

IN THE SUPREME COURT OF THE STATE OF OREGON

MARK STRAWN, on his own behalf)	Supreme Court
and as representative of a class of)	No. S057520
similarly situated persons,)	
)	Court of Appeals
Plaintiff-Respondent,)	No. A131605
)	
v.)	Multnomah County Circuit Court
)	No. 9908-09080
FARMERS INSURANCE)	
COMPANY)	
OF OREGON, an Oregon stock)	
insurance company; MID-CENTURY)	
INSURANCE COMPANY, a foreign)	
corporation; and TRUCK)	
INSURANCE)	
EXCHANGE, a foreign corporation,)	
)	
Defendants-Appellants)	

ANDYE BENNETT
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JUL 30 2009

AMICUS BRIEF IN SUPPORT OF REVIEW

Petition for Review of the Decision of the Court of Appeals
May 20, 2009;

Opinion by Sercombe, J. Edmonds, Presiding Judge, and Wollheim, J.

In an appeal from the Judgment and Supplemental Judgment of the
Multnomah County Circuit Court
The Honorable Jerome E. LaBarre, Judge

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QUESTION PRESENTED

Should a reviewing court address federal constitutional challenges to a punitive damage award without first considering whether the defendant complied with state procedures that ordinarily are required before a party may challenge a jury's verdict?

PROPOSED RULE OF LAW

Established state procedural requirements for bringing a challenge to the jury's verdict apply to challenges based on the federal constitution as well, and a reviewing court should first consider whether the appeal can be resolved on this subconstitutional basis.

REASONS FOR GRANTING REVIEW

1. The case raises significant issues of state law, on which amicus is available to advise the Court.

The petition for review in this case raises significant issues that are important to members of the Oregon Trial Lawyers Association (OTLA), many of whom represent Oregonians harmed by willful, wanton or malicious wrongdoing that the State has a legitimate interest in punishing through punitive damages. If this Court allows review, OTLA intends to file a brief on the merits to provide an amicus perspective on the issues raised by the petition.

2. The issues presented by the petition for review affect many other cases.

This Court currently has pending before it at least three other cases involving challenges to the size of a punitive damage award: *Hamlin v. Hampton Lumber Mills, Inc.*, 222 Or App 230, 193 P3d 46 (2008), *rev allowed* 346 Or 157 (April 8, 2009); *Lithia Motors v. Yovan*, 226 Or App 572, 204 P3d 120 (2009), *pet rev filed* May 20, 2009

(S057383); and *Schwarz v. Philip Morris, Inc.*, 206 Or App 20, 135 P3d 409, *rev allowed* 346 Or 213 (May 14, 2009). The present case presents factual variations that could aid the Court in formulating sound rules of law in the other pending cases.

However, the greatest significance of this case for OTLA is that it highlights the extent to which resort to appellate “review” has supplanted the role of a “rational jury” in determining the appropriate size of punitive damage awards. Under the approach employed by the Court of Appeals, as this case illustrates, defendants have no incentive to help the jury reach a constitutionally permissible punitive damage verdict because the Court of Appeals believes it must take a fresh look at the issue regardless of procedural requirements. The petition for review presents the opportunity for this Court to address the extent to which – before seeking intervention from the appellate courts – counsel must comply with well-established state procedures that help the jury to make a rational decision in the first instance.

3. The Court of Appeals mistakenly assumes that established procedural rules do not apply to due process challenges to punitive damage awards.

Both the order of the trial court denying remittitur and new trial¹ and the Respondent’s Brief emphasized that numerous procedural obstacles prevented consideration of the merits of defendants’ constitutional challenge to the size of the punitive damage award, including failure to move for a partial directed verdict; failure to request a limiting instruction on the size of the award (indeed requesting that the jury be

¹ The trial court timely signed an order denying defendants’ motion for remittitur and new trial on the 55th day following entry of the judgment, and made oral findings at that time which were recorded and – with the permission of all parties – incorporated into subsequent written Findings of Fact and Conclusions of. (SER 105, 107-08, 109-123).

told it could award up to twice as much in punitive damages); and failing to object to the verdict when there was still an opportunity to send the jury back for additional deliberations. (SER 116; Respondent's Brief at 51-52). Defendants' appeal failed to even challenge any of these alternative, procedural reasons for affirming the verdict. (Respondent's Brief at 51-52). Yet the decision of the Court of Appeals jumps directly into an analysis of defendants' substantive challenge without even pausing at the procedural obstacles. *Strawn v. Farmers Ins. Co. of Oregon*, 228 Or App 454, 477, 209 P3d 357 (2009).

The Court of Appeals' disregard for defendant's procedural failings was more than a mere oversight; the court has previously made clear its assumption that challenges to the size of a punitive damage award are simply not subject to the normal rules of preservation. *See Cantua v. Creager*, 169 Or App 81, 84, 7 P3d 693(2000) (unlike challenges to other damage awards, due process objection to punitive damage awards can be raised for first time by post-trial motion).

However, the approach of the Court of Appeals is contrary to the principles laid out by this Court and by the US Supreme Court. While the Due Process Clause of the federal constitution protects individuals – including corporations – from “grossly excessive” punitive damage judgments, that does not override the ability of the states to follow well-established procedures that serve “the State's important interest in ensuring that counsel do their part” to prevent error. *Osborne v. Ohio*, 495 US 103, 123, 110 SCt 1691, 109 LEd2d 98 (1990). In *Osborne*, the U.S. Supreme Court had “no difficulty agreeing” that a defendant's failure to comply with state procedural rules “constitutes an

independent state-law ground” for affirming the jury’s verdict that will preclude the federal due process challenge. This Court correctly applied that principle in *Williams v. Philip Morris*, which rejected the defendant’s due process challenge to the punitive damage award because the defendant failed to satisfy the well-established state rule that counsel must offer an entirely correct jury instruction if they want to later challenge the refusal to give the instruction. 344 Or 45, 55, 176 P3d 1255 (2008), *cert dismissed as improvidently granted* 129 SCt 1436 (2009) (“there is a preliminary, independent state law standard that we must consider, before we address the constitutional standard that the United States Supreme Court has articulated.”)

The procedural rules that should have prevented the defendants’ due process challenge in this case are also well-established. For example, this Court has emphasized that when a party believes the evidence constrains the jury’s discretion regarding the assessment of damage, it is the responsibility of the party’s attorney “to bring these matters to the attention of the trial judge by appropriate motion or requested instruction” and that the failure to do so is deemed a waiver of any objection to the amount of the jury’s award. *Wheeler v. Huston*, 288 Or 467, 481, 605 P2d 1339 (1980) (specifically discussing awards of economic damages without non-economic). This Court has also held that a defendant may not object on appeal that an award of punitive damages was improper when the defendant failed to object to the verdict before the jury was dismissed. *Building Structures, Inc. v. Young*, 328 Or 100, 110, 968 P2d 1287(1998). As this Court emphasized:

“(1) The time to object to a defective verdict, if it is defective, is while the jury is still on hand so that the trial court can resubmit the matter with proper instructions.

“(2) An objection not taken when the verdict is returned into court is waived.

“(3) The only correct procedure to follow is to resubmit the matter to the same jury.” *Building Structures*, 328 Or at 107 (quoting *Mullins v. Rowe et ux*, 222 Or 519, 353 P2d 861 (1960)).

There is no justification for abandoning these procedures when the jury finding that is challenged is the amount of punitive damages.

4. The Court of Appeals’ disregard for established procedural rules seriously distorts important legal principles.

a. **Adhering to the established procedures serves to preserve the role of the jury in determining factual questions.**

The established procedural rules are vital to protecting the jury’s fundamental role in determining damages. As this Court has emphasized, the assessment of punitive damages is one of the questions of fact “tried by a jury” that Article VII (Amended), section 3 of the Oregon Constitution protects from being “re-examined in any court unless no evidence supports the verdict.” *See Oberg v. Honda Motor Co., Ltd.* 320 Or 544, 548, 888 P2d 8 (1995). The “rational juror” remains the standard by which constitutionally permissible punitive damage awards are determined. *See Goddard v. Farmers Ins. Co. of Oregon*, 344 Or 232, 262, 179 P3d 645 (2008) (on review, Court determines “highest lawful amount of punitive damages that a rational juror could award, consistent with the Due Process Clause.”); *Honda Motor Co. v. Oberg*, 512 US 415, 432 n.10, 114 SCt 2331, 129 LEd2d 336 (1994) (determination that a punitive damage award

is grossly excessive is equivalent to a determination that “no rational trier of fact could have reached the same verdict.”)

Yet a defendant who sits back and allows the jury to be told – indeed asks that the jury be told – that it is permitted to award punitive damage in an amount beyond what the defendant believes to be constitutional has deprived the jury of information vital to a “rational” result. For the Court of Appeals to, nevertheless, override the jury’s determination by considering guidelines on which the jury was not instructed emasculates the role of the jury in determining punitive damages.

b. Adhering to the established procedures furthers judicial efficiency.

The established procedural rules also protect the State’s important interest “in ensuring that counsel do their part” to prevent error. *See Osborne v. Ohio*, 495 US at 123. As this Court has emphasized:

“The underlying basis for the line of reasoning adopted by this court in these defective verdict cases is the promotion of justice and the efficient administration of justice. In all cases in which the validity of a verdict is doubtful, an objection must be made in order that the trial court can decide whether the verdict is faulty. If it is, the trial court can decide whether to resubmit the case to the jury and have the case decided correctly by the jury which has heard the case.” *Building Structures, Inc.*, 328 Or at 109 (quoting *Smith v. J.C. Penney Co.*, 269 Or 643, 654-55, 525 P2d 1299 (1974)).

The consequence of defendant’s delayed objection in this case is that the question of punitive damages has now been remanded for an entirely new trial with a different jury when a timely objection could have allowed the trial court to resubmit the question to the same jury that already sat through the relevant evidence. This is precisely the inefficiency that the rules of preservation seek to eliminate. *See Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382, 823 P2d 956 (1991) (policy behind rule requiring

preservation of error is to afford trial courts an opportunity to correct any error before it is made).

c. Adhering to the established procedures furthers the policy that cases should be resolved on subconstitutional grounds when possible.

Adherence to the established procedural rules is an important component of the so-called “first things first” jurisprudence under which the appellate courts avoid unnecessarily deciding constitutional issues. *See, e.g., Leo v. Keisling*, 327 Or 556, 562, 964 P2d 1023 (1998) (“it is well established that this court ordinarily does not decide constitutional issues if there is an adequate subconstitutional basis for decision.”) When a defendant fails to employ well-established procedural requirements before raising a constitutional challenge to a jury’s verdict, the appeal can and should be resolved on that subconstitutional basis.


CONCLUSION

This Court should accept the petition for review to emphasize that, before engaging in a due process analysis of a jury’s punitive damage verdict, reviewing courts must enforce the State’s important interest “in ensuring that counsel do their part” to prevent the jury from reaching an irrational decision in the first place. *See Osborne*, 495 US at 123.

DATED: July 29, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original and twelve copies of the foregoing BRIEF OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW were filed July 29, 2009, by mailing by First Class Mail with the United States Postal Service, postage prepaid, addressed to the State Court Administrator, Records Section, Supreme Court Building; 1163 State Street; Salem, Oregon 97301.



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I further certify that that I served two copies of the foregoing BRIEF OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW by mailing two copies by first class mail to:

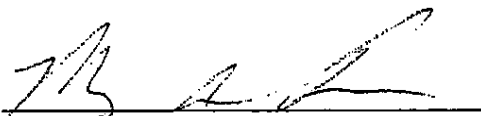
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