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 CONTRUCTIONS, 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.

MAY 2015

KEVIN RAINS' AND MITZI RAINS' BRIEF ON THE MERITS

WITHERS LUMBER COMPANY,
Fourth-Party Plaintiff,

v.

SELLWOOD LUMBER CO., INC.; and WEYERHAEUSER COMPANY,
Fourth-Party Defendants.

WESTERN INTERNATIONAL FOREST PRODUCTS, INC.,
Fourth-Party Plaintiff,

v.

BENITO RODRIGUEZ, KEVIN RAINS, RODRIGUEZ & RAINS CONSTRUCTION,
Fourth-Party Defendants.

SELLWOOD LUMBER CO., INC.; an Oregon corporation,
Fifth-Party Plaintiff,

v.

SWANSON BROS. LUMBER CO, INC, and Oregon corporation,
Fifth-Party Defendant.

Marion County Circuit Court
06C21040

Court of Appeals
A145916

S062939

KEVIN RAINS' AND MITZI RAINS' BRIEF ON THE MERITS

On review from the decision of the Court of Appeals
On appeal from the Marion County Circuit Court
Limited Judgment and Money Awards entered May 28, 2010

The Honorable Dennis Graves, Circuit Court Judge

Court of Appeals Opinion filed: August 13, 2014
Reconsideration denied by Order: December 10, 2014
Author of opinion: Ortega, P.J.
Concurring judges: Sercombe, J. and Hadlock, J.

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KEVIN RAINS' AND MITZI RAINS' BRIEF ON THE MERITS

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I. INTRODUCTION

In this brief on the merits, plaintiffs Kevin and Mitzi Rains challenge the Court of Appeals' decision to reduce the noneconomic damages the jury awarded on Mr. Rains' product liability claim pursuant to the damage limit set forth in ORS 31.710.

II. LEGAL QUESTIONS PRESENTED

1. Does the right to jury trial apply to Mr. Rains' product liability claim because it is a "civil case[]" and an "action[] at law" as defined in Article I, section 17 and Article VII (Amended), section 3. Specifically, does the right to jury trial apply to a product liability claim because *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463 (1999), has already so decided, and as *M. K. F. v. Miramontes*, 352 Or 401, 287 P3d 1045 (2012), has reiterated, it is a "civil case" and an "action at law" that must be tried to a jury?

2. If the rights to jury trial apply to Mr. Rains' product liability claim, does that mean, as *Lakin* has already held, that the jury's determination of Mr. Rains' compensatory damages must be given effect without reduction pursuant to a statute?

3. Is the reexamination clause of Article VII (Amended), section 3 violated when the court sets aside a verdict supported by evidence and imposes a statutory damage amount?

III. PROPOSED RULES OF LAW

1. The right to jury trial applies to "all" civil cases, not just civil cases presenting claims identical to those available in 1857 or 1910. As interpreted in *Lakin*, the right to jury trial applies to a product liability claim because it is a civil action "of like nature" to the claims traditionally tried to a jury. As interpreted in *Miramontes*, the right to jury trial applies to Mr. Rains' claim because it is a civil action at law for money damages.

2. As this court already held in *Lakin* and *Klutschkowski v. PeaceHealth*, 354 Or 150, 176-177, 311 P3d 461 (2013), the right to jury trial is violated when the legislature requires courts to ignore the jury's damage award and enter judgment for a lesser amount set by statute.

3. The reexamination clause prevents courts from setting aside verdicts supported by evidence. Imposing a statutory damage amount is an unlawful reexamination that substitutes the legislature's number for the jury's factual determination.

IV. STATEMENT OF THE CASE

A. Nature of the action and relief sought.

Plaintiffs brought a claim for product liability against Stayton Builders Mart, Inc. ("Stayton") for personal injuries to Kevin Rains and loss of consortium to his wife, Mitzi Rains, caused by a defective board that Stayton sold for the

construction of a pole barn. Stayton filed a third-party complaint against Weyerhaeuser Company ("Weyerhaeuser") for indemnity, the entity that sold the defective board to Stayton. The jury returned a verdict for plaintiffs against both Stayton and Weyerhaeuser for economic and noneconomic damages. The trial court entered judgment on the verdict with Stayton and Weyerhaeuser jointly liable for plaintiffs' damages.

B. Nature of the Judgment

The trial court entered a limited judgment and money awards for Kevin Rains and Mitzi Rains for the full amount of the jury's economic and noneconomic damages minus Mr. Rains' 25 % comparative fault. ER-40-47. The Court of Appeals reversed the plaintiffs' limited judgment and required reduction of Mr. Rains' noneconomic damages award to $500,000, the damage limit set forth in ORS 31.710. *Rains v. Stayton Builders Mart, Inc.*, 264 Or App 636, 640, 659-665, 336 P3d 483 (2014).

V. STATEMENT OF FACTS

On this petition for review, the facts tried to the jury are not in dispute. In brief, plaintiff Kevin Rains fell and broke his back while moving across Weyerhaeuser's board used as a purlin spanning two roof trusses. Tr 1148-1149. The 14-foot board was graded number 2 or better, designating to engineers, architects and construction workers that it was suitable for the structural and

weight-bearing use plaintiff made of it. Tr 748-749, Ex. 4; Tr 814-816. The board was defective in that it had a large knot that caused it to break under Mr. Rains' weight. Tr 343-344; Tr 1157; Tr 476, 487; Tr 1050-1052, 1061-1064. The jury found that the board was a defective product manufactured by Weyerhaeuser. The fall caused Mr. Rains' paralysis. Tr 433-434; 436-438.

Mr. Rains brought a strict product liability claim and Mrs. Rains brought a loss of consortium claim. The jury returned a verdict against Weyerhaeuser, who manufactured the board, and Stayton, who sold it. The jury found liability, apportioned fault, and awarded compensatory damages for Mr. Rains and Mrs. Rains. ER-32-35 (Verdict). The trial court entered a limited judgment for $6,272,025 for Mr. Rains; $2,343,750 was for his noneconomic damages. The same judgment awarded $759,375 for Mrs. Rains' noneconomic damages.[1]

The trial court rejected Weyerhaeuser's motion to reduce the noneconomic damages awards to the statutory $500,000 limit. However, the Court of Appeals ordered that Mr. Rains' award should be reduced to the statutory limit, relying primarily on this court's decisions in *Klutschkowski* (medical negligence verdict for birth injury protected from reduction by right to jury trial), and *Hughes v. PeaceHealth,* 344 Or 142, 178 P3d 225 (2008) (wrongful death verdict for medical

[1] These amounts are the damage awards reduced by Mr. Rains' 25% comparative

negligence not protected from reduction by right to jury trial). The Court of Appeals did not address *Lakin.*

VI. SUMMARY OF ARGUMENT

In *Lakin,* this court decided that the right to jury trial, Article I, section 17, of the Oregon Constitution, prevented the imposition of a statutory limit on noneconomic damages to reduce a jury's verdict.

This case is controlled by *Lakin*. It is virtually identical to *Lakin* both on its facts and with regard to the well-established jurisprudence on which *Lakin* is grounded. The Lakins brought claims for negligence, strict product liability, and loss of consortium; the jury found Mr. Lakin 5% at fault. 329 Or at 66. This court held the cap statute unconstitutional as to **all** the claims. 329 Or at 77. ("[T]hese common-law actions carry with them fundamental rights to a jury determination of the right to receive, and the amount of, damages. Thus, because of the common-law origins of plaintiffs' claims here, *Greist* is distinguishable.").[2]

In this case, no one claimed below that the parties did not have the right to try this dispute to a jury. Indeed, *Miramontes* assures that the constitutional jury trial guarantees apply to this civil action at law for money damages. Weyerhauser admitted in the Court of Appeals that "in 1857 a common law negligence action

[2]*Greist v. Phillips*, 322 Or 281, 906 P2d 789 (1995).

could be brought against a manufacturer for defects in products produced or sold by that manufacturer. Accordingly, there was a right to jury trial for such claim in 1857." Open Br at 43. Nonetheless, Weyerhaeuser claimed, and the Court of Appeals agreed, that jury trial rights do not apply to a claim for product liability, because the modern action against manufacturers is not identical to its common law origins.

This argument should be rejected. *Lakin* controls and has not been overruled. *Lakin* is consistent with *Miramontes*, and both are consistent with the many cases over the years that have protected jury verdicts, including the jury's compensatory damages awards, from legislative interference.

VII. ARGUMENT

A. Rights to jury trial – jury as exclusive fact-finder

Article I, section 17, of the Oregon Constitution provides:

> "In all civil cases the right of Trial by Jury shall remain inviolate."

Article VII (Amended), section 3, of the Oregon Constitution provides in relevant 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."

When enacted in 1910, Article VII (Amended), section 3 reasserted the right to jury trial in the 20th century. In addition to "preserv[ing]" the right to jury trial, it expressly strengthened the jury's fact-finding responsibility by a specific prohibition on a reexamination of any facts found by a jury where there is evidence to support the jury's verdict. Article VII (Amended), section 3 is an independent source that protects the jury's role as sole fact-finder.

1. *Lakin* controls this case.

In *Lakin, supra,* the court decided that the damage limitation in ORS 31.710[3] could not be applied to plaintiffs' claims for negligence, strict product defect and loss of consortium, because to reduce the jury's damages award would violate Article I, section 17 of the Oregon Constitution. *Lakin* decided:

> "[T]hese common-law actions carry with them fundamental rights to a jury determination of the right to receive, and the amount of, damages. Thus, because of the common-law origins of plaintiffs' claims here, *Greist* is distinguishable."

Lakin, 329 Or at 77.[4]

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[3] ORS 31.710(1) provides in relevant part:

> "Except for claims subject to ORS 30.260 to 30.300 and 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."

[4] The Court of Appeals had already accurately described the claims in its *Lakin* opinion as "common law rights of action, *e.g.*, negligence and loss of consortium

Lakin decided that the right to jury trial "prohibits the legislature from interfering with the full effect of a jury's assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857, or in cases of like nature." 329 Or at 78. The language "cases of like nature" is important to Article I, section 17 jurisprudence because it means that the right to jury trial is not limited to the causes of action that were known and tried to juries in 1857. In *State v. 1920 Studebaker Touring Car,* 120 Or 254, 251 P 701 (1926), this court rejected the state's argument that the right to jury trial did not extend to a statutory forfeiture proceeding under the liquor prohibition laws:

> "It is argued that these proceedings concern matters in respect to prohibitory laws enacted since the adoption of the Constitution, and for that reason are not within the guaranty of the Constitution, and that controversies concerning violations of them may be disposed of by the courts in any manner the Legislature sees fit to adopt. The answer to this contention is that the **constitutional right of trial by jury is not to be narrowly construed, and is not limited strictly to those cases in which it had existed before the adoption of the Constitution, but is to be extended to cases of like nature as they may hereafter arise.**"

State v. 1920 Studebaker Touring Car, 120 Or at 263 (Emphasis added).

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or, in the case of the strict liability claim, a right of action now clothed in statutory garb, but with common law origins." *Lakin v. Senco Products, Inc.*, 144 Or App 52, 79, 925 P2d 107 (1996). However, the Court of Appeals changed course in this case and, with no discussion of its own opinion in *Lakin*, decided that Mr. Rains' product liability claim was not entitled to constitutional protections because it was not identical to any cause of action against manufacturers in existence in 1857.

Product liability is a civil action for money damages for personal injuries traditionally tried to a jury. It is a case "of like nature" to its common law predecessors in negligence and warranty law. Thus, the constitutional protections should apply fully.

The right to jury trial includes the litigants' right to an effective verdict. The jury is constitutionally authorized to decide the facts. The jury's fact-finding includes the amount of money necessary to compensate a plaintiff for his or her losses. *Molodyh v. Truck Insurance Exchange,* 304 Or 290, 295-298, 744 P2d 992 (1987) (the right to jury trial includes having a jury determine all issues of fact, including the amount of damages).

The verdict is the jury's conclusion on the facts. *Lakin,* 329 Or at 79-80, 82, and *Klutschkowski,* 354 Or at 177, recognized that when the right to jury trial applies, it must include the right to have the effect of the jury's damages award. As *Lakin* explained:

> "If Article I, section 17 guarantees the right to have a jury assess noneconomic damages in cases to which it applies, the legislature may not interfere with that right by capping those damages."

Lakin, 329 Or at 79.

The right to jury trial is violated "if the jury is allowed to determine facts which go unheeded when the court issues its judgment." 329 Or at 80, quoting *Sofie v. Fibreboard Corp.,* 112 Wash 2d 636, 771 P2d 711, 721 (1989). *Lakin*

concluded that application of the cap to the same claims asserted here was unconstitutional:

> "The statute's requirement that 'the amount awarded * * * shall not exceed $500,000' violated the injured party's 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].'"

Lakin, 329 Or at 8 (Ellipses in original).

2. *Miramontes* affirms that the rights to jury trial apply to a product liability claim.

This court has long held that the right to jury trial is not limited to causes of action that were known and tried to juries in 1857, but extends to all "cases of like nature" – including statutory claims – in which a jury determines the facts, including the fact of damages. *State v. 1920 Studebaker Touring Car* (statutory forfeiture claim must be tried to a jury); *Molodyh* (statutorily required appraisal rather than jury damage determination in insurance contract dispute violated right to jury trial).

This principle was reaffirmed and even broadened in *Miramontes*. There, the court addressed whether a statutory claim for money damages as compensation for a stalker's repeated unwanted sexual contact required a jury trial. As here, the Court of Appeals required that the modern claim be identical to a common-law predecessor. *Foster v. Miramontes*, 236 Or App 381, 389-390, 236 P3d 782

(2010). This court disagreed and decided that the statutory claim must be tried to a jury.

The court considered in depth "what kind of case, because of its 'nature,' requires a jury trial." 352 Or at 409. The court stated unequivocally:

> "A claim seeking only monetary compensation for injuries inflicted is an 'action at law,' and the constitution, by its terms, preserves the right to jury trial for such legal claims."

Miramontes, 352 Or at 414.

"[T]he right to jury trial," the court stated, "must depend on the nature of the relief requested[.]" 352 Or at 425. The court explained:

> "[W]e conclude that Article I, section 17, and Article VII (Amended), section 3, of the Oregon Constitution do not guarantee a right to jury trial for claims or request for relief that, standing alone, are equitable in nature and would have been tried to a court without a jury at common law. By the same token, in the absence of a showing that the nature of a claim or request for relief is such that, for that or some other reason, it would have been tried to a court without a jury, those provisions do guarantee a right to jury trial on claims or requests that are properly categorized as 'civil' or 'at law.'"

Miramontes, 352 Or at 425.

The court concluded that the statutory claim seeking money damages was legal, not equitable, in nature and therefore was subject to the right to jury trial. No other prerequisite was required:

> "The Court of Appeals erred in conditioning the right to jury trial on such a precise match between the elements of a current claim and those of a common-law predecessor. As we have explained,

> Article I, section 17, and Article VII (Amended), section 3, preserve the right to jury trial for claims that are properly categorized as 'civil' or 'at law.' For the reasons that we have discussed, plaintiff's claim seeking monetary damage for injury inflicted fits within those terms, even if it does not have a precise historical analog."

Miramontes, 352 Or at 426.

Here, Mr. Rains brought a civil action for money damages for his personal injuries caused by a defective product. This is an action at law to which the constitutional jury trial protections apply.

3. *Klutchkowski* did not overrule *Lakin.*

Despite *Lakin's* clear applicability to this case, the Court of Appeals read *Klutchkowski* to overrule *Lakin* and narrow the claims protected by the constitutional right to jury trial. 264 Or App at 659-660. We disagree and, alternatively, if *Klutchkowski* was so intended to limit the jury trial guarantees, it must be reconsidered. It clearly conflicts with *Lakin*, *Miramontes,* and the many cases on which they relied that applied the jury trial guarantee to both statutory and common law claims regardless of similarity to, or even the pre-existence of, historical claims and defenses.[5]

Klutchkowski addressed both remedies clause and jury trial guarantees. It considered the historical origins of medical negligence claims for birth injuries and

[5] Weyerhaeuser has never argued that Mr. Rains' comparative fault has any effect on his right to jury trial.

found that such a claim existed at common law, and did not fall within an historical exception that the defendant advocated. 354 Or at 171-176. Ultimately, the court decided the case on jury trial grounds, not the remedies clause. In requiring that plaintiff must have judgment for the full amount of the jury's verdict as part of his jury trial right, the court reaffirmed *Lakin's* holding that "Article I, section 17, prohibits the legislature from limiting the jury's determination of noneconomic damages." 354 Or at 177.

Justice Landau's concurrence identified the conflict between the historical analysis of Article I, section 17 in *Klutchkowski* and the textual analysis of Article I, section 17 and Article VI (Amended), section 3 in *Miramontes*. 354 Or at 194-196. In particular, Justice Landau questioned the continuing viability of *Hughes*, which exempted the wrongful death action from the full protections of the jury trial guarantee. 354 Or at 194-196. We question the *Hughes* wrongful death exception as well. However, whatever the continuing validity of the wrongful death exception to the jury trial guarantees, that analysis has no application in this case. Even if the court chooses to preserve the lesser status of wrongful death claims tried to juries, the *Hughes* rationale does not apply here to a product liability claim.

4. A product liability claim is not within the narrow exception for the "wholly statutory" wrongful death action.

Lakin distinguished *Greist*, a wrongful death case whose origin, the court said, was "wholly statutory." 322 Or at 295-296 ("[T]he right of action for

wrongful death in Oregon is wholly statutory, and the legislature is entitled to impose boundaries on statutory actions."). This distinction was reaffirmed in *Hughes v. PeaceHealth*, 344 Or at 155-156 (legislature created the wrongful death action and set the measure of damages "on a clean slate." 344 Or at 156). According to this court, the unique origins of the action for wrongful death – originated by statute with a limit on the types and amount of damages that could be recoverable – set it apart from other actions tried to a jury. Even though the right to jury trial includes the right to an effective verdict – one in which the jury's damage award cannot be reduced by legislative fiat and must be given effect in a judgment – the court decided that the complete jury trial right does not extend to a wrongful death claim. Its "wholly" statutory origin with legislatively imposed damage restrictions meant that reducing a damages verdict and imposing a modern statutory limit on damages did not violate the right to jury trial.

The Court of Appeals below extended the exception for wrongful death actions to Mr. Rains' product liability claim, reasoning that product liability is now codified in ORS 30.920, and elements of the modern claim are not the same as its common law origins. 264 Or App at 662-665. This was a misreading of *Hughes* and *Greist*.

There are significant differences between a product liability claim and a wrongful death action. First, unlike wrongful death, an action against a

manufacturer for personal injuries caused by its defective product existed at common law around the country and in Oregon before it was codified in Oregon. *Greenman v. Yuba Power Products, Inc.*, 59 Cal 2d 57, 27 Cal Rptr 697, 377 P2d 897 (1963); *Heaton v. Ford Motor Co.*, 248 Or 467, 435 P2d 806 (1967). In *Heaton,* this court adopted the Restatement (Second) of Torts § 402A as the guiding compilation of the common law on product liability. In 1979, when the Oregon legislature codified the action for product defect, it expressly adopted the common law foundations of the action by incorporating much of the Restatement's commentary, which derives from common law, as part of the statute. ORS 30.920(3) ("It is the intent of the Legislative Assembly that the rule stated in subsections (1) and (2) of this section shall be construed in accordance with the Restatement (Second) of Torts § 402A, Comments a to m (1965)."); enacted by 1979 c. 866 § 2.

Second, unlike wrongful death, a manufacturer's liability for its defective product existed at common law without any monetary limit on the damages available to the plaintiff. *Stout v. Madden & Williams,* 208 Or 294, 300 P2d 461 (1956), *overruled on other grounds, Kuhns v. Standard Oil Co.,* 257 Or 482, 493-494, 478 P2d 396 (1970) (tracing history of personal injury claims based on defective products to *Thomas v. Winchester,* 6 NY 397 (1852)). There was no common law limit on compensatory damages for personal injuries from defective

products. Nor did the Oregon legislature impose a monetary limit on damages for product liability claims when it enacted the first codification in ORS 30.920.

Thus, the justifications on which this court relied to carve out wrongful death actions from the full protections of the jury trial guarantee do not exist in a product liability action. Neither *Greist* nor *Hughes* should be extended beyond their rationale to a product liability claim.

5. The common law liability of manufacturers, as it developed in the periods relevant to the Oregon constitutional provisions, expressed strict liability principles.

Neither *Lakin,* nor the cases on which it relied, required that the modern claim seeking jury trial protections must match a common law forbearer in existence at the time constitutional protections were enacted. *Miramontes* relied on the same cases to expressly disavow such a prerequisite, stating, "plaintiff's claim seeking monetary damage for injury inflicted fits within [the constitutional] terms, even if it does not have a precise historical analog." 352 Or at 426.

If it matters, however, the modern claim for product liability has roots in the common law. The relevant dates for this inquiry are 1857 for Article I, section 17, and 1910 for Article VII (Amended), section 3. The late 1800's through the turn of the century was a time of rapid development of tort principles regarding the liability of manufacturers for their goods and products. Before 1857, American courts had begun rejecting privity limitations on claims by injured consumers

against manufacturers. By 1910, both negligence and warranty principles had developed to support such claims.

In *Thomas v. Winchester,* 6 NY 397 (1852), the New York Supreme Court dispensed with the privity requirement and recognized a customer's claim against the manufacturer for injuries from ingesting belladonna labeled as extract of dandelion. Exceptions to the privity requirement grew rapidly. *See McCaffrey v. Mossberg Mfg. Co.,* 23 RI 381, 382-383, 50 A 651 (1901) (describing three classes of cases recognizing the liability of a manufacturer to parties with whom it had no privity in contract, including liability for an imminently dangerous article that foreseeably could endanger others).

Some of the earliest cases following *Thomas v. Winchester* recognized the inherent danger of working at height using defective materials. These cases fell into an early exception to the privity rule for inherently dangerous products posing an obvious danger of harm to users if defectively made. *Coughtry v. The Globe Woolen Co.,* 56 NY 124, 128 (1874) (deciding that a scaffold builder could be liable without privity to workers who used the scaffold because it was inherently dangerous); *Devlin v. Smith,* 89 NY 470 (1882) (deciding that negligence in constructing a scaffold created an imminent danger making builder liable to injured worker without privity); *Schubert v. J.R. Clark Co.,* 49 Minn 331, 51 NW 1103 (1892) (manufacturer liable to user of ladder injured when ladder failed to bear his

weight and collapsed; no privity required for dangerous defect of which manufacturer knew or should have known but failed to disclose); *Bright* v. *Barnett*, 88 Wis 299, 60 NW 418 (1894) (defendant liable to worker for providing a plank with a knot for use across a scaffold walk; no privity required).

Many early decisions are framed in the language of negligence. However, by 1913, in *Mazetti v. Armour & Co.,* 75 Wash 622, 135 P 633 (1913), the Washington Supreme Court had based a manufacturer's liability on a theory of implied warranty without privity, a rule of strict liability. *Mazetti* is the "lead case that is widely credited with inaugurating strict liability." *Doe v. Miles Laboratories, Inc.*, 675 F Supp 1466, 1471 (US Dist Ct D Md 1987); *see also Mull v. Colt Co.*, 31 FRD 154, 169 (US Dist Ct SD NY 1962) (describing implied warranty as a rule of strict liability).

In *Mazetti,* the plaintiff restaurant owner served defendant's canned tongue to a customer, who became ill. The restaurant owner sued for loss of business and reputational damage. The court in *Mazetti* reviewed cases concerning manufacturer liability to the ultimate consumer (75 Wash at 625) and summarized the then-current law:

> "Some of the cases hold that the action is for breach of warranty; others, that it is to be sustained upon the ground of negligence. A few courts have attributed the growth of this exception to the general public policy as declared in the pure food laws * * *; while others say that the liability for furnishing provisions which endanger human life

> rests upon the same grounds as the manufacturing of patent or proprietary medicine."

Mazetti, 75 Wash at 625.

The *Mazetti* court settled on a theory of implied warranty for providing a product that was not suitable for its intended purpose. The Court explained that the common law must develop so as to accommodate new products and markets, including "the art of canning" and the burgeoning use of canned food products. 75 Wash at 627-628. Canned food did not lend itself to inspection by the purchaser, and this required a change to the "old rule that a manufacturer is not liable to third persons who have no contractual relations with him[.]" 75 Wash at 628-629. The court held:

> "Our holding is that, in the absence of an express warranty of quality, a manufacturer of food products under modern conditions impliedly warrants his goods when dispensed in original packages, and that such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade."

Mazetti, 75 Wash at 630.

The law was beginning to recognize a theory of strict liability for manufacturers whose products injure users around the same time that Oregonians were voting to adopt Article VII (Amended), section 3 with its enhanced right to jury trial provision. If this court decides to overrule *Lakin* and *Miramontes* and narrow the jury trial protection to actions recognized when the constitutional

provision was adopted (it should not), plaintiffs' product liability claim qualifies for constitutional protection.

B. Article VII (Amended), section 3 - The jury's facts cannot be reexamined by a court or legislature.

Article VII (Amended), section 3 provides in relevant 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**."

(Emphasis added).

Interpreting Article VII (Amended) § 3 shortly after its enactment, *Woods v. Wickstrom,* 67 Or 581, 135 P 192 (1913) stated:

> "When the amount in controversy exceeds $20, and the facts have been passed upon by a jury, and the verdict has not been vitiated by errors of law committed by the court in rulings on admission of evidence or in charging the jury, **no court can legally set aside the verdict or the judgment based upon it, unless the court can affirmatively say that there was no evidence to support it.**"

Woods, 67 Or at 588 (Emphasis added).

In *Van Lom v. Schneiderman,* 187 Or 89, 95, 210 P2d 461 (1949), the court made clear that the only verdict that could be set aside was one with "no evidence" to support it:

> "All that the court may do, so far as the facts are concerned, is to examine the record to determine whether it 'can affirmatively say there is no evidence to support the verdict.'"

Van Lom, 187 Or at 95. There is no dispute that there is ample evidence to support the verdict here.

The statutory damage limit on noneconomic damages commands a trial judge to set aside the jury's verdict, and the constitution prevents a judge from doing so when the evidence supports the verdict. Article VII (Amended), section 3 was enacted to stop the then-prevalent practice of ignoring jury awards and compelling a retrial when the trial court deemed the damage award "excessive." It applies with equal force when a lawful verdict is set aside so that judgment may be entered in an amount the legislature dictates.

In 1910, the constitutional reformers were concerned that legally sufficient verdicts were being set aside, and that plaintiffs faced two unpalatable options: accepting a damage award set not by the constitutionally designated fact-finder but by the judge, or being put to the expense and delay of a second trial. The only differences between then and now are features that render the statute even more destructive of the jury trial right. If the damage limit in ORS 31.710 is imposed, plaintiffs have no choice but to accept a measure of damages imposed without constitutionally required fact-finding, by a branch of government not authorized to set compensation in civil cases,[6] and in an amount that entirely disregards the

[6]As between the judicial and the legislative branches of government, "the ascertainment of" just compensation is a judicial inquiry; the legislature has no authority to "fix compensation or prescribe the rules for its computation."

lawful verdict supported by evidence, of how much is necessary to compensate Mr. Rains for his harm.

The Court of Appeals majority was correct in *Tenold v. Weyerhaeuser Co*., 127 Or App 511, 873 P2d 413 (1994), *rev dismissed* 321 Or 561 (1995), when it held that this legislatively-directed damage limit violated the reexamination clause of Article VII (Amended), section 3 of the Oregon Constitution. *Tenold* relied on several cases interpreting Article VII (Amended), section 3, and articulated a reasoning the court should find persuasive:

> "[The statutory damage limit] requires the court to apply the monetary standard in every case, whether or not the evidence supports the jury's higher damage award. Article VII (amended), section 3, was designed to prevent that practice, because the people chose to make jurors the exclusive judges of the facts regarding the extent of a plaintiff's damages."

Tenold, 127 Or App at 524.

VIII. CONCLUSION

The court should affirm the limited judgment entered by the trial court for the full amount of the verdict.

Chapman v. Hood River, 100 Or 43, 50, 196 P 467 (1921) (condemnation proceeding).

Respectfully submitted this 21st day of May 2015.

_/s/ Maureen Leonard_____
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CERTIFICATE OF COMPLIANCE

I certify that this brief, including footnotes, is in Times New Roman 14 point font. The word count of this brief is 5,338 words, and is in compliance with ORAP 9.17(2)(c) and ORAP 5.05(2)(b)(i) which limits an opening brief on the merits to 14,000 words.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the date stated below I filed the foregoing KEVIN RAINS' AND MITZI RAINS' BRIEF ON THE MERITS by efiling to:

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