IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Zeferino VASQUEZ,
Plaintiff-Respondent,

v.

DOUBLE PRESS MFG., INC.,
a California corporation,
Defendant-Appellant.

Multnomah County Circuit Court
110302844; A154774

David F. Rees, Judge.

On appellant's petition for reconsideration filed May 13, 2016, respondent's response to petition for reconsideration filed May 27, 2016, and appellant's reply in support of its petition for reconsideration filed June 3, 2016. Opinion filed May 4, 2016. 278 Or App 77, 372 P3d 605.

Jonathan Henderson argued the cause for appellant. With him on the briefs were Elizabeth E. Lampson and Davis Rothwell Earle & Xochihua, P.C. With him on the supplemental brief was Davis Rothwell Earle & Xochihua, P.C.

Kathryn H. Clarke argued the cause for respondent. With her on the briefs were Mark G. McDougal and Gregory Kafoury.

James S. Coon and Thomas, Coon, Newton & Frost filed the brief *amicus curiae* for Oregon Trial Lawyers' Association.

Nathan R. Morales, Sharon A. Rudnick, and Harrang Long Gary Rudnick P.C. filed the brief *amicus curiae* for Associated Oregon Industries and the Oregon Liability Reform Coalition.

Before Armstrong, Presiding Judge, and Hadlock, Chief Judge, and Egan, Judge.

ARMSTRONG, P. J.

Egan, J., concurring.

Reconsideration allowed; former opinion withdrawn; affirmed.

ARMSTRONG, P. J.

Defendant seeks reconsideration of our decision in *Vasquez v. Double Press Mfg., Inc.*, 278 Or App 77, 372 P3d 605 (2016). In that decision, we concluded that the application in this case of the cap on noneconomic damages in ORS 31.710(1)[1] would violate plaintiff's jury-trial right under Article I, section 17, of the Oregon Constitution.[2] We based our decision on the controlling precedent of *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463, *clarified*, 329 Or 369, 987 P2d 476 (1999). One day after we issued our decision in *Vasquez*, the Supreme Court issued its decision in *Horton v. OHSU*, 359 Or 168, 376 P3d 998 (2016), which overruled *Lakin*. In light of *Horton*, we allow reconsideration and withdraw our opinion in *Vasquez*.

We also conclude that it is appropriate to exercise our discretion to address the two "right for the wrong reason" arguments raised by plaintiff in response to defendant's request for reconsideration. As to those arguments, we conclude that plaintiff's claims against defendant are not "subject to" ORS chapter 656, such that they would be excepted from the application of ORS 31.710(1). However, we also conclude that, as applied in this case, ORS 31.710(1) violates the remedy clause of Article I, section 10, of the Oregon Constitution.[3] Accordingly, we allow reconsideration, withdraw our former opinion, and affirm the trial court's ruling not to apply ORS 31.710(1) to plaintiff's award of damages.

We take the facts from our prior opinion, which we recited consistently with the jury's verdict in favor of plaintiff:

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[1] ORS 31.710(1) provides:

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

[2] Article I, section 17, provides that "[i]n all civil cases the right to Trial by Jury shall remain inviolate."

[3] Article I, section 10, provides that "[n]o 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."

"Defendant manufactures and sells agricultural machinery. OR PAC Feed & Forage LTD, the employer of plaintiff, purchased a bale-cutting machine from defendant, and defendant installed the machine. Plaintiff's job duties included operating and cleaning hay out of and around the bale-cutting machine. Plaintiff operated the machine from a control panel located at the control tower. Before plaintiff cleaned hay out of or around the machine, he pushed a button on the control panel to switch the machine from automatic to manual mode. In addition to switching the machine to manual mode, there was a 'lockout/tagout' safety procedure. Under that procedure, an operator shuts off the power source supply with a lock and key and takes the key so that only one person has access to the power supply while working on the machine.

"On March 31, 2010, plaintiff left the control tower to ask his cousin whether his shift was over. Plaintiff did not turn off and lock out the machine, nor did he switch the machine from automatic mode to manual mode. When plaintiff's cousin confirmed that his shift was over, plaintiff began to clean the machine. While cleaning the machine—removing jammed material from the exterior—plaintiff was 'crushed by a "pinch point" created by a hydraulic ram moving against the exterior framework' of the machine. A 'pinch point' is a place on the machine 'where two pieces of material come together.'

"Plaintiff was severely injured. Plaintiff's neurosurgeon testified that plaintiff was 'essentially cut in half, right through the base of the spine' and that the machine 'broke his bones and crushed his spine and tore soft tissue.' As a result of the injury plaintiff is permanently paraplegic.

"Plaintiff filed an action against defendant, alleging claims for negligence and products liability, and subsequently amended his complaint to proceed on his negligence claim alone. Before trial, defendant moved for partial summary judgment to limit plaintiff's noneconomic damages to $500,000 under ORS 31.710(1). Relying on *Lakin,* the trial court denied defendant's motion for summary judgment, explaining, 'For now I'm going to consider *Lakin* to be binding on' the issue of noneconomic damages.

"At trial, plaintiff testified that he was partially at fault for his injuries. Based on that admission, defendant moved

> for a directed verdict to cap plaintiff's noneconomic damages. The trial court denied that motion, again relying on *Lakin*[.]
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> "The jury returned a verdict in plaintiff's favor for $2,231,817 in economic damages and $8,100,000 in noneconomic damages, but found plaintiff 40 percent at fault for his injuries. Defendant moved to reduce the jury's award of noneconomic damages to $500,000 based on ORS 31.710(1), arguing that *Lakin* did not control. The trial court denied defendant's motion. The trial court then entered a judgment for plaintiff in the amount of $6,199,090.20, representing 60 percent of the total award from the jury—$4,860,000 of which are noneconomic damages.
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> "Following the entry of judgment, defendant moved for judgment notwithstanding the verdict and a new trial, again arguing that ORS 31.710(1) applied. The trial court denied those motions without explanation."

Vasquez, 278 Or App at 79-81 (footnote omitted). On appeal, defendant challenged the trial court's denial of its post-verdict motion to apply the noneconomic damages cap in ORS 31.710(1).

In our former opinion, we explained that *Lakin*, and its progeny, controlled our decision. In *Lakin*, which involved a negligence and products-liability case against a nail-gun manufacturer, the Supreme Court concluded that *former* ORS 18.560(1) (1987), *renumbered as* ORS 31.710(1) (2003), violated the jury-trial right in Article I, section 17. *See Lakin*, 329 Or at 79-81. The analysis in *Lakin* with respect to Article I, section 17, was reaffirmed by the Supreme Court in *Foster v. Miramontes*, 352 Or 401, 287 P3d 1045 (2012), and *Klutschkowski v. PeaceHealth*, 354 Or 150, 311 P3d 461 (2013). *See Vasquez*, 278 Or App at 84-85. We concluded that *Lakin* controlled, and we affirmed the trial court's ruling. *Id.* at 86. We explained,

> "Under *Lakin*, Article I, section 17, guarantees a jury trial in civil cases for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857 and cases of like nature. The determination of damages in a personal injury case is a question of fact. Thus, in this

> context, applying ORS 31.710(1) would violate Article I, section 17."

278 Or App at 87.

The day after we issued our decision in *Vasquez*, the Supreme Court issued its decision in *Horton*, which expressly overruled *Lakin*. *See Horton*, 359 Or at 250. With respect to Article I, section 17, the court re-examined at length the text and history of Article I, section 17, and the case law applying it. The court then concluded,

> "The text of Article I, section 17, its history, and our cases that preceded *Lakin* establish that Article I, section 17, guarantees litigants a procedural right to have a jury rather than a judge decide those common-law claims and defenses that customarily were tried to a jury when Oregon adopted its constitution in 1857, as well as those claims and defenses that are 'of like nature.' However, that history does not demonstrate that Article I, section 17, imposes a substantive limit on the legislature's authority to define the elements of a claim or the extent of damages available for a claim."

359 Or at 250.

In light of the Supreme Court's conclusion and overruling of *Lakin*, we allow reconsideration in this case and withdraw our former opinion. However, that does not end our inquiry. Because *Horton* announced a significant change in the law—not only in the application of Article I, section 17, but, as we will discuss below, in the application of Article I, section 10—we requested additional briefing and oral argument from the parties. We now turn to the additional arguments raised by the parties on reconsideration.

On reconsideration, plaintiff raises two new arguments as a basis to affirm the trial court under the "right for the wrong reason" principle: (1) plaintiff's claims against defendant are excepted from ORS 31.710(1) because they are "subject to" ORS chapter 656; and (2) ORS 31.710(1) violates Article I, section 10, both on its face and as applied in this case. Defendant responds that we should not consider those arguments because plaintiff did not timely raise them in his answering brief on appeal. However, as explained below, we conclude that we should consider plaintiff's "right for the

wrong reason" arguments in determining whether to modify our previous disposition affirming the trial court.

In contending that plaintiff was required to raise his arguments in his answering brief for the arguments to be considered by us, defendant points to cases in which we and the Supreme Court have said that we will not consider arguments raised for the first time on reconsideration. *See, e.g.*, *State v. Leistiko*, 352 Or 622, 624, 292 P3d 522 (2012) (declining to address argument raised for first time in defendant's petition for reconsideration); *Kentner v. Gulf Ins. Co.*, 298 Or 69, 74, 689 P2d 955 (1984) (noting that "purpose of rehearing is not to raise new questions or rehash old arguments, but to allow the court to correct mistakes and consider misapprehensions"); *Rogers v. RGIS, LLP*, 232 Or App 433, 435, 222 P3d 710 (2009), *rev den*, 348 Or 291 (2010) (declining to consider argument for modifying opinion that was raised by *amicus curiae* for first time in support of reconsideration petition); *State v. Schneider*, 204 Or App 710, 713, 131 P3d 842, *rev den*, 341 Or 392 (2006) (rejecting defendant's new argument on reconsideration attempting to disavow concession made on appeal in light of new case law); *Coast Range Conifers v. Board of Forestry*, 192 Or App 126, 130, 83 P3d 966 (2004), *rev'd*, 339 Or 136, 117 P3d 990 (2005) (stating that the state may not assert an unpreserved argument on appeal "much less for the first time in a petition for reconsideration"); *Kinross Copper Corp. v. State of Oregon*, 163 Or App 357, 360, 988 P2d 400 (1999), *rev den*, 330 Or 71 (2000) (noting that it is not appropriate for a party to assert a contention in a petition for reconsideration that was not raised in its brief on appeal).

Properly understood, those cases establish that we will not consider arguments raised for the first time in support of a petition for reconsideration as a basis on which to *allow* reconsideration and *modify* our prior opinion and disposition. The reasons for that general rule are to "prevent a party from appealing in a piecemeal manner," to "keep[] a party from shifting its position," and to "promote the finality of appellate courts' decisions and to conserve judicial time." *Kentner*, 298 Or at 74. Those reasons are not implicated when, as here, a party raises a "right for the wrong reason" argument for the first time in *opposition* to a petition

for reconsideration as a basis on which to *adhere* to our disposition affirming the trial court, despite an intervening change in the law. Rather, affirming the trial court on a proper alternative basis under those circumstances promotes efficient use of judicial resources. *See, e.g.*, *State v. Rogers*, 330 Or 282, 295, 4 P3d 1261 (2000) ("The 'right for the wrong reason' principle establishes that appellate courts may examine legal arguments not relied on by a trial court to determine if those arguments provide a basis for affirmance. To conclude otherwise could result in reversal of a correct action of a trial court, which would warp the law and waste judicial resources.").

We are not aware of any instance, and defendant has pointed to none, in which we have stated that we will not consider a new argument raised on reconsideration even though the reasons for the general rule against consideration of such arguments are not implicated. Indeed, both we and the Supreme Court have exercised our discretion to address arguments raised for the first time on reconsideration when it was appropriate to do so under the circumstances. *See Kentner*, 298 Or at 75 (modifying opinion on reconsideration based on a new argument because adhering to prior disposition "would defeat one of the basic purposes of the general rule that a contention not raised on the original hearing will not be considered on a rehearing—judicial economy"); *Bergman v. Holden*, 122 Or App 257, 260, 857 P2d 217, *rev den*, 318 Or 170 (1993) (considering arguments raised for the first time in a petition for reconsideration "because the evidence now cited indicates that at least one of our statements concerning the factual record was incorrect").

We conclude that this is a unique case in which we should exercise our discretion to consider "right for the wrong reason" arguments raised for the first time on reconsideration. Here, the reasons for the general rule against considering arguments raised for the first time on reconsideration are not implicated—*viz.*, plaintiff is not seeking a piecemeal appeal, has not shifted positions on reconsideration, and has raised arguments that are consistent with judicial efficiency. Also, plaintiff had no incentive to advance

alternative arguments for affirmance in his answering brief on appeal because *Lakin* conclusively resolved the issue on appeal in his favor. Had *Horton* been issued by the Supreme Court *before* plaintiff filed his answering brief on appeal, plaintiff could have raised his "right for the wrong reason" arguments at that time, and we would have considered them if they met our usual conditions for considering "right for the wrong reason" arguments. *See* *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 659-60, 20 P3d 180 (2001) (setting out conditions). That the Supreme Court did not issue *Horton* until one day after we had issued our opinion, in which we had relied on *Lakin* to affirm the trial court, does not make the rationale for considering plaintiff's "right for the wrong reason" arguments invalid. Accordingly, we will consider plaintiff's "right for the wrong reason" arguments, provided those arguments satisfy the conditions outlined in *Outdoor Media* for us to do that.

As explained in *Outdoor Media*, we will affirm a trial court under the "right for the wrong reason" principle—as a matter of discretion—under certain conditions:

> "The first condition is that, if the question presented is not purely one of law, then the evidentiary record must be sufficient to support the proffered alternative basis for affirmance. That requires: (1) that the facts of record be sufficient to support the alternative basis for affirmance; (2) that the trial court's ruling be consistent with the view of the evidence under the alternative basis for affirmance; and (3) that the record materially be the same one that would have been developed had the prevailing party raised the alternative basis for affirmance below. *** The second condition is that the decision of the lower court must be correct for a reason other than that upon which the lower court relied. Third, and finally, the reasons for the lower court's decision must be either (a) erroneous or (b) in the reviewing court's estimation, unnecessary in light of the alternative basis for affirmance."

Outdoor Media, 331 Or at 659-60.

With respect to plaintiff's argument that his claims are excepted from ORS 31.710(1) because they are "subject to" ORS chapter 656, defendant argues that the conditions in *Outdoor Media* are not satisfied. Defendant contends

that, had plaintiff raised the issue below, it would have developed a different factual record; specifically, defendant asserts that it would have developed the record on "whether the [workers' compensation] lien or liens had been satisfied or waived, whether plaintiff was within the course and scope of his employment when he was injured, [and] whether and to what extent plaintiff received workers' compensation benefits."

We disagree with defendant's assessment of the factual record. Plaintiff has raised an issue of statutory construction—whether the legislature intended the exception in ORS 31.710(1) for claims "subject to" ORS chapter 656 to include a claim brought by a worker against a third party who is not employed by the worker's employer (a "third-party claim"). That legal question does not require development of a factual record to answer it. In addition, the questions that defendant suggests that it would have developed below do not bear on whether plaintiff's claim is, in fact, a third-party claim. Defendant has never asserted that it was not, in fact, a "third party" and instead was immune from suit under ORS chapter 656, and none of the questions that defendant asserts that it would have explored below are relevant to that issue. *See SAIF v. Meredith*, 104 Or App 570, 574, 802 P2d 95 (1990) ("The term 'third person' applies to any one incurring a common law liability for injury to workmen not immune to suit under the Act." (Quotation marks and brackets omitted.)). Because we conclude that all the *Outdoor Media* conditions that must be met for us to address the legal question raised by plaintiff are met, we proceed to that question.

To address plaintiff's argument, we must construe the exception language in ORS 31.710(1), which provides:

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

(Emphasis added.)

We apply a plain meaning understanding to words that are not defined by statute, and, here, "subject to" in the context of ORS 31.710(1) means "under the authority of" or "governed by." *See Webster's Third New Int'l Dictionary* 2275 (unabridged ed 2002) ("1 : falling under or submitting to the power or dominion of another *** c : OBEDIENT, SUBMISSIVE <be ~ to the laws>"). The parties do not appear to fundamentally disagree that that is the plain meaning of the words "subject to";[4] rather, their disagreement centers on whether a third-party claim can be said to be under the authority of, or governed by, ORS chapter 656. We conclude that third-party claims are not.

Plaintiff contends that his third-party claim against defendant is "subject to" ORS chapter 656 because that chapter contains provisions that apply to such claims. Specifically, plaintiff points to ORS 656.154 and ORS 656.576 to 656.596. Of those statutes, plaintiff particularly points to ORS 656.580 and ORS 656.593(1), which give the paying agent for a workers' compensation claim a lien against any recovery that a worker receives from a third party.

In addition, plaintiff points out that workers' compensation claims are not "civil actions"—*viz.*, they arise in an administrative proceeding—and do not include compensation for noneconomic damages; thus, plaintiff argues, application of ORS 31.710(1) could never be at issue for such claims. Plaintiff thus asserts that, unless the exception for claims "subject to" ORS chapter 656 is read to include third-party claims, the exception has no meaning. Plaintiff also points out that the other claims that are excepted from ORS 31.710(1)—*viz.*, claims subject to ORS 30.260 to 30.300—are claims brought under the Oregon Tort Claims Act, which are civil actions, so, plaintiff reasons, the legislature also must have had civil actions in mind for the workers' compensation exception.

[4] We note that plaintiff does at times suggest in his argument that "subject to" means "affected by," and in doing so suggests that a lesser influence than to be "governed by" is sufficient for a claim to be "subject to" the workers' compensation laws. We reject that suggestion as not comporting with the plain meaning of "subject to" as used in ORS 31.710(1). Many laws may "affect" a claim—*viz.*, may have some influence on—without making that claim "subject to" the provisions in the law, as that term is commonly understood.

First, we reject plaintiff's argument that the provisions in ORS 656.576 to 656.596 demonstrate that a third-party claim is "subject to" ORS chapter 656. Those provisions do three things: they (1) provide that a worker can elect to bring a third-party claim, but, if the worker does not do that, provide a process by which the claim can be assigned to the paying agent, (2) provide that any compromise of a third-party claim must be approved by the paying agent, and (3) provide the process by which a paying agent can collect on a workers' compensation lien from proceeds of damages received by a worker in a third-party claim. However, nothing in those provisions makes a third-party claim a *claim* that is *under* the authority of ORS chapter 656. Those provisions only have relevance if (1) a worker *does not* bring a third-party claim, or (2) a worker *prevails on* or *settles* a third-party claim, such that the claim is no longer a claim. We likewise reject plaintiff's argument that ORS 656.154 demonstrates that a third-party claim is "subject to" ORS chapter 656. Contrary to plaintiff's assertions, that statute does not authorize a third-party claim; it states only that an employee "may elect to seek a remedy" against a third party.[5]

We do recognize that there is a single statute in ORS chapter 656 that has relevance to third-party *claims*. ORS 656.595 provides that a third-party claim "shall have precedence over all other civil cases," that evidence that the worker is entitled to or received workers' compensation benefits "shall not be pleaded or admissible in evidence," and that a "challenge of the right to bring such third party action shall be made by supplemental pleadings only and such challenge shall be determined by the court as a matter of law." Those three special procedural rules, however, do not demonstrate that a third-party claim is "subject to" ORS chapter 656, which is a broad reference to the entire workers' compensation scheme. Quite the opposite, those three procedural rules serve to ensure that a worker can timely bring and prosecute

[5] ORS 656.154 provides:

> "If the injury to a worker is due to the negligence or wrong of a third person not in the same employ, the injured worker, or if death results from the injury, the spouse, children or other dependents, as the case may be, may elect to seek a remedy against such third person."

a third-party claim as a matter that is kept entirely separate from the workers' compensation scheme.

Second, we reject plaintiff's argument that the legislature must have meant the exception to apply to third-party claims because workers' compensations claims would not be subject to ORS 31.710(1) even if there were no exception. As explained above, none of the provisions in ORS chapter 656 suggests that a third-party claim is "subject to" that chapter. As a result, the plain words of ORS 31.710(1), as the best evidence of the legislature's intention, suggest that the legislature did intend that the exception was meant to cover workers' compensation claims, and not third-party claims. We are not persuaded by plaintiff's arguments to ignore that plain meaning. It is plausible that the legislature wanted to ensure that there would be no ambiguity about whether ORS 31.710(1) could be applied in some manner to workers' compensation claims, which are already subject to compensation limits imposed by ORS chapter 656. Accordingly, we reject plaintiff's first "right for the wrong reason" argument and conclude that his claim against defendant does not fall within the exception in ORS 31.710(1).

We next address plaintiff's "right for the wrong reason" argument based on Article I, section 10. Defendant does not dispute that the *Outdoor Media* conditions are met with respect to that argument, and we conclude that they are.

With respect to Article I, section 10, plaintiff makes two related arguments. First, plaintiff argues that the noneconomic damages cap in ORS 31.710(1) is facially invalid under the remedy clause of Article I, section 10, because that limit on noneconomic damages does not provide a *quid pro quo—viz.*, the legislature did not confer any benefits on claimants in return for depriving them of any recovery that exceeds the statutory limit—and, thus, is an unconstitutional denial of a remedy. Second, plaintiff argues that the noneconomic damages cap as applied in this case violates Article I, section 10, because it leaves plaintiff with an unconstitutionally insubstantial remedy.

Our discussion of Article I, section 10, necessarily begins with *Horton*, in which the court re-examined at length the remedy clause of that constitutional provision. In

doing so, the court did three important things with respect to the case law construing and applying the remedy clause: It overruled *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001); reinvigorated pre-*Smothers* cases applying Article I, section 10; and called into question the viability of post-*Smothers* Article I, section 10, cases that rely on the *Smothers* construct. *See Horton*, 359 Or at 218, 220-21. The court also distilled general principles from the case law that inform the substantive limits that Article I, section 10, places on the legislature:

> "In determining the limits that the remedy clause places on the legislature, our cases have considered three general categories of legislation. First, when the legislature has not altered a duty but has denied a person injured as a result of a breach of that duty any remedy, our cases have held that the complete denial of a remedy violates the remedy clause. *See Noonan*[*v. City of Portland*], 161 Or [213, 222-35, 88 P2d 808 (1939)] (summarizing *Mattson* and cases following it). Similarly, our cases have held that providing an insubstantial remedy for a breach of a recognized duty also violates the remedy clause. *Compare Clarke*[*v. OHSU*, 343 Or 581, 608, 610, 175 P3d 418 (2007)] ($200,000 capped damages not substantial in light of $12,000,000 in economic damages and $17,000,000 in total damages), *with Howell*[*v. Boyle*, 353 Or 359, 376, 298 P3d 1 (2013)] ($200,000 capped damages substantial in light of $507,500 in total damages).
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> "Second, the court has recognized that the reasons for the legislature's actions can matter. For example, when the legislature has sought to adjust a person's rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others, we have considered that *quid pro quo* in determining whether the reduced benefit that the legislature has provided an individual plaintiff is 'substantial' in light of the overall statutory scheme. *Hale*[*v. Port of Portland*], 308 Or [508, 523, 783 P2d 506 (1989)].
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> "Third, the legislature has modified common-law duties and, on occasion, has eliminated common-law causes of action when the premises underlying those duties and causes of action have changed. In those instances, what has mattered in determining the constitutionality of the

> legislature's action is the reason for the legislative change measured against the extent to which the legislature has departed from the common law. *See Perozzi*[*v. Ganiere*], 149 Or [330, 348, 40 P2d 1009 (1935)]. That is, we have considered, among other things, whether the common-law cause of action that was modified continues to protect core interests against injury to persons, property, or reputation or whether, in light of changed conditions, the legislature permissibly could conclude that those interests no longer require the protection formerly afforded them. *See Norwest* [*v. Presbyterian Intercommunity Hosp.*], 293 Or [543, 563, 652 P2d 318 (1982)] (discussing legislative abolition of common-law torts of criminal conversation and alienation of affections)."

Horton, 359 Or at 219-20. The court declined to discern a unifying principle to apply to challenges under the remedy clause but reiterated that "[i]t follows from our cases that, in deciding whether the legislature's actions impair a person's right to a remedy under Article I, section 10, we must consider the extent to which the legislature has departed from the common-law model measured against its reasons for doing so." *Id.* at 220.

Finally, although the court called into question the continued viability of post-*Smothers* cases, it agreed with *Clarke* and *Howell* that "the substantiality of the legislative remedy can matter in determining whether the remedy is consistent with the remedy clause." *Id.* The court continued:

> "When the legislature does not limit the duty that a defendant owes a plaintiff but does limit the size or nature of the remedy, the legislative remedy need not restore all the damages that the plaintiff sustained to pass constitutional muster, *see Howell*, 353 Or at 376, but a remedy that is only a paltry fraction of the damages that the plaintiff sustained will unlikely be sufficient, *see Clarke*, 343 Or at 610. It is worth noting, however, that both *Clarke* and *Howell* evaluated the plaintiffs' Article I, section 10, claims in those cases through the lens that *Smothers* provided. As explained above, and as this court recognized in *Hale*, other factors, such as the existence of a *quid pro quo*, can bear on the determination."

Horton, 359 Or at 220-21.

In *Horton*, the court was confronted with whether the damages cap under the Oregon Tort Claims Act, which applies to public bodies, violated Article I, section 10, as applied in that case. Because the Oregon Tort Claims Act "limits a plaintiff's remedy for a breach of [an OHSU doctor's] duty as part of a comprehensive statutory scheme intended to extend benefits to some persons while adjusting the benefits to others," the case fell within the second category of cases described above that contain a *quid pro quo*. *Horton*, 359 Or at 221. In determining whether the plaintiff was afforded a constitutionally "substantial" remedy under the Oregon Tort Claims Act, the court focused primarily on the nature of the statutory scheme enacted, which included a large increase in the state's liability cap beginning in 2009 and a waiver of the state's sovereign immunity. The court concluded that,

> "[g]iven the legislature's efforts to accommodate the state's constitutionally recognized interest in sovereign immunity and a plaintiff's constitutional right to a remedy, we cannot say that the $3,000,000 tort claims limit on damages against state employees is insubstantial in light of the overall statutory scheme, which extends an assurance of benefits to some while limiting benefits to others."

Id. at 224. The court emphasized that its holding was limited to that case and stated that "[w]e express no opinion on whether other types of damages caps, which do not implicate the state's constitutionally recognized interest in sovereign immunity and which are not part of a similar *quid pro quo*, comply with Article I, section 10." *Id.* at 225. In this case, we are now confronted with the type of damages cap that the court in *Horton* did not address.

We begin our discussion with the legislature's reasons for enacting the statute at issue, ORS 31.710, because the court in *Horton* stated that those reasons are important to the analysis that we must undertake under Article I, section 10. The legislature enacted ORS 31.710(1), which was originally numbered ORS 18.560, in 1987 as part of a larger effort to "reform" tort law, which included amendments and additions to ORS chapters relating to various aspects of tort law and liability insurance. *See* Or Laws 1987, ch 774.

Although what became ORS 31.710(1) was included in a larger bill aimed at tort reform generally, the noneconomic damages cap itself was labeled as a stand-alone provision within the bill. *See* Or Laws 1987, ch 774, § 6 (section enacting noneconomic damages cap included in bill under its own heading entitled "economic/noneconomic damages cap").

As we have previously recognized, the legislature's purpose in enacting the cap on noneconomic damages was "to stabilize insurance premiums and to decrease costs associated with tort litigation." *Tenold v. Weyerhaeuser Co.*, 127 Or App 511, 519, 873 P2d 413 (1994) (citing Minutes, House Judiciary Subcommittee, Apr 29, 1987, at 11, 15). The Supreme Court has quoted as apt the following summary of the legislative history of the noneconomic damages cap in ORS 31.710(1):

> "'In enacting the cap, the Oregon Legislature sought to control the escalating costs of the tort compensation system. The legislature determined that the cap would put a lid on litigation costs, which in turn would help control rising insurance premium costs for Oregonians. The legislature listened to hours of testimony on the insurance and tort crisis, and how reform was needed in order to salvage the system.'"

Greist v. Phillips, 322 Or 281, 299 n 10, 906 P2d 789 (1995) (quoting Kathy T. Graham, *1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?*, 24 Willamette L Rev 283, 292 (1988) (footnote omitted in *Greist*)).

With that understanding of the legislature's purpose in enacting ORS 31.710(1), we turn to the analysis that we understand *Horton* to have outlined for us to undertake. To begin with, we address exactly which of the three "categories" this case falls into. Plaintiff asserts that this is a category one case, because ORS 31.710(1) does not include a *quid pro quo* as understood in the Article I, section 10, cases. Defendant, however, asserts that the statute does contain a *quid pro quo* and is thus a category two case. Defendant asserts that the cap contains a *quid pro quo* because "the legislation permitted more Oregonians to purchase insurance, and hence, more plaintiffs could then recover when

they were injured, in exchange for a limitation on the noneconomic damages available." Defendant further argues that the broader tort reform bill contained a *quid pro quo* for insurers because, "while [the bill] imposed some additional regulations or restrictions on insurers, at the same time it put a lid on litigation costs by limiting the amount of noneconomic damages available to a plaintiff."

We agree with plaintiff that ORS 31.710 is not part of a *quid pro quo* statutory scheme as understood in the Article I, section 10, cases. A *quid pro quo*, as discussed by *Horton* and *Hale*, refers to a statutory scheme that adjusts a plaintiff's rights and benefits such that it extends benefits to some plaintiffs, while limiting benefits to other plaintiffs. *Horton*, 359 Or at 194, 219; *Hale*, 308 Or at 523. As discussed in those cases, the statutory scheme itself must confer a *quid pro quo* of adjustment of benefits, such that both sides to the equation (*viz*., plaintiffs and tortfeasor defendants) receive a benefit in the adjustment. For example, in *Hale*, the court reasoned:

> "It is clear from the language of ORS 30.265(1) itself that the legislature intended to meet fully the requirements of Article I, section 10, when it enacted the statute. The statute specifically identifies the new balance it strikes between municipal corporations and those to whom certain of those corporations could, under limited circumstances, formerly have been liable[.]
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> "*****
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> "The class of plaintiffs has been widened by the legislature by removing the requirement that an injured party show that the municipal corporation's activity that led to the injury was a proprietary one. At the same time, however, a limit has been placed on the size of the award that may be recovered. A benefit has been conferred, but a counterbalancing burden has been imposed. This may work to the disadvantage of some, while it will work to the advantage of others. But all who had a remedy continue to have one."

Hale, 308 Or at 523. The court in *Horton* also discussed the *quid pro quo* involved in that case in similar terms:

> "The Tort Claims Act avoids that dilemma [caused by state employees being liable for actions that they take on

> behalf of the state] by waiving the state's immunity for its torts but capping the amount for which the state can be held liable—in this case, $3,000,000. ORS 30.265(1) (waiving immunity from tort actions subject to certain limitations); ORS 30.271(3) (listing graduated limits on state liability). The Tort Claims Act indemnifies state employees for liability in tort for acts occurring in the performance of their public duty but caps the amount of their liability at the amount for which the state has waived its sovereign immunity. ORS 30.285(1), (6). In so doing, the Tort Claims Act accommodates the state's constitutionally recognized interest in asserting its sovereign immunity with the need to indemnify its employees for liability that they incur in carrying out state functions.
>
> "Moreover, the Tort Claims Act gives plaintiffs something that they would not have had if the state had not partially waived its immunity. The act ensures that a solvent defendant will be available to pay any damages up to $3,000,000—an assurance that would not be present if the only person left to pay an injured person's damages were an uninsured, judgment-proof state employee. * * * There is, in short, a *quid pro quo*."

Horton, 359 Or at 222-23.

Under those cases, a statute, such as ORS 31.710, that only adjusts benefits in favor of the insurance industry and tortfeasor defendants, while limiting the benefits extended to all plaintiffs, without some commensurate, identifiable benefit to plaintiffs, is not a *quid pro quo*, as that term is understood in the context of the remedy clause of Article I, section 10. A *quid pro quo* occurs when both sides obtain a real benefit conferred in the statutory scheme itself. Here, the statutory scheme does not extend any benefit to plaintiffs on the whole. The benefit that defendant argues exists for plaintiffs—that more defendants can afford insurance and thus be solvent defendants from which plaintiffs can recover—might be a hoped-for consequence of the noneconomic damages cap, but it is not a *quid pro quo* that is conferred by the statute itself. Because ORS 31.710(1) does not involve a *quid pro quo*, as discussed in *Horton* and *Hale*, this case falls within the first category of cases discussed in *Horton*.

That discussion leads us into plaintiff's first argument, which is that ORS 31.710(1) is facially unconstitutional under Article I, section 10, because it does not contain a *quid pro quo*. We reject that argument as foreclosed by *Horton*. Under the first category of cases—legislation that does not alter a duty and does not contain a *quid pro quo*—the statutes that could be facially invalid are only those that completely deny a remedy for the breach of a recognized duty. *See Horton*, 359 Or at 219 (statutes that deny any remedy for the breach of a recognized duty violate Article I, section 10). ORS 31.710(1) places a cap on the amount of noneconomic damages that a plaintiff may recover; it does not completely deny a remedy to a plaintiff, as a plaintiff may still recover an unlimited amount of economic damages and may recover an amount of noneconomic damages up to $500,000. When a statute limits a remedy for a recognized duty, and does not deny a remedy completely, the statute is invalid under the remedy clause only if the remedy provided is not "substantial." *Id.* Whether a remedy is "substantial" is a question that we can answer only on a case-by-case basis, because a capped remedy could provide complete relief for many claimants. Thus, we reject plaintiff's facial challenge to ORS 31.710(1).

In his second argument, plaintiff makes an as-applied challenge, arguing that the cap on noneconomic damages in his case leaves him with an unconstitutionally insubstantial remedy. Plaintiff's argues that reducing his noneconomic damage award to $500,000, which is only about 10 percent of the noneconomic damage award that he would otherwise receive, leaves him with a "paltry fraction" of his damages, which the court in *Horton* recognized does not pass constitutional muster in the absence of a countervailing *quid pro quo* in the statutory scheme. *See Horton*, 359 Or at 220-21.

Defendant responds that *Greist* is controlling precedent in its favor because, in that case, the Supreme Court concluded that all of the plaintiff's economic damages plus $500,000 in noneconomic damages was substantial under Article I, section 10. Additionally, defendant argues that plaintiff will receive roughly 30 percent of his total damages—*viz.*, all of his economic damages plus $500,000—

which is a percentage similar to the percentage of damages recovered in cases in which the Supreme Court has found the capped remedy to be substantial. *See Horton*, 359 Or at 224 ($3 million damages cap was substantial remedy in relation to $12 million jury award); *Howell*, 353 Or at 376 ($200,000 damages cap was substantial remedy in relation to $500,000 jury award); *Greist*, 322 Or at 291 ($500,000 noneconomic damages cap was substantial remedy in relation to total jury award of $100,000 in economic and $1.5 million in noneconomic damages); *Hale*, 308 Or at 511, 523-24 ($100,000 damages cap was substantial remedy in relation to over $600,000 in plaintiff's medical bills). *But see Clarke*, 343 Or at 608-10 ($200,000 damages cap was not substantial in relation to $12 million in claimed economic damages). Finally, defendant asserts that the noneconomic damages cap is substantial because the Supreme Court considers recovery of noneconomic damages to be less important than recovery of economic damages in considering whether a remedy is substantial.

Because defendant argues that it is controlling, we first address *Greist*. *Greist* was a wrongful-death case in which the plaintiff obtained a jury award for $100,000 in economic damages and $1.5 million in noneconomic damages. The trial court applied *former* ORS 18.560 (1987), *renumbered as* ORS 31.710 (2003), and reduced the noneconomic damages award to $500,000. The Supreme Court concluded that application of the cap did not violate Article I, section 10, because that remedy was substantial. *Greist*, 322 Or 290-91. In coming to that conclusion, the court stated that "[t]he remedy for wrongful death is substantial, not only because 100 percent of economic damages plus up to $500,000 in noneconomic damages is a substantial amount, but also because the statutory wrongful death action in Oregon has had a low limit on recovery for 113 years of its 133-year history." *Id.* at 291. That history included that the wrongful-death claim came into existence with a damages limitation, and, thus, the court concluded that, "[i]n relation to that history, the present remedy is substantial." *Id.* As a result, the court's holding in *Greist* is limited to wrongful-death claims based on the historical limitations placed on

those claims, which is a circumstance that is not present in this case.[6]

Likewise, *Horton*, *Howell*, and *Hale*—all cases applying damages caps in the Oregon Tort Claims Act—are distinguishable because those cases explicitly took into consideration in their substantiality discussions the *quid pro quo* and constitutional implications of the waiver of sovereign immunity that is a part of the Oregon Tort Claims Act. *See Horton*, 359 Or at 224 n 28 (considering the *quid pro quo* the Oregon Tort Claims Act provides, including its "accommodation of the state's interest in sovereign immunity," in determining whether the damages allowed were substantial); *Howell*, 353 Or at 376 (considering a similar *quid pro quo* as discussed in *Hale* to determine an Oregon Tort Claims Act damages cap was a substantial remedy); *Hale*, 308 Or at 523-24 (relying on the *quid pro quo* in the Oregon Tort Claims Act to conclude that the damages cap was a substantial remedy). The additional considerations present in *Greist* and the Oregon Tort Claims Act cases are not present here. Thus, those cases do not control our decision.

We thus turn to whether the statutorily substituted remedy under ORS 31.710(1) is "substantial" as required by Article I, section 10. As set out above, the Supreme Court stated in *Horton* that "the legislative remedy need not restore all the damages that the plaintiff sustained to pass constitutional muster, *** but a remedy that is only a paltry fraction of the damages that the plaintiff sustained will unlikely be sufficient." *Horton*, 359 Or at 221 (citations omitted). To determine if Article I, section 10, is satisfied, the court has directed that we "consider the extent to which the legislature has departed from the common-law model measured against its reasons for doing so." *Id.* at 220.

Here, under the common-law model, plaintiff would have been entitled to recover his noneconomic damages,

[6] Because *Greist* is not on point in this case, we express no opinion on whether that case is still controlling precedent for wrongful-death claims in light of the court's indications in *Horton* that historical limitations on tort claims are no longer the rubric by which we are to measure the legislature's departure from the common law. *See Schutz v. La Costita III, Inc.*, 288 Or App 476, 485, ___ P3d ___ (2017) (understanding *Horton* to require us to compare the statute at issue with the common law in place at the time the statute is enacted).

not subject to any cap.[7] The legislature has departed fairly dramatically from that model by placing a hard cap on the amount of noneconomic damages a plaintiff may recover—a cap that was placed in 1987 and has not since been revisited—with no mechanism for adjustment for the changing value of money or for adjustment based on the relative severity of the injuries sustained by a plaintiff. The legislature's reason for enacting the hard monetary cap was to "put a lid on litigation costs, which in turn would help control rising insurance premium costs for Oregonians." *Greist*, 322 Or at 299 n 10 (internal quotation marks omitted). We express no opinion on whether the legislature's reasoning has borne out over time, as we must confront what the legislature did when it did it. However, we do conclude that the legislature's reason for enacting the noneconomic damages cap—which was not concerned with injured claimants—cannot bear the weight of the dramatic reduction in noneconomic damages that the statute requires for the most grievously injured plaintiffs.

Here, plaintiff was grievously injured. While cleaning the bale-cutting machine manufactured by defendant, plaintiff "was 'crushed by a "pinch point" created by a hydraulic ram moving against the exterior framework' of the machine." *Vasquez*, 278 Or App at 80. The effect of being crushed by that "pinch point" was to essentially cut plaintiff in half at the base of his spine, leaving him permanently paraplegic. For those injuries, the jury awarded plaintiff $2,231,817 in economic damages and $8,100,000 in noneconomic damages but found plaintiff 40 percent at fault for his injuries. As a result, plaintiff's award was reduced to 60 percent, for a total of $6,199,090—*viz.*, $1,339,090 in economic and $4,860,000 in noneconomic damages. Thus, if the cap is applied, plaintiff would receive only $1,839,090 out of the $6,199,090 that he would receive without the cap.

In this case, we conclude that ORS 31.710(1) would leave plaintiff with a remedy that is only a "paltry fraction"

[7] Defendant has not pointed to any historical limitation on noneconomic damages that we must consider under the construct given to us by *Horton*. And, as noted above, *Horton* suggests that the common-law model we must consult is the one in place at the time the legislature acted—here, 1987. *Schutz*, 288 Or App at 485.

of the damages that he sustained and would otherwise recover. We decline to approach this case in the way suggested by defendant, by comparing and contrasting various percentages of recovery from other cases that the Supreme Court has determined involved a substantial remedy. As discussed above, those cases all relied on considerations that are not present here. Here, we are left with a bare reduction in plaintiff's noneconomic damages without any identifiable statutory *quid pro quo* or constitutional principle that the cap takes into consideration. Under those circumstances, the application of ORS 31.710(1) to plaintiff's jury award violates the remedy clause in Article I, section 10.

Reconsideration allowed; former opinion withdrawn; affirmed.

EGAN, J., concurring.

I agree with the majority's analysis and result under Article I, section 10, of the Oregon Constitution; however, I disagree that we should have reached that constitutional analysis. *See State v. Davis*, 295 Or 227, 240, 666 P2d 802 (1983) (appellate courts analyze the statutory issues applicable to a case before reaching constitutional ones). In light of that principle of appellate review, we should have addressed only the issue of whether plaintiff's claims against defendant are excepted from the application of ORS 31.710 because they are "subject to" Oregon's workers' compensation law. I write to briefly explain the reasons I disagree with the majority's analysis of that issue.

The majority mistakenly opines that the procedural rules at ORS 656.576 to 656.596 do not demonstrate that a third-party claim is "subject to" ORS chapter 656. 288 Or App at 514-15. The majority states that those rules "serve to ensure that a worker can timely bring and prosecute a third-party claim as a matter that is kept entirely separate from the workers' compensation scheme." *Id*. As a matter of fact, however, the recovery of third-party settlements are inextricably tied to the delivery and settlement of workers' compensation benefits in ORS 656.593. Specific settlement amounts are discussed with regard to the injured worker's ability to waive future workers' compensation benefits. Although it is *possible* that some third-party settlements

might not exceed the caps set in ORS 31.710 while fitting into the scheme set forth in ORS 656.593(6), the vast majority of claims in which the injured worker would receive over one million dollars involve devastating and tragic injuries for which the judgment or settlement far exceeds caps on noneconomic damages. In addition, it is clear that the legislature contemplated law suits that would affect the money that carriers must pay out for the delivery of services under Oregon's workers' compensation law when it allowed carriers to "offset" any settlement amounts received prior to acceptance of a claim under ORS 656.596. Finally, I would point out that the legislature had an interest in making certain that workers' compensation claims were not subject to caps under ORS 656.593(5) because the state receives a proportionate reimbursement of its costs in workers' compensation claims out of the carriers' share of settlements and that proportional amount is inevitably affected by the amount of economic and noneconomic damages.