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**IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH**

LORI HORTON, as Guardian Ad Litem and  
Conservator of and for Tyson Horton, a Minor,

Plaintiff,

vs.

OREGON HEALTH & SCIENCE UNIVERSITY,  
a Public Corporation; MARVIN HARRISON,  
M.D.,

Defendants.

CASE NO. 1108-11209

**MEMORANDUM: IN SUPPORT OF  
DEFENDANTS' MOTION TO ENTER  
LIMITED JUDGMENT PURSUANT  
TO OTCA LIMITS; IN SUPPORT OF  
DEFENDANTS' PROPOSED  
LIMITED JUDGMENT; AND IN  
RESPONSE TO PLAINTIFFS'  
PROPOSED LIMITED JUDGMENT**

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TO OTCA LIMITS; ; IN SUPPORT OF DEFENDANTS'  
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1 This Memorandum is submitted in support of Defendants' Motion to Enter  
2 Limited Judgment Pursuant to OTCA Limits; in support of Defendants' Proposed  
3 Limited Judgment; and in response to Plaintiffs' Proposed Limited Judgment.  
4

5 Limited Judgment should be entered against Defendant Oregon Health &  
6 Science University ("OHSU") and Defendant Dr. Harrison in the total amount of  
7 \$3,000,000.00 (three million dollars), pursuant to ORS 30.271. In addition, the  
8 Limited Judgment should recite that an advance payment has been made by  
9 Defendant OHSU in the amount of three million dollars, fully satisfying the  
10 amount of the judgment.  
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13 **I. INTRODUCTION**

14 OHSU is a state entity, which has waived its sovereign immunity to be sued  
15 in an amount up to \$3 million for the claims in this case pursuant to ORS 30.271,  
16 and cannot be liable in excess of that amount. *Clarke v. OHSU*, 343 Or 581, 594-  
17 600, 175 P3d 418 (2007). The ORS 30.271 damages limitations in the Oregon  
18 Tort Claims Act (ORS 30.260-30.300, "OTCA"), apply equally to physicians  
19 employed by OHSU, ORS 30.267, including Dr. Harrison whose conduct in the  
20 course and scope of his employment was pleaded by Plaintiff and whose  
21 responsibility was admitted by Defendants.  
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1 Plaintiff nonetheless asserts that three separate provisions of the Oregon  
2 Constitution render the statutory cap of \$3 million on damages unconstitutional  
3 with respect to the jury's verdict against Dr. Harrison, such that a Limited  
4 Judgment must be entered for the full amount of the jury's verdict of  
5 \$12,071,190.38. Those provisions are Article I, section 10 (the "Remedy Clause");  
6 Article I, section 17 (right to jury trial); and Article VII (Amended), section 3  
7 (prohibition on courts reexamining facts found by a jury).<sup>1</sup>  
8

9  
10 **A. Oregon Law In 1857 Immunized Defendants: The Remedy Clause**  
11 **And Right To Jury Trial Thus Do Not Apply**

12 The threshold issue for application both of the Remedy Clause under Article  
13 I, section 10, and the right to jury trial under Article I, section 17 in a case  
14 involving the adequacy of an alternative legislative remedy (including the OTCA),  
15 is whether there was a common law right in Oregon to sue a state-employed  
16 physician for negligent patient care when the Oregon Constitution was adopted in  
17 1857. *Smothers v. Gresham Transfer, Inc.* 332 Or 83, 124, 23 P3d 333 (2001)  
18 (Remedy Clause); *Hughes v. PeaceHealth*, 344 Or 142, 156, 178 P3d 225 (2008)  
19 (right to jury trial ).  
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24 <sup>1</sup> Plaintiff's reliance on Article VII (Amended), section 3 is meritless, lacking any  
25 support in case law, history or logic. It is addressed at p. 60, *infra*.

1 Plaintiff in this case cannot demonstrate that a right to sue Dr. Harrison  
2 would have existed in 1857, principally because the common law immunity for  
3 discretionary acts by government employees and officials -- broadly defined at that  
4 time to include acts that require any exercise of judgment and which excluded only  
5 ministerial obligations expressly imposed by laws -- would have immunized Dr.  
6 Harrison from suit and thus from liability. The Oregon Supreme Court has held  
7 that OHSU itself would have been immune in 1857 by virtue of sovereign  
8 immunity. *Clarke v. OHSU*, 343 Or at 594-600.  
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11 Accordingly, neither the Remedy Clause nor the right to jury trial applies.  
12 The \$3 million statutory limit on liability must be enforced, to reduce the verdict to  
13 that amount in the Limited Judgment.  
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16 **B. If The Remedy Clause Applies, The OTCA Limits Provide A**  
17 **Substantial And Constitutionally Adequate Remedy**

18 If, contrary to Defendants' position regarding individual immunity, Plaintiff  
19 could have sued Dr. Harrison in 1857, and the Remedy Clause and the right to jury  
20 trial therefore apply, then the \$3 million OTCA limit, the rights to sue OHSU and  
21 to sue Dr. Harrison whose liability is indemnified by OHSU, and the advance  
22 payment by OHSU of the OTCA limit of \$3 million, should be upheld as a  
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1 substantial and constitutionally adequate alternative remedy under the Remedy  
2 Clause.

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4 Support for the conclusion that OHSU's payment of the OTCA limit is a  
5 constitutionally adequate remedy, considering the reality of the facts in this case, is  
6 set out in Section III below. Those facts include, but are not limited to: all of  
7 Plaintiff's future medical costs will be covered by mandatory health insurance as a  
8 matter of federal law; Plaintiff already has received \$1 million in noneconomic  
9 damages, which also can pay out several times that over the course of his lifetime,  
10 and that is a substantial and adequate remedy in this case; and Plaintiff's prior  
11 medical bills have been paid in part and to the extent they have not been paid, they  
12 are covered by a health insurance policy provided by Tyson's father's employer.  
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16 Moreover, in direct response to the Oregon Supreme Court's Remedy Clause  
17 decision in *Clarke v. OHSU* (2007), the legislature in 2009 adopted new tort claim  
18 limits at very high dollar levels that are manifestly constitutionally adequate, and  
19 which at the same time recognize the importance of stable funding and the ability  
20 to support programs at a state entity such as OHSU. Indeed, OHSU is constituted  
21 and required by law to provide, and does provide, critical and unique services to  
22 the citizens of the State of Oregon, benefits that must be taken into account in the  
23 Remedy Clause analysis. Those benefits include, but are not limited to, education  
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1 and training of physicians and health care professionals for Oregon, including the  
2 state's only medical school; clinical care including to a large population of indigent  
3 patients and patients in otherwise underserved areas including rural areas  
4 throughout the state; specialized medical resources for physicians and patients  
5 statewide; and extensive health care research.  
6

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8 **II. OREGON COMMON LAW IN 1857 DID NOT RECOGNIZE A**  
9 **VIABLE CAUSE OF ACTION AGAINST A STATE-EMPLOYED**  
10 **PHYSICIAN FOR NEGLIGENT PATIENT CARE, AND THUS THE**  
11 **REMEDY CLAUSE AND THE RIGHT TO JURY TRIAL DO NOT**  
12 **APPLY**

13 In order for the Remedy Clause under Article I, section 10, and the right to  
14 jury trial under Article I, section 17,<sup>2</sup> to apply in a case involving the adequacy an  
15 alternative legislative remedy such as the OTCA, the party seeking their  
16 application must demonstrate that the common law of Oregon in 1857 recognized  
17 the viability of the claim, which has been variously characterized as there having  
18 been a “well-established” and “absolute” remedy for the claims at issue. *See*  
19

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21 <sup>2</sup> Article I, section 10, of the Oregon Constitution provides: “No court shall be  
22 secret, but justice shall be administered, openly and without purchase, completely  
23 and without delay, and every man shall have remedy by due course of law for  
24 injury done him in his person, property, or reputation.” (The Remedy Clause is the  
25 underlined passage.)

26 Article I, section 17, of the Oregon Constitution provides: “In all civil cases, the  
27 right of Trial by Jury shall remain inviolate.”

constitutional inquiry by a court on the actual adequacy of a remedy by relying on a fiction that Plaintiff will be responsible for payment of past medical bills, when that is not the case. Plaintiffs cannot contend on the one hand, as they do here, that application of the statutory \$3 million limit will leave Plaintiff saddled with an overwhelming burden of debt for medical bills and, on the other hand, force the Court to ignore the fact that payment of the bills is covered by insurance.

In this case, the reality is that the advance payment paid providers and insurers \$1,439,822.87 toward specified prior medical bills. The remaining amount of prior medical bills is covered by insurance. And OHSU waived its own bills. The remedy for past economic damages in this case is a substantial and constitutionally adequate alternative remedy.

### **3. Future Economic Damages**

The Verdict contains: "Future Economic Damages \$1,941,754.00." The MOU expressly provides that from the \$3 million advance payment, \$500,000 shall be placed in an interest-bearing joint account for Tyson's conservator and his health insurer Jeld-Wen/Shasta in the event of a future liver transplant. (Declaration of Ellen Rensklev, Ex. B at p. 2.) At the time of trial, that account contained \$502,388. (Declaration of Janet Schroer, ¶4 and Ex. 3.) The MOU further provides that the money in the account will be paid to Tyson "[i]n the event

1 Tyson does not receive a liver transplant by the time he reaches 26 years of age, or  
2 Jeld-Wen/Shasta ceases to provide health insurance for Tyson, whichever comes  
3 first[.]” (Declaration of Ellen Rensklev, Ex. B at p. 2.)  
4

5 In addition, the MOU also provides that a minimum of \$274,273 shall be  
6 used to fund a custodial account for Tyson’s “ongoing medical care,” of which  
7 \$124,564.91 remained in the account for future medical care at the time of trial.  
8 (*Id.*; Declaration of Janet Schroer, ¶3 and Ex. 2.)  
9

10 Thus, the MOU provides, and the facts demonstrate, that at the time of trial,  
11 the \$3 million advance payment had set aside \$626,952.91 for payment of future  
12 medical care. For purposes of the Remedy Clause analysis, that amount must be  
13 subtracted from the Verdict amount of \$1,941,754.00 for future economic  
14 damages, leaving an adjusted verdict amount of \$1,314,801.09.  
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17 The question then becomes whether, in fact, the advance payment by OHSU  
18 and the statutory cap provide a substantial and adequate remedy for future  
19 economic damages for any future medical care in this case. The answer here must  
20 be informed not only by the fact that there is presently insurance and that there is a  
21 substantial amount of money set aside for future medical care, but also by the law.  
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24 As of January 1, 2014, the federal Patient Protection and Affordable Care  
25 Act (“ACA”) guarantees that Tyson’s future medical care will be covered by  
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1 health insurance. As with prior medical bills, although the jury is not informed of  
2 this fact, it is a fact nonetheless, and it is one that must be taken into account in the  
3  
4 post-verdict Remedy Clause analysis by the Court into whether the remedy in this  
5 case is a substantial and constitutionally adequate one.

6 The ACA mandates health insurance coverage, including for Tyson.  
7  
8 Coverage must be provided by insurers regardless of any preexisting conditions  
9 and without any annual or lifetime limits on the amount of coverage. Premiums  
10 may not be based on the medical condition of the insured, rather they must be  
11 based strictly on factors including the insured person's age, gender, geography. 26  
12 USCA §§ 5000A(b), (d); 42 USCA § 300gg, subsections: -1, 2(a), 2(b), (a)(1)(A),  
13 (a)(1)(B), -4(a), -4(b), -11. Thus, pursuant to federal law, Tyson Horton will be  
14 covered by insurance for his future medical care and he will pay no higher  
15 premium based on any future medical needs as a result of the facts underlying this  
16  
17 case.  
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19  
20 Given the advance payment of \$626,952.91 toward Tyson Horton's future  
21 medical care, and the federal statutory mandate/guarantee of health insurance  
22 coverage for his future medical care at no increased premium to him based on his  
23 condition, the advance payment by OHSU and the statutory cap must be deemed to  
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provide a substantial and adequate remedy for future economic damages for any future medical care in this case.

#### **4. Noneconomic Damages**

The Verdict contains: “Noneconomic Damages \$6,000,000”. The MOU expressly provides that of the \$3,000,000 advance payment made in March 2011, \$1,000,000 will be “allocated ... to noneconomic damages.” (Declaration of Ellen Rensklev, Ex. B at p. 1, “Terms of Advance Payment” ¶ 2.) The question then is whether the advance payment by OHSU and the statutory cap provide a substantial and adequate remedy for noneconomic damages in this case.

The testimony at trial established that Tyson had undergone an ordeal as an infant and there was testimony that there will be and/or may be need for future medical care, which is supported by the jury’s Verdict for future economic damages. The testimony at trial also established, however, that Tyson can expect to lead a long and productive life.

The undisputed testimony at trial established that Tyson is a happy, well-adjusted child, who is not in any pain or distress (testimony of Steven Horton, Faith Galderisi, DO). He attends a regular daycare and participates in all of the same activities as his peers (testimony Lori and Steven Horton). According to his