

## Statement in Support of Senate Bill 695

March 12, 2013

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**Mr. Chairman and Members of the Senate Judiciary Committee.**

**My name is Mel Stewart, I represent only myself today.**

I was unfortunate enough to have the City of Salem over run the 120 rule of ORS 227.178 on a partitioning application. This in turn triggered a mandamus action. The details of which can be found in *State ex rel Mel Stewart v. City of Salem, (Stewart I)* 241 Or. App. 528, 251 P.3d 783 (2011), where I was the prevailing party.

During my trip through the judicial process, I observed the part of what caused the continuation of the litigation, which was that ORS 34.210 was not as carefully worded as might have been hoped for.

SB 695 does not attempt to change the underlying case law or legislative intent but only to word the statute in terms clear enough that reasonable misinterpretations are eliminated.

These changes are necessitated in part by decisions of Courts and changes made by the legislature itself to other statutes that impact ORS 34.210.

### **First problem:**

**In 1981, the Oregon Supreme Court in *State ex rel Kashmir Corp. v. Schmidt*, 291 Or 603, 633 P2d 791 (1981)** pointed out the part of the language of ORS 34.210 that was outdated. After a detailed historical derivation of mandamus law and its evolution since old English law, Justice Bud Lent, who was writing for the majority, identified when and how damages arise in mandamus actions. His conclusion was that damages in mandamus are only available for a "False Return".

Justice Lent would go on to become Chief Justice of the Oregon Supreme Court. Near the time Justice Lent retired, the Oregon Trial Court Administrator advanced SB 288 1989, which placed in statute many of Justice Lent's conclusions. The staff summary from the legislative history is attached. This is the first time the word "False Return" appears in statute.

As you can see in the staff summary, the Judiciary Committee had questions about the definition of the term “False Return”. The answer to that question was *Kashmir Corp. v. Schmidt*. Regrettably, the definition of “False Return” from *Kashmir Corp. v. Schmidt* never made it into the statute.

SB 695 corrects that oversight. The statute will be more effective if participants in mandamus action clearly understand what they are prohibited from doing and the consequence of their actions.

If this definition had been in statute, I might very well have saved two trips to the Court of Appeals and a large sum of attorney fees.

**Second Problem:**

The passage of ORS 20.077, enacted by HB 2374, 2001 Or Laws 417 §1 and ORS 20.075 Enacted by Or Laws 1995 c.618 §6 changed the level of discretion of the judge in mandamus actions. Those statutes eliminate the broad range of discretion previously available to the court in determining the prevailing party and the awarding of attorney fees or not. Unfortunately, nothing in ORS 34.210 referenced ORS 20.077 and ORS 20.075 to alert reader of the change.

SB 695 corrects that oversight.

**I would also like to thank Merisa James of the LC office in taking her time to suggest positive ways to improve the statute’s readability.**

**I would also like to thank Senator Sen. Jackie Dingfelder for her help in 2011, HB2131 which cleaned up the wording of ORS 197.303 and ORS 197.307 to make that statute more effective in regard to regulation of “Needed Housing”, presented by Bob Rindy of LCDC.**

**Senate Bill 695**

Sponsored by COMMITTEE ON JUDICIARY

**SUMMARY**    Modifies provisions relating to mandamus actions.  
                  Declares emergency, effective on passage.

**A BILL FOR AN ACT**

**SECTION 1.** ORS 34.105 is amended to read:

*State ex rel Kashmir Corp. v. Schmidt, (Kashmir)*  
291 Or 603, 633 P2d 791 (1981)

*State ex Rel. v. City of Pendleton, (Pendleton)*  
145 Or. App. 236, 929 P.2d 1044 (1996)

**SECTION 2.** ORS 34.210 is amended to read:

*State ex rel Aspen Group v. Washington County, ( Aspen Group (I)),*  
150 Or App 371, 378, 381, 946 P2d 347 (1997),  
rev den 327 Or 82 (1998)

*State ex rel Aspen Group v. Washington County, (Aspen Group (II))*  
166 Or App. 217, 996 P2d 1032 (2000)

“We reiterate that there can be no successful mandamus action under that statute unless the county has violated the statutory requirement”

ORS 20.077. Enacted by HB 2374, 2001 Or Laws 417 §1

ORS 20.075 Enacted by Or Laws 1995 c.618 §6.

ORS 20.075 (1)(a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or **illegal**.

## SENATE JUDICIARY /

Bill No. \_\_\_\_\_ Pages \_\_\_\_\_  
 Exhibit J Date 2/17/89  
 Presented by Stang

MEASURE: SB 288

OREGON HOUSE OF REPRESENTATIVES  
 STAFF MEASURE SUMMARY

Committee: Senate Judiciary  
 Hearing Dates: 2.17  
 Prepared by: Catherine Webber

Date Prepared: February 17, 1989

## ISSUE ADDRESSED:

Mandamus is a writ or command for a superior court to order a lower court, tribunal, corporation, board, officer or person to perform or not perform an act the law requires as a duty resulting from an office, trust or position.

Frequently, the judge or official is not the real party in interest and the action benefits the other party to the proceeding. Currently the "real party in interest" is not a party to the mandamus proceeding. This raises questions about representation of that person's interest and responsibility for damages.

Also, existing statutes are not clear about mandamus procedures involving service and its effects, the nature of the petition and intervention of the real party in interest.

## PROVISIONS OF MEASURE AS REPORTED OUT:

The bill modernizes mandamus proceedings by:

1. Defining which parties have an interest and their roles.
2. Makes the format to initiate the action similar to a complaint.
3. Specifies service requirement in the proceedings.
4. Allows the court to specify the format for the writ.
5. Provides specifically for participation from the "real party in interest"
6. Specifies how the writ of mandamus affects the other ongoing proceedings

The bill makes changes in the awards of damages, costs and disbursements. Currently, ORS 34.210 provides for an award of damages, costs and disbursements if the plaintiff prevails in the action.

The bill changes the law by allowing only damages (not costs and disbursements) to be awarded against a judge. It deletes the costs and disbursements provisions for awards against judges. Commonlaw limits "damages" in these proceedings to those sustain by reason of a wrongful return.

In Kashmir, a 1981 Oregon case, the Supreme Court held that the only damages that could be recovered in a mandamus proceedings were those where the common law cause of action, false return, was proven. False return is an ancient common law action which requires proof that in the response the defendant was either in fact false or was false in intent.

It also makes permissive the award of costs and disbursements against other losing parties. It specifies that the adverse party must be served to be responsible for these costs and disbursements. The award of damages would remain mandatory.

Effective date of the Act: The bill applies to all action pending as well as filed after the effective date; however, the costs and disbursements section only applies to actions filed after the effective date.

Note: This summary has not been adopted or officially endorsed by action of the committee.