IN THE SUPREME COURT OF THE STATE OF OREGON

LORI HORTON, as Guardian Ad Litem and Conservator of and for a minor,

Plaintiff-Respondent,

and

LORI HORTON, Individually; and STEVE HORTON,

Plaintiffs,

v.

OREGON HEALTH AND SCIENCE UNIVERSITY, a Public corporation;

Defendant,

and

MARVIN HARRISON, M.D.,

Defendant-Appellant,

and

PEDIATRIC SURGICAL ASSOCIATES, P.C., an Oregon professional corporation; and AUDREY DURRANT, M.D.,

Defendants.

Multnomah County Circuit Court Case No. 1108-11209

Supreme Court Case No. S061992

AMICUS CURIAE BRIEF ON THE MERITS

GOVERNOR JOHN KITZHABER, M.D.

Direct Appeal from the Limited Judgment and Money Award entered in the Multnomah County Circuit Court on January 6, 2014
Hon. Jerry B. Hodson, Judge

June 2014

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I. INTRODUCTION

When constitutional provisions are poised to collide, "[i]t is [the Supreme Court's] function to harmonize" them. *In re Fadeley*, 310 Or 548, 560, 802 P2d 31 (1990) (brackets supplied).

This is a medical malpractice action subject to the Oregon Tort Claims Act. Three sections of the state constitution have been brought to bear upon the damages limitations the Legislative Assembly has enacted for public body torts. The trial court deemed the legislature's judgment, which those limitations embody, incompatible with all three constitutional requirements. Consequently, it refused to apply the OTCA limits to the jury's damages award against one of the defendants, a publicly employed physician. "To do so," the trial court concluded, "would violate the remedies clause, the right to jury trial, and the reexamination clause of the Oregon Constitution." (Order on Post-Trial Motions at 2 (Register 12/19/13).)

Charged with "tak[ing] care that the Laws be faithfully executed," Or Const, Art V, § 10, *amicus curiae* Governor John Kitzhaber, M.D., respectfully submits that the trial court's ruling, which would hold unconstitutional every attempt to apply the OTCA's damages limits to the tort liability of an agent of a public body, was error. First, the trial court incorrectly concluded that Article VII (Amended), section 3, properly is relevant to – let alone can be violated by – an application of

the OTCA's damages limitations. Second, under any appropriate extension of this Court's Article I, section 17, jurisprudence, the OTCA's damages limitations do not violate the right to civil jury trial. (Governor Kitzhaber takes no position with respect to the trial court's application of Article I, section 10, to the facts of this case.)

Simply stated, if the trial court's ruling is to become the law of this state, Article I, section 17, would drain "the legislature's reservoir of lawmaking authority to adjust remedial processes and substantive remedies," *Clarke v. Oregon Health Sciences University*, 343 Or 581, 607, 175 P3d 418 (2007), to the point that the Remedy Clause would become largely irrelevant to any constitutional evaluation of the Legislative Assembly's attempt to exercise its acknowledged authority.

It is difficult to imagine the framers intending such a constitutional landscape: preserving, with one stroke of the pen, substantive legislative authority in Article I, section 10, only to take it away seven sections later, with another, through the right to trial by jury under Article I, section 17. And there is nothing about the Re-examination Clause, adopted some fifty years thereafter, that properly can be said to dilute the legislature's exceedingly broad power to enact substantive laws. Yet the trial court's ruling below would produce just such an outcome and, if

embraced, would set the stage for precisely the type of constitutional conflict and imbalance that courts strive to avoid.

Put differently, the Court is being challenged to endorse an expansive understanding of the right to jury trial, one that would impair legislative power in substantial and heretofore unknown respects. But, unlike the federal government, whose powers are those of enumeration, "the State legislature has jurisdiction of all subjects on which its legislation is not prohibited." Thomas M. Cooley, *A Treatise on Constitutional Limitations* 173 (1868). That is: "Plenary power in the Legislature, for all purposes of civil government, is the rule, and a prohibition to exercise a particular power is an exception." *Jory v. Martin*, 153 Or 278, 285, 56 P2d 1093 (1936).

The issues, as they have been joined, appear to have triggered this Court's responsibility to ensure that the provisions of the Oregon Constitution continue to work in harmony. As this Court has held on numerous occasions: "The Constitution must be construed as a whole, and effect must be given to all of its provisions, and, so far as these provisions relate to the same subject-matter, they must be read and construed together." *Cameron v. Stevens*, 121 Or 538, 542, 256 P 395 (1927). The analysis that follows is intended to assist the Court in carrying out its constitutional obligation. *See Klutschkowski v. PeaceHealth*, 354 Or 150, 196, 311 P3d 461 (2013) (Landau, J., concurring) (inviting "the sort of research

and advocacy that the adversarial process provides" with respect Remedy Clause and right to civil jury trial).

II. DISCUSSION

A. Interpretive Guideposts

This Court's statement, made over a century ago, remains significant today:

> "[I]t is important that we call attention to the general rules of construction under which Constitutions are universally interpreted. They may be summarized as follows:
>
> "(1) The object and purpose of the law, whether fundamental or otherwise, must be considered, and the Constitution must not be interpreted on narrow or technical principles, but liberally and on broad general lines, in order that it may accomplish the objects intended by it and carry out the principles of government.
>
> "(2) The whole Constitution must be construed together.
>
> "(3) When two constructions are possible, one of which raises a conflict or takes away the meaning of a section, sentence, phrase, or word, and the other does not, the latter construction must be adopted, or the interpretation which harmonizes the Constitution as a whole must prevail.
>
> "In this connection it must also be kept in mind that the Constitution of a state, unlike that of our national organic law, is one of limitation, and not a grant, of powers, and that any act adopted by the legislative department of the state, not prohibited by its fundamental laws, must be held valid; and this inhibition must expressly or impliedly be made to appear beyond a reasonable doubt."

State v. Cochran, 55 Or 157, 178-79, 105 P884 (1909) (original formatting modified).

As Justice Landau's concurring opinion in *Klutschkowski* lays bare, 354 Or at 178-96, there is tension in this Court's comparatively recent Remedy Clause and civil right to jury trial case law. *Also cf.* Hon. Thomas A. Balmer and Katherine Thomas, *In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation*, 76 Albany L Rev 2027, 2053, 2055 (2012/2013) (describing differing approaches to construing Article I, section 10, as "proven to be complicated" and unable to "provide satisfactory answers in all cases of constitutional interpretation"). That tension is not only intra-sectional, but cross-sectional as well. In such circumstances, resort to, or at least a meaningful look-back upon, first principles can have salutary effects.

B. The Re-examination Clause

The people adopted Article VII (Amended), section 3, by initiative in 1910. Among other things, that section preserves the right to trial by jury and prohibits courts from re-examining jury-found facts unless there is no evidence to support the verdict. The interpretive polestar for constitutional initiatives "is to discern the intent of the voters." *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993). Courts do that by examining the text, context, and, in most cases, the history of the provision. *Ecumenical Ministries of Oregon v. Oregon State Lottery Commission*, 318 Or 551, 559-60, 871 P2d 106 (1994). In other words, "the same way [the Court] interpret[s] a statute." *State v. Reinke*, 354 Or

98, 106, 309 P3d 1059 (brackets supplied), *adh'd to as modified on recons*, 354 Or 570 (2013).

1. Text

The operative term for present purposes is "re-examined." At the turn of the 20th century, "re-examination" as a matter of common usage meant "'a second examination.'" *See State v. Mendez*, 211 Or App 311, 319, 155 P3d 54 (quoting *Webster's New Int'l Dictionary* 1792 (unabridged ed 1909)), *rev den*, 343 Or 160 (2007). As a matter of more particularized, legal usage, the way the legislature had defined a different term, "new trial," in the then-applicable Code of Civil Procedure, also helps shed light on past understanding: "a re-examination of an issue of fact in the same court after judgment." Lord's Oregon Laws, title I, ch VIII, § 173 (1910). That definition, moreover, was not of recent origin. *See*, *e.g.*, Statutes of Oregon (Territory) 1855, ch II, title VII, § 35, p 114 ("A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury, court, or referees.").

So, even though all new trials under the Code were re-examinations but not every re-examination a new trial, using the root "re-examine" to define what a new trial was in the early 1900s is entirely consistent with the contemporaneous dictionary's definition: a second examination. That is, "'[t]o test by any appropriate method; to inspect carefully with a view to discover the real character

or state of[.]" *Mendez*, 211 Or App at 319 (quoting *Webster's* (1909); brackets in original). In light of the foregoing, when judges apply legislatively determined damages limitations, they are not doing the same thing as, or something analogous to, ordering a new trial. Nor are they, without stretching the meaning of the term beyond that which it is able to bear, "re-examining" a jury's verdict. There is no testing, no careful inspection, no weighing of the evidence at all; instead, there is only the judicial imposition of "a rule of law, a limit on 'recoverable' damages on the jury's verdict." *Tenold v. Weyerhaeuser Co.*, 127 Or App 511, 532, 873 P2d 413 (1994) (Edmonds, J., concurring in part; dissenting in part), *rev dismissed*, 321 Or 561 (1995).

2. Context

"Context includes[, among other things,] 'the preexisting common law and the statutory framework within which the law was enacted.'" *Reinke*, 354 Or at 107 (brackets supplied). Contextual considerations surrounding the adoption of Article VII (Amended), section 3, likewise suggest that the voters had in mind judges and new trials, not the legislature and its power to enact laws. For one thing, it had been long held and well understood that, "[u]nder the common law[,] the court could set aside a verdict and order a new trial upon its own motion." *Scott v. Ford*, 52 Or 288, 298, 97 P 99 (1908) (citations omitted).

For another, and as noted above, that common-law power had been codified in Oregon since territorial times, going so far as to set out the conditions upon which new trials could be granted. *See*, *e.g.*, Lord's Oregon Laws, title I, ch VIII, § 174(1) – (7) (1910) (including misconduct of the jury, newly discovered evidence, excessive damages, and insufficient evidence); Statutes of Oregon (Territory) 1855, ch II, title VII, § 36, p 114 (same). Thus, the text of the measure, in the context of the legal framework within which it was adopted, is strongly suggestive of a voter intent that was focused upon judicial, not legislative, authority.

3. History

The circumstances surrounding the adoption of the Re-examination Clause have been recounted elsewhere. *See*, *e.g.*, *State v. Burke*, 126 Or 651, 269 P 869 (quoting from Campaign Pamphlet: purpose was "'[t]o simplify procedure on appeals and remove the pretext for new trials in those cases in which substantial justice is done * * *'"), *reh'g den*, 126 Or 651 (1928), *app dismissed*, 279 US 811, 49 S Ct 262, 73 L Ed 971 (1929); *Mendez*, 211 Or App at 320 (history is "indicative of a general purpose of precluding judicial abrogation of 'just' jury verdicts"). That history is consistent with this Court's later statement about the intent of the voters in 1910:

> "they in effect declared their purpose to eliminate, as an incident of jury trial in this state, the common-law power of a trial court to re-

> examine the evidence and set aside a verdict because it was excessive or in any other respect opposed to the weight of the evidence."

Van Lom v. Schneiderman, 187 Or 89, 99, 210 P2d 461 (1949).

Taken together, the text, context, and history of Article VII (Amended), section 3, all point to the conclusion that "the primary – and, perhaps, exclusive – purpose" of the Re-examination Clause "was to preclude courts from reexamining and setting aside jury verdicts based on a judicial assessment of the weight and persuasiveness of the evidence." *Mendez*, 211 Or App at 321. Because that is not what courts do when they apply a legislatively determined cap on damages for purposes of entering judgment, the OTCA's damages limitations do not implicate the provision.[1]

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[1] If it really were the case that simply laying a jury's verdict against a law providing a damages limitation so as to determine whether award in the former exceeded limit of the latter is the kind of "re-examination" that the voters in 1910 intended to proscribe, then that would be a hollow right at best. A mere temporal shift in mechanics – moving the limit forward in the trial process – would avoid the provision altogether. The legislature could, for example, require judges to instruct juries that, for X-tort or Y-cause of action, any damages award may not exceed Z-dollars. Under that scenario, there would be no re-examination of anything, and, were a jury to disregard the instruction, an indisputably proper grant of new trial would follow. *See*, *e.g., Heise v. Pilot Rock Lumber Co.*, 222 Or 78, 99, 352 P2d 1072 (1960) ("It is the law that instructions, even if erroneous, when not followed constitute grounds for a new trial.").

Indeed, analogous constructs both exist and are not uncommon today, although not as a matter of legislative compulsion. *See*, *e.g.*, *Wiebe v. Seely*, 215 Or 331, 357, 335 P2d 379 (1959) ("it has been the accepted practice in Oregon for the court to instruct the jury that their verdict must not exceed the amount of damages alleged and prayed for in the complaint"); *Eisele v. Rood*, 275 Or 461,

C. The Remedy Clause and the Right to Civil Jury Trial

1. The Law Presently

"[T]he legislature is authorized under Article I, section 10, to vary or modify the nature, the form, or the amount of recovery for a common-law remedy." *Clarke*, 343 Or at 609. Consistently with that acknowledgment, the Court also has held that "[t]he OTCA is capable of constitutional application." *Jensen v. Whitlow*, 334 Or 412, 421, 51 P3d 599 (2002). There is, however, a limit to that authority. In the context of a damages limitation and this Court's case law to date, that limit is triggered, or not, by considering both a party's determined damages and the legislative limit of liability. *See Clarke*, 343 Or at 607-08 (more than $17 million in damages and $200,000 cap exceeded constitutional limit); *Howell v. Boyle*, 353 Or 359, 376, 298 P3d 1 (2013) ($507,500 in damages and $200,000 cap within constitutional limit).[2]

467, 551 P2d 441 (1976) ("As a general rule, a verdict for special damages without an allowance for general damages is improper."); UCJI No. 70.04 ("If you find that the plaintiff is entitled to recover economic damages, you must award some noneconomic damages."). Constitutions normally are not amended to adjust matters of timing.

[2] Another nod to the plenary lawmaking authority of the first branch is the Privileges and Immunities Clause of Article I, section 20. That provision, by its plain terms, presumes the legislature's power to grant privileges and immunities, restricting only the ability to discriminate when so doing. *See State v. Savastano*, 354 Or 64, 73, 309 P3d 1083 (2013) (clause "permits the legislature to draw classifications among citizens in *granting* privileges and immunities" (emphasis supplied)); *Rogers v. Saylor*, 306 Or 267, 278, 760 P2d 232 (1988)

In other words, in the context of substituted remedies, the question of adequacy or substantiality for purposes Article I, section 10, is answered with "an inquiry more akin to balancing." Balmer, 76 Albany L Rev at 2054. In contrast to that nuanced, seemingly workable approach, application of Article I, section 17, has been categorical. *See id.* at 2058 (generally describing categorical approach to constitutional application "as a series of binary, either/or choices"). That creates the potential for conflict when, with respect to the same subject matter, one constitutional provision endorses a range of legislative actions and the other does not.

As an initial matter, it is not entirely clear to what actions or claims the right to civil jury trial pertains. *Compare Lakin v. Senco Products, Inc.*, 329 Or 62, 82, 987 P2d 463 ("civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857 and in cases of like nature"),

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(describing OTCA as statute that "puts a cap on compensatory damages and grants *immunity* for damages in excess of that limitation" (emphasis added).). This Court has held that a legislatively drawn distinction between those subjected to governmental torts and those subjected to private tortious conduct does not constitute an impermissible privilege under Article I, section 20. *Hale v. Port of Portland*, 308 Or 508, 524-26, 783 P2d 506 (1989), *overruled in part on other grounds by Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001). Nor would a legislative grant of partial damages immunity to officers, employees, and agents of a public body.

clarified, 329 Or at 369 (1999) *and Hughes v. Peacehealth*, 344 Or 142, 156, 178 P3d 225 (2008) (perhaps only actions that incorporated "pre-existing substantive common law right to compensation" or had "clear common-law tradition with respect to the necessary elements" in 1857) *with M.K.F v. Miramontes*, 352 Or 401, 425, 287 P3d 1045 (2012) ("claims or requests that are properly characterized as 'civil' or 'at law") *and State v. N.R.L.*, 354 Or 222, 225-26, 311 P3d 510 (2013) ("all civil claims or requests for relief" unless tried to the court at common law; "fact that a particular claim or request was not judicially recognized at the time the constitution was adopted or * * * was created by the legislature thereafter does not necessarily mean that * * * Article I, section 17, does not apply * * *").

However, whenever the right to civil jury does attach, the Court has twice held that the application of a pure damages limitation – $500,000 for noneconomic damages, ORS 31.710(1) (*formerly* ORS 18.560(1) (2001) – violates that constitutional guarantee, at least for actions for which the "right to jury trial was customary in 1857." *See Klutschkowski*, 354 Or at177 (internal quotations omitted; medical malpractice); *Lakin*, 329 Or at 81-82 (products liability and negligence). Yet the Court also has held, repeatedly, that "Article I, section 17, is not a source of law that creates or retains a substantive claim or a theory of recovery in favor of any party." *See*, *e.g., Jensen*, 334 Or at 422; *Clarke*, 343 Or at

600 n 9 (citing *Jensen* and *Lakin*); *Hughes*, 344 Or at 144 (quoting *Jensen*); *Klutschkowki*, 354 Or at 177 (also quoting *Jensen*).

Moreover, add to that this Court's holding in *Jensen* that, at least as far as Article I, section 17, is concerned, the legislature remains completely free to abolish a cause of action – common law or otherwise – without implicating the right to civil jury trial. 334 Or at 422 ("[I]n this case the legislature has eliminated plaintiff's right to bring her claim against the individual employees[.] * * * "Plaintiff has no 'civil action" against the individual defendants. It follows that there is no claim to which a right to jury trial can attach."); *see also Sealy v. Hicks*, 309 Or 387, 396, 788 P2d 435 (Article I, section 17, "is not an independent guarantee of the existence of a cognizable claim"), *cert den sub nom*, 489 US 819 (1990), *overruled in part on other grounds by Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 12, 23 P3d 333 (2001).

2. Future Considerations

The foregoing would appear to frame for the Court the question whether, as *Lakin* and *Klutschkowski* suggest, Article I, section 17, really does have a substantive component, or, as *Jensen*, *Clarke*, and *Hughes* have stated, that provision properly is understood to embrace only constitutional procedural rights. No doubt the parties and other *amici* will be engaging the Court in those regards.

The Governor's purpose here, however, is not to seek to undermine past precedent; the Court will determine for itself the continuing vitality of its prior decisions.

Instead, and as set out in his application, the Governor's interests are three-fold: (1) upholding the exercise of the Legislative Assembly's law-making authority, which he is charged with executing faithfully; (2) preserving public resources for the benefit of all Oregonians; and (3) ensuring that those who are injured by the torts of public bodies and their agents receive fair compensation. And, as noted above, the law – *as it exists today* – and even with its patent tensions, is consistent with those interests.

First, under Article I, section 10:

- there is a reservoir of lawmaking authority to adjust remedial processes and substantive remedies, but the provision does place some limit on the legislature's otherwise plenary law-making authority;

- consequently, the OTCA damages limitations are capable of constitutional application;

- when the Court in *Clarke* held that the OTCA's damages limitations could not be applied in a constitutional manner to particularly egregious facts, it did so based on Article I, section 10, not Article I, section 17 (even though the latter was available; *see* 343 at 587-88 & nn 3, 4 (discussing procedural history);

- the legislature responded to the suggested request for reform in the concurring opinion in *Clarke* during the very next session and with substantial modifications to enhance tort victim recovery (343 Or at 611-12 (Balmer, J., concurring); Or Laws 2009, ch 67); and

- nothing about the Court's opinions in *Clarke* suggested that any attempt to modernize the OTCA's damages limitations would be an empty

> legislative exercise that would be overridden in every case in which the augmented limit otherwise would apply because of substantive elements implied within the right to jury trial in civil cases.

Second, under Article I, section 17:

- most of this Court's decisions have emphasized that the provision does not create or retain any substantive claim or theory of recovery;

- one statute, a pure limitation on the right to recover noneconomic damages, has been held incapable of constitutional application (when a jury's verdict exceeds the cap) for cases to which the right of trial by jury applied in 1857;

- the latest case to do so, *Klutschkowski*, neither analyzed the relationship between sections 10 and 17 of Article I nor purported to disturb any of this Court's Remedy Clause case law; and

- Article I, section 17, has never been applied to the OTCA.

The question for the Court in this case (assuming that it decides not to revisit any of its earlier decisions) will be whether to *extend* existing Article I, section 17, to the OTCA's damages limitations. Were it to do so, then there would seem little or no choice but to state explicitly that which *Lakin* and *Klutschkowski* already, at a minimum, suggested: the right to jury trial in civil actions includes, in addition to its patent procedural protections, an implied substantive component as well. But, as noted above, the approach to applying Article I, section 17, has been categorical and not one of balancing, to use Chief Justice Balmer's terms. That is, the jury trial switch is either "on" or "off"; there is no dimmer.

And that is where constitutional conflict will result if the holdings in those cases are extended to the OTCA. Were the Court to apply a substantive component of the right to jury trial in the same categorical manner as Article I, section 17, has been consistently construed – that is, without any limiting principles – then the outcome of that conflict has been predetermined: Article I, section 10, will become virtually meaningless in the constitutional calculus. *See Klutschkowski*, 354 Or at 177 ("Having reached that conclusion, we need not address plaintiff's arguments under Article I, section 10, or Article VII (Amended), section 3."). In other words, asymmetry rather than harmony.

Yet, if Article I, section 10, is substantive and uses a balancing approach as part of its proper application, then so should any substantive component of Article I, section 17. With respect to ORS 31.710(1) – *Lakin* and *Klutschkowski* – there was then and remains today nothing to balance. The statute simply takes something away from persons entitled to noneconomic damages – any amount awarded that exceeds $500,000 – and gives them nothing in return. The OTCA, however, gives persons injured by public body torts something considerable in exchange for the damages limitation, something that they do not already have: a partial waiver of sovereign immunity against the public body and the potential for a significant damages recovery (one that almost always will outstrip unlimited recoveries against public agents alone).

Thus, if the Court elects to pursue this line of inquiry, then, in order to ensure consonance (that is, to make certain that the Remedy Clause remains constitutionally significant), the substantive component of Article I, section 17, should not be held to require that legislative consideration given in return for a jury trial limitation be either adequate or substantial (the Article I, section 10, standard). Instead, legislative action should be held to encroach upon the substantive protections of Article I, section 17, only when the Court can say, "expressly" and "beyond a reasonable doubt," *State v. Cochran*, 55 Or at 179, that the legislatively offered consideration and the corresponding impact upon the right to jury trial, taken together, would produce a significant impairment of the jury's proper function.

Assume, for example, that the legislature took a particular species of common law tort – intentional infliction of emotional distress – and set a low total damages limit for all such claims – $50,000. In return for that limitation, however, the state allowed judges to award successful IIED plaintiffs a penalty against the defendant to be set by the court (advancing a legislative policy favoring judges over jurors as modulators of overall recovery). That law would, or should, violate plaintiffs' substantive rights under Article I, section 17. And that is because, in many if not most such cases, economic and noneconomic damages will exceed (often greatly) that limit. Thus, it would be the court, not the jury, having the

greatest impact on the ultimate award. The jury's efforts toward deciding damages in those cases would become, in large measure, meaningless. That is, its proper function will have been significantly impaired.

Under that construction of Article I, section 17, substantiality/adequacy properly would remain the domain of Article I, section 10, and, thus, the latter provision would retain its constitutional significance the same as it exists today. And so would continue without diminution the already acknowledged and important procedural protections that Article I, section 17, provides. In that way, each provision would be construed "without distorting the meaning of" the other. *Jory* 153 Or at 287.[3]

Applying that test, or one like it, to the OTCA would not be difficult. This Court already has recognized the important public purposes that underlie the legislature's decisions both to limit the state's waiver of sovereign immunity in tort and to restrict recovery from public officers, employees, and agents:

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[3] To be sure, the substantive protection, if any, of Article I, section 17, would be much less than that of Article I, section 10. But that is as it should be – and was enough to have provided the basis for twice holding the $500,000 noneconomic damages limit unconstitutional in its application. (And that always would be the case if the legislature were to take something away without giving anything back.) The right to jury properly emphasizes procedural rights. And, because both provisions are triggered by rights that were extant in 1857 – under the law as it stands today – it would not be the case that an enactment limiting damages could be subject to review under only Article I, section 17, but not Article I, section 10.

> "To be clear, we respect the legislature's goal in amending the OTCA in 1991 – the legislature was entitled to conclude that the goal of encouraging public employment of qualified health care professionals by protecting them from the demands of litigation and the threat of personal liability is an important one."

Clarke 343 Or at 609-10 (footnote omitted); *see also Griffin v. Tri-County Metropolitan Transportation District of Oregon*, 318 Or 500, 513, 870 P2d 808 (1994) ("the legislature [in 1967] included liability limits within the OTCA to ensure fiscal stability for public bodies and to facilitate the purchase of liability insurance by those bodies * * *" (brackets supplied)).

To be clear, the policy choices that underlie the OTCA's damages limits are critically important to the state, governments across Oregon, and the people those entities serve. The public funds at stake are substantial and rise to a level that implicates core governmental functions and the ability to continue to provide important services. This is not about accounting entries and balance sheets.

For example, and taking just one administrative agency – the Department of Human Services – and one species of claim – child abuse – DHS paid a little over $3.5 million to settle such claims from 2000 through 2007. After *Clarke* and the legislature's augmentation of the damages limitations in 2009, looking at the period from 2008 to 2012, that figure increased nearly four-fold to $13.4 million. Under a constitutional regime in which the legislature effectively is unable to enact a partial waiver of sovereign immunity but only a total one – unless it also decides

to foist damages awards upon public servants individually – the impacts upon the ability of government to govern will be palpable.

The OTCA's damages limits, either as they were initially in 1967 or are now today, are not such that would support an argument, let alone a conclusion, that their enactment impairs the proper function of the jury. The Court should so hold and proceed to determine whether, as applied to the facts of this case, the OTCA's damages limits provide plaintiff with a substantial or adequate substitute remedy under Article I, section 10.

III. CONCLUSION

It may well be that the tension within and between this Court's prior decisions is too great. Those cases may not be able to withstand the additional layering that the foregoing, more nuanced understanding of the way in which Article I, sections 10 and 17, could be held to work together would involve. Heavier tool work may be required. Yet, if Article I, section 17, either does or is deemed at least in part to be substantive in nature, and if that substantive element properly reaches the OTCA and its damages limitations, then there seems little doubt but that harmonization will be necessary. In that regard, the OTCA damages

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limitations have never been held facially unconstitutional; they should not be held functionally so now.

Respectfully submitted this 10th day of June 2014.

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CERTIFCATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

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 5,074 words.

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)(g).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 10, 2014, I caused the foregoing *AMICUS CURIAE* BRIEF ON THE MERITS, GOVERNOR JOHN KITZHABER, M.D., to be electronically filed with the Supreme Court Administrator through the eFiling system and to be served on the parties or attorneys for the parties identified herein, in the manner set out below:

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