IN THE SUPREME COURT OF THE STATE OF OREGON

ZEFERINO VASQUEZ,

Plaintiff-Respondent, Respondent on Review,

v.

DOUBLE PRESS MFG., INC.,
a California corporation,

Defendant-Appellant, Petitioner on Review.

Supreme Court No. S065574
Court of Appeals No. A154774
Multnomah County Circuit Court Case No. 110302844

BRIEF OF AMICUS CURIAE OREGON ASSOCIATION OF DEFENSE COUNSEL ON BEHALF OF DEFENDANT-APPELLANT PETITIONER-CROSS-RESPONDENT ON REVIEW

On Review of the Decision of the Court of Appeals
Opinion Filed: November 1, 2017
Author of Opinion: Armstrong, P.J.; Egan, J., Concurring
Panel: Armstrong, Presiding Judge, Hadlock, Chief Judge, and Egan, Judge

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Hillary A. Taylor, OSB No. 084909
Lindsey H. Hughes, OSB No. 833857
Keating Jones Hughes, P.C.
One SW Columbia, Suite 800
Portland, OR 97258
Telephone: (503) 222-9955
htaylor@keatingjones.com; lhughes@keatingjones.com

Of Attorneys for *Amicus Curiae* Oregon Association of Defense Counsel

(Continued on reverse)

August, 2018

Janet M. Schroer, OSB No. 813645
Ruth Casby Rocker, OSB No.944225
HART WAGNER LLP
1000 SW Broadway, Twentieth Floor
Portland, OR 97205
Telephone: (503) 222-4499
jms@hartwagner.com

Jonathan W. Henderson, OSB No. 063554
Elizabeth E. Lampson, OSB No. 975185
Davis Rothwell Earle & Xochihua PC
200 SW Market Street, Suite 1800
Portland, OR 97201
Telephone: (503) 222-4422
jhenderson@davisrothwell.com
elampson@davisrothwell.com

Of Attorneys for Defendant-Appellant/Petitioner on Review

Mark G. McDougal, OSB No. 890869
Gregory Kafoury, OSB No. 741663
Kafoury & McDougal
411 SW Second Ave., Suite 200
Portland, OR 97204
Telephone: (503) 224-2647
mcdougal@kafourymcdougal.com
kafoury@kafourymcdougal.com

Kathryn H. Clarke, OSB No. 791890
PO Box 11960
Portland, OR 97211
Telephone: (503) 460-2870
kathrynhclarke@mac.com

Of Attorneys for Plaintiff-Respondent/Respondent on Review

Julie A. Smith, OSB No. 983450
Cosgrave Vergeer Kester LLP
888 SW Fifth Avenue, Suite 500
Portland, OR 97204
Telephone: (503) 323-9000
jsmith@cosgrave.com

Of Attorneys for *Amicus Curiae* McInnis Waste Systems, Inc.

Hillary A. Taylor, OSB No. 084909
Keating Jones Hughes, PC
One SW Columbia, Suite 800
Portland, OR 97258
Telephone: (503) 222-9955
htaylor@keatingjones.com

Of Attorneys for *Amici Curiae* Oregon Medical Association and American Medical Association

Susan Marmaduke, OSB No. 841458
J. Aaron Landau, OSB No. 094135
Harrang Long Gary Rudnick P.C.
1001 SW Fifth Avenue, 16th Floor
Portland, OR 97204
Telephone: (503) 242-0000
Susan.marmaduke@harrang.com; aaron.landau@harrang.com

Of Attorneys for *Amicus Curiae* Oregon Liability Reform Coalition

James S. Coon, OSB No. 771450
Thomas, Coon, Newton & Frost
820 SW 2nd Ave., Suite 200
Portland, OR 97204
Telephone: 503-228-5222
jcoon@tcnf.legal

Nadia Dahab, OSB No. 125630
Stoll Stoll Berne Lokting & Schlachter PC
209 SW Oak St., Suite 500
Portland, OR 97204
Telephone: 503-227-1600
ndahab@stollberne.com

W. Eugene Hallman, OSB No. 741237
Hallman Law Office
P.O. Box 308
Pendleton, OR 97801
Telephone: 541-276-3857
office@hallman.pro

Of Attorneys for *Amicus Curiae* Oregon
Trial Lawyers Association

Travis Eiva, OSB No. 052440
Zemper Eiva Law
101 E. Broadway, Suite 303
Eugene, OR 97401
Telephone: 541-636-7480
travis@zempereiva.com

Of Attorneys for *Amicus Curiae* Oregon Jury Project

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Oregon Association of Defense Counsel ("OADC") is a nonprofit organization for defense-oriented civil litigators whose goals are to provide a unified voice for defense concerns in Oregon, offer networking opportunities, and sponsor continuing legal education. OADC requests leave to appear amicus to address the issues raised by plaintiff and *amicus curiae* Oregon Jury Project (collectively "plaintiff") with respect to the correct meaning of the trial by jury right of the Oregon Constitution, as re-affirmed by *Horton v. Oregon Health and Science University,* 359 Or 168, 376 P3d 998 (2016).

The court should reject the invitation to reconsider its holding that the right to trial by jury is not a limit on the legislature's authority to define and limit causes of action, including enacting damages limitations. The foundation on which *Horton* rests is solid, indeed myriad of cases and a judicial tradition since 1857 with but one aberration, *Lakin*. Plaintiff provides no new arguments or rationale that have not already been considered and rejected. *Stare decisis* precludes plaintiff's position and the court should stop there. However, amicus explains why plaintiff's arguments to disturb *Horton* fail.

ARGUMENT

I. *Stare Decisis.*

As a preliminary matter, the arguments advanced as to Article I, section 17, should be rejected without discussion on the basis of *stare decisis*. Plaintiff offers nothing but a disagreement with the outcome of *Horton*. If constitutional law and the court are to retain legitimacy, the judiciary must be driven by more than results-oriented interpretation. "The rule of *stare decisis* is essential to the public's confidence that the law is more than a reflection of personal preference, and the public's confidence in the law is the fragile foundation on which our system of justice rests." *Horton*, 359 Or at 303 (J. Walters, dissenting).

Jury Project's brief provides nothing that was not fully vetted and rejected in *Horton.* Amicus ignores history and case law, advocating for a change in the law to serve a singular purpose, to nullify limitations on damages. Plaintiff's position is asserted without regard to the broader picture and reasons why Article I, section 17, should not be viewed, and is not viewed, as a limit on the legislature's authority to create, define, and limit causes of action.

The meaning of the right to trial by jury in civil cases was correctly decided in *Horton*; it cannot be said that the conclusions reached were the product of an improper paradigm, nor does plaintiff so argue. 359 Or at 306 ("we should assume that our 'fully considered prior cases are correctly decided' unless we can

say that the constitutional rule at issue 'was not formulated either by means of the appropriate paradigm or by some suitable substitution." (J. Walters, dissenting) (internal citations omitted). "It goes without saying that stability and predictability are essential to the consistent administration of justice and the legitimacy of this court's decisions." *Id.* at 256 (J. Landau, concurring). The court should refuse to entertain plaintiff's challenge to ORS 31.710(1) based on Article I, section 17.

II. Summary of Argument.

OADC joins in the arguments of Double Press Mfg., Inc., that the court should not revisit *Horton's* trial by jury analysis. Out of an abundance of caution, however, amicus explains why the attack on *Horton* fails. The historical analysis, text, and this court's precedent, save for *Lakin*, all support the conclusion that Article I, section 17, is a guarantee that litigants in civil cases at law will have the opportunity to present their evidence to a jury instead of a judge. The jury will find the facts and the judge applies the law. Nothing about "trial by jury" also guarantees a plaintiff the right to a particular outcome or amount of recoverable damages. Jury Project's arguments about the historical record, the rights afforded criminal defendants, and general disagreement with damages limitations do not alter the understanding of this constitutional protection.

III. Plaintiff's Attacks on *Horton* are Non-Starters.

A. *Horton's* Historical Analysis is Sound.

Before this court's decision in *Horton*, momentum was building as post-*Smothers* and post-*Lakin* cases demonstrated that Oregon's remedy clause and jury trial jurisprudence was becoming unwieldy, untenable, and unfaithful to the constitution. *Klutchkowski v. PeaceHealth*, 354 Or 150, 196, 311 P3d 461 (2013) (J. Landau, concurring) (stating the court should invite careful and vigorous advocacy to address the issues raised regarding Article I, section 10, and Article I, section 17). In an effort to provide cogent rules to govern future cases, the parties and *amici* in *Horton* put forth a herculean effort to thoroughly present the issues. Hundreds of pages of briefing were submitted for this court's consideration. In its opinion, the court painstakingly sifted through the text, history, and prior case law, arriving at the decision that all three supported the conclusion that trial by jury in Oregon means what it says. That is, litigants are afforded the right to have their cases at law tried to a jury; it says nothing to the legislature about what the measure of damages may be; *Lakin* was an aberration and needed to be overruled. 359 Or at 225-251.

Beginning with history, *Horton* correctly recognized and addressed the significant influence of William Blackstone on the early American understanding of trial by jury. 359 Or at 235-238 (his writing on the civil jury trial was

influential in shaping American thought on the issue). The court also discussed the history surrounding the passage of the Seventh Amendment, including the debates between the federalists and antifederalists with respect to the civil jury trial. 359 Or at 236-43. The court catalogued the views of the time as to the purpose of the civil jury trial. Not surprisingly, much concern was placed on the treatment of debtors, taxation, and a suspicion for the class of lawyers and judges, in that many judges at the time were appointed by the monarchy. The court synthesized many sources, concluding that, consistent with history, Article I, section 17, was not designed as a substantive check on the people's plenary legislative authority. 359 Or at 239; 242; 243.

B. The Quarrel with *Horton's* Historical Analysis Fails.

Notwithstanding plaintiff's efforts to poke holes in the historical analysis of the right to trial by jury, the foundation is strong. The suggestion that *Horton's* foremost source for its historical analysis is a 1973 article by Charles W. Wolfram belies a careful reading of the opinion and ignores the extensive review of original sources and literature undertaken to arrive at that opinion. Plaintiff's criticism is not borne out even on the face of the decision. Regardless, the court's representation of Wolfram is accurate. Wolfram says nothing which indicates that the right to trial by jury was meant to exist in a space untouched by legislation, merely that the right guaranteed that jury trials could not be wholly abdicated by

the legislature.[1] Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN L REV 639 (1973). When viewing history, there is overwhelming support for the proposition that the guarantee of trial by jury was not directed at the legislature, a fact that is reflected in Article I, section 17's text and the court's case law, save for *Lakin*, the lone aberration. *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463, *modified*, 329 Or 369, 987 P2d 476 (1999).

The critique that *Horton* improperly relies on Alexander Hamilton's influence suffers from the same skin-deep infirmity as that of the Wolfram critique. The point of Jury Project's arguments about Hamilton are difficult to decipher. Regardless, to the extent Jury Project argues that Hamilton had no influence on early American law, that argument is unsupportable. Amicus appears to suggest that Hamilton's influence on the court's decision in *Horton* was too great. That argument ignores the court's examination of Hamilton's import in light of *Lakin*. *Horton* explains the arguments for and against the civil jury trial that Hamilton canvassed, they

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[1] Further, in conclusion Wolfram, advocates for a "dynamic" reading of the Seventh Amendment which would give legislatures broad discretion with respect to the right of a civil jury trial. This position is based on the idea that "common law" in the realm of the Seventh Amendment was likely a reference to a process of legal development and change, not to a static changeless law. 57 MINN L REV at 744-46.

> "all addressed the jury's value as a procedural corrective to potentially biased or, worse, corrupt judges serving as triers of fact. Those arguments do not suggest that the right was viewed as a substantive limit on Congress's lawmaking power."

359 Or at 241. Second, in response to the argument that trial by jury serves as a safeguard against an oppressive exercise of the power of taxation,

> "Hamilton explained that the right to a civil jury trial would not limit Congress's ability to enact statutes defining the subjects and extent of taxation. Instead, it could serve as a check on the manner in which the executive carried out the law in an individual case."

Id. at 241-42.

Plaintiff makes no salient argument that successfully undermines the historical analysis of Article I, section 17, and none exists. For almost the entirety of Oregon's statehood, the provision has been understood to guarantee trial by jury in civil cases at law. That is all. It was only during the limited reign of *Lakin*, between 1999 and 2016, that trial by jury was imbued with meaning in relation to the legislature's enactment of a damages cap. Even then, it was only suggested to have a "substantive" component by those singularly opposed to the limits on damages enacted by the legislature. *Lakin's* logic began to fall away as early as 2002 in *Jensen v. Whitlow,* 334 Or 412, 51 P3d 599 (2002), and *DeMendoza v. Huffman,* 334 Or 425, 51 P3d 1232 (2002). *Horton* revealed it for what it was, an anachronism. *Horton* correctly reflects what the guarantee of trial by jury means to civil litigants. The right to trial by jury is not a right to curb

plenary legislative authority, it is not a right to unlimited damages, or to any particular outcome, nor does history support such an interpretation.

C. Trial by Jury Guarantees a Process Not an Outcome.

By its text, "in all civil cases" there is a right to "trial by jury" and the defendant's right is coequal to that of plaintiff. *Horton*, 359 Or at 247. The text of Article I, section 17, requires that a jury trial be available to civil litigants instead of requiring them to accept a bench trial, arbitration, compurgation, or trial by ordeal. Trial by jury is a procedural right; it defines who the factfinder will be, "in all civil cases." It does not guarantee a certain outcome; it is not a theory of recovery. *Jensen v. Whitlow*, 334 Or 412, 422, 51 P3d 599 (2002) ("Article I, section 17 is not a source of law that creates or retains a substantive claim or theory of recovery in favor of any party.").

It is not that "trial by jury" lacks substance, as it certainly carries meaning in the sense that it requires a jury trial be available to civil litigants. A trial is an examination of an issue of fact. *Association of Unit Owners of Timbercrest Condominiums v. Warren*, 352 Or 583, 594, 288 P3d 958 (2012).

ORS 10.010(3) defines "jury" as:

> "a body of persons temporarily selected from persons who live in a particular county or district, and invested with power to present or indict in respect to a crime or to try a question of fact."

Therefore, a "trial by jury" is a formal adversary proceeding with the presentment of evidence to a group of persons authorized to examine or "try" a question of fact. That is the "substance" of the procedural right. Interpreting it in such a way is akin to interpretations of the ill-fated *Lochner* era of federal substantive due process jurisprudence. What the right does not do, is act as a limit on the legislature such that it is a reservoir of rights to certain outcomes. When there is a right to trial by jury and the parties have endured one, such as in this case, its guarantee is satisfied.

The right to trial by jury is the right to have the facts in a legal, as opposed to equitable, case tried to a jury of community members instead of a judge. *See Deane v. Willamette Bridge Ry. Co.*, 22 Or 167, 170, 29 P 440 (1892); *Tribou v. Strowbridge*, 7 Or 156 (1879); *Kendall v. Post*, 8 Or 141 (1879). Even the dissent in *Horton* recognizes, "the court and legislature have authority to define the elements of a tort claim and to determine types of damages that are recoverable." 359 Or at 297 (J. Walters, dissenting). That premise simply cannot be reconciled with an argument that the authority of the legislature is limited when it comes to placing boundaries on recoverable damages. Applying the law is not the same as making a factual finding. 359 Or at 245-46. Suggesting that a limit on damages equates to an "arbitrary decision" that a damages award is "excessive" is nothing more than judicial disapproval of considered legislative action and a violation of

the separation of powers. 359 Or at 299 (J. Walters, dissenting); *See also* Brief of Amicus OMA/AMA pp 17-19.

Further, plaintiff mistakenly conflates Article I, section 10, with Article I, section 17, suggesting they work together to provide plaintiffs a unilateral right to unlimited damages. *Horton* correctly unbound those two provisions and they should remain disentangled. The remedy clause and trial by jury provisions offer different protections but neither is a limit on the legislature's plenary authority to enact legislation defining, eliminating or creating causes of action.

D. The Rights of Criminal Defendants are Inapposite Here.

The court should reject plaintiff's arguments suggesting Article I, section 17, should borrow from federal due process analysis about rights of the accused and recognize that civil trial by jury includes a protection for plaintiffs to unlimited damages. Plaintiff seeks to find a reservoir of rights to substantive claims where none exists. It is true that trial by jury in criminal cases is important both as a democratic check on the process and because of the substantive goal that the proceedings are fair and that no one be deprived of their life, liberty, or property by the state without due process. However, that goal has no role here, except to ensure a civil *defendant* is not similarly deprived.

Jury Project points to *Blakely v. Washington*, 542 US 296, 124 SCt 2531 (2004), a sentencing case wherein Justice Scalia refers to *Apprendi v. New Jersey*, 530 US 466, 490, 120 SCt 2348 (2000), in which the court held

> "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, must be submitted to a jury and proved beyond a reasonable doubt."

Justice Scalia, writing for the court, concluded in *Blakely* that the sentence the judge imposed depended on finding a specified fact that was not found by the jury, and therefore, "the jury's verdict alone does not authorize the sentence" and it violated the Sixth Amendment. 542 US at 305.

Providing context to the phrase relied on by Jury Project demonstrates the court's holding and fails to support an argument against *Horton*:

> "Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. *** *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended."

542 US at 305-06.

The same is true of the citation to *Crawford v. Washington*, 541 US 36, 124 SCt 1354 (2004). Albeit an important decision, *Crawford* lends nothing to the

analysis of the meaning of Oregon's civil trial by jury provision. Like the reference to *Blakely*, the *Crawford* quote is taken out of context and provides nothing helpful. *See* Jury Project Br. p 10 citing 541 US at 61 (discussing generally the concept of reliability with respect to case law interpreting the confrontation clause). Seeking to inject Article I, section 17, with the imprimatur of *Blakely* and *Crawford*, Jury Project argues: "the same link between procedure and substance applies to any procedural constitutional right." *Id.* No authority is cited for that proposition. There is no support for the idea that because criminal defendants have rights of confrontation and trial by jury, that means that a plaintiff in a civil case has a right to unlimited damages in order to have been said to have had a "trial by jury."

Plaintiff does not think through this analogy. The civil right to trial by jury in Oregon is a guarantee that applies with equal force to plaintiffs and defendants. *Horton*, 359 Or at 247 ("The state constitutional right to a civil jury trial applies equally to plaintiffs and defendants."). This distinguishes it from the rights of criminal defendants where the state does not enjoy reciprocal protection. The state has no right to confrontation or to not incriminate itself. Here, if the civil jury trial right were imbued with authority to protect outcomes, it would apply with equal force to both parties. 359 Or at 247 (explaining a defendant could invoke its right to a jury trial to argue against any expansion of damages beyond

those it could have been held liable for when the Constitution was framed). For example, if damages awards cannot be altered by the legislature to "disfavor" plaintiffs, neither could liability be expanded by the legislature to "disfavor" defendants, just as damages could not be increased by legislative action (i.e., provisions that allow double and treble damages would be invalid). The protection must go both ways because the civil jury trial right is reciprocal.

E. Plaintiff Ignores this Court's Prior Case Law.

Plaintiff argues that *Horton* was wrong and *Lakin* should be reinstated but provides no argument as to how the post-*Lakin* decisions can be reconciled. Indeed, they cannot. Plaintiff tangentially discusses *M.K.F. v. Miramontes,* 352 Or 401, 287 P3d 1045 (2012) and *Molodyn v. Truck Insurance Exchange,* 304 Or 290, 744 P2d 992 (1987), but, as explained in Defendant's Answering Brief, plaintiff reads too much into their holdings. *Molodyn* stands for the proposition that when a plaintiff has a legal claim, it is the jury and not someone else designated by the legislature that must decide the facts of the claim; it did not limit the legislature's authority. *Horton,* 359 Or at 247. *Miramontes* addressed whether a party was entitled to trial by jury, rather than by judge for a particular issue. 352 Or 401, 413-14. "[T]he constitutional right of trial by jury is not to be narrowly construed, and is not limited strictly to those cases in which it had existed before the adoption of the Constitution, but is to be extended to cases of

like nature as they may hereafter arise." 352 Or at 408-09 (quoting *State v. 1920 Studebaker,* 120 Or 254, 263, 251 P 701 (1926)). This court affirmed the reasoning of *Miramontes* even before *Horton*. *See Evergreen West Business Center*, 354 Or 790, 801-802, 323 P3d 250(2014) (footnote omitted); *see also State v. N.R.L.*, 354 Or 222, 225-26, 311 P3d 510 (2013) (resting on same reasoning). Plaintiff fails wholesale to engage the other cases examined in *Horton* that confirm the court's decision.

This court cannot undo *Horton* and reinstate *Lakin* without also overruling all of its other trial by jury cases that correctly explain it is a procedural right of litigants, not a curb on legislative authority. *Jensen*, 334 Or at 422, ("Article I, section 17 is not a source of law that creates or retains a substantive claim or theory of recovery in favor of any party."); *Hughes v. PeaceHealth,* 344 Or 142, 157, 178 P3d 225 n 13 (2008) (Article I, section 17, is not a source of substantive law. "Thus, any right to a jury trial that plaintiff might have under Article I, section 17, cannot confer a right to a jury award of a kind or amount of damages that is contrary to that *statutory* law."); *DeMendoza v. Huffman,* 334 at 446-47, citing *Jensen*, 334 Or at 422 (concluding, "plaintiffs have no underlying 'right to receive an award that reflects the jury's determination of the amount damages ***" and the legislature's "distributive scheme" of ORS 18.540 regarding punitive damages is constitutional).

In light of the significant case law describing Article 1, section 17, as procedural, both pre-*Lakin,* and post-*Lakin,* the court in *Horton* correctly resolved:

> "Given our cases it is difficult to describe *Lakin* as either 'settled' or 'well-established' precedent. This court has distinguished *Lakin* in all of the cases that came after it, with the exception of *Klutschkowski* where the defendant declined to challenge it."
>
> ***
>
> Given the disarray among our Article 1, section 17, cases, we conclude that it is appropriate to reconsider *Lakin's* holding."

Horton, 359 Or at 234. Upon reconsideration, this court explained that neither the text nor the history of the right to trial by jury

> "suggests that it was intended to place a substantive limitation on the legislature's authority to alter or adjust a party's rights and remedies. We accordingly overrule the court's decision in *Lakin." Id. at 250.*

Plaintiff offers no compelling legal basis on which to revisit *Horton's* holding, because there is none.

IV. History of Trial by Jury and Plenary Legislative Authority.

Amicus offers the following analysis demonstrating again that the history of Article I, section 17, supports the court and defendant's positon. The right of trial by jury in civil cases predates Magna Carta and was borrowed by the American colonists from English common law. Early Americans incorporated the right to trial by jury beginning as early as 1606. Hon. Randy J. Holland, *State Jury Trials*

and Federalism: Constitutionalizing Common Law Concepts, 38 VAL U L REV 373, 377-379 (2004) (explaining same).

> "[A]s tensions grew between the American colonies and the King of England, it became apparent that the jury was the ultimate protection of each citizen. [In 1774], the First Continental Congress declared, '[t]hat the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.' Consequently, the Declaration of Independence listed the denial of the benefits of trial by jury as one of the grievances which led to the American Revolution."

Id. at 378 (footnotes omitted).

"The American Jury System is a point of pride in our justice system, in part because it reflects a democratic tradition. Not a single judge or bureaucrat will determine the factual validity of a citizen's lawsuit, but a group of fellow citizens. The jury long has been celebrated as a brake on potential governmental tyranny, because of its democratic, in fact majoritarian, effect on the justice system." Bradley Nicholson, *A Sense of the Oregon Constitution*, Chapter 6, 191 (2011).

Trial by jury does not exist in a vacuum, but within the broader system allocating powers among the three coequal branches of government. In contrast to the federal government, whose power to legislate arises from affirmative grants of limited authority, the Oregon Legislature, like other state legislatures, "has plenary authority to legislate within constitutional limits." *Dennehy v. Dep't of Revenue*, 305 Or 595, 602, 756 P2d 13 (1988); *See* Brief of Amicus OMA/AMA pp 23-24.

Plenary authority of state legislatures is necessary to allow responsiveness to the needs of a changing society:

> "Legislation … looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

Prentis v. Atlantic Coast Line Co., 211 US 210, 226, 29 SCt 67 (1908) (Holmes, J.) (distinguishing legislative from judicial authority).

A critical part of plenary authority is the power to amend common law including abolishing common law claims. *See, e.g., U.S. Fidelity & Guaranty Co. v. Bramwell*, 108 Or 261, 264, 217 P 332 (1923) (common law applies in Oregon except, *inter alia*, "as modified, changed, or repealed by our own statutes"). This principle was effectively ratified by Article XVIII, section 7, of the Oregon Constitution: "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**." (Emphasis added).

William Blackstone likewise explained in *Commentaries on the Law* that "Where the common law and a statute differ, the common law gives place to the statute." Blackstone, *Commentaries* *90. He described the legislature's plenary authority to control the course of common law, whether by restating, expanding, or restricting it:

> "Statutes also are either declaratory of the common law, or remedial of some defects therein. Declaratory, where the old

> custom of the kingdom is almost fallen into disuse or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. . . . Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law, where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into enlarging and restraining statutes."

Id. at *87–88.

Blackstone consistently contended that the civil jury trial was the best and fairest procedure because of the "jury trial's ability to come to the correct judgment, through the community's imprimatur, not because of its preservation of the rights of any individual defendants." Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND L J 397, 419 (2009). The jury trial was valued for its ability to reach the truth with the stamp of the community. Juries provide a democratic check on the judicial process by the community. *Apodaca v. Oregon*, 406 US 404, 410, 92 SCt 1628 (1972) ("the purpose of trial by jury is to prevent oppression by the Government by providing a safeguard against the corrupt or overzealous prosecution and against the complaint, biased, or eccentric judge.") (internal quotation marks omitted).

Given this context, it is no surprise that in 1892 this court considered and rejected as "startling" the notion that Article I, section 10, somehow permanently froze every aspect of a common law remedy that had existed in 1857 against legislative change, stating that such a rule would:

> "tie[] the hands of the legislature so that such liability should endure as long as the constitution shall remain in force. As a proposition of constitutional law, this contention seems startling."

Templeton v. Linn County, 22 Or 313, 316, 29 P 795 (1892). Contrary to any view that the law was immutable, it was recognized at the beginning of statehood that courts must accord legislative acts a strong presumption of constitutionality. *King v. City of Portland*, 2 Or 146, 151-52 (1865) ("It is not the province or duty of courts to declare the acts passed by the legislative assembly to be unconstitutional upon grounds seemingly reasonable; the case must be one in which the court can have no rational doubt."). The presumption of constitutionality for legislative acts endures and is reflected in this court's decision in *Horton*.

Article I, section 17, has been a part of the Oregon constitution since its inception in 1857. Oregon modeled its trial by jury provision on the guarantee in Indiana's constitution and it was adopted without discussion. *Horton*, 359 Or at 243 (stating same). "It follows that the relevant history of Article I, section 17, comes primarily from English practice reflected in Blackstone's *Commentaries*

and the history leading up to and surrounding the adoption of the Seventh Amendment." *Id.* This court has undertaken extensive analysis of the Oregon trial by jury right and the context that informs its meaning today. The court's conclusions in *Horton* are accurate and should not be disturbed.

CONCLUSION

OADC joins in the arguments of Double Press Mfg., Inc. and amici that ORS 31.710(1) is constitutional. Consistent with *Horton*, the court should reject any invitation to revisit the meaning of a civil litigant's right to trial by jury.

DATED this 9th day of August, 2018.

KEATING JONES HUGHES, PC

s/ Hillary A. Taylor`
Hillary A. Taylor, OSB No. 084909
Attorneys for *Amicus Curiae*
Oregon Association of Defense Counsel

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I certify that this memorandum complies with the word count limitation for briefs pursuant to ORAP 5.05(2)(b); the word count is 4849 words. I further certify that this brief is produced in a type font not smaller than 14 point in both text and footnotes pursuant to ORAP 5.05(2)(d)(ii).

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Hillary A. Taylor, OSB No. 084909

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I served the foregoing BRIEF OF AMICUS CURIAE OREGON ASSOCIATION OF DEFENSE COUNSEL ON BEHALF OF DEFENDANT-APPELLANT PETITIONER-CROSS-RESPONDENT ON REVIEW on the following attorneys on the date indicated below:

Janet M. Schroer, OSB No. 813645
HART WAGNER LLP
1000 SW Broadway, Twentieth Floor
Portland, Oregon 97205
Telephone: (503) 222-4499
jms@hartwagner.com

Jonathan W. Henderson, OSB No. 063554
Elizabeth E. Lampson, OSB No. 975185
Davis Rothwell Earle & Xochihua PC
200 SW Market Street, Suite 1800
Portland, Oregon 97201
Telephone: (503) 222-4422
jhenderson@davisrothwell.com
elampson@davisrothwell.com

Of Attorneys for Defendant-Appellant/Petitioner on Review

Mark G. McDougal, OSB No. 890869
Gregory Kafoury, OSB No. 741663
Kafoury & McDougal
411 SW Second Ave., Suite 200
Portland, Oregon 97204
Telephone: (503) 224-2647
mcdougal@kafourymcdougal.com
kafoury@kafourymcdougal.com

Kathryn H. Clarke, OSB No. 791890
PO Box 11960
Portland, Oregon 97211
Telephone: (503) 460-2870
kathrynhclarke@mac.com

Of Attorneys for Plaintiff-Respondent/Respondent on Review

Julie A. Smith, OSB No. 983450
Cosgrave Vergeer Kester LLP
888 SW Fifth Avenue, Suite 500
Portland, OR 97204
Telephone: (503) 323-9000
jsmith@cosgrave.com

Of Attorneys for *Amicus Curiae* McInnis Waste Systems, Inc.

Hillary A. Taylor, OSB No. 084909
Keating Jones Hughes, PC
One SW Columbia, Suite 800
Portland, OR 97258
Telephone: (503) 222-9955
htaylor@keatingjones.com

Of Attorneys for *Amici Curiae* Oregon Medical Association
and American Medical Association

Susan Marmaduke, OSB No. 841458
J. Aaron Landau, OSB No. 094135
Harrang Long Gary Rudnick PC
1001 SW Fifth Avenue, 16th Floor
Portland, OR 97204
Telephone: (503) 242-0000
Susan.marmaduke@harrang.com; aaron.landau@harrang.com

Of Attorneys for *Amicus Curiae* Oregon Liability Reform
Coalition

James S. Coon, OSB No. 771450
Thomas, Coon, Newton & Frost
820 SW 2nd Ave., Suite 200
Portland, OR 97204
Telephone: 503-228-5222
jcoon@tcnf.legal

Nadia Dahab, OSB No. 125630
Stoll Stoll Berne Lokting & Schlachter PC
209 SW Oak St., Suite 500
Portland, OR 97204
Telephone: 503-227-1600
ndahab@stollberne.com

W. Eugene Hallman, OSB No. 741237
Hallman Law Office
P.O. Box 308
Pendleton, OR 97801
Telephone: 541-276-3857
office@hallman.pro

Of Attorneys for *Amicus Curiae* Oregon
Trial Lawyers Association

Travis Eiva, OSB No. 052440
Zemper Eiva Law
101 E. Broadway, Suite 303
Eugene, OR 97401
Telephone: 541-636-7480
travis@zempereiva.com

Of Attorneys for *Amicus Curiae* Oregon Jury Project

by electronic delivery from the Supreme Court e-filing system.

On the same date I filed the foregoing BRIEF OF AMICUS CURIAE OREGON ASSOCIATION OF DEFENSE COUNSEL ON BEHALF OF DEFENDANT-APPELLANT CROSS-RESPONDENT ON REVIEW with the State Court Administrator, Appellate Records Section by means of the appellate court e-filing system.

DATED this 9th day of August, 2018.

KEATING JONES HUGHES, P.C.

s/Hillary A. Taylor

Hillary A. Taylor, OSB No. 084909
htaylor@keatingjones.com; FAX; 503-796-0699
Of Attorneys for *Amicus Curiae* Oregon Association of Defense Counsel