IN THE SUPREME COURT OF THE STATE OF OREGON

LORI HORTON,
as guardian *ad litem* and Conservator of and for . a Minor,

Plaintiff-Respondent,

and

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 Case No. S061992

BRIEF OF *AMICI CURIAE* LEAGUE OF OREGON CITIES AND ASSOCIATION OF OREGON COUNTIES

On Direct Appeal of Limited Judgment and Money Award
of the Multnomah County Circuit Court
The Honorable Jerry B. Hodson, Circuit Judge

June, 2014

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June, 2014

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1. INTEREST OF AMICI

This case involves the application of the limits of liability under the Oregon Tort Claims Act, ORS 30.271. Specifically, this Court must determine whether reducing a plaintiff's recovery to the limits mandated in that statute would violate the Remedies Clause of Oregon Constitution, Article I, section 10, the jury trial clause of Article I, section 17, or the prohibition on judicial re-examination of questions determined by a jury under Article VII (Amended), section 3.

By leave of the Court, the League of Oregon Cities ("League" or "LOC") and the Association of Oregon Counties ("AOC") appear as *amici curiae* to support defendant, Marvin Harrison, MD. Founded in 1925, the League is a voluntary statewide association representing all of Oregon's 242 incorporated cities. The League advocates for improved quality of municipal services through technical assistance, research and education.

The Association of Oregon Counties is an intergovernmental entity formed in 1906 by Oregon's 36 counties for the purpose of promoting and advocating the common interests of Oregon's county governments.

LOC's and AOC's interest in this case, and therefore the interest of their combined 278 member entities, arises because this Court's decision will affect the potential liability of all cities and counties in Oregon, and, ultimately, the

ability Oregon's cities and counties to provide the core services for which they are incorporated.

The Oregon Tort Claims Act, ORS 30.260 to 30.300, represents a thoughtful and comprehensive effort by the Legislature, refined in the light of experience over the years, to balance the competing needs and interests of parties claiming injuries by the acts and omissions of the government and its agents, of the taxpayers who ultimately bear the costs of claims brought against the government, of public bodies, who need some level of predictability in their liabilities in order to continue to plan for and deliver essential public services, and of the officers, employees and agents of public bodies, whom the Legislature has sought to encourage to zealously perform their public duties without fear of personal liability.

The League and AOC have a particular interest in assisting the Court to make a decision consistent with the text, context and historical understanding of the principles underlying the Oregon Constitution, giving due regard to the legislative power that the people have vested in their Legislative Assembly to make the policy choices inherent in the Oregon Tort Claims Act.

2. LEGAL ISSUE PRESENTED

In this case, plaintiff sued defendant for medical negligence. The jury returned a verdict finding defendant at fault, and assessing damages in the amount of $12,071,190.38. The Circuit Court denied defendant's motion to

reduce the award to the maximum recovery of $3,000,000 provided by ORS 30.271, on the ground that to do so would deprive plaintiff of her rights under the Oregon Constitution.

ORS 30.274 provides for direct review in this Court, and this appeal presents this essential issue:

Does the Oregon Constitution prohibit the Legislature from limiting plaintiff's recovery to $3,000,000?

3. PROPOSED RULES OF LAW

A. Neither Oregon Constitution, Article I, section 10, nor Oregon Constitution, Article I, section 17, nor Oregon Constitution, Article VII (Amended), section 3, prohibits the Legislature from immunizing individual government employees from personal injury actions arising out of their performance of duty.

B. Neither Oregon Constitution, Article I, section 10, nor Oregon Constitution, Article I, section 17, nor Oregon Constitution, Article VII (Amended), section 3, prohibits the Legislature from limiting the amount of recovery against the government or its employees in personal injury actions.

4. STATEMENT OF THE CASE

Amici accept and adopt the Statement of the Case in Appellant's Opening Brief.

5. SUMMARY OF THE ARGUMENT

Amici adopt and support the arguments in Appellant's Opening Brief, particularly those regarding the common law immunities of government employees and the proper scope of Oregon Constitution, Article I, section 10, Article I, section 17, and Article VII (Amended), section 3. *Amici* focus their argument on Article I, section 10. That provision, along with the others involved in this case, must be read and analyzed in the context of Article I, section 20, and Article XVIII, section 7. When the Court follows its historic paradigm of reading the Constitution as a whole to determine the meaning of any particular section, and of affording proper deference to the public policy choices of the Legislature, it becomes clear that Article I, section 10, does not prohibit the Legislature from granting personal immunity from tort liability to individual government employees, nor from limiting the amount of recovery available against their governmental employers.[1]

The Court should revisit its holding in *Smothers v. Gresham Transfer, Inc.,* 332 Or 83, 23 P3d 333 (2001), for two reasons. First, by failing to read

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[1] *Amici* recognize that ORS 30.265 was amended by 2011 Or Laws, ch 270, § 1, to permit naming individual government employees as defendants when damages are alleged in excess of the OTCA limits, and that this case does not require the Court to address the question whether it would be constitutional for the Legislature to grant them personal immunity. *Amici's* position, nonetheless, is that the Legislature has the authority to substitute a limited remedy against the government for a nominally limitless remedy against a government employee, and that the statute, prior to that amendment, was constitutional.

Article I, section 10, in the context of Article I, section 20, and Article XVIII, section 7, the Court did not follow the proper paradigm for interpreting the Oregon Constitution. Second, there is a pre-Statehood case, not found or discussed in *Smothers,* which did address the analogous provision of Indiana's constitution, which provision was the source of Article I, section 10, which demonstrates that the framers of the Oregon Constitution would not have understood Article I, section 10, as limiting the Legislature's authority to limit damages in personal injury actions.

The early decisions of the Oregon Supreme Court adhered to the view that legislation could act prospectively to alter, amend or abolish common law rights of recovery. When the Court first held, in 1901, that Article I, section 10, prohibited the Legislature from abolishing a remedy, it did so without analyzing the text, context or history of Article I, section 10, and based its holding on dicta from post-Statehood cases from other jurisdictions, none of which invalidated acts of their respective legislatures.

In the ensuing years, through a number of mid-twentieth century cases, this Court adopted the view that the Legislature could alter, amend or abolish remedies. When the Court abandoned some 65 years of this history, in *Smothers*, it did so without giving the legislation the presumption of validity which it was due, without reading Article I, section 10, in the context of Article

I, section 20, and Article XVIII, section 7, and through a misunderstanding of the basis of the Court's earlier decisions, which *Smothers* repudiated.

Consistently with the view prevalent in pre-Statehood case law both in the Territory of Oregon and in other jurisdictions, Article I, section 10, protects only those interests that have "vested" at the time an enactment is passed. Rights have "vested" only if a contract has been entered into or an injury suffered before the limiting statute has been enacted. As to future occurrences, the Legislature remains competent to alter, amend or abolish remedies, and, in particular, to grant personal immunity or to limit the amount of damages recoverable in a personal injury action.

To the extent that there are general common law principles or other pre-Statehood legal precedents indicating otherwise, they must give way to the express recognition, in Article I, section 20, that the Legislature retains authority to grant immunities, so long as it does so on an equal basis, and in Article XVIII, section 7, that the Legislature retains the authority to alter all laws in force at the time of the adoption of the Constitution, whether the source of those laws is statutory or common law.

The Oregon Tort Claims Act, ORS 30.260 to 30.300, does not deprive plaintiff of a remedy, in violation of Article I, section 10, nor does it violate her jury trial rights under Article I, section 17, or Article VII (Amended), section 3.

6. ARGUMENT

A. *Amici* Joins Defendants' Arguments.

Amici join in the arguments made in Appellant's Opening Brief. In particular, *amici* endorse Appellant's arguments regarding the immunities of governmental employees at the time of the adoption of the Oregon Constitution, and the analysis of the jury trial provisions of Article I, section 17, and Article VII (Amended), section 3. *Amici* therefore will focus their argument on Article I, section 10.

B. This Court Should Revisit its Interpretation of Article I, section 10.

Amici submit this brief to encourage the Court to revisit its interpretation of Article I, section 10. *Amici* suggest that it is appropriate for the Court to do so, because the Court's cases have departed from its usual, historic paradigm for considering and construing the constitution, and because *amici* have found a case, *Madison and Indianapolis Railroad Co. v. Whiteneck*, 8 Ind 217 (1856), not previously mentioned in this Court's decisions, that sheds light on the original meaning of the Oregon Constitution, namely that it was not intended to prohibit the Legislature from fixing or limiting recovery in personal injury cases. *See State v. Cincanelli*, 339 Or 282, 289, 121 P3d 613 (2005); *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228 (2000).

C. The Proper Methodology for Interpreting Article I, Section 10.

In *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992), this Court did not announce a new test for interpreting provisions of the Oregon Constitution, but, rather, merely summarized its long-standing methodology when it said: "There are three levels on which [a] constitutional provision must be addressed: Its specific wording, the case law surrounding it, and the historical circumstances that led to its creation." That shorthand was perfectly appropriate for the Court's determination, in *Priest v. Pearce*, that Article I, section 14 did not guarantee a criminal defendant the right to bail on appeal of his conviction. No enactment of the Legislature was challenged in that case.

But, in this case, where the Court is asked whether Article I, section 10, prevents the realization of the intent of the Legislature to limit recovery in civil actions against the government and its employees, the Court's methodology, as it did prior to *Priest v. Pearce*, must also incorporate those considerations inherent in the Constitution's separation of powers, which are peculiarly applicable when the judicial power to declare laws unconstitutional confronts the legislative power to enact or repeal laws, Article IV, section 1(1), and the executive power to approve or veto them, Article V, section 15b.[2] In particular,

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[2] Article III, section 1 provides: "The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with

that methodology must give due regard to the Legislature's policy choices, and must include examination of other provisions of the Constitution itself.

The Court articulated its task in such a case over a century ago:

> The object and purpose of the law, whether fundamental or otherwise, must be considered; and the constitution must not be interpreted on narrow or technical principles, but liberally and on broad general lines, in order that it may accomplish the objects intended by it and carry out the principles of government. The whole constitution must be construed together.
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> When two constructions are possible, one of which raises a conflict or takes away the meaning of a section, sentence, phrase, or word, and the other does not, the latter construction must be adopted, or the interpretation which harmonizes the constitution as a whole must prevail.
>
> In this connection, it must also be kept in mind that the constitution of a state, unlike that of our national organic law, is one of limitation, and not a grant, of powers, and that any act adopted by the legislative department of the State, not prohibited by its fundamental laws, must be held valid; and this inhibition must expressly or impliedly be made to appear beyond a reasonable doubt.

State v. Cochran, 55 Or 157, 179, 104 P 884 (1909).

These, then, are the bedrock principles in adjudging whether legislation is constitutional:

- The whole constitution must be construed together;

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official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

- The Court should adopt an interpretation of the constitution that preserves the meaning of all provisions and that harmonizes the constitution as a whole;
- The Legislature may enact any statute that the constitution does not prohibit; and
- Any prohibition must appear beyond a reasonable doubt.

By 1909, these principles had been "well settled by a unanimity of decisions." *Id.*

In its cases addressing the constitutionality of Legislative limits on personal injury actions under Article I, section 10, particularly in *Clarke v. OHSU*, 343 Or 581, 175 P3d 418 (2007), and in *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001), and even in *Mattson v. Astoria,* 39 Or 577, 65 P 1066 (1901), this Court departed from that paradigm. In those cases, the Court failed to give the challenged legislation the strong presumption of constitutionality which it was due, and failed to examine the Constitution, or even the Bill of Rights, as a whole. *See Coultas v. City of Sutherlin,* 318 Or 584, 590, 871 P2d 465 (1994) ("The context of a constitutional provision includes other provisions in the constitution that were adopted at the same time"). By returning to first principles of constitutional construction, a proper examination of Article I, section 10, reveals that it does not preclude the Legislature from limiting recovery against public bodies or their employees.

D. The "Context" of Article I, section 10, Must Include Looking at the Constitution as a Whole

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."

What is readily apparent from reading the words of this section is that there is nothing in the text itself of Article I, section 10 that purports to restrain the acts of the Legislature. *Brewer v. Dept. of Fish and Wildlife*, 167 Or App 173, 193-94, 2 P3d 418 (2000) (Landau, J., concurring). In contrast, numerous provisions of the constitution expressly do restrain the Legislature: Article I, section 8; Article I, section 20; Article I, section 26; Article I, section 29; Article I, Section 30. *Id.* The Framers clearly knew how to constrain the Legislature when that was, in fact, their object.

This Court should adopt then-Judge Landau's conclusion that "the language that ultimately made its way into Article I, section 10, historically was understood to guarantee open access to a fair and impartial court, not to guarantee that the legislatures would not alter the substance of rights and remedies in the future." *Brewer*, 167 Or App at 197 (Landau, J., concurring).

Article I, Section 10 must be read in conjunction with Article I, Section 20, which reads: "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." As the Legislature is prohibited only from granting ***unequal*** privileges and immunities, it necessarily retains the power to grant citizens or classes of citizens privileges or immunities applicable to all on the same terms.

Johnson's and Walker's English Dictionaries 439 (Boston Stereotype Edition, 1830) defined "immunity" as "[d]ischarge from any obligation," or "[p]rivilege ; exemption from onerous duties." That same authority defined the noun "privilege" as "[p]eculiar advantage" or "[i]mmunity; right not universal." *Id.* at 725. The verb "privilege" it defined as "[t]o invest with rights or immunities; to grant a privilege," or "[t]o exempt from censure or danger," or "to exempt from paying tax or impost." *Id.*

Noah Webster, *Dictionary of The English Language* 192 (Revised Edition 1850), defined "immunity" as "[e]xemption from duty, charge, or tax; peculiar privilege." Webster defined the noun "privilege" as "[p]eculiar advantage; a right," and the verb "privilege" as "[t]o grant a privilege to; to free; to exempt from censure or danger." *Id.* at 306.

Article I, Section 20 thus preserves the Legislature's authority to exempt individuals from personal liability, so long as it does so in a way that treats all similarly situated individuals the same. It follows necessarily, then, that Article

I, section 10, cannot be read to prohibit the immunization of public employees or the limitation of recovery against their governmental employers.

The text of Article I, Section 10 similarly does not expressly protect any particular form or extent of a remedy. Rather, it guarantees a "remedy by due course of law." To understand what "due course of law" encompasses, Article I, Section 10 must be read in conjunction with Article XVIII, Section 7: "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."

"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 of the state by Article XVIII, § 7." *Perozzi v. Ganiere*, 149 Or 330, 346, 40 P2d 1009 (1935). "[H]ad it been the intention of the framers of the Constitution to adopt and preserve the remedy for all injuries to person or property which the common law afforded, they undoubtedly would have signified this intention by exact and specific wording, rather than the language used in [A]rticle I, § 10." *Id.*[3]

[3] *Amici* recognize that this Court disavowed *Perozzi v. Ganiere*, 149 Or 330, 40 P2d 1009 (1935), in *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001). For the reasons explained, *infra* at 33-35, the Court's rejection of *Perozzi* is based on a false premise and should be re-examined.

E. The Pre-Statehood Case Law

Several pre-Statehood cases from the Territorial Supreme Court illustrate the contemporary understanding that, while the Legislature could not enact laws that destroyed vested rights, it was free to define or limit rights and liabilities prospectively.

In an 1847 decision, reprinted as *Knighton v. Burns,* 10 Or 549 (1882), the Territorial Supreme Court held that a territorial statute which authorized territorial scrip as legal tender could not supplant the defendant's contractual obligation to pay in cash, because to do so would unlawfully impair the obligation of contracts. The Court said, "[T]he debt, in order that a discharge may extinguish the remedy against the future property of the debtor, must be contracted after the passage of the act *within* the *state,* and between citizens of the state." 10 Or at 552. In other words, it was competent for the Legislature to abolish a remedy for something that had not yet happened, but not to alter the remedy (cash payment) for a debt that already existed. Just as the Legislature could "extinguish the remedy against the future property of the debtor," so long as the contract had not been entered into at the time the legislation was passed, so the legislature could "extinguish the remedy" against individual government employees, as to persons whose claims had not yet accrued.

In *McLaughlin v. Hoover,* 1 Or 32 (1853), the issue was the operation of the statute of limitations. The first statute of limitations had been adopted in

1845; a new one in 1849; yet another new one in 1853. Each act provided for a six-year limitation on actions in assumpsit. "When the statute of 1845 was repealed, it had run three years against the right to sue in this case, and the defendant claims that these three years, together with the succeeding three years under the act of 1849 ought to be considered as a bar to this suit." 1 Or at 32. The Court agreed, *id.* at 34-35:

> Limitation laws effect [sic] the remedy, and the legislative power has the same right to regulate and restrict remedies upon causes of action in existence as upon causes of action to be created. When the law is made operative *in presenti*, courts cannot legislate away the effect and declare that it shall operate only *in futuro.*
>
> Whenever judicial tribunals can apply the remedy and save the right, no discretion is left by the law; but all cases must be treated in the same manner, and adjudged upon the same principles.
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> * * * * *
>
> If the legislature should pass an act barring a past action, without any allowance of time for the institution of a suit in future, such an act would be so unreasonable as to amount to a denial of right, and call for the interposition of the court.
>
> We conclude, then, that it is the duty of the court to apply the remedy by limitation in all cases, except where it would cut off the right, and then the court is bound, by the fundamental law, to give a party reasonable time in which to escape the effect of such remedy.

By setting out the "duty of the court to apply the remedy by limitation in all cases, except where it would cut off the right," *id.* at 35, *McLaughlin*

demonstrates that "remedy" encompasses both claims and defenses. When the Court said, "If the legislature should pass an act barring a past action, without any allowance of time for the institution of a suit in future, such an act would be so unreasonable as to amount to a denial of right, and call for the interposition of the court," it recognized, at least implicitly, that the legislature could pass an act barring a *future* action (i.e., granting immunity from claims that had not yet accrued), without being "so unreasonable as to amount to a denial of right." *Id.*

In *Steamer Gazelle v. Lake,* 1 Or 120, 121 (1854), the Court said, "It is competent for the legislature, at any time, to alter or change the remedy or mode of enforcing a right, and all proceedings instituted thereafter must conform to the new remedy." Thus, the framers would have recognized that Article I, section 10 would not prohibit the Legislature from substituting a limited remedy against a governmental body for the common law remedy against an individual government employee.

Pre-1857 cases from other jurisdictions similarly upheld the authority of legislatures prospectively to change or eliminate remedies. In *Gooch v. Stephenson,* 13 Me 371, 376-77 (1836), the Supreme Judicial Court of Maine expressly upheld the legislature's authority to grant an immunity, and to completely eliminate, under certain circumstances, a common law remedy for trespass. There, by statute, the legislature had provided "that no action of trespass shall be maintained against the owner of cattle, breaking into the

inclosure of another, through an insufficient fence; such cattle being lawfully on the opposite side thereof." 13 Me at 375. The court upheld the constitutionality of the statute, notwithstanding that it "denies and withholds the remedy, under certain circumstances, where it existed before at common law." *Id.* at 376. The court held, *id.* at 376-77:

> It was for the legislature to determine what protection should be thrown around this species of property; what vigilance and what safeguards should be required at the hands of the owner; and where he might invoke the aid of courts of justice. They have no power to take away vested rights; but they may regulate their enjoyment. Lands in this country cannot be profitably cultivated, if at all, without good and sufficient fences. To encourage their erection, it is undoubtedly competent for the legislature to give to the owners of lands thus secured, additional remedies and immunities.

In *Evans v. Montgomery,* 4 Watts & Serg 218, 220 (Pa 1842), the Supreme Court of Pennsylvania held:

> [I]t is now clearly established by repeated decisions, that the legislature may pass laws altering, modifying or even taking away remedies for the recovery of debts, without incurring a violation of the clauses in the constitution which forbid the passage of *ex post facto* laws, or laws impairing the obligation of contracts. And where the provisions of such laws, in relation to remedies, apply only to future proceedings, there is not the least ground for appealing to constitutional restrictions on the powers of the legislature.

In *Erie & North-East Railroad v. Casey*, 1 Grant 274, 26 Pa 287, 304 (1856), the Pennsylvania Supreme Court said, "To change the common law,

and repeal earlier statutes, is the main, if not the only business which the legislature has to perform." The Court added, "When we are considering whether a statute ought to be obeyed or disregarded, it is very unsatisfactory to be informed how the law stood a hundred years before the statute was passed." *Id.*

In *Preston v. Drew,* 33 Me 558, 54 Am Dec 639 (1852), the Supreme Judicial Court of Maine upheld a statute that barred "any action of any kind . . . in any court in this State, for the recovery and possession of intoxicating or spiritous liquors, or the value thereof," against a challenge that the statute violated Maine's constitutional guarantee "'[t]hat every person, for an injury done him in his person, reputation, property, or immunities, shall have remedy by due course of law.'" 33 Me at 560, quoting Maine Constitution, Article I, section 19. The Court held, "The State, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals, shall not constitute property, within its jurisdiction." Just as a legislature may determine what constitutes "property" within its jurisdiction, the framers of the Oregon Constitution would have understood it to be within the competence of the Legislature to determine what constitutes an "injury" that is redressable by the courts.

In *Madison and Indianapolis Railroad Co. v. Whiteneck,* 8 Ind 217 (1856), the Supreme Court of Indiana construed an Indiana statute regarding the

liability of railroads for injury to or destruction of animals. The statute provided that, unless the railroad was securely fenced, the railroad company was strictly liable for such injury or destruction, and that a plaintiff could recover by instituting an action before a justice of the peace. Section 3 of that statute provided that if the railroad appealed the judgment, but did not reduce its damages by at least 20%, "the appellate court shall give judgment for double the amount of damages assessed in such appellate court, and a docket fee of 5 dollars." 8 Ind at 218-19.[4] The Indiana Supreme Court reversed the judgment of the Court of Common Pleas, on the ground that Section 3 of the statute was unconstitutional. There was no majority opinion agreeing on the basis on which the statute was unconstitutional. See Note, *id.* at 251. In the principal opinion, Justice Perkins wrote that Section 3 was unconstitutional as a special law affecting the practice of law, in derogation of Article IV, section 22 of the Indiana Constitution of 1851. *Id.* at 237. Justice Gookins dissented from that reasoning but concurred in the disposition.

Justice Gookins wrote, "I do not doubt but that the legislature has power . . . to fix or limit the extent of a recovery in personal actions, -- as in 2 RS p

[4] The "appellate court" in the statute was the Court of Common Pleas, trying the case anew upon appeal from the justice of the peace. *Madison and Indianapolis Railroad Company v. Whiteneck*, 8 Ind 217 (Ind 1856).

205, s 784." *Id.* at 249."[5] Under a provision of Indiana's constitution essentially identical to Oregon Constitution, Article I, section 10, Justice Gookins agreed that Section 3 was unconstitutional, because "if the inflicting of double damages was designed to prevent the pursuit of a substantial remedy by due course of law, it would seem that the constitution was violated." *Id.* at 250.

There are several significant things about Justice Gookins's statement "that the legislature has power . . . to fix or limit the extent of a recovery in personal actions." First, this was so notwithstanding Article I, section 12 of the Indiana Constitution of 1851. That section provided: "'All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely and without denial; speedily, and without delay.'" *Madison*, 8 Ind at 249 (Gookins, J, concurring). Second, Article I, section 12 of the Indiana Constitution of 1851 is regarded as the source of

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[5] The statute Justice Gookins cited was a statute providing for, and limiting recovery in, wrongful death actions. App-1 – App-2. But Justice Gookins did not make any distinction based on whether or not wrongful death actions were cognizable at common law. *See Hughes v. PeaceHealth*, 344 Or 142, 148-52, 178 P3d 225 (2008). Rather, he categorically and unequivocally expressed that he did "not doubt that the legislature has power . . . to fix or limit the extent of a recovery in personal actions." *Madison*, 8 Ind at 249. In 1862, the first Oregon Legislature adopted a similar statute, Code of Civil Procedure § 367 (1862). That is further evidence of the original understanding of Article I, section 10, namely that it did not curtail the legislature's power to fix or limit recovery in civil actions.

Article I, section 10 of the Oregon Constitution. Carey, *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* (1984 ed) at 468.

Third, and most important, no pre-1857 authority, case or treatise cited in any of the decisions of this Court construing Oregon Constitution Article I, section 10 addresses specifically the question of the authority of a legislature "to fix or limit the extent of a recovery in personal actions." Justice Gookins's opinion, entertaining no doubt as to the Legislature's power to do that, and the fact that he cited a then-extant Indiana statute which did so, shows that, to the extent that the framers of the Oregon Constitution relied on Indiana law in framing Article I, section 10, they would have believed that they were not prohibiting the Legislature from enacting laws, such as the Oregon Tort Claims Act, limiting the recovery available in civil personal injury actions.[6]

Nor is it significant whether Justice Gookins's statement is *dictum*. The decision would not, in any event, be binding on this Court. The point is that

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[6] Justice Gookins's opinion also suggests that this Court may have been wrong in characterizing Article I, section 10 as a "plaintiff's clause." *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 121, 23 P3d 333 (2001), quoting *Davidson v. Rogers*, 281 Or 219, 222-23, 574 P2d 624 (1978) (Linde, J., concurring). In Justice Gookins's view, at least, the remedies clause protected a defendant's remedies, as well as a plaintiff's. *Madison*, 8 Ind at 250. Accord *Barclay v. Weaver*, 19 Pa 396, 57 Am Dec 661, 1852 WL 5887 at *3 (Pa 1852) ("If the defendant had a valid defence before the passage of the act . . . it would be a denial of right and justice, and a refusal of remedy by due course of law, to prevent him from setting it up.").

Justice Gookins's statement directly addresses the legislative power to limit recovery in civil cases. It clearly and unequivocally articulates the contemporary understanding that there was "no doubt" that legislatures indeed had that power. None of this Court's cases has identified any pre-Statehood judicial statement that directly contradicts that understanding.

F. The Early Oregon Decisions.

In *O'Harra v. City of Portland*, 3 Or 525 (1869), this Court upheld the constitutionality of a City of Portland charter immunity from claims of injuries caused by defective streets. While it held that the charter provision did not unlawfully impair the obligation of contracts, it did not even raise the issue of Article I, section 10. Presumably, this was because it never occurred to the Court (nor to the litigants who did not assert this ground) that Article I, section 10 was any impediment to a legislative grant of immunity.

Certainly, that was the view of things this Court expressed in *Templeton v. Linn County*, 22 Or 313, 318-19, 29 P 795 (1892):

> Vested rights are placed under constitutional protection, and cannot be destroyed by legislation. Not so with those expectancies and possibilities in which the party has no present interest. * * * Under a constitutional provision in all respects similar to our own, it was held that there is no vested right in the law generally, nor in legal remedies, and it is competent for the legislature to make changes in these so long as they do not affect the obligation of contracts.

The Court cited, in support of this holding, *Bryson v. McCreary*, 102 Ind 1, 1 NE 55 (Ind 1885). There, 1 NE at 60, the Indiana Supreme Court explained:

> It is well settled everywhere that there are no vested rights in the law generally, nor in legal remedies, and hence changes in these, by the legislature, do not fall within the constitutional inhibition, unless they are of such a character as to materially affect the obligation of contract.

Concurring in *Templeton,* Justice Bean observed, "The provision of the constitution under consideration in this case does not seem to have been noticed or considered by the courts in *O'Harra v. Portland,* but the result of that decision is fatal to plaintiff's contention here." 22 Or at 320-21 (Bean, J, concurring).

Certainly, even in 1892, there were eminent jurists who believed otherwise. *See*, *Templeton v. Linn County*, 22 Or at 321-29 (Lord, J., dissenting); *Eastman v. Clackamas County*, 32 F 24 (D Or 1887) (Deady, D.J.).[7] But the prevailing view, at and immediately after the adoption of the Oregon Constitution, was that the Legislature was not constrained in its treatment of remedies, as long as it did not impair the obligation of contracts. And, because "courts never declare an act of the legislature unconstitutional

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[7] Even Judge Deady, upon whose opinion in *Eastman v. Clackamas County*, 32 F 24, 32 (D Or 1887), this Court placed great reliance in *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 122 (2001), later recognized that the Oregon Supreme Court had held the legislative immunization of municipalities to be constitutional. *Balls v. Woodward*, 51 F 646, 647-48 (1892).

unless the conflict is manifest and free from all reasonable doubt," *Templeton*, 22 Or at 320, that should be sufficient for this Court to uphold the constitutionality of the Legislature's balancing of rights, responsibilities and limitations in the Oregon Tort Claims Act.

G. *Mattson v. Astoria* Changes Course.

In *Mattson v. Astoria,* 39 Or 577, 65 P 1066 (1901), this Court invalidated a provision of Astoria's charter exempting the city and the members of the council from liability for failure to keep the streets in repair. In *Mattson,* this Court held, for the first time, that the remedies clause "was intended to preserve the common-law right of action for injury to person or property, and while the legislature may change the remedy or the form of procedure, attach conditions precedent to its exercise, and perhaps abolish old and substitute new remedies, it can not deny a remedy altogether." 39 Or at 580 (citations omitted).

In *Mattson,* the Court did not employ the correct methodology—it did not even identify any methodology—for discerning the meaning of the Constitutional text. Nor did the Court look at Article I, section, 10 in the context of Article I, section 20, or of Article XVIII, section 7. It did not explain why it was departing from its holding in *Templeton* "that there is no vested right in the law generally, nor in legal remedies, and it is competent for the legislature to make changes in these so long as they do not affect the obligation of contracts." 22 Or at 319.

None of the cases the Court cited in support of its conclusion actually held that the Legislature could not grant immunities or destroy remedies. *Landis v. Campbell,* 79 Mo 433, 437-38, 49 Am Rep 239 (1883) (Missouri's remedies clause did not guarantee access to "review the decisions of ecclesiastical judicatories in matters properly within their province under the constitution and laws or regulations of the church"); *Flanders v. Town of Merrimack,* 48 Wis 567, 4 NW 741 (1880) (Wisconsin's remedies clause did not preclude the Legislature from staying the invalidation of a tax pending its reassessment by the proper authorities); *McClain v. Williams,* 10 SD 332, 73 NW 72, 74 (1897) (South Dakota's remedies clauses did not preclude the Legislature from limiting appeals to a defined class of cases); *Reining v. City of Buffalo,* 102 NY 308, 6 NE 792 (1886) (Charter could require presentment of a claim to the city council as a precondition of suit); *Fitzpatrick v. Slocum,* 89 NY 358 (1882) (upholding nonsuit in favor of city bridge commissioners). And, of course, all of these cases were decided after the Oregon Constitution was adopted.

Had this Court, in *Mattson*, reviewed Article I, section 10 in light of Article I, section 20, and Article XVIII, section 7, and had it adhered to its earlier caselaw, and to the rule that it described a mere eight years later as "well settled by a unanimity of decisions," *State v. Cochran*, 55 Or at 179, "that any act adopted by the legislative department of the State, not prohibited by its fundamental laws, must be held valid[,] and this inhibition must expressly or

impliedly be made to appear beyond a reasonable doubt," *id.,* it would have found the immunity constitutional.

In *Batdorff v. Oregon City,* 53 Or 402, 409, 100 P 937 (1909), again without examining the text, context or history of Article I, section 10, this Court held that "where a recovery is restricted by the act of incorporation to gross negligence and limited to the officers of a city, the charter practically denies a remedy to any person injured, contravenes Section 10, Article I, Constitution of Oregon [and] is therefore void." In *West v. Jaloff,* 113 Or 184, 195, 232 P 642 (1925), the Court, relying on *Mattson* and *Batdorff*, held that "it has been the settled law of this state that the common-law remedy for negligently inflicted injuries could not be taken away without providing some other efficient remedy in its place."

The Oregon Tort Claims Act, ORS 30.260 to 30.300, does not "deny a remedy altogether." *Mattson,* 39 Or at 580. Rather, it provides a limited (but certain) remedy (in this case, $3,000,000), and provides indemnification to the individual government employee for that limited liability. And, as Dr. Harrison correctly argues in Appellant's Opening Brief, plaintiff would not have had a remedy against him under the common law in 1857, because he was a government employee performing what, at that time, was considered a "discretionary" act. Even under *Mattson*, *Batdorff* and *West,* legislation such as the Oregon Tort Claims Act is constitutional.

H. *Perozzi, Noonan* and *Holden* Uphold Statutory Immunities.

In *Perozzi v. Ganiere,* 149 Or 330, 40 P2d 1009 (1935) this Court upheld the constitutionality of Oregon's guest passenger statute, which denied recovery by a non-paying passenger in an automobile against the driver, unless the accident was the result of the driver's intentional misconduct, gross negligence, intoxication or recklessness. The Court rejected the plaintiff's contention "that in all instances in which recovery could be had at common law for injuries to person or property such right of recovery has, by article I, § 10, been preserved and that it is not within the province of the legislature to take it away or in any way limit it." 149 Or at 345. Rather, the Court explained, "[t]he 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 of the state by article XVIII, § 7." 149 Or at 346. Further, the Court said, "had it been the intention of the framers of the constitution to adopt and preserve the remedy for all injuries to person or property which the common law afforded, they undoubtedly would have signified that intention by exact and specific wording, rather than the language used in article I, § 10." *Id.* The Court pointed to the "care taken by the constitutional convention to use definite and unequivocal terms concerning the preservation of certain rights, [in] the prohibition against the passage of *ex post facto* laws or those impairing the obligation of contracts." *Id.* at 347.

"The common law is not a fixed and changeless code for the government of human conduct. Its applicability depends to a large extent upon existing conditions and circumstances at any given time." *Id.* at 348. The Court pointed to "many instances in which under the common law as administered in England recovery was allowed for injuries suffered, but is denied in this country because of changed conditions." *Id.* The Court concluded, "There was and is no constitutional inhibition against the enactment of our guest statute. It was clearly within the police power of the state for the legislature to attempt to correct what it considered a growing evil." *Id.* at 350.

In *Noonan v. City of Portland,* 161 Or 213, 249, 88 P2d 808 (1939), this Court reiterated:

> Article I, § 10, Oregon Constitution, was not intended to give anyone a vested right in the law either statutory or common; nor was it intended to render the law static. Notwithstanding similar constitutional provisions in other states, the courts have sustained statutes which eliminated the husband's common law liability for the torts of his wife and which placed the wife upon an economic level with her husband. They have likewise sustained statutes which have abolished actions for alienation of affections, actions for breach of promise, etc. The legislature cannot, however, abolish a remedy and at the same time recognize the existence of a right: *Stewart v. Houk,* 127 Or 589, 271 P 893, 61 ALR 1236 [1928].[8]

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[8] *Stewart v. Houk*, 127 Or 589, 591-95, 271 P 893, 61 ALR 1236 (1928), had invalidated Oregon's 1927 guest passenger statute under Article I, section 20, relying on the line of cases emanating from *Mattson v. City of Astoria.* Four years before *Noonan* was decided, *Perozzi v. Ganiere,* 149 Or at 346-50, had

In *Holden v. Pioneer Broadcasting Co.*, 228 Or 405, 365 P2d 845 (1961), the Court upheld the constitutionality of a statute which denied recovery of general damages for defamation unless the plaintiff proved either that the defendant intended to defame the plaintiff or refused to issue a retraction upon demand. The Court explained, *id.* at 410 (footnote omitted):

> Plaintiff's central point of attack is based upon the guarantee in Art. I, § 10, Oregon Constitution, that "every man shall have remedy by due course of law for injury done him in his person, property or reputation." It is contended that retraction is not a substitute for the remedy of general damages and that, therefore, the constitution is violated. This and the other constitutional objections raised by plaintiff are carefully analyzed in two excellent opinions; one by Mr. Justice Traynor in *Werner v. Southern California Associated Newspapers,* [35 Cal 2d 121, 216 P2d 825 (1950), appeal dismissed, 340 US 810 (1951)], and the other by Mr. Justice Mitchell in *Allen v. Pioneer Press Co.*, [40 Minn 117, 41 NW 936 (1889)]. Although the statutes and constitutional provisions dealt with in the Werner and Allen cases are not precisely the same as ours, the basic constitutional problems presented are the same. We agree with the courts' analysis in these cases and adopt it as dispositive of the case at bar.
>
> It is not necessary to repeat what was there expressed. In the Werner case the court held that the enactment of the California retraction statute (Civil Code § 48a) was the result of a legislative determination and choice based upon the resolution of considerations of certain matters of policy which were within the

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upheld the successor guest passenger statute against a similar challenge, but the Court's statement in *Noonan*, that the Legislature cannot "abolish a remedy and at the same time recognize the existence of a right," has persisted and has continued to perplex this Court and its cases.

> province of the legislature. The statutory scheme enacted in ORS 30.160-30.170 is the result of similar considerations. Unless it is clear that the legislature exceeded the constitutional bounds within which it has the power to exercise its policy making functions we must hold this legislative choice to be valid.

The Court held that "if the legislature cannot modify the fault principle in defamation cases it cannot modify it in other areas of tort liability. To require such a conclusion would impose a stricture upon our law which could not have been contemplated in the adoption of our constitution." 228 Or at 412. Even the dissent recognized, and did not seek to overturn, the line of cases in which "a proper respect for the prerogatives of the legislative branch of government has compelled the courts to uphold a substitution of a substantial alternative remedy for a common-law cause of action, or the outright elimination of a remedy when to do so violated no constitutional guarantee." *Id.* at 433 (Goodwin, J., dissenting).

This was the state of the law in 1967, when the Oregon Legislature first enacted the Oregon Tort Claims Act, ORS 30.260 to 30.300, and in 1975, when the Legislature extended the limits of liability in the OTCA to claims against individual government employees. 1975 Or Laws, ch 609 § 13. The Legislature acted within the limits of its constitutional authority recognized by this Court at the time of those enactments.

I. *Smothers* Changes Course Yet Again.

In *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 86, 23 P3d 333 (2001), this Court held:

> [I]f a workers' compensation claim alleging an injury to a right that is protected by the remedy clause is denied for failure to prove that the work-related incident giving rise to the claim was the major contributing cause of the injury or condition for which the worker seeks compensation, then the exclusive remedy provisions of [the Workers' Compensation Law] are unconstitutional under the remedy clause.

In *Smothers*, this Court repudiated two constitutional principles which previously had been firmly established in its case law. First, the Court disavowed over sixty-five years of case law which had held "that the legislature can abolish or alter absolute rights respecting person, property, or reputation that existed when the Oregon Constitution was drafted without violating the remedy clause in Article I, section 10." 332 Or at 119. Second, the Court disavowed a related line of cases which had held "that the legislature constitutionally is authorized to define what constitutes an injury to absolute rights respecting person, property, and reputation that are protected by Article I, section 10." 332 Or at 123.

In departing from this Court's long-established precedents, *Smothers* made several subtle, but crucial, mischaracterizations of prior case law. The result of these is that *Smothers* conflated the concepts of "absolute rights" and

"vested rights," in a manner that led it ultimately to an incorrect and unsustainable interpretation of the remedies clause. In addition, in *Smothers*, the Court again failed to read Article I, section 10, in the context of Article I, section 20, and Article XVIII, section 7.

In *Smothers,* 332 Or at 109, this Court cited *Gooch v. Stephenson*,13 Me 371 (1836), for the proposition that, prior to the adoption of the Oregon Constitution, "[c]ourts assumed that common-law remedies provided constitutionally adequate remedies for injuries to recognized rights. Nonetheless, they acknowledged legislative authority to alter remedies, so long as the alterations did not infringe on absolute, or vested, rights. *See Gooch v. Stephenson,* 13 Me 371, 376-77 (1836) (so stating)." What *Gooch* actually stands for is the proposition that, to encourage beneficial outcomes for the community, the legislature may grant "additional remedies and immunities," even if that means that a particular plaintiff is left without a remedy for a common law-recognized claim.

In *Gooch*, in order to encourage the erection of fences, and, thereby, the profitable cultivation of farmland, the legislature permissibly granted immunity from claims of trespass to owners of cattle who had entered onto the property of another, if the owner of the property had not constructed a "sufficient" fence. The legislature had that authority, notwithstanding that its act cut off a remedy for an injury to an "absolute" right that the owner of the property otherwise had

to security of his property. The Oregon Legislature, by the same reasoning, has the authority to grant immunity from damage claims to individual government employees, and to substitute therefor a limited remedy against their governmental employers, in order to encourage people to work for the government and to perform their duties zealously, without fear of personal liability. That is so even if the result is that an injured person is left without a remedy that otherwise might have been available for an injury to one's "absolute" right of personal security.

In *Smothers,* 332 Or at 116, the Court quoted a passage from *Templeton v. Linn County,* 22 Or at 318: "'[v]ested rights are placed under constitutional protection, and cannot be destroyed by legislation.'" But, critically, the Court omitted the crucial language that followed, 22 Or at 318-19:

> Not so with those expectancies and possibilities in which the party has no present interest. * * * Under a constitutional provision in all respects similar to our own, it was held that there is no vested right in the law generally, nor in legal remedies, and it is competent for the legislature to make changes in these so long as they do not affect the obligation of contracts.

Thus, *Templeton* stands for the proposition that the Legislature may not eliminate a remedy for a claim that has vested, but that the Legislature could alter or abolish remedies as to claims that might accrue in the future, as to which, in the present, no right had "vested."

Smothers traced the genesis of the rule of law it was repudiating to *Perozzi v. Ganiere*, 149 Or at 345. There, according to *Smothers*, 332 Or at 117-18, the Court relied on a mistaken correlation between the federal constitution's Equal Protection Clause and Oregon Constitution, Article I, section 10. According to *Smothers*, that mistake led the Court in *Perozzi* to hold "that the remedy clause in Article I, section 10, of the Oregon Constitution, does not prohibit the legislature from creating new rights or abolishing old rights recognized at common law." 332 Or at 117, citing *Perozzi v. Ganiere*, 149 Or at 333 (footnote omitted). Based upon that same distinction between the federal and state constitutions, this Court in *Smothers* rejected its historic understanding of the legislature's power "to define what constitutes an injury." 332 Or at 123.

But *Perozzi* was merely following the law this Court previously had established when it held that the Legislature could alter the common law. In *Perozzi*, the Court's holding was not dependent on its citation of similar authority under the federal constitution. Rather, the Court carefully considered the history specifically of the adoption of the Oregon Constitution:

> 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 of the state by article XVIII, § 7, supra. Indeed, that section of our organic act which adopted the common law of England clearly contemplated future changes in the common law, as

> evidenced in the condition expressed that the common law should continue in force "*until altered or repealed.*" Moreover, had it been the intention of the framers of the constitution to adopt and preserve the remedy for all injuries to person or property which the common law afforded, they undoubtedly would have signified that intention by exact and specific wording, rather than the language used in article I, § 10.
>
> As indicative of the care taken by the constitutional convention to use definite and unequivocal terms concerning the preservation of certain rights, the prohibition against the passage of *ex post facto* laws or those impairing the obligation of contracts may be cited.

149 Or at 346-47. And, as *amici* have pointed out, the Court went through similar historical analyses in *Noonan v. City of Portland*, 161 Or at 248-50, and in *Holden v. Pioneer Broadcasting Co.*, 228 Or at 410. *See supra* at 26-30.

Neither in *Perozzi* nor in *Noonan* was the basis of this Court's holding the United States Supreme Court's construction of the federal constitution in *Silver v. Silver,* 280 US 117 (1929). *See Smothers,* 332 Or at 117-19. Rather, that case was cited for what it is: a similar holding by the United States Supreme Court under a similar, but not identical, constitutional provision. The basis of this Court's holdings, both in *Perozzi* and in *Noonan,* was the historical context of the adoption of the Oregon Constitution, and its interpretation by Oregon courts, which this Court in *Perozzi* and in *Noonan* found to be consistent with similar holdings by other courts, including the United States

Supreme Court, construing similar, but not identical, constitutional provisions. *Smothers* erred in its treatment of *Perozzi* and *Noonan*.

In *Smothers,* 332 Or at 108, the Court said, "We have found no cases construing the Indiana remedy clause before the Oregon Constitution was adopted in 1857." But, as *amici* have explained, *supra* at 18-20, *Madison and Indianapolis Railroad Co. v. Whiteneck*, 8 Ind 217 (1856), is such a case. Concurring in the Court's judgment, Justice Gookins wrote, "I do not doubt but that the legislature has power . . . to fix or limit the extent of a recovery in personal actions, -- as in 2 RS p 205, s 784." *Id.* at 249. Under a provision of Indiana's constitution essentially identical to Oregon Constitution, Article I, section 10, Justice Gookins agreed that the provision of the Indiana statute at issue there was unconstitutional, because "if the inflicting of double damages was designed to prevent the pursuit of a substantial remedy by due course of law, it would seem that the constitution was violated." *Id.* at 250.

No pre-1857 authority, case or treatise cited in any of the decisions of this Court construing Oregon Constitution Article I, section 10 addresses specifically the question of the authority of a legislature "to fix or limit the extent of a recovery in personal actions." Justice Gookins's opinion, entertaining no doubt as to the Legislature's power to do that, and the fact that he cited a then-extant Indiana statute which did so, shows that, to the extent that the framers of the Oregon Constitution relied on Indiana law in framing Article

I, section 10, they would have believed that they were not prohibiting the Legislature from enacting laws, such as the Oregon Tort Claims Act, limiting the recovery available in civil personal injury actions..

In *Lakin v. Senco Products, Inc.,* 329 Or 62, 71-72, 987 P2d 463 (1999),[9] in support of its conclusion that "the framers of the Oregon Constitution clearly understood the meaning of the right to jury trial in a civil case," this Court quoted the following language from an 1844 Act of the Oregon Legislature, Oregon Laws, Article III, section 1 (1843-49) (emphasis added):

> All the statute law of Iowa Territory passed at the first session of the Legislative Assembly of said Territory, and not of a local character, and not incompatible with the condition and circumstances of this country, shall be the law of this government, unless otherwise modified; and the common law of England and principles of equity, ***not modified by the statutes of Iowa or of this government,*** and not incompatible with its principles, shall constitute a part of ***the law of this land.***

It is clear from the first emphasized portion of that 1844 act that the earliest Oregon settlers understood that the "common law" was subject to modification by statute. It further is clear, from the second emphasized portion of the statute, that "the law of the land" included statutory modifications to the common law.

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[9] For the reasons set forth in Appellant's Opening Brief at 71-87, *Lakin v. Senco Products, Inc.,* 329 Or 62, 987 P2d 463 (1999) was wrongly decided and should be overruled, or, at least, held inapplicable to the Oregon Tort Claims Act.

Surely, the Oregon Legislature so understood "the law of the land" a year later, when, in 1845, it adopted the Organic Law of the Provisional Government of Oregon. The full text of Article I, section 2 of the Organic Law read:

> The inhabitants of said territory shall always be entitled to the benefits of the writ of habeas corpus and trial by jury, or a proportionate representation of the people in the legislature, and of judicial proceedings, according to the course of common law. All persons shall be bailable, unless for capital offences, when the proof shall be evident, or the presumption great. All fines shall be moderate, and no cruel or unusual punishments inflicted. No man shall be deprived of his liberty, but by the judgment of his peers or the law of the land; and should the public exigencies make it necessary for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same; and in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide* and without fraud, previously formed.

The Organic Law specifically granted to the Legislature the power "generally to pass such laws to promote the general welfare of the people of Oregon, not contrary to the spirit of this instrument." *Id.*, Article II, section 6.

Similarly, in 1848, in Section 4 of the Act to Establish the Territorial Government of Oregon, the United States Congress provided "That the legislative power and authority of said territory, shall be vested in a legislative assembly." Section 6 of that Act provided "[t]hat the legislative power of the

territory, shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." Section 6 contained a list of prohibited subjects of legislation, which did not include any reference to alterations of the common law rights and remedies of citizens or residents of the territory. To the contrary, Section 14 of the Act provided (emphasis added):

> That the inhabitants of said territory shall be entitled to enjoy all and singular, the rights, privileges, and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio, by the articles of compact contained in the ordinance for the government of said territory, on the thirteenth day of July, seventeen hundred and eighty-seven; and shall be subject to all the conditions, and restrictions, and prohibitions in said articles of compact imposed upon the people of said territory; and the existing laws now in force in the territory of Oregon, under the authority of the provisional government established by the people thereof, shall continue to be valid and operative therein, so far as the same be not incompatible with the constitution of the United States, and the principles and provisions of this act; ***subject, nevertheless, to be altered, modified, or repealed, by the legislative assembly of the said territory of Oregon;*** but all laws heretofore passed in said territory making grants of land, or otherwise affecting or incumbering the title to lands, shall be, and are hereby declared to be null and void; and the laws of the United States are hereby extended over, and declared to be in force in said territory, so far as the same, or any provision thereof, may be applicable.

When the Constitutional Convention of 1857 proposed, and the voters of Oregon approved, Article IV, section 1, which vested the "Legislative authority of the State * * * in the Legislative Assembly, which shall consist of a Senate,

and House of Representatives," they must have understood that "Legislative authority" to include the power to alter or modify the common law. In fact, that power is reflected in Article XVIII, section 7: "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***."

The framers of the Oregon Constitution would have understood the full extent of the legislative power, notwithstanding Article I, section 10, to alter, amend or abolish remedies. *Smothers* was wrongly decided, and the Court should overrule it.[10]

J. The Importance of Article I, section 20.

As *amici* have stressed, none of this Court's Article I, section 10 cases, from *Mattson* to *Smothers*, has analyzed Article I, section 10, in the context of Article I, section 20. The reservation of the Legislature's authority to grant privileges and immunities, so long as it does so on an equal basis, provides textual confirmation that the framers did not intend Article I, section 10, to prohibit the Legislature from granting individual immunity to government employees, or from limiting damages recoverable against the government itself.

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[10] Although this Brief focuses on Article I, section 10, the impact of these pre-Statehood enactments on the understanding of the legislative power also demonstrates that the framers would not have viewed Article I, section 17, as limiting the authority of the Legislature to limit recovery under the OTCA.

The juxtaposition of Article I, section 10, and Article I, section 20, underscores what Justice Landau has described as the untenability of "the sort of hyper-originalism that [the Court's] decisions both require and purport to reflect." *Klutschkowski v. PeaceHealth*, 354 Or 150, 178, (2013) (Landau, J., concurring). Justice Landau's concurrence identifies many of the critical flaws in the Court's historical analysis in *Smothers*, which, in addition to those others identified specifically in this Brief, are ample reason to discard that decision. 354 Or at 178-90.

But, whatever the framers' understanding of Article I, section 10, might have been—assuming there was any contemporary consensus as to what that was—this Court still must reconcile it with the plain text of Article I, section 20. And that text plainly contemplates that the Legislature may, in fact, grant "privileges and immunities," as long as it does so "upon the same terms, . . . equally . . . to all citizens." Even if *Smothers* accurately captured an implied original understanding that Article I, section 10, did prohibit the Legislature from granting immunities, the plain text of Article I, section 20, demonstrates that there was an express original understanding that the Legislature could grant immunities. Such a reading of the Constitution would mean that the framers created a document with inherently inconsistent provisions regarding the authority of the Legislature.

This Court must interpret and apply Article I, section 10, in a manner that preserves the effectiveness of Article I, section 20. "When two constructions are possible, one of which raises a conflict or takes away the meaning of a section, sentence, phrase, or word, and the other does not, the latter construction must be adopted, or the interpretation which harmonizes the constitution as a whole must prevail." *State v. Cochran,* 55 Or at 179. Article I, section 10, must be read in a way that harmonizes it with the authority Article I, section 20 reserves to the Legislature to grant "privileges and immunities" to citizens on an equal basis.

Amici respectfully submit that the proper way to reconcile these provisions is to hold that Article I, section 10, protects only those interests that have "vested" at the time an enactment is passed. Rights have "vested" only if a contract has been entered into or an injury suffered before the limiting statute has been enacted. As to future occurrences, the Legislature remains competent to alter, amend or abolish remedies, and, in particular, to grant personal immunity or to limit the amount of damages recoverable in a personal injury action.

CONCLUSION

When viewed in context, in accordance with long-established criteria for assessing the constitutionality of legislation, the Oregon Constitution does not prohibit the Legislature from fixing or limiting the recovery in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE-SIZE REQUIREMENTS

Pursuant to ORAP 5.05(2)(d) and 9.05(3)(a), I certify that the word count of this brief is 10,770 words and the size of the type is not smaller than 14 point for both the text of the brief and the footnotes.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing BRIEF OF *AMICI CURIAE* LEAGUE OF OREGON CITIES AND ASSOCIATION OF OREGON COUNTIES on June 10, 2014 with the State Court Administrator at the following address:

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I further certify that I electronically served the foregoing BRIEF OF *AMICI CURIAE* LEAGUE OF OREGON CITIES AND ASSOCIATION OF OREGON COUNTIES on June 10, 2014 on the following attorneys:

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