/j ';[-OREGON TORT REFORM DAMAGE CAPS

(**Maybe we can all wear baseball caps and toss them in the air at points**)

(Tiktok video)

The March Pupilage Group has selected "Back to Tort Reform" as its topic. We will travel through time exploring the evolution of tort reform in Oregon and take a quick peek into the future.

Our trip has three destinations:

A. Pre-Horton – Tort Reform is Implemented affecting many aspects of tort litigation. Caps are implemented and then invalidated by later cases.
B. Post Horton – Caps are revived depending on case by case review.
C. Busch and Beyond – Caps again found unconstitutional.

Join me as we time travel to the Pre -Horton v. OHSU era. The year is 1999, Bill Clinton has been acquitted by the Senate, the peer to peer music sharing service Napster is born, kids (as well as some adults)are obsessed with Nintendo's game boy, Sponge Bob Premiers and gas costs $1.33 per gallon. . Our scene opens with " [Lake's character]" who is clawing his way up the celebrity ladder. His goal is to reach what was then the highest pinnacle of public recognition: an endorsement contract with Diet Coke.

The scene is the law office of Renee Rothauge in the 90's. Specifically, it is **July 15, 1999**.

(1999 time travel clip)

[Pre-Horton Group Takes Over]

Attorney- Good afternoon Lake. I understand you have a claim that you would like to pursue against "Better Legs Inc."; tell me in your own words what happened.

LAKE. - It is horrible, I have a shot at a big career after my success on some MTV videos where I sang and danced in the most fabulous and extraordinary way. Let me show you……. Anyway I wanted some calf implants because I am up for a part in a Diet Coke ad that will make me more famous than I already am and make me more money than I have ever dreamed of . Elaborate about how Better Legs has ruined your legs with bad implants.

Attorney - That sounds bad, so have you lost jobs and suffered economic loss?

LAKE- YES! Elaborate on lost money

Attorney - It sounds like you have suffered emotionally too? Tell me about that

LAKE- YES! Elaborate on loss of self esteem, nightmares anything else.

Attorney - Well you have a claim alright, a claim sounding in tort, but we need to discuss what damages you can recover. You may not be able to recover for all the damages you have suffered.

LAKE - That is outrageous! I thought I had rights under the Oregon Constitution!

Attorney - Well you do under Article 1, section 17, of the Oregon Constitution. It provides “In all civil cases the right of Trial by Jury shall remain inviolate”. And that section has been interpreted as including the right to “Have a jury determine all issues of fact, not just those issues that remain after the legislature has narrowed the claims process.” Molodyh v. Truck Insurance Exchange, 304 Or. 290, 297-98, 744 P.2d 922(1987). (SLIDE ONE is the above Constitutional section and the quote from Molodyh). So you do get a remedy but many years ago in 1987, the Oregon Legislature enacted major legislation that reformed how tort claims like yours are handled.

They were responding to the great Insurance Crisis of the 80s. At the time, insured individuals and companies were in a tough spot: insurance companies were either raising rates for, declining to renew, or canceling insurance policies. Nationwide, individuals, small businesses and local and state governments could not get insurance and the insurance companies blamed the civil justice system, namely increasing verdicts.

LAKE- What does a national insurance crisis have to do with my recovering the millions I am owed for my terrible injury?!!!

Attorney - Great question which brings us to what the Oregon legislature did in response to this crisis. First, in January 1987 the Oregon Legislature convened its own task force called the Joint Interim Task Force on Liability Insurance. That task force suggested several changes to our civil justice system which are still with us today like mandatory arbitration, the collateral source rule,

reformed Joint and Several liability but as relates to you they suggested changing the law to put a cap of $500,000 on non-economic damages.

Second, The Legislature passed the cap suggested by the task force soon after at ORS 18.560(1). It provided that

“In any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damages of any one person including claims for loss of care, comfort, companionship and society and loss of consortium the amount awarded for non-economic damages shall not exceed $500,000.” (SLIDE 2 IS THIS TEXT)

So as you can see, your claims for emotional distress resulting from what Better Legs did to you will be limited to $500,000.

LAKE- This is unbelievable. I am calling my State Senator and Representative to give them a piece of my mind about this

Renee’s Red 1990’s phone rings.

Attorney -Lake I need to pick this up. It is obviously important because I only get calls on this red phone if it is urgent. Attorney nods and says ok a few times and then gets up and starts to dance(badly)

LAKE- What is wrong? Are you having attack or seizure because I have never seen dancing that bad in my life….

Attorney- Lake you are not going to believe it, it is just incredible. I just got word that the Oregon Supreme Court just issued an opinion in Lakin v. Senco today!

LAKE-Why do I care?!!

Attorney -Because the court ruled that the $500,000 cap is unconstitutional! They found that it violated the Article 1, section 17 of the Oregon Constitution. There is no limit on your emotional distress damages now. We can sue for a million dollars.

LAKE- I would cheer but I am too depressed by the damage Better Legs caused me.(use an exaggerated depressed voice).

Attorney- Don't worry Lake, you will get justice now.

The next stop on our journey is the post-Horton era. It's 2016 when Justin Bieber and Drake topped the charts and confusion reigned in the world of tort caps. Our scene opens with "The Ocean" [Lake's character], who is clawing his way up the celebrity ladder. The Ocean has hit the pinnacle of influencer fame…he's a Vine star, but wants to break out of the 6-second clip mold (now that it's about to be shut down by Twitter to make way for another Reality TV Star and presidential also-ran, Donald Trump, who is using all of Twitter's available bandwidth with his insightful tweets about geopolitics. So The Ocean wants to take his act to the bigger small screen, and his goal is to reach what was then the highest pinnacle of public recognition- to be the next MTV reality TV star with his pilot, "Astoria Shores." But he just needed one thing to really make the story lines pop on tv…bigger calves! Unfortunately, his journey went sideways when he took a surgical shortcut, with tragic results. Talk about stepping on a land mine!

(2016 time travel clip)

[Post Horton Group Takes Over]

LAKE "The Ocean" [Jumping up and down]: Yay! We won! I always knew I had $16 million dollar legs. Of course, I wish I had earned that money taking "Astoria Shores" to MTV, and not from some jury, but I'll take it.

Leah [Appellate Specialist, just meeting client]: Well, you don't exactly have "$16 Million Dollar Legs" anymore, Mr. Ocean…

Lake: It's "The Ocean"... and who are you anyway?

Leah: I'm Leah, and I'm a specialist in Oregon appeals. I wrote amicus briefs on the last couple decisions on damages caps.

Lake: What do you mean "damages caps"? And why would we appeal? We won. The jury foreperson said so. Didn't they, Tony?

Tony: Well yeah, The Ocean, you did. The state is really upset; they said that no set of calves, no matter how lumpy, are worth $16 million. Defense counsel has filed a motion to reduce the verdict pursuant to the Oregon Tort Claims Act.

Lake: What does a sandwich have to do with this?

Tony: Not a torta, the tort claims act. The trial court is likely to grant the motion because sovereign immunity applies to OSCH, the legislature can constitutionally limit the damages OSCH is liable for, which in this case is only $3 million. Either way, this case is headed for an appeal and years of litigation.

Lake: You have to be kidding me. $3,000,000 isn't enough! They botched my calves. I was supposed to have two beautiful Italian hoagies, one on the back of each leg. Instead I got a meatball [points to big leg], and a chicken cutlet [points to small leg]. No one wants a meatball and a cutlet on MTV! The verdict was beyond reasonable. $1 million dollars to fix my calves, with a good surgeon this time, $3 million in lost wages from my expected salary on "Astoria Shores," $9 million for pain and suffering and $3 million for loss of consortium. That's what I deserve. It's perfectly reasonable.

Leah: $3 million for loss of consortium? I didn't even think you were married.

***Lake*:** Well I'm not. But Tony said I didn't need to be to recover on that. We convinced the judge that being married was so yesterday, and not like in a cool retro way. Like old. From the 1990s old. So I spent a day and a half on the stand, telling them how I was this close to being on MTV, and if I had gotten Astoria Shores on the air, telling the jury every single detail about the dreams I had of losing my consortium…er finding consortium…er, "consorting" with every piece of driftwood in each bar from Long Beach down to Garibaldi.

Tony: He really did. Every single detail, from hair style to the shoes they were wearing. Each and every one. I've never seen a judge give such leeway, but the calves ARE pretty hideous, so she let the Ocean have his day in court. I also have no idea how a Jersey Shore disciple made it past voire dire and actually was made foreperson, but there they were, eating up every detail like it was on TV.

Lake: The jury loved every minute of it, especially the one with the blowout like Pauly D. They could see that I was a natural-born storyteller. Just like the MTV scouts saw, as they were searching for their next Situation and they stumbled on my Vine account. I was supposed to BE the next Situation. Now you're telling me I "have" a situation?

Leah: Unfortunately, yes, since you likely will not be collecting for all that consortium you missed out on. Which hospital did you say the surgery was at?

Lake: OSCH.

Leah: Never heard of it. Is that new?

Tony: Yes it is. It's only been around for two years. Remember late in the last governor's term, before he resigned last year, when more and more random lobbyists were showing up in Salem and suddenly sitting in private meetings? Well one of those lobbyists was from the Oregon Office for Plastic Surgery Yes-men ("OOPSY" for short).

Leah: Yes, of course, OOPSY. They didn't change that awful acronym, after half their membership got sued?

Tony: No, they're sticking with it. Well, were, anyway. Their lobbyist got a hold of the Governor's ear and reminded him how much more profitable cosmetic surgeries were than the "save your life" or "repair horrible injuries" stuff OHSU specializes in. He thought back to his days in the Klamath Falls ER, and how the cosmetic docs always had nicer cowboy boots than he did, and knew that was where the money was.

Leah: But how did that proposal for a public cosmetic hospital ever pass?

Tony: Well, they called in the playbook from the 90s, you know, the "olden days," like the Ocean says. They said the extra money in the state treasury from this profitable new state-owned hospital would fund a new soccer field for every school in the state…the Soccer Mom Solicitation. Classic Clinton triangulation. Who votes against a bill like that?

Leah: No one.

Lake**:** Me! Soccer fields? The only kicker that money should go to is, well, the Kicker, not to some kid in bad shorts sneezing on a field in hayfever season.

Leah**:** Well it passed, and the hospital opened. Unfortunately, since the doctors are all public employees, and they knew their salary would be public, and they didn't want to get ridiculed like Chip Kelly for being the biggest participants in PERS, OSCH had a lot of trouble recruiting "the best and the brightest." So they lowered the standards a bit until they filled their offices, and booked out every appointment. They also found that actually made the hospital more profitable, since they didn't have to pay top dollar for the doctors. You know Doctor Nick, from the Simpsons?

Tony: Sure, but that's a cartoon. You're not gonna tell me…

Leah: Yeah I thought he was fake too. Turns out Matt Groening based that character on a doctor he saw growing up, who fixed a skateboard injury and stitched up his ankle, but somehow accidentally cut off one of his fingers in the process. Why do you think every character on that show has four fingers?

Lake: What are you talking about?

Leah: The Simpsons. Its a television show. [Lake gives blank stare] Well anyway, someone tracked him down, paid his back fines for him, somehow got the medical board to reinstate his license, and they made him head of the EAU, the Elective Augmentation Unit at the hospital.

Lake**:** Wait, Doctor Nick? Like, Defendant Doctor Nicholas?

Tony**:** Yes, that's him. The one who had to sing nursery rhymes out loud to remember which ligaments connect to which bone when he discussing anatomy on the witness stand. That Doctor Nicholas. He tells his patients to call him Doctor Nick. He's trying to be an "influencer," whatever that is, so that's his trademark.

Lake**:** He was my doctor!

Tony**:** I know. I still don't get how the head of the medical board paid off his student loans from 10 years of medical school the week before the board decision to reinstate that license, but that's not important right now…. Anyway, we're gonna have a hard fight winning on appeal, since Doctor Nick was an employee and the state is not going to want to pay such a big award. I've heard the story before, but why don't you tell it again to Leah, so they can analyze and see if there are additional avenues of attack to try to uphold your judgment.

Lake**:** Sure. Well it all started back in June 2012. This little startup called Vine was first born. But the day the Ocean was truly born was January 14, 2013, the day Twitter launched the app the whole world was waiting for. It let you post decontextualized loops of video clips that were six seconds long, and that

repeated over and over, with no punchline required! It was the Best! Thing! Ever! It was born for me, and I, the Ocean, was born for it. I was literally there from day 1.

***Leah*:** What does a dumb phone app have to do with getting surgery on your legs?

***Lake*:** Well I was basing my persona on the Situation, and you all know what he was all about right? [Blank stares from the attorneys] He was all about "GTL?" Gym, Tan, Laundry? You know, as he used to say "If you don't go to the gym, you don't look good; if you don't tan, you're pale; and if you don't do laundry, you ain't got no clothes!" He was the poet of that cast.

***Leah*:** OK, forget about the app, what does a dumb TV show have to do with this?

***Lake*:** It's called "letting the story unfold". Would you listen? I'd think someone who is paid by the word and is supposed to convince judges of things would know how to tell a story. Anyway, the cast of Jersey Shore had disbanded when it was no longer acceptable to be on spring break when they turned 35, and MTV was looking for a new star. The Ocean was the top creator on Vine, and MTV thought my videos showing me as a younger, hotter version of the Situation, someone who really does look "like Rambo, pretty much, with his shirt off" would be perfect for their new show. They wanted me so badly they agreed to cast the show right here in Oregon. And there, a star was born… "Astoria Shores, featuring, The Ocean!."

Leah: Doesn't Astoria already have an ocean?

Lake: Yes, but not [dramatically] "THE OCEAN."

Leah: Does it have a shore though?

***Lake*:** Well, not really. It also doesn't have sun most of the year, which the show requires, but I had the scouts come on a lucky day in August during a heat wave, so it was over 65 out. The test shots in bathing suits were a little chilly, but I told them it was never windy there and this was an anomaly, and they bought it. I also spent waaay more time than I expected tanning to be camera ready, given my Oregonian vitamin D deficiency, so I didn't have as much time for hitting the Gym.

***Leah*:** Again, where do the calves come in?

***Lake*:** Right, so you see, on my Vine videos it was easy to "fake it till you make it" on the GTL lifestyle. Except I never made it.

***Leah*:** What?

***Lake*:** Well, you know when you're a kid and want to look like you have big muscles, so you push up on the back of your arm to make it look like you have biceps?

***Tony*:** Yeah, like this [demonstrates]. That's how he showed it to the jury.

***Lake*:** Yes, so on Vine, any time I wanted to show my calves after leg day, I really went out for pizza, and then would flex my leg and push with my other hand to make my calves look as big as possible, while I took the shot with a selfie stick. I even perfected the technique of using pizza grease to make it look like muscle definition in the shot. And with the shaky camera and short clips, no one was the wiser. But I knew that wouldn't work on high definition tv, especially on this new streaming stuff. So I wanted a little help. I figured that I could cover up the rest of me in sweatshirts (no way it's hitting 65 degrees during

spring break in Astoria) but that my calves would get noticed. I didn't want to take steroids to bulk up, cause I'm a vegan, so wanted a little boost the natural way - with implants in my legs.

***Tony*:** Turns out an intern in Salem went to college with the Ocean, and was bringing coffee in the licensing meeting with Doctor Nick. He knew the Ocean had a situation, and needed calf implants bad. He hadn't actually heard the case against Doctor Nick, just that he was the new chief surgeon at OSCH, so he recommended him to the Ocean.

***Lake*:** Long story short, here we are [points to calves].

[FIRST SLIDE - IN THE HORTON ERA]

***Leah*:** Ok, that's quite a tale, Ocean. Let me try to break down the legal analysis. And there was a case decided earlier this year that will provide plenty of guidance on the path forward. In May of this year, the Supreme Court of Oregon decided a case called Horton v. Oregon Health and Science University. The plaintiff in that case is what we in the legal field call a "much more sympathetic plaintiff than you." But the facts are otherwise comparable. The jury there awarded $12 million to the guardian of an injured baby after a botched cancer surgery. OHSU moved to reduce the verdict under the Tort Claims Act, and the court granted that motion, but denied it as to the named surgeon, who was an employee of OHSU. The surgeon filed a direct appeal to the Supreme Court, under a special procedure found in ORS 30.274, which allows the trial court to enter a limited judgment and for the party to then bring an appeal regarding the issue of the application of damage caps under the Oregon Tort Claims Act.

***Lake*:** You've lost me again.

***Tony*:** The Oregon Tort Claims Act, the law we just discussed? It's the law that allows you to sue the state.

***Lake*:** I don't want to sue the STATE. I want to sue, I mean I already sued!, Doctor Nick and the hospital, and won!

***Tony*:** Yes, but the hospital IS the state.

***Lake*:** W. T. F.?

***Tony*:** The hospital IS the state. Remember how we were talking about the state passing the law to create the hospital, and the revenue going to the treasury? Well, the hospital is a part of the state government, and so the same rules apply as if you were suing the state.

***Leah*:** Exactly. And at least since 2007, in Clarke v. OHSU, the Court has ruled that sovereign immunity applies to OHSU, and therefore the legislature can limit damages for which OHSU is liable. So in the Horton case, OHSU moved to apply the same rule, and the court granted the motion. However, the doctor, an employee of OHSU, was sued as well, and the Court rejected the motion as to him. He argued that in 1857 he would have been entitled to discretionary immunity for errors in surgery, and so it follows, that since he would not have been liable for any damages in 1857, the Tort Claim Act limits also applied to him…

***Lake*:** What? 1857? Were there even surgeons in 1857?

***Leah*:** Yes, but with their death rates in those days, you can see why they couldn't be sued for errors. They didn't even know about germs. They just gave you a couple shots of whiskey and a piece of leather to bite on.

***Lake*:** Sounds like what goes on in my room at Astoria Shores!

***Leah*:** Well anyway, the trial court in rejecting the doctor's motion had rejected the $3 million liability limits under the Tort Claim Act, on the basis that the limitation violated Article I, Section 10 of the constitution, the "Remedy Clause", which says "every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

Lake: Well, I've got a reputation... And I need a remedy! But why does any of this matter?

Tony: Well, the state has sovereign immunity under the Oregon constitution. However, sovereign immunity does not extend to employees, according to Gearin v. Marion County. The Horton court discussed the difficulty that puts the state in, since no one would work for an employer if they were going to be personally sued for on the job accidents, and the state is ALWAYS acting through "someone".

Leah: Right. So as the court explained, 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. The Court calls this a quid pro quo.

[SECOND SLIDE]

Lake: I feel like that's a bad thing. Like a quid pro quo is the kind of thing that is illegal, and you'd have to leave office immediately if a public figure did that, especially if it involved another country's defense or finding dirt on a political opponent. But enough about total hypotheticals. Bernie Sanders is going to be our next president in the election this fall as soon as he clinches the nomination next month, so we'll finally have some sane leadership in the White House and won't have to worry about that kind of thing. Us Bernie Bros are an unstoppable force…. So anyway, you said there's a quid pro quo?

Tony: Yes. The Court views this as a positive quid pro quo, not the bribe kind. The courts have often looked to whether there is still a "substantial right" in cases with damages caps so as to survive a challenge under the Remedy Clause of Article I, Section 10. They have allowed damage caps to survive challenges when the cap has been part of a scheme that also expanded rights, such as broadening the class of plaintiffs who could bring a claim, but limiting the amount of their possible claims, for claims against municipal corporations, as discussed in Hale v. Portland in 1989. In other words, the legislature gives something while taking something else away, that's the quid pro quo.

Leah: The Court also took us on a journey clear back to the Magna Carta, discussed Blackstone and Coke at length, and spent multiple pages discussing the Indiana Constitutional Convention of 1851.

[THIRD SLIDE]

Lake: And people called my Vines boring.

Leah: So from all that, the Horton court distilled a few principles. First, they recognize that under the Tort Claims Act as applied to a state employee, the legislature did not alter a duty of care owed to the plaintiff, but only how much they may recover on a defined cause of action, so this is not a case on denial

of a remedy. Some courts have also found that an insubstantial remedy is no remedy at all, and so a case where the award is reduced too far is like there was no remedy at all.

Next, the court recognizes that the legislature's reason for acting matters, such as when the bill is a part of a legislative quid pro quo, so long as the remedy is still "substantial" in the overall scheme.

And finally, they recognize that the legislature can sometimes modify common law duties, such as when the legislature abolished claims for criminal conversion, or alienation of affections.

***Lake*:** I NEED to alienate some affections. But how can I do that with legs like this?

***Tony*:** Anyway, so the Horton court applied all of that to the facts, and found it was the second kind of case, where the Tort Claims Act did not alter the duty of care the Doctor owed to the OHSU patient, but instead only limited recovery if the doctor breached that duty in the scope of his employment by the state. The court saw the quid pro quo in the waiver of sovereign immunity, in exchange for capped damages.

***Leah*:** The Court discussed how the plaintiff got the additional benefit of a solvent defendant who could pay the $3 million claim under the Tort Claims Act. You wouldn't think a doctor would be judgment-proof, but given Doctor Nick's finances, we may want to use that argument.

[FOURTH SLIDE]

***Tony*:** Right. Those caps actually used to be much lower, at like $200,000 until 2009, but then the legislature found it was "vastly inadequate" and increased it to $1.5 Million to $3 Million in aggregate. The Horton court found the $3 million limit could not be said to be 'insubstantial' and thus passed the remedies clause test. Of course, what qualifies as a "substantial" recovery will now be decided on a case by case basis when it comes to evaluating caps. Horton has created a nightmare for our overworked court system.

***Leah*:** So then the court went on to analyze the Lakin v. Senco Products case from 1999, which held that the Tort Claims Act limitations violated Article I, Section 17 ("In all civil cases the right of Trial by Jury shall remain inviolate") because it removed the ultimate limit of the damages award from the jury's unfettered discretion. The Court again evaluated if a particular claim existed in 1857 and whether a plaintiff bringing said claim had a right to a jury in 1857. But the crux of the analysis was whether Article I, Section 17 gives only a procedural right to jury on certain claims, or a substantive right in how the jury decides that claim.

***Tony*:** The court then went on and on again about the Magna Carta, and Blackstone, Coke, and all the rest, on the history of the jury right. Peter Zenger and his libel case makes an appearance, for the tension between the American jury and a judge beholden to King George. Hamilton and his Federalist Papers also make an appearance.

***Lake*:** Oh I know him, he's the rapper with that insane wig.

***Tony*:** Well, yeah, sort of. Anyway, they eventually get around to telling us why a bunch of cases they previously decided, were wrong after all. They explicitly reversed *Lakin*, and found that there is a procedural right to a jury under the constitution, but that does not imply a substantive limit on the

legislature's right to define the elements of a claim or the amount of damages available. Ultimately, if the damages cap does not violate some other part of the constitution, then it can stand.

***Leah*:** The Court looked to one final avenue of attack under Article VII (Amended), Section 3, which says "In actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." The Court distinguished that clause as addressing second-guessing the fact determination of the jury rather than the legislative right to define the scope of a cause of action.

Lake: Ok, back to The Ocean and my "situation." What does this all mean for me?

***Leah*:** Well, it means that you are likely going to be capped at $3 million for your injury, and will not be collecting $16 million.

***Lake*:** OK. That's nothing compared to what I would have earned on Astoria Shores, but I suppose it is enough for surgery and a fresh start on a new service, now that Vine is shutting down. So $6 million right? $3 million per botched calf?

***Tony*:** No, its in the "aggregate." As in $3 million total.

Lake: What??? Some fon-zah-noon in a black robe is gonna tell me my meatball and chicken combo is worth only $3 million total??

Leah: Unfortunately, that's what we're stuck with, unless the legislature steps in or the court changes its approach to damage caps.

Tony: Unless we stick to our guns, and force an appeal. We can roll the dice on overturning Horton, but more importantly, it gives us the opportunity to mediate and negotiate a settlement somewhere between the $16 million dollar verdict and the $3 million dollar cap. Defendants will feel a lot of pressure to avoid a potential loss. An appeal could increase political pressure and create some trouble for the defendants. You like trouble, right the Ocean?

Lake: you know it.

Tony: Well let's threaten some trouble if they won't settle, and maybe you'll have $6 million dollar legs after all.

The final stop on our journey is 2020 when our nation was collectively mesmerized by the Tiger King, pretended to enjoy zoom happy hours and the Oregon Supreme Court again found tort caps largely unconstitutional. Our scene opens with " [Lake's character]" who is clawing his way up the celebrity ladder. His goal is to reach what was then the highest pinnacle of public recognition- viral tik tok fame.

(2020 time travel clip)

[Busch and Beyond Group takes over]

PART 3 - BUSCH

Jon: What brings you in today?

Lake: In my continuing pursuit of clout, I wanted calf implants. However, my doctor botched the entire operation and now I have these! What can I do?

Jon: Well, Lake, like most people in the magical time known as 2020, I assume you're experienced with time travel?

Lake: Of course!

Jon: Great! So I assume you've visited Oregon's recent past and know all about the *Horton* case?

Lake: Absolutely!

Jon: Ok, well lucky for you earlier in this year, 2020, the Oregon Supreme Court reviewed the *Horton* decision and the non-economic damages cap in *Busch v. McInnis Waste Systems*.

[1st Slide]

Busch was a personal injury case where, for the first time since *Horton*, the court re-examined the remedy clause of Article I, Section 10, of the Oregon Constitution. The plaintiff, Scott Raymond Busch, was walking across a downtown Portland crosswalk—he had the right-of-way—when a garbage truck owned by the defendant, McInnis Waste Systems, Inc. hit him. By the time the truck stopped, Busch's leg was under the truck and attached to his body by a one-inch piece of skin. He remained fully conscious and alert the entire time!

Lake: That's awful!

Jon: Understandably, his leg had to be amputated and he underwent extensive rehabilitation and therapy. Defendant admitted liability and so the only issue for the jury was the amount of damages to be awarded. The jury determined that plaintiff had sustained and would sustain $3,021, 922 in economic damages and $10,500,000 in noneconomic damages. Defendant

subsequently moved to reduce the noneconomic damages award to $500,000 under the cap provided in ORS 31.710(1). Plaintiff countered that the cap was unconstitutional under Article I, Section 10 of the Oregon Constitution both on its face and as applied to Mr. Busch. The trial court agreed with McInnis, granted its motion, and entered a judgment reducing the jury's award by $10,000,000.

Lake: That's terrible! I thought you said this case was going to help me get money for my botched calf implants.

Jon: Don't worry, we're not done yet. Mr. Busch appealed and the Court of Appeals relied on its own then-recent decision in *Vasquez v. Double Press Mfg, Inc.* to shoot down the cap.

In *Vasquez*, the Court of Appeals was also faced with the question of whether the damages cap imposed by ORS 31.710(1) could survive a remedy-clause challenge. The court relied on *Horton* for what it considered to be the applicable test for making said determination which was, "the extent to which the legislature has departed from the common-law model measured against its reasons for doing so."

In *Vasquez*, under that test, the court concluded "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." And that such a "bare bones reduction in plaintiff's noneconomic damages without any identifiable statutory *quid pro quo* or constitutional principle that the cap takes into consideration" violated the remedy clause as applied to the plaintiff's case.

The court of appeals determined that *Vasquez* and *Busch* cases were indistinguishable and reversed the trial court's reduction of Mr. Busch's award.

Lake: Great, so I can get more than $500,000 for my pain and suffering?

Jon: Under the ruling of the court of appeals, yes. But the defendant's appealed the case to the Oregon Supreme Court.

Lake: Oh no!

Jon: Oh yes! And before the Supreme Court, the defendant made three arguments:

1) That the Oregon Supreme Court's ruling in the pre-*Horton* case called *Greist v. Phillips* controls and stands for the proposition of economic damages plus $500,000 in noneconomic damages is a "substantial" remedy for a breach of a common-law duty in and of itself.

2) That a full award of economic damages plus $500,000 in noneconomic damages necessarily is "substantial" considering the nature and purpose of noneconomic damages.

3) That ORS 31.710 provides a "substantial" remedy considering the overall statutory scheme and the legislature's policy reasons for capping noneconomic damages at $500,000.

In addition to adamantly opposing defendant's arguing not once, not twice, but three times that $500,000 noneconomic damages is a "substantial" remedy, plaintiff also contended that, when the legislature limited the damages that a plaintiff may recover without altering a defendant's duty of care or providing a substitute remedy, that statutory limitation runs afoul of Article I, section 10 of the Oregon Constitution.

Lake: So what did the Supreme Court do?

Jon: Well, before addressing defendant's 3 arguments, the opinion launched into a very lengthy history of *Horton* and other cases. It then noted at the start of its analysis that ORS 31.710(1) did not apply to claims subject to the Oregon Tort Claims Act or workers compensation claims. It also noted that under ORS 31.710(4) the jury shall not be advised of the cap on damages, so the cap at issue in *Busch* was on the amount that a trial court may award a plaintiff after a jury verdict in the plaintiff's favor for claims other than claims against public bodies or their employees. Therefore, *Horton* did not directly govern BUT, the court determined, *Horton* did provide the framework for its analysis, which, spoiler alert, pretty much lets you know that defendants were not going to prevail on their first argument, that the pre-*Horton* case *Greist* controlled.

And, unsurprisingly, that's exactly how they ruled on defendant's first argument, saying that defendant wanted them to ignore the Constitutional analysis and take from *Greist* in a vacuum the notion that $500,000 in noneconomic damages is always a substantial amount and therefore always a substantial remedy. The court disagreed, saying that would be contrary to *Horton,* The court did note, however, that *Horton* did not overrule *Greist* or *Howell*, another pre-*Horton* case, and they weren't overruling *Greist* or *Howell* either, instead saying that those two cases are best understood as upholding limits on damages for reasons additional to the amount of the plaintiff's award and not the amount being the sole focus.

Lake: Great! One argument down, two more to go!

Jon: For defendant's second argument, which was that plaintiff's award was "substantial" and adequate considering the nature and purpose of noneconomic damages and that the subtext of prior court rulings was that noneconomic damages are different from economic damages and less protected under the remedy clause.

The court acknowledged that economic and noneconomic damages are indeed different but rejected the notion that the remedy clause protects them differently. The court went on to further reject defendant's argument that any statute that limits a plaintiff's recovery of noneconomic damages, while permitting the plaintiff to fully recover economic damages satisfies the remedy clause "in and of itself."

Lake: So that's 2 arguments the court rejected. What about the third?

Jon: As I said before, defendant's 3rd argument was that the legislature's reasons for enacting the damages cap in ORS 31.710 render it constitutional. The reasons cited by the defendant were 1) the legislature sought to address the availability and affordability of insurance and 2) the legislature adopted the cap as a tradeoff to the "broadening" of tort liability that had occurred in the 1960s and 70s.

Plaintiff did not contest the reasons given by defendants but instead argued that, in enacting the statute, the legislature did not provide a *quid pro quo* and that the failure to provide a *quid pro quo* when an established remedy is reduced or eliminated violates the remedy clause. The court felt that plaintiff's latter argument was too broad and that the Oregon Supreme Court had upheld statutes against a remedy-clause challenge without relying on the existence of a *quid pro quo*.

Lake: That's bad for me!

Jon: BUT plaintiff was correct that when the court has upheld statutes that do not modify a common-law duty but limit the remedies available for their breach, a *quid pro quo* has often been present.

Lake: Then that's good for me!

Jon: HOWEVER…

Lake: Oh no

Jon: The court said that those cases do not establish that a *quid pro quo* is always necessary or even sufficient to sustain such a statute against a remedy-clause challenge. Saying that, under *Horton*, the legislature must act for a reason sufficient to counterbalance the substantive right that Article I, Section 10, grants. That right assures that people who are injured in their person, property, or reputation have a remedy for those injuries. Oregon law has long recognized and protected that substantive right.

Lake: So is that good for me? Bad for me?

Jon: We're getting there. The court stated that, under the common law, all persons owe a duty of reasonable care and persons who are injured as a result of breach of that duty have a right to bring a claim for their injuries. The court further stated that when the legislature adopted ORS 31.710(1), it did not alter the common-law duty of reasonable care nor did it alter a plaintiff's common-law right to bring a claim for breach of duty. Nor did the legislature bar a grievously injured plaintiff from seeking and having a jury award a sum that the jury determines is necessary to compensate the plaintiff for the right that was injured, including both economic and noneconomic damages. Instead, the legislature required the trial court to override the jury's verdict and enter judgment for a specified amount that is not tied to the extent of the plaintiff's injuries. By doing so, the legislature did not provide a *quid pro quo* to counterbalance a plaintiff's right to a remedy under Article I, section 10 and, therefore, left defendant's common-law duty of

care intact but deprived injured plaintiffs of the right to recover damages assessed for breach of that duty and thus violated the remedy clause of the Oregon Constitution.

[Slide 2]

Lake: That's good for me, right?

Jon: Yes. That's very good for you. It means you can recover as much in noneconomic damages as a jury deems appropriate.

Lake: That's great! But what if the legislature just tries to fix ORS 31.710 so it is constitutional?

[Slide 3]

Jon: Well, two things about that. First, in an opinion concurring in part and dissenting in part in *Busch*, Senior Judge Justice Pro Tem Landau stated that, although he didn't believe ORS 31.710 violated the remedy clause, he felt it did violate Article I, Section 17's right to a jury trial. Also, again, since everyone time travels in 2020, I went ahead to 2022 and found out that in 2021, SB 193 was passed by the Oregon Legislature which cleaned up ORS 31.710 after *Busch.* The statute now says it only applies to wrongful death claims, which the opinion in *Busch* stated, has a long history of being capped in Oregon.

[Slide 4]

But that doesn't mean the fight is over. The Oregon Liability Reform Coalition, and the National Federation of Independent Business filed amicus briefs in support of maintaining the *Horton* ruling. They were joined by the Oregon Medical Association, the American Medical Association, and the American College of Obstetricians and Gynecologists. However, the Oregon Trial Lawyers Association provided their own amicus brief in favor of overruling it. It is clear where interests lie and that this battle is far from over (and, unfortunately, I never went further into the future than 2022). But for now, let's sue!

(Final slide)