



The Application of Oregon’s Non-Economic Damages Cap to Wrongful Death Actions Arising from Workplace Accidents

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he noneconomic damages cap set forth in ORS 31.710(1) has been a subject of contention among litigants since its enactment in 1987. The disputes have primarily centered on the constitutionality of the cap, and specifically whether its application violates the



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Right to Jury Trial or Remedies clauses of the Oregon Constitution. Over the past fifteen years, the Oregon Supreme Court has established that the non-economic damages cap is unconstitutional as applied to claims that were viable at common law, such as personal injury actions. *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463 (1999). The supreme court has further held that the cap is constitutional as applied to wrongful death actions because such actions were not recognized at common law. *Hughes v. Peacehealth*, 344 Or 142, 178 P3d 225 (2008); *Greist v. Phillips*, 322 Or 281, 906 P2d 789 (1995) (“Because wrongful death actions are ‘purely statutory,’ they ‘exist only in the form and with the limitations chosen by the legislature’”). In sum, the constitutional parameters of the cap in large part have been decided by the Oregon Supreme Court.

In addition to disputing the constitutionality of the cap, litigants have often

fought over the scope of the exemption clause in ORS 31.710(1), particularly in wrongful death cases arising from workplace accidents (i.e., third-party wrongful death actions). ORS 31.710(1) and its exemption clause read, in relevant part: **“Except for claims subject to ORS 32.260 to ORS 32.300 and ORS chapter 656**, in any civil action seeking damages arising out of bodily injury, including ... death ... the amount awarded for noneconomic damages shall not exceed \$500,000.” (Emphasis added.) In third-party wrongful death actions where the plaintiff seeks noneconomic damages in excess of \$500,000, the parties invariably dispute whether the noneconomic damages cap applies.

The plaintiffs in such cases contend that third-party wrongful death actions constitute “claims subject to ... [Oregon’s Workers’ Compensation Act]” within the meaning of ORS 31.710(1) and thereby are exempt from the cap. Plaintiffs typically rely on a plain-language argument, proffering a broad reading of “subject to” in ORS 31.710(1). Specifically, they argue that third-party wrongful death actions are governed or affected by several provisions in ORS chapter 656 – including ORS 656.580 and ORS 656.593 (paying agency has lien against proceeds recovered in third-party action); ORS 656.587 (any settlement of third-party action requires approval of paying agency or workers’ compensation board); ORS

656.595(1) (third-party actions have precedence on civil docket); and ORS 656.595(2) (any right to workers’ compensation benefits shall not be pleaded or admissible in evidence in third-party action) – and thus are “claims subject to ... ORS chapter 656” and thereby exempt from the cap. Beyond this plain-language argument and a few trial court rulings in Oregon, the plaintiffs’ bar lacks additional support for their proffered interpretation.

The defendants in such cases argue that the noneconomic damages cap applies to third-party wrongful death actions. They contend such actions are not encompassed by the exemption clause in ORS 31.710(1) which refers only to workers’ compensation claims (those actually processed through the workers’ compensation system) and claims brought pursuant to the Tort Claims Act. In support of their position, defendants typically rely on the legislative context in 1987 (tort reform), the statutory text and context, the legislative history, and Oregon appellate and trial court decisions on the issue. A close examination of the aforementioned demonstrates that defendants have the better supported arguments on this issue.

First, the 1987 Oregon Legislature, which enacted the noneconomic damages cap at ORS 18.560 (renumbered ORS 31.710(1)), undertook a significant effort and intended to reform tort li-

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ability laws. The legislature, for example, created the “Joint Interim Task Force on Liability Insurance” in 1986 to investigate and recommend solutions to the recurring “liability insurance crisis” in Oregon. The task force and the legislature also had stated goals of bringing stability to insurance markets and lowering the cost of tort litigation through, in part, a noneconomic damages cap. The legislative context, thus, indicates that the damages cap was intended to apply broadly (to any civil action arising from a bodily injury or death).

Second, the statutory text and context demonstrates that third-party wrongful death actions are not “claims subject to ... ORS chapter 656” within the meaning of ORS 31.710(1). In such actions, both liability and damages (if any) are determined without regard to any provision in the Workers’ Compensation Act. Moreover, the ORS chapter 656 provisions routinely cited by plaintiffs are either purely administrative in nature, apply only “after the fact,” or merely preclude workers’ compensation issues from the trial-court proceeding. As such, wrongful death actions arising from workplace accidents are not “subject to” (but, rather, only tangentially affected by) the Workers’ Compensation Act. Additionally, the exemption clause logically carves out two types of claims – workers’ compensation claims and Tort Claims Act claims – for which the legislature had already established separate, comprehensive systems, including damages caps, that were not to be disturbed by the enactment of a general noneconomic damages cap. See ORS 30.270 (1985); ORS 656.018 (1985).

Third, the legislative history of ORS 31.710(1) supports that the exemption clause was not intended to encompass third-party wrongful death actions. The legislative history is exhaustive and includes tapes of testimony over 200 hours long and over 5,000 pages of minutes

and exhibits, as well as materials from the Joint Interim Task Force. However, there is no indication in those materials that the legislature intended to exempt civil actions arising from workplace injuries or deaths. If such an interpretation were intended, which would affect a significant number of cases on the civil docket, it seems inconceivable that the legislature would have no discussion of such a rationale.

The legislative history materials also contain an interpretation of the exemption clause that supports defendants’ position on this issue. The exemption-clause language in ORS 31.710(1) first appeared in the Joint Interim Task Force where the clause was explicitly described by its authors, as found in the July 2, 1986 minutes and exhibits, as referring only to “workers’ compensation claims and injuries which fall under the Tort Claims Act.” The task force, which included several key legislators and whose materials were made available to the legislature, incorporated that language into draft legislation. The legislature subsequently incorporated the draft legislation into Senate Bill 323. The exemption-clause language then remained unchanged through enactment of ORS 18.560 (renumbered ORS 31.710(1)). Thus, the legislative history shows that the legislature passed SB 323 with the understanding that the noneconomic damages cap applied to all civil actions arising from bodily injuries or deaths, and it exempted only “workers’ compensation claims and injuries which fall under the Tort Claims Act.”

Fourth, the Oregon Court of Appeals and trial courts in Oregon have rendered decisions in favor of defendants on this issue. In *Groth v. Hyundai Precision & Ind. Co.*, which appears to be the only Oregon appellate decision on point, the court of appeals “rejected” the plaintiff’s argument that its third-party wrongful death action was a “claim subject to ...

ORS chapter 656” within the meaning of ORS 31.710(1). 209 Or App 781, 801, 149 P3d 333 (2006). The court’s ruling on this issue is not evident from the opinion, which only states, in relevant part: “We reject plaintiff’s first assignment of error without discussion.” However, an examination of the plaintiff’s underlying briefing in *Groth* reveals that it presented the argument that third-party actions are exempt from the cap as “claims subject to ... ORS chapter 656,” which the court, again, rejected. As such, the *Groth* opinion has precedential value with respect to this issue.

Most recently, in November 2009, the United States District Court for the District of Oregon considered extensive briefing and argument from numerous parties on this precise issue. In the multi-district litigation *In re: Helicopter Crash Near Weaverville, California 8/5/08*, the parties in the third-party wrongful death actions filed cross-motions for partial summary judgment asking the court to decide whether the noneconomic damages cap applied. Relying on tort reform principles, ORS 31.710(1), and *Groth*, the court ruled on November 12, 2009, that the cap applied. Plaintiff challenged the ruling with a motion for reconsideration, a motion to certify the question to the Oregon Supreme Court, and a motion for an interlocutory appeal to the Ninth Circuit; the court denied all three motions on February 4, 2010.

While the federal court did not issue written opinions on its decisions in the *In re: Helicopter Crash* case, those rulings do not form precedent that is binding on future cases. However, the decisions provide further support for arguments commonly offered by defense counsel that the noneconomic damages cap in ORS 31.710(1) applies to third-party wrongful death actions. ☺