FILED July 2, 2015 04:54 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

KEVIN RAINS AND MITZI RAINS,
Plaintiffs-Respondents/
Petitioners on Review,

v.

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

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

v.

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

and

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

WEYERHAEUSER COMPANY,
Fourth-Party Plaintiff,

v.

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

WITHERS LUMBER COMPANY,
Fourth-Party Plaintiff,

v.

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

Marion County Circuit Court
Case No. 06C21040

Court of Appeal A145916

Supreme Court No. S062939

July 2015

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.

ANSWERING BRIEF ON THE MERITS FOR WEYERHAEUSER COMPANY

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.

Names and Addresses of Counsel on Next Page

July 2015

Michael T. Garone, OSB No. 802341 W. Michael Gillette, OSB No. 660458 Sara Kobak, OSB No. 023495 Jordan R. Silk, OSB No. 105031 Schwabe, Williamson & Wyatt, P.C. 1211 SW Fifth Avenue, Suite 1900 Portland, Oregon 97204 Telephone: 503-222-9981 *Attorneys for Respondent-on-Review Weyerhaeuser Company*	Maureen Leonard, OSB No. 823165 Attorney at Law P O Box 42210 Portland, Oregon 97205 Telephone: 503-224-0212 Brian R. Whitehead, OSB No. 833452 Law offices of Brian Whitehead, P.C. 1610 12th Street SE Salem, Oregon 97302 Telephone: 503-364-8505
Keith Garza, OSB No. 940773 Law Office of Keith M. Garza P.O. Box 68106 Oak Grove, Oregon 97268 Telephone: 503-344-4766 *Attorney for Amici Curiae Associated Oregon Industries and Oregon Business Association*	J. Randolph Pickett, OSB No. 721974 Pickett Dummigan LLP 621 SW Morrison, Suite 900 Portland, Oregon 97205 Telephone: 503-226-3638 *Attorneys for Petitioners-on-Review Kevin And Mitzi Rains* Kathryn H. Clarke P.O. Box 11960 Portland, OR 97211 Telephone: 503-460-2870 *Attorney for Amici Curiae Oregon Trial Lawyers Association*
William F. Gary, OSB No. 77032 Sharon A. Rudnick, OSB No. 83083 Harrang Long Gary Rudnick PC 360 E. 10th Avenue, Suite 300 Eugene, Oregon 97401-3273 Telephone: 541-485-0220 Mark A. Behrens (*pro hac* pending) Cary Silverman (*pro hac* pending) Shook, Hardy & Bacon LLP 1155 F Street, NW, Suite 200 Washington, DC 20004 Telephone: 202-783-8400 *Attorneys for Amici Curiae U.S. Chambers of Commerce et al.*	Thomas W. Brown, OSB No. 801779 Nicholas E. Wheeler, OSB No. 044491 Julie A. Smith, OSB No. 983450 Cosgrave Vergeer & Kester LLP 888 SW Fifth Avenue, Suite 500 Portland, Oregon 97204 Telephone: 503-323-9000 *Attorneys for Third-Party Plaintiff-Respondent*

James N. Westwood, OSB No. 743392
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
Telephone: 503-294-9187

Attorneys for Amici Curiae
Washington Legal Foundation and
Allied Educational Foundation

July 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Oregon Cases

Other Cases

Statutes

Other Authorities

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

I. First Question Presented and Proposed Rule of Law

Question: Does the right to a trial by jury under Article I, section 17, of the Oregon Constitution encompass both a procedural right to have a jury find the amount of damages in an action at law and a substantive right to have the jury's findings on damages to be given effect by entry of a judgment reflecting those findings without application of any statutory limits on the damages that lawfully may be awarded in the action?

Rule of Law: The right to a trial by jury under Article I, section 17, is a procedural right. That procedural right guarantees that a party is entitled to insist on a jury finding the amount of damages as a factual matter in an action at law for money damages. Contrary to the holding in *Lakin v. Senco Products, Inc*., 329 Or 62, 987 P2d 463 (1999), *clarified on other grounds by* 329 Or 369, 987 P2d 476 (1999), however, nothing in Article I, section 17, creates any substantive right to have the jury's verdict to be given effect by entry of a judgment reflecting the jury's full findings on damages even if those damages are contrary to statutory law. Subject to the requirement of a constitutionally adequate remedy for rights protected by the remedy clause in Article I, section 10, of the Oregon Constitution, the legislature enjoys plenary authority to define, modify, or limit the type and amount of damages that may be awarded

on a claim. Applying the legislature's choice on the type and amount of damages that may be recovered on a claim is an application of law that is properly the function of the court and that does not implicate the right to a jury trial on factual issues under Article I, section 17.

II. Second Question Presented and Proposed Rule of Law

Question: When the legislature creates a statutory cause of action for money damages that did not exist at common law at the time when the Oregon Constitution was adopted in 1857, does the legislature enjoy plenary authority to prescribe the type and amount of damages that may be recovered in such a cause of action, or does the right to a trial by jury under Article I, section 17, of the Oregon Constitution encompass a right to have a judgment entered on the full amount of damages found in a jury's verdict even if the legislature has not authorized recovery of those damages?

Rule of Law: In enacting a new statutory cause of action, the legislature has authority to prescribe the scope of the action, including the elements of the claim, the available defenses, and the type and amount of damages and other relief that may be awarded. Even if this Court adheres to its holding in *Lakin*, 329 Or 62, that the right to a jury trial under Article I, section 17, encompasses a right to receive the full amount of damages found by a jury in common-law actions in existence when the Oregon Constitution was adopted, or in actions of

like nature, Article I, section 17, does not restrict the legislature's authority to prescribe the damages that may be recovered in statutory actions where the legislature itself created the substantive right to recovery. A right to a trial by jury under Article I, section 17, does not confer a right to receive unlimited damages. If the legislature creates a statutory cause of action, the legislature has authority to limit the damages that lawfully may be awarded in the action. Article I, section 17, requires "a jury's determination of [a party's] damages, both in type and amount, only to the extent that the substantive law, *i.e.*, the statute, pertaining to [the] claim so provides." *Hughes v. Peacehealth*, 344 Or 142, 155, 178 P3d 225 (2008). Thus, because a strict-product-liability claim under ORS 30.920 is a statutory claim unlike any common-law claim existing at the time when the Oregon Constitution was adopted, application of ORS 31.710 to such a claim does not violate Article I, section 17.

III. Third Question Presented and Proposed Rule of Law

Question: Does the prohibition against judicial reexamination of facts found by a jury in Article VII (Amended), section 3, of the Oregon Constitution prohibit the legislature from setting a limit on the amount of damages that may be awarded in an action at law or prohibit courts from applying a statute setting such a limit?

Rule of Law: Article VII (Amended), section 3, prohibits courts from independently reexamining facts found by a jury and setting aside the jury's verdict unless no evidence supports the verdict. Article VII (Amended), section 3, does not concern the power of the legislature, nor does it in any way restrict the legislature's plenary authority to define, modify, or limit the remedies available in an action at law. Article VII (Amended), section 3, also does not concern, or in any way restrict, the authority and function of the courts to apply the law to a jury's factual findings in entering a judgment on the jury's verdict. When a court applies a statutory limit on recoverable damages in entering a judgment on a jury's verdict, the court is applying law, not reexamining facts, and Article VII (Amended), section 3, is not implicated.

STATEMENT OF THE CASE

This case involves strict-product-liability claims under ORS 30.920 that plaintiffs/respondents-on-review Kevin and Mitzi Rains ("plaintiffs") brought against respondent Stayton Builders Mart, Inc. ("Stayton") and third-party defendant/respondent-on-review Weyerhaeuser Company ("Weyerhaeuser"), seeking to recover for personal injury to Kevin Rains ("Rains") and for loss of consortium to Mitzi Rains after Rains was injured in a construction accident.

(ER-2-6.)[1] The claims were tried to a jury, and the jury returned a verdict for plaintiffs awarding both economic and noneconomic damages. Weyerhaeuser moved the trial court to apply the statutory limit on recoverable noneconomic damages under ORS 31.710 in entering a judgment on the jury's verdict, but the trial court denied the motion based on its understanding of this Court's decision in *Lakin*, 329 Or 62.[2] After applying ORS 31.600 to the jury's verdict to reduce plaintiffs' damages awards based on Rains's comparative fault, the trial court entered a judgment awarding $3,928,275 in economic damages and $2,343,750 in noneconomic damages to Rains and $759,375 in noneconomic damages to Mitzi Rains. (ER-16-23.)

On Weyerhaeuser's appeal, the Court of Appeals reversed the trial court in part. In doing so, the Court of Appeals held that the limit on noneconomic damages under ORS 31.710 was constitutional as applied to the jury's verdict

---

[1] Unless otherwise noted, all citations to "ER" in this brief are to the excerpts of record filed with Weyerhaeuser's brief on the merits in S062959.

[2] ORS 31.710(1) provides, in part:

> "Except for claims [against public bodies] subject to ORS 30.260 to 30.300 and [workers' compensation statutes in] ORS chapter 656, ***in any civil action seeking damages arising out of bodily injury***, including emotional injury or distress, death or property damage of any one person including claims for loss of care, comfort, companionship and society and loss of consortium, ***the amount awarded for noneconomic damages shall not exceed $ 500,000***."

(Emphasis added.)

on Rains's strict-product-liability claim under ORS 30.920 because that claim was a statutory claim unlike any claim that existed at common law at the time when the Oregon Constitution was adopted. *Rains v. Stayton Builders Mart, Inc.*, 264 Or App 636, 659-66, 336 P3d 483 (2014). Even though Mitzi Rains's claim was the same strict-product-liability claim as Rains's claim, the Court of Appeals reached the opposite conclusion as to her claim, holding that the limit under ORS 31.710 was unconstitutional as applied to a claim seeking to recover for loss of consortium.[3] *Id.* at 665-66.

Before this Court, plaintiffs challenge the constitutionality of applying the damages limit under ORS 31.710 to a strict-product-liability claim under ORS 30.920. In making that challenge, plaintiffs do ***not*** argue that the damages limit under ORS 31.710—which allows unlimited recovery of all economic damages and up to an additional $500,000 in noneconomic damages—results in a remedy that is constitutionally inadequate in violation of Article I, section 10, of the Oregon Constitution.[4] Instead, even accepting that the remedy allowed

---

[3] Weyerhaeuser has challenged the Court of Appeals decision concerning the constitutionality of applying ORS 31.710 to Mitzi Rains's claim in S062959. Because plaintiffs asserted the same strict-product-liability claim under ORS 30.920—with Rains seeking to recover for personal injury and Mitzi Rains seeking to recover for loss of consortium—the constitutionality of applying ORS 31.710 should be the same as applied to both claims.

[4] Article I, section 10, provides, in part: "Every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

under ORS 31.710 is substantial and constitutionally adequate in every way, plaintiffs argue that ORS 31.710 is unconstitutional as applied to actions at law for money damages because, according to plaintiffs, ORS 31.710 violates the jury-trial rights in Article I, section 17, and Article VII (Amended), section 3.[5] Alternatively, plaintiffs argue that, even if ORS 31.710 is capable of being applied constitutionally in entering damages awards on claims that are purely statutory, a strict-product-liability claim under ORS 30.920 does not qualify as such a statutory claim. For the reasons stated below, this Court should reject both of plaintiffs' arguments and hold that the jury-trial rights in both Article I, section 17, and Article VII (Amended), section 3, are not violated by applying the statutory limit on noneconomic damages under ORS 31.710 to plaintiffs' strict-product-liability claims.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

A full recitation of the historical and procedural facts underlying this case is provided in Weyerhaeuser's brief on the merits in S062595. In short, this

---

[5] Article I, section 17, provides: "In all civil cases the right of Trial by Jury shall remain inviolate."

Article VII (Amended), section 3, provides, in part: "In actions at law, where the value in controversy shall exceed $ 750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

case arose after Rains was seriously injured in a construction accident. The accident happened when Rains was walking on top of a two-by-six-inch board at a height of 16 feet above the ground during the construction of a pole barn. (Tr-1230-32, Tr-1148-49.) The board was 14 feet long and stretched across an exposed span between two poles. (*Id*.) Rains was not wearing fall-protection gear when he was walking on top of the board, and he fell to the ground after the board broke under his weight. (*Id*.) As a result of his fall, Rains suffered injuries to his lower back that resulted in paraplegia. (*Id*.; *see also* ER-1-6.)

In seeking to recover damages against Stayton and Weyerhaeuser for Rains's accident, plaintiffs asserted a strict-product-liability claim under ORS 30.920, alleging that the board involved in the accident was defective because the board had a large knot roughly five inches in diameter in the center of the board.[6] (ER-2-4.) Plaintiffs' strict-product-liability claim eventually proceeded to a jury trial that lasted two weeks. At trial, Weyerhaeuser disputed that it was the manufacturer of the board.[7] In doing so, Weyerhaeuser presented evidence

---

[6] Rains also originally asserted a negligence claim against Stayton, but that claim was dismissed before trial pursuant to plaintiffs' Mary Carter agreement. (*See* ER-11-13 (Mary Carter agreement).) Weyerhaeuser has challenged the Court of Appeals' decisions concerning the Mary Carter agreement in S062959.

[7] Plaintiff did not know the manufacturer of the board because Rains's business partner destroyed the board shortly after the accident. (Tr-325.) Weyerhaeuser was brought into the action after Stayton filed third-party claims for indemnity and contribution against different lumber manufacturers. (ER-7-10.)

that Weyerhaeuser's lumber mill that supposedly had manufactured the board was not capable of milling logs that were large enough to produce a knot of the size that the board allegedly contained. (*See, e.g.*, Tr-1321-22, Tr-1376.) Even though Stayton claimed that it had supplied only boards manufactured by Weyerhaeuser (*see, e.g.*, Tr-1285)—and, thus, a finding that the board was not manufactured by Weyerhaeuser would have furthered Stayton's position that it did not supply the defective board—Stayton did not support Weyerhaeuser's defense. Instead, after entering a Mary Carter agreement with plaintiffs that contained financial incentives for Stayton to assist plaintiffs with securing a favorable verdict (ER-11-13), Stayton admitted liability at trial and actively joined plaintiffs in trying to overcome Weyerhaeuser's evidence and to increase plaintiffs' damages award. (*See* Weyerhaeuser Merits Br in S062959, at 10-20 (describing trial proceedings); *see also* ER-24-50 (excerpts of Stayton's closing argument).) Because the trial court ruled that the terms of the Mary Carter agreement were inadmissible for any purpose at trial, the jury never learned of Stayton's financial incentives under that agreement, and both plaintiffs and Stayton were able to argue to the jury that Stayton supported a large verdict for plaintiffs against itself and Weyerhaeuser because Stayton had "accepted responsibility" for the accident. (*See, e.g.,* Tr-1553; Tr-1598-1600.)

At the conclusion of trial, the jury returned a verdict for plaintiffs and awarded economic and noneconomic damages. (ER-16-23.) Weyerhaeuser moved the trial court to apply the limit on noneconomic damages under ORS 31.710 in entering judgment on the jury's verdict, but the trial court denied the motion based on its understanding of this Court's decision in *Lakin*, 329 Or 62. (Tr-1834.) After applying ORS 31.600 to reduce the recoverable damages in view of Rains's comparative fault, the trial court entered a judgment awarding $3,928,275 in economic damages and $2,343,750 in noneconomic damages to Rains and $759,375 in noneconomic damages to Mitzi Rains. (ER-16-23.) As noted, on appeal, the Court of Appeals reversed the trial court in part, holding that ORS 31.710 was constitutional as applied to the jury's verdict on Rains's claim, but not as applied to Mitzi Rains' claim. *Rains,* 264 Or App at 659-66.

SUMMARY OF ARGUMENT

I. This Court should reject plaintiffs' effort to expand the holding in *Lakin*, 329 Or 62, in arguing that ORS 31.710 violates the right to a jury trial under Article I, section 17, in an action at law for money damages, even if—as in this case—the action is statutory in nature and is unlike any action that was cognizable at common law when the Oregon Constitution was adopted. Rather than expand the holding in *Lakin*, this Court should overrule that decision as wrongly decided. The right to a jury trial under Article I, section 17, is a

procedural right that entitles a party to have a jury assess factual issues in an action at law for money damages, including factual issues about the nature and extent of damages. The right to a jury trial under Article I, section 17, is not implicated by application of ORS 31.710 because it is the province of the court to apply law to the jury's findings of fact. The right to a jury trial under Article I, section 17, also does not confer any substantive right to have the jury's verdict to be given "full effect" by entry of a judgment reflecting the jury's findings on damages even if those damages are not permitted by law. Subject to the requirement of constitutionally adequate remedy for rights protected by Article I, section 10, the legislature enjoys plenary authority to define or limit the type and amount of damages that may be awarded on a claim. When, as in this case, it is undisputed that the legislature provided an adequate remedy, no constitutional impediment exists to the application of ORS 31.710.

II. Even if this Court declines to overrule the holding in *Lakin*, 329 Or 62, this Court should reject plaintiffs' argument that application of ORS 31.710 is constitutionally impermissible in this case. This case involves strict-product-liability claims under ORS 30.920. A strict-product-liability claim under ORS 30.920 is a statutory claim unlike any claim existing at common law when the Oregon Constitution was adopted. When the legislature exercises its authority to create a statutory cause of action, the legislature has plenary authority to limit

the type and amount of damages that may be recovered in the action. The right to a jury trial under Article I, section 17, does not confer any right to damages that the legislature has not authorized for recovery. Instead, when—as in this case—ORS 31.710 is applied to a statutory cause of action that did not exist at common law when the Oregon Constitution was adopted, Article I, section 17, requires "a jury's determination of [a party's] damages, both in type and amount, only to the extent that the substantive law, *i.e.*, the statute, pertaining to [the] claim so provides." *Hughes,* 344 Or at 155.

III. Finally, this Court should reject plaintiff's argument that ORS 31.710 violates the prohibition on judicial reexamination of a jury's findings under Article VII (Amended), section 3. Article VII (Amended), section 3, prohibits a court from independently reexamining facts that a jury has found or from setting aside a jury's verdict unless the court affirmatively concludes that no evidence supports the verdict. Article VII (Amended), section 3, does not concern, or in any way restrict, the legislature's authority to define, modify, or limit the remedies available in an action at law. That provision also does not concern, or in any way restrict, the authority and function of the courts to apply the law to a jury's factual findings in entering a judgment on the jury's verdict. When a court applies the statutory limit on recoverable noneconomic damages under ORS 31.710 in entering a judgment on a jury's verdict, the court is

applying law, not reexamining facts, and Article VII (Amended) section 3, is not implicated.

ARGUMENT

I. Introduction: Operation and History of ORS 31.710

ORS 31.710—formerly numbered as ORS 18.560 (1987)[8]—originally was enacted in 1987 as a key part of the Oregon Tort Reform Law "to control the escalating costs of the tort compensation system" after the legislature had considered "hours of testimony on the insurance and tort crisis, and how reform was needed in order to salvage the system." *Greist v. Phillips*, 322 Or 281, 299 n 10, 906 P2d 789 (1995) (quoting Kathy T. Graham, *1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?,* 24 Willamette L Rev 283, 292 (1988), as apt summary of history of ORS 31.710). ORS 31.710 permits a tort claimant to have full recovery of all economic damages and authorizes recovery of noneconomic damages up to $500,000. *See* ORS 31.710(1) (so providing). When, as in this case, a case is tried to a jury, the jury assesses the amount of damages as a factual matter without any knowledge of the legal limit on recoverable noneconomic damages to prevent the limit from influencing the

[8] *Former* ORS 18.560 (1989) was renumbered as ORS 31.710 in 2003. For ease of reference, this brief uses ORS 31.710—the current codification of the statutory limit on noneconomic damages in civil actions arising out of bodily injury—in all references to the statute.

jury's findings. *See* ORS 31.710(4) ("The jury shall not be advised of the limitation set forth in this section."). After the jury returns its verdict, the trial court then determines the amount of damages that lawfully may be awarded in a judgment based on the jury's findings. In addition to any other applicable statutory provisions reducing or increasing the damages that lawfully may be imposed—such as ORS 31.600(1) in cases with comparative fault, or ORS 124.100(2) in actions involving abuse of vulnerable persons—the trial court applies ORS 31.710 in entering a judgment on a jury's verdict to eliminate any noneconomic damages that are not authorized by law.

Since its enactment, this Court has considered numerous constitutional challenges to ORS 31.710. In *Greist*, 322 Or 281, this Court considered its first challenge to ORS 31.710 as unconstitutional under Article I, section 17, and Article VII (Amended), section 3, in the context of a wrongful death action. In upholding the constitutionality of the statute, this Court assumed for the sake of the decision that the right to a jury trial under Article I, section 17, applies to wrongful death actions. *Id*. at 294. Even accepting that premise, however, the Court held that application of ORS 31.710 does not violate Article I, section 17, based on its conclusion that the right to a jury trial does not encompass any right to have "the jury's unmodified determination of damages … given effect" notwithstanding contrary statutory law. *Id.* at 292-95. The Court also held that

application of ORS 31.710 does not violate Article VII (Amended), section 3, because Article VII (Amended), section 3, does not restrict the legislature's authority to limit the damages that may be recovered on a statutory claim. *Id*. at 296-97.

In *Lakin*, 329 Or 62—decided just four years after *Greist*—this Court again considered the constitutionality of ORS 31.710 under Article I, section 17. In that case, this Court first concluded that the right to a jury trial under Article I, section 17, includes a right to have a jury to determine the amount of damages as a factual matter. *Id*. at 74. From that uncontroversial conclusion, however, the Court leaped much further and—for the first time in its history and in sharp contrast to its recent interpretation of Article I, section 17, in *Greist*—the Court held that Article I, section 17, also includes a substantive right to receive a judgment reflecting the "full effect" of a jury's determination of damages in any "civil cases in which the right to jury trial was customary in 1857, or in cases of like nature." *Id*. at 82.[9] In reaching that holding, this Court distinguished between statutory actions for money damages—like

[9] In *Lakin*, the Court stated that *Greist* wrongfully had asserted that Oregon trial courts historically had the authority to reduce a jury's verdict over the objection of a party. *Lakin*, 329 Or at 76-77. In fact, *Greist* includes ***no*** such assertion. In *Greist*, the Court observed that "[u]ntil the adoption of Article VII (Amended), section 3, in 1910, trial courts were empowered to reduce jury awards of damages when the courts believed that those awards were excessive" in the context of discussing *remittitur*. *See Greist*, 322 Or at 294-95 (same).

wrongful death actions—and common-law actions, noting that common-law actions historically were not subject to limits on noneconomic damages. *Id.* at 77. While affirming the holding in *Greist* that ORS 31.710 may be applied constitutionally to statutory actions that are unlike any actions existing at common-law, the Court in *Lakin* determined that the limit on noneconomic damages under ORS 31.710 was unconstitutional as applied to common-law actions that existed when the Oregon Constitution was adopted in 1857, or actions of like nature. *Id*. at 82.[10]

Subsequently, in *Hughes*, 344 Or 142, this Court considered a renewed challenge to the constitutionality of ORS 31.710 as applied to a wrongful death action. Relying on *Lakin*, 329 Or 62, the plaintiff argued that Article I, section 17, prohibits the legislature and courts from "interfering" with the amount of damages that may be awarded based on a jury's verdict in a wrongful death action because, according to the plaintiffs, such an action is like a personal injury action recognized at common law at the time of the Oregon Constitution.

---

[10] In their brief, plaintiffs repeatedly assert that *Lakin* already concluded that ORS 31.710 may not be applied to a strict-product-liability claim because the plaintiffs in *Lakin* asserted a strict-product-liability claim in addition to their negligence claim. (*See* Pl Merits Br at 5 (arguing same).) In *Lakin,* however, this Court referred only to plaintiffs' common-law claims in holding that ORS 31.710 was unconstitutional as applied to common-law actions at law existing when the Oregon Constitution was adopted or actions of like nature. *Lakin,* 329 Or at 78-79. *Lakin* did not consider—much less hold—that a strict-product-liability claim falls within that category.

Id. at 155. In rejecting that argument, this Court did not disturb its holding in *Lakin* but reiterated the precept that the right to a jury trial under "'Article I, section 17, is not a source of law that creates or retains any substantive theory of recovery in favor of any party.'" *Id*. (quoting *Jensen v. Whitlow*, 334 Or 412, 422, 51 P3d 599 (2002)). After concluding there was "no clear common-law tradition" concerning wrongful death actions, this Court again affirmed that ORS 31.710 does not violate the jury-trial rights under Article I, section 17, or Article VII (Amended), section 3, when applied to statutory actions for money damages where the legislature itself created the substantive right to recovery. *Id.* at 156-57.

Finally, *Klutschkowski v. Peacehealth*, 354 Or 150, 311 P3d 461 (2013), is this Court's most recent decision considering the constitutionality of ORS 31.710 under Article I, section 17. In *Klutschkowski*, this Court applied the holdings in *Lakin* and *Hughes* to conclude that Article I, section 17, prohibits the legislature from limiting the amount of noneconomic damages that may be recovered in a medical malpractice action based on a birthing injury because such an action was one "for which the right to jury trial was customary in 1857." *Id*. at 177. Notably, in so concluding, this Court acknowledged the tension between the holding in *Lakin* that Article I, section 17, prohibits the legislature from "interfer[ing]" with the "full effect" of a jury's assessment of

damages in common-law actions, and this Court's recognition that the jury-trial right under Article I, section 17, does not create or retain any substantive theory recovery in favor of any party. *Id*. at 177. The Court, however, declined to reconsider its prior decisions concerning the constitutionality of ORS 31.710 under Article I, section 17, because no party asked for reconsideration. *Id*. at 169.[11]

In this case, plaintiffs again challenge ORS 31.710 as contrary to the jury-trial rights in Article I, section 17, and Article VII (Amended), section 3. In doing so, plaintiffs do not dispute that the damages limit under ORS 31.710 provides a constitutionally adequate remedy. Instead, even accepting that the remedy under ORS 31.710 is adequate, plaintiffs argue that the noneconomic damages limit under ORS 31.710 cannot be applied constitutionally under

---

[11] Justice Landau authored a concurring opinion in *Klutschkowski* in which he expressed reservations about *Hughes*, 344 Or 142, "especially with respect to its incorporation of *Smothers* [*v. Gresham Transfer, Inc*., 332 Or 83, 23 P3d 333 (2001)]-type analysis into the interpretation and application of the right to a jury trial guaranteed by Article I, section 17, of the Oregon Constitution." *Klutschkowski*, 354 Or at 194 (Landau, J., concurring). As plaintiffs correctly note (Pl Merits Br at 13), Justice Landau observed that "some tension" exists between the Court's decisions in *M.K.F. v. Miramontes*, 352 Or 401, 287 P3d 1045 (2012), and *Hughes*, as to the types of claims that are subject to Article I, section 17. Justice Landau, however, did ***not*** opine on the scope of Article I, section 17, or the correctness of the holding in *Lakin* that "a particular aspect of the right to a jury trial" was "a right to the benefit of the jury's decision itself without any statutory limitations" in common-law actions. *See Klutschkowski*, 354 Or at 195-96 (Landau, J., concurring) (discussing same).

Article I, section 17, because—according to plaintiffs—the right to a jury trial under Article I, section 17, encompasses a substantive "right to have the effect of the jury's damages award" without application of any statutory limits on recoverable damages even when, as is true for strict-product-liability actions, the action did not exist at common law when the Oregon Constitution was adopted.[12] (Pl Merits Br at 6-19.) Plaintiffs also contend that the reexamination clause of Article VII (Amended), section 3, bars the legislature from prescribing any statutory limits on recoverable damages in actions at law. (*Id*. at 20-22.) This Court should reject both arguments and hold that application of ORS 31.710 to plaintiffs' strict-product-liability claims does not violate any jury-trial rights under Article I, section 17, or Article VII (Amended), section 3.

---

[12] This Court previously has held that the remedy clause in Article I, section 10, does not preclude the legislature from altering or limiting the damages that may be recovered for tort claims "so long as the remaining remedy is 'substantial'" or constitutionally adequate for the claim at issue. *Howell v. Boyle*, 353 Or 359, 373, 298 P3d 1 (2013); *see also, e.g., Clarke v. Or. Health Sciences Univ.*, 343 Or 581, 175 P3d 418 (2007) (same). This Court currently is interpreting Article I, section 10, in *Horton v. Or. Health and Science Univ*., S061992. If this Court were to accept plaintiffs' arguments in this case, however, the remedy clause in Article I, section 10, would be largely superfluous because, in plaintiffs' view, ***any*** statutory limit on noneconomic damages is constitutionally impermissible under Article I, section 17, no matter how adequate the remedy. *Cf. also, e.g.*, *Lakin,* 329 Or at 81 ("[W] do not assess the constitutionality of [ORS 31.710] under Article I, section 17, based on the amount of the statutory cap; rather, we assess its constitutionality *because it is a cap* on the jury's determination of noneconomic damages." (italics in original)).

II. This Court Should Overrule *Lakin* as Wrongly Decided Because the Right to Jury Trial under Article I, Section 17, Is a Procedural Right that Is Not Implicated by ORS 31.710

In urging that ORS 31.710 cannot be constitutionally applied under Article I, section 17, to their strict-product-liability claims under ORS 30.920, plaintiffs rely exclusively on this Court's decision in *Lakin* for the proposition that "[t]he right to jury trial includes the litigants' right to an effective verdict." (Pl Merits Br at 9.) Plaintiffs' argument fails because, as discussed in Section III below, this Court has refused to extend the holding in *Lakin* to rule that the right to a jury trial under Article I, section 17, precludes the legislature from prescribing the damages that lawfully may be recovered in statutory actions. Even more basically, however, plaintiffs' argument fails because *Lakin* was wrong in its interpretation of Article I, section 17.

Contrary to the decision in *Lakin*, a review of the text, context, and historical circumstances surrounding Article I, section 17, shows that the right to a jury trial is a procedural right—equally applicable to both plaintiffs and defendants—to have a jury to decide questions of fact in civil actions at law. Nothing in that procedural right restricts the legislature's authority to prescribe a limit on the damages that lawfully may be recovered in an action—whether the action is common law or statutory. Application of a statutory limit on recoverable damages also does not interfere with the jury's role as the finder of

fact because the question of what damages are legally authorized for recovery is a question of law for the court. Although this Court need not overrule *Lakin* to reject plaintiffs' constitutional challenges to the application of ORS 31.710, the *Lakin* decision is wrongly decided and should be overruled. *See State v. Ciancanelli*, 339 Or 282, 290-91, 121 P3d 613 (2005) (court may reconsider decisions if shown wrongly decided).

A. The Right to a Jury Trial under Article I, section 17, Is a Procedural Right to Have a Jury Decide Issues of Fact

Article I, section 17, is an original provision of the Oregon Constitution adopted in 1857. That provision provides "[i]n all civil cases the right of Trial by Jury shall remain inviolate." *See Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992) (when interpreting original provision of the Oregon Constitution, this Court examines "its specific wording, the case law surrounding it, and the historical circumstances that led to its creation."). As this Court observed in *Lakin*, 329 Or at 69, the term "inviolate" means the right to a jury trial is secure against violation or impairment. *See also, e.g., Learmouth v. Sears Roebuck and Co*., 710 F3d 249, 263 (5th Cir 2013) (observing "inviolate" jury guarantee "simply means that the jury right is protected absolutely in cases where it applies; the term does not establish what that right encompasses"). As to what rights are secure in Article I, section 17, this Court long has instructed that the

scope of the right to a jury trial under Article I, section 17, is governed by the historical scope of that right at the time when the Oregon Constitution was adopted. *See, e.g., Tribou* v. *Strowbridge*, 7 Or 156, 158 (1879) ("the right of trial by jury shall continue to all suitors in courts, in all cases in which it was secured to them by the laws and practice of the courts at the time of the adoption of the constitution"); *see also M.K.F. v. Miramontes*, 352 Or 401, 411, 287 P3d 1045 (2012) (in determining applicability of right to jury trial under Article I, section 17, court looks at nature of case to determine if action at law for which jury trial applies and nature of issue in proceeding to determine if particular issue is one for jury).

In *Lakin*, 329 Or at 70-73, this Court examined in detail the history of the right to a trial by jury. As described in that decision, the right to a trial by jury "was ensured in the Magna Carta in 1215" and its historical origins predated the Magna Carta by hundreds of years. *Id*. at 70 (citing Thomas H. Tongue, *In Defense of Juries as Exclusive Judges of the Facts*, 35 Or L Rev 143, 145 (1956)). The right to a jury trial was incorporated into most of the early state constitutions, the Seventh Amendment to the United States Constitution, as well as Oregon's territorial laws. *Id.* at 71-73 (discussing same). The text of Article I, section 17, was taken verbatim from Article I, section 20, of the 1851 Indiana Constitution, and it was approved without any recorded debate. *Id*. at 71 (citing

W.C. Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200, 201 (1926)); *see also* Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857 – Part I (Article I, & II)*, 37 Willamette L Rev 469, 528 (2001). Other state constitutions also adopted identical or similar jury-trial guarantees. *See, e.g.*, Idaho Const, Art I, § 7 ("[t]he right of trial by jury shall remain inviolate"); Wash Const, Art 1, § 21 (same); Mo Const, Art I, § 22 (same); SC Const, Art I, § 14 (same); Neb Const, Art I, § 6 (same).

As this Court recognized in *Lakin*, the right to a jury trial, as it existed at common law, provided the jury with authority to determine factual issues, but not legal issues, in actions at law. *See Lakin,* 329 Or at 71 ("The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts." (quoting *Dimick v. Schiedt*, 293 US 474, 486 (1935)); *see also, e.g., Deane v. Willamette Bridge Co*., 22 Or 167, 172-73, 29 P 440 (1892) (distinguishing between factual issues for jury and legal issues for the court); *Nelson v. Or. R & N. Co*., 13 Or 141, 143, 9 P 321 (1886) (noting "[t]he jury are judges of the facts"). Instead, issues of law were reserved solely for the court. *Miramontes*, 352 Or at 411 ("questions of law generally are the province of judges and not of juries"); *see also State v. Merton*, 175 Or 254, 261-71, 152 P2d 942 (1944) (discussing history of Article I, section 16, governing right to jury trial in criminal cases,

and noting "[t]here is no provision in our Constitution which confers upon a jury in civil cases the power to determine both law and facts").

The right to have a jury to determine factual issues extended to having a jury determine factual issues about the extent of damages. *Lakin*, 329 Or at 74 ("the assessment of damages was a function of a common law jury in 1857"); *id*. at 73 ("[t]he amount of damages … from the beginning of trial by jury, was a 'fact' to be found by the jurors" (quoting Charles T. McCormick, *Handbook on the Law of Damages* at 24 (1935)); *see Molodyh v. Truck Ins. Ex*., 304 Or 290, 296-97, 744 P2d 992 (1987) (right to jury trial includes right to have jury determine amount of damages). Before the adoption of Article VII (Amended), section 3, in 1910, a trial court had discretion to set aside a jury's verdict and grant a new trial if the court determined that the jury's verdict was excessive, or to order *remittitur* of the excessive damages as a condition for denying a motion for a new trial.[13] *Greist*, 322 Or at 294; *see also* General Laws of Oregon, Civ Code, ch 2, § 232(5), p 197 (Deady 1845-1864) (so providing). A trial court

[13] As noted, in *Lakin*, 329 Or at 76-77, this Court criticized the *Greist* decision as wrongly asserting that "courts were empowered to reduce jury awards of damages when the courts believed that those awards were excessive" in *dicta*. The Court's statement in *Greist*, however, was in the context of its discussion of the power of *remittitur*, where the Court recognized that courts were required to offer a new trial as an alternative to *remittitur*. *Greist*, 322 Or at 294-95. The Court in *Greist* discussed *remittitur* to illustrate that no right existed at common law "to have a judge enter a judgment on a jury's award of damages" without any judicial alteration in personal-injury actions. *Id*. at 295.

could not order *remittitur* without giving the option of a new trial because a trial court was not permitted to substitute its judgment for the jury's factual findings. *Lakin*, 329 Or at 76. The power of *remittitur,* however, shows that a jury's findings on damages were not immune from judicial review.

Prior to *Lakin*, this Court did not understand the right to a jury trial as implicated by application of laws governing the amount of damages authorized for recovery in an action. In *Wiebe v. Seely*, 215 Or 331, 335 P2d 379 (1959), this Court considered the then-existing statutory limit on recoverable damages in wrongful-death actions. In describing application of the statutory limit, this Court explained that applying a statutory limit on damages is properly the function of the court, stating:

> "[T]he statute does not deal with the function of the jury at all, but with that of the court. The legislature has said, in effect, that regardless of the extent of damages actually suffered by the plaintiff in an action against the estate of a deceased tort-feasor, ***recoverable*** damages may not exceed $15,000."

Id. at 352-53 (italics in original, bold added). In *Lakin*, however, this Court took a different view and determined that applying law to a jury's verdict to enter a judgment on only those damages authorized by law implicated the function of the jury as the fact-finder because, according to *Lakin*, it "prevents the jury's award from having its full and intended effect." 329 Or at 79. That reasoning in *Lakin*, however, disregards that a jury has no authority to dictate

the legal consequences of its factual findings. *See, e.g., Davis v. Omitowoju*, 883 F2d 1155, 1160 (3d Cir 1989) ("[I]t is not the role of the jury to determine the legal consequences of its factual findings."); *Boyd v. Bulala*, 877 F2d 1191, 1196 (4th Cir 1989) ("once the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law").

B. This Court's Decision in *Lakin* Has No Support in Prior Precedents Interpreting Article I, Section 17

Before its decision in *Lakin*, this Court never had interpreted the right to a jury trial under Article I, section 17, as encompassing any substantive right to receive a judgment reflecting the jury's findings of damages without application of any laws affecting the amount of damages that lawfully could be awarded. Although plaintiffs urge that *Lakin* "is consistent with many cases over the years" (*see* Pl Merits Br at 6), plaintiffs rely solely on *Lakin* for the proposition that "[t]he right to jury trial includes the litigants' right to an effective verdict" (*id*. at 9), and they are unable to identify any other Oregon case or historical evidence in support of *Lakin*'s holding. (*See* Pl Merits Br at 6-9.) No support appears to exist.

In supporting their argument, plaintiffs cite this Court's decision in *Klutschkowski*, 354 Or 150, but *Klutschkowski* merely applied the holding in

Lakin and expressly noted that "neither party has asked us to reconsider our decisions under … Article I, section 17." *Id*. at 169. Similarly, plaintiffs cite *Molodyh,* 304 Or 290, for the proposition that the right to a jury trial includes the right to have the jury decide all issues of fact, but that case provides no other support for *Lakin*'s holding. Additionally, plaintiffs cite *State v. 1920 Studebaker Touring Car*, 120 Or 254, 251 P 701 (1927), for the proposition that the right to a jury trial is not limited to cases existing before the adoption of the Oregon Constitution, but nothing in *1920 Studebaker* suggests that Article I, section 17, includes any substantive right to receive the full damages awarded by a jury even if those damages are not authorized by law.

The decision in *Lakin* also identifies no prior Oregon case interpreting Article I, section 17, as encompassing any such substantive right. In *Lakin*, this Court identified ample support for its determination that "the assessment of damages was a function of a common law jury in 1857." 329 Or at 74. Notably, however, the Court identified ***no*** historical evidence or Oregon case law supporting its view that "the drafters of Article I, section 17, would [not] have tolerated [legislative] interference with a jury's award of noneconomic damages" or that the right to a jury trial was intended to restrict the legislature's

authority to modify common-law remedies for personal injury.[14] *Id*. at 78. Instead, lacking other supporting precedents, this Court in *Lakin* relied heavily on the Washington Supreme Court's decision in *Sofie v. Fibreboard Corp*., 771 P2d 711 (Wash 1989).[15] As the dissenting opinion recognized in the Court of Appeals' decision in *Tenold v. Weyerhaeuser*, however, "the *Sofie* court's

---

[14] *Lakin* cited *Oliver v. N. Pac. Transp. Co*., 3 Or 84, 87 (1869), in stating that an injured party has a "right to receive an award that reflects the jury's factual determination of the amount of the damages as will fully compensate [plaintiffs] for all loss and injury to [them]." The statement in *Oliver*, however, was merely a report on jury instructions given in a personal-injury action.

[15] Much like *Lakin*, the *Sofie* decision identified scant historical support for its view that the right to a jury trial encompasses a right to receive a judgment on the jury's full award of damages, even if recovery of those damages is not authorized by statutory law. *See Sofie*, 112 Wn2d at 651-59. The *Sofie* court found it "highly persuasive" that some other courts at that time also had rejected the constitutionality of limits on recoverable noneconomic damages. *Id.* At this time, however, the vast majority of courts considering the issue—including the Indiana Supreme Court in interpreting the source of Article I, section 17—have found no constitutional impediment by application of statutory limits on recoverable noneconomic damages, including no violation of jury-trial rights. *See, e.g., State v. Doe,* 987 NE2d 1066, 1071 (Ind 2013) ("there is no indication . . . that the right to have a jury assess the damages in a case properly tried by jury constitutes a limitation upon the authority of the Legislature to set limits upon damages") (quoting *Johnson v. St. Vincent Hosp., Inc*., 273 Ind 374, 381, 404 NE2d 585, 602 (Ind 1980)); *Kirkland v. Blaine County Med. Ctr*., 4 P3d 1115 (Idaho 2000) (upholding statutory damages limit against challenge based on jury right); *Jenkins v. Patel,* 688 NW2d 543 (Mich App 2004) (same); *Murphy v. Edmonds*, 601 A2d 102 (Md App 1992) (same); *Peters v. Saft*, 597 A2d 50 (Me 1991) (same); *English v. New England Med. Ctr., Inc*., 541 NE 2d 329 (Mass 1989) (same); *Wright v. Colleton County Sch. Dist*., 391 SE2d 564 (SC 1990) (same); *Robinson v. Charleston Area Med. Ctr*., 414 SE2d 877 (W Va 1991) (same); *Guzman v. St. Francis Hosp., Inc*., 623 NW2d 776 (Wis App 2000) (same); *Evans v. State*, 56 P3d 1046 (Alaska 2002) (same).

reasoning is flawed because it fails to recognize the difference between the jury's fact finding process and the imposition of a rule of law by a trial court subsequent to the jury's factual determination." 127 Or App 511, 530, 873 P2d 413 (1994) (Edmonds, J., dissenting). The *Sofie* court's reasoning—like *Lakin*—also fails to appreciate that the legislature has authority to modify common-law remedies. *See, e.g., Josephs v. Burns,* 260 Or 493, 503, 491 P2d 203 (1971) (discussing same).

C. This Court's Decision in *Lakin* Is Inconsistent with Subsequent Decisions from This Court that Recognize that Article I, Section 17, Is Not the Source of a Right to Unlimited Damages

Since its decision in *Lakin*, this Court has issued other decisions rejecting the notion that the right to a jury trial under Article I, section 17, is the source of a right to receive a judgment reflecting the "full effect" of a jury's findings on damages. In *DeMendoza v. Huffman*, 334 Or 425, 446, 51 P3d 1232 (2002), for example, this Court rejected the argument that the right to a jury trial to determine punitive damages also included a right to receive "the full amount of a jury's punitive damages award." In doing so, this Court explained "if a 'right' to receive an award that reflects the jury's determination of the amount of punitive damages exists, then it must arise from some source other than Article I, section 17." *Id*. at 447. *See also Jensen*, 334 Or at 422 ("Article I, section 17, is not a source of law that creates or retains a substantive claim or theory of

recovery in favor of any party."). Although the Court in *DeMendoza* attempted to differentiate *Lakin* by stating that the plaintiffs in *Lakin* had an "underlying right" to receive unlimited damages found by a jury. *See id.* at 447. But *Lakin* was wrong that any such "underlying right" to unlimited damages exists.

In *Lakin*, and in subsequent cases applying the reasoning *Lakin*, this Court appears to have reasoned that the right to a jury trial under Article I, section 17, includes a "right" to receive unlimited damages awarded by a jury because, at time of the adoption of the Oregon Constitution, parties had a historical right to unlimited damages for personal injury at common law. *See, e.g., Lakin,* 329 Or at 78-79 (legislature's power to alter laws does not allow legislature to "infringe on constitutionally-protected rights" to have jury finding unlimited damages); *see also, e.g., Lawson v. Hoke,* 339 Or 253, 267, 119 P3d 210 (2005) (reasoning Article I, section 17, not violated by statute barring recovery of noneconomic damages for uninsured driver because there was no "absolute common-law right" to remedy for injuries). In *Hughes*, for example, the Court stated that the legislature "retained" the authority to prescribe the recoverable damages in a wrongful death action "[b]ecause the common law does not, and did not in 1857, recognize a right to unlimited damages" as to that action. 344 Or at 156-57.

Those efforts to preserve *Lakin*, however, fail to appreciate that the common law did not create fixed rights that were protected against further change by the legislature. *See, e.g., Perozzi v. Ganiere,* 149 Or 330, 346, 40 P2d 1009 (1935) (Article XVIII, § 7 "clearly contemplated future changes in the common law"). The legislature in Oregon enjoys "plenary authority to legislate within constitutional limits." *Dennehy v. Dep't of Revenue*, 305 Or 595, 602, 756 P2d 13 (1988). That authority includes the authority to modify common-law tort remedies. *See, e.g.*, Article XVIII, § 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***." (emphasis added)); *see also, e.g., Noonan v. City of Portland*, 161 Or 213, 88 P2d 808 (1939); *Holden v. Pioneer Broadcasting Co*., 228 Or 405, 365 P2d 845 (1961). Thus, although the Court in *Lakin* holds that the legislature may not "interfere" with the amount of damages to be awarded in common-law actions where parties had a historical right to unlimited damages, such reasoning wrongly understands common-law remedies as fixed rights not subject to legislative change. *See, e.g., Lakin,* 329 Or at 78-79 (stating legislature may not "infringe" on jury determination of full extent of damages). In fact, subject to the requirement of constitutionally adequate remedy for rights protected by Article I, section 10, the legislature enjoys plenary authority to define or limit the type and amount of

damages that may be awarded on a claim. This Court's decision in *Lakin* is wrongly decided, and it should be overruled. *See Farmers Ins. v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011) (recognizing obligation to reach "the correct result in each case" and stating willingness to reconsider prior case if failed to "adequately analyze the controlling issue").

D. ORS 31.710 Does Not Implicate the Right to Jury Trial under Article I, Section 17

Examination of the text, relevant case law, and historical circumstances surrounding Article I, section 17, confirms that the constitutional right to a jury trial is a procedural right to have a jury to determine factual issues. Contrary to *Lakin*, that right is not implicated by application of ORS 31.710 because it is the province of the court to apply law to the jury's findings of fact. Contrary to *Lakin*, the right to a jury trial also does not confer any substantive right to have the jury's verdict to be given "full effect" by entry of a judgment reflecting the jury's findings on damages even if those damages are unauthorized by law.

Rather than implicating any fact finding, application of the noneconomic damages limit under ORS 31.710 is the "imposition of a rule of law, a limit on 'recoverable' damages on the jury's verdict." *Tenold*, 127 Or App at 532 (Edmonds, J., dissenting); *Wiebe*, 215 Or at 352-53 (statutory damages limit in wrongful-death action "does not deal with the function of the jury at all, but

with that of the court"). As one court has explained, a statutory limit on the amount of recoverable damages "does nothing more than establish the outer limits of [the] remedy" available and the available "remedy is a matter of law and not of fact." *Pulliam v. Coastal Emergency Serv.,* 509 SE2d 307, 312 (Va 1999). Application of ORS 31.710 does not implicate the role of the jury under Article I, section 17, because the jury determines the amount of damages as a factual matter. After the jury completes its function of finding the extent of damages, it is the function of the court to apply law to determine the damages that lawfully may be recovered based on a jury's verdict. *See, e.g., Etheridge v. Medical Center Hosp*., 376 SE 2d 525 (Va 1989) (question of legally authorized remedy "is a matter of law, not a matter of fact").[16] Stated differently, applying ORS 31.710 to the jury's verdict does not implicate Article I, section 17, because it is an application of law to eliminate damages that are not legally

[16] As the dissent in *Tenold* also noted, the application of ORS 31.710 to determine the legally permissible damages that may be awarded based on the jury's verdict is no different in concept than applying any other rules of law that "require a trial court to enter a judgment that changes the decision of the jury, *e.g*., a directed verdict under ORCP 60, a judgment notwithstanding the verdict under ORCP 63, a reduction in an award of damages because of comparative negligence under ORS 18.470, or a judgment for treble damages for timber trespass under ORS 105.810." *Tenold*, 127 Or App at 532 (Edmonds, J., dissenting). Notably, plaintiffs here do not challenge the reduction of the jury's verdict on damages for comparative fault under ORS 31.600—even though plaintiffs claim that Article I, section 17, protects jury verdicts from legislative "interference" even as to claims not recognized at common law.

authorized. *See Kirkland v. Blaine County Med. Ctr*., 4 P3d 1115, 1120 (Idaho 2000) ("[Application of statutory limit on noneconomic damages] does not violate the right to a jury trial because the statute does not infringe upon the jury's right to decide cases …The statute simply limits the legal consequences of the jury's finding.").

Application of the damages limit under ORS 31.710 also does not violate Article I, section 17, on the ground that it "interferes" with the "full effect" of the jury's findings of damages. *Lakin*, 329 Or at 78. As discussed above, the legislature enjoys plenary authority to modify the common law and to prescribe new statutory causes of action. Just as the legislature may abolish causes of action, or prescribe limits on the availability of actions, the legislature has authority to prescribe the damages that are recoverable on claims. *Cf., e.g., Sealey v. Hicks,* 309 Or 387, 396, 788 P2d 435, *cert den sub nom, Sealey v. Toyota Motors Corp*., 498 US 819 (1990) (rejecting argument that statute of repose violated Article I, section 17, because Article I, section 17, guarantees a jury trial only to extent substantive right to recover exists); *cf.,e.g*., *Pulliam,* 509 SE2d at 314 (rejecting similar challenge to statutory damages limit, stating "[i]t is by now axiomatic that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object"). When the legislature exercises its authority to

place a limit on the amount of recoverable damages in an action, the right to a jury trial under Article I, section 17, does not create a right to receive any more damages than the legislature has authorized for recovery. As long as the legislature has provided a remedy that is adequate under Article I, section 10 , no constitutional impediment exists to the application of ORS 31.710. The contrary conclusion in *Lakin* should be overruled.

III. Even If the Court Adheres to *Lakin*, the Court Should Not Expand the Holding in *Lakin* to Apply to Statutory Actions that Did Not Exist at Common-Law When the Oregon Constitution Was Adopted

Even if this Court adheres to its holding in *Lakin*, this Court should reject plaintiffs' argument that ORS 31.710 may not be applied constitutionally in this case. In *Lakin*, 329 Or at 78-79, this Court made clear that application of ORS 31.710 was constitutionally impermissible *only* in "civil cases in which the right to jury trial was customary in 1857, or in cases of like nature." In doing so, this Court distinguished between statutory claims that did not exist at common law when the Oregon Constitution was adopted, as compared to common-law claims that historically had permitted recovery of unlimited damages for bodily injury. Although the Court in *Lakin* held that application of ORS 31.710 to such common-law claims was constitutionally impermissible under Article I, section 17, the Court did not extent that holding to statutory claims. *Id.* at 77.

Following *Lakin*, this Court consistently has adhered to that rule and determined whether ORS 31.710 may apply to a claim by examining whether "the common law recognized a right to recover for [the claimed injuries] when Oregon adopted its constitution in 1857." *Klutschkowski*, 354 Or at 168. In *Hughes*, this Court explained that, where "there is no clear common-law tradition" with the respect to the action at the time that the Oregon Constitution was adopted, and the legislature exercised its authority to create a statutory cause of action, the legislature "retain[s] authority" to define the scope of the action and to make "legislative adjustment" to the action. 344 Or at 154-56. Although a party may have a procedural right to a jury trial on the claim, Article I, section 17, requires "a jury's determination of [a party's] damages, both in type and amount, only to the extent that the substantive law, *i.e.*, the statute, pertaining to [the] claim so provides." *Id.* at 155.

Applying that reasoning, in *Lakin*, *Hughes*, and *Klutschkowsi* this Court consistently has held that Article I, section 17, bars application of the limit on noneconomic damages only with respect to claims that would have been legally viable when the Oregon Constitution was adopted. As to all other claims—whether purely statutory claims created by the legislature or claims that entered into Oregon's common law only *after* 1857—the Oregon Constitution does not prohibit the legislature from prescribing a limit on available remedies. Because

a strict-product-liability claim under ORS 30.920 is a statutory claim unlike any claim existing at common law when the Oregon Constitution was adopted, no constitutional impediment exists to applying ORS 31.710 to those claims even if this Court adheres to *Lakin*.

A. Plaintiffs Had No Legally Viable Cause of Action Against Weyerhaeuser When Article I, section 17, Was Adopted

Plaintiffs' only claims in this action are statutory strict-product-liability claims under ORS 30.920. Pursuant to ORS 30.920, plaintiffs alleged that: Weyerhaeuser was in the business of selling boards like the one involved in Rains' accident; the board came to Rains without any substantial change in condition; the board was dangerously defective; and that defect caused injury to Rains. *See* ORS 30.920(1) (establishing those elements of a strict product liability claim). Plaintiff Mitzi Rains relied on those exact same allegations in seeking to recover for loss of consortium. *Cf. Hughes*, 344 Or at 155 (stating that application of Article I, section 17, turns on underlying substantive-law source of law for the claim at issue).

The noneconomic damages limit under ORS 31.710 properly applies to both plaintiffs' noneconomic damages awards in this case because the theory of liability on which both of those damages awards rest—a strict-product-liability theory under ORS 30.920—was not a legally viable cause of action at the time

when the Oregon Constitution was adopted. Because plaintiffs would have had no right to recover on their claims at all at common law, Article I, section 17, does not preclude the legislature from limiting the noneconomic damages for those claims.

B. At the Time of the Adoption of the Oregon Constitution, the Common Law Did Not Recognize Strict Liability Claims at All, including Strict-Product-Liability Claims

As an initial matter, it is important to stress that an ORS 30.920 claim is a strict-liability claim. *See* ORS 30.920(2)(a) (noting that liability may exist under that section even though "[t]he seller … has exercised *all possible care* in the preparation and sale … of the product" (emphasis added)). The Oregon common law did not embrace the concept of strict liability as that concept is understood today—that is, direct liability for personal injuries without the need to prove any sort of fault or intentional conduct—until the mid-twentieth century, approximately 100 years after the Oregon Constitution was adopted in 1857. Indeed, the concept of strict liability itself derives from an English case that was decided eleven years after the Oregon Constitution was adopted.

Rylands v. Fletcher, LR 3, HL 330 (1868), frequently is viewed as the first case to apply the concept of strict liability. In that case, after the defendant's water reservoir ruptured and flooded the plaintiff's coal mine, the

court imposed liability without requiring proof of negligence on the defendant's part. One judge explained the court's holding as follows:

> "If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however, careful he may have been, and whatever precautions he may have taken to prevent the damage. In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is, not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage."

Id.

Only in the mid-twentieth century did Oregon's common law embrace strict liability in any form, including strict liability applied to the manufacturers of allegedly defective products. In 1952, nearly 100 years after the *Rylands* decision, this Court adopted the doctrine of strict liability—then denominated as liability for "ultrahazardous activities"—in *Bedell v. Goulter*, 199 Or 344, 364, 261 P2d 842 (1953). Subsequently, in *Wights v. Staff Jennings, Inc.*, 241 Or 301, 310-11, 311 n 15, 405 P2d 624 (1965), this Court relied on *Bedell* and other cases discussing the doctrine of strict liability for ultrahazardous activities to affirm for the very first time strict liability imposed on a manufacturer of a defective product. Finally, only in 1967, this Court adopted the doctrine of strict liability for product defects in the *Restatement (Second) of Torts* § 402A in *Heaton v. Ford Motor Co.*, 248 Or 467, 470, 435 P2d 806 (1967)—now 110

years after the Oregon Constitution was adopted. After this Court's decision in *Heaton*, the legislature codified the § 402A doctrine of strict products liability in 1979. Or Laws 1979, ch 866, § 2.

In light of the fact that this Court adopted a common law cause of action for strict products liability when it decided *Heaton* in 1967—roughly twelve years before the Oregon legislature codified that cause of action—plaintiffs correctly recognize that the claim codified by ORS 30.920 is a statutory claim with common-law "roots." (Pl Merits Br at 16.) But in suggesting that that point has any significance to this case, plaintiffs ignore that the concept of "strict liability," as that concept is understood today, was foreign to the common law of Oregon when Article I, section 17, was adopted in 1857 and for nearly a century thereafter. Under *Lakin*, Article I, section 17, bars application of ORS 31.710 only as to claims that were a part of common law when the Oregon Constitution was adopted, or like claims. In other words, if the claim came into existence only *after* 1857, it makes no difference whether the courts or the legislature acted first in creating it. Thus, although an ORS 30.920 claim may be a statutory claim with common-law "roots," those roots do not run deep enough to satisfy the rule that this Court has adhered to in *Lakin*, *Hughes*, and *Klutschkowski*.

C. Plaintiffs Could Not Have Asserted *Any* Legally Viable Claim against Weyerhaeuser When the Oregon Constitution Was Adopted

Even putting aside the question whether a strict product liability claim existed in 1857, plaintiffs also could not have maintained a common-law negligence claim against Weyerhaeuser based on the allegations in this case. *Cf. Klutschkowsi*, 354 Or at 169 (noting that the analysis under Article I, section 17, focuses on "whether, in 1857, the common law recognized a claim for the type of injuries" for which plaintiff seeks recovery). As the Court of Appeals correctly recognized, at the time when the Oregon Constitution was adopted, the "general rule" was that contractual privity was required to bring a negligence claim against a product manufacturer. *Rains*, 264 Or App at 664. Or, as this Court previously has explained in describing that general rule at common law, "a manufacturer or supplier [was] never liable for negligence to a remote vendee or other person with whom [the manufacturer] had no contractual relation." *Stout v. Madden*, 208 Or 294, 300-01, 300 P2d 461 (1956). As this Court in *Stout* recognized, *id.* at 301, that general rule derived from an English case, *Winterbottom v. Wright*, 152 Eng Rep 402 (1842), which was decided in 1842, 15 years before the Oregon Constitution was adopted.

In *Winterbottom*, a carriage manufacturer sold a carriage to a party engaged in the business of delivering mail. 152 Eng Rep at 402. The plaintiff

in *Winterbottom* had been hired by the purchaser to drive the carriage. *Id.* Defects in the carriage caused the carriage to break down on the road, causing injury to the plaintiff. *Id.* Plaintiff attempted to sue the carriage manufacturer as a result of those injuries, but the court in *Winterbottom* held that the plaintiff had no claim against the manufacturer. *See* 152 Eng Rep at 405. In a seriatim opinion, one judge explained why injured parties generally had no claim against remote manufacturers, stating:

> "There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I see no limit, would ensue."

Stout, 208 Or at 301 (quoting *Winterbottom*, 152 Eng Rep at 405).

In *Stout*, this Court recognized that the statement from *Winterbottom* "became fixed as a common law rule of the law of negligence in both American cases and textbooks." 208 Or at 301; *see also Bamford v. Van Emon Elevator Co.*, 79 Or 395, 400, 155 P 373 (1916) (acknowledging the "general rule" that "a contractor, manufacturer, or vender is not liable to third parties who have no contractual relation to him for negligence in construction, manufacture, or sale of the articles he handles" (citing *Huset v. J.I. Case Threshing Mach. Co.*, 120 F 865, 870-71 (8th Cir 1903)).

In advancing their ORS 30.920 claims, plaintiffs make no allegation that they were in contractual privity with Weyerhaeuser. And no evidence exists to support any such allegations. As a result, under the general rule prevailing at the time that the Oregon Constitution was adopted, the circumstances of this case would not have provided plaintiffs with ***any*** legally viable cause of action against Weyerhaeuser. It follows that the claims that plaintiffs advance in this case are not ones for which Article I, section 17, prohibits the application of the limit on noneconomic damages under ORS 31.710.

The Court of Appeals correctly acknowledged that, over time, courts carved out exceptions to the general rule that product manufacturers were not liable in negligence for injuries that their products caused to remote purchasers. *See Rains*, 264 Or App at 664. Specifically, courts carved out three different exceptions to the general rule that product manufacturers were not liable to remote purchasers: (1) an exception for cases in which "the manufacture of foods and poisons is involved in which the person making them is liable to anyone who is injured by his [or her] negligence irrespective of any contract;" (2) an exception for cases in which "the manufacturing owner invites the use of a defective machine by the person injured" on the owner's premises; and (3) an exception for cases in which the manufacturer "makes and sells an article or

machine necessarily dangerous without giving notice of the danger." *Bamford*, 79 Or at 400-01.

Plaintiffs in this case have made no argument to this Court—or to any court below—that any of those exceptions embrace the circumstances alleged in plaintiffs' claims under ORS 30.920. But even if they had, those exceptions provide plaintiffs no assistance in this case. As an initial matter, there is simply no evidence that the common law of Oregon, as it existed in 1857, had adopted any of those exceptions. *Cf. Klutschkowksi*, 354 Or at 176 (noting absence of historical evidence directly addressing existence of claim at common law, and following general rule articulated by available authorities).

And, even assuming for the sake of argument that Oregon's common law embraced those exceptions, none of them would have embraced plaintiffs' claims under ORS 30.920. Plaintiffs' claims in this case do not involve foods, poisons, or any injury occurring on any premises owned by Weyerhaeuser, so the first two exceptions clearly do not apply. Plaintiffs' claims also do not fall within the third exception, which allowed remote purchasers to sue product manufacturers for injuries caused by "inherently dangerous" products. In *Stout*, this Court explained that "for the most part" all of the exceptions to the general rule precluding liability in the absence of contractual privity "have stemmed from the case of *Thomas v. Winchester*, 6 NY 397," decided in 1852, in which

the court allowed an injured plaintiff to sue a defendant who had mislabeled a poisonous drug, even though the plaintiff lacked contractual privity with the defendant. *See* 208 Or at 302. Consistently, that exception initially "was permitted to apply only in cases involving what has been described as 'inherently dangerous' chattels, such as poisons, drugs, explosives, inflammable oils, and guns, articles or products which in and of themselves contained danger to human life and limb." *Id.*

The case law surrounding the "inherently dangerous" products exception —as it developed in the late nineteenth century, *after* the Oregon Constitution was adopted—is careful to maintain the distinction between "inherently dangerous" products "such as poisons, drugs, [and] explosives," and other products with injury-causing defects, to which the general rule of non-liability still applied. Illustrative of that distinction is *Loop v. Litchfield*, 42 NY 351 (1870), in which the defendants manufactured a cast-iron balance wheel to be used with a circular saw.[17] The strength of the wheel was compromised due

[17] In *Stout*, this Court cited the New York Court of Appeals decision in *Devlin v. Smith*, 89 NY 470 (1882), as illustrating the development of the common-law exceptions to the general rule of non-liability in the late-nineteenth century, after the Oregon Constitution already had been adopted. In *Devlin*, the court relied on its prior decision in *Loop v. Litchfield* as illustrating what courts understood at the time to be the distinction between the narrow field of product-defect cases involving inherently dangerous products and other product-defect cases, to which the general rule of non-liability applied.

manufacturer negligence; specifically, defective casting resulted in voids in the wheel, and the defendants' subsequent attempts to fill the voids with lead further compromised the wheel's structural integrity and also effectively concealed all of the defects. The wheel broke apart while being used, sending a fragment flying through the air and fatally injuring the user.

The plaintiffs attempted to rely in *Thomas v. Winchester* to establish that the defective wheel was "inherently dangerous," but the court rejected that argument. As the court explained:

> "Poison is a dangerous subject. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, a loaded rifle or the like. They are instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose. They are essentially, and in their elements, instruments of danger. Not so, however, an iron wheel, a few feet in diameter and a few inches in thickness, although one part may be weaker than another."

Loop, 42 NY at 359.

And, significantly, although evidence in *Loop* showed the manufacturer had expressly disclosed the defects in the wheel to the purchaser, the court expressly disclaimed reliance on that fact in rejecting plaintiffs' claims. *See id.* at 359-60. Instead, the court again drew a distinction that illustrated the narrow scope of the exception identified in *Thomas v. Winchester*, noting that:

> "[t]he injury in that case was a natural result of the act. It was just what was to have been expected from putting falsely labeled

> poisons in the market, to be used by whoever should need the true articles. It was in its nature an act imminently dangerous to the lives of others. *Not so here*. The bursting of the wheel and the injury to human life was not the natural result or the expected consequence of the manufacture and sale of the wheel. *Every use of the counterfeit medicines would be necessarily injurious* …."

Id. (emphasis added).

The distinction drawn in *Loop* illustrates that, well into the latter half of the nineteenth century—and well after the Oregon Constitution already had been adopted—courts did not understand injury to be a "natural and probable" consequence of *any* manufacturer negligence that resulted in an injury-causing defect in a product. Rather, the courts accepted the general rule that manufacturers would be insulated from liability to remote purchasers, *even assuming* that the product contained an injury-causing defect. It was only where the likelihood of a serious injury was immediately apparent from the nature of the product itself that manufacturer negligence could be actionable. Applying those principles to this case, a two-by-six-inch board is not an "inherently dangerous" product.

In light of the foregoing, at the time when the Oregon Constitution was adopted, plaintiffs would have had no viable cause of action based on the facts of the present lawsuit. Plaintiffs had no contractual privity with Weyerhaeuser and, even assuming that the exceptions to that general rule discussed above

were part of Oregon's common law in 1857, none of those exceptions embrace plaintiffs' action. Instead, this action is indistinguishable from circumstances that the courts in both *Winterbottom* and *Thomas* explicitly stated would give rise to no cause of action—that is, circumstances that would in the present day constitute a "run of the mill" product liability claim. *See* 6 NY at 408; *see also* ORS 30.900 (defining product liability civil action).

And, because plaintiffs would have been unable to assert any action against Weyerhaeuser based on the circumstances of this case at the time when the Oregon Constitution was adopted, it follows that Article I, section 17, would not have provided plaintiffs any right to have those nonviable claims resolved by a jury. Thus, under this Court's decisions in *Klutschkowski*, *Hughes*, and *Lakin*, the right to a jury trial under Article I, section 17, poses no impediment to the application of ORS 31.710 to plaintiffs' strict-product-liability claims under ORS 30.920.

D. Plaintiff's Claims under ORS 30.920 Are Not Claims "Of Like Nature" to Any Legally Viable Cause of Action that Existed at Common Law When the Oregon Constitution Was Adopted

Finally, plaintiffs' strict-product-liability claims under ORS 30.920 are not claims "of like nature" to any claims that existing at common law when the Oregon Constitution was adopted. *See Klutschkowski*, 354 Or at 154 (noting that Article I, section 17, extends to "cases of like nature" to ones that existed at

common law). This Court previously has indicated that a claim is *not* "of like nature" to a claim that existed at common law if the claim requires proof of different elements to establish the claim, allows recovery of different damages, or if different persons may sue or be sued. *See Hughes*, 344 Or at 156. Those considerations confirm that plaintiffs' strict-product-liability claims are unlike any claim then existing at common law.

As noted, a strict-product-liability claim under ORS 30.920 involves substantially different proof than a negligence claim that could have been maintained at common law. A claim under ORS 30.920 is premised on *strict liability*, so a plaintiff need not prove any fault on the part of the manufacturer in order to prevail. *See* ORS 30.920(2)(a). By contrast, even the legally viable negligence claims against manufacturers that existed at common law—of which plaintiffs' claims would not be one—still required proof of negligence on the manufacturer's part as a predicate to liability. *See, e.g.*, *Thomas*, 6 NY at 409 (characterizing the mislabeling of the poison as "negligence").

Moreover, other significant evidentiary differences may exist between strict product liability claims and common law negligence claims. As this Court previously has recognized, contributory negligence at common law was not only a complete bar to a plaintiff's recovery, but it was an element of the plaintiff's *prima facie* negligence case. *See Howell v. Boyle*, 353 Or 359, 382-

86, 298 P3d 1 (2013). Contributory negligence as a complete bar to recovery has never been applied to strict-product-liability claims in the same way as it applied to negligence claims at common law. *See Findlay v. Copeland Lumber Co.*, 265 Or 300, 303-04, 509 P2d 28 (1973) (addressing question for the first time and concluding that strict-product-liability claims permitted consideration of plaintiff's misconduct in narrower circumstances than traditional negligence cases). Even in the present day, the rules of Oregon's comparative-fault regime appear to apply in a more limited way to strict-product-liability claims under ORS 30.920 than to general negligence claims. *See Sandford v. Chevrolet Div. of Gen. Motors*, 292 Or 590, 598, 642 P2d 624 (1982) (noting that certain negligent conduct on the part of a plaintiff may not be considered in a strict products liability action).

Other significant differences also exist. Different damages are available in strict products liability claims than are available in common law negligence claims. For example, economic loss damages are not recoverable in a strict products liability claim pursuant to ORS 30.920. *See, e.g.*, *State ex rel. Western Seed v. Campbell*, 250 Or 262, 269, 442 P2d 215 (1968). Different parties also may sometimes be sued in strict-products-liability claims under ORS 30.920 than could be sued in a common law negligence claim. Specifically, a plaintiff may bring an ORS 30.920 claim against any manufacturer, distributor, sellor, or

lessor in the chain of distribution of an allegedly defective product, regardless of whether any of those individual parties engaged in independent negligent conduct. *See* ORS 30.900 and ORS 30.920. And, because a statutory strict-product-liability claim under ORS 30.920 dispenses with any requirement of contractual privity as a predicate to bringing suit, *see* ORS 30.920(2)(b), different plaintiffs also may bring ORS 30.920 claims than could have brought negligence claims against product manufacturers when the Oregon Constitution was adopted. A strict-product-liability claim under ORS 30.920 is not "of like nature" to any claim that existed when Oregon's constitution was adopted in 1857. Article I, section 17, does not prohibit applying ORS 31.710 to the noneconomic damages awarded on plaintiffs' claims.

IV. ORS 31.710 Does Not Violate the Prohibition Against Judicial Reexamination of a Jury's Findings of Fact

Lastly, this Court should reject plaintiff's argument that application of ORS 31.710 violates the prohibition on judicial reexamination of a jury's factual findings under Article VII (Amended), section 3. (*See* Pl Merits Br at 20-22.) Article VII (Amended), section 3, is not directed at the legislature's authority to prescribe remedies available in an action at law. That provision also does not restrict the authority of courts to apply law to a jury's factual findings in entering a judgment on the jury's verdict.

Article VII (Amended), section 3, provides, in part: "In actions at law … no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." Article VII (Amended), section 3, was adopted by voter initiative in 1910, and its purpose "'was to bring about an improved administration of justice by reducing retrials to a minimum'" to eliminate "delay and expense" resulting from the then-common practice of granting new trials based on the court's disagreement with the jury's factual findings on damages. *Greist,* 322 Or at 296-97 (quoting Hall S. Lusk, *Forty Five Years of Article VII, section 3, Constitution of Oregon*, 35 Or L Rev 1, 4 (1955)); *see also, e.g., Van Lom v. Schneiderman,* 187 Or 89, 99-100, 210 P2d 461 (1949) (discussing provision).

In arguing that ORS 31.710 violates Article VII (Amended), section 3, plaintiffs contend that a statutory limit on damages violates the reexamination clause because it requires "the court to apply the monetary standard in every case, whether or not the evidence supports the jury's higher damage award." (Pl Merits Br at 22 (quoting *Tenold*, 127 Or App at 524).) That argument has no merit. Article VII (Amended), section 3, is not a limitation on the legislative authority to prescribe the remedies available in a cause of action. Article VII is the part of the Oregon Constitution concerned with the judiciary, and the text and history of Article VII (Amended), section 3, are clear that the provision is

directed solely at judicial authority. *See* Or Const, Art VII (Amended), § 3 ("no fact tried by a jury shall be otherwise re-examined in any court of this state").

Article VII (Amended), section 3, also does not concern judicial authority to apply law in entering a judgment on a jury's verdict. As the dissent in *Tenold* correctly determined, when a court applies the statutory limit on recoverable noneconomic damages under ORS 31.710 in entering a judgment on a jury's verdict, the court is applying law, not reexamining facts, and Article VII (Amended) section 3, is not implicated. 127 Or App at 532 (Edmonds, J., dissenting) ("[ORS 31.710 does not require the trial court to make a reassessment of the amount of damages, but requires the court to perform a different function" of imposing a rule of law); *see also, e.g. Gasperini v. Ctr. for Humanities*, 518 US 415, 442 (1996) (Stevens, J., dissenting) (in applying state damages limit, court "did not reexamine any fact determined by a jury … [i]t merely identified that portion of the judgment that constitutes 'unlawful excess'" under state law).

CONCLUSION

For the reasons stated, Weyerhaeuser asks this Court to hold that the jury-trial rights under Article I, section 17, and Article VII (Amended), section 3, do not preclude application of ORS 31.710 to a noneconomic damages award in a strict-product-liability case under ORS 30.920.

Dated this 2nd day of July, 2015.

SCHWABE WILLIAMSON & WYATT P.C.

/s/ Sara Kobak

Michael T. Garone, OSB No. 802341
W. Michael Gillette, OSB No. 660458
Sara Kobak, OSB No. 023495
Jordan R. Silk, OSB No. 105031
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW Fifth Avenue, Suite 1900
Portland, Oregon 97204
Telephone: 503-222-9981

Attorneys for Cross-Petitioner-on-Review
Weyerhaeuser Company

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05; and (2) the word-count of this brief, as described in ORAP 5.05(2)(a), is 13,631 words. I also 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 this 2nd day of July, 2015.

/s/ Sara Kobak
Sara Kobak, OSB No. 023495
Attorneys for Petitioner-on-Review
Weyerhaeuser Company

CERTIFICATE OF FILING AND SERVICE

I certify that on July 2, 2015, I filed the original of this ANSWERING BRIEF ON THE MERITS FOR WEYERHAEUSER COMPANY with the State Appellate Court Administrator by the eFiling system. I further certify that on July 2, 2015, I served this ANSWERING BRIEF ON THE MERITS FOR WEYERHAEUSER COMPANY on the following parties by the eFiling system, if applicable, and by sending two copies by the United States Postal Service, first-class mail to parties not served by the eFiling system, at these addresses:

Brian Whitehead, OSB No. 833452
Law Offices of Brian Whitehead, P.C.
1610 12th Street SE
Salem, Oregon 97302
Telephone: 503-364-8505
(MAIL COPY)

Maureen Leonard, OSB No. 823165
Attorney at Law
P O Box 42210
Portland, Oregon 97205
Telephone: 503-224-0212

J. Randolph Pickett, OSB No. 721974
Pickett Dummigan LLP
621 SW Morrison, Suite 900
Portland, Oregon 97205
Telephone: 503-226-3638

Kathryn H. Clarke, OSB No. 791890
P. O. Box 11960
Portland, Oregon 97211
Telephone: 503-460-2870

Keith Garza, OSB No. 940773
Law Office of Keith M. Garza
P.O. Box 68106
Oak Grove, Oregon 97268
Telephone: 503-344-4766

Thomas W. Brown, OSB No. 801779
Nicholas E. Wheeler, OSB No. 044491
Julie A. Smith, OSB No. 983450
Cosgrave Vergeer & Kester LLP
888 SW Fifth Avenue, Suite 500
Portland, Oregon 97204
Telephone: 503-323-9000

William F. Gary, OSB No. 77032
Sharon A. Rudnick, OSB No. 83083
Harrang Long Gary Rudnick PC
360 E. 10th Avenue, Suite 300
Eugene, Oregon 97401-3273
Telephone: 541-485-0220

Mark A. Behrens (*pro hac* pending)
Cary Silverman (*pro hac* pending)
Shook, Hardy & Bacon LLP
1155 F Street, NW, Suite 200
Washington, DC 20004
Telephone: 202-783-8400
(MAIL COPY)

James N. Westwood, OSB No. 743392
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
Telephone: 503-294-9187

By: /s/ Sara Kobak
Sara Kobak, OSB No. 023495
Attorneys for Petitioner-on-Review
Weyerhaeuser Company