STATEMENT OF DONALD J. KOEHLER, II
TO THE
OREGON SENATE JUDICIARY COMMITTEE
May 6, 2019

I come in support of HB 2014 before this committee to address a grave injustice to the elderly resulting from the arbitrary cap on non-economic damages for medical malpractice claims. My stepfather, Lowell Creecy, was the victim of medical malpractice which severely impacted his quality of life, and his ability to interact with others. The physical damages resulting from the botched back surgery left him unable to control his bladder and bowels, restricting his ability to travel and to participate in major family events, such the graduations of his grandchildren, the birth of his great-grandchildren and the wedding of his only granddaughter. Eventually, Lowell died as a direct result of the damage done to him by his doctor.

At the time he filed his lawsuit, there was no cap on non-economic damages in medical malpractice cases. But, before the case could be tried, the Oregon Supreme Court overruled its decision, made 17 years prior, that such caps were unconstitutional. This left my parents with little to no recourse, the insurance company knew this and took full advantage of it. Lowell wanted his day in court to express his anger and frustration with the doctor who altered his life forever. His ability to air his grievances against the doctor was effectively taken away by the reinstitution of the cap on non-economic damages.

I come at this issue from a different perspective than most. I am a practicing attorney here in Oregon. I have been practicing law now for 28 years. A large portion of my practice is in litigation. The mere fact that I am testifying here today, in all likelihood, assures that no insurance company will hire me to represent them. Early in my career, practicing in Missouri and Kansas, I represented insurance companies on occasion. In later years, I was in-house counsel for a large financial services corporation located in Iowa, which also had an insurance company subsidiary. As such, most of my career has been spent on the defense side of litigation. Because of this, I was in favor of tort reform and had always held a firm belief that there should be caps on non-economic damages for any type of tort, not just medical malpractice. That belief was based on my opinion, at the time, that an injured plaintiff's damages could be adequately covered by economic damages and a limited additional award for such things as pain and suffering. I have now come to realize that my earlier position was ill-informed. I had never taken the time to thoroughly think through how such caps might have a greater impact on different groups of people.

It was not until I saw the effect of such a cap on my parents that I came to realize that caps such as the one in Oregon have a disproportionate negative impact on the elderly. When you are retired, living solely on social security and medicare, you have very limited economic damages. So, effectively your damages are limited to the arbitrary cap placed on non-economic damages. This arbitrary cap places a set value on your life without any consideration as to the total effect and circumstances surrounding the wrong that has been done to you, or the extent of the limitations and burdens you will suffer for the rest of your life. Everyone is in the same boat, without regard to their individual situation.

Insurance companies do not just hand over the cap amount. An injured elder must hire an attorney to force any sort of reasonable recovery. Medical malpractice cases are expensive to bring and require the patient's attorney to put in a great deal of time, working the case up and preparing it for trial. Expenses in these cases are also substantial due to the need for multiple depositions of medical personnel present during the surgery, depositions of additional witnesses and the hiring of expert witnesses. So, even if an elderly patient receives an award of the full cap of $500,000, the elderly victim does not receive the full $500,000. After payment of the fees and expenses incurred in bringing the lawsuit, the elderly client is lucky to actually realize anything close to $500,000, thereby pouring salt into an open wound. The patient's pain and suffering is further minimized, while the doctor's liability is capped, regardless of the degree of recklessness exhibited by the doctor or the extent of the permanent damage to the patient.

Another problem with the cap is that now, it may be more difficult to find an attorney willing to take a medical malpractice case on behalf of the elderly. As stated, it costs a lot to bring a medical malpractice claim to trial. As such, attorneys who practice in this area may be reluctant to take on a case, even a less complex case, because they are not likely to be able to recoup the cost for the time they are required to put in to bring the case to trial. The only way these attorneys can even break even and avoid a loss on these cases, is to settle the cases early before too much time and too many expenses have been incurred. Insurance companies know this, and the cap has put one more weapon in the insurance company arsenal when dealing with a medical malpractice claim brought by an elderly patient. I saw this firsthand with my parents.

I have heard the argument that if there is no cap, medical malpractice premiums will skyrocket. But, from 1999, when the Oregon Supreme Court ruled in the *Lakin* case that damage caps were unconstitutional until 2016, when the Oregon Supreme Court reversed itself in *Horton*, those premiums did not skyrocket. That argument for non-economic caps is a red herring.

So, yes – I am a convert. Caps on noneconomic damages have a disproportionate negative effect on the elderly, and the elderly in Oregon deserve better. Caps are arbitrary. Each patient's case is different. Those who are the victims of medical malpractice deserve to have their case judged on the merits and to be awarded damages based on their particular situation, not on a number plucked from the air without regard to individual circumstances.