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 61992

ANSWERING BRIEF, SUPPLEMENTAL EXCERPT OF RECORD AND APPENDIX OF RESPONDENT LORI HORTON, GUARDIAN AD LITEM FOR

On appeal from the limited judgment and money award entered on January 6, 2014
The Honorable Jerry B. Hodson, Multnomah County Circuit Court

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STATEMENT OF THE CASE

Nature of the action and relief sought

Lori Horton, guardian ad litem for her son, sued Dr. Marvin Harrison and Oregon Health and Science University (OHSU) for Dr. Harrison's negligence during surgery that caused serious permanent injuries to Shortly before trial, Dr. Harrison admitted negligence; the case was tried to a jury on damages. The jury returned a verdict for $12,071,190.38 for economic and noneconomic damages. The trial court entered judgment against Dr. Harrison for the amount of the verdict, over defendants' objection that the judgment against Dr. Harrison should be reduced to $3 million, the limit imposed by the Oregon Tort Claims Act (OTCA).

Nature of the judgment under review

The trial court entered a limited judgment pursuant to ORS 30.274.

Statutory basis of appellate jurisdiction

ORS 30.274 allows direct appeal to the Oregon Supreme Court from a limited judgment to raise "the issue of the application of the limitations imposed by" the OTCA. ORS 30.274(1), (4).

Dates relevant to this appeal

The limited judgment was entered on January 6, 2014. The notice of appeal was timely filed and served on January 24, 2014.

QUESTIONS PRESENTED

1. Should this court overrule *Lakin v. Senco Products, Inc.,* 329 Or 62, 987 P2d 463 (1999) and decide that the jury trial rights do not include the right to give effect to the jury's verdict?

2. Should this court overrule *Smothers v. Gresham Transfer, Inc,* 332 Or 83, 23 P3d 333 (2001) and *Clarke v. OHSU,* 343 Or 581, 589, 175 P3d 418 (2007) and decide that the remedy clause does not prevent the legislature from reducing plaintiff's recovery of compensatory damages for personal injury in a negligence action?

3. Should the court reconsider the meaning of plaintiff's "remedy by due course of law" and conclude that in this case it means a jury trial in which the jury's verdict must be given effect?

4. Should this court apply *Smothers* and *Clarke* and decide:

a. that the remedy clause protects contemporary negligence claims for personal injuries without consideration of discarded restrictions and defenses from 1857; or

b. that in the mid-1800s, no common law governmental immunity would have barred this action against Dr. Harrison.

5. Should this court apply *Smothers* and *Clarke* and decide:

a. that the only constitutionally compliant remedy is one that restores plaintiff for his injuries by providing the compensatory damages the jury awarded; or

b. that a damage limitation reducing plaintiff's verdict by $9 million does not provide a "substantial" remedy.

6. Does an unconstitutional reexamination occur, in violation of Article VII (Amended), section 3 when:

a. the court sets aside a jury's lawful damage verdict and imposes a damage amount determined by statute?

b. the court sets aside a jury's lawful damage verdict in order to consider whether a capped recovery is "substantial" in light of other facts said to justify the reduction?

SUMMARY OF ARGUMENTS

The legislature amended the OTCA in response to this court's decision in *Clarke v. OHSU*. The legislature was well aware that the amended OTCA damages limits, though significantly increased in 2009 for the first time in 30 years, would not compensate for all tort claims against public employees. The legislature also understood that the judiciary plays a role in policing constitutional lines. As the legislature anticipated, the rare but predicted catastrophic damages case occurred again at OHSU. This is the case.

The parties have used the procedures the legislature made available to resolve this dispute and obtain this court's review of the constitutional issues at stake. In addition to increasing the OTCA damage limitations, the legislature also amended the OTCA substitution provision, which permitted this trial to proceed against Dr. Harrison, individually.[1]

After admitting surgical negligence, Dr. Harrison and OHSU chose to try damages to the jury, urging the jury to "return a verdict that's fair to but also a verdict that's fair to Dr. Harrison and to OHSU." SER-2 [Tr. II, 35, excerpt of defendants' opening statement]. After all the evidence was in, including defendants' evidence of future medical costs, defendants again argued for a "fair" and "reasonable" recovery and endorsed an $8 million verdict as supported by defendants' evidence. SER-7 [Tr X 149, excerpt of defendants' closing statement].

[1] The former statute required dismissal of the public employees and substitution of the public body in all cases. ORS 30.265(4) now provides:

> [i]f an action under [the OTCA] alleges damages in an amount greater than the damages allowed under [the OTCA limits], the action may be brought and maintained against an officer, employee or agent of a public body, whether or not the public body is also named as a defendant.

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The jury returned a verdict in excess of $12 million in damages; judgment was entered against Dr. Harrison in that amount.[2]

Dr. Harrison now urges this court to overrule several cases interpreting constitutional protections so that his liability can be reduced to compensate a fraction of the harm he caused.

This court should not take the extraordinary and disruptive measures defendant and his amici urge. The constitutional decisions that support plaintiff's judgment for the full damage award were thoroughly considered and grounded in this court's constitutional methodology. They are entitled to continuing effect. *State v. Ciancanelli*, 339 Or 282, 290, 121 P3d 613 (2005) ("A decent respect for the principle of *stare decisis* dictates that this court should assume that its fully considered prior cases are correctly decided."); *see also* Landau, *Some Thoughts About State Constitutional Interpretation*, 115 Penn St L Rev 837, 871 (2011) (constitutional decision is entitled to *stare decisis* if it applies the court's stated principles of constitutional interpretation and it represents "a considered and authoritative attempt to determine the meaning of a given constitutional provision.")

[2] The judgment was offset by OHSU's partial satisfaction of $3 million, the OTCA aggregate damages cap.

The first controlling decision, fully grounded in the constitutional text, context and Oregon jurisprudence, is *Lakin v. Senco Products, Inc.*, which interpreted the right to jury trial to mean that a jury's verdict must be given effect without legislative interference in the form of a limitation on damages. There is no question here that the plaintiff had the right to try this negligence case against Dr. Harrison to a jury. Under *Lakin,* that right includes the obligation to give effect to the jury's verdict.

As recently affirmed in *M.K.F. v. Miramontes*, 352 Or 401, 287 P3d 1045 (2012), jury trial rights are not limited only to those claims that might have been successfully litigated under the rules of 1857 or 1910 tort principles. 352 Or at 426 (plaintiff's civil action for money damages was protected by rights to jury trial "even if it does not have a precise historical analog"). Defendant therefore presses two radical changes in the law: First, this court should overrule *Lakin* and decide that a jury's verdict need not be given effect, an outcome that should alarm claimants, counterclaimants and defendants alike. Second, this court should reduce the jury trial right to the narrow and rigid confines of common law claims and defenses as existed in the mid-1800s. Neither change is supportable.

The second controlling decision is *Clarke* and the case on which it relied, *Smothers v. Gresham Transfer, Inc.* These cases interpret and apply Article I, section 10 as a substantive right to a remedy for personal injuries in a negligence

action, a right protected from interference not only by the courts but also the legislature. *Smothers* reached its conclusion after an extended discussion of the history, meaning and the many judicial interpretations of the substantive guarantee of the Oregon remedy clause.

Defendant makes a passing reference to an alternative interpretation of the remedy clause as a procedural protection only. He offers no new research to support such a revision. Open Br at 51-52. Nor does he explain why a reinterpretation as a guarantee of a remedy "by due course of law" -- here, a jury trial -- would alter the outcome in this case. Amicus League of Oregon Cities and Association of Oregon Counties offers another interpretation, which we dispose of later in this brief.

In *Clarke* this court applied *Smothers* and decided that a physician employed by OHSU was liable for damages caused by his medical negligence, and the former OTCA damage limitation of $200,000 was not an adequate substitute remedy for the plaintiff's catastrophic harms.[3] If the same analysis were applied here, the court should readily conclude that $3 million in a capped recovery is not an adequate substitute remedy for lifetime injuries, which the jury valued in excess of $12 million. After OHSU paid $ 3 million, the Horton family

[3] In *Clarke*, OHSU did not dispute plaintiff's evidence of $12 million in economic damages; plaintiff's damages allegations totaled $17 million with noneconomic damages included. 343 Or at 608, 611.

continues to face ruinous debt for past medical expenses, a dwindling fund soon to be exhausted for future medical needs, and a fraction of the amount awarded to compensate for his pain and suffering.

The better analysis, however, would recognize that no lesser amount than the damages proven at trial could be condoned as a constitutionally compliant remedy. This court took a wrong turn in recent damage limitation cases when it regarded non-compensatory recoveries as "substantial" and thus constitutionally compliant. No amount of hypothetical benefits conferred on hypothetical others can justify the hardships and his family will face without compensation for the injuries Dr. Harrison caused him. The core purpose of the remedy clause is "to **restore** plaintiff's right that has been injured." *Smothers*, 332 Or at 124; *Clarke*, 343 Or at 593 (emphasis added). In a civil action for negligence, this is done by means of money damages. Any amount less than that necessary to compensate plaintiff for his harms cannot restore plaintiff for the injury suffered.

The other wrong turn in this court's remedy clause jurisprudence limits remedy clause protection to the peculiarities of mid-nineteenth century tort law. *Smothers* added this gloss and other cases followed, but there is nothing unique about Article I, section 10 to suggest that a remedy clause that protects at least the common law remedies for personal, property and reputational harms in existence at the time of the constitution does not also protect them in their modern guise.

Personal, property and reputational harms were and remain legally cognizable injuries, and neither the legislature nor the courts can deny a compensatory remedy for culpable conduct that causes those enumerated injuries.

Dr. Harrison cleaves to nineteenth century tort law, which he mines for any authority suggesting absolute immunity to a negligent physician because of his public employment. The law does not support Dr. Harrison's interpretation. But the court should take this opportunity to readjust its remedy clause analysis to eliminate the historical inquiry and recognize that money damages to compensate personal injuries for negligence was and is a remedy that an injured person "shall have," free from government interference.

The reexamination clause of Article VII (Amended), section 3 is an important component of Oregon's second right to jury trial that is implicated whenever a court is asked to set aside a lawful jury verdict. Here, a prohibited reexamination of fact would occur if the court ignored the jury's finding of damages and imposed the statutory limit. It would also occur if this court were to ignore a jury's lawful damages verdict and impose a damage amount determined to be "substantial" in light of the considerations defendant asserts, such as legislative policy, future insurance availability or return rates on investments.

STATEMENT OF FACTS

In September 2009, at the age of nine months, underwent a planned surgery at OHSU to remove a portion of his liver. The surgery was the culmination of his treatment for hepatoblastoma, a cancerous tumor in his liver. Chemotherapy reduced the tumor so that it could be surgically removed with no adverse affect on liver function. Tr III, 77; 100. The prognosis with a non-negligent surgery was that would effectively be cured of the cancer and live a normal life. Tr II, 43-44; 90; III, 28.

Dr. Harrison performed the surgery with a pediatric surgical fellow, Dr. Audrey Durrant.[4] In the process of cutting out the tumor Dr. Harrison also cut vessels that take blood to the liver, bile system and intestines, and injured the spleen, inferior vena cava, small bowel and portal vein. Tr III, 43; X, 60-61.

began to bleed to death. Tr II, 47-48. He underwent two emergency surgeries at OHSU to control the bleeding and attempt repairs; he received at least ten times his blood volume in transfusions. Tr III, 28-31. His liver was essentially destroyed. He was life-flighted to Stanford/ Lucile Packard Children's Hospital in California for a liver transplant. Tr III, 40-41. He arrived with liver failure and was placed on dialysis immediately. Tr III, 102. Because of the surgical negligence at OHSU, Stanford surgeons had to remove necrotic liver,

[4] Plaintiff voluntarily dismissed Dr. Durrant shortly before trial.

spleen, portions of his small bowel, and right adrenal gland. Tr III, 120-121; 116; IV, 3-4, 18.

When he arrived at Stanford, went to the top of the list for a cadaver liver for transplant. Tr III, 105-106. None was available and time was short so surgeons chose the riskier route of a live donor. Tr III, 110-111; 114-115. The only donor option was mother, Lori. Tr III, 115. A portion of Lori Horton's liver was removed and transplanted into Tr II, 151-152.

spent three and one-half months in or near Lucile Packard Children's Hospital for various treatments to stabilize his systems, monitor and combat organ rejection, and maintain him on heavy narcotics then wean him through withdrawal symptoms. Tr II, 155-159. He was discharged home to Klamath Falls on December 23, 2009, with a regime of frequent medical monitoring and a lot of medications. Tr II, 158, 160. By this time had undergone seven major abdominal surgeries. Tr II, 210, 238.

When he came home, was fearful of many things and developmentally delayed. Tr II 59-61. These conditions improved over time. Tr II 62. He was required to make monthly trips to Stanford for monitoring and infusions of medications; he also saw Klamath Falls practitioners. Tr II, 160. He was on immunosuppressant drugs to prevent rejection and he had no spleen, which further increased his risk of infections. Tr 11, 62; IV 33; V 74.

must be closely monitored for signs of infection because any infection could trigger the rejection process. Tr II, 62-63, 213. In June 2010, a minor finger infection required a life-flight to Stanford and readmission to the hospital to combat the infection and the risk of organ rejection. Tr II, 64; 211. came home with a temporary PICC line in his arm leading to his heart for infusions of antibiotics. Tr II, 65-66. cannot have any live vaccines because it could trigger an immune response and start rejection. Tr V, 192. If were to contract any of the childhood illnesses, such as chickenpox, it would require immediate admission to the hospital. Tr VII, 88-89.

was on immunosuppressant drugs from the September 2009 transplant until December 2010. Tr V 174. This created a risk that he will develop post transplant lymphoma disorder (PTLD), a life-threatening cancer that must be treated with chemotherapy. Tr V, 169-170, 174-175.

In December 2010 showed signs that he was developing full-blown lymphoma, a side-effect of the immunosuppressant drug. Doctors began antiviral medications, then reduced and eventually stopped the immunosuppressant drug. Tr IV, 21-25. At the time of trial, was still able to stay off immunosuppressants. Tr IV, 25. His physicians and experts testified that would, at some point, face organ rejection and would have to return to the immunosuppressants, with their own side effects and cancer risks. Dr. Clark

Bonham, transplant physician, described future need to return to immunosuppressants: "I don't think it is an if, I just think it is a when, probably there will be some sort of event that stimulates his immune system and those cells that are sitting around that can recognize that liver as foreign will expand and attack the liver and cause a rejection." Tr IV, 26. Other experts agreed. Tr VII, 63 (Dr. Jacqueline Fridge, treating gastroenterologist at Legacy, testified that "remains at high risk for rejection."); Tr II, 94, 96 (Dr. George Mazareigos, chief of pediatric transplantation at Children's Hospital of Pittsburgh: Organ rejection is "a significant risk" for "It is highly likely that he will need to go back on immunosuppressant drug therapy at some point in his lifetime.").

Dr. Bonham, described the "tightrope" a liver transplant patient must walk constantly balancing the risk of organ rejection and the risks of the immunosuppressant drugs; when has to resume the immunosuppressants it will likely need to be at greater strengths than before, with greater risk of side effects. Tr IV, 20.

future health risks include the risk of organ rejection, future infections, the side effects from immunosuppressants, which include high blood pressure, kidney damage and diabetes, and the need for a kidney transplant. Tr IV 31 (Dr. Bonham: immunosuppressant drugs are very hard on the kidneys; they start to fail after 10-20 years). also faced the possible need for a second liver

transplant, ulcers, poor wound healing, future bowel obstructions and infections. Tr IV 27-33, 41-42. Adolescence is a time of greater risk and difficulty for transplant patients, raising issues of compliance with drug regimes and sensitivity to scars. Tr IV, 42; V, 179. At the time of trial had been put under general anesthesia "dozens" of times Tr II, 238 (including for scans so that he remains still; general anesthesia for MRI scans still continued at the time of trial. Tr II, 72-73). There was expert testimony that recurrent general anesthesia in young children is associated with significant drops in IQ. Tr V, 73. Future abdominal surgeries will be more difficult and riskier because of the extensive scarring and reconstructed anatomy from the surgical negligence. Tr IV, 40-41; 29 (the mass of scar tissue means that for any future abdominal procedure surgeons will have to "dig through concrete"). complains to his Mom most days about stomach aches. Tr II, 218.

maintains a medical monitoring regime with visits to the Stanford outreach clinic in Portland twice a year (requiring two days of travel and a full day of testing and physician visits), and regular lab work including blood draws in Klamath Falls every month. Tr II, 221-226; 170; Tr V, 14.

In the two years before trial, had been relatively "healthy," that is, he had no health crises and no hospitalizations, and he was not taking the expensive

anti-rejection and anti-viral drugs for his transplant. Nonetheless, his care for two "healthy" years cost over $150,000. SER-17 [Declaration of Lori Horton, ¶ 12].

past medical expenses of $4,129,436.38 were undisputed (SER-1 [P Ex 12A; Tr X, 131]), and this is what the jury awarded. ER-19. The parties disputed future medical care costs, with plaintiff presenting evidence of $13.5 million, which included the costs of a second liver transplant, a kidney transplant and renewed use of immunosuppressant drugs. Tr VI, 60, 65-66; Tr X, 12-15; P Ex 64. Defendants presented evidence of future medical care costs of slightly less than $1 million and, in addition, projected the cost of a second liver transplant at approximately $544,000. SER-11 [D Ex 152.]; Tr IX 47-59; 68-69; 112. The jury awarded $1,941,754.00 in future economic damages. ER-19. The jury also awarded $6 million in noneconomic damages. ER-19.

The Hortons had private insurance to pay for medical care. SER-12 - 13 [Declaration of Lori Horton, ¶ 3]. medical needs as a result of the surgical negligence far exceeded the limits of the Hortons' insurance policies. SER-13 [*Id.*, ¶ 4]. Today, the Horton family remains personally liable to the Stanford/ Lucile Packard Hospitals for approximately $2.6 million in past medical care they provided to SER-16 [*Id.*, ¶ 11].

PRELIMINARY RESPONSE TO DEFENDANT'S "CONSTITUTIONAL CONTEXT" AND LEGISLATIVE HISTORY

1. The legislature's power is not "plenary" with regard to the civil rights set forth in Article I of the Oregon Constitution. In many cases, including some that defendant cites, the court explained that the legislature's lawmaking authority is plenary **except** as limited by constitutional provisions. *Hale v. Port of Portland,* 308 Or 508, 512, 783 P2d 506 (1989) (the legislature's lawmaking authority is plenary except for constitutional provisions to the contrary); *State v. McDonnell,* 329 Or 375, 382, 987 P2d 486 (1999) (legislature generally has plenary power over criminal procedure, but it is subject to constitutional restrictions); *State v. Ray,* 302 Or 595, 599, 733 P2d 28 (1987) ("[L]egislative power to select the objectives of legislation is plenary, except as it is limited by the state and federal constitutions.").

The remedy clause and the rights to jury trial are such limiting provisions. In *Smothers,* this court stated that the legislature does **not** have plenary power to declare what rights are protected by the remedy clause. 332 Or at 123, 135-136. *Lakin* explained that Article XVIII, section 7 did not bestow legislative authority to override the right to jury trial. 329 Or at 78-79 ("the legislature's power to alter

'laws' in force in 1857 may be exercised only to the extent that it does not infringe on constitutionally-protected rights.").[5]

2. Defendant finds "plenary legislative authority" in surprising places. Open Br at 48; *see also* Amicus Brief of League of Oregon Cities and Association of Oregon Counties at 11-12, 40-41. Article I guarantees do not "authorize" legislative acts, they limit government power in relation to individuals. Article I, section 20 does not "authorize" the legislature to enact privileges or immunities. Rather, it guarantees that the government will not do so by means of unjustified denial of equal privileges or immunity to individual citizens, *State v. Clark*, 291 Or 231, 239, 630 P2d 810 (1981), or by unjustified differentiation among classes of citizens. *Hewitt v. SAIF*, 294 Or 33, 45, 653 P2d 970 (1982).

3. Defendant has submitted some of the legislative history of 2009 and 2011 OTCA amendments prompted by the *Clarke* decision.[6] The conclusions to be drawn are not controversial. The legislature understood that despite the increased damage limitations, some personal injury claims would exceed the

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[5] Article XVIII, section 7 provides:

> 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. –

[6] The legislative history appears in the Appendix to Defendant's Opening Brief. It is not paginated. Plaintiff presents this summary with reference to pages in the Opening Brief. For documents of note, plaintiff has reproduced them for convenient access in the Appendix attached to this brief, identified at P APP.

revised damages cap. Tort claims exceeding the OTCA damage limitation were rare historically; the legislature expected that after it raised the tort claims amount claims above the cap would continue to be rare. Open Br at 17-19.

The legislature understood that the rare claims that exceeded the cap presented constitutional issues with regard to individual publicly employed tortfeasors. Open Br at 21, n. 10, 22-23. Therefore, the legislature enacted procedures to facilitate this court's examination of individual verdicts for compliance with constitutional protections.[7] In 2009, the legislature created an expedited review process to this court. ORS 30.274. In 2011, at OHSU's urging, the legislature dispensed with substitution in damage claims exceeding the cap so that the injured plaintiff could again bring an action directly against the individual tortfeasor(s). P APP-1 - 3 [Testimony of Roy Pulvers on behalf of OHSU]. Defendant argues that the legislature relied on Oregon Supreme Court case law in amending the OTCA. Open Br at 85. This would include *Lakin,* as well as *Smothers* and *Clarke.*

The legislature understood that raising the OTCA cap would mean paying more for tort claims and more for insurance premiums. Open Br at 19. The Task Force reviewed financial projections from OHSU and other public entities. Open

[7] To the extent it matters (we think it does not) it seems clear that *these* legislative bodies did not regard their authority as "plenary" and their legislation as beyond judicial review for constitutional compliance in a particular case.

Br at 18. The Task Force also heard from local public bodies, which advocated for a two-tiered damage limit, with higher amounts that applied to the state and OHSU, and lower amounts that applied to local public bodies, which eventually became law. P App-4 - 5 [Testimony of William Blair, Washington County Counsel, to Joint Interim Task Force on OTCA, October 30, 2008]. In support, the local public bodies told the legislature that there were very few cases among local public bodies "that would even come close to the existing caps," and that the catastrophic damages cases were confined to OHSU:

> "OHSU has to deal with a different kind of claim, as well as having control over pricing of services. Their high severity claims are orders of magnitude greater than those of any governmental entity in Oregon. We recently learned that OHSU settled a half dozen multi-million dollar claims in a single day (the *Clarke* case included). Cities, counties, school boards and special districts haven't had a half dozen multi-million dollar claims under the OTCA *ever,* and not because of the OTCA limits but because local governments aren't providing high-risk and experimental procedures and treatment."

P APP-7 – 8 [Testimony of William Blair, *Id*].

The City and County representative also pointed out differences between most public bodies, which operate within fixed incomes with inflexible annual increases, and OHSU, whose "primary risk comes from services for which it can adjust fees, just like a private corporation." P APP-6 [Testimony of William Blair, *Id*].

The legislature reviewed several options involving caps, no caps and costs. It made its choice, performing its uniquely legislative function.[8]

RESPONSE TO ASSIGNMENT OF ERROR

The trial court correctly entered judgment for the full amount of plaintiff's damages as found and awarded by the jury.

I.
THE RIGHTS TO JURY TRIAL REQUIRE THE COURTS TO GIVE EFFECT TO THE JURY'S VERDICT

Article I, section 17, of the Oregon Constitution provides:

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

Article VII (Amended), section 3, of the Oregon Constitution provides in relevant part:

> 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 re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

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[8] The Amicus Brief of Oregon School Boards Association, CityCounty Insurance Services, Special Districts Association of Oregon, University of Oregon, Oregon State University, and Portland State University projects future insurance premium increases for local public bodies. This information would be suitable for such a legislative forum. Amicus presumably attempts to show that affirming plaintiff's constitutional rights in this case will lead inevitably to financially devastating outcomes for local public bodies. This is by no means clear. It is certainly beyond the scope of a court to test the validity of data, weigh options, or preempt policy choices the legislature may make in the future.

A. The rights to jury trial require entry of judgment consistent with the jury's damage verdict.

In *Lakin v. Senco Products, Inc.*, 329 Or 62 (1999), a unanimous court interpreted Article I, section 17 to guarantee the jury's assessment of personal injury damages in a civil case by giving it effect in the judgment. *Lakin* is built on a solid foundation of constitutional history and analysis, and well-established precedent. According to *Lakin*, the framers valued the right to jury trial in a civil case and intended that the right would remain " 'inviolate,' *i.e.*, secure against violation or impairment[.]" 329 Or at 72. The assessment of damages was and is a function of the jury. 329 Or at 73-74. Neither the courts nor the legislature could reduce the jury's damages verdict and impose a judgment for a lesser amount. 329 Or at 75-77.

In *Klutschkowski v. PeaceHealth*, 354 Or 150, 311 P3d 461 (2013), the court resolved a challenge to the application of the noneconomic damage statutory cap in a medical negligence case. The court decided that the right to jury trial precluded any reduction of the jury's verdict. 354 Or at 177. Having so decided, the court did not need to resolve issues of the remedy clause or the reexamination clause. 354 Or at 177.

The noneconomic damage cap statute in these cases was a modern limitation on damages that had never been capped at common law. 329 Or at 77. Similarly, the OTCA damage limitation as applied to publicly employed individuals is a

modern limitation on damages in negligence claims that had never been capped at common law.[9]

Lakin decided that neither the legislature nor the court may interfere with a jury's damage award by entering judgment for a capped amount in the face of a jury's lawful damage verdict. *Lakin* explained:

> The proper focus under Article I, section 17, is on the rights of the litigants and the proper role of the jury in a civil case. Here, the broad powers of the legislature must yield to a litigant's specific right to a "Trial by Jury" guaranteed in Article I, section 17, as that right was understood in 1857. We conclude that Article I, section 17, prohibits the legislature from interfering 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, or in cases of like nature.

329 Or at 78.

Lakin concluded:

> If Article I, section 17 guarantees the right to have a jury assess noneconomic damages in cases to which it applies, the legislature may not interfere with that right by capping those damages.

329 Or at 79.

Lakin also addressed and rejected Dr. Harrison's argument here that the jury's verdict can by set aside and replaced with a judgment for the capped amount

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[9] Even after the OTCA was first enacted in 1967, the damages limitation applied for several years only to the vicariously liable public body employer. Or Laws 1967, ch. 627, § 4; *see Clarke v. OHSU*, 343 Or at 589 (recounting history of OTCA).

without violating the right to jury trial. 329 Or at 79-80. The right to jury trial is violated "if the jury is allowed to determine facts which go unheeded when the court issues its judgment." 329 Or at 80, quoting *Sofie v. Fibreboard Corp.*, 112 Wash 2d 636, 771 P2d 711, 721 (1989). *Lakin* concluded, in language pertinent to this negligence action against Dr. Harrison:

> "The statute's requirement that 'the amount awarded * * * shall not exceed $500,000' violated the injured party's right to receive an award that reflects the jury's factual determination of the amount of the damages 'as will fully compensate [plaintiffs] for all loss and injury to [them]."

329 Or at 81. (Ellipses in original).[10]

Moreover, *Lakin* rejected any argument that the right to jury trial is preserved by a judgment less than the verdict so long as it is substantial.

> We do not find *Hale's* [*Hale v. Port of Portland*, 308 Or 508, 783 P2d 506 (1989)] Article I, sections 10 and 20 analyses relevant to our analysis of Article I, section 17. The court's Article I, section 17, jurisprudence never has established a "substantial" remedy test in defining the scope and meaning of the right of jury trial.

329 Or at 81.

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[10] Governor John Kitzhaber offers a deferential test to condone legislative encroachment on the right to jury trial that asks whether the challenged statute "would produce a significant impairment of the jury's proper function." *Amicus Curiae* Brief on the Merits Governor John Kitzhaber, M.D., at 17. As *Lakin* makes clear, failing to give effect to the jury's damages verdict in a particular case *does* impair the jury's proper function.

B. *Lakin* should not be overruled.

Dr. Harrison and amici urge this court to overrule *Lakin.* In *State v. Ciancanelli,* 339 Or at 290, the court required that the party seeking to overrule precedent "must assume responsibility for affirmatively persuading us that we should abandon that precedent." Under the terms set forth in *Ciancanelli,* defendant's efforts should fail because he has not shown that "the constitutional rule that [he] attacks was not formulated either by means of the appropriate paradigm or by some suitable substitute;" nor has Dr. Harrison met "the more difficult task of persuading this court that application of the appropriate paradigm establishes that the challenged constitutional rule is incorrect." 339 Or at 291.

Lakin should not be overruled. Since 1999 when it was decided, *Lakin* has been applied in several cases, most recently by this court in *Klutschkowski. Lakin* properly applied this court's methodology of constitutional interpretation. 329 Or at 68 ("this court looks to the specific wording of the provision, the case law surrounding it, and the historical circumstances that led to its enactment," citing *Priest v. Pearce,* 314 Or 411, 415-16, 840 P2d 65 (1992)). *Lakin* is based on long-standing precedent; it is one of a series of cases addressing limits on the legislature's power to interfere with jury fact-finding. *See e.g., Molodyh v. Truck Insurance Exchange,* 304 Or 290, 744 P2d 992 (1987) (overturning statute requiring an appraiser, not the jury, to set plaintiff's damages for fire loss in an

insurance policy dispute); *Carrier v. Hicks*, 316 Ore 341, 352, 851 P2d 581 (1993) (applying *Molodyh*, construing insurance statute not to compel arbitration by unwilling party so as not to violate right to jury trial). In addition, *Lakin's* interpretation of the historical and contemporary meaning of the right to jury trial is still accurate; all of the reasons defendant and amici offer here to the contrary, including the cases defendant cites from other jurisdictions (Open Br at 82), were already considered and rejected in *Lakin.* 329 Or at 77-82. Finally, overruling *Lakin* will lead to confusion in the law and a serious diminution of important constitutional rights.

C. A precise historical analog to plaintiff's claim is not required

The rights to jury trial – which include the right to have judgment for the full amount of the verdict – are not concerned with real or speculative defenses to a claim. Once it is established that plaintiff's "civil action" or "action at law" is of common law origin or another claim "of like nature," the right to jury trial applies and protects the full amount of the jury's damages award. *Lakin*, 329 Or at 78.

Defendant attempts to inject into the right to jury trial a rigid, fact-matching "history-only" analysis of the claims to which the constitutional protections apply.[11] This is contrary to *Lakin* and of the cases on which *Lakin* relied.

[11]Contrary to Dr. Harrison's misstatement (Open Br at 25), plaintiff did below and does here dispute that historical common law claims define the limits of Article I, section 17 protections. Plaintiff's Memorandum in Support of Plaintiff's Proposed

In addition, defendant's approach was expressly rejected in *Miramontes*, in which the court decided that a statutorily created action allowing money damages for stalking the plaintiff must be tried to a jury. The court decided that plaintiff's claim does not need a "precise historical analog" in order to be protected by Article I, section 17 and Article VII (Amended), section 3. "[T]he relevant inquiry," according to the court, "is not whether a newly created statutory claim existed at common law, but whether, because of its nature, it falls 'within the guarantee of the Constitution' to a jury trial." 352 Or at 409, quoting *State v. 1920 Studebaker Touring Car et al.*, 120 Or 254, 263, 251 P 701 (1927). There is no question that plaintiff's claim here is protected by the right to jury trial. As *Miramontes* stated, "A claim seeking only monetary compensation for injuries inflicted is an 'action at law,' and the constitution, by its terms, reserves the right to jury trial for such legal claims." 352 Or at 414.

In *Klutschkowski*, the court decided that the noneconomic damages cap could not be applied to the jury's damages verdict compensating a child injured during birth by medical negligence. The court could not find historical precedent "one way or the other" about whether a child could maintain a cause of action for medical negligence under the circumstances of the plaintiff's injury. 354 Or at 176. Nonetheless, according to the court, both the right to jury trial and the

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Limited Judgment and Money Award at 11-13; CR # 109 at 1, 4, 6 [Plaintiff's Reply in Support of Plaintiff's Proposed Judgment].

remedy clause protected the claim because "we follow the general principle that actions for medical malpractice and negligence were recognized in 1857" and there was no persuasive authority that supported an exception for the facts of plaintiff's case. 354 Or at 176.

When the right to jury trial applies, as here, it requires that plaintiff have judgment consistent with the jury's damage verdict. There is no support in any of the jury trial cases for defendants' apparent assumption that a now-defunct (and, we believe, unsubstantiated) common law defense would defeat plaintiff's right to retain the jury's full damage award on a claim today.

In *Klutschkowski*, the concurring decision by Justice Landau questions an analysis under either the right to jury trial provision or the remedy clause that "freezes the guarantee to preserve mid-nineteenth-century tort law." 354 Or at 178. Plaintiff questions it too. This court has never limited the right to jury trial to claims that would have succeeded under the constraints of mid-nineteenth century tort law. The court has opted instead for an interpretation consistent with the constitutional texts protecting jury trials in "civil cases" (Article I, section 17) and "actions at law." Article VII (Amended), section 3.

In addition, Article VII (Amended), section 3 reasserted the right to jury trial in the 20th century. In addition to "preserv[ing]" the right to jury trial, it expressly

strengthened the jury's fact-finding responsibility by prohibiting a reexamination of any facts found by a jury where there is evidence to support the jury's verdict.

Article VII (Amended), section 3 is an independent source that protects the jury's role as sole fact-finder. The OTCA damage limit for individual tortfeasors is in direct conflict with this enunciation of the jury trial right.

D. Defendant's interpretation is not viable

Defendant offers an alternative in which the parties would go through the time and expense of a jury trial only to achieve a verdict that can be ignored as the legislature sees fit. Amicus Oregon Medical Association (OMA) emphasizes the doctor's right to a jury trial. Brief of Amicus OMA at 2. It is doubtful that the OMA would accept a constitutional interpretation that left a jury's liability finding in favor of the doctor subject to legislative override or nullification. Both defendant and Amicus Governor John Kitzhaber offer variations on a deferential review standard that eliminates constitutional interpretation and replaces it with routine approval of legislative policy choices. These arguments should be rejected.

Defendant claims that plaintiff's successful assertion of the rights to jury trial in this case renders the OTCA "facially" invalid. Not so. This court has already endorsed a case-by-case regime for remedy clause challenges. *Jensen v. Whitlow*, 334 Or 412, 420-421, 51 P3d 599 (2002). Similarly, in any particular

trial, a jury may or may not find that plaintiff's damages exceed the cap. The damage amount will be a matter of proof and jury fact-finding in each case.

In this case, plaintiff's undisputed rights to jury trial require entry of a judgment for the full amount of the jury's verdict.

II.
THE REMEDY CLAUSE PROTECTS PLAINTIFF'S RIGHT TO THE REMEDY THE JURY AWARDED

A. The remedy clause as interpreted in *Clarke* and *Smothers* requires entry of judgment for the full verdict amount.

Article I § 10 of the Oregon Constitution 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."

In *Clarke*, plaintiff sued OHSU and several medical providers for personal injuries caused by their negligence. The OTCA substitution provision at that time required dismissal of the individuals and substitution of the public body as sole defendant. There was no jury trial. OHSU admitted negligence and admitted that plaintiff's damages -- $12 million in economic damages supported by evidence which OHSU did not dispute -- exceeded the OTCA limitation. OHSU moved for judgment on the pleadings and obtained a judgment for $200,000, the OTCA damages limitation at that time. The court applied *Smothers* and considered, first, whether the legislature had abolished a common law cause of action for injury to

rights protected by the remedy clause and, second, whether the legislature had provided a "constitutionally adequate substitute remedy" for the one taken away. 343 Or at 593, *quoting Smothers*, 332 Or at 124.

This court decided that the legislature's substituted remedy – a cause of action against the public body with limited damages – failed to provide the plaintiff a constitutionally adequate substitute remedy, given the extent of plaintiff's damages in the case. 343 Or at 609. The same analysis applies here – a negligence action against the individual tortfeasor with limited damages also fails to provide a constitutionally adequate remedy for the extraordinary damages plaintiff has suffered.

Clarke was a correct application of *Smothers*, and *Smothers* was a correct interpretation of the remedy clause.

B. *Smothers* correctly interpreted the remedy clause as a prohibition on legislative authority to limit remedies for specified injuries.

As with *Lakin*, defendant has failed to offer good reasons to overrule *Smothers*. *Smothers* is one of many judicial interpretations that the remedy clause provides substantive protection against legislative interference with remedies for personal, property and reputational harms. Dr. Harrison does not dispute this, but simply urges the court to choose another course.

For many years, this court has interpreted the remedy clause as a substantive prohibition on legislative authority to limit remedies for injuries. *See, e.g., Thomas*

v. Bowen, 29 Or 258, 264, 45 P 768 (1896) ("The right of personal security which has been transmitted to us from Magna Charta, and incorporated into the fundamental law of this state, guarantees to every member of society the preservation of his good name from detraction, and for any infringement of this right the law furnishes an adequate remedy: Constitution of Oregon, Art. I, § 10"); *Mattson v. Astoria*, 39 Or 577, 65 P 1066 (1901) (city could not constitutionally immunize itself and its officers from tort liability); *Batdorff v. Oregon City*, 53 Or 402, 100 P 937 (1909) (city ordinance limiting recovery for injury to city officers for gross but not ordinary negligence violated remedy clause). As *Smothers* recounted, this court's early case law consistently interpreted the remedy clause as a substantive limit on the legislature's power to restrict a plaintiff's remedy for injuries to person, property and reputation. 332 Or at 118-119. *Clarke* is another precedential decision that continues this jurisprudence.

C. This court's treatment of historical common law should be revised.

This court has often stated that Article I, section 10 was not intended to give anyone a vested interest in the common law or render the law static. *Smothers*, 332 Or at 119 ("[T]he court never has held that the remedy clause freezes in place common-law remedies."). At the same time, *Smothers* engaged in an inquiry about the specific claim in the case - negligence between employee and employer – and reviewed its existence in the mid-1800s in order to identify the "substantive

content of the constitutional right." As a result, in two recent attempts to justify modern legislative incursions into remedies for injuries, this court has indeed "frozen common law" by reducing the protections of Article I, section 10 to the claims that might have been successfully litigated in 1857. This should be reexamined.

In *Howell v. Boyle*, 353 Or 359, 298 P3d 1 (2013), challenging the OTCA damage limited as applied to the individual public employee, the majority indicated that in order for a negligence claim to gain Article I, section 10 protection it must be parsed on its facts and relitigated in an 1857-era courtroom. 353 Or at 381 (plaintiff not entitled to be "restored" for injury if claim was not viable in 1987).

In *Lawson v. Hoke*, 339 Or 253, 119 P3d 210 (2005), the majority reached even farther afield to justify the legislature's abolition of noneconomic damages for negligence when the plaintiff drives without insurance. In *Lawson*, the court relied on nineteenth century laws to show that the original understanding of a remedy clause permitted the legislature to condition some forms of recovery on compliance with prerequisites on the use of the roads.

Smothers reviewed English and early American history to show that the common law provided both substantive and procedural protections to injured individuals who sought remedies for specified harms. 332 Or at 124 ("The word

'remedy' refers both to a remedial process for seeking redress for injury and to what is required to restore a right that has been injured."). *Smothers* concluded that these common law antecedents led to substantive remedial protections that were carried forward in remedy clauses in the constitutions of the colonies and states, including Oregon. Indeed, that Article I, section 10 has both a procedural and a substantive component is consistent with Oregon's long remedy clause jurisprudence.

However, finding the historical purpose of Article I, section 10 does not require that its protections must be limited to historical claims. As Justice DeMuniz wrote in the dissent in *Howell:*

> "[R]egardless of who has the better argument about Oregon's legal history, because the Oregon legislature abolished the contributory negligence doctrine decades ago, it was not part of the 'due course of law' that governed plaintiff's right to a remedy at the time of *her* injury."

353 Or at 404 (Emphasis in original).

Anyone seeking a remedy for injury today under current legal standards should also be entitled to the constitutional protection.

In recent cases this court has more clearly explained that understanding the original intent of a constitutional provision is simply the beginning of the inquiry, not the end. *State v. Davis*, 350 Or 440, 446, 256 P3d 1075 (2011) ("The purpose of that analysis is not to freeze the meaning of the state constitution in the mid-

nineteenth century."). In *State v. Mills*, 354 Or 350, 353-354, 312 P3d 515 (2013), the court explained that the *Priest* analysis is not meant to "fossilize the meaning of the state constitution so that it signifies no more than what it would have been understood to signify when adopted in the mid-nineteenth century." In *State v. Savastano*, 354 Or 64, 72, 309 P3d 1083 (2013) the court stated:

> "[T]he historical inquiry set out in *Priest* invites us to identify the principles that Article I, section 20, was intended to advance, **while recognizing that the scope of that provision is not limited to the historical circumstances surrounding its adoption.** *See Hewitt v. SAIF*, 294 Or 33, 46, 653 P2d 970 (1982) (recognizing that Article I, section 20, extends protection to classes of citizens who were not protected when Oregon adopted its constitution in 1859)."

354 OR at 72 (Emphasis added).

The principle that Article I, section 10 was intended to advance was to ensure that individuals who are injured in their person, property or reputation can find in the courts a remedy that compensates them for their harm. Article I, section 10 protections should not be rendered ineffectual by a restricted application to claims and defenses extant in 1857. That is a gloss this court has chosen, not one demanded by the constitutional text or history. The textual command that "every man shall have remedy for injury done him in his person, property, or reputation" does not suggest or require a limit confined to 1857.

D. If the historical claim matters, a publically employed physician was not immune from personal liability for negligence at common law.

1. Dr. Harrison's negligence did not involve the exercise of discretion or even medical judgment.

In the usual case, defendant has the burden to plead and prove his affirmative defense of discretionary immunity. *See Franke v. Oregon Dept of Fish and Wildlife***,** 166 Or App 660, 666, 2 P3d 921 (2000). Defendant did not do so here. Defendants admitted at trial that the facts of this medical negligence case do not support an affirmative defense of discretionary immunity under the OTCA.[12]

At the post-trial hearing on reduction of the judgment to the OTCA limitation, the trial court found that Dr. Harrison did not exercise discretion when he committed surgical negligence in this case. Tr. 44-45 [Hearing on post-trial motions, November 22, 2013]. This finding was correct.

Plaintiff alleged that Dr. Harrison was negligent in:

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[12] Defendants admitted:

> "Under current law, the facts alleged in the Third Amended Complaint and the conduct admitted by OHSU in its Answer to the Third Amended Complaint do not justify placing the defense of discretionary function immunity in front of the jury as a defense to *liability* for the claim of negligence."

CR # 83, p. 3:1-4 (Emphasis in original) [Defendants' Opposition to Plaintiff's Motion for Judgment on the Pleadings, Motion to Strike and Make More Definite and Certain].

> failing to properly identify the porta hepatis and vascular and ductal structures around and within plaintiff liver before cutting, ligating, cauterizing, transecting or otherwise irreparably severing or damaging such structures and causing the injuries and damages alleged below.

ER-3 - 4 [Third Amended Complaint, ¶ 10].

Dr. Harrison admitted negligence as follows:

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

ER-9, [Defendants Answer to Plaintiff's Third Amended Complaint and Demand for Jury Trial, ¶ 7].

There is nothing about Dr. Harrison's admitted act of negligence – "inadvertently" "transect[ing]" "vessels to the left lobe of the liver" -- that implicates the exercise of discretion, or even medical judgment. Defendant's admission that vessels were transected "inadvertently" makes clear that Dr. Harrison wasn't even aware of what he was doing at the time. An inadvertent act is an inattentive or unintended one. It is the antithesis of the exercise of discretion or judgment. Indeed, if Dr. Harrison *had* exercised medical judgment, he would not have chosen to cut and destroy vital organs.

Perhaps recognizing this problem, defendant makes reference to Dr. Harrison's "discretion as to when to have a pediatric surgical fellow-in-training * * * do the surgery." Open Br at 39. This was not an allegation of negligence in the case. ER-2-4 ,¶¶ 7-11. It was not the admission of negligence on which the case was tried. ER-9, ¶ 7. Whether or not this surgical choice would qualify as governmental discretion for immunity purposes (we think not), it was not part of this case and should be ignored.

2. Publicly employed physicians were liable for their medical negligence at common law.

Defendant proposes another form of discretionary immunity: that a publicly employed physician in 1857 would have been immune from liability for medical negligence *as a matter of law*. According to defendant, this is a form of absolute immunity that existed regardless of the acts of the negligent physician. This is incorrect.

In a comprehensive law review from the mid 1920's about the origins and development of governmental immunity, Edwin Borchard addressed liability for public health functions at common law. Borchard explained that safeguarding the public health was usually considered a "governmental" function so that the public body providing the service was not liable, but the individual public officer **was** liable without immunity for his own negligence. Borchard, *Government Liability in Tort*, 34 Yale L J 1, 246-247 (1924). This is borne out by the cases below.

In *Barbour v. City of Ellsworth*, 67 Me 294 (1876), a city administering a smallpox hospital was not liable for the negligence of its officers in caring for a seaman quarantined to the hospital, but the individual health officers could be liable: "The plaintiff's remedy, if any he has, is against the individuals who did the damage." 67 Me at 295. In *Meier v. Paulus*, 70 Wis 165, 35 NW 301 (1887), the court held the county-appointed head of the county's poor-house liable for negligence in failing to provide adequate medical care and supervision for an ill person in his charge. Having undertaken to care for the plaintiff, the court said, defendant was liable for the negligence that resulted in plaintiff's injuries. 35 NW at 303-304. In *Miller v. Horton*, 152 Mass 540, 26 NE 100 (1891), public health officials were held liable for destroying plaintiff's horse erroneously believed to be diseased with the glanders. In *Lowe v. Conroy*, 120 Wis 151, 97 NW 942 (1904), a doctor employed as the public health officer was held personally liable for destruction of plaintiff's cows under the mistaken belief that they had anthrax. The court expressly rejected defendant's defense of discretionary duties. "The discretion in which such officers are protected must be limited to the line where their acts invade the private property rights of another, for which invasion the law awards no redress other than an action against the one actually committing the trespass." 120 Wis at 945.

3. At common law public employees were personally liable for their own negligence.

Defendant argues that plaintiff would have had **no** remedy at common law against a negligent individual employed by a public body. Open Br at 30. This is a surprising argument, given the many judicial pronouncements to the contrary. *See, e.g., Clarke,* 343 Or at 588 ("Before 1967 [when the OTCA was enacted] * * * [a] person injured by the negligence of a public employee acting within the scope of his or her employment could pursue an action against the employee, but not against the public employer."); *Krieger v. Just,* 319 Or 328, 331-332, 876 P2d 754 (1994) ("Before the Oregon Tort Claims Act was adopted in 1967, and notwithstanding the sovereign immunity of the government that the Oregon Tort Claims Act partially removed, this court had held that public employees were not immune as individuals from an action for injuries caused by torts that they committed, even though they were acting in the course and scope of their public employment at the time of their tortious acts."); *Smith v. Pernoll*, 291 Or 67, 69, 628 P2d 729 (1981) (medical negligence claim against OHSU doctors did not require tort claim notice under 1975 version of OTCA; "The tort immunity of public bodies did not extend to employees of public bodies."); *see also Ackerman v. OHSU Medical Group,* 233 Or App 511, 526, 227 P3d 744 (2010) ("[I]t is undisputed that, at common law, plaintiff would have had an uncapped remedy against [OHSU Dr.] West in his individual capacity.").

A scholar addressed the liability of public officials at common law as follows:

> [T]he common law traditionally did not distinguish between public officials and private individuals for purposes of determining the scope of personal tort liability. In fact, courts that drew such a distinction often imposed a stricter standard of care on officials than on private individuals, holding them personally liable for the consequences of simple non-negligent mistakes.

George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 Colum L Rev 1175, 1178 (1977); *See also* Borchard, 34 Yale L J at 2 (1924) (examining origins of sovereign immunity; challenging the doctrine of sovereign immunity that "accord[ed] the injured individual an action against the wrong-doing officer" but not against the public body itself.).

This is certainly consistent with early Oregon law. *See, e.g., Dunn v. The University of Oregon,* 9 Or 357, 362 (1881) (individual members of the board of directors of the University of Oregon could be personally liable for participating in a fraudulent conveyance of land to the disadvantage of creditors: "The immunity of the principal in such a case does not extend to the agent.").

Defendant misinterprets cases in which injured plaintiffs sued the state (*Ketchum v. State,* 2 Or 103 (1864)) or another public body (*McCalla v. Multnomah County,* 3 Or 424 (1869)) as support for his claim that an injured plaintiff had no common law remedy against a different defendant – the negligent public officer or employee. Open Br at 29-32. In *Rankin v. Buckman,* 9 Or 253

(1881), a case on which defendant relies, the court recognized the liability of city officers for their own negligence in failing to repair an unsafe bridge from which plaintiff's decedent fell to her death. The case explains that cities were liable for injuries caused by unsafe roads and bridges, but here the city charter exempted the city from liability. 9 Or at 256-257. The charter retained the liability of individual public officers, however, by providing, "this section does not exonerate any officer of the city of East Portland, or any other person, from such liability" for willful neglect of duty or gross negligence or willful conduct in any other respect. 9 Or at 257. The word "exonerate" indicates wiping out a preexisting liability. In addition, the court drew on older cases addressing the liability of individual public officers who neglected various duties, such as street repair, canal maintenance and bridge repair. 9 Or at 263-265.

Hover v. Barkhoof, 44 NY 113, Hand 113 (1870), a case cited in *Rankin*, confirmed the longevity of the rule of individual public officer liability for negligence:

> [N]early fifty years ago, Chief Justice BEST, in *Henly v. The Mayor of Lyme* (5 Bing., 91), said: "I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer. The instances are so numerous that it would be a waste of time to refer to them." And still earlier Chief Justice SPENCER, in *Bartlett v. Crosier* (15 John., 250), said: "It is a general principle of law, that whenever an individual has sustained an injury by the *non-feasance* or *misfeasance* of an officer who acts or

> omits to act contrary to his duty, the law affords redress by an action on the case adapted to the injury." And these eminent judges were preceded by Chief Justice HOLT, who more than a century earlier laid down the rule in *Lane v. Cotten* (1 Salk., 17), that in every case where an officer is intrusted by the common-law or by statute, an action lies against him for a neglect of the duty of his office.

44 NY at 123-124.

In *Gearin v. Marion County*, 110 Or 390, 223 P 929 (1924), the court made this clear statement of the law:

> When a tort is thus committed, the person committing it is personally liable for the injury resulting therefrom. The wrongful act, however, is the act of the wrongdoer and not the act of the state or county in whose service the wrongdoer is then engaged. For the damages occasioned by the wrong thus committed it is within the power of the Legislature to impute liability against the state or the county in whose service the wrongdoer is then engaged, or to exempt the state or county from such liability; **but in either event the wrongdoer is himself personally responsible.**

110 Or at 396-397. (Emphasis added).

Indeed, Oregon's long history of public employees' personal liability for their own negligence was the reason Justice Linde agreed that the OTCA damage limit as to cities was not unconstitutional in *Hale v. Port of Portland*, 308 Or 508, 530, 783 P2d 506 (1989) (Linde, J. concurring) ("[T]he court has allowed legislative immunization of cities from tort liability only on condition that the individuals who are personally responsible for harm qualifying as a legal injury remain liable.").

4. Discretionary immunity in Oregon - then and now

In the absence of facts, history and case law from the mid-1800s, defendant relies on a definition of discretionary and ministerial duties as pertinent to public bodies set forth in *Antin v. Union High School Dist.*, 130 Or 461, 469, 280 P 664 (1929). In *Antin,* the court decided that a school district performed governmental, not proprietary functions when it provided for the heating of a school building, and therefore it was immune for personal injuries to a student when the water boiler exploded. The court explained that the trial court had dismissed the claim on sovereign immunity grounds, finding that the installation and maintenance of the water tank for the school were "public or governmental acts, for which the district, whether negligent or not, would not be liable, and that the directors of the district, for the same reason, are immune from personal liability, **except for their own individual negligent acts,** and that there was no allegation in the complaint that any of the directors had been guilty of any personal negligence." 130 Or at 463-464 (emphasis added).

In defendant's view, *Antin* was intended to limit the liability of individuals. To the contrary, in *Clarke,* when OHSU conceded that "[a]t common law, plaintiff would have had a claim against the individual defendants in this case—health care professionals working at OHSU," the Court of Appeals relied on its own research – including *Antin* – in accepting the concession. 206 Or App 610, 624, 138 P3d 900

(2006) *aff'd,* 343 Or 581, 175 P3d 418 (2007). The Court of Appeals quoted *Antin,* 130 Or at 478, concerning individual liability*:*

> "[I]f the duty is one which the officer owes both to the public and to a private individual, and the private individual is injuriously affected specially, and not as a member of the public, then for such violation the injured party may sue [the officer] for the wrong done."

206 Or App at 624.[13]

In defendant's view, *Antin* represents a period in Oregon law in which courts extended discretionary immunity broadly, a period that came to an end with *Smith v Cooper,* 256 Or 485, 475 P2d 78 (1970). Defendant describes *Smith v Cooper* as a watershed "narrowing" of discretionary immunity. Open Br at 34. But *Smith* did not announce a change in the law about discretionary immunity; *Smith* appears to be reconciling the law.[14] *Smith* drew on many early cases – including *Antin,* from which it quoted extensively (256 Or at 496-497) – and upheld the same distinctions as earlier cases: planning and design decisions are discretionary, maintenance and repair decisions are ministerial. 256 Or at 511-512. *Smith* did not reject *Antin;* it

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[13] Defendant selects only the sentence that follows this statement of the law in his brief. Open Br at 42. The *Antin* court's larger discussion concerned a public officer's breach of a duty that injures the community at large, for which there was no liability, and breach of a duty to an individual that caused individual harm, for which there was liability.

[14] Dissenting Justice Sloan argued that *Smith* **expanded** discretionary function immunity by extending immunity to a road design decision that created a death trap. 256 Or at 513.

incorporated it in a comprehensive discussion of discretionary immunity. *See also McBride v. Magnuson,* 282 Or 433, 578 P2d 1259 (1978) in which the court cited both *Antin* and *Smith,* to illustrate an unbroken and consistent line of decisions regarding discretionary decision-making. 282 Or at 437.

The division that *Antin* described between making policy choices for which a public employee had discretionary immunity, and negligently carrying out a policy for which a public employee had no immunity, has not really changed. *Compare, e.g., McCord v. High,* 24 Iowa 336, 343-344, 345 (1868) (when the road supervisor determined when and where repairs were necessary and what work should be done, he was exercising immune functions; when the supervisor directed the work and made the repairs he had determined upon, this was a ministerial duty that was not immune for negligence in executing the work) *with Westfall v. State,* 355 Or 144, 159-160, 324 P3d 440 (2014) (endorsing distinction between immune policy choices and non-immune negligence in fulfilling the policy choice).

More precisely, exercising professional judgment or choice in the performance of one's public employment was not and is not the same thing as governmental discretion subject to immunity.

In *Peterson v. Cleaver,* 124 Or 547, 265 P 428 (1928), a case decided in the year before *Antin,* the court rejected an alcohol prohibition commissioner's defense of discretionary immunity in plaintiff's action for malicious prosecution. The

court reviewed the statutory duties of the commissioner ("to diligently enforce the [alcohol prohibition] laws" and to "make * * * complaints against violators") and stated:

> We fail to find anything in this act which confers upon the commissioner discretionary or judicial powers. **Every** servant, **employee**, deputy, assistant clerk, stenographer, bookkeeper, etc., **is required to use some judgment in the discharge of his daily tasks, but this does not convert the entire mass of mankind into judicial and quasi judicial officers.**

124 Or at 557. (Emphasis added).

In *Peterson*, despite the fact that enforcing the laws and prosecuting violators involves the exercise of both professional and governmental discretion, the commissioner was held not be exercising an immune discretionary function.

The same distinction appears in modern cases. In *McBride v. Magnuson*, the court decided that a police officer who negligently investigated a child abuse report may have been exercising professional judgment and choice, but was not engaged in immune discretionary policy choices. 282 Or at 436-437. In *Stevenson v. State of Oregon*, 290 Or 3, 11, 619 P2d 247 (1980), the court explained:

> "That decisions require expertise does not, for that reason alone, make such decisions discretionary in the sense that there is immunity from liability for injuries caused by the making of such decisions."

290 Or at 11.

Thus, in *Comley v. Emanuel Lutheran Charity Bd.*, 35 Or App 465, 582 P2d 443 (1978), when the Court of Appeals decided that OHSU doctors sued for medical negligence were not entitled to common law discretionary immunity, even though they were alleged to have engaged in medical treatment choices, the Court applied the same long-standing distinction.[15] *Comley's* rationale is entirely consistent with other early cases cited in this brief:

> At least some of these allegations charge conduct which is, in the literal sense, discretionary in that the conduct may be a result of choice. However, none of the allegations involve the sort of policy-based decisions which are insulated from judicial scrutiny by the discretionary act exception. None of Dr. Noonan's alleged acts involved a weighing of factors for the purpose of attaining the utmost public benefit. Nor did they involve a decision to pursue one public policy, at the expense of others. In sum, whatever may have been involved, there was no governmental discretion. Rather, the alleged acts involved the same balancing of risk against benefit which every physician must undertake in treating patients and which every individual must undertake in fulfilling his or her duty of care to other individual members of society, whether in or out of government.

35 Or App at 478-479.

Comley overruled the short-lived *Baker v. Straumfjord*, 10 Or App 414, 500 P2d 496 (1972), a decision that applied discretionary immunity to the medical treatment decisions of a publicly employed physician sued for negligence. *Baker*

[15]The court applied common law because the injuries in the case occurred before enactment of the OTCA in 1967. The court regarded the common law and statutory discretionary act immunities as "identical." *Comley*, 35 Or App at 472, n. 6.

was an erroneous application of discretionary immunity and was quickly discarded.[16]

Even if the discretionary-ministerial distinction would have applied to Dr. Harrison individually, his surgical negligence would not have been immunized, under defendant's own definitions. According to defendant, a discretionary duty is one that "necessarily require[s] the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." Open Br at 32. There is no evidence that Dr. Harrison exercised discretion when he cut the wrong structures and vessels of liver. He did not adapt a means to an end; he did not choose one course over another. He simply cut in the wrong places. No governmental discretion would have shielded to these negligent acts. *See Adsit v Brady*, 4 Hill 630, 635 (NY 1843) (rejecting the canal keeper's assertion that he had discretion as to what repairs were needed, so that he could not be liable for negligence: "[C]learly the defendant had no discretion to leave this dangerous obstruction in the canal.").

A ministerial duty, according to defendants, is a duty that "a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment

[16] Amicus Oregon Medical Association emphasizes the discretionary nature of medical decision-making. Nonetheless, as OMA's early cases show, Oregon **juries** resolved questions of medical negligence. Amicus Br at 5-7.

upon the propriety of the act being done." Open Br at 32. Dr. Harrison had a legal duty to provide competent surgical care. He breached this duty by failing to perform surgery in a prescribed manner, that is, in accordance with the community standard of care. His negligence was in the execution of the surgical procedure, a duty that a surgeon is required to perform competently. There is nothing about Dr. Harrison's surgical duties that gave him discretion to cut and destroy

liver. Then, as now, Dr. Harrison did not have discretion to breach the standard of care.

5. Sovereign immunity did not apply to individual public employees.

Defendant relies on *Jarrett v. Wills*, 235 Or 51, 383 P2d 995 (1963), to support his theory that a publicly employed physician would have had both discretionary immunity and sovereign immunity (which belongs exclusively to the sovereign public body). This is incorrect.

In *Jarrett*, the plaintiff sued the superintendent of Fairview, the state home for the mentally disabled. The court decided that this highly placed public officer had discretionary authority by statute to make custody and release decisions about inmates, and so was entitled to immunity for the exercise of this discretion. 235 Or at 55 ("The duties and functions of the superintendent are such as to place that official near the top of the scale of immunity"). By statute and regulation, the

superintendent had "complete discretion" to make release decisions about inmates. 235 Or at 54.

Dr. Harrison is not a policy maker for OHSU. He is a staff physician who has no statutory discretion, and certainly is not charged to "judge and govern human beings and human conduct" (*Jarrett,* 235 Or at 56) on behalf of the state.

Defendant's idea that Dr. Harrison has the immunity of the sovereign is wide of the mark. The court in *Jarrett* relied on *Schrader v. Veatch,* 216 Or 105, 337 P2d 814 (1959) as its controlling authority. 235 Or at 57. *Schrader v. Veatch* is one of a cluster of cases (including *Duby,* also cited by defendant and addressed below) in which the plaintiff named individual heads of state agencies or commissions in lieu of suing the state. In *Schrader,* plaintiff sued members of the State Fish Commission for breach of contract. The court decided, "There can be no question but that the action is against the state." 216 Or at 108. After all, the contract was with the state. The court disallowed the action because the state had not waived its sovereign immunity. 216 Or at 108. The court in *Jarrett* similarly concluded that the action against the superintendent of Fairview was an action against the state at a time when sovereign immunity had not been waived.

United Contracting Co. v Duby, 134 Or 1, 292 P 309 (1930), is another case in which the court disallowed suit against a state agency head as a means of skirting sovereign immunity. *Duby* decided that a lawsuit naming the members of

the State Highway Commission for payments owed under a construction contract was the same as suing the state. It dismissed the action because the state had not consented to be sued. ("The plaintiffs frankly concede that they propose to collect the remuneration allowed them by the circuit court's decree out of the state treasury and not from the personal resources of the highway commissioners." 134 Or at 9-10). Plaintiffs' claim was that the state engineer, who was to make a final estimate of money owed under the contract, made gross errors but, as the court noted, "The engineer is not a party to this cause." 134 Or at 5. [17]

Defendant also cites *Caspary v. City of Portland,* 19 Or 496 (1890), but that case does not address any issue pertinent here. Open Br at 42. In that case, an undisclosed public official removed undisclosed personal property for an undisclosed reason and plaintiff sued the city for conversion. The complaint was held inadequate to reveal whether the public officer was acting as an agent of the city, for which the city might be vicariously liable. The court discussed other cases in which public health and other officers were found not to be agents of a

[17] *Reed v. Conway*, 20 Mo 22 (1854), which defendant also cites (Open Br at 28), appears to fall in this category. There, plaintiff sued the surveyor general of the United States for Illinois and Missouri. The court described the defendant as an executive officer with both ministerial duties and judicial powers. 20 Mo at 38. *State of Mississippi v. Johnson,* 71 US 475 (1866), is even farther afield. Mississippi sued President Johnson to enjoin enforcement of the Reconstruction Acts after the Civil War. The court disallowed the action.

defendant city, thus precluding the city's vicarious liability for the officer's negligence. The case says nothing about the immunity of the public officer.

Ross v. Schackel, 920 P2d 1159 (Utah 1996), upon which defendants rely, (Open Br at 32-34) is not helpful. First, it cited no cases from the nineteenth century addressing the liability of publicly employed doctors. 920 P2d at 1164. Second, the court expressly limited its application to prison physicians, whom the court regarded as performing uniquely governmental functions. In particular, the court made this pertinent distinction:

> "There is a **vast difference between the operation of a state-owned hospital, where patients are voluntarily admitted as they are at private hospitals**, and the operation of a prison, where its residents are kept involuntarily and the state must provide for their every need."

920 P2d at 1165, n. 6 (Emphasis added).

The dissent in *Ross* gives a thorough review of early public employee immunity, which is consistent with Oregon law. 920 P2d at 1168-1173.

In conclusion, the decision in *Comley* reflects the state of the common law as it would have been interpreted in 1857 and 1910. Medical negligence does not involve the type of governmental discretion to which immunity applies. Dr. Harrison had a nondiscretionary duty to provide competent medical care to

E. The correct remedy analysis - An amount that fails to compensate for harm is not a constitutionally compliant remedy.

1. A constitutional remedy must compensate plaintiff for his injury.

For most of its jurisprudence, the purpose of a remedy clause has been to compensate a plaintiff for specified injuries. Before Oregon courts had to address a statutory limit on compensatory damages, the Pennsylvania Supreme Court struck down a statutory limit of $3,000 for injuries caused by railroads. *Thirteenth and Fifteenth Street Passenger Railway Co. v. Boudrou*, 92 Pa 475, 482 (1880). The court reasoned: "A limitation of recovery to a sum less than the actual damage, is palpably in conflict with the right to remedy by the due course of law."

Later, this court addressed a damage limit for injuries resulting from negligence by a city. In *Pullen v City of Eugene*, 77 Or 320, 146 P 822 (1915) the court upheld the $100 damage cap against a remedy clause challenge because plaintiff could seek full compensation from responsible city officers. 77 Or at 328. Here, the measure of a constitutionally compliant remedy was the availability of a fully compensatory award that met plaintiff's harms.

In *Holden v. Pioneer Broadcasting Co.*, 228 Or 405, 365 P2d 845 (1961) and *Davidson v. Rogers*, 281 Or 219, 574 P2d 624 (1978) split opinions of this court upheld a statutory damage limitation for defamation in the face of a remedy clause challenged. The legislature retained special damages for defamation but allowed media defendants to avoid paying general damages for defamation by

publishing a retraction. The majority opinions answered the remedy clause challenge by concluding that a retraction could repair the damage to plaintiff's reputation, thus restoring plaintiff in a way similar to money damages. *Holden*, 228 Or at 415 (retraction "is more effective than a judgment for damages in assuaging the harm suffered by the plaintiff"); *Davidson*, 281 Or at 222 ("As a practical matter, retraction can come nearer to restoring an injured reputation than can money, although neither can completely restore it.").

The dissenters disagreed, arguing that neither the legislature nor the court could decide that retraction was a comparable remedy for any individual plaintiff's reputational damage; that was a matter to be adjudicated case by case.

Nonetheless, both majority and dissenting opinions understood one fundamental thing about a constitutionally compliant remedy: it must compensate (or at least have the possibility of compensating) the plaintiff for the injury suffered. According to the court at this time, the measure of a constitutionally compliant remedy was its ability to restore plaintiff for the harm caused.

This changed in *Hale v. Port of Portland,* 308 Or 508 (1989), when the court upheld the OTCA damage limitation applicable to a city. The monetary limit was not sufficient to compensate plaintiff for his injuries. Nonetheless, the court justified the reduced monetary damages as to the city, a public body that did not have complete sovereign immunity before the Tort Claims Act, by finding a

benefit conferred – waiver of the city's immunity for all purposes – in exchange for the burden of a reduced recovery. 308 Or at 523. In *Hale,* the court posited that a benefit conferred on hypothetical others justified depriving the plaintiff of a fully compensatory remedy.

Justice Linde's concurring opinion refocused the legitimacy of the reduced monetary damages in that case by recalling the remedy clause case law that allowed city immunity only on condition that individuals remained liable for their own negligence. 308 Or at 530.

In *Clarke* the court distinguished *Hale.* 343 Or at 607 ("[T]he court in Hale had no occasion to consider the constitutionality of a liability scheme that altered the common-law right of a personal injury victim to bring an action against any individual tortfeasor for the full damage amount."). *Clarke* required that the remedy must fully compensate the plaintiff for his injuries, reiterating *Smothers'* definition of a remedy as including "both the remedial process as well as what is required to restore a right that has been injured[.]" *Clarke*, 343 Or at 593.

Yet in *Howell v. Boyle*, 353 Or 359 (2013), the majority opinion revived the *Hale* formula **even as to the individual tortfeasor** and approved a reduced monetary recovery that did not compensate the plaintiff for her injury. The majority called the reduced remedy "substantial" in light of benefits to hypothetical others, not plaintiff. 353 Or at 371-374.

This was the first remedy clause decision in Oregon that endorsed a legislatively imposed damage limit for personal injury that, in fact and in legislative intent, did not compensate plaintiff for her harm. The dissenters in *Howell* offered many valid criticisms of this analysis, which plaintiff endorses. 353 Or at 389 (DeMuniz, J., dissenting); 353 Or at 407 (Durham, J., dissenting).

This trial illustrates why the court's endorsement of a substantial but not compensatory remedy is flawed and should be abandoned. A competent defense attorney representing his or her client in good faith cannot advocate to a jury for a damage amount that is patently less than compensatory. In this case, the defendant's own evidence proved plaintiff's need for damages well in excess of the capped amount. Yet the court's "substantial-but-not-compensatory" theory in *Howell* invites the defendant's false position here, and allows defendant to argue that an amount no one regards as compensatory is nonetheless a constitutionally compliant remedy. The court should jettison a theory that dishonors the trial process and mocks the constitutional protection.

Clarke is correct that the remedy clause requires a restorative remedy. *Clarke* made reference to an injured person's right that preexisted the OTCA damage limitation "to obtain a **full recovery** for those damages from the individual tortfeasors who negligently caused the injuries." 343 Or at 609 (Emphasis added).

In *Holden,* Justice Goodwin described a constitutionally compliant remedy in a way no one on the court questioned:

> "**A substantial remedy is one in which the law, as best it can, either restores the status quo or compensates the injured party for the loss.** In some situations there are equitable remedies. In others damages are the pecuniary consequences which the law imposes for the breach of a duty or the violation of a right."

228 Or at 422-423 (dissenting opinion) (Emphasis added).

This should remain the constitutional requirement today.

cannot be restored to his condition of pre-negligence well-being. The civil justice system provides its only alternative: money damages to compensate him for his losses. Any amount less than the jury's verdict denies him his remedy protected by Article I, section 10.

2. Financial benefits to the state and OHSU do not justify denying plaintiff a compensatory remedy.

The OTCA does not provide any alternative remedy to the plaintiff for the $9 million it would deny him. Instead, defendant and amici argue that because more injured people will be fully compensated by the increased OTCA damage limitations, plaintiff's non-compensatory reduction is constitutional. Defendant urges the court to balance the interests of the injured plaintiff and find the interests of the state and OHSU more compelling. This is faulty constitutional analysis for several reasons:

First, a monetary limit that denies an injured plaintiff compensation for harm cannot be squared with the guarantee that "every" person shall have remedy. Article I, section 10 does not condone a remedy for some at the expense of others. Indeed, that is exactly what the remedy clause should prevent – that the burden of a legislative choice should fall on the catastrophically injured, those who need their remedy the most.

Second, even if the legislature intended or believed that the increased damage limits would render reduction of all larger verdicts constitutionally sound (and this is **no**t indicated in the legislative record defendant provides), this does not relieve the court from its obligation to review plaintiff's remedy in this case for compliance with the constitutional guarantee. In *Eckles v. State*, 306 Or 380, 399, 760 P2d 846 (1988) this court decided that the legislature could not resolve a financial crisis by breaching its constitutional contract obligation to employers insured with SAIF. The court stated:

> "[T]he state cannot avoid a constitutional command by 'balancing' it against another of the state's interests or obligations[.]"

306 Or at 399.

In many decisions this court has declined to resolve Article I guarantees by balancing the individual's right against the state's interest. *State v. Stoneman*, 323 Or 536, 542, 920 P2d 535 (1996) (Article I, section 8 (speech) "among the various

interests that the government of this state seeks to protect and promote, the interests represented by the state constitution are paramount to legislative ones. Consequently, a state legislative interest, no matter how important, cannot trump a state constitutional command."); *Oregonian Pub. Co. v. O'Leary*, 303 Or 297, 305, 736 P2d 173 (1987) (Article I, section 10 (open courts)) "The government cannot avoid an unqualified constitutional command by 'balancing' it against another of its obligations."); *Libertarian Party of Oregon v. Roberts*, 305 Or 238, 246, 750 P2d 1147 (1988) (Article I and Article II interests) "it is in the constitution that competing interests are balanced.").

Justice Balmer has written about balancing individual and government interests as a means of constitutional interpretation. Balmer and Thomas, *In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation*, 76 Alb L Rev 2027 (2012). He recounts criticisms of interest balancing in Oregon cases, including the point that "relevant constitutional interest were balanced when the constitution was drafted and adopted, and those interests should not be recalibrated by the courts." *Id.*, at 2041. He also reminds us that constitutional texts differ; some invite balancing and some do not. *Id.*, at 2056-2058.

A constitutional guarantee that "every man shall have remedy by due course of law" does not invite balancing. If there are remedies the government cannot

take away, then the remedy clause should prevent reducing a plaintiff's compensatory damage award to any sum the legislature directs. Any perceived benefit to the public at large would not justify a constitutional denial in an individual case.

Finally, what is left for judicial review? If remedy clause interpretation is simply about balancing the benefits and burdens that justify particular legislation, we do not need the court at all. The legislature has already done the balancing when it passed the challenged statute. If the legislature were acting in the absence of any constitutional restraint, its power would indeed by plenary; it could cast off the catastrophically injured and choose to compensate others less seriously injured by the negligence of publicly employed doctors. But over many years, even though the path has sometimes wobbled, this court has given substantive meaning to the remedy clause as a check on legislative interference with remedy for injury. The court must calibrate what that means independently of the legislature's policy choices.

F. A $3 million capped recovery is not a substantial remedy for plaintiff's $12 M in damages.

If this court chooses to continue the proposition that a non-compensatory damage limitation can nonetheless be "substantial" and thus constitutionally valid, the OTCA damage limit as applied here is unconstitutional.

1. Plaintiff's recovery is not substantial in total or for any subset of damages.

Defendant argues that plaintiff's overall recovery and each category of damages as limited provides plaintiff a substantial remedy. Defendant's analysis requires information about the Memorandum of Understanding (MOU) that distributed OHSU's advance payment of $3 million. SER-20 - 25 [MOU].

a. The terms of the Memorandum of Understanding

Before trial, OHSU made an advance payment of the $3 million it owed under the OTCA. After lengthy negotiations with the Hortons, their medical lien holders and their private insurers, the parties agreed to allocate the $3 million as follows:

• $1,289,387.78 to providers and insurers to pay down past medical expenses

• $500,000 set aside toward the cost of a future liver transplant

• $274,273 set aside to pay for ongoing medical care. The Hortons' insurer was not obliged to pay anything for medical care until this fund is expended for ongoing medical care. SER-21 [MOU, ¶ 4 b].

• The remainder of approximately $1 million was to be used for benefit, to reimburse the Hortons for expenses related to medical needs, and to pay attorney fees. SER-21 [MOU, ¶ 4 c].

•OHSU gained a release from liability to medical lienholders for past medical expenses. SER-20 [MOU, p. 1]. However, the Hortons remain liable

for past medical expenses that remain unpaid. The lien holders agreed to postpone collection efforts until the conclusion of this litigation. SER-20 [MOU, p. 1]

b. Plaintiff has not received a substantial recovery in any category of damages.

Past economic damages

The jury awarded more than $4 million in past medical expenses. Defendants did not dispute this amount at trial.[18]

Lori and Steve Horton are the guarantors for their son's medical care. At the time of trial, and after OHSU's payment and distribution of the $3 million advance payment, the Hortons' debt for past medical costs was approximately $2.6 million. SER-16 [Declaration of Lori Horton, ¶ 11]. In a declaration in support of plaintiff's post-verdict motions, Lori Horton stated:

> [O]ur family is currently approximately $2.6 million in debt to Stanford/Lucile Packard for the medical care that saved life. Medical debt related to liver transplant has been hanging over our family since 2009. The negligence of OHSU and Dr. Harrison has financially ruined our family. We feel a strong

[18]Defendant raises a collateral issue regarding the admission of evidence that should not be considered on this expedited review. Open Br at 59. OHSU billed the Hortons for certain services it provided, such as life flight to Stanford for the life-saving liver transplant. Tr II 165, 167. The jury awarded the value of these reasonable and necessary medical services. ER-19. After trial, the court denied OHSU's motion to offset the judgment by the amount of the services for which OHSU had billed the Hortons. Defendant offers neither evidentiary nor legal support to challenge the trial court's rulings.

> moral, ethical and legal obligation to ensure that the hospitals and doctors who save life are paid for their efforts. But we have literally no hope of every paying off this medical debt, let alone the inevitable future medical debt, unless OHSU and Dr. Harrison are required to pay the full amount of the jury verdict in lawsuit.

SER-13 [*Id.*, ¶ 5].[19]

Defendant never addresses how leaving an injured patient and his family with crushing medical debts can be a constitutionally compliant remedy.

Future economic damages

There was no dispute that will need continuing medical care and monitoring as a result of the negligence of Dr. Harrison. The costs are of course unknowable but could be extraordinary. The current monthly cost of immunosuppressants is approximately $1,000. Tr VI 60. The projected cost of a second liver transplant ranged from defendant's projection of $544,000 to plaintiff's projection of $ 3.3 million. SER-11 [D Ex 152]; Tr VI 65. The cost of a kidney transplant was projected at approximately $300,000. Tr VI 66.

The jury awarded $1.9 million for future medical needs. The distribution from the $3 million advance payment set aside approximately $275,000 for ongoing medical care and $500,000 for a second liver transplant.

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[19] Before the MOU, Stanford/ Lucile Packard Hospital offered OHSU a 52 percent reduction of its charges for transplant-related medical care if OHSU would pay his bills, in light of the two institutions' long-standing relationship. OHSU declined to pay. SER-26 - 27 [CR # 110, Ex. E].

During the two years before trial, all medical care was paid out of this set-aside account. SER-17 [Declaration of Lori Horton, ¶ 12]. At the time of trial, this account was reduced to less than $124,000. This meant that in two relatively "healthy" years (when was not taking the expensive immunosuppressants and had no hospitalizations), medical care had cost over $150,000. SER-17 [*Id.*, ¶ 12].

It is obvious that the $275,000 set aside for ongoing medical care is neither substantial nor adequate. It is likely this fund will be depleted before this litigation is concluded. The $500,000 fund for a future liver transplant is inadequate under either party's trial projections.

Noneconomic damages

The jury awarded $6 million in damages for his past and future pain and suffering as a result of Dr. Harrison's medical negligence. Noneconomic damages are long-established components of an injured plaintiff's compensation for negligence. *Oliver v. N. Pac. Transp. Co.*, 3 Or 84, 88 (Or Cir 1869) ("The object and intent of the law in this class of cases [negligence causing personal injuries], is to establish such a measure of damages as will fully compensate the injured party for all the injury he has sustained, whether the injury be loss of time, loss of money, bodily pain, or permanent bodily injury.").

The MOU designates $1 million of the $3 million capped amount as noneconomic damages, which is clearly insubstantial in light of the jury's view of his extensive pain, suffering and future psychic harms. In reality, the $1 million was reduced immediately by other expenditures authorized in the MOU. As Lori Horton stated, did not "net" anywhere near $1 million dollars in non-economic damages after payment of attorney, litigation costs and other authorized expenses. SER-18 – 19 [Declaration of Lori Horton, ¶ 14].

2. Comparison with controlling cases.

The cases that guide this court on the question are *Howell* and *Clarke*. The determination of whether a reduced recovery is constitutionally "inadequate" or "substantial" depends on the facts and circumstances of the particular case. *Howell,* 353 Or at 375 (requiring "flexibility and consideration of the facts and circumstances that each case presents." (internal quotations omitted)). *Clarke* involved medical negligence by doctors at OHSU. *Howell* concerned injuries incurred in a motor vehicle accident between plaintiff and a city police officer.

In *Howell,* the court decided that $200,000 then available under the OTCA was constitutionally adequate:

> [B]ut for the $200,000 damage limitation of ORS 30.270(1)(b)(2007), plaintiff would have recovered a total of $507,500, consisting of $382,500 in economic damages and $125,000 in noneconomic damages. The damage limitation thus does not leave plaintiff "wholly without remedy," as was the case for the parent of the plaintiff in *Neher.* And it represents a far

> more substantial remedy than the paltry fraction that remained after the imposition of the limitation in *Clarke.*

353 Or at 376.

In *Clarke* the court stated that the remedy clause disposition was "relatively simple" given plaintiff's $17 million in damages and $200,000 in a statutorily limited recovery. 343 Or at 607; *Howell,* 353 Or at 373 (reiterating this point). The court stated:

> [T]here is simply nothing we can discern from our state's history, or from the nature, the form, or the amount of recovery available for the preexisting common-law claim, that would permit this court to conclude that the limited remedy for permanent and severe injury caused by medical negligence that is now available under the OTCA meets the Article I, section 10, remedy requirement.

343 Or at 610.

The disposition is relatively simple here, too. A capped recovery of $3 million is not constitutionally adequate for plaintiff's proven damages that the jury has assessed at over $12 million. Applying the OTCA limit would cost plaintiff over $9 million of the amount the jury found necessary to compensate him for his harms. Not even plaintiff's undisputed past medical expenses would be paid in full. Plaintiff and his family would face extraordinary debt. Plaintiff would face a lifetime of precarious health without financial resources to obtain the medical care he needs—medical care the jury valued at $1.9 million and defendants admitted were at least $996,000. Plaintiff would receive a fraction for his noneconomic

damages, which the jury determined were $6 million, and which OHSU admitted could fairly and reasonably be assessed at $3 million.

If the constitutional calculus is that a loss of hundreds of thousands is constitutional but a loss of millions is not, the reduction defendant seeks here is clearly unconstitutional.

3. Benefits and burdens

Dr. Harrison points to OHSU's contributions to charity health care, underserved populations, medical research and physician training, all functions also provided successfully by private health care institutions in Oregon and elsewhere without limitations on damages for medical negligence. Defendant argues that because OHSU does good things in health care, the Hortons should bear a $9 million reduction in the amount the jury found was required to address negligently inflicted injuries. *Clarke* has already rejected such policy arguments with regard to comparably devastating personal injuries. The court stated:

> [W]e respect the legislature's goal in amending the OTCA in 1991–the legislature was entitled to conclude that the goal of encouraging public employment of qualified health care professionals by protecting them from the demands of litigation and the threat of personal liability is an important one. However, there is simply nothing that we can discern from our state's history, or from the nature, the form, or the amount of recovery available for the preexisting common-law claim, that would permit this court to conclude that the limited remedy for permanent and severe

> injury caused by medical negligence that is now available under the OTCA meets the Article I, section 10, remedy requirement.

343 Or at 609-610.

Defendants urge the court to engage in legislative policy-making and find that a financially secure OHSU depends on applying damage limits for its physician's negligence no matter how costly or devastating the injuries. Defendants' own submissions suggest otherwise. OHSU currently receives only 1.7 percent of its funding from the state. SER-28 [Excerpt from OHSU brochure; Declaration of Lora Cuykendall, Ex. B, p. 6]. It seems otherwise to be a vibrant and expanding privately funded enterprise. *Id.* Medical negligence verdicts are not paid out of OHSU operating funds. Dr. Harrison is fully insured for this verdict with insurance coverage up to $35 million. Tr VII, 37-38, 49. No public funds will be expended to pay this verdict and no public services will be curtailed.

4. Other considerations

a. Defendants' admissions at trial

In this case, there is another factor that must be considered with regard to the adequacy of the remedy – defendants' own admissions to the jury that an award of $8 million would be fair and reasonable for the injuries plaintiff sustained in this case. SER-7 [Tr X 149, excerpt from defendants' closing argument]. Defendants told the jury to award all plaintiff's past economic damages of approximately $4 million. SER-6 - 7 [Tr X 146-147, excerpt from defendants' closing argument].

Defendants acknowledged plaintiff's right to future economic damages of nearly $1 million, (SER-4 – 5 [Tr X 146-147]), and noneconomic damages of $3 million. SER-7 [Tr X 149]. Defendants' endorsed total of $8 million as a "fair" and "reasonable" recovery, is more than two and one-half times the cap. SER-7 [Tr X 149]. In the face of this admission, defendants should be foreclosed from arguing that a damage limit of $3 million is an adequate or substantial remedy for plaintiff's injuries. *Yates v. Large*, 284 Or 217, 585 P2d 697 (1978) ("An admission of fact in a pleading is a judicial admission and, as such, is normally conclusive on the party making such an admission. * * * The same is ordinarily true of admissions of fact made by attorneys during the course of a trial." 284 Or at 223 (citations omitted)).

b. Placing the costs of defendant's negligence on others

Defendant concedes, as he must, that the $3 million capped amount does not pay for past medical expenses, it is inadequate for his future medical needs and it is a fraction of what the jury awarded him for his noneconomic harms. Nonetheless, Dr. Harrison relies on the speculation that other insurers will fill in some of the gaps. This is troubling, given Dr. Harrison's admitted insurance coverage of up to $35 million. In this respect, as with his common law liability, Dr. Harrison is no different than a private physician. He is adequately insured for his negligence. If, as defendant seems to suggest, the

constitutional choice comes down to which insurer should pay for Dr. Harrison's negligence, the answer is easy: the wrongdoer should pay for his negligence. Dr. Harrison's $35 million in insurance exists to pay this obligation. Plaintiff should not be left to the uncertainties of a future without the means to meet his medical needs.

5. Conclusion

A reduction that beggars plaintiff and his family, and leaves his future medical care to charity, taxpayers or plaintiff himself to buy whatever insurance he can find cannot be a constitutionally compliant remedy.

Imposing the damage limit in the OTCA on plaintiff's judgment against Dr. Harrison would deprive plaintiff of a constitutionally adequate remedy. The statute cannot be imposed on the facts of this case. Plaintiff is entitled to a judgment for the full amount of the verdict.

G. Alternative Theories

1. "Due course of law"

Justice Landau has suggested that the purpose of Article I, section 10 is simply as an "open courts" clause to ensure access to courts to seek whatever remedies the law may provide. *Klutschkowski*, 354 Or at 178 (Landau, J., concurring); *Brewer v. Department of Fish & Wildlife*, 167 Or App 173, 192-193, 2 P3d 418 (2000) (Landau, P.J., concurring), *rev den* 334 Or 693 (2002). This

corresponds with the theory that Article I, section 10 protects the independence of the judiciary from interference by other branches of government. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions,* 74 Or L Rev 1279 (1995). Yet even a purely procedural interpretation would prevent the legislature from interfering with access to or use of judicial procedures, as this court has recognized in "open courts" challenges under the remedy clause. *Oregonian Pub. Co. v. O'Leary*, 303 Or 297 (1987) (statute that closed a hearing to determine the validity of a witness's invocation of the Fifth Amendment privilege against self-incrimination violated "open courts" requirement of Article I, section 10).

In this case, the guarantee of a "remedy by due course of law" would require a judgment in accordance with the jury's verdict. The law gives plaintiff a jury trial – a procedure for the jury's determination of damages. Part of that procedural right is to conclude the trial with a judgment consistent with the verdict. A constitutional purpose to protect judicial independence should ensure that the court can fulfill its responsibility to give effect to the jury's lawful verdict in a judgment. The statutory damage limitation is a legislative interference with the culminating step in a jury trial.

Sir Edward Coke fought the English King and his ministries because they sought, among other outrages, to direct the judgments that the common law courts

should enter against the King's enemies. Hoffman, 74 Or L Rev at 1291-1292 (describing Coke's battles with Chancery, the Star Chamber and the Ecclesiastical High Commission). The OTCA damage limitation seeks to direct a judgment here that overrides the jury's verdict; it is equally harmful to judicial independence.

The dissenters in *Holden* and *Davidson* believed that due course of law protected the process to determine injury and remedy in **each person's case**. Justice Goodwin in *Holden* wrote:

> "Due course of law requires an individual hearing to determine whether retraction has in fact restored the plaintiff's reputation or merely aggravated the wrong. The statute is a legislative judgment that the plaintiff has been made whole."

228 Or at 424-425.

Justice Lent, dissenting in *Davidson*, also believed that the guarantee of remedy by due course of law required, at a minimum, a "course of law" - an adjudication to determine whether the retraction in fact restored the plaintiff's reputation. 281 Or at 234. Justice Lent wrote:

> I cannot accept the legislative judgment that the publisher's option to retract makes every person defamed by the mass media whole. When I say I cannot accept it, it is not because I personally disagree with that legislative judgment; rather, I conceive Art I, § 10, as prohibiting the legislature from pronouncing that judgment in a statute.

281 Or at 234. (Footnote and emphasis omitted). These views are certainly consistent with the text and historical purposes of the remedy clause.

As a procedural guarantee, the remedy clause protects adjudication of disputes by jury trial. The legislature should not be able to tell the courts to disregard a lawful verdict and impose a different judgment.

In *DeMendoza v. Huffman*, 334 Or 425, 51 P3d 1232 (2002) the court decided that the statute requiring entry of judgment that included the state as judgment creditor for a punitive damage award did not interfere with the court's judicial function to enter judgment consistent with the verdict. The court reasoned that "the distribution of punitive damages is not a matter within a jury's discretion or, even, a matter that it considers." 334 Or at 454. But the compensatory damages amount responsive to plaintiff's harm **is** within the jury's fact-finding function, and a legislative mandate to ignore a lawful verdict and enter judgment for a statutory amount does "interfere[e] impermissibly with the adjudication of plaintiffs' claims." 334 Or at 454.

2. Response to Amicus Brief of League of Oregon Cities and Association of Oregon Counties

Amicus Cities/ Counties urge a reconsideration of *Smothers* for two reasons. The first claims that the proper paradigm for interpreting the remedy clause is to harmonize it with other constitutional guarantees and provisions. The second is a pre-statehood case from Indiana that Amicus regards as pivotal to an understanding of the Indiana and Oregon constitutions.

Amicus derives the requirement to "harmonize[] the constitution as a whole" from *State v. Cochran,* 55 Or 157, 179, 105 P 884 (1909). Amicus Br at 10. *Cochran* examined and upheld the legislature's authority to increase the personnel of the Oregon Supreme Court from three to five justices. *Cochran* recited the familiar understanding that the state legislature is authorized to enact any law not prohibited by the state or federal constitutions. *Cochran* does not suggest that courts must reconcile and harmonize the Article I guarantees. It seems obvious that this would be impossible as Article I rights often protect different interests, derive from different sources and serve different purposes. In particular, Amicus advances the startling and unsupported idea that Article I, section 20 authorizes the legislature to immunize public employees and presumably everyone else; this means the remedy clause is a dead letter and the many cases to the contrary are wrong.

Amicus extracts much from little in its survey of early case law. An interpretation of the constitutional protection of contracts (*Knighton v. Burns*, 10 Or 549 (1882)) does not really inform the interpretation of the remedy clause. The court considered changes to statutory lien rights for materials suppliers in *Steamer Gazelle v. Lake*, 1 Or 119, 120-121 (1854), and then observed, "If the new statute substituted no other statutory remedy for the one abolished, the party would then be compelled resort to his common-law remedy, and proceed to enforce his claim

by an action at law against the persons on whose account the materials were furnished, or by bill in equity to subject the boat to the payment of the demand."

Madison and Indianapolis Railroad Co. v. Whiteneck, 8 Ind 217 (1856), the case Amicus regards as dispositive, is a curious choice. The court struck down a statute as a violation of the Indiana remedy clause because it interfered with the railroad's remedy – the right to appeal.

In that case, a statute required the railroad to fence the tracks or be liable for injuries. In addition, the statute imposed a penalty for an unsuccessful appeal. Plaintiff sued the railroad for loss of his heifer killed by the train; he prevailed for money damages. The railroad, which appealed and then failed to appear at the appellate hearing, was required to pay the statutory penalty for an unsuccessful appeal: double the money damages. After lengthy discourse ranging from the Magna Carta and Montesquieu to the monarchies of Europe, with observations about God and monogamy along the way, the court upheld the legislature's authority to enact a statute that required the railroad to fence its track or be liable for injuries. 8 Ind at 220-233. As to the appeal penalty, the majority struck it as an impermissible special law particular to justice courts.

Dissenting Justice Gookins, on whom Amicus relies, disagreed with the special law designation. He believed that the appeal penalty was intended to exclude a party from a court of justice in violation of the state remedy clause. 8

Ind at 249-250. Amicus discerns significance from Justice Gookins's reference to the legislature's power to enact a wrongful death statute. Amicus Br at 19-21. The larger message, however, is that, a few years before Oregon brought the same provision into its constitution, the court used Indiana's remedy clause to invalidate a statute that obstructed the judicial process.

III.
THE JURY'S DAMAGE AWARD CANNOT BE REEXAMINED UNDER ARTICLE VII (AMENDED), SECTION 3.

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

> 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 re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict**.

Interpreting Article VII (Amended) § 3 shortly after its enactment, *Woods v. Wickstrom,* 67 Or 581, 135 P 192 (1913) stated:

> When the amount in controversy exceeds $20, and the facts have been passed upon by a jury, and the verdict has not been vitiated by errors of law committed by the court in rulings on admission of evidence or in charging the jury, **no court can legally set aside the verdict or the judgment based upon it, unless the court can affirmatively say that there was no evidence to support it.**

67 Or at 588 (Emphasis added).

In *Van Lom v. Schneiderman,* 187 Or 89, 95, 210 P2d 461 (1949), the court made clear that the only verdict that could be set aside was one with "no evidence" to support it:

> All that the court may do, so far as the facts are concerned, is to examine the record to determine whether it "can affirmatively say there is no evidence to support the verdict."

187 Or at 95. There is ample evidence to support the verdict here.

The OTCA damage limit applicable to Dr. Harrison commands a trial judge to set aside the jury's verdict, and the constitution prevents a judge from doing so when the evidence supports the verdict. Article VII (Amended) § 3 was enacted to stop the then-prevalent practice of ignoring jury awards and compelling a retrial when the trial court deemed the damage award "excessive." It applies with equal force when a lawful verdict is set aside so that judgment may be entered in an amount the legislature dictates.

In 1910, the constitutional reformers were concerned that legally sufficient verdicts were being set aside, and that plaintiffs faced two unpalatable options: accepting a damage award set not by the constitutionally designated fact-finder but by the judge, or being put to the expense and delay of a second trial. The only differences between then and now are features that render the statute even more destructive of the jury trial right. If the OTCA damage limit is imposed, plaintiff has no choice but to accept a measure of damages imposed without constitutionally required fact-finding, by a branch of government not authorized to set

compensation in civil cases,[20] and in an amount that entirely disregards the lawful verdict supported by evidence of how much is necessary to compensate plaintiff for his harm.

The Court of Appeals majority was correct in *Tenold v. Weyerhaeuser Co*., 127 Or App 511, 873 P2d 413 (1994), *rev dismissed* 321 Or 561 (1995), when it held that a similar legislatively-directed damage limit (the noneconomic damages limit in ORS 31.710) violated the reexamination clause of Article VII (Amended), section 3 of the Oregon Constitution. *Tenold* relied on several cases interpreting Article VII (Amended), section 3, and reasoned:

> [The statutory damage limit] requires the court to apply the monetary standard in every case, whether or not the evidence supports the jury's higher damage award. Article VII (amended), section 3, was designed to prevent that practice, because the people chose to make jurors the exclusive judges of the facts regarding the extent of a plaintiff's damages.

127 Or App at 524.

This court's remedy clause review of whether the reduced amount is "substantial" is another form of reexamination prohibited by Article VII (Amended), section 3. Defendant puts forward new considerations for the court to

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[20]As between the judicial and the legislative branches of government, "the ascertainment of" just compensation is a judicial inquiry; the legislature has no authority to "fix compensation or prescribe the rules for its computation." *Chapman v. Hood River*, 100 Or 43, 50, 196 P 467 (1921) (condemnation proceeding).

weigh and assess in order to conclude that a $3 million recovery in place of a $12 million verdict is adequate and substantial. Defendant calls this a mixed question of fact and law. Open Br at 25. Defendant asks the court to speculate about the availability of private insurance for for the rest of his life, and the rate of return on investments, among other things. Putting aside the factual errors (a $3 million recovery does not leave with money to invest), this new recalculation on appeal is exactly the sort of reexamination of the damages amount that Article VII (Amended), section 3 forbids.

CONCLUSION

The court should affirm the limited judgment entered by the trial court for the full amount of the verdict.

Respectfully submitted this 22nd day of July 2014.

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CERTIFICATE OF COMPLIANCE

I certify that this brief, including footnotes, is in Times New Roman 14 point font. The word count of this brief is 17,920 words. It is in compliance with the order of this court dated March 27, 2014, permitting a brief of up to 20,000 words.

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