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Case Study

Noneconomic Damages — Does a \$500,000 Cap Violate the Oregon Constitution?

— by Jeffrey D. Eberhard

Claims Pointer: To properly preserve an objection to a jury instruction for appeal, an attorney must state an exception with particularity. Additionally, noneconomic damages in a claim for prenatal injuries can be properly limited to \$500,000 without violating the Oregon Constitution.

The remedies clause in Article I, Section 10 of the Oregon Constitution gives everyone a remedy for injury to their person, but ORS 31.710(1) limits some civil action damages to \$500,000. The Oregon Court of Appeals, in Klutschkowski v. Oregon Medical Group, P.C., recently looked at the constitutionality of the limiting statute when applied to prenatal injuries. (Case No. A138722, September 21, 2011). The Court also reminded attorneys that the proper preservation of objections for appeal will be strictly enforced in the courts.

When Bobbi Klutschkowski gave birth to her third child in 1999, the delivery was complicated by a shoulder dystocia, which occurs when the baby's shoulder becomes stuck behind the mother's pubic bone during delivery. Despite the complications, the baby was delivered unharmed. Women who have shoulder dystocia complications during the birth of one child are likely to have them during the birth of any subsequent children, and a shoulder dystocia can often lead to severe injury to the child. As such, the standard of care in the medical profession requires that a doctor inform a mother of the increased risk for subsequent births and also advise the mother to consider a cesarean section to reduce or avoid the potential risk. In 2004, when Bobbi prepared to give birth to her son Braedon, her new doctor did not inform her of the increased risk that would come with vaginal delivery. Braedon suffered a shoulder dystocia during his birth, and was diagnosed with a permanent disabling brachial

plexus injury that would have been avoided if he had been delivered by cesarean section. The Klutschkowskis sued, among others, Oregon Medical Group (OMG). A jury awarded the Klutschkowskis almost \$2 million dollars. OMG appealed to the Court of Appeals.

On appeal, OMG argued the trial court erred by 1) instructing the jury on plaintiff's informed consent claim, and 2) denying its motion to reduce noneconomic damages to the statutory cap of \$500,000. Regarding the jury instruction, the Court reviewed ORCP 59 H, which discusses the requirements for preserving an error for appeal. The Court reminded OMG that it "rigorously – some might think ruthlessly" enforces the requirement that any exception to a jury instruction be taken after the jury is instructed "with particularity." After reviewing the trial court proceedings, the Court found OMG did not properly preserve its objection for appeal, and rejected the challenge as unreviewable.

Regarding the noneconomic damages awarded by the trial court, OMG argued that ORS 31.710(1) limited the award to \$500,000. The Klutschkowskis argued that the statute violated the Oregon Constitution's remedy clause in Article I, Section 10, which states "every man shall have remedy by due course of law for injury done him in his person, property or reputation." The Court noted that the issue was whether the Klutschkowskis alleged an injury protected by the remedy clause. OMG argued actions for prenatal injuries did not exist at the time the Oregon Constitution was adopted, and the Klutschkowskis argued their claim was not for prenatal injuries, but rather for negligence. The Court of Appeals agreed with OMG, finding the claim to be one for prenatal injuries, which it had previously held did not exist at the time the Oregon Constitution was adopted. Because the claim did not exist at the time the Constitution was adopted, the remedy clause did not apply, and the Court applied ORS 31.710(1), limiting the noneconomic damages available to the Klutschkowskis to \$500,000. ❖

— Full case available at: www.publications.ojd.state.or.us/A138722.pdf

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