IN THE SUPREME COURT OF THE STATE OF OREGON

AMBER KENNEDY,

Plaintiff-Respondent,
Petitioner on Review,

vs.

KELSEY C. WHEELER,

Defendant-Appellant,
Respondent on Review,

and

KATIE HALL,

Defendant.

Yamhill County Circuit Court
Court No. CV080512

Court of Appeals No. A149019

Supreme Court No. S061836

DEFENDANT WHEELER'S RESPONSE BRIEF ON THE MERITS

Petition for Review From a Decision of the Court of Appeals
On Appeal from the Yamhill County Circuit Court
Judgment Entered June 14, 2011
The Honorable Carroll J. Tichenor, Circuit Court Judge

Opinion Filed: August 28, 2013
Author of Opinion: Duncan, J.
Concurring Judges: Schuman, P. J., Wollheim, J.

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RESPONSE BRIEF ON THE MERITS

Introduction

This matter involves a personal injury case which, after a trial, resulted in a jury verdict in favor of plaintiff on her negligence claim awarding her economic and noneconomic damages against defendant Kelsey C. Wheeler. Before the case went to the jury, they were instructed by the court that the same nine jurors must agree on each answer to support the verdict, and the verdict form stated that the same nine jurors must agree on each of the questions the jury was required to answer in regard to plaintiff's negligence claim. Plaintiff made no objection to either the instruction or the verdict form.

After the verdict was given, but before the jury was discharged, a jury poll revealed that only eight jurors concurred on negligence, economic and noneconomic damages on plaintiff's negligence claim. Over defendant's objection, however, the trial court received the verdict and a judgment based on that verdict was entered.

On appeal, the court of appeals held that, because of the jury instruction given by the court and the language of the verdict form, the law of the case doctrine required the same nine jurors to agree on all questions required to support the verdict, that the verdict therefore violated Article VII (Amended), section 5(7) of the Oregon Constitution, and was therefore invalid. The court

then reversed the judgment in favor of plaintiff and remanded the case for a new trial.

The decision of the Oregon Court of Appeals is correct and should not be reversed or altered.

A. Legal Questions and Proposed Rules of Law on Review

Question 1: Does the law of the case doctrine apply in this case, requiring the same nine jurors to concur on liability, economic damages and noneconomic damages as to plaintiff's negligence claim against defendant Wheeler, to result in a valid verdict on that claim?

Proposed Rule of Law: The trial court instructed the jury, and the verdict form directed, that the same nine jurors were required to concur on all questions required to be answered to support plaintiff's negligence claim, and plaintiff did not object to either. Therefore, the law of the case in this matter was that the same nine jurors must agree on liability, economic damages and noneconomic damages as to plaintiff's negligence claim against defendant Wheeler to result in a valid verdict on that claim.

Question 2: Under Oregon law, are the same nine jurors required to concur on liability, economic damages and noneconomic damages in order to render a valid verdict on a negligence claim?

Proposed Rule of Law: Oregon Constitution Article VII (Amended), section 5(7) and ORCP 59 G(3) require that the same nine jurors concur on

liability, economic damages and noneconomic damages in order to render a valid verdict on a negligence claim.

B. Statement of Facts.

Plaintiff's claim against defendant Wheeler in this matter is for negligence arising out of a motor vehicle accident. Plaintiff's complaint alleges that defendant Wheeler's negligence caused her non-economic damages of $400,000, and economic damages of $85,804.94.

Trial commenced on April 26, 2011. At the close of evidence on the fourth day of trial, the jury was given instructions, including an instruction that "[a]t least the same nine jurors must agree on each answer unless the verdict form instructs you otherwise as to a particular question." The jury was then sent out to deliberate, after which time it returned with what appeared to be a verdict in favor of plaintiff against defendant Wheeler.

The completed verdict form, as it related to plaintiff's claim against defendant Wheeler, stated as follows:

"For questions 1 and 2, at least the same nine jurors must agree on each of the questions that you answer.

> We, the jury, find:
>
> 1. Was defendant Wheeler's negligence a cause of damage to plaintiff?
>
> ANSWER: *12* (Yes or No)
>
> If your answer to question 1 is "yes," proceed to question 2.

If your answer to question 1 is "no," proceed to question 3.

2. What are plaintiff's damages resulting from defendant Wheeler's negligence?

ANSWER: Economic Damages $ 65,386.48

Noneconomic Damages $ 300,000.00

. . .

/s/ Charles J. Martin
Presiding Juror"

Immediately upon the reading of the verdict, counsel for defendant Wheeler requested that the court poll the jury pursuant to ORCP 59G(3). The poll demonstrated that all twelve jurors agreed that defendant Wheeler's negligence was a cause of damage to plaintiff. However, the jury poll showed that the same nine jurors did not agree with both the economic and noneconomic damages awarded against defendant Wheeler. Specifically, the same nine jurors that agreed on the economic damages (Jurors 2, 4, 5, 6, 7, 8, 9, 10, 11, and 12) did *not* agree on the non-economic damages portion (Jurors 1, 4, 5, 6, 7, 8, 9, 10, and 11). Instead, only *eight* of the jurors agreed on the amount of both kinds of damages (Jurors 4, 5, 6, 7, 8, 9, 10, and 11). In fact, it was undisputed that only eight jurors agreed on liability, economic damages and noneconomic damages.

Immediately after the polling was completed, counsel for defendant Wheeler brought to the court's attention the deficiency in the number of jurors

in agreement as to the damages portion of the verdict. However, the court did not require the jury to deliberate further, and notwithstanding defendant Wheeler's objections, the court received the verdict and discharged the jury. After the jury was discharged, defense counsel again raised the objection to the validity of the verdict in light of only eight jurors being in agreement as to the damages awarded against her. Despite defendant Wheeler's objections, the trial court stated that the verdict had been accepted, and it was thereafter filed and entered by the court on May 2, 2011.

On May 4, 2011, defendant Wheeler filed her Objections to Judgment and Motion for New Trial. That document objected to entry of the General Judgment in this matter, and moved for a new trial, on the grounds that the judgment was based on an invalid jury verdict. The court overruled the objections and denied the motion for new trial.

On June 14, 2011, the trial court entered a General Judgment based on that verdict, awarding plaintiff $65,386.48 in economic damages and $300,000 in noneconomic damages against defendant Wheeler.

C. Summary of Argument

The trial court instructed the jury in this matter, and the verdict form stated, that all questions required to be answered to support plaintiff's negligence claim against defendant Wheeler must be concurred on by the same nine jurors to render a valid verdict on that claim. Plaintiff did not object to the

instruction or verdict form. Therefore, those instructions became the law of the case. Because the same nine jurors did not concur on the questions of liability, economic damages and noneconomic damages, the verdict was invalid.

Oregon law has long required, through Oregon Constitution Article VII (Amended), section 5(7) and ORCP 59 G(3), that the same nine jurors must concur on the issues of liability, economic damages and noneconomic damages to render a valid verdict on a negligence claim. Plaintiff's argument that the same nine jurors are not required to concur on economic and noneconomic damages because they are "separate and independent" issues fails, because those issues are interdependent under Oregon law.

D. Argument

A) The court of appeals' decision in this matter is correct.

The court of appeals in this matter held that:

> "because the court gave the jury instructions and a verdict form that indicated that at least the same nine jurors were required to agree as to economic and noneconomic damages, that became the law of the case, and the court erred in receiving the jury's verdict when only the same eight jurors agreed on liability, economic damages, and noneconomic damages. We therefore reverse and remand."

Kennedy v. Wheeler, 258 Or App 343, 344, 309 P.3d 196 (2013). This is the correct decision under the circumstances of this case.

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1) **The court of appeals properly applied the "law of the case" doctrine in deciding this matter.**

The court of appeals held that because the jury in this matter was instructed, and the verdict form stated, that the same nine of them must concur on all questions regarding liability, economic damages and noneconomic damages, and because those instructions were not objected to, those instructions became the "law of the case." *Id.* at 344, 349. Because that was the law of the case, the court held that the verdict rendered by the jury in this matter was in violation of Article VII (Amended), section 5(7) of the Oregon Constitution, and therefore invalid. *Id.* at 349-50. Thus, the "law of the case" in the trial court was that, in order to constitute a valid and constitutional verdict under Article VII (Amended), section 5(7) of the Oregon Constitution,[1] and ORCP 59 G(3), the same nine jurors were required to concur on the issues of liability, economic damages and noneconomic damages in this matter.

The Oregon Supreme Court has held that jury instructions that are not objected to become the law of the case. *Fulton Ins. Co. v. White Motor Corp.*, 261 Or 206, 223 n. 5, 493 P2d 138 (1972). In *Fulton Ins.*, this Court stated that

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[1] Article VII (Amended), section 5(7) of the Oregon Constitution requires the concurrence of three-fourths of the jury to render a verdict in civil cases. *Shultz v. Monterey*, 232 Or 421, 424, 375 P2d 829 (1962)(citing *Clark v. Strain*, 212 Or 357, 364, 319 P2d 940 (1958)); *see also* ORCP 59 G(3)(containing identical language). In regard to a 12-person jury, this means that not less than nine jurors must agree on all issues determined by the verdict. *Id.* A verdict concurred in by less than three-fourths of the jury is unconstitutional, and therefore invalid. *Id.* at 424-25; *Clark*, 212 Or at 360.

an instruction that instructed a jury regarding a statute set forth an interpretation of the statute that had been disapproved by the Supreme Court. However, the Court stated that because that was the jury instruction given and no one objected to it, it became the "law of the case." *Id.* Indeed, the Oregon Supreme Court has long held that "[i]t is settled law that the charge of the court to the jury, without objections or exceptions thereto, whether right or wrong, becomes the law of the case." *Columbia Digger Sand & Gravel Co. v. Ross Island Sand & Gravel Co.,* 145 Or 96, 108-09, 25 P2d 911 (1933)(citing *Tou Velle v. Farm Bureau Co-op Exch.,* 112 Or 476, 229 P. 83, 1103 (1924)). Put differently, the rule as stated in an instruction, to which both parties agreed, became binding upon both of them as the "law of the case." *Wampler v. Sherwood,* 281 Or 261, 267, 574 P2d 319 (1978). The "law of the case" is binding on the parties both in the trial court and in the appellate courts. *See Fulton Ins.,* 261 Or 206; *Columbia Digger Sand & Gravel,* 145 Or 96.

In accordance with the above, the court of appeals in this matter correctly ruled that the law of the case is that, to constitute a valid and constitutional verdict under Article VII (Amended), section 5(7) of the Oregon Constitution and ORCP 59 G(3), the same nine jurors were required to concur on the issues of liability, economic damages and noneconomic damages. Because only eight jurors concurred on those questions, the court of appeals correctly held that the verdict was in violation of that provision and therefore invalid.

2) <u>The case was properly decided based on the law of the case doctrine; therefore, the court of appeals properly declined to conduct constitutional analysis regarding Article VII (Amended) section 5(7) of the Oregon Constitution.</u>

This Court has long held that Oregon courts, including the supreme court, "will not decide constitutional questions if the case can be properly determined on other grounds." *State v. Franzone,* 243 Or 597, 601, 415 P2d 16 (1966).

As stated above, the court of appeals properly decided this case based on the law of the case doctrine. Therefore, the court properly declined to conduct constitutional analysis regarding Article VII (Amended), section 5(7) of the Oregon Constitution. As such, the court of appeals' decision is correct, and this Court should affirm that decision.

B) Plaintiff's arguments that the Court of Appeals' decision is incorrect and must be reversed have no merit.

1) <u>The verdict was not valid.</u>

The Oregon Supreme Court has already clearly held that to render a valid verdict on a particular claim under the Oregon Constitution, the same nine jurors must concur on all issues determined by the verdict, which on a negligence claim includes liability, economic damages and noneconomic damages. *Clark,* 212 Or at 366; *Shultz,* 232 Or at 424; *Munger v. S.I.A.C.,* 243 Or 419, 422, 414 P2d 328 (1966); *Sandford v. Chev. Div. Gen. Motors,* 292 Or 590, 613, 642 P2d 624 (1982). *See also State v. Hazelett,* 8 Or App 44, 49, 492 P2d 501 (1972); *Congdon v. Berg,* 256 Or App 73, 79, 299 P3d 588

(2013)(same nine jurors must agree on liability and "amount of damages," "amount of damages" includes answers to both amount of economic and amount of noneconomic damages).

Plaintiff argues that the same nine jurors did not need to concur on liability, economic and noneconomic damages to render a valid verdict because economic and noneconomic damages "are not interdependent – they are separate and independent." Pl. Br., p. 7. This argument fails.

As stated above, this Court has already held that on a negligence claim, the same nine jurors must concur on liability, economic damages and noneconomic damages to render a valid, constitutional verdict. Implicit in those holdings is the finding that economic damages and noneconomic damages are interdependent issues, not separate and independent. This is confirmed by the Court's statement that the same nine jurors must concur on all elements required to be determined by the verdict, which includes the "measure of damages." *Clark,* 212 Or at 366. The "measure of damages" on a negligence claim necessarily includes amounts for both economic and noneconomic damages. *See Congdon,* 256 Or App at 79. Thus, this Court has held that economic and noneconomic damages on a negligence claim are interdependent elements of a verdict on that claim, not separate and independent as plaintiff suggests.

Plaintiff cites three Oregon cases that she states support her argument that economic and noneconomic damages are separate and independent. Those cases, however, do not help plaintiff.

In *Veberes v. Knappton Corp.*, 92 Or App 378, 759 P2d 279 (1988), the court reconfirmed the rule that all elements of a particular claim for relief, *i.e.,* liability, causation and amount of damages on that claim, must be concurred in by the same nine jurors, but held that *two separate and independent claims for relief* (in that case, a claim for negligence, and a claim for unseaworthiness) need not be agreed upon by the same nine jurors. *Id.* at 381-82. Thus, *Veberes* does not help plaintiff, but instead reinforces defendant's argument. Similarly, in *Eulrich v. Snap-On Tools Corp.*, 121 Or App 25, 853 P2d 1350 (1993), the court stated that the law "requires that the same nine jurors decide all elements on a single claim," but held that the same nine jurors did not need to agree on punitive damages awarded on *separate claims for relief. Id.* at 43-44. Thus, *Eulrich* does not help plaintiff.

Further, plaintiff's reliance on *Schwarz v. Phillip Morris, Inc.,* 348 Or 442, 235 P3d 668 (2010) is misplaced. In *Schwarz,* after defendant was found liable on claims for Strict Product Liability, negligence and fraud, the Court remanded the case for a retrial only on the issue of punitive damages. This Court has already identified punitive damages as being independent of

negligence, causation and compensatory damages on a negligence claim. *See Clark,* 212 Or at 365. Thus, *Schwarz* does not help plaintiff.

Lastly, the three Oregon criminal cases plaintiff cites discuss the consequences of "inconsistent verdicts" in a criminal case, not whether nine jurors had to concur in all parts of a plaintiff's claim against defendants. Thus, those cases are not helpful. *See State v. Mendez*, 308 Or 9, 774 P2d 1082 (1989); *Godin v. Hill*, 184 Or App 71, 55 P3d 523 (2002); *State v. Watkins*, 67 Or App 657, 679 P2d 882 (1984).

In sum, to render a verdict in this case that complies with the requirements of the Oregon Constitution and ORCP 59 G(3), the same nine jurors were required to agree on negligence, causation, economic damages and noneconomic damages as to plaintiff's negligence claim against defendant Wheeler. The same nine jurors did not concur on all of those elements. Therefore, the verdict was unconstitutional, and therefore invalid.

2) <u>The trial court did not properly uphold a constitutional verdict.</u>

As stated above, the court of appeals properly ruled that the law of the case doctrine governed this case, and properly reversed the trial court judgment on that basis. Further, as also stated above, the Oregon Constitution requires that the same nine jurors concur on all elements required to render a verdict on a negligence claim, which include negligence, causation, economic damages

and noneconomic damages. Accordingly, the trial court, which instructed the jury in accordance with that rule, properly instructed the jury as to their voting duties in this matter, and the verdict, which was not rendered in accordance with those requirements, was unconstitutional. Thus, plaintiff's argument that the trial court improperly instructed the jury but properly upheld a constitutional verdict fails.

Plaintiff next argues that the "law of the case" doctrine applies only to substantive law, but not to procedural and voting rules.

Oregon courts nowhere state that the law of the case doctrine applies only to tenets of substantive law, not procedural rules. Further, contrary to plaintiff's assertion, Oregon case law shows that that doctrine *does apply* to procedural rules, not just substantive law. *See Tou Velle v. Farm Bureau Co-Op. Exch.,* 112 Or 476, 480-81, 229 P 83 (1924)(Court's instruction regarding procedure for awarding damages, unobjected to, became law of the case); *Mays v. Vejo,* 224 Or App 426, 430, 198 P3d 943 (2008)(court's instruction regarding rules for awarding economic and noneconomic damages, unobjected to, became law of the case); *Congdon,* 256 Or App at 80-81 (court's instruction that "same nine" jurors must agree on all elements required to render verdict, unobjected to, became law of the case). *See also Wallace v. Weaver,* 133 P 1099, 1102 (Mont. 1913)(Court's instructions regarding procedure for awarding damages, unobjected to, became law of the case); *Whitney v. Northwest Greyhound Lines,*

Inc., 242 P2d 257, 258 (Mont. 1952)(instructions regarding procedural rules, unobjected to, became law of the case). Thus, plaintiff's argument that the law of the case doctrine does not apply in this case has no merit.

3) The uniform jury instruction on verdicts in civil cases does not prevent jurors from carrying out constitutional duties or deprive them of constitutional powers.

As is evident from the above analysis, the Uniform Jury Instruction and verdict form referred to by plaintiff properly set forth Oregon law regarding jury voting requirements. Therefore, plaintiff's arguments in this regard are misplaced.

4) Plaintiff's argument that deference should be given to a trial judge's ruling as to whether an objection was timely made must be rejected.

Plaintiff argues that great deference should be given to a trial judge's ruling regarding whether a timely objection was made to a claimed error. Plaintiff, however, cites no authority to support this proposal, nor could any authority be found addressing that issue. Further, whether a particular claimed error was properly preserved is an issue for the appellate courts. To give the suggested deference to the trial judge would result in improper interference by trial courts into the power of the appellate courts to review cases in that, among other things, trial judges could make such statements in an attempt to avoid review and reversal of his/her decisions. For these reasons, this argument must be rejected.

Moreover, the record in this case clearly shows that defendant's objection to the verdict was properly preserved. *See* Appellant's Opening Brief and Excerpt of Record, pp. 6-8; Appellant's Reply Brief, pp. 1-3.

C) To the extent the court sees fit to re-examine the law of the case doctrine, that rule should remain unchanged.

As stated above, this Court has held that the "law of the case" doctrine governs cases similar to this one since 1924. *See Tou Velle,* 112 Or 476. This application of that doctrine is a general rule applied in almost every jurisdiction. *See, e.g., Gifford-Hill-Western, Inc. v. Anderson,* 496 P2d 501, 503 (Wyo. 1972)(it is universal rule that instruction given to jury without objection becomes law of the case and is not open to review by appellate court); *Owens-Illinois, Inc. v. Thomas Baker Real Estate, Ltd.,* 379 SE2d 344, 346 (Va. 1989)(instructions given without objection become the law of the case and thereby bind the parties in the trial court and the appellate courts on review); *Whitney,* 242 P2d at 258 (Mont.)(by failing to object to giving of instruction plaintiff consented to the rules therein announced and will not be heard on appeal to urge a theory in conflict therewith). *See also Seattle v. Harclaon,* 354 P2d 928, 929 (Wash. 1960); *Hoskinson v. City of Iowa City,* 621 NW2d 425, 430 (Iowa 2001); *State v. Lee,* 364 NW2d 544, 545 (S.D. 1985); *Burrel Collins Brokerage Co. v. Hines*, 230 SW 371 (Mo. 1921); *Salcedo v. Toepp,* 696 NE2d 426 (Ind. App. 1998); *Aultman v. Reams,* 4 NW 81, 82 (Neb. 1880).

Indeed, this application of that doctrine has been applied by the courts for many years, and for good reason, which was explained early on by the Montana Supreme Court.

> "It needs no authority, then, to say that the jury is bound to take the law from the court. . . . And when the law is announced by the court it is the law of the case until overruled by a higher authority. It follows, then, that a verdict in direct conflict with the law of the court is a verdict against the law. . . . So far as the jury is concerned, there is no such thing as the charge of the judge being contrary to law, because whatever may be his charge, it is the law to them. . . . It matters not if the instruction disobeyed be itself erroneous in point of law. It is, nevertheless, binding upon the jury, who can no more be permitted to look beyond the instruction of the court to ascertain the law than they would be allowed to go outside of the evidence to find the facts of the case. . . . If the contention of appellant is correct, the time of this court in hearing future appeals will be devoted to determining whether the court or the jury were right in their views of the law in the trial of the cause in the lower court. Authority or no authority, we cannot give our sanction to a practice that will lead to such results. Such a course would ultimately result in overturning our system of keeping separate and distinct the powers and duties of courts and juries, confining each to its own proper province, in the degradation of the courts, and confusion and chaos in the administration of the law. Such calamities are much more to be deplored than the inconvenience and costs of a new trial in cases where juries usurp the powers of the court."

Wallace v. Weaver, 133 P 1099, 1102 (Mont. 1913)(quoting *Murray v. Heinze,* 43 P. 714). The Court in *Wallace* goes on to state:

> "Any other rule than that announced above would confer upon the jurors in every instance the authority to determine the law of the case as well as the facts; and we are not prepared to go to that extreme limit, even for the sake of preventing the reversal of a judgment."

Id.

Thus, it has long been a general rule both in Oregon and across the country that a jury instruction given without objection becomes the law of the case, and error regarding such instruction will not be considered on appeal. The

reason for the rule is that to allow jurors to ignore the court's instructions effectively allows the jury to decide the *law and* the facts of the case. Research reveals no contrary treatment by any courts. Accordingly, should the Court reexamine that rule in this case, the rule should remain unchanged.

D) To the extent the Court sees fit to re-examine the issue of whether Article VII (Amended), section 5(7) of the Oregon Constitution and ORCP 59 G(3) require that the same nine jurors agree on liability, economic damages and noneconomic damages to sustain a verdict on a negligence claim, that rule must remain as it is currently interpreted under Oregon law.

1) Oregon Law currently requires that the same nine jurors concur on liability, economic damages and noneconomic damages to sustain a verdict on a negligence claim.

As stated above, Oregon courts have long interpreted Article VII (Amended) section 5(7) of the Oregon Constitution and ORCP 59 G(3) to require that the same nine jurors must concur on liability, economic damages and noneconomic damages to sustain a verdict on a negligence claim.

2) The legislative intent behind Article VII (Amended), section 5(7) of the Oregon Constitution and ORCP 59 G(3) is that the same nine jurors must concur on all questions required to sustain a verdict on a particular claim; therefore, those provisions must be enforced in accordance with that intent until a different intent is expressed by the legislature.

a) The intent behind Article VII (Amended), section 5(7) of the Oregon Constitution was to require that the same nine jurors concur on all elements required to support a verdict on a particular claim.

The Oregon Constitution was enacted in 1857. The language "[i]n civil cases three-fourths of the jury may render a verdict" was added to the

Constitution by initiative petition in 1910. That language has remained unchanged in the Oregon Constitution since that time. *See* Oregon Constitution, Article VII (Amended), section 5(7); *Freeman v. Wentworth & Irwin,* 139 Or 1, 16, 7 P2d 796 (1932).

In interpreting voter-initiated constitutional provisions, the goal of the court is to discern the intent of the voters. *Li v. State of Oregon,* 338 Or 376, 388, 110 P3d 91 (2005). Once that intent is ascertained, the court's inquiry into the meaning of the provision is at an end, and the court interprets the provision to have the meaning so determined. *PGE v. BOLI,* 317 Or 606, 612, 859 P2d 1143 (1993). The process of interpreting a constitutional provision is the same as the process used to interpret statutory provisions in Oregon. *Ecumenical Ministries of Oregon v. Oregon State Lottery Comm.,* 318 Or 551, 560, 871 P2d 106 (1994).

The analysis begins with the text and context of the provision at issue. *PGE*, 317 Or at 611. In considering the text, words cannot be inserted or omitted, and words of common usage are given their plain and ordinary meaning. *Id.* The context of a statute includes other provisions of the same statute and other related statutes, in addition to judicial authorities construing the same or similar language. *Id.*

If the intent is clear from the text and context, further inquiry is unnecessary. *Id.*

In the present case, the relevant text states "in civil cases three-fourths of the jury may render a verdict." Thus, to determine the intent of the voters in enacting that provision, the first step is to examine the text.

The phrase "three-fourths of the jury may render a verdict" implies that the same three-fourths of the jury must concur on all questions required to be answered to support a verdict. That term is not conducive to an interpretation that states that a *different* three-fourths of the jury may agree on different parts of the verdict. Also, Oregon courts have interpreted "verdict" to mean the final outcome on a particular claim for relief, and incorporating all questions required to be answered by the jury to arrive at that verdict. *Clark,* 212 Or at 364-68, *Shultz,* 232 Or at 424-25, *Veberes,* 92 Or App at 381-83; *Eulrich,* 121 Or App at 44.

The next step is to review that language in the context of related statutes and judicial authorities construing the same or similar language.

The same language present in Article VII (Amended), section 5(7) was later incorporated into ORS 17.355 and ORCP 59 G(3), and the legislative intent behind the enactment of those rules was that the same nine jurors be required to concur on all elements required to support a verdict on a particular claim. *See infra.* Further, all Oregon cases which have interpreted this provision interpret it to mean that the same nine jurors must concur on all elements required to support a verdict on a particular claim for relief. *See*

Freeman, 139 Or 1, 16-17; *Clark,* 212 Or at 366; *Shultz,* 232 Or at 424; *Munger,* 243 Or at 422; *Sandford,* 292 Or at 613.

Thus, the text of Article VII (Amended), section 5(7), read in context, clearly indicates that that provision requires the "same nine" jurors to concur on all questions required to support a verdict. Therefore, further analysis is unnecessary.

In sum, it is apparent that the intent of the voters in enacting Article VII (Amended), section 5(7) of the Oregon Constitution was to require the same nine jurors to concur on all questions required to be answered to support a verdict on a particular claim. Since enactment of that provision, and in light of all the case law interpreting that provision, the Oregon Legislature could have sought to change that rule had it so desired. However, no such efforts have ever been undertaken.

b) The intent of the legislature in enacting ORS 17.355 and ORCP 59 G(3) was to require that the same nine jurors concur on all elements required to support a verdict on a particular claim.

In interpreting the meaning of a statute or a court rule, the Court uses the same rules of construction used to interpret constitutional provisions. *See Ecumenical Ministries,* 318 Or at 560. The objective of the court is to determine the intent of the legislature in enacting the statute or rule, and to

enforce the statute or rule consistently with that intent. *See PGE,* 317 Or at 612.

As stated above with regard to Article VII (Amended), section 5(7), the plain language of ORS 17.355 and ORCP 59 G(3) indicates that the legislature intended that statute and rule to require that the same nine jurors concur on each element required to support a verdict. Considering the context in which that statute and rule were enacted confirms this interpretation.

In reviewing statutory or rule language "in context," the court presumes that the legislature enacts statutes or rules in light of existing judicial decisions that have a direct bearing upon those statutes or rules. *Weber & Weber,* 337 Or 55, 67, 91 P3d 706 (2004).

In 1953, the Oregon Legislature enacted ORS 17.355, which adopted, verbatim, the relevant language of Article VII (Amended), section 5(7). Thus, that statute was enacted after *Freeman* had interpreted that language to require the same nine jurors concur on all elements required to support a verdict on a claim. Therefore, the legislature in enacting ORS 17.355 must have intended the language have the meaning attributed to it in *Freeman.*

After the enactment of ORS 17.355, the Oregon Supreme Court decided *Clark, Shultz, Munger* and *Sandford,* specifically interpreting the language in both Article VII (Amended), section 5(7) and ORS 17.355, consistently with

Freeman, to mean that the same nine jurors were required to concur on all issues required to support a verdict on a particular claim.

In 1979, the relevant language of ORS 17.355 was incorporated verbatim into ORCP 59 G(3).[2] That rule has been unchanged since that date. Again, it must be presumed that the legislature enacted that rule in light of the Supreme Court's interpretation of that language in *Freeman, Clark, Shultz, Munger* and *Sandford,* and thus intended the subject language to have the meaning attributed to it in those cases.[3]

In sum, as shown above, in enacting ORS 17.355 and ORCP 59 G(3), it is clear that the intent of the legislature was that the same nine jurors must concur on all elements required to support a verdict on a particular claim. If the legislature had seen fit at any time to clarify the language of ORS 17.355 or ORCP 59 G(3) in order to change the existing interpretation, the enactment of those provisions was the opportunity to do so. Instead, the rule has not been altered in any way.

3) <u>The "same nine" rule is the better rule.</u>

Plaintiff expresses dissatisfaction with the "same nine" rule used in Oregon. Courts considering this issue have fallen into two groups: those who

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[2] ORS 17.355 was then repealed.

[3] It is noteworthy that the "any majority" rule was being recognized by courts in 1969, *see Ward v. Weekes*, 258 A2d 379 (N.J. 1969); *McChristian v. Hooten*, 436 SW2d 844, 849 (Ark. 1969), so it must be presumed that the legislature was aware of that alternative interpretation of the language but chose not to use it.

follow the "same juror" rule, and those who follow the "any juror" or "any majority" rule. *O'Connell v. Chesapeake and Ohio R. Co.,* 569 NE.2d 889, 894-95 (Ohio 1991). The "same juror" rule requires that the same nine jurors concur on all questions required to sustain a verdict. *Id.* at 895. Under the "any juror" or "any majority" rule, a verdict is valid so long as nine jurors support each question required to sustain the verdict, but they need not be the same nine jurors which agree on each question. *Id.* at 896.

As stated above, Oregon has long followed the "same juror" rule. *See Clark,* 212 Or 357, *Shultz,* 232 Or 421, *Munger,* 243 Or at 422 and *Sandford,* 292 Or 624. Further, courts have held that the "same juror" rule is the more rational, analytically sound and well-reasoned rule. *O'Connell,* 569 NE.2d at 897; *ESCA Corp. v. KPMG Peat Marwick,* 939 P2d 1228, 1232 n. 12 (Wash. App. 1997). For example, in adopting the "same juror" rule, the Ohio Supreme Court in *O'Connell* stated that

> "[i]t is illogical to require, or even allow, a jury to initially find a defendant has not acted causally negligently, and then subsequently permit this juror to assign some degree of fault to that same defendant."

O'Connell, 569 NE.2d at 897.

Similarly, in the present case, it would not make sense to allow a juror who does not find the defendant to be liable in negligence to then assess damages against that defendant. Accordingly, the majority of courts

considering whether the "same juror" rule applies in circumstances similar to this case, *i.e.,* whether the same nine jurors must concur on liability and damages, have held the same juror rule applies. *Klanseck v. Anderson Sales & Service, Inc.,* 356 NW2d 275 (Mich. App. 1984); *Shultz,* 232 Or 421, 424 (1962); *Clark,* 212 Or 357 (1958); *Bernard v. Seyopp Corp.,* 202 NYS.2d 707 (1960); *Zintak v. Perchik,* 471 NW2d 522 (Wis. App. 1991); *Boyer v. Perigo,* 979 SW2d 953 (Mo. App. 1998); *McCauley v. Charter Oak Fire Ins. Co.,* 660 SW2d 863 (Tex. 1984).

One of the problems created by the "any majority" rule is illustrated by the court in *Boyer v. Perigo*, 979 SW2d at 957:

> "If any nine jurors could agree on liability and any nine jurors could agree on damages, a plaintiff could ultimately prevail by convincing only six persons unanimously of her position with regard to *both* liability and damages. To illustrate this point, suppose that in a negligence case against a single defendant, only juror numbers one through nine agreed that the defendant was liable, while only juror numbers four through twelve agreed that the defendant should pay $50,000 in damages. Ultimately, under an 'any nine jurors' rule, the plaintiff would prevail, because nine jurors agreed that the defendant was liable and nine jurors agreed that the plaintiff should recover $50,000 in damages. Yet, the plaintiff only convinced six jurors unanimously (i.e, juror numbers four through nine) of *both* the defendant's liability and the plaintiff's right to recover $50,000 in damages. Thus, in such a case, the 'any nine jurors' rule serves to alter the plaintiff's burden from convincing a unanimous group of at least nine to convincing a unanimous group of only six. The 'same nine jurors' rule, on the other hand, requires a plaintiff to convince at least a group of nine jurors unanimously of his or her case."

Plaintiff argues that jurors are "disenfranchised" by the "same juror" rule in that the "same juror" rule does not allow a juror to participate in all issues on a case. This argument fails. As stated in *O'Connell*,

> "the initial . . . question is whether the defendant is causally negligent for the injury to the plaintiff. . . . The full assembly of jurors participates in these determinations and, thereafter, those jurors who find a party to be causally negligent then refine this determination by apportioning fault to the respective parties. Because the full jury undertakes the initial determination as to negligence and proximate cause, neither party is deprived of having all of the jurors deliberate the material issue of negligence and proximate cause. . . . [The further mission of allocating] fault is a method through which a juror clarifies his or her finding that a party is causally negligent for the injury sustained. As such, the allocation of fault *flows from* the adjudication of negligence and proximate cause."

Id. at 897-98 (emphasis in original). Similarly, in the present case, an award of damages to the plaintiff *flows from* the adjudication of negligence and proximate cause as to the particular defendant. Thus, plaintiff's argument that the "same nine" rule results in jurors being "disenfranchised" fails.

In sum, to the extent this Court reconsiders application of the "same nine" juror rule versus the "any majority" rule, the "same nine" rule is the more sound rule for this jurisdiction.

4) <u>On a civil negligence claim, economic damages and noneconomic damages are interdependent issues, not separate and independent.</u>

As stated above, Oregon courts have held, implicitly if not directly, that in regard to a civil negligence claim, economic damages and noneconomic

damages are interdependent issues, not separate and independent. *See supra* Section D(B)(1). Further, the legislative intent behind Article VII (Amended), section 5(7) and ORCP 59G(3) appears to be the same. In the event the Court reexamines this issue, further analysis confirms that those items are interdependent.

First, economic damages are not recoverable on a negligence claim in the absence of an award of noneconomic damages, except in very limited circumstances which are not present in this case. *Wheeler v. Huston,* 288 Or 467, 477, 605 P2d 1339 (1980). Because of this rule, economic and noneconomic damages are necessarily interdependent, not independent, as plaintiff asserts.

Second, it is common knowledge that jurors ordinarily do not view liability, economic damages and noneconomic damages each in a vacuum. The amount of noneconomic damages a jury awards are often calculated based on the amount of economic damages being awarded. Thus, the amount awarded on one is often dependent on the amount awarded on the other. *See Maxwell v. Portland Term. R. Co.*, 253 Or 573, 577, 456 P2d 484 (1969)(court states that one part of proof of a personal injury case may affect another).

Thus, plaintiff's argument that economic damages and noneconomic damages are separate, independent issues must be rejected.

/ / /

CONCLUSION

In accordance with the analysis set forth above, the decision of the Oregon Court of Appeals in this case should be affirmed.

DATED this 11th day of July, 2014.

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CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 9.17 and ORAP 5.05 and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,280 words.

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(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed electronically with the Oregon Supreme Court the foregoing **DEFENDANT WHEELER'S RESPONSE BRIEF ON THE MERITS** on the date stated below.

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