IN THE SUPREME COURT OF THE STATE OF OREGON

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

Brief on the Merits
of *Amicus Curiae* Oregon Trial Lawyers Association

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

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

Attorney for *Amicus Curiae*
Oregon Trial Lawyers Association

Counsel continued next page

June 2014

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

Attorneys for Petitioner on Review
Amber Kennedy

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

Attorneys for Respondent on Review
Kelsey C. Wheeler

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Introduction

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

The Court of Appeals avoided the question of whether economic and noneconomic damages are "interdependent," and hence require that the same nine jurors agree on both amounts – the question that was essential to the constitutional validity of the verdict. Instead, the Court of Appeals said that the parties, by agreeing to an instruction defining the "same nine" rule in terms that were neither clear nor correct (though uniformly given), had established the "law of the case;" that rule required complete identity of the nine jurors on the two-slot damages question, and the verdict therefore "violated Article VII (Amended), section 5(7) of the Oregon Constitution" and should not have been received. *Kennedy v. Wheeler*, 258 Or App 343, 350, 309 P3d 196 (2013).

OTLA has appeared in this case to urge that the verdict was valid, and was properly accepted by the trial court despite any inconsistency with the language of the court's instruction to the jury or the language on the verdict form.

Statement of Facts

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

Questions Presented and Proposed Rules of Law

OTLA writes to address the first and second questions presented in Plaintiff's Opening Brief.

Question 1: Was this verdict constitutionally valid?

Proposed Rule: Economic and noneconomic damages are independent questions, though both are dependent on negligence and causation. Where a plaintiff seeks both economic and noneconomic damages for negligence, the verdict is constitutionally valid if each damages amount is supported by nine jurors who also voted in favor of plaintiff on liability. There is no requirement for complete identity of jurors on both independent forms of damages.

Question 2: Where a jury is mis-instructed, without objection from either party, regarding the constitutional requirement for a verdict, must the

constitutionally valid verdict be set aside as constitutionally invalid because the mis-instruction has become "the law of the case?"

Proposed Rule: The parties cannot re-define the constitution and force a court to reject as constitutionally invalid a verdict that is, in fact, constitutionally valid. The integrity of a jury's verdict should not be threatened because the parties agreed to a broadly phrased "same nine" rule that goes beyond what the constitution requires. A verdict that meets the constitutional requirement must be accepted.

Argument

1. What the Oregon Constitution requires: A uniform consensus on interdependent questions essential to a judgment on a claim.

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

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

In *Clark v. Strain,* 212 Or 357, 319 P2d 940 (1958), the court invalidated a general verdict where, when the jury was polled, the ninth juror agreed on liability but not on the amount of damages. The question, the court said, involved

> the voting unity required of jurors when it becomes necessary for them to first determine **two or more material issues** in a given case **as a condition precedent to the verdict** which they ultimately return to the court. 212 Or at 364 (emphasis added)

The "few cases" addressing that question, the court said,

> all hold that the minimum legal number of jurors required for a valid verdict must be the same jurors voting similarly **on each separate issue demanding resolution**. *Id.* (emphasis added).

Thus, in *Earl v. Times-Mirror Co.,* 185 Cal 165, 196 P 57 (1921) (cited in *Clark* at 365), verdicts for compensatory and punitive damages were each supported by ten jurors, but only seven had concurred in both amounts. In citing *Earl,* this court noted that the California court only invalidated the punitive damages portion, but not the verdict for compensatory damages, because the two issues were "independent." *Clark, supra,* 212 Or at 365. In *Christensen v. Petersen (Schwartz),* 198 Wis 222, 222 NW 231, 223 NW 839 (1929), the court held that there should be no distinction between a general and special verdict, and therefore the same jurors must concur in liability and damages. The *Clark* court quoted with approval this language of the Wisconsin Supreme Court:

> To have a valid verdict *the same ten jurors* must concur in the answers to all questions which are necessary to support a judgment[.] *McCauley v. Int'l Trading Co.,* 268 Wis 62, 66 NW2d 633, 638 (1954), quoted in *Clark,* 212 Or at 365 (emphasis added in *Clark*).

And the Ohio court, as pointed out in Clark had used virtually identical language. *Plaster v. Akron Union Passenger Depot Co.,* 101 Ohio App 27,

137 NE 2d 624, 628 (1955), *appeal dism* 165 Ohio St 289, 135 NE2d 61 (1956)("[T]he requisite number of jurors must agree upon all questions necessary to sustain the judgment[.]").

In *Munger v. SIAC*, 243 Or 419, 423-24, 414 P2d 328 (1966), which involved a special verdict, the court stated:

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

And the court cited again to the Ohio and Wisconsin formulation: the required number of jurors must concur in the answer to "all questions which are necessary to support a judgment." 243 Or at 425.

In *Veberes v. Knappton Corp.*, 92 Or App 378, 759 P2d 279, *rev den* 307 Or 78 (1988), the Court of Appeals relied on *Clark v. Strain* and *Munger v. SIAC* to hold that negligence and unseaworthiness were independent, not "interdependent," questions and the verdict for plaintiff on one but not the other was valid.

> Defendant's argument assumes that negligence and unseaworthiness are interdependent concepts when, in fact, they are alternative theories of recovery. 92 Or App at 381.
>
> Because negligence and seaworthiness are not interdependent, it matters not that the same nine jurors failed to find negligence and unseaworthiness. Nine of the same jurors who found unseaworthiness agreed on the allocation

> of fault and the amount of damages. It was on that basis that the verdict was received. The verdict is valid. 92 Or App at 382.

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

2. Economic and noneconomic damages are independent, not interdependent, questions.

The division of damages into "economic" and "noneconomic" was created by the legislature in 1987. ORS 31.710; 1987 Or Laws c.774 §6. Prior to this legislation, tort damages were categorized as either "general" or "special." General damages were those that a party "necessarily" and "inevitably" sustains as a result of the wrongful conduct complained of; special damages may flow naturally from that conduct but were not presumed to do so, and must be specially claimed. *Dose v. Tooze,* 37 Or

13, 16, 50 P 380 (1900). Stated otherwise, general damages were those the law "implies" or "presumes" because of the nature of the wrong; special damages were those that "really took place and are not implied by law," and must be specifically pleaded. *Hoskins v. Scott,* 52 Or 271, 278, 96 P 1112 (1908). Thus, amounts expended for doctor and hospital bills, the costs of an ambulance, crutches, drugs and cleaning – "[t]hese are all items of damage such as do not necessarily result from the injury complained of and which the law does not imply as a result thereof" and were therefore "items properly classified as special damages." *Hall v. Cornett,* 193 Or 634, 642, 240 P2d 231 (1952).

With tort damages so defined, a personal injury verdict that awarded general damages only was a valid verdict. *Mullins v. Rowe,* 222 Or 519, 522, 353 P2d 861 (1960)("if the verdict was for general damages it would be invulnerable."). On the other hand, because "special damages" were viewed as "consequential" to an "injury" and therefore dependent on an award of general damages, there came to be a "well-established rule that in order to support an award of special damages there must be an award of more than nominal general damages." *Baden v. Sunset Fuel C.,* 225 Or 116, 357 P2d 410 (1960).

Justice O'Connell, in a dissent in *Flansberg v. Paulson*, 239 Or 610, 399 P2d 356 (1965), challenged the asserted link between special and general damages:

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

Partly as a result of Justice O'Connell's dissent, six years later the court modified the link between general and special damages: a verdict awarding special damages only could nonetheless be valid, depending on the circumstances. *Saum v. Bonar*, 258 Or 532, 484 P2d 294 (1971). In *Eisele v. Rood*, 275 Or 461, 551 P2d 441 (1976), the court held that a verdict for special damages only was valid if the "plaintiff's evidence of injury is merely subjective in nature" or if there is evidence that the plaintiff's injury "was not caused by the accident." In a concurrence, Justice O'Connell commented:

> The majority opinion in the present case traces the sad story of confusion which has ensued in an effort to follow the *Saum* rule. The refinements and fine distinctions made in these cases remind one of the ancient discourses on the number of angels that could dance on the point of a needle.

275 Or at 469 (O'Connell, J., concurring).

The court continued to struggle with the relationship between general and special damages in *Wheeler v. Huston*, 288 Or 467, 605 P2d 1339 (1980).

However, as noted at the outset of this section, the legislature in 1987 enacted a statute that eliminated the distinction between general and special damages, and instead categorized tort damages into "economic" and "noneconomic." 1987 Or Laws c.774 §6. ORS 31.710(2) provides:

> (a) "Economic damages" means objectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services, burial and memorial expenses, loss of income and past and future impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that is economically verifiable, reasonable and necessarily incurred costs due to loss of use of property and reasonable costs incurred for repair or for replacement of damaged property, whichever is less.
>
> (b) "Noneconomic damages" means subjective, nonmonetary losses, including but not limited to pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship and society, loss of consortium, inconvenience and interference with normal and usual activities apart from gainful employment.

"Economic damages" now includes not just those damages formerly called "special" damages (past medical expenses, past wage loss), but also includes "impairment of earning capacity" and projected future medical expenses that

were formerly labeled "general damages." *See, e.g., Smith v. Jacobson,* 224 Or 627, 638, 356 P2d 421 (1960)(impaired earning capacity is an element of general damages).

The Court of Appeals has held that a jury's verdict for economic damages only was valid, although it did so by equating economic to special damages and finding that the award fit within one of the "circumstances" outlined in *Wheeler v. Huston, supra. Fatehi v. Johnson,* 207 Or App 719, 143 P3d 561, *rev den* 342 Or 116, 149 P2d 138 (2006). *Amicus* suggests that it is a mistake to force the newly-redefined tort damages into the troublesome categories of the past; Justice O'Connell, who urged the legislature to recognize the independence of general and special damages, would no doubt find that irony difficult to bear.

The fact is, the redefinition of damages by the legislature has nullified a rule that was already providing more than its share of judicial headaches. There is no basis for tying economic damages to noneconomic damages, and requiring the latter as a predicate for the former. Indeed, the legislature's redefinition of tort damages was accompanied by the imposition of a limit on the noneconomic – but not the economic losses – that could be recovered. ORS 31.710(1). The independence of the two forms of damages was re-emphasized when the legislature limited the accident victim who happened

to be driving uninsured to a claim for economic injuries only. ORS 31.715(1); 1999 Or Laws c. 1065 §1. Whatever else one might have to say about these statutes, they certainly indicate that the legislature regards these damages as independent of each other.

A claim for economic damages is independent of a claim for noneconomic damages; both are dependent on a finding of negligence and causation. Since at least nine of the twelve jurors who unanimously agreed on liability also agreed on the amount of each category of damages, the verdict was constitutionally valid.

3. A constitutionally valid verdict is not rendered invalid by a misleading instruction to which the parties don't object.

The Court of Appeals concluded that the trial court's instruction on the same nine rule trumped the constitutional issue: whether or not the constitution required the same nine on economic and noneconomic damages, the instruction did, and it was the "law of the case."

First of all, the Court of Appeals states that the instruction told the jury this: "In order for the same nine jurors to agree on 'the answer'" to the damages question, they were "necessarily required to agree" to both subparts. 258 Or App at 346. OTLA submits that isn't necessarily so. The trial judge, who gave the instruction, didn't think so. And neither,

apparently, did the jury. For each subpart, the "same nine" that had voted "yes" on liability agreed to the sum stated – and that is an equally tenable interpretation of the instruction given by the trial court.

But then the Court of Appeals states that the unexcepted-to instruction was the "law of the case." The "law of the case" doctrine simply does not apply under those circumstances.[1] This court has summarized the doctrine as follows:

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

In *Simmons*, the court cited thirteen cases spanning the years 1886 to 1930 for the proposition stated in that quotation. In the earliest case cited, *Powell v. D. S. & G. R. R. CO.*, 14 Or 22, 23 (1886), the court said that "the former

---

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

opinion of this court is the *law of the case*," and that rule "precludes the re-examination of legal propositions once settled by the appellate court in the same case." (Emphasis in text). In the latest case cited, *Adskim v. Oregon-Washington R. & Nav. Co.*, 134 Or 574, 576 (1930), the court stated that "[q]uestions of law which have arisen and been decided upon a former appeal become *the law of the case* so far as applicable to the facts developed on the second trial." (Emphasis added.) The doctrine has been consistently stated, and as stated cannot apply in these circumstances.

The litigants' consent to a uniform instruction is not equivalent to an appellate decision on a contested issue. That instruction, if wrong, is not "the law of the case" to the extent that it can compel the court to reject an otherwise valid verdict. Under the Court of Appeals' approach in *Congden v. Berg*, 256 Or App 73, 299 P3d 588 (2013) and in this case, the constitutional *validity* of a verdict can be waived before the verdict is even announced, by failing to object to a uniformly given but arguably incorrect instruction on the same nine rule. This makes no sense.

As OTLA pointed out in supporting plaintiff's petition for review, this version of "law of the case" has not been consistently applied. In *Veberes*, *supra*, the court rejected a "law of the case" argument that a verdict for plaintiff on unseaworthiness, but not on negligence, was invalid because it

was inconsistent with the trial court's instruction that "at least nine" jurors would "have to be in total agreement on every answer." The court construed the instruction as stating nothing more than the need for a three-fourths majority, not the "same nine," and rejected defendant's "law of the case" argument. 92 Or App at 383. However, in the court's view of this case an instruction that "at least the same nine jurors must agree" on each of the questions answered necessarily communicated the need for the "same nine" on each subpart of one answer – even though it failed to do so to twelve jurors, one trial court judge and plaintiff.

Conclusion

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

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

But the verdict did not violate this provision. At most, it may have violated the rule that was mis-stated in the instruction.

The jury's verdict was constitutionally valid, and the trial court properly received it. OTLA urges the court to reverse the Court of Appeals and affirm the trial court's entry of judgment on the jury's verdict.

Respectfully submitted,

/s/ Kathryn H. Clarke

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

CERTIFICATE OF COMPLIANCE

Brief length:

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), and the word count of this brief is **3229** words.

Type size:

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

CERTIFICATE OF SERVICE AND FILING

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

Mark Mcdougal
Attorney for Petitioner on Review

Michael T. Stone
Attorney for Respondent on Review

DATED this 2nd day of June, 2014.

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