IN THE SUPREME COURT OF THE STATE OF OREGON

EMILY JOHNSON, Plaintiff, v. SCOTT GIBSON; and ROBERT STILLSON, Defendants.	)	United States Court of Appeals for the Ninth Circuit 1335087 SC No. S063188

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL

On Certification from the United States Court of Appeals for the Ninth Circuit

Appeal from the Judgment of the United States District Court
for the District of Oregon Dated January 14, 2013
Honorable John V. Acosta, United States Magistrate Judge

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

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

(Counsel Continued on Next Page)

OCTOBER 2015

Thane W. Tienson, OSB No. 773741
Christine N. Moore, OSB No. 060270
LANDYE BENNETT BLUMSTEIN LLP
1300 SW 5th Avenue, Suite 3500
Portland, Oregon 97201
(503) 224-4100
ttienson@lbblawyers.com
cmoore@lbblawyers.com

Harry Auerbach, OSB No. 831830
City Attorney's Office
1221 SW 5th Avenue, Ste 430
Portland, Oregon 97204
(503)823-4047
harry.auerbach@portlandoregon.gov

Of Attorneys for Defendants-Appellees

Of Attorneys for Plaintiff-Appellant

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

Shenoa L. Payne, OSB No. 084392
HAGLUND, KELLEY LLP
200 S.W. Market St., Ste. 1777
Portland, Oregon 97201
(503) 225-0777
spayne@hk-law.com

Of Attorneys for Amicus Curiae Oregon Trial Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES AND STATUTES

CONSTITUTIONAL PROVISIONS

OTHER

I. INTEREST OF AMICUS

The OADC is a nonprofit organization for defense-oriented civil litigators whose goals are to provide a unified voice for defense concerns in Oregon, improve the civil justice system, offer networking opportunities and sponsor continuing legal education. The OADC requests leave to appear amicus in this matter to address the second question certified to this court by the Ninth Circuit Court of Appeals.

This certified question raises significant issues of interpretation of provisions in the Oregon Constitution. OADC Amicus believes additional briefing would benefit the court in its consideration of the petition.

II. INTRODUCTION

This court has long struggled to devise a coherent reading of the "remedy clause" of Article I, section 10. In 2000, in his concurring opinion in *Brewer v. Dept. of Fish and Wildlife*, 167 Or App 173, 2 P3d 418 (2000), Justice Landau—then Judge Landau—laid out the confusion in the cases addressing Article 1, section 10. 167 Or App at 191-192. One year later, this court attempted to set forth a new and coherent reading of the clause in *Smothers v. Gresham Transfer, Inc*., 332 Or 83, 23 P3d 333 (2001). In *Smothers*, after setting forth an extensive analysis of the history surrounding the remedy clause, the court set forth a two-part test for determining whether a remedy was protected by Article I, section 10: (1) Was there a cause of action for the alleged injury when the Oregon Constitution was drafted in 1857? and (2) if the answer to that question is yes, and if the legislature has abolished the

common-law claim, has the legislature provided a constitutionally adequate substitute remedy for the common-law cause of action. 332 Or at 124.

The 50-plus page analysis in *Smothers* notwithstanding, as pointed out in Justice Landau's concurring opinion in *Klutschkowski v. PeaceHealth*, 354 Or 150, 311 P3d 461 (2013), *Smothers* did not cure the confusion and inconsistencies in this court's decisions. 354 Or at 190. Indeed, Justice Landau pointed out that the court "appears to have trouble even identifying—and agreeing about—what *Smothers* held," and cited *Howell v. Boyle*, 353 Or 359, 298 P3d 1 (2013), as an example of a recent, sharply-divided opinion. 354 Or at 191. In *Howell*, the majority held that $200,000 was a substantial remedy, while the dissent argued that "substantial remedy," a test previously applied by the court, was not the correct test for determining whether the legislature had provided an adequate remedy. *Id*. at 365-381, 389-407.

Justice Landau further pointed out that in *Lawson v. Hoke*, 339 Or 253, 119 P3d 210 (2005), this court used the term "absolute" as it relates to common law rights, quite differently than it had in *Smothers*. 354 Or at 191. OADC would add that in *Klutschkowski* itself, the court departed from its two-part *Smothers* analysis by deciding that the plaintiff would have had a claim in 1857, then failing to address part two of the analysis. 354 Or at 176. Thus, the confusion continues.

Justice Landau concluded his *Klutschkowski* concurrence, by stating his interest in having "the matter served up for proper argument and re-examination." 354 Or at 194. This brief responds that invitation. The bench and bar require a clear reading of what Justice Landau has called the "so-called remedy clause." *Brewer*, 167 Or App at 191. This court needs to present a reading of the clause that does not require the court to "parse through the existing case law to articulate increasingly more clever distinctions." *Id*. at 192. Such an approach makes it extremely difficult for the bench and bar to brief and apply the law in remedy-clause challenge cases, much less predict future outcomes and plan their prospective business affairs accordingly.

As argued below, the correct reading of the remedy clause is that it does not guarantee a particular remedy, but, instead, guarantees the right of all citizens to equal access to the courts. This reading is in accord with the wording of the clause, the cases and historical circumstances surrounding the adoption of the Oregon Constitution, and the in-depth research provided by Justice Landau in his *Brewer* and *Klutschkowski* concurrences.

Reconsideration of *Smothers* is appropriate, not only because Justice Landau has invited briefing on the matter, but also because this challenge meets the requirements for overruling precedent. In *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 11 P3d 228 (2000), this court expressed its willingness to correct past errors because it has the ultimate responsibility for construing Oregon's

constitution, and "if we err, no other reviewing body can correct that error." *Id*. at 53. The court explained that it was:

> "willing to reconsider a previous ruling under the Oregon Constitution whenever a party presents to us a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question. We will give particular attention to arguments that either present new information as to the meaning of the constitutional provision at issue or that demonstrate some failure on the part of this court at the time of the earlier decision to follow its usual paradigm for considering and construing the meaning of the provision in question."

Id. at 54 (emphasis added).

In *State v. Ciancanelli*, 339 Or 282, 291, 121 P3d 613 (2005), this court added the requirement that the party challenging the prior decision must demonstrate that, factoring in the passage of time and the precedential use of the challenged rule, overturning the rule will not unduly cloud or complicate the law.

As argued below, the *Smothers* court failed to follow it previous paradigm for construing the remedy clause, and incorrectly read the history and cases surrounding adoption of the Oregon Constitution, as well as more contemporary case law. In addition, OADC will cite the court to cases not considered by the *Smothers* court that support OADC's reading of the clause, and will present the argument, not considered by the *Smothers* court, that Article I, section 10 must be read in the context of the rest of the Oregon Constitution. Finally, *Smothers* is only 14-years-old and, as set forth above, it

itself made the already cloudy and unduly complicated remedy clause law even more so.

III. PROPOSED RULE OF LAW.

The remedy clause of Article I, section 10 of the Oregon Constitution does not guarantee a particular remedy, but instead guarantees that all persons will have equal access to an impartial court where they may seek whatever remedy the law may provide.

IV. SUMMARY OF ARGUMENT.

OADC asks the court to rule that the remedy-by-due-course-of-law clause in Article I, section 10 of the Oregon Constitution is an open-courts clause, as ably argued by Justice Landau in his *Brewer* and *Klutschkowski* concurrences. That the framers intend to guaranteed equal and open access to the courts, and did not intend to guarantee particular remedies, is supported by the language of Article I, section 10, which is directed at the courts, not the legislature.

The conclusion that the remedy-by-due-course-of-law clause was not intended to guarantee an unchanging remedy, or any remedy at all, is also supported by the historical circumstances surrounding its adoption. As thoroughly discussed by Justice Landau in *Brewe*r and *Klutschkowski*, the writings of early commentators relied upon in *Smothers*, in fact, support the conclusion that Article I, section 10 was directed at excesses by the courts, not

at curbing the power of the legislature. In addition early acts of the territorial government demonstrate the framers' understanding that the common law was subject to change. Further, pre-1857 cases from around the country support the conclusion that early settlers understood that legislatures were free to change the common law.

In addition, the *Smothers* court erred in disavowing *Perozzi v. Ganiere*, 149 Or 330, 40 P2d 1009 (1935) and cases following it, which had held that Article I, section 10 was not intended to adopt and preserve the remedies for all injuries to person or property provided at common law. This disavowal was based upon the *Smothers* court's incorrect reading of *Perozzi* as relying upon a mistaken correlation between the federal constitution's equal protection clause and Article I, section 10. In fact the *Perozzi* holding was based upon the specific history surrounding the adoption of the Oregon Constitution.

Article I, section 10 must be viewed in context with other sections of the constitution, and the court must read Article I, section 10 in a fashion that gives effect to all sections of the constitution. When read in context with Article I, section 20, which permits the legislature to grant immunities as long as they are granted on the same terms to all citizens, and Article XVIII, section 7, which allows for the altering or repeal of all laws in force when the constitution took effect, the "remedy-by-due-course-law" clause cannot be read as guaranteeing a particular remedy or any remedy at all.

Finally, in the alternative, in the event that the court does not agree that the remedy-by-due-course of law clause was intended to guarantee open access to the courts to preserve whatever remedy is available, OADC joins in the City's argument that this clause preserves only those remedies that are vested. See Answering Br, pp. 33-43.

V. ARGUMENT

A. The Methodology

The intent of the drafters of a constitutional provision is to be determined through the provision's wording, the case law surrounding it, and the historical circumstances that led to its creation. *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). In addition, "[t]he context of a constitutional provision includes other provisions in the constitution that were adopted at the same time." *Coultas v. City of Sutherlin,* 318 Or 584, 590, 871 P2d 465 (1994); *State v. Cochran*, 55 Or 157, 179, 105 P 884 (1909).

Further, the court's methodology must incorporate those considerations inherent in the Constitution's separation of powers, which are peculiarly applicable when the judicial power to declare laws unconstitutional confronts

the legislative power to enact or repeal laws, Article IV, section 1(1).[1] This court articulated its task in such a case over a century ago:

> " * * * [I]it must also be kept in mind that the constitution of a state, unlike that of our national organic law, is one of limitation, and not a grant, of powers, and that <u>any act adopted by the legislative department of the State, not prohibited by its fundamental laws, must be held valid; and this inhibition must expressly or impliedly be made to appear beyond a reasonable doubt</u>."

Cochran, 55 Or at 179 (emphasis added).

B. For the reasons set forth in Justice Landau's concurring opinions in *Brewer* and *Klutschkowski*, the court should rule that the "remedy clause" does not guarantee a particular remedy or any remedy.

In *Brewer*, then-Judge Landau laid out a persuasive argument for "the remedy clause" in fact being an "open-courts clause," that did not guarantee a remedy but instead guaranteed everyone '*access* to the courts in order to seek whatever remedy the law may provide." 167 Or App at 192-198 (italics in original). Although he stated in *Klutschkowski* that he was "less interested in a particular interpretation of the clause than * * * in having the matter served up for proper argument and reexamination," 354 Or at 194, Justice Landau nonetheless set forth a comprehensive review of, and persuasive argument

---

[1] Article III, section 1 provides: "The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

against, the historical conclusions relied upon by the *Smothers* court, 354 Or at 179-190, and, citing *Brewer*, stated his inclination "to agree with what appears to be the majority of other state courts that have addressed the issue * * * [and which have concluded that] the target is the accessibility of the courts by all, without discrimination." *Id*. at 193.

In light of brief length limitations, OADC adopts Justice Landau's arguments in their entirety and sets forth the two concurrences in an appendix to this brief.

C. The *Smothers*' analysis is not supported by the language of Article I section 10.

Article I, section 10 provides: "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

As pointed out in the *Brewer* concurrence, this section is directed at courts, not at the legislature, and, as evidenced by other sections of the Oregon Constitution such as Article I, sections 8, 20, 26, 29, and 30, the framers knew how to direct limitations to the legislature. 167 Or App at 193-94. Each of the cited sections of the constitution contains the words "no law shall be passed." No such language appears in Article 1, section 10.

As further pointed out by then-Judge Landau, the section sets forth specific limits on the powers of the courts, requiring that they administer justice "openly and without purchase, completely and without delay," and requires that the courts be open to every man to obtain a remedy by due course of law. 167 Or App at 194. He concluded:

> "[T]he focus of Article 1, section 10 cannot be mistaken. It does not address the power of the legislature to enact laws generally, much less the power of the legislature to eliminate particular wrongs. Nor does it guarantee particular remedies for wrongs committed. It provides that every person shall find in the courts 'remedy by due course of law.'"

Id. OADC agrees with Justice Landau that the remedy clause means that "every man shall have whatever remedy the 'due course of law' provides." *Id*. at 92-193. In other words, Article 1, section 10, "guarantees *access*, not substantive rights." *Id*. at 194 (italics in original). It is an open-courts provision, not the guarantee of a remedy.[2]

---

[2] Although *Smothers* concludes that "due course of law" is meant to be a restraint on the legislature, 332 Or at 109-110, the "remedy clause" must be read in conjunction with Article XVIII, section 7, which provides: "All laws in force in the Territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered or repealed." (emphasis added). In light of this language, Article I, section 10 cannot be read as forbidding the legislature from altering or abolishing remedies. See further discussion at section G.2 below.

D. The historical context for the remedy clause does not support the *Smothers* court's analysis.

Justice Landau's argument in *Brewer* and *Klutschkowski* that Article I, section 10 guarantees free access to the courts and not a particular remedy, or any remedy at all, is supported by his historical analyses in those cases. *Brewer*, 167 Or App at 192-198; *Klutschkowski*, 354 Or 179-189. OADC relies upon Justice Landau's analysis, and draws particular attention to his refutation of the *Smothers* historical analysis. 354 Or 179-184.

OADC offers the following additional historical analysis.

An 1844 Act of the Oregon Legislature provided:

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

Oregon Laws, Article III, section 1 (1843-49) (emphasis added). It is clear from the words emphasized above that the earliest Oregon settlers understood that the "common law" was subject to modification by statute, and that such modifications were part of "the law of the land."

In 1848, in Section 4 of the Act to Establish the Territorial Government of Oregon, the United States Congress provided: "That the legislative power

and authority of said territory, shall be vested in a legislative assembly." Section 6 of that Act provided "[t]hat the legislative power of the territory, shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." Section 6 contained a list of prohibited subjects of legislation, which did not include any reference to alterations of the common law rights and remedies of citizens or residents of the territory. To the contrary, Section 14 of the Act provided that "the existing laws now in force in the territory of Oregon, under the authority of the provisional government established by the people thereof, shall continue to be valid and operative therein, so far as the same be not incompatible with the constitution of the United States, and the principles and provisions of this act; subject, nevertheless, to be altered, modified, or repealed, by the legislative assembly of the said territory of Oregon." (emphasis added).

Based upon the above, when the Constitutional Convention of 1857 proposed, and the voters of Oregon approved, Article IV, section 1, which vested the "Legislative authority of the State * * * in the Legislative Assembly, which shall consist of a Senate, and House of Representatives," it must have understood that "Legislative authority" to include the power to alter or modify the common law. In fact, that power is reflected in Article XVIII, section 7: "All laws in force in the Territory of Oregon when this Constitution takes

effect, and consistent therewith, shall continue in force until altered, or repealed." (emphasis added).

Thus, the framers of the Oregon Constitution would have understood the full extent of the legislative power, notwithstanding Article I, section 10, to alter, amend or abolish remedies. In light of this history and the history set forth in the Landau concurrences, *Smothers* was wrongly decided, and this court should overrule it.

E. Historical case law does not support the *Smothers* court's analysis.

1. Cases pre-dating the Oregon Constitution

The *Smother's* court, in its analysis, noted that the Oregon Constitution was based upon the Indiana Constitution, 332 Or at 113, and declared that it "had found no cases construing the Indiana remedy clause before the Oregon Constitution was adopted." 332 Or at 108. There is, in fact, such a case.

In *Madison and Indianapolis Railroad Co. v. Whiteneck*, 8 Ind 217 (1856), the Indiana Supreme Court construed an Indiana statute regarding the liability of railroads for injury to or destruction of animals. Section 3 of the statute provided that if the railroad appealed a judgment for the plaintiff, but failed to obtain a 20-percent reduction in the judgment, "the appellate court shall give judgment for double the amount of damages assessed in such appellate court, and a docket fee of 5 dollars." 8 Ind at 218-19. The court held

that this section was unconstitutional. In the principal opinion, Justice Perkins wrote that Section 3 was unconstitutional as a special law affecting the practice of law, in derogation of Article IV, section 22 of the Indiana Constitution of 1851. *Id*. at 237. Justice Gookins dissented from that reasoning but concurred in the disposition.

Justice Gookins decided the case pursuant to Indiana's equivalent to Oregon's Article I, section 10, which provided:

> "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

8 Ind 217.

He concluded that the statutory section in question was unconstitutional because "it was designed to keep parties out of court who have merits." *Id*. In other words, he treated the Indiana provision as an open-courts provision. That he viewed it as such, and not as a provision guaranteeing a remedy is made clear by his statement: "I do not doubt but that the legislature has power * * * to fix or limit the extent of a recovery in personal actions, as in [citing an Indiana statute]."

Thus, there is an Indiana case predating the Oregon constitution that treats the Indiana equivalent to Article I, section 10 as an open-courts provision,

and affirmatively states that the legislature has power to fix or limit the extent of a recovery in a personal injury action.

Pre-1857 cases from other jurisdictions similarly upheld the authority of legislatures prospectively to change or eliminate remedies. In *The Vicksburg and Jackson Railroad Co. v. Patton*, 2 George (31 Miss) 156, 185, 66 Am Dec 552 (Miss 1856), the High Court of Errors and Appeals of Mississippi held "that the common law of England is the law of this State only so far as it is adapted to our institutions and the circumstances of the people, and is not repealed by statutes, or varied by usages which, by long custom, have superseded it." (emphasis added). The court further observed: "If there could be a reasonable doubt upon this point, it must be removed by the provisions of our statutes. These provisions are utterly irreconcilable with the rule of the common law, and are made with reference to the contrary policy which has existed here." 2 George (31 Miss) at 186-87. Thus, at the time of the adoption of the Oregon Constitution, the Mississippi court also recognized the legislative authority to alter common law duties and liabilities.

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

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

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

Id. at 376-77.

Smothers cited *Gooch* in support of the proposition that the legislature may alter remedies so long as the alterations do not infringe on absolute, or vested, rights. 332 Or at 109. The case, however, says nothing about absolute rights, and the court's reliance on *Gooch* for this principle is misplaced

In *Erie & North-East Railroad v. Casey*, 1 Grant 274, 26 Pa 287, 304 (1856), the Pennsylvania Supreme Court stated: "To change the common law, and repeal earlier statutes, is the main, if not the only business which the legislature has to perform." The court added: "When we are considering

whether a statute ought to be obeyed or disregarded, it is very unsatisfactory to be informed how the law stood a hundred years before the statute was passed." *Id.*

F. The *Smothers* court departed from previously accepted remedy-clause analysis.

As set forth below, the history of "remedy-clause" analysis is a history of shifting jurisprudence, culminating with a final shift in *Smothers*.

1. Early Oregon Decisions

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

2. *Mattson v. Astoria* Incorrectly Reads Article I, section 10 as a Narrow Remedies Clause.

As set forth above, the history surrounding the adoption of the Oregon Constitution demonstrates that remedy-by-due-course-of-law was intended to guarantee open access to the courts. In *Mattson v. Astoria*, 39 Or 577, 65 P 1066 (1901), this court invalidated a provision of Astoria's charter exempting the city and the members of the council from liability for failure to keep the

streets in repair, holding for the first time that the "remedy clause" was "intended to preserve the common-law right of action for injury to person or property, and while the legislature may change the remedy or the form of procedure, attach conditions precedent to its exercise, and perhaps abolish old and substitute new remedies, it cannot deny a remedy altogether." 39 Or at 580 (citations omitted).

In *Mattson*, the court did not employ the correct methodology—it did not even identify any methodology—for discerning the meaning of the constitutional text, nor did it consider Article I, section, 10 in the context of other sections of the constitution. See section G below. None of the cases cited by the court in *Mattson* in support of its conclusion actually held that the legislature could not grant immunities or do away with remedies. See *Landis v. Campbell*, 79 Mo 433, 437-38, 49 Am Rep 239 (1883) (Missouri's remedy clause did not guarantee access to "review the decisions of ecclesiastical judicatories in matters properly within their province under the constitution and laws or regulations of the church"); *Flanders v. Town of Merrimack*, 48 Wis 567, 4 NW 741 (1880) (Wisconsin's remedy clause did not preclude the legislature from staying the invalidation of a tax, pending its reassessment by the proper authorities); *McClain v. Williams*, 10 SD 332, 73 NW 72, 74 (1897) (South Dakota's remedy clause did not preclude the Legislature from limiting appeals to a defined class of cases); *Reining v. City of Buffalo*, 102 NY 308, 6

NE 792 (1886) (Charter could require presentment of a claim to the city council as a precondition of suit). Further, of course, all of these cases were decided after the Oregon Constitution was adopted.

Had this court, in *Mattson*, reviewed the history of the remedy clause, and viewed this section of the constitution in light of other sections of the constitution (section G below), it would have found that Article I, section 10 does not preserve particular remedies and would have concluded that the clause in question is an open-courts clause.

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

3. The Court Correctly Changes Tack in *Perozzi v. Ganeire.*

In *Perozzi v. Ganiere*, 149 Or 330, 40 P2d 1009 (1935), this court upheld the constitutionality of Oregon's guest passenger statute, which denied recovery by a non-paying passenger in an automobile against the driver, unless the accident was the result of the driver's intentional misconduct, gross negligence, intoxication or recklessness. The court rejected the plaintiff's contention "that in all instances in which recovery could be had at common law for injuries to person or property such right of recovery has, by article I, § 10, been preserved and that it is not within the province of the legislature to take it away or in any way limit it." 149 Or at 345. Rather, the court explained, "[t]he right to alter all laws in force in the territory of Oregon when the constitution was adopted, whether the same were of common-law or legislative origin, was reserved to the people of the state by Article XVIII, § 7." 149 Or at 346. The court further stated: "Had it been the intention of the framers of the constitution to adopt and preserve the remedy for all injuries to person or property which the common law afforded, they undoubtedly would have signified that intention by exact and specific wording, rather than the language used in Article I, § 10." *Id*.

The court pointed to the "care taken by the constitutional convention to use definite and unequivocal terms concerning the preservation of certain rights, [in] the prohibition against the passage of *ex post facto* laws or those impairing

the obligation of contracts," and held: "The common law is not a fixed and changeless code for the government of human conduct. Its applicability depends to a large extent upon existing conditions and circumstances at any given time." *Id*. at 347-348. The court pointed to "many instances in which under the common law as administered in England recovery was allowed for injuries suffered, but is denied in this country because of changed conditions," *Id*., and concluded: "There was and is no constitutional inhibition against the enactment of our guest statute. It was clearly within the police power of the state for the legislature to attempt to correct what it considered a growing evil." *Id*. at 350.[3] Unlike *Mattson*, *Perozzi* was in line with the early cases cited above and the history surrounding the passage of the remedy clause.

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

> "Article I, § 10, Oregon Constitution, was not intended to give anyone a vested right in the law either statutory or common; nor was it intended to render the law static. Notwithstanding similar constitutional provisions in other states, the courts have sustained statutes which eliminated the husband's common law liability for the torts of his wife and which placed the wife upon an economic level with her husband. They have likewise sustained statutes which have abolished actions for alienation of

[3] OADC recognizes that this court disavowed *Perozzi* in *Smothers*, 332 Or at 117-118. For the reasons explained in section 4 below, the court's rejection of *Perozzi* was based on a false premise and should be re-examined.

> affections, actions for breach of promise, etc. The legislature cannot, however, abolish a remedy and at the same time recognize the existence of a right: *Stewart v. Houk*, 127 Or 589, 271 P 893, 61 ALR 1236 [1928, invalidating Oregon's 1927 guest passenger statute under Article I, section 20, relying on the line of cases emanating from *Mattson v. City of Astoria*].

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

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

> enactment of the California retraction statute (Civil Code § 48a) was the result of a legislative determination and choice based upon the resolution of considerations of certain matters of policy which were within the province of the legislature. The statutory scheme enacted in ORS 30.160-30.170 is the result of similar considerations. Unless it is clear that the legislature exceeded the constitutional bounds within which it has the power to exercise its policy making functions we must hold this legislative choice to be valid."

Id. at 410 (footnote omitted):

The court held that "if the legislature cannot modify the fault principle in defamation cases it cannot modify it in other areas of tort liability. To require such a conclusion would impose a stricture upon our law which could not have been contemplated in the adoption of our constitution." 228 Or at 412. [4]

4. *Smothers* Incorrectly Changes Course.

In *Smothers*, this court held:

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

332 Or at 86.

---

[4] Relying upon its incorrect reading of *Perozzi*. *see* section 4 below, the *Smothers* court also incorrectly disavowed *Noonan* and *Holden*.

In *Smothers*, this court disavowed over sixty-five years of case law, beginning with *Perozzi*, which had held "that the legislature can abolish or alter absolute rights respecting person, property, or reputation that existed when the Oregon Constitution was drafted without violating the remedy clause in Article I, section 10." 332 Or at 119, 123.

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

Perozzi, however, was merely following the law this court had previously established when it held that the legislature could alter the common law. The *Perozzi* court's holding was not, as asserted by the *Smothers* court, dependent upon its citation of similar authority under the federal constitution in *Silver v.*

Silver, 280 US 117 (1929). Rather, the court carefully considered the specific history of the adoption of the Oregon Constitution:

> "The right to alter all laws in force in the territory of Oregon when the constitution was adopted, whether the same were of common-law or legislative origin, was reserved to the people of the state by article XVIII, § 7, *supra*. Indeed, that section of our organic act which adopted the common law of England clearly contemplated future changes in the common law, as evidenced in the condition expressed that the common law should continue in force "*until altered or repealed.*" Moreover, had it been the intention of the framers of the constitution to adopt and preserve the remedy for all injuries to person or property which the common law afforded, they undoubtedly would have signified that intention by exact and specific wording, rather than the language used in article I, § 10. As indicative of the care taken by the constitutional convention to use definite and unequivocal terms concerning the preservation of certain rights, the prohibition against the passage of *ex post facto* laws or those impairing the obligation of contracts may be cited."

Perozzi, 149 Or at 346-47 (italics in original; underlining added).

The United States Supreme Court's construction of the federal constitution in *Silver* was not the basis for the holdings in *Perozzi, Noonan* and *Holden*. Instead, *Perozzi* cited *Silver* for what it is—a similar holding by the United States Supreme Court under a similar, but not identical, constitutional provision. The basis of this court's holdings in *Perozzi*, *Noonan*, and *Holden* was the historical context of the adoption of the Oregon Constitution, and its interpretation by Oregon courts, which this court in those

cases found to be consistent with similar holdings by other courts, including the United States Supreme Court. The *Smothers* court erred in disavowing these cases.

G. When read in context with other sections of the Oregon Constitution, the remedy clause cannot be given the interpretation adopted by the *Smothers* court.

As set forth above, the context of a constitutional provision includes other provisions in the constitution that were adopted at the same time. *Coultas*, 318 Or at 590. When considered along with Article I, section 20 and Article XVIII, section 7, of the constitution, Article I, section 10 cannot be given the reading adopted by the *Smothers* court.

1. Article I, section 20.

Article I, section 20 provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." As the Legislature is prohibited only from granting unequal privileges and immunities, it necessarily retains the power to grant citizens or classes of citizens privileges or immunities applicable to all on the same terms.

Johnson's and Walker's English Dictionaries 439 (Boston Stereotype Edition, 1830) defined "immunity" as "[d]ischarge from any obligation," or "[p]rivilege ; exemption from onerous duties." That same authority defined the noun "privilege" as "[p]eculiar advantage" or "[i]mmunity; right not universal."

Id. at 725. The verb "privilege" it defined as "[t]o invest with rights or immunities; to grant a privilege," or "[t]o exempt from censure or danger," or "to exempt from paying tax or impost." *Id*.

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

None of this court's Article I, section 10 cases, from *Mattson* to *Smothers*, has analyzed Article I, section 10, in the context of Article I, section 20. The reservation of the Legislature's authority to grant privileges and immunities, so long as it does so on an equal basis, provides textual confirmation that the framers did not intend Article I, section 10, to prohibit the Legislature from granting individual immunity to government employees.

Whatever the framers' understanding of Article I, section 10 might have been—assuming there was any contemporary consensus as to what that was—this court still must reconcile it with the plain text of Article I, section 20, and that text plainly contemplates that the legislature may, in fact, grant "privileges and immunities," as long as it does so "upon the same terms, * * * equally * * * to all citizens."

Article I, Section 20 preserves the legislature's authority to exempt individuals from personal liability, so long as it does so in a way that treats all similarly situated individuals the same. Thus, Article I, section 10 cannot be read as guaranteeing specific remedies; it must, instead, be read as an open-courts clause, guaranteeing equal access to the courts.

2. Article XVIII, Section 7

Article I, Section 10 does not expressly protect any particular form or extent of a remedy. Rather, it guarantees a "remedy by due course of law." To understand what "due course of law" encompasses, Article I, Section 10 must be read in conjunction with Article XVIII, Section 7: "All laws in force in the Territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered or repealed."

Article XVIII, section 7 restates the essence of the provision of the 1844 Organic Law, stating: "The common law of England and principles of equity, not modified by the statutes of Iowa or of this government, and not incompatible with its principles, shall constitute a part of the law of this land." (emphasis added).

As the court stated in *Perozzi,* "The right to alter all laws in force in the territory of Oregon when the constitution was adopted, whether the same were of common-law or legislative origin, was reserved to the people of the state by Article XVIII, § 7." 149 Or at 346. "[H]ad it been the intention of the framers

of the Constitution to adopt and preserve the remedy for all injuries to person or property which the common law afforded, they undoubtedly would have signified this intention by exact and specific wording, rather than the language used in [A]rticle I, § 10." 149 Or at 346.[5]

This court must interpret and apply Article I, section 10, in a manner that preserves the effectiveness of Article I, section 20 and Article XVIII, section 7. "When two constructions are possible, one of which raises a conflict or takes away the meaning of a section, sentence, phrase, or word, and the other does not, the latter construction must be adopted, or the interpretation which harmonizes the constitution as a whole must prevail." *Cochran*, 55 Or at 179. If *Smothers* accurately captured an implied original understanding that Article I, section 10 prohibited the Legislature from granting immunities, the plain text of Article I, section 20 demonstrates that there was, nonetheless, an express original acknowledgment that the Legislature could grant immunities. Such a reading of the Constitution would mean that the framers created a document with inherently inconsistent provisions regarding the authority of the Legislature, contrary to the rule of *Cochran*.

---

[5] This view of the mutability of common law remedies is supported by pre-statehood cases from other jurisdictions, such as *The Vicksburg and Jackson Railroad Co. v. Patton, supra*, pp 13-16.

Reading Article I, section 10 as an open-courts clause allows it to be read consistently with these other sections of the constitution.

H. The *Smothers* court failed to account for the presumption of constitutionality.

In its cases addressing the constitutionality of legislative limits on personal injury actions under Article I, section 10, particularly in *Clarke v. OHSU*, 343 Or 581, 175 P3d 419 (2007) and *Smothers*, as well as *Mattson*, this court failed to give the challenged legislation the strong presumption of constitutionality which it was due. *Cochran*, 55 Or at 179. Had it done so, and in light of the arguments above, it would have had to conclude that Article I, section 10 does not guarantee particular remedies or any remedy, but is instead an open-courts clause that guarantees accessibility to the courts without discrimination.[6]

VI. IN THE ALTERNATIVE, THE COURT SHOULD ACCEPT THE CITY'S READING OF THE CLAUSE AS APPLYING TO VESTED RIGHTS ONLY.

In the alternative, in the event that the court does not agree that the remedy-by-due-course of law clause was intended to guarantee open access to the courts to preserve whatever remedy is available, OADC joins in the City's

---

[6] If the court does not agree that the remedy-by-due-course of law clause was intended to guarantee open access to the courts to preserve whatever remedy is available, then, in the alternative, OADC supports the City's argument that this clause preserves only those remedies that are vested. See Answering Br, pp. 34-43.

argument that this clause preserves only those remedies that are vested. See Answering Br, pp. 33-43.

VII. CONCLUSION

For all of the above reasons, OADC respectfully urges the court to overturn Smothers and all other cases holding that Article I, section 10 guarantees a remedy, and to hold that this section of the Oregon Constitution guarantees no more than accessibility to the courts without discrimination.

Respectfully submitted this 6th day of October 2015.

HART WAGNER LLP

By: */s/ Janet M. Schroer*
Janet M. Schroer, OSB No. 813645
Of Attorneys for *Amicus Curiae*
OADC

CERTIFICATE OF FILING AND SERVICE

I certify that on the 6th day of October 2015, I filed the original **BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL** with the State Court Administrator by Electronic Filing.

I further certify that on the same day, I caused the foregoing to be served upon the following counsel of record by electronic filing:

Thane W Tienson
Landye Bennett Blumstein LLP
1300 SW 5th Ave Ste 3500
Portland OR 97201

Kathryn H Clarke
PO Box 11960
Portland OR 97211

Christine N Moore
Landye Bennett Blumstein LLP
1300 SW 5th Ave Ste 3500
Portland OR 97201

Harry Michael Auerbach
Portland Ofc of City Attorney
1221 SW 4th Ave Ste 430
Portland OR 97204

Shenoa L Payne
Haglund Kelley LLP
200 SW Market St Ste 1777
Portland OR 97201

DATED this 6th day of October 2015

HART WAGNER, LLP

By: /s/ *Janet M. Schroer*

Janet M. Schroer, OSB No. 813645
Of Attorneys for *Amicus Curiae*
OADC

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 7, 435.

Type Size

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 footnotes as required by ORAP 5.05(4)(f)

DATED the 6th day of October 2015

HART WAGNER. LLP

By: /s/ *Janet M. Schroer*
Janet M. Schroer, OSB No. 813645
Of Attorneys for *Amicus Curiae*
OADC