IN THE SUPREME COURT OF THE STATE OF OREGON

LORI HORTON, as Guardian Ad Litem and Conservator of and for 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 OPENING BRIEF

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

June 2014

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I. STATEMENT OF THE CASE

A. Nature of Action; Relief Sought

This is a civil action for damages brought under the Oregon Tort Claims Act, ORS 30.260-30.300 ("OTCA"). (ER-1-10.) Plaintiff-Respondent ("Plaintiff") is Guardian/Conservator for an injured Minor Child (" . Defendants, who admitted fault on one allegation of the negligence claim before trial, are Oregon Health and Science University ("OHSU") and its employee Dr. Marvin Harrison. (ER-8-9.)[1]

Dr. Harrison is the Appellant and he seeks modification of the Limited Judgment and Money Award ("Limited Judgment"), for judgment to be entered and deemed satisfied in the amount of $3 million. That is the damages limit prescribed by the OTCA, ORS 30.271(3)(a), and it has been fully paid by a $3 million "Advance Payment" made pursuant to ORS 31.550 *et seq*.. (ER-10,12-17.)

B. Nature of Judgment

Appellant seeks review of the Limited Judgment, entered pursuant to ORS 30.274. (ER-39-42.) Trial was before a jury.

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[1] The action against Pediatric Surgical Associates, P.C. was dismissed on summary judgment and the action against Audrey Durrant, M.D., was dismissed voluntarily by Plaintiff. The actions by mother for her own alleged injury and by father for loss of consortium, were dismissed on Rule 21 motions and the separate appeal from that limited judgment is being briefed in the Court of Appeals, A155917.

The parties agreed that the liability of Defendant OHSU (a public corporation and State entity) was capped by the OTCA at $3 million, and that OHSU's liability had been fully satisfied by the $3 million Advance Payment. The Limited Judgment and a Full Satisfaction of Judgment (ER-47-48) entered accordingly. OHSU thus is not an appellant.

The Limited Judgment further provided for entry of judgment against Defendant Dr. Harrison in the full amount of the jury's verdict, $12,071,190.38. (ER-40-41) Dr. Harrison's liability was deemed partially satisfied by the $3 million Advance Payment (ER-45-46), affixing his remaining liability at $9,071,190.38. That aspect of the Limited Judgment is the subject of this direct appeal by Dr. Harrison.

C. **Appellate Jurisdiction**

ORS 30.274(1) provides for entry of limited judgment on request of either party, when the sole issue is application of OTCA damages limits after the finder of fact has decided the total amount of damages. The jury's Verdict did decide the total amount of damages. (ER-19.) ORS 30.274(3) further provides for direct appeal to the Oregon Supreme Court from a limited judgment entered in conformance with ORS 30.274(1).

D. **Dates**

The Limited Judgment was entered in the circuit court register on January 6, 2014. The notice of appeal was timely filed and served on January 24, 2014.

E. **Questions Presented**

Limited Judgment entered against Dr. Harrison above the $3 million statutory limit prescribed by the OTCA, ORS 30.271(3)(a). Plaintiff contends (and the circuit court agreed, ER-37) that judgment exceeding the cap is lawful because the OTCA limits are unconstitutional, based on three separate provisions of the Oregon Constitution: the "Remedy Clause" of Article I, section 10; the right to jury trial of Article I, section 17; and the prohibition on a court reexamining facts found by a jury, of Article VII (Amended), section 3.

The Questions Presented are:

1. Was there a well-established, absolute common law right of action in 1857 against a state-employed physician for negligent patient care; would discretionary immunity or sovereign immunity for the doctor have barred the claim in 1857?

If Plaintiff cannot establish the 1857 right, then the Remedy Clause and the right to jury trial do not apply, and judgment must be entered and deemed satisfied against Dr. Harrison pursuant to the $3 million OTCA limits.

2. If, however, Plaintiff can establish the 1857 right, then the following questions are presented:

A. Does the Remedy Clause of Article I, section 10, guarantee a remedy, or does it guarantee access to courts for such remedies as the law may provide? If the latter, then the Remedy Clause does not invalidate the OTCA limit. If the former, then is the $3 million OTCA limit and Advance Payment a constitutional, "substantial" remedy, with respect to all or discrete parts of the verdict?

B. Is the right to jury trial in Article I, section 17, a substantive guarantee of a remedy in a case under the OTCA, or does it guarantee that a jury will decide facts subject to the legislature's plenary authority to amend common law with respect to causes of action and to define and limit remedies? If the latter, then the right to jury trial does not invalidate the OTCA damages limit. If the former, then should the right to jury trial be extended for the first time to the OTCA limits, to facially invalidate and eliminate OTCA damages limitations?

3. Is the prohibition on a court's authority to reexamine facts found by a jury, Article VII (Amended), section 3, also a prohibition on the legislature's authority to enact OTCA damages limitations, resulting in the facial invalidity and elimination of OTCA damages limitations?

F. Summary of Argument

1. Plaintiff's Positions

Plaintiff will ask this Court to declare the $3 million damages limit of the OTCA *facially invalid* and thus to preclude the legislature from enacting any enforceable statutory damages limitations in the OTCA. Plaintiff's absolutist position relies on unprecedented, unwarranted extensions to the OTCA of the right to jury trial in Article I, section 17, and the provision prohibiting a court from reexamining facts found by a jury in Article VII (Amended), section 3.

Alternatively, Plaintiff will ask this Court to declare that the legislature's 2009 and 2011 direct responses to *Clarke v. OHSU*, 343 Or 581 (2007) -- eliminating the OTCA "substitution" provision and reinstituting a cause of action against the individual physician defendant, and dramatically raising the OTCA damages limit here to $3 million -- do not provide a constitutional, "substantial" remedy under the Remedy Clause of Article 1, section 10.

2. Defendant's Positions

a. Individual Immunities

Plaintiff cannot establish the prerequisite for application of Article I, sections 10 and 17 under current constitutional caselaw, *viz.*, that there was a well-established, absolute common law right of action in 1857 to sue a state-employed physician for negligent patient care. Indeed, discretionary immunity or sovereign immunity would have barred Plaintiff's claim in 1857, pursuant to

Oregon caselaw from early statehood until the 1970s, and caselaw in other jurisdictions from both before and after 1857.

b. Plenary Legislative Authority to Amend Common Law

The most fundamental state legislative authority is the plenary authority to enact laws to deal with changing needs of society, unless there is an express constitutional prohibition on that authority. That bedrock principle finds expression in the legislature's plenary authority to amend common law and enact statutory immunities, including the partial damages immunities of the OTCA, and informs the analysis of each state constitutional provision at issue.

c. Article I, Section 10

Plaintiff's position is that the $3 million damages cap is not a "substantial" remedy under the Remedy Clause of Article I, section 10.[2] There are four independent responses to that position, set out below. One is that *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001), is incorrect and should be overruled. But the Court does not have to overrule *Smothers* in order to conclude that the $3 million damages cap and Advance Payment are constitutional.

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[2] Article I, section 10, provides: "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

(a) Article I, section 10 does not apply: Discretionary immunity or sovereign immunity would have barred this claim against a state-employed physician for negligent patient care in 1857. In *Smothers* and *Clarke*, the defendants did not make this argument and the Court did not adjudicate it.

(b) *Smothers* concluded that Article I, Section 10 provides for a substantive right to a remedy. However, the correct analytic conclusion is that Article I, Section 10 guarantees access to courts for such remedies as the law may provide. *Smothers*, therefore, should be overruled.

(c) In *Smothers* and *Clarke*, statutes had completely eliminated the plaintiff's remedy against a defendant, under the Worker's Compensation Act and the OTCA, respectively. However, in direct response to *Clarke*, the legislature amended the OTCA in 2009 and 2011, and provided for a $3 million remedy against the individual physician in this case. That is a constitutional, "substantial" remedy.

(d) Separate analysis of each portion of the $3 million Advance Payment made pursuant to the OTCA cap reveals that it provides a substantial remedy for that portion of the jury's verdict. For example, Plaintiff received $626,952.91 for future medical costs as part of the $3 million Advance Payment. The jury verdict contained $1,941,754.00 future economic damages for medical costs, primarily a potential future liver transplant. However, the federal Affordable Care Act mandates and guarantees that .H. will have access

to health insurance, with no exclusions or higher premiums based on his condition, and no annual or lifetime coverage limits. Under the circumstances, Plaintiff already has received a "substantial" remedy for future economic damages and the constitution thus does not mandate that he receive additional payment above the statutory cap.

d. **Article VII (Amended), Section 3**

Plaintiff contends that the provision in Article VII (Amended), section 3 that prohibits a court from reexamining facts found by a jury also was intended to permanently bar the legislature from enacting statutory damages caps.[3] However, text, context and history of the 1910 initiative that produced Article VII (Amended), Section 3, demonstrate that the provision was intended to eliminate the then-common practice of judges to grant new trials on liability or to remit damages based on the judge's disagreement with the jury about the weight or import of the evidence.

By contrast, a statutory damages cap is an exercise of legislative authority, applied mechanically to all verdicts. It does not involve reexamination by a judge of the facts in a particular case and does not result in retrial in any case, which were the two specific concerns of the initiative. There

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[3] Article VII (Amended), section 3, pertinently provides: "In actions at law the right of trial by jury shall be preserved, and no fact tried by a jury shall be reexamined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

is no basis to conclude that the initiative also contained an implicit bar on otherwise plenary legislative authority to amend common law and enact the OTCA with its partial damages immunities.

e. **Article I, Section 17**

Plaintiff seeks an unprecedented extension, to the OTCA, of the opinion in *Lakin v. Senco Products*, 329 Or 62 (1999), which facially invalidated a statutory limit on noneconomic damages -- outside the OTCA -- based on the right to jury trial in Article I, section 17.[4] This Court declined to do this in the context of the OTCA in *Clarke v. OHSU*, where it engaged in an as-applied Remedy Clause analysis rather than consider a facial challenge based on right to jury trial.

In addition to the precedent in *Clarke*, there are three other independent responses to Plaintiff's position, set out below. One is that *Lakin* is incorrect and should be overruled. But the Court does not have to overrule *Lakin* to reject Plaintiff's facial challenge to the OTCA damages caps.

(a) Article I, section 17 does not apply: Discretionary immunity or sovereign immunity would have barred this claim against a state-employed physician for negligent patient care in 1857. In *Lakin*, the defendant did not make this argument and the Court did not adjudicate it.

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[4] Article I, section 17, provides: "In all civil cases the right of Trial by Jury shall remain inviolate."

(b) *Lakin* incorrectly concluded that a legislative limit on noneconomic damages violated the right to jury trial, and it should therefore be overruled. The right to jury trial does not contain any substantive right to a remedy. Rather, the provision allocates authority between judge and jury on questions of law and fact. It does not thereby affect either the plenary authority of the legislature to shape the underlying causes of action and remedies including the consequences and effects of a damages verdict, or the judge's duty then to apply and enforce the law.

(c) If *Lakin* is not overruled, then it must not be extended to the OTCA, to facially invalidate the OTCA damages caps.

i. The statute invalidated in *Lakin* simply limited noneconomic damages, with no benefit to plaintiffs. By contrast, the OTCA is a comprehensive substitute remedial construct whose benefits to plaintiffs include governmental waiver of sovereign immunities; governmental indemnity; no limits on noneconomic damages within the overall cap amounts; damages limits that the legislative record for the 2009 OTCA amendment demonstrates are sufficient to completely cover well over 99% of claims and provide a sizable remedy for other claims; and preservation of government’s ability to budget and pay for mandatory or important government services in a capped environment.

ii. The OTCA was enacted in 1967 and amended repeatedly thereafter, in reliance on a long line of cases from the Oregon Supreme Court -- stretching from 1892 to 2008 -- holding that the right to jury trial contained no substantive right to remedy. The presumption of constitutionality after long usage is especially pronounced in that context, and this Court must not extend *Lakin* to the OTCA under those circumstances.

iii. This Court also has emphasized (in *Clarke v. OHSU*, for example), that the legislature has an extensive "reservoir" of affirmative constitutional authority under the Remedy Clause of Article I, section 10 to enact the OTCA, as a comprehensive substitute remedial construct and to shape its remedies so long as they are "substantial."[5] Read together with the right to jury trial, the more specific substantive provision of the Remedy Clause must apply. The right to jury trial cannot facially invalidate statutes that the Remedy Clause authorizes.

G. Statement of Facts

1. The Child's Condition

In July 2009, . a six-month-old infant, was found to have an abdominal mass diagnosed as a Stage III hepatoblastoma, an uncommon liver cancer. (Tr.III,pp.8-10.) The tumor extended into both lobes of the liver and

[5] This assumes, *arguendo*, that Article I, section 10, contains a guarantee of a remedy.

into the vessels of the porta hepatis. (Tr.III,pp.42-43.) To achieve the best result, a total resection of the cancerous tumor is required. (Tr.III,p.45.) . tumor was not operable at diagnosis. (Tr.III,pp.42-43.) Three rounds of chemotherapy were required to successfully reduce . ’s tumor to a size that could be surgically removed. (Tr.III,pp.15-17,69; Tr.IX,p.7.) If the tumor did not shrink sufficiently in response to chemotherapy, a liver transplant would have been required. (Tr.IX,p.11.)

In September 2009, . underwent surgery at OHSU that removed the portions of his liver that contained the malignant tumor. (ER-8-9[Answer].) The surgery was performed by a pediatric surgical fellow, Dr. Audrey Durrant, and the attending surgeon, Defendant Dr. Marvin Harrison, both of whom were within the course and scope of their employment with OHSU. (*Id.*) Plaintiff alleged that during the course of the operation, Defendants attempted "to perform the recommended surgery to remove the right lobe of [. ’s liver." (ER-3,¶7.)

Prior to trial, Defendants admitted fault in . 's surgery, that "vessels to the left lobe of the liver were inadvertently transected[.]" (*Id.*,¶7.) As a result, . required two additional surgeries at OHSU, and was emergently transported to Stanford University Hospital for additional surgeries, including removal of his spleen and transplantation of a portion of his mother’s liver. (*Id.*)

The surgical removal of the tumor by Defendants here eliminated the imminent risk to . .'s life from the cancer, and provided a 90% chance of a cure. (Tr.III,p.66). The likelihood of the cancer's recurrence is not greater because . ultimately required a liver transplant rather than surgical resection of the tumor. (Tr.III,p.68).

. was discharged from Stanford hospital in November 2009. (Tr.IV,p.5.) Thereafter, . had additional hospitalizations, surgeries, and received treatment with immuno-suppression and other medications. (Tr.II,p.122; Tr.IV,pp.15-30.) As a transplant recipient and having had his spleen removed, . is at risk of developing other conditions, will likely require future medical care, and may require an additional liver transplant. (Tr.II,pp.94-122; Tr.IV,pp.15-61.).

. 's father testified that . is bright, happy and well-adjusted. (Tr.II,pp.172,190-91.) He attends a regular daycare and participates in all of the same activities as his peers. (Tr.II,pp.173,189-91.)

. experiences no pain or distress. (Ex.102,p.3.) At . 's most-recent visit before trial, his pediatrician completed a complete review of systems, which was entirely normal. (Ex.102,p.2) . receives regular monitoring but no ongoing therapy or medical interventions, other than two benign medications. (Tr.II,pp.170,232-33; Tr.IX,pp.190,194-97.) His liver

function has been normal and stable for the past two years, and he has been off immunosuppression since December 2010. (Tr.IX,pp.190-97.)

. is meeting all developmental benchmarks and his doctor has no concerns about how . is growing or developing physically. (Tr.II,p.236; Tr.V,p.35.) He has no cognitive impairment. (Tr.V,p.37.) Plaintiff made no claim that . 's ability to earn a living has been affected or that he will experience any loss for future earning capacity. (ER-5,¶13[3rd Am. Com.].) . has no limitations or restrictions on his activities. (Tr.V,p.40.) He is expected to live a full life to normal life expectancy. (Tr.X,p.77.)

2. **The Verdict and the $3 Million Advance Payment**

The jury awarded $1,941,754 future economic damages, comprised solely of future medical care (primarily the cost of a potential future liver transplant). (ER-19[verdict].) The jury awarded $4,129,436.38 past economic damages, which included $179,283.35 in past medical bills from OHSU that were either written off before billing, forgiven or repaid by OHSU. (ER-19[verdict]; CR-88,104[Declarations of John Payne, Renee Wenger].) The jury awarded $6,000,000 non-economic damages. (ER-19[verdict].)

In 2011, after mediation and before filing this action, mother, father and . agreed to accept an Advance Payment of $3,000,000 from OHSU. The parties' agreement was memorialized in a Memorandum of Understanding

("MOU"). (ER-12-17.) The Advance Payment was for the full aggregate damages limit under the OTCA, ORS 30.271(3)(a).[6]

The MOU further provided that the Advance Payment would be allocated $2,000,000 to economic damages and $1,000,000 to non-economic damages. (*Id.*) Of the Advance Payment, it was agreed that $1,289,387.78 would be paid toward medical bills previously incurred by . (*Id.*) The MOU further provided that from the remaining balance of the Advance Payment, $500,000 would be placed in a conservator's interest-bearing account, to be held towards the cost of a potential future liver transplant, if one is performed. (ER-13[MOU].) Coupled with an additional amount set aside for future medical care, at time of trial there was $626,952.91 set aside for future medical costs from the Advance Payment. (CR-__[Schroer Declaration,10/7/13,¶3&Ex.2].)[7]

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[6] The trial court subsequently ruled that the $3 million aggregate limit applied, rather than the $1.5 million single claim limit, because both . and his parents had claims for damages for . 's care. (ER-37[order].)

[7] "CR-__" refers to items that were filed and served in the trial court record but for which there is no OJIN number. A stipulated motion to supplement the record has been granted (6/3/14).

3. Legislative History of 2009 and 2011 OTCA Amendments[8]

a. *Clarke v. OHSU*

On December 28, 2007, the Oregon Supreme Court issued *Clarke v. OHSU*, 343 Or 581 (2007). The decision marked the first time the Court held a damage limit in the Oregon Tort Claims Act to be unconstitutional.

The Court considered a $15 million claim for medical negligence brought on behalf of a severely brain-damaged infant, whose complaint alleged he was deprived of oxygen during surgery that left him totally and permanently disabled. *Clarke*, 343 Or at 586. The Court applied the then-applicable $200,000 single-claim limit to OHSU, because OHSU would be entitled to sovereign immunity as a state entity and thus any limits on liability against OHSU were constitutional. *Id*. at 600. But the Court also concluded that the OTCA did not provide a constitutional, substantial remedy pursuant to the Remedy Clause of Article I, section 10, with respect to the claim against the individual physician, for which the OTCA provided no remedy at all other than the substituted remedy. *Id.* at 600-610. That was because in 1991 the legislature had completely eliminated any cause of action against the individual by adopting the "substitution" provision of the OTCA, which required

[8] Legislative history is summarized here and is attached in full as provided by Legislative Archives, in the Appendix.

replacement of the individual with the government entity as the sole party in an action under the OTCA. *Id.* at 589, 608-10.

In addition to the *as-applied* challenge based on the Remedy Clause, the plaintiff in *Clarke* also made a *facial* challenge to the validity of tort claims limits in the OTCA, based on right to jury trial under Article I, section 17. The Court did not consider that claim. *Id.* at 610 n.19.

b. **The Interim Joint Task Force on the OTCA**

In direct, immediate response to *Clarke v. OHSU*, the Oregon legislature established the Interim Joint Task Force on the Oregon Tort Claims Act ("Task Force"), in February 2008. The Task Force's sole purpose was to make recommendations to the 2009 legislature for changes to the OTCA in light of *Clarke*. (APP-309[Co-Chair Macpherson testimony].) The Task Force was comprised of five members each from the Oregon House and Senate, and representatives from the Oregon Trial Lawyers Association ("OTLA"), OHSU, local public bodies and consumers. (App-63[Minutes].)

The legislators and stakeholders concluded that the pre-*Clarke* OTCA limits, while adequate for the vast majority of OTCA claims, were not a sufficient remedy for some injured Oregonians. (*See, e.g.*, APP-332[Stadum testimony]; APP-309[Co-Chair Macpherson testimony].) The Task Force also recognized, however, that higher OTCA caps -- which would provide a larger remedy for a relatively small number of injured persons -- could only be

recommended if the increased limits preserved public budgets so that government could provide statutorily-and-constitutionally-mandated, essential and important public services to all Oregonians in light of generally fixed government incomes. (APP-330[Co-chair Macpherson testimony]; APP-317[Blair testimony].)

Task Force consideration included, *inter alia*, historical analysis of OTCA claims and payout histories for local and state public bodies; actuarial analysis of *Clarke*'s impact on required loss reserves and insurance rates for public bodies including OHSU, cities, counties and school districts; actuarial analysis of the projected financial impact of various cap increases on public bodies' ability to continue to provide public services; and comparative analysis of other states' tort claim caps. (APP-62-66,94-100[Agendas, Minutes].)

The Oregon Department of Administrative Services ("DAS") manages risk for and insures state agencies, boards and commissions. DAS reported that the percentage of OTCA claims it paid over the $200,000 cap for the ten-year period from 1998-2007 was *one-tenth of one percent*. (APP-125[Kautz PowerPoint: 34 claims out of 30,007].)[9] The DAS numbers established that only one claim over that same ten-year period exceeded $5 million and just four exceeded $1 million. (APP-126.) And in the 27-year period before 2008, *one-*

[9] Categories analyzed by DAS included auto, employment liability, medical malpractice and general liability. *Id.*

half of one percent of the 20,048 claims handled by City County Insurance Services ("CIS"), the primary insurance underwriter for Oregon cities and counties, exceeded the OTCA cap. (APP-292[Blair testimony].)

c. Task Force Evidence Established That an Uncapped or Extremely High Cap Environment Would Devastate Public Budgets and Interfere with Governments' Provision of Essential Services

The *Clarke* decision was perceived as effectively eliminating the existing low OTCA caps for major cases against Oregon's public bodies, resulting in immediate increased costs and related cuts to public services. (*E.g.*, APP-313-314[Stadum testimony].) The Task Force heard repeatedly and authoritatively that an uncapped claims environment or a too-drastic increase in cap limits would result in tremendous increases in insurance costs, often unachievable reserve levels, and interference with, and in some cases inability to provide essential government services. (*E.g.*, APP-212-213[AON Corp. actuarial analysis]; APP-228[Rauch testimony: caps are crucial to the ability of insurer CIS to pool risk exposure for cities and counties and to obtain affordable reinsurance above the pool's self-insured retention level]; APP-315-319[Blair testimony].)

DAS actuarial evidence showed that a complete cap loss [which Plaintiff argues for here, based on two separate jury trial provisions] would cost the state an additional *$110 million per biennium* over costs at existing cap levels.

(APP-132[Kautz PowerPoint].) A proposed cap of $1 million per person/$3 million per occurrence would increase cost to DAS by $46 million per biennium. *Id.* OHSU's revised actuarial estimates showed a one-time cost of $22.3 million and additional annual estimated costs in the range of *$18 million per year* in an uncapped environment. (APP-58[Ex.6]; APP-218[OHSU Cost Analysis & Projections].)

Increased costs of coverage and claims, and fixed budgets, meant public services would need to be cut by many key stakeholders. (*Id.*) OHSU testified:

> Cuts caused by loss of the tort cap reduce healthcare outreach to rural and vulnerable populations; reduce workforce initiatives aimed at creating more healthcare professionals so Oregonians can find care when they need it; delay or diminish activities that improve university facilities and create jobs and economic benefits for the state and communities. Loss of the tort cap also forces OHSU physicians to reassess which innovative medical procedures they can continue to perform, advance and teach as Oregon's only academic health center.

(APP-58[Ex.6].)

OHSU President, Dr. Joe Robertson, also testified: "I think if you just remember that you will see that the true impact of, of the loss of the tort cap on this institution, it's more than the entire support of this state for our schools of medicine[.]" (APP-96[Dr. Robertson testimony].) Indeed, OHSU budget cuts would exceed the amount earned by OHSU Health Services that directly supported OHSU education and research missions. (APP-58[Ex.6].) In fact, in February 2008, in response to *Clarke*, OHSU made an immediate $20 million

cut from its budget due directly to higher insurance costs and additional reserves. (APP-313-314[Stadum 2009 legislative testimony].)

d. Key Stakeholders OHSU and OTLA Agree on Appropriate New Limits, Which the Task Force then Recommends

On September 11, 2008, after facilitated sessions with U.S. District Court Judge Garr King, Task Force members OHSU and OTLA submitted to the Task Force a "Memorandum of Understanding" ("MOU") containing their joint proposed changes to the OTCA. (APP-247-250[MOU].) The proposal pertinently included: 1) increasing the "per claim" limit to $1.5 million, to be further increased by $100,000 per year to $2 million by 2015; 2) increasing the "per occurrence" limit (multiple claimants) to $3 million, increasing by $200,000 per year to $4 million by 2015; 3) increasing limits by 4% per year after 2015; 4) establishing no separate sub-limit for non-economic damages within the cap; and 5) expediting review of plaintiffs' constitutional challenges directly to the Oregon Supreme Court.[10] (*Id.*)

On January 22, 2009, the Task Force presented its final recommendations for OTCA reform to the legislature. (APP-311-312.) Those proposals tracked the terms of the accord reached by OTLA and OHSU.

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[10] Task Force Chair, Senator Prozanski, stated: "There is nothing in this bill to in fact keep an individual from going forward and show that in their particular case, such as in the Clarke decision, the caps no matter what they are set at that they are not adequate for that situation." (App-308-310[Minutes].)

e. The 2009 OTCA Amendments Responsive to *Clarke v. OHSU* and the Task Force

Senate Bill 311 (2009) encompassed each of the elements jointly proposed by OTLA, OHSU, and the Task Force. There were additional amendments that set separate new limits for local governments at $500,000 (single claim) and $1,000,000 (aggregate), with significant annual increases to 2015 and then up to 3% annual increases thereafter. Senate Bill 311 ultimately passed with the new state and local government limits and two additional modifications to the OTLA/OHSU Task Force proposal -- direct review in the Supreme Court if sought by *either* party, and post-2015 annual cap increases up to 3% (rather than 4%). ORS 30.271-30.274. (APP-338-339[2009 Or Laws, ch.67].) The law was made retroactive back to the date of the December 2007 *Clarke* decision. (APP-339[2009 Or Laws, ch.67, §3a].)

f. The 2011 OTCA Amendments Responsive to *Clarke v. OHSU*

In 2011, the legislature further amended the OTCA in response to *Clarke*'s repeatedly-expressed constitutional concern that the OTCA's "substitution" provision had *entirely eliminated* a remedy against individual government employee defendants by mandating the substitution of the government entity as the sole defendant. *Clarke*, 343 Or at 609. (APP-345-347,358-360[Wayson testimony].) The 2011 legislature therefore amended the OTCA substitution provision to permit a plaintiff to proceed directly against a

named individual and/or the government entity when the complaint alleges damages in an amount exceeding the OTCA cap, without relieving the public body of its obligation to indemnify that individual, with all claims still subject to the cap. ORS 30.265(3)-(4). (App-364-365[2011 Or Laws, ch.270].)

II. FIRST ASSIGNMENT OF ERROR

The Circuit Court erred in denying Defendants' Motion to Enter Limited Judgment Pursuant to OTCA Limits. The Circuit Court erred by entering Limited Judgment consistent with Plaintiff's form of Proposed Limited Judgment and Money Award (in the verdict amount), and by refusing to enter Limited Judgment consistent with Defendants' form of Proposed Limited Judgment and Money Award (applying the $3 million OTCA limit).

The Circuit Court erred by concluding that the $3 million OTCA damages limit (ORS 30.271(3)(a)), was unconstitutional as applied to all, or all parts, of the jury's verdict pursuant to the following provisions of the Oregon Constitution: Article I, section 10; Article I, section 17; Article VII (Amended), section 3.

A. Preservation of Error

Following the jury's verdict (ER-19), Defendants filed a Motion to Enter Limited Judgment Pursuant to OTCA Limits and to have a limited judgment entered accordingly. (ER-24-26.) Defendants submitted a proposed Limited Judgment and Money Award for $3 Million, showing the amount having been

fully satisfied as to both Defendants by the $3 Million Advance Payment. (ER-31-35.)

Also following the verdict, Plaintiff submitted a proposed Limited Judgment and Money Award that sought entry of limited judgment in the full amount of the jury's verdict against Dr. Harrison. (ER-20-23.)

In context of Defendants' motion and the parties' competing proposed forms of Limited Judgment, the parties briefed the constitutionality of the $3 million OTCA damages limit, pursuant to Article I, section 10; Article I, section 17; and Article VII (Amended), section 3. (ER-27-30; CR-__,__,__,__[Plaintiff 9/23/13; Defendant 10/17/13].) Oral argument was held, and the circuit court issued an Order that denied Defendants' motion (ER-36-38):

> [T]he damages verdict should not be reduced as to defendant Dr. Harrison. To do so would violate the remedies clause, the right to jury trial, and the reexamination clause of the Oregon Constitution.

(ER-37.) That order resulted in entry of Limited Judgment consistent with Plaintiff's position. (ER-39-42.)

The parties agreed that the liability of Defendant OHSU (a public body of the State) was capped by the OTCA at $3 million, and that OHSU's liability had been fully satisfied by Advance Payment of $3 million. Limited Judgment and a Full Satisfaction entered accordingly. (ER-39-42,47-48.) The Limited Judgment and a Partial Satisfaction further provided for entry of judgment against Defendant Dr. Harrison in the full amount of the jury's verdict,

$12,071,190.38, and that Dr. Harrison's liability had been partially satisfied by the $3 million Advance Payment, affixing his remaining liability at $9,071,190.38. (ER-39-42,45-46.)

B. **Standard of Review**

Questions of law (determination of common law immunities and issues of constitutional interpretation) are reviewable for errors of law. A potential, mixed question of fact and law (if the Remedy Clause applies, to determine substantiality of the $3 million remedy), is reviewable for errors of law.

C. **Argument**

1. **Right to Jury Trial and the Remedy Clause Do Not Apply: Common Law Immunities Would Have Barred The Claim in 1857**

a. **Common Law Right of Action Was Not Well-Established or Absolute Because the Conduct was Immune From Liability in 1857**

The parties do not dispute that 1857 Oregon law regarding immunity for a state-employed physician (*i.e.*, Dr. Harrison) is the critical threshold inquiry for Remedy Clause (Article I, section 10) and right to jury trial (Article I, section 17). *See, e.g.*, *Smothers*, 332 Or at 124 (Article I, section 10); *Hughes*, 344 Or at 156 (Article I, section 17). A plaintiff must demonstrate a "well-established," "absolute" 1857 right for the claim, in order for the constitutional

provisions to apply.[11] *See Smothers*, 332 Or at 116 (purpose of Remedy Clause is to prevent legislature from abolishing "rights which had become well-established prior to the enactment of our Constitution") quoting *Stewart v. Houk*, 127 Or 589, 591 (1928)); *Lawson v. Hoke*, 339 Or 253, 258 (2005) (Remedy Clause "protects absolute common law rights that existed when the Oregon Constitution was drafted") (internal quotation omitted); *Hughes v. PeaceHealth*, 344 Or 142, 156 (2008) (likewise for Article I, section 17).

Thus, the existence in 1857 of discretionary immunity or sovereign immunity for negligent patient care by a state-employed physician, or, alternatively, Plaintiff's inability to establish that no such individual immunity existed, would defeat Plaintiff's reliance on Article I, sections 10 and 17. That is because an immunized defendant *could not be sued* at common law, regardless of plaintiff's misfortune and regardless of defendant's negligence. *See Clarke v. OHSU*, 343 Or at 594-600 (so holding regarding the claim against OHSU).[12]

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[11] Appellant separately challenges, *infra*, whether either constitutional provision provides a relevant substantive right at all.

[12] In *Clarke*, OHSU asserted (and the Court held) that OHSU would have had sovereign immunity in 1857 and, therefore, neither the Remedy Clause nor the right to jury trial applied. 343 Or at 594-600. But OHSU and the physician conceded in *Clarke* that a negligence claim would have existed against a state-employed physician for negligent patient care in 1857, and thus did not raise or brief the individual's discretionary immunity and sovereign immunity issues that are raised by Dr. Harrison here. The Supreme Court decided *Clarke*

b. **Law Before 1857**

This Court has looked to law from Oregon and other jurisdictions, before and after statehood, to infer whether certain remedies existed in 1857 in Oregon. *See Howell v. Boyle, City of Beaverton*, 353 Or 359, 386-87 (2013) (methodology for assessing 1857 common law) ("*Howell v. Beaverton*"). In *Lawson v. Hoke*, 339 Or at 264-65, for example, the Court held that a legislatively-created affirmative defense did not violate the Remedy Clause because similar defenses existed *circa* 1857. *Lawson* declined to find a well-established and absolute remedy based on the fact that *some* (not all) 19th century cases from *other jurisdictions* recognized defenses that were merely *analogous* to the defense at issue in *Lawson*. 339 Or at 262-64. The historical evidence regarding individual immunities is considerably stronger here.

Justice Landau's concurrence in *Klutchkowski v. PeaceHealth*, 354 Or 150 (2013), captures the general spirit of mid-nineteenth-century personal-injury law:

> The mid-nineteenth century, after all, was no friend to those seeking recovery for injury. The law of negligence was in its infancy.
>
> ***
>
> The robust common-law remedies with which we are so familiar today barely existed at the time.

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assuming the concession, without examining any individual immunity issues or rendering a decision on their merits. 343 Or at 608.

Id. at 186, 189 (Landau, J., concurring) (citations omitted). Indeed, common law of liability in the mid-19th century generally was *ad hoc*, with focus on malfeasance (intentional misconduct) rather than nonfeasance (negligence). G. Edward White, *Tort Law In America: An Intellectual History*, 5, 15, 18 (Oxford Univ. Press 1980). The prior collection of writs and forms of action was in desuetude, in transition to be replaced ultimately by tort law. Oliver Wendell Holmes, Jr., *The Common Law*, xiv-xv (Mark DeWolfe Howe, ed., Little, Brown and Company 1963) (1881) (1963 editor's introduction).

On the eve of Oregon's statehood, the Missouri Supreme Court surveyed the law of individual immunity and articulated a very broad standard for what is commonly known as discretionary immunity:

> From a careful examination of authorities from the case of *Turner v. Sterling*, 23d Charles II. [1671], reported in 2 Ventris, 26, down to our own times, both in the English and American courts, the doctrine that a ministerial officer, acting in a matter before him with discretionary power, or acting in a matter before him judicially, or as a quasi judge, is not responsible to any one receiving an injury from such act, unless the officer act maliciously and willfully wrong, is most clearly established and maintained.

Reed v. Conway, 20 Mo 22, 1854 WL 4640 at *12 (1854). Just one year before Oregon's constitution, the California Supreme Court reached the same conclusion in *Downer v. Lent*, 6 Cal 94, 95 (1856).

Similarly, the U.S. Supreme Court, *in Kendall v. Stokes*, 44 US 87, 97-98 (1845), a case against the Postmaster General, surveyed the range of English and American common law and recognized discretionary immunity:

> We are not aware of any case in England or in this country in which it has been held that a public officer, acting to the best of his judgment and from a sense of duty, in a matter of account with an individual, has been held liable to an action for an error of judgment. * * * But a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake.

By contrast, a ministerial duty, narrowly defined, could give rise to liability. *See State of Mississippi v. Johnson*, 71 US 475, 498 (1866) ("A ministerial duty . . . is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.").

c. **Early Oregon law**

Most of Oregon's earliest immunity cases involved suits arising out of street/bridge disrepair, and for many years were only brought against local governments, and not against individuals. The legislature waived immunity by statute for local governments shortly after statehood, in 1862.[13] Before that, holders of such claims had to "appeal[] to the generosity or justice of the legislature." *Ketchum v. State*, 2 Or 103, 105 (1864). This indicates that 1857

[13] Chapter IV, Title IV, Section 347 (1862).

common law generally did not recognize a claim against a government official/employee.

Holdings in other early Oregon cases underscore the point. In *McCalla v. Multnomah County*, 3 Or 424 (1869), the plaintiff sued the county based on alleged negligence of the county road supervisor in failing to repair a bridge. The court stated:

> It is contended, that at common law there would be no such liability; and, that a person injured by a bridge out of repair, has no remedy, however clearly it be shown to have been occasioned by the negligence of the road supervisor. This may be true at common law, but the statute of this state (page 235, sec. 347) provides [for maintaining an action against the county or a public corporation of like character].

3 Or at 425. That passage indicates that the plaintiff would have had *no remedy* at common law, whether it be against the county *or* the road supervisor. Similarly, *Templeton v. Linn County*, 22 Or 313 (1892), involved a tort action based on highway disrepair in which the court held repeal of a statute authorizing county liability "destroyed the *only* foundation upon which an action for negligence could rest." 22 Or at 317 (emphasis added).

Rankin v. Buckman, 9 Or 253 (1881) appears to be the first Oregon case to expressly address immunity of government individuals. The issue was whether city officials were liable for failing to repair a bridge where the city charter imposed an express duty of keeping streets in safe repair, and where city officials were on long notice that the bridge was unsafe. *Id*. at 255. The court

began by analyzing Section 347, which waived local government body immunity, and held:

> The liability which [Section 347] imposes upon the corporation for any act or omission resulting in an injury, *is shifted*, by this section of the charter, from the corporation to the officer or person out of whose negligence [defined as "willful neglect of a duty imposed by the charter or gross negligence"] a duty enjoined, but unperformed, has resulted in injury."

Id. at 237, 258 (emphasis added.)

If government individuals had been liable under common law for their negligence, there would have been no need to "shift" liability to them by legislatively-enacted city charter. *See also Sheridan v. City of Salem*, 14 Or 328, 335 (1886) ("without [a charter provision shifting liability to individuals], the tax-payers of public corporations will have to continue to be insurers against the negligence of their officers.").

Furthermore, even though the city charter in *Rankin* authorized suits against individuals, the court still analyzed whether the individual's specific actions were immunized. The court drew a distinction between *discretionary actions*, *which were immunized*, and actions pursuant to an "absolute duty" for which officials would lack immunity. 9 Or at 260-61.

Twenty years later, the court addressed a city ordinance that expressly exempted both the city itself and city council members from liability for street disrepair. *Mattson v. Astoria*, 39 Or 577 (1901). The Court held that the

ordinance violated the Remedy Clause and reasoned that because city council was directed by city charter to keep streets in repair, the city council members had a *ministerial duty* to do so. *Id*. at 579. The Court thus recognized that the individuals would have been liable at common law for failing in such *ministerial duties* and concluded that the ordinance had eliminated all remedies in violation of Article I, section 10. Nothing in *Mattson* remotely undermines the principle, however, that individual government officials/employees were immune for *discretionary acts* at common law, by contrast to *ministerial duties*.

Indeed, the definition of "ministerial" was quite narrow -- and conversely the definition of "discretionary" was quite broad -- not only in the 19th century. *Antin v. Union High School Dist.*, 130 Or 461 (1929), defined the distinction, consistent with the historically-common understanding, as follows:

> Discretionary duties: "are such as necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued."
>
> Ministerial duties: "are such as a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done."

Antin, 130 Or at 469 (quoting the then-current Corpus Juris treatise). Under those definitions, the actions of state-employed healthcare professionals in treating patients are discretionary and thus would have been immune from a common law negligence claim. *See generally Ross v. Schackel*, 920 P2d 1159,

1165 (Utah 1996) (court relied on multiple "cases from other jurisdictions holding that medical care is discretionary in nature, entitling physicians to immunity [in 1877].").

Significantly, the principal case relied on by Plaintiff below for the proposition that discretionary immunity in Oregon historically was narrower, *Lupke v. Sch. Dist. No. 1 of Multnomah County*, 130 Or 409 (1929), was overruled by the Oregon Supreme Court as incorrect and an aberration just a few years later in *Lovell v. School Dist. No. 13, Coos County*, 172 Or 500 (1943). *Lovell* concluded that *Lupke* lacked "any sound basis" for its decision, and expressly overruled it on the additional basis that *Lupke* "cannot be reconciled" with the decision in *Antin*, which had been decided exactly contemporaneously with *Lupke*. *Lovell*, 172 Or at 505, 506-07.

d. **The Utah Supreme Court Holds that State-Employed Physicians Would Have Been Immune in 1877**

In *Ross v. Schackel*, the Utah Supreme Court confronted the same threshold Remedy Clause question as here, whether Utah law at statehood (1877) would have immunized a state-employed (prison) doctor from a negligence claim based on patient care. The court examined caselaw nationally on individual immunity from 1877 through 1968 and concluded that the doctor would have had discretionary immunity from liability:

> A prison doctor, if performing a ministerial duty in good faith, would have been liable for compensatory damages but not for punitive damages. However, the doctor would have been immune from an action for negligence if acting in a discretionary, official capacity.
>
> * * *
>
> Schackel's rendering of medical care to prisoners could not properly be described as ministerial in nature at common law. The care a prison physician provides does not merely involve the execution of a set task without the need for judgment or discretion. Nor does the care arise out of a clear state of facts. Rather, a great deal of judgment and opinion are involved in making a diagnosis and prescribing appropriate medical treatment.

920 P2d at 1164-65.

e. **Modern Oregon Caselaw Strongly Supports the Conclusion that a State-Employed Physician Would Have Been Immune From Liability in 1857**

Smith v. Cooper, 256 Or 485 (1970) is arguably the seminal late-20th century case addressing individual immunity. *See generally Westfall v. State*, 355 Or 144, 157 (2014) (*Smith v. Cooper* "would be important to the future construction [of discretionary immunity]" citing to and quoting *Stevenson v. State of Oregon*, 290 Or 3, 8 (1980)). *Smith v. Cooper* marks a turning point in narrowing immunity under Oregon law, and therefore provides a reference point for understanding the prior state of Oregon immunity law.

As detailed above, *Antin* had employed a very broad definition of discretionary immunity, consistent with other definitions used in the 19th and 20th century in common law generally. After reviewing *Antin* and a number of

other discretionary immunity cases, *Smith v. Cooper* expressly departed from such earlier "literal" approaches and dramatically narrowed the scope of discretionary immunity to acts generally at a policy level. 256 Or at 495-511. S*ee also Comley v. Emanuel Lutheran Charity Bd.*, 35 Or App 465, 473 (1978) (stating that "[t]he Supreme Court [in *Smith v. Cooper*] declined to apply this literal approach [as in *Antin*] because under it nearly every governmental act involves some degree of judgment and thus would be discretionary, leaving nothing excepted by the purported exception.").

f. **Oregon Appellate Courts Immunized State-Employed Physicians From Claims of Negligent Patient Care As Recently As the 1960s and 1970s**

Jarrett v. Wills, 235 Or 52 (1963), relied on discretionary immunity and sovereign immunity Oregon caselaw to hold that a state-employed doctor/superintendent was immune for choosing to discharge a mental health patient. *Id*. at 56 ("whether [defendant's] conduct is measured by a rule based on 'discretionary conduct' or upon public policy[,] [e]ither rationale, as found in the authorities before cited, would place immunity upon the judgments of the official now charged.").

In *Baker v. Straumfjord*, 10 Or App 414, 417 (1972), the Court of Appeals relied on *Jarrett v. Wills*, *inter alia*, to hold that a state-employed physician was entitled to discretionary immunity from negligence allegations including:

> [F]ailing to adequately instruct available personnel in the care of a person suffering from a schizophrenic reaction after plaintiff was admitted and received in said infirmary. [And] failing to administer sufficient tranquilization to the plaintiff to disable him from the destructive characteristics of an acute schizophrenic reaction.

Six years later, in *Comley v. Emanuel Lutheran Charity Board*, the Court of Appeals *reversed Baker v. Straumfjord* and held that a state-employed physician was *not* entitled to discretionary immunity for negligent patient care, relying on *Smith v. Cooper's* modern narrow definition for discretionary immunity. 35 Or App at 473-479. Indeed, *Comley* acknowledged that "[a]t least some of the[] allegations charge conduct which is, in the literal sense, discretionary . . . ." *Id*. at 478. In other words, *Comley* recognized that under the earlier literal discretionary immunity test, immunity would have applied.

Baker, Comley and *Jarrett* demonstrate that *as recently as the 1960s and 1970s* there was still no legally-cognizable negligence claim against state-employed physicians. Those cases underscore what *Antin* and its predecessor cases, and cases such as *Ross v. Schackel* also make clear: Dr. Harrison would have been immune in 1857 from Plaintiff's claim of negligence here under discretionary immunity. Plaintiff certainly cannot show there was a well-established and absolute right to a claim.

g. The Surgery Here Would Have Qualified for Discretionary Immunity

To try to avoid the consequences of Dr. Harrison's immunity position, Plaintiff argued below that: 1) Dr. Harrison's conduct would not have qualified for discretionary immunity in 1857, and 2) right to jury trial is not limited only to claims that were cognizable at common law in 1857 because a precise claim match then-to-now is not required.

i. Dr. Harrison's Conduct Would Have Qualified for Discretionary Immunity in 1857

Plaintiff's Third Amended Complaint (ER-1-7) ("Complaint") and Defendants' Answer to Third Amended Complaint (ER-8-11) ("Answer") are the operative pleadings.[14] They contain Plaintiff's medical negligence claim and Defendants' admission of fault for an allegation of that claim, which removed liability from trial, which then was limited to damages. (*See, e.g.*, ER-19[verdict].) Facts pleaded concerning Defendants' conduct plainly demonstrate that Dr. Harrison was engaged in a discretionary act (requiring exercise of reason and discretion) and not a ministerial act (to fulfill a legal mandate without regard to or the exercise of personal judgment). *See, e.g.*, *Antin*, 130 Or at 469 (relevant definitions).

[14] All fact cites in this section thus are to the Complaint and Answer.

Barely six-months-old, . had a large abdominal mass, diagnosed as Stage III hepatoblastoma. (ER-9,¶6.) After more than two months of "specialty care" at OHSU, . 's doctors recommended surgery for an extended right hepatectomy. (ER-2,¶6; ER-9,¶6.)

Still less than nine-months-old, . was taken to surgery with a team led by Dr. Harrison and including Dr. Audrey Durrant, a pediatric surgical fellow-in-training, both employees of OHSU acting in the course and scope. (ER-2-3,¶7; ER-9,¶6.) Dr. Harrison is a licensed physician "practicing the surgical specialty of pediatric surgery." (ER-1-2,¶2; ER-8,¶2.)

The Complaint alleged conduct that:

> During the operation alleged above, defendants cut, ligated, cauterized or otherwise completely transected the blood vessels and ductal structures to and from plaintiff [. 's entire liver, and cut or otherwise damaged the vena cava and related structures, and injured his spleen and small bowel.

(ER-3,¶8.)

The Complaint further alleged negligence[15] in that:

> Dr. Harrison and the other agents of Defendant OHSU…were negligent in causing the injuries and damages to Plaintiff [. at the time of his September 17, 2009 surgery, in failing to properly identify the porta hepatis and the vascular and ductal structures around and within plaintiff [s liver before cutting, ligating,

[15] The Complaint is captioned as a claim for "Medical Negligence" and alleges throughout a claim for "negligence." (ER-1,3-5, caption,¶¶10-13.)

> cauterizing, transecting or otherwise irreparably severing or damaging such structures[.]

(ER-3-4,¶10.)

In response, Defendants admitted:

> Defendants admit that during the course of the surgery, vessels to the left lobe of the liver were inadvertently transected, which resulted in injury to [. 's liver and other structures, and necessitated additional medical and surgical care, including transfer to Stanford/Lucile Packard Children's Hospital and the need for a liver transplant. Defendants admit responsibility and therefore fault for the cutting of the vessels to the left lobe of the liver.

ER-9,¶7.)

Dr. Harrison thus led a pediatric surgical team performing complex, life-saving surgery on an infant child. The exercise of discretion as to when to have a pediatric surgical fellow-in-training [who had completed a general surgery residency] do the surgery or parts thereof also is at the heart of an advanced training program in pediatric surgery at an academic medical center.

Under the relevant definition of a discretionary act (*e.g.*, *Antin*, 130 Or at 469), the pleaded conduct was discretionary, and negligent performance obviously does not change the underlying nature of the conduct, since it is the negligent performance of a discretionary act that is entitled to immunity. Likewise, there is no way to characterize the surgery here conversely as a ministerial act. These conclusions are embodied not only in the definitions of

the terms but also in the court decisions cited above, in which alleged negligent medical care by a physician was deemed to be discretionary and entitled to immunity. (*See, e.g., Jarrett v. Wills; Baker v. Straumfjord; Ross v. Schackel,* and cases cited therein.)

Plaintiff nonetheless contended below that the word, "inadvertently," in the Answer does not equate with negligent conduct and compels a conclusion that there would have been no discretionary immunity. The word "inadvertently," however, is synonymous with "negligence." Webster's Third New International Dictionary (unabridged 2002) defines "inadvertence" as: "**1**: the fact or action of being inadvertent; lack of care or attentiveness : INATTENTION **2**: an effect of inattention : a result of carelessness : an oversight, mistake, or *fault from negligence*." *Id*. at 1139-40 (emphasis added). Likewise, "inadvertent" is defined to include "NEGLIGENT." *Id.* at 1140. Moreover, "inadvertently" was used in immediate context of a pleading paragraph in which Defendants admitted "responsibility and therefore fault" from conduct constituting a legal claim of ordinary medical negligence, the only claim Plaintiff alleged.

ii. Plaintiff Cannot Establish a Cognizable Right to a Cause of Action

Plaintiff also argued below, relying on *M.K.F. v. Miramontes*, 352 Or 401 (2012) and *State v. N.R.L.*, 354 Or 222 (2013), that the right to jury trial is

not limited to claims that were cognizable at common law in 1857 because a precise match with a modern claim is not required. *Miramontes* and *N.R.L.* may allow for modern claims that did not yet exist in 1857 but which are similar enough to claims that existed in 1857 to trigger constitutional protection. But the cases do not thereby purport to recognize claims like this one in which common law immunity would have barred the alleged negligence claim in 1857. *See Clarke v. OHSU*, 343 Or at 354-60 (OHSU's sovereign immunity in 1857 precludes application of the Remedy Clause as to OHSU); *Lawson v. Hoke*, 339 Or at 262-65 (same result re 19th century affirmative defense).

Despite Plaintiff's attempts to obscure the issue, this case presents the straightforward question whether a state-employed physician would have been immune from liability in 1857 from a claim of negligent patient care: If Plaintiff cannot establish that there was a well-established, absolute right to sue a state-employed physician in 1857 for negligent patient care, then neither the Remedy Clause of Article I, section 10 nor the right to jury trial of Article I, section 17 applies.

h. **Sovereign Immunity**

Jarrett's conclusion that the doctor also was protected by sovereign immunity likewise is supported by prior Oregon law. *Antin*, in 1929, expressly recognized governmental immunity for negligence by *government-employed healthcare providers*:

> [W]hen a municipality provides . . . health protection . . . such functions are governmental in their nature, and for its own negligent acts or wrongful omissions, or those of its agents and servants, it is not liable to suit by a private person.
>
> * * *
>
> [I]n so far as a public officer executes the authority or performs the functions of government, the exemption of the state for wrong applies to him.

130 Or at 467, 478. *See also Caspary v. City of Portland*, 19 Or 496, 501-02 (1890) (physician or health officer employed by town acts as independent public officer of the state and therefore immunity attaches to performance of such officer's duties); *United Contracting Co. v. Duby*, 134 Or 1, 25 (1930) (suit could not be maintained against state officers if "officers represented the state both in action and liability."). That rule was in accord with other jurisdictions. *See Lawhorne v. Harlan*, 214 Va 405, 407, 200 SE2d 569 (1973) (*overruled on other grounds by First Virginia Bank-Colonial v. Baker*, 225 Va 72, 301 SE2d 8 (1983)) (citing nineteenth-century caselaw to support proposition that state-employed healthcare professionals were protected by broad sovereign immunity).

In the years since *Jarrett v. Wills*, a more restrictive line of Oregon sovereign immunity cases has largely disavowed that individuals may be protected by sovereign immunity. *See, e.g.*, *Clarke*, 343 Or at 589 (citing cases). This modern evolutionary departure underscores the historical fact that

sovereign immunity would have immunized state-employed physicians prior in 1857.

i. Conclusion

Dr. Harrison would have been immune from liability in Oregon in 1857 under discretionary immunity or sovereign immunity; Plaintiff cannot show there was a well-established, absolute right to a claim. Thus, neither the Remedy Clause of Article I, section 10, nor the right to jury trial in Article I, section 17, applies. Dr. Harrison therefore is entitled to the full protection of the OTCA.

That conclusion is an independent, sufficient basis to require entry of judgment at the $3 million OTCA limit, and to reject Plaintiff's constitutional challenges. The remainder of this brief regarding those constitutional provisions is relevant only if the Court does not agree.

2. Constitutional Context: Plenary Legislative Authority to Amend Common Law and Enact Statutory Immunities

a. Amending Common Law

By contrast to the federal government, whose power to legislate is an affirmative constitutional grant of authority, the Oregon Legislature, like other state legislatures, "has plenary authority to legislate within constitutional limits." *Dennehy v. Dep't of Revenue*, 305 Or 595, 602 (1988). As this Court explained in 1865:

> The construction of the State Constitution is widely different from that to be given to the Constitution of the United States. The latter is the *sole source* of power and authority for the national government . . . . In the former, it is fairly the reverse; the people, acknowledged to be sovereign, framed it as a *restriction* upon such powers as might be needed by the legislature over subjects enumerated therein. On all other matters the power of that body is unrestrained; it is absolutely sovereign, except when limited by the terms of the Constitution alone.

King v. City of Portland, 2 Or 146, 152-53 (1865) (emphasis original). A central purpose of that plenary legislative authority is to respond to the felt needs of a changing society and to legislate looking toward society's future needs:

> Legislation … looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Prentis v. Atlantic Coast Line Co., 211 US 210, 226 (1908) (Holmes, J.) (distinguishing legislative from judicial authority).

Accordingly, one of the legislature's important plenary powers is authority to amend common law, up to and including the abolition of common law claims. *See, e.g., U.S. Fidelity & Guaranty Co. v. Bramwell*, 108 Or 261, 264 (1923) (common law applies in Oregon except, *inter alia*, "as modified, changed, or repealed by our own statutes"); *see also Lakin*, 329 Or at 70 (same) (citing *State v. Hansen*, 304 Or 169, 172 (1987)).

That core legislative power to override common law was well-established when the Oregon Constitution was drafted and adopted. Indeed, common law

itself was always extremely changeable by the courts and varied widely among jurisdictions in the 19th century. For example, *The Common Law* explained that:

> The Common Law has changed a good deal since the beginning of our series of reports, and the search after a theory which may now be said to prevail is very much a study of tendencies.

(Holmes, *The Common Law*, *supra*, at 6.) To this passage, Holmes appended a handwritten note observing that the review he had in mind would be "necess. prelim. to any serious codification or legislative working over of the substance." *Id*. at 6 n. *b*.[16] Holmes therefore recognized that common law was subject to organic, experience-based change over time, and also necessarily subject at any time to wholesale legislative modification.

William Blackstone likewise explained in *Commentaries on the Law* that "Where the common law and a statute differ, the common law gives place to the statute." William Blackstone, *Commentaries* *90. He further described the legislature's plenary authority to control the course of common law, whether by restating, expanding, or restricting it:

> Statutes also are either declaratory of the common law, or remedial of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare

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[16] *See id*. at xxvii (editor's note explaining that "lettered footnotes . . . have been inserted by the editor: in all instances these come from marginal notes inserted by Holmes in pen or pencil in his own copy of *The Common Law*.").

> what the common law is and ever hath been. . . . Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law, where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into enlarging and restraining statutes.

Id. at *87–88.

Both the Supreme Court and state courts before 1857 recognized that the legislature had plenary authority to enact statutes that amend common law. *E.g.*, *Mayburry v. Brien*, 40 US 21, 38 (1841) (noting common law rule changed by statute in many states); *McCorry v. King's Heirs*, 22 Tenn 267, 1842 WL 1936, *4 (1842); (state adopted domestic relations common law "except as far as changed and modified by statutes"); *Lindsley v. Coats*, 1 Ohio 243, 245 (1823) (statutes controlled, obviating need to decide based on common law). *See also* The Federalist No. 84 (Alexander Hamilton) (recognizing legislative authority over common law).

The Oregon territorial legislature, in fact, had enacted a law in 1853 modifying the remedy for timber trespass by providing for treble damages. *The Statutes of Oregon* (1853), Ch I, title II, §17 (title re nuisance action). Similarly, the Supreme Court of the Oregon Provisional Government had cited to U.S. Supreme Court authority that recognized legislative authority to change

a contractual remedy, within limits imposed by the constitutional protection against impairment of the obligations of contract. *Knighton v. Burns*, Oregon Supreme Court Record at 53-57, *reprinted at* 10 Or 548-52 (Appendix) (1847).

That principle of legislative supremacy is embodied in the Oregon territorial laws and the Oregon Constitution itself. In 1844, Oregon's provisional legislature adopted "'the common law of England, and principles of equity, *not modified by the statutes of Iowa, and of this government*, and not incompatible with its principles.'" *Hughes v. PeaceHealth*, 344 Or at 148 (quoting law) (emphasis added). That law then effectively was ratified by Article XVIII, section 7, of the Oregon Constitution: "All laws in force in the Territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered, or repealed."

Given all of the foregoing, it is no surprise that the Oregon Supreme Court, in 1892, considered and resoundingly rejected as "startling" the notion that Article I, section 10, of the Oregon Constitution somehow permanently froze every aspect of a common law remedy that had existed in 1857 against legislative change, stating that such a rule would:

> tie[] the hands of the legislature so that such liability should endure as long as the constitution shall remain in force. As a proposition of constitutional law, this contention seems startling.

Templeton v. Linn County, 22 Or at 316.

That solid foundation for legislative authority and supremacy underlies the principle, recognized immediately at the very inception of statehood, that courts must accord to legislative acts a strong presumption of constitutionality. *King*, 2 Or at 151-52 ("It is not the province or duty of courts to declare the acts passed by the legislative assembly to be unconstitutional upon grounds seemingly reasonable; the case must be one in which the court can have no rational doubt.").

b. Enacting Statutory Immunities, Including OTCA Partial Damages Immunities

Pursuant to its plenary authority, including to amend common law, the Oregon legislature has adopted well over 100 different full or partial statutory immunities presently on the books. (APP-10-15[listing statutory immunities].) This Court has recognized that the OTCA statutory damages caps are properly characterized as "immunity for damages in excess of that [cap] limitation." *Rogers v. Saylor*, 306 Or 267, 278 (1988); *see also Hale v. Port of Portland*, 308 Or 508, 516 n.6 (1990) ("OTCA establishes partial immunity by statute").

Plenary legislative authority to enact statutory immunities also is reflected in the "privileges, or immunities" provision of Article I, section 20,[17] which recognizes the legislative authority to enact immunities and prohibits

[17] Article I, section 20, provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which upon the same terms, shall not equally belong to all citizens."

discrimination in such laws. *See State v. Savastano*, 354 Or 64, 73 (2013) (relying on Oregon caselaw back to 1891, "the court has recognized that requiring privileges or immunities to be granted "equally" permits the legislature to grant privileges or immunities to one citizen or class of citizens as long as similarly situated people are treated the same."); *Gunn v. Lane County*, 173 Or App 97, 103 n.4 (2001) ("Article I, section 20, does not tell the legislature what privileges and immunities it may or may not grant. Rather it requires only that whatever privileges and immunities the legislature grants be granted equally.").

Plaintiff here nonetheless contends that jury trial rights in Article I, section 17 and Article VII (Amended), section 3, *implicitly* contain a substantive individual right to a remedy that bars the legislature forever from enacting a partial damages immunity within the OTCA. Surely the notion that this is what they were really doing would have come as a surprise to the drafters of Article I, section 17 in 1857 and the voters who adopted Article VII (Amended), section 3, in 1910. The Supreme Court put the point well, in an analogous context: "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions -- it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns.*, Inc., 531 US 457, 467-68 (2001).

A short list below of the much broader range of full or partial statutory immunities (App-10-15) shows how much a part of our social fabric they are[18] and what Oregon would look like without them if Plaintiff's position were to prevail:

> **At least 28 statutes immunize persons who provide various healthcare services**:[19] Providing pro bono services to charity; using automatic external defibrillator; emergency care provided by government staff or without compensation; emergency transportation for injured/ill persons; trained responder to allergic, hypoglycemic events; outreach care to homeless people. (APP-10.)
>
> **Partial Damages Immunity**: Volunteer transporting older or disabled persons is liable only up to amount of insurance coverage. (ORS 30.480.)
>
> **Partial Damages Immunity**: Defendant is immune from noneconomic damages if plaintiff drives under the influence of alcohol or without mandatory insurance. (ORS 31.715.)
>
> **Donors**: food, household items to charity/nonprofit; previously-owned eyeglasses/hearing aids; anatomical gifts; Charitable Prescription Drug Program. (APP-12.)
>
> **Persons who report abuse/neglect** of children, disabled persons, elder persons, persons in various residential facilities, are immune from liability for reporting. (APP-13.)

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[18] *See OHSU v. Clarke*, 343 Or at 619 (Balmer, J., concurring) (recognizing legislative authority under Article I, section 10, to enact statutes, including full or partial immunities "in which the legislature has adjusted common-law rights and liabilities").

[19] ORS 30.800 (immunity for emergency care without compensation) would, for example, immunize Governor Kitzhaber's recent voluntary, life-saving provision of emergency CPR to a person on the street. [http://www.oregonlive.com/politics/index.ssf/2014/05/gov_john_kitzhaber_performs_cp.html#incart_m-rpt-1]

Joint tortfeasor who obtains covenant-not-to-sue is immune from contribution claims by other tortfeasors. (ORS 31.815.)

Persons who open property to recreational use, or for fish/wildlife improvement project, are immune. (ORS 105.682, ORS 496.270.)

With the legislature's plenary authority to amend common law and to enact statutory immunities -- including the OTCA partial damages immunity -- as context, consideration turns to examination of the three constitutional provisions that Plaintiff nonetheless relies on to invalidate the partial damages immunities of the OTCA.

3. Article I, Section 10: Remedy Clause

a. *Smothers* Should be Overruled

Plaintiff seeks to avoid application of the OTCA damages cap, in reliance on the 'Remedy Clause' provision of Article I, section 10. This case therefore presents an appropriate vehicle to reconsider *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001), to determine whether Article I, section 10 is a substantive guarantee of a remedy (per *Smothers*) or, rather, guarantees access to the courts for such remedies as the law may provide. The Court should reconsider its decision in *Smothers* because the Court has committed to "reach what we determine to be the correct result in each case" and also "because we were not presented with an important argument or failed to apply our usual

framework for decision or adequately analyze the controlling issue." *Farmers Ins. Co. of Oregon v. Mowry*, 350 Or 686, 698 (2011).

Dr. Harrison urges the Court to overrule *Smothers* and conclude that Article I, section 10 does not guarantee a remedy (here unlimited damages), and therefore that application of the $3 million OTCA cap to the verdict is constitutional. Dr. Harrison relies on the history, extensive authorities and analysis in Justice Landau's concurrences in *Klutchkowski v. PeaceHealth*, 354 Or at 178-94, *and Brewer v. Dept. of Fish and Wildlife*, 167 Or App 173, 191-98 (2000) (Landau, J. concurring, joined by Linder, J). Dr. Harrison has nothing substantive to add in this brief to those well-developed positions.

In *Brewer* (which was decided just before *Smothers*), Judge DeMuniz's decision reviewed prior caselaw and held that the Remedy Clause did not bar absolute statutory immunity for property owners who open their land to recreational use, ORS 105.682, so long as the immunity statute provided a 'trade off' of a public benefit gained for the immunity. 167 Or App at 188-91 (relying on cases including *Hale v. Port of Portland*, 308 Or at 523 (*quid pro quo* analysis for Article I, section 10)). *See also Clarke v. OHSU*, 343 Or at 616-17 (Balmer, J. and Kistler, J., concurring) (concluding that due to a "trade off …, the workers' compensation scheme provides workers generally with a 'substantial remedy' for Remedy Clause purposes.").

If Article I, section 10 is not re-interpreted as an access-to-courts provision, then the rule of law stated by the Court of Appeals in *Brewer* should be adopted by this Court, for the reasons stated therein. That would lead to the conclusion that application of the OTCA cap here is constitutional. The 'trade off' here includes but is not limited to government waiver of sovereign immunity and government indemnity thereby effectively guaranteeing a collectable judgment; high cap limits that cover virtually all cases and a sizable amount in the remaining few cases; no limits on noneconomic damages within the caps; and the provision of extensive public services -- including by OHSU -- that otherwise could not be provided due to costs of liability and insurance in an uncapped environment.

b. **The $3 Million Remedy is Constitutional**

If this Court does not overrule *Smothers* on either of the grounds stated above, then the next question becomes how to determine the constitutionality/substantiality of a $3 million statutory remedy. This Court has acknowledged that it "has never spelled out the precise contours of such a determination." *Howell v. Beaverton*, 353 Or at 375. The Court nonetheless has made clear that a substantial remedy does not need to make a plaintiff whole or match the jury's verdict, rather "the constitutional adequacy of a modern remedy may be established by the fact that the modern remedy is 'substantial' and does not leave the plaintiff 'wholly without remedy'." *Id*.

i. The Test for a Constitutional Remedy

Dr. Harrison proposes the following construct to determine whether a remedy is substantial/constitutional in a particular case under the OTCA, which does not leave Plaintiff wholly without a remedy against him. First, the court should examine the substantiality of the remedy in general terms.

In making that determination, the Court should take into account the record of legislative factfinding, which established that a cap at this level would cover far more than 99% of the claims brought under the OTCA and that there were hardly any cases historically that were substantially larger than the new cap limits. That legislative process also produced a strong consensus among stakeholders and the legislature that the amendments had produced fair and sizeable remedies, including provision for significant future annual increases to maintain the strength of the remedy. Moreover, the face amount of the remedy itself is manifestly "substantial." Indeed, the remedy here falls squarely in the middle of the range of $1 million to $5 million private medical malpractice insurance that the concurrence in *Clarke* identified as an indicator of a substantial remedy for purposes of the Remedy Clause. 343 Or at 612. Under these circumstances, the OTCA remedy is "substantial" as a general matter.

Moreover, the legislature fixed the "substitution" problem in 2011 in direct response to *Clarke*, and therefore there has not been a complete elimination of a remedy against the individual defendant here, as was the case

in *Clarke*. Under those circumstances, the Court should conclude that the statutory remedy of $3 million is a substantial remedy and constitutional, without reference to the details of the verdict.

That is essentially how the Court would analyze the adequacy of a remedy under the Workers' Compensation Act and in accord with how this Court has most recently analyzed the substantiality of a remedy under the OTCA in *Howell v. Beaverton*: "the constitutional adequacy of a modern remedy may be established by the fact that the modern remedy is 'substantial' and does not leave the plaintiff 'wholly without remedy." 353 Or at 375. *See also Clarke*, 343 Or at 616-17 (Balmer, J. and Kistler, J., concurring), referring to workers' compensation and the Remedy Clause:

> In a sense, an injured worker's damages are capped at the level of benefits that the worker receives under the workers' compensation program. However, because of the trade off of not having to prove the employer's negligence (and other procedural advantages) and because injured workers benefits are related to the severity of the injury, the workers' compensation scheme provides workers generally with a 'substantial remedy' for Remedy Clause purposes.

The legislature's plenary authority to amend common law dovetails with this Court's recognition of "the legislature's reservoir of lawmaking authority to adjust substantive remedies to satisfy the constitutional command to provide 'remedy by due course of law for injury…'" and with this Court's reiteration that "as our review of the cases demonstrates, Article I, section 10, does not eliminate the power of the legislature to vary and modify both the form and the

measure of recovery for an injury[.]" *Clarke*, 343 Or at 606-09 (internal citations omitted).

If, however, *Clarke* nonetheless requires consideration of the particular verdict -- despite the legislature subsequently restoring the remedy against the individual and despite the general substantiality of the new OTCA damages limits -- then the Court should refine the "substantial" standard in the context of the OTCA to determine whether the remedy in the particular case 'shocks the conscience' of the Court. *See Howell v. Beaverton*, 353 Or at 375 (determining "whether an award of damages is 'substantial' requires flexibility and consideration of the facts and circumstances that each case presents"); *see generally State v. Humphrey*, 253 Or 183, 184 (1969) (criminal sentence is not so disproportionate, under Article I, section 16, as to shock the conscience of fair-minded persons). This proposed test helps identify extreme outlier cases (like *Clarke*), in which the strong presumption of constitutionality attributable to the OTCA may be overcome.

c. If the Remedy Clause Applies, then Advance Payment of $3 Million Pursuant to the OTCA is a Constitutional Remedy for Plaintiff, and Judgment Must be Entered in that Amount

i. Introduction

Regardless whether the test is "shocks the conscience" or "substantial," the test applies not only to the remedy for the verdict as a whole but also to the

remedy for discrete portions of the verdict in cases in which that inquiry can be made. Here, the jury verdict was divided into past economic damages, future economic damages, and noneconomic damages. (ER-19.) In the MOU pursuant to which the Advance Payment of $3 million was made, the parties likewise expressly divided and apportioned the payment among the same three categories of damages. (ER12-13.) Thus, as was done in the trial court, this Court can examine whether the remedy received by Plaintiff for each aspect of damages is constitutional.

The Remedy Clause determination must take into account the individual facts or circumstances of the case at bar. *See Howell v. Beaverton*, 353 Or at 375-381. The analysis also considers the benefits that the OTCA limits are intended to provide or secure, including the manifest and varied benefits that OHSU uniquely provides as a state entity. *See id.*; *Clarke v. OHSU*, 343 Or at 597. (*See* pp.62-64, *infra*, re public benefits here.)

In addition, reference to the more general framework of claims for governmental and nongovernmental liability (*e.g.*, Oregon jury verdicts and insurance policy limits for individual physicians) is appropriate. *See Clarke v. OHSU*, 343 Or at 611-612 (Balmer, J., concurring). Here, the Task Force verified that the new limits that ultimately were proposed and enacted would completely cover well over 99% of claims and that they would provide a sizable remedy in the few cases that would exceed the limits. Indeed, Defendants' own

review of Oregon jury verdicts (the accuracy of which Plaintiff did not dispute below) disclosed that it appeared that since 2002 there has been just one other jury verdict for medical negligence above $3 million.[20] Moreover, as noted above, the $3 million Advance Payment here per the OTCA falls squarely in the middle on private insurance policy limits of $1 million to $5 million found to exist by the concurrence in *Clarke*. *See Clarke*, 343 Or at 612 & n.1 (Balmer, J. concurring).

ii. **Future Economic Damages**

The verdict contains: "Future Economic Damages $1,941.754.00." (ER-19.) At the time of trial, the $3 million Advance Payment had set aside $626,952.91 for future medical care, primarily for a potential future liver transplant.

The federal Patient Protection and Affordable Care Act ("ACA") guarantees that the cost of . 's future medical care will be covered by health insurance. Although the jury is not informed of this fact, it nonetheless must be taken into account by the Court in the post-verdict Remedy Clause analysis to determine whether the remedy received by Plaintiff is constitutional. *See Howell v. Beaverton*, 353 Or at 375 (courts must consider "facts and circumstances that each case presents").

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[20] In the aftermath of *Clarke*, in 2008 OHSU settled six outstanding cases, including *Clarke*, all with conduct that occurred in or before the year 2000, for a total of $38,500,000. (CR-__[Cuykendall Dec.10/7/13, Ex.A].)

The ACA mandates and also guarantees access to health insurance coverage, including for . Coverage must be provided by insurers regardless of any preexisting conditions and without any annual or lifetime limits on the amount of coverage. Premiums may not be based on a person's medical condition. 26 USCA §§ 5000A(b), (d); 42 USCA § 300gg, subsections: -1, 2(a), 2(b), (a)(1)(A), (a)(1)(B), -4(a), -4(b), -11.

Given the Advance Payment of $626,952.91 toward . 's future medical care, and the federal statutory mandate/guarantee of health insurance coverage for future medical care with no limits and no exclusions based on condition, the Advance Payment and the statutory cap must be deemed to provide a constitutional remedy for future economic damages. Whether the test is "shocks the conscience" or "substantial," the result is the same.

iii. **Past Economic Damages**

The verdict contains: "Past Economic Damages (OHSU Bills Only) $179,283.35". (ER-19.) Over Defendants' objection, uncontradicted evidence was not introduced at trial, and the jury was not informed or instructed, that OHSU had waived its bills for all $179,283.35, and that Plaintiff did not owe that money to OHSU. The Circuit Court nonetheless refused to reduce the judgment by that amount. (ER-37[order].) The judgment must be deemed satisfied by that amount, and the remedy that Plaintiff already has received for this verdict item must be deemed to be constitutional.

The verdict also contains: "Past Economic Damages (Other than OHSU Bills) $3,950,153.03". (ER-19.) This is the amount of past medical bills (other than OHSU bills) incurred by . that Plaintiff submitted to the jury and which Defendants did not contest at trial. With respect to these bills, the MOU provides for payment, out of the $3 million, of $1,289,387.78 toward specified prior medical bills. (ER-12-13.) In addition, pursuant to the MOU, by the time of trial money from the Advance Payment set aside in a "medical custodial account to pay for . 's ongoing medical care" had paid an additional $150,435.09 of the past medical bills included in the Verdict. (CR-__,__[Rensklev Dec.10/7/13, Ex.B,p.2; Schroer Dec.10/7/13, ¶3&Ex.2].) That results in $1,439,822.87 from the Advance Payment for past medical bills.

For a statutory remedy to be constitutional, even under a "substantial" standard (and *a fortiori* under a "shocks the conscience" standard), it does not have to be a dollar-for-dollar match with the jury's verdict, including economic damages. *Howell v. Beaverton*, 353 Or at 368-369; *Hale v. Port of Portland*, 308 Or at 523. The $1,439,822.87 remedy for past economic damages in this case is "substantial" and does not "shock the conscience."

iv. **Noneconomic Damages**

The Verdict contains: "Noneconomic Damages $6,000,000". (ER-19.) The MOU expressly provides that of the $3,000,000 Advance Payment, $1,000,000 will be "allocated … to noneconomic damages." (ER-12.)

Testimony at trial (summarized with citations in the Statement of Facts, *supra*) established that . had undergone a serious ordeal as an infant and there was testimony that there will be and/or may be need for future medical care, including potential for a second liver transplant. In sharp contrast, however, to the seriously brain-damaged infant in *Clarke*, the testimony here established that . can expect to lead a long, generally healthy, and fully productive life, and that . has no cognitive or physical impairment, and no pain or distress.

The $1 million Advance Payment for noneconomic damages could provide to . a consistent, reliable annual payment of at least $34,000 per year for the rest of his life, without ever touching the principal.[21] Over the course of his lifetime, the $1 million . received in 2011 conservatively could amount to well over $2 million in lifetime annual interest payments, plus the $1 million principal.[22]

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[21] This payment amount is an extremely conservative estimate, based on the (historically quite low) rate of 3.41% (as of the time of trial) on 20-year United States Treasury Bonds, which pay interest semi-annually. [http://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=longtermrate and http://www.barchart.com/economy/treasuries.php.]

[22] The circuit court did not accept Defendants' request for a present-value instruction on noneconomic damages. (Tr.IX,pp.137-40.) So it is particularly appropriate for the Court to value the Advance Payment amount as in text above, recognizing that the verdict amount was not reduced to present value by the jury.

The $1 million recovery here is double the amount that the Oregon legislature deems to be a reasonable maximum amount of noneconomic damages in wrongful death cases and in personal injury cases. ORS 31.710. The Advance Payment of $1 million for noneconomic damages provides a constitutional remedy in this case; it does not "shock the conscience" and it is "substantial."

v. OHSU Provides Important Benefits that Must be Considered in the Constitutional Equation

Remedy Clause analysis also requires consideration of the benefits that a law provides and furthers when the legislature adopts an alternative remedial structure such as the OTCA or the workers' compensation system. *E.g.*, *Clarke,* 343 Or at 602. This Court has recognized that a certain source of payment, in the form of government waiver of its own immunity from liability and also government indemnity for individual liability pursuant to the OTCA, is a material benefit to potential claimants from the OTCA's alternative remedial structure. *Howell v. Beaverton,* 353 Or at 367.

Furthermore, *Clarke v. OHSU* served as a wake-up call to the Oregon legislature that the dollar amounts of its state tort claim limits, then $200,000 single and $500,000 aggregate, had become inadequate, certainly in that case involving a seriously brain-damaged infant with a claim of $5 million in

noneconomic damages[23] and $10 million in economic damages, and potentially in other cases as well. In direct response to the constitutional concerns raised by the Oregon Supreme Court, the Oregon legislature dramatically increased the tort claims limits and also reinstated the cause of action against the individual defendant that had been completely eliminated by the 1991 amendments to the OTCA.

There are also profound public benefits that accrue as a result of the secure funding environment under the OTCA for governmental entities that provide essential and unique public services, including specifically OHSU. *See Clarke*, 343 Or at 597 (recognizing the extensive statutory responsibilities that OHSU is charged with fulfilling under its organic statutes). OHSU is Oregon's only medical school, providing education and training to a vast number of medical students who become physicians who serve the people of this state.[24] Likewise, OHSU's clinical faculty, spanning an extremely broad range of practice areas and disciplines, provides patient care, training of physicians and other medical personnel, unique in Oregon. There is no other medical research facility in the state. OHSU provides care to areas in the state through its rural

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[23] The claim for the severely brain-damaged infant in *Clarke* pleaded a maximum of $5 million noneconomic damages, which is $1 million *less* than the jury awarded here.

[24] For this fact, and those that follow (and others) regarding OHSU, see the Declaration of Lora Cuykendall and materials in Exhibit B attached thereto. (CR-__,10/7/13.)

health programs that otherwise would be unserved or seriously underserved. There are a range of programs and services that only OHSU does provide or would provide, essential to the public health in the state. Indeed, historically, one of the key steps in OHSU's evolution and growth was its assumption of responsibility for the indigent patients of the old Multnomah County Hospital, as part of its emergence as a state entity.

For each of the foregoing reasons, this Court should conclude that the OTCA limit applicable to this case is constitutional, either as a general matter or as specifically applied either to the verdict as a whole or to each element of the verdict in this case.

vi. The Right to Jury Trial Does Not Trump the Remedy Clause

Plaintiff also contends that jury trial rights in Article I, section 17 and Article VII (Amended), section 3, guarantee an *unlimited* remedy. Plaintiff thus asserts what is effectively a *facial challenge* that would invalidate and eliminate the OTCA limits, regardless of whether the legislature provided through the OTCA for a constitutional substantial substitute remedy pursuant to the Remedy Clause. Plaintiff relied below on the disposition in the recent opinion in *Klutchkowski v. PeaceHealth,* 354 Or at 176-77.

In *Klutchkowski*, the Court applied the right to jury trial to invalidate a statutory damages limit, *outside the context of the OTCA*, without examining

the substantiality of the remedy under the Remedy Clause, even though it was raised in the case. *Id*. In *Clarke*, however, the Court decided the case based on a substantiality analysis for the OTCA limits under the Remedy Clause, and thereby declined to consider a preemptive challenge to the OTCA limits based on right to jury trial. *Clarke*, 343 Or at 610 n.19. Plaintiff's position fails to recognize that *Klutchkowski*'s disposition does not cite *Clarke*, much less purport to overrule it.

Moreover, for multiple reasons set out below, *Klutchkowski*'s disposition was not correct or, in all events, certainly should not be extended to the OTCA. (*See* pp.71-87, *infra*, addressing why *Lakin v. Senco Products* (on which *Klutchkowski* principally relied) either should be overruled or should not be extended to the OTCA.)

4. **Article VII (Amended), Section 3**

Article VII (Amended), section 3, of the Oregon Constitution was enacted by initiative in 1910 to abrogate the previously well-established, often-used authority of Oregon judges to substitute their own judgment for that of the jury on the weight of the evidence and grant a new trial on liability or damages. However, neither text, context, nor history supports Plaintiff's altogether different contention, that the measure also somehow eliminated and facially invalidated the plenary authority of the legislature to enact generally-applicable statutory damage limits, including those ultimately adopted in the OTCA.

Article VII (Amended), section 3 was adopted by initiative in 1910. Oregon Blue Book (http://bluebook.state.or.us/state/elections/elections11.htm). It pertinently provides:

> In actions at law, where the value in controversy shall exceed $750, the right to jury trial shall be preserved, and 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.

Construction must give effect to the voters' understanding and intent. *Ecumenical Ministries of Oregon v. Oregon State Lottery Commission*, 318 Or 551, 559 (1994); *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 57 (2000). To do so, the court examines text, context, and history. *State v. Algeo*, 354 Or 236, 246 (2013).

a. **Text: Limits Only Judicial Authority**

The constitutional wording is the "best evidence of the voters' intent." *Ecumenical Ministries*, 318 Or at 559 (quoting *Roseburg School District v. City of Roseburg*, 316 Or 374, 378 (1993)). To "re-examine" meant then (and still means): "To examine anew." *See* Webster's Revised Unabridged Dictionary (1828) (definition); Webster's Third New International Dictionary (2002) ("to subject to reexamination" which in turn is defined as "a second or new examination"). "Examine," meant to "test," "inspect carefully," "subject to inquiry or inspection of particulars for the purpose of obtaining a fuller insight

into the subject." *See* Webster's Revised Unabridged Dictionary (1913) (definition).

Accordingly, an Oregon judge cannot independently test and inspect (reexamine/weigh) evidence that the jury already considered. *See, e.g., Van Lom v. Schneiderman,* 187 Or 89, 99 (1949) (Art.VII (Am.), sec.3 prohibits prior practice of granting new trial based on trial judge's disagreement with jury about quantum of damages warranted by the evidence). By contrast, when a court enforces a general statutory rule of law limiting the amount of damages that an injured party may recover in all cases, there is no new trial and the court does not test, inspect or even review the evidence already weighed by the jury. The court applies a rule of law and does not pass on any issue of fact.

b. **Context: Voters Intended to Limit Only Judicial Authority**

This court has explained that the drafters of Article VII (Amended), section 3 tracked the language of the Seventh Amendment to a point, but that:

> 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 at 99.[25] Indeed, in 1910, existing caselaw and statutes plainly recognized a court's authority to re-examine evidence underlying a jury's verdict and to grant a new trial based solely on that assessment. *See Serles v. Serles*, 35 Or 289, 293 (1899) (so holding); *Multnomah County v. Willamette Towing Co*., 49 Or 204, 213 (1907) (same); Lord's Oregon Laws/Hill's Ann. Laws, § 235, subd5&6.

Consistent with the voters' intent, the measure's context also makes clear that it is addressed to judicial authority and is not a restriction on legislative authority. The ballot measure comprised only amendments to Article VII, which regulates the judiciary. See *State ex rel Kaino v. Or. Commission on Judicial Fitness & Disability*, 335 Or 633, 637 (2003) (other sections of same constitutional article provide context).

c. Primary Historical Sources: Voters Intended to Limit Courts' Authority to Grant Retrials

Relevant history includes contemporaneous materials (ballot title, voters' pamphlet, reporting and commentary) that disclose the public's understanding. *See Ecumenical Ministries*, 318 Or at 559 n.8. The November 1910 ballot title

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[25] Caselaw, shortly after its passage, confirmed the voters' intent to eliminate judges' former authority to grant new trials based on a re-examination of evidence the jury had received. *Buchannan v. Lewis A. Hicks Co.*, 66 Or 503, 510 (1913); *see also Van Lom*, 187 Or at 94–96 (collecting cases applying Art.VII (Am.), sec.3). *See Stranahan v. Fred Meyer, Inc.*, 331 Or at 62 (post-enactment caselaw provides context).

pertinently stated: "prohibiting re-trial where any evidence to support verdict." (APP-26[1910 voters' pamphlet].)

The argument submitted in favor of the 1910 measure by its sponsor, the People's Power League, addressed generally the perceived problem of protracted litigation. (APP-25.) The People's Power League's own initial drafts of the amendment, circulated for public comment in January 1910, were likewise described as "intended to decrease the number of technical appeals and new trials." (APP-20.)

Contemporary reporting and editorials gave no indication that the proposed measure could bar legislative authority to enact damages limits. (*See* APP-29-37) (articles, editorials). Likewise, contemporaneous legal commentators clearly understood the initiative's point. The March 1911 *Political Science Quarterly* reported that Oregon's amendment included "certain changes in the state judiciary," and "prohibited re-trial of any case, 'unless the court can affirmatively say there is no evidence to support the verdict.'" (APP-39-41.) *See also* 77 Cent. L.J. 384, 388 (1913) (same). (APP-42-43.)[26]

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[26] For the same conclusion, *see* Hall S. Lusk, *Forty-Five Years of Article VII, Section 3, Constitution of Oregon*, 35 Or L Rev 1, 3, 24 (1955); Thomas H. Tongue, *In Defense of Juries as Exclusive Judges of the Facts*, 35 Or L Rev 143, 152–153, 175 (1955).

d. The Court of Appeals Opinion in *Tenold* Is Wrong and Should Be Overruled

In *Tenold v. Weyerhaeuser Co.*, 127 Or App 511 (1994) *(en banc), rev dismissed* (1995), the Oregon Court of Appeals held, in a 6-4 decision, that a statutory limit on the amount of noneconomic damages violated Article VII (Amended), section 3. The circuit court here felt bound by *Tenold* and refused to apply the OTCA damages limits, but *Tenold* did not apply to the OTCA, does not bind this Court and it should be overruled.

Tenold did not cite *Ecumenical Ministries* (decided two weeks prior) and the majority failed to follow its method, ignoring most context and primary historical sources. The *Tenold* majority also incorrectly and illogically simply jumped from the measure's indisputable, targeted ban on judicial authority to grant new trials, to a different prohibition altogether on legislative authority to create statutory limits on recoverable damages.

By contrast, the dissenters explained that Article VII (Amended), section 3, prevents a court from independently re-examining facts tried by a jury, but not from "imposi[ng] a rule of law that supersedes a determination of fact by a jury." *Id*. at 531 (Edmonds, J., concurring in part and dissenting in part). The *Tenold* dissenters concluded, correctly, that under Article VII (Amended), section 3, "the authority of trial courts to set aside verdicts after 1910 for

excessive damages was limited, but the legislature's authority to limit the amount of reasonable damages remained unfettered." *Id*. at 534–35.

e. **Conclusion**

The OTCA damages limits do not result in a new trial and do not entail reexamination by a judge of a jury's factfinding. Rather, the OTCA requires uniform judicial application of a rule of law prescribed by the legislature. The OTCA limits thereby implicate neither the textual prohibition nor the intent behind Article VII (Amended), section 3. There is no basis to strike down the OTCA limits pursuant to that provision.

5. **Article I, Section 17**

a. **Introduction**

Plaintiff seeks to extend this Court's decision in *Lakin v. Senco Products, Inc.*, 329 Or 62 (1999), for the first time to the OTCA, to declare that partial damages immunities in the OTCA are facially unconstitutional under Article I, section 17. As with Plaintiff's position on Article VII (Amended), section 3, Plaintiff's unprecedented position here appears to contain no limiting principle: the legislature would be barred from adopting statutory damages limitations and the OTCA damages caps never could be applied constitutionally to any jury verdict.

The history of the jury trial right in Anglo-American law, the text and context of the Oregon Constitution, and over a century of this Court's precedent

prior to and since *Lakin*,[27] establish that the right to jury trial preserves the respective roles of the jury to find facts, on one hand, and judges to interpret the law, instruct the jury on the law, and apply the law as directed by the legislature, on the other hand. The procedural right to jury trial does not thereby contain a substantive right to a remedy and does not explicitly or somehow implicitly eliminate plenary authority of the legislature to amend common law including by adopting partial damages immunities.

Lakin's contrary conclusion should be overruled. This Court, however, is not obliged to overrule *Lakin* in order to conclude that its holding should not be extended and applied for the first time to the OTCA, for the reasons set forth at pages 83-87, *infra*.

b. **History of the Right to Trial by Jury**

'"The right of trial by jury is of ancient origin.'" *Lakin*, 329 Or at 70 (quoting *Dimick v. Schiedt*, 293 US 474, 485 (1935)). The right pre-dated its inclusion in Magna Carta and was incorporated into early American colonial charters, the first state constitutions, the Seventh Amendment, and later in Article I, section 20, of the 1851 Indiana Constitution. *See id*. at 70-71 & n.5. Article I, section 17, of the Oregon Constitution was taken *verbatim* from this

[27] Cases on Oregon constitutional interpretation rely on all of these inquiries though the labels sometimes vary and overlap. *See, e.g., Priest v. Pearce*, 314 Or 411, 415-17 (1992) (text, history, caselaw); *State v. Cavanx*, 337 Or 433, 441 (2004) (text and context.)

provision of the Indiana Constitution, and it draws upon the earlier history. *Id*. at 71.

The history also makes clear that the jury's authority is not unlimited. "'Ad quæstionem facti non respondent judices . . . ad quæstionem juris non respondent juratores,'" wrote Sir Edward Coke in the 17th century: Judges do not answer questions of fact, juries do not answer questions of law. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 US 687, 720 (1999) (quoting 1 E. Coke, Institutes 155b (1628)). *Lakin* recognizes, "'[t]he controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts.'" *Lakin*, 329 Or at 71 (quoting *Dimick*, 293 US at 486). It follows *a fortiori* that the jury's factfinding power does not limit the legislature's substantive lawmaking authority. Indeed, there is evidence that the right to trial by jury was historically understood as a check on judges, not on the legislature. *See Davis v. Omitowoju*, 883 F2d 1155, 1164 (3d Cir 1989) (citing, *inter alia*, The Federalist No. 83).

This distinction between law and facts governs the jury's role in assessing damages. Damages normally turn on questions of fact, such as the extent of the plaintiff's injury and the nature of the defendant's conduct. In these circumstances, determining damages is for the jury. *See generally Lakin*, 329 Or at 73-77. Even here, the jury's power has not been unlimited: *remittitur*

permitted the judge to propose a lower damages amount if the judge concluded that the jury's award was excessive. *See id*. at 76-77. However, because a court is prohibited "from substituting its judgment for that of the jury's regarding any issue of fact," when a judge ordered a remittitur, the prevailing party had to "be given the option of a new trial in lieu of remitting a portion of the jury's award." *Johansen v. Combustion Eng'g, Inc.*, 170 F3d 1320, 1329 (11th Cir 1999) (citing *Hetzel v. Prince William Cnty., Va.*, 523 US 208 (1998)); *see also Lakin*, 329 Or at 76-77 (similar).

By contrast, where damages depend solely on questions of law, the right to jury trial is not implicated. The Eleventh Circuit has explained:

> Neither common law nor the Seventh Amendment . . . prohibits reexamination of the verdict for legal error. Therefore, if legal error is detected, the federal courts have the obligation and the power to correct the error by vacating or reversing the jury's verdict. Similarly, *where a portion of a verdict is for an identifiable amount that is not permitted by law, the court may simply modify the jury's verdict to that extent and enter judgment for the correct amount.*

Johansen, 170 F.3d at 1330 (emphasis added) (citations and footnote omitted). That is the distinction that also animates the analysis under Article VII (Amended), section 3, wherein the judge applying the statutory damages cap does not engage in any reexamination of the facts found by the jury, and the same principle applies to Article I, section 17.

Indeed, importantly, legislatures have long exercised their authority to enact statutes modifying damages in civil cases. Prior to the enactment of the Oregon Constitution in 1853 and then immediately afterward in 1862, the Territorial Legislature followed by the Oregon Legislature created a treble damages remedy for timber trespass. *See* The Statutes of Oregon (1853) Ch I, Title II, sec. 17 (in action for nuisance); David H. Bowser, *Hey That's My Tree*, 36 Willamette L Rev 401, 403 (2000) (citing Act of Oct. 11, 1862, Or Gen Laws ch 4, §§ 335, 336).

The treble damages remedy was derived from New York's Field Code of 1848. *See Wyatt v. Sweitz*, 146 Or App 723, 729 (1997) (so stating). New York had enacted a similar provision as early as 1805. *See Newcomb v. Butterfield*, 8 Johns 32 (NY Sup Ct 1811). And in 1841, a New York court explained why the award of treble damages was not an issue for the jury: "Treble damages are the legal consequence of the finding, as certainly as a judgment is the consequence of a verdict. . . . If the jury find the defendants guilty of the trespass . . . they are to assess single damages, and it is then the duty of the court to treble them." *King v. Havens*, 25 Wend 420, 422 (NY Sup Ct 1841).

The right to trial by jury thus entitles parties to a jury verdict based on the evidence, but "[t]he legal consequences and effect of a jury's verdict are a matter for the legislature (by passing laws) and the courts (by applying those laws to the facts as found by the jury)." *Kirkland v. Blaine County Medical*

Center, 4 P3d 1115, 1117, 1119-20 (Idaho 2000).[28] That court also emphasized that territorial statutes provided for double or treble damages in civil actions when Idaho's constitution was adopted and that "the defendant's right at common law to have the extent of his liability determined by a jury was legislatively altered by the imposition of statutory penalties." *Id*. at 1117. Although these laws increased, rather than reduced, damages awards, they show "the Framers could not have intended to prohibit in the Constitution all laws modifying jury awards." *Id*.; *see also Phillips v. Mirac,* Inc., 651 NW2d 437, 443 (Mich Ct App 2002) (similar reasoning).

c. The Oregon Constitution: Text, Context and Caselaw

Article I, section 17 provides: "In all civil cases the right of Trial by Jury shall remain inviolate." That provision in 1857 was *not* intended to eliminate the otherwise plenary authority of the legislature to amend common law, including by enacting the OTCA and its partial damages immunities.

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[28] For the same conclusion *see also Judd v. Drezga*, 103 P3d 135, 144-45 (Utah 2004); *Gourley v. Neb. Methodist Health Sys., Inc*., 663 NW2d 43, 53-54 (Neb 2003); *Phillips v. Mirac, Inc*., 651 NW2d 437, 442-43 (Mich Ct App 2002). Two of these cases involved state constitutional provisions whose language is, in relevant part, virtually identical to Article I, section 17. *See Gourley*, 663 NW2d at 953 (Neb Const Art I, § 6); *Kirkland*, 4 P3d at 1117 (Idaho Const Art I, § 7).

Indeed, the phrase "In all civil cases," necessarily carries with it the contextual plenary authority of the legislature *to amend common law in all civil cases*. That includes common law remedies. (*See* pp.43-51, *supra*.)

After simply citing to dictionary definitions from 1828 and 1889 for the word "inviolate," *Lakin* summarily concluded that "whatever the right to a jury trial in a civil case meant in 1857, it has the same meaning today." 329 Or at 69. *Lakin* was not correct, however, to effectively interpret "inviolate" as 'untouched, 'sacrosanct,' 'immutable,' invariable,' or 'unchangeable,' all of which were terms in common usage in 1857 but which were not used either in the constitutional provision itself or by the dictionary to define the word "inviolate." *See* Webster's Revised Unabridged Dictionary (1828) (definitions). Rather, the terms that the dictionary did use to define "inviolate" ("Unhurt; uninjured; unprofaned; unpolluted; unbroken"), were themselves defined by an element of injury or impairment, which is materially distinct from immutable and untouchable. *Id.*

Necessary to the concept of injury or impairment, by contrast to untouched and unchanged, is that *some limitations manifestly must be acceptable and do not rise to the level of an injury or impairment.* Thus, *Lakin's* conclusion that a statutory cap on noneconomic damages was *facially* unconstitutional -- "[W]e do not assess the constitutionality of ORS 18.560(1) under Article I, section 17, based on the <u>amount</u> of the statutory cap; rather we

assess its constitutionality *because it is a cap* on the jury's determination of noneconomic damages" -- is seemingly at odds with (and certainly is not compelled by) the dictionary definition of "inviolate." 329 Or at 81 (italics in original; underline added).

Moreover, whatever "inviolate" meant, it begs the question of what it is that remains inviolate. As with Article VII (Amended), section 3, the right to jury trial is "preserved" -- and likewise will "remain inviolate" under Article I, section 17 -- so long as the jury retains its authority to decide factual issues in the civil cases that it hears. But that does not extend to preclude and preempt legislative authority to prescribe the legal consequences and effects of the verdict and the courts' duty to enforce those laws.

Nothing in the Oregon Constitution suggests that the framers intended to make a radical break from common law and principles of legislative supremacy by adopting Article I, section 17. Indeed, Oregon Supreme Court cases from the period surrounding adoption of the Oregon Constitution, which presumably reflect the framers' contemporary understanding, "are illustrative of the court's tendency, like other courts of the time, *to rely on common law and general legal principles even in deciding cases based on statutes and constitutional provisions*." Thomas A. Balmer, *The First Decades of the Oregon Supreme Court*, 46 Will L Rev 517 at n.111 (2010) (emphasis added).

Unlike many of the core individual rights provisions in the Oregon Constitution, the right to jury trial in Article I, section 17, does not contain an express prohibition on legislation. (*Compare* Article I, section 8 (speech: "No law shall be passed"); Article I, section 3 (religion: "No law shall in any case whatever control"); Article I, section 9 (search and seizure: "No law shall violate").) Article I, section 16, of the Oregon Constitution, which is the right to jury trial in a criminal case,[29] also provides further contextual support for a conclusion that the right to jury trial does not facially invalidate and eliminate the OTCA damages limits.

State v. Merten, 175 Or 254, 261-71 (1944), detailed the original debate surrounding Article I, section 16, as the framers wrestled with whether the jury or the judge should decide questions of law in a criminal case. The framers resolved the issue by recognizing the supremacy of the laws as enacted by the legislature, and placing the ultimate responsibility on the judge to decide what the law meant and to instruct the jury on the law. *Id.* This is true even though Article I, section 16, unlike Article I, section 17, contemplates a role for the jury in determining the law in criminal cases. *See Merten*, 175 Or at 271 ("There is no provision in our Constitution which confers upon a jury in civil cases the power to determine both law and facts."). No one in the debate

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[29] Article I, section 16, pertinently provides: "In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the court as to the law, and the right of new trial, as in civil cases."

questioned the underlying premise that the legislature's authority to act was plenary.

d. The Right to Trial by Jury Is Procedural, Not Substantive

The foregoing discussion demonstrates that Article I, Section 17 reflected the right to trial by jury as it existed at common law, giving the jury the authority to decide factual, but not legal questions. In other words, the right is procedural, not a substantive guarantee of a remedy. A long line of Oregon case law holds precisely that, beginning in 1892 with *Dean v. Willanmette Bridge Ry Co*, 22 Or 167, 169 (1892). Even since *Lakin* was decided in 1999, this Court twice has reaffirmed that principle, in *Jensen v. Whitlow*, 334 Or 412 (2002) and *Hughes v. PeaceHealth*, 344 Or 142 (2008):

> "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. . . . The right to pursue a 'civil action,' if it exists, must arise from some source other than Article I, section 17, because, that provision 'is not an independent guarantee of the existence of a cognizable claim.'"

Jensen, 334 Or at 422 (citations omitted); *Hughes*, 344 Or at 155 (quoting *Jensen*).[30]

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[30] The disposition in *Klutchkowski v. PeaceHealth* may have clouded the picture recently. *Klutchkowski* relied primarily on *Lakin*. *Klutchkowski*, 354 Or at 176-77. Appellant's challenges here to the validity of *Lakin* as well as to any extension of *Lakin* to the OTCA, are addressed in text above and apply equally to the deposition in *Klutchkowski*.

The Ninth Circuit recently explained, rejecting a challenge to Oregon's workers' compensation statute, that the right to a jury trial "provides only a procedural right, not a substantive right to a cause of action." *Stephens v. Evers*, 318 F App'x 477, 480 (9th Cir 2008) (rule applies under Article I, section 17, of the Oregon Constitution, and the Seventh Amendment) (citing *Hughes* and *Mountain Timber Co. v. Washington*, 243 US 219 (1917)); *see also Johansen*, 170 F3d at 1330.

e. *Lakin* Should be Overruled

Lakin held that the right to jury trial under Article I, section 17, rendered facially unconstitutional a statutory limitation on noneconomic damages in a tort action, ORS 31.170, because the right to jury trial entrusted the jury with the responsibility to determine damages, and that role could not be limited by the statutory damages cap. 329 Or at 81. For the reasons discussed above, that holding ultimately lacks support in the text, context, history and caselaw of Article I, section 17, and thus should be reconsidered and overruled. *See Farmers Ins. v. Mowry*, 350 Or at 698 (Court's commitment to "reach what we determine to be the correct result in each case").

In reconsidering and overruling *Lakin*, the Court would be realigning itself with numerous well-reasoned state and federal court decisions that have held that the right to jury trial does not eliminate the legislature's authority to enact partial damages immunities. In *Montgomery v. Daniels*, 38 NY2d 41

(1975), for example, the plaintiffs contended that damages limitations in New York's no-fault automobile accident compensation statute violated the jury trial right in the New York Constitution. The state's highest court rejected their argument. The statute did "not replace the jury as trier of fact with some other trier of fact," but rather "modifie[d] the substantive law." *Id*. at 66. The *Montgomery* court explained that a contrary holding would undermine the legislature's "most basic function":

> Plaintiffs' argument that where a cause of action triable by jury exists today, the Legislature can do nothing tomorrow to limit or to abolish that cause of action, carried to its logical extension, would seriously handicap the Legislature in carrying out its most basic function—"to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

Id. (citation omitted).

The Fourth Circuit upheld Virginia's damages cap in medical malpractice cases, holding that, although "it is the role of the jury as factfinder to determine the extent of a plaintiff's injuries," it is "not the role of the jury to determine the legal consequences of its factual findings. That is a matter for the legislature . . . ." *Boyd v. Bulala*, 877 F2d 1191, 1196 (4th Cir 1989). S*ee also English v. New England Med. Ctr.*, 541 NE2d 329, 331 (Mass 1989) (similar reasoning, rejecting challenge to a statutory damages cap on suits against charitable organizations). Numerous decisions since *Lakin* reach the same result, with

similar reasoning. *See Kirkland v. Blaine County Medical Center*, 4 P3d at 1117, 1119-20; s*ee also* cases cited at fn. 28, *supra*.)

The Indiana Supreme Court has long held to the same position with respect to Article I, section 20, of the Indiana Constitution -- which is the direct source of Article I, section 17, of the Oregon Constitution -- finding "no indication" in Indiana's history to support a conclusion like the conclusion in *Lakin*: "'[T]here is no indication that the right to have a jury assess the damages in a case properly tried by jury constitutes a limitation upon the authority of the Legislature to set limits on damages.'" *State v. Doe*, 987 NE2d 1066, 1071 (Ind 2013) (quoting *Johnson v. St. Vincent Hosp., Inc.*, 404 NE2d 585, 602 (Ind 1980)). Damages caps limit the amount of recovery, "but subject to that limit, 'the right to have the jury assess the damages is available. No more is required by Art. I, § 20, of the Indiana Constitution in this context.'" *Id.* (quoting *Johnson*, 404 NE2d at 602).

f. ***Lakin* Should Not be Extended to the OTCA**

For the reasons detailed above, Dr. Harrison respectfully submits that the opinion of a five-justice court in *Lakin* is incorrect and should be overruled.[31] Even if the Court does not overrule *Lakin*, for the reasons detailed below,

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[31] *Lakin* was authored by Justice Van Hoomissen and the court included Chief Justice Carson and Justices Gillette, Durham and Kulongoski.

Lakin's holding should not be extended for the first time to apply to the OTCA and to declare that the OTCA's damage limits are facially unconstitutional.

i. Conduct was Immune in 1857

If the Court concludes that Plaintiff cannot establish an 1857 right of action due to individual immunity, then Article I, section 17 and *Lakin* simply do not apply. The defendant in *Lakin* did not raise this argument and the court did not consider or adjudicate it.

ii. Right to Jury Trial Has Not Been Applied to OTCA Damages limits

This Court has never held that the right to jury trial applies in the context of the OTCA partial damages immunities. Indeed, the only case in this Court in which the constitutionality of the OTCA has been challenged successfully was *Clarke v. OHSU*, under the Remedy Clause, not the right to jury trial.[32] Most recently, this Court has affirmed the application of the OTCA damages limits as against a Remedy Clause challenge, in *Howell v. City of Beaverton*.

Plaintiff's attempt to extend *Lakin* to apply to the OTCA would require the Court to effectively overrule *Clarke v. OHSU*. *Clarke* chose to adjudicate the plaintiff's as-applied Remedy Clause challenge, despite the fact that the

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[32] *Clarke* relied repeatedly on the distinction that in 2007 (since corrected by the legislature in 2011) the OTCA contained a "substitution provision" that had completely eliminated a cause of action against the individual government employee, leaving a plaintiff with *no remedy at all against the individual* (other than the substituted remedy). *Clarke*, 343 Or at 589, 608-10.

plaintiff also made a facial challenge based on right to jury trial, which the Court declined to consider. *Clarke*, 343 Or at 610 n.19. *Clarke* also recognized that this Court had rejected a facial challenge to the OTCA damages limits brought pursuant to the Remedy Clause in *Jensen v. Whitlow*. *Clarke*, 343 Or at 604. The legislature and the relevant stakeholders then proceeded to work together to amend the OTCA limits in 2009 on that basis and with that understanding.

iii. The Legislature Relied on Oregon Supreme Court Caselaw in Enacting and Amending the OTCA

The OTCA was enacted in 1967 and amended repeatedly thereafter, in reliance on the long line of this Court's cases holding that the right to jury trial contained no substantive right to a remedy. The presumption of constitutionality for legislative enactments and the deference to longstanding usage under those circumstances is strong. In *Tribou v. Strowbridge*, 7 Or 156 (1879), the court rejected a right-to-jury-trial challenge to a statute, and held that because the statute was used without objection for over 25 years, any doubt as to constitutionality would "under the circumstances and the sanction of long usage, have to be solved in favor of the statute.". *Id*. at 159 (*citing*, *inter alia*, *Fletcher v. Peck*, 10 US 87, 128 (1810); Cooley's Constitutional Limitations, 74)).

iv. The OTCA is a Substitute Remedial Structure With Benefits to Claimants

Unlike the statutory limit on noneconomic damages that *Lakin* invalidated, the OTCA is a comprehensive substitute remedial construct with multiple significant benefits provided to claimants. Those include waiver of sovereign immunity and the consequent assurance of payment of valid claims; indemnity; no caps on noneconomic damages within the overall cap; coverage for the full value of more than 99% of claims and a sizable remedy for the remaining claims; provision for government to be able to budget and provide for necessary and important government services that would be significantly impaired in an uncapped environment; and the ability to attract and retain professionals and other individuals in government service.

v. The Right to Jury Trial Cannot Invalidate What Other Constitutional Provisions Authorize

By its enactment of the OTCA, the legislature has exercised its plenary authority to amend common law and to enact statutory immunities. The legislature also has exercised the "reservoir" of constitutional authority that it possesses under multiple provisions of the Oregon Constitution, including the Remedy Clause of Article I, section 10; the "privileges, or immunities" provision of Article I, section 20; and the sovereign immunity waiver provision of Article IV, section 24. The right to jury trial -- even if it were deemed to

contain a substantive guarantee of a remedy -- must not be extended to the OTCA, to facially prohibit what the Remedy Clause (*et alia*) expressly authorizes.

g. **Conclusion**

Plaintiff seeks to have the Court extend *Lakin* for the first time to the OTCA, to declare that the OTCA's partial damages immunities are facially unconstitutional and thus never can be enforced. However, the correct construction of Article I, section 17, is that the right to jury trial does not guarantee to plaintiffs unlimited remedies, and *Lakin*'s contrary conclusion should be overruled. In all events, compelling jurisprudential and prudential reasons should prevent the Court from extending *Lakin* to the OTCA.

III. CONCLUSION

For each of the reasons set forth above, Dr. Harrison respectfully submits that the $3 million damages limit of the OTCA, ORS 30.271(3)(a), is constitutional and should be enforced. The $3 million Advance Payment is a constitutional remedy, in whole or in its parts, and the Limited Judgment should be modified accordingly.

Respectfully submitted this 3rd day of June 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 brief up to 20,000 words. The Court also issued an order dated May 22, 2014 that granted a motion and permits 500 pages for the combined excerpt of record and appendix. I certify that (1) this brief complies with those orders; (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 19,968 words; and (3) the combined excerpt of record and appendix is 413 pages.

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 3rd day of June, 2014.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 3, 2014, I caused to be electronically filed the foregoing APPELLANT'S OPENING 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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