

IN THE SUPREME COURT OF THE STATE OF OREGON

MAX ZWEIZIG,

Plaintiff-Appellant,

v.

TIMOTHY C. ROTE,

Defendant-Appellee,

and

NORTHWEST DIRECT
TELESERVICES, INC.; NORTHWEST
DIRECT MARKETING OF OREGON,
INC.; NORTHWEST DIRECT
MARKETING, INC; NORTHWEST
DIRECT OF IOWA, INC.; ROTE
ENTERPRISES, LLC; and DOES 1
THROUGH 5,

Defendants.

SCA No. S067820

United States Court of Appeals
for the Ninth Circuit
No. 1836060

**BRIEF ON THE MERITS OF
PLAINTIFF-APPELLANT MAX ZWEIZIG**

On Certified Question of Law from the
United States Court of Appeals for the Ninth Circuit

Appeal from the General Judgment of the
United States District Court for the District of Oregon entered July 25, 2018
The Honorable Marco A. Hernández, Chief United States District Judge

Shenoa L. Payne, OSB No. 084392
Shenoa Payne Attorney at Law PC
65 SW Yamhill St., Ste. 300
Portland, Oregon 97204
(503) 914-2500
spayne@paynelawpdx.com

*Of Attorneys for Plaintiff-Appellant
Max Zweizig*

Joel Christiansen, OSB No. 080561
Vogele & Christiansen
812 NW 17th Avenue
Portland, Oregon 97209
(503) 841-6722 ext. 2
joel@worklaw.io

Timothy C. Rote
24790 SW Big Fir Rd.
West Linn, Oregon 97068
(503) 702-7225
timoty.rote@gmail.com
Pro se Defendant-Appellee

James S Coon, OSB No. 771450
Thomas Coon Newton & Frost
820 SW 2nd Ave Ste 200
Portland OR 97204
(503) 228-5222
jcoon@tcnf.legal
Proposed Amicus Curiae
Oregon Trial Lawyers Association

BRIEF INDEX

STATEMENT OF THE CASE 1

 Nature of the Judgment 2

 Appellate Jurisdiction..... 2

 Certified Question and Proposed Rules of Law 3

 Certified Question..... 3

 Does ORS 31.710(1) cap the noneconomic damages awarded
 on an unlawful employment practice claim under ORS 659A.030?

 Proposed Rules of Law 3

 (1) No. ORS 31.710(1) does not cap the noneconomic
 damages awarded on unlawful employment practice
 claim under ORS 659A.030 where a plaintiff does not
 seek "damages arising out of bodily injury"

 (2) No. If construed to cap noneconomic damages
 in unlawful employment claim under ORS 659A.030,
 ORS 31.710(1) would violate Article I, Section 10,
 of the Oregon Constitution.

SUMMARY OF ARGUMENT..... 3

STATEMENT OF FACTS..... 4

 I. Plaintiff’s 2004 Unlawful Employment Practice Claim 4

 II. Subsequent Retaliation Against Plaintiff 5

 III. Plaintiff’s Retaliation Action 7

 A. Plaintiff’s Claims 7

B.	The District Court’s Reduction of Plaintiff’s Damages	9
C.	Proceedings before the Ninth Circuit Court of Appeals.....	11
	ARGUMENT	12
I.	ORS 31.710(1) Does Not Apply to Unlawful Employment Practice Claims under ORS 659A.030 Because They are Not "Civil Actions Seeking Damages Arising Out of Bodily Injury"	12
A.	The plain text of ORS 31.710(1) limits its scope to civil actions “seeking damages arising out of bodily injury.”	12
B.	Because the plain language is so clear, this Court and the Court of Appeals repeatedly assumed that the statute applies only to civil actions involving bodily injury	14
C.	The phrase “including emotional injury or distress, death, or property damage,” in the text of ORS 31.710(1) does not modify “bodily injury.”	15
D.	Unlawful employment practice claims arising under ORS 659A.030 are not civil actions <i>arising out of bodily injury</i>	19
E.	The legislative history of ORS 31.710(1) does not contradict the plain language of the statute.....	23
II.	ORS 31.710(1) Cannot Constitutionally Apply to Unlawful Employment Practice Claims Without Bodily Injury	31
	CONCLUSION	38

TABLE OF AUTHORITIES

	Page(s)
CONSTITUTION	
Or Const., Art. 1 § 10	31
CASES	
<i>Bldg. Structures, Inc. v. Young</i> , 328 Or 100, 968 P2d 1287 (1998).....	14
<i>Busch v. McInnis Waste Systems</i> , 366 Or 628, 468 P3d 419 (2020).....	4, 31, 32, 33, 34, 35, 37, 38
<i>Cooper v. Phipps</i> , 24 Or 357, 33 P 985 (1893).....	36
<i>Delaney v. Taco Time Intern, Inc.</i> , 297 Or 10, 681 P2d 114 (1984).....	35
<i>DeVaux v. Presby</i> , 136 Or App 456, 902 P2d 593 (1995).....	14
<i>Doyle v. City of Medford</i> , 356 Or 336, 337 P3d 797 (2014).....	16
<i>Greist v. Phillips</i> , 322 Or 281, 906 P2d (1995).....	24, 33, 34, 36, 37
<i>Hall v. State</i> , 274 Or App 445, 366 P3d 345 (2015).....	35
<i>Holien v. Sears, Robuck and Co.</i> , 298 Or 76, 689 P2d 1292 (1984).....	36
<i>Horton v. OHSU</i> , 359 Or 168, 376 P3d 998 (2016).....	32, 33, 34, 35

<i>Liberty Nw. Ins. Corp., Inc. v. Watkins,</i> 347 Or 687, 227 P3d 1134 (2010).....	17
<i>Loczi v. Daimler Trucks N. Am. LLC,</i> No. 14CV15265 (Mult Co. March 4, 2017).....	19
<i>Love v. Polk Cnty. Fire Dist.,</i> 209 Or App 474, 149 P3d 199 (2006).....	35
<i>McGarry v. Hansen,</i> 201 Or App 695, 120 P3d 525 (2005).....	17
<i>McLaughlin v. Wilson,</i> 365 Or 535, 449 P3d 492 (2019).....	20
<i>Mcmillan v. Li Ning Sports USA, Inc.,</i> No. 110708760 (Mult Co. Dec. 18, 2013)	19
<i>Norwest, By and Through Crain v. Presbyterian Intercommunity. Hosp.,</i> 293 Or 543, 652 P2d 318 (1982).....	16
<i>Paul v. Providence Health Sys.-Oregon,</i> 351 Or 587, 273 P3d 106 (2012).....	16
<i>Philibert v. Kluser,</i> 360 Or 698, 385 P3d 1038 (2016).....	16
<i>Pierce v. Daimler Trucks N. Am., LLC,</i> No. 15CV24701 (Mult Co. Jul 19, 2017).....	19
<i>Portland State Univ. Chapter of Am. Ass'n of Univ. Professors v. Portland State Univ.,</i> 352 Or 697, 291 P3d 658 (2012).....	20
<i>Powerex v. Dep't of Revenue,</i> 357 Or 40, 346 P3d 476 (2015).....	12

<i>Rains v. Stayton Builders Mart, Inc.</i> , 264 Or App 636, 336 P3d 483 (2014) <i>rev'd in part on other grounds</i> , 359 Or 610 (2016).....	14
<i>Smothers v. Gresham Transfer, Inc.</i> , 332 Or 83, 23 P3d 33 (2001), <i>overruled in part by</i> <i>Horton v. OHSU</i> , 359 Or 168, 376 P3d 998 (2016).....	32, 36
<i>State v. Gaines</i> , 346 Or 160, 206 P3d 173 (2009).....	23, 29
<i>State v. Kurtz</i> , 350 Or 65, 249 P3d 1271 (2011).....	18
<i>State v. McNally</i> , 361 Or 314, 392 P3d 721 (2017).....	30
<i>State v. Pearson</i> , 250 Or 54, 440 P2d 229 (1968).....	21
<i>State v. Webb</i> , 324 Or 380, 927 P.2d 79 (1996).....	18
<i>Swift & Co. v. Peterson</i> , 192 Or 97, 233 P2d 216 (1951).....	17
<i>Tenold v. Weyerhaeuser Co.</i> , 127 Or App 511, 873 P2d 413 (1994).....	15
<i>Vasquez v. Double Press Mfg., Inc.</i> , 364 Or 609, 437 P3d 1107 (2019).....	14, 23, 24, 27, 28
<i>Willetts v. Scudder</i> , 72 Or 535, 144 P 87 (1914).....	36
<i>Wyers v. Am. Med. Response Nw., Inc.</i> , 360 Or 211, 377 P3d 570 (2016).....	28

Zehr v. Haugen,
318 Or 647, 871 P2d 1006 (1994)..... 14

Zweizig v. Rote,
818 Fed. Appx. 645 (9th Cir 2020).....2, 11

STATUTES AND RULES

ORS 28.200 2

ORS 31.7104, 12, 15, 19, 23, 31, 33, 37

ORS 31.710(1)..... 1, 3, 4, 9, 10, 11, 12, 13, 14, 15, 17, 18
21, 22, 23, 26, 27, 28, 29, 30, 31, 33, 34, 35, 37, 38

ORS 659A.003 19, 21, 36

ORS 659A.030 3, 4, 12, 19, 20, 21, 22, 30, 31, 35, 36, 37

ORS 659A.030(1)(f)..... 1, 7, 22

ORS 659A.030(1)(g)..... 1, 7, 8, 22

ORS 659A.199 7

ORS 659A.230 7

42 USC § 1981a(b)(3) 21

LEGISLATIVE HISTORY

Former ORS 18.560, renumbered ORS 31.710 (2003), 23, 33, 37

Ex D at 3, Senate Judiciary Committee, SB 323, Jan 20, 1987 25, 26

Ex E at 23, Joint Interim Task Force on Liability Insurance, Jul 2, 1986..... 29

Ex K, Joint Interim Task Force, Feb 25, 1986 25

Governor's Task Force on Liability, Final Report on Recommendations to
Ease the Liability Insurance Strain in Oregon (1986)..... 25

Minutes, House Judiciary Committee, SB 323, May 13, 1987	25
Minutes, Joint Interim Task Force on Liability Insurance, Jul 2, 1986	29, 30
Or Laws 1987, ch 744, § 6	23
Testimony, Senate Judiciary Committee, SB 323, Feb. 3, 1987, Ex A	26
SECONDARY AUTHORITIES	
Bryan A. Garner, <i>Black's Law Dictionary</i> (11th ed 2019).....	12, 13
Internal Revenue Code, <i>Settlements – Taxability</i> , Publication 4345 (Rev 12-2016), <i>available at</i> https://www.irs.gov/pub/irs-pdf/p4345.pdf	18
Norman J. Singer, 2A <i>Sutherland Statutory Construction</i> § 47.33 (5th ed 1992)	18
<i>Restatement (Second) of Torts</i> § 15 (1965).....	13
<i>Webster's Third New Int'l Dictionary</i> (unabridged ed 1986)	13

**BRIEF ON THE MERITS OF
PLAINTIFF-APPELLANT
MAX ZWEZIG**

STATEMENT OF THE CASE

Plaintiff brought this employment action against defendant Timothy C. Rote, alleging that Rote violated [ORS 659A.030\(1\)\(g\)](#) when he aided and abetted certain corporate defendants owned by Rote in retaliating against plaintiff in violation of [ORS 659A.030\(1\)\(f\)](#). A jury returned a verdict against Rote and awarded plaintiff \$1,000,000 in noneconomic damages. ER 1415.¹

Rote objected to plaintiff's proposed judgment, arguing that plaintiff's damages should be reduced to \$500,000 pursuant to [ORS 31.710\(1\)](#). ER 1265; Def. First Am. Obj. to Pl. Form of Judg., *Zweizig v. Rote*, No. 3:15-cv-02401-HZ, Dkt 197 (D. Or. Feb. 3, 2018).² The district court agreed with Rote, reduced plaintiff's damages, and entered judgment for plaintiff and against all defendants jointly and severally in the amount of \$500,000. ER 3-5.

Rote appealed the jury's verdict in plaintiff's favor to the Ninth Circuit Court of Appeals. ER 1-2. Plaintiff timely cross-appealed, challenging the district

¹ All citations are to the Excerpt of Record filed before the Ninth Circuit Court of Appeals, which was designated as part of the record in this proceeding.

² The District Court docket is located at the end of Volume I of Appellant's Excerpt of Record.

court's reduction of his damages. SER 1-2. Plaintiff also moved the Ninth Circuit to certify the legal issue raised in his cross-appeal to the Oregon Supreme Court pursuant to [ORS 28.200](#). Mtn. for Order Certifying Determinative Question of Law to the Oregon Supreme Court, *Zweizig v. Rote*, No. 18-36060, Dkt 23-1 (9th Cir Jul 22, 2015). The Ninth Circuit rejected Rote's appeal, *Zweizig v. Rote*, 818 [Fed. Appx. 645, 647 \(9th Cir 2020\)](#), and certified the legal question raised in plaintiff's cross-appeal to this Court. Order Certifying Question to Or Sup Ct, *Zweizig v. Rote*, No. 18-36060, Dkt 73 (9th Cir Jun 16, 2020). This court accepted the certified question. Order Accepting Certified Question, Jul 30, 2020 (Or S067820).

Nature of the Judgment

The district court entered a \$500,000 judgment in plaintiff's favor and against all defendants jointly and severally on November 20, 2018. ER 3-5.

Appellate Jurisdiction

This Court has jurisdiction to answer the question of law certified to this Court pursuant to [ORS 28.200](#).

Certified Question and Proposed Rules of Law

Certified Question:

Does [ORS 31.710\(1\)](#) cap the noneconomic damages awarded on an unlawful employment practice claim under [ORS 659A.030](#)?³

Proposed Rules of Law:

(1) No. [ORS 31.710\(1\)](#) does not cap the noneconomic damages awarded on unlawful employment practice claim under [ORS 659A.030](#) where a plaintiff does not seek "damages arising out of bodily injury";

(2) No. If construed to cap noneconomic damages in unlawful employment claim under [ORS 659A.030](#), [ORS 31.710\(1\)](#) would violate Article I, Section 10, of the Oregon Constitution.

SUMMARY OF ARGUMENT

[ORS 31.710\(1\)](#) does not cap the noneconomic damages awarded on an unlawful employment practice claim under [ORS 659A.030](#) for two reasons. First, the plain language of the noneconomic damages cap in [ORS 31.710\(1\)](#) limits application of the cap to "any civil action *seeking damages arising out of bodily*

³ Although the Ninth Circuit Court of Appeals phrased the certified question as limited to employment "discrimination" claims, plaintiff's claims are more technically described as retaliation and aiding and abetting claims. Although it may be a distinction without a difference, plaintiff believes this Court should rephrase the certified question to eliminate the word *discrimination* to properly include the unlawful employment practice claims arising in this case under [ORS 659A.030](#).

injury." (Emphasis added). Nothing in the legislative history contradicts that clear legislative intent. Because plaintiff did not seek damages "arising out of bodily injury," this Court should answer "no" to the certified question.

Even if [ORS 31.710](#) was construed to apply to plaintiff's claim even though he did not seek damages "arising out of bodily injury," the cap still would not apply to plaintiff for reasons this court recently discussed in *Busch v. McInnis Waste Systems*, 366 Or 628, 468 P3d 419 (2020). Applying [ORS 31.710\(1\)](#) to reduce plaintiff's damages awarded under [ORS 659A.030](#) would violate the remedies clause in Article I, Section 10, of the Oregon Constitution. Because [ORS 31.710\(1\)](#) does not alter the duties owed to plaintiff, but limits the remedies without any *quid pro quo*, fundamental governmental foundation, or provision for inflationary increase, the holding in *Busch* applies here: "application of [ORS 31.710\(1\)](#), as a limit on the noneconomic damages that a court can award to a plaintiff, violates Article I, section 10." [366 Or at 652](#).

STATEMENT OF FACTS

I. Plaintiff's 2004 Unlawful Employment Practice Claim

Plaintiff worked for a corporate company owned by defendant Rote, Northwest Direct Teleservices (NDT), from September 1, 2001 to November 15, 2003, as the Director of Information Technology. ER 135, 167, 1596. During his employment, plaintiff notified the Oregon Department of Justice that NDT was

engaging in illegal over-billing of clients. ER 82-83. Following his complaint, NDT terminated plaintiff's employment. ER 81-83, 163-64, 166-68.

In 2004, plaintiff brought a whistleblower retaliation action against NDT in the Superior Court of New Jersey. ER 83, 144-48. Due to specific terms in an employment contract between plaintiff and NDT, plaintiff's case was transferred to arbitration in Oregon. ER 135-43; ER 162-63. The arbitrator concluded that NDT terminated plaintiff in retaliation for reporting that NDT was overbilling some of their clients, ruled in plaintiff's favor, and awarded plaintiff damages. ER 162-70.

II. Subsequent Retaliation Against Plaintiff

On or about February 27, 2015, defendant Rote created a blog titled "Sitting Duck Portland – Another Story on Arbitrator Corruption and Costs." SER 80. The blog provided an in-depth perspective on the arbitration that took place between NDT and plaintiff. *See generally* SER 3-61, 84-87. The Sitting Duck website had approximately 89 or 90 chapters. ER 1665. Around late 2016, defendant Rote deleted the Sitting Duck website and republished a similar blog titled "The Explosion of Fake Whistleblowing." ER 237-599. The latter blog had 97 chapters. ER 1665.

A significant portion of the published statements on the blog were dedicated to disparaging plaintiff and the people associated with him in relation to his prior claim against NDT. In particular, the blog contained false accusations that plaintiff

filed a false complaint, fabricated evidence, breached his contract with NDT, and sought "whistle blower type protection to save his job." ER 238, 265-66, 269-70, 1717; SER 14, 46, 55-57.

The blogs indicated that NDT terminated plaintiff "for a variety of performance reasons" and claimed that he was "not well educated." ER 237, 380, 1625; SER 9, 12. The blogs also contained seriously damaging false allegations that plaintiff engaged in criminal acts, destroyed evidence, and illegally downloaded thousands of movies and other data, including pornography and child pornography. ER 250-52, 261-63, 265, 305, 414-15, 422, 1625, 1641; SER 33-36, 46, 48, 50-52, 57-61, 262, 265, 274. The blogs also questioned whether plaintiff disseminated pornography and child pornography to others, including federal judges. SER 85. Finally, the blogs contained negative statements about Zweizig's fiancé and attorneys. ER 241, 258-59, 262, 289-91, 295-98, 342-46; SER 28-29, 62-63.

By the end of 2015, defendant Rote's blogs ultimately became the top Google search result associated with plaintiff's name. ER 1611, 1617; SER 80, 82. Plaintiff's fiancé also appeared in those search results. ER 1617; SER 82. Defendant Rote further publicized and disseminated his blog posts about plaintiff through his social media accounts, including his LinkedIn, Facebook, and Twitter accounts. ER 1623, 1657-63; SER 253-58, 281-97.

III. Plaintiff's Retaliation Action

A. Plaintiff's Claims

In response to Rote's blogs, Plaintiff filed this unlawful employment practice action against defendants Rote, NDT, and other corporate defendants owned by defendant Rote, in federal court pursuant to diversity jurisdiction. ER 6-15.

Plaintiff asserted whistleblower discrimination claims against the corporate defendants ([ORS 659A.230](#)), as well as claims for retaliation ([ORS 659A.199](#) and [ORS 659A.030\(1\)\(f\)](#)). ER 12-14. Plaintiff also brought an aiding and abetting claim under [ORS 659A.030\(1\)\(g\)](#) against Rote individually. ER 14-15. Plaintiff alleged that defendants' conduct caused him noneconomic damages in the form of "damage to reputation, loss of enjoyment of life, inconvenience, frustration, fear, dread, stress, helplessness, hopelessness, humiliation, and anxiety." ER 11.

The district court *sua sponte* dismissed Zweizig's [ORS 659A.230](#) whistleblower claims and [ORS 659A.199](#) retaliation claims against the corporate defendants. Order, *Zweizig v. Rote*, 3:15-cv-002401-HZ, Dkt 95 (D Or Jan 6, 2017). However, the [ORS 659A.030\(1\)\(f\)](#) retaliation claim proceeded against the corporate defendants, who ultimately defaulted on that claim. Entry of Default, *Zweizig v. Rote*, 3:15-cv-002401-HZ, Dkt 108 (D Or Mar 13, 2017).

Plaintiff's aiding and abetting claim under [ORS 659A.030\(1\)\(g\)](#) against Rote proceeded to trial.⁴ At trial, plaintiff testified that the content published in Rote's blogs took a serious toll on plaintiff. He explained that Rote had taken over his reputation and the reputations of those closest to him. ER 1650-51. As a result of the blogs' negative and defamatory nature, plaintiff was forced to change his behavior. ER 1678. Plaintiff anonymized himself by ceasing using his real name online and instead used an alias. ER 1628-29, 1655. He could no longer professionally network, afraid that people would believe what they read about him. ER 1655. He watched how the online allegations affected his family. ER 1621. He felt his identity had been taken from him. ER 1664. He was terrified, frightened, and felt "stalked and terrorized." ER 1637, 1639, 1652.

The jury was instructed that "there was one type of damages alleged in this case: noneconomic damages" and that "[n]oneconomic damages are subjective, nonmonetary losses that a plaintiff has sustained and will sustain in the future."

The jury also was instructed that it could consider each of the following:

"(1) The mental suffering, emotional distress, or humiliation that the plaintiff has sustained from the time he was injured until the present and that the plaintiff probably will sustain in the future as the result of his injuries;

⁴ Just prior to trial, plaintiff amended his complaint solely to increase his prayer to \$2 million. Am. Compl., *Zweizig v. Rote*, 3:15-cv-002401-HZ, Dkt. No. 193 (D Or Jan 22, 2018).

"(2) Any inconvenience and interference with the plaintiff's normal and usual activities apart from activities in a gainful occupation that you find have been sustained from the time he was injured until the present and that the plaintiff probably will sustain in the future as the result of his injuries; and

"(3) Any injury to the plaintiff's reputation."

ER 1432.

The verdict form also permitted the jury to award only "noneconomic damages." ER 1415. The jury returned a unanimous verdict in plaintiff's favor and awarded plaintiff \$1 million in noneconomic damages. ER 1415.

B. The District Court's Reduction of Plaintiff's Damages

Plaintiff submitted a proposed judgment. Rote objected and argued that plaintiff's damages should be reduced from \$1 million to \$500,000 pursuant to [ORS 31.710\(1\)](#). ER 1265; Def. Obj. to Pl. Form of Judg., *Zweizig v. Rote*, 3:15-cv-02401-HZ, Dkt 192 (D Or Jan 22, 2018); Def. First. Am. Objection to Pl. Form of Judg., *Zweizig v. Rote*, 3:15-cv-02401-HZ, Dkt 197 (D Or Feb 3, 2018).

Plaintiff responded that the noneconomic damages cap under [ORS 31.710\(1\)](#) did not apply to his unlawful employment practice claims because the non-economic damages cap statute only applies to civil actions seeking damages *arising out of bodily injury* and plaintiff's damages did not arise from bodily injury. Pl. Resp. to Def. Rote's 1st Am. Obj. to Pl. Form of Judgment, *Zweizig v. Rote*, 3:15-cv-02401-HZ, Dkt 199 (D Or Feb 12 2018); Pl. Sur-Reply to Def. Rote's First

Am. Obj. to Pl. Form of Judg. at 2-9, *Zweizig v. Rote*, 3:15-cv-02401-HZ, Dkt 210 (D Or Feb 26, 2018). Plaintiff further argued that applying [ORS 31.710\(1\)](#) to reduce his damages violated Article I, Section 10, of the Oregon Constitution. Pl. Sur-Reply to Def. Rote's First Am. Obj. to Pl. Form of Judg. at 10-13, *Zweizig v. Rote*, 3:15-cv-02401-HZ, Dkt 210 (D Or Feb 26, 2018). The district court rejected plaintiff's arguments, agreed with Rote, and applied [ORS 31.710\(1\)](#) to reduce the jury's verdict to \$500,000. ER 1459-67.

The district court reasoned that [ORS 31.710\(1\)](#) applied to plaintiff's claim, because the legislature did not expressly carve out an exception for unlawful employment practice claims. The court further determined that the legislature did not intend that emotional damages must stem from physical harm in some way but, rather, that emotional injury or distress was *an example of bodily injury* subject to the statute's cap. ER 1462-63. The district court also concluded that capping damages arising out of purely emotional injury fulfilled the legislature's goal of reducing the cost of tort litigation. ER 1464.

Finally, the court rejected plaintiff's constitutional challenge under Article I, Section 10, reasoning that \$500,000 was a substantial remedy. ER 1464-67. Despite recognizing that at the time that [ORS 31.710\(1\)](#) was passed that the "common-law remedial scheme would have provided Plaintiff with his full damages award," the Court concluded that plaintiff did not suffer a "grievous"

physical injury and that \$500,000 was a substantial remedy and therefore did not violate Article I, Section 10. ER 1466-67.

C. Proceedings before the Ninth Circuit Court of Appeals

Rote appealed the judgment in plaintiff's favor on multiple grounds.⁵ The Ninth Circuit Court of Appeals rejected Rote's appeal in its entirety. *Zweizig v. Rote*, 818 Fed. Appx. 645, 647 (9th Cir 2020).

Plaintiff cross-appealed, challenging the district court's order reducing plaintiff's damages from \$1 million to \$500,000 under [ORS 31.710\(1\)](#). SER 1-2. Plaintiff also moved the Court to certify to this Court as a question of law whether [ORS 31.710\(1\)](#) applies to unlawful employment practice claims raising pure emotional distress damages. Motion for Order Certifying Determinative Question of Law, *Zweizig v. Rote*, No. 18-36060, Dkt 23-1 (9th Cir. Jul 22, 2019). After briefing and oral argument, the Ninth Circuit certified the following question:

"Does Oregon Revised Statutes § [31.710\(1\)](#) cap the noneconomic damages awarded on an employment discrimination claim under Oregon Revised Statutes § [659A.030](#)?"

Zweizig v. Rote, No. 18-36060, Dkt. 77 (9th Cir. Jun 16, 2020). This court accepted the certified question. Order Accepting Certified Question, Jul 30, 2020 (S067820). As explained below, this court should answer "no" to the certified question.

⁵ The corporate defendants did not appeal.

ARGUMENT

I. **ORS 31.710(1) Does Not Apply to Unlawful Employment Practice Claims under ORS 659A.030 Because They are Not "Civil Actions Seeking Damages Arising Out of Bodily Injury."**

A. **The plain text of ORS 31.710(1) limits its scope to civil actions "seeking damages arising out of bodily injury."**

ORS 31.710(1) provides, in relevant part:

"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."

ORS 31.710(1) (emphasis added).

Here, the text of ORS 31.710(1) does not support applying the noneconomic damages cap to an unlawful employment practice claim arising under ORS 659A.030. The express language of ORS 31.710(1) limits its application only to civil actions "seeking damages arising out of bodily injury."

"Bodily injury" is not defined in ORS 31.710. Nonetheless, that phrase is a legal term of art in the field of tort law. See *Powerex v. Dep't of Revenue*, 357 Or 40, 61, 346 P3d 476 (2015) (when the legislature has not defined a word or phrase, the court assumes it has its ordinary meaning except when the words are "terms of art" drawn from a specialized trade or field). "Bodily injury" is defined as "physical damage to a person's **body**. – Also termed as *personal injury*; *personal bodily injury*; *physical injury*. Bryan A. Garner, *Black's Law Dictionary* (11th ed

2019) (bold emphasis added; italicized emphasis in original). The *Restatement (Second) of Torts § 15 (1965)* also explains that "bodily harm" is any "physical impairment of the condition of another's body, or physical pain or illness."

Even the plain and ordinary meaning of the adjective "bodily" means "of or relating to the body" or "concerning the body." *Webster's Third New Int'l Dictionary* 245 (unabridged ed 1986).

Based on those definitions of "bodily injury," when the legislature chose to use the phrase "civil actions seeking damages arising out of bodily injury" – it intended that there first *must be a bodily injury* – i.e., physical impairment, physical pain, or physical illness – as a prerequisite to application of the statute. Then, and only then, are emotional injury and distress damages that *arise out of* that bodily injury subject to the cap. Without a bodily injury, there simply can be no damages *arising out of* a bodily injury.

In sum, under the plain meaning of the statute, [ORS 31.710\(1\)](#) applies only to civil actions seeking damages arising out of bodily injury – i.e., *physical damage or impairment to a person's body* -- and not to civil actions where the plaintiff has suffered no bodily injury.

B. Because the plain language is so clear, this Court and the Court of Appeals repeatedly has assumed that the statute applies only to civil actions involving bodily injury.

Because the language of the statute is so clear, both this Court and the Court of Appeals repeatedly have noted in *dicta* that the statute applies only to civil actions involving bodily injury. For example, in *Bldg. Structures, Inc. v. Young*, 328 Or 100, 103 n 1, 968 P2d 1287 (1998), this Court noticed that ORS 31.710(1) applied only to civil actions "seeking damages arising from bodily injury" and therefore was inapplicable in that case because "the plaintiffs' alleged damages, which were based on breach of contract, fraud, and quantum meruit claims, did not arise out of bodily injury." *See also Vasquez v. Double Press Mfg., Inc.*, 364 Or 609, 614, 437 P3d 1107 (2019) ("Under ORS 31.710(1), noneconomic damages *in civil actions involving bodily injury* are capped at \$500,000 * * * ." (Emphasis added.)); *Zehr v. Haugen*, 318 Or 647, 656, 871 P2d 1006 (1994) (describing statute as defining economic and noneconomic damages "in the context of civil actions *seeking damages arising out of bodily injury*" (emphasis added)).

The Oregon Court of Appeals also similarly has described the statute. *See Rains v. Stayton Builders Mart, Inc.*, 264 Or App 636, 659, 336 P3d 483 (2014) ("ORS 31.710(1) caps noneconomic damages at \$500,000 in most civil actions "arising out of bodily injury[.]", *rev'd in part on other grounds*, 359 Or 610 (2016); *DeVaux v. Presby*, 136 Or App 456, 461, 902 P2d 593 (1995) (looking at

legislative history and explaining that under the 1987 version of the statute, "all compensatory damages recoverable in an action 'arising out of bodily injury' were divided into two classes: economic and noneconomic" and that the noneconomic damages were capped at \$500,000). *But see, Tenold v. Weyerhaeuser Co.*, 127 Or App 511, 518-20, 873 P2d 413 (1994) (assuming without deciding that statute applied to claims for defamation, malicious prosecution, and intentional infliction of emotional distress when parties did not raise issue or argue that cap was otherwise limited to claims seeking damages arising out of bodily injury).

C. The phrase "including emotional injury or distress, death, or property damage," in the text of ORS 31.710 does not modify "bodily injury."

The district court concluded that plaintiff's unlawful employment practice claim not arising out of bodily injury was subject to the cap. In reaching that conclusion, the district court relied on the following italicized text in the statute as dispositive:

"[I]n any civil action seeking damages arising out of bodily injury, *including emotional injury or distress*, death or property damages * *
* the amount awarded for noneconomic damages shall not exceed \$500,000."

[ORS 31.710\(1\)](#) (emphasis added). Based on that text, the district court concluded that "emotional injury and distress" was in fact a *bodily injury*. ER 1463. That conclusion is flawed for numerous reasons.

First, as explained above, the plain meaning of "bodily injury" would limit injuries to those that are physical and "of the body." Pure emotional distress damages are not physical injuries "of the body."

Second, an interpretation equating *emotional injury and distress* with "bodily injury" is contrary to a long line of authority distinguishing "emotional injury or distress" from bodily or "physical injury." See, e.g., *Philibert v. Kluser*, 360 Or 698, 703, 385 P3d 1038 (2016) (contrasting physical harms and emotional harms and explaining that "[i]n contrast to physical harms, emotional harms occur frequently"); *Id.* at 707-16 (overturning former "impact rule" which limited recovery of emotional distress damages by bystanders if they had suffered a "physical injury"); *Doyle v. City of Medford*, 356 Or 336, 375-76, 337 P3d 797 (2014) (outlining limited circumstances in which a plaintiff may assert emotional distress damages absent the infliction of a physical injury); *Paul v. Providence Health Sys.-Oregon*, 351 Or 587, 597-98, 273 P3d 106 (2012) (Oregon does not permit claims for emotional distress damages caused by a defendant's negligence in the absence of any physical injury except in limited circumstances); *Norwest, By and Through Crain v. Presbyterian Intercommunity. Hosp.*, 293 Or 543, 558-59, 652 P2d 318 (1982) (outlining limited circumstances in which a plaintiff may assert emotional distress damages absent the infliction of a physical injury).

Third, a reading of the statute where the phrase "emotional injury and distress" is equivalent to a "bodily injury" simply is illogical. In order to reach that conclusion, this Court would also have to conclude that both death *and* "property damage" are also a type of "bodily injury." However, property damage clearly is not a "bodily injury" – *i.e.* a physical harm or injury to the body – under any rational interpretation. To hold otherwise would defy common sense and adopt an unreasonable and absurd construction of the statute. *See Swift & Co. v. Peterson*, 192 Or 97, 110, 233 P2d 216 (1951) (Oregon courts will adopt a common sense, reasonable and wholesome construction over an absurd or mischievous one); *McGarry v. Hansen*, 201 Or App 695, 700, 120 P3d 525 (2005) (avoiding "awkward interpretation" of statute).

Finally, such an interpretation contradicts the rule of last antecedent. The phrase "including emotional injury or distress, death, or property damage" is offset from the rest of the sentence by a comma. [ORS 31.710\(1\)](#). That "indicat[es] as a matter of English that [the] phrase is nonrestrictive; that is, it is not intended to modify only the immediately preceding noun in the sentence." *Liberty Nw. Ins. Corp., Inc. v. Watkins*, 347 Or 687, 693-94, 227 P3d 1134 (2010) (holding that because the phrase "except medical services," was preceded by a comma, that indicated that it applied to all the antecedents). Rather, the phrase "including emotional injury or distress, death, or property damage" is intended to apply to the

last antecedent in the sentence: "damages arising out of bodily injury." *State v. Webb*, 324 Or 380, 386, 927 P.2d 79 (1996) (quoting Norman J. Singer, 2A *Sutherland Statutory Construction* § 47.33, at 270 (5th ed 1992)) ("Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma").

A more reasonable and logical interpretation of the statute, then, is that the phrase "including emotional injury or distress, death, or property damage" modifies the entire phrase "damages arising out of bodily injury." *ORS 31.710(1)*. In turn, emotional injury or distress, death, and property damage are merely part of a non-exhaustive list of the types of damages that, *if arising out of* bodily injury, are subject to the cap.⁶ *See, e.g. State v. Kurtz*, 350 Or. 65, 249 P.3d 1271 (2011) ("Typically, statutory terms such as 'including' and 'including but not limited to' when they precede a list of statutory examples, convey an intent that an

⁶ Even the federal tax code, in its taxability of settlement agreements, recognizes that emotional distress and mental anguish might *originate* from a personal physical injury or physical sickness but that emotional distress or mental anguish that does *not* originate from a personal physical injury or physical sickness is distinct and is not a "physical injury." The former is not taxable income, while the latter is. *See Internal Revenue Code, Settlements – Taxability*, Publication 4345 (Rev 12-2016), available at <https://www.irs.gov/pub/irs-pdf/p4345.pdf>.

accompanying list of examples be read in a nonexclusive sense.").⁷ However, there first must be bodily injury before damages can *arise out of* a bodily injury.

D. Unlawful employment practice claims arising under ORS 659A.030 are not civil actions *arising out of* bodily injury

ORS chapter 659A serves to

"encourage the fullest utilization of the available workforce by removing arbitrary standards of race, color, religion, sex, sexual orientation, national origin, marital status, age or disability as a barrier to employment of the inhabitants of this state, and to ensure the human dignity of all people within this state and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of unlawful discrimination of any kind based on race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status."

[ORS 659A.003](#). [ORS 659A.030](#) was designed to vindicate the civil rights of

⁷ Two out of three Multnomah County circuit court judges agree with plaintiff that [ORS 31.710](#) does not apply to unlawful employment practice claims. *See* Op. re Def. Mtn to Reduce Pl. Noneconomic Damages to the Statutory Limit, *Loczi v. Daimler Trucks N. Am. LLC*, No. 14CV15265 (Mult Co. March 4, 2017) (Greenlick, J.) (App 201-204) (holding that [ORS 31.710](#) did not cap damages on claims arising from employment discrimination and that "the most reasonable interpretation is that the legislature unartfully and superfluously employed "including emotional injury or distress" to ensure that emotional injury or distress damages *stemming from bodily injury* were expressly subject to the cap"); Op. re Def. Li Ning USA's Mot. in Opp. to McMillan's Proposed General Judgement and Money Award, *McMillan v. Li Ning Sports USA, Inc.*, No. 110708760 (Mult Co. Dec. 18, 2013) (Litzenberger, J.) (App 205-209) ([ORS 31.710](#) applies to claims arising out bodily injury, death or property damage and, by omission, does not apply to claims arising out of employment). *But see* Order Granting Def. Daimler Trucks N. Am. LLC's Mtn. to Reduce Damages to the Statutory Limit, *Pierce v. Daimler Trucks N. Am., LLC*, No. 15CV24701 (Mult Co. Jul 19, 2017) (Immergut, J.) (App 197-200) (concluding that "bodily injury" under [ORS 31.710](#) includes claims for purely emotional injury under [ORS 659A.030](#)).

Oregonians by ensuring that Oregonians can obtain "employment * * * without unlawful discrimination because of race, color, religion, sex, sexual orientation, national origin, marital status, age or disability * * *." [ORS 659A.006](#).

The anti-retaliation provision of [ORS 659A.030](#) serves a unique and important function in carrying out the purposes of ORS chapter 659A by ensuring "that any person who is engaged in protected conduct, such as opposing discriminatory practices or seeking redress in an agency or court, is not discouraged from doing so by the threat of being subjected to adverse, disparate treatment." *Portland State Univ. Chapter of Am. Ass'n of Univ. Professors v. Portland State Univ.*, 352 Or 697, 710, 291 P3d 658 (2012). The retaliation provision is broad – and extends to acts that occur outside the employment context, when those relationships have a nexus to a plaintiff's prior employment. *McLaughlin v. Wilson*, 365 Or 535, 55, 449 P3d 492 (2019).

Finally, [ORS 659A.030](#) permits not only claims against employers but "against any person, whether an employer or an employee" who aid[s], abet[s], incite[s], compel[s], or coerce[s] the doing of any of the acts forbidden under this chapter or * * * attempt[s] to do so."

In vindicating these harms, the legislature expressly intended to provide an "adequate remedy for persons aggrieved by certain acts of unlawful discrimination" in employment. [ORS 659A.003\(2\)](#). The legislature therefore

deviated from its federal counterpart under Title VII of the Civil Rights Act, which expressly caps the amount of compensatory damages an employee may recover.

[42 USC § 1981a\(b\)\(3\)](#) (capping compensatory damages to a range of \$50,000 - \$300,000, depending on the size of the employer). Instead, the legislature expressly provided employees with the full range of remedies in order to vindicate the violation of their civil rights. *See* [ORS 659A.885\(3\)\(a\)](#) (providing for compensatory damages, injunctive relief, punitive damages, and attorney fees).

The legislature's specific intent to provide an "adequate remedy" for violations of ORS chapter 659A cannot be harmonized with the more general noneconomic damages cap under [ORS 31.710\(1\)](#), and therefore the more specific statute in [ORS 659A.003](#) must serve as an exception to the more general statute in [ORS 31.710\(1\)](#). *State v. Pearson*, 250 Or 54, 58, 440 P2d 229 (1968) (to the extent two statutes cannot be harmonized, the more specific statute will prevail over the more general statute).

It is important to understand that the goals of the legislature in drafting [ORS 659A.030](#) were focused on discrimination, retaliation, and harassment – not bodily injury. Of course, one can imagine a scenario where a bodily injury could occur *in conjunction* with a discrimination, harassment, or retaliation claim. For example, an employee could be touched sexually without the employee's consent by a supervisor, or an employee could be physically assaulted by a coworker or

supervisor with a racially based motive. Under such circumstances, the employee would have a tort claim lying in battery *in addition to* their employment discrimination or harassment claim under [ORS 659A.030](#). And any noneconomic damages asserted as part of that tort claim would "aris[e] out of bodily injury" and be subject to the noneconomic damages cap in [ORS 31.710\(1\)](#).

However, even in such circumstances, the damages arising out of the *discrimination* or *harassment* the employee suffered apart from the bodily injury – that is, the damages caused by the violation of the person's civil rights in being treated differently based on their sex or race – would not be subject to [ORS 31.710\(1\)](#) because they do not *arise out of* a bodily injury – they arise out of *discrimination*.

Nonetheless – this court need not decide those particular nuances, as here, it is undisputed that plaintiff's retaliation and aiding and abetting claims under [ORS 659A.030\(1\)\(f\)](#) and [\(g\)](#) raised no allegations of physical or sexual assault, or even allegations that plaintiff's emotional distress manifested in any particular physical injury or illness.⁸ *See* Order Certifying Question to Supreme Court at 4, *Zweizig v. Rote*, No. 18-36060, Dkt. No. 73 (June 16, 2020) ("It is undisputed that Zweizig suffered no physical injury.") There simply was no bodily injury of any kind that

⁸ Even if a plaintiff's pure emotional distress damages ultimately manifest into physical symptoms, those symptoms cannot reasonably be said to have arisen *out of a bodily injury*.

plaintiff's damages could have arisen out of.

Instead, plaintiff's damages arose out of retaliatory statements made on Rote's online blogs. Plaintiff alleged that defendants' conduct caused him noneconomic damages in the form of "damage to reputation, loss of enjoyment of life, inconvenience, frustration, fear, dread, stress, helplessness, hopelessness, humiliation, and anxiety." ER 11. In unlawful employment practice actions such as this one, where the plaintiff asserts purely emotional distress damages and there is *no bodily injury at all*, [ORS 31.710\(1\)](#) does not apply.

E. The legislative history of ORS 31.710(1) does not contradict the plain language of the statute.

The legislative history of [ORS 31.710\(1\)](#) does not contradict the plain meaning of the statute. A court is obligated to consider legislative history "only for what it is worth – and what it is worth is for the court to decide." *State v. Gaines*, [346 Or 160, 206 P3d 173 \(2009\)](#). "When the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests – or even confirms – that the legislators intended something different." *Id.*

The noneconomic damages cap under [ORS 31.710\(1\)](#) (previously [ORS 18.560](#)) was enacted as part of Senate Bill (SB) 323 in 1987, which was an overall "tort reform" effort in the Oregon legislature. Or Laws 1987, ch 744, § 6; *see Vasquez*, [364 Or at 628-29](#) (explaining legislative history of [ORS 31.710](#)). The

legislature's passage of SB 323 in 1987 "took place in reaction to earlier changes in the law affecting tort liability." *Id.* at 628. The bill arose out of concerns by liability insurers and their insureds that certain changes in the law had resulted in increased damage awards in tort cases. *Id.*

A Joint Interim Task Force on Liability Insurance and a Task Force on Liability appointed by Governor Victor Atiyeh both met in 1986 to consider proposed changes in tort law in order to control the costs of liability insurance. *Id.* One of the stated goals coming out of the groups was to cap noneconomic damages. *Id.*

The legislature's overall goal in enacting SB 323 was to reduce costs of insurance by reducing the liability of defendants in tort actions. *See, e.g., Greist v. Phillips*, 322 Or 281, 299, 906 P2d 789 (1995) (purpose of bill was to reduce costs of insurance premiums and litigation). The portion enacting a noneconomic damages cap was but one section of the overall legislation, which contained 150 sections. *Vasquez*, 364 Or at 628.

Given the plain language of the ultimate statute and its focus on bodily injury, it is no surprise that the legislative history focuses generally on tort actions and on individuals who suffered bodily injuries. For example, in the Final Report issued by the Governor's Task Force, the task force identified the problem that it was intending to address as high awards for "pain and suffering" damages *related*

to an injury. Governor's Task Force on Liability, Final Report on Recommendations to Ease the Liability Insurance Strain in Oregon, 8 (1986) (App 8). The Task Force relied on specific data regarding increased damage awards in product liability, medical malpractice, and personal injury actions. *Id.* at 24-25, 30-31 (App 24-25, 30-31); Exhibit K, Joint Interim Task Force, Feb 25, 1986 (accompanying statement of John Powell) (discussing personal injury verdicts in Oregon) (App 88-115).

Once the tort reform bill reached the legislature, both proponents and opponents of the bill centered their discussions on concerns surrounding damage awards in personal injury and death claims. For example, an opponent of the bill discussed his opposition to the cap and the seriousness of his physical injury related to a truck rolling on top of him. *See* Minutes at 5-6, House Judiciary Committee, SB 323, May 13, 1987 (App 194-95) (Testimony of Ray Gardner, accident victim). Tort reform proponents also focused on what they considered changes in negligence law that allowed for increased damages, such as changes in comparative negligence, and concerns related to increased verdicts in personal injury and death cases. *See* Ex D at 3, Senate Judiciary Committee, SB 323, Jan 20, 1987 (accompanying statement of Kip Lombard, Citizens Initiative for Equity in the Legal System) (App 159) (proposing limitations on non-economic damages for "victims of negligence" and discussing concerns related to pain and suffering

damages arising out of death and injuries); *Id.* at 9 (App 165) (explaining that the "tort system" are those "laws governing how courts make awards in personal injury cases" and noting that "when an individual is injured due to negligence" that person must have access to the civil justice system and reasonable compensation); Testimony at 3-6, Senate Judiciary Committee, SB 323, Feb. 3, 1987, Ex A (statement of John Holmes, Portland attorney) (App 179-182) (discussing changes in negligence laws, the increase in the average personal injury award, and citing a public opinion poll favoring a cap on damages in death and injury suits).

Admittedly, while the legislative history does not demonstrate the legislature's specific intent to *exclude* unlawful employment practice actions from its reach, it does demonstrate an overall focus and concern on *personal injury* and *death* actions and an increase in those types of verdicts. The legislative history simply is *silent* as to concerns about reducing liability in unlawful employment practice actions or actions *not* involving personal injury or death.

A recent decision from this Court confirms that (1) legislative silence on the specific intent behind the cap should not be relied on; and (2) the general goals of tort reform behind the legislation are not sufficient to override the plain language in [ORS 31.710\(1\)](#).

In *Vasquez*, 364 Or at 614, this court considered whether the legislature intended the noneconomic damages cap under ORS 31.710(1) to apply to claims under ORS chapter 656. The court considered the legislative history and recognized that "SB 323 was enacted to 'control the escalating costs of the tort compensation system' * * * and that the cap on noneconomic damages in ORS 31.710(1) was an aspect of that effort." *Id.* at 629 (internal citations omitted).

Nonetheless, this court explained that it:

"did not infer from that *general goal* that the legislature did not intend to make an exception for claims brought by or on behalf of injured workers against third parties and noncomplying employers, as governed by the provisions of ORS chapter 656 * * * . Indeed there is no indication in the text of the 1987 legislation that the damages cap provision in ORS 31.710(1) was intended to apply to those types of claims described in ORS chapter 656."

Vasquez, 364 Or at 629 (emphasis added).

The court further explained that because the text of ORS 31.710(1) contained explicit exceptions to the tort cap, the text itself belied any "assumption that the legislature intended the noneconomic damages cap to apply equally in all circumstances * * * we know from the text that it did not." *Vasquez*, 364 Or at 630.

Here, similarly, this court cannot infer from the broad overall goals of the tort reform legislation in 1987 that the legislature "did not intend to make an exception" for certain claims to the tort cap. Not only did the legislature make express exceptions in the statute for claims under the OTCA and ORS chapter 656,

it also expressly *limited the scope of the cap* to civil actions "seeking damages arising out of bodily injury." As this Court explained in *Vasquez*, we know from the text itself that the legislature never intended for the cap to apply equally to all noneconomic damages claims. *Id.* at 630.

Furthermore, the legislature's silence on its specific intent means that the legislative history simply is not illuminating on the issue – and this court should not rely on legislative silence as determinative:

"[A]rguments based on legislative silence are based on unrealistic assumptions, including that 'legislators are in a position to predict all the potential consequences of legislation and that they will always address them'; that legislators are not subject to the time pressures at play in legislative sessions, which may preclude opportunities for 'comment on all of a bill's potential consequences'; and that 'the nature of legislative history . . . often is designed not to explain to future courts the intended meaning of a statute, but rather to persuade legislative colleagues to vote in a particular way.' Although defendant speculates that the exception is one that would have been discussed, we are not so sure. It is also possible that the exception was crafted and understood as preserving the workers' compensation system as it then existed. *We do not know, and we do not draw any conclusion one way or the other from the lack of legislative history concerning the scope of the exception.*"

Id. (citing *Wyers v. Am. Med. Response Nw., Inc.*, 360 Or 211, 227, 377 P3d 570 (2016)) (emphasis added).

Nonetheless, the district court relied on a "Summary" of the Tort Reform Bill relied on by Rote in reasoning the legislature intended that [ORS 31.710\(1\)](#) apply to employment claims. That summary provided:

"With the exception of workers' compensation claims and injuries which fall under the State Tort Claims Act, this section proposes to cap out the "non-economic" portion of *any award*. The dollar amount of the cap has been left open and is subject to reasoned debate. Prior to submission to the legislature, the amount of the cap must be determined. It has been suggested by a number of individuals and organizations that the unlimited recovery of the "non-economic damages has resulted in substantial personal injury verdicts which recently have been reduced throughout the U.S. It is the belief of many organizations that such a cap will ultimately result in a reduction in the cost of liability insurance. Whether or not the capping of "non-economic" damages results in a reduction in the cost of liability insurance remains to be seen. Based upon California's experience with its Tort Reform Bill (limited to medical malpractice) there is some suggestion that the number of covered losses has dropped since its passage and that the California Act has had a tendency to hold down liability insurance rates. However, we are unaware of any hard data which supports those positions.

Ex E at 23, Joint Interim Task Force on Liability Insurance, Jul 2, 1986, (accompanying statement of Scott Gallant, Oregon Medical Association) (App 147) (emphasis added).

The district court's reliance on that summary was flawed. First, the summary described a proposal by the Oregon Medical Association before the Joint Interim Task Force and not any bill before the legislature. *See Minutes* at 1, 8, Joint Interim Task Force on Liability Insurance, Jul 2, 1986 (App 116, 123). It therefore has little to no value in determining what *the legislature* meant in later enacting [ORS 31.710\(1\)](#). *Gaines*, 346 Or at 173. Several parties offered potential proposals on how to reform the tort system at that point, and their own interpretations of what their proposed reforms would mean. *See Minutes* at 2, Joint

Interim Task Force on Liability Insurance, Jul 2, 1986 (App 117) (Art Johnson proposing insurance reform legislation on behalf of the Oregon Trial Lawyers Association).

Furthermore, such a summary – offered by a witness before the task force – is not dispositive regarding what *the legislature* intended, when the remaining legislative history reveals there were no discussions about unlawful employment practice claims or applying the noneconomic damages cap to claims that did not involve bodily injury. In *State v. McNally*, 361 Or 314, 333, 392 P3d 721 (2017), this Court held that a measure summary authored by *legislative staff* was not dispositive of legislative intent when there were not discussions by the legislature about the particular amendment at issue. The court explained that

"[a]t most, therefore, the measure summary expresses the understanding of the author of that document. It is only one comment in a much larger body of commentary by legislators * * *."

Id. at 333-34.

In conclusion, the legislative history does not contradict [ORS 31.710\(1\)](#)'s express language limiting its scope only to civil actions seeking damages "arising out of bodily injury." Because plaintiff did not seek damages arising out of bodily injury, the statute does not apply to his unlawful employment practices action under [ORS 659A.030](#).

II. ORS 31.710(1) Cannot Constitutionally Apply to Unlawful Employment Practice Claims Without Bodily Injury.

The remedies clause, contained in Article I, Section of the Oregon Constitution, provides in relevant part:

Every man shall have a remedy by due course of law for injury done to him in his person, property, or reputation.

Or. Const., Art. I, § 10 (emphasis added).

After the Ninth Circuit Court of Appeals certified the question of law, this Court decided *Busch v. McGinnis Waste Sys., Inc.*, 366 Or 628 (2020). The *Busch* decision is critical in answering the certified question, as application of ORS 31.710(1) to cap noneconomic damages in unlawful employment practice claims under ORS 659A.030 would be unconstitutional under *Busch*.

In *Busch*, this Court held that "application of ORS 31.710(1), as a limit on the noneconomic damages that a court can award to a plaintiff, violates Article I, section 10." 366 Or at 652⁹. This court's reference to "a" plaintiff is significant because it reflects that ORS 31.710 is a *facial resolution*, not an as-applied resolution. Had this court wished to limit or qualify its holding, it would have referred to "this" plaintiff or "the" plaintiff. In other words, ORS 31.710(1) is unconstitutional on its face.

⁹ This court's decision in *Busch* was published on July 9, 2020, nearly a year after Zweizig moved the Ninth Circuit Court of Appeals for an order certifying a question of law to the Oregon Supreme Court on July 22, 2019.

In reaching its ruling, this Court began by outlining its prior remedy clause jurisprudence, including *Horton v. OHSU*, 359 Or 168, 376 P3d 998 (2016), and *Smother's v. Gresham Transfer, Inc.*, 332 Or 83, 90, 23 P3d 33 (2001), *overruled in part* by *Horton*, 359 Or 168. In *Horton*, this Court reaffirmed that the remedy clause "grants injured persons a substantive right and places a substantive limit on the legislature's ability to modify remedies." 359 Or at 218. This Court also held that the remedy clause applies to contemporary claims, overruling *Smother's* to the extent that it tied "the meaning of the remedy clause to Oregon common law in 1857." *Horton*, 359 Or at 185. This Court explained that the remedy clause does not "lock[] courts and the legislature into a static conception of the common law as it existed in 1857." *Id.* at 218-19.

This Court observed that its cases had three categories of legislation in which remedy clause issues arise. "At times, the legislature has left a common-law duty intact while eliminating a remedy for injuries cause[d] by a breach of that duty; at other times, the legislature has left a common-law duty intact and has modified only the remedy; and, in other instances, the legislature has eliminated or modified the common-law duty itself." *Busch*, 366 Or at 636 (citing *Horton*, 359 Or at 219-20). This Court opined that, "'when the legislature does not limit the duty that a defendant owes a plaintiff but limits the size or nature of the remedy,' the legislative remedy need not restore all the damages that the plaintiff sustained

and that factors, such as the existence of a *quid pro quo*, matter when determining whether a limited remedy is constitutional." *Busch*, 366 Or at 636 (citing *Horton* at 220-21).

This court acknowledged that, like the Oregon Tort Claims Act in *Horton*, ORS 31.710(1) fits within the first category of cases because it does not modify any duty but "[i]nstead, it limits, without eliminating, the remedy that an injured plaintiff may recover for injuries caused by a breach of that duty." *Id.* at 639 at 639. The court also confirmed an important distinction between the Tort Claims Act and ORS 31.710(1) "Because ORS 31.710(1) is not a cap imposed by the Oregon Tort Claims Act, *Horton* does not directly govern the result here." *Id.* at 639.

In *Busch*, this court reached three substantive conclusions: First, it rejected the defendant's argument that *Greist* controlled. *Greist* was a statutory wrongful death action brought under ORS 30.020. 322 Or at 284. In that case, this Court ruled that former ORS 18.560, renumbered ORS 31.710 (2003), was a constitutionally permissible damage cap. 322 Or at 291. In *Busch*, this Court distinguished *Greist* on the basis that a statutory wrongful death claim was not cognizable at common law and that such a claim was always subject to a cap on damages. *Busch*, 366 Or at 642. This Court then went on to reject defendant's argument that *Greist* stands for the proposition that 100 percent of a plaintiff's

economic damages plus \$500,000 in noneconomic damages always is a substantial amount and therefore a substantial remedy. *Busch*, 366 Or at 642. Although this court did not overrule its decision in *Greist*, it declined to "pluck" such a notion from *Greist* because "[t]o take a stroke in that direction * * * would be to swim against the tide of *Horton*." *Id.* Indeed, this court emphasized that unlike ORS 31.710(1), the damage cap at issue in *Griest* "did not rely solely on the amount or relative size of the plaintiff's award to uphold the applicable damages cap, and that any other reading of *Greist* would be contrary to *Horton*." *Busch*, 366 Or at 643.

Second, this court concluded that when the legislature enacted ORS 31.710(1) "it did not provide injured persons with a *quid pro quo* as that term is used in *Horton*." *Busch*, 366 Or at 651. The Court held:

"[W]hen the legislature enacted ORS 31.710(1), it required a trial court to override a jury's verdict and enter judgment for a specified amount that is not tied to the plaintiff's injuries. When it did so, the legislature did not provide injured persons with a *quid pro quo* as that term is used in *Horton*—something they otherwise would not have had."

Id. Although not fatal, the absence of a *quid pro quo* "to counterbalance a plaintiff's right to a remedy under Article I, section 10, strikes a real blow" to the constitutionality of a legislative cap. *Id.*

Third, this court concluded that when the legislature enacted ORS 31.710(1), it did not seek to limit noneconomic damages "to a sum capable of restoring the right that had been injured in many, if not all, instances, and would remain capable

of doing so over time." *Busch*, 366 Or at 651. Nor did the legislature "advance the state's interest in sovereign immunity or any other interest with constitutional underpinnings" as it had when it adopted the Tort Claims Act cap at issue in *Horton*. This, combined with the other underlying constitutional concerns, was sufficient to persuade this court to strike down ORS 31.710(1) for violating the remedies clause.

Busch provides a clear answer to the certified question currently before this court: No, ORS 31.710(1) does not cap the noneconomic damages on an unlawful employment practice claim under ORS 659A.030. To do so would violate Article I, Section 10, of the Oregon Constitution. Nothing about the particular claim asserted under ORS 659A.030 changes how *Busch* applies to the relevant damages cap: ORS 31.710(1).

Although claims asserted under ORS 659A.030 are statutory claims, not common-law claims, the underlying *right to a* remedy for these claims existed at common-law. For example, an employee like plaintiff who was retaliated against for being discharged for blowing the whistle had a common-law claim for wrongful discharge. See *Delaney v. Taco Time Intern, Inc.*, 297 Or 10, 18, 681 P2d 114 (1984) (recognizing common-law claim for wrongful discharge when important public duty involved); *Hall v. State*, 274 Or App 445, 455-56, 366 P3d 345 (2015) (common-law claim for wrongful discharge related to whistle-

blowing); *Love v. Polk Cnty. Fire Dist.*, 209 Or App 474, 496, 149 P3d 199 (2006) (common-law claim for wrongful discharge when terminated even for making threat of whistleblowing). And, like plaintiff, if that employee was further retaliated against through false public statements by an employer or former employer, that employee could bring a common-law claim for libel, slander, or defamation. *Willets v. Scudder*, 72 Or 535, 541, 144 P 87 (1914); *Cooper v. Phipps*, 24 Or 357, 33 P 985 (1893).

In providing statutory relief to victims of unlawful employment practice claims under [ORS 659A.030](#), the legislature did not eliminate the existing common law remedies available to employees. *Holien v. Sears, Robuck and Co.*, 298 Or 76, 96-97, 689 P2d 1292 (1984). Rather, the legislature expressly intended to expand the duties owed by employers and to ensure an "adequate" remedy.

[ORS 659A.003](#). This court expressly has recognized that if a cause of action existed for an injury to an absolute right respecting person, property, or reputation at common law, then either that cause of action *or a legislatively created substitute process that provides a constitutionally adequate remedy* for that injury must be available to every person. *Smothers*, 332 Or at 127 (emphasis added).

Thus, unlike the statutory wrongful death action in *Greist*, which was "created with a limitation on the amount recoverable," [322 Or at 297](#), the legislature created [ORS 659A.030](#) without eliminating any common law rights or

remedies and with a clear intent that plaintiffs have an "adequate" remedy. [ORS 659A.003\(2\)](#); [ORS 659A.885\(3\)](#). Thus, just as in *Busch*, *Greist* does not apply.

The district court agreed that "at the time that [ORS 31.710](#) was passed, the common-law remedial scheme would have provided Plaintiff with his full damages award." ER 1466. It nonetheless reduced plaintiff's damages by determining that plaintiff was not "grievously injured" and that \$500,000 was a "substantial remedy." However, this Court rejected that the relative size of the plaintiff's award is determinative "in and of itself"; rather, it may be used "only as a final check on the constitutionality of the cap as applied to the plaintiff." *Busch*, 366 Or 643.

Here, considering the pertinent inquiries identified in *Busch*, [ORS 31.710\(1\)](#) does not alter the duties an employer owes under [ORS 659A.030](#), and it does not alter a plaintiff's right to bring a claim for a breach of that duty. *Busch*, 366 Or at 650. It also does not bar a severely emotionally 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. *Busch* at 650-51. The legislature's failure to provide a *quid pro quo*, such as those found in the Tort Claims Act or [ORS 18.560](#), strikes the same "real blow" to [ORS 31.710\(1\)](#)'s constitutionality as it did in *Busch* at 651. The final relevant consideration from *Busch*—*i.e.*, whether the legislature intended to limit noneconomic damages "to a sum capable of restoring the right that had been injured in many, if not all, instances, and would remain capable of

doing so over time" – remains unchanged here. For the same reasons that this court already explained in *Busch*, the legislature did not pursue an "interest with constitutional underpinnings." *Id.* [ORS 31.710\(1\)](#) remains unconstitutional.

CONCLUSION

For the reasons explained above, this Court should answer no to the certified question of law.

DATED this 29th day of October, 2020.

Shenoa Payne Attorney at Law PC

By: /s/ Shenoa Payne
Shenoa Payne, OSB No. 084392
65 SW Yamhill St, Ste 300
Portland, Oregon 97204
(503) 914-2500
spayne@paynelawpdx.com

Joel Christiansen, OSB No. 080561
Vogele & Christiansen
812 NW 17th Avenue
Portland, Oregon 97209
(503) 841-6722 ext. 2
joel@worklaw.io

*Of Attorneys for Plaintiff-Appellant
Max Zweizig*

CERTIFICATE OF COMPLIANCE

Brief length:

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 8,978 words.

Type size:

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

/s/ Shenoa Payne
Shenoa Payne, OSB 084392

*Of Attorneys for Plaintiff-Appellant
Max Zweizig*

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on October 29, 2020, I filed the foregoing **BRIEF ON THE MERITS OF PLAINTIFF-APPELLANT MAX ZWEIZIG** by Electronic filing.

I further certify that on the same date, I served the same document on the following lawyer(s) by electronic service:

James S Coon, OSB No. 771450
Thomas Coon Newton & Frost
820 SW 2nd Ave Ste 200
Portland OR 97204
(503) 228-5222
jcoon@tcnf.legal
Proposed Amicus Curiae
Oregon Trial Lawyers Association

and by email via the party's consent pursuant to ORCP 9G:

Timothy C. Rote
24790 SW Big Fir Rd.
West Linn, Oregon 97068
(503) 702-7225
timoty.rote@gmail.com
Pro se Defendant-Appellee

/s/ Shenoa Payne
Shenoa Payne, OSB 084392

*Of Attorneys for Plaintiff-Appellant
Max Zweizig*