Filed: July 15, 1999

IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN LAKIN and ANN MARIE LAKIN,
husband and wife,

Respondents on Review,

v.

SENCO PRODUCTS, INC., an Ohio
corporation, Petitioner on Review,

and

WESTERN SUPPLY CORPORATION,
an Oregon Corporation, dba
WESTERN TOOL SUPPLY,

Defendant.

(CC 9211-07901; CA A83575; SC S44110)

On review from the Court of Appeals.*

Argued and submitted November 5, 1997; resubmitted June 11, 1998.

Ridgway K. Foley, Jr., of Green & Markley, P.C., Portland, argued the cause for petitioner on review. With him on the briefs was M. Elizabeth Duncan.

Kathryn H. Clarke, Portland, argued the cause for respondents on review. With her on the briefs was Maureen Leonard, Portland.

Mark A. Bonanno and Thomas E. Cooney, of Cooney & Crew, P.C., Portland, filed a brief on behalf of amicus curiae Oregon Medical Association.

Jeffrey M. Batchelor, of Lane Powell Spears Lubersky LLP, Portland, filed briefs on behalf of amicus curiae Oregon Association of Defense Counsel.

Thomas W. Brown, of Cosgrave, Vergeer & Kester, LLP, Portland, Steven J. Goode, Austin, Texas, William Powers, Jr., Austin, Texas, and Hugh F. Young, Jr., of the Product Liability Advisory Council, Inc., Reston, Virginia, filed a brief on behalf of amicus curiae Product Liability Advisory Council, Inc.

Thomas M. Christ, of Mitchell, Lang & Smith, Portland, filed a brief on behalf of amicus curiae Mutual of Enumclaw Insurance Company.

Jonathan M. Hoffman, of Martin, Bischoff, Templeton, Langslet & Hoffman, Portland, filed a brief on behalf of amici curiae Toyota Motor Corporation, Toyota Motor Sales U.S.A., Inc., and Broadway Toyota, Inc.

Daniel J. Popeo and David M. Young, of Washington Legal Foundation, Washington, D.C., and R.

Daniel Lindahl, of Bullivant Houser Bailey Pendergrass & Hoffman, P.C., Portland, filed a brief on behalf of amici curiae Washington Legal Foundation and Allied Educational Foundation.

Charles S. Tauman, Portland, filed a brief on behalf of amici curiae Oregon State Council of Senior Citizens, United Seniors of Oregon, Salem Gray Panthers, Portland Gray Panthers, Oregon Consumer League, Consumer Justice Alliance, Oregon Action, Oregon Advocacy Center, Oregon State Public Interest Research, Oregon Law Center, and Brain Injury Support Group of Oregon.

Robert K. Udziela, of Pozzi Wilson Atchison, LLP, Portland, David F. Sugerman, of Paul & Sugerman, P.C., and Douglas G. Schaller, of Johnson, Clifton, Larson, & Corson P.C., filed a brief on behalf of amicus curiae Oregon Trial Lawyers Association.

Arthur C. Johnson, Eugene, filed a brief on behalf of amicus curiae Association of Trial Lawyers of America.

Before Carson, Chief Justice, and Gillette, Van Hoomissen, Durham, and Kulongoski, Justices.**

VAN HOOMISSEN, J.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to the circuit court for further proceedings.

*Appeal from Multnomah County Circuit Court,

Ancer L. Haggerty, Judge.

144 Or App 52, 925 P2d 107 (1996).

**Fadeley, J., retired January 31, 1998, and did not participate in this decision; Graber, J., resigned March 31, 1998, and did not participate in this decision; Leeson, J., did not participate in the consideration or the decision of this case.

VAN HOOMISSEN, J.

John Lakin and Ann Marie Lakin, (plaintiffs), brought an action at law against defendant Senco Products, Inc., (Senco) seeking economic, noneconomic, and punitive damages for personal injury and loss of consortium arising out of allegations of negligent failure to warn and strict products liability in the design and manufacture of the SN325 pneumatic nail gun. In its answer, Senco alleged, inter alia, that ORS 18.560(1) [(1)] limited any noneconomic damage award to $500,000. The jury returned a special verdict finding Senco liable both in strict liability and in negligence, and fixing John Lakin's comparative fault at five percent. The jury awarded John Lakin $3,323,413 in economic damages and $2,000,000 in noneconomic damages, and awarded Ann Marie Lakin $876,000 in noneconomic damages for loss of consortium. The jury also found that Senco had acted with "wanton disregard for the health, safety and welfare of others" in causing plaintiffs' injuries, and awarded $4,000,000 in punitive damages. The trial court applied ORS 18.560(1) and entered judgment for each plaintiff for $500,000 in noneconomic damages, reduced by the jury's finding that John Lakin had contributed five percent to his injuries. Plaintiffs and Senco both appealed.

On Senco's appeal, the Court of Appeals affirmed. On plaintiffs' cross-appeal, the court affirmed in part and reversed in part. Adhering to its earlier holding in Tenold v. Weyerhaeuser, 127 Or App 511, 873 P2d 413 (1994), rev dismissed 321 Or 561, 901 P2d 859 (1995), the court held that ORS 18.560(1)

violates Article VII (Amended), section 3, of the Oregon Constitution,[2] by mandating an unconstitutional "re-examination" of a fact tried by a jury. Lakin v. Senco Products, Inc., 144 Or App 52, 925 P2d 107 (1996). We allowed Senco's petition for review. The primary issue on review is the constitutionality of ORS 18.560(1). For the reasons that follow, we hold that ORS 18.560(1) violates Article I, section 17, of the Oregon Constitution.[3] We affirm the Court of Appeals' decision.

We summarize the facts from the Court of Appeals' opinion. Defendant Senco manufactures and markets pneumatic nail guns, including the SN325, which discharges 3.25 inch nails. In 1990, plaintiff John Lakin used an SN325 gun to place a single nail into a piece of wood. Standing on his toes on a makeshift sawhorse platform, Lakin raised the wood and the SN325 over his head, pressed the firing end of the SN325 against the wood, and activated the trigger. Instead of discharging only a single nail, the SN325 immediately thereafter discharged a second nail, which struck part of the first nail, causing the firing end of the SN325 to recoil into Lakin's face. The SN325 then discharged a third nail, which penetrated Lakin's brain. As a result of his injuries, parts of Lakin's brain had to be surgically removed. He now suffers from diminished mental and emotional capacities, his left arm and leg are paralyzed, he has undergone a radical personality change, and he cannot live independently. As noted, the jury awarded both plaintiffs noneconomic damages in excess of the limits provided by ORS 18.560(1). The trial court reduced the jury's awards according to a formula that the trial court thought to be required by that statute.

As pertinent on appeal, Senco challenged the trial court's evidentiary rulings, its jury instructions, and its denial of a directed verdict, all of which pertained to Senco's compensatory liability. Senco also challenged the trial court's rulings pertaining to punitive damages. Senco renews those arguments on review. Plaintiffs' cross-appeal contended that ORS 18.560(1) violates several provisions of the Oregon and United States constitutions. On Senco's appeal, the Court of Appeals affirmed; on plaintiffs' cross-appeal, the court reversed and remanded for entry of a judgment modifying John Lakin's recovery of noneconomic damages and Ann Marie Lakin's recovery for loss of consortium, and otherwise affirmed. We allowed Senco's petition for review primarily to consider the constitutionally of ORS 18.560(1), which caps noneconomic damages in this case.

OREGON CONSTITUTION

In addressing the constitutionality of ORS 18.560(1) under the Oregon Constitution, this court's concern is whether the legislature had the power to enact that statute. Although, as noted, the Court of Appeals decided this issue on the basis of Article VII (Amended), section 3, of the Oregon Constitution, we believe that the answer to whether the challenged statute violates the right to jury trial expressed in Article I, section 17, of the Oregon Constitution, is dispositive.

In analyzing the meaning of a provision of the Oregon Constitution, this court looks to the specific wording of the provision, the case law surrounding it, and the historical circumstances that led to its enactment. Priest v. Pearce, 314 Or 411, 415-16, 840 P2d 65 (1992). We begin with the text of Article I, section 17.

Text

Article I, section 17, provides:

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

No party questions that this is a civil case or that plaintiffs had a right to a jury trial for their claims. No party argues that "inviolate" has a different meaning today that it did when Article I, section 17, was adopted in 1857 as part of the original Oregon Constitution. In 1828, the word "inviolate" meant "unhurt;

uninjured; unprofaned, unpolluted; unbroken." Noah Webster, American Dictionary of the English Language, Vol 1, p 113 (1828). Although it post-dates adoption of Article I, section 17, in 1889 "inviolate" meant "not violated; free from violation or hurt of any kind; secure against violation or impairment." The Century Dictionary, Vol III, p 3174 (1889). Thus, for purposes of this case, whatever the right to a jury trial in a civil case meant in 1857, it has the same meaning today. The plain wording of Article I, section 17, does not answer the question whether the right to a jury trial then meant, and, therefore, now means, that the legislature may not adopt a statute imposing a cap on the amount of noneconomic damages recoverable in a civil case. We proceed to examine Oregon cases that have construed Article I, section 17.

Case Law

In Molodyh v. Truck Insurance Exchange, 304 Or 290, 295, 744 P2d 992 (1987), this court stated that Article I, section 17, guarantees a jury trial "in those classes of cases in which the right was customary at the time the [Oregon] constitution was adopted or in cases of like nature." The court further stated that the right to jury trial under Article I, section 17,

> "includes having a jury determine all issues of fact, not just those issues that remain after the legislature has narrowed the claims process."

Id. at 297-98. See also State v. 1920 Studebaker Touring Car, 120 Or 254, 259, 251 P 701 (1927) ("The right of trial by jury guaranteed by the Constitution of this state, embraces every case where it existed before the adoption of the Constitution, and it is not within the power of the legislature to enact any law which deprives any litigant of that right."); Tribou v. Strowbridge, 7 Or 157, 159 (1879) (Article I, section 17, "indicates that 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.").

History

The guarantee of trial by jury was ensured in the Magna Carta in 1215, although the historical origins of the jury system predate the Magna Carta by hundreds of years. Thomas H. Tongue, In Defense of Juries as Exclusive Judges of the Facts, 35 Or L R 143, 145 (1956) (citing 3 Blackstone Commentaries 349-50) (hereafter "Tongue"). See also James L. Coke, On Jury Trial, 1 Or L R 177 (1922) (tracing history of jury trial to ancient Athens). From the first British expeditions to America, the common law of England, including jury trial procedures, was made a part of the law of colonial communities);[(4)] State v. Hansen, 304 Or 169, 172, 743 P2d 157 (1987) ("The 'common law of England' was adopted prior to statehood or official territorial status by Oregon's provisional government. * * * The common law, in the sense of an evolving body of law, continues in force insofar as it is not in conflict with legislation or constitutional provisions.").

In Dimick v. Schiedt, 293 US 474, 485-86, 55 S Ct 296, 79 L Ed 603 (1934), the United States Supreme Court explained:

> "The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy' (Bk. 3, p 379); and, as Justice Story said (2 Story, Const. § 1779),' * * * the Constitution would have been justly obnoxious to the most conclusive objection it if had not recognized and confirmed it in the most solemn terms.' With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as

> a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. * * *
>
> "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."

(Citations omitted.)

By 1783, the majority of state constitutions contained a catalogue of civil liberties that uniformly guaranteed the right to trial by jury in a civil case. Robert F. Williams, State Constitutional Law, 151-53 (2d ed 1993). Those provisions were carried over into the 1802 Ohio Constitution and the 1816 Indiana Constitution.(5) Article I, section 17, was taken verbatim from Article I, section 20, of the Indiana Constitution of 1851. (6) W. C. Palmer, The Sources of the Oregon Constitution, 5 Or L Rev 200, 201 (1926). Thus, Article I, section 17, has its origins in the early American colonial charters and the first state constitutions.

In 1844, an Oregon legislative act provided in part:

> "All the statute law of Iowa Territory passed at the first session of the Legislative Assembly of said Territory, and not of a local character, and not incompatible with the condition and circumstances of this country, shall be the law of this government, unless otherwise modified; and the common law of England and principles of equity, not modified by the statutes of Iowa or of this government, and not incompatible with its principles, shall constitute a part of the law of this land."

Or Laws, Art. III, § 1, p 100 (1843-49).(7)

In 1845, the inhabitants of the Oregon Territory adopted the organic law of the provisional government of Oregon. Article I, section 2, of that document provided in part:

> "The inhabitants of said [Oregon] territory shall always be entitled to the benefits of * * * trial by jury, * * * and of judicial proceedings according to the course of the common law. "

Organic Law of the Provisional Government of Oregon (reprinted in General Laws of Oregon, p 59 (Deady 1845-64)).

In 1848, Congress extended the rights protected by the 1787 Northwest Ordinance, including the right to jury trial in a civil case, to the Oregon Territory. An Act to Establish the Territorial Government of Oregon, Section 14 (reprinted in General Laws of Oregon, pp 66, 75 (Deady 1845-65)).

The people of the Oregon Territory approved the Oregon Constitution in 1857; it went into effect February 14, 1859.

From the foregoing, we conclude that the framers of the Oregon Constitution clearly understood the meaning of the right to jury trial in a civil case and that they intended that that right would remain "inviolate," i.e., secure against violation or impairment, in the new State of Oregon. It follows, therefore, that whatever the right to "Trial by Jury" meant in 1857, it means precisely the same thing today. The next question is whether the assessment of damages was a function of a common-law jury in 1857.

In actions for injuries not willfully inflicted, compensation is the fundamental principle of the law of

damages. See Oliver v. North Pacific Transportation Co., 3 Or 84, 88 (1869) (if entitled to anything, plaintiff "is entitled to such a sum of money as will fully compensate him for all loss and injury to him, caused by the negligence or wrongful act"). The purpose of awarding money for pain and suffering caused by another person is to give "the sufferer a pecuniary satisfaction." 3 W. Blackstone, Commentaries 1112. Blackstone also wrote that, if a civil verdict were for the plaintiff, the jurors "assess the damages also sustained by the plaintiff in consequence of the injury upon which the action is brought." Id. at 1339. In his treatise on damages, McCormick wrote that

> "The amount of damages * * * from the beginning of trial by jury, was a 'fact' to be found by the jurors."

Charles T. McCormick, Handbook on the Law of Damages 24 (1935). See also Molodyh, 304 Or at 297-98 (the right to jury trial "includes having a jury determine all issues of fact, not just those issues that remain after the legislature has narrowed the claims process"); 1920 Studebaker Touring Car, 120 Or at 259 ("[I]t is not within the power of the legislature to enact any law which deprives any litigant of [the right of jury trial guaranteed by the Oregon Constitution].").

In Nelson v. Oregon Railway Etc. Co., 13 Or 141, 143 (1886), this court considered the defendant's argument that the trial jury's factual findings did not support the damages awarded. The court stated:

> "The verdict herein may have been much larger than this court would have allowed under the evidence in the case, or in view of the facts found by the jury. Still we have no right to set it aside, or reverse or modify the judgment entered thereon. The jury are judges of the facts, and however widely our view might disagree with theirs matters nothing. We have no right to invade their province, however sanguine we may be that they have committed error."

To the same effect, see generally Locatelli v. Ramsey, 223 Or 238, 242, 354 P2d 317 (1960); Van Lom v. Schneiderman, 187 Or 89, 111, 210 P2d 461 (1955); Hall v. Cornett, 193 Or 634, 644, 240 P2d 231 (1952); Fehely v. Senders, 170 Or 457, 474, 135 P2d 283 (1943); Malpica v. Cannery Supply Co., 95 Or 242, 248, 187 P 596 (1920); Smitson v. Southern Pac. Company, 37 Or 74, 95, 60 P2d 907 (1900). From the foregoing, we conclude that the assessment of damages was a function of a common law jury in 1857.[(8)]

Judicial control of jury verdicts

In ancient common-law trial, judges had no power to order a new trial solely on the ground that the judge thought that the verdict was "excessive."

The power of a common-law trial judge to set aside a jury verdict on account of excessive damages and to order a new trial evolved on account of misbehavior by jurors. 3 W. Blackstone, Commentaries 1347. It was not until Wood v. Gunston, 82 Eng Rep 864, 867 (1655), that a judge, without any statutory authority, assumed the power to set aside a jury verdict and grant a new trial for the reason that, in the opinion of the trial judge, the amount of the verdict was "excessive." Before that case, it appears that the only ground for a new trial was actual "misconduct of the jury." Tongue, 35 Or L R at 145-46 (citing 1 Holdsworth, A History of English Law 225 (3d ed 1922)). In Van Lom, 187 Or at 111-12, this court stated:

> "In ancient times, as is recounted in 1 Holdsworth's History of English Law (3d ed.) 337-347, when a jury brought in what seemed to be a false verdict the court examined by means of an attaint jury whether it was correct. If the original jury was convicted by the attaint jury they were imprisoned for a year, forfeited their goods, became infamous, their wives and

> children were turned out, and their lands laid waste. * * * The barbarity of this practice finally led to its abandonment. But 'It was obvious', says Holdsworth (p. 346) 'that some regular method of controlling the verdicts of juries was essential to the proper working of the jury system. This regular method of control was found in the growth of the practice of granting new trials if the verdict was clearly contrary to the weight of evidence.' And, again, he says in speaking of the value of the jury system as it developed in England, 'the jury would never have won this popularity, it would never have attained these results, if it had not been controlled by the action of the courts, the legislature and the Council.' (p. 321)."

This court's early cases indicate that the court took seriously the principle that juries were to be the exclusive judges of a party's damages. Before 1910, with respect to motions for non-suit or directed verdict, the sole question was whether there was "any" evidence in favor of the plaintiff and, if there was, the jury must receive the case. Tippin v. Ward, 5 Or 450, 453 (1875) (the case should be submitted to jury, unless an entire lack of evidence tending to maintain issues on behalf of the plaintiff or, unless upon the whole case made by the plaintiff, it appears beyond doubt that the plaintiff has no right to recover); Vanbebber v. Plunkett, 26 Or 562, 564-65, 38 P 707 (1895) (if evidence offered to prove a fact is "competent, and its tendency, however slight, is to prove such fact, the jury ought to have it, as they are the exclusive judges of its sufficiency"). Moreover, this court discouraged the practice of setting aside a jury's verdict solely on the ground that the trial judge thought the verdict was "excessive." See Ore. Cas. R.R. v. Ore. S. Nav. Co., 3 Or 178, 179 (1869) (a verdict that is subject to no other objection should not be set aside because the judge may differ from the jury as to the preponderance of evidence).

In Serles v. Serles, 35 Or 289, 57 P 634 (1899), however, this court interpreted Oregon law to mandate judicial review that weighed the evidence and could set aside a jury's verdict and order a new trial, even if the verdict was supported by sufficient evidence to submit the case to the jury and was rendered after a trial without legal error. Even after Serles, however, no Oregon trial court could enter a judgment for an amount less than the jury's verdict without giving the prevailing party the option of a new jury trial. In 1910, Oregon voters eliminated Oregon trial courts' power to grant new trials for excessive verdicts by adopting Article VII (Amended), section 3, (prohibiting any "fact tried by a jury" from being "re-examined in any court unless no evidence supports the verdict").

In the face of the foregoing line of authority, punctuated by the adoption of Article VII (Amended), section 3, in 1910, Senco relies on dicta in Greist v. Phillips, 322 Or 281, 906 P2d 789 (1995), to support its contention that ORS 18.560(1) does not violate Article I, section 17. In Greist, this court stated:

> "When Article I, section 17, and the [Oregon] constitution were adopted, a jury's determination of the amount of damages to be awarded in tort actions was not protected from judicial alteration.
>
> "* * * * *
>
> "Until 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. That fact, in itself, disposes of plaintiff's argument that there existed at common law, at the time Article I, section 17, was adopted in 1857, a right to have a judge enter judgment on a jury's award of damages -- without judicial alterations -- in a personal injury action."

322 Or at 294-95 (emphasis in original).

Based on that dicta, Senco argues:

> "From the beginning, the Oregon legislature also possessed the power to authorize courts to set aside excessive verdicts, * * * limit the amount of recoverable damages in certain actions * * *, and govern the procedure for awarding damages, * * * without compromising the right of trial by jury."

Senco asserts that Greist "should end the inquiry for the present case."

The quoted dicta requires correction. Oregon trial courts never have had the power to reduce a jury's verdict or to enter judgment for a lesser amount of damages over the objection of the prevailing party, who always could reject a judicial remittitur and demand a new jury trial. See Adcock v. Oregon Railroad Co., 45 Or 173, 181, 77 P 78 (1904) (in an action for personal injuries, the court may order a remission of part of the damages awarded by the jury, but only as a condition of overruling a motion for a new trial).

In Greist, this court held that there is no right to a jury trial in a wrongful death action, because a wrongful death claim was not one recognized at common law or under the Oregon Territorial law when Article I, section 17, was adopted. Greist, 322 Or at 294-95. However, Greist, did not resolve the constitutionality of ORS 18.560(1) as applied to a statutory limit on recovery of noneconomic damages in a common-law action such as this for which, until recently, no statutory limitation on noneconomic damages had existed. We agree with plaintiffs that these 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.

Senco's arguments

Senco argues that because, at common-law, the trial judge had authority to ask the plaintiff to accept a remittitur of damages thought to be excessive or not supported by the evidence or to face a new trial, the legislature has the right to do the same thing by imposing a cap on noneconomic damages. We disagree. A statutory cap fundamentally is different from the doctrine of judicial remittitur. First, the legislative cap is mandatory, not discretionary. The legislature obviously has not "asked" plaintiffs to accept less than the jury's verdict; it has mandated a reduction. Moreover, a trial judge's power before 1857 to grant a new trial differs in several important respects from the legislature's power to cap damages. Most important, the trial judge determined the excessiveness of the damages, if any, or the insufficiency of the evidence to support the award by reviewing the facts in a specific case. Then, if the judge decided that the jury had rendered an improper damages verdict, the prevailing party had the right to have a second jury decide damages. Under the cap, plaintiffs are denied a second jury trial.

Additionally, the statutory cap is not contingent on a factual finding that the award is excessive as a matter of law. The reduction is mandated even though the jury is correctly instructed, its findings are supported by the evidence as a matter of law, and no legal error is present in the record. The statutory cap involves no review of the facts of a specific case. Moreover, the statutory cap also denies a prevailing party an opportunity to accept a remittitur of the jury's award of noneconomic damages that is less than the jury's award, but that exceeds the statutory cap.

Senco cites no authority, and we are aware of none, for the proposition that the drafters of Article I, section 17, would have tolerated interference with a jury's award of noneconomic damages in a case such as this as long as the interference originated in the legislature and not in the court. Senco's focus on the legislature's power is misdirected. The proper focus under Article I, section 17, is on the rights of the litigants and the proper role of the jury in a civil case. Here, the broad powers of the legislature must yield to a litigant's specific right to a "Trial by Jury" guaranteed in Article I, section 17, as that right was understood in 1857. We conclude that Article I, section 17, prohibits the legislature from interfering with