

SUPREME COURT

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Cases decided July 9, 2020.

Scott Raymond Busch v. McInnis Waste Systems, Inc., (CC 15CV13496) (CA A164158) (SC S066098).

On review from the Court of Appeals in an appeal from the Multnomah County Circuit Court, Michael A. Greenlick, Judge. 292 Or App 820, 426 P3d 235 (2018). The decision of the Court of Appeals is affirmed. The decision of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings. Opinion of the Court by Chief Justice Martha L. Walters. Senior Justice Jack L. Landau, pro tempore, filed an opinion specially concurring in part and dissenting in part. Justice Thomas A. Balmer filed a dissenting opinion in which Senior Justice Jack L. Landau joined. Justice Christopher L. Garrett did not participate in the consideration or decision of the case.

Today, the Oregon Supreme Court held that application of ORS 31.710(1), as a limit on the noneconomic damages that a court can award to a plaintiff in a personal injury action, violates the remedy clause of Article I, section 10, of the Oregon Constitution.

Plaintiff had the right of way and was walking across a crosswalk in downtown Portland when he was struck by defendant's garbage truck. By the time that the truck came to a stop, plaintiff's leg was under the truck and attached to his body by a one-inch piece of skin. Plaintiff was fully conscious and alert throughout the event, and he experienced tremendous pain. Plaintiff had surgery to amputate his leg just above the knee. He has since undergone extensive rehabilitation and therapy, but the injuries that plaintiff suffered will affect him for the rest of his life.

Plaintiff initiated this action against defendant, a private entity. Defendant admitted liability, and the jury awarded plaintiff \$3,021,922 in economic damages and \$10,500,000 in noneconomic damages. Subsequently, defendant moved to reduce the noneconomic damages award to \$500,000, in accordance with the noneconomic damages cap provided under ORS 31.710(1). In response, plaintiff argued that ORS 31.710(1)

violates the remedy clause of Article I, section 10, of the Oregon Constitution. The trial court agreed with defendant and reduced plaintiff's noneconomic damages award accordingly. The Court of Appeals reversed, and the Oregon Supreme Court allowed review.

In an opinion written by Chief Justice Martha L. Walters, the Oregon Supreme Court affirmed the decision of the Court of Appeals. The Court held that application of ORS 31.710(1), as a limit on the noneconomic damages that a court can award to a plaintiff in a personal injury action, violates the remedy clause of Article I, section 10 of the Oregon Constitution.

The Court began its analysis by explaining that the remedy clause places a substantive limit on the legislature's ability to modify the remedies available for injuries caused by a breach of a common-law duty. To decide whether a statutory cap on damages for injuries resulting from such a breach is constitutional, the Court followed the framework set out in *Horton v. OHSU*, 359 Or 168, 376 P3d 998 (2016). In that case, the Court considered "the extent to which the legislature ha[d] departed from the common-law model measured against its reasons for doing so."

Applying the *Horton* framework, the Court rejected defendant's argument that allowing a plaintiff to recover \$500,000 in noneconomic damages for injuries caused by a breach of a recognized duty is a "sufficient" remedy "in and of itself." The Court also rejected defendant's argument that the reasons for the legislature's limitation on damages were constitutionally sufficient. Proponents of the cap argued that it was designed to reduce insurance costs and improve insurance availability. The Court explained, however, that the legislature's reasons for enacting the cap were not sufficient to counterbalance plaintiffs' constitutional rights to remedies. The legislature did not alter a defendant's legal duty or provide a plaintiff with a *quid pro quo* -- something a plaintiff would not have had absent the legislation. Nor did the legislature set the cap at an amount that it determined was capable of providing a complete recovery in many cases and would remain capable of so providing over time.

Senior Justice Jack L. Landau, pro tempore, specially concurred in part and dissented in part. Justice Landau explained that he continues to believe, as he had explained in his concurrence in *Horton v. OHSU*, 359 Or 168, 254-56, 376 P3d 998 (2016) (Landau, J., concurring), that the remedy clause of Article I, section 10, does not limit the authority of the Oregon Legislature to make laws modifying rights and remedies. But even if it does, Justice Landau reasoned, it does not prohibit the legislature from enacting a statute that limits recovery of noneconomic damages to \$500,000.

Nonetheless, Justice Landau agreed with the majority that the damages cap under ORS 31.710(1) is unconstitutional. But, unlike the majority, Justice Landau would have held that ORS 31.710(1) violates the right to a jury under Article I, section 17, of

the Oregon Constitution. Justice Landau acknowledged that the majority in *Horton* had overruled *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463 (1999), which had held that right to a jury under Article I, section 17, limits the authority of the Oregon Legislature to modify remedies. Justice Landau also acknowledged that he had joined the majority in *Horton*. Even so, Justice Landau explained that the majority in *Horton* had been incorrect to overrule *Lakin* because the majority had been inconsistent in its application of principles of stare decisis. Justice Landau suggested that, in future cases, parties develop the argument that *Horton* was wrong to overrule *Lakin* because *Horton* had not followed the Oregon Supreme Court's own established rules for when the Court will reconsider and overrule its own prior constitutional decisions.

Justice Thomas A. Balmer filed a dissenting opinion in which Senior Justice Jack L. Landau joined. Justice Balmer would have held that the statutory cap on noneconomic damages is constitutional on its face and as applied to this plaintiff. In Justice Balmer's view, it is within the plenary power of the legislature to legislate regarding noneconomic damages if it chooses to do so, much as the legislature has, in other contexts, modified otherwise applicable rules of common-law negligence and the remedies for such negligence to advance specific public policies. Justice Balmer explained that noneconomic damages are qualitatively different than economic damages and that the Court's prior cases do not hold that a cap on noneconomic damages violates the remedy clause. He noted that, in contrast to economic damages, which by law must be "objectively verifiable," noneconomic damages by law are "subjective nonmonetary losses." For that reason, he noted, noneconomic damages can be unpredictable and seemingly arbitrary; not subject to substantive review on appeal; and potentially discriminatory based on race, gender, and other characteristics of the plaintiff. Given those characteristics, Justice Balmer would have concluded that the cap at issue here does not violate the remedy clause.

Kinzua Resources, LLC v. Oregon Department of Environmental Quality,
(LQSWER11108) (CA A161527) (SC S066676)

On review from the Court of Appeals in a judicial review of an order of the Department of Environmental Quality. 295 Or App 395, 434 P3d 461 (2018), *adh'd to on recons*, 296 Or App 487, 437 P3d 331 (2019). The decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for further proceedings. Opinion of the Court by Justice Meagan A. Flynn.

Today, the Oregon Supreme Court held that the statutory obligations imposed on persons "owning or controlling" an inactive landfill site apply to persons with authority to control the site; they are not limited to persons who are actively involved with the operation or management of the site.

Kinzua Resources, LLC was both the permit-holder and the owner of a landfill site. Petitioners are the two members of Kinzua -- Frontier Resources, LLC and ATR Services, Inc. -- as well as Gregory Demers, who is a member of Frontier and the president of ATR. In 2010, the landfill accepted its last delivery of waste, but Kinzua failed to fulfill the requirements for closing a landfill that has stopped receiving waste.

If a landfill becomes inactive and the permit holder has failed to properly close it, then other persons "owning or controlling" the landfill site must fulfill obligations related to proper closure. ORS 459.205; ORS 459.268. The Environmental Quality Commission found that petitioners had the legal authority to control an inactive landfill site, and on that basis held that petitioners were persons "controlling" the site. Accordingly, the commission imposed liability on petitioners for failing to perform the statutory closure requirements.

The Court of Appeals reversed. It held that persons "controlling" a landfill site are limited to those persons actively involved in the operation or management of the site, and petitioners were not in that class. The Department of Environmental Quality sought review.

In a unanimous opinion written by Justice Meagan A. Flynn, the Supreme Court reversed the decision of the Court of Appeals and remanded the case to that court. After examining the text, context, and legislative history of ORS 459.205 and ORS 459.268, the Court concluded that the legislature had intended the category of persons "controlling" a site to include persons having the authority to control the site, regardless of whether that authority has been exercised.

The Court additionally considered petitioners' argument that, as limited liability company members, they were "not personally liable for a debt, obligation or liability of the limited liability company solely by reason of being or acting as a member or manager." ORS 63.165(1). The Court held that, if an LLC member meets the statutory test of a person "controlling" a site under ORS 459.205 and ORS 459.268, then the member will be directly liable for its own omissions, and that liability would not conflict with the statutory liability shield of ORS 63.165(1).

The Court remanded the case for the Court of Appeals to consider an alternative argument that the record lacked substantial evidence to support the commission's findings.