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

BRIEF OF AMICUS CURIAE OREGON MEDICAL ASSOCIATION ON BEHALF OF DEFENDANT-APPELLANT

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Oregon Medical Association (OMA) is a private, not-for-profit, professional association of physicians organized for the purpose of serving and supporting physicians in their efforts to improve the health of Oregonians. This is an action against a physician employed by Oregon Health and Science University (OHSU). This case involves highly significant issues, including whether a publicly employed physician would have been entitled to immunity at Oregon common law, whether the Oregon Tort Claims Act (OTCA), ORS 30.260 to 30.300, limitation on damages in an action against an OHSU employed physician is a constitutionally adequate remedy, and what the right to trial by jury protects.

Because it is adequate, the OTCA damages limitations for actions against publicly-employed physicians, as amended in the policy-driven sessions of the 2009 and 2011 Oregon Legislatures, withstand Oregon constitutional challenges under the remedy clause, the right to trial by jury and of the prohibition on a court's reexamination of facts found by a jury. Or Const Art I, § 10; Or Const Art I, § 17; Or Const Art VII (Amended), § 3.

OMA appears in support of defendant Dr. Harrison's argument that no common law right of action for medical negligence would have existed against a state-employed physician in 1857 because such physicians would have been

immune from suit. Specifically, OMA addresses how medical practice is by nature discretionary. The very nature of the practice of medicine would have meant a state-employed physician at common law would have been immune from suit.

OMA also addresses essential factors that require consideration in the determination whether, in the context of a claim for medical negligence against a public body or its employee, here OHSU and Dr. Harrison, the OTCA limitations on damages, ORS 30.271, provide an injured plaintiff a substantial alternate remedy to one that would have existed at common law. Tort claim protections similar to those granted to the state are afforded to other public hospitals and their employees. ORS 30.260(4), (6); 30.272(3)(a); 174.109; 174.116(2)(p). Thus, the court's decision on the important issues presented will affect rural hospital districts and their employed physicians in remote areas of the state just as deeply as Dr. Harrison and OHSU. In those locales, patients necessarily depend on the local public hospital and the physicians who practice there as their *only* resource for emergency and inpatient care, laboratory testing and same day surgical services in their community.

Finally, when physicians are sued for malpractice, they have a right to trial by jury, and how that right is interpreted directly affects OMA members. OMA notes the scope of the right is currently being litigated in other cases on

appeal. *See* Defendant Portland Adventist Medical Center's Opening Brief filed in *Taylor v. Portland Adventist Medical Center*, Court of Appeals No. A154969 on March 18, 2014. OMA appears in support of the arguments that *Lakin v. Senco Products Inc.*, 329 Or 62, 987 P2d 463, *opinion clarified* 329 Or 369, 987 P2d 476 (1999), should be overruled. OMA offers an interpretation of Article 1, section 17 that gives effect to its procedural guarantee, recognizes it is not a source of substantive law, and disentangles it from Article I, section 10, jurisprudence.

THE FRAMEWORK

OMA supports the arguments made by Dr. Harrison and other amici regarding why the court should abandon the paradigm for assessing constitutional challenges under Article 1, section 10, adopted in *Smothers v. Gresham Transfer, Inc*., 332 Or 83, 23 P3d 333 (2001). The court's decision in *Klutchkowski v. PeaceHealth,* 354 Or 150, 311 P3d 461 (2013), and the apparent departure from the *Smothers* methodology in favor of *Lakin*'s earlier erroneous analysis of Article 1, section 17 and the right to trial by jury demonstrate the need for reconsideration of the law in these areas.

Before turning to the discretionary nature of medical practice, OMA recognizes, as should the court, that the parties agree on the starting point for the analysis of any argument that the legislature impermissibly limited a right of

action guaranteed to an injured person under the remedy clause of the Oregon Constitution. That first question is whether Oregon common law recognized a cause of action for the alleged injury when the Oregon Constitution was drafted in 1857. If there was no clearly recognized remedy at common law, including circumstances in which a defendant would have had immunity from suit, there is no constitutional restraint on limiting the remedy legislatively. *Clarke v. Oregon Health Sciences Univ.*, 343 Or 581, 600, 175 P3d 418 (2007); *Smothers*, 332 Or at 124.

1. Discretionary Immunity at Common Law

A. Oregon's Earliest Cases Recognized a Need for Protections for Physicians.

OMA begins its analysis by showing that common law did not recognize an unfettered claim for recovery against physicians for mere lack of success in treating a patient. Nor was there a clear right of action for negligence against a state-employed physician who treated a patient in the exercise of his or her discretion. Rather, a physician employed by a public body would have been immune from a patient's claim for negligence by virtue of the discretionary nature of medical treatment and decision-making.

Without expressly citing to any Oregon decision, this Court has generally held that causes of action for medical malpractice pre-existed the adoption of the Oregon constitution. *See Mead v. Legacy Health Sys.*, 352 Or 267, 276, 283

P3d 904 (2012) (discussing the sources of medical malpractice actions); *Klutchkowski,* 354 Or at 176-77 (2013) (recognizing what the court considered a "general rule" that negligence and medical malpractice were recognized causes of action in 1857). OMA acknowledges this premise but finds no Oregon cases involving claims for medical negligence decided before 1869. Three cases were heard in the trial courts that year, and the courts considered medical negligence law to be well established. Significantly, in these early Oregon cases the court recognized that the law, while protecting the patient, was also intended to protect the physician.

Heath v. Glisan, 3 Or 64 (Or Cir 1869), involved a trial of a claim by a young businessman alleging negligent treatment of an elbow injury. The court considered the law of medical negligence to be established "with a good degree of certainty" and designed to protect both patients and physicians. *Id.* at 65. The court instructed the jury, in part:

> The object of the law is, on the one hand, to guard the patient against the wrongful practices of ignorant or negligent men, who set themselves up as physicians or surgeons, and on the other, to protect the faithful practitioner of ordinary skill from loss either in character or in his purse, on account of matters for which it would be unreasonable to hold him responsible.

Id. at 68. The jury deliberated over a period of 48 hours and was discharged without returning a verdict.

Williams v. Poppleton, 3 Or 139 (Or Cir 1869), involved a claim against a surgeon for negligent treatment of a compound ankle fracture resulting in amputation of the plaintiff's leg at the knee. The case was retried after the first jury failed to agree on a verdict. The second jury reached a verdict for the plaintiff. At trial, the court repeated the instruction that the law is intended for the protection of all, both physician and the patient, and that a physician or surgeon cannot be held responsible for mere want of success; there must be a want of ordinary care or skill. *Id.* at 146. The court further instructed:

> The faithful, honest and conscientious physician is called upon to administer to every kind and class of men, the high and low, the rich and the poor, the virtuous and the depraved. Common humanity demands that the sick and distressed should be administered to, whatever may be their circumstances. The physician is obliged by his calling, constantly to enter the abodes of others, and frequently to undertake difficult cases and to perform critical operations in the presence of those who are ignorant and credulous.
>
> He is liable to have his acts misjudged, his motives suspected and the truth colored or distorted even where there are no dishonest intentions on the part of his accusers. And from the very nature of his duty, he is constantly liable to be called upon to perform the most critical operations in the presence of persons united in interests and sympathy by the ties of family, where he may be the only witness in his own behalf.

Id. at 146; *see also Boydston v. Giltner*, 3 Or 118, 124 (Or Cir 1869) (in trial of claim for negligent treatment of broken arm, court noted it charged the jury by employing the duties and liabilities of physicians and surgeons substantially as

in *Heath*; verdict for defendant). From the well-established law as stated in 1869, it can be inferred that Oregon common law recognized a need to protect physicians as well as patients.

Against this backdrop, the court is faced, for the first time, with the question whether a plaintiff would have had a cause of action in 1857 against an individual physician employed by an instrumentality of the state. Because the exercise of discretion is inescapably required in the treating of every patient, the answer is that a physician would have been immune from suit.

B. No Right of Action at Common Law for Discretionary Acts of State Employed Physicians.

Plaintiff cannot demonstrate he would have had a well-established right to sue Dr. Harrison in 1857 because the common law immunity for discretionary acts by government employees and officials would have immunized Dr. Harrison from suit and thus from liability. Discretionary acts at that time were broadly construed; only ministerial obligations expressly imposed by laws were excluded. *Antin v. Union High School Dist. No. 2 of Clatsop Cnty.*, 130 Or 461, 468-69, 280 P 664 (1929). OMA urges the court to adopt the arguments for immunity thoroughly developed in Dr. Harrison's merits brief at pages 25-43. OMA supplements those arguments by focusing on the discretionary nature of providing medical care to patients.

The "want of ordinary care or skill" standard that applied at statehood, *see Heath*, 3 Or at 67-68, is found today in ORS 677.095. Just as now, an Oregon physician's conduct in 1857 could not be measured against finite rules or concrete standards. In *Langford v. Jones*, 18 Or 307, 22 P 1064 (1890), the court reversed a verdict in favor of the plaintiff based on a physician's alleged negligence in discovering that the plaintiff was pregnant before performing surgery to remove what he believed to be a tumor. In reaching its decision, the court stated:

> Other physicians might have been more successful, -might possibly have exercised better judgment in regard to the matter; but it would not follow that the appellant was liable to damages for malpractice. A liability, in such a case, does not attach as against a doctor, any more than it would against a lawyer who commits an error in the practice of his profession. The law exacts the same requirements and duty from each, -that he shall possess a reasonable degree of learning and skill, and exercise it according to his best judgment. It is not a difficult matter to indicate from a retrospective standpoint the proper course to have pursued in regard to affairs, however complicated they may have been.

Id. at 320.

Medical treatment for the same condition varies, depending on the patient and the circumstances. Considerations include subjective symptoms, age, weight, allergies, past medical history, past surgical history, family history, and social history, as well as the physician's experience-based assessment of the patient's objective findings, labs, imaging, other diagnostic studies, and a host

of other considerations. Courts in the 1800s understood the discretion involved in performing the role of physician:

> In order to determine in regard to the existence of the pregnancy, the appellant was compelled to rely upon the history of the case, upon his own knowledge of the circumstances and surroundings of the affair, and upon those tests established from observation and experience as indications of it. Time, however, which is the only certain proof of the correctness of any theory, showed that the appellant's conclusions were wrong in that particular; but that did not prove him guilty of unskillfulness or negligence. He did not undertake in his treatment of the respondent's case that his judgment was infallible. He only agreed to exercise his best judgment.

Langford, 18 Or at 321-22. Even earlier, Oregon courts instructed juries about the exercise of discretion and judgment inherent in medical treatment:

> The surgeon does not deal with inanimate or insensate matter like the stone mason or brick layer, who can choose his materials and adjust them according to the mathematical lines, but he has a suffering human being to treat, a nervous system to tranquilize, and an excited will to regulate and control; where a surgeon undertakes to treat a fractured limb, he has not only to apply the known facts and theoretical knowledge of his science, but he may have to contend with very many powerful and hidden influences; such as want of vital force, habit of life, hereditary disease, the state of the climate. These or the mental state of his patient may often render the management of a surgical case difficult, doubtful and dangerous; and may have greater influence in the result than all the surgeon may be able to accomplish, even with the best skill and care.

Williams, 3 Or at 147.

Both this Court and the Court of Appeals have previously recognized the discretionary nature of medical care. In *Jarrett v. Wills*, 235 Or 51, 383 P2d 995 (1963), the court found that the superintendent, "a well-educated physician," could not be held liable for his decision to release a resident of Fairview, who then injured Ms. Jarrett. The immunity applied in *Jarrett*, just as it should here, because the defendant doctor had made an underlying decision – in that case that the patient was appropriate for release. *Id*. at 54-56. In *Baker v. Straumfjord*, 10 Or App 414, 500 P2d 496 (1972), the Court of Appeals held a physician employed at the Oregon State University infirmary was immune from liability for a student's suicide because the physician's alleged negligent acts were discretionary in nature. *Id*. at 417. Although the Court of Appeals refused to extend immunity to a physician a few years later in *Comley v. Emanuel Lutheran Charity Bd*., 35 Or App 465, 582 P2d 443 (1978), it was because this Court in 1970 had adopted a much narrower view of what would qualify as a discretionary act for purposes of immunity than had existed previously. *See Smith v. Cooper*, 256 Or 485, 475 P2d 78 (1970).

The system for training the next generation of physicians is complex. OHSU trains medical students, physician residents, and physician fellows and provides continuing education for practicing physicians throughout the state. To become a physician, an undergraduate degree is followed by four years of

medical school and then residency. The duration of residency varies according to speciality; residency training may be one to seven years, often followed by more specialization and a fellowship that is typically one to two years. The medical student, resident, and fellow are supervised according to their levels of experience. At some point, each must perform procedures and administer treatments with increasing degrees of responsibility to attain the next level of skill and expertise. Discretion and judgment are exercised at every stage of instruction, both by physician instructors as a part of teaching and by the medical students, residents, and fellows as a part of their learning.

OMA is not aware of any Oregon case that has previously recognized the immunity that would have been afforded to the provision of medical care by state-employed physicians in 1857. However, cases from other jurisdictions have determined that immunity would have existed at common law based on the discretionary nature of physician practice. In *Ross v. Schackel*, 920 P2d 1159 (Utah 1996), discussed in Dr. Harrison's brief at pages 33-34, the court recognized the discretionary nature of medical care, holding that a prison physician would have been entitled to immunity when Utah's Constitution was adopted, and thus held the statutory limit on damages did not violate Utah's open courts clause. The court stated:

> 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.

Id. at 1164-65. The Utah court's analysis mirrors this court's characterization of physician practice in the 1800s. *Langford*, 18 Or at 321-322.[1]

Although there are differing views on whether immunity protects publicly-employed physicians providing medical care in a vast range of contexts, the practice of medicine, in 1857 and now, remains an exercise of discretion and judgment. Physicians learn beginning in medical school in both a didactic and clinical setting, both carefully constructed to provide the education needed. There is no algorithm to be memorized and then applied mechanically to disease and injury. Each human being is unique in his or her presentation and response to treatments, requiring the patient's physician to draw on his or her knowledge and experience as each patient is evaluated, treated, and re-evaluated.

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[1] The Utah court referenced other cases to the same effect. *See Estate of Burks v. Ross*, 438 F2d 230, 235 (6th Cir 1971) (V.A. hospital physician "in her diagnoses and treatment of patients . . . was vested with discretion: and therefore was entitled to immunity from suit); *Smith v. Arnold*, 564 So. 2d 873, 876 (Ala 1990) (state hospital psychiatrist immune from liability because his decisions and recommendations concerning patient's care were discretionary); *Canon v. Thumudo*, 430 Mich 326, 352, 422 NW2d 688, 699 (1988) (medical decisionmaking is inherently discretionary).

At common law, a physician employed by the state would have had immunity for a claim of negligence in treating a patient because the treatment would have occurred in the exercise of his or her discretion. Thus, just as with the public entity OHSU, there is no constitutional impediment to the legislature's limitation on damages in ORS 30.271(3)(a) being applied to limit plaintiffs' recovery against Dr. Harrison in this case to the $3 million already paid.

2. The OTCA Limits Provide Constitutionally Adequate Remedies to Injured Plaintiffs.

In the event the court reaches this question, OMA addresses considerations that are required for a determination of what constitutes a substantial remedy, specifically as it relates to OHSU and its doctors, as well as public hospital districts and their employed physicians. As Justice Balmer recognized in his concurring opinion in *Clarke*, no precise test has been articulated. 343 Or at 613 (Balmer, J., concurring).

As a starting point, OMA acknowledges that the right to alter all laws in force in the territory of Oregon when the constitution was adopted, whether the same were of common law or legislative origin, was reserved to the people by Article 18, section 7 of the Oregon Constitution. *Perozzi v. Ganiere*, 149 Or 330, 346, 40 P2d 1009 (1935), *abrogated on other grounds by Smothers*, 332 Or 83. Thus, while Article I, section 10, may pertain to all remedies that were

available when the constitution was drafted, Article 18, section 7, grants the legislature the authority to alter those remedies.

Before the court's decision in *Smothers*, Oregon courts interpreted the remedy clause as permitting the legislature to place limits or restrictions on a cause of action protected by Article I, section 10, so long as the cause of action was not completely abolished. The court in *Clarke* restated the rule based on its 2007 review of the cases: "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, as long as it does not leave the injured party with an 'emasculated' version of the remedy that was available at common law." *Clarke*, 343 Or at 607. The limitations found permissible include limitations on damages, limitations on from whom the remedy can be sought, and restrictions on the availability of the cause of action to those who had performed a condition precedent to filing the cause of action.

Thus, whether a statutory limitation provides a remedy that is substantial is not, and cannot be, only a measure of the damages alleged or the amount awarded by a jury. Rather, just as with other limits on the remedial process, the proper considerations must include the public interest in enacting the statutory protections and the public benefit conferred.

For example, reasonable time limitations on causes of action, put in place for the protection of the public interest, have been expressly upheld against numerous constitutional challenges:

> It has always been considered a proper function of legislatures to limit the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest. It is in the interest of the public that there be a definite end to the possibility of future litigation resulting from past actions. It is a permissible constitutional legislative function to balance the possibility of outlawing legitimate claims against public need that at some definite time there be an end to potential litigation.

Josephs v. Burns, 260 Or 493, 503, 491 P2d 203 (1971), *abrogated on other grounds by Smothers*, 332 Or 83. The authority of the legislature to adopt, modify, or repeal statutes of limitation and repose as it sees fit has been recognized by Oregon courts since before the Oregon Constitution was adopted. *Compare Baldro v. Tolmie*, 1 Or 176, 178 (Or Terr 1855), *with Christiansen v. Providence Health Sys. of Oregon Corp.*, 344 Or 445, 456, 184 P2d 1121 (2008) (upholding tolling statute and five-year period of repose in ORS 12.160 and ORS 12.110(4) against challenge that a minor at common law would have had until age of majority to bring claim; "The Remedy Clause creates no barriers to the enactment of a statute that modifies the disability protection that minors enjoyed before 1859."). In light of the purposes they serve, and regardless of the view that statutory periods of limitation and repose can work

harsh results, Oregon courts apply such statutes according to their plain language and have consistently upheld such statutes against constitutional challenges. *Sealey By & Through Sealey v. Hicks*, 309 Or 387, 788 P2d 435 (1990) *cert den*, 498 US 819 (1990) *and abrogated on other grounds by Smothers*, 332 Or 83 (products liability); *Christiansen*, 344 Or at 453. "As a result, otherwise absolute rights give way to laws that are 'necessary and expedient for the general advantage of the publick.'" *Klutchkowski*, 354 Or at 184 (Landau, J., concurring, internal citation omitted).

In the healthcare context, Oregon citizens not only have an interest in access to quality, affordable healthcare, they also have an interest in ensuring that OHSU and public hospital districts and their physician employees continue to provide healthcare in fulfillment of their statutory mandates, without risk of unlimited liability.

A. Considerations Essential to the Determination that OTCA Remedies for Medical Negligence Claims Are Substantial.

OMA supports the structure for determining whether a remedy is substantial proposed by defendant Dr. Harrison's brief at pages 51-64. OMA focuses on considerations relevant to the determination of whether the remedy is substantial in the context of the delivery of healthcare by OHSU and other public hospitals and their employees.

In enacting the OTCA, the legislature's goal was to ensure continued availability of statutorily-mandated and important public services at the state, county, and local levels. OHSU is an instrumentality of the state, performing state functions. *Clarke*, 343 Or at 599-600. The Oregon legislature has mandated that in carrying out its mission to serve the people of Oregon, OHSU is "[t]o provid[e] education in health, science, engineering and their management for students of the state and region." ORS 353.030(1)(a). The legislature has enumerated some of OHSU's public services and functions:

> (3) The university is designated to carry out the following public purposes and missions on behalf of the State of Oregon:
>
> > (a) Provide high quality educational programs appropriate for a health and science university;
> >
> > (b) Conduct research in health care, engineering, biomedical sciences and general sciences;
> >
> > (c) Engage in the provision of inpatient and outpatient clinical care and health care delivery systems throughout the state;
> >
> > (d) Provide outreach programs in education, research and health care;
> >
> > (e) Serve as a local, regional and statewide resource for health care providers; and
> >
> > (f) Continue a commitment to provide health care to the underserved patient population of Oregon.

> (4) The university shall carry out the public purposes and missions of this section in the manner that, in the determination of the Oregon Health and Science University Board of Directors, best promotes the public welfare of the people of the State of Oregon.

ORS 353.030. OHSU's role in the delivery of quality healthcare to all Oregonians cannot be overstated.

i. The Public Interest in Adopting and Preserving the Limitations on Damages.

Whether the legislature acted for the purpose of protecting a recognized public interest is a proper consideration in determining whether the remedy provided by the legislature is substantial. *See Josephs*, 260 Or at 503 (statute of limitations). Indeed, individual rights often give way to public need. *Klutchkowski*, 354 Or at 183 (Landau, J., concurring) ("Blackstone explicitly stated that even so-called 'absolute rights' were subject to regulation by Parliament in the public interest.") (internal citations omitted). Just as it is in the public interest for there to be a definite end to the possibility of future litigation resulting from past actions, it is also in the public interest that there be a limitation on the damages available against state and local public body tortfeasors.

In medical negligence claims in particular, the legislature has legitimate concerns about the availability and cost of insurance for healthcare providers, and thus the cost and continued availability of quality healthcare for

Oregonians. *See Jones By & Through Jones v. Salem Hosp.*, 93 Or App 252, 258-59, 762 P2d 303 (1988), *rev den*, 307 Or 514 (1989) (noting that ORS 12.110(4) was "enacted in response to the so-called 'medical malpractice crisis'" and that treating minors and adults identically for malpractice claims had a rational basis despite the fact that minors and others with disabilities were given more time under ORS 12.160 for other claims); *Fields v. Legacy Health Sys.*, 413 F3d 943, 955 (9th Cir 2005) ("Here, the classifications made in the Oregon statutes of limitations and repose are rationally related to the legitimate legislative ends of avoiding stale claims and limiting the costs of litigation and medical care"; court upheld the ORS 12.110(4) five-year period of repose for medical malpractice claims against Oregon Constitution Article 1, section 10 challenges as well as equal protection and due process challenges under the U.S. Constitution).

The state has similar interests in legislating limitations on damages in claims against OHSU. The OHSU School of Medicine has nearly 800 residents and fellows in 75 graduate medical education programs which are fully accredited and overseen according to the requirements established by the Accreditation Council for Graduate Medical Education (ACGME). Accreditation: Graduate Medical Education (GME), http://www.ohsu.edu/xd/education/schools/school-of-medicine/about/

accreditation.cfm (last visited May 28, 2014). The ACGME requires that OHSU provide residents and fellows with professional liability coverage against awards from claims reported, filed either during or after participation, if the acts or omissions were within the scope of the residency or fellowship program. ACGME Institutional Requirements approved June 9, 2013, effective July 1, 2014 section IV.E.1; and ACGME Institutional Requirements effective July 1, 2007 section II.D.4.f. http://www.ohsu.edu/xd/education/schools/school-of-medicine/about/accreditation.cfm.

The interest in damages limitations against public bodies extends beyond OHSU. Physicians employed by public hospitals may legitimately require as a condition of employment that the hospital provide liability insurance. The legislature is aware that the potential for personal exposure above the OTCA limits, and above even the insurance limits affordable to strained county and local health district budgets, is a hefty disincentive to the skilled surgeons, obstetricians and other specialists so desperately needed in rural areas, who are otherwise willing to accept lower salaries in order to serve the greater public need.

Finally, the nature of medical negligence claims "is such that damages in the form of future medical expenses and lost wages often can be hundreds of thousands or millions of dollars." *Clarke*, 343 Or at 612 (Balmer, J.

concurring). Although the majority of verdicts may be within statutory tort claim limits, as Dr. Harrison points out, Opening Brief pages 18-19, the public's interest is nonetheless served by damages limitations that affect more than just caps on jury verdicts. They also serve as realistic indicators of the value of a case for purposes of achieving settlement, as well as for risk management, underwriting and reserves, all interests recognized as worthy of protection. *See Jones*, 93 Or App at 258; *Fields*, 413 F3d at 955.

ii. Public Benefit Conferred by the Limitation – The Quid Pro Quo.

Whether a public benefit is conferred by the legislature's OTCA limitations is another necessary consideration and it should be determinative in this case. In *Hale v. Port of Portland*, 308 Or 508, 783 P2d 506 (1989), *abrogated on other grounds by Smothers*, 332 Or 83 (2001), the court held that the then $100,000 cap on damages against a municipality in *former* ORS 30.270(1)(b) did not violate the remedy clause. *Id.* at 523-24. In reaching its decision, the court stated that "Article I, section 10, is not violated when the legislature alters (or even abolishes) a cause of action, so long as the party injured is not left entirely without a remedy. Under those cases, the remedy need not be precisely of the same type or extent; it is enough that the remedy is a substantial one." *Id*. at 523 (*referring to Noonan v. City of Portland*, 161 Or 213, 220, 88 P2d 808 (1939), and *Evanhoff v. State Industrial Acc. Com.*, 78 Or

503, 154 P 106 (1915)). According to the Court in *Hale*, the remedy available to plaintiff was "substantial" because, although the OTCA reduced the size of the potential recovery, it also expanded the class of plaintiffs that could recover; a plaintiff was no longer required to demonstrate that the municipal corporation was engaged in a proprietary activity when it injured him or her. *Id*. The court described that quid pro quo as follows:

> A benefit has been conferred, but a counterbalancing burden has been imposed. This may work to the disadvantage of some, while it will work to the advantage of others. But all who had a remedy continue to have one. This may not be what plaintiff wants. It may not even be what this court, if it were in the business of making substantive law on this subject, would choose to enact. But it is within the legislature's authority to enact in spite of the limitations of the Oregon Constitution, Article I, section 10.

Hale, 308 Or at 523.

The workers' compensation system upheld in *Smothers* is another example of public benefit outweighing personal injury on the substantiality of remedy scale. The workers' compensation system's "remedial process for seeking redress for injury to a right that the remedy clause protects," results in only limited compensation for lost wages, and noneconomic damages are determined by a rating system. 332 Or at 135. The money provided for temporary disability, permanent disability, and fatality is based on the average Oregon weekly wage, and does not exceed 133 percent of the average weekly

wage. Dept. of Consumer and Business Services, Oregon Bulletin No. 111, May 28, 2014; ORS 656.726; OAR 436-035-0001 *et seq*. Likewise the injured body part is assigned a specific value. In other words, the compensation to injured workers is even more limited for on-the-job injuries than damages the OTCA provides for injured patients, yet the workers' compensation system passes constitutional scrutiny and is even touted as a successful example of the navigation of competing interests resulting in an acceptable remedy.

OHSU is Oregon's principal medical school, providing education and training to a vast number of medical students who become physicians. OHSU also provides care through its rural health programs, including partnering with the Oregon Office of Rural Health, to provide care in locations that otherwise would be unserved or underserved. *See* About the Oregon Office of Rural Health, www.ohsu.edu/xd/outreach/oregon-rural-health/about/index.cfm. Much of OHSU's statutorily mandated medical care, work and outreach is performed without compensation, and, indeed at a budgetary deficit, again fulfilling public need.

OMA urges the court to acknowledge OHSU's public functions and the role of its physicians in the balance of what is considered a substantial remedy. All Oregonians have a vested interest in ensuring a steady flow of knowledgeable and skilled physicians available to provide medical care. A

balance must be achieved to provide adequate and ongoing benefits to the public and to compensate those inadvertently injured in a program which requires that medical students learn to become physicians, and that medical school graduates train as residents and fellows, by working with real patients, all with the ultimate goal of becoming practicing generalists and specialists, providing the sophisticated level of care that the Oregon public deserves.

The public benefits from the training of physicians and the continued availability of such services. The legislative limits on liability were carefully adopted and reflect the legislature's balance of interests and public benefit. Compensation to injured persons is assured but with predictability and not at a cost that affects the institution's ability to provide the public with needed medical expertise. The legislature has plenary authority to protect the public in this way.

Additional considerations come into focus for other public hospitals faced with waning or already destitute budgets. The court's analysis of the OTCA provisions directed at OHSU will also apply to the OTCA provisions directed at local public bodies; the only material difference is the amount of the damages allowed. Consideration and recognition of this difference is appropriate and helpful to the overall analysis of the adequacy of a remedy. Alleged damages in claims against public health districts frequently exceed the

limits in ORS 30.272 and the damages ceiling has an impact far beyond imposition after verdict in the cases such as this one asserting damages in the millions.

The difference between the limits as to OHSU versus local public bodies demonstrates that the calculus of determining whether a remedy is substantial must involve more than simply measuring the prayer or the jury verdict against the limits. The OTCA limit for all claimants against OHSU for this case is $3 million; had the injury occurred at one of many of the state's many local public hospitals that limitation would have been $1 million. *Compare* ORS 30.271(2)(a); (3)(a) *with* 30.272(2)(a); (3)(a) (the limit for an individual claimant is $1.5 million and $500,000, respectively). This suggests there is something to the damages limitation that necessarily goes beyond the individual claimant. That is, the legislature has seen appropriate to permit a lower amount of recovery, likely out of economic necessity, if the same injury were to occur at a local public hospital. The lower damages amounts available for the same or a similar injury had it occurred in one of Oregon's 26 public hospital districts, serves to validate the $3 million OHSU limit as a substantial remedy when viewed in the global context of the OTCA.

The OTCA is a direct reflection of the reality that public bodies providing healthcare must be able to do so in a way that is economically

feasible; otherwise, such entities would not be able to perform their statutorily-mandated functions and people would be without healthcare services. Public bodies, including local health districts and their physicians, must be able to depend on the OTCA in order to appropriately value cases. Anticipating arguments about whether a cap is or is not a constitutionally adequate remedy in every single case undermines the public body's efforts at settlement if the plaintiff values the case beyond the statutory limit.

3. The Right to Trial by Jury in Article 1, Section 17 Does Not Invalidate the OTCA's Limitation on Damages.

A. The Proper Interpretation of Article I, Section 17 is as a Procedural Right Guaranteed to Litigants in All Civil Cases at Law.

OMA supports Dr. Harrison's arguments and invites the court to re-examine the right to trial by jury and abandon *Lakin's* erroneous imputation of substantive rights into the jury trial process guaranteed by Article I, section 17. It is time to redirect the court's analysis of the right to jury trial and unbind it from an analysis based on whether the remedy in question was recognized at common law. The court has already begun that work. *See M.K.F. v. Miramontes*, 352 Or 401, 287 P3d 1045 (2012) and *Evergreen West Bus. Ctr., LLC v. Emmert*, 354 Or 790, 323 P3d 250 (2014), discussed below.

The right to jury trial was intended to protect litigants' rights to have their actions at law tried to a jury. Article I, section 17 did not speak to existing

remedies, or to their protection or limitation. Failing to recognize that there were legislative limits on recovery in civil actions in 1857, the *Lakin* court erroneously concluded that the drafters of Article I, section 17, would not have tolerated legislative "interference with a jury's award of noneconomic damages." *Lakin*, 329 Or at 78. That fundamental premise is unsupported and, respectfully, wrong.

The question is what the right to "trial by jury" as guaranteed by the Oregon Constitution means. Beginning with the text, the right of trial by jury is set out in two provisions of the Oregon Constitution. See *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992) (the methodology for interpreting original provisions of the Oregon Constitution includes three levels on which a constitutional provision is addressed: "Its specific wording, the case law surrounding it, and the historical circumstances that led to its creation."). Article I, section 17, part of the original Oregon Constitution enacted in 1859, provides, that "in all civil cases the right of Trial by Jury shall remain inviolate." In addition, Article VII (Amended), section 3, adopted by initiative in 1910, provides that "In actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." OMA

incorporates Dr. Harrison's arguments regarding the history and meaning of Article VII (Amended), section 3, Opening Brief pages 65-71, and focuses on Article I, section 17.

By its text, "in all civil cases" there is a right to "trial by jury" and the defendant's right is coequal to that of plaintiff. The text of Article I, section 17 requires that a jury trial be available to civil litigants instead of requiring them to accept a bench trial, arbitration, compurgation, or trial by ordeal. Here, the question for decision is whether "trial by jury" translates to a right to "trial by jury for unlimited damages." It does not. Article I, section 17 does not affect legislative power to create or abolish causes of action; it merely requires that a jury trial be available for all civil actions at law.

Trial by jury is a procedural right; it defines who the factfinder will be, "in all civil cases." It does not guarantee a certain outcome; it is not a theory of recovery. *Jensen v. Whitlow*, 334 Or 412, 422, 51 P3d 599 (2002) ("Article I, section 17 is not a source of law that creates or retains a substantive claim or theory of recovery in favor of any party."). The right to trial by jury is the right to have the facts in a legal, as opposed to equitable, case tried to a jury of community members instead of a judge. *See Deane v. Willamette Bridge Ry. Co.*, 22 Or 167, 170, 29 P 440 (1892); *Tribou v. Strowbridge*, 7 Or 156 (1879); *Kendall v. Post*, 8 Or 141 (1879). Article I, section 17 has no application to

invalidate legislation limiting tort actions; it is not a right to a particular remedy. Interpreting it in such a way is akin to interpretations of the ill-fated *Lochner* era of federal substantive due process jurisprudence. When there is a right to trial by jury and the parties have endured one, such as in this case, its obligation is satisfied.

In *M.K.F. v. Miramontes*, 352 Or at 426, this Court held that the plaintiff was entitled to a jury trial on her claim for compensatory money damages filed pursuant to the stalking protective order statute, ORS 30.866. This court reached that conclusion because, working in concert, Article I, section 17 and Article VII (Amended), section 3, provide a right to jury trial in all civil cases in actions at law, where the value in controversy exceeds $750. *Id*. at 408. This Court pointed out that it had previously "rejected the argument that no right to a jury trial attaches to claim unless there was a firmly established common-law right to a jury trial for that claim in 1857" in *State v. 1920 Studebaker Touring Car et al.*, 120 Or 254, 521 P 701 (1927) (internal footnote omitted). "[T]he constitutional right of trial by jury is not to be narrowly construed, and is not limited strictly to those cases in which it had existed before the adoption of the Constitution, but is to be extended to cases of like nature as they may hereafter arise." *M.K.F.*, 352 Or at 408-09 (quoting *State v. 1920 Studebaker*, 120 Or at

263). This court affirmed the reasoning in *M.K.F.* in February this year, in *Evergreen West Business Center*, explaining:

> In *Miramontes*, this court stated that Article I, section 17, and Article VII (Amended), section 3, of the Oregon Constitution, do not guarantee a right to jury trial for claims or requests for relief that, standing alone, are equitable in nature and would have been tried to a court without a jury at common law. 352 Or. at 425, 287 P.3d 1045. However, the court concluded that, in the absence of a showing that the nature of a claim or request for relief is such that, for that or some other reason, it would have been tried to a court without a jury, those provisions do guarantee a right to a jury trial on claims or requests that are properly categorized as "civil" or "at law."

354 Or at 801-802 (footnote omitted); *see also State v. N.R.L.*, 354 Or 222, 225-26, 311 P3d 510 (2013) (resting on same reasoning). Thus, the right to trial by jury means that litigants have the right to have their cases "at law," i.e., those seeking money damages such as actions for medical negligence, tried to a jury. That is all trial by jury requires or guarantees.

The right to trial by jury is not a right to a remedy, nor does history support such an interpretation. OMA incorporates Dr. Harrison's arguments regarding the history of trial by jury and provides the following in supplement. Article I, section 17 has been a part of the constitution since its inception in 1857. There was no recorded debate from Oregon's constitutional convention about the text of Article I, section 17. Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857- Part I (Articles I &II)*, 37 WILLAMETTE L REV 469, 528 (2001); s*ee also* Defendant Portland Adventist

Medical Center's Opening Brief at 32-37 in *Taylor v. Portland Adventist Medical Center*, Court of Appeals No. A154969 filed March 18, 2014, for additional arguments regarding the history of Article I, section 17 and the view of trial by jury as a community right for the protection of the public, not individuals (e.g., Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND LJ 397, 399 (2009)). Although it is difficult to discern the intent of the framers, an understanding of what trial by jury historically has meant in context of the role of the legislature in defining and limiting actions leads to the conclusion that "trial by jury" was in fact conceived of as a procedural right, not as any constraint on the legislature to change or abolish remedies.

Consistent with a construction of the right as procedural only, Oregon law in 1857 recognized fixed damage limitations in some civil actions. For example, at least two statutes provided limits on the amount of damages that persons with possessory interests in real property could recover in the event of exclusion. By statute, any person who had a legal estate in real property and a present right to possession "may recover such possession, with damages for withholding the same, *by an action at law*." General Laws of Oregon, Civ Code, ch IV, title I, § 313 (Deady 1845-1864) (emphasis added). The legislature limited the plaintiff's recovery: "to recover damages for withholding the property for the term of six years next preceding the commencement of the

action, and for any period that may elapse from such commencement, to the time of giving a verdict therein, exclusive of the use of permanent improvements made by the defendant." *Id*. at § 318. Also, in 1854 a widow's damages in a civil action against the heir of her husband for withholding her dower were limited to damages from the time of the death of her husband to the time of alienation by the heir, not to exceed six years in the whole. *Id*. at ch XIV, § 27. The concept of legislative limitation on damages, therefore, was in place in Oregon when the constitution was drafted, even if fixed temporally rather than by specific amount, and even if not widely applied. Conceived of as a procedural guarantee at a time when personal injury law was much less developed than it is now, *see Deane*, 22 Or at 169, it is highly unlikely that trial by jury was intended to embrace a substantive right to unlimited damages or any substantive right at all, nor should it be so interpreted today. *Klutchkowski*, 354 Or at 186-89 (Landau, J., concurring) ("The mid-nineteenth century, after all, was no friend to those seeking recovery for injury. * * * The robust common-law remedies with which we are so familiar today barely existed at the time.").

B. *Lakin* should be overruled.

In the event the court reaches this question, OMA supports the arguments that *Lakin v. Senco Products, Inc.* should be overruled. *Lakin* erroneously held

that Article I, section 17, encompassed the "fundamental rights to a jury determination *of the right to receive, and the amount of, damages*. *329 Or at* 77 (emphasis added). *Lakin* relied on the faulty premise that trial by jury includes a right to a jury's determination of the amount of damages, unlimited by applicable statutory law. Therefore, it wrongly imputed a substantive guarantee to what it means to have a "trial by jury." *State v. Ciancanelli*, 339 Or 282, 290, 121 P3d 613 (2005) (stating grounds for abandoning precedent). The guarantee of trial by jury is not a guarantee of any remedy, and Article I, section 17 analyses should be distinct from other constitutional inquiries.

The proper understanding of trial by jury as a procedural right cannot be reconciled with *Lakin's* holding that Article I, section 17, includes a right to unlimited damages. The court in *Hughes v. PeaceHealth*, 344 Or 142, 156, 178 P3d 225 n 12 (2008), a wrongful death action, did not expressly recognize the problem, but it did allude to the quandary presented. Noting that Article I, section 17 is not a source of substantive law, the court stated: "Thus, any right to a jury trial that plaintiff might have under Article I, section 17, cannot confer a right to a jury award of a kind or amount of damages that is contrary to that *statutory* law." *Id*. at 157.

Klutchkowski, 354 Or 150, decided after *M.K.F.* and before *Evergreen West*, brings the problem into focus. Foregoing a *Smothers* analysis under

Article I, section 10, in *Klutchkowski* the court applied a common law remedy analysis under Article I, section 17 to invalidate the legislative limitation in ORS 31.710(1) on recovery of noneconomic damages in a medical negligence action. The court stated it had adhered to its holding in *Lakin* 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. In any such case, the trial of all issues of fact must be by jury. The determination of damages in a personal injury case is a question of fact. *** <u>The legislature may not interfere with the full effect of a jury's assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857</u>.

354 Or at 177 (emphasis added). However, the court cites to no cases where it had so relied on *Lakin*. In fact, there are none. The court has cited the above holding, however, it had never, until *Klutchkowski*, applied it to find a violation of the right to trial by jury.

As demonstrated above, early Oregon law limited damages available in certain cases. *Lakin's* premise that Article I, section 17 encompasses a right *beyond* a jury trial to *also* curb the authority of the legislature to limit actions or recovery in damages is unsupported. Not asked to overrule precedent, the Court in *Klutchkowski* sought to reconcile its case law. The result is another erroneous holding that Article I, section 17 is a reservoir of remedy protection

that can invalidate legislative policy determinations and public benefit statutes. The result illustrates why such precedents should be reexamined now.

Time-worn, *Lakin* has run its course and should be abandoned. It is contrary to the holding that Article I, section 17 is not a source of substantive law. *Jensen*, 334 Or at 422; *Hughes*, 344 Or at 157. It is inconsistent with the guarantee plainly stated in the language of Article I, section 17 and the purpose for the guarantee, to assure the jury trial process to civil litigants in actions at law. Consistent with *Jensen* and *Hughes*, trial by jury should be interpreted to mean what the language plainly states. That is, litigants in all civil cases at law have the right to have their cases tried to a jury, meaning that litigants may insist on the process of a jury trial. That is the promise of Article I, section 17. As a procedural guarantee it has no substantive component. The jury trial guarantee was never intended as a tool by the courts, or one party over the other, to override legislation or statutory constraints on recovery.

Conclusion

State-employed physicians were immune from liability in 1857 and therefore application of the remedy clause to this case is inapposite. In the event the court reaches the questions posed by Article I, section 10 and Article I, section 17, OMA urges the court to overrule *Smothers* and *Lakin*, to hold the

OTCA limits constitutionally adequate, and to hold that "trial by jury" means what it says and no more.

DATED this 10th day of June, 2014.

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Certificate of Compliance

I certify that this brief complies with the word count limitation pursuant to ORAP 5.05(2)(b); the word count is 8,579 words. I further certify that this brief is produced in a type font not smaller than 14 point in both text and footnotes pursuant to ORAP 5.05(4)(f).

In addition, I certify that this document was converted into a searchable PDF format for electronic filing and was scanned for viruses; it is submitted to the court brief bank virus-free as required by ORAP 9.17(5)(b).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the date below I served the foregoing BRIEF OF AMICUS CURIAE OREGON MEDICAL ASSOCIATION ON BEHALF OF DEFENDANT-APPELLANT on the following:

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