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6 IN THE CIRCUIT COURT OF THE STATE OF OREGON
7 FOR THE COUNTY OF MULTNOMAH
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| 9 LORI HORTON, as Guardian Ad Litem and | ) | Case No. 1108-11209 |
| 10 Conservator of and for TYSON HORTON, | ) | |
| 11 A Minor; | ) | PLAINTIFF'S REPLY |
| 12 | ) | IN SUPPORT OF |
| 13 Plaintiff, | ) | PLAINTIFF'S PROPOSED |
| 14 | ) | LIMITED JUDGMENT AND |
| 15 v. | ) | MONEY AWARD |
| 16 | ) | |
| 17 OREGON HEALTH & SCIENCE | ) | |
| 18 UNIVERSITY, a Public Corporation; | ) | |
| 19 And MARVIN HARRISON, M.D., | ) | |
| 20 | ) | |
| 21 Defendants. | ) | |

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1 # INTRODUCTION

2 With the exception of a few pages in their response, defendants spend all
3 their time debating issues relevant only to the remedies clause. The court may
4 choose to engage on these issues (common law immunities, the substantiality of
5 the capped award), or not. These issues have no effect on the right to jury trial and
6 the reexamination clause.

7 In *Klutschkowski v. PeaceHealth,* 354 Or 150, ___ P3d ___ (2013), the court
8 resolved a challenge to the application of the noneconomic damages statutory cap
9 in a medical negligence case. The court held that the right to jury trial precludes
10 any reduction of the jury's verdict. 354 Or at *16.[1] Having so decided, the court
11 did not need to resolve issues of the remedies clause or the reexamination clause.

12 The rights to jury trial – which include the right to have judgment for the full
13 amount of the verdict – are not concerned with real or speculative defenses to a
14 claim. Once it is established that plaintiff's claim is of common law origin, the
15 right to jury trial applies and protects the full amount of the jury's damages award.
16 As defendants concede, a claim for medical negligence existed in 1857.
17 Defendants' Memorandum: In Support of Defendants' Motion to Enter Limited
18 Judgment Pursuant to OTCA Limits; In Support of Defendants' Proposed Limited
19 Judgment; and In Response to Plaintiff's Proposed Limited Judgment ("Def

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[1] This indicates the Westlaw pagination.

1 Memo"), p. 28:10-15. There is no dispute that plaintiff had the right to a jury trial
2 in this case.

3 The reexamination clause similarly prohibits reduction of the verdict to the
4 statutory capped amount. Though defendants choose to ignore it, *Tenold v.*
5 *Weyerhaeuser Co.*, 127 Or App 511, 873 P2d 413 (1994), *rev dismissed* 321 Or
6 561 (1995), is alive and well and binding on this court.

7 Finally, the remedies clause protects plaintiff's claim here. As a factual
8 matter, Dr. Harrison did not exercise discretion, even if, in the nineteenth century,
9 governmental discretion would have been interpreted to include medical judgment.
10 Dr. Harrison admitted to cutting the wrong vessel "inadvertently." Defendants
11 Answer to Plaintiff's Third Amended Complaint and Demand for Jury Trial, ¶ 7.
12 An inadvertent act is an inattentive or unintended one. It is the antithesis of the
13 exercise of discretion or judgment.

14 As to the common law of governmental immunities, defendants serve up a
15 jambalaya of disparate themes to defeat the remedies clause, but offer nothing to
16 show that a publicly employed physician would have been immune from liability
17 for medical negligence in the circumstances of this case. As documented below, a
18 publicly employed physician who injured someone through negligence would have
19 been personally liable, just like most other negligent public employees. Neither
20 discretionary function immunity nor sovereign immunity (which belongs

1 exclusively to the sovereign public body) would have been thought to shield a
2 negligent physician for surgical errors.

3 Finally, defendants' justifications about the adequacy of a capped remedy
4 fail because they are based on incorrect and unsupported facts. The $3 million
5 capped remedy does not even repay the Horton family's outstanding past medical
6 expenses, for which there is no insurance and for which the Horton family remains
7 personally liable. The reduced recovery does not meet Tyson Horton's future
8 medical needs, and it provides a fraction for his significant noneconomic harms.
9 The $9 million disparity (or $10.5 million disparity, if the single claimant cap
10 applies) between Tyson Horton's proven damages and the capped recovery renders
11 the capped amount unconstitutional.

12 **POINTS AND AUTHORITIES**

13 **A. RIGHT TO JURY TRIAL**

14 The right to jury trial applies here and is the most expeditious way for the
15 court to enter a judgment for the full amount of the verdict. As defendants
16 concede, a claim for medical negligence existed in 1857. Def Memo p. 28:10-15.
17 There is no dispute that plaintiff had the right to a jury trial in this case. Given
18 these undisputed points, *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463
19 (1999), and, most recently, *Klutschkowski* require the entry of a judgment
20 consistent with the verdict. *Lakin*, 329 Or at 77. ("We agree with plaintiffs that

1 the two years during which it has paid for Tyson's medical care, Tyson has been
2 relatively "healthy," has had no health crises, and he was not taking the expense
3 anti-rejection and anti-viral drugs for his transplant. Nonetheless, his care for two
4 "healthy" years cost over $150,000. *Id.*

5 **b. Future economic damages**

6 The jury awarded more than $1.9 million in future medical care needs. The
7 record shows that Tyson's transplant fund of $500,000 (set aside from the $3
8 million advance payment) is inadequate to cover the cost of a future transplant.
9 Declaration of Lori Horton, ¶ 13. The testimony at trial was that the current
10 average cost of an uncomplicated liver transplant is approximately $1 million.
11 Tyson's re-transplant, if needed, will not be uncomplicated and it will be more
12 costly because of the scarring damage caused by Dr. Harrison's negligence. *Id.* In
13 addition, the monthly cost of anti-rejection and anti-viral medications is
14 approximately $1,500. *Id.*, ¶ 12. Tyson's physicians testified that at some point he
15 will have to resume these medications. *Id.*

16 Defendants argue that the $1.3 million deficit between the jury's award and
17 the approximately $627,000 set aside from the advance payment for Tyson's
18 lifetime medical care is constitutionally acceptable because, according to
19 defendants without substantiation, Tyson will be able to obtain insurance under the
20 federal Affordable Care Act.

1 The new and as yet untested federal healthcare law is the subject of much
2 confusion and dissension. A significant minority of Congress seeks to defund it.
3 Twenty-six states have refused to enact it. There is no evidence in this case about
4 coverage, premiums or lifetime limits for the type of extraordinary medical needs
5 Tyson Horton faces.

6 If, as defendants seem to suggest, the constitutional choice comes down to
7 which insurer should pay for Dr. Harrison's negligence, then the answer is easy:
8 the wrongdoer should pay for his negligence. Dr. Harrison's $35 million in
9 insurance exists to pay this obligation. Plaintiff should not be left to the
10 uncertainties of a future without the means to meet his medical needs.

11 **c. Noneconomic damages**

12 The jury awarded Tyson Horton $6 million in damages for his past and
13 future pain and suffering as a result of Dr. Harrison's medical negligence.
14 Defendants argue that the $3 million advance payment generated $1 million to
15 Tyson in noneconomic damages, because the MOU so designated the funds. This
16 is inaccurate. The $1 million not designated to pay lienholders was significantly
17 reduced by attorney fees and the costs of this litigation. Declaration of Lori
18 Horton, ¶ 14. The reality is that Tyson may receive nothing in noneconomic
19 damages because the entire $3 million could be consumed to pay medical bills.

20 Further, any amounts that the Hortons set aside are under the supervision of