IN THE SUPREME COURT OF THE STATE OF OREGON,

KEVIN RAINS and MITZI RAINS,
Plaintiffs-Respondents-Petitioners on Review,

v.

STAYTON BUILDERS MART, INC., JOHN DOE LUMBER SUPPLIER, JOHN DOE LUMBER MILL and FIVE STAR CONTRUCTIONS, INC.,
Defendants.

STAYTON BUILDERS MART, INC.,
Third- Party Plaintiff - Respondent,

v.

RSG FOREST PRODUCTS, INC., SANDERS WOOD PRODUCTS, INC., dba RSG FOREST PRODUCTS-MOLALLA DIVISION; GEORGIA PACIFIC CORP.; GEORGIA PACIFIC WEST, INC.; STARFIRE LUMBER COMPANY; WITHERS LUMBER COMPANY; WESTERN INTERNATIONAL FOREST PRODUCTS, LLC; and BLUELINX CORPORATION,
Third-Party Defendants,

and

WEYERHAEUSER COMPANY,
Third-Party Defendant-Appellant- Respondent on Review.

WEYERHAEUSER COMPANY,
Fourth-Party Plaintiff,

v.

RODRIGUEZ & RAINS CONSTRUCTION, an Oregon corporation,
Fourth-Party Defendant.

WITHERS LUMBER COMPANY,
Fourth-Party Plaintiff,

v.

SELLWOOD LUMBER CO., INC.; and WEYERHAEUSER COMPANY,
Fourth-Party Defendants.

WESTERN INTERNATIONAL FOREST PRODUCTS, INC.,
Fourth-Party Plaintiff,

v.

BENITO RODRIGUEZ, KEVIN RAINS, RODRIGUEZ & RAINS CONSTRUCTION,
Fourth-Party Defendants.

SELLWOOD LUMBER CO., INC.; an Oregon corporation,
Fifth-Party Plaintiff,

v.

SWANSON BROS. LUMBER CO, INC, and Oregon corporation,
Fifth-Party Defendant.

Marion County Circuit Court No. 06C21040

A145916
S062939

Brief of *Amicus Curiae* Oregon Trial Lawyers Association in support of Plaintiffs' Petition for Review

Of the decision of the Court of Appeals dated August 13, 2014
Authored by Ortega, P.J.; Sercombe, J., and Hadlock, J., concurring,
in an appeal from the Marion County Circuit Court
Limited Judgment and Money Awards entered May 28, 2010
The Honorable Dennis Graves, Circuit Court Judge

Kathryn H. Clarke OSB 791890
kathrynhclarke@mac.com
PO Box 11960
Portland, Oregon 97211
(503) 460-2870

Attorney for *Amicus Curiae* Oregon Trial Lawyers Association

Maureen Leonard OSB 823165
Attorney at Law
P.O. Box 42210
Portland, Oregon 97242
Telephone: 503-224-0212

Brian R. Whitehead OSB 833452
Law Offices of Brian Whitehead, P.C.
1610 12th Street SE
Salem, Oregon 97302
Telephone: 503-364-8505

J. Randolph Pickett OSB 721974
Pickett Dummigan LLP
621 SW Morrison, Suite 900
Portland, Oregon 97204
Telephone: 503-226-3628

Attorneys for Plaintiffs-Petitioners on review Kevin Rains and Mitzi Rains

Michael T. Garone OSB 802341
W. Michael Gillette OSB 660458
Sara Kobak OSB 023495
Jordan R. Silk OSB 105031
Schwabe, Williamson & Wyatt, P.C.
1211 SW Fifth Avenue, Suite 1900
Portland, Oregon 97204
Telephone: 503-222-9981

Attorneys for Defendant-Respondent on review Weyerhaeuser Company

Thomas W. Brown OSB 801779
Cosgrave Vergeer & Kester LLP
500 Pioneer Tower
888 SW Fifth
Portland, Oregon 97204
Telephone: 503-323-9000

Attorneys for Defendant Stayton Builders Mart, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Introduction

The Court of Appeals has once again concluded that the cap on noneconomic damages (ORS 31.710) can be applied without offending a plaintiff's jury trial rights because the plaintiff's claim for strict product liability differs "in significant ways" from the common law claims available in 1857. *Rains v. Stayton Builders Mart, Inc.,* 264 Or App 636, 665, 336 P3d 483 (2014). This decision cannot be reconciled with this court's opinion in *Lakin v. Senco Products, Inc.,* 329 Or 62, 987 P2d 463 (1999), holding that the same statute, applied to limit a jury's verdict on the same claim, violated the Article I § 17 of the Oregon Constitution. [1]

The Oregon Trial Lawyers Association (OTLA) urges this Court to accept review to reiterate once more that the right to jury trial does not depend on finding a precise historical analog in mid-19th century common law (*M.K.F. v. Miramontes,* 352 Or 401, 426, 287 P3d 1045 (2012)), and that Article I § 17 prohibits legislative interference with a jury's verdict in any civil case "of like nature" to those in which jury trial was customary in 1857. *Lakin,* 329 Or at 78, 82. If review is granted, OTLA intends to submit a brief on the merits.

[1] "In all civil cases the right of Trial by Jury shall remain inviolate."

The questions presented, the proposed rules, and the difficulties with the Court of Appeals' approach are well-stated in Plaintiffs' Petition. OTLA offers the following brief comments as to why it is essential for this Court to grant that Petition.

Reasons for Granting Review

1. The Court of Appeals holding cannot be reconciled with *Lakin.*

In *Lakin,* this court concluded that ORS 31.710 (then ORS 18.560) violated the right to jury trial on plaintiffs' claims against a manufacturer for strict product liability and negligence:

> In summary, Article I, section 17, guarantees a jury trial in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857 and **in cases of like nature.** In any such case, the trial of all issues of fact must be by jury. The determination of damages in a personal injury case is a question of fact. The damages available in a personal injury action include compensation for noneconomic damages resulting from the injury. The legislature may not interfere with the full effect of a jury's assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857, or **in cases of like nature**. It follows, therefore, that, **in this context**, ORS 18.560(1) violates Article I, section 17. 329 Or at 82 (emphasis added.)

The Court of Appeals in *Rains* quotes much of this language (indirectly, by quoting another case[2]), but never confronts the fact that "this context," in

[2] 264 Or App at 660, quoting *Klutschkowski v. Peacehealth,* 354 Or 150, 177, 311 P3d 461(2013), which in turn was quoting *Lakin.*

which *Lakin* ruled, was exactly the same kind of product liability claim made in *Rains.* The Court of Appeals opinion is simply inconsistent with *Lakin.*

2. The Court of Appeals opinion is equally at odds with *Miramontes*.

The Court of Appeals never discusses or mentions this court's opinion in *M.K.F. v. Miramontes, supra*. In that case, the claim for damages associated with a stalking protective order was a statutory creation, with no "precise historical analogue." 352 Or at 426. However, it was a claim for damages, and the court concluded that whether a claim is "civil" or "at law" turns on "the nature of the relief sought: if the relief sought is monetary compensation for injuries suffered, then the claim is properly categorized as "civil" and the right to jury trial attaches. 352 Or at 424. This court held: "The Court of Appeals erred in conditioning the right to jury trial on such a precise match between the elements of a current claim and those of a common-law predecessor." 352 Or at 426. That error was repeated in this case.

3. The Court of Appeals has misapplied *Klutschkowski.*

The Court of Appeals misinterprets and misapplies this court's analysis in *Klutschkowski v. Peacehealth*, 354 Or 150, 311P3d 461 (2013). In that case, this court concluded that the Court of Appeals had erred when it

said that claims for prenatal injury were unknown at common law in 1857 and therefore the plaintiff's damages could be capped without offending his jury trial rights. This court reversed. In that case, both the defendant and the Court of Appeals had merged the remedy clause analysis, and its *Smothers*-mandated examination of the remedies available in 1857, with the Article I § 17 question of whether the case is a "civil case" that was "of like nature" (even though statutory in origin) to common law cases. To some extent, this court did likewise in the first part of its opinion. The court began by pointing out that actions for medical negligence were well-established when the Oregon Constitution was adopted," and therefore "at first blush" the constitutional protections applied. 354 Or at 171. The court then went on at some length to establish that the "exception" on which defendant relied, and which the Court of Appeals had found persuasive, did not provide a valid basis for not applying the general rule. 354 Or at 176. The court therefore "adhered to *Lakin's* holding" – despite the fact that no case could be found, either by the court or by the parties, that had discussed the viability of a child's claim for medical negligence in the course of delivery.

OTLA points out that the manufacturing and transportation of goods that accompanied the Industrial Revolution inevitably pushed the common law to accommodate a changed world, where products were produced at a

distance and transported in commerce, where "privity" requirements were increasingly meaningless and where contractual principles of implied warranty were increasingly employed in a tort context. *See, e.g.,* the historical discussion in *Stout v. Madden,* 208 Or 294, 300-303, 300 P2d 461 (1956), discussed in Plaintiffs' Petition at 9. Changes in the law that applies to civil cases cannot prevent them from being "of like nature," any more than twentieth-century birth of modern obstetrics prevents obstetrical negligence from being "of like nature" to medical negligence claims that existed in 1857.

4. This court should correct or overrule *Hughes v. Peacehealth.*

The Court of Appeals found *Hughes v. Peacehealth,* 344 Or 142, 178 P3d 225 (2008) "most instructive." 265 Or App at 660. In *Hughes* the court concluded that an action for wrongful death was unknown at common law, was solely a creature of statute, and had come into existence with a dollar limit on recovery, and therefore the damages could be capped without offense to Article I § 17. In his concurrence in *Klutschkowski, supra,* Justice Landau expressed reservations about *Hughes,* "especially with respect to its incorporation of a *Smothers*-type analysis into the interpretation and

application of the right to a jury trial." 354 Or at 194 (Landau, J., concurring).[3] He went on to state:

> By its terms, [Article I § 17] applies to "all civil cases," not just the limited number of civil cases that would have triggered a right to a jury trial in 1857. And I am aware of no evidence in the historical record that the framers of the provision intended or contemplated that the constitutional guarantee would be so limited. *Id.* at 194-95.

As Justice Landau pointed out, there is "some tension" between the *Hughes* approach and the court's decision in *Miramontes, supra. Id.* at 195. Given the fact that the Court of Appeals finds *Hughes* "most instructive," OTLA suggests that it is time to resolve that tension.

The *Smothers*-like inquiry into historical antecedents may, at this point, be a major feature of remedy clause jurisprudence, but it should not be a factor in a proper analysis of the jury trial provision.[4] This court should either restrict *Hughes* to its context – a claim unknown at common law, with no common law origins, solely statutory in origin, and created with a limited recovery[5] – or overrule it. Its inconsistency with other cases, as summarized

---

[3] Referring to *Smothers v. Gresham Transfer, Inc.,* 332 Or 83, 23 P3d 333 (2001).

[4] In *Lakin, supra,* the court expressly rejected an argument that merged the analysis of the remedy clause and the jury trial provision. 329 Or at 81.

[5] OTLA does not believe this to be an accurate characterization of a wrongful death claim, but it is the one accepted by the court in *Hughes.*

above, should not continue to mislead lower courts into decisions that unjustifiably limit the protections afforded citizens by the Constitution.

Conclusion

OTLA urges the Court to grant review in this case and to make clear that *Lakin v. Senco Products, Inc.*, is still good law.

Respectfully submitted,

/s/ Kathryn H. Clarke
Kathryn H. Clarke OSB 791890
Attorney for *Amicus Curiae*
Oregon Trial Lawyers Association

CERTIFICATE OF COMPLIANCE

Brief length: I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), and the word count of this brief is 1472 words.

Type size: I certify that the size of the type in this brief is not smaller than 14 point for both text and footnotes as required by ORAP 5.05(4)(f).

CERTIFICATE OF SERVICE AND FILING

I certify that on this date I electronically filed the foregoing **Brief of *Amicus Curiae* Oregon Trial Lawyers Association** with the State Court Administrator and by so doing served a copy electronically on

Maureen Leonard
Of Attorneys for Plaintiffs-Petitioners

Michael T. Garone
Of Attorneys for Defendant-Respondent Weyerhaeuser Company

Thomas W. Brown
Of Attorneys for Defendant Stayton Builders Mart Inc.

DATED this 30th day of January, 2014.

/s/ Kathryn H. Clarke
Kathryn H. Clarke OSB 791890
Attorney for *Amicus Curiae*
Oregon Trial Lawyers Association