

IN THE SUPREME COURT OF THE STATE OF OREGON,

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

v.

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

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

v.

RSG FOREST PRODUCTS, INC., et al.,
Third-Party Defendants,

and

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

WEYERHAEUSER COMPANY,
Fourth-Party Plaintiff,

v.

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

JULY 2015

WITHERS LUMBER COMPANY,
Fourth-Party Plaintiff,

v.

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

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

v.

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

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

v.

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

Marion County Circuit Court
06C21040

Court of Appeals
A145916

S062939

REPLY BRIEF OF KEVIN AND MITZI RAINS

On review from the decision of the Court of Appeals
On appeal from the Marion County Circuit Court
Limited Judgment and Money Awards entered May 28, 2010

REPLY BRIEF OF KEVIN AND MITZI RAINS

The Honorable Dennis Graves, Circuit Court Judge

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Concurring judges: Sercombe, J. and Hadlock, J.

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INTRODUCTION

Weyerhaeuser asserts another belated issue – the court should overrule *Lakin*. For the first time in its response brief on the merits, Weyerhaeuser argues that – as to Mr. Rains’ product defect claim – *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463 (1999), should be overruled, and the right to jury trial should be interpreted to mean that the jury’s findings of fact can be nullified by the legislature’s limitation on noneconomic damages in ORS 31.710.¹ Weyerhaeuser Answering Brief on the Merits, at 20-35.

In the trial court, Weyerhaeuser sought to distinguish *Lakin*. It acknowledged that the cap statute, ORS 31.710(1) was unconstitutional as to common law claims, but argued that the statutory limit could be applied to claims that arise out of statutes, and that a product defect claim was such a statutory claim. CR # 386 (Weyerhaeuser’s motion to reduce noneconomic damage award, p. 3, lines 15-18); CR # 418 (Weyerhaeuser’s reply on reducing noneconomic damage

¹ 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.”

awards, pp. 2-4). In the Court of Appeals, Weyerhaeuser similarly sought to distinguish *Lakin* on the same basis, not overrule it. Open Br at 41-45.

Now Weyerhaeuser and its *amici* assert that the court should overrule *Lakin*. They offer various arguments – most already considered and rejected in *Lakin* – that would render the right to jury trial an empty ceremony in all claims, common law and statutory. Indeed, Weyerhaeuser would write the jury trial guarantees out of the constitution.

Under Weyerhaeuser’s interpretation, the right to jury trial contemplates that any fact found by the jury – fault, causation, or damages – can be set aside after trial if the legislature says so. Weyerhaeuser Answering Brief on the Merits, at 20-35. This theory runs contrary to this court’s interpretation that the rights to jury trial have meaningful effect and prevent legislative encroachment on the jury’s constitutionally assigned functions.²

² Article I, section 17, of the Oregon Constitution provides:

“In all civil cases the right of Trial by Jury shall remain inviolate.”

Article VII (Amended), section 3, of the Oregon Constitution provides in relevant part:

“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.”

ARGUMENT

A. **Lakin was correctly decided**

In *Lakin*, a unanimous court interpreted Article I, section 17 to guarantee the jury's assessment of compensatory damages in a civil case by giving it effect in the judgment. *Lakin* is built on a solid foundation of constitutional history and analysis, and well-established precedent. According to *Lakin*, the framers valued the right to jury trial in civil cases and intended that the right would remain “‘inviolat[e],’ *i.e.*, secure against violation or impairment[.]” 329 Or at 72. This means that neither the courts nor the legislature can reduce the jury's compensatory damages verdict when the evidence supports it. 329 Or at 75-77.

As *Lakin* made clear:

“If Article I, section 17 guarantees the right to have a jury assess noneconomic damages in cases to which it applies, the legislature may not interfere with that right by capping those damages.”

329 Or at 79.

In *M.K.F. v. Miramontes*, 352 Or 401, 287 P3d 1045 (2012), this court decided that jury trial rights apply to all civil actions seeking money damages; the right to a jury trial is not limited to historical common law claims. 352 Or at 426 (plaintiff's civil action for money damages was protected by rights to jury trial “even if it does not have a precise historical analog”). *Miramontes* confirms that plaintiffs' product defect and consortium claims are entitled to the protections of

the rights to jury trial in Article I, section 17 and Article VII (Amended), section 3.

Weyerhaeuser never argued otherwise below. Neither Weyerhaeuser nor its *amici* assert otherwise before this court. Instead, while recognizing that plaintiffs' claims were properly tried to a jury, Weyerhaeuser asserts that the jury's damages awards should be set aside and replaced by the legislature's limit on noneconomic damages. Weyerhaeuser now asserts that in **no** claim, statutory or common law, are the litigants entitled to the benefit of the jury's fact-finding. According to Weyerhaeuser, litigants are entitled to have a jury impaneled, but the jury's decisions about disputed facts can be ignored to be replaced, in this case, by a statutory limit on the amount of noneconomic damages.

Lakin should not be overruled. It was based on well-established Oregon jurisprudence interpreting the right to jury trial to mean that the jury must determine all issues of fact without interference from the courts or the legislature. *Lakin* was grounded in this court's constitutional methodology, and is entitled to continuing effect. *Couey v. Atkins*, 357 Or 460, ___ P3d ___ (2015) (“*Stare decisis* does not permit this court to revisit a prior decision merely because the court's current members may hold a different view than its predecessors about a particular issue.”); *State v. Ciancanelli*, 339 Or 282, 290, 121 P3d 613 (2005) (“A decent respect for the principle of *stare decisis* dictates that this court should assume that its fully considered prior cases are correctly decided.”); *see also*

Landau, *Some Thoughts About State Constitutional Interpretation*, 115 Penn St L Rev 837, 871 (2011) (constitutional decision is entitled to *stare decisis* if it applies the court's stated principles of constitutional interpretation and it represents "a considered and authoritative attempt to determine the meaning of a given constitutional provision.")

None of the problems this court identified in *Couey* as sufficient to warrant a reversal of constitutional precedent exist here. *See* 357 Or at 485-486 (identifying reasons). *Lakin's* interpretation of the right to jury trial was not dicta. *Lakin's* interpretation was grounded in the text and history of Article I, section 17. *Lakin's* holding was consistent with this court's earlier decisions prohibiting the legislature from reducing the jury's role in deciding disputed facts at trial. 329 Or at 69-77.

Moreover, this court has reaffirmed *Lakin* in subsequent decisions, including one less than two years ago. In *Klutschkowski v. PeaceHealth*, 354 Or 150, 311 P3d 461 (2013), the court applied *Lakin* to preclude reduction of the jury's noneconomic damages award pursuant to ORS 31.710 in a medical negligence case. 354 Or at 177. In *Jensen v. Whitlow*, 334 Or 412, 51 P3d 599 (2002), the court reaffirmed that *Lakin* limits legislative interference with the jury's damages awards in cases for which a jury trial is available. 334 Or at 422. In *DeMendoza v. Huffman*, 334 Or 425, 51 P3d 1232 (2002), the court decided that ORS 18.540

(1995), the statute requiring entry of judgment including the state as judgment creditor for a punitive damage award, did not interfere with the court’s judicial function to enter judgment consistent with the verdict. The court reasoned that “the distribution of punitive damages is not a matter within a jury’s discretion or, even, a matter that it considers.” 334 Or at 454. But the compensatory damages amount responsive to plaintiff’s harm **is** within the jury’s fact-finding function, and a legislative mandate to ignore a lawful verdict and enter judgment for a statutory amount does interfere with the right to jury trial. 334 Or at 447. *DeMendoza* thus reaffirmed the plaintiff’s constitutionally protected “right to receive an award that * * * fully compensate [plaintiffs] for all loss and injury to [them].” 334 Or at 447 (quoting *Lakin*; internal quotations omitted).³

³ The only inconsistencies in recent case law are the wrongful death cases, *Hughes v. PeaceHealth*, 344 Or 142, 178 P3d 225 (2008) (wrongful death verdict for medical negligence not protected from reduction by right to jury trial) and *Greist v. Phillips*, 322 Or 281, 906 P2d 789 (1995) (same for negligence causing vehicle crash). If not overruled, these cases can be distinguished by the unique origins of the claim for wrongful death: a purely statutory claim enacted with statutory limits on the type and amount of damages.

B. The statutory cap on noneconomic damages in ORS 31.710 violates the rights to jury trial.

The jury's compensatory damage assessment is a finding of fact within the sole province of the jury. *Lakin*, 329 Or at 73-74 (citing several authorities). Noneconomic damages are a necessary and long-established part of the jury's compensatory damages determination. *Id.*, 329 Or at 73; *Scott v. Sheperd*, 95 Eng Rep 1124 (K.B. 1773) (explicitly recognizing compensation for pain and suffering). And, as *Lakin* states, the noneconomic damage cap statute is a modern limitation on damages that had never been capped at common law. *Lakin*, 329 Or at 77.

Weyerhaeuser does not dispute these basic propositions. Weyerhaeuser Answering Brief on the Merits, at 11, 23-26. Rather, it seeks to re-name the right to jury trial as “procedural,” meaning, apparently, a right without consequence, or subject to legislative override. It also claims that when the legislature directs a damages amount contrary to the jury's compensatory award, it is justified as an application of law that can override the jury's finding of fact. *Id.*, at 10-11, 21-26, 32-35.

This analysis does not square with the constitutional delegation of fact-finding authority to the jury. The explicit directives in Article I, section 17 that the right to jury trial “remain inviolate” and in Article VII (Amended), section 3 that the right of trial by jury “shall be preserved” mean that decisions constitutionally

assigned to the jury must be decided by the jury and given effect. When the legislature previously tried to withdraw the jury's authority to decide damages in an insurance contract claim, this court held the statute violative of the right to jury trial. *Molodyh v. Truck Insurance Exchange*, 304 Or 290, 744 P2d 992 (1987) (overturning statute requiring an appraiser, not the jury, to set plaintiff's damages for fire loss in an insurance policy dispute). ORS 31.710 is similarly unconstitutional because it impairs the fact-finding function of the jury with regard to compensatory damages, a constitutional function that involves not just the process of jury deliberation, but "the full effect" of a jury's assessment of damages. *Lakin*, 329 Or at 78.

1. Substantive vs. procedural right – a false distinction

In *Miramontes*, this court examined what it described as "the substantive constitutional right to a jury trial" in relation to modern procedural rules that allow for the combined trial of law and equity cases. 352 Or at 421. Indeed, the court's extensive discussion of how federal and Oregon courts have attempted to reconcile the right to jury trial on law claims with judge decision-making in equity claims is a clear recognition that the jury trial rights guarantee to litigants not only the process for decision making but also the legal effect of the jury's decision.

For the right to a jury trial to provide its intended protections to individual liberty, the "full and intended effect" of the facts found by the jury must be

reflected in the judgment and the ultimate legal obligations between the parties.

Lakin, 329 Or at 77, 81; *see also* William Blackstone, *Commentaries on the Laws of England* 380 (1768) (“when once the fact is ascertained [by the jury], the law must of course redress it”). To ignore the jury’s assessment of damages is to eliminate a primary purpose of the right to a jury trial.

In *Blakely v. Washington*, 542 US 296, 306, 124 S Ct 2531, 2538-39, 159 L Ed 2d 403 (2004) (interpreting Sixth Amendment right to jury trial in criminal cases), the Court explained the substantive nature and effect of the jury’s role as constitutional fact-finder:

“That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”

542 US at 305-306.

The *Blakely* Court cited historical authorities in support of the power of juries. 542 US at 306. The Federal Farmer described the divided power function of the jury as “secur[ing] to the people at large, their just and rightful controul [*sic*] in the judicial department.” The Federal Farmer, *Letter XV* (Jan. 18, 1788), reprinted in 2 *The Complete Anti-Federalist* 315, 320 (H. Storing ed 1981). John Adams similarly explained that “the common people, should have as complete a control * * * in every judgment of a court of judicature” as they do in the legislature. John Adams, *Diary Entry* (Feb. 12, 1771), reprinted in 2 *Works of*

John Adams 252, 253 (C. Adams ed 1850)). Reflecting these views by those who wrote the federal constitution's jury trial guarantee, *Blakely* concluded: "The very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." 542 US at 308.

Early Americans believed that the jury uniquely controlled the domain of decisions that affect the rights of an individual citizen in civil and criminal trials and no government official or body was entitled to intrude upon that decision-making. Accordingly, a juror as a "fact-find[er]" is elevated to "a constitutional officer—the constitutional equal" to legislative, executive, and judicial officers. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 Suffolk U L Rev 67, 71 (2006). In Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 Tex L Rev 345 (1995), the author describes the role of civil juries in post-revolutionary era conflicts between debtors and creditors. *Id.* at 397-399. The author sees in the constitutional history of the federal Seventh Amendment "a preference for jury trial as the protector of individuals, even in the face of economic crisis." *Id.* at 236. "The historical response * * * was not to circumscribe the jury's determination of compensation but rather to enshrine the right to jury trial in the constitution." *Id.* at 237.

Jensen v. Whitlow, is not to the contrary. *Jensen* decided that the right to jury trial did not guarantee a jury trial when the legislature had entirely eliminated plaintiff's claim against individual public employees. But *Jensen* acknowledged that when

“the plaintiffs had the right to bring a civil action to which the right to a jury trial was attached, Article I, section 17, prohibited the legislature from interfering with or interrupting that right by imposing a cap on the amount of noneconomic damages that the jury could award.”

334 Or at 422.

2. Legislative power to abolish a claim does not include power to nullify jury trial rights.

Weyerhaeuser asserts that if the legislature has power to abolish a cause of action entirely, it must also have the power to deny an effective verdict in the viable civil law claims that remain. *Lakin* expressly rejected this argument. 329 Or at 78-79 (“the legislature's power to alter ‘laws’ in force in 1857 may be exercised only to the extent that it does not infringe on constitutionally-protected rights. If Article I, section 17, guarantees the right to have a jury assess noneconomic damages in cases to which it applies, the legislature may not interfere with that right by capping those damages.”) If the claim is not abolished and must be tried to a jury, as all involved agree is the case here, the constitution designates the jury as the proper factfinder. The legislature cannot deny the jury its constitutional power to adjudicate the facts in a viable claim. As the court

explained in *Sofie v. Fibreboard Corp.*, 112 Wn 2d 636, 771 P2d 711 (Wash 1989), even if the legislature has power to define the parameters of a cause of action and prescribe factors to take into consideration in determining liability, “[t]his is fundamentally different from directly predetermining the limits of a jury's fact-finding powers in relevant issues, which offends the constitution.” 112 Wn 2d at 666; 771 P2d at 727.

Many decisions entrusted to the jury are governed by legal standards and rules, yet the constitution guarantees a sphere of exclusive decisional authority for the jury. For example, one rule in which this jury was instructed directed damages awards that were supported by the evidence of the harms plaintiffs have sustained as a result of defendant’s fault. Tr 1677-1679. The jury complied with this instruction; plaintiffs’ damage awards were consistent with the law on which the jury was instructed, and were fully supported by the evidence. In cases such as this one, where plaintiffs’ right to try their claims to a jury is not in dispute, litigants are entitled to a trial in which the essential functions of jury trial are preserved, including giving effect to the jury’s assessment of the amount of damages required to compensate plaintiffs for their harms.

C. Other courts since *Lakin* recognize that the right to jury trial includes the right to effective jury fact-finding.

While several states invalidated cap statutes around the same time as *Lakin*, (see Amicus Br of U.S. Chamber of Commerce, et al., at 8, n 10, citing some of

these decisions), state supreme courts continue to find compensatory damages limits unconstitutional. In *Watts v. Lester E. Cox Med. Ctrs.*, 376 SW 3d 633 (Mo 2012), the Missouri Supreme Court overruled its 1992 decision in *Adams v. Children's Mercy Hosp.*, 832 SW 2d 898 (Mo 1992), and decided that the statutory limit on noneconomic damages violated the state constitutional right to jury trial. In *Adams*, the court had upheld a compensatory damages limit with a rationale that the application of the cap was a matter of law applied after the verdict, and did not interfere with the jury's constitutional task of deciding damages. *Adams*, 832 SW 2d at 907. In *Watts*, the court discussed the "four flaws" in this rationale – rejecting many of the same arguments Weyerhaeuser and *amici* offer here. 376 SW 3d at 642-644. In particular, the *Watts* court reasoned as follows:

“[I]f the action is a civil action for damages, then the right to a jury trial attaches and must ‘remain inviolate.’ * * * Because the constitutional right to a civil jury trial is contingent upon there being an action for damages, statutory limits on those damages directly curtail the individual right to one of the most significant constitutional roles performed by the jury – the determination of damages.”

376 SW 3d at 642. (Internal citation omitted).

The court also distinguished the legislature's authority to abolish a cause of action entirely, from its lack of authority to interfere with the right to jury trial in an existing cause of action. 376 SW 3d at 643. Further, the *Watts* court could not condone the cap statute because Missouri recognizes judicial remittitur. As the court explained, the remittitur process is intended to conform the damages award to

the evidence, as a cap statute does not. 376 SW 3d at 639. Of course, Oregon did away with judicial remittitur in 1910. So long as the evidence supports the verdict, as it unquestionably does here, the verdict cannot be set aside. *Woods v. Wickstrom*, 67 Or 581, 588, 135 P 192 (1913) (“no court can legally set aside the verdict or the judgment based upon it, unless the court can affirmatively say that there was no evidence to support it.”)

In *Atlanta Oculoplastic Surgery, P.C. v. Nestelhutt*, 286 Ga 731, 691 SE 2d 218 (Ga 2010), the Georgia Supreme Court struck down a noneconomic damages limit in medical negligence cases. Using the same reasoning as *Lakin*, -- the determination of compensatory damages is exclusively for the jury, noneconomic damages are a long-established component of total damages required to compensate the injured plaintiff -- the court concluded that the statute “clearly nullifies the jury’s findings of fact regarding damages and thereby undermines the jury’s basic function.” 286 Ga at 735; 691 SE 2d at 223. The court distinguished statutes allowing double or treble damages because they “do not in any way nullify the jury’s damages award but rather merely operate upon and thus affirm the integrity of that award.” 286 Ga at 737; 691 SE 2d at 224.

In *Lebron v. Gotlieb Memorial Hospital*, 237 Ill 2d 217, 930 NE 2d 895 (Ill 2010), the Illinois Supreme Court struck down a statutory cap on noneconomic damages in medical negligence claims as a legislative intrusion into judicial power.

In doing so, the court affirmed *Best v. Taylor Machine Works*, 179 Ill 2d 367, 689 NE 2d 1057 (1997), that decided, among other things, that a statutory damages limit imposed without regard to the evidence in the case was “arbitrary,” and “undermined the statute’s stated goal of providing consistency and rationality to the civil justice system.” 237 Ill 2d at 233; 930 NE 2d at 905. Certainly, a reduction of the Rains’ noneconomic damages to \$500,000 each for their life-shattering injuries is arbitrary.

In a decision cited in *Lakin*, 329 Or at 74, n 8, the U.S. Supreme Court interpreted the Seventh Amendment to protect the jury’s power to determine damages – even statutory damages – for copyright infringement, a claim traditionally tried to juries. In *Feltner v. Columbia Pictures TV*, 523 US 340, 118 S Ct 1279, 140 L Ed 2d 438 (1998), the court stated:

“The right to a jury trial includes the right to have a jury determine the amount of statutory damages, if any, awarded to the copyright owner. It has long been recognized that ‘by the law the jury are judges of the damages.’ *Lord Townshend v. Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-995 (C. P. 1677). Thus in *Dimick v. Schiedt*, 293 U.S. 474, 79 L. Ed. 603, 55 S. Ct. 296 (1935), the Court stated that ‘the common law rule as it existed at the time of the adoption of the Constitution’ was that ‘in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.’”

523 US at 353 (some internal quotation marks and citations omitted).

D. Article VII (Amended), section 3 also protects the jury's fact-finding.

Article VII (Amended), section 3 reasserted the right to jury trial in the 20th century. In addition to “preserv[ing]” the right to jury trial, it expressly strengthened the jury’s fact-finding responsibility by prohibiting a reexamination of any facts found by a jury where there is evidence to support the jury’s verdict. *Cornelison v. Seabold*, 254 Or 401, 407, 460 P2d 1009 (1969) (“Section 3, Art VII, in effect provides that a jury’s findings are final if there is any evidence to support the findings.”) Article VII (Amended), section 3 is an independent source that protects the jury’s role as sole fact-finder. The statutory damage limit in ORS 31.710 is in direct conflict with this enunciation of the jury trial right.

CONCLUSION

The trial court’s judgments giving effect to the jury’s damage awards should be affirmed.

Respectfully submitted this 30th day of July 2015.

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CERTIFICATE OF COMPLIANCE

I certify that this brief, including footnotes, is in Times New Roman 14 point font. The word count of this brief is 3,893 words, and is in compliance with ORAP 9.17(2)(c) and ORAP 5.05(2)(b)(i)(E) which limits a reply brief on the merits to 4,000 words.

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Review Kevin and Mitzi Rains

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the date stated below I filed the foregoing **REPLY**

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I further certify that I served a true copy of the same document by the
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