except for the gross negligence or willful misconduct of city officers. The limitation of liability was unconstitutional, according to the court, because it "practically denies a remedy to any person injured." *Id.* at 409. As the court explained in *Colby v. City of Portland*, 85 Or 359, 373, 166 P 537 (1917), a city charter that exempted the city from liability for injuries arising from defective streets and placed liability on city officers

> "does not create any new or additional obligation as against such officer, as a city official who personally neglect to perform a specific duty was always liable irrespective of any statute prescribing such liability."

See also *Caviness v. City of Vale*, 86 Or 554, 665, 169 P 95 (1917) (A city charter that shifted responsibility for maintaining sidewalks to the abutting property owner passed constitutional muster, in part because it left in place "the remedy that always existed against the officers of the city for failure to cause repair of defects coming to their knowledge").

In *Peterson v, Cleaver*, 124 Or 547, 265 P 428 (1928), the court upheld a malicious prosecution claim against the state "prohibition commissioner," holding that a state officer can be personally liable for authorizing a raid on the

plaintiff's home without probable cause. In *Marchant v. Clark*, 225 Or 273, 276, 357 P2d 541 (1960), the court made clear that a county's truck driver was liable for his own negligence; the fact that he was following his employer's orders did not relieve him of liability. "Neither a state nor an individual can confer upon an agent authority to commit a tort." *Id.* (citing *Gearin*, 110 Or 390). In *Ogle v. Billick*, 253 Or 92, 453 P2d 677 (1969), the court re-stated that same proposition, holding that "[a] county employee who negligently drives a vehicle, operates a grader or performs other kinds of work for a county is personally liable."

That common law tort liability was unchanged by the original Oregon Tort Claims Act. *Smith v. Pernoll*, 291 Or 67, 70, 628 P2d 719 (1981) ("The 1967 Act in no way restricted the common law tort liability of public employees arising from nondiscretionary acts.")[7]; *see also Krieger v. Just*, 319 Or 328, 340, 876 P2d 754 (1994) (The 1977 amendments to the Act did not indicate any intent "to cancel or impair the previously existing right to make claim only against an individual who happened to be a public employee.").

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[7] In the defendants' brief to the Ninth Circuit, they argued that they were performing (or not performing) a discretionary function, and for that reason would have been immune at common law. Ans Br of Defs-Defs-Appellees, at 21-23. Defendants apparently take the position that any exercise of choice or judgment is a discretionary function. However, defendants were not making choices involving public policy. *See Antin v. Union High School Dist.*, 130 Or 461, 469, 280 P 664 (1929). OTLA suggests that defendants' argument is an exercise in desperation, and agrees with the arguments made by plaintiff in response to this position. Appellant's Opening Br at 28-32.

In this case, plaintiff alleges that these defendants created a hazard in an area where the public could be expected to pass, and took no steps to prevent public access or warn of the danger. Defendants had an obligation to exercise reasonable care to prevent foreseeable harm to others, and that obligation did not disappear simply because they were employed by a public entity. The common law provided plaintiff with a right of action to seek a remedy for her injuries.

B. Immunizing defendants from liability for negligence leaves plaintiff without a remedy, and violates Article I, section 10.

Even if the district court were correct in determining that the recreational immunity statute could be invoked by the city, because maintenance of the park was a governmental function and the city would have been immune at common law, that same reasoning cannot be applied to the individual tortfeasors. At common law, regardless of the city's immunity (or its source), the individuals would have been liable. Application of ORS 105.682 to immunize these city employees deprives plaintiff of a remedy that would have been available to her at common law, before enactment of that statute and indeed before enactment of the Oregon Tort Claims Act. Because the law provides no substitute remedy, under *Smothers*, this application of the recreational immunity statute violates Article I, section 10.

In *Clarke v. OHSU*, 343 Or 581, 175 P3d 418 (2007), the plaintiff brought an action against Oregon Health and Science University (OHSU) and

his individual treatment providers, alleging severe and permanent brain damage as the result of prolonged oxygen deprivation while recovering from an otherwise successful surgery. The trial court granted the defendants' motion to substitute OHSU as the sole defendant, pursuant to the Oregon Tort Claims Act (as amended in 1991). OHSU admitted liability, admitted that the plaintiff had suffered damages in excess of the monetary limitation of the Act, and moved for judgment on the pleadings in the amount of that limitation (then $200,000). 343 Or at 586-87. Because "there [was] no dispute that, when Oregon adopted its remedy guarantee, plaintiff would have been entitled to seek and, if successful, to recover * * * damages from the individual defendants," the elimination of a cause of action against those individual defendants (and the provision of a severely limited remedy against OHSU) violated the remedy clause. *Id.* at 610.

This case does not present an issue of the adequacy of a substitute remedy, as *Clarke* did. Here, no remedy at all is left to plaintiff. This court has said repeatedly: Article I, section 10 "is not violated when the legislature alters * * * a cause of action, *so long as the party injured is not left entirely without a remedy*." *Hale v. Port of Portland*, 308 Or 508, 523, 783 P2d 506 (1989) (emphasis added). *See also Smothers*, 332 Or at 119; *Howell v. Boyle*, 353 Or 359, 366-69, 298 P3d 1 (2013) (reviewing cases so holding).

In this case, as in *Clarke*, there is no basis for any dispute that at common

law plaintiff had a claim for negligence against the individual who failed to exercise reasonable care and created an unreasonable and unnecessary risk of harm to the public that resulted in her injury. Interpreting the recreational use statute to immunize these employees from that liability deprives plaintiff of a remedy she would otherwise have had, and leaves her with no remedy at all. This is a violation of plaintiff's rights under Article I, section 10.

CONCLUSION

OTLA submits that these city employees are not "owners" of Waterfront Park and are therefore not entitled to invoke the recreational immunity statute. If the court determines that these defendants are entitled to invoke the statute, OTLA urges the court to hold that its application in this case deprives plaintiff of her common law remedy without providing any alternative, and therefore violates the remedy clause of Article I, section 10 of the Oregon Constitution.

DATED this 24th day of August, 2015.

Respectfully submitted,

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Kathryn H. Clarke OSB 791890

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
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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)(a)) is 5,389 words.

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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 SERVICE AND FILING

I certify that I filed the foregoing BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON TRIAL LAWYER'S ASSOCIATION by Electronic filing on August 24, 2015.

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