IN THE SUPREME COURT OF THE STATE OF OREGON

LORI HORTON, as Guardian Ad Litem and Conservator of and for T.H., a Minor,

Plaintiff-Respondent,

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 No. S061992

APPELLANT'S REPLY BRIEF

Appeal from Limited Judgment and Money Award entered on January 6, 2014, by Judge Hodson in Multnomah County Circuit Court

September 2014

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OREGON CONSTITUTION

OTHER AUTHORITIES

Defendant-Appellant Dr. Harrison respectfully submits this Reply Brief.

I. PLAINTIFF'S ABSOLUTE POSITIONS AND FACIAL CHALLENGES TO THE OTCA

Plaintiff's Answering Brief asserts that jury trial rights in Article I, section 17 and Article VII (Amended), section 3, of the Oregon Constitution, are absolute, and that the legislature is barred by those provisions from enacting enforceable damage limitations in the Oregon Tort Claims Act ("OTCA"), ORS 30.260-30.300. Plaintiff argues that the Court not only should adhere to *Lakin v. Senco Products*, 329 Or 62 (1999), but should extend *Lakin*'s holding for the first time to apply to the OTCA.

Plaintiff further asserts that Remedy Clause jurisprudence under Article I, section 10 should be remade in the image of *Lakin*, and therefore that the Court should overrule *Clarke v. OHSU*, 343 Or 581 (2007), *Howell v. Boyle, City of Beaverton*, 353 Or 359 (2013), and *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001), all in material part. Plaintiff argues that the Remedy Clause requires a 'complete' remedy -- judgment for the full amount of a jury's verdict -- and that anything less (including a constitutional,

"substantial" remedy under *Clarke*, *Howell* and *Smothers*) violates the constitution.[1]

Plaintiff avoids characterizing these constitutional challenges as "facial" challenges to the statute, but that is precisely what they are. Pursuant to plaintiff's positions, there is no circumstance in which the OTCA damages limits could be applied and enforced, even though this Court as recently as last year instructed the Ninth Circuit that the OTCA's former lower damages cap did not violate the Remedy Clause when applied to a jury verdict that exceeded that cap. *Howell v. Boyle/City of Beaverton*, *supra*.

Neither plaintiff's brief nor that of *amicus curiae* Oregon Trial Lawyers Association ("OTLA") addresses the inescapable conclusions from their absolute positions. If their positions were correct, then not only the OTCA partial damages immunities but also other alternative statutory remedies such as the workers' compensation laws, and the broad range of full and partial statutory immunities in Oregon law, all would be stricken as facially unconstitutional. (*See* Op.Br.48-51, APP-10-15, setting out these provisions.)

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[1] Plaintiff's Answering Brief states: "Any amount less than the jury's verdict denies [plaintiff] his remedy protected by Article I, section 10." (Ans.Br.57.)

That is not, however, what the constitutors intended or what the Oregon Constitution provides.

Moreover, plaintiff does not dispute that plaintiff's position would require all state and local governments to operate in an uncapped liability environment, with all of the attendant major costs and uncertainties for provision of services that would entail. That is precisely what the legislature and stakeholders sought to prevent with the 2009 and 2011 OTCA amendments in direct response to *Clarke v. OHSU*. (Op.Br.16-23.) The real costs from an uncapped liability environment to government and those whom government serves are well-described by the legislative history of the 2009 amendments (*id*.) and the briefs and motions to appear *amici curiae* of the Governor and the array of state and local government entities, particularly the *amicus* brief of Oregon School Boards Association, *et al*..

II. CONSTITUTIONAL INTERPRETATION: THE OBLIGATION TO REACH A CORRECT CONCLUSION

Both parties and their supporting *amici* seek reexamination, reaffirmance, reversal or modification, application, extension or limitation of Article I, sections 10 and 17, and Article VII (Amended), section 3 jurisprudence. This Court's recent caselaw has embraced the overriding "obligation when interpreting constitutional *** provisions *** to reach what

we determine to be the correct result in each case." *Farmer's Insurance Company of Oregon v. Mowry*, 350 Or 686, 697, 698 (2011) (if the court errs interpreting the constitution, "there is no one else to correct the error"). The Court thus has effectively sidelined prior decisions that may have stated methodological conditions or prerequisites to reexamination of prior constitutional decisions. *See State v. Ciancanelli*, 339 Or 282, 289 (2005) (methodology).

Factors, not prerequisites or conditions, should guide *stare decisis* in constitutional interpretation. This Court has recognized at least the following relevant factors: failures to adequately analyze the controlling issue or to consider an important argument or to apply the usual framework for analysis; material changes in legal or factual context; age of the precedent at issue and the extent it has been relied on in other cases; and the degree of a prior error and any resulting injustice or harm. *Mowry*, 350 Or at 693 n3, 698. Other prudential considerations include whether a rule has proved workable in practice or is subject to reliance that would create a special hardship if corrected. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833, 854-55 (1992) (factors).

The short, controversial histories of *Lakin* and *Smothers* match several important factors for reconsideration. *Lakin* has obvious inadequacies in its analysis of constitutional text, context and history. (Op.Br.71-83.) *Lakin* also fails to accord proper consideration to well-established jury trial jurisprudence in Oregon and elsewhere (including Indiana, which is the direct source of the Oregon provision) that held (even *after Lakin*) that the right to jury trial did not contain a substantive guarantee of a right to a claim or remedy. (Op.Br.79-83.) Moreover, cases such as this one demonstrate that *Lakin* is unworkable if it bars legislative authority to create alternative statutory remedies such as the OTCA and to limit damages therein. At a minimum, the factors that justify reconsideration and reversal of *Lakin*, and other prudential considerations, also strongly caution against extending and applying it to the OTCA. *See Clarke*, 343 Or at 429 n9 (refusing to extend *Lakin* to OTCA); Op.Br.83-87 (prudential considerations).

Smothers' interpretation of the Remedy Clause likewise warrants reconsideration, for reasons including those in Justice Landau's concurrence in *Klutchkowski v. PeaceHealth,* 354 Or 150, 178-94 (2013), and the *amicus* brief of League of Oregon Cities, *et al*.. Furthermore, the recent disposition in *Klutchkowski* and the questions about its validity, meaning and applicability, underscores that the relationship between the Remedy Clause

and right to jury trial requires further consideration, especially with any reexamination of the underlying provisions themselves.

III. THE ROLE OF 1857 IN REMEDY CLAUSE AND JURY TRIAL JURISPRUDENCE

Under current law, the Remedy Clause and the right to jury trial generally apply to common law claims that were well-established and absolute in Oregon in 1857. *Smothers*, 332 Or at 116 (Remedy Clause); *Hughes v. PeaceHealth*, 344 Or 144, 156 (2008) (jury trial). Thus, the existence in 1857 of discretionary or sovereign immunity for negligent patient care by a state-employed physician (or, alternatively, plaintiff's inability to show that no such immunity existed), would defeat plaintiff's reliance on Article I, sections 10 and 17.

Plaintiff asserts that Dr. Harrison is seeking to reduce the right to jury trial and the Remedy Clause "to the narrow and rigid confines of common law claims and defenses as existed in the mid-1800s." (Ans.Br.6.) Rather, our position is clear that *a claim that would have been barred by immunity in 1857 cannot be entitled to absolute constitutional protection now.* This Court has held precisely that in *Clarke v. OHSU*, 343 Or at 428-29: "When an entity would have been immune from liability at common law, the legislature's choice to limit that entity's liability does not violate Article I, section 10." *See*

also Lawson v. Hoke, 339 Or 253, 262-64 (2005) (Remedy Clause does not apply to claim that could have been subject to an affirmative defense in 1857).

Plaintiff seeks to avoid that result by arguing that the existing threshold inquiry (employed again as recently as *Klutchkowski v. PeaceHealth* in 2013) should be jettisoned and along with it the Court's decisions including *Clarke v. OHSU* and *Lawson v. Hoke*. If the Court repudiates *Clarke* and *Lawson* and overrules the holding that a claim that would have been barred in 1857 cannot be entitled to absolute constitutional protection now, then the issue becomes what constitutional protection should be afforded to the modern cause of action that exists at the time of plaintiff's injury. In *M.K.F. v. Miramontes*, 352 Or 401 (2012) and *State v. N.R.L.*, 354 Or 222 (2013), the answer was that parties to a modern civil statutory claim could be entitled to have a jury decide the case pursuant to Article I, section 17, but the Court did not hold that there was any concomitant substantive guarantee or right to a remedy other than the one that current law provided for the claim.

Thus, for example, if a modern legislature recognizes restitution as a civil-type claim, then *N.R.L.* holds the parties can have that claim tried by a jury under Article I, section 17, which protects the right to a jury trial "[i]n all civil cases." However, the Court did not hold that Article I, section 17 *thereby*

also guarantees a restitution remedy in an unlimited amount. The constitution would not prohibit the legislature from limiting the amount of restitution damages to, for example, a maximum of $50,000 or one-half actual damages. *See Hughes v. PeaceHealth*, 344 Or at 152-57 (no right to unlimited remedy pursuant to right to jury trial for wrongful death claim that would have been statutory and not common law in 1857).

Likewise here, any constitutional protection for plaintiff's modern statutory claim for negligence under the OTCA would include the parties' right to have a jury hear the case, but also must respect the legislative conditions and limitations that are part-and-parcel of the claim, including the partial damages immunity of the OTCA.[2] Plaintiff here cannot protect a modern statutory claim of negligence under the OTCA, including broader liability under a modern narrow definition of discretionary immunity that is limited to policy-making decisions,[3] while at the same time claiming the right

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[2] The *amicus* briefs of the League of Oregon Cities, *et al*. and of the Governor also suggest temporal, vested-rights approaches, that would recognize whatever protection the constitution provides *for such claims as they existed at the time that a person is injured*.

[3] Discretionary immunity in the OTCA, ORS 30.265(5), (6)(c), is generally understood to be intended to track the evolving common law. *See, e.g.*, *Comley v. Emanuel Lutheran Charity Bd.*, 35 Or App 465, 473-79 (1978) (state-employed physician not protected by discretionary immunity based on

to an unlimited damages remedy that would eliminate dominant legislative modifications to the common law claim including the partial damages immunity of the OTCA.

Dr. Harrison's position is consistent with the fact that common law claims, by nature and definition, are designed to be subject to change and even elimination over time, not only by judges but first and foremost by the legislature. (Op.Br.43-48.) Indeed, OTLA's *amicus* brief (20) in support of *plaintiff's* position itself made this very point: "Early Americans valued the common law not because its standards, whether in tort or otherwise, were fixed in place but because those standards were capable of change through an ongoing search for the best reasoning to govern society."

IV. DISCRETIONARY IMMUNITY AND SOVEREIGN IMMUNITY

A. Discretionary Immunity in 1857

As discussed in section III above, the existence in 1857 of discretionary or sovereign immunity for negligent patient care by a state-employed physician (or, alternatively, plaintiff's inability to show that no such immunity existed), would defeat plaintiff's reliance on Article I, sections 10 and 17.

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the narrow policy-making definition of common law discretionary immunity in *Smith v. Cooper*, 256 Or 485 (1970)).

Plaintiff does not dispute that the issue of individual immunity was not decided by this Court in *Clarke v. OHSU*.

Plaintiff does not challenge that the general state of injury law in the mid-19th century was "no friend to those seeking recovery for injury****The robust common law remedies with which we are so familiar today barely existed at the time." *Klutchkowski v. PeaceHealth*, 354 Or at 186, 189 (Landau, J., concurring) (citations omitted). Indeed, plaintiff's Answering Brief itself refers to the "narrow and rigid confines" of mid-19th century common law. (Ans.Br.6.)

Plaintiff also does not dispute that the defense of discretionary immunity existed in common law in 1857. Rather, plaintiff basically ignores the significant representative cases that Dr. Harrison's Opening Brief cites (28-29), which demonstrate that the immunity was well-established nationally at that time: *Kendall v. Stokes*, 44 US 87 (1845); *Downer v. Lent*, 6 Cal 94 (1856); *Reed v. Conway*, 20 Mo 22 (1854).

Plaintiff also cannot establish that discretionary immunity would not have been applied in Oregon in 1857. Indeed, discretionary immunity has always been recognized in Oregon (and has never *not* been recognized), from *Rankin v. Buckman*, 9 Or 253 (1881) and *Antin v. Union High School Dist.*,

130 Or 461 (1929), to *Smith v. Cooper*, 256 Or 485 (1970) and *Westfall v. State*, 355 Or 144 (2014). Moreover, as recently as 1963 in *Jarrett v. Wills*, 235 Or 52 (1963) and 1972 in *Baker v. Straumfjord*, 10 Or App 414 (1972), the Oregon appellate courts applied discretionary immunity to immunize state-employed physicians from claims of negligent patient care.

That defense of discretionary immunity was broadly defined to include acts requiring the exercise of reason or discretion, as distinct from "ministerial" acts or duties the performance of which was dictated by law. *See Antin*, 130 Or at 469 (citing to Corpus Juris for the well-established definitions). Only after this Court changed the course of the common law of discretionary immunity in *Smith v. Cooper*, and narrowed the immunity to policy-making decisions, did the Oregon courts for the first time impose negligence liability against a state-employed physician for negligent patient care. *See Comley v. Emanuel Lutheran Charity Bd.*, 35 Or App 465 (1978) (reversing *Baker v. Straumfjord* and permitting liability based on *Smith v. Cooper*).

Ross v. Schackel, 920 P2d 1159 (Utah 1996), likewise holds that a state-employed physician would have had discretionary immunity when Utah became a state in 1877. Plaintiff responds, incorrectly, that *Ross*' holding was

limited to prison doctors. *Ross* concluded that both discretionary immunity and sovereign immunity would have applied to the "rendering of medical care." *Id*. at 1164. Separately addressing only sovereign immunity, the court stated "[p]rison doctors would seem to be especially entitled to immunity given that their official duties are integral to the performance of a uniquely governmental function." *Id*. at 1165. "Governmental function" is a term of art regarding sovereign immunity.

Plaintiff also fails to respond to the early Oregon cases that support the conclusion that there was no common law cause of action in Oregon to hold a government employee liable for ordinary negligence for discretionary acts. (Op.Br.29-30.) Moreover although Dr. Harrison's Opening Brief discussed *Rankin v. Buckman*, 9 Or 253 (1881), plaintiff has no response to the fact that even though the city charter in *Rankin* "shifted" liability from the city and expressly authorized suits against individuals, *the court then proceeded to analyze whether the individual's actions in that case were immune*. And in making that analysis, the court distinguished between discretionary actions which would have been immune, and actions done pursuant to an "absolute duty" (which is how "ministerial" actions were defined) for which there would be no immunity. 9 Or at 260-61. *See also Mattson v. Astoria*, 39 Or 577, 579

(1901) (recognizing common law liability for negligent performance of *ministerial duties imposed by charter*).

The weakness of plaintiff's response on the issue of discretionary immunity is not limited to the telling omissions discussed above, but also extends to plaintiff's misdirected reliance on a range of authorities that have nothing material to do with a discretionary immunity analysis. That includes reference to: cases involving intentional torts (malfeasance) rather than negligence (nonfeasance);[4] case excerpts regarding sovereign immunity rather than discretionary immunity;[5] cases involving property destruction and the Takings Clause rather than personal injury;[6] cases involving specific

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[4] *E.g.*, *Dunn v. University of Oregon*, 9 Or 357 (1881) (fraud); *Peterson v. Cleaver*, 124 Or 547 (1928) (malicious prosecution). *See* Op.Br. 27-28 for discussion of 19th century liability focus on malfeasance (intentional misconduct) rather than nonfeasance (negligence).

[5] *Clarke*, 343 Or at 588; *Krieger v. Just*, 319 Or 328, 331-32 (1994); *Smith v. Pernoll*, 291 Or 67, 69 (1981); *Gearin v. Marion County*, 110 Or 390, 396-97 (1924); *Dunn v. University of Oregon*, 9 Or at 362; *Ackerman v. OHSU Medical Group*, 233 Or App 511, 526 (2010). Sovereign immunity and discretionary immunity are "two different legal concepts and have two different origins and purposes." *Smith v. Cooper*, 265 Or at 493.

[6] *Lowe v. Conroy*, 120 Wis 151, 97 NW 942 (1904); *Miller v. Horton*, 152 Mass 540 (1891); *McCord v. High*, 24 Iowa 336 (1868). Those cases expressly recognize and distinguish discretionary immunity, which existed "provided there be an absence of malice or corruption****The discretion in which such officers are protected must be limited to the line where their acts

duties mandated by statute or local law ("ministerial") rather than acts requiring exercise of reason or discretion the specific performance of which are not dictated by statute ("discretionary");[7] and short statements from a couple of law review articles that on examination do not support plaintiff's position.[8] Plaintiff also cites two nineteenth-century cases involving ordinary

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invade the private property rights of another[.]" *Lowe*, 97 NW at 945 (citing *Miller*).

[7] *E.g.*, *Hoover v. Barkhoof*, 44 NY 113, 1870 WL 7794 at *5 (1870) ("it was their absolute and imperative duty to repair this bridge. Upon that point, they had no discretion to exercise"). Plaintiff also refers out-of-context to a passage in *Antin* regarding public officer liability for violating a duty owed to a "private individual" resulting in a special injury. (Ans.Br.44.) That public duty/special injury formula posed no limitation on discretionary immunity. *Antin* cited the formula in the context of its *sovereign immunity* analysis, and the sole authority *Antin* relied on, 1 Jaggard on Torts, p. 125 et seq., further made clear that the formula only applied to claims against *ministerial* officers. 130 Or at 478. Indeed, in *Batdorff v. Oregon City*, 53 Or 402 (1909), the court recognized that liability only would attach where the conduct at issue was both ministerial (not discretionary) and in violation of a duty owed to an individual causing special injury:

> "Highway officers charged with the performance of a *ministerial duty*," says a text-writer, "are, in general, liable for negligently performing it to one to whom the duty is owing and upon whom they inflict a special injury."

Id. at 408 (emphasis added, citation omitted).

[8] The Borchard article focuses on sovereign immunity, and states without pertinent cited authority that public bodies providing health care were entitled to "governmental function" immunity (*viz.*, *sovereign immunity)* but individuals were not. Edwin M. Borchard, Government Liabililty in Tort, 34 Yale LJ 1, 246-47 (1924). By contrast, with respect to discretionary

negligence in health care, but neither case addressed discretionary immunity or involved a state-employed defendant.[9]

For each of the foregoing reasons, the existence in 1857 of discretionary immunity for negligent patient care by a state-employed physician (or, alternatively, plaintiff's inability to show that no such immunity existed), defeats plaintiff's reliance on Article I, sections 10 and 17.

B. Dr. Harrison's Conduct Would Have Been Immune in 1857

Plaintiff also challenges Dr. Harrison's position that the surgical error here would have qualified for discretionary immunity in 1857 as an act involving the exercise of reason or discretion, as opposed to a ministerial act or duty mandated by law. Plaintiff does not dispute that the pleadings provide the operative facts for the determination, since fault was admitted by

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immunity, Borchard recognizes that discretionary immunity was broad and growing in the mid-nineteenth century. *Id.* at 7&n.20, 19&n.71. The Bermann article (George A. Bermann, Integrating Governmental and Officer Tort Liability, 77 Colum LR 1175, 1178 (1977)) either cites no authority or is essentially devoid of pertinent 19th-century analysis (citing to the inapposite *Miller v. Horton*, *see* fn.6 above).

[9] *Meier v. Paulus*, 70 Wis 165 (1887*); Barbour v. City of Ellsworth*, 67 Me 294 (1876).

defendants' Answer. Liability for negligence, therefore, was defined by the pleadings and was not tried to the jury.[10]

The only plausible conclusion to be drawn here is that the complex life-saving surgery on an infant would have qualified as a discretionary act in 1857, including also decisions by the clinical faculty team leader (Dr. Harrison) about whether and how to include a surgical-resident-fellow-in-training (Dr. Durrant), which are the essence of highly-specialized reason and discretion in an advanced training program at an academic medical center.[11] (ER-2-3,¶7;ER-9¶6.) (It also bears note that plaintiff misstates that the cutting that transected vessels was done by Dr. Harrison. (Ans.Br.36.) The pleadings allege that the surgery was performed by Drs. Harrison and Durrant, that the negligence was attributable to defendants and their agents, and there is no allegation or admission as to who may have actually done the cutting at issue. (*See* Op.Br.38-39, quoting pleadings.))

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[10] Plaintiff states that the trial court made a "finding" that Dr. Harrison's conduct was not discretionary. (Ans.Br.33.) However, that characterization is not correct since it necessarily was the judge's *conclusion* based on the pleadings, which receives no deference on appeal.

[11] The *amicus* brief of the Oregon Medical Association (7-12) further underscores these points.

Plaintiff nonetheless argues that defendants' pleading that the surgical error was "inadvertent" somehow takes it out of the category of a discretionary act. Yet plaintiff does not and cannot dispute that "inadvertent" is defined as "negligent" (Op.Br.40). Moreover, plaintiff cannot explain why the negligent performance of a discretionary act would take it outside the scope of discretionary immunity, since the point of discretionary immunity is to immunize negligent performance of discretionary acts.

C. Sovereign Immunity in 1857

The sum total of the parties' briefing makes clear that either sovereign immunity would have protected Dr. Harrison in Oregon in 1857, or that plaintiff cannot demonstrate that sovereign immunity would not have applied. Indeed, the general range of early sovereign immunity holdings has been described as follows:

> It must be confessed that it is almost impossible to discover any guiding principle for determining when a suit against an officer is a suit against the State and most of those who have dealt with the subject have contented themselves with an enumeration of the cases, without for the most part any serious effort to educe an underlying principle or criticize inconsistencies.

Borchard, 34 Yale LJ at 22.

In Oregon, *Antin v. Union High School District*, 130 Or at 467, 478, held that provision of healthcare was considered a governmental function and that sovereign immunity would attach to individuals engaged in the

performance of governmental functions. *See also Jarrett v. Wills*, 235 Or 52 (1963) (same holding).[12] In light of such authorities, it cannot be said with any confidence that plaintiff's action against Dr. Harrison would have overcome a sovereign immunity defense in 1857 in Oregon. This is yet another reason that no well-established, absolute remedy existed for plaintiff's claim at common law.

V. THE REMEDY CLAUSE: ARTICLE I, SECTION 10

A. The Meaning of the Remedy Clause

If the Court nonetheless concludes that plaintiff would have had a viable claim in 1857, then plaintiff's principal position is that *Smothers*, *Clarke* and *Howell* all must be reversed in material part, so that the Remedy Clause would guarantee a 'complete' remedy (Ans.Br.57), rather than the "substantial" remedy that those cases require. Without any material legal analysis or authority, plaintiff seeks to remake *Smothers* in *Lakin*'s image and turn the Remedy Clause into an absolute, facial bar to any legislative damages limitation in the OTCA (or, presumably, anywhere else in the law). The Court expressly rejected a less restrictive contention by the plaintiff in *Clarke*, 343

[12] For the same conclusion, *see Ross v. Schackel*, 920 P2d at 1165; *Lawhorne v. Harlan*, 214 Va 405, 407 (1973) (*overruled on other grounds by First Virginia Bank-Colonial v. Baker*, 255 Va 72 (1983).

Or at 601 (seeking 'substantial equivalence'), and plaintiff has provided no additional or persuasive reason to reverse that decision here.

Plaintiff also has provided no material additional support for reaffirming *Smothers*. By contrast, both Justice Landau's recent concurrence in *Klutchkowski* and the *amicus* brief of League of Oregon Cities, *et al*., have provided compelling reasons for the Court to reconsider and reverse *Smothers* and return Article I, section 10 to its intended place insuring access to the courts. If that interpretation is correct, then OTCA damages limits do not violate Article I, section 10.

Alternatively, Dr. Harrison's Opening Brief and the *amicus* brief of the Oregon Medical Association assert that the test for constitutionality under Article I, section 10 requires examination of whether there has been a 'trade-off' of benefits and limitations such that the resulting remedy may be deemed to be constitutional. (Op.Br.52-53; OMA21-26.) *See, e.g.*, *Clarke v. OHSU*, 343 Or at 616-17 (Balmer, J. concurring, joined by Kistler, J.) (pointing to that analysis in context of workers' compensation statutes); *Hale v. Port of* Portland, 308 Or 508, 523 (1990) (relying on 'trade-off' to conclude that application of OTCA limits did not violate the Remedy Clause); *Brewer v. Dept. of Fish and Wildlife*, 167 Or App 173, 188-91 (2000) (before *Smothers*

was decided, surveying Oregon caselaw and employing 'trade-off' analysis to uphold constitutionality of statutory immunity from negligence claims for landowners who open their property to public recreational use).

In this instance, the 'trade-off' analysis would yield the same conclusion that the courts reached in *Brewer* and *Hale*. Plaintiff has a cause of action against both the doctor and OHSU; payment of a judgment against the doctor effectively is guaranteed by OHSU's statutory indemnity obligation; the OTCA defense of discretionary immunity has been narrowed substantially to policy acts, making claims much easier to prosecute; and damages are limited to $3 million, which not only reflects private insurance realities but also is an amount that demonstrably covers the full amount of virtually all claims.[13] Moreover, the public benefits are manifest from the stable funding and budgeting environment provided by the OTCA caps, which facilitate OHSU's ability to provide critically-needed, statutorily-mandated, and unique medical and educational services to Oregon. (*See* Op.Br.62-64 and *amicus curiae* brief of Oregon Medical Association pp.23-24 re: singular importance of services that OHSU provides.)

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[13] Indeed, plaintiff does not dispute that there has been just one other jury verdict for medical negligence above $3 million since 2002 in Oregon. (*See* Op.Br.57-58.)

Plaintiff responds that the Court rejected a "balancing" approach in *Smothers*. But that begs the question since *Smothers* is now at issue. The 'trade-off' approach not only has a rich tradition in caselaw prior to *Smothers*, but also provides a cogent analytic approach that will not force the Court to strike down other well-established alternative statutory remedies (*e.g.*, workers' compensation) or the range of full and partial statutory immunities.

B. The Meaning of the Substantiality Test

Assuming, *arguendo*, that the Court nonetheless reaffirms *Smothers*, then consideration turns to what constitutes a constitutional, "substantial" remedy under that decision.

Relying on the Court's express holding in *Howell v. Boyle/Beaverton* and the prior concurrence of Justices Balmer and Kistler in *Clarke v. OHSU*, Dr. Harrison's Opening Brief (53-56) asserts that: if an alternative remedy is "substantial," *and* if the law has not completely eliminated a remedy against a defendant, then the alternative remedy is constitutional. Unlike in *Clarke* with the manifestly inadequate $200,000 remedy against OHSU *and* the complete elimination of a remedy against the doctor there, the remedy provided by the OTCA here is against *both* Dr. Harrison and OHSU, and the *$3 million* remedy should be deemed "substantial," thus constitutional. Plaintiff has not provided any response to this analytic approach.

Indeed, notably, plaintiff also completely ignores the 2011 amendments to the OTCA that restored the private right of action against the individual government employee, here Dr. Harrison, that had been completely eliminated previously by the legislature. That complete elimination of a remedy against the individual had loomed large in this Court's analysis in *Clarke v. OHSU*, which repeatedly relied on the point and distinguished other cases on that basis. 343 Or at 602-10. In fact, the *Clarke* plaintiff's opening brief in this Court had asserted that the legislature's complete elimination of a remedy against the individual had "marked a *profound change in the law*" that "raised *serious constitutional concerns*" under the Remedy Clause. (*Clarke v. OHSU*, plaintiff's Opening Brief 19, emphases added.) Yet now that the legislature restored that remedy in 2011, in direct response to this Court's decision in *Clarke*, plaintiff entirely ignores that equally "profound change in the law."

Alternatively, the appropriate substantiality test -- taking into account the acknowledged 'reservoir of legislative authority' to amend the common law and create alternative statutory remedies -- should be to determine whether the OTCA remedy "shocks the conscience" of the Court. (Op.Br.56.) Plaintiff provides no response to this proposed test, which if applied here

should lead to the conclusion that the OTCA remedy plaintiff received does not violate Article I, section 10.

C. Application of the Substantiality Test

Plaintiff does not dispute that the Court should examine each discrete part of the verdict and the corresponding discrete part of the remedy, to determine constitutionality.

1. OHSU's Bills

Plaintiff contends that the Remedy Clause requires that plaintiff receive $179,283.35 awarded in the verdict/judgment to pay for OHSU bills that OHSU *wrote off, forgave or repaid*. Contrary to plaintiff's unsupported assertion (Ans.Br.62n.18), the trial court record contains unrebutted proof that plaintiff does not owe OHSU any money for its bills.[14] Moreover, plaintiff's constitutional contention here highlights the absurd results of plaintiff's absolutist position that "Any amount less than the jury's verdict denies [plaintiff] his remedy protected by Article I, section 10." (Ans.Br.57.)

The judgment must be reduced by $179,283.35.

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[14] The trial judge improperly and prejudicially prohibited OHSU from presenting this evidence to the jury. The evidence thus was presented in an offer of proof and in support of a post-trial motion to reduce the verdict. CR88,104.

2. Future Economic Damages

Plaintiff does not dispute that under the federal Affordable Care Act plaintiff will not bear the cost of the $1,941,754.00 in future medical costs found by the jury. Plaintiff instead makes policy arguments that: 1) it is unfair to place the risk of any conceivable future *change* in the federal law on plaintiff, or 2) the Court should not make a decision that would shift financial responsibility from Dr. Harrison's malpractice insurer to plaintiff's future health insurer.

Both of those policy arguments miss the legal point here, however. The Court must determine whether $626,952.91 plaintiff received as an advance payment is a constitutional, "substantial" remedy for $1,941,754.00 future economic damages for future medical care. The answer is that the Remedy Clause does not guarantee that an injured plaintiff must receive money for health care costs that federal law provides he will not have to bear.

The judgment for future economic damages therefore must be reduced from $1,941,750.00 to $626,952.91, which has been satisfied.

3. Past Economic Damages

Plaintiff's position is that the Remedy Clause requires that plaintiff receive the full amount of the jury's verdict. Assuming *arguendo,* however,

that the Remedy Clause continues to require a "substantial" remedy that can be less than the amount of economic damages, then the question remains whether $1,439,822.87 plaintiff received for past economic damages is a substantial remedy for the $3,950,153.03 jury verdict. The remedy received here is substantial and does not shock the conscience, and the Remedy Clause therefore should not invalidate the statutory cap in this particular.

4. Noneconomic Damages

Plaintiff's position -- that $1 million received for noneconomic damages is not a substantial remedy -- relies heavily on the closing argument of defendants' counsel at trial, who stated that $3 million would be a reasonable amount to award for noneconomic damages. However, the entire point of a damages cap is that there will be cases with reasonable damages amounts in the verdict, to which a statutory damages cap will apply and provide a constitutional, substantial remedy. Thus, both *Howell v. Boyle/Beaverton* and *Hale v. Port of Portland* held that the OTCA damages limits could be constitutionally applied even to reasonable *economic* damages verdicts that exceeded the cap.

Unlike with economic damages, the jury is given no real guidance on how to monetize noneconomic damages and was not instructed to reduce the award to present value. $1 million also is *twice* the amount of $500,000 that

the legislature generally considers to be a reasonable uppermost limit for noneconomic damages. ORS 31.710. Indeed, one additional benefit from the OTCA to plaintiffs is that the $500,000 cap on noneconomic damages does not apply within the overall OTCA cap, thereby allowing $1 million in noneconomic damages in this case. ORS 30.269(2).

Second, plaintiff's Answering Brief paints a picture of T.H.'s past and possible future condition tailored to convince the Court that $6 million is required as a remedy, whereas a more objective total picture supports the conclusion that $1 million is a substantial remedy and does not shock the conscience. Plaintiff's Answering Brief fails to engage on two important points with respect to T.H.'s condition. One is that T.H.'s liver cancer has no greater likelihood of recurrence due to the surgery at OHSU, and likewise regardless of the surgery he will require lifetime monitoring and preventive care and may experience side effects with his health. The other is that T.H.'s overall condition includes no developmental limitations and an unrebutted prognosis for a fulfilling life with a normal life expectancy.

This case stands in stark contrast to the injured infant in *Clarke v. OHSU*, who was deprived of oxygen at birth that resulted in severe brain damage and total permanent disability. *Clarke*, 343 Or at 586. (In *Clarke*, the plaintiff pleaded a maximum $5 million noneconomic damages, which is

less than the jury verdict here.) *Clarke* obviously was an "outlier" case overall in terms of the awful injuries and the total amounts of economic and noneconomic damages (assumed to be at least $17 million) as compared to the relatively paltry $200,000 provided then by the OTCA.

Plaintiff's brief emphasizes the medical monitoring and anticipated problems T.H. faces in the future. (Ans.Br.11-14.) However, regardless of the liver transplant and related issues caused by OHSU, T.H. faced continued medical monitoring for recurrence of the uncommon liver cancer and also for long-term issues from side effects and risks from the multiple rounds of chemotherapy and radiation that he had prior to surgery.[15] (Tr.III,68, Tr.V,28.) T.H. was required to live with this whether his cancerous liver had been successfully resected, or instead removed entirely and transplanted as a result of the unsuccessful surgery at OHSU. (Tr.III,69.)

The likelihood of T.H.'s cancer's recurrence, approximately 10 percent, also is not greater because T.H. had a liver transplant, rather than successful surgical resection. (Tr.III,66,68.) Moreover, whatever follow-up care from

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[15] That includes physical exams, neuro-psychology testing (since chemotherapy can have neuro-cognitive impacts), audiograms, alpha fetoprotein testing and imaging studies. (Tr.III,66, Tr.V,32-34.) The tests would be done multiple times per year for at least the first few years (Tr.III,6), and many follow-up trips out-of-town for evaluations, medical monitoring and care would be necessary (Tr.II,136).

an oncologist T.H. receives, he would have needed whether or not the resection surgery was successful. (Tr.III,68-69.)

Importantly, plaintiff does not dispute that T.H. is meeting all his developmental bench marks, has no cognitive impairment, and his doctors have no concerns about how he is growing or developing; he has no limitations or restrictions on his activities, and is expected to have a normal life expectancy. (Tr.V,40; Tr.X,77; Tr.II,236; Tr.V,35,37; Ex.102,p.3.**)**

Under these circumstances, $1 million is a substantial remedy and does not shock the conscience.

5. Benefits that OHSU Provides

One material factor in determining whether a remedy is constitutional is to take account of the public benefits that the remedy provides. *E.g.*, *Clarke v. OHSU*, 343 Or at 602. Dr. Harrison's Opening Brief (62-64) points to those unique public benefits provided by OHSU, many of them mandated by state law, and the *amicus* brief of the Oregon Medical Association (23-24) underscores and adds to those points. Plaintiff has no fact-based counter position.

VI. THE RIGHT TO JURY TRIAL: ARTICLE I, SECTION 17

Plaintiff's Answering Brief relies strictly on *Lakin*, without addressing the extensive analysis of text, context, history and caselaw surrounding Article I, section 17 provided by Dr. Harrison's Opening Brief (71-83). Plaintiff and *amicus* OTLA focus on the role of the jury as factfinder, which undeniably is distinct from the role of the judge responsible for the law, but without addressing the core issue here which is legislative authority to amend the common law.

It is indisputably a core premise of our legal system -- before 1857, in 1857, and ever since 1857 -- that common law claims (which were and are recognized, modified or eliminated by judges) were and are always subservient to overriding plenary *legislative* authority to recognize, modify or even eliminate such claims. (*See* Opening Brief 43-48.) Indeed, the very idea of a common law claim necessarily includes legislative authority as integral to the concept. As but one example, plaintiff ignores the fact that even prior to 1857 the Oregon legislature (along with legislatures in other states) had enacted laws that modified common law damages remedies. (Op.Br.46-47.)

Moreover, there is no indication whatsoever in the constitutional history that the right to jury trial (or the Remedy Clause) was intended to forever bar the legislature from exercising its plenary authority to modify

common law remedies. Indeed, plaintiff has no response to TriMet's *amicus* brief that presents the following determinations of a highly-respected Western historian, who came to precisely that same ultimate conclusion:

> The implications of that historical evidence with respect to how the framers would have viewed the right to jury trial in civil cases seem pretty clear:
>
> - First, legislative authority was understood to be plenary unless superseded by a provision of organic law.
>
> - Second, from its first organic act in 1843 – using text that is the product of replication rather than innovation – Oregon has consistently recognized and protected the right to trial by jury.
>
> - Third, Article I, section 17 (also using borrowed wording), did not purport – either expressly or impliedly – to remove from the legislative domain any authority not already subsumed within the right to jury trial as it existed in 1857.
>
> - Fourth, notwithstanding the protected status of civil jury trials, legislators from provisional times onward regularly had been enacting statutes that both altered the common law and did so in ways that necessarily affected the function of the civil jury (authorizing new trials, permitting treble damages, etc.).
>
> - Fifth, courts – including Oregon's provisional supreme court in the *Knighton* case – had specifically embraced the principle that legislatures properly may modify common-law remedies, and judges for years had been policing jury verdicts for excessive damages, insufficient evidence, and legal inconsistency.
>
> *In light of the foregoing, there does not appear to be any historical basis to support the proposition that Article I, section 17, prevents the legislature from making common law claims*

> *easier or more difficult to prove, or establishing damages limitations.*

(TriMet's *amicus* brief 30-31, emphasis added.)

VII. REEXAMINATION OF FACTS: ARTICLE VII (AMENDED), SECTION 3

Plaintiff relies on the Court of Appeals decision in *Tenold v. Weyerhaeuser Co.*, 127 Or App 511 (1994) (*en banc*), *rev dismissed* (1995), for the proposition that the prohibition on a judge reexamining facts found by a jury, contained in Article VII (Amended), section 3, translates into an absolute prohibition on legislative authority to enact the partial damages immunity contained in the OTCA. Plaintiff does not respond either to the detailed analysis of text, context and history, and the critical analysis of *Tenold* set out by Dr. Harrison's Opening Brief, or to the Governor's *amicus* brief, all of which lead squarely to a contrary conclusion. (Op.Br.65-71; Governor5-9.) Accordingly, no reply here is required.

VIII. HARMONIZING JURY TRIAL RIGHTS AND THE REMEDY CLAUSE

If the Court were to adhere to its decision in *Lakin* and then consider extending it for the first time to the OTCA, and if the Court were to adhere to its decisions in *Smothers*, *Clarke* and *Howell*, then the two provisions of the constitution (the right to jury trial and the Remedy Clause, respectively) would be on what appears to be a collision course. The Court cannot on the

one hand hold that the right to jury trial is absolute and that any statutory damages limitation in the OTCA is facially invalid, and on the other hand hold that the legislature has a reservoir of legislative authority under the Remedy Clause to change the common law and enact alternative remedies such as the OTCA so long as they are "substantial."

If this conflict appears to exist after both provisions are reexamined, then the Court should choose the latter alternative and apply Article I, section 10, which recognizes legislative authority to act in a traditional core area of plenary legislative authority and competence. *See, e.g., King v. City of Portland*, 2 Or 146, 151-52 (1865) (presumption of constitutionality for legislative acts). The right to jury trial should not negate what the Remedy Clause (and the privilege and immunities provision of Article I, section 20 and the sovereign immunity waiver provision of Article IV, section 24) expressly authorizes. (Op.Br.86-87.)

Plaintiff relies on *Klutchkowski v. PeaceHealth* for a contrary position. However, *Klutchkowski* was not decided in the context of the OTCA and did not cite *Clarke*, which had applied the substantiality test of the Remedy Clause despite the plaintiff's contention there that the right to jury trial was absolute. *Clarke v.* OHSU, 343 Or at 434 n19. Nonetheless, if *Klutchkowski* stands for

an absolute right to jury trial that trumps the Remedy Clause, then *it should be overruled* because it incorrectly decided the issue.

In addition -- as asserted in Dr. Harrison's Opening Brief (83-87) and without any response by plaintiff -- there are several compelling prudential reasons *not to extend Lakin* and *Klutchkowski* to apply them for the first time to the OTCA. That limitation on the reach of those jury trial decisions also would avoid a conflict with the Remedy Clause here.

IX. CONCLUSION

The Court should conclude that the $3 million OTCA damages limit can be applied constitutionally in whole or in part to the judgment in this case.

Respectfully submitted this 9th day of September, 2014.

s/ Roy Pulvers
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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that the Court granted a motion to exceed the length limit for this brief. The order granting the motion was dated March 27, 2014 and permits a Reply Brief of up to 7,000 words. I certify that this brief complies with that order and that the word count of this brief (as described in ORAP 5.05(2)(a)) is 6,992.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f)

Respectfully submitted this 9th day of September, 2014.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 9, 2014, I caused to be electronically filed the foregoing APPELLANT'S REPLY BRIEF with the Supreme Court Administrator through the eFiling system and served on the parties or attorneys for parties identified herein, in the manner and on the date set forth below:

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