IN THE SUPREME COURT OF THE STATE OF OREGON

LAURIE PAUL,

Plaintiff,

and

RUSSELL GIBSON and WILLIAM WEILLER, DDS, Individually and on behalf of all similarly-situated individuals,

Plaintiffs-Appellants/
Petitioners on Review,

v.

PROVIDENCE HEALTH SYSTEM-OREGON, an Oregon corporation,

Defendant-Respondent/
Respondent on Review.

Multnomah County Circuit Court
Case No. 0601-0159

CA A137930

SC S059131

CORRECTED BRIEF OF *AMICI CURIAE* OREGON ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS, OREGON MEDICAL ASSOCIATION, AND AMERICAN MEDICAL ASSOCIATION (APPEARING ITSELF AND ON BEHALF OF THE LITIGATION CENTER OF THE AMERICAN MEDICAL ASSOCIATION AND THE STATE MEDICAL SOCIETIES)

Review of the Decision of the Court of Appeals from a Judgment Entered on January 8, 2008, the Circuit Court for Multnomah County, Honorable Marilyn E. Litzenberger, Judge

Opinion Filed: October 6, 2010
Author of Opinion: Armstrong, J.
Concurring Judges: Haselton, P.J. and Rosenblum, J.

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I. STATEMENT OF AMICI INTEREST.

The Oregon Association of Hospitals and Health Systems (OAHHS) is a nonprofit trade association that works to enhance and promote community health and to continue improving Oregon's innovative health care industry. The Oregon Medical Association (OMA) is a nonprofit association serving and supporting physicians in their efforts to improve the health of Oregonians. The American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

The issues raised in this case potentially affect the liability of health care professionals and treatment facilities for unintentional disclosures of patient information, particularly electronic medical records, at a time when the move toward electronic medical records should be encouraged. Thus, the court's decision may affect the interests of OAHHS, OMA and AMA members.

II. QUESTION ON REVIEW.

In the absence of physical injury, can plaintiffs state a claim in negligence for recovery of purely economic losses or emotional distress damages arising out of the theft of patient data from defendant?

III. PROPOSED RULE OF LAW.

A plaintiff cannot state a claim in negligence for recovery of purely economic losses or emotional distress damages arising out of the theft of patient data from a health care provider.

IV. INTRODUCTION.

The expanded use of electronic medical records carries the promise of improved care, fewer medical errors and lower health care costs. There may be little reason to assume that paper records are more secure than electronic records, but the potential for someone to access and distribute large numbers of electronic records to a wide audience is a legitimate concern. As a consequence, fear of liability arising out of the disclosure of such records, including unintentional disclosures or unauthorized access to those records by third parties, is a significant deterrent to wider use of electronic medical records.

Plaintiffs in this case ask this court to recognize a new common law tort making health care providers liable in negligence for purely economic losses and emotional distress damages arising out of the theft of patient information from health care providers, in the absence of physical injury. Current common

law doctrines would not provide for such liability. Nor has the legislature provided by statute for such liability. There are strong policy reasons against the creation of liability in these circumstances, especially the chilling effect it could have on the broader use of electronic medical records, which make this a subject more appropriately addressed in the legislative process than through changes to the common law. *Amici* OAHHS, OMA and AMA respectfully urge this court to decline plaintiffs' invitation to change long-standing common law rules in a way that discourages progress toward the digitization of health records.

V. ARGUMENT.

A. Not All Negligently Inflicted Harms Give Rise to a Negligence Claim or Certain Types of Damages.

Oregon tort law does not provide compensation for every consequence that follows from negligent conduct. *Lowe v. Philip Morris USA, Inc.*, 344 Or 403, 410, 183 P3d 181 (2008) ("Not all negligently inflicted harms give rise to a negligence claim."). To state a claim for negligence, a plaintiff must suffer harm "to an interest of a kind that the law protects against negligent invasion." *Solberg v. Johnson*, 306 Or 484, 490, 760 P2d 867 (1988), citing *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1, 734 P2d 1326 (1987), and *Stewart v. Jefferson Plywood Co.*, 255 Or 603, 606, 469 P2d 783 (1970).

Historically, the law of negligence has been preoccupied with bodily harm and property damage. *See* Dan B. Dobbs, 1 *The Law of Torts* 258 (2001)

("[T]he core of negligence law is about injury to persons and property."). As one commentator observed, "[n]egligence law is designed primarily to protect people against physical hurts to person and property unintentionally inflicted by the dangerous activities of other people." Leon Green, *Foreseeability in Negligence Law*, 61 Colum. L. Rev. 1401, 1417 (1961), citing *MacPherson v. Buick Motor Co.*, 111 NE 1050 (1916).

Consistent with the principle that negligence claims serve primarily to remedy physical injuries and damage to property, courts over time have recognized various common law rules that limit the scope of negligence claims and the types of damages that may be recovered through such claims. Two of those rules are at issue in this case. They hold, with limited exceptions, that: (1) there is no liability in negligence for purely economic losses; and (2) a person may not recover damages for emotional distress in the absence of physical injury. The remainder of this section discusses this court's adoption of those rules and their jurisprudential foundations.

1. Generally, There Is No Liability in Negligence for Purely Economic Losses.

Under Oregon law, "one ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property." *Hale v. Groce*, 304 Or 281, 284, 744 P2d 1289 (1987). This court has explained its adoption of the economic loss rule by pointing to the "limitless recoveries" and "ruinous consequences" that could follow if persons were permitted to recover

all economic losses caused by another's negligence. *Ore-Ida Foods v. Indian Head Cattle Co.*, 290 Or 909, 917, 627 P2d 469 (1981). Later, this court quoted Judge Cardozo's opinion that allowing recovery in negligence for economic losses unrelated to injury to person or property could allow "a thoughtless slip or blunder" to lead to "*liability in an indeterminate amount for an indeterminate time to an indeterminate class*." *Duyck v. Tualatin Valley Irrigation Dist.*, 304 Or 151, 157, 742 P2d 1176 (1987) (quoting *Ultramares Corp. v. Touche*, 255 NY 170, 179, 174 NE 441 (1931)) (emphasis in *Duyck*).

Although the economic loss doctrine may not have been announced by this court until it decided *Snow v. West*, 250 Or 114, 440 P2d 864 (1968), the rule dates back to "the birth of negligence" and is "unique in the annals of tort law for its durability," Robert J. Rhee, *A Production Theory of Pure Economic Loss*, 104 Nw. U. L. Rev. 49, 49-50 (2010). The doctrine recognizes that "[p]ure economic loss is meaningfully different from personal injury and property damage. Financial loss is morally different from personal injury and death." Bruce Feldthusen, *What the United States Taught the Commonwealth About Pure Economic Loss: Time to Repay the Favor*, 38 Pepp. L. Rev. 309, 318 (2011).

Justifications for the economic loss doctrine fall into several categories. The primary justification includes the pragmatic objections to liability that have been expressed by this court: potential liability would be too vast, indeterminate

and administratively difficult to sort out in any practical sense. Rhee, 104 Nw. U.L. Rev. at 60; Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 Wash. & Lee L. Rev. 523, 542 (2009) (rule has been justified on ground that allowing recovery for purely economic losses "expose defendants to an unlimited scope of liability"). Others have reasoned that the economic loss doctrine protects against the imposition of liability for damages that are speculative and liability that is disproportionate to fault. Johnson, Wash. & Lee L. Rev. at 543.

The economic loss doctrine also serves a purpose that is particularly important to health care providers and their patients: limiting open-ended liability that could "unduly inhibit useful activity." David B. Gaebler, *Negligence, Economic Loss, and the U.C.C.*, 61 Ind. L.J. 593, 612 (1986). Professor Gaebler explained: "To the extent that such liability would inhibit negligent conduct, it would be desirable. However, the problem is that because the line between negligent and non-negligent conduct is not a clear one, there would be a substantial chilling effect on non-negligent conduct as well." *Id*. Thus, the economic loss rule operates to protect society's interest in "useful activity" that would be hindered by open-ended liability. As discussed in more detail below, expanding the current boundaries of negligence law in the way requested by plaintiffs in this case would risk inhibiting progress toward wider use of electronic medical records and the substantial benefits they create.

2. Generally, There Is No Liability for the Negligent Infliction of Emotional Distress in the Absence of Physical Injury.

Over one hundred years ago, this court decided that emotional distress damages could be recovered in negligence claims only when such distress resulted from physical injury, observing that "the law regards supposed injuries to sentimental feelings of this character as too remote and speculative." *Maynard v. Oregon RR & Navigation Co.*, 46 Or 15, 18, 78 P 983 (1904) (internal quotation omitted). Following this court's continued application of the "physical impact rule," the Oregon Court of Appeals has explained that the rule "affords the desired guarantee that the mental disturbance is genuine." *Wilson v. Tobiassen*, 97 Or App 527, 532, 777 P2d 1379 (1989) (quoting *Prosser and Keeton on Torts*, 363 (5th ed 1985)). The Court of Appeals also has cited the United States Supreme Court's explanation that "common-law courts employ rules such as the physical impact rule in order to separate valid, important claims from those that are invalid and to avoid the threat of 'unlimited and unpredictable liability.'" *Lowe v. Philip Morris, USA, Inc.*, 207 Or App 532, 552, 142 P3d 1079 (2006), *aff'd* 344 Or 403 (2008) (quoting *Metro-North Commuter R. Co. v. Buckley*, 521 US 424, 433, 117 S Ct 2113, 138 L Ed 2d 560 (1997)).

Although courts throughout the country have adopted numerous variations on the physical impact rule,[1] the general rule remains that a person may not recover emotional distress damages in a negligence claim unless someone has suffered or was threatened with physical injury:

> "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance."

Restatement (Second) of Torts § 436A (1965). The oft-quoted explanation for the rule comes from *Prosser and Keeton*:

> "The temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the intentional tort context are lacking."

Prosser and Keeton on Torts, 361 (5th ed 1984).

Thus, the three principal concerns that have been cited consistently as rationales for judicial caution in denying claims based solely on emotional distress are: (1) the difficulty in allowing legal redress for harm that is often temporary and relatively trivial; (2) the danger that claims of mental harm will

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[1] *See* John J. Kirchner, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 Marq. L. Rev. 789, 806-19 (2007) (discussing various tests adopted by state courts for the recovery of emotional distress damages in the absence of physical injury).

be falsified or imagined; and (3) the perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the "wrongful" act. *Id*. at 360-61.

B. Defendant Had No Duty, Outside a General Duty to Exercise Reasonable Care, that Would Allow Plaintiffs to Recover Damages for Purely Economic Losses or Emotional Distress.

Each of the rules discussed above – the economic loss doctrine and the physical impact rule – has an exception. The exceptions are quite similar and easily confused, but are in fact distinct. As the Court of Appeals held in this case and as explained briefly in the following paragraphs, the exception to each rule is inapplicable here.

1. Plaintiffs and Defendant Were Not in a Special Relationship Giving Rise to Liability in Negligence for Purely Economic Loss Resulting From the Theft of Information.

The economic loss doctrine, which generally precludes recovery of purely economic loss in the absence of physical injury or property damage, allows an exception in instances where the parties have a "special relationship" giving rise to a duty on the part of the defendant to protect the plaintiff from such economic harm. *Onita Pacific Corp. v. Trustees of Bronson*, 315 Or 149, 160-61, 843 P2d 890 (1992). This heightened duty to avoid foreseeable harm arises where one party has given responsibility and control over his or her economic interests in the situation to the other, and the former has a right to rely

upon the latter to achieve a desired outcome or resolution. *Conway v. Pacific Univ.*, 324 Or 231, 239-40, 924 P2d 818 (1996).

There is dicta in this court's decision in *Conway* suggesting that physician/patient relationships can constitute the type of special relationship that creates a heightened duty of care. *Id.* at 239-40. On its face, that suggestion, at least in most physician/patient relationships, is inconsistent with this court's holding in *Onita* (and explanation of that decision in *Conway*), which focused on relationships in which the professional "who owes a duty of care is, at least in part, acting to further the *economic* interests of the 'client,' the person owed the duty of care," *Onita Pacific Corp.*, 315 Or at 161 (emphasis added). But even if this court were to conclude that physician/patient relationships are "special relationships" for purposes of the economic loss doctrine, plaintiffs' claim for purely economic damages still would fail. In this case, plaintiffs' negligence claim arises out of an information technology business practice within defendant's network of hospitals, health plans, physicians, clinics, home health services and affiliated services. That is not to diminish the sensitivity of the information that was stolen in this instance or the importance of taking appropriate measures to protect that information, but there is no allegation in this case that plaintiffs were in a patient relationship with any physician who did anything wrong or that plaintiffs' claims are based on the delivery of health care services by defendant. Defendant's mistake arises in the

context of the business relationship between the parties, which does not include an assumption of responsibility for plaintiffs' economic interests by defendant. Although Defendant Providence Health System has voluntarily and appropriately provided credit monitoring services and assumed full responsibility for direct economic losses that might befall plaintiffs and other affected persons (SER 12-13, 15), it was not legally obligated to do so based on alleged negligence alone.[2]

2. Defendant's Alleged Conduct Did Not Infringe on a Legally Protected Interest Sufficient to Permit the Recovery of Emotional Distress Damages in the Absence of Physical Injury.

Negligent infliction of emotional distress may be actionable without physical injury "where the defendant's conduct infringed on some legally protected interest apart from causing the claimed distress." *Hammond v. Central Lane Commc'ns Ctr.*, 312 Or 17, 23, 816 P2d 593 (1991). This court has found such a legally protected interest in limited circumstances, such as an intentional invasion of privacy rights, *Hinish v. Meier & Frank Co.,* 166 Or 482, 113 P2d 438 (1941); the right of a surviving spouse to have the remains of

[2] Plaintiffs focus their argument on the premise that they are entitled to recover economic damages associated with credit monitoring services because of an alleged duty owed to them by defendant, but *amici* OAHHS, OMA and AMA note that the clearest reason plaintiffs' claim for economic damages fails is that, as the Court of Appeals held, money spent because of "the threat of future harm, by itself, is insufficient as an allegation of damage in the context of a negligence claim." *Lowe*, 344 Or at 410 (quoting *Zehr v. Haugen*, 318 Or 647,

a deceased spouse undisturbed, *Hovis v. City of Burns*, 243 Or 607, 415 P2d 29 (1966); trespass to a home and conversion of personal property, *Douglas v. Humble Oil*, 251 Or 310, 445 P2d 590 (1968); and interference with use and enjoyment of land, *Edwards v. Talent Irrigation Dist.*, 280 Or 307, 570 P2d 1169 (1977).

Plaintiffs and their aligned *amici curiae* have attempted to establish the existence of such a legally protected interest by citing the myriad state and federal regulations relating to medical record privacy. A careful review of each source of law – ORS 677.190(5), ORS 192.518, 45 CFR § 164.306, 45 CFR § 164.530 and 42 CFR § 482.24(b)(3) – reveals that not one of them creates a private right of action for the conduct alleged. Plaintiffs mistakenly point to this court's decision in *Humphers v. First Interstate Bank of Oregon*, 298 Or 706, 696 P2d 527 (1985), as the source of a privacy right applicable to the claims they assert in this case. But as the Court of Appeals correctly held, the right to privacy addressed in *Humphers* case extends only to *intentional* disclosures of health care information. *Paul v. Providence Health System-Oregon*, 237 Or App 584, 595-96, 240 P.3d 1110 (2010). In the absence of such an enforceable duty to plaintiffs, the Court of Appeals correctly concluded that defendant's alleged conduct did not infringe a legally protected right of plaintiffs separate from the general standard of care for negligence and,

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656, 871 P2d 1006 (1994)). This rule reflects another limit on the scope of

therefore, Oregon law provides no basis for the recovery of emotional distress damages.

C. Changing the Common Law Rules to Permit Plaintiffs to State a Claim for Negligence in this Case Would Have a Deleterious Effect on Important Progress Toward Wider Adoption of Electronic Health Records.

This court has expressly considered and rejected appeals to pare back the economic loss doctrine and the physical impact rule. *Lowe*, 344 Or at 414-15 (rejecting claim that this court "should modify existing negligence law [including economic loss doctrine] to require defendants to bear the cost of medical monitoring"); *Hammond*, 312 Or at 25-26 (rejecting plaintiff's invitation to abandon the physical impact rule for less stringent *Restatement* rule). It should do so again in this case.

This court generally will reconsider common law doctrines in three situations: (1) when an earlier case was inadequately considered; (2) when statutes or regulations have altered an essential legal element assumed in the earlier case; or (3) when the earlier rule was based on specific facts that have changed. *Juarez v. Windsor Rock Products, Inc.*, 341 Or 160, 168, 144 P3d 211 (2006). None of those circumstances exist here. The economic loss doctrine and physical impact rule are deeply rooted in the common law and, to the extent they have been modified in other jurisdictions (such as the adoption of a "zone of danger" rule in many jurisdictions instead of requiring actual physical impact

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negligence claims, precluding liability in the absence of actual harm. *Id*.

to permit recovery of emotional distress damages in negligence claims), such modifications would not open the door to liability in the circumstances of this case. Nothing has changed in underlying laws or facts that justify a change to the common law rules.

An expansion of liability in this area is not necessary to discourage negligent disclosure of patient information. A complex web of government regulation and professional obligations, cemented by the business imperative to maintain the trust of patients and customers, already operates to protect the confidentiality of electronic health records. For example, for violations of the Health Insurance Portability Accountability Act (HIPAA), the Department of Health and Human Services (HHS) has the discretion, subject to various affirmative defenses, to penalize covered entities $50,000 per violation, with an annual maximum of $1.5 million. 42 USC § 1320d-5 (2010). Substantial costs are also incurred by covered entities merely for alleged violations of HIPAA, as HHS has the discretion to conduct time-consuming and costly compliance reviews. 45 CFR §160.310 (2010). Wrongful disclosure of individually identifiable health information can also result in individual civil financial penalties as well as criminal sanctions. 42 USC § 1320d-6 (2010). Furthermore, as the defendant in this case has experienced, there are expensive business consequences to even an unintended disclosure of patient information. SER 15 (the estimated costs of credit monitoring provided by defendant to

persons affected by the theft that triggered this lawsuit is $8,000,000; which does not include any amounts defendant pays to compensate any individual who suffers a direct financial loss as a result of fraud related to the theft, which defendant has promised to pay).

The greater risk is that an expansion of liability will "unduly inhibit useful activity." Gaebler, 61 Ind. L.J. at 612. Where the line between negligent and non-negligent conduct is not a clear one, where merely negligent conduct can lead to liability in an indeterminate amount for an indeterminate time to an indeterminate class, there can be a "substantial chilling effect on non-negligent conduct as well." *Id*. In this case, that means an undesirable risk that growth in the use of electronic medical records would be inhibited.

Expanded use of electronic medical records is critically important because it opens the door to, among other things:

> Access by clinicians to patients' complete medical history and lab and imaging data;
>
> Reduced medical errors;
>
> Improved communication between providers and patients;
>
> Increased efficiencies related to decreased personnel costs and improved data collection;
>
> Reduced adverse drug events; and
>
> Easier accumulation and comparison of medical data.

Shana Campbell Jones, Joseph McMenamin and David C. Kibbe, *The Interoperable Health Record: Preserving Its Promise by Recognizing and Limiting Physician Liability,* 63 Food & Drug L.J. 75, 76 (2008). *See also* The Office of the National Coordination for Health Information Technology (hereinafter, "ONCHIT"), *Get the Facts About Electronic Health Records: Advancing America's Health Care*[3] (electronic medical records foster accurate, complete and accessible information about a patient's health; the ability to better coordinate care; the ability to securely share patient information with patients; diagnosing health problems sooner and reducing medical errors; making the health care system more efficient; and expanding access to affordable care).

By way of more specific examples, a review of 257 different studies on the use of electronic health information found that it increased delivery of care in adherence to guidelines and protocols by 12-20%, reduced medication errors by 5.4% and decreased utilization of diagnostic tests by 8-14%. Basit Chaudry, M.D., *et al*., *Systematic Review: Impact of Health Information Technology on Quality, Efficiency, and Costs of Medical Care,* 144 Annals of Internal Medicine 10 (May 16, 2006). Beyond the clinical benefits, ONCHIT estimates that wide-spread adoption of electronic health records would lead to annual

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[3] Available at: http://healthit.hhs.gov/portal/server.pt/community/providers/2998/get_the_facts_about_electronic_health_records:_advancing_america's_health_care_/21233.

savings of between 7.5% and 30% of national health care costs. *Health Information Technology Leadership Panel Final Report* 9.[4]

The fear of liability for violation of a patient's privacy rights, including liability for unintended disclosures and improper actions of others, is a major obstacle to the widespread use of electronic health records. *See* John R. Christiansen, *Legal Speed Bumps on the Road to Health Information Exchange*, 1 J. Health & Life Sci. L. 1, 20, 47 (2008) (reviewing a study showing that the leading trust issue for health care providers with respect to the exchange of electronic health information is fear of lawsuits and liability). Modifying the common law rules of negligence to extend liability for purely economic losses and emotional distress damages in circumstances where they previously were unavailable is both unnecessary to encourage the protection of patient information and potentially deleterious to wider adoption of electronic health care information technology that carries important benefits for individual patients and public health generally. Because there are strong policy reasons that counsel against recognizing the tort, this situation it particularly unsuited to being addressed by an extension of the common law. The consideration of competing policy interests and striking the appropriate balance between them is more readily achieved through the legislative process.

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[4] Available at: http://www.hhs.gov/health/HITFinalReport.pdf

VI. CONCLUSION.

The Court of Appeals correctly determined that Oregon's common law does not recognize plaintiffs' negligence claims for purely economic losses and emotional distress damages in the absence of physical injury. The common law rules should not be modified to expand liability in the way sought by plaintiffs, as doing so would discourage increased use of electronic health care records at a time when use of such records should be promoted to improve patient care and reduce health care costs.

Respectfully submitted this 19th day of August, 2011.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(D)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5,883 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 19, 2011, I caused to be electronically filed the foregoing ***CORRECTED*** **BRIEF OF *AMICI CURIAE* OREGON ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS, OREGON MEDICAL ASSOCIATION AND AMERICAN MEDICAL ASSOCIATION (APPEARING ITSELF AND ON BEHALF OF THE LITIGATION CENTER OF THE AMERICAN MEDICAL ASSOCIATION AND THE STATE MEDICAL SOCIETIES)** by using the court's efiling system.

I further certify that I caused to be mailed two true and correct copies of the foregoing ***CORRECTED*** **BRIEF OF *AMICI CURIAE* OREGON ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS, OREGON MEDICAL ASSOCIATION AND AMERICAN MEDICAL ASSOCIATION (APPEARING ITSELF AND ON BEHALF OF THE LITIGATION CENTER OF THE AMERICAN MEDICAL ASSOCIATION AND THE STATE MEDICAL SOCIETIES)** via first class mail, postage prepaid, to the following:

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