IN THE SUPREME COURT OF THE STATE OF OREGON

KEVIN RAINS and MITZI RAINS,
Plaintiffs-Respondents,
Petitioners on Review,

v.

STAYTON BUILDERS MART, INC.; JOHN DOE LUMBER SUPPLIER; JOHN DOE LUMBER MILL; and FIVE STAR CONSTRUCTION, INC.,
Defendants.

STAYTON BUILDERS MART, INC.,
Third-Party Plaintiff-Respondent,

v.

RSG FOREST PRODUCTS, INC., *et al*.,
Third-Party Defendants,

and

WEYERHAEUSER COMPANY,
Third-Party Defendant-Appellant, Respondent on Review.

WEYERHAEUSER COMPANY,
Fourth-Party Plaintiff,

v.

RODRIGUEZ & RAINS CONSTRUCTION, an Oregon corporation,
Fourth-Party Defendant.

WITHERS LUMBER COMPANY,
Fourth-Party Plaintiff,

Marion County Circuit Court Case No. 06C21040

Court of Appeals Case No. A145916

Supreme Court Case No. S062939

July 2015

v.

SELLWOOD LUMBER CO., INC., an Oregon corporation; and WEYERHAEUSER COMPANY,
Fourth-Party Defendants.

WESTERN INTERNATIONAL FOREST PRODUCTS, INC.,
Fourth-Party Plaintiff,

v.

BENITO RODRIGUEZ, KEVIN RAINS, and RODRIGUEZ & RAINS CONSTRUCTION,
Fourth-Party Defendants.

SELLWOOD LUMBER CO., INC., an Oregon corporation,
Fifth-Party Plaintiff,

v.

SWANSON BROS. LUMBER CO., INC., an Oregon corporation,
Fifth-Party Defendant.

AMICI CURIAE BRIEF OF ASSOCIATED OREGON INDUSTRIES AND OREGON BUSINESS ASSOCIATION IN SUPPORT OF WEYERHAEUSER COMPANY'S BRIEF ON THE MERITS

On Appeal from the Judgments and Money Awards of the Circuit Court for Marion County, the Honorable Dennis J. Graves, Judge
Court of Appeals Opinion Filed: August 13, 2014
Reconsideration Denied: December 10, 2014
Author of Opinion: Ortega, P.J. (Sercombe, Hadlock, JJ., concurring)

Keith M. Garza, OSB No. 940773
keithgarza@comcast.net
Law Office of Keith M. Garza
P.O. Box 68106
Oak Grove, Oregon 97268
Telephone: 503-344-4766

Attorney for *Amici Curiae* Associated Oregon Industries and Oregon Business Association

Michael T. Garone, OSB No. 80234
mgarone@schwabe.com
W. Michael Gillette, OSB No. 660458
wmgillette@schwabwe.com
Sara Kobak, OSB No. 023495
skobak@schwabe.com
Jordan R. Silk, OSB No. 105031
jsilk@schwabe.com
Schwabe, Williamson & Wyatt, P.C.
1211 SW Fifth Avenue, Suite 1900
Portland, Oregon 97204
Telephone: 503-222-9981

Attorneys for Respondent on Review Weyerhaeuser Company

Kathryn H. Clarke, OSB No. 791890
kathrynhclarke@mac.com
P.O. Box 11960
Portland, Oregon 97211
Telephone: 503-460-2870

Maureen Leonard, OSB No. 823165
mleonard@pacifier.com
P.O. Box 42210
Portland, Oregon 97205
Telephone: 503-224-0212

Brian R. Whitehead, OSB No. 833452
attynotices@attywhitehead.com
Law Offices of Brian Whitehead, P.C.
1610 12th Street SE
Salem, Oregon 97302
Telephone: 503-364-8505

J. Randolph Pickett, OSB No. 721974
randy@pickettdummigan.com
Pickett Dummigan LLP
621 SW Morrison, Suite 900
Portland, Oregon 97205
Telephone: 503-226-3638

Attorneys for Plaintiffs-Respondents, Respondents on Review Kevin and Mitzi Rains

Thomas W. Brown, OSB No. 801779
tbrown@cosgravelaw.com
Nicholas E. Wheeler, OSB No. 044491
nwheeler@cosgravelaw.com
Julie A. Smith, OSB No. 983450
jsmith@cosgravelaw.com
Cosgrave Vergeer & Kester LLP
888 SW Fifth Avenue, Suite 500
Portland, Oregon 97204
Telephone: 503-323-9000

Attorneys for Third-Party Plaintiff-Respondent, Stayton Builders Mart, Inc.

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I. INTRODUCTION

Plaintiffs Kevin and Mitzi Rains' petition for review challenges the following holding of the Court of Appeals:

> "[W]e conclude that in 1857, there was no common-law tradition with respect to a strict products liability claim that could provide the basis for a conclusion that the legislature is prohibited by Article I, section 17 ["In all civil cases the right of Trial by Jury shall remain inviolate."], from altering the measure of damages available for such an action."
>
> "* * * * *
>
> "* * * Accordingly, the trial court erred in concluding ORS 31.710(1) [limiting non-economic damages for bodily injury to $500,000] did not apply to Kevin's strict products liability claim, and we reverse and remand plaintiff's limited judgment for correction of that error."

Rains v. Stayton Builders Mart, Inc., 264 Or App 636, 663, 665, 336 P3d 483 (2014) (bracketed text added). The disposition of that conclusion on review (it should be affirmed) is, by itself, important and will affect the many members of Associated Oregon Industries (AOI) and the Oregon Business Association (OBA) engaged in the manufacturing or distribution of products. But that is not why *amici* have sought leave to appear.

Instead, they have done so because of the sweeping rule of law that plaintiffs and their *amicus*, the Oregon Trial Lawyers Association (OTLA), ask this Court to

announce regarding the right to jury provisions and the Re-examination Clause of the Oregon Constitution. That rule of law is based on the following syllogism:

> The right to trial by jury applies to any "civil action at law for money damages," whether or not jury tried or an action of like nature at the time of the framing, and products liability claims are civil actions.
>
> The right to jury trial is violated when the legislature enacts a limitation on damages, and ORS 31.710(1) is a limitation on damages.
>
> Therefore, ORS 31.710(1) cannot be applied to a jury's verdict on a statutory claims for strict products liability.

(*See* Plaintiffs' Merits Brief at 2; OTLA's Merits Brief at 2-8.)

The implications of such a holding, were this Court to accept plaintiffs' and OTLA's invitation, cannot be overstated. Not only would it wreak havoc on long-standing administrative (*e.g.*, workers' compensation) and statutory systems (*e.g.*, wrongful death, governmental tort claims), but also hopelessly hamstring the Legislative Assembly's ability to enact new causes of action. All of that based on constitutional provisions that historically have been understood to be procedural in nature. And, in a case in which the plaintiffs have not even asserted that the application of a $500,000 limitation on noneconomic damages provides an inadequate remedy under Article I, section 10, of the Oregon Constitution.

Oregon's continued economic success, to which *amici* and their members are committed, depends in no small measure on constitutional provisions that are both meaningful and properly construed, a tort system that is just, and a legislative

branch of government equipped to meet the challenges of an increasingly complex and rapidly changing society. The rule of law that plaintiffs and OTLA seek to advance would undermine each of those important elements, all to the collective detriment of Oregon businesses, government, and the state as a whole. More to the point, however, and as demonstrated below, the rule of law they propose is simply incorrect.

II. DISCUSSION

A. Preliminary Considerations

There are several.

First, 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). Stated differently, "[p]lenary 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); *see also Calder v. Bull*, 3 US 386, 387, 3 Dall 386, 1 L Ed 648 (1798) (Chase, J.: "all the powers that remain in the State Governments are indefinite * * *" and "the peculiar and exclusive province, and duty of the State Legislatures * * *").

Consequently, this Court should act with circumspection when asked to hold that a wide swath of heretofore acknowledged legislative authority is now constitutionally proscribed – particularly when the acknowledgement precedes even this state's territorial existence. *See Knighton v. Burns*, reprinted in Appendix 10 Or 548, 550 (1847) (Supreme Court of the Provisional Government of Oregon; noting, based on U.S. Supreme Court precedent that, while states may not impair the obligation of contracts, "the remedy to enforce the obligation of a contract might be modified as the wisdom the Legislature should direct * * *.").

Second, and as this Court has noted,

> "[t]he whole Constitution must be construed together. * * * 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."

State v. Cochran, 55 Or 157, 178-79, 105 P 884 (1909); *see also In re Fadely*, 310 Or 548, 560, 802 P2d 31 (1990) ("It is our function to harmonize" "two potentially conflicting provisions in the constitution").

Here, the rule that plaintiffs and OTLA propose, were it to become law, would render superfluous the substantive protection this Court has held the Remedy Clause in Article I, section 10, of the Oregon Constitution, provides. *See, e.g., Clarke v. Oregon Health Sciences University*, 343 Or 581, 607, 175 P3d 418 (2007) (acknowledging "the legislature's reservoir of lawmaking authority to

adjust remedial processes and substantive remedies" under Remedy Clause). So long as the action is a civil one at law – old or new – the constitutional right to a jury trial in Article I, section 17, would bar legislative modification of the damages recoverable. To know that such would be the case, the Court need look no further than plaintiffs' advocacy, which sees no reason to invoke the Remedy Clause at all. That is conflict, not harmony, between two original constitutional provisions separated by only six paragraphs.

Third, and finally, this Court has long held that any doubt regarding the constitutionality of a statute should be resolved in favor "of the mode" the legislature has adopted:

> "Before a statute is declared void, in whole or in part, its repugnancy to the Constitution ought to be clear and palpable and free from all doubt. Every intendment must be given in favor of its constitutionality. Able and learned judges have, with great unanimity, laid down and adhered to a rigid rule on this subject."

Cline v. Greenwood, 10 Or 230, 241 (1882); *see also, e.g., Kadderly v. City of Portland*, 44 Or 118, 144, 74 P 710 (1903) ("This rule has been often announced in the strongest language, varied only to give force of expression.")

Thus, in light of the foregoing and when considering the arguments of the parties and the briefs of all the *amici* in this case, this Court's precedents counsel that it should conduct its inquiry against the backdrop of plenary legislative authority absent constitutional proscription, with due care toward ensuring that its

decision leaves intact and vital both the substantive protection of the Remedy Clause and the procedural protection that the right to jury trial provides, and remembering that it is only the clearest of cases that an act of the legislature should be deemed unconstitutional. With those guideposts in mind, *amici* proceed to address the merits of plaintiffs' and OTLA's position.

B. Article VII (Amended), Section 3 – The Re-examination Clause

Relying primarily upon an *en banc* decision of the Court of Appeals that garnered four dissenting votes, plaintiffs argue that the Re-examination Clause of Article VII (Amended), section 3, removes from the ambit of legislative authority the power to enact damages limitations and makes "'jurors the exclusive judges of the facts regarding the extent of a plaintiff's damages.'" *Tenold v. Weyerhaeuser Co.*, 127 Or App 511, 524, 873 P2d 413 (1994), *rev dismissed*, 321 Or 561 (1995). Suffice it to say, the dissent got it right:

> "'Facts are actualities.' * * * A determination of an ultimate fact is a determination of what took place based on the underlying evidentiary facts and the inferences drawn therefrom. * * * In contrast, the imposition of a rule of law by a court arises from a different source; from the mandate of a constitutional provision, a statute or the case law. Although a ruling of law by the court often 'flows from the ultimate facts' as found by the trier of fact, it is uniquely within the province of the court and it does not involve the fact finding process."

Id. at 531 (Edmonds, J., concurring in part and dissenting in part; citations omitted).

The people adopted Article VII (Amended), section 3, by initiative in 1910. Among other things, that section provides: "In actions at law, * * * no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." When interpreting constitutional initiatives, the goal "is to discern the intent of the voters." *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993). That requires 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). Because plaintiffs have not attempted to provide analysis that conforms to that methodology, *amici* do so below (and borrow in large measure from the brief that counsel for *amici* earlier filed on behalf of then-Governor John Kitzhaber, M.D., in *Horton v. OHSU et al.*, Oregon Supreme Court Case No. S061992 (argued November 6, 2014)).

1. Text

The operative term 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). Thus, 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*, 127 Or App at 532 (Edmonds, J., concurring in part and dissenting in part).

2. Context

"Context includes[, among other things,] 'the preexisting common law and the statutory framework within which the law was enacted.'" *State v. Reinke*, 354 Or 98, 107, 309 P3d 1059 (brackets supplied), *adh'd to as modified on recons*, 354 Or 570 (2013). 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.

Finally, *amici* cannot leave unaddressed plaintiff's argument, made tellingly in a footnote, that this Court has held that "'the ascertainment of' just compensation is a judicial inquiry; the legislature has no authority to 'fix compensation or prescribe the rules for its computation.'" (Plaintiffs' Merits Brief at n 6 (quoting from *Chapman v. City of Hood River*, 100 Or 43, 196 P 467 (1921).) The context from which those fractured quotations were taken, however, is revealing:

> "The plaintiff alleges error because of certain charter provisions **relating to compensation for property taken under the right of eminent domain**. The Legislature cannot fix compensation or prescribe the rules for its computation. Just compensation as damages **for property taken under the power of eminent domain** presents a judicial, and not a legislative, question."

100 Or at 50 (emphasis added); *see also id*. (quoting U.S. Supreme Court authority: "'The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.'").

Like the Fifth Amendment, Article I, section 18, of the Oregon Constitution, mandates that "[p]rivate property shall not be taken for public use * * * without just compensation." That is why both this Court and the United States Supreme Court have held that it is the province of the judicial branch to construe the meaning of the constitutional term "just compensation." No organic comparator exists for civil action damages. Instead, there is only Article I, section 10: "every

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

And, as this Court has ruled, repeatedly, both the legislature and the courts share the authority to act when it comes to the Remedy Clause:

> "As this court explained in *Clarke*, Article I, section 10, does not deprive the legislature of the authority to 'vary and modify both the form *and the measure of recovery* for an injury,' so long as the legislature leaves the plaintiff with a substantial remedy."

Howell v. Boyle, 353 Or 359, 375, 298 P3d 1 (2013) (citation omitted; emphasis in original). Plaintiffs' attempt to rely upon *Chapman*, therefore, is well off the mark, and everything about the context of the Re-examination Clause points decidedly in the direction of a prohibition aimed at the courts of this state and not the Legislative Assembly.

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 noneconomic damages limitation of ORS 31.710(1) does not implicate the provision.[1]

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[1] If 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.").

C. Article VII (Amended), Section 3 – The Right to Trial by Jury

Whereas Article I, section 17, provides simply that "[i]n all civil cases the right of Trial by Jury shall remain inviolate," Article VII (Amended), section 3, provides that "[i]n actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved." The differing wording and timing of the adoption of those provisions – one original, the other following some five decades later – have not been lost on the Court. For example, in a case construing the 1910 amendment, the Court noted that "[t]he language of the Constitution in relation to the right of trial by jury was a part of our original charter, and it, of course, could gain no additional force by re-enactment." *Hoag v. Washington-Oregon Corp.*, 75 Or 588, 613, 147 P 756 (1915). However, the Court continued, "[t]hat portion of the amendment relating to retrials of cases by this court is new." *Id.*

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, 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.

Also new were the words "actions at law" and a monetary threshold. (Initially, the value in controversy was set at $20, which was increased to $200 in 1974, and, again, to its present $750 in 1996. *See Carey v. Lincoln Loan Co.*, 342 Or 530, 539, 157 P3d 775 (2007) (tracing history).) And, as this Court noted in *Molodyh v. Truck Insurance Exchange*, 304 Or 290, 295, 744 P2d 992 (1987), those words have meaning:

> "Defendant is correct in stating that Article I, section 17, does not give plaintiff a right to a jury trial in *all* civil matters. That right is impliedly limited, for example, by Article VII (Amended), section 3, which states in part that '[i]n actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved.'"

(Emphasis in original.)

Those considerations, while not unimportant, do not appear to be relevant to plaintiffs' claims in this case. That is because, as Chief Justice Carson acknowledged in *Molodyh*, both provisions guarantee jury trial "only in those classes of cases in which the right was customary at the time the constitution was adopted or in cases of like nature." *Id.* (citing cases from 1969, 1927, and 1879); *see also, e.g., Evergreen West Business Center, LLC v. Emmert*, 354 Or 790, 802 n 2, 323 P3d 250 (2014) (noting that Court has been "[r]eading those provisions together"); *M.K.F. v. Miramontes*, 352 Or 401, 426, 287 P3d 1045 (2012) (construing those provisions together and perhaps altering scope of jury trial right).

Thus, at least as developed by this Court's case law to date, there does not appear to be any basis to contemplate whether plaintiffs' argument should fail under Article I, section 17, yet succeed under the jury trial clause of Article VII (Amended), section 3, or vice versa. The rule of law they propose will rise or fall depending on whether this Court concludes that the constitutional right to trial by jury is procedural, substantive, or both.

One thing, however, is clear. And that is the relevance of OTLA's suggestion, citing *Hoag*, 75 Or at 612, that the jury trial provision of Article VII (Amended), section 3, "is an injunction primarily upon the Legislature and courts of first instance." (OTLA's Merits Brief at 20.) Simply put, there is none. First, as the Court made clear in the very next sentence that followed: "The Legislature cannot pass a law abolishing jury trials in law actions, nor can a law court arbitrarily refuse to allow a jury to be called in such cases * * *." The same thing, of course, can be said about the Re-examination Clause – the legislature cannot enact laws authorizing trial courts to weigh jury-found facts; nor can trial judges do so on their own – but that does not mean that the focus of any part the initiative was on the legislative branch, let alone that the voters intended those provisions to prohibit the legislature, for the first time, from adjusting common-law remedies. As demonstrated above, they did not.

Second, and perhaps more importantly, the majority in *Hoag* went even further, with text that OTLA has chosen not to provide the Court:

> "**it does not follow that because the court has made a mistaken ruling on a question of law in admitting evidence or instructing a jury, there has been no jury trial**. The verdict is not void, nor is the judgment rendered upon it void. They are simply erroneous."

75 Or at 612 (emphasis added). Those statements do nothing less than synthesize the position of Weyerhaeuser, AOI, and OBA in this case, and OHSU's position in *Horton*: the right to a trial by jury is procedural, not substantive, and is neither violated nor properly even implicated by the application post-verdict of a constitutionally adequate damages limitation. *Amici* proceed to the remaining relevant constitutional provision.

D. Article I, Section 17

At this point in the evolution of the construction of the Remedy Clause and the original right to trial by jury provision in Article I, as well as the interplay between those two constitutional provisions, there frankly is not much of independent value that AOI and OBA can add to the briefing that is and will be filed in this case and has been filed and is being considered by the Court in *Horton*. It does bear noting, however, that – as is suggested by Justice Landau's concurring opinion in *Klutschkowski v. PeaceHealth*, 354 Or 150, 196, 311 P3d 461 (2013) ("questions such as the ones that I have posed are difficult and complex") – the Court appears to be at something of a constitutional crossroads.

On the one hand, there is the Remedy Clause and the substantive protections this Court has held that clause provides to the citizens of this state, protections that leave the legislature with ample room to maneuver. Its absence from this case is palpable. On the other hand is the right to trial by jury that, beginning with *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463, *clarified*, 329 Or 369 (1999), and ending, for now, with *Klutschkowski*, has enjoyed nothing short of a 15-year renaissance. While the Remedy Clause allows dialogue between Oregonians and their lawmakers within a constitutionally circumscribed boundary, the right to jury trial is like a chambered round – pull the trigger and, absent a misfire, there is a gunshot. And, if the right to jury trial carries with it substantive implications, then that is a truly dangerous weapon.

Amici are committed to a citizenry and business community actively engaged with their legislators. AOI has seven Policy Councils, each chaired by an AOI member and staffed by an AOI policy manager, charged with developing the association's public policy recommendations and keeping members up-to-date on legislative, regulatory and other business issues. http://asoft4200.accrisoft.com/aoi/index.php?submenu=_pub_pol&src=gendocs&ref=PublicPolicy&category=Main. OBA has five Policy Committees devoted to issues such as business and finance, education, transportation, and health, as well as designated legislative priorities. http://www.oba-online.org/public-

policy/policy-committees/. They believe, strongly, that the legislative process is effective and salutary, must be respected, and most often produces the best public policy.

The statute at issue here, ORS 31.710(1), is but one example of that process at work. It was enacted as part of Senate Bill 323 (1987), which, together with the Beach and Bottle bills, and the Workers' Compensation Law, is counted by the Secretary of State as one of Oregon's Landmark Legislative Bills. http://arcweb.sos.state.or.us/pages/records/legislative/recordsguides/legislative_guide/History.html. Consideration of SB 323 was preceded by the creation of a Joint Interim Task Force on Liability Insurance, comprised of lawmakers and citizens who studied the issues for more than 10 months before recommending a broad package of reforms intended to mitigate liability insurance rate hikes and ensure that affordable insurance is available for Oregon professionals and businesses. *See, e.g.*, Tom Detzel, *Task force tackles liability 'crisis'*, Eugene Register Guard 1C-2C (Nov 30, 1986).

The legislature, after considerable debate, ultimately adopted many – but not all – of the Task Force's recommendations. *See* Kathy T. Graham, *1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?*, 24 Willamette L Rev 283, 28485(1988) (discussing legislative history). With respect to the noneconomic damages limitation,

> "[a] common perception among those who presented testimony in support of the cap is that the tort system is out of control because tort damage recoveries are too high and too numerous. A further belief is that the insurance industry cannot continue to bear the high costs of the traditional tort system without boosting insurance premiums, which many believe are already too high. * * *"
>
> "* * * * *
>
> "Others who argued in favor of the cap stressed a need to control insurance costs by controlling damage awards. Arguments made in support of the cap relate to the effect the cap will have on all settlements, not just those that would exceed the cap amount."

Id. at 289-90 (footnotes omitted; also discussing empirical analysis of cap effects).

In other words, ORS 31.710(1) was not some hastily considered measure drawn up on a cocktail napkin. It deserves, consistently with this Court's precedents, that every intendment be given in favor of its constitutionality. That cannot happen if the mere and unalterable fact that the law imposes a legislative determination about the contours of a remedy automatically runs afoul of the right to trial by jury. Moreover, if in a given case, $500,000 is constitutionally inadequate as noneconomic damages, then the law must yield – but only in that case and not voided categorically. If history is any indication, when that happens (as it did in *Clarke*), the legislature more than likely will respond and quickly so.

Finally, and to the extent that this Court deems itself foreclosed in that regard by its earlier decision in *Lakin*, that decision should be disavowed for the reasons set out in Weyerhaeuser's brief in this case and OHSU's brief and those of

its *amici* in *Horton*. *See also, e.g, State v. Mills*, 354 Or 350, 370, 312 P3d 515 (2013) ("Although this court does not lightly overrule an earlier constitutional decision, * * * it has determined that the need to correct past errors may outweigh the importance of stability when the application of the court's interpretive analysis * * * demonstrates that the earlier case or cases find little or no support in the text or history of a disputed constitutional provision." (Citations omitted.)).

III. CONCLUSION

Constitutional construction that would foreclose an entire range of legislative discussion should issue after only the most careful and thorough of deliberations. AOI and OBA are confident that, after running plaintiffs' and OTLA's arguments through that gauntlet, the Court will affirm the decision of the Court of Appeals upholding the constitutionality of ORS 31.710(1) in this case.

Respectfully submitted this 2nd day of July 2015.

s/ *Keith M. Garza*
Keith M. Garza, OSB No. 940773
P.O. Box 68106
Oak Grove, OR 97268
Phone: 503-344-4766
Fax: 503-344-4767
Email: keithgarza@comcast.net

Attorney for *Amici Curiae* Associated Oregon Industries and Oregon Business Association

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that: (1) this brief complies with the word-count limitation in ORAP 9.10(3); and (2) the word-count of this brief as described in ORAP 5.05(2)(a) is 4,912.

I further 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).

/s/ Keith M. Garza
Keith M. Garza, OSB No. 940773

Attorney for *Amici Curiae* Associated Oregon Industries and Oregon Business Association

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 2, 2015, I caused the foregoing *AMICI CURIAE* BRIEF to be electronically filed with the Supreme Court Administrator through the eFiling system and served on the attorneys for the parties via regular mail or the court's electronic filing system if currently enrolled:

Michael T. Garone, OSB No. 802341
W. Michael Gillette, OSB No. 660458
Sara Kobak, OSB No. 023495
Jordan R. Silk, OSB No. 105031
Schwabe, Williamson & Wyatt, P.C.
1211 SW Fifth Avenue, Suite 1900
Portland, Oregon 97204

Thomas W. Brown, OSB No. 801779
Nicholas E. Wheeler, OSB No. 044491
Julie A. Smith, OSB No. 983450
Cosgrave Vergeer & Kester LLP
888 SW Fifth Avenue, Suite 500
Portland, Oregon 97204

Brian Whitehead, OSB No. 833452
Law Offices of Brian Whitehead, P.C.
1610 12th Street SE
Salem, Oregon 97302

Maureen Leonard, OSB No. 823165
Attorney at Law
P.O. Box 42210
Portland, Oregon 97205

J. Randolph Pickett, OSB No. 721974
Pickett Dummigan LLP
621 SW Morrison, Suite 900
Portland, Oregon 97205

Kathryn H. Clarke, OSB No. 791890
P.O. Box 11960
Portland, Oregon 97211

s/ *Keith M. Garza*
Keith M. Garza, OSB No. 940773

Attorney for *Amici Curiae* Associated Oregon Industries and Oregon Business Association