IN THE SUPREME COURT OF THE STATE OF OREGON

THOMAS BROWN AND MARIA DEL CARMEN ESPINDOLA GOMEZ,
Individually and as parents and natural guardians of M.B., a minor,
Plaintiffs-Appellants, Respondents on Review

v.

GLAXOSMITHKLINE, LLC,
Defendant,

and

PROVIDENCE HEALTH SYSTEM – OREGON, d/b/a Providence Newberg Medical Center, f/k/a Providence Newberg Hospital,
Defendant-Respondent, Petitioner on Review.

AMICUS CURIAE BRIEF OF OREGON ASSOCIATION OF DEFENSE COUNSEL ON THE MERITS IN SUPPORT OF PETITIONER ON REVIEW

Supreme Court No. S070082
Court of Appeals No. A169544
Multnomah County Circuit Court Case No. 15CV23066
On Review of a Decision of the Court of Appeals
on Appeal from the Limited Judgment of the Multnomah County Circuit Court,
by the Honorable Gregory Silver

Court of Appeals opinion filed: December 14, 2022
Author: Powers, J.

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TABLE OF CONTENTS

OREGON ASSOCIATION OF DEFENSE COUNSEL'S AMICUS BRIEF

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

OREGON ASSOCIATION OF DEFENSE COUNSEL'S AMICUS BRIEF

A. Introduction and Interest of Amicus Curiae.

The Oregon Association of Defense Counsel ("OADC") is a non-profit association of members of the Oregon State Bar who devote a substantial portion of their practice to representing defendants in civil litigation. OADC's mission is, in part, to advocate for concerns of defense counsel in Oregon, as well as protect and enhance the civil justice system. The Court of Appeals' opinion in this case, *Brown v. GlaxoSmithKline, LLC*, 323 Or App 214 (December 14, 2022), raises significant concerns for OADC's membership. The opinion's rationale will increase the difficulties faced by counsel, courts, and juries in litigation. The opinion unintentionally eliminates legal protections granted to foreign defendants under federal law and further burdens Oregon's state court system, which is still recovering from the effects of the COVID-19 pandemic. Finally, the opinion will be used to extend strict products liability to service industries that were not originally contemplated by the Oregon legislature and the Restatement (Second) of Torts, § 402A, impacting clients represented by OADC's membership.

The Court of Appeals decision in *Brown* holds hospitals, clinics, and other medical practices strictly liable as "sellers" of drugs and medical devices (323 Or App at 216), effectively eliminating the prior distinction between their duties to provide competent medical services as set by the standard of care in the

community, and the duties of a product manufacturer and seller under Oregon's strict products liability statutes. Unless overturned by this Court, the *Brown* opinion will blur the lines between strict products liability and negligence in cases litigated in Oregon. As a result, the cost of litigating medical malpractice cases, which is already expensive, will increase. Hospitals and clinics will be forced to retain experts to opine on both the standard of care in the community vis-à-vis negligence, as well as those who can explain the design, warnings, and efficacy of drugs or medical devices. And, it will impair the defense bar's ability to present clear, understandable cases on behalf of its clients. What would otherwise be a clear distinction—either product liability or negligence—will be muddied, as counsel and the court work to explain to juries the differences between these separate causes of action, standards of care, and how those differences may be applicable to the exact same conduct. This will impact defense counsel and the courts' ability to facilitate the "just, speedy, and inexpensive determination of every action." ORCP 1; FRCP 1.

The opinion also effectively, though perhaps unintentionally, eliminates any opportunity for drug and medical device manufacturers to remove cases filed in state court on diversity grounds under 28 USC § 1332, impacting their ability to place cases into multidistrict litigation ("MDL") under 28 USC § 1407, a burden to foreign defendants and to Oregon's Circuit Courts. Finally, the opinion

will be used to support similar arguments to apply strict products liability across multiple service industries where it never reached previously.

This Court Should Reverse the Opinion of the Court of Appeals.

B. Argument

1. *Brown* creates significant difficulties for litigants and factfinders.

This Court should reverse the Court of Appeals' opinion in *Brown*. As it stands, *Brown* creates significant practical issues for litigants, civil defense counsel, the courts, and juries, especially in medical malpractice and medical device cases. The practical impact of a hospital or medical clinic being deemed a "seller" under ORS § 30.920 is immense.

In pre-*Brown* medical malpractice cases, juries typically evaluated conduct against a single standard of care, applicable to both physicians and hospitals: Did the physician's or the hospital's conduct fall below the reasonable practice in the community? *See, e.g., Getchell v. Mansfield*, 260 Or 174, 179 (1971); *see also*, ORS § 677.095(1) (setting standard of care for physicians). Now, by rendering hospitals, clinics, or other medical practices liable as "sellers" of drugs or medical devices, *Brown* injects strict products liability into medical malpractice cases, where liability may attach even if the hospital exercised "all possible care."[1] *Brown*, 323 Or App at 216; ORS 30.920(2)(a) (a seller is liable even if the seller

[1] This may include care that exceeds the standard of care in the relevant community.

has "exercised all possible care in the . . . sale . . . of the product"). Practically speaking, this eviscerates the application of the "standard of care in the community."[2]

As the Petitioner and other *amici* point out, hospitals and clinics do not, as entities, prescribe medications or implant medical devices. Medical interventions do not occur in a vacuum; rather, the treatments are determined and directed by physicians who are themselves exempt from strict products liability under ORS § 30.902. Thus, the conduct of the physician who directed the treatment—and who cannot be held strictly liable under ORS § 30.902—will be judged according to the reasonable practice in the community. ORS § 677.095(1). Conversely, the facility, a hospital or clinic, though passive in setting the course of treatment, may be held strictly liable under *Brown* for the physician's act of prescribing a drug or medical device alleged to have caused injury to the plaintiff.[3] 323 Or App at

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[2] The difficulties for courts, practitioners, and defendants posed by this shift are easy to see. Before *Brown*, counsel defending a hospital or a physician would focus on the hospital's actions relative to what the standard of care in the community would be. Following *Brown*, unless it is overturned, counsel must craft a defense of both the treatment rendered and the medication prescribed.

[3] Moreover, as other *amici* highlight, claims against drug manufacturers may be preempted under federal law. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 US 312, 128 S Ct 999 (2008) (if a medical device manufacturer is alleged to have violated state-law duties notwithstanding compliance with the applicable federal law, claim is preempted); *Mut. Pharm. Co., Inc. v. Bartlett*, 570 US 472, 133 S Ct 2466 (2013) (state-law design defect claims against drug manufacturer based on the adequacy of a drug's warnings are preempted by federal law). If the manufacturer is immune, the hospital may be left alone to pay the judgment.

216. This liability is due simply to the hospital "billing" for the medication. 323 Or App at 232. This result is unequitable and disastrous for hospitals, and *Brown* should be overturned.

Following *Brown*, any case involving medical treatment that includes a drug or device might conceivably include both negligence and product liability claims. For example, a doctor may be sued for malpractice for choosing to prescribe a drug, and the hospital may be sued in both negligence and strict products liability under ORS 30.920 if the drug allegedly caused harm.[4] In this scenario, the jury will be forced to analyze both whether the physician's decision to prescribe a drug fell below the standard of care and whether that drug was unreasonably dangerous. Conceivably, a jury could find that a decision to give the drug was perfectly reasonable—the physician (and the hospital) met the standard of care—while also finding the hospital strictly liable for the drug, notwithstanding that the hospital was not involved in the decision to prescribe the drug or device. Or, a jury could surreptitiously impose strict products liability on the physician,[5] in contravention of ORS 30.902, by finding that the drug

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[4] While a strict products liability claim typically subsumes all potential causes of action, the negligence claim here is not related to negligence regarding the inspection of or sale of the product itself, so it is not necessarily subsumed.

[5] Taken to its end, *Brown* invites a jury to ignore ORS 30.902 by injecting strict products liability into what would otherwise have been a straight negligence analysis. A lawsuit against a physician alleging medical malpractice where the

administered was unreasonably dangerous, and therefore the decision to prescribe it fell below the standard of care. Either way, hospitals and physicians will need to retain experts on both the standard of care in the community and the product, something that was unnecessary pre-*Brown*.[6]

While the scenarios in the foregoing paragraph present difficulties to the court, counsel, and the fact finder, they are also problematic to medical practitioners. Decisions to treat are often made in emergent situations. *Brown* demonstrates this; Zofran was provided to the plaintiff mother in an emergency situation. 323 Or App at 217 ("A physician in the emergency department evaluated Gomez and prescribed 4 mg of injectable Zofran, which a nurse administered"). Allowing strict products liability to apply to these situations injects unnecessary uncertainty and effectively hangs a sword of Damocles over the heads of hospital administrators.

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hospital is joined as a strict liability defendant now seems a plausible scenario. In that case, the jury will hear about the alleged injuries caused by a drug or a device and it may be tempted to find that the physician did not meet the standard of care *because he or she prescribed a defective drug or device.* While the legislature expressly foreclosed that argument as strict liability, *Brown* may have unintentionally opened it.

[6] Before *Brown*, a plaintiff who was injured would assert either a negligence claim (i.e. medical malpractice) or a strict product liability claim. Following *Brown*, it stands to reason that a claim that a drug or device was unreasonably dangerous may also give rise to a negligence claim.

With uncertainty about the standard of care applicable to hospitals, negligence versus strict liability, must administrators enact policies to second guess the physicians and risk liability in negligence for not timely providing a potentially beneficial drug? Do they risk exposure to punitive damages should a prescribed drug prove harmful?[7] Will administrators push for second opinions on a proposed course of treatment to mitigate their liability, thereby increasing costs and decreasing treatment efficacy? Or do hospitals need their own research teams, independent of the FDA, to evaluate the efficacy and safety of each drug on their shelves?[8] Each of these predicaments is directly encouraged by *Brown*'s holding.[9] The Oregon legislature had it right in the first instance, back in 1979,

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[7] Hospitals, under the Court of Appeals' rationale in *Brown*, would likely not be included in the punitive damages prohibition found at ORS § 30.927, applicable to manufacturers of drugs.

[8] And even if a hospital did this, it still would not be protected from strict products liability, because the exercise of all care is not a defense under ORS 30.920(2)(a).

[9] As policy, it seems axiomatic that the law should not encourage courts, juries, or hospital administrators to second-guess those who have dedicated their lives and studies to the treatment of patients. In fact, by enacting ORS 30.902, the Oregon legislature expressly prohibits courts and juries from holding physicians strictly liable under products liability for directing and prescribing treatments. Thus, physicians are immune from exactly the hand-wringing scenario presented in the prior paragraph, while, under *Brown*'s rationale, the hospital, the more passive actor in the process, is not. A doctor need not worry that prescribing a drug as part of a course of treatment will subject her or him to strict products liability, while a hospital must worry about what the doctor prescribes. This is nonsensical.

when it incorporated the Restatement (Second) of Torts § 402A, comments *a* – *m*; service providers, like hospitals, are not subject to strict liability. The Court of Appeals' opinion in *Brown* wrongly usurps the legislative role and creates a whole new realm of strict products liability for service providers, in direct contravention to the legislature's enactments.

If left to stand, *Brown* will inevitably lead to hospitals and clinics being sued for both acts and omissions, with the same conduct at issue for both. For example, a plaintiff may sue for the act of a physician prescribing a drug as part of a course of treatment ("Drug A"), which, under *Brown*, the hospital "sells" to the plaintiff. As to the conduct of selling the drug, per *Brown,* strict liability applies. However, the plaintiff may also allege that the standard of care in the community was that a different drug ("Drug B") should have been given instead. For that conduct, negligence applies. These two standards may become inextricably intertwined should the plaintiff argue that Drug B represents a safer alternative design to Drug A. Is the hospital negligent? Subject to strict liability? Essentially the same act may constitute both an act and an omission, to which different standards of care apply, and which a jury will be required to parse.

Brown will inevitably create confusion amongst counsel, the courts, and juries as they sort out the right standards of liability and determine what evidence

may be considered for which claims.[10] Hospitals (and physicians) will be bombarded with discovery requests and depositions about what the hospital knew about the drug and when.[11] Rather than focusing on the reasonableness of the treatment (i.e. did the treatment meet the standard of care in the community), the litigation will turn into an investigation of prior patients' reactions to the drug, the hospital's attention to databases recording adverse drug reactions,[12] etc., as each of those may be introduced as evidence of negligence and may also serve as evidence that the product was unreasonably dangerous and therefore defective.

All of this upends the goal of achieving the "just, speedy, and inexpensive determination of every action." ORCP 1; FRCP 1. The Court of Appeals' opinion

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[10] For example, in a hybrid products liability and negligence case against a hospital arising out of the use of Drug A over Drug B, and a medical malpractice case against the doctor who prescribed the course of action, would evidence about the efficacy of alternative drugs be admissible on all claims? Would the design and composition of the drug be admissible to prove the reasonableness (or lack thereof) of the doctor's treatment?

[11] It is easy to see this spiraling out of control in discovery. A simple example would be: is a doctor who contracts with the hospital to provide services there the hospital's agent, such that the doctor's knowledge or belief about a medication is imputed to the hospital? What if another doctor, who also treats patients at that hospital (or even the same patient), has a different belief about the medication? Which belief is imputed as the hospital's "knowledge"? It may become a jury question that would always trend unfavorably to the hospital if at least one doctor takes a negative view of the medication.

[12] Such as the Food and Drug Administration's (FDA) Adverse Event Reporting System (FAERS).

in *Brown* threatens to significantly impair the Oregon courts' ability to resolve cases in a manner that sets reasonable expectations in the community.

Brown was wrongly decided, and the negative ramifications of the decision, even if unintended, are patent. This Court should reverse.

2. The Opinion effectively eliminates foreign drug and medical device manufacturers' right of removal under federal diversity principles, increasing the burden on defendants and Oregon courts.

In addition to significantly upending civil practice in state court, *Brown* practically eliminates a key protection for out-of-state drug and device manufacturers: diversity jurisdiction under 28 USC § 1332. "The purpose of diversity jurisdiction is to provide a federal forum for out-of-state litigants where they are free from prejudice in favor of a local litigant." *See Lively v. Wild Oats Markets, Inc.*, 456 F3d 933, 940 (9th Cir 2006) *quoting Tosco Corp. v. Communities for a Better Environment*, 236 F3d 495, 502 (9th Cir 2001). For a federal court to have jurisdiction based on diversity, the conditions set forth in 28 USC § 1332(a) must be met: namely, complete diversity of citizenship between the plaintiffs and defendants, and the amount in controversy must exceed $75,000. 28 USC § 1332, as *Lively* indicates, was enacted as a federal protection for foreign defendants being haled into court in a state where they are not "at home."

Brown undermines the protections of 28 USC § 1332 for every foreign drug and device manufacturer when a plaintiff is treated at a hospital or a clinic. Consider a plaintiff who receives a hip prosthesis. The patient does not "buy" the device from a retailer for implantation; rather, the surgery implanting the device *is* when the patient "acquires" the device. Then, the hospital or clinic bills the patient for the procedure and the device. If those conditions are met, *Brown* renders the hospital or clinic viable product liability defendants, although they never were previously.[13] If the hospital or clinic is incorporated in or has a principal place of business in Oregon, it is a forum defendant under *Brown*, and this defeats diversity jurisdiction. *See* 28 USC §§ 1332(c)(1), 1441(b) (defining

[13] Some might argue: "Wouldn't the hospital be a viable defendant in negligence anyway?" No. Oregon still follows the rule of *Summers v. Tice*, 199 P2d 1 (1948), so plaintiffs cannot simply point to two separate and distinct potential causes and argue that one of those causes must have injured plaintiff, entitling the plaintiff to recover. *See Senn v. Merrell-Dow Pharmaceuticals, Inc.*, 305 Or 256 (1988). It is insufficient to meet the burden of proof to simply say "one of you hurt me." Oregon plaintiffs must allege the specific conduct that caused them harm. If the claim is that an allegedly defective drug caused harm, then the claim is in strict products liability, and the hospital, like the physician, is not a legitimate defendant. If the claim is that the treatment given fell below the standard of care, then the drug manufacturer is not a legitimate party. While a plaintiff might initially sue in both negligence and strict products liability, early discovery can clarify plaintiff's claims and still allow for removal of the claim for up to one year. *See* 28 USC § 1446(c)(1). If the hospital remains, under *Brown*, a viable product liability defendant, removal is never possible.

citizenship of defendant for purposes of diversity); *see also, Lively*, 456 F3d at 939 (discussing forum defendant rule).[14]

A major implication of manufacturer defendants not being able to remove to federal court is that drug and medical device product liability cases in Oregon will not be placed into multidistrict litigation, or MDL, settings. 28 USC § 1407. MDLs ensure the prompt, efficient, and consistent resolution of the scientific and discovery issues involved in medical device cases. In an MDL, the manufacturer is not required to face the costs and burdens of defending lawsuits, depositions, and discovery requests from multiple plaintiffs across all 50 states, each of which focuses on the same issues. Rather, those processes are streamlined into a single setting, where a single judge makes rulings applicable to all cases and claimants who are part of the MDL. Many MDLs involve drugs[15] and medical devices, as they are uniquely suited to resolving questions regarding the science behind the claims in ways that other product claims may not be.

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[14] The inability of defendants to remove cases will also increase the number of cases handled by the Circuit Courts in Oregon, which are still currently working out of a backlog of cases due to the COVID-19 pandemic.

[15] In fact, the drug at issue in *Brown* was itself the subject of an MDL. *See In re: Zofran (Ondansetron) Products Liability Litigation*, MDL No. 1:15-md-2657-FDS (D Mass 2015). This case was not consolidated into the MDL due to the presence of a non-diverse defendant, preventing removal. *See Brown, et al. v. GlaxoSmithKline, LLC*, Case No. 1:16-cv-10215-FDS (D Mass 2016), dkt. 41 (order of remand, dated June 16, 2016); and *Brown, et al. v. GlaxoSmithKline, LLC*, Case No. 1:19-cv-10647-FDS (D Mass 2019), dkt. 33 (memorandum and order granting motion to remand, dated June 13, 2019).

Brown significantly curtails the possibility of Oregon cases involving drugs and medical devices being removed to federal court or placed into an MDL.[16] This will inevitably increase the costs of drug and device litigation for companies doing business in the state of Oregon.

Additionally, as a matter of common sense, the inability to place Oregon drug and medical device cases in MDLs or to have them removed to federal court under diversity jurisdiction increases the burden on Oregon's circuit courts. Those courts continue to admirably dig out from the COVID-19 pandemic, and *Brown* does nothing to diminish their workload. Both the increased costs and the heightened strain on Oregon's judiciary are matters of concern for OADC's membership, which asks this Court to overturn *Brown*.

3. The Opinion threatens to extend the scope of Oregon's strict product liability law much further than the legislature contemplated.

While the opinion in *Brown* is specific to the issue of whether a hospital or clinic is subject to strict products liability, its analysis of what constitutes a "seller" has broader implications, potentially extending liability beyond what Oregon's strict product liability statutes allow and any prior Oregon appellate court has recognized. So who is a "seller" under Oregon law?

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[16] In fact, defendant GlaxoSmithKline, LLC sought to remove this case to the MDL in

In 1967, the Oregon Supreme Court adopted the Restatement (Second) of Torts, section 402A as the law of the land in *Heaton v. Ford Motor Co.*, 248 Or 467, 470 (1967), which the Oregon legislature later adopted in 1979. ORS 30.920, based on section 402A, holds a party who "sells any product in a defective condition unreasonably dangerous to the user or consumer" strictly liable if the "seller . . . is engaged in the business of selling . . . such a product[.]" ORS 30.920(1)(a); Restatement (Second) of Torts, § 402A. Comment *c.* to the Restatement justifies the rule by expecting that "reputable sellers will stand behind their goods" that are marketed to consumers. Restatement (Second) of Torts, § 402A, comment *c*. Comment *f.* further clarifies the "business of selling" as those engaged in the manufacture, wholesale, distribution, or retail selling of a product. Restatement (Second) of Torts, § 402A, comment *f*. In other words, the primary function of those held liable is to either create the goods (manufacturer), or to distribute goods through the chain down to the end users who will ultimately buy the goods for their own consumption.

> The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of the persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.

Id. It can hardly be said that the primary business of a hospital or clinic is to "supply human beings with products;" rather, they provide a service—medical

treatment—to which drugs and devices are incidental. "ORS 30.920 does not provide for strict liability of service providers." *Watts v. Rubber Tree, Inc.*, 118 Or App 557, 562-63, *opinion adh'd to as modified on recons.*, 121 Or App 21, *rev. den.* 317 Or 272 (1993).

Indeed, though *Brown* cites it as support, the *Watts* case, identified in footnote 3 of the opinion, highlights how the Court of Appeals' decision is inconsistent with Oregon law and precedent and must be reversed. *Watts* rejected the notion that providing a service was sufficient to bring that service provider under the strict product liability umbrella. *Watts*, 118 Or App at 562-63. *Brown* attempted to differentiate *Watts* and characterized its holding as "the installation of a defective product is not a sale of product subject to strict liability."[17] 323 Or App at 224, n3. But *Watts*' facts belie this over-simplification of its holding and illustrate the issues with the Court of Appeals' analysis in *Brown*.

Watts arose out of a failure of a recapped tire. 118 Or App at 559. Watts, the plaintiff, brought the case as conservator and guardian for Isom, who was seriously injured when the recapped tire blew out, causing the driver of a truck (Wright) to lose control and injure Isom. *Id.* The tire at issue was manufactured in 1985. *Id.* In 1989, Wright's employer took four tires to Rubber Tree to be

[17] As analogies go, injecting a drug into a patient seems much closer to an "installation" than it does a "sale."

recapped. *Id.* Rubber Tree rejected two of the four tires brought by Wright's employer, replacing them with two of its own casings, and recapped all four tires (two belonging to Wright's employer, and two supplied by Rubber Tree). *Id.* Rubber Tree billed $10 for each of the casings it supplied (i.e., a "sale" per *Brown*), and then billed for recapping all four tires. *Id.* The tire that failed was a recapped casing supplied to Wright's employer by Rubber Tree. *Id.*

Despite the Court of Appeals attempt to harmonize the two cases, it seems clear that, under *Brown*'s rationale, *Watts* would have gone the other way. Did Rubber Tree "sell" the casing and recapped rubber to Wright's employer? Yes.[18] Was Rubber Tree "engaged in the business of selling" casings and recapped tires? It appears so. But the Court of Appeals in *Watts* stated that, unlike a scenario where a fully recapped tire was sold directly to a consumer, *Watts* was different, because Rubber Tree "did not sell the defective casing." *Id.* at 563. Rather, the Court of Appeals stated that "Defendant merely provided a service when it affixed the new tread to the casing," notwithstanding the fact that Rubber Tree provided the casing too. *Id.* The service was primary, the product incidental. How that differs from *Brown* is difficult to understand, but it is clear that *Brown* ignores *Watts*' correct statement of the law: "ORS 30.920 does not provide for strict liability of service providers." *Id.*

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[18] Indeed, the full "bundle of sticks" of property rights with respect to the casing went to Wright's employer.

Brown, if not reversed, dramatically alters product liability law in Oregon. Consider, for example, a general contractor who constructs a home for a property owner. The owner contracts with the contractor, who acquires the necessary building materials from a building material supply company and charges a 10% markup on the materials to his customer. The owner engages the contractor to provide a service—coordinate trades and build a home—and, incidental to that, building supplies are necessary, so the contractor acquires them and passes those costs on, at a markup, to the owner.

On the rationale expressed in *Brown*, the contractor is a "seller" of those products, because 1) he billed the owner for those products, and 2) the contractor routinely charges a markup for similar acquired products. But common sense shows that, like a hospital, a contractor is not a "seller" under Oregon product liability law. No one calls a contractor to purchase building supplies other than when they need a project done, the contractor does not advertise or market the sale of any building supplies, and the markup of building supplies is incidental to the actual service provided of constructing a home.[19] Under those circumstances, and the holding in *Brown,* the contractor would be subject to strict liability for

[19] Similarly, no one visits a hospital outside of needing a service provided, hospitals are not advertising the sale of any particular drugs to patients, and the provision of drugs is incidental to the service provided, which is medical treatment.

any defect in the building materials he used to provide services, representing a significant departure from the law as it stands.

Unless overturned, *Brown* threatens to undermine the last 40 years of product liability law in Oregon, including the protections afforded to service providers by their being excluded from statutory product liability. This Court should reverse *Brown*.

C. Conclusion

Based on the foregoing, OADC supports Petitioner Providence and requests this Court reverse the Court of Appeals' decision and affirm the trial court's grant of summary judgment to Providence.

DATED: July 13, 2023.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that this Amicus Brief complies with the word-count limitation in ORAP 5.05 and 9.10(3), and the word count is 4,079 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and the footnotes as required by 5.05(3)(b)(ii).

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CERTIFICATE OF FILING

I certify that on July 13, 2023, I filed the foregoing *Amicus Curiae* Brief of Oregon Association of Defense Counsel on the Merits in Support of Petitioner on Review with the Appellate Court Administration using the appellate courts' eFiling system.

CERTIFICATE OF SERVICE

I also certify that on July 13, 2023, service of a copy of this brief will be accomplished on the following participants in this case, who are registered users of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participant's email address as recorded this date in the appellate eFiling system:

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