



Court of Appeals Reaffirms Position on Noneconomic Damages

From the Desk of Jeff Eberhard: If the jury awards plaintiff \$10,500,000 in noneconomic damages, will the court find that applying the statutory \$500,000 noneconomic damages cap violates the remedy clause of the Oregon Constitution? For now, the answer is yes. Read on to find out why that answer may change.

Claims Pointer: Because the Oregon Court of Appeals found that ORS 31.710(1) violated the remedy clause in *Vasquez* and *Rains*, the Court of Appeals' ruling, in this case, was somewhat expected. It is likely that in the meantime, the Court of Appeals will continue to invalidate the statutory cap on noneconomic damages. As such, the next opportunity for clarification will come from the Oregon Supreme Court, which could take over a year to render a decision. The Oregon Supreme Court has accepted a petition for review of the *Vasquez* decision. The petitioners and respondents in *Vasquez* have filed their respective briefs on the merits, and six parties filed *amicus curiae* briefs. Petitioners will have until August 2, 2018 to file a reply brief, unless extensions are provided, and the Oregon Supreme Court is set to hear oral argument on September 14, 2018.

[Busch v. McInnis Waste Systems, Inc. 292 Or App 820 \(2018\).](#)

Plaintiff Scott Busch ("Plaintiff") was crossing the street on his way to work when he was struck by a garbage truck owned by Defendant McInnis Waste Systems, Inc. ("Defendant"). Plaintiff suffered severe injuries, leading to the amputation of his leg above the knee. Plaintiff filed suit against Defendant. Defendant admitted liability and the case proceeded to trial on the issue of damages. At trial, the jury found that Plaintiff was entitled to \$3,021,922 in economic damages and \$10,500,000 in noneconomic damages. Defendant moved to reduce the noneconomic damages award to \$500,000, pursuant to 31.710(1). The trial court awarded the motion and reduced the judgment accordingly. Plaintiff appealed.

The Oregon Court of Appeals first looked to the Oregon Supreme Court's decision in *Horton v. OHSU*, which explained that the remedy clause "limits the legislature's substantive authority to alter or adjust a person's remedy for injuries to person, property, and reputation." The court also noted

that *Horton* provided three categories of legislation to be considered when determining the limitations posed by the remedy clause:

- (1) Legislation that does not alter a duty, but denies or limits the person remedies;
- (2) *Quid pro quo* legislation, which adjusts a person's remedies as part of an overall scheme; extending benefits to some while limiting benefits to others; and
- (3) Legislation that either modifies or limits the cause of action when the premises underlying the duties and causes of actions have changed.

The Oregon Court of Appeals then looked to its previous 2017 decision in *Vasquez*, where it determined that the statutory cap on noneconomic damages fell within the first category of legislation. Legislation that falls into the first category and limits but does not deny damages, is deemed to violate the remedy clause if the remedy provided is not "substantial." The *Vasquez* court noted that in order to determine if the remedy is



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substantial, it would need to “consider the extent to which the legislature has departed from the common-law model measured against its reasons for doing so.” (emphasis added).

In *Vasquez*, the Court of Appeals held that because at common law plaintiff could recover all of their damages, the legislature departed “dramatically” from the common law model. The court pointed out that the legislature’s reason for enacting the cap was to “put a lid on litigation costs, which in turn would help control rising insurance premium costs for Oregonians.” *Vasquez* determined that the legislature’s reason for the cap could not bear the “dramatic reduction in noneconomic damages . . . for the most grievously injured plaintiffs.” In *Vasquez*, the statutory cap would have reduced plaintiff’s noneconomic damages from \$4,860,000 to \$500,000.

The court noted that after *Vasquez*, it issued an opinion in *Rains*, a case where the husband was awarded \$2,343,750 in noneconomic damages and the wife was awarded \$759,375 in noneconomic damages. The *Rains* court relied on the analysis set forth in *Vasquez* to hold that application of the cap would violate the remedy clause if applied to the husband’s noneconomic damages award and the wife’s \$759,375 noneconomic damages award.

Turning to the case at hand, the Oregon Court of Appeals pointed out that the case was “indistinguishable from *Vasquez* and *Rains*.” The court noted that application of the cap would reduce Plaintiff’s total award from \$13,521,922 to \$3,521,922, and would reduce plaintiff’s noneconomic damages award from \$10,500,000 to \$500,000. The court noted that similar to the reasons set forth in *Vasquez* and *Rains*, application of the noneconomic damages cap would violate the remedy clause. Accordingly, the Oregon Court of Appeals reversed the trial court’s decision to apply the statutory cap.

View full opinion at <https://cdm17027.contentdm.oclc.org/digital/pdf.js/web/viewer.html?file=/digital/api/collection/p17027coll5/id/15367/download#page=1&zoom=auto>



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