IN THE SUPREME COURT OF THE STATE OF OREGON

AMBER KENNEDY, Plaintiff-Respondent, Petitioner on Review, v. KELSEY C. WHEELER, Defendant-Appellant, Respondent on Review, and KATHE HALL, Defendant.	Supreme Court No. S061836 Court of Appeals No. A149019 Yamhill County Circuit Court No. CV080512

Brief of *Amicus Curiae* Oregon Trial Lawyers Association in support of Plaintiff's Petition for Review

of the Opinion of the Court of Appeals dated August 28, 2013
Opinion by Duncan, J.; Schuman, P.J., and Wollheim, J., concurring,
in an Appeal from the Judgment of the Yamhill County Circuit Court
The Honorable Carroll J. Tichenor, Judge

Kathryn H. Clarke OSB 791890
kathrynhclarke@mac.com
PO Box 11960
Portland, Oregon 97211
(503) 460-2870

Attorney for *Amicus Curiae*
Oregon Trial Lawyers Association

Counsel continued next page

December 2013

Mark McDougal OSB 890869
mcdougal@kafourymcdougal.com
Jason Kafoury OSB 091200
Natalie McDougal OSB 042501
Kafoury & McDougal
202 Oregon Pioneer Building
320 SW Stark Street
Portland, Oregon 97204
(503) 224-2647

Attorneys for Petitioner on Review
Amber Kennedy

Michael T. Stone OSB 935499
William H. Stockton OSB 743163
law@brisbeeandstockton.com
Brisbee & Stockton, L
PO Box 567
Hillsboro, Oregon 97123
(503) 648-6677

Attorneys for Respondent on Review
Kelsey C. Wheeler

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Introduction

In this action arising out of a motor vehicle accident, the jury returned a verdict in favor of plaintiff. All twelve jurors agreed that defendant's negligence caused damage to plaintiff. Ten agreed on the amount of economic damages, and therefore the "same nine" agreed on negligence, causation and economic damages. Nine agreed on the amount of noneconomic damages, and therefore the "same nine" agreed on negligence, causation and noneconomic damages. But only eight agreed to both sums.

The Court of Appeals avoided the question of whether economic and noneconomic damages are "interdependent," and hence require that the same nine jurors agree on both amounts – the question that was essential to the constitutional validity of the verdict. Instead, the Court of Appeals said that the parties, by agreeing to an instruction defining the "same nine" rule in terms that were neither clear nor correct (though uniformly given), had established the "law of the case;" that rule required complete identity of the nine jurors on the two-slot damages question, and the verdict was therefore invalid and should not have been received. *Kennedy v. Wheeler*, 258 Or App 343, 309 P3d 196 (2013).

The jury's verdict was not set aside for insufficiency of the evidence, or for legal error in the course of the proceedings. It was set aside by the

Court of Appeals because it was constitutionally infirm – "the verdict violated Article VII (Amended), section 5(7) of the Oregon Constitution." 268 Or App at 350. But it did not. OTLA is extremely concerned that the integrity of a jury's verdict can be threatened because the parties agreed to a broadly phrased "same nine" rule that goes beyond constitutional requirements, and urges this court to grant review to resolve these unanswered questions.

Statement of Historical and Procedural Facts

The facts are adequately stated in the Court of Appeals opinion, and are summarized above.

Questions Presented and Proposed Rules of Law

OTLA is interested in the first and third questions presented by Plaintiff's Petition, but would reverse the order. The first question is whether this verdict was constitutionally valid, and OTLA believes it was because the economic damages and noneconomic damages are independent, not interdependent, questions. The question then is whether an improper or ambiguous instruction on the "same nine" rule can require the court to reject an otherwise valid jury verdict, and OTLA believes it cannot. A verdict that meets the constitutional requirement must be accepted, absent legal error or factual insufficiency.

Reasons for Granting Review

1. Economic and noneconomic damages are independent of each other, though both are dependent on liability and causation; thus there was no constitutional infirmity in this verdict.

Article VII (Amended), section 5(7) states:

> In civil cases three-fourths of the jury may render a verdict.

In *Clark v. Strain*, 212 Or 357, 364, 319 P2d 940 (1958), the court invalidated a general verdict where, when the jury was polled, the ninth juror agreed on liability but not the amount of damages: where jurors must determine "two or more material issues as a condition precedent to the verdict," the same jurors must agree "on each separate issue demanding resolution." In *Munger v. SIAC*, 243 Or 419, 423-24, 414 P2d 328 (1966), which involved a special verdict, the court stated:

> An integrated verdict of the type presented here – one in which **the answer to a question is dependent on the answer to a previous question and both are necessary to the determination of the final verdict** – does not differ in principle from a general verdict. (Emphasis added.)

See similarly Verberes v. Knappton Corp., 92 Or App 378, 759 P2d 279 (1988)(relying on *Clark v. Strain* and *Munger v. SIAC* to hold that negligence and unseaworthiness were independent, not "interdependent," and the verdict for plaintiff on one but not the other was valid).

Interdependent decisions exist in any contested negligence claim, where a finding of liability is a prerequisite for a damage award. The same nine jurors must agree on liability and on the amount of damages because any damages award, to use the language of *Munger, supra,* "is dependent on the answer to [the] previous [liability] question." And the "same nine" requirement was met here, where ten jurors agreeing on the amount of economic damages had also agreed on liability, and nine jurors agreeing on the amount of noneconomic damages had also agreed to liability.

2. The independence of economic and noneconomic damages, for purposes of the "same nine" rule, has not been addressed by this court.

In 1987, the legislature redefined tort damages and attempted to limit the noneconomic damages that could be recovered. ORS 31.710; 1987 Or Laws c.774 §6. "Economic damages" now includes not just those damages formerly called "special" (past medical expenses, wage loss), but also includes "impairment of earning capacity" and projected future medical expenses that were formerly labeled "general damages." *See, e.g., Smith v. Jacobson,* 224 Or 627, 638, 356 P2d 421 (1960)(impaired earning capacity is an element of general damages).

Prior to this change, a personal injury verdict that awarded general damages only was a valid verdict. *Mullins v. Rowe,* 222 Or 519, 522, 353 P2d 861 (1960)("if the verdict was for general damages it would be

invulnerable."). The problem arose with "special damages," which were viewed as "consequential" to an injury and therefore dependent on an award of general damages. A verdict awarding special damages only could nonetheless be valid, depending on the circumstances. *Wheeler v. Huston*, 288 Or 467, 605 P2d 1339 (1980). Justice O'Connell, in a dissent in *Flansberg v. Paulson,* 239 Or 610, 399 P2d 356 (1965), challenged the link between special and general damages in terms that have even more relevance since the move to economic and noneconomic damages:

> Certainly the plaintiff is not entitled to recover medical costs or loss of earnings unless he is injured. And so it is proper to say that such damages are a consequence of the injury.
>
> Precisely the same thing may be said about general damages -- they too must be a consequence of the injury. But **neither type of damages flows from the other; each measures a distinct type of invasion of the plaintiff's interest**.
>
> 239 Or at 620 (O'Connell, J., dissenting)(emphasis added**).**

More recently, the Court of Appeals held in an auto accident case that a jury's verdict for economic damages only was valid, although it did so by equating economic to special damages and finding that the award fit within one of the "circumstances" outlined in *Wheeler v. Huston, supra. Fatehi v. Johnson,* 207 Or App 719, 143 P3d 561, *rev den* 342 Or 116, 149 P2d 138 (2006).

These questions can be expected to recur. This case represents the second time this year that the Court of Appeals has invalidated a jury verdict where the same nine jurors did not concur on the amounts of economic and noneconomic damages. *Congden v. Berg*, 256 Or App 73, 299 P3d 588 (2013). OTLA urges this court to give guidance on the requirements for a valid verdict under these circumstances.

3. A constitutional rule cannot be nullified by a uniform but ambiguous and overly general instruction.

In *Congden*, as it said it did in this case, the Court of Appeals declined to reach the question of whether the verdict was valid under Article VII (Amended), §5(7). The court concluded that the trial court's instruction on the same nine rule trumped the constitutional issue: whether or not the constitution required the same nine on economic and noneconomic damages, the instruction did, and it was the "law of the case."

First of all, the Court of Appeals says this: "In order for the same nine jurors to agree on 'the answer'" to the damages question, they were "necessarily required to agree" to both subparts. 258 Or App at 346. OTLA submits that isn't necessarily so. The trial judge, who gave the instruction, didn't think so. And neither, apparently, did the jury. For each subpart, the "same nine" that had voted "yes" on liability agreed to the sum stated – and

that is an equally tenable interpretation of the instruction given by the trial court.

In any event, the "law of the case" doctrine does not apply.[1] This court has summarized that principle as follows:

> It is a general principle of law and one well recognized in this state that when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review.
>
> *State v. Pratt*, 316 Or 561, 569, 853 P2d 827 (1993), quoting *Simmons v. Wash. F. N. Ins. Co.*, 140 Or 164, 166, 13 P2d 366 (1932).

The litigants' agreement to a uniform instruction is not equivalent to an appellate decision on a contested issue,

In *Schultz v. Monterey*, 232 Or 421, 375 P2d 829 (1962), the defendant failed to object to an invalid verdict before it was received, and plaintiff argued that defendant had therefore waived the right to object. The court held that "invalidity" cannot be waived:

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[1] The Court of Appeals cited *Fulton Ins. Co. v. White Motor Corp.*, 261 Or 206, 223 n. 5, 493 P2d 138 (1972), where the phrase was used when the court pointed out, in a footnote, that a trial court instruction had stated a formulation of a legal rule that the court had disapproved; neither party had objected and the rule stated in the instruction was "law of the case." There, however, the difference in the legal rule was not significant to the issue decided, and the instruction wasn't used to dictate the validity of a verdict or the meaning of the Oregon constitution.

> A verdict concurred in by less than three-fourths of the jury is invalid and the failure to object thereto before the verdict is received and filed does not constitute of waiver of such invalidity.

The *invalidity* of a verdict cannot be waived by failing to object before the verdict is received. Under the Court of Appeals' approach in *Congden* and in this case, the *validity* of a verdict can be waived before the verdict is even announced, by failing to object to a uniformly given but arguably incorrect instruction on the same nine rule. This makes no sense.

Nor is the Court of Appeals' approach consistent. In *Verberes, supra*, the court concluded that a verdict for plaintiff on unseaworthiness, but not on negligence, was valid. The defendant argued that the jury's verdict was inconsistent with the trial court's instruction that "at least nine" jurors would "have to be in total agreement on every answer," and that instruction was law of the case. In that case, however, the court construed the instruction as stating the need for a three-fourths majority, not the "same nine," and rejected the argument. The court's lack of consistency adds another layer of confusion.

4. After saying it would not reach the issue, the Court of Appeals stated that the verdict violated the Constitution.

The Court of Appeals essentially held that the verdict was inconsistent with the instruction given by the trial court regarding the required consensus. But this is what it said:

> [T]he verdict violated Article VII (Amended), section 5(7) of the Oregon Constitution. 258 Or App at 350.

This apparent holding – after the court said it wasn't deciding that question – is bound to make more difficult the process of articulating a jury instruction on the same nine rule. It simply is not clear what the constitution requires.

There are few questions more certain to cause headaches than the "same nine" rule: witness the difficulty the trial judge in this case had in articulating why he thought the verdict was valid (*see* Amended Pet Rev at 17). This is not a new phenomenon: witness the communication difficulties of the trial judge and a juror, memorialized in *Clark v. Strain*, *supra*, 212 at 360-63. The Court of Appeals has clarified no issue as to how juries should be instructed or what, in fact, the constitution means or how it should be applied. It has merely increased the confusion for an already perplexed bench and bar.

Conclusion

There are more interests at risk in this case than the litigants' concern for a particular outcome. A jury's verdict has been set aside on the basis that it violates Article VII (Amended) §5(7), by a court that, in fact, declined to reach the constitutional question. OTLA urges the court to grant review, and would plan on submitting a further brief on the merits of these two questions.

Respectfully submitted,

/s/ Kathryn H. Clarke

Kathryn H. Clarke OSB 791890
Attorney for *Amicus Curiae*
Oregon Trial Lawyers Association

CERTIFICATE OF COMPLIANCE

Brief length:

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), and the word count of this brief is **2116** words.

Type size:

I hereby certify that the size of the type in this brief is not smaller than 14 point for both text and footnotes as required by ORAP 5.05(4)(f).

CERTIFICATE OF SERVICE AND FILING

I certify that on this date I electronically filed the foregoing **Brief of *Amicus Curiae* Oregon Trial Lawyers Association** with the State Court Administrator and by so doing served a copy electronically on

Mark Mcdougal
Attorney for Petitioner on Review

Michael T. Stone
Attorney for Respondent on Review

DATED this 17th day of December, 2013.

/s/ Kathryn H. Clarke
Kathryn H. Clarke OSB 791890
Attorney for *Amicus Curiae*
Oregon Trial Lawyers Association