No. 18-35991 and No. 18-36060

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAX ZWEIZIG,
Plaintiff
Appellee/Cross-Appellant

v.

TIMOTHY C. ROTE,
Defendant
Cross-Appellant/Appellee

and

NORTHWEST DIRECT TELESERVICES, INC., et al,
Defendants.

Appeal from the
United States District Court for the District of Oregon
Case No. 3:15-cv-02401-HZ
The Honorable Marco A. Hernandez

AMENDED SECOND BRIEF ON CROSS-APPEAL OF CROSS-APPELLANT/APPELLEE MAX ZWEIZIG

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AMENDED SECOND BRIEF ON CROSS-APPEAL

INTRODUCTION

Plaintiff brought this action against Timothy C. Rote, Northwest Direct Teleservices, Inc. (NDT) and other corporate defendants, alleging that NDT and the corporate defendants retaliated against plaintiff under ORS 659A.030(1)(f), and that Rote, individually, aided and abetted NDT and the corporate defendants under ORS 659A.030(1)(g). The corporate defendants defaulted and the claims against Rote proceeded to trial. A jury returned a verdict against Rote in the amount of $1,000,000. The district court granted Rote's post-trial motion to reduce the verdict to $500,000 pursuant to ORS 31.710(1).

In doing so, the district court ignored the plain language of the statute, which limits application of the statue to civil actions "seeking damages arising out of bodily injury." The legislative history does not contradict the clear intent demonstrated from the text. Therefore, the district court's application of the statute to this employment case, where the plaintiff sought no damages arising out of bodily injury, contradicts the legislature's intent. Plaintiff therefore asks this Court, on cross-appeal, to reverse the district court with instructions to modify the judgment by reinstating the jury's full verdict.

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JURISDICTIONAL STATEMENT

In addition to the grounds identified by defendant, jurisdiction is proper because plaintiff timely appealed. SER 1-2.

STATEMENT OF ISSUES PRESENTED ON CROSS-APPEAL

1. Whether the noneconomic damages cap under ORS 31.710(1) applies to this action when plaintiff did not seek damages arising out of bodily injury.

2. Whether reducing plaintiff's damages from $1,000,000 to $500,000 under ORS 31.710(1) left plaintiff without a substantial remedy in violation of Article I, section 10, of the Oregon Constitution.

STATUTORY ADDENDUM

Pursuant to Circuit Rule 28-2.7, attached to this brief is a statutory addendum containing the pertinent statutes at issue in this appeal and cited in this brief, "set forth verbatim and with appropriate citation."

COUNTERSTATEMENT OF THE CASE

I. Plaintiff's Protected Activity

Plaintiff worked for defendant NDT from September 1, 2001, to November 15, 2003, as Director of IT. ER 135, 167, 1596. During his employment, plaintiff made a complaint to the Department of Justice that NDT was engaging in illegal over-billing of clients. ER 82-83. Following his complaint, plaintiff was

terminated. ER 81-83, ER 163-64, 166-68.

In 2004, plaintiff brought an action against NDT in the Superior Court of New Jersey. ER 83, 144-48. Due to an Employment Agreement between NDT and plaintiff, the claim was arbitrated in Oregon. ER 135-43; ER 162-63. NDT counterclaimed against plaintiff, alleging that he breached the Employment Agreement and engaged in conversion and other actions by deleting, destroying, or otherwise failing to return to NDT certain software programs, codes, and applications. ER 164. NDT also counterclaimed for attorneys' fees and costs. ER 165. Expert forensic evidence was presented to support NDT's claim that plaintiff had deleted, destroyed, or failed to return software. ER 1312-29. The arbitrator ultimately found in plaintiff's favor. The arbitrator specifically found that plaintiff was a credible witness. ER 162-63. Other than a claim that plaintiff owed NDT for court reporter fees, the arbitrator denied all of NDT's counterclaims. ER 164-66. The arbitrator concluded that NDT terminated plaintiff in retaliation for reporting that NDT was overbilling some of their clients and awarded plaintiff $75,375. ER 162-70.

II. Rote's Blog About Plaintiff's Protected Activity

On or about February 27, 2015, Rote created a blog entitled "Sitting Duck Portland – Another Story on Arbitrator Corruption and Costs." SER 80. The blog portrays an in-depth perspective on the arbitration between NDT and plaintiff. *See*

generally SER 3-61, 84-87. Rote's blog focused on complaints about the arbitration proceedings – in particular, all the ways he believed the arbitration was corrupt and unfair and that a litigant is better off in court. ER 241, 273, 296, 298, 300, 321 366, 373.

Rote often used the terms "us" or "we" on the blog. ER 1626; SER 11. The Sitting Duck website had approximately 89 or 90 chapters. ER 1665. Around late 2016, Rote deleted the Sitting Duck website and republished a similar blog titled "The Explosion of Fake Whistleblowing." ER 237-599. The latter blog had 97 chapters. ER 1665.

Besides attacking the arbitration process itself, a significant portion of the published statements on the blog contained numerous negative statements directed at plaintiff and people associated with him. In particular, the blog contained accusations that plaintiff filed a false complaint, fabricated evidence, breached his contract with NDT, and sought "whistle blower type protection to save his job." ER 238, 265-66, 269-70, 1717; SER 14, 46, 55-57. The blogs represented that plaintiff was terminated "for a variety of performance reasons" and was "not well educated." ER 237, 380, 1625; SER 9, 12. The blogs also contained allegations that plaintiff engaged in criminal acts, destroyed evidence, and illegally downloaded thousands of movies and other data, including pornography and pedophilia. ER 250-52, 261-63, 265, 305, 414-15, 422, 1625, 1641; SER 33-36,

46, 48, 50-52, 57-61, 262, 265, 274. The blogs also posed a question whether plaintiff disseminated pornography to others, including federal judges. SER 85. The blogs contained additional accusations that plaintiff conspired with another employee to set up a competing company. ER 238, 265-66, 381, 1625-26; SER 9, 12-13, 46, 57. Finally, the blogs contained negative statements about plaintiff's fiancé and attorneys. ER 241, 258-59, 262, 289-91, 295-98, 342-46; SER 28-29, 62-63.

By the end of 2015, a Google search of plaintiff's name showed that the Sitting Duck Website was the top search result. ER 1611, 1617; SER 80, 82. Plaintiff's fiancé's name also appeared in those search results. ER 1617, SER 82. Rote further publicized and disseminated the blogs through his social media accounts, including his LinkedIn.com, Facebook, and Twitter accounts. ER 1623, 1657-63; SER 253-58, 281-97. Rote also threatened further publication: "We are going to publish, disseminate, write our Congressional delegation, challenge our media to critically evaluate this issue, raise the awareness and send out a million emails." SER 93. He also announced that a screenplay based on the arbitration was in its final stages of editing. ER 337.

The content published in the blogs took a serious tole on plaintiff. As a result of the negative and defamatory nature of the statements in the blog, plaintiff had to change his behavior. ER 1678. Plaintiff no longer used his real name

online, used an alias, and had to anonymize himself. ER 1628-29, 1655. He could no longer professionally network, afraid that people would believe what they read about him. ER 1655. He explained that Rote had taken control of his reputation and the reputation of those closest to him. ER 1650-51. He watched it affect his family. ER 1621. He felt his identity had been taken from him. ER 1664. He was terrified, frightened, and felt "stalked and terrorized." ER 1637, 1639, 1652.

III. Procedural History

A. Plaintiff's Allegations

Plaintiff brought claims against all defendants for Whistleblower Discrimination, ORS 659A.230, and Retaliation, ORS 659A.199 and ORS 659A.030(1)(f). ER 12-14. Plaintiff also brought an aiding and abetting claim, ORS 659A.030(1)(g), against Rote individually. ER 14-15. The district court *sue sponte* dismissed plaintiff's ORS 659A.230 and ORS 659A.199 claims against all defendants. Order, Jan. 6, 2017 (Doc #95). The ORS 659A.030(1)(f) claims proceeded against all defendants, and the ORS 659A.030(1)(g) claim proceeded against defendant Rote.

B. The Corporate Defendants' Default Judgment

The corporate defendants initially were represented by counsel and filed an answer. ER 30-36. However, their counsel ultimately withdrew. Order Granting Motion to Withdraw or Substitute an Attorney (Doc #72). Because Rote, acting

pro se, could not represent the corporate defendants,[1] the corporate defendants defaulted on the remaining retaliation claim, ORS 659A.030(1)(f), their previous answer was struck from the record, and judgment ultimately was entered against them. Entry of Default (Doc #108), Order Striking Answer to Complaint/Counterclaim (Doc #109); ER 4-5.

C. Rote's Counterclaims and Plaintiff's Special Motion to Strike Pursuant to Oregon's Anti-SLAPP Statute, ORS 31.150

Rote proceeded in the action *pro se*[2] and filed multiple answers on his own behalf, asserting seven counterclaims against plaintiff that sought over $11 million in damages against plaintiff. ER 16-29; SER 363-66. Those counterclaims alleged that plaintiff, plaintiff's counsel, and other related parties contacted the chambers of Judges Robert E. Jones and provided information to the United States Marshall's office about the following statement in Rote's blog, which plaintiff represented as a threat to Judge Jones:

> "The Honorable Robert E. Jones is receiving a lifetime achievement award tomorrow night. The press will be there. Congratulation Judge Jones. Perhaps more often than not our legacies are not what we wanted them to be."

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[1] 28 U.S.C. § 1654; *Beam Limited Partnership v. Roller Derby Skates, Inc.*, 366 F3d 972, 973-74 (9th Cir. 1993).

[2] The district court noted that Rote was an "extremely sophisticated litigant." ER 1453.

ER 627; SER 363.

Plaintiff brought a special motion to strike pursuant to Oregon's Anti-SLAPP Statute, ORS 31.150, against Rote's First (Defamation), Sixth (Intentional Infliction of Emotional Distress) and Seventh (Aiding and Abetting) Counterclaims. ER 601-613. The district court granted plaintiff's motion, reasoning that Rote's counterclaims were subject to Oregon's anti-SLAPP provisions because they arose out of a protected statement made in anticipation of a proceeding authorized by law pursuant to ORS 31.150(2)(a) and defendant failed to establish a probability on a *prima facie* basis that he would prevail on his counterclaims. ER 704-719.

D. Rote's Motion to Dismiss the Plaintiff's Complaint

Rote moved to dismiss plaintiff's complaint for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), arguing that plaintiff's claims were subject to arbitration. ER 67-81; ER 75-77; ER 135-43. Neither Rote nor the corporate defendants had previously moved to compel arbitration nor raised it as a defense. *See* ER 20, 33 (raising the previous arbitration as a defense, but not the arbitration agreement as a defense).[3] Rote also argued that plaintiff's claims were moot, because Rote had removed or redacted plaintiff's name from the allegedly harmful

[3] Defendant Rote did previously move to dismiss plaintiff's complaint, but voluntarily withdrew the motion. ER 47-48; 64.

blog, which, according to Rote, removed any live case or controversy. ER 79-80.

The district court denied Rote's motion. ER 117-34. The court reasoned that Rote, as a non-signatory individual to the Agreement, could not compel arbitration and even if he could, he had waived his right to do so. ER 121-22. Finally, the court denied Rote's mootness argument on the basis that plaintiff had presented evidence that Rote recently had engaged in false and damaging blog posts to plaintiff, and therefore plaintiff's claims were not moot. ER 123.

E. The Parties' Cross-Motions for Summary Judgment

Plaintiff moved for summary judgment and Rote cross-moved for summary judgment. Pl Mot. Summ. J. (Doc #117). ER 731-766. Rote renewed his arguments as to arbitration and mootness. ER 751, 754. Rote also argued that plaintiff's aiding and abetting claim under ORS 659A.030(1)(g) should be dismissed because NDT was no longer an active employer. ER 764, 1060, 1067.

The district court denied both motions. The court rejected Rote's renewed argument arising as to arbitration, adhering to its previous ruling. ER 1108. As to Rote's argument regarding mootness, the court denied the motion because Rote "himself had conceded that there may still be an 'internet presence' associated with the material [Rote] published in the blog." ER 1114. Finally, the court denied Rote's argument as to the aiding and abetting claim, because Rote submitted "no evidence to corroborate his statements" that NDT had not been an active company

since 2014. ER 1114.

F. The Trial Court's Exclusion of Forensic Evidence

Rote sought to admit Defense Exhibits 512-515 – forensic reports regarding the content of plaintiff's employer's computer and hard-drives – as evidence that the statements about plaintiff in Rote's blog were in fact true – including that plaintiff downloaded pornography, deleted evidence, and reformatted hard-drives. ER 1330-32. Plaintiff objected to the admission of these exhibits on the basis that they were irrelevant under FRE 401, unduly prejudicial under FRE 403, and should be excluded under principles of res judicata and collateral estoppel, because they were offered in an attempt to relitigate matters previously litigated in the parties' arbitration. ER 1334-37; Pl.'s Obj. to Def. Rote's Exhibits, Dec. 13, 2017 (Doc 151). The district court granted plaintiff's motion *in limine*. ER 1479-80.

G. Jury Instructions

The parties proposed joint jury instructions. ER 1370-1410. Rote also submitted amended proposed jury instructions. SER 298-304. The parties agreed on a mitigation instruction. ER 1372; SER 300. Rote proposed a separate jury instruction on the retaliation and aiding and abetting claims. ER 1405-09; SER 301-303. As to the retaliation instruction, the court instructed the jury on a "substantial factor" causation standard:

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> A plaintiff is "subjected to an adverse employment action because of his participation in the protected activity" if he shows that an unlawful motive was a substantial factor in his adverse employment action, or, in other words that the plaintiff would have been treated differently in the absence of the unlawful motive.

ER 1430; 1832.

Rote's alternative proposed instruction did not request a "but-for" causation instruction, nor did he object to the retaliation instruction on the basis that it contained a "but-for" causation standard. SER 301-02.

As to both the retaliation and aiding and abetting instructions, Rote specifically agreed with the court that the jury instructions did not need to include "NDT" in place of "business entities" so long as NDT was on the verdict form. ER 1795. Nonetheless, the court ultimately instructed the jury that "business entities" as to both the elements of the retaliation and the aiding and abetting claims referred only to NDT. ER 1830-32.

H. The Verdict Form

The parties submitted alternative proposed verdict forms. Defendant proposed a special verdict form that requested that the jury make a special finding as to whether the fact that NDT was dissolved at the time of the publishing of the blog foreclosed plaintiff's claims:

> "Does the fact that the employer (NDT) was shut-down and out of business before the blog was written foreclose the plaintiff's claims in this case?"

Def. Am. Proposed Verdict Form, Jan. 11, 2018 (Doc No. 174).

Before the court submitted the verdict form to the jury, the court asked the parties whether they objected to the verdict form. ER 1793. Rote objected that the term "business entities" was used in the verdict form instead of NDT. ER 1793-94. The district court agreed to make the change that Rote requested and asked if such change would satisfy Rote. ER 1795. Rote responded, "Yes, it will." ER 1795. When the district court asked Rote if he had any other objections to the verdict form, Rote stated "I do not." ER 1795. Ultimately, a general verdict form was submitted to the jury on the question of liability:

> "Has plaintiff proved by a preponderance of the evidence that Defendant Rote aided and abetted Northwest Direct Teleservices in retaliating against Plaintiff?"

ER 1415. The jury answered that question in the affirmative and awarded plaintiff $1 million in damages to plaintiff.

I. Rote's Motion for a New Trial

Rote moved for a new trial pursuant to FRCP 59, arguing in part that plaintiff's counsel engaged in misconduct through statements he made in opening and closing arguments. ER 1259-61. Rote conceded that he did not object to the statements at the time they were made at trial. ER 1439. The court rejected Rote's argument, determining that plaintiff's counsel's statements could "reasonably be

interpreted as a request by counsel to hold Defendant liable rather than a request that the jury punish Defendant" in awarding damages and, even if they could be interpreted as asking the jury to improperly punish Defendant, they did not "sufficiently permeate the entire proceeding to warrant a new trial." ER 1454. The court further held that, in light of the fact that the evidence supported the jury's award of damages, there was no evidence that the jury was improperly influenced by counsel's statements. ER 1455.

J. Rote's Objection to the Proposed Judgment and Motion to Reduce the Jury's Verdict

Rote objected to plaintiff's proposed judgment and sought to reduce the jury's verdict to $500,000 pursuant to ORS. 31.710(1). ER 1265; Def. Obj. to Pl. Form of Judg., Jan. 22 2018 (Doc 192); Def. First. Am. Objection to Pl. Form of Judg., Feb. 3, 2018 (Doc. 197). Plaintiff responded that ORS 31.710(1) does not apply to plaintiff's claims, because the statute applies only to claims seeking damages arising from bodily injury. Pl. Resp. to Def. Rote's 1st Am. Obj. to Pl. Form of Judgment, Feb. 12. 2018 (Doc. 199); Pl. Sur-Reply to Def. Rote's First Am. Obj. to Pl. Form of Judg. at 2-9, Feb. 26, 2018 (Doc. 210). Plaintiff further contended that application of the cap to plaintiff's claims would violate Article I, Section 10, of the Oregon Constitution, because it would leave plaintiff without a substantial remedy. Pl. Sur-Reply to Def. Rote's First Am. Obj. to Pl. Form of

Judg. at 10-13, Feb. 26, 2018 (Doc. 210). The district court rejected plaintiff's arguments and applied ORS 31.710(1) to reduce the jury's verdict to $500,000. ER 1459-67.

SUMMARY OF ARGUMENT

Plaintiff cross-appeals from the judgment in this action on two bases: (1) whether ORS 31.710(1) applies to civil actions that do not seek damages arising out of bodily injury, and (2) whether application of the cap in this case violated Article I, section 10 of the Oregon Constitution because it left plaintiff without a substantial remedy. As to the former, a textual analysis of ORS 31.710(1) demonstrates that the legislature intended the noneconomic damages cap to apply only to civil actions where a party seeks "damages arising out of bodily injury." Nothing in the legislative history contradicts the clear intent in the text of the statute. Because plaintiff did not seek damages arising out of bodily injury, the district court erred in applying the statute.

Even if ORS 31.710(1) applies to this action, however, its application under these circumstances violated Article I, Section 10 of the Oregon Constitution because it left plaintiff without a substantial remedy. The district court erred in determining otherwise, because the district court determined that plaintiff was not grievously injured in contradiction to Oregon Supreme Court caselaw and the jury's determination that plaintiff was grievously injured via its significant damage

award of $1,000,000 in noneconomic damages.

Rote raises seven issues in his appeal, most of which are not preserved and without merit. First, the district court properly denied Rote's motion to dismiss the complaint based on subject matter jurisdiction because Rote was a non-signatory to the arbitration agreement and, alternatively, he waived any rights to compel arbitration by actively litigation in federal court. The district court also properly denied his motion to dismiss on the basis of mootness, because Rote's voluntary offer to cease illegal conduct did not moot plaintiff's claims – particularly for past harms. Second, Rotes' appeal of the district court's denial of a motion for summary judgment on an issue of fact, after a final judgment has been entered after trial, is not appealable. Third, the district court did not err in granting plaintiff's special motion to strike under Oregon's anti-SLAPP statute without permitting Rote to obtain additional discovery, when Rote never asked for additional discovery or any delay in deciding the motion so he could obtain additional discovery. Fourth, the district court properly excluded forensic evidence based on principles of collateral estoppel and res judicata when the issues that defendant sought to introduce the evidence for had been fully litigated in the parties' previous arbitration. Five, Rote failed to preserve his arguments regarding the mitigation, retaliation, and aiding and abetting jury instructions and the instructions were legally correct, nonetheless. Six, the district court did not abuse its discretion to provide a special verdict form

to the jury when Rote waived his rights to request the special verdict form and the general verdict form was adequate to obtain a jury determination of the factual issues essential to the judgment. Finally, the district court properly denied Rote's motion for a new trial on the basis of attorney misconduct in closing arguments on the basis that Rote failed to object to any of counsel's statements in closing, the statements were not improper, and even if improper, Rote failed to demonstrate that such statements so permeated the entire proceedings such that the jury was influenced by passion and prejudice.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REDUCING THE JURY'S VERDICT PURSUANT TO ORS 31.710

As explained in plaintiff's Motion to Certify Issues to the Oregon Supreme Court, whether ORS 31.710 applies to employment claims and other civil actions that do not seek "damages arising out of a bodily injury" is an issue of first impression in Oregon. Therefore, plaintiff seeks to have the first issue on cross-appeal certified to the Oregon Supreme Court. Alternatively, plaintiff requests that this Court reverse the district court for the reasons outlined below.

A. ORS 31.710(1) Does Not Apply to This Action, Because Plaintiff did Not Seek "Damages Arising Out of Bodily Injury."

The district court erred in granting defendant's objections to the proposed form of judgment and reducing plaintiff's noneconomic damages from $1,000,000

to $500,000 under ORS 31.710(1). As explained below, the noneconomic damages cap under ORS 31.710(1) is applicable only to civil actions where a party seeks "damages arising out of bodily injury." Because plaintiff did not seek damages arising out of bodily injury, the district court erred in applying ORS 31.710 to reduce his damages.

1. The plain text of ORS 31.710(1) limits its scope to civil actions "seeking damages arising out of bodily injury."

ORS 31.710 provides, in relevant part:

> Except for claims subject to ORS 30.260 to 30.300 and ORS chapter 656, in any civil action *seeking damages arising out of bodily injury*, including emotional injury or distress, death or property damage of any one person including claims for loss of care, comfort, companionship and society and loss of consortium, the amount awarded for noneconomic damages shall not exceed $500,000.

ORS 31.710(1) (emphasis added).

In construing ORS 31.710(1), this Court's rule is to "interpret the law as would the [Oregon] Supreme Court. *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004). Under Oregon rules of statutory construction, this Court must first consider the text and context of the statute. *State v. Gaines*, 346 Or. 160, 171, 206 P.3d 1042 (2009). The second step involves considering pertinent legislative history that a party may proffer "even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis." *Id.* at 172. The third and final step involves

statutory interpretive methodology. *Id.*

Here, the text of ORS 31.710(1) does not support the district court's application of the noneconomic damages cap to plaintiff's statutory employment claims against the defaulted corporations and Rote. The express language of ORS 31.710(1) limits its application only to civil actions "seeking damages arising out of bodily injury." Although the statute clarifies that it applies even if the damages arising out of such bodily injury "include emotional injury or distress, death, or property damage," the legislature expressly made it a prerequisite that such damages "aris[e] out of bodily injury" in order for the cap to apply under the statute.

In specifically describing the type of civil actions subject to ORS 31.710(1) – those that seek damages arising out of bodily injury -- the Oregon legislature impliedly excluded other types of civil actions, including those seeking damages arising from employment retaliation – particularly where, as here, there are no allegations of physical or sexual assault by the employer or supervisor, or allegations that plaintiff's emotional distress manifested in any physical injury or illness.

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2. Oregon courts have recognized that the statute only applies to civil actions involving bodily injury.

Oregon appellate courts, though not directly deciding the question raised here, have repeatedly recognized that ORS 31.710 applies only to civil actions arising out of bodily injury. *See Vasquez v. Double Press Mgf., Inc.*, 364 Or. 609, 614, 437 P.3d 1107 (2019) ("Under ORS 31.710(1), noneconomic damages *in civil actions involving bodily injury* are capped at $500,000 . . . " (emphasis added)); *Zehr v. Haugen*, 318 Or. 647, 656, 871 P.2d 1006 (1994) (describing statute as defining economic and noneconomic damages "in the context of civil actions *seeking damages arising out of bodily injury*" (emphasis added)); *Rains v. Stayton Builders Mart, Inc.*, 264 Or.App. 636, 659, 336 P.3d 483 (2014) ("ORS 31.710(1) caps noneconomic damages at $500,000 in most civil actions "arising out of bodily injury[.]"), *rev'd in part on other grounds*, 359 Or. 610 (2016); *Bldg. Structures, Inc. v. Young*, 328 Or. 100, 103, 968 P.2d 1287 (1998) (statute applied only to civil actions "seeking damages arising from bodily injury" and therefore was inapplicable in that case because "the plaintiffs' alleged damages [based on breach of contract, fraud, and quantum meruit claims] do not arise out of bodily injury"); *DeVaux v. Presby*, 136 Or.App. 456, 561, 902 P.2d 593 (1995) (looking at legislative history and explaining that under the 1987 version of the statute, "all compensatory damages recoverable in an action "arising out of bodily injury" were

divided into two classes: economic and noneconomic and that the noneconomic damages were capped at $500,000). *But see Tenold v. Weyerhaeuser Co.*, 127 Or.App. 511, 518-20, 873 P.2d 413 (1994) (assuming statute applied to claims for defamation, malicious prosecution, and intentional infliction of emotional distress when parties did not raise issue or argue that cap was otherwise limited to claims seeking damages arising out of bodily injury).

3. The phrase "including emotional injury or distress, death, or property damage," preceded by a comma, does not change the clear legislative intent.

The fact that the legislature followed the phrase "damages arising out of bodily injury" with the phrase "*including* emotional injury or distress, death or property damage" does not support the district court's application of the statute to plaintiff's action. The legislature's use of the term "including" simply indicates that it was providing specific examples of *types* of damages that could "arise out of bodily injury." The legislature was not defining the phrase "bodily injury." *State v. Kurtz*, 350 Or. 65, 74-75, 249 P.3d 1271 (2011) (use of term "includes" typically signals that legislature did not intend list of particulars that follows to be limiting or exhaustive).

The legislature's use of a list of specific *examples* of the types of damages that may arise out of bodily injury does not mean that the opposite is true – that such damages *only* arise out of bodily injury and are, therefore, synonymous with

the phrase "bodily injury." Such an interpretation would be absurd. For example, property damage certainly does not *always* arise out of bodily injury but instead arises out of constructive defect claims, breach of contract claims, and more. And as the above cases clearly demonstrate, emotional injury and distress also does not *always* arise out of bodily injury. If not the majority of the time – such damages arise out of intentional infliction of emotional distress, discrimination, and other violations of legal harms that do not involve bodily or physical injury. Thus, it is much more likely that, by providing the "including" language following the phrase "damages arising out of bodily injury," the legislature intended to ensure that even if a party only alleges emotional distress damages *arising out of bodily injury*, such damages would be subject to the cap.

The district court nonetheless reasoned that the legislature intended the phrase "including emotional injury and distress" to modify the phrase "bodily injury" – meaning that emotional injury and distress was a type of *bodily injury* rather than a type of *damages that arise out of bodily injury*. ER 1463. That conclusion is flawed for numerous reasons.

First, it is contrary to a long-line of Oregon caselaw distinguishing *emotional injury or distress* from *bodily injury*. *See, e.g.*, *Philibert v. Kluser*, 360 Or. 698, 703, 385 P.3d 1038 (2016) (contrasting physical harms and emotional harms); *id.* at 707-16 (overturning prior "impact rule" which limited recovery of

emotional distress damages by bystanders if they had suffered a "physical injury"); *Doyle v. City of Medford*, 356 Or. 336, 375-76, 337 P.3d 797 (2014) (outlining limited circumstances in which a plaintiff may assert emotional distress damages absent the infliction of a physical injury); *Paul v. Providence Health Sys.-Oregon*, 351 Or. 587, 597-98, 273 P.3d 106 (2012) (Oregon does not permit claims for emotional distress damages caused by a defendant's negligence in the absence of any physical injury except in limited circumstances); *Norwest, By and Through Cain v. Presbyterian Intercmty. Hosp.*, 293 Or. 543, 558-59, 652 P.2d 318 (1982) (outlining limited circumstances in which a plaintiff may assert emotional distress damages absent the infliction of a physical injury); *Quesnoy v. Dep't. of Rev.*, 286 Or.App. 359, 374, 400 P.3d 960 (2017) (differentiating between plaintiff's damages for "mental anguish, anxiety, and humiliation," from damages based on "bodily injury"); *Delaney v. Clifton*, 180 Or.App. 119, 125, 41 P.3d 1099 (2002) (noting that plaintiff sought "purely *emotional* injuries" and not "claims for personal *physical* injuries") (emphases in original)).

The district court's reliance on *Rains v. Stayton Builders Mart, Inc.*, 289 Or.App. 672, 687-88, 410 P.3d 336 (2018), to conclude otherwise, is misplaced. The Oregon Court of Appeals in *Rains* did not equate emotional distress damages with *bodily* or *physical* injury. Instead, it considered whether a spousal claim for loss of consortium – which arose out of her husband's physical injury -- constituted

an "injury to person or reputation" under Article I, Section 10, to the Oregon Constitution. An "injury to person" under the remedy clause is a much broader concept than *bodily* or *physical* injury, and *Rains* is therefore distinguishable.

Second, the district court's reasoning is similarly flawed because it necessarily would have to conclude that the terms "death" and property damage" modify "bodily injury" – but property damage clearly is not a type of "bodily injury." To hold otherwise would defy common sense and adopt an unreasonable and absurd construction of the statute. *See Swift & Co. v. Peterson*, 192 Or. 97, 110, 233 P.2d 216 (1951) (Oregon courts will adopt a common sense, reasonable and wholesome construction over an absurd or mischievous one); *McGarry v. Hansen*, 201 Or.App. 695, 700, 120 P.3d 525 (2005) (avoiding "awkward interpretation" of statute).

The district court's interpretation is further contradicted by the doctrine of last antecedent. The second phrase "emotional injury or distress, death, or property damage" begins with "including" and is set off from the rest of the sentence by a comma. ORS 31.710(1). That "indicat[es] as a matter of English that [the] phrase is nonrestrictive; that is, it is not intended to modify only the immediately preceding noun in the sentence." *Liberty Northwest Ins. Corp., Inc. v. Watkins*, 347 Or. 687, 693-94, 227 P.3d 1134 (2010) (holding that because phrase "except medical services," was preceded by a comma, that indicated that it applied to all

the antecedents). Rather, it is intended to apply to all the antecedents in the sentence. *State v. Webb*, 324 Or. 380, 386, 927 P.2d 79 (1996) ("Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma") (quoting Norman J. Singer, 2A *Sutherland Statutory Construction* § 47.33, at 270 (5th ed 1992)). Based on the structure of the sentence, the legislature intended the phrase "including emotional injury or distress, death or property damage," to modify the entire antecedent "damages arising out of bodily injury" and not just the phrase "bodily injury."

4. The legislative history is not illuminating and does not contradict the plain language of the statute.

Finally, the legislative history does not support the district court's application of the statute to plaintiff's cause of action. A court is obligated to consider legislative history "only for what it is worth – and what it is worth is for the court to decide." *Gaines*, 346 Or. at 173. "When the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests – or even confirms – that the legislators intended something different." *Id.*

The noneconomic damages cap under ORS 31.710(1) was enacted as part of Senate Bill (S.B.) 323 in 1987, which was an overall "tort reform" effort in the

Oregon legislature. Or. Laws 1987, ch. 744, § 6; *see Vasquez*, 364 Or. at 628-29 (providing legislative history of ORS 31.710). The legislature's passage of S.B. 323 in 1987 "took place in reaction to earlier changes in the law affecting tort liability." *Vasquez*, 364 Or. at 628. The bill arose out concerns by liability insurers and their insureds that certain changes in the law had resulted in increased damage awards in tort cases. *Id.* (citing Kathy T. Graham, *1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?*, 24 Willamette L. Rev. 283, 289 (1988)).

A Joint Interim Task Force on Liability Insurance and a Task Force on Liability appointed by Governor Victor Atiyeh both met in 1986 to consider proposed changes in tort law in order to control the costs of liability insurance. *Id.* One of the stated goals coming out of the groups was to cap noneconomic damages. *Id.*

The legislature's overall goal in enacting S.B. 323 was to reduce costs of insurance by reducing the liability of defendants in tort actions. *See, e.g.*, *Greist v. Phillips*, 322 Or. 281, 299, 906 P.2d (1995) (purpose of bill was to reduce costs of insurance premiums and litigation). The portion enacting a noneconomic damages cap was but one section of the overall legislation, which contained 150 sections. *Vasquez*, 364 Or. at 628.

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Despite the voluminous nature of the legislative history for S.B. 323, there is little history regarding the one section enacting ORS 31.710(1), and no *specific* discussions regarding whether the noneconomic damages cap was intended to be limited only to civil actions seeking damages arising out of bodily injury. Although there were no *specific* discussions, the discussions did tend to focus on individuals who suffered bodily injuries. *See* Minutes at 5-6, House Judiciary Committee, S.B. 323, May 13, 1987 (App 33-34) (Testimony of Ray Gardner, accident victim) (discussing opposition to cap on damages and discussing negligence claim arising out of damages he suffered when truck rolled on top of him). The tort reform proponents also seemed to suggest that they were interested in reforming *personal injury* actions, not all types of legal actions. Ex. D at 2, Senate Judiciary Committee, S.B. 323, Jan. 20, 1987 (App 2) (Testimony of Kip Lombard, CIELS) (proposing limitations on non-economic damages for "victims of negligence" and discussing pain and suffering arising out of death and injuries); *Id.* at 9 (App 9) (explaining that the "tort system" are those "laws governing how courts make awards in personal injury cases" and advocating for reform of the tort system in Oregon); Ex. A at 3-4 & 6, Senate Judiciary Committee, S.B. 323, Feb. 3, 1987 (App 18-19, 21) (Testimony of John Holmes, Hoomes, DeFranco & Schulte, P.C.) (discussing the increase in the average personal injury award and citing to a public opinion poll favoring a cap on damages in death and injury suits).

Thus, although there is no direct evidence in the legislative history that the legislature intended to include actions *not* arising out of bodily injury – there is also no direct evidence of anything in the legislative history that contradicts the plain language of the statute.

A recent Oregon Supreme Court decision confirms that the legislative history is silent on the specific intent behind the cap – and that the general goals of tort reform behind the legislation are not sufficient to override the plain language in ORS 31.710(1). In *Vasquez*, the Oregon Supreme Court considered whether the legislature intended the noneconomic damages cap under ORS 31.710(1) to apply to claims under ORS chapter 656. The court considered the legislative history and recognized that "S.B. 323 was enacted to 'control the escalating costs of the tort compensation system . . . and that the cap on noneconomic damages in ORS 31.710(1) was an aspect of that effort." *Vasquez*, 364 Or. at 629 (internal citations omitted). Nonetheless, the Court explained that it

> did not infer from that *general goal* that the legislature did not intend to make an exception for claims brought by or on behalf of injured workers against third parties and noncomplying employers, as governed by the provisions of ORS chapter 656. . . . Indeed there is no indication in the text of the 1987 legislation that the damages cap provision in ORS 31.710(1) was intended to apply to those types of claims described in ORS chapter 656.

Vasquez, 364 Or. at 629 (emphasis added). The court further explained that because the text of ORS 31.710(1) contained explicit exceptions to the tort cap, the

text itself belied any "assumption that the legislature intended the noneconomic damages cap to apply equally in all circumstances . . . we know from the text that it did not." *Vasquez*, 364 Or. at 630.

Here, similarly, this Court cannot infer from the broad overall goals of the tort reform legislation in 1987 that the legislature "did not intend to make an exception" for certain claims to the tort cap. Not only did the legislature make express exceptions in the statute for claims under the OTCA and ORS chapter 656, it also expressly limited the cap to civil actions "seeking damages arising out of bodily injury." As the Oregon Supreme Court explained in *Vasquez*, we know from the text itself that the legislature never intended for the cap to apply equally to *all* noneconomic damages claims. 322 Or. at 630.

Furthermore, the legislature's silence in the legislative history as to its specific intent related to the issue raised here means that the legislative history simply is not illuminating on the issue – and this Court should not rely on it as determinative.

> [A]rguments based on legislative silence are based on unrealistic assumptions, including that "legislators are in a position to predict all the potential consequences of legislation and that they will always address them"; that legislators are not subject to the time pressures at play in legislative sessions, which may preclude opportunities for "comment on all of a bill's potential consequences"; and that "the nature of legislative history . . . often is designed not to explain to future courts the intended meaning of a statue, but rather to persuade legislative colleagues to vote in a particular way." Although

> defendant speculates that the exception is one that would have been discussed, we are not so sure. It is also possible that the exception was crafted and understood as preserving the workers' compensation system as it then existed. *We do not know, and we do not draw any conclusion one way or the other from the lack of legislative history concerning the scope of the exception.*

Id. (citing *Wyers v. Am. Med. Response N.w., Inc.*, 360 Or. 211, 227, 377 P.3d 570 (2016)) (emphasis added).

In conclusion, the district court erred in determining that the noneconomic damages cap under ORS 31.710(1) applied to plaintiff's employment claim, because plaintiff did not seek damages arising out of bodily injury. Due to the absence of Oregon authority on the issue, plaintiff requests that this Court certify the issue to the Oregon Supreme Court for its determination in the first instance. Alternatively, this Court should reverse and remand with instructions to reinstate the full amount of the jury's verdict.

B. Even if ORS 31.710(1) Caps Noneconomic Damages in Employment Claims, Application of the Cap in This Case Violates Article I, Section 10 of the Oregon Constitution

Article I, section 10 of the Oregon Constitution – the remedy clause-- provides, in relevant part:

> [E]very man shall have a remedy by due course of law for injury done to him in his person, property, or reputation.

Or. Const., Art. I, § 10.

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1. The *Horton* decision

In *Horton v. OHSU*, 359 Or. 168, 218-21,376 P.3d 998 (2016), the Oregon Supreme Court re-examined the remedy clause of the Oregon constitution. In doing so, the Court reaffirmed that the remedy clause places substantive limits on legislative interference with civil tort law. 359 Or at 217. The court also decided that the remedy clause applies to contemporary claims, overruling *Smothers v. Gresham Transfer, Inc.*, 332 Or. 832, 23 P.2d 333 (2001), to the extent that it tied "the meaning of the remedy clause to Oregon common law in 1857." *Horton*, 359 Or. at 185.[4]

The court also identified three general categories of legislation that it had considered in determining the limits that the remedy clause places on the legislature:

> (1) legislation that did not alter the common-law duty but denies or limits the remedy a person injured as a result of duty may recover; (2) legislation that sought to adjudge a person's rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others (a *quid pro quo*); (3) legislation that modified common-law duties or eliminated a common-law cause of action when the premises underlying those duties and causes of action have change.

Schutz v. La Costita III, Inc., 288 Or.App. 476, 486, 406 P.3d 66 (2017) (describing *Horton*), *aff'd on other grounds*, 364 Or. 536, 436 P.3d 776 (2019).

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[4] In all other respects, *Smothers* remains good law.

Under the first category of cases, the court explained that when a reduction in damages leaves the plaintiff without a substantial remedy, the remedy clause is violated. *Horton*, 359 Or. at 219. In making that determination, courts are to consider "the extent to which the legislature has departed from the common-law model measured against is reasons for doing so." *Id.* at 220.

2. Post-*Horton* decisions analyzing whether application of ORS 31.710 violates the remedy clause

In three post-*Horton* cases, the Oregon Court of Appeals considered whether application of the noneconomic damages cap under ORS 31.710(1) violated the remedy clause. *Vasquez v. Double Press Mfg,* 288 Or.App. 503, 406 P3d 225 (2017), *rev'd on other grounds*, 364 Or. 609, 614, 437 P.3d 1107 (2019); *Rains*, 289 Or.App. 672; *Busch v. McInnis Waste Syst., Inc.*, 292 Or.App. 820, 426 P.3d 235 (2018). In all three cases, the court determined that the trial court's reduction of damages left the plaintiff without a substantial remedy and violated Article I, Section 10 of the Oregon Constitution.

In *Vasquez*, the plaintiff was "grievously injured" when a bale-cutting machine "essentially cut the plaintiff in half at the base of his spine, leaving him permanently paraplegic. *Id.* at 506. Plaintiff ultimately received $4,680,000 in noneconomic damages (in addition to over $1,000,000 in economic damages) after a 40 percent reduction based on comparative fault. *Id.* at 525.

In *Vasquez*, the court first concluded that the noneconomic damages cap falls within the first category of cases identified in *Horton* – that is, ORS 31.710(1) does not alter a common-law duty, but it limits the remedy that a person injured as a result of a breach of that duty may recover. 288 Or.App. at 582.

In determining whether application of the cap left the plaintiff without a substantial remedy, the court considered "the extent to which the legislature has departed from the common-law model measured against is reasons for doing so," *Horton*, 359 Or. at 220, and concluded that under the common-law model, the plaintiff would have been entitled to recover his noneconomic damages, not subject to any cap. *Vasquez*, 288 Or.App. at 524-25. The court explained that the legislature capped the total damages to control rising insurance premium costs and that such reasons, which did not consider injured claimants, "cannot bear the weight of the dramatic reduction in noneconomic damages that the statute requires for the most grievously injured plaintiffs." *Id.* at 525. The court ultimately concluded that $500,000 out of the $4,460,000 awarded was a "paltry fraction" of the damages *the plaintiff sustained and would otherwise recover* and would violate Article I, Section 10. *Id.* at 526.

In *Rains*, the Court of Appeals followed its earlier opinion in *Vasquez* and similarly held that reducing the plaintiffs' damages to the $500,000 cap under ORS 31.710(1) would violate the remedy clause. 289 Or.App. at 675. There, plaintiff

Kevin Rains fell almost 16 feet to the ground when a defective wood board broke at his job site. He suffered severe injuries that resulted in paraplegia. He brought a claim of strict products liability against the retailer and the manufacturer of the defective board. His wife, plaintiff Mitzi Rains, brought a claim for loss of consortium against the same defendants. *Id.* The jury awarded Kevin $3,125,000 in noneconomic damages (in addition to over $5 million in economic damages) and Mitzi $1,012,500 in noneconomic damages. Based on the jury's finding that Kevin was 25% at fault, the court entered a limited judgment awarding Kevin $6,272,025 and Mitzi $759,375. *Id.* at 675-76.

Consistent with *Vasquez*, the court held that the reduction of *both* of the plaintiffs' damages would violate the remedy clause:

> We conclude that, given the nature of plaintiffs' injuries, the lack of any *quid pro quo* in ORS 31.710(1), and our conclusion that "the legislature's reason for enacting the noneconomic damages cap . . . cannot bear the weight of the dramatic reduction in noneconomic damages that the statute requires for the most grievously injured plaintiffs," reducing plaintiffs' noneconomic damages awards to $500,000 would leave them without a "substantial" remedy as required by Article I, Section 10.

Rains, 289 Or.App. at 691. Importantly, the court rejected the defendants' argument that the wife would be left with a substantial remedy because she would recover "65 percent" of her noneconomic damages award. *Id.* at 691. The court explained that reducing the award by $259,375 constituted a "bare reduction in

[her] noneconomic damages without any identifiable statutory *quid pro quo* or constitutional principle that the cap takes into consideration" and the court saw no "principled reason" to conclude that such a reduction left her with a "substantial" remedy. *Id.*

Finally, in *Busch*, the Court of Appeals followed both *Rains* and *Vasquez* to hold that application of the noneconomic damages cap under ORS 31.710(1) in that case violated the remedy clause. *Busch*, 292 Or.App. at 824-25. There, the plaintiff suffered severe injuries, including the amputation of his leg above the knee, when he was struck by the defendant's garbage truck as he crossed the street in downtown Portland. *Id.* at 821. In addition to over $3 million in economic damages, the jury awarded the plaintiff $10.5 million in noneconomic damages. The trial court granted the defendant's motion to reduce the noneconomic damages to $500,000 pursuant to ORS 31.710(1). *Id.*

Following both *Vasquez* and *Rains*, the Court of Appeals explained that "we again have a grievously injured plaintiff" and a "bare reduction in noneconomic damages without any identifiable *quid pro quo* or constitutional principle that the cap takes into consideration." *Id.* at 824. The court thus held that reducing the noneconomic damages from $10.5 million to $500,000 violated the remedy clause. *Busch*, 292 Or.App. at 824-25.

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3. The district court's decision

The district court distinguished those post-*Horton* cases[5] on the following basis:

> Plaintiff is not the type of "grievously injured" plaintiff that the Oregon Court of Appeals was concerned with in the decisions above. The plaintiffs in *Vasquez* and *Rains* both suffered *debilitating physical injuries* as a result of serious workplace accidents. Similarly, the plaintiff's wife in *Rains* suffered a grievous emotional injury and was accordingly compensated for a lifetime loss of consortium *as the result of her husband's paraplegia*.

ER 1466-67 (emphasis added). The district court then engaged *in its own analysis* to determine that plaintiff was not grievously injured because his emotional distress was suffered over only a few years of defendant's actions. ER 1467. Thus, the district court concluded that a remedy of $500,000 was a "substantial" remedy." *Id.*

4. The district court's flawed analysis

a. The district court improperly reexamined the jury's factual finding that plaintiff was grievously injured.

The district court's analysis was fundamentally flawed because it misinterpreted the Court of Appeals' focus on the plaintiffs' "grievous" injuries in *Vasquez*, *Rains*, and *Busch*. Although the Oregon Court of Appeals looked to the

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[5] The district court did not address *Busch*.

nature of the injuries in those cases, the court did not determine for itself whether the plaintiff was grievously injured. Instead, the court looked to *the amount of damages the jury awarded*. This was consistent with requirements under *Horton* that the court consider whether plaintiff would have been entitled to recover *his non-economic damages* and whether the cap would be a paltry fraction of *the damages the plaintiff sustained and would otherwise recover*. *Horton*, 359 Or. at 220.

The district court, however, did not focus on the noneconomic damages awarded by the jury, but instead made its own, independent determination that plaintiff's injuries were not *grievous*. That determination had already been made by the jury when the jury awarded plaintiff $1,000,000 for his emotional injuries. The district court's conclusion otherwise conflicted with the jury's verdict and *Horton*. That analysis was incorrect.

In Oregon, a court cannot reexamine facts found by a jury. Or. Const., Art. VII (Amended), § 3 (no fact tried by a jury shall be otherwise re-examined in any court of this state). "The reexamination clause prohibits courts from reassessing or second-guessing the facts that the jury found unless there is no evidence to support the jury's verdict." *Horton*, 359 Or at 252.

Furthermore, the district court had already determined that the jury's verdict was supported by the evidence. ER 1455. It could not then reexamine that verdict

and determine that plaintiff was not in fact seriously or grievously injured consistent with the jury's verdict award.

Notably, the amount awarded to plaintiff here was nearly identical to the amount the jury awarded to the wife in *Rains*. 289 Or.App. at 675 (awarding wife $1,012,500 in noneconomic damages, which was reduced 25 percent after comparative fault). Thus, the jury determined that plaintiff's harms were just as grievous as the wife's in *Rains*, despite the district court's personal opinion otherwise, and the district court should not have second-guessed the jury's factual determination.

b. The district court erred in requiring a "debilitating physical injury" in a non-personal injury case.

The district court also erred in determining that the Oregon appellate court was only concerned with "debilitating physical injuries" in considering whether plaintiff had been left with a substantial remedy. Although the particular plaintiffs in those cases happened to suffer such injuries – they all had damages arising out of bodily injuries – or derivative claims (which makes sense, since the cap only applies to those sorts of claims). The court erred in comparing apples to oranges – plaintiff's purely noneconomic damages to the severe physical injuries in the above cases.

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Nonetheless, a debilitating physical injury is not necessary in order to determine that a $500,000 cap leaves the plaintiff without a substantial remedy. In fact, the Court of Appeals determined as much for the wife in *Rains.* Like the wife in *Rains*, plaintiff here suffered a severe emotional injury. *See Rains*, 289 Or.App. at 687 (describing the wife's loss of consortium claim, as primarily an emotional injury). The jury recognized the serious injuries of each plaintiff by awarding a large amount of noneconomic damages. As the court explained in *Rains* – even leaving a plaintiff with *65 percent* of the awarded noneconomic damages is not a substantial remedy without any identifiable statutory *quid pro quo*. 289 Or.App. at 691. The district court therefore erred in holding that leaving plaintiff with *50 percent* – less than the wife in *Rains* – was a substantial remedy.

Furthermore, the remedy clause expressly protects injuries to "person, property, *or reputation*." Or. Const., Art. I, § 10 (emphasis added). The district court's requirement that an individual must be severely physically injured or have an emotional injury arising out of that severe physical injury for the remedy clause to apply contradicts the plain language of the remedy clause and would leave those with only injures "to reputation" or those with injures to their person – but not a physical injury – unprotected. This court should reject such a strained interpretation.

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In conclusion, this this Court should reverse and remand to the district court with instructions to reinstate the jury's verdict and modify the judgment accordingly.

II. THE ISSUES RAISED IN ROTE'S APPEAL ARE WITHOUT MERIT AND LARGELY UNPRESERVED

A. The District Court Properly Denied Defendant Rote's Motion to Dismiss Plaintiff's Complaint.

1. Plaintiff's claims against defendant Rote were not subject to arbitration.

The Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), divests a district court of subject matter jurisdiction when there is a valid, enforceable arbitration clause. Rote contends that the district court erred in denying his motion dismiss pursuant to the arbitration clause contained in the Employment Agreement between NDT and plaintiff. Op. Br. at 27-36. For the reasons explained below, this Court should reject Rote's argument and affirm the district court's ruling.

a. Standard of review

A denial of a motion to compel arbitration is reviewed *de novo*. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1044 n. 1 (9th Cir. 2009). The question of whether a party has waived arbitration is one of law, which this Court reviews *de novo*. *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 693 (9th Cir. 1986).

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b. Defendant Rote cannot invoke the arbitration clause, because Rote is not a party to the Employment Agreement between plaintiff and NDT.

Rote argues that, despite being a non-signatory to the Employment Agreement, he was entitled to invoke the arbitration clause in the Agreement between plaintiff and NDT, citing to the doctrine of equitable estoppel. Op Br at 35-36. Rote's argument fails.

i. Rote's arguments on appeal are unpreserved.

As a threshold issue, Rote's argument is unpreserved. Rote never argued that the Employment Agreement should apply to him under the doctrine of equitable estoppel; rather, he argued only that the employment claims asserted by plaintiff were arbitrable claims and that there was a valid arbitration agreement. ER 111-12; *see also* ER 751.

ii. Rote was a non-signatory that could not enforce the Agreement.

"The right to compel arbitration stems from a contractual right." *Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993). That contractual right "may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration." *Id.* Thus, "[t]he strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement." *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277,

1287 (9th Cir. 2009) (citation omitted).

The Agreement was between NDT and plaintiff only. The parties are specifically defined as "Northwest Direct Teleservices, Inc" and "Max Zweizig," and the Agreement expressly fails to include the company's owners, directors, employees, or agents as parties to the Agreement. ER 135. Rote signed the Agreement on behalf of NDT – not as an individual. ER 143. Thus, Rote was not a party to the Agreement, and nothing in the Agreement makes the arbitration clause applicable to claims against Rote.

Nor did plaintiff ever agree to an arbitration provision that applies to Rote. Thus, plaintiff made no conscious decision to arbitrate his claims against Rote. *See AT&T., Ins. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

Importantly, Rote seeks to compel arbitration under an Agreement in which he could, himself, could not be compelled to arbitrate. *See Fink v. Carson*, 856 F.2d 44, 46 (8th Cir. 1988) ("Signing an arbitration agreement as agent for a disclosed principal is not sufficient to bind the agent to arbitrate claims against him principally."). As a policy standpoint, adopting his position would allow Rote to benefit from a contract in which he is not bound.

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> In other words, an agent for a disclosed principal would enjoy the benefits of the principal's arbitral agreement, but would shoulder none of the corresponding burdens. . . . [J]udges should think long and hard before endorsing a rule that will allow a party to use the courts to vindicate his rights while at the same time foreclosing his adversary from comparable access.

McCarthy v. Azure, 22 F.3d 351, 361 (1st Cir. 1994).

Rote nonetheless relies on Oregon contract law[6] to invoke arbitration. Specifically, Rote relies on *Livingston v. Metropolitan Pediatrics, LLC*, 234 Or.App. 137, 227 P.3d 796 (2010). There the plaintiff brought employment claims against signatories and non-signatory employees. The applicable arbitration clause required arbitration of "[a]ny controversy, dispute or disagreement arising out of or relating to this Agreement, or the breach thereof[.]" *Id.* at 141.

In determining whether the non-signatory individual defendants could compel arbitration, the Oregon Court of Appeals explained that "the terms of the arbitration clause are at the center of the inquiry, because it is the text of the arbitration clause that will determine whether the parties to the agreement intended that third parties could enforce its provisions." *Id.* at 149. The court relied on broad language of the clause on that case – "arising out of or relating to" language – to reason that the clause plausibly encompassed not only claims between the

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[6] *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009) (a litigant that is not a party to an arbitration may invoke arbitration under the FAA if the relevant state contract law allows the litigant to enforce the agreement).

parties to the agreement, but claims against the individual defendants. *Id.* at 149-151. In reaching that conclusion, the Oregon Court of Appeals specifically reasoned that the clause did "not expressly limit its scope to claims between the parties . . . ." *Id.* at 150.

Here, unlike the clause in *Livingston*, the arbitration clause between NDT and plaintiff expressly limits its application to "any dispute of the parties":

> Employee agrees to submit to mediation . . . *any dispute of the parties* arising out of or related to: Employee's employment with the Company; (2) any breach of this Agreement (excepting the injunctive relief provided in paragraph 4.3 above); or (3) the termination of Employee's employment with the Company (hereafter "Disputes"). Such Disputes include, but are not limited to, any alleged violations of federal, state and/or local statutes including any claims of discrimination based on race, color, religion, sex, national origin, age, disability, marital status, veteran or other status protected under federal or state law, harassment claims, employee benefit claims for unpaid commissions or compensations, claims based on any purported breach of duty arising in contract or tort, including breach of contract, breach of the covenant of good faith and fair dealing, violation of public policy or any other alleged violation of statutory, contractual or common-law rights *of either party* arising out of or relating to the Dispute as defined above (excluding claims for workers' compensation or unemployment insurance).

ER 139 (emphases added). The text of the clause is susceptible to only one interpretation – that the parties did not intend it to apply to claims against non-signatories. *See also Bates v. Andaluz Waterbirth Ctr.*, 298 Or.App. 733, --- P.3d --- (2019) (terms of arbitration clause was limited to parties and gave no notice that non-parties would be bound to the agreement).

Finally, Rote argues that the district court should have compelled arbitration on the basis of equitable estoppel. Op. Br. at 36. "Equitable estoppel 'precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes.'" *Comer v. Micor*, 436 F.3d 1098, 1101 (9th Cir. 2006). However, in the arbitration context, to invoke the doctrine, the claims must be "intertwined with the contract providing arbitration." *Mundi*, 555 F.3d at 1047. Here, plaintiff did not rely on or benefit from the Agreement. Plaintiff did not bring claims for breach of contract, nor did he seek any contractual remedies. Plaintiff's claims are completely independent of and do not require the examination of his the Agreement. Instead, his claims arise under the Oregon's Fair Employment Practices Act, ORS 659A.030(1)(f), (1)(g). The duties owed by NDT and Rote to plaintiff under that Act arise independently of any duty owed to plaintiff under the Agreement. And even though plaintiff brought an action against Rote for aiding and abetting NDT, a party to the contract, a claim against an aider and abettor of a party alone is insufficient to work an estoppel when the claims are otherwise not intertwined with the underlying contract. *Cf. Ross v. Am. Express Co.*, 547 F.3d 137, 148 (2d Cir. 2008) (it is wrong to suggest a claim against a co-conspirator of a party will always be intertwined to a degree sufficient to work an estoppel"). Given these circumstances, the claims are not "intertwined with" the Agreement, and Rote could not compel arbitration. *Mundi*, 555 F.3d at 1047;

Rajagopolan v. NoteWorld, LLC, 718 F.3d 844, 847-48 (9th Cir. 2013).

Oregon contract law also does not provide Rote the ability to enforce the Agreement under the doctrine of equitable estoppel. Oregon has never applied equitable estoppel to the arbitration context. Rote also fails to meet the elements under Oregon law for estoppel, which requires: (1) a false representation; (2) made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have been induced to act upon it. *State v. Portland Gen. Elec. Co.*, 52 Or 502, 528, 95 P 722, 731 (1908). Oregon law therefore does not help Rote.[7]

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[7] Rote does not argue that the Agreement should apply to him because he was acting as an officer, agent, or employee of NDT, Op. Br. at 35-56, and in fact argued the opposite below. ER 1589 (arguing that it was not the corporation that acted, but he alone). Nonetheless, such argument would fail. *See Britton*, 4 F.3d at 748 (non-signatory to an arbitration agreement has no standing to compel arbitration, even as an agent, officer, or employee of a signatory, when an opposing party seeks to impose subsequent, independent acts "unrelated to any provision or interpretation of the contract."). He also does not argue, or provide any evidence, that the parties intended for him to be a third-party beneficiary to the Employment Agreement.

c. Even if defendant Rote could enforce the arbitration agreement, he waived his right to do so.

i. Rote's arguments as to waiver are unpreserved.

This Court should reject Rote's arguments on appeal as to waiver because they are not preserved. In particular, Rote never argued to the district court that it had no authority to determine the issue of waiver or that Oregon law applied. ER 111-12. Rote also did not contend that plaintiff was not prejudiced by his delayed invocation of the arbitration agreement because plaintiff also knew of the right to arbitration. *Id.* Instead, Rote simply argued that the defense of subject matter jurisdiction could not be waived. *Id.*

ii. Waiver is an issue for the court to decide under federal law.

It is well-established that unless the parties clearly evidence their intent to be bound by state-law rules, federal law applies to determine waiver. *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002). It is also settled that, unless the Agreement clearly and unmistakably provides otherwise, the question of waiver is an issue of arbitrability and one for the court to decide. *See Martin v. Yasuda*, 829 F.3d 1118, 1122-23 (9th Cir. 2016). Here, the Agreement provides no clear evidence by the parties that Oregon law applies to the *rules* of arbitration. Instead, the parties agreed that "Oregon State Law *and applicable federal law* will govern

"all procedural issues" not covered by the applicable arbitration rules." ER 142 (emphasis added). The Agreement also does not include unmistaken or clear language that an arbitrator must decide the issue of waiver; rather, the Agreement provides that the arbitrator may decide "only the Dispute submitted to the arbitrator." ER 140-42. Therefore, the district court did not err in applying federal law or deciding the question of waiver itself.

iii. The district court correctly determined that Rote waived his right to compel arbitration.

Furthermore, the district court was correct in holding that Rote had waived any such rights. "The right to arbitration, like other contractual rights, can be waived." *Martin*, 829 F.3d at 1124. Although waiver must be considered "in light of the strong federal policy favoring enforcement of arbitration agreements," and the party arguing waiver bears "a heavy burden of proof," waiver may be demonstrated based on the following: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Fisher*, 791 F.2d at 694.

Rote does not dispute that he had a longstanding knowledge of any potential right to compel arbitration. Op. Br. at 32-34. Nor could he. His company, NDT,

previously compelled arbitration and Rote was heavily involved in those proceedings, as demonstrated by the statements on his blog.

As to the second element, the district court was correct in determining that Rote acted inconsistently with any right to compel arbitration. This element is satisfied when a party chooses to delay his right to compel arbitration by "actively litigating his case to take advantage of being in federal court." *Martin*, 829 F.3d at 1125. "A party's extended silence and delay in moving for arbitration may indicate a 'conscious decision to continue to seek judicial judgment on the merits of [the] arbitrable claims,' which would be inconsistent with a right to arbitrate." *Id.* (quoting *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 759 (9th Cir. 1988)). "A statement by a party that it has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver." *Id.* Seeking a decision on the merits of an issue may also satisfy this element. *Id.* (citing cases).

The district court properly concluded that Rote acted inconsistent with any right he had to compel arbitration. Plaintiff filed this action on December 14, 2015. ER 6-15. Rote did not move to compel arbitration until approximately 10 months later. ER 67-80. In the meantime, he filed multiple answers admitting that jurisdiction was proper and failing to assert any right to compel arbitration. ER 16-29; SER 355, 357. He also asserted counterclaims against plaintiff, and filed an amended answer asserting additional counterclaims. ER 26-28; SER 363-66. Rote

also sought to join plaintiff's attorneys and fiancé as additional counterclaim defendants. Rote's Motion to Join, Feb. 5, 2016 (Doc #20). He attended court conferences. Minutes of Proceedings (Doc #39). He engaged in meet and confer conferences with plaintiff's counsel. SER 368-71. Rote filed a motion to strike and dismiss plaintiff's complaint, seeking to have the court dismiss plaintiff's claims under Oregon's anti-SLAPP statute. SER 332-52. Rote also filed multiple response memoranda and heavily defended his right to bring counterclaims against plaintiff. ER 635-56, 720-29; Rote's Resp. and Mem. In Opp'n to Pl.'s Mot. Dismiss (Doc #51).

While Rote sought to use the arbitration clause as a shield, he simultaneously sought to benefit from litigating in federal court. Considered as a whole, these actions are wholly inconsistent with any reliance on a right to compel arbitration. *Martin*, 829 F.3d at 1126 (party acted inconsistent with right to arbitrate by litigating case for seventeen months, including filing a joint stipulation for structuring litigation, entering a protective order, answering discovery, and conducting depositions); *Van Ness Townhouses*, 862 F.2d at 759 (party acted inconsistently with right to arbitrate by actively litigating matter for two years, including pleadings, motions, and approving a pre-trial conference order); *Kelly v. Public Util. Dist. No. 2 of Grant County*, 552 Fed.Appx. 663, 664 (9th Cir. 2014) (waiting eleven months after lawsuit to demand arbitration, conducting discovery

and litigating motions constituted activity "inconsistent with preserving the right to compel arbitration"). *See also Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 718 (6th Cir. 2012) (failure to raise arbitration in answer, asserting a counterclaim, and actively participating in discovery constituted conduct "completely inconsistent with any reliance on [the] right to arbitrate"); *Jones Motor Co. v. Chauffeurs, Teamsters and Helpers Local Union No. 633 of New Hampshire*, 671 F.2d 38, 44 (1st Cir. 1982) (defendant waived right to arbitration when it engaged in considerable discovery, litigated substantive motions, and waited until after court decided those motions on the merits to advocate for arbitration); *Cornell & Co. v. Barber & Ross Co.*, 360 F.2d 512, 513 (D.C. Cir. 1966) (party waived right to arbitrate by actively litigating and waiting four months into litigation to compel arbitration). *Compare with Britton v. Co-op Banking Group*, 916 F.2d 1405, 1413 (9th Cir. 1990) (defendant did not act inconsistent with his pursuit of arbitration because he refused to participate in discovery and moved to stay the litigation).

More importantly, Rote moved for dismissal with prejudice on "a key merits issue that would preclude relief as to one or more plaintiff's claims" and thus sought a ruling on the merits. *Martin*, 829 F.3d at 1126 n.4. Thus, Rote's motion to dismiss plaintiff's complaint under Oregon's anti-SLAPP statute alone satisfies this element. *Id.* at 1125-26; *see also Nat'l Found. for Cancer Research v. A.G.*

Edwards & Sons, Inc., 821 F.2d 772, 776 (D.C. Cir. 1987) (electing to have court resolve issue on the merits was wholly inconsistent with intent to arbitrate).

It is not surprising that Rote did not seek to compel arbitration and instead chose to hedge his bets on a litigation strategy in federal court. The main thrust of Rote's blog was to shine a light on what he characterized as systemic problems with the arbitration system. ER 298, 321, 373. Rote heavily criticized the arbitration process, opining that "you don't get sophisticated Judges when you arbitrate," ER 273, the opportunity for abuse is great in the arbitration form and it should be "avoided at all costs," ER 241, the process is "just too dangerous" and "you are better off in court," ER 296, there are limited opportunities for appeal, ER 300, 366, and the rules of evidence don't apply, ER 366.

Only after his litigation strategy failed and he received several adverse rulings did Rote attempt to change course and try his hand at another forum. However, Rote should not be able to hedge his bets – first attempting to benefit litigating in federal court – and, when unhappy with the results after nearly a year, compel arbitration. As this Court explained in *Martin*:

> A party that signs a binding arbitration agreement and has subsequently been sued in court has a choice: it can either seek to compel arbitration or agree to litigate in court. It cannot choose both. A party may not delay seeking arbitration until after the district court rules against it in whole or in part; nor may it belatedly change its mind after first electing to proceed in what it believed to be a more favorable forum. Allowing it to do so would result in a waste of

> resources for the parties and the courts and would be manifestly unfair to the opposing party. Here, we reject the defendants' attempt to manipulate the judicial and arbitral systems and to gain an unfair advantage by virtue of their litigation conduct.

829 F.3d at 1128. *See also Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 86 (2d Cir. 1988) (permitting delay of assertion of right to arbitration allows parties to "test[] the water before taking a swim"); *Cabinetree of Wisconsin, Inc. v. Kraftamid Cabinetry, Ind.*, 50 F.3d 388, 391 (7th Cir. 1995) (policy favoring arbitration is not meant "to allow or encourage the parties to proceed, either simultaneously or sequentially, in multiple forums" and "weighing options" by seeing how a case goes in federal district court is a game of "heads I win, tails you lose"); *Midwest Window Syst. v. Amcor Indust., Inc.*, 630 F.2d 535, 537 (7th Cir. 1980) (a party should not be permitted to change the arena and the rules at a late date in the litigation); *Nat'l Found. for Cancer Research*, 821 F.2d at 776 ("To give [the defendant] a second bite at the very questions presented to the court for disposition squarely confronts the policy that arbitration may not be used as a strategy to manipulate the legal process.").

Second, Rote's argument that plaintiff suffered no prejudice by his delay should be rejected. Although delay alone rarely constitutes prejudice, substantial invocation of the litigation process may cause prejudice to an opposing party. When a party 'has expended considerable time and money due to the opposing

party's failure to timely move for arbitration and is then deprived of the benefits for which it has paid by a belated motion to compel, the party is indeed prejudiced." *Martin*, 829 F.3d at 1127; *see also Kelly*, 552 Fed.Appx. at 664 ("A late shift to an arbitrator would force the parties to bear the expense of educating arbitrators and threaten to require [the plaintiffs] to relitigate matters decided by the district judge. It would waste time and money spent by [the plaintiffs] in federal court."); *Joca-Roca Real Estate, LLC v. Brennan*, 772 F.3d 945, 949, 951 n.51 (1st Cir. 2014) (finding prejudice with a nine-month delay after the filing of complaint); *Messina v. N. Centr. Distrib., Inc.*, 821 F.3d 1047, 1051 (8th Cir. 2016) (finding prejudice after an eight-month delay); *Johnson Assocs. Corp.*, 680 F.3d at 720 (eight-month delay, expenses of participating in litigation, and engaging in discovery, caused the plaintiff prejudice). At that point, "the costs and expenses of litigating in district court are no longer simply 'self-inflicted' wounds on the part of the plaintiffs, *Fisher*, 791 F.2d at 698, because the defendants' actions have shown that they, too, have sought at least for some period of time to attempt to resolve the issue in court rather than in arbitration." *Martin*, 829 F.3d at 1127.

Here, it is obvious and apparent on the record that plaintiff expended substantial resources, time and effort to litigate this action, including defending against Rote's multiple counterclaims asserted against plaintiff, and motion to join additional parties. *Id.* at 1128 (additional costs incurred by plaintiff as a result of

defendant's delay in compelling arbitration "constitutes obvious prejudice."). The district court specifically found that plaintiff had vigorously litigated the case for a year, that a trial date had been set, and delaying the case any further would cause plaintiff prejudice. ER 122.

Furthermore, plaintiff would have been prejudiced for an additional reason – the court already had made significant rulings in plaintiff's favor on the merits, dismissing Rote's counterclaims. ER 696-719. This factor is "dispositive" because plaintiff "would be prejudiced if the defendants got a mulligan on a legal issue it chose to litigate in court and lost." *Martin*, 829 F.3d at 1128; *see also Van Ness Townhouses*, 862 F.2d at 759 (party may establish prejudice if it would be forced to relitigate an issue on the merits on which they have already prevailed in court).

In conclusion, this Court should affirm the district court's denial of Rote's motion to dismiss for lack of subject matter jurisdiction.

2. Defendant's offer to voluntarily cease his illegal conduct did not moot plaintiff's claims.

"Generally, a case should not be considered moot if the defendant voluntarily ceases the allegedly improper behavior in response to a suit, but is free to return to it at any time. Only if there is no reasonable expectation that the illegal action will recur is such a case deemed moot." *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994).

Here, there was no evidence that defendant had actually ceased his illegal conduct. In fact, plaintiff presented evidence that defendant was continuing to blog about plaintiff at the time of his motion to dismiss. SER 310-12. Furthermore, absent a court order, there was no reasonable expectation that his illegal action would cease. Finally, plaintiff was not just seeking injunctive relief, but sought damages for past harms. ER 15. Thus, plaintiff alleged that he had already experienced significant harm for which he sought to be compensated, and Rote's offer to stop the illegal conduct in the future would not have mooted that controversy. Therefore, the district court properly denied defendant's motion to dismiss and this Court should affirm the district court's order.

B. The District Court Properly Denied Rote's Motion for Summary Judgment.

1. Standard of review

This Court reviews a district court's grant of summary judgment *de novo*. *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1124 (9th Cir. 2002). Because defendant moved for summary judgment, it is defendant's burden to demonstrate the absence of a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This Court "must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant

substantive law." *Dawson v. Entek Int'l*, 630 F.3d 928, 934 (9th Cir. 2011).

2. The district court properly denied Rote's renewed arguments as to arbitration and mootness.

In his cross-motion for summary judgment, Rote renewed his previously-raised arguments as to mootness and arbitration. ER 751, 754-55. For the same reasons explained above, the district court properly denied defendant's motion for summary judgment as to those purely legal arguments.

3. Defendant's argument as to plaintiff's aiding and abetting claim fails.

a. Defendant cannot appeal the denial of his motion for summary judgment involving issues tried to a jury.

An order denying summary judgment "is not properly reviewable on appeal from the final judgment entered after trial." *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1358 (9th Cir. 1987). Here, Rote's alleged errors do not concern pure questions of law, but instead involve an issue of fact – whether NDT was still operating in some compacity during the relevant time period. Such fact-bound determinations, after a full trial on the merits, are not appealable. *Compare Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004) (reviewing orders denying summary judgment after a jury trial when alleged error concerns a pure question of law.

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b. Even if defendant could appeal, Rote failed to demonstrate an absence of a genuine issue of material fact.

Even if defendant could appeal, the district court properly denied Rote's cross-motion for summary judgment. Rote failed to establish any absence of material issues of fact for the jury on the element that NDT was no longer plaintiff's employer. Rote simply made conclusory statements but failed to present any evidence in support of his arguments. ER 764. The court expressly found that Rote "submits no evidence to corroborate his statements" and "assertions" that NDT was no longer an active company after 2014. ER 1114. Defendant admits in his brief that he failed to present this evidence, but instead suggests that the district court could have requested the information through additional briefing. Op. Br. at 42. The district court was under no obligation to request evidence from the parties and correctly denied defendant's motion.

C. The District Court Did Not Err in Granting Plaintiff's Special Motion to Strike Rote's Counterclaims.

Rote contends that the district court erred in granting plaintiff's special motion to strike Rote's counterclaims under Oregon's anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute, ORS 31.150, because the district court should have allowed discovery before granting the motion. Op. Br. at 45-56. Rote does not raise any other basis for challenging the court's ruling.

1. Standard of review.

In reviewing a special motion to strike under ORS 31.150, the court takes the facts from the pleadings and from the supporting and opposing affidavits submitted to the district court and states them in the light most favorable to the non-moving party. ORS 31.150(4); *see also Baldwin v. Seida*, 297 Or.App. 67, 70 (2019). A special motion to strike has a two-step burden-shifting process. *Young v. Davis*, 259 Or.App. 497, 501, 314 P.3d 350 (2013). First, the court must determine whether [the moving party] has met its initial burden to show that the claim against which the motion is made arises out of one or more protected activities. Second, if the moving party meets its burden, the burden then shifts to the non-moving party to establish that there is a probability that the moving party will prevail on the claim by presenting substantial evidence to support a prima facie case. *Id.*

2. Rote's argument on appeal is unpreserved.

In opposing plaintiff's special motion to strike, Rote argued that plaintiff did not meet his initial burden to show that Rote's counterclaims arose out of one or more protected activities. In addressing whether Rote would prevail on his counterclaims by presenting substantial evidence to support a *prima facie* case, Rote admitted that "we do not know as of this time the extent of what was actually conveyed to Judge Jones Deputy or to Judge Jones, but we know it suggested a

threat." ER 653. However, Rote never requested that the court defer ruling on the motion to allow Rote to seek additional discovery.

3. The district court properly granted plaintiff's special motion to strike.

The district court's determined that plaintiff established that Rote's counterclaims arose out of one or more protected activities and Rote does not appeal that ruling. Rote therefore had the burden of proof to establish that there was a probability that he would prevail on his counterclaims by presenting substantial evidence to support a prima facie case. *Young v. Davis*, 259 Or.App. at 501. Thus, the district court was within its authority to grant plaintiff's motion based on Rote's failure to present evidence necessary to support his counterclaims.

4. The asserted error, if any, was harmless.

Furthermore, any error by the district court was harmless. *Dixon v. S. Pac. Transp. Co.*, 579 F.2d 511, 514 (9th Cir. 1978). The district court's ruling was not dependent on any lack of evidence. Instead, the district court ruled that Rote could not establish a prima facie case of defamation because plaintiff's representation – even if a threat -- was an opinion and not an assertion of fact. *See Neumann v. Liles*, 358 Or. 706, 717, 369 P.3d 1117, 1124 (2016) (statement must be objective assertion of fact to be basis of defamation and setting out test). It was on that basis that the district court granted the motion. ER 717. Rote does not appeal that basis

for granting the motion – and therefore his appeal fails.

In addition, the district court dismissed Rote's counterclaims *without prejudice*. Rote later moved to submit the relevant "discovery" he now asserts he needed in order to respond to plaintiff's special motion to strike. ER 203; *see* Op. Br. at 47 ("Rote tendered that evidence after the anti-SLAPP decision). The court considered that evidence, but still found it to be insufficient to support his counterclaims and denied his motion to amend. ER 203-04; 124. Rote does not appeal the district court's denial of his motion to amend his complaint.

D. The District Court Properly Granted Plaintiff's Motion *in Limine* Excluding Forensic Evidence

Rote also contends that the district court erred in granting plaintiff's motion *in limine* excluding certain forensic reports Rote sought to admit at trial. Op. Br. at 48-54. According to Rote, the district court erred in excluding the evidence because it wrongly applied the doctrines of issue preclusion and collateral estoppel. *Id.* Rote's argument fails.

1. Standard of review.

The district court's ruling on a motion *in limine* is reviewed for an abuse of discretion. *U.S. v. Rude*, 88 F.3d 1538, 1549 (9th Cir. 1996).

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2. Rote did not preserve his argument on appeal.

In Rote's response to plaintiff's motion *in limine*, Rote simply contended that the arbitration proceedings were corrupt. He did not argue that the evidence should be admitted because collateral estoppel didn't apply or because the arbitrator did not properly consider the evidence he sought to introduce in making its determination. ER 1360. Rote also conceded at the pre-trial conference that the arbitrator expressly made a ruling regarding the forensic evidence. ER 1484-95. Thus, Rote invited and/or waived the error.

3. Rote's appeal fails because the district court did not ultimately exclude the forensic evidence on the basis of collateral estoppel.

The district court did not ultimately exclude Rote's proposed forensic exhibits on the basis of collateral estoppel. Although the court granted plaintiff's motion *in limine*, the court expressly informed the parties that it would revisit the ruling after plaintiff's case if Rote believed that plaintiff opened the door to evidence related to the arbitration. ER 1490, 1493, 1503. When Rote requested to introduce the forensic evidence as impeachment evidence, the court excluded the evidence *based on Rote's inability to authenticate the evidence* through any witness. ER 1703-06; *see* Fed. R. Evid. 901.

Rote nonetheless contends that plaintiff's motion *in limine*, which identified the forensic reports in objecting to their admission, somehow authenticated them

sufficient for their admission under Rule 901. Plaintiff, who simply identified the exhibits defendant sought to introduce, was not the *proponent* of the evidence, and could not authenticate the evidence. Fed. R. Evid. 901. Plaintiff also did not have the personal knowledge of the forensic reports – which were created by forensic experts -- in order to testify that they were what defendant claimed them to be. Fed. R. Evid. 901(b)(1). Thus, this argument also fails.

4. Even if excluded on the basis of collateral estoppel, the district court did not abuse its discretion.

An arbitration award may have a preclusive effect on subsequent litigation in federal court. *C.D. Anderson & Co., Inc. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir. 1987).

> In applying res judicata and collateral estoppel to an arbitration proceeding, we make an examination of the record, if one exists, including any findings of the arbitrators. . . .We must decide whether a rational factfinder could have reached a conclusion based upon an issue other than that which the defendant seeks to foreclose. . . .When the issue for which preclusion is sought is the only rational one the factfinder could have found, then that issue is considered foreclosed, even if no explicit finding of that issue has been made.

Clark v. Bear Stearns & Co., Inc., 966 F.2d 1318, 1321 (9th Cir. 1992).

Here, application of res judicata and collateral estoppel to exclude the forensic evidence was not error. Rote sought to introduce the forensic evidence to show plaintiff's destruction of evidence and to show plaintiff was not truthful in his testimony before the arbitrator. ER 1364. However – whether Rote was truthful in

his testimony at the arbitration was specifically decided by the arbitrator. ER 162. Furthermore, the arbitrator specifically determined that plaintiff did not breach his contract with NDT by "deleting, destroying, or otherwise failing to return to [NDT] certain software programs, codes, and applications" to NDT. ER 164-65. The arbitrator also specifically considered the forensic evidence that defendant sought to introduce. ER 1312-29. Thus, the issues that were actually decided and necessarily decided in the former arbitration proceeding and the district court did not err.

5. The district court's error, if any, is harmless.

Even if the court erred in excluding the forensic evidence, such error was harmless. Rote cannot establish that he suffered any prejudice from the exclusion. Despite not being able to admit the actual forensic reports, the district court permitted Rote to testify in length to the content of the reports and Rote was not prohibited from presenting his theory of his case. ER 1721-24.

E. Rote Did Not Preserve His Objections to the Jury Instructions.

1. Retaliation instruction

Rote argues that the district court erred by giving a retaliation instruction to the jury that did not include a "but-for" causation standard for retaliation under ORS 659A.030(1)(f). Rote's argument is unpreserved and fails on the merits.

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a. Rote's argument is unpreserved.

No party may assign as error the giving or the failure to give an instruction unless he objects thereto, before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Fed. R. Civ. P. 51. Rule 51 is satisfied if the plaintiff does not object to instructions, but the plaintiff proposes alternative instructions and the district court is aware that plaintiff does not agree with the court's instructions. *Martinelli v. City of Beaumont*, 820 F.2d 1491, 1493-94 (9th Cir. 1987).

Here, Rote's proposed alternative instruction on retaliation did not contain a "but-for" causation standard. SER 301-02. There also is nothing in the record showing that Rote otherwise made the district court aware that disagreed with the court's instruction based on causation.

b. The retaliation instruction is legally correct.

The retaliation instruction was also a correct statement of Oregon law. Oregon courts have explained:

> To prove causation under ORS 659A.030(1)(f) – that is, that plaintiff was discharged by defendant "because" of his protected activity – plaintiff must prove that defendant's unlawful motive was a substantial factor in his termination, or, in other words, that he would have been treated differently in the absence of the unlawful motive.

Lacasse v. Owen, 278 Or.App. 24, 32, 373 P.3d 1178 (2016). The retaliation instruction provided to the jury mirrored the language in *LaCasse*:

> A plaintiff is "subjected to an adverse employment action because of his participation in the protected activity" if he shows that an unlawful motive was a substantial factor in his adverse employment action, or, in other words that the plaintiff would have been treated differently in the absence of the unlawful motive.

ER 1430; 1832. Based on Oregon law, Rote's contention that a but-for causation standard was required is without merit.

2. Aiding and abetting instruction

Rote argues that the aiding and abetting jury instruction was erroneous because the "business entity language was inaccurate," for failing to apply only to NDT. Op. Br. at 60.

Rote's argument wholly is without merit because the court instructed the jury that "business entities" meant NDT. ER 1830 ("At this juncture, really, "the business entities" relate solely to [NDT]"); ER 1831 (clarifying in the aiding and abetting instructions that "business entities" was referring to "[NDT]").

Furthermore, Rote waived this alleged error when he expressly informed the court that he was satisfied with NDT being listed on the verdict form and not in the jury instructions. ER 1793-95; *U.S. v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997).

3. Mitigation instruction

Rote contends that the jury instruction on mitigation was erroneous because it did not reflect his concern that the offer of "anonymity and redaction" vacated plaintiff's claim. Op. Br. at 60. Rote jointly submitted this jury instruction, ER

1372, and concedes that he did not preserve this issue for appeal. Op. Br. at 60. *See* Fed. R. Civ. P. 51; *Martinelli*, 820 F.2d at 1493-94. Further, by jointly requesting this instruction, he invited the error, if any. *U.S. v. Reyes-Alvarado*, 963 F.2d 1184, 1187 (9th Cir. 1992).

F. The District Court Did Not Abuse Its Discretion in Failing to Provide a Special Verdict Form

Rote contends that the district court erred by failing to provide a special verdict form on whether NDT was still in business and whether Rote was employed by NDT. Rote's arguments are unpreserved and, alternatively, fail.

1. Rote did not preserve his arguments on appeal.

The court specifically asked the parties whether they objected to the verdict form. ER 1793. Rote objected that the term "business entities" was used in the verdict form instead of NDT. ER 1793-94. The district court agreed to make that change and asked if such change would satisfy Rote. ER 1795. Rote responded, "Yes, it will." ER 1795. When the district court asked Rote if he had any other objections to the verdict form, Rote stated "I do not." ER 1795. Rote therefore failed to preserve his argument now raised on appeal. Furthermore, Rotes' acquiescence to the court's submission of the verdict form constitutes waiver because he affirmatively acted to relinquish a known right. *Perez*, 116 F.3d at 845.

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2. The general verdict form was proper

Rote essentially contends that the district court should have provided the jury with a special verdict form on the question of whether NDT was still in business during the relevant time period. Whether to provide a jury with a special verdict form is within the discretion of the trial court. FRCP 49(b); *see also U.S. v. Real Property Located at 20823 Big Rock Drive, Malibu, CA 90265*, 51 F.3d 1402, 1408 (9th Cir. 1995).

Certainly, the general verdict form was "adequate to obtain a jury determination of the factual issues essential to judgment." *Smith v. Jackson*, 84 F.3d 1213, 1220 (9th Cir. 1996). The verdict form required the jury to determine whether Rote aided and abetted NDT in its retaliation of plaintiff. The jury was also instructed on the elements of both aiding and abetting and retaliation, and informed that NDT was the only business entity or employer in regard to the retaliation. Rote also argued extensively at trial that NDT was no longer active. If the jury determined that NDT was no longer in business, it necessarily could not have answered yes to the general verdict form. Therefore, the district court did not abuse its discretion. *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1317 (9th Cir. 1982); *Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1374 (9th Cir. 1987).

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G. The District Court Properly Denied Rote's Motion for a New Trial.

Rote contends that the district court erred in denying his motion for new trial, citing multiple statements by plaintiff's counsel that he contends constituted misconduct in closing argument. Op. Br. at 60-65. Rote concedes he did not object to any of the statements. *Id.* at 63.

Improper argument by counsel can be grounds for a new trial, but "generally, misconduct by trial counsel [only] results in a new trial if the flavor of misconduct sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1192 (9th Cir. 2002) (internal citations and quotations omitted). "The federal courts erect a 'high threshold' to claims of improper closing arguments in civil cases raised for the first time after trial." *Id.* at 1193 (internal citations omitted).

1. Rote fails to demonstrate that counsel's statements were improper.

Here, Rote does not sufficiently identify any improper statements by counsel. A review of the record demonstrates that plaintiff's counsel's statements simply are not as Rote characterizes them to be. As a mere example:

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Alleged prejudicial statement as stated in Rote's Opening Brief " Op. Br. at 62.	**Transcript**
Punishing Rote will force San Francisco to pay attention	"So again, I bring you back to community, big picture, little picture." ER 1812.
Plaintiff had no duty to mitigate, contrary to the instructions	[Rote cites to his own closing argument] ER 1822.
Defendant makes $4 million dollars a year in net income and should be punished	No citation in the record
Arbitrator made definitive rulings on the accuracy of the forensic reports	"[NDT]. . . asserted a whole laundry list of claims against Mr. Zweizig. They accused him of destroying computer, withholding code, alerting software applications, shutting down their business, putting people out of work for a week, a whole laundry list of things. And the arbitrator also ruled on that." ER 1584.

Because Rote fails to establish in the record that plaintiff's counsel actually made any improper statements, his argument fails.

2. Even if improper, Rote fails to demonstrate that such statements so permeated the entire proceeding such that the jury was influenced by passion and prejudice.

As explained above, Rote has failed to demonstrate that counsel made any of the alleged inflammatory statements. But even counsel made improper statements, Rote has not established that such statements sufficiently permeated the entire proceeding to justify a new trial.

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In considering Rote's motion for new trial, the district court considered plaintiff's statements in closing – in particular, his statements regarding sending a message to the community. ER 1453-54. When viewed in light of the entire record – in particular plaintiff's testimony supporting his noneconomic damages -- the court held that they did not sufficiently permeate the entire proceeding to warrant a new trial. ER 1454-55.

The district court's ruling was proper. Plaintiff testified that the content on the blog took a serious tole on plaintiff. As a result of the negative and defamatory nature of the statements in the blog, plaintiff had to change his behavior. ER 1678. Plaintiff no longer used his real name online, used an alias, and had to anonymize himself. ER 1628-29, 1655. He could no longer professionally network, afraid that people would believe what they read about him. ER 1655. He explained that Rote had taken control of his reputation and the reputation of those closest to him. ER 1650-51. He watched it affect his family. ER 1621. He felt his identity had been taken from him. ER 1664. He was terrified, frightened, and felt "stalked and terrorized." ER 1637, 1639, 1652. The district court expressly found that plaintiff was "emotional in describing how Defendant's actions had impacted him." ER 1455.

In light of the overall evidence, Rote has failed to demonstrate that the jury was improperly influenced by counsel's alleged improper statements. *See Kehr v.*

Smith Barney, Harris Upham & Co., Inc., 736 F.2d 1283, 1285-86 (9th Cir. 1984) (affirming the district court's decision to deny the defendant's motion for a new trial where isolated improper remarks were made principally during opening and closing argument, the jury's damage award was not excessive, and the defendant made no objection).

CONCLUSION

For the foregoing reasons, plaintiff Max Zweizig urges this Court to affirm the district court's rulings on the issues raised in defendant Rote's appeal. Plaintiff Zweizig further requests that this Court certify to the Oregon Supreme Court the first issue raised in plaintiff's cross-appeal or, alternatively, vacate the judgment and remand the case to the district court with instructions to modify the judgment and reinstate the jury's verdict in its entirety.

DATED this 6th day of September, 2019.

SHENOA PAYNE ATTORNEY AT LAW PC

/s/ *Shenoa L. Payne*
Shenoa L. Payne, Oregon State Bar No. 084392

VOGELE AND CHRISTIANSEN

Joel Christiansen, Oregon State Bar No. 080561

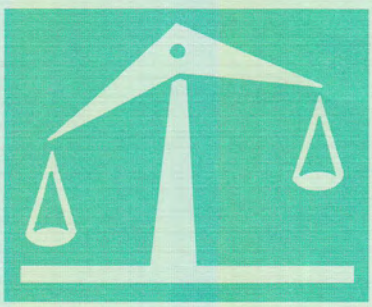
Attorneys for Cross-Appellant/Appellee
Max Zweizig

APPENDIX

SENATE JUDICIARY
Bill No. TORT REFORM Pages 15
Exhibit D Date 1/20/87
Presented by KIP LOMBARD (CIELS)

TORT REFORM

Returning Balance To The Legal System



WHAT CAN BE DONE?

In this state, as in most other states, the insurance industry and the trial attorneys have clearly stated their positions. Insurance companies do not want more government regulation of their industry. Members of the Oregon Trial Lawyers Association have a vested interest in unlimited fees based on unlimited awards.

But there is a third group involved. A statewide coalition, Citizens' Initiative for Equity in the Legal System (CIELS), represents the consumers. It is known as "The Coalition for Tort Reform" and seeks changes in the tort laws in the 1987 Oregon Legislature. CIELS represents not only the businesses and individuals who buy insurance, but everyone in Oregon who pays for the crisis either through increased product and service fees or through diminishing choices as businesses fail or services are cut back.

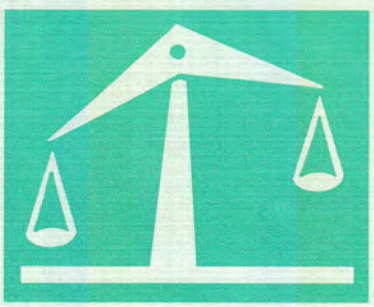
The coalition's membership of over 70 organizations, representing more than 50,000 individual businesses, professionals and public bodies, ranges from truckers to doctors, nurserymen to auto dealers, hospitals to cities.

CIELS advocates tort reform as a long-term solution to the insurance crisis. Stability must be brought to the legal system to avoid the unpredictability of upwardly spiraling numbers, more and more lawsuits and higher and higher awards. The coalition is focusing only on tort reform because thousands of Oregonians believe this is the most critical area to bring back availability and affordability of liability insurance in Oregon. CIELS is not, however, ruling out the possibility of other types of reform in the areas of court procedures or insurance regulation.

The major concepts the coalition considers essential to a long-term solution to the liability crisis are:

1. Limitations on non-economic damages
2. Elimination of joint and several liability
3. Elimination of punitive damages
4. Elimination of the collateral source rule
5. Periodic payments of future damages
6. Contingency fee structure
7. Allowing recovery of damages in frivolous lawsuits
8. Expert confirmation of the merits of a suit before filing
9. Denial of a suit by someone hurt while committing a felony
10. Limiting the liability of volunteer officers and directors

The following pages explain the details of these issues.



LIMITATIONS ON NON-ECONOMIC DAMAGES

The victims of negligence deserve payment for medical costs, lost wages and other real economic losses; past, present and future. The coalition supports full payment for monetary loss.

The limitation on non-economic damages is another issue. A ceiling is needed on subjective, non-monetary losses (frequently referred to as "pain and suffering" which include mental anguish, inconvenience and emotional distress). The policy behind this legislation is to provide adequate compensation to the claimant without breaking the system. A limit will help contain awards within realistic limits, reduce the exposure of defendants to unlimited damages, lead to more settlements and enable insurance carriers to set more accurate rates because of greater predictability of the size of judgments.

The coalition is not suggesting elimination of non-economic damages, but a maximum limit. No amount of money will replace the spouse or child who has died or who has been injured. Juries, and society, want to help the person who has suffered, whether it is through worry, physical pain or sorrow. However, millions of dollars to the victim will not alleviate "pain and suffering." These awards may more often reflect a jury's "sympathy" for the victim rather than an actual evaluation of the "loss." Without a limit on these awards, however, plaintiffs are encouraged to ask for astronomical amounts. Society then pays through high insurance premiums for unpredictable risks.

The question of reform involves creating a balance between compensation for those who are injured and the finite resources of society. Higher taxes, premiums and prices, failing businesses, unemployment and lower wages are all part of the price Oregonians pay when the financial resources are stretched too far. Society cannot continue to pay unlimited amounts for non-economic losses.

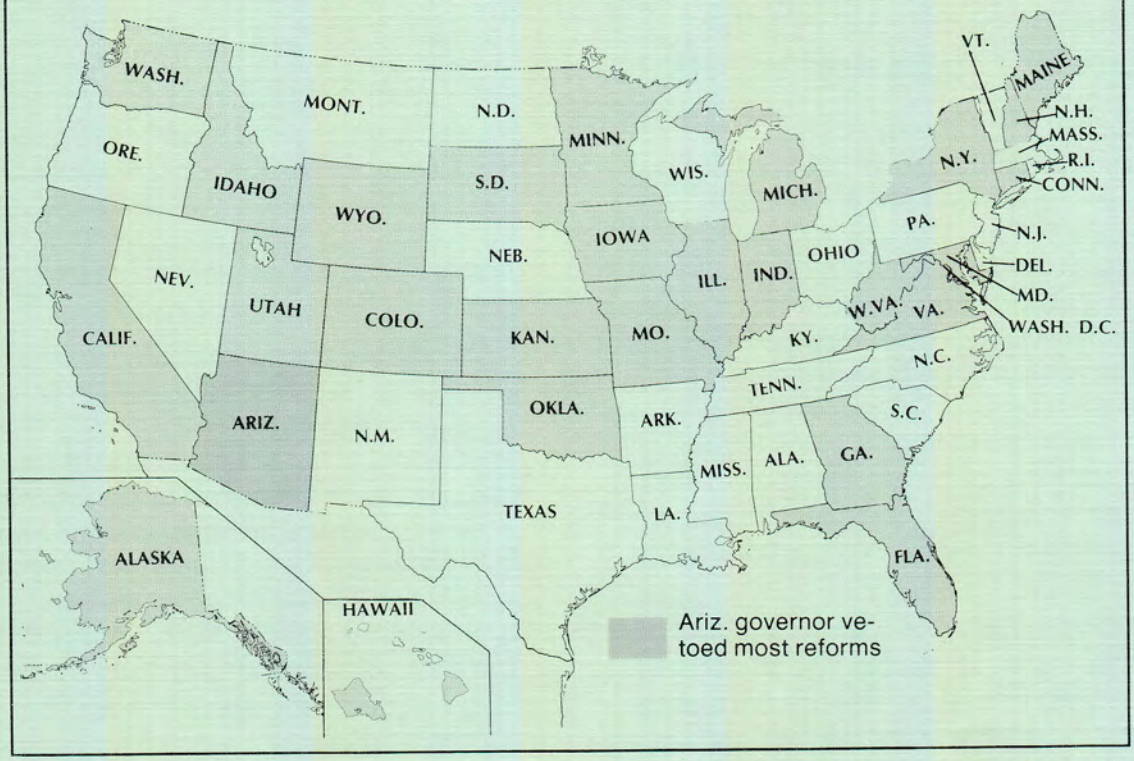
ELIMINATION OF JOINT AND SEVERAL LIABILITY

Joint and several liability (also called the "deep pocket") should be eliminated. Simply stated, joint and several liability holds any single defendant, in a multi-party case, responsible for the entire amount of the award regardless of his amount of responsibility in the action. The erosion of the original intent of this law has lead to a system which imposes on each defendant the potential for being the ultimate payor of the entire verdict. It also encourages suits against the defendant with the most financial resources or the "deep pocket." Joint and several liability encourages a lottery attitude towards a defendant with financial resources but a minor percentage of fault.

If a defendant is found to be 5% liable, that defendant should be responsible for no more than 5% of the damages. To be fair, the amount a defendant must pay in compensation should be related directly to the amount of fault or negligence of that individual. If that were so, a defendant with only a minor amount of responsibility (such as 2%) could approach a million dollar lawsuit (in which he might have to pay $20,000) in a more reasonable and less expensive way.

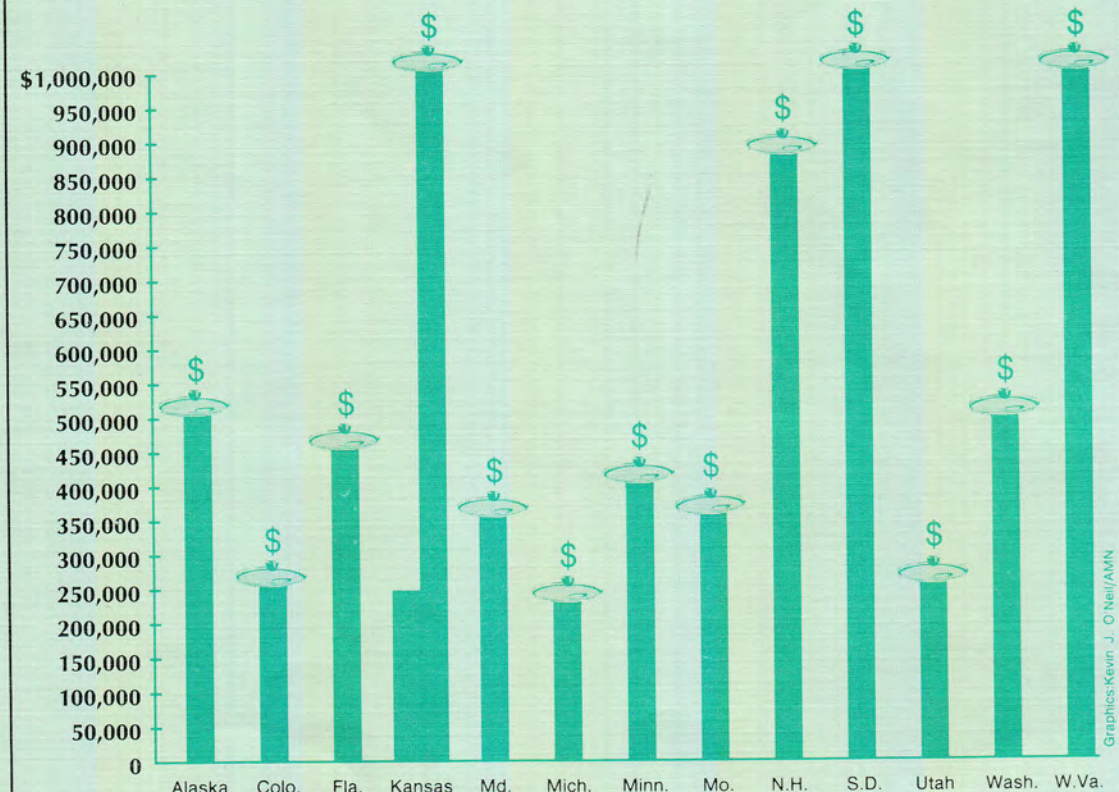
Tort reforms passed in 1986

(Either OK'd by or awaiting governors' signature)



Putting a lid on damages

Caps voted in states this year on non-economic damages, unless noted



Notes: Caps apply to non-economic medical malpractice damages only in Michigan, Missouri, Utah, and West Virginia. In South Dakota, the $1 million cap applies to overall medical malpractice damages. In Kansas, the $250,000 lid caps non-economic medical malpractice damages, while the $1 million cap applies to overall medical malpractice damages.

WILL TORT REFORM WORK?

In California, tort reforms in medical malpractice were passed in 1975. The average jury award in 1984 for medical malpractice in that state was $397,000 compared to the national average of $975,000. The California awards for all other personal injury suits (where laws weren't reformed) were slightly higher than the national average. The California legislation has had a significant impact in the medical malpractice field. Last year, California doctors paid an average premium increase of 16% compared to 32% average for all U.S. doctors and 65% for Oregon doctors.

According to *Barron's,* a respected national financial newspaper (June 16, 1986), "Even before some of the reforms have gone into effect, they have begun to yield results. In some states — Connecticut and Washington are cases in point — where various kinds of policies were previously unobtainable, underwriters cautiously have dipped a toe in the market. Insurance company bigwigs quietly are urging small cuts in rates, as a kind of voluntary quid pro quo . . .

"Significant change for the better is looming. In response to Washington State's move toward tort reform, Fireman's Fund Insurance Co. last week announced its re-entry into such hitherto-shunned market areas as coverage for small and medium-sized municipalities, professional daycare centers and school districts. Similarly, Connecticut's new legislation has prompted Aetna Life & Casualty to plan on further growth in commercial insurance in the Nutmeg State."

"We serve best when we discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, in expenses and in waste of time. As a peace-maker, the lawyer has a superior opportunity of being a good man. A worse man can scarcely be found than one who stirs up litigation. Be a good man."

Abraham Lincoln

CITIZENS' INITIATIVE FOR EQUITY IN THE LEGAL SYSTEM

Membership

Affiliated Rental Housing Association of Oregon, Inc.
AG Stores
Architects & Engineers Legislative Council of Oregon
Associated Builders & Contractors
Associated Oregon Industries
Associated Oregon Loggers
Boise Cascade Corporation
Capitol Health Care
Consulting Engineers Council of Oregon
Diamond Lake Resort
Eli Lilly and Company
Eugene Area Chamber of Commerce
Farmers Insurance Company of Oregon
General Telephone
Independent Employer Association, Inc.
Kaiser Permanente
Kienow's Food Stores
League of Oregon Cities
National Electrical Contractors Association
National Federation of Independent Business
Northwest Alliance for Market Equality
Oregon Association of Hospitals
Oregon Association of Nurserymen
Oregon Association of Public Accountants
Oregon Association of Realtors
Oregon Association of Rehabilitation Professionals in the Private Sector
Oregon Automobile Dealers Association
Oregon Automotive Parts Association
Oregon Bankers Association
Oregon-Columbia Chapter, Association General Contractors
Oregon Concrete & Aggregate Producers Association
Oregon Council of Architects
Oregon Dairymen's Association
Oregon Dental Association
Oregon Food Processors Council
Oregon Forest Industry Council
Oregon Forest Products Transportation Association
Oregon Gasoline Dealers Association
Oregon Hearing Aid Society
Oregon Hotel & Motel Association
Oregon Independent Auto Dealers
Oregon League of Financial Institutions
Oregon Machinery Dealers Association
Oregon Medical Association
Oregon Mobilehome Park Association
Oregon Motor Hotel Association
Oregon Optometric Association
Oregon Petroleum Marketers Association
Oregon Psychiatric Association
Oregon Registered Care Providers Association
Oregon Restaurant & Beverage Association
Oregon Retail Council
Oregon Society of Certified Public Accountants
Oregon Soft Drink Association
Oregon State Home Builders Association
Oregon State Pharmacists Association
Oregon Transit Association
Oregon Trucking Associations, Inc.
Osteopathic Physicians & Surgeons of Oregon
Pacific Hospital Association
Physicians Association of Clackamas County (PACC)
Portland Chamber of Commerce
Private & Fraternal Organizations, Inc.
Restaurants of Oregon Association
Select Care
Sentry Markets
Shilo Inns
Standard Insurance Company
The Society of the Plastics Industry
Thriftway Stores
Travel Industry Council of Oregon
Unique Northwest Country Inns
United Grocers
Western Family Foods, Inc.
Western Grocers Employee Benefits Trust
Weyerhaeuser Company

For more information, contact

CIELS
4000 Kruse Way Place, #2-225
Lake Oswego, OR 97034
(503) 636-0865

"Basic institutional reform in the legal profession is what is needed — lawyers have got to stop using the court system as a means of enriching themselves at the expense of their clients. And the courts have got to stop allowing the lawyers to do it."

Chief Justice Warren Burger
Speech to the American Bar Association
February 12, 1984

LIABILITY INSURANCE AND TORT REFORM

The liability insurance crisis has captured the nation's attention. Oregonians are experiencing the problems firsthand.

Businesses, individuals and local governments must insure themselves against lawsuits for personal or economic injury. However, the cost of such insurance has skyrocketed and the coverage has narrowed. In some cases, it has become unavailable altogether. All Oregonians are paying the price . . . either directly, through high premiums, or indirectly, through higher prices for goods and services.

A recent survey of Oregon businesses shows that most respondents believe the liability crisis will get worse unless there are legislative reforms. The majority believe the civil justice system encourages frivolous claims. In addition, they believe that liability is now based on ability to pay, not fault.

The system is out of control. Insurance companies are in the business of predicting risk. How can they predict risk when the number of claims and amount of awards are increasing at such a high rate? In the past 10 years, medical malpractice cases have increased by 400%, product liability suits by 600% and million dollar awards by more than 400%.

The tort system, those laws governing how courts make awards in personal injury cases, must be reformed during the 1987 Oregon legislative session.

The tort system must be returned to a primary concern with genuine fault. Damage awards must bear some predictable and reasonable relationship to actual economic injury. Frivolous litigation and unfair, windfall legal fees for lawyers must be deterred.

When an individual is injured due to negligence, he or she must have access to the civil justice system and to reasonable compensation for injuries suffered as a result of the fault of others.

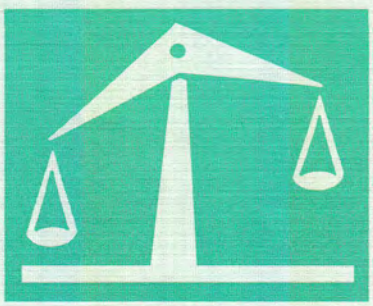
MULTIPLE PROBLEMS AND MULTIPLE SOLUTIONS

The tort liability and insurance liability issues have caused a serious problem for those who provide products or services to consumers. But, it is the consumer who ultimately pays for the increasing costs of liability coverage and increasingly larger awards. The solutions to this crisis are also multiple.

Professions and businesses must improve their safety programs. The legislative authority to implement effective programs also must be available. Insurers should provide information which is useful and readily available to enable legislators to make effective policy decisions. The lack of useful data for public and legislative policy makers is a serious problem and should be resolved. The state insurance commissioner should have the statutory authority and adequate and expert staff to effectively regulate the insurance industry for the benefit of all Oregonians.

IS THERE A SIMPLE SOLUTION?

The opponents of tort reform claim that new insurance regulations are the sole solution to the liability crisis. They want Oregonians to believe there is a simple solution to a complex problem. There is not. Other states have more strict regulatory schemes, but they, too, face a liability crisis. Many non-profit self-insurers are facing the same liability problems we are experiencing in Oregon. The problem we face today is not simple. Its resolution will require tort reform, insurance reform and private initiative to resolve. We all have a part to play in helping our elected officials make the difficult decisions which will benefit all Oregonians.



WHAT IS THE NATIONAL PICTURE?

TORT REFORM LEGISLATION ENACTED IN 1986

STATE	Collateral Source Rule	Joint & Several Liability	Caps on Recovery	Contingent Fee Regulation	Punitive Damage Restrictions	Frivolous Suit Penalties	Periodic Payments
ALABAMA							X
ALASKA	X	X	X		X		X
ARIZONA	X					X	
ARKANSAS							X
CALIFORNIA	X	X		X			X
COLORADO	X	X	X		X		
CONNECTICUT	X	X		X		X	X
DELAWARE	X			X			X
DISTRICT OF COLUMBIA							
FLORIDA	X	X	X	X	X	X	X
GEORGIA						X	
HAWAII	X	X	X	X	X		X
IDAHO				X			
ILLINOIS	X	X		X	X		X
INDIANA	X		X			X	X
IOWA	X				X	X	X
KANSAS	X		X		X		X
KENTUCKY							
LOUISIANA	X						X
MAINE				X			X
MARYLAND	X		X				X
MASSACHUSETTS	X	X	X	X			
MICHIGAN	X	X	X			X	X
MINNESOTA	X		X		X	X	
MISSISSIPPI					X		
MISSOURI	X	X	X			X	X
MONTANA							
NEBRASKA	X						
NEVADA							
NEW HAMPSHIRE	X	X	X	X	X	X	
NEW JERSEY				X			
NEW MEXICO	X		X	X	X		X
NEW YORK	X	X		X		X	X
NORTH CAROLINA							
NORTH DAKOTA							
OHIO	X						
OKLAHOMA					X	X	
OREGON							
PENNSYLVANIA					X		
RHODE ISLAND	X					X	X
SOUTH CAROLINA							X
SOUTH DAKOTA	X		X		X	X	X
TENNESSEE	X						
TEXAS	X						
UTAH	X	X	X				X
VERMONT							
VIRGINIA	X		X				
WASHINGTON	X	X	X	X			X
WEST VIRGINIA	X	X	X		X	X	
WISCONSIN	X		X	X			X
WYOMING		X	X			X	

In some of the marked categories, the tort reform applies to only a limited segment, such as medical malpractice or municipalities. This list may be incomplete. There may be other changes in states which are not included.

ELIMINATION OF PUNITIVE DAMAGES

Punitive damages originally were intended to punish the defendant or to act as a deterrent to keep others from being negligent. Those purposes have been lost in the system. Punitive damages often are used as another device for the plaintiff and the plaintiff's attorney to receive more money beyond economic losses and the pain and suffering award.

Once the plaintiff has received economic and non-economic damages, he or she has been compensated completely. Punitive damages are an unfair windfall. Often, punitive damages are used to frighten the defendant into an out-of-court settlement. Since these damages are rarely covered by insurance, the defendant must hire a personal attorney and face potential ruin. Even defendants who are certain they were not at fault will incur substantial personal expense.

By definition, a punitive award exceeds what is necessary to compensate a plaintiff for the injuries sustained. The public pays for these windfall awards through increased product and insurance costs, increased taxes and decreased public services.

Punitive damages should be eliminated except where provided for by statute. In those situations where punitive damages are allowed by statute, the amount of damage should be determined by a court and based upon intentional conduct. The jury should only determine whether the defendant was negligent and whether such negligence caused the harm alleged. In cases where punitive damages are awarded, the recovery should go to a state fund such as a crime victims' assistance fund or Common School Fund. Certainly, it should not go to the plaintiff or the attorney, as it constitutes punishment of the defendant, not recovery of losses.

ELIMINATION OF THE COLLATERAL SOURCE RULE

The collateral source rule prohibits the jury from knowing when a plaintiff already has been compensated for some of his financial loss. Often a plaintiff's medical bills are paid by workers' compensation or through a government-provided fund. For some plaintiffs, there is no real wage loss because salary is, in fact, continued during the period of disability. When the jury awards damages in these cases, the plaintiff receives double payment.

Concealing alternate sources of financial protection, the non-taxability of awards and similar facts from the jury often results in damage awards that are higher than appropriate. A jury, out of sympathy and concern for the plaintiff's well-being, may grant an award even if they know the defendant was not negligent because they believe the plaintiff will have no other way to pay the bills. Telling the jury about previous compensation to the plaintiff will allow them to weigh all the facts and then make a fair decision.

FRIVOLOUS SUITS AND SUITS WITHOUT MERIT

Too much money is being spent in the courts and in defense costs for cases that are frivolous or without merit. The Oregon Trial Lawyers Association stated in a recent document, "The most recent look Congress has taken in the product liability area shows that 75% of all products cases going to trial are won by defendant manufacturers." In medical malpractice, 75% of the suits result in no payment to the plaintiff.

Nonetheless, these suits cost defendants enormous amounts of money. Perhaps many of these cases are pursued in the hope that a defendant will choose to settle out-of-court for a smaller amount rather than fight a lawsuit and win at great expense.

A frivolous lawsuit is one which has no basis in law or fact and is brought for the purpose of malice or to harass the defendant.

The coalition believes the number of frivolous lawsuits would diminish if a defendant, who has won, could then sue the plaintiff for defense costs and damages. Currently, Oregon only allows counter suits in cases of "special injury" beyond defense costs.

Non-meritorious suits may be based on a real injury but the plaintiff is suing the wrong person or the injury did not result from negligence or fault.

Tort law needs to be changed to require supporting evidence of the validity of a claim before the suit can be filed. It is reasonable to expect the plaintiff to produce an affidavit by a qualified expert who agrees that there is an injury and the defendant was at fault.

This law would not, however, stop someone from filing a lawsuit just because he could not find such an expert. The plaintiff would need to name three experts who refused to verify the case. Perhaps it would cause the plaintiff to re-examine the credibility of his case before proceeding.

The high number of cases in which the plaintiff does not win or simply "gives up" indicates lawyers are not doing their homework before filing lawsuits. The courts should not be used for "fishing expeditions" by those who do not have valid cases.

"The temptation to put profits first . . . (is) greater now than at any period in history . . . Has our profession abandoned principle for profit, professionalism for commercialism?"

Commission on Professionalism
American Bar Association

PERIODIC PAYMENTS

Traditionally, awards and settlements for personal injury cases have been paid on a "lump sum" basis. To make payment more reasonable, however, the amount of the judgment in excess of $100,000 should be paid by periodic installments set by the court. All past damages actually incurred and future damages up to $100,000 should be paid by the defendant upon entry of the judgment.

Huge lump sum payments for future damages do not serve most plaintiffs well and cost defendants more, when less expensive alternatives exist. A change in the tort law will provide a less expensive alternative.

Statistics (from a Washington State survey) demonstrate that two months after a lump sum settlement, 30% of the plaintiffs have nothing left. One year after lump sum settlements, 50% have nothing left. Five years after a lump sum settlement, 90% have nothing left.

The purpose of structured settlements is to provide the claimant with a predictable and secure stream of income. An annuity-type settlement can be structured to cover medical expenses, future earnings, pain and suffering, attorneys' fees, care for dependents beyond the life of the injured party and inflation.

CONTINGENCY FEE STRUCTURE

The policy underlying this legislation is to provide more money for the victim. Under most contingency fee agreements, the plaintiff's attorney receives from 33-40% of the amount recovered, regardless of the time involved on the case.

The coalition supports legislation structuring the contingency fee, after expenses, at 35% of the first $100,000 of recovery, 25% of the second $100,000 and 10% of the amount over $200,000. Structuring the contingency fee ensures maximum compensation for the injured party, availability of quality legal services, and attorney fees related to actual legal services.

The contingency fee system does serve a useful purpose. It enables persons with limited means to seek redress and affords them access to our courts. However, an individual with no money, seeking an attorney to represent him, is not in a position to bargain over the percentage of contingency fee. A fee structure will protect him from unfair contracts.

In fact, the vast majority of awards and settlements involve amounts under $100,000. Attorneys' compensation, and therefore their willingness to take on most cases, would be largely unaffected. But, the volume of tort litigation and the explosion in the size of awards, particularly in large cases, have resulted in grossly disproportionate compensation to plaintiffs' attorneys.

Let's use an example. After the expenses of the plaintiff's attorney have been paid, the award is a million dollars. Under the current system, if the plaintiff's attorney is taking 40%, the plaintiff receives $600,000. With the proposed contingency fee structure, the victims receives an additional $260,000 or a total of $860,000.

INJURY WHILE COMMITTING A FELONY

The current Oregon tort law allows a person who is injured while committing a felony (in other words, a criminal) to sue for his injuries. To put it in even simpler terms, a burglar who was hurt while stealing can sue the owner of the property on which he was injured.

Our laws are meant to protect society and its individuals. It is unreasonable to extend that protection to those who are injured while breaking the law. The coalition proposes that the right to sue under these circumstances be denied.

LIMIT LIABILITY OF OFFICERS AND DIRECTORS

Individuals who volunteer to serve on the school board, the board of a charity organization or other types of private or non-profit corporations can be personally sued.

In the past, liability insurance to cover these volunteers was affordable and available. Now, many organizations are "going bare;" not buying the liability insurance because of huge increases in the cost of premiums.

Volunteers are essential to the continuation of many of Oregon's most important charity organizations from Girl Scouts to Little League to United Way. It is asking too much to require that volunteers not only donate their time and talents but also put their personal resources at risk.

Unless the acts of the directors and officers constitute "gross negligence," liability of such individuals should be limited to the insurance policy issued to the group. If there is no such insurance policy, the officer or director should not be liable for damages.

TORT REFORM STRENGTHENS THE LEGAL SYSTEM

These tort reforms make a lot of changes to the civil liability statutes, but most of the system stays the same. Individuals will continue to have access to legal counsel and legal remedies for injuries. With these reforms in place, people will be compensated for non-economic damages up to a maximum limit. Economic losses will be paid for past, present and future medical and income costs. The proposed changes shift the available dollars for the civil justice system to benefit the victim and society. This will allow it to continue in a more stable, fair and equitable way.

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ROLAND DAVIS
THEODORE B. JENSEN
RETIRED

TORT REFORM
AND LIMITS ON NON-ECONOMIC DAMAGES

(Testimony of John H. Holmes given to
Senate Judiciary Committee on
Section 11 of SB 323
Tuesday, February 3, 1987)

I am appearing at the request of the Citizens' Initiative for Equity in the Legal System.

BACKGROUND

I am a practicing lawyer of 20 years and a member of the Portland firm of HOLMES, DeFRANCQ & SCHULTE, P.C. I concentrate my practice in the defense of civil liability litigation, including automobile accident defense; product liability defense; the defense of real estate agents and brokers; the defense of cities, counties and school districts, (with my firm having represented Gresham, Lake Oswego, Yamhill County, Lane County, Clatsop County, Seaside, Portland Community College and the City of Portland); the defense of insurance agents and brokers; the defense of hospitals and doctors; and the defense

of lawyers. The Citizens' Initiative for Equity in the Legal System, or CIELS, consists of over 82 organizations representing thousands of Oregonians. Some of these organizations are the Architects & Engineers Legislative Council of Oregon; Boise Cascade Corporation; Capitol Health Care; Consulting Engineers Council of Oregon; Eugene Area Chamber of Commerce; Kaiser Permanente; Kienow's Food Stores; League of Oregon Cities; Oregon Association of Hospitals; Oregon Association of Realtors; Oregon Bankers Association; Oregon Dairymen's Association; Oregon Dental Association; Oregon Forest Industries Council; Oregon Medical Association; Oregon Restaurant & Beverage Association; Oregon Society of Certified Public Accountants; Portland Chamber of Commerce; Sentry Markets; Shilo Inns; Thriftway Stores; United Grocers; Western Family Foods, Inc; Western Grocers Employee Benefits Trust; and Weyerhaeuser Company.

THE TORT REFORM PROBLEM

The tort reform problem is not just an insurance problem. Insurance rates are symptoms of the problem. It is not an insurance problem --

- For those who have no insurance;
- For self-insureds;
- For non-profit, captive insurance companies;
- Where there are large deductibles or exclusions from coverage;

- Where limits have been and will be inadequate to cover large awards, particularly for non-economic damages, such as pain and suffering.

There has been a dramatic increase in the size of verdicts in some areas of tort law and in settlements made in light of those verdicts. Because more is at stake, the parties to litigation and their counsel feel compelled to use more resources to prepare for and conduct litigation. There are now 10 million civil cases filed in all courts in this country annually. The number has doubled in the last 16 years. In the last 20 years there has been a broadening of the bases of tort liability in this state and throughout the country.

In the 1960's, Oregon adopted the doctrine of strict product liability, i.e., liability without fault. Later there was a codification of that by statute. Several years back our courts threw out the doctrine of charitable immunity. By legislative enactment, you abolished contributory negligence as a complete defense to a negligence action. We now have comparative negligence. We used to have a guest passenger law; we no longer have such a law. The dramatic increase in lawsuits and in awards is in part because of the changes in laws adopted by the legislature and courts, which have created new rights to sue and made it easier for injured persons to recover.

I understand that a study published by Jury Verdict

Research, Inc. in 1984, indicates that the average personal injury award was 30.49 percent higher in 1983 than in 1981, and 24.5 percent higher in 1980 than in 1979. During the period 1974 to 1982, the average yearly increase was 12.79 percent. During this same period, the consumer price index showed an average increase of 9 percent. However, considering the high stakes, or larger cases, the same source -- Jury Verdict Research, Inc. -- indicates that there were 27 million-dollar verdicts in personal injury cases during the period of 1962 to 1970; from 1970 to 1977 there were 224 such verdicts. In 1982 alone, there were 251 million-dollar verdicts -- a number equal to the 15-year period 1962 to 1977.

The national debt has grown dramatically in the last five years. Many of the expenditures of government have been for worthwhile and proper causes. However, the question with the national debt is as to whether that is socially desirable or whether that threatens a bankruptcy of attempting to achieve proper and worthwhile governmental goals and governmental stability. With regard to the tort system, the question is whether or not society can continue to afford to pay unlimited amounts for non-economic damages and generally continue to support a tort system that does not solve all problems, does not award damages to all victims, is expensive and cumbersome to operate, is often uncomfortable, embarrassing and demeaning for the parties sued, and currently is failing to operate in a practical manner to achieve its proper purpose.

I enjoyed sitting here last Thursday and listening to the three plaintiff's lawyers testifying. I know all three lawyers, have had cases with all three lawyers, went to law school with one of these lawyers, and am always charmed by and interested in what they have to say. I was interested to hear that Mr. Burt owns a bar and restaurant in the Fiji Islands or Tahiti or wherever it was, where he said his liability insurance wasn't expensive. I don't know really where that was or what that has to do with anything, and I did not hear Mr. Burt testify as to the premiums he pays for his lawyer liability insurance, although I know that excess liability in that area was down to two companies this year, with increases in rates running in the area of 50 percent over the previous year. My firm's quote involved a rate increase of over 50 percent for lawyers' liability insurance.

I was interested in Mr. Velure's comment that if you would put a ceiling on non-economic damages, that you would need to double the size of the Court of Appeals to interpret what non-economic damages were, which is, of course, ridiculous, and I think someone on this Committee might have suggested that to him.

I don't agree with the opinions of these plaintiff's lawyers, but neither does the public. In public opinion polls taken in both the State of Washington and the State of Oregon, the overwhelming majority of the people polled favored tort

reform. In Washington, by a 2 to 1 margin -- 61 percent to 32 percent. Residents of that state favored putting a quarter-of-a-million dollar ceiling on non-economic damages in death and injury suits, and in Oregon 81 percent of the people polled felt that reform is needed in the current system of awarding money to people who have been injured by another person or company. 77 percent feel that the dollar amounts awarded in lawsuits are usually excessively large, while only 15 percent disagreed with that statement and 64 percent thought that people who win lawsuits are usually awarded much more money than they need for just their injuries and court costs. 71 percent of the people polled in Oregon supported placing a limit on the amount which can be awarded in these lawsuits. Copies of the news releases on these survey are being provided to you. The Washington poll was done by Northwest Strategies and the Oregon poll was done by Moore Information.

The question is, Can society continue to afford to pay unlimited amounts for non-economic damages, such as pain and suffering? We live in a world of finite resources. Defendants seldom pay losses directly; society pays them -- that is, you pay them and I pay them -- through higher prices, premiums, and taxes.

GENERAL RECOMMENDATIONS AND COMMENTS

The Citizens' Initiative for Equity in the Legal System

suggests that the legislation that you enact make plaintiffs whole for economic losses which are finite and predictable. I would further suggest to you that the current lack of predictability of non-economic damages is a fundamental part of the problem in tort litigation in terms of cost and delayed settlements.

Rightly or wrongly, Oregon is considered anti-business. Both California and Washington are considered to be pro-business and not anti-business. California and Washington have both enacted tort reform legislation. Both states have enacted limits on non-economic damages. In California, there is a $250,000 limit on non-economic damages in medical malpractice actions. We would hope that Oregon will not be anti-business and will not be anti-tort reform. An anti-tort reform attitude most assuredly will be considered to be an anti-business attitude. An economic comeback for the State of Oregon needs more than an anti-business attitude.

I was astonished Thursday to hear Mr. Burt say that the Washington tort reform legislation was a failure. That's an interesting statement considering that the law was passed in 1986 and has been in effect for about half a year. Currently, the system in Washington is loaded with an onslaught of cases that were filed by all of the plaintiff's attorneys right before the cut-off date. However, contrary to Mr. Burt's off-hand testimony, the Washington experience has been successful, and

has already been successful. The Washington State Physicians' Insurance Association ("WSPIA") adopted a premium rate for 1987 that was 15 percent less than it would have been without tort reform.

WSPIA insures approximately 65 percent of all the doctors in private practice in the State of Washington. That organization commissioned studies with Millimin and Robertson Actuaries out of New York and California, and first had a generic study out of Millimin and Robertson's New York office that provided numbers that would justify rates of 28 percent to 33 percent less than the rates would have been otherwise within 24 months of the enactment of tort reform. A follow-up study by Millimin and Robertson out of California showed WSPIA that a 25 percent rate increase would be anticipated and needed without tort reform, but that they could implement, and now have implemented, only a ten percent rate increase because of the State of Washington tort reform legislation which includes limits on non-economic damages.

The limits on non-economic damages in Washington are based on a sliding scale where the highest limit on these damages would be $573,000 and with the average limit on noneconomic damages in the amount of $350,000. As previously stated, WSPIA writes liability insurance on approximately 65 percent of the doctors in private practice. However, if it wrote all of the doctors the savings in premiums, because of tort reform and tort limits, would be in the amount of $10 million.

Also, let's talk about the availability of insurance. There has been a marked increase in the availability of insurance in all casualty lines in the State of Washington with the passage of the tort reform bill. In the medical malpractice area, an insurance company called the Doctors' Company based in California, with $312 million in assets and that writes approximately $80 million in premiums annually, has filed for admission in the State of Washington because of the Washington tort reform package and has been very candid and open about its belief that because of the tort reform package, Washington is a desirable market for it to write insurance. The Doctors' Company also is licensed in California, Montana, Nevada and Wyoming. To my knowledge, it is neither licensed in Oregon nor applied for admission in Oregon. I have talked with Ted Linham, the president of the WSPIA, who provided me with this information. In his experience, the Washington tort reform package has had and will have a positive effect. I have also talked with attorney Bill Robinson who has been involved with the Washington tort reform legislation. The Washington legislature meets annually and it is not anticipated that there will be any cutting back or curtailment in tort reform. To the contrary, it is anticipated that there will be some further legislation in the tort reform area.

In other states, there is ample evidence that tort reform has slowed the rate of insurance premium increases, has

allowed those states the increased availability of insurance, and has allowed people in those states to insure for lesser rates than in non-tort reform states.

You must bear in mind that the cost of insurance is only one of the issues and that the availability of insurance is also important. With the increased availability of insurance, there usually is increased competition and, eventually, a competitiveness in rates that operates to the benefit of the consumer.

For over 20 years we have seen all sorts of legislation and court decisions that have broadened the scope of liability and made it easier for plaintiffs to recover. I do not believe anyone has ever suggested that remedial action in the area of tort reform will cause instantaneous relief. But there is no question that tort reform is working and will work. Aside from insurance cost issues, the damage limitation will help keep losses within available insurance coverage. In my opinion, many cases will be easier to settle and this will reduce costs.

SPECIFIC RECOMMENDATIONS AND COMMENTS

With regard to Section 11 of SB 323, Section 3 should be deleted. That section provides: "This section does not apply to damages for severe disfigurement or severe physical impairment." This section would make the other provisions of Section 11 meaningless.

The language of the bill with regard to economic damages and non-economic damages should be tightened, and I would suggest that 2.A. be amended to read as follows:

> "Economic damages" means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.

I would recommend that Section 2.B. with regard to future damages be deleted and that Section 2.C. with regard to non-economic damages be amended to read as follows:

> "Non-economic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship."

With regard to the amount of the limits to be awarded for non-economic damages, the citizen's initiative for equity in the legal system is recommending that the limit be set at $300,000. That is $50,000 above the limit set for non-economic damages in medical malpractice cases in California and $50,000 below what appears to be the average limit for non-economic

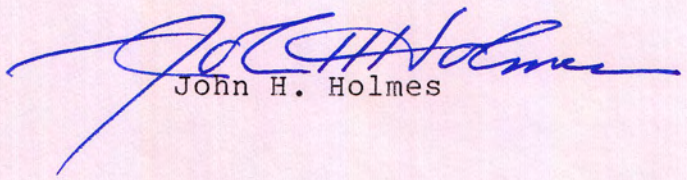
damages in the State of Washington. My own personal view is that the limit for non-economic damages should be no higher than $500,000 and no lower than $300,000. I personally lean toward a limit of $500,000. This limit will certainly allow million-dollar verdicts. Economists testify routinely in Oregon courts and elsewhere of economic damages related to loss of employment and loss of business and employment opportunities, and even with regard to obtaining substitute domestic services. I settled a wrongful death case two weeks ago in which I was presented with an economist's opinion as to economic loss in obtaining substitute domestic services.

IN CONCLUSION

Putting a reasonable limit on the maximum recovery for non-economic damages is not a drastic move. States all around us are doing it and we have to bear in mind that our legislature for the last 20 years has been enacting legislation that went the other way, making it easier to recover and more expensive for all of us. A limit on non-economic damages, in my view, will improve the justice system, make economic sense, result in the availability of more insurance, result in better insurance rates for the consumers, provide predictability in the reinsurance markets of the world, and result in a more reasonable cost to the public of all those goods and services that have been affected by the escalating costs in this area. In other words,

I agree with the public. Tort reform is needed and should be enacted. Reasonable limits on non-economic damages should be part of that tort reform.

Respectfully submitted,



John H. Holmes

Bills to be considered:
SB 323, SB 324
HB 2970, 2972, 2982
HB 3150, 3330, 3366

HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE 1

May 13, 1987
1:30 p.m.
Tapes: 551 - 557

Hearing Room 150
Salem, Oregon

MEMBERS PRESENT: DICK SPRINGER, CHAIR
TOM HANLON
DAVE DIX
STAN BUNN
PAUL PHILLIPS

STAFF PRESENT: CATHERINE WEBBER, CHIEF COUNSEL
GLORIA FISHER, ASSISTANT

WITNESSES: LARRY TOPLIFT, ACCIDENT VICTIM
KAREN TOPLIFT, MOTHER OF VICTIM
PAT WESTROPE, MOTHER OF VICTIM
KARI HARTMAN, ACCIDENT VICTIM
BURL GREEN, ATTORNEY FOR HARTMAN
RAY GARDNER, ACCIDENT VICTIM
ART JOHNSON, ATTORNEY FOR VICTIMS
REP. GEORGE TRAHERN
REP. LIZ VANLEEUWEN
KIP LOMBARD, CITIZEN INITIATIVE FOR EQUITY IN THE LEGAL SYSTEM
DOUG CONWAY, ALL SPORTS SUPPLY CO.
JACK BARNS, FARMERS INSURANCE CO.
KEITH BAUER, FARMERS INSURANCE CO.
CHRIS LARSON, FOR REP. RANDY MILLER
MIKE SHINN, OREGON TRIAL LAWYERS ASSOCIATION
DON BOWERMAN, ATTORNEY, OREGON CITY SCHOOL DIST.
ED MCKINNEY, GEM EQUIPMENT CO.
JIM WESTWOOD, ATTORNEY, PORTLAND SCHOOL DISTRICT
JEFF JOHNSON, ATTORNEY (G.I. JOE CASE)

000 REPRESENTATIVE SPRINGER called the hearing on SB 323 to order. Present were: REPRESENTATIVES SPRINGER, PHILLIPS,

ATTORNEY ART JOHNSON asked that his people, who are victims, testify later when more members are present.

003 REPRESENTATIVE SPRINGER recessed to wait for more members, who are with the Governor at a bill signing.

REPRESENTATIVE SPRINGER called the public hearing to order at 1:30 p.m. Present were REPRESENTATIVE SPRINGER, BUNN, PHILLIPS, HANLON, and BAUMAN visiting. REPRESENTATIVE DIX excused.

043 MR. JOHNSON said he is not attorney for Larry Toplift, but is a friend.

LARRY TOPLIFT, Sandy Oregon , said through the help of an attorney he has settled, but he is concerned with the effect of this legislation on others. He is concerned because it is discriminatory. He was a wrestler well on the way to the Olympics. He has been hurt economically, socially and his future destroyed. What he can achieve is limited and the economic value of his life diminished. His friends get married, have children and achieve their goals, while he is in a wheelchair. The degradation and humiliation he feels every day. Regarding a $500,000 cap, it is hard to say what he would have made economically. He was in school so how can you determine what his future income was worth. It is not fair to limit. (EXHIBIT A)

REPRESENTATIVE SPRINGER asked about school. MR. TOPLIFT is taking classes at PCC and will enroll at PSU. His schooling was interrupted.

KAREN TOPLIFT, LARRY's MOTHER, said they had big dreams; they had spent a lot of time and money on his wrestling. He was nationally ranked at 16; he should have had a secure financial future. If something happens to his parents, what will happen to him? He will have to pay for care. Things are not that accessible for wheel chair people; they had problems parking today. He does not have use of his hands. They run into some problem every day. She has to be there everywhere he goes; to wake him at night. It is humiliating for him to be dependent (21 years old). It is not fair to say $500 is all his pain and suffering is worth. He went through 3 surgeries, 3.5 months on a respirator; 6 months in a hospital; 4 months in California for therapy; 3 weeks in Colorado for surgery. She had to be away from the family. Her 13 year old daughter had to take on a lot of responsibility. It affected the entire family.

151 LARRY TOPLIFT, said he needs a special van, his house accessible. He cannot control his temperature because of his spinal injury. He cannot be independent without several thousand dollars to hire help. $30,000 average a year is the cost for care for a paraplegic. He received his settlement and has more freedom, but there are others. He was innocent and what is sad is that the same economic factors that put him here (inadequate car and untrained driver) override the

rights of the individual. REPRESENTATIVE SPRINGER asked if he works with othrs. TOPLESS said he is in spinal association but not very active.

186 PAT WESTROPE is the mother of Marie, 14. She provided photos. Marie will be a Freshman. She had a terrible injury 11 days after she was 6 years old; severe burns. The first 15 days they did not know if she would live. She was put in a dunk tank and the dead skin removed, then grafts. After removing tissues, they have to wait 12 days before they can do more. She will require surgery for the next 10 years; 20 operations or more. The doctor said the most painful injury is burns. She was disfigured; she has no breasts, which make her selfconscious. Her nipples were burned off. Her ears were burned off. They attempted to replace but they do not look right. She cannot wear earrings. She is discriminated against by teachers and classmates. She is the target of name calling. She was hit and kicked on school bus. They are not sure if her scars will stretch enough so she can carry a baby full term. She is almost 4 point in school but she has no friends. The manufacturer has made flammable material and it is sold without warning. The pajamas caught on fire. They ignited because she was playing with matches but if they were treated she would not have been burned. The law suit will pay for the surgeries she must have and for her suffering. She is sure there are compliants from business about liability insurance. (EXHIBIT B)

278 REPRESENTATIVE SPRINGER asked if her daughter received counseling. MS. WESTROPE took her to be evaluated and the psychiatrist said she does not need help. She has days when she is down because nobody wants to socialize with her. She is basically alone. They don't give her a chance after they see her.

REPRESENTATIVE PHILLIPS asked if she was Mr. Johnson's client. Did Ms. Westrope sign for her. MS. WESTROPE said she did sign. MR. JOHNSON said Ms. Westrope has done a remarkable job for years. She is a hero.

330 KARI HARTMAN said it is hard to stress how hard it is to be disabled. On Nov 15, 1981 she was going to a party. They parked and were electrocuted in the car. Out of fright they crawled out and she blacked out. She was drug away. The whole front of her body was on fire. She was told that they must amputate her leg. Later they amputated her hand. She began the burn therapy which is incredibly painful and humiliating. He body was like hamburger, she felt it wasn't her any more. She felt her life was ruined. When she heard there will be a cap on injuries of this type she could not think it would be possible. There is no way to award someone enough after what they have gone through. It is hard to be stared at every day with people thinking you are a freak. You need to look far into the future before you can say what award will help. She

has pain all the time; her stumps are a problem, wearing a leg is difficult because of scar tissue. A person cannot go swimming with scars all over the body; no limbs. It is so frightening that this kind of law could be passed. She feels it is almost unrepayable and she is against any kind of cap. Each person needs to be looked at individually, how it affected their life. She loved to play the piano, the flute, to dance, and she was a cheer leader. To go from that to a thing everyone feels sorry for is unbelievable. She hopes the Committee realizes that, when they have suffered so much, to put on a cap is wrong. She cannot explain how hard it is, how you are discriminated against, how you feel about yourself. It is a constant thing; you are working against feeling bad about yourself. No monetary reward can repay but it helps the persons life. She and her family have help. She did finish college. She had 13 surgeries. The focal point of your life is being disabled. The awards help to fight off some of these feelings and make life easier. A cap is not fair. For a person in her position, it would not be fair.

TAPE 552

028 REPRESENTATIVE PHILLIPS asked about the litigation. MR. BURL GREEN, the attorney, said Kari was hurt worst, but one girl was killed. He represented Carry. After two years, a date was set. He was not accepted as specialized enough to acts as counsel. He turned to another attorney. At the time of trial, it was settled, and was structured. He has photos for the file; what her body is like now.

REPRESENTATIVE PHILLIPS said part of economic damages is future loss. Her earning potential was yet to be determined. MR. GREEN said an economist was prepared to testify; he got figures on what the average person will earn, college graduate. The case was settled when the defense asked to settle. REPRESENTATIVE PHILLIPS asked if a noneconomic cap would effect this case. MR. GREEN said a projection of her age would predict $250,000 which is economic. $50,000 costs. REPRESENTATIVE PHILLIPS said the Committee has discussed periodic payments. How was this arranged. MR. GREEN said "structured" means to buy an annuity with the settlement. The annuity is purchased with the settlement, and the interest goes to her on a regular basis. She will get 12 to 14 times the settlement. With "periodic payments", the interest goes to the insurance company. REPRESENTATIVE PHILLIPS asked about the delay. How can settlement be stimulated. One suggestion was prejudgment interest. MR. GREEN said they could have settled in 10 to 12 months when the extent of the injury was known. Prejudgment interest would save about 1.5 years.

REPRESENTATIVE DIX arrived.

132 REPRESENTATIVE PHILLIPS asked who contracted with an attorney. MS. HARTMAN said that her parents selected the attorney. REPRESENTATIVE PHILLIPS said a woman testified that her husband had signed an agreement when part of the issue was brain damage. He marvelled that an attorney would sign an agreement with someone with brain damage. She did not know what the fees and process was.

MR. BURTON arrived at the hearing.

MR. GREEN said the agreement was with her parents subject to approval of Kari. If she did not agree, she would have to get another attorney.

MS. HARTMAN said her parents brought things to her and she was aware of what was happening. She knew the attorney's son. There was no doubt or dissatisfaction. REPRESENTATIVE PHILLIPS said part of the bill is fee agreements.

183 REPRESENTATIVE HANLON asked about $50,000 in costs. Those are costs that are paid by the person that makes the claim in order to get the case to court. How much of the $50,000 would not have been necessary if PGE had admitted liability early? MR. GREEN said well over half. There would still be doctors costs, but no expert on electrical engineering, etc. REPRESENTATIVE HANLON said carry had to pay $25,000 she shouldn't have had to pay. MR. GREEN said she and his office. REPRESENTATIVE HANLON asked, with those costs to prove who is wrong, when there is a substantial injury, would most clients be able to take care of those costs up front? What percent would be able to pay them up front. MR. GREEN said the only one was a federal magistrate whose wife was killed by a doctor. He paid part up front. REPRESENTATIVE HANLON asked if he had to charge an hourly fee, in lieu of percentage of net recovery, would the clients get into court? MR. GREEN said he has never, since 1951, had an injured person pay on hourly basis. 90 percent ask for contingency. They don't want to have to pay up front; they are injured and not working.

292 RAY GARDNER, 30, Bandon, said he has heard about the proposal. He was a machinist and had a degree in technology. He was buying a new home. On 9/2/82, while driving a field service truck he swerved to miss a dog and the truck rolled over. The truck had defects he had asked to have repaired. His neck was broken. His employer was negligent when the truck was redesigned making it top heavy. It did not have seat belts. The door was damaged and not repaired. When the truck rolled, he fell out. REPRESENTATIVE HANLON asked if this was a private employer. MR. JOHNSON said it was after hours and the employer claimed workers' compensation did not cover because he was on his way home from work in the company

vehicle. So they sued the company. He was a field service mechanic and went into the field to repair. His only opportunity was to sue claiming the truck was badly designed, unreasonably unstable, not repaired and that was the cause of his injuries. It was a negligence claim. (EXHIBIT C)

373 MR. GARDNER said he could get a small business because it is hard to get employment. Usually they end in a rest home or with family. Many people do not have a family. Since he received a settlement he can be more independent. He could not make in on $500,000; he could live to be 80 or 90 years old. The award he won makes it easier; he does not have to worry if he needs something. He can get things adapted to him. If there were a ceiling, it would hurt those with no income. There are a lot of people who can contribute to the community but never have a chance. It is punishing severely injured people. He has a couple of friends who did not get anything. They are unable to do what others do. He can almost live a normal life, but they cannot.

455 REPRESENTATIVE HANLON asked for an example. MR. GARDNER said he has a thing for his arm that holds a fork or pencil. It cost $700. Friends who did not get a settlement cannot afford that. They can only use something like a spoon and scoop, so their food has to be cut up.

MR. JOHNSON said Mr. Gardner has an unusual mother and father. His father altered a boat, but he cannot hunt or fish. MR. GARDNER said it gives him freedom; his friends cannot do this.

REPRESENTATIVE DIX asked if there is anyone here representing his interests other than his attorney -- a victim's rights advocate. MR. GARDNER said no. MR. JOHNSON said they are able to settle without going through trial; but when settled it is based on what a jury would return. A cap would severely limit ability to negotiate a fair settlement. Economic damages are loss of earnings, medical bills, but not enough is known about what will be needed. In predicting loss of earnings they can use economist projections, but there are many things about disability that effects employability. Marie will have paper credentials, but she would have difficulty getting a job. In the same way peers discriminate, the employer will also. Intangible damages are significant; a jury can consider the case. Severe injuries are rare and putting a cap should be on bent fenders, not on severe damages. Structured settlement is something he favors; the present system is better than having the court supervise. He hates to see a new bureaucracy. It is better with negotiations. In cases with youngsters, there is a conservatorship that is court supervised.

TAPE 553

MR. JOHNSON favors prejudgment interest because insurance companies don't pay until they have to. This is good business sense. This would be an incentive; it would get rid of a lot of the delay.

114 REPRESENTATIVE PHILLIPS said if there is a non-economic cap it would be a reasonable practice to try to put more in economic damages. MR. GREEN said he is trying to see how they can do that. So many things are economic but are not demonstrated as that. That would be a natural tendency. REPRESENTATIVE PHILLIPS wants a fee agreement. He wants to see if they are a problem. MR. GREEN said he gives the choice of by the hour or contingent. Only one person wanted hourly charge. There is some adjustment according to time involved.

157 REPRESENTATIVE DIX said that is why they want to put on a cap, to limit negotiating ability by victim. MR. JOHNSON said in compensating victims, that is only one part of the tort system. The regulatory effect on misconduct is important. A cap would greatly limit the ability to be private attorney general. Ray Gardner is having an effect; the trucks were changed. The flammable material was changed. If damages are limited, this kind of important threat will be damaged. The free enterprise system should encourage individuals to do this.

295 REPRESENTATIVE HANLON asked if the vehicle was used in the course of the job. Was there any inspection of a public agency that should check safety. MR. GARDNER said there were 15 trucks and they were never inspected. A month after the settlement they got new trucks. MR. JOHNSON said governmental regulation for safety is very important but is overrated. It isn't true protection, so this is an additional protection. There was a case where a woman was run over at a sawmill by a fork truck in reverse. Fork trucks are operated in reverse because the driver cannot see over the load in front. The fork truck been altered to operate on propane, a propane tank was put on as a counterweight behind the operator. The operator could not see. It had been there 7.5 years. After the suit they were changed.

253 REPRESENTATIVE SPRINGER recessed the hearing at 2:46 p.m.

REPRESENTATIVE SPRINGER reconvened the hearing at 2:58 P.M. Present were: REPRESENTATIVES SPRINGER, HANLON, DIX, PHILLIPS.

HB 3330 RELATING TO CIVIL ACTIONS.

REP. GEORGE TRAHERN said the bill requires that attorney fees be paid on suits that are lost. It would cut the number of

STATUTORY ADDENDUM

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ORS 31.150

(1) A defendant may make a special motion to strike against a claim in a civil action described in subsection (2) of this section. The court shall grant the motion unless the plaintiff establishes in the manner provided by subsection (3) of this section that there is a probability that the plaintiff will prevail on the claim. The special motion to strike shall be treated as a motion to dismiss under ORCP 21 A but shall not be subject to ORCP 21 F. Upon granting the special motion to strike, the court shall enter a judgment of dismissal without prejudice. If the court denies a special motion to strike, the court shall enter a limited judgment denying the motion.

(2) A special motion to strike may be made under this section against any claim in a civil action that arises out of:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law;

(c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or

(d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(3) A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section. If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to

support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.

(4) In making a determination under subsection (1) of this section, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(5) If the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim:

(a) The fact that the determination has been made and the substance of the determination may not be admitted in evidence at any later stage of the case; and

(b) The determination does not affect the burden of proof or standard of proof that is applied in the proceeding.

ORS 31.710

(1) Except for claims subject to ORS 30.260 to 30.300 and ORS chapter 656, in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage of any one person including claims for loss of care, comfort, companionship and society and loss of consortium, the amount awarded for noneconomic damages shall not exceed $500,000.

(2) As used in this section:

(a) "Economic damages" means objectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services, burial and memorial expenses, loss of income and past and future impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that is economically verifiable, reasonable and necessarily incurred costs due to loss of use of property and reasonable costs incurred for repair or for replacement of damaged property, whichever is less.

(b) "Noneconomic damages" means subjective, nonmonetary losses, including but not limited to pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship and society, loss of consortium, inconvenience and interference with normal and usual activities apart from gainful employment.

(3) This section does not apply to punitive damages.

(4) The jury shall not be advised of the limitation set forth in this section.

ORS 659A.030

(1) It is an unlawful employment practice:

(a) For an employer, because of an individual's race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, sexual orientation, national origin, marital status or age of any other person with whom the individual associates, or because of an individual's juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to refuse to hire or employ the individual or to bar or discharge the individual from employment. However, discrimination is not an unlawful employment practice if the discrimination results from a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business.

(b) For an employer, because of an individual's race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, sexual orientation, national origin, marital status or age of any other person with whom the individual associates, or because of an individual's juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to discriminate against the individual in compensation or in terms, conditions or privileges of employment.

(c) For a labor organization, because of an individual's race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or because of an individual's juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to exclude or to expel from its membership the individual or to discriminate in any way against the individual or any other person.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment that expresses directly or indirectly any limitation,

specification or discrimination as to an individual's race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or on the basis of an expunged juvenile record, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification. Identification of prospective employees according to race, color, religion, sex, sexual orientation, national origin, marital status or age does not violate this section unless the Commissioner of the Bureau of Labor and Industries, after a hearing conducted pursuant to ORS 659A.805, determines that the designation expresses an intent to limit, specify or discriminate on the basis of race, color, religion, sex, sexual orientation, national origin, marital status or age.

(e) For an employment agency, because of an individual's race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, sexual orientation, national origin, marital status or age of any other person with whom the individual associates, or because of an individual's juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to classify or refer for employment, or to fail or refuse to refer for employment, or otherwise to discriminate against the individual. However, it is not an unlawful employment practice for an employment agency to classify or refer for employment an individual when the classification or referral results from a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business.

(f) For any person to discharge, expel or otherwise discriminate against any other person because that other person has opposed any unlawful practice, or because that other person has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so.

(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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9th Cir. Case Number(s): No. 18-35911 and No. 18-36060

I am the attorney or self-represented party.

This brief contains 16,471 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[X] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

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Signature /s/ Shenoa L Payne, OSB No. 084392 **Date:** 09/06/19

STATEMENT OF RELATED CASES

To the knowledge of Plaintiffs' counsel, there are no related cases pending before this Court at this time.

DATED this 6th day of September, 2019.

/s/ *Shenoa L. Payne*
Shenoa L. Payne

Of Attorneys for Cross-Appellant/Appellee Max Zweizig

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2019, I caused the foregoing **Amended Second Brief on Cross-Appeal** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that I have caused the foregoing document to be sent by electronic mail to the following non-CM/ECF participant:

None

/s/ *Shenoa L. Payne*
Shenoa L. Payne

Of Attorneys for Cross-Appellant/Appellee Max Zweizig