IN THE SUPREME COURT OF THE STATE OF OREGON

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

v.

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

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

v.

RSG FOREST PRODUCTS, INC., SANDERS WOOD PRODUCTS, INC., dba RSG FOREST PRODUCTS-MOLALLA DIVISION; GEORGIA PACIFIC CORP.; GEORGIA PACIFIC WEST, INC.; STARFIRE LUMBER COMPANY; WITHERS LUMBER COMPANY; WESTERN INTERNATIONAL FOREST PRODUCTS, LLC; and BLUELINX CORPORATION,
Third-Party Defendants,

and

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

WEYERHAEUSER COMPANY,
Fourth-Party Plaintiff,

v.

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

WITHERS LUMBER COMPANY,
Fourth-Party Plaintiff,

v.

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

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

v.

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

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

v.

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

Marion County Circuit Court No. 06C21040

A145916
S062939

Merits Brief of *Amicus Curiae* Oregon Trial Lawyers Association

On review of the decision of the Court of Appeals dated August 13, 2014
Authored by Ortega, P.J.; Sercombe, J., and Hadlock, J., concurring,
in an appeal from the Marion County Circuit Court
Limited Judgment and Money Awards entered May 28, 2010
The Honorable Dennis Graves, Circuit Court Judge

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Introduction

Amicus Curiae Oregon Trial Lawyers Association submits this brief to argue, as do the Rains, that this court's holding in *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463 (1999) controls in this case as it did in *Klutschkowski v. Peacehealth,* 354 Or 150, 311 P3d 461(2013). The cap on noneconomic damages cannot be applied to limit plaintiffs' recovery without violating the right to jury trial that the Constitution says "shall remain inviolate."

This is not the only case in which the court is addressing whether a limitation on liability violates Article I, section 17 of the Oregon Constitution. The case of *Horton v. OHSU,* S061992, submitted November 6, 2014, presents the question whether the limitation on damages recoverable from a public entity can be applied to limit the damages recoverable from the individual public employees, without violating the jury trial right. OTLA submitted a brief to this court in *Horton*, authored by OTLA member Travis Eiva. Much of the substance of what OTLA needs to say here has already been well said in that brief; therefore the first three sections of the argument below are taken almost verbatim from OTLA's brief in *Horton.*

OTLA agrees with plaintiffs' statement of the questions presented and proposed rules of law. OTLA also concurs in and will not repeat plaintiffs' history of product liability that preceded the 1979 codification of the common law in ORS 30.905. Plaintiffs' Brief on the Merits at 15-20.

Argument

The Oregon Constitution, Article I, section 17, provides:

> In all civil cases the right of Trial by Jury shall remain inviolate.

Article VII (Amended), section 3, provides in relevant part:

> In actions at law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-0examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

There is no contention that the jury's damages awards in this case were not supported by the evidence presented.

A. Plaintiffs have a right to a jury trial right because their claims are legal in nature.

In *Foster v. Miramontes*, 352 Or 401, 287 P3d 1045 (2012), this court explained that Article I, section 17, and Article VII (amended), section 3, of the Oregon Constitution mean what they say: A party has a jury trial right so long at it is "civil" or, said differently, so long as it is an "action at law."

In *Foster*, the plaintiff filed a petition under ORS 30.866 for a stalking order and money damages. 352 Or at 403. The defendant argued that he had a right to a jury trial for the portion of the plaintiff's claim that sought money damages. *Id*. The plaintiff argued, contrary to the broad terms of the constitutional provision, that there is only a jury trial in "civil cases" if the case was "customary at the time the constitution was adopted" or was "of like nature" to such a case. *Id.* at 407. The argument followed that no jury right attached to a claim for money damages under ORS 30.866 because that newly-created statutory claim was neither customary or "of like nature" to any claim known at common law when the constitution was adopted. *Id*. The Court of Appeals agreed that the claim was unlike those available in the mid-19th century and therefore the defendant had no right to a jury trial. *Id.* at 426.

This court reversed. Of note, this court agreed with the Court of Appeals that the claim was unlike those customarily tried to juries at the time of the Constitution's adoption. *Id*. at 426 ("rightly so"). However, this court explained that the Court of Appeals was wrong to think that the right turns on whether the claim has a "precise historical analog" from the mid-19th century. *Id*. That is because the terms of Article I, section 17, and Article VII (amended), section 3, make no such requirement and instead the

only textual prerequisite for the jury trial right was that the claim be "properly categorized as 'civil' or 'at law.'" *Foster*, 352 Or at 426.

Whether a claim is "civil" or "at law" turns on the "the nature of the relief sought," in particular, whether the relief is "legal, as opposed to equitable," in nature. *Id.* at 424. If the relief sought is monetary compensation for injuries suffered then the claim is properly categorized as "civil" or "at law," and the parties have a right to a jury trial. *Id.* No further analysis is necessary because that is all that the text of the Oregon Constitution requires.

In *Foster*, this court held that because the plaintiff sought "monetary compensation for injuries inflicted," the case was an action at law. *Id*. at 414, 426. Either party, therefore, could invoke the right to a jury trial. *Id.* at 426.

This case is no different. Plaintiffs sought "monetary compensation for injuries inflicted" upon them by defendants. The case is an action at law and no one argues otherwise. Plaintiffs therefore have a right to have a jury decide the facts of their case, no matter the state of the law in 1857.

B. Because plaintiffs have the right to a jury trial, plaintiffs are entitled to redress based on the facts ascertained by the jury.

The role of the jury is to determine the facts of a civil dispute. That fact-finding is not empty procedure. For the right to a jury trial to provide

its intended protections to individual liberty, the "full and intended effect" of the facts found by the jury must be reflected in the judgment and the ultimate legal obligations between the parties. *Lakin v. Senco Products, Inc.*, 329 Or 62, 79, 81, 987 P2d 463 *opinion clarified*, 329 Or 369, 987 P2d 476 (1999); *see also* William Blackstone, *Commentaries on the Laws of England* 380 (1768) ("when once the fact is ascertained [by the jury], the law must of course redress it").

"The amount of damages" to award a plaintiff "was a 'fact' to be found by jurors" from the historical "beginning[s] of trial by jury." *Lakin*, 329 Or at 73 (quoting Charles T. McCormick, *Handbook on the Law of Damages* 24 (1935)). Indeed, in many cases, such as this one, "the amount of the [damages] will be the only disputed [factual] issue" that the jury will decide. *Molodyh v. Truck Insurance Exchange*, 304 Or 290, 298, 744 P2d 992 (1987). Accordingly, to take away the effect of the jury's assessment of damages is to take away a primary purpose of the jury.

Here, the Oregon Legislature passed a statute that sets aside the "full and intended effect" of the jury's damages and replaces it with an artificial limitation divorced from the evidence and the jury's deliberations. In doing so, the legislature attempts to separate the facts ascertained in the civil case from the legal redress available in the civil case. Of course, the

constitutionality of such legislative policy-making supplanting jury fact-finding was fought over and decided already in *Lakin*, where this court determined that such a statutory limitation offends the command of the Oregon Constitution that the right to a jury trial shall remain inviolate.

In *Lakin*, the Legislature placed a statutory cap on damages, analogous to the statutory cap in this case, that would negate the jury's damages verdict to the extent that it exceeded a maximum statutory amount. *Lakin*, 329 Or at 79-80. This court held that the Oregon Constitution prohibited the legislature from overriding the jury's factual findings in that way. The court explained that the statute

> ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages. [To argue contra is to assert] that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment. Such an argument pays lip service to the form of the jury but robs the institution of its function. This court will not construe constitutional rights in such a manner."

Lakin v. Senco Products, Inc., 329 Or 62, 79-80, 987 P2d 463, 474 *opinion clarified*, 329 Or 369, 987 P2d 476 (1999) (quoting and agreeing with *Sofie v. Fibreboard Corp.*, 112 Wash 2d 636, 771 P2d 711, 721 (1989)) (brackets in original).

The statutory cap "prevent[ed] the jury's award from having its full and intended effect." *Id.* at 79. In particular, it prevented the injured party

from "receiv[ing] an award that reflect[ed] the jury's factual determination of the amount of the damages [that would] fully compensate [him] for all loss and injury to' " *Id.* at 81 (quoting *Oliver v. N. Pac. Transp. Co.*, 3 Or. 84, 87-88 (Or Cir 1869)). The Constitution gives a plaintiff the right to have legal redress flow from the findings of the jury, not a decision by government. The statutory cap intruded upon that constitutional access to the power of a jury and therein violated the plaintiff's constitutional right to a jury trial. *Lakin*, 329 Or at 79-81.

The defendant in *Lakin* also attempted to soften the protections of the jury trial right by arguing that, as long as the damages were "substantial" under the statutory cap, then the Legislature was free to curtail the jury's damages determination. But "inviolate" means "inviolate," and this court flatly rejected the argument:

> Article I, section 17, jurisprudence never has established a 'substantial' remedy test in defining the scope and meaning of the right of jury trial. [W]e do not assess the constitutionality of [a statutory cap on damages] under Article I, section 17, based on the amount of the statutory cap; rather, we assess its constitutionality *because it is a cap* on the jury's determination of * * * damages.

Lakin, 329 Or at 81 (emphasis added).

The Oregon Constitution requires the same result in this case. Plaintiffs' right to a jury trial includes the "right to receive an award that

reflects the jury's factual determination of the amount of the damages 'as will fully compensate [them] for all loss and injury'" suffered. *Lakin*, 329 Or at 81 (quoting *Oliver, supra*). The jury has made such a determination and ORS 30.271 prevents plaintiffs from receiving an award that reflects that determination. The statute is an unconstitutional intrusion on plaintiffs' jury trial rights under Article I, section 17, and Article VII (Amended), section 3, and accordingly cannot be applied in this case.

C. *Lakin* was right in its result and in its reasoning.

Defendant Weyerhauser argues that *Lakin* "misconstrued Article I, section 17, and should be overruled" – perhaps an implicit acknowledgement that it loses its argument under *Lakin.* Weyerhauser Resp Pl Pet Rvw, p. 6. *Lakin* was rightly decided based on the sound reasoning articulated by this court and described above. There also is additional historical support for the court's conclusion: the preservation of the jury trial is an essential part of the constitutional architecture of divided powers in Oregon's government.

The drafters of the Oregon Constitution, as well as the drafters of the federal and other state constitutions, were influenced by the philosophy of Locke and Montesquieu that the best way to protect individual liberty was through divided government and separated powers. *See* Baron de Montesquieu, *The Spirit of the Law* 151-52 (Thomas Nugent trans., Hafner

Publishing Co 1949) (1777); John Locke, *Two Treatises of Government* 203 (Thomas I. Cook ed., Hafner Publishing Co 1965) (1690). The jury trial is an implicit part of that separation of powers. During the time of the Oregon territory and its first steps toward statehood, the jury was regarded as a separate "institution of government" and "a mode of the sovereignty of the people" distinctly fashioned to "temper[] the tyranny of the majority." Alexis De Tocqueville, *Democracy in America* 266 (Henry Reeve trans., 1838).

Before Oregon adopted its Constitution, Americans did not see the jury trial right as "mere procedural formality, but [rather] a fundamental reservation of power in * * * constitutional structure * * * to ensure the people's ultimate control * * * in the judiciary." *Blakely v. Washington*, 542 US 296, 306, 124 S Ct 2531, 2538-39, 159 L Ed 2d 403 (2004). The Federal Farmer described the divided power function of the jury as "secur[ing] to the people at large, their just and rightful controul [*sic*] in the judicial department." The Federal Farmer, *Letter XV* (Jan. 18, 1788), reprinted in 2 *The Complete Anti–Federalist* 315, 320 (H. Storing ed 1981). John Adams similarly explained that "the common people, should have as complete a control * * * in every judgment of a court of judicature" as they do in the

legislature. John Adams, *Diary Entry* (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed 1850)).

Early Americans believed that the jury uniquely controlled the domain of decisions that affect the rights of an individual citizen in civil and criminal trials and no government official or body was entitled to intrude upon that decision-making. Accordingly, a juror as a "fact-find[er]" is elevated to "a constitutional officer—the constitutional equal" to legislative, executive, and judicial officers. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 Suffolk U L Rev 67, 70 (2006).

Americans protected juries because they believed that juries were more likely to provide and promote justice outside of the corrupting influences of politics, power, or wealth found in the offices of government. So they reserved fact-finding power in civil cases to juries to "secure the individual from the arbitrary exercise of the powers of government." *Capital Traction Co. v. Hof*, 174 US 1, 21, 19 S Ct 580, 588, 43 L Ed 873 (1899). That is a sound method to preserve individual liberty. When a jury adjudicates an individual's rights, the jury most likely will enforce those rights to the same degree as they would do for themselves. That same motivation in decision-making is not apparent when made by a

governmental actor or body that may be motivated by lobbyists, politics, and power. "[I]t is precisely because [early Americans] believed that they might receive a different result at the hands of a jury of their peers than at the mercy of the sovereign" that the right to a civil jury trial was constitutionally protected. *Parklane Hosiery Co., Inc. v. Shore*, 439 US 322, 354, 99 S Ct 645, 664, 58 L Ed 2d 552 (1979) (Rehnquist, J. dissenting).

Blackstone further explained the inherent advantage of preserving such decision-making in the hands of a jury:

> [T]he most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.

William Blackstone, *Commentaries on the Laws of England* 380 (1768); *Colgrove v. Battin*, 413 US 149, 157, 93 S Ct 2448, 2453, 37 L Ed 2d 522 (1973) (the jury trial right was secured in order to "assure a fair and equitable resolution of factual issues" in civil cases).

The jury trial in early America was understood not just as an individual right of a litigant but also a "constitutional structure" that reserves "ultimate control" to the people in adjudications. Nothing in the history of

the Oregon Constitutional Convention of 1857 suggests that the framers had a more limited appreciation of the jury trial.

ORS 30.710 offends the Oregon Constitution because it requires that the constitutional reservation of power to ordinary citizens in civil cases must yield to the changing whims of the legislature.

D. The jury trial right is not defined or limited by the precise contours of the civil law as it existed in 1857.

Defendant Weyerhauser's alternative argument about *Lakin* is that "strict-product-liability under ORS 30.920 is a purely statutory claim," and *Lakin* applies only "to common law actions or cases of a like nature" and "did not hold that a strict-product-liability claim falls within that category." Weyerhauser Resp Pl Pet Rev, at 5-6. The Court of Appeals agreed with those propositions. *Rains v. Stayton Builders Mart, Inc.*, 264 Or App 636, 664-666, 336 P3d 483 (2014). But both the defendant and the court below ignore the fact that *Lakin* involved exactly the same strict product liability and loss of consortium claims asserted in *Rains. Lakin*, 329 Or at 66.[1] And in *Lakin*, the court carefully distinguished its prior holding in *Greist v.*

[1] In the first sentence of the *Lakin* opinion, the court states that plaintiffs "brought an action at law" against Senco "seeking economic, noneconomic, and punitive damages **for personal injury and loss of consortium arising out of allegations of negligent failure to warn and strict products 0liability**[.]" In the third sentenced the court states that "[t]he jury returned a special verdict finding Senco liable both **in strict liability** and in negligence." (Emphasis added.)

Phillips, 322 Or 281, 906 P2d 789 (1995), that ORS 31.710 could constitutionally be applied in a wrongful death action, and did so "because of **the common law origins** of [the *Lakin*] plaintiffs' claims." 329 Or at 77.

In its decision in this case, the Court of Appeals essentially ignored *Lakin*. Its sole reference was indirect. It quoted *Klutschkowski v. Peacehealth,* 354 Or 150, 177, 318 P3d 461 (2013), which in turn quoted *Lakin* (329 Or at 78), where the court said

> Article I, section 17, guarantees a jury trial in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857 and **in cases of like nature**.

264 Or App at 660.

And the phrase "of like nature" did not carry much meaning for the Court of Appeals. It said that the common law "did not recognize the type of action that is now codified in ORS 30.920" (*id.* at 664); the exceptions to the privity requirement "were all based on the common law of negligence" (*id.*); strict liability did not develop until the twentieth century and "differs in significant ways from a common law negligence claim" (*id.* at 664-5). The jury trial guarantee did not prohibit legislative alteration of a jury's verdict in a strict product liability action because there was an insufficient match between that claim and the common law predecessors that were available in 1857. *Id.* at 665.

Such reasoning misinterprets this court's opinion in *Klutschkowski.* In that case, the plaintiff was injured during the process of a vaginal delivery; the Court of Appeals held that claims for prenatal injury were unknown at common law in 1857, and therefore the jury's damages award could be capped without violating Article I, section17. 245 Or App 524, 263 P3d 1130 (2011). It had reached this conclusion by beginning with the remedy clause analysis set forth in *Smothers v. Gresham Transfer, Inc.,* 332 Or 83, 23 P3d 333 (2001); it relied on its previous conclusion, in *Christiansen v. Providence Health System*, 210 Or App 290, 150 P3d 50 (2006), *aff'd on other grounds* 344 Or 445, 184 P3d 1121 (2008),[2] that a claim for prenatal injuries did not exist in 1857, and therefore the remedy clause did not preclude application of the noneconomic damages cap. 245 Or App at 545-46. The Court of Appeals then turned to *Hughes v. Peacehealth.,* 344 Or 142, 178 P3d 225 (2008), taking the position that *Hughes* rejected plaintiff's "'expansive' view of her claim" (as "of like nature" to a negligence claim) "because it clearly conflicted with the principle that Article I, section 17, is

[2] In *Christiansen,* the minor plaintiff brought his medical negligence claim for a birth injury more than 5 years after the negligence occurred, and the claim was barred by ORS 12.110(4). Plaintiff claimed that the legislature's failure to toll the statute for minority was a violation of his constitutional rights. On review, the Supreme Court affirmed the Court of Appeals on different grounds, which did not involve an inquiry into the common law status of claims for prenatal injuries in 1857.

not a source of law that creates or retains a substantive claim or theory of recovery." 245 Or App at 547. Given *Hughes,* the Court of Appeals said it "necessarily reject[ed]" plaintiff's "of like nature" claim to the protections of the jury trial guarantee.

On review in *Klutschkowski,* this court chose to begin with the newly reiterated conclusion of the Court of Appeals that a claim for prenatal injury was such a stranger to the common law in 1857 that none of the constitutional provisions were implicated. In *Christiansen* this court had affirmed on different grounds but left untouched the Court of Appeals' pronouncements that claims for prenatal injury were, like wrongful death, so unknown to the common law that there were no constitutional protections. This court chose not to do so a second time.[3] The historical record, this court said, did not support "the proposition that a defendant's negligence that directly causes a physical injury only to the child during delivery was not actionable at common law," and provided no basis "for saying that that class of cases was excepted from the general rule that negligence and medical malpractice were recognized causes of action in 1857 for which a jury trial was available." 354 Or at 176.

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[3] Indeed, at oral argument in *Klutschkowski,* plaintiff's counsel specifically asked the court to do what it did not do in *Christiansen* and correct the Court of Appeals' mis-interpretation of the nineteenth-century case law on which it had relied.

When this court then turned to Article I, section 17, it began with *Lakin:* "[W]e have adhered to *Lakin's* holding that 'Article I, section 17, guarantees a jury trial in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857 **and in cases of like nature**.'" 354 Or at 177 (quoting *Lakin*, 329 Or at 82, emphasis added).

Thus *Klutschkowski* does not support the approach taken by the Court of Appeals here: it does not dictate that the right to a jury trial disappears when a claim "differs in significant ways" (264 Or App at 665) from the common law as it existed in the middle of the nineteenth century.

E. *Hughes,* to the extent it survives, must be restricted to its context.

In this case, as it had in *Klutschkowski,* the Court of Appeals found *Hughes v. Peacehealth* "most instructive," supporting its conclusion that the absence of a "common-law tradition with respect to a strict products liability claim" meant that the jury trial right either did not apply or meant something different than stated in *Lakin. Rains,* 264 Or App at 662, 663. But in *Hughes* this court had concluded that an action for wrongful death was completely unknown at common law, was solely a creature of a statute enacted after the Constitution was adopted, and had come into existence with a limitation on the available recovery; therefore the damages could once again be capped without offense to Article I, section 17. And when the

Court of Appeals, within one sentence of its citation to *Foster v. Miramontes,* turned to *Hughes*, it did not acknowledge *Foster's* holding: that Article I, section 17, guarantees a jury's determination of facts in "all civil cases," included those newly minted by statute.

In his concurrence in *Klutschkowski,* Justice Landau acknowledged the "tension" between the *Hughes* approach and the court's decision in *Foster.*

> Article I, section 17, provides that, "[i]n all civil cases the right of Trial by Jury shall remain inviolate." By its terms, it applies to "all civil cases," not just the limited number of civil cases that would have triggered a right to a jury trial in 1857. And I am aware of no evidence in the historical record that the framers of the provision intended or contemplated that the constitutional guarantee would be so limited.
>
> In fact, our more recent case law rejects just such a reading of Article I, section 17. In *Foster v. Miramontes*, we expressly rejected the notion that the right to a jury trial is limited to claims that existed at common law at the time of the framing of the constitution. To the contrary, we held that the guarantee applies to all 'claims or requests that are properly categorized as 'civil' or 'at law.'' Only if a claim, standing alone, is "equitable in nature and would have been tried to a court without a jury at common law," does the guarantee not apply.
>
> Obviously, there is some tension between what this court said and did in *Hughes* and what we said and did in *Foster.*
>
> It strikes me that there are two possible ways to resolve that tension. First, we could conclude that *Foster* —which did not expressly address the matter—implicitly overruled *Hughes.* Second, we could conclude that *Foster* did not need

> to overrule *Hughes*, because *Hughes* and its *Smothers*-like analysis apply to only a particular aspect of the right to a jury trial, namely, a right to the benefit of the jury's decision itself without any statutory limitations, and does not apply to the broader question whether there is a right to have the jury make the decision in the first place.
>
> In my own view, only the former possibility is tenable. I do not understand how the right to a jury trial can be parsed out into subsidiary rights, one of which requires *Smothers-like* historical analysis and the other that does not. Either there is a right to a jury trial, or there is not. Plain and simple.

Klutschkowski, 354 Or at 194-196 (Landau, J., concurring)(internal citations omitted).

The two cases are, in fact, incompatible, and *Hughes* should succumb to the better-reasoned analysis of *Foster*. First, *Hughes* has no foundation in the constitutional text. The text requires a jury trial right in "*all* civil cases," and "not just the limited number of civil cases that would have triggered a right to a jury trial in 1857." *Klutschkowski*, 354 Or at 195. If the framers had intended to so limit the application, then they would not have inserted "all" in the provision. *Compare* Article I, section 22(a) of the Missouri Constitution (providing that "the right of trial by jury *as heretofore enjoyed* shall remain inviolate[.]"); *Watts v. Lester E. Cox Med. Centers*, 376 SW3d 633, 638 (Mo 2012) ("The phrase 'heretofore enjoyed' means that '[c]itizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted' in

1820."). The test from *Foster* is loyal to Oregon's constitutional text; it does not insert a limitation not reflected in its terms.

Hughes also has no foundation in the historical record. As the concurrence in *Klutschkowski* recognized, there is "no evidence . . . that the framers of the provision intended or contemplated that the constitutional guarantee would be . . . limited" to antebellum common law. 354 Or at 195. Without such evidence, this Court should give full meaning to the word "all" used in the constitutional provision and continue to recognize, as it did in *Foster*, that the right applies to "all" civil cases without regard to whether an Oregon pioneer could have brought the same claim.

This is not a wrongful death claim, and the court may not find it the proper vehicle to overrule the holding in *Hughes.* But the court can disavow its reasoning as applicable in any other context than the one it saw in *Hughes* – a claim unknown at common law, that was solely statutory in origin, and that was originally created with a limited recovery.[4] *Hughes* should not mislead lower courts into decisions that are inconsistent with this court's more recent opinions, and that unjustifiably limit the protections afforded citizens by the Constitution.

[4] OTLA does not believe this to be an accurate characterization of a wrongful death claim, but it is the one accepted by the court in *Hughes.*

Conclusion

OTLA's focus in this brief has been on Article I, section 17. OTLA concurs with plaintiffs' analysis of Article VII (Amended), section 3. Three years after passage of the 1910 initiative that amended Article VII, the court was quite clear that the provision acted as a limit on legislative as well as judicial power:

> The sentence, 'The right of trial by jury shall be preserved,' is an injunction primarily upon the Legislature and courts of first instance.
>
> The Legislature cannot pass a law abolishing jury trials in law actions, nor can a law court arbitrarily refuse to allow a jury to be called in such cases[.]

Hoag v. Washington-Oregon Corp., 75 Or 588, 611-12, 147 P 756, 762 (1915)(quoting Article VII (Amended), section 3. OTLA submits that the legislature also cannot pass a law that requires a court to substitute a legislative policy choice for the jury's fact-finding when entering a judgment.

OTLA urges the court to reverse the decision of the Court of Appeals and affirm the judgment on the jury's verdict.

Respectfully submitted,

/s/Kathryn H. Clarke

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CERTIFICATE OF COMPLIANCE

Brief length:

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), and the word count of this brief is 4893 words.

Type size:

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

CERTIFICATE OF SERVICE AND FILING

I certify that on this date I electronically filed the foregoing **Brief of *Amicus Curiae* Oregon Trial Lawyers Association** with the State Court Administrator and by so doing served a copy electronically on

Maureen Leonard
Of Attorneys for Plaintiffs-Petitioners

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DATED this 22nd day of May, 2015.

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