IN THE SUPREME COURT OF THE STATE OF OREGON

ASHLEY SCHUTZ,
Plaintiff-Appellant, Respondent on Review,

v.

LA COSTITA III, INC.,
Defendant,

and

O'BRIEN CONSTRUCTORS, LLC,
Defendant-Respondent,

and

KEELEY O'BRIEN,
Defendant-Respondent, Petitioner on Review.

Multnomah County Circuit Court No. 1012-17338
Court of Appeals No. A157621
Supreme Court No. S065638

BRIEF OF *AMICUS CURIAE*
OREGON ASSOCIATION OF DEFENSE COUNSEL,
IN SUPPORT OF DEFENDANT-RESPONDENT'S
PETITION FOR REVIEW

Review of the Court of Appeals' Decision on Appeal from the Judgment of the Multnomah County Circuit Court Honorable David F. Rees, Judge

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Date of Decision:	November 1, 2017
Author of Opinion:	Hadlock, C.J.
Joining in Opinion:	Armstrong, P.J. and Egan, J.

***AMICUS CURIAE* WILL FILE A BRIEF**
ON THE MERITS IF REVIEW IS ALLOWED

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I. INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae the Oregon Association of Defense Counsel ("OADC") appears in support of Defendants-Petitioners O'Brien Constructors, LLC and Keeley O'Brien's position on review. OADC addresses the expansion and misapplication of this court's opinion in *Horton v. OHSU*, 359 Or 168, 376 P3d 998 (2016), the unintended consequences of the *Horton* decision, and the role and importance of both the judiciary and the legislature in establishing Oregon law.

The Court of Appeals' application of *Horton* in this case as well as in several other recent cases is erroneous and strays far beyond the principles this court has articulated. *Horton*'s stated purpose was to increase flexibility and reject the notion of a static common law. But, the Court of Appeals' recent opinions applying those principles have struck down legislative action broadly. This application of *Horton* overextends the reach of Oregon's remedy clause, creating a one-way street where claims or causes of action may be created or adopted, but never abrogated or removed. These cases also illustrate the unintended problems with the *Horton* analysis, including the muddying of separation of powers, the intrusion of judicial review into policy, and the potential for unfettered expansion of claims and remedies. Review is needed to address the unprecedented restriction on the legislative branch and to reconnect the remedies clause to its historical roots.

II. THE COURT OF APPEALS TAKES *HORTON* A BRIDGE TOO FAR

Over time, Oregon courts have adopted and rejected a number of tests and approaches for determining exactly what rights are protected by the remedy clause, and to what extent. *See Stewart v. Houk*, 127 Or 589, 591, 271 P 998, *on reh'g*, 127 Or 597, 272 P 893 (1928) (the purpose of the remedy clause is to "save from legislative abolishment those jural rights which had become well established prior to the enactment of our Constitution"); *Perozzi v. Ganiere*, 149 Or 330, 345, 40 P2d 1009 (1935) (the remedy clause does not prohibit the legislature from creating new rights or abolishing old rights under the common law); *Horton*, 359 Or at 218 ("Rather, for over 100 years, this court has debated the meaning of the clause, the latitude it gives the legislature, and the rights it protects.").

This court's new test, as explained in *Horton*, departed from previous case law. However, in its recent applications of this new test, the Court of Appeals has leapt far beyond the scope of the original *Horton* rule.

A. *Horton*'s Stated Purpose is to Increase Flexibility in the Common Law

Horton overturned the "bright-line rule" from *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 86, 23 P3d 333 (2001), and turned to pre-*Smothers* cases for the unexceptionable point that "the common law is not inflexible but changes to meet the changing needs of the state." *Horton*, 359 Or at 218. This

court anchored its rejection of *Smothers* in this perceived need for greater flexibility, stating that *because* the common law is flexible, "*Smothers* clearly erred in holding that the remedy clause locks courts and the legislature into a static conception of the common law as it existed in 1857." *Id.* at 218-19. This new rule recognized and sought to protect both the expansion *and contraction* of rights and remedies, and allowed the legislature to alter "either [the] common-law duties or the remedies available for [the] breach of those duties." *Id.* at 219.

The *Horton* test sought greater flexibility by anchoring its analysis not to a moment in time, but to the importance of the rights at issue in a particular statute by measuring and balancing the degree of departure from a constitutionally-protected remedy against the justification for doing so. Going forward, this court directed: "[t]o the extent that those cases turn on the bright line rule that *Smothers* drew (all injuries for which common-law causes of action existed in 1857 require a remedy while injures for which no cause of action existed in 1857 are entitled to no protection), then those cases must be taken with a grain of salt." *Id.* at 220.

However, rather than proceeding with the advised "grain of salt," the Court of Appeals has wholly discarded not just the "bright-line rule" from *Smothers*, but also the historical foundations upon which it rested and the very flexibility of the common law that *Horton* sought to reaffirm and protect.

B. The Court of Appeals Below Simply Replaced One Static Conception of Common Law with Another

In its opinion below, the Court of Appeals indicated that "instead of looking to the common law as it existed in 1857, the remedy-clause analysis focuses on the effect of [the] legislation on the common law as it existed when the legislature acted." *Schutz v. La Costita III, Inc*., 288 Or App 476, 485, 406 P3d 66 (2017). But, rather than analyzing the common law's development over time, the court below held that "it is the common-law causes of action and remedies that exist *at the time legislation is enacted* that provide the 'baseline for measuring the extent to which [that] legislation conforms to the basic principles of the remedy clause—ensuring the availability of a remedy for persons injured in their person, property, and reputation.'" *Id.*, *quoting Horton*, 359 Or at 218 (emphasis in original).

Though the court cited to *Horton* for the statement italicized above, the *Horton* opinion did not contain this direction. Rather, *Horton* seemingly requires a consideration of the full historical development of the common-law claim or remedy at issue in deciding the constitutionality of subsequent legislation that removed or abrogated it.

In other words, the *Horton* passage to which the Court of Appeals cited does not specify that *only* the common law as of the *moment* of legislative action is relevant. Otherwise, a long-standing common-law rule prohibiting certain claims could be overturned by an appellate court, then the legislature

would immediately seek to return the law to its long-understood state, only to be unable to do so because it is abrogating the common law as it exists in the moment the legislature acts.

Indeed, that is precisely what occurred here. In its analysis, the Court of Appeals merely substituted the static moment of 1857 for the static moment of the 2001, when ORS 471.565 was enacted. The history and development of the relevant common law prior to 2001 is nuanced and should inform the analysis of the "the extent to which the legislature has departed from the common-law model measured against its reasons for doing so." *Horton*, 359 Or at 220.

As Defendants have argued in their Petition, first-party common-law claims against a social host for harms arising from *voluntary* intoxication did not exist in Oregon for the majority of the time period leading up to the enactment of ORS 471.565, and the legislature in 2001 sought to expeditiously *return* the law to that state after this court announced a contrary rule in *Fulmer v. Timber Inn Restaurant & Lounge., Inc.*, 330 Or 413, 9 P3d 710 (2000). Even if that were not the case, the common law surrounding first-party claims arising from voluntary intoxication cannot be unraveled from the history of prohibition and the passage of the Dram Shop Act in 1913. The opinion below neglected to adequately consider this history.

C. The Court of Appeals Below Miscategorized the Statute Under the *Horton* Analysis

In addition to the issue discussed above, another reason to accept review of this case is to determine in which *Horton* "category" it fits. Under the *Horton* analysis, a reviewing court must determine whether the challenged legislation falls into one of three categories:

> (1) legislation that did not alter the common-law duty but denies or limits the remedy a person injured as a result of that breach of duty may recover;
>
> (2) legislation that sought to adjust a person's rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others (a *quid pro quo*); or
>
> (3) legislation that modified common-law duties or eliminated a common-law cause of action when the premises underlying those duties and causes of action have changed.

359 Or at 219. Below, the Court of Appeals chose to place ORS 471.565 in the first category. 288 Or App at 487. But, the differences between the first category and the third category are not readily apparent.

As Defendants argue, the legislature's decision to eliminate claims arising from involuntary intoxication are justified by societal changes. Specifically, the legislature's decision makes sense in the context of the end of Prohibition and waning Temperance Movement, the evolving medical understanding of alcohol abuse and addiction as a disease rather than a moral or spiritual failing, and the rise of movements like Mothers Against Drunk Driving and the resulting social expectations of a designated driver.

To properly determine the degree of departure from the common law and whether that departure is justified, the development of that common law— *i.e.*, whether the remedy was recognized in 1857, whether it has existed at common law for a century or for only five minutes; whether it arose from a particular historical movement or represented a much-needed modernization—are inarguably relevant and should be considered. This court should accept review to perform this kind of analysis here.

D. Other Court of Appeals Cases Have Misapplied *Horton*

Subsequently, in *Rains v. Stayton Builders Mart, Inc.*, 289 Or App 672 (2018), the Court of Appeals relied on its opinion in *Schutz* to direct its analysis to the "effect of [the] legislation on the common law as it existed when the legislature acted." *Id.* at 678. Though the court purported also to "tak[e] into account how the common-law may have changed over time to 'meet the changing needs of the state,'" *id.*, *quoting*, *Schutz*, 288 Or App at 485, the *Rains* court goes even further than *Schutz* by saying that *Horton* "did away with the idea that the state of the common law in 1857 had *anything to do* with the constitutionality of legislation challenged under the remedy clause." *Id.* at 688 (emphasis added).

In both *Rains* and *Vasquez v. Double Press Manufacturing*, 288 Or App 503, 406 P3d 225 (2017), another case addressing the constitutionality of the ORS 31.710 damages cap, the court below did not consider the historical

context of the claims or remedies, but instead, mechanically concluded that because the cap statute did not provide a *quid pro quo*, the legislature's policy purposes in taking action could not justify any impact on the plaintiff's claims beyond what was recoverable immediately before the statute was enacted. Every post-*Horton* case from the Court of Appeals to address the remedy issue has struck down legislative action as violating the remedy clause, except those cases dealing with challenges to a statute of ultimate repose. *See, e.g.*, *Schutz*, 288 Or App at 484-85 (striking down ORS 471.565); *Rains*, 289 Or App at 688 (striking down ORS 31.710 as applied); *Vasquez*, 288 Or App 503 (same); *but see Cannon v. Or. DOJ*, 288 Or App 793, 801, 407 P3d 883 (2017) (upholding statute of repose). Far from taking *Smothers* with a "grain of salt," the Court of Appeals has departed from the *Smothers* analysis on a grand scale.

This court should take review clarify the scope and application of the *Horton* rule. At a minimum, the lower courts should consider not a moment in time, but the broader context of common law rights and remedies, including the state of the law in 1857, in determining the constitutionality of statutes capping or reducing claims and damages. Otherwise, any time a court decides to expand a remedy, that decision would cloak itself with constitutional protections. In other words, decisional law in tort cases would automatically expand constitutional rights, and the legislature would be powerless to act. This

outcome is contrary to the stated purpose in *Horton* of protecting the flexibility of the common law.

III. UNINTENDED CONSEQUENCES OF THE *HORTON* RULE SHOW THE REMEDY CLAUSE HAS BEEN TAKEN OUT OF CONTEXT

In overruling *Smothers*, this court attempted to provide more flexibility in the law and more recognition of the legislature's authority to adjust the law in recognition of the changing needs of the public. However, it may have rendered the legislature less able to make needed changes to common-law claims and remedies. For example, *Horton* re-avowed many of *Smothers'* predecessors, saying that it disagreed with the *Smothers* conclusion that Oregon courts "can or should disregard *Perozzi* and the cases that followed it." 359 Or at 197.

It is notable, then, that parts of *Horton* and certainly the Court of Appeals' application of *Horton* significantly conflict with the principles of *Perozzi* and its progeny. Most importantly, *Perozzi* rejected the notion that the legislature could not constitutionally curtail a significant remedy at common law:

> "The common law is not a fixed and changeless code for the government of human conduct. Its applicability depends to a large extent upon existing conditions and circumstances at any given time. For example, as the complexity of industrial relations has increased, we have seen engrafted on the common law the defenses of the fellow-servant doctrine, contributory negligence and assumption of risk. Due to their harshness as directed against the

> workman, these common-law defenses have been by legislation abolished in many of the states during the last two decades.
>
> If we were to give to article I, § 10, the construction contended for by plaintiff, we should be obliged to declare unconstitutional much of the legislation of recent years, such, for example, as the workmen's compensation law, which deprives the injured workman of the remedy which he had at common law."

Perozzi, 149 Or at 348-49. It would appear, based on the discussion of the workman's compensation statute in *Perozzi*, that it would fall into the third category of *Horton* cases, *i.e.*, legislation that "modified common-law duties . . . [or] eliminated [a] common-law causes of action when the premises underlying those duties and causes of action have changed." *Horton*, 359 Or at 219. It is doubtful, then, that the workman's compensation scheme would have survived the scrutiny applied in *Vasquez* and *Rains.*

Regardless, this court's attempt to free the legislature from the confines of those remedies recognized in 1857 has not resulted in the desired "flexibility" of common law and legislative policy, but rather in the Court of Appeals striking down statutes representing the legislature's comprehensive attempts to reform tort law and limit damages in recognition of the changing legal landscape and policy needs of the state and its people following democratic processes.

Nor does it follow that the courts can or should weigh the policy decisions of the legislative branch and assess their merit in deciding whether such enactments merit that protection. The courts are ill-equipped to decide

policy in comparison with the legislature, and the remedy clause does not conceive of an ever-expanding common law that grows without meaningful and substantive shaping from the legislature.

A. The Approach Below Raises Separation of Powers Concerns

In fact, requiring state courts to assess the legislature's policy choices on the merits under a remedies clause analysis may strain the separation of powers past its breaking point. Justice Thomas Phillips of the Texas Supreme Court observed that "the remedies clause is clearly in tension with the separation of powers doctrine that is the genius of the American system." Phillips, 78 NYUL Rev at 1340-41. And, when the "legislature clearly expresses its desire to limit the remedies available, the court should be especially cautious before striking down such a law, lest the open courts clause be used to undermine the very separation of powers which the provision was intended to foster." Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or L Rev 1279, 1316-17 (1995).

A vast majority of states have constitutional or statutory reception clauses providing that the common law shall control unless and until changed by statutory law. Phillips, 78 NYUL Rev at 1340-41. The remedies guarantee must be harmonized with the legislature's constitutionally enshrined role to make broad policy. "How do courts supply content to the provision without overstepping their traditional role and legislating themselves?" *Fireman's Fund*

Am. Ins. Co. v. Coleman, 394 So 2d 334, 351 (Ala. 1980). The answer to that question becomes more critical and less clear as the Court of Appeals continues to expand *Horton.*

In Oregon, our constitution prohibits any person "charged with official duties" in one of the government's three branches to "exercise any of the functions of another, except as in this Constitution expressly provided." Or Const, Art III, § 1. However, the same issues arise before the courts and the legislature frequently, and cleanly delineating the boundaries between each branch's role is difficult.

That said, it is inarguable that the legislature has a long history of responding differently to the changing policy needs than the courts, and is better suited to weighing the competing interests and policies involved. For example, Oregon's former tort for alienation of affection of a spouse began as an action available only to the husband. *Norwest v. Presbyterian Intercommunity Hosp*., 293 Or 543, 562-67, 652 P2d 318 (1982). This court eventually changed the common law, holding that the act removing a wife's civil disabilities allowed her to sue for alienation of her husband's affection. *Id.* However, subsequently, the legislature decided to address equality with respect to alienation of affections not by making the claim available to wives but by abolishing it altogether, along with the tort of criminal conversation. Or Laws 1975, ch 562. The legislative history makes clear that despite their intentional

character and the resulting emotional harm to the injured spouse, these torts for invasion of the family relationship were considered to be outmoded given changing views of marriage, divorce, and sexual relations, and could no longer be supported as a matter of public policy. *Norwest*, 293 Or at 567.

In order for a court to evaluate a legislative choice such as the one to eliminate the tort of alienation of affection under the *Horton* rule, a court must somehow assess the value of the policy choice and whether it justifies abolishing a common-law claim. As Justice Phillips cautioned: "The standards articulated by courts for conducting this balance typically provide little guidance to constrain the judges' personal preferences." Phillips, 78 NYUL Rev at 1336. *Horton* considered, "among other things, whether the common-law cause of action that was modified continues to protect core interests against injury to persons, property, or reputation or whether, in light of changed conditions, the legislature permissibly could conclude that those interests no longer require the protection formerly afforded them." 359 Or at 219-20. Though more detailed than some, that approach suffers from a "common vice": it requires courts to strike a delicate balance between important competing interests without clear standards for evaluating the relative importance of those interests. How is a judge to determine whether a person's interest no longer requires protection? How can the court assess whether the legislature's conclusions about that protection are "permissible?" That level of discretion

cannot be extricated from individual judges' personal predilections. Accordingly, in Oregon's caselaw and that of other states, it is common to find that "one justice therefore finds the cap to be 'reasonable,' the other justices condemn the cap as 'unfair and unreasonable' or 'unreasonable and arbitrary.'" *Lucas v. United States*, 757 SW2d 687, 717 (Tex. 1988) (citations omitted).

B. Is the Court bound by the Remedy Clause as well?

The Court of Appeals' analysis below arguably imbues all new judicially-recognized claims with constitutional protection and prevents them from being refined or abrogated by the legislature unless the legislature gives a *quid pro quo*, relieves a duty, or engages in some other balancing of interest. However, nothing in this court's opinion in *Horton* or the text of the remedy clause—"every man shall have remedy by due course of law for injury done him in his person, property, or reputation"—would restrict the application of the clause to legislative action. Or Const, Art I, § 10; *see generally* 359 Or 168. Arguably, the court itself is bound to protect any remedy that is judicially, or even legislatively, created.

Indeed, courts and commentators have grappled with the application of a state remedy clause to protect only the common law against only the actions of the legislative branch. *See Neher v. Chartier*, 319 Or 417, 879 P2d 156 (1994) (recognizing abandonment of distinction between statutory and common-law claim); David Schuman, *The Right to a Remed*y, 65 Temp L Rev 1197, 1217

(1992) ("To distinguish between common-law and legislative causes of action is to elevate form over substance."). Of course, courts are not able to offer a *quid pro quo*, and usually cannot abrogate duties or engage in the other balancing actions identified in *Horton* as means to permissibly alter the common law. If the legislature cannot permissibly eliminate common-law remedies without providing a substitute, arguably the court cannot either. *Horton* and its subsequent application by the Court of Appeals, have created a scenario where tort law can expand without bounds, but cannot contract, which directly contradicts the goal of flexibility identified in *Horton*, and which finds no historical support in the reason for having a remedies clause in our Constitution.

In sum, this court should accept review in order to redirect this line of cases toward the legislative flexibility it recognized in *Horton*, and to center the remedy clause analysis more firmly in its historical context.

Dated this 7th day of February, 2018.

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that this brief complies with the word-count limitation pursuant to ORAP 5.05(2)(b) as the word count is 3,578 words. I further certify that this brief is produced in type font no smaller than 14-point in text and footnotes pursuant to ORAP 5.05(4)(g).

Dated this 7th day of February, 2018.

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CERTIFICATE OF FILING AND SERVICE

I certify that on February 7, 2018, I filed the foregoing **BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL ON BEHALF OF DEFENDANT-RESPONDENT** using the eFiling System, with:

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