IN THE SUPREME COURT OF THE STATE OF OREGON

LORI GAYLE HUGHES, as Personal Representative for the Estate of Jill Marie Dieringer, deceased,	)	Supreme Court No. S53447
	)	Court of Appeals Case No. A123782
Plaintiff-Appellant, Petitioner on Review,	)	Lane County Circuit Court Case No. 16-02-18544
v.	)	
PEACEHEALTH, a Washington corporation doing business in Oregon as SACRED HEART MEDICAL CENTER and PEACEHEALTH MEDICAL GROUP,	)	
Defendant-Respondent, Respondent on Review,	)	
and	)	
EUGENE EMERGENCY PHYSICIAN, P.C., an Oregon corporation,	)	
Defendant.	)	

AMICUS BRIEF OF OREGON ASSOCIATION OF DEFENSE COUNSEL

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitution

Statutes and Rules

Other Authorities

AMICUS BRIEF OF OREGON ASSOCIATION OF DEFENSE COUNSEL

Amicus Curiae Oregon Association of Defense Counsel appears in support of the defendant's positions in this case. OADC focuses its arguments on the absence of support for plaintiff's argument that common law in Oregon in 1857 recognized a claim for wrongful death. OADC also discusses Oregon's original wrongful death statute and the legislative intent to ameliorate the common law rule that there was no remedy for wrongful death. OADC also argues that even had a common law remedy for wrongful death been allowed, at most it would have permitted pecuniary loss to the estate, an economic loss that is not impacted by ORS 30.710 or any limitation on noneconomic damages. Thus, the limitation on noneconomic damages in a claim for wrongful death is not in violation of Article 1, section 10 of the Oregon Constitution.

OADC recognizes that the court need not reach these arguments, either because of plaintiff's failure to preserve the claim for common law wrongful death, *see* Defendant's Merits Brief, pp 4 - 8, or because its recent decision in *Juarez v. Windsor Rock,* 341 Or 160, ___ P3d ___ (2006), controls the outcome in this case. Like the plaintiffs in *Juarez*, plaintiff here failed to allege any injury to person or property, including legal entitlement to services or financial dependence on the decedent, or to invoke any protection under the remedies clause of the Oregon Constitution. OADC supports and incorporates defendant's arguments on those issues. See Respondent's Merits Brief, pp 8 - 14.

In the event the court reaches plaintiff's renewed arguments that a claim for wrongful death existed at common law in Oregon when the constitution was adopted in 1857, OADC urges the court to lay to rest those arguments once and for all, abiding by both a historically accurate analysis and more than a century of Oregon precedent. No common law remedy for wrongful death existed in Oregon in 1857, nor does one exist today apart from the statutory remedy provided in ORS 30.020 and its statutory predecessors. An effort to rewrite

Oregon law to recognize a *modern* common law basis for wrongful death claims ignores the framework for analyzing Article I, section10 challenges set out in *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001). The dozens of unanswered questions attendant to the recognition of a new common law remedy, *see* discussion, *infra*, pp 21-22, accentuate the reasons that legislatures uniformly have adopted comprehensive statutes to specify the elements of wrongful death recovery, the proper parties, beneficiaries, and the distribution of any proceeds. Oregon has had such a scheme since the wrongful death statute was first enacted in 1862. No other recovery for wrongful death has ever been permitted in Oregon law.

Following *Smothers,* the pertinent inquiry under Article I, section 10 is whether Oregon common law recognized a claim for wrongful death in 1857 when the constitution was drafted and adopted. As the court recognized in *Juarez*, by raising this question plaintiff again asks the court "to overrule its prior cases that reject a common-law wrongful death cause of action."[1] The court, however, has identified the very narrow circumstances in which it will overturn its own precedent:

> "The court generally will reconsider common-law doctrines in three situations: (1) when an earlier case was 'inadequately considered or wrong when it was decided'; (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. *G. L. v. Kaiser Foundation Hospitals, Inc.*, 306 Or 54, 59, 757 P2d 1347 (1988) (citations omitted) * * *"

Juarez, 341 Or at 168 (additional citation omitted). The present challenge again falls into the first scenario, *id.*, and yet, again, plaintiff has failed to show that the court's own criterion for overruling existing precedent has been satisfied.

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[1] Plaintiff's attempt to argue that the court need not overrule its prior decisions because she did assert a claim for common law wrongful death, unlike other cases rejecting the challenge, *e.g., Storm* v. McClung, 334 Or 210, 47 P3d 476 (2002), fails in light of her voluntary withdrawal of the common law claim in the trial court. Defendant's Merits Brief, pp 4 - 8.

For 115 years the Oregon Supreme Court has recognized that no common law right to a remedy for wrongful death existed in Oregon when the constitution was adopted. *E.g., Putman v. Southern Pacific Co.*, 21 Or 230, 231-32, 27 P 1033 (1891) ("[a]t common law, no action could be maintained for the death of a human being caused by the wrongful act of another."); *Lakin v. Senco Products, Inc.*, 329 Or 62, 77, 987 P2d 463 (1999) ("* * * a wrongful death claim was not one recognized at common law"), *opinion clarified*, 329 Or 369 (1999); *Greist v. Phillips*, 322 Or 281, 906 P2d 789 (1995). Despite this unbroken line of authority, and bolstered by *amici curiae* OTLA and ATLA, plaintiff relies on arguments that have little or nothing to do with Oregon law, either in 1857 or as it has developed over the last one hundred and fifty years. Whatever the status of English common law before 1808, when Lord Ellenborough pronounced the common law rule that in a civil court the death of a human being could not be complained of as an injury, *Baker v. Bolton*, 1 Camp 493, 170 Eng Rep 1033 (Nisi Prius 1808), there is no question that thereafter it was the rule in England and in this country. *Carey v. Berkshire R.R. Co.*, 55 Mass 475 (1848); *Goheen v. General Motors Corp.*, 263 Or 145, 151, 502 P2d 223 (1972) ("[S]ince then [*Carey*] most American courts, including this court, have adopted the rule holding that there is no common law cause of action for wrongful death."); *see also Mobile Life Insurance Co. v. Brame*, 95 US 754, 756-57, 24 L Ed 580 (1877) ("no civil action lies for an injury which results in * * * death[;] * * * no deliberate, well-considered decision to the contrary is to be found.").

Plaintiff and *amici* continue to rely on arguments by commentators about the underpinnings of *Baker, supra,* rather than examine how that decision and *Carey, supra,* and the early American cases that followed , shaped the common law when Oregon adopted its constitution in 1857. They also persist in the misplaced view that cases decided in other jurisdictions in the nineteenth century uniformly recognized claims for wrongful death. In doing

so they fail to distinguish between claims for loss of services by a master – including fathers for loss of services of a minor child – who had the then-lawful property right to such services, and claims for compensation arising from a person's death. Even if the former claims were recognized by various jurisdictions, plaintiff and *amici* fail to show that a claim for damages based on death *ever* was an accepted common law claim, let alone one that permitted any recovery for non-pecuniary loss.

Finally, plaintiff and *amici* encourage the court to adopt the same flawed view, without engaging in meaningful analysis or discussion of Oregon statutes and precedent. As the *Juarez* court's examination of early Oregon decisions and statutes acknowledged, 341 Or 170-173, the application of Oregon law answers far more questions in this case than plaintiff and *amici* are willing to admit, or even explore.

I. The Court Should Again Reject the Invitation to Rewrite History to Provide Non-Existent Common Law Remedies

The court should again affirm the historically correct and consistently-held view that no wrongful death action was recognized at common law in Oregon when the constitution was adopted in 1857. The rule of law is supported by historical analysis, by early Oregon statutes and decisions, and by an accurate review of the nineteenth and twentieth century cases from other jurisdictions on which plaintiff relies for a different rule.

The tenet of Oregon law that wrongful death is purely a statutory claim was unchallenged for more than a hundred years. Indeed, over that span of time, the court had only one occasion to address a question about whether the common law recognized a claim, and then the court rejected a different rule. *See Goheen,* 263 Or at 145. The court reviewed the developments in the common law after 1808 and stated, correctly, that, "Since then [1848 and *Carey*] most American courts, including this court, have adopted the rule holding that there is no

common law cause of action for wrongful death." *Id.*, 263 Or at 151. The *Goheen* court reviewed the history of ORS 30.020 and, citing several cases to that effect, adhered to the precedent that Oregon does not recognize a common law remedy for wrongful death. *Id.* at 152.

That rule remains today. In *Greist*, *supra*, the court held there was no constitutional prohibition under Article I, section 17 on the statutory limit on noneconomic damages in *former* ORS 18.560 (now ORS 31.710) in claims for wrongful death because no common law action for wrongful death existed at the time the Oregon Constitution was adopted. 322 Or at 294; *see also Storm,* 334 Or at 222 n 4 ("Since at least 1891, this court has adhered to the view that no right of action for wrongful death existed at common law."); *Smothers,* 332 Or at 128 (" * * * Oregon has no common-law action for wrongful death * * *"); *Lakin,* 329 Or at 77. *See Barke v. Maeyens*, 176 Or App 471, 480, 31 P3d 1133 (2001), *rev den*, 333 Or 655 (2002) (" * * * the Oregon Supreme Court has, on more than one occasion, held that there was no action for wrongful death at the time the Oregon Constitution was adopted * * *").

Like plaintiffs in other recent cases, *see e.g., Juarez*, plaintiff here attempts to ignore the unbroken line of Oregon Supreme Court decisions by dismissing the holdings as *dicta*. ATLA Brief, pp 4-6. Those decisions, however, cannot be so easily dismissed. See Defendant's Merits Brief, p 16 n 16. Plaintiff argues, without much discussion, that the decision in *Juarez* was wrong, yet acknowledges that the decision may control this case. Still, plaintiff fails to discuss this court's recognition that:

> "Many of the cases that plaintiffs rely on to show the existence of a wrongful death cause of action at common law were rooted in property rights. Generally, those cases involved fathers seeking to recover for the loss of services of their minor children."

341 Or at 171. Moreover, the court recognized that "[i]n Oregon, a parent similarly could recover for loss of services of a minor child," and that if death resulted the compensation was

limited to 'pecuniary loss sustained by the parent on account thereof in the interim between the time of the casualty and the death.' " *Id.* at 172, and n 4 (*quoting Schleiger v. Northern Terminal Co.*, 43 Or 4, 9-10, 72 P 324 (1903)).

Plaintiff also fails to address the wrongful death statute adopted in 1862, or other Oregon statutes adopted contemporaneously, and discussed in more detail below. These statutes, and the early cases discussing them, show a legislative intent to provide a right to relief for wrongful death where none existed at common law.

II. Oregon Common Law Did Not Recognize a Civil Remedy for Death When the Oregon Constitution Was Adopted in 1857

In 1848, in *Carey*, the Supreme Judicial Court of Massachusetts, a leading American court at the time, embraced the holding in *Baker* that at common law there was no claim for wrongful death. 55 Mass at 477-78. *Carey* was the first published appellate decision in the United States to cite *Baker*; there are no previous cases relying on or distinguishing *Baker*'s holding. After *Carey* was decided, and through 1857 and later, courts throughout the United States quickly adopted the holding in *Baker*. In *Eden v. Lexington & Frankfort Railroad Co.*, 14 B Mon 204, 53 Ky 204 (1853), the court cited *Carey* as *the authoritative interpretation of the common law*. In *Connecticut Mut. Life Ins. Co. v. New York & New Haven R.R.*, 25 Conn 265, 271-72 (1856), the court cited both *Baker* and *Carey* approvingly for the proposition that "[b]y the common law, no action was sustainable for damages by reason of the death of any person." This view continued. In *Green v. Hudson River Rail Road Co.*, 28 Barb 9, 21-22 (NY Sup Ct 1858), *aff'd*, 2 Abb Dec 277 (1866), the court recognized that at common law, no claim for wrongful death existed. The court also noted that "[t]he doctrine thus laid down by Lord Ellenborough has not been questioned in England from that day to this, as a principle of common

law * * *. It can scarcely be necessary to review at any length the cases in this country, which have affirmed the same doctrine."

The courts, including courts in Oregon, recognized *Baker* as an authoritative statement of the common law at the time. *Holmes v. Or. & C.R.*, 6 Sawy 262, 5 F 75 (Deady, J, Dist Or 1880) (sitting in admiralty); *Cutting v. Seabury et al.*, 1 Sprague 522 (Dist Mass 1860) (recognizing the weight of authority against an action for wrongful death). Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN L REV 1043, 1044 (1965) (although critical of the view, Professor Malone recognized that "the death of a human being was not regarded as giving rise to any cause of action at common law on behalf of a living person who was injured by reason of the death.").

Territorial Oregonians were both capable of understanding laws, including the common law, and of forming laws by which they would be governed. *See Lownsdale v. City of Portland*, 1 Or 381, 390-91 (Deady, J., U.S. District Court, 1861) (Wilson). Judge Matthew Deady, one of the principal drafters of the Oregon Constitution and a jurist who demonstrated a clear understanding of the common law, *State v. Maynard*, 168 Or App 118, 191, 5 P3d 1142 (2000), *rev den*, 332 Or 137 (2001) (Landau, J., dissenting), aptly stated:

> "When Congress, by the act of 1848, organizing the territory of Oregon, said that the laws of the United States should be in force in said territory, '*so far as the same, or any provision thereof, may be applicable*,' they did not mean that any particular law of the United States should be in force here, but only such as should be *determined* 'to be applicable.' Under this state of things, authority is necessarily given to the courts of the country, and it becomes their duty, whenever the question arises, to decide what laws were in force and what were not."

Id. at 390 (emphasis in original).

The cases cited by plaintiff and *amici* OTLA and ATLA in support of a common law remedy for wrongful death erroneously blur the distinction between a parent's recovery for lost services of a minor, akin to a master's recovery for injury to a servant, and recovery for an

individual's wrongful death.[2] Although the former was recognized at common law, see discussion below, recovery for wrongful death was not. This was significant to the court in *Juarez*, which rejected those cases as support for a common law wrongful death claim as being "rooted in property rights." 341 Or at 160. The court stated:

> "Thus, while a parent could recover at common law for the loss of services of a minor child, a child could not recover for the death of a parent because the common law considered the services of a minor child to be a property right of the parent, but not vice versa."

Id. at 172. When the cases cited are reviewed accurately and in the proper light, and the parsing is done, plaintiff can show no prevailing or predominant nineteenth century recognition of any common law remedy for wrongful death.[3] Indeed, in perhaps the first reported case acknowledging such recovery, *Moragne v. States Marine Lines*, 398 US 375, 90 S Ct 1772, 26 L Ed2d 339 (1970), the United States Supreme Court found a federal common law basis for a claim for wrongful death in admiralty. Although the Supreme Court questioned the basis for the common law rule, it did not hold that such an action was recognized in 1857. In fact, despite the court's criticism of the common law rule against recovery for wrongful death, the court's historical recitation makes clear that no such action was recognized in 1857. *Id.* at 382-86.

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[2] ATLA also cites many cases that involve recovery by a slave owner for the value of lost services of an injured slave, or the value of the slave, cases also rooted in property rights. *See* Defendant's Merits Brief, pp 28-30 & n 24 and ATLA Brief, p 23.

[3] *E.g.*, *Plummer v. Webb*, 1 Ware 69, 19 Fed Cas 894 (No 11,234) (DC Me 1825), *dis'd on appeal for lack of juris.*, 19 Fed Cas 891 (No 11,233) (CCD Me 1827) (court denied father's claim for damages for son apprenticed to another); *Shields v. Yonge*, 15 Ga 349 (1854) (father's suit for damages for loss of son's services caused by his son's death; court recognized that an action did exist by a master for an injury to his servant, including a father for an injury to his son; court considered statement in *Baker* not necessarily wrong, but too broad); *James v. Christy*, 18 Mo 162 (1853) (court stated father has a property interest in the services of his son during his minority).

Defendant has done a thorough job of reviewing the case law cited, and OADC adopts rather than repeats that discussion. Plaintiff's and *amici* OTLA's and ATLA's cases have in common that they were brought by a father for the death of his son seeking damages for the loss of services,[4] or by a master for the loss of services of a servant or slave. These claims were based on the property interest to the father, or master; they were not claims based on the death, for which there was no recovery. Certainly, they do not stand for the broad proposition that the courts universally recognized a common law cause of action for wrongful death in the nineteenth century.

III. Oregon Law in 1857 Was in Keeping with the Common Law Recognition of a Parent's Claim for Loss of Services of a Minor but Not Recovery for Wrongful Death

Juarez recognized claims by parents at common law were rooted in property law for recovery for loss of services of a minor child. 341 Or at 172-73. This court's early decisions considered claims by parents and noted that, at common law, a parent was entitled to maintain an

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[4] These actions originated in the context of the family institution, and as Professor Malone recognized in 1965,

> "[t]he right was accorded to the family head to maintain a suit for an injury to his wife or minor child and to the master for an injury to his servant. The interest was first regarded as a property right, and consistent with this character the claim was first limited to the value of the wife's or child's services in the household."

Malone, *The Genesis of Wrongful Death*, 17 STAN L REV at 1052; *see also Shields*, 15 Ga at 349 (discussed above); *James*, 18 Mo at 162 (same); *Wilt v. Vickers*, 8 Watts 227 (Pa 1839) (noting "the right of the father to maintain an action for a personal injury done to his child, would seem to grow out of the right which he has to its services, and therefore this action may be said to be founded upon the relation rather of master and servant than that of parent and child, and the loss of the services of the child by reason of the injury."), *overruled in part on other grn'ds by Good v. Mylin*, 7 Pa LJ 382, 8 Pa 51 (1848); *Reed v. Inhabitants of Belfast*, 20 Me 246 (1841) (noting "[a]ctions of trespass, *per quod servitium amisit*, for the battery of a servant, we all know, are of familiar occurrence."). But neither the children nor the wife had a corresponding protected interest at common law in the husband or father.

action for the loss of service of his child, upon injury to the child. *Schleiger v. Northern Terminal Co.*, 43 Or at 9-10; *Putman v. Southern Pacific Co.*, 21 Or at 239; *Beerbower v. State ex rel Oregon Health Sciences*, 85 Or App 330, 736 P2d 596 (1987). The right was not founded on the parental relation, but upon the technical relation of master and servant. *Schleiger*, 43 Or at 9-10. The damages were measured by the pecuniary loss sustained by the parent, resulting from the injury to the child. *Id.*

When death resulted from the injury, the right of recovery was limited to the pecuniary loss sustained by the parent in the interim between the time of the injury and the death. *Id.* At common law, there was no right of action in the parent, either for the child's death, or for any loss or damages occasioned or resulting from the death itself. *Id.* at 10. The claims were distinct in 1857, as well as in 1862 when the first wrongful death statute was adopted, and they are distinct today.

IV. Oregon Enacted Legislation in 1862 Specifically to Ameliorate the Effect of Common Law In Matters of Recovery Based on Wrongful Death

In 1862 the legislature adopted statutes as part of an act to provide a Code of Civil Procedure. *Schleiger*, 43 Or at 6, 8-9 (citing subsequent provisions at B & C Comp sections 34, 379, and 381). The legislature provided in section 365 of the Deady Code that:

> "A cause of action arising out of an injury to the person, dies with the person of either party, except as provided in section 367. But the provisions of this title shall not be construed so as to abate the action mentioned in section 38, or to defeat or prejudice the right of action by section 33."

General Laws of Oregon, § 365 (Deady 1845-64). The original provision was considered to be "declaratory of the common law." *Schleiger*, 43 Or at 10 (citing B & C Comp section 379).

At the same time, section 33 of the Deady Code provided in relevant part:

> "A father, or in case of the death or desertion of his family, the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward."

General Laws of Oregon, § 33 (Deady 1845-64). Finally, the legislature created a cause of action for the death of a person when it adopted the following provision of the Deady Code:

> "When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury caused by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person."

General Laws of Oregon, § 367 (Deady 1845-64) (emphasis added).

Construing later-renumbered versions of these provisions together, *Schleiger*, 43 Or at 9 (holding that these sections "naturally were intended to subserve a harmonious purpose, without impinging one upon the other"), it is readily seen that although the statutes maintain the common law in some respects, they also change the law to the extent that the statutes for the first time in Oregon permit recovery for the death of a child or person.

Early Oregon courts were well versed in the differences between the common law and the statutes enacted to secure rights in derogation of common law. *E.g., Lownsdale,* 1 Or at 390-91 (Wilson 1861) (Deady, J., U.S. District Court) (construing "land law" that vested ownership in real property in married women, contrary to common law); *Rugh v. Ottenheimer*, 6 Or 231 (1877) (same); *Goodwin v. Morris,* 9 Or 322, 324 (1881) (court held it must presume common law prevails in other jurisdictions absent pleading and proof to the contrary; held Oregon statute of limitation would not bar claim for possession of property in Washington Territory where common law was presumed to prevail); *Furgeson v. Jones*, 17 Or 217, 20 P 842 (1888) (court recognized the adoption statute to be of civil-law origin and in derogation of

common law; thus, the court held that strict construction must apply). Early decisions confirmed the understanding that there was no action for wrongful death in Oregon before the adoption of the Oregon wrongful death statutes. *Holmes,* 6 Sawy at 262 (Judge Deady); *Putman*, 21 Or at 239 (decision by Justice William Lord, stating that 1862 statutes creating a right to recover for death were designed to cure "this defect of the common law, and remedy its injustice").[5]

Putman, involved a claim by a mother seeking damages for the death of her adult son, on whom she was dependent, and the interpretation of Hill's Code, sections 34 and 371 (substantially the same as the 1862 Deady Code sections 33 and 367 set forth above). Justice Lord acknowledged the common law claim by a parent for loss of services of a child. He also recognized that at common law no action could be brought for the death of a human being caused by the wrongful act of another, and that there was no action to recover damages for the death of a child at common law when the death was instantaneous. As Justice Lord found, that apparent injustice prompted the legislature to adopt the statute allowing a cause of action on behalf of a parent for the death of a child. The court stated:

> "The effect of section 34 was to confer *a new and independent right of action beyond that given at common law.* Under it [common law], the father could recover for loss of services for an injury to his child during the period of disability; and if death ensued, for loss of services during the interim between the injury and the death, and the incidental expenses incurred for care and medical attendance. But he could maintain no action to recover for the death of his child, or for services lost by the death, as the death of a human being was not an injury for which redress could be given. As there could be no loss of services or incidental expenses when the death was instantaneous, the parent was without remedy after the death of his child. *That section 34 was intended, at least, to obviate this defect in the common law and remedy its injustice, there can be no question.*

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[5] Justice Lord was experienced in matters of the common law and its application. *See, e.g., Cressy v. Tatom,* 9 Or 541, 544-45 (1881); *Furgeson,* 17 Or at 217 (holding that right of adoption was unknown to common law and repugnant to its principals, permanent transfer of natural rights of a parent was against the policy of the common law).

Putman, 21 Or at 234-235 (emphasis added).

Thus, just as Judge Deady indicated in the Deady code, and as Justice Lord maintained when the statutes were first construed, the 1862 statutes were adopted to ameliorate the "injustice" of the common law regarding civil actions for death, creating rights where none previously existed. The recognized purpose of the wrongful death statute was to provide a remedy when there would have been an action for damages if death had not occurred. *See Libbee v. Permanente Clinic*, 268 Or 258, 518 P2d 636 (1955) (court stated it will look to see if action would have been permitted had the decedent lived; wrongful death statutes created a new right of action for wrongful death with the limitation that the decedent might have maintained an action against the wrongdoer had he lived).

The action recognized under Section 33, Deady's General Laws, was for the value of the service of the child during his minority, minus the cost of rearing the child during the same period. *Craft v. N.P.R.R. Co.*, 25 Or 275, 285, 35 P 250 (1894); *Schleiger,* 43 Or at 9. The action for death of a person recognized under Section 367, was an action for the "pecuniary damage to the estate." *Goheen,* 263 Or at 155. The measure was the "pecuniary value of [the] decedent's life, or, as recognized in most early cases, the decedent's "earning capacity," or "potential earning capacity." *Id.* at 156-165, and cases discussed therein.

V. Oregon Law Distinguishes Parents' Claims Based on Injury to a Child and Claims for Wrongful Death

The distinctions between actions for injury to a child and actions for wrongful death remain a part of Oregon law. ORS 30.010 provides:

> "(1) A parent having custody of a child of the parent may maintain an action for the injury of the child.
>
> "(2) A parent may recover damages for the death of a child of the parent only under ORS 30.020 [Oregon's wrongful death statute]."

In *Beerbower*, 85 Or App at 330, the parents of a minor child, injured by a nurse who negligently gave the child a drug overdose, brought an action under *former* ORS 30.010 seeking damages for the loss of their minor child's society and companionship resulting from her injuries. *Former* ORS 30.010 was silent with respect to the measure of damages, as is current ORS 30.010. The court looked to the legislative history of ORS 30.010 and noted "[p]arents have had a statutory right to bring an action for the injury or death of a child since the original Deady Code." *Id.* at 333. According to the court, the original statute "preserved a parent's common law right of action when the child is injured and created an additional right when the child dies." *Id.* The court also noted that before the 1973 amendments to *former* ORS 30.010, chief among them removing an action for the death of a child from *former* ORS 30.010 and placing it exclusively in ORS 30.020, damages were limited to the loss of the child's services. *Id.* at 334 (citing *Escobedo v. Ward*, 255 Or 85, 464 P2d 698 (1970)). Looking at the original statute permitting an action by a parent for injury to a minor child, the court held that under *former* ORS 30.010 damages were limited to pecuniary loss, meaning the value of the services lost as a result of the child's injury. The court thus denied the parents' claim for damages for the loss of their minor child's society and companionship.

In *Escobedo*, a case decided before the 1973 amendments to *former* ORS 30.010, the court held that a father's claim for the wrongful death of his child, allowable at the time under either *former* ORS 30.010 or ORS 30.020, or both, 255 Or at 97, was limited to the value of the services of the child during the child's minority. The court further held that the cost of rearing the child during the period of minority should be deducted when determining the value of the child's services during. *Id.* (citing *Putman*, 21 Or at 239). Significantly, the court noted ORS 30.010 and ORS 30.020 were both enacted in 1862 "as complementary statutes–one creating a cause of action for wrongful death of all persons, both adult and minor–the other

expanding the father's common law cause of action for loss of services resulting from injury to his minor child to include loss of services resulting from the death of the child." *Id.* at 97-98.

A father's common law remedy for damages was limited to the value of the lost services occasioned by the child's injury. *Id.* Currently, a cause of action by either parent for injury to his or her child is permitted by ORS 30.010(1) and damages are limited to pecuniary loss, meaning the value of lost services. *See Beerbower,* 85 Or App at 335. ORS 30.020 also now permits a parent to recover damages for the loss of services occasioned by the death of a child. ORS 30.020(2)(d). The statutory changes appear to have expanded a parent's common law cause of action based on injuries to a minor child, rather than limiting it. Thus, no viable challenge may be made to these provisions under Article I, section 10 of the Oregon Constitution.

VI. Modern Cases Do Not Recognize Recovery for Wrongful Death Other Than as Provided by Statute, Despite Acknowledging Common Law Characteristics of the Claim

Although a few courts have criticized the rule stated in *Baker v. Bolton*, they have not disagreed that at common law there was no right of action for the death of an individual. A few courts, like the court in *Moragne,* 398 US at 409 (recognizing an action under admiralty law), have ruled that their laws have evolved to the point that a basis in wrongful death may be recognized. *See Gaudette v. Webb*, 362 Mass 60, 71, 284 NE 2d 222, 229 (1972) (holding Massachusetts law has *now evolved* "to the point where it may now be held that the right to recovery for wrongful death is of common law origin.")

In *Summerfield v. Superior Court*, 144 Ariz 467, 698 P2d 712 (1985), the Arizona Supreme Court declined to conclude that a wrongful death action is recognized at common law:

> "This excursion into common law history and principle does *not* necessary lead us to the conclusion that a wrongful death action is recognized at common law, nor that such an action should be allowed irrespective of legislative intention or

> pronouncement. We need not solve that problem. We can conclude, at a minimum, that statute and precedent have combined to produce a cause of action with common law attributes. The common law may participate in the growth and evolution of a statutorily created action, especially where its pronouncements do not constitute 'drastic or radical incursion[s] upon existing law,' or directly contradict either legislative words or expressed legislative intention."

698 P2d at 718 (italics in original, underling added). Based upon the above reasoning, the Arizona court applied common law principles and policy in interpreting the wrongful death statute to find that the word "person" included a stillborn, viable fetus. Rather than recognizing a common law cause of action, most states have merely concluded that due to the perceived common law basis, they need not apply a strict construction of their wrongful death statutes. *See, e.g., Wilbon v. D.F. Bast Co., Inc.*, 73 Ill 2d 58, 382 NE 2d 784 (1978) (wrongful death statute of limitations was tolled during plaintiff's minority as a matter of legislative intent, not on the basis of a retrospective recasting of common law); *see also Haakanson v. Wakefield Seafoods, Inc.*, 600 P2d 1087 (Ak 1979) (in deciding that the statutory tolling of actions during a plaintiff's minority applied to a wrongful death action, the court did "not deem it necessary to base our holding on the common law"); *Hanebuth v. Bell*, 694 P2d 143 (Ak 1984) (following reasoning of *Haakanson* in determining that the discovery rule applied to wrongful death actions).[6]

VII. There is No Principled Basis on Which to Change Oregon Law

Plaintiff has not demonstrated any basis upon which the court may rely to re-write Oregon law to hold to the contrary. *See Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228 (2000) (court stated party must present principled argument that court wrongly decided issue

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[6] In *LaFage v. Jani*, 166 NJ 412, 766 A2d 1066 (2001), the court examined its earlier decisions and found a common law premise based on its own state laws predating *Baker*. 166 NJ at 438 (stating that pre-*Baker* English common law, which had been adopted at the time of New Jersey's 1776 constitution, was left in place by the 1848 New Jersey wrongful death act). The court in *LaFage* merely found a common law thread in its own case law that pre-dated *Baker*.

in earlier decisions); *G.L. v. Kaiser Foundation Hospitals,* 306 Or at 59 (earlier decision must have been wrong or inadequately considered when it was decided).

The Oregon Constitution is to be construed to determine the intent of the drafters and of the people who voted to adopt it. *Stranahan v. Fred Meyer, Inc.,* 331 Or at 54; *State ex rel v. Metschan*, 32 Or 372, 387, 46 P 271 (1896). This court should refuse the invitation to abandon precedent and history and rewrite Oregon law governing wrongful death. Defendant ably demonstrates in the cases cited that the majority of courts have refused similar requests and claims. Defendant's Merits Brief, pp 26-27.

This court has held that Article I, section 10 preserves a remedy only where a cause of action for the wrong or harm existed and the common law of Oregon would have recognized an action under the circumstances of the case when the drafters wrote the Oregon Constitution in 1857. *Smothers*, 332 Or at 124; *Lawson v. Hoke*, 339 Or 232, 259, 119 P3d 210 (2005). Because no common law claim for wrongful death was recognized at the time the Oregon Constitution was drafted, a statutory limitation on non-economic damages awarded for such a claim does not violate Article I, section 10; plaintiff's claims for damages based on decedent's death are not subject to protection under the remedies clause.

VIII. Even If a Wrongful Death Claim Had Been Recognized at Common Law in 1857, the Remedy Would Have Been Limited to Economic Damages

In *Smothers*, the Supreme Court ruled that the drafters of the Oregon Constitution sought to give protection to absolute rights "*as those rights were understood in 1857*," 332 Or at 115, and that the history of the remedies clause indicates that its purpose was "to protect absolute common law rights * * * *as those rights existed when the Oregon constitution was drafted in 1857* * * *." 332 Or at 118 (emphasis supplied). If the court is to abandon 110 years of Oregon law on the issue, then it is significant in light of *Smothers*, *supra*, that any remedy in 1857 would

have been limited to damages for pecuniary loss only. In other words, if such recovery *had* been permitted, it is clear that the drafters would have allowed only recovery for pecuniary losses.

The Oregon wrongful death statute adopted in 1862 provided for a claim on behalf of the estate, not for the beneficiaries, and the proceeds would be used to satisfy creditors and others, including the beneficiaries. *Schleiger*, 43 Or at 9-11; *Putman*, 21 Or at 233. No claim by individuals was permitted. Moreover, recovery excluded damages for *solatium*; the exclusive measure of damages was the pecuniary value of the decedent's life to the estate. *Putman,* 21 Or at 232. Thus a wrongful death action, as it would have been understood in 1857, would have been limited to an action for pecuniary losses.[7]

The remedy clause does not guarantee to a plaintiff a greater remedy than the remedy that would have been available in 1857. *Barke,* 176 Or App at 471; *see also Lawson,* 339 Or at 258-60. In *Barke*, a wrongful death action, the court ruled that the application of the statute of ultimate repose in ORS 12.110(4) did not violate the remedy clause. The Court of Appeals did not reach the question of whether a wrongful death action was recognized at common law. The court based its decision instead on the fact that at the time the Oregon Constitution was enacted, the plaintiff's action would have been subject to, and barred by, a statute of limitations that acted as a statute of repose. 176 Or App at 481.

The Court of Appeals explained: "There is no basis to assume that the remedy provision of Article I, section 10, enacted several years [after the passage of the 1854 statute of limitations], was intended to give plaintiffs a right to commence actions that were barred under then-existing statutes of limitation." *Id.* at 482. Thus, the court ruled that the remedy clause

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[7] Even if Lord Campbell's Act had been in effect in Oregon at the time of the adoption of the Oregon Constitution, that Act had by then been interpreted to restrict recovery to pecuniary losses suffered by the decedent's survivors. Stewart M. Speiser, *Recovery for Wrongful Death*, § 3:1, p 55 (1966); *Goheen*, 263 Or at 153.

"would not guarantee plaintiff the right to initiate a personal injury action based on negligent acts that occurred some seven years before the action was initiated. In short, plaintiff's action would have been time barred under the law as it existed at the time that Article I, section 10 was enacted, just as it is barred under the current law." *Id.* at 483.

Fields v. Legacy Health System, 413 F3d 943 (9th Cir 2005), does not assist plaintiff's arguments. Although the concurring judge in *Fields* expressed frustration that the case did not meet the requirements for certification to this court, the Ninth Circuit followed Oregon law that no wrongful death claim existed at common law. The court also upheld Oregon wrongful death statutes of limitations and repose against challenges under Article 1, section 10 of the Oregon Constitution, and the due process and equal protection clauses of the United States Constitution. *Id.* at 960.

On the facts presented, if any claim had been available in 1857 based on the death of the decedent, such claim would have been limited to pecuniary loss, based on the value of loss of services. Of course, there presently is no statutory limit on plaintiff's recovery for economic loss. The only limitation set by ORS 30.710 is a limitation on noneconomic damages, a limitation that is *not* implicated by any absolute right at common law.

IX. A Holding that the Court has Been Wrong for Over a Century Will Result in Chaos

OADC has already discussed the narrow parameters for overruling precedent. Particularly where plaintiff voluntarily withdrew her common law claim, the court cannot reverse the Court of Appeals on this issue without holding that it has been wrong for over a century and that a claim for wrongful death existed at common law in 1857. *G.L. v. Kaiser Foundation Hospitals*, 306 Or at 59. Of course, that is not the case; no common law claim existed.

The courts' opinions on the subject now span three centuries. In that time, courts have had countless occasions to consider the statutory rather than common law basis for the

action. From Judge Deady's earliest commentary, to the court's most recent opinions, Oregon courts have properly held that no claim for wrongful death existed at common law. That was the correct rule in 1857. There is no support for a different view today.

Overruling and abandoning the rule stated in *Putnam* and confirmed consistently over the decades will not mark a simple departure from precedent. Adoption of a new common law claim would unavoidably force the court into the role of legislating the limits of such a claim. That role is properly for the legislature, which it already has fulfilled with ORS 30.020.

Claims for "common law" wrongful death will proliferate. OADC again raises just some of the significant questions that would remain:

What are the elements of a common law claim? Who is entitled to bring the claim and on whose behalf? What statutes of limitations apply? What instructions would the jury receive? What damages may be recovered? How would proceeds of any common law claim be distributed?

Of course, unanswered questions also remain about the relationship of a common law claim to a statutory claim. May statutory and common law wrongful death claims be brought independently of one another? May a common law claim for wrongful death be brought in conjunction with a statutory claim? How would a judgment in one case affect a later claim by different individuals? Would a prior claim by an individual trump a claim by a later-appointed personal representative? How would the potential for additional multiple claims affect settlement and litigation? What certainty would exist that a final resolution has been achieved?

The court should anticipate many additional legal questions, all which will need to be addressed before any new claim for common law wrongful death might be approached with any degree of certainty. *See* Wex S. Malone, *The Genesis of Wrongful Death*, 17 Stan L Rev 1043, 1073-1076 (1965) (discussing the "confused state of affairs that must necessarily attend

any effort to support a common-law claim for death in the face of a competing statutory scheme."). Every aspect of the claim would be subject to debate absent clear guidance from the court.

X. Conclusion

If the court reaches the issue, it should hold, once and for all, that the common law of Oregon did not recognize any claim for wrongful death in 1857. That being said, the answer to the first question in the *Smothers* analysis is, "no," and the statutory limit on noneconomic damages awarded by the jury does not violate Article I, section 10 of the Oregon Constitution. Any claim that might be held to have existed in 1857 would have recognized only pecuniary losses, or economic damages. Absent recovery at common law for noneconomic damages, application of ORS 30.710 cannot be held to violate the remedies clause of the Oregon Constitution.

OADC supports defendant's arguments on the remaining issues, in the event the court finds it necessary to reach them. OADC also supports defendant's arguments on the proper application of the interest rate in ORS 82.010(2)(f) to the judgment in this case.

DATED this 12th day of September 2006.

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