

IN THE SUPREME COURT OF THE STATE OF OREGON

AMBER KENNEDY,

Plaintiff-Petitioner on Review,

vs.

KELSEY C. WHEELER,

Defendant-Respondent on Review,

And

KATIE HALL,

Defendant

Supreme Court  
No. N004034

61836

Court of Appeals  
No. A149019

Yamhill County Circuit Court  
No. CV080512

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**PLAINTIFF'S OPENING BRIEF ON THE MERITS**

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On Review of the Opinion of the Court of Appeals dated August 28, 2013  
Opinion by Duncan; Schuman, Presiding Judge, and Wollheim, concurring,  
In an Appeal from the Judgment of the Yamhill County Circuit Court  
The Honorable Carroll K. Tichenor, Judge

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## INTRODUCTION

This is a very common, run-of-the-mill car wreck case. The jury returned a verdict in plaintiff's favor against defendant Wheeler. All twelve jurors agreed that defendant Wheeler's negligence was a cause of damage to plaintiff. Nine jurors agreed on the economic damages, nine jurors agreed on the noneconomic damages. However, the same nine did not agree on economic and noneconomic damages.

The trial court entered a judgment based on the jury's verdict. The trial court held that the verdict was valid, as economic and noneconomic damages are independent of each other. The trial court also held that defendant Wheeler had failed to timely object to the verdict.

The Court of Appeals overturned the jury's verdict on the basis that it "is undisputed that only the same eight jurors agreed on economic and noneconomic damages . . . the verdict violated Article VII (Amended), section 5(7), of the Oregon Constitution." The Court of Appeals also held that that when the trial court instructed the jury that at least the same nine jurors were required to agree on each answer (without objection), that instruction became the law of the case.

The Court of Appeals holdings cannot be reconciled with this Court's precedents, and the Court of Appeals should be reversed.

## **QUESTIONS PRESENTED AND PROPOSED RULES OF LAW**

A. If twelve jurors agree on liability, and thereafter three-fourths of the jury agree on economic damages, and a separate three-fourths of the jury agree on noneconomic damages, does the verdict violate Article VII (Amended), section 5(7) of the Oregon Constitution?

B. Can a constitutionally valid verdict be invalidated?

C. Should a trial judge's determination that a party failed to timely object to a jury's verdict be given great weight, given his understanding of how things elapsed in real time and whether or not he or she was adequately apprised of the basis of the objection?

### **First proposed rule:**

The same nine jurors do not have to agree on questions on the verdict form where those questions are independent of each other. Economic damages and noneconomic damages are independent of each other. Any juror who voted for liability may vote on economic and noneconomic damages. The findings on noneconomic and economic damages are dependent only upon liability.

### **Second Proposed Rule:**

If a jury is improperly instructed as to the requirements for a valid verdict, the valid verdict should override the incorrect instructions. An error on the part of the court or litigants should not invalidate an otherwise constitutional verdict

rendered by a jury. If so, jurors are being disenfranchised. A trial judge who, whether on his own initiative or through the urging of the parties, incorrectly instructs a jury as to their voting requirements for a valid verdict may correct the error and accept a constitutionally-valid verdict. Courts do and should have an inherent authority to protect the jury's constitutionally-valid verdict.

**Third Proposed Rule:**

A trial judge is in the unique position to assess and give weight to the sufficiency of an objection as the trial judge observes and hears the objection in real time under the pressures of trial. A trial judge's decision as to whether or not an objection was preserved must be given great weight.

**STATEMENT OF HISTORICAL AND PROCEDURAL FACTS**

Plaintiff and defendant were involved in an automobile accident, and plaintiff subsequently filed suit against defendant, and the case went to trial. At the close of evidence, the trial court instructed the jury 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.” Further, the verdict form that the court gave the jury 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: \_\_\_\_ (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 \$\_\_\_\_

“Noneconomic Damages \$\_\_\_\_”

The jury unanimously agreed that defendant’s negligence was a cause of damage to plaintiff. However, the jury poll showed that the nine jurors who agreed on the economic damages of \$65,386.48 (jurors 2, 4, 5, 6, 7, 8, 9, 10, 11, and 12) were not the same nine jurors who agreed on the noneconomic damages of \$300,000 (jurors 1, 4, 5, 6, 7, 8, 9, 10, and 11).

Before the jury was discharged, defense counsel stated:

“[DEFENSE COUNSEL]: Before you discharge the jury, Judge, I think maybe we should talk about the verdict. I don’t think there’s nine agreeing, if I counted right.

“THE COURT: On which one?

“[DEFENSE COUNSEL]: On the first one.

“THE COURT: On the first one there were two no’s and—that was Number 1 and Number 3; 2, 4, 5, 6, 7, 8, 9, 10, 11, 12 voted yes on the first verdict on the first—on Wheeler with the question as to



economic damages. And the Question 2, there was one, two, three no's and nine yes on noneconomic damages.

“[DEFENSE COUNSEL]: I think there were only the same eight, however.

“THE COURT: Pardon?

“[DEFENSE COUNSEL]: I think there was only eight that were in agreement.

“THE COURT: No, there was nine out of the twelve that voted for the unanimous verdict on each answer. They were unanimous yes on the first question on both—first yes question, and nine jurors that voted to the answer yes, that vote for the answer—the question.

“The verdict is accepted. You are free to go. Thank you very much.

“(JURY DISMISSED.)”

### **SUMMARY OF ARGUMENT**

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

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

The jury's verdict is valid. The Court of Appeals opinion is in conflict with other Court of Appeals decisions: *Veberes v. Knappton Corporation*, 92 Or.App. 378, 759 P.2d 279 (1988); and *Eulrich v. Snap-On Tools*, 121 Or.App. 25, 853 P.2d 1350 (1993) *cert den* 317 OR. 583. The Court of Appeals decision is also in conflict with *Schwarz v. Philip Morris Incorporated*, 348 Or. 442, 235 P.3d 668 (2010). The liability verdict was unanimous. The noneconomic and economic damages awards were supported by nine jurors who had voted for liability—even

though they were not the same nine on all questions. The above-cited Court of Appeals decisions held that the same nine juror rule applies only to cases in which the answers are interdependent, not where they are separate and independent. In *Schwarz v. Philip Morris*, this Court held that nine out of twelve jurors could vote on punitive damages in a bifurcated proceeding, even though none of the jurors who voted on liability would be involved in the punitive damages determination.

Notably, the Court of Appeals held that the verdict that was issued was constitutionally invalid—even though the opinion does not analyze whether or not economic and noneconomic damages are dependent upon each other.

The Court of Appeals held that the jury instruction with regard to the jurors' voting rights was the law of the case such that the verdict was invalid if it did not comply with the same nine jury instructions. A jury that constitutionally exercises its powers and renders a legal verdict cannot have its verdict set aside due to having been erroneously instructed as to the jury's voting requirements. The jurors had a right to render their verdict. A trial judge who realizes such a mistake in the instructions may accept a constitutionally-valid verdict.

The defendant waived its objection to the verdict when the defendant failed to timely object to the verdict while the jurors were still present. The trial court found such a waiver, and the trial court's determination should be given great weight. The trial judge is the one who has to assess whether a sufficient objection

was made under the circumstances existing while the trial is going on live. The Court of Appeals reviewed the transcript in isolation and focused on a single sentence. The trial judge explained that he had a different understanding of what was being said. Accordingly, waiver should be upheld.

### **ARGUMENT**

1. The verdict was valid.

The verdict is valid under Article VII (Amended), section 5 of the Oregon Constitution, which states that “[I]n civil cases, three-fourths of the jury may render a verdict.” The amount of economic and noneconomic damages are not interdependent - they are separate and independent, and therefore the verdict is valid. Plaintiff had three-fourths of the jury agree on liability and on economic damages. Three-fourths of the jury agreed on liability and noneconomic damages.

The Court of Appeals held that the verdict was invalid under the Oregon Constitution while simultaneously stating that it was not necessary to determine whether economic or noneconomic damages are independent or interdependent issues.

The following quotes demonstrate the sequence of the Court of Appeal’s reasoning and the flaw in its conclusion:

Under the Oregon Constitution, in civil cases, “three-fourths of the jury may render a verdict.” Or. Const., Art. VII (Amended), § 5(7); ORCP 59 G(2). When, as here, there is a twelve-person jury, the same nine or more jurors must agree on every

interdependent element of a particular claim against a particular defendant.

*Kennedy v. Wheeler*, 258 Or.App. 343, 344, 309 P.3d 196 (2013).

This case does not require us to decide, as a general rule, whether economic and noneconomic damages are independent or interdependent issues.

*Id.* at 349.

When the court instructed the jury, apparently without objection, that at least the same nine jurors were required to agree on the amounts of both types of damages, that instruction became the law of the case.

*Id.* at 349.

Thus, we conclude that, in this case, at least the same nine jurors were required to agree on each answer in the verdict form, including the amounts of economic and noneconomic damages. It is undisputed that only the same eight jurors agreed on economic and noneconomic damages. *As a result, the verdict violated Article VII (Amended), section 5(7), of the Oregon Constitution.*

*Id.* at 350 (emphasis added).

Oddly, the Court of Appeals did not need to decide whether the verdict was constitutional under its own reasoning that the law of the case doctrine disposed of the issue, but then abruptly concluded the verdict was unconstitutional.

The Court of Appeals opinion held that *Clark v. Strain*, 212 Or. 357, 368, 319 P.2d 940 (1958) required the reversal of the judgment, to-wit:

It is undisputed that only the same eight jurors agreed on economic and noneconomic damages. As a result, the verdict

violated Article VII (Amended) Sec. 5(7) of the Oregon constitution.

*Kennedy*, 258 Or. at 350.

*Veberes v. Knappton Corporation*, 92 Or.App. 378, 759 P.2d 279 (1988)

reviewed the holding in *Clark v. Strain* and explained that the same nine jurors do not have to agree on the entire verdict when the answers to questions are independent, to-wit:

*Clark v. Strain et al.*, 212 Or. 357, 319 P.2d 940 (1958), holds that, in a civil case, the same nine jurors must agree on every issue material to the decision in order to return a legal verdict. Or. Const., Art. VII (Amended) ORCP 59 G(2). . . . *However*, that rule *applies only to cases in which the answers are interdependent, not where they are separate and independent*. Here, ten jurors concluded that defendant was negligent, with jurors number 1 and number 4 dissenting. Ten jurors concluded that the CHAMPION was unseaworthy, with jurors number 5 and number 8 dissenting.

*Veberes v. Knappton Corp.*, 92 Or. App. 378, 381, 759 P.2d 279, 280 (Or. Ct. App. 1988) (emphasis supplied).

It is undisputable that the economic and noneconomic damages are separate, since the jury could have decided to award no economic damages, but still award noneconomic damages.<sup>1</sup> The findings on noneconomic and economic damages are dependent only upon liability.

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<sup>1</sup> A personal injury verdict that awards noneconomic damages only is a valid verdict. *Mullins v. Rowe*, 222 Or. 519, 522, 353 P.2d 861 (1960) (“if the verdict was for general damages it would be invulnerable.”)

After *Veberes* was decided, the independent/interdependent distinction was again addressed by the Oregon Court of Appeals in *Eulrich v. Snap-On Tools*, 121 Or.App. 25, 853 P.2d 1350 (1993) *cert den* 317 OR. 583 (*rev'd on other grounds* and *rem'd* for post-verdict review of punitive damage amount, 512 U.S. 1231, 129 L.Ed.2d 854 (1994)). Consider:

. . . [T]he [common core of at least nine] rule does not apply, however, where the answers to the questions are independent. [Citations omitted]. Here, the awards of punitive damages were dependent on the jury's conclusion that defendants were liable to plaintiff. All jurors concluded that defendants were liable *on both* claims for which punitive damages were awarded. But the award for punitive damages on the fraud claim was *not* dependent on the award of punitive damages on the claim for tortious breach of the duty of good faith, and the same nine jurors did not have to agree on both awards.

*Id.* 44 (Emphasis in original).

As pointed out by the trial court<sup>2</sup>, the *Clark* case was recently discussed in *Schwarz v. Philip Morris Incorporated*, 348 Or. 442, 235 P.3d 668 (2010). In *Schwarz*, the defendant argued that a new trial solely on the issue of punitive damages would violate the constitution and cited to *Clark* for the proposition that the same nine jurors must vote on all issues demanding resolution. The Oregon Supreme Court disagreed, stating: "...defendant raises concerns that this case does not present. We remand this case for a new trial on a limited issue, and three-

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<sup>2</sup> Hearing on Motion for New Trial, TR page 22.

fourths of the jury that considers that issue is sufficient to render a verdict on that issue.” *Schwarz* at 460.

The trial court noted that if *Clark* were controlling, then *Schwarz v. Philip Morris* should have gone back for a new trial on all of the issues since the same nine jurors didn’t consider all of the damages they were awarding.

Punitives are dependent on the finding of liability, and in many cases, jurors are instructed that the amount of punitive damages should be in reasonable relationship to the harm suffered by plaintiff. There can be little doubt that punitive damages are dependent on a finding of liability. *Schwarz v. Philip Morris* implicitly held that a verdict such as the one received by plaintiff is constitutionally valid.

Also of note, the *Clark* decision relied upon decisions from California, Wisconsin, and Ohio in reaching its decision that the same nine jurors must agree on a verdict, and the “same nine” rule has since been modified or is no longer controlling in each of those jurisdictions.

*Earl v. Times-Mirror Co.*, 185 Cal. 165, 196 P. 57 (S.C. California 1921), was modified, with the California Supreme Court stating as follows:

*[I]f nine identical jurors agree that a party is negligent and that such negligence is the proximate cause of the other party's injuries, special verdicts apportioning damages are valid so long as they command the votes of any nine jurors. (Juarez v. Superior Court, supra, 31 Cal.3d at p. 768, 183 Cal.Rptr. 852,*

647 P.2d 128, first italics added, 183 Cal.Rptr. 852, 647 P.2d 128.)

*Resch v. Volkswagen of Am., Inc.*, 36 Cal. 3d 676, 681, 685 P.2d 1178, 1183 (1984).

In fact, the California Supreme Court has found that to hold otherwise would be to deny the parties of “the right to a jury of 12 persons deliberating on all issues,”<sup>3</sup> to wit:

The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. \* \* \* Permitting any nine jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. (31 Cal.2d at pp. 767-768, 183 Cal.Rptr. 852, 647 P.2d 128.) Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue.

*Resch*, 36 Cal at 682.

The Wisconsin Supreme Court has also revisited its position and held:

Art. I, sec. 5 of the Wisconsin Constitution provides for the right to a jury trial in all cases at law “[p]rovided, however, that the legislature may, from time to time, by statute provide that a valid verdict, in civil cases, may be based on the votes of a specified number of the jury, not less than five sixths thereof.” . . . It is well established in Wisconsin law that this statute requires not that five-sixths of the jury agree on all questions in the verdict, but rather that this number must agree on all

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<sup>3</sup> *Resch*, 36 Cal at 682.



questions necessary to support a judgment on a particular claim. Thus a verdict must be reviewed on a claim-by-claim basis rather than as a whole. Dissents important to one claim may be immaterial to another when the verdict is reviewed in this fashion.

*Giese v. Montgomery Ward, Inc.*, 111 Wis. 2d 392, 401, 331 N.W.2d 585, 590 (1983) (citations omitted).

The Ohio Supreme Court has cited the following passage from Oregon case law with fervor:

Relying on Oregon case law, the court in *Veberes v. Knappton Corp.* (1988), 92 Or.App. 378, 759 P.2d 279, held that “in a civil case, the same nine jurors must agree on every issue material to the decision in order to return a legal verdict. \* \* \* That is true for both special and general verdicts. \* \* \* [Citations omitted.] However, that rule applies only to cases in which the answers are interdependent, not where they are separate and independent.” *Id.* at 381, 759 P.2d at 280.

*O’Connell v. Chesapeake & Ohio R. Co.*, 58 Ohio St. 3d 226, 233, 569 N.E.2d 889, 895-96 (1991).

Finally, even in the area of criminal law, where a defendant’s freedom is at stake, Oregon courts have consistently held that even when a unanimous verdict is required, there is not always a requirement that the jury unanimously agree on every issue, so long as the verdicts can be “harmonized.” *State v. Mendez*, 308 Or. 9, 774 P.2d 1082 (1989)(overruled on other grounds). *See, also, Godin v. Hill*, 184 Or.App 71 at 74, 55 P.3d 523 (2002)(“Even if the verdicts were inconsistent, we have followed the rule that jury verdicts in criminal cases need not be consistent.”)

and *State v. Watkins*, 67 Or. App. 657, 661, 679 P.2d 882 (1984)(“The subsequent deliberations on the aggravated murder charge involved a separate and independent question, on which the jurors were not bound by their previous votes on the burglary count.”)

2. A valid verdict cannot be invalidated, the trial court properly upheld a constitutional verdict.

Although there are a wide class of errors or misstatements of the law that may be applied absent objection, by what right can jurors be summoned into court and be improperly instructed as to their voting powers and then have a constitutional verdict they render be set aside? If the jury is improperly instructed as to its voting structure, what should be set aside, the improper instruction, or the valid verdict? The Court of Appeals applied the law of the case doctrine and held that absent objections, jury instructions concerning jurors’ voting powers would be enforced to invalidate a verdict. The Court of Appeals did not analyze whether a constitutionally-valid verdict should trump or override incorrect jury instructions as to the voting powers of jurors.

Similarly, the Court of Appeals did not engage in such an analysis in their recent *Congdon v. Berg*, 256 Or.App. 73, 299 P3d 588 (2013) decision applying the law of the case to reject a verdict under the same nine rule.

All of the cases cited by the Court of Appeals in this case and in the *Congdon* case concerning the “law of the case,” relate to cases in which counsel did not object to erroneous statements of the substantive law in jury instructions, as opposed to instructions with regard to the procedural and voting rules for a proper jury verdict. Courts at all levels (independent of the silence or objection of the parties) are the guardians and safe-keepers of jurors summoned into court. The responsibility to properly instruct jurors as to the procedures and voting rights they should follow is highly different than instructions relating to the merits of the case. The relationship between the bench and the jury is unique. Each relies upon the other, to a large degree.

Looking at it through a different telescope, does the judiciary have a non-delegable duty or constitutional obligation to instruct jurors as to their voting powers and the requirements for a valid verdict?

Here, the trial court recognized that the jury’s verdict was valid, understood that the jury’s verdict was inconsistent with the instructions, but nonetheless upheld the jurors’ verdict under the Oregon Constitution as opposed to allowing the faulty jury instructions to rule the day. It would seem that a court should, and does, have that inherent power.

In the proceedings at the trial level and at the Court of Appeals, plaintiff argued that jurors were being disenfranchised by the application of the same nine

rule. Other supreme courts have addressed whether jurors are being disenfranchised by the application of a “same juror” rule. Consider the Supreme Court of Pennsylvania’s holding below, to wit:

The right to have a jury of twelve decide one's case means that the jurors who have been empanelled are required to consider and decide each of the issues submitted to them by the court. The absence of any one voice from that process or the relegation of that voice to the margins by diminishing its influence invalidates the sanctity of the jury trial as defined by *Blum*. Once a juror has voted against, for example, a defendant's liability, the same-juror rule would have the effect of silencing that juror as to subsequent interrogatories pertaining to contributory negligence and damages. With respect to this case, under the same-juror rule, a juror who dissented on the issue of Appellant's contributory negligence would not have any voting power in determining the amount of damages, thus removing himself from further deliberations contrary to *Blum*.

The Superior Court acknowledged the disenfranchisement argument, but found it sufficient that jurors with dissenting views “may continue to express their disagreements throughout the deliberation process and seek to persuade others to their point of view.” *Fritz*, 872 A.2d at 853 n. 3. We disagree. A dissenter stripped of his or her voting power does not have the same voice as a qualified, voting juror.

*Fritz v. Wright*, 589 Pa. 219, 237-39, 907 A.2d 1083, 1094-95 (2006).

In fact, the California Supreme Court has found that to hold otherwise would be to deny the parties of “the right to a jury of twelve persons deliberating on all issues,” to wit:

The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate

as to each verdict submitted to it. \* \* \* Permitting any nine jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. (31 Cal.2d at pp. 767-768, 183 Cal.Rptr. 852, 647 P.2d 128.) Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue.

*Resch v. Volkswagen of America, Inc.*, 36 Cal.3d. 676, 685 P.2d 1178, 1181-1182 (1984).

Numerous other cases are also in accord that incorrect instructions disenfranchise jurors<sup>4</sup>. Here in Oregon, where the jury has a uniquely significant role and its verdicts are afforded a high degree of protection by the court, it would seem that judicial intervention to review whether jurors' powers and duties are being eroded by a uniform instruction or verdict form is of urgent constitutional concern, even as a single instance as presented by this case should prompt intervention and enforcement of a valid verdict.

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<sup>4</sup> That is not to suggest that Oregon has or should have the same standards for valid verdicts.

3. The uniform jury instruction on verdicts in civil cases is routinely depriving duly-sworn and empanelled jurors from carrying out their constitutional duties and powers.

The same nine rule is embodied in the Uniform Jury Instruction and verdict form. ER-7. Trial courts are reluctant to veer away from the uniform jury instructions or verdict forms. As a practical matter in even the most routine auto case, a litigant will have to object to the uniform instructions and the verdict form, which will invariably be met with resistance and unlikely success. As a result, jurors are routinely being improperly instructed and many jurors are losing their constitutional voting powers.

4. The trial judge's ruling that an objection to the verdict was waived should be upheld.

The Court of Appeals, with prior knowledge of the precise issue at hand, reviewed the trial transcript and focused on a single assertion in the context of counting votes finding it to be sufficient to have alerted the trial judge as to the defendant's objection to the verdict.

For this Court's convenience of record, plaintiff's counsel has posted the audio file of the proceedings after the jury was polled at <https://soundcloud.com/kafoury-1>. The transcript appears below:

Mr. Stockton: Before you discharge the jury, Judge, I think maybe we should talk about the verdict. I don't think there's nine agreeing, if I counted right.

The Court: On which one?

Mr. Stockton: On the first one.

The Court: On the first one there were two no's and -- that was Number 1 and Number 3; 2, 4, 5, 6, 7, 8, 9, 10, 11, 12 voted yes on the first verdict on the first -- on Wheeler with the question as to economic damages. And the Question 2, there was one, two, three no's and nine yes on noneconomic damages.

Mr. Stockton: I think there were only the same eight, however.

The Court: Pardon?

Mr. Stockton: I think there was only eight that were in agreement.

The Court: No, there was nine out of the twelve that voted for the unanimous verdict on each answer. They were unanimous yes on the first question on both -- first yes question, and nine jurors that voted to the answer yes, that vote for the answer -- the question.

The verdict is accepted. You are free to go. Thank you very much.

(JURY DISMISSED).

Defendant then objected to the court's receipt of the verdict, the precise nature of defense counsel's objection was not understood by the trial judge until after the jury had been let go. After the jury was released, defense counsel stated:

Mr. Stockton: Well—I except to the jury -- verdict being accepted because on Questions 2 and 3 there are only eight answers that are the same eight. I have –

The Court: Okay. Hold on a second. I understand what you're stating. What the requirement is, that at least nine of the same jurors that voted yes to Question 1 voted yes to Question 2. It does not have to be the same nine but it must be at least nine of those that answered yes, and there were nine that answered -- there were ten that answered yes -- there were twelve that answered yes to Question 1.

The second question to Question 1, on the economic damages -- You see, all twelve jurors voted yes on both Questions 1 and 3, so all we needed was nine more on either of the other questions out of those twelve. It has to be nine out of the twelve that voted yes.

Tr. 7-8.

Defendant's objection to the jury verdict was not specific, nor was the precise nature of defense counsel's objection clear to the court. At the hearing on defendant's motion for a new trial, the trial judge found:

From the standpoint of the Court, from the objection that was raised by the defendant I did not understand the nature of your objection before the jury was discharged. I thought you were stating that there was a miscount and that nine jurors had not agreed to the part of the verdict and there were only eight. . . .

Tr. 19.



The trial court's written order on defendant's Objections to the Judgment and Motion for New Trial states:

The Court finds that defendant Wheeler failed to make a timely objection to the jury's verdict.

TCF 89, Order.

The Court of Appeals has put trial judges to an extremely high standard of construing a single statement, in a setting where there was possible confusion over counting. Reviewing text (after being aware of the nature of the objection being asserted) does not reflect the real-time presentation of the objection to the degree that an audio file does.

Defense counsel failed to (1) plainly tell the court of the objection to the verdict because the same nine jurors did not agree on all questions, (2) request that the jurors be instructed to return and deliberate until the same nine had agreed on the answers to all questions, or (3) object to the release of the jurors.

Trial judges have tough jobs. Retrials are taxing of the litigants and the court system. Great deference should be given to a trial judge's decision that an objection has been waived. Using somewhat familiar phraseology, can it be said that no reasonable trial judge could find that defendant's objection was not adequate to apprise the Court of the precise nature of the objection? If not, then the verdict should be restored.

## CONCLUSION

The Court of Appeals should be overturned and the jury's verdict should be restored.

Dated: May 30, 2014.

*/s/ Mark McDougal*

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH  
AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(b)) is 5,042 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(4)(f).

Dated: May 30, 2014.

*/s/ Mark McDougal*

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## **CERTIFICATE OF FILING AND SERVICE**

I certify that on May 30, 2014, I filed Petitioner on Review's Brief on the Merits via electronic filing (eFiling) with:

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Appellate Court Records Section  
1163 State Street  
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I further certify that on May 30, 2014, I served Petitioner on Review's Brief on the Merits via electronic service on:

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