IN THE SUPREME COURT OF THE STATE OF OREGON

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

Plaintiff-Respondent,

and

LORI HORTON, Individually; and STEVE HORTON,

Plaintiffs,

v.

OREGON HEALTH AND SCIENCES UNIVERSITY, a Public Corporation,

Defendant,

and

MARVIN HARRISON, M.D.,

Defendant-Appellant

and

PEDIATRIC SURGICAL ASSOCIATES, P.C., an Oregon Professional Corporation; and ANDY DURRANT, M.D.,

Defendants.

Supreme Court No. S061992

Multnomah County Circuit Court No. 1108-11209

BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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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July 2014

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INTRODUCTION

Defendant Marvin Harrison provided the child private medical care in exchange for payment. In the course of providing that private medical care, defendant violated known safety standards in the medical profession and as a result caused profound injury to the child. Defendant admitted that he negligently caused the child to suffer severe and permanent injuries, but argued to the jury that $8,000,000 would compensate the child for the injuries. After reviewing the evidence, the jury rejected that argument and found that defendant caused $12,071,190.38 in damage to the child. The verdict was without legal error.

Defendant now asks this court to ignore the legally correct verdict based on the evidence and jury's deliberations. Defendant asks that this Court reverse the judgment, replace the jury's factual determination of damages with the damages limitation articulated in ORS 30.271, and hold defendant accountable for only $3,000,000, less than 25% of what the jury determined was necessary to offset the harms defendant caused the child. Defendant's request violates plaintiff's jury trial and remedy rights under Article I, section 17, Article VII (amended), section 3, and Article I, section 10 of the Oregon Constitution. Amicus Oregon Trial Lawyers urges that this Court reject defendant's arguments and affirm the judgment.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT TO A JURY TRIAL

Article I, section 17, provides that the right to a jury trial "shall remain inviolate in all civil cases," and Article VII (amended), section 3, provides that in "actions at law" the right to a jury trial "shall be preserved." Plaintiff, as guardian *ad litem* for the child, had a right to a jury trial in this case. The jury found that that the child suffered over $12 million in damages. Defendant argues that ORS 30.271 requires that this court set aside that factual finding and hold defendant accountable for only $3 million. That proposed application of ORS 30.271 violates Article I, section 17, and Article VII (amended), section 3, of the Oregon Constitution.

A. *Plaintiff has a right to a jury trial right because the claim is legal in nature.*

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

In *Miramontes*, the plaintiff filed a petition under ORS 30.866 for a stalking order and money damages. 352 Or at 403. The defendant argued that he had a right to a jury trial for the portion of the plaintiff's claim that sought money

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

This Court reversed. Of note, this Court agreed with the Court of Appeals that the claim was unlike those customarily tried to juries at the time of the Constitution's adoption. *Id*. at 426 ("rightly so"). However, this Court explained that the Court of Appeals was wrong to think that the right turns on whether the claim has a "precise historical analog" from the mid-19th century. *Id*. That is because the terms of Article I, section 17, and Article VII (amended), section 3, make no such requirement and instead the only textual prerequisite for the jury trial right was that the claim be "properly categorized as 'civil' or 'at law.'" *Miramontes*, 352 Or at 426.

Whether a claim is "civil" or "at law" turns on the "the nature of the relief sought," in particular, whether the relief is "legal, as opposed to equitable," in

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

In *Miramontes*, this Court held that because the plaintiff sought "monetary compensation for injuries inflicted," the case was an action at law. *Id*. at 414, 426. Either party could invoke their right to a jury trial. *Id.* at 426. This case is no different. Plaintiff, Lori Horton as *guardian ad litem*, sought "monetary compensation for injuries inflicted" upon the child by defendant. The case is an action at law and no one argues otherwise. Plaintiff has a right to have a jury decide the facts of his case, no matter the state of the law in 1857.

B. *Because plaintiff has the right to a jury trial, plaintiff is entitled to redress based on the facts ascertained by the jury.*

The role of the jury is to determine the facts of a civil dispute. That fact-finding is not empty procedure. For the right to a jury trial to provide its intended protections to individual liberty, the "full and intended effect" of the facts found by the jury must be reflected in the judgment and the ultimate legal obligations between the parties. *Lakin v. Senco Products, Inc.*, 329 Or 62, 79, 81, 987 P2d 463 *opinion clarified*, 329 Or 369, 987 P2d 476 (1999); *see also* William Blackstone,

Commentaries on the Laws of England 380 (1768) ("when once the fact is ascertained [by the jury], the law must of course redress it").

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

Here, the Oregon Legislature passed a statute that sets aside the "full and intended effect" of the jury's damages and replaces it with an artificial limitation divorced from the evidence and the jury's deliberations. In doing so, the legislature attempts to separate the facts ascertained in the civil case from the legal redress available in the civil case. Of course, the constitutionality of such legislative policy making supplanting jury fact finding was fought over and decided already in *Lakin*, where this Court determined that such a statutory limitation offends the command of the Oregon Constitution that the right to a jury trial shall remain inviolate.

In *Lakin*, the Legislature placed a statutory cap on damages, analogous to the

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

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

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

The statutory cap "prevent[ed] the jury's award from having its full and intended effect." *Id.* at 79. In particular, it prevented the injured party from "receiv[ing] an award that reflect[ed] the jury's factual determination of the amount of the damages [that would] fully compensate [him] for all loss and injury[.]' " *Id.* at 81 (quoting *Oliver v. N. Pac. Transp. Co.*, 3 Or. 84, 87-88 (Or Cir 1869)). The Constitution gives a plaintiff the right to have legal redress flow from the findings of the jury, not a decision by government. The statutory cap intruded

upon that constitutional access to the power of a jury and therein violated the plaintiff's constitutional right to a jury trial. *Lakin*, 329 Or at 79-81.

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

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

Lakin, 329 Or at 81.

The Oregon Constitution requires the same result in this case. Plaintiff's right to a jury trial includes the "right to receive an award that reflects the jury's factual determination of the amount of the damages as will fully compensate [her] for all loss and injury" suffered. *Lakin*, 329 Or at 79-81. The jury has made such a determination and ORS 30.271 prevents plaintiff from receiving an award that reflects that determination. The statute is an unconstitutional intrusion onto plaintiff's jury trial rights under Article I, section 17, and Article VII (amended), section 3, and accordingly cannot be applied in this case.

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

Defendant, likely in implicit acknowledgement that *Lakin* requires that he should lose, argues that *Lakin* should be overruled. *Lakin* was rightly decided based on the sound reasoning articulated by this Court in that case and described in section I-B, *supra*. There is also additional reasoning why the result in *Lakin* is correct. In particular, the preservation of the jury trial implicitly is part of the constitutional architecture of divided powers in Oregon's government.

The drafters of the Oregon Constitution, as well as the drafters of the federal and other state constitutions, were influenced by the philosophy of Locke and Montesquieu that the best way to protect individual liberty was through divided government and separated powers. *See* Baron de Montesquieu, *The Spirit of the Law* 151-52 (Thomas Nugent trans., Hafner Publishing Co 1949) (1777); John Locke, *Two Treatises of Government* 203 (Thomas I. Cook ed., Hafner Publishing Co 1965) (1690). The jury trial is an implicit part of that separation of powers. During the time of the Oregon territory and its first steps toward statehood, the jury was regarded as a separate "institution of government" and "a mode of the sovereignty of the people" distinctly fashioned to "temper[] the tyranny of the majority." Alexis De Tocqueville, *Democracy in America* 266 (Henry Reeve trans., 1838).

Before Oregon adopted its Constitution, Americans did not see the jury trial right as "mere procedural formality, but [rather] a fundamental reservation of power in * * * constitutional structure * * * to ensure the people's ultimate control * * * in the judiciary." *Blakely v. Washington*, 542 US 296, 306, 124 S Ct 2531, 2538-39, 159 L Ed 2d 403 (2004). The Federal Farmer described the divided power function of the jury as "secur[ing] to the people at large, their just and rightful controul [*sic*] in the judicial department." The Federal Farmer, *Letter XV* (Jan. 18, 1788), reprinted in 2 *The Complete Anti–Federalist* 315, 320 (H. Storing ed 1981). John Adams similarly explained that "the common people, should have as complete a control * * * in every judgment of a court of judicature" as they do in the legislature. John Adams, *Diary Entry* (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed 1850)).

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

Americans protected juries because they believed that juries were more likely to provide and promote justice outside of the corrupting influences of politics, power, or wealth found in the offices of government. So they reserved fact-finding power in civil cases to juries to "secure the individual from the arbitrary exercise of the powers of government." *Capital Traction Co. v. Hof*, 174 US 1, 21, 19 S Ct 580, 588, 43 L Ed 873 (1899). That is a sound method to preserve individual liberty. When a jury adjudicates an individual's rights, the jury most likely will enforce those rights to the same degree as they would do for themselves. That same motivation in decision-making is not apparent when made by a governmental actor or body that may be motivated by lobbyists, politics, and power. "[I]t is precisely because [early Americans] believed that they might receive a different result at the hands of a jury of their peers than at the mercy of the sovereign" that the right to a civil jury trial was constitutionally protected. *Parklane Hosiery Co., Inc. v. Shore*, 439 US 322, 354, 99 S Ct 645, 664, 58 L Ed 2d 552 (1979) (Rehnquist, J. dissenting).

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

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

> they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens."

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

The jury trial in early America was understood not just as an individual right of a litigant but also a "constitutional structure" that reserves "ultimate control" to the people in adjudications. Nothing in the history of the Oregon Constitutional Convention of 1857 suggests that the framers had a more limited appreciation of the jury trial.

ORS 30.271 offends the Oregon Constitution because it requires that a constitutional reservation of power to ordinary citizens in civil cases must yield to the changing whims of the legislature.

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

Hoag v. Washington-Oregon Corp., 75 Or 588, 611-12, 147 P 756, 762 (1915). ORS 30.271 unacceptable undermines the jury trial and it is unconstitutional.

D. *Civil immunity defenses available under mid-19th Century tort law do not alter plaintiff's jury trial right in "all civil cases."*

Defendant also argues that the legislature is entitled to enfeeble plaintiff's jury trial right in this case, because in 1857 there may have been a civil immunity defense for a public employee's conduct and therefore no jury trial right to this claim at that time. The argument follows that because plaintiff would have had no right to a jury trial in 1857, the Legislature is free to curtail the effect of the jury's findings here.

First, the premise of defendant's argument is wrong, because, as explained in plaintiff's Answering Brief, Section II-D at 35-52, there was no such civil immunity defense available in medical negligence claims like plaintiff's in 1857. Second, even if we were to accept the premise that such a civil immunity defense existed, the argument ignores this Court's rejection in *Miramontes* of the use of "historical analogs" from 1857 to determine a party's right to a jury trial.

Defendant highlights *Hughes v. PeaceHealth*, 344 Or 142, 178 P3d 225 (2008) and argues that only if "1857 Oregon law" would have established an "absolute . . . right for" plaintiff's medical malpractice claim would she have a jury trial right. Defendant acknowledges the later-decided *Miramontes* by name, but wrongly describes that case as requiring that the jury trial right applies to a modern claim only if it is "similar enough to claims that existed in 1857 to trigger constitutional protections." Appellant's Opening Brief at 41. *Miramontes*

provides no support for that statement. Nor does defendant provide a pinpoint citation for what part of the opinion from *Miramontes* supports his claimed holding (maybe defendant was referring to the Court of Appeals' analysis, which this Court reversed).

A more accurate reading of *Miramontes* reveals that this Court rejected the application of historical analog test that some have gleaned from *Hughes*. *Miramontes* reversed the Court of Appeals even though it correctly applied that test, explaining that the jury trial right turns on the nature of the relief sought as opposed to whether the claim has some degree of likeness with those available in antebellum America. *Miramontes*, 352 Or at 426.

Indeed, in reversing the Court of Appeals in *Miramontes*, this Court appears to have overruled any rule from *Hughes* that suggests that the jury trial right turns on historical analogs. The concurrence of Justice Landau in *Klutschkowski v. PeaceHealth*, 354 Or 150, 311 P3d 461 (2013), expressly recognized this tension between the cases and suggested that *Hughes* may no longer be good law in light of *Miramontes*:

> "At issue in *Hughes* was the constitutionality of a statutory limit on noneconomic damages in a wrongful death action. The plaintiff argued that the cap, among other things, violated her right to . . . a jury trial under Article I, section 17. . . [T]he court . . . concluded that the plaintiff could not prevail '[b]ecause the common law does not, and did not in 1857, recognize a right to unlimited damages in wrongful death actions.' *Id.* at 156–57, 178 P3d 225.

> "Article I, section 17, provides that, "[i]n all civil cases the right of Trial by Jury shall remain inviolate." By its terms, it applies to "all civil cases," not just the limited number of civil cases that would have triggered a right to a jury trial in 1857. And I am aware of no evidence in the historical record that the framers of the provision intended or contemplated that the constitutional guarantee would be so limited.
>
> "In fact, our more recent case law rejects just such a reading of Article I, section 17. In [*M.K.F.*] *v. Miramontes*, 352 Or 401, 287 P3d 1045 (2012), we expressly rejected the notion that the right to a jury trial is limited to claims that existed at common law at the time of the framing of the constitution. To the contrary, we held that the guarantee applies to all 'claims or requests that are properly categorized as 'civil' or 'at law.'' *Id.* at 425, 287 P3d 1045. Only if a claim, standing alone, is "equitable in nature and would have been tried to a court without a jury at common law," does the guarantee not apply. *Id.*
>
> "Obviously, there is some tension between what this court said and did in *Hughes* and what we said and did in [*Miramontes*]. It strikes me that there are two possible ways to resolve that tension. First, we could conclude that [*Miramontes*] —which did not expressly address the matter—implicitly overruled *Hughes.* Second, we could conclude that [*Miramontes*] did not need to overrule *Hughes*, because *Hughes* and its *Smothers*-like analysis apply to only a particular aspect of the right to a jury trial, namely, a right to the benefit of the jury's decision itself without any statutory limitations, and does not apply to the broader question whether there is a right to have the jury make the decision in the first place.
>
> "In my own view, only the former possibility is tenable. I do not understand how the right to a jury trial can be parsed out into subsidiary rights, one of which requires *Smothers-like* historical analysis and the other that does not. Either there is a right to a jury trial, or there is not. Plain and simple."

Klutschkowski, 354 Or at 194-96. (Landau, J. concurring).

The two cases are incompatible and *Hughes* should succumb to the better-reasoned analysis of *Miramontes*. First, *Hughes* has no foundation in the constitutional text. The text requires a jury trial right in "*all* civil cases," and "not just the limited number of civil cases that would have triggered a right to a jury trial in 1857." *Klutschkowski*, 354 Or at 195. If the framers had intended to so limit the application, then they would not have inserted "all" in the provision. *Compare with* Article I, section 22(a) of the Missouri Constitution (providing that "the right of trial by jury *as heretofore enjoyed* shall remain inviolate[.]"); *Watts v. Lester E. Cox Med. Centers*, 376 SW3d 633, 638 (Mo 2012) ("The phrase 'heretofore enjoyed' means that '[c]itizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted' in 1820."). The test from *Miramontes* is loyal to the constitutional text; it does not insert a limitation not reflected in the terms.

Hughes also has no foundation in the historical record. As the concurrence in *Kltutschkowski* recognized, there is "no evidence . . . that the framers of the provision intended or contemplated that the constitutional guarantee would be . . . limited" to antebellum common law. 354 Or at 195. Without such evidence, this Court should give full meaning to the word "all" used in the constitutional provision and continue to recognize, as it did in *Miramontes*, that the right applies

to "all" civil cases no matter if an Oregon pioneer could have brought the same or similar case.

E. *The verdict must be given its full effect under the re-examination provision of Article VII(amended), section 3 of the Oregon Constitution.*

Article VII (amended), Section 3, of the Oregon Constitution provides that "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." In *Van Lom v. Schneiderman*, 187 Or 89, 95, 210 P2d 461 (1949), this Court explained that Article VII (Amended), section 3, prevents Oregon courts from reviewing and altering a jury's damages finding for excessiveness. *Id.* at 110-13 (so explaining in relation to punitive damages). This Court explained that due to the re-examination prohibition in Article VII (amended), section 3,

> "[a]ll 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 some limitation on that rule. For example, in *Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 555-65, 17 P 3d 473, 484-90 (2001), this Court recognized that Article VII (amended), section 3, cannot prohibit the review of a jury's damages awards for excessiveness if required by the United States

Constitution. *Id.* (explaining that the re-examination prohibition of the Oregon Constitution yields to the Supremacy Clause when damages must be reviewed for excessiveness under the Due Process Clause).

But those unique circumstances that limit the effect of Article VII (amended), section 3, are not present in this case. Here, a state statute, not the United States Constitution, required the trial court to review whether the jury's damages finding was excessive in light of the limitations in ORS 30.271. If the trial court determined that a jury finding exceeded those limits, then the court was required to reduce the damages award. The statute requires that reduction even when, like in this case, there is sufficient evidence to support the verdict. *Cf.* Article VII (amended), section 3 (only allowing re-examination if the "court can affirmatively say there is no evidence to support the verdict"). Article VII (amended), section 3, prohibits any court from engaging in that kind of re-examination of a jury's damages findings.

II. THE CONSTITUIONAL RIGHT TO A REMEDY

A. *The remedy clause analysis is unnecessary because Plaintiff's jury trial rights require that her damages cannot be limited by ORS 30.271.*

As an initial matter, the Court need not even address whether ORS 30.271 violates Article I, section 10. As discussed above, ORS 30.271 cannot be applied in this case, because it violates Article I, section 17, and Article VII (amended),

section 3. Accordingly, a court cannot constitutionally apply ORS 30.271 to the jury's verdict, even if Article I, section 10, was not offended by the statute. The analysis need go no further and this Court should affirm the judgment.

Nevertheless, if the damages limitation of ORS 30.271 was applied to this case it would violate Article I, section 10.

B. *Applying ORS 30.271 in this case violates Article I, section 10, because it leaves plaintiff without a substantial remedy.*

Article I, section 10 provides:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and e*very man shall have remedy by due course of law for injury done him in his person, property, or reputation*."

This Court recently explained that the legislature can "enact a limitation on tort claim recovery" without violating the promise of "remedy" under Article I, section10, "so long as the remaining remedy is 'substantial.'" *Howell v. Boyle*, 353 Or 359, 373, 298 P3d 1, 9 (2013) (so interpreting the test from *Clarke v. OHSU*, 343 Or 581, 175 P3d 418 (2007) and *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001)).

For the reasons stated in section II-F (pages 60-70) of plaintiff's Answering Brief, Amicus agrees that the remaining remedy for the severely injured child after

imposition of the requested damages limitation is not substantial. Specifically, the remaining remedy would not even cover the child's medical costs much less provide any compensation for the profound human losses reflected in the non-economic damages. Under the existing case law, this Court should find that ORS 30.271 violates plaintiff's right to a remedy under Article I, section10.

C. *The* Klutschkowski *invitation to revisit remedy clause jurisprudence.*

In *Klutschkowski,* the concurrence suggested that the current remedy clause jurisprudence as articulated in *Howell v. Boyle*, 353 Or 359, 373, 298 P3d 1, 9 (2013), is based on unsatisfying reasoning and invited litigants to urge the Court to reconsider the matter. *Klutschkowski*, 354 Or at 178-194. To the extent that the Court does so, Amicus offers these comments.

1. *The protections of Article I, section 10, are triggered when another causes an injury to one's person, property, or reputation.*

First and foremost, any interpretation of the remedy clause must be loyal to the text. Again, it provides that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." A legal dictionary available at the time defined "injury" as "a wrong or tort." *Smothers,* 332 Or at 93 (quoting John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of*

the United States of America, 507 (1839)). Accordingly, the provision promises a remedy for a "wrong or tort" committed to one's person, property, reputation.

This Court currently interprets Article I, section 10, to apply only if a person had "an 'absolute common-law right' that existed when the Oregon Constitution was drafted in 1857" to seek a remedy for the injury. *Howell*, 353 Or at 374 (quoting *Lawson v. Hoke*, 339 Or 253, 259, 119 P3d 210, 213 (2005)). That qualification is not found in the text. Just as the jury trial right applies to all "civil cases," the remedy clause should apply to any injury, or said differently any "wrong or tort," to one's person, property, or reputation, no matter if that wrong or tort was recognized in 1857. The current case law is incorrect to the extent it reads the remedies clause to imply an 1857 qualification.

First, the historical record does not offer any real indication that the framers intended such a qualification to the remedy clause. *See generally*, *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* (C. Carey ed 1925). Early Americans valued the common law not because its standards, whether in tort or otherwise, were fixed in place but because those standards were capable of change through an ongoing search for the best reasoning to govern society. As John Adams describes, the "Colonies adopt the common Law, not as the common Law, but as the highest Reason." John Adams, *Notes of Debates in the Continental Congress, 6 September 1774* 6 (1774). Blackstone

similarly recognized the law as a process of reasoned "discovery" that would promote a better society:

> "[I]t is still necessary to have recourse to reason, whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life, by considering what method will tend the most effectually to our own substantial happiness."

Blackstone, Commentaries on English Law 41 (1768). Holmes articulated the nature of the common law as developing with the nation, informed by but not subjugated to the past:

> "The [common] law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."

Oliver Wendell Holmes, *The Common Law* 1-2 (1881).

Thus, in 1857, it was commonly understood that an important value of the common law was its ability to search out a better reasoning by which to set the standards of society. The historical record of the Oregon Constitutional Convention does not indicate that the framers wished to abandon the evolving protections of the common law. Just as much, the record does not indicate that the

framers believed that 1857 tort law had so perfected the protections to person, property, and reputation as to be constitutionally enshrined.

The remedy clause was likely the framers response to their awareness that legal standards would shift and change through democratic invention and common law evolution, but throughout that process it was critical that basic values of person, property, and reputation must be protected. The clause thus becomes a touchstone for changes in the positive law whether fashioned by the legislature or the court: "[A]lthough statutory and common law remedies may be changed, they must maintain some comparable degree of protection" against wrongs or torts to one's person, property, or reputation. *Hale v. Port of Portland*, 308 Or 508, 528, 783 P2d 506, 517 (1989) (Linde, J. concurring).

The protections of Article I, section 10, are triggered when there has been a wrong to one's person, property, and reputation as understood in a present-sense application. The provision applies if the alleged injury implicates such an interest. In the vast majority of cases, like this one, determining whether the clause applies will be obvious. Indeed, in the vast majority of cases, the issue will never arise, because the legislature and the courts are generally not in the business of taking away rights of redress for individual injuries.

Amicus appreciates that, in the rare case, a more difficult question may arise as to whether a wrong to one's person, property, or reputation has been implicated.

This is a society where values surrounding the sanctity of personhood and property are changing. However, the difficulty those cases may present pales in comparison to the unpredictability of the current jurisprudence of Article I, section 10, where the availability of the constitutional protection turns not on the common sense understanding of injuries shared by the people of Oregon but on the ability of one's lawyer to identify the ghosts of 1857 common law claims or defenses.

In this case the answer is simple. All agree that a wrong or tort to the child's person is implicated by the alleged injury. The protections of Article I, section 10 apply.

2. *Article I, section 10, guarantees the right to be restored for the injury suffered.*

Again, in determining the scope of the protections of Article I, section 10, the text is the best guide. The text promises a "remedy" for one's injury. "A mid-nineteenth century law dictionary defined 'remedy' as '[t]he means employed to enforce a right or redress an injury.'" *Smothers*, 332 Or at 92 (quoting Bouvier, *A Law Dictionary* at 340). In other words, "remedy" not only meant a procedure ("means"), but a procedure where redress for that injury was available. Consequently, "this court consistently has held that [Article I, section 10 requires that] the law must provide a means for seeking redress for injury." *Smothers*, 332 Or at 119 (citing by way of example *Thomas v. Bowen*, 29 Or 258, 264, 45 P 768 (1896) and *Batdorff v. Oregon City*, 53 Or 402, 408-09, 100 P 937 (1909)). And,

an 1857 legal definition of "redress" was "[t]he act of receiving satisfaction for an injury sustained." Bouvier, *A Law Dictionary* at 350. In the end, when the text is given its full weight, the clause requires the opportunity to receive satisfaction, *i.e.*, compensation or other restoration sufficient to offset the harms suffered.

In line with the above, Justice Goodwin articulated that Article I, section 10 promises a "substantial remedy":

> "Remedy for injury * * * protected by Article I, section 10, must be a real and substantial remedy, not merely a colorable one, * * * so that the rights guaranteed by the constitution are not merely false promises. 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."

Holden v. Pioneer Broad. Co., 228 Or 405, 422, 365 P2d 845, 854 (1961) (Goodwin, J. dissenting). In *Cavines v. City of Vale*, 86 Or 554, 169 P 95 (1917), this Court similarly explained that Article I, section 10, requires "an equivalent remedy; one reasonably adequate to serve the purpose of that taken away." The constitutional rule of remedy is a rule of satisfaction to the injured.

In recent cases, this Court appears to have shifted its analysis of what constitutes a "substantial remedy" and does not emphasize the ability of a remedy to provide a plaintiff the opportunity for satisfaction from a defendant. Whereas this Court once required a "substantial remedy" that "restores the status quo," *see Holden*, *supra*, it now requires that the remedy only be something "substantial" so as not to leave the plaintiff "wholly without remedy." *Howell*, 353 Or at 374. That

test suggests that it no longer matters if the plaintiff actually can achieve satisfaction for the injury. What appears to now matter is that the plaintiff receives something of substance, notwithstanding whether that something is sufficient to offset the loss. That rule falls short of satisfaction, and appears to remove the meaning of remedy from principles of offset to that of consolation prize.

For a remedy to be adequate under Article I, section 10, it must be "a substantial remedy * * * in which the law, as best it can, either restores the status quo or compensates the injured party for the loss." *Holden*, 228 Or at 422. The rule from *Howell* appears to fall short of that target and should be abandoned.

In this case, the limited remedy mandated by ORS 30.271 would reduce plaintiff's compensation by over 75%. That is not satisfaction for the losses suffered. That is a consolation prize. The application of ORS 30.271 in this case violates Article I, section 10.

CONCLUSION

For the reasons stated in this amicus brief and the reasons discussed in the briefing of the plaintiff OTLA urges the court to affirm the judgment.

DATED this 29th day of July, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
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Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 6,307words.

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CERTIFICATE OF SERVICE AND FILING

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