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**APPLICATION OF OREGON MEDICAL ASSOCIATION AND AMERICAN  
MEDICAL ASSOCIATION TO APPEAR *AMICI CURIAE***

Pursuant to ORAP 8.15, the Oregon Medical Association (hereinafter "OMA") and the American Medical Association (hereinafter "AMA") request permission to appear in this case as *amici curiae* in support of defendant Peacehealth.

The OMA is a private, not for profit professional association of physicians organized for the purpose of promoting professionalism, education, quality of care, and loss prevention among Oregon's medical community. The AMA is a private, not for profit professional association of physicians organized for the purpose of promoting professionalism, education, quality of care, and uniting physicians nationwide to work on professional and public health issues.<sup>1</sup>

The OMA and the AMA appear in support of the defendant's positions in this case. Under plaintiff's theory, if a wrongful death action was cognizable at common law, such an action is protected by the remedy clause of Article I, section 10, Oregon Constitution, and the cap on noneconomic damages in ORS 31.710(1) violates the remedy clause. *Amici curiae* OMA and AMA contend that if the court holds that a wrongful death action was cognizable at common law, the court should re-examine its opinion in *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 124, 23 P3d 333 (2001), and hold that Article I, section 10 is not a substantive remedies clause, but is an "open courts" clause.

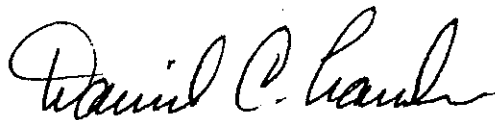
The OMA and the AMA respectfully request that the Court permit them to appear in this case and that the brief accompanying this application be accepted for filing.

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<sup>1</sup>The AMA seeks leave to appear in its own person and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition of the AMA and the medical societies of all 50 states and the District of Columbia. Its purpose is to consolidate the resources of its members and to represent the interests of the medical profession in the courts.

DATED this 27 day of September, 2006.

Respectfully submitted,

A handwritten signature in cursive script, reading "David C. Landis". The signature is written in black ink and is positioned above a horizontal line.

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David C. Landis, OSB No. 62050  
Attorney for *amici curiae*  
Oregon Medical Association and  
American Medical Association

IN THE SUPREME COURT OF THE STATE OF OREGON

LORI GAYLE HUGHES,  
as Personal Representative of the  
Estate of Jill Marie Dieringer, deceased,

Plaintiff-Adverse Party,

v.

PEACEHEALTH, a Washington  
corporation, d/b/a Sacred Hearth Medical  
Center and PeaceHealth Medical Group

Defendant-Relator,

and

EUGENE EMERGENCY PHYSICIANS,  
P.C., an Oregon corporaion,

and

OREGON MEDICAL ASSOCIATION,  
not-for-profit corporation

*Amicus Curiae.*

) Lane County Circuit Court  
) No. 16-02-18544

) Appellate Court No. A123782

) Supreme Court No. S53447

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AMICUS BRIEF OF OREGON MEDICAL ASSOCIATION  
AND AMERICAN MEDICAL ASSOCIATION

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Review of the Decision of the Court of Appeals, March 15, 2006

Opinion by: Linder, Presiding Judge  
Concurring: Haselton and Ortega, Judges

In an appeal from the Judgment of the Circuit Court for Lane County  
The Hon. Maurice K. Merten, Presiding

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(continued on reverse side)

September 2006

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**AMICUS BRIEF OF OREGON MEDICAL ASSOCIATION  
AND AMERICAN MEDICAL ASSOCIATION**

**1. Introduction**

The Oregon Medical Association (“OMA”) and the American Medical Association (“AMA”) appear in support of the defendant’s positions in this case.<sup>1</sup> Under plaintiff’s theory, if a wrongful death action was cognizable at common law, such an action is protected by the remedy clause of Article I, section 10, Oregon Constitution, and the cap on noneconomic damages in ORS 31.710(1) violates the remedy clause.<sup>2</sup> In *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 124, 23 P3d 333 (2001), the court, disavowing several of its previous decisions, held that Article I, section 10 guarantees a remedy for any injury to common-law rights respecting person, property and reputation that existed when the drafters wrote the constitution; and that the legislature does not have the authority to extinguish a remedy for such injuries. *Smothers*, 332 Or at 123. The court held that the legislature may abolish a common-law cause of action only if it provides a substitute remedial process in the event of “injury to the absolute rights that the remedy clause protects.” *Ibid.*, 332 Or at 124.

*Amici curiae* OMA and AMA contend that if the court holds that a wrongful death

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<sup>1</sup>The OMA is a private, not for profit professional association of physicians organized for the purpose of promoting professionalism, education, quality of care, and loss prevention among Oregon’s medical community. The AMA appears in its own person and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition of the AMA and the medical societies of all 50 states and the District of Columbia. Its purpose is to consolidate the resources of its members and to represent the interests of the medical profession in the courts.

<sup>2</sup>Article I, section 10 provides: “No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.”

action was cognizable at common law, the court should re-examine its opinion in *Smothers* and hold that Article I, section 10 is not a substantive remedies clause, but is an “open courts” clause.

**2. The court should re-examine its interpretation of the specific wording of Article I, section 10. The text provides for a limitation of access to the courts.**

Under the analytical framework set out in *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992), a constitutional provision is addressed on three levels: “Its specific wording, the case law surrounding it, and the historical circumstances that led to its creation.” *Id.*

The court should re-examine its interpretation of the specific wording of Article I, section 10. Judge Landau argued in his concurring opinion in *Brewer v. Dep’t. of Fish and Wildlife*, 167 Or App 173, 2 P3d 418 (2000), *rev den* 334 Or 693, 56 P3d 405 (2002), that the language and history of Article I, section 10, establish:

“[T]hat it was intended to function as an ‘open courts’ clause, to guarantee that everyone will have *access* to the courts to seek whatever remedies the law may provide, not as a guarantee that the law must provide a remedy.” *Brewer*, 167 Or App at 192-93. (Emphasis supplied).

Judge Landau construed the text of Article I, section 10 to provide for a “prohibition of limitations on access to the courts.” *Brewer*, 167 Or App at 193. Judge Landau pointed out that five other sections of the bill of rights provide for limitations to the legislature. Article I, section 8, directs that “[n]o law shall be passed restraining the free expression of opinion\*\*\*.”<sup>3</sup> Article I, section 20, provides that “[n]o law shall be passed granting to any citizen or class of citizens

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<sup>3</sup>Article I, section 8 provides: “No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.”



privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.” Article I, section 26, provides that “[n]o law shall be passed restraining any of the inhabitants of the State from Assembling together\*\*\*.”<sup>4</sup> Article I, section 29, provides that “[n]o law shall be passed granting any title of Nobility, or conferring hereditary distinctions.” Article I, section 30, provides that “[n]o law shall be passed prohibiting emigration from the State.”

By contrast, Article I, section 10, does not begin with the phrase “[n]o law shall be passed.” Rather, it begins with “[n]o court shall.” Judge Landau concluded that it is plain that “the focus is not on the power of the legislature to enact laws, but on the power of *the courts*.” *Brewer*, 167 Or App at 194 (Emphasis supplied.) Judge Landau concluded that Article I, section 10 lists several limitations on the power of the courts:

“The courts may not ‘be secret.’ They must administer justice ‘openly and without purchase, completely and without delay.’ And, they must be open to ‘every man’ to obtain ‘remedy by due course of law’.” *Id.*

3. **The remedy clause of Article I, section 10 provides that every man shall have whatever remedy the due course of law provides.**

With respect to the clause “and every man shall have remedy by due course of law,” Judge Landau argued that it does not guarantee to every man a remedy for every injury. Rather, it provides that every man shall have whatever remedy the “due course of law” provides.” *Id.*

4. **The court should re-examine its discussion of the historical circumstances that led to the creation of Article I, section 10.**

In its discussion of the historical circumstances that led to the creation of Article I,

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<sup>4</sup>Article I, section 26 provides: “No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of grievances [sic].”

section 10, the *Smothers* court held that the phrasing of Article I, section 10 traces to Edward Coke's commentary, first published in 1642, on the second sentence of Chapter 29 of the Magna Carta of 1225. *Smothers*, 332 Or at 94. The commentary provides:

“\*\*\*every subject of this realme, for injury done to him in bonis, terris, vel persona, by any other subject, be he ecclesiastical, or temporall, free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.” *Smothers*, 332 Or at 96, quoting Coke's commentary on the second sentence of Chapter 29, Magna Carta. (Emphasis supplied.)

The *Smothers* court interpreted Coke's commentary as an assertion that the common law of England had come to guarantee every subject a legal remedy for injury to goods, lands, or person caused by any other subject. *Smothers*, 332 Or at 97.

Judge Landau construed Coke's commentary differently:

“Coke wrote not merely to explain Magna Carta but also to support a lifelong fight against the Crown's interference with the work of the common-law courts. His concerns, in particular, were the corruption of the courts, the sale of judicial offices, and the partiality of judicial decisions.” *Brewer*, 167 Or App at 195-96.

The *Smothers* court, in discussing early remedy clauses in the American colonies, noted that Delaware was one of the first colonies to place a remedy clause in its declarations of rights, and that the Delaware remedy clause closely paraphrased Coke's commentary of the second sentence of Chapter 29 of the Magna Carta. *See*:

“That every freeman for every injury done him in his goods, lands or person, by any other person, ought to have remedy by the course of the law of the land and ought to have justice and right for the injury done to him freely without sale, fully without any denial, and speedily with delay, according to the law of the land.” *Smothers*, 332 Or at 104, quoting Delaware Declaration of Rights, section 12 (1776).

Judge Landau noted that lawyers in colonial America had concerns similar to Coke's

concerns. They faced repeated interference with their courts by the Crown. He contended that the above-quoted provision of the Delaware Declaration of Rights was addressed to open access and not to any limitation of the legislature's authority and cited in support Article 25 of the Delaware Constitution of 1776, which expressly adopted the common law of England "unless they shall be altered by a future law of the Legislature." *Brewer*, 167 Or App at 198.

Judge Landau stated:

"What seems clear to me is that, in the light of Coke's concerns expressed in his famous *Institutes*, and in the light of the similar concerns of the framers of early state constitutions, the language that made its way into Article I, section 10, historically was understood to guarantee open access to a fair and impartial court, not to guarantee that the legislatures would not alter the substance of rights and remedies in the future. Thus, the relevant history simply will not support the practice of the Oregon courts in treating the language of Article I, section 10, as two separate provisions, one assuring an open and impartial court and the other ensuring a remedy for every wrong." *Brewer*, 167 Or App at 197.

Judge Landau noted that neither his analysis nor his conclusion was particularly revolutionary, and cited Hoffman, *By the Course of Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or. L. Rev. 1279 (1995). *Id.*

Hoffman argues:

"Coke's language does not support the interpretation that the court must fashion a remedy to vindicate every right. Rather, it describes how such remedies shall be administered: 'freely without sale, fully without any denial, and speedily without delay,' and 'by the course of the Law.' These phrases articulate the very abuses against which Coke railed: the sale of common-law justice through corruption and the denial and delay of justice through external interference with the courts by the King and his ministers." Hoffman, 74 Or. L. Rev. at 1294.

The *Smothers* court noted that the Indiana constitution of 1851 was the primary source for the Oregon Constitution. *Smothers*, 332 Or at 105. Article I, section 11, of the Indiana Constitution of 1816, provided:

"That all Courts shall be open, and every person, for an injury done him in his

lands, goods, person, or reputation, shall have remedy by the due course of law; and right and justice administered without denial or delay." *Smothers*, 332 Or at 106.

In 1851, the Indiana Constitutional Convention of 1850 made fundamental changes to that state's original constitution, and rewrote various provisions of Indiana's Bill of Rights. The above-quoted clause was rewritten to provide:

"All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." Article I, section 12, Indiana Constitution.

The *Smothers* court construed the decisions to restructure Article I, section 12 as:

"indications that the drafters of the Indiana Constitution of 1851 intended to secure more firmly than had been done in the 1816 constitution the common-law right to remedy for injury to absolute rights concerning person, property, and reputation." *Smothers*, 332 Or at 107.

However, the Indiana Supreme Court does not agree with the conclusion that the remedy clause of its constitution prohibits the legislature from abolishing common-law remedies. In *McIntosh v. Melroe Co.*, 729 NE2d 972 (Ind 2000), plaintiff challenged a repose statute that bars product liability claims for injuries sustained more than ten years after the product is delivered to its initial user or consumer. Plaintiff argued that the statute of repose violated section 12. The court noted that there appears to be no unique Indiana history surrounding the adoption of this clause in 1816 or its redrafting in 1851. *McIntosh*, 729 NE2d at 974.

The Indiana court held that the first sentence of Article I, section 12, prescribes procedural fairness. "It guarantees a 'remedy by due course of law' for injuries to 'person, property, or reputation.'" *McIntosh*, 729 NE2d at 975-76.

However, the Indiana court rejected the argument that Article I, section 12 prohibits the legislature from abolishing common-law remedies. It noted a long history in Indiana case law of

recognition of the ability of the legislature to modify or abrogate the common law. *McIntosh*, 729 NE2d at 977. It held that section 12 “promises that, for injuries recognized elsewhere in the law, the courts will be open for meaningful redress.” *Id.* The court noted that section 12 requires that legislation that deprives a person of a complete tort remedy must be a rational means to achieve a legitimate legislative goal, and held that the ultimate repose statute met that test. *McIntosh*, 729 NE2d at 979-80.

The *Smothers* court noted that the Oregon Constitutional Convention rewrote Article I, section 12, of the Indiana Constitution of 1851, and stated in part:

“The committee reorganized the provision to express in one clause all the requirements relating to open courts and judicial administration. It expressed in a separate, independent clause the guarantee of remedy by due course of law for injury to person, property, or reputation. The decision to express in a separate, independent clause the guarantee of remedy by due course of law for injury to person, property, or reputation indicates that the drafters of the Oregon Constitution believed that the right to a remedy for injury to those rights needed to be stated clearly and unambiguously in the Oregon Bill of Rights.” *Smothers*, 332 Or at 114.

However, the court conceded that there is no record of the debates surrounding the changes that the committee on the Bill of Rights made to Article I, section 10; and it further conceded that evidence of the scope of the drafters’ intent when they wrote the remedy clause in section 10 of the Oregon Bill of Rights “admittedly is sketchy.” *Id.*

5. **ORS 31.710 does not abolish a plaintiff’s cause of action or remedy. Even if it is necessary to inquire whether the remedy provided in ORS 31.710 is constitutionally adequate, the court should find that the remedy is adequate.**

In the event that the court holds that a common law wrongful death action was recognized in 1857 and that the remedy clause guarantees a remedy for wrongful death, the next question is whether the legislation at issue abolished that remedy with providing a

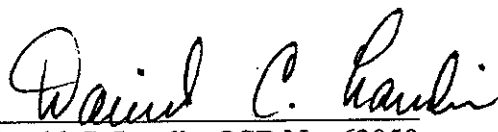
constitutionally adequate substitute. Defendant argues that ORS 31.710 does not abolish a plaintiff's cause of action or remedy; and even if the remedy was abolished, ORS 31.710 provides a constitutionally adequate substitute. *See* Defendant's Merits Brief, pp. 32-35. The OMA and the AMA adopt rather than repeat that discussion.

**6. Conclusion**

If the court holds that a wrongful death action was cognizable at common law, the court should re-examine its opinion in *Smothers* and hold that Article I, section 10, Oregon Constitution, is not a substantive remedies clause, but is an "open courts" clause.

The OMA and the AMA support defendant's arguments on the remaining issues, in the event the court finds it necessary to reach them.

DATED this 27 day of September 2006.

  
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Oregon Medical Association and  
American Medical Association