IN THE SUPREME COURT OF THE STATE OF OREGON

KEVIN RAINS and MITZI RAINS,

Plaintiff-Respondents,
Petitioners on Review,

v.

STAYTON BUILDERS MART, INC.; JOHN DOE LUMBER SUPPLIER; JOHN DOE LUMBER MILL; and FIVE STAR CONSTRUCTION, INC.,

Defendant.

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.

Marion County Circuit Court
Case No. 06C21040

CA A145916

SC S062939

July 2015

WITHERS LUMBER COMPANY,

Fourth-Party Plaintiff,

v.

SELLWOOD LUMBER CO., INC., an Oregon corporation; and WEYERHAEUSER COMPANY,

Fourth-Party Defendants.

WESTERN INTERNATIONAL FOREST PRODUCTS, INC.,

Fourth-Party Plaintiff,

v.

BENITO RODRIGUEZ, KEVIN RAINS, and RODRIGUEZ & RAINS CONSTRUCTION,

Fourth-Party Defendants.

SELLWOOD LUMBER CO., INC., an Oregon corporation,

Fifth-Party Plaintiff,

v.

SWANSON BROS. LUMBER CO., INC., an Oregon corporation,

Fifth-Party Defendant.

AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, AND COALITION FOR LITIGATION JUSTICE, INC. IN SUPPORT OF WEYERHAEUSER COMPANY

July 2015

On Petition for Review of the Opinion of the Court of Appeals
On Appeal from the Judgments of the Circuit Court for Marion County,
Honorable Dennis J. Graves, Circuit Court Judge

Court of Appeals Opinion Filed: August 13, 2014
Reconsideration Denied: December 10, 2014
Author of Opinion: Ortega, P.J.
Concurring Judges: Sercombe, Hadlock, J.J.

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QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question: Whether Oregon's statutory upper limit on noneconomic damages in personal injury cases (ORS 31.710) violates Article I, section 17 or Article VII (Amended), section 3 of the Oregon Constitution.

Rule of Law: The right to jury trial preserves and protects the role of the jury as the finder-of-fact. Once the jury has ascertained the facts and assessed damages, it is the trial court's duty to apply the law to the facts *after* the jury's determination. A party has no right to have a jury dictate the legal consequences of its findings, including with respect to determinations of damages. A limit on noneconomic damages merely establishes the scope of the available remedy and does not intrude on the jury's fact-finding role. *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463, *clarified on other grounds*, 329 Or 369, 987 P2d 476 (1999), should be overruled.

STATEMENT OF THE CASE AND FACTS

Amici adopt Weyerhauser Company's Statement of the Case and Facts as relevant to our argument.

SUMMARY OF ARGUMENT

Noneconomic damage awards are highly subjective and inherently unpredictable. As awards for pain and suffering became the largest part of tort costs, Oregon placed a reasonable upper limit on such awards to allow personal injury plaintiffs to receive a substantial ($500,000), but not unlimited, remedy.

ORS 31.710 does not limit a plaintiff's ability to receive economic damages, such as medical expenses or lost income, or seek punitive damages.

ORS 31.710 is in the legal mainstream. About half of the states have adopted statutory limits on noneconomic damages. The vast majority of courts that have considered the constitutionality of these laws have upheld them.

This court considered the constitutionality of ORS 18.560, renumbered as ORS 31.710, in *Lakin*, 329 Or 62. The Court held that Oregon's statutory cap violated the right to jury trial when applied to common law claims existing at the time the Oregon Constitution was adopted. *Lakin* was decided before many other courts had resolved the constitutionality of damages caps and the majority position upholding such laws became clear.

The reasoning of *Lakin* warrants reexamination. As many state high courts interpreting identical or similar constitutional provisions have recognized, a limit on noneconomic damages represents a legislative policy judgment that does not interfere with the right to trial by jury. A jury still determines the facts and assesses liability. The statute applies only *after* the jury's determination. As with many other laws, it is the duty of the court to conform the jury's findings to the specified remedy.

Lakin fails to adequately distinguish the fact-finding function of the jury in assessing a plaintiff's losses from the law-applying role of the courts in

arriving at a judgment. The holding carves out an untenable distinction prohibiting limits on noneconomic damages. *Lakin* should be overruled.

ARGUMENT

I. MOST STATES HAVE ENACTED LIMITS ON NONECONOMIC DAMAGES IN RESPONSE TO THE RISE OF UNPREDICTABLE PAIN AND SUFFERING AWARDS

A. In the 20th Century, Pain and Suffering Awards Became Larger and More Unpredictable

Product liability claims in their current form did not exist at the time the Oregon Constitution was adopted and, prior to the 20th century, large noneconomic damage awards were typically reversed. *See* Ronald J. Allen & Alexia Brunet Marks, *The Judicial Treatment of Noneconomic Compensatory Damages in the Nineteenth Century*, 4 J Empirical Legal Stud 365, 379-87 (2007) (no noneconomic damage award exceeded $450,000 in present dollars prior to the 20th century).

The size of pain and suffering awards took its first leap after World War II as personal jury lawyers became adept at enlarging these awards. *See* Marvin M. Belli, *The Adequate Award*, 39 Cal L Rev 1 (1951).[1] Because "juries are left with nothing but their consciences to guide them," Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal L Rev 772, 778

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[1] *See also* Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective Review of the Problem and the Legal Academy's First Responses*, 34 Cap U L Rev 545, 560-65 (2006) (examining post-war expansion of pain and suffering awards).

(1985), the size of pain and suffering awards expanded unpredictably. Early academic concern went unheeded. *See, e.g.*, Marcus L. Plant, *Damages for Pain and Suffering*, 19 Ohio St LJ 200 (1958) (expressing concern over the ease of proof of pain and suffering and the unpredictability of such awards, and proposing "a fair maximum limit on the award").

By the 1970s, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience constitute[d] the largest single item of recovery, exceeding by far the out-of-pocket 'specials' of medical expenses and loss of wages." *Nelson v. Keefer*, 451 F2d 289, 294 (3d Cir 1971). This trend continues. For instance, according to the Bureau of Justice Statistics, the median damage award in product liability jury trials in state courts, adjusted for inflation, was about five times higher in 2005 ($749,000) than in 1992 ($154,000)—a nearly 387% increase—*see* Lynn Langton & Thomas H. Cohen, Bureau of Justice Statistics, *Civil Bench and Jury Trials in State Courts*, 2005, at 10 tbl 11 (Apr 9, 2009), with noneconomic damages accounting for approximately half of the awards, *see* Thomas H. Cohen, Bureau of Justice Statistics, *Tort Bench and Jury Trials in State Courts*, 2005, at 6 fig 2 (Nov 2009).

As Judge Paul Neimeyer of the U.S. Court of Appeals for the Fourth Circuit has observed, "Money for pain and suffering . . . provides the grist for the mill of our tort industry." Paul Neimeyer, *Awards for Pain and Suffering:*

The Irrational Centerpiece of Our Tort System, 90 Va L Rev 1401, 1401 (2004); *see also* Stephen D. Sugarman, *A Comparative Look at Pain and Suffering Awards*, 55 DePaul L Rev 399, 399 (2006) (pain and suffering awards in the United States are more than ten times those in the most generous of other nations).

B. Oregon is Among Many States that Have Enacted a Reasonable Upper Limit on Noneconomic Damages

Because of the public policy and legal problems associated with the rise of unpredictable pain and suffering awards, many states, including Oregon, responded by adopting statutory ceilings on noneconomic damages to control outlier awards, provide greater predictability, stabilize or lower insurance rates, and preserve the affordability and accessibility of the healthcare system. *See generally* Ronald M. Stewart, *Malpractice Risk and Cost Are Significantly Reduced After Tort Reform*, 212 J Am C Surgeons 463 (2011); Mark A. Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118 Obstetrics & Gynecology 335 (Aug 2011). Limits on noneconomic damage awards also promote uniform treatment of individuals with comparable injuries, facilitate settlements, and limit arbitrariness that may raise due process issues.[2]

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[2] *See Gilbert v. DaimlerChrysler Corp*., 685 NW2d 391, 400 n 22 (Mich 2004) ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not *labeled* 'punitive.'"); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L Rev 763, 769 (1995) (observing that unpredictability "undermines the legal system's claim

Approximately half of the states limit noneconomic damages to promote these goals. A number of states, including Oregon, have adopted an upper limit that extends to all personal injury claims.[3] Many other states limit noneconomic damages in healthcare liability actions.[4]

II. THE VAST MAJORITY OF COURTS HAVE UPHELD LIMITS ON NONECONOMIC DAMAGES

Most courts have respected the prerogative of legislatures to enact reasonable limits awards for pain and suffering. State appellate courts have upheld limits on noneconomic damages that apply to all civil claims[5] and

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that like cases will be treated alike"); *see also* Neimeyer, 90 Va L Rev at 1414 ("The relevant lesson learned from the punitive damages experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules.").

[3] *See* Alaska Stat § 09.17.010; Colo Rev Stat § 13-21-102.5; Haw Rev Stat § 663-8.7; Idaho Code § 6-1603; Kan Stat Ann § 60-19a02(b); Md Cts & Jud Proc Code § 11-108; Miss Code Ann §11-1-60(2)(b); Ohio Rev Code Ann § 2315.18; Okla Stat Ann title 23, § 61.2; Tenn Code Ann § 29-39-102.

[4] *See* Alaska Stat § 09.55.549; Cal Civ Code § 3333.2; Colo Rev Stat § 13-64-302; Ind Code § 34-18-14-3; La Rev Stat § 40:1299.42; Md Cts & Jud Proc Code § 3-2A-09; Mass Gen Laws ch 231 § 60H; Mich Comp Laws § 600.1483; Mo Rev Stat § 538.210 (2015 Mo. SB 239); Mont Code Ann § 25-9-411; Neb Rev Stat § 44-2825; Nev Rev Stat § 41A.035; NM Stat Ann § 41-5-6; NC Gen Stat § 90-21.19; ND Cent Code § 32-42-02; Ohio Rev Code § 2323.43; SC Code Ann § 15-32-220; SD Codified Laws § 21-3-11; Tex Civ Prac & Rem Code § 74.301; Utah Code § 78B-3-410; Va Code § 8.01-581.15; 27 VIC § 166b; W Va Code § 55-7B-8; Wis Stat § 893.55.

[5] *See, e.g.*, *C.J. v. Dep't of Corrections*, 151 P3d 373 (Alaska 2006); *Evans ex rel Kutch v. State*, 56 P3d 1046 (Alaska 2002); *Scharrel v. Wal-Mart Stores, Inc*., 949 P2d 89 (Colo App 1998); *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P2d 541 (Kan 1990), *overruled in part on other grounds*, *Bair v. Peck*, 811 P2d 1176 (Kan 1991); *McGinnes v. Wesley Med. Ctr*., 224 P3d 581 (Kan App 2010); *DRD Pool Serv., Inc. v. Freed*, 5 A3d 45 (Md 2010); *Green v. N.B.S.*,

medical liability cases.[6] In addition, federal courts have consistently upheld state limits on noneconomic damages.[7] Courts have also upheld laws that limit a plaintiff's *total* recovery against healthcare providers,[8] as well as caps that apply to various other types of claims or entities.[9]

Inc., 976 A2d 279 (Md 2009); *Murphy v. Edmonds*, 601 A2d 102 (Md 1992); *Arbino v. Johnson & Johnson*, 880 NE2d 420 (Ohio 2007).

[6] *See, e.g., Fein v. Permanente Med. Group*, 695 P2d 665 (Cal 1985); *Rashidi v. Moser*, 2015 WL 1811971 (Cal App, Apr 20, 2015), *rev'd in part on other grounds*, 60 Cal 4th 718 (2014); *Stinnett v. Tam*, 198 Cal App 4th 1412 (2011); *Garhart ex rel Tinsman v. Columbia/HealthONE, L.L.C*., 95 P3d 571 (Colo 2004); *Scholz v. Metro. Pathologists, P.C.*, 851 P2d 901 (Colo 1993); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P3d 1115 (Idaho 2000); *Miller v. Johnson*, 289 P3d 1098 (Kan 2012); *Oliver v. Magnolia Clinic*, 85 So 3d 39 (La 2012); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So 2d 517 (La 1992); *Zdrojewski v. Murphy*, 657 NW2d 721 (Mich App 2002); *Knowles v. United States*, 544 NW2d 183 (SD 1996), *superseded by statute*; *Rose v. Doctors Hosp*., 801 SW2d 841 (Tex 1990); *Judd v. Drezga*, 103 P3d 135 (Utah 2004); *MacDonald v. City Hosp., Inc.*, 715 SE2d 405 (W Va 2011); *Estate of Verba v. Ghaphery*, 552 SE2d 406 (W Va 2001); *Robinson v. Charleston Area Med. Ctr*., 414 SE2d 877 (W Va 1991).

[7] *See, e.g., Learmonth v. Sears, Roebuck & Co.*, 710 F3d 249 (5th Cir 2013); *Estate of McCall v. United States*, 642 F3d 944 (11th Cir 2011); *Smith v. Botsford Gen. Hosp*., 419 F3d 513 (6th Cir 2005); *Patton v. TIC United Corp*., 77 F3d 1235 (10th Cir 1996); *Owen v. United States*, 935 F2d 734 (5th Cir 1991); *Boyd v. Bulala*, 877 F2d 1191 (4th Cir 1989); *Davis v. Omitowoju*, 883 F2d 1155 (3d Cir 1989); *Hoffman v. United States*, 767 F2d 1431 (9th Cir 1985); *Watson v. Hortman*, 844 F Supp 2d 795 (ED Tex 2012); *Fed. Express Corp. v. United States*, 228 F Supp 2d 1267 (D NM 2002); *Simms v. Holiday Inns, Inc*., 746 F Supp 596 (D Md 1990); *Franklin v. Mazda Motor Corp*., 704 F Supp 1325 (D Md 1989).

[8] *See, e.g., Garhart ex rel Tinsman v. Columbia/HealthONE, L.L.C*., 95 P3d 571 (Colo 2004); *Gourley ex rel Gourley v. Neb. Methodist Health Sys., Inc*., 663 NW2d 43 (Neb 2003); *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 SE2d 307 (Va 1999); *Etheridge v. Med. Ctr. Hosp.*, 376 SE2d 525 (Va 1989); *Ind. Patient's Comp. Fund v. Wolfe*, 735 NE2d 1187 (Ind App 2000); *Bova v. Roig*, 604 NE2d 1 (Ind App 1992); *Johnson v. St. Vincent Hosp*., 404

Oregon is one of a minority of states in which the state's high court has invalidated a limit on noneconomic damages. *See Lakin*, 329 Or at 81.[10] The clear trend, however, is to uphold such laws. *See MacDonald v. City Hosp., Inc.*, 715 SE2d 405, 421 (W Va 2011) (finding decision upholding $500,000 limit on noneconomic damages in medical liability case to be "consistent with the majority of jurisdictions that have considered the constitutionality of caps on noneconomic damages in medical malpractice or in any personal injury action"). "Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damage caps." Carly N. Kelly & Michelle M.

NE2d 585 (Ind 1980), *overruled on other grounds by In re Stephens*, 867 NE2d 148 (Ind 2007).

[9] *See, e.g.*, *Quackenbush v. Super. Ct. (Congress of Cal. Seniors)*, 60 Cal App 4th 454 (1997) (uninsured motorists, intoxicated drivers, and fleeing felons); *Samples v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 114 So 3d 912 (Fla 2013) (birth-related neurological injuries); *Peters v. Saft*, 597 A2d 50 (Me 1991) (servers of alcohol); *Phillips v. Mirac, Inc*., 685 NW2d 174 (Mich 2004) (lessors of motor vehicles); *Wessels v. Garden Way, Inc*., 689 NW2d 526 (Mich App 2004) (product liability actions); *Schweich v. Ziegler, Inc*., 463 NW2d 722 (Minn 1990) (loss of consortium damages); *Oliver v. Cleveland Indians Baseball Co., LP*, 915 NE2d 1205 (Ohio 2009) (political subdivisions).

[10] *See also Estate of McCall v. United States*, 134 So 3d 894 (Fla 2014); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 SE2d 218 (Ga 2010) (right to a jury trial); *Lebron v Gottlieb Mem. Hosp*., 930 NE2d 895 (Ill 2010); *Watts v. Lester E. Cox Med. Ctrs.*, 376 SW3d 633 (Mo 2012) (right to a jury trial); *Moore v. Mobile Infirmary Assoc*., 592 So 2d 156 (Ala 1991); *Brannigan v. Usitalo*, 587 A2d 1232 (NH 1991); *Arneson v. Olson*, 270 NW2d 125 (ND 1978); *Lucas v. United States*, 757 SW2d 687 (Tex 1988), *superseded by constitutional amendment*, Tex Const, Art III, § 66 (amended 2003); *Sofie v. Fibreboard Corp*., 771 P2d 711 (Wash 1989); *Ferdon ex rel Petrucelli v. Wisconsin Patients Comp. Fund*, 701 NW2d 440 (Wis 2005) (prior statute).

Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 JL Med & Ethics 515, 527 (2005).

A. A Legislative Limit on Noneconomic Damages Defines the Scope of the Available Remedy and Does Not Disturb a Jury's Fact-Finding Function

Courts in most other states, many of which have constitutional language similar or identical to Oregon's Constitution,[11] have squarely rejected claims that noneconomic damage limits violate the right to jury trial. These courts carefully distinguish the fact-finding function of the jury in assessing a plaintiff's losses from the law-applying role of the courts in arriving at a judgment.

For example, the Virginia Supreme Court explained that "although a party has a right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment." *Etheridge v. Med. Ctr. Hosps.*, 376 SE2d 525, 529 (Va 1989). Once the jury

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[11] Courts have upheld limits on noneconomic damages in states such as Idaho, Maryland, and Nebraska, where the state constitution, like Oregon, provides that the right to trial by jury shall remain "inviolate." Idaho Const, Art I, § 7; Md Const, Decl of Rights, Art 23; Neb Const, Art I, § 6; *see Kirkland v. Blaine Cnty. Med. Ctr.*, 14 P3d 1115, 1120 (Idaho 2000); *DRD Pool Serv., Inc. v. Freed*, 5 A3d 45, 57 (Md 2010); *Gourley ex rel Gourley v. Neb. Methodist Health Sys., Inc.*, 663 NW2d 43, 75 (Neb 2003). As the U.S. Court of Appeals for the Fifth Circuit recognized, "'[i]nviolability' simply means that the jury right is protected absolutely in cases where it applies; the term does not establish what that right encompasses." *Learmonth v. Sears, Roebuck & Co.*, 710 F3d 249, 263 (5th Cir 2013).

"has ascertained the facts and assessed the damages . . . it is the duty of the court to apply the law to the facts." *Id.*

Courts spanning from Maryland to Alaska have found that a limit on noneconomic damages represents a policy judgment that does not interfere with the right to trial by jury. A jury still determines the facts and assesses liability; the statute applies only after the jury's determination. *See L.D.G., Inc. v. Brown*, 211 P3d 1110, 1131 (Alaska 2009) (upholding limit on noneconomic damages); *DRD Pool Serv., Inc. v. Freed*, 5 A3d 45, 57 (Md 2010) (same).

Even where juries determine damages as questions of fact, it is nonetheless "up to the court to conform the jury's findings to the applicable law." *Judd v. Drezga*, 103 P3d 135, 144 (Utah 2004) (rejecting assertion that $250,000 limit on noneconomic damages in medical malpractice cases violated right to jury trial). A statutory limit on noneconomic damages does not impede a plaintiff's ability to present his or her case or hamper the jury's ability to assess the factual extent of the plaintiff's damages. *See Zdrojewski v. Murphy*, 657 NW2d 721, 737 (Mich Ct App 2002) (upholding Michigan limit on noneconomic damages in medical malpractice actions). In applying a limit on noneconomic damages, courts simply apply the law to jury's factual determinations, as courts routinely do in other actions when reaching a judgment. "[T]hey do not alter the findings of facts themselves, thus avoiding

constitutional conflicts." *Arbino v. Johnson & Johnson*, 880 NE2d 420, 432 (Ohio 2007).

Federal courts considering the issue have reached similar results both when applying the Seventh Amendment to the U.S Constitution and when interpreting the right to jury trial provided by state constitutions.[12] Most recently, the Fifth Circuit Court of Appeals held that Mississippi's generally applicable limit on noneconomic damages did not violate the right to jury trial, recognizing that "a court's judgment is based on, but separate from, factual findings." *Learmonth v. Sears, Roebuck & Co.*, 710 F3d 249, 259 (5th Cir 2013). The Third and Fourth Circuits have found that it is not the jury's role to "determine the legal consequences of its factual findings." *Davis v. Omitowoju*, 883 F2d 1155, 1161 (3d Cir 1989); *see also Boyd v. Bulala*, 877 F2d 1191, 1196 (4th Cir 1989). The law defines the permissible remedy.

Courts also recognize that if the legislature has the power to abolish or significantly modify a common law cause of action, the legislature must also have the power to limit the damages recoverable for that action. *See Boyd*, 877 F2d at 1196; *Franklin v. Mazda Motor Corp.*, 704 F Supp 1325, 1333 (D Md

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[12] The United States Supreme Court has recognized that the federal constitution "does not forbid the creation of new rights, or the abolition of old one recognized by the common law" and that "statutes limiting liability are relatively commonplace and have consistently been enforced by courts." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 US 59, 88 n 32 (1978).

1989); *Kirkland v. Blaine Cnty. Med. Ctr.*, 14 P3d 1115, 1119 (Idaho 2000); *Gourley*, 663 NW2d at 75.[13]

Some state high courts point to *Lakin* as an outlier. As the Idaho Supreme Court held:

> "Nothing in the [statutory limit on noneconomic damages] prohibits a plaintiff from presenting his or her full case to the jury and having the jury determine the facts of the case based on the evidence presented at trial. The jury is not instructed about the cap, and is free to make all factual determinations relevant to the case. Once those factual determinations have been made, it is then up to the judge to apply the law to the facts as found by the jury. While some courts have held this procedure simply 'plays lip service to the form of the jury but robs the institution of its function,' *Lakin v. Senco Products, Inc.*, 329 Or. 62, 987 P.2d 463, 473 (1999) (quoting *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711, 721 (1989)), we disagree. In this case, the [plaintiffs] had a jury trial during which they were entitled to present all of their claims and evidence to the jury and have the jury render a verdict based on that evidence. That is all to which the right to jury entitles them. The legal consequences and effect of a jury's verdict are a matter for the legislature (by passing laws) and the courts (by applying those laws to the facts as found by the jury)."

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[13] *See also* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers LJ 907, 908-10 (2001) (examining adoption of reception statutes that delegated to the courts the power to make common law, but reserved the power to retrieve such lawmaking); Or Const, Art 18, § 7 ("All laws in force in the Territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered or repealed.").

Kirkland, 14 P3d at 1120; *see also Gourley*, 663 NW2d at 75 (recognizing that *Lakin* takes minority view on right to jury trial that is similar to Nebraska state constitutional provision and disagreeing with *Lakin's* reasoning).

B. Many Laws Require Courts to Fit a Jury's Assessment of Damages to Applicable Law Without Offending the Right to Jury Trial

There are many examples of laws that establish, constrain, or expand the remedy available in a civil action. Oregon's system of modified comparative fault, application of the collateral source rule, and reallocation of uncollectable damages under joint and several liability illustrate this point. In addition, statutes allocating a jury's award of punitive damages among the plaintiff and state funds, and state laws tripling a jury's award also show that jury awards are altered by operation of law. None of these laws have been found to violate the right to jury trial.

For example, a jury may find that a car accident resulted in $50,000 in medical expenses and lost income, and award $50,000 for pain and suffering. If the jury finds that the plaintiff was 25% at fault for the injury (as it did here), the damage award is reduced by his or her percentage consistent with the jury's verdict. If the plaintiff is found 51% at fault, however, the plaintiff does not receive $49,000—he or she receives nothing. *See* ORS 31.600(1); *see also Phillips v. Monday & Assocs., Inc.*, 235 F Supp 2d 1103, 1105-07 (D Or 2001) (rejecting contention that right to jury trial precluded legislature from replacing common law contributory negligence defense with comparative fault).

Oregon courts also effectively alter the jury's verdict before entering a judgment through application of the collateral source rule. After the verdict, the court is required to deduct certain payments that the plaintiff received from a third party, such as settlements, from the jury's award, but is precluded from deducting other types of payments, such as insurance benefits. ORS 31.580(1).

Oregon's joint and several liability law can also affect the amount of damages recoverable and from whom they may be collected. A jury may find that Defendant A was 75% at fault and Defendant B was 25% at fault. If the plaintiff cannot collect from Defendant B, however, then Defendant B's liability is reallocated to Defendant A in proportion to Defendant A's fault. *See* ORS 31.610(3). By operation of law, Defendant A will pay a greater share of the judgment than the jury's factual determination.

In addition, a plaintiff's recovery of punitive damages, while not compensatory in nature, is also significantly altered by operation of law. A jury may find that a defendant's malicious conduct warrants a $10 million punitive damage award. By operation of Oregon law, however, the plaintiff will receive just 30% of that award, $3.3 million (from which his or her attorney will subtract a fee), while 60% will go to the Criminal Injuries Compensation Act and 10% will go to the State Court Facilities and Security Account. ORS 31.735(1). This court has found that the split-recovery statute does not violate the right to jury trial. *See DeMendoza v. Huffman*, 334 Or 425, 446-47, 51 P3d

1232 (2002) (distinguishing *Lakin* as involving a right to noneconomic compensatory damages that does not apply to punitive damages).

Finally, various Oregon laws require courts to enter a judgment for treble damages.[14] These laws are the flip-side of a limit on damages. They require *increasing* a jury's award in accordance with the law. If Oregon law can constitutionally require courts to triple a jury's damage award where warranted by public policy, then it stands to reason that, where liability concerns weigh otherwise, the legislature can limit recoverable damages. *See Kirkland*, 14 P3d at 1119 (recognizing that "at the time the Idaho Constitution was adopted, there were territorial laws providing for double and treble damages in certain civil actions, . . . [t]herefore, the Framers could not have intended to prohibit in the Constitution all laws modifying jury awards").

Application of each of these laws is in tension with *Lakin*. None of these modify the jury's assessment of damages or fault. Rather, the judgment simply results from the court's proper application of the law to the jury's findings. This court should reexamine *Lakin* in light of subsequent development of the

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[14] *See, e.g.*, ORS 105.810 (requiring treble damages in cases of removal of trees of another without permission); ORS 124.100 (requiring treble damages in cases involving abuse of a vulnerable person); ORS 646.780(1)(a) (requiring treble damages in consumer protection and antitrust cases); ORS 659.785 (requiring treble damages in certain cases of impermissible adverse employment actions against an employee).

law in Oregon[15] and other states and find that ORS 31.710 is consistent with the right to jury trial.

CONCLUSION

For these reasons, we urge the court to:

(1) affirm the decision of the Court of Appeals to the extent that it found that ORS 31.710 is constitutional as applied to product liability claims;

(2) reverse the decision of the Court of Appeals to the extent it found that ORS 31.710 is unconstitutional as applied to loss of consortium claims; and

(3) overrule *Lakin* and hold that ORS 31.710 is consistent with Article I, section 17 and Article VII (Amended), section 3 of the Oregon Constitution.

Respectfully submitted this 2nd day of July, 2015.

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[15] For example, since *Lakin*, this Court has upheld a limit on noneconomic damages applied under the Oregon Tort Claims Act, *Howell v. Boyle*, 353 Or 359, 375, 298 P3d 1 (2013), found that a law precluding an uninsured or intoxicated driver from collecting noneconomic damages does not violate the right to jury trial, *Lawson v. Hoke*, 339 Or 253, 264-65, 119 P3d 210 (2005), and found the statute at issue here is constitutional in wrongful death cases, *Hughes v. PeaceHealth*, 344 Or 142, 154, 178 P3d 225 (2008) (reaffirming *Greist v. Phillips*, 322 Or 281, 294, 906 P2d 789 (1995)).

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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 5.05(2)(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 4,515 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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I certify that on July 2, 2015, I filed the foregoing ***AMICI CURIAE*** **BRIEF** with the Appellate Court Administrator by using the eFiling system.

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