

For all of the many hours spent gearing up for trial; for all of the work that goes in to preparing witnesses and exhibits; for all of the energy expended re-writing and rehearsing closing arguments, it seems at times that a jury will simply side with the party that they like better.

The opposite, of course, is also true. If the jury doesn't like you, you better watch out! We've all heard of those verdicts, and maybe we've seen them, when the plaintiff is despicable, but legitimately injured. The honorable jury performs its duty, but where the plaintiff prayed for \$100,000 in non-economic damages, the jury awards the medical bills and \$1 for plaintiff.

But why \$1? Why not \$0?

There has been a general understanding in Oregon that the law prohibits a verdict for economic damages without at least some non-economic damages. This understanding is only partially true, however, and has evolved over a long line of cases dating back half a century. These cases include Hall v. Cornett; Saum v. Bonar and Eisele v. Rood.

Prior to 1980, the general rule was in flux, but mostly seemed to state that a verdict for economic damages alone, without non-economic damages, was improper. However, certain cases suggested that if there was evidence that controverted the injury claim, a jury might conclude that the plaintiff did not actually suffer non-economic damages. On the other hand, if there was uncontroverted objective evidence of injury, and defendant was liable, a verdict of economics alone was improper. *See Wheeler v. Huston* 288 Or 467 (1980).

Finally, in 1980, in one of those bright-line establishing rulings, the Oregon Supreme Court handed down Wheeler, and what became known as the "Wheeler Rule." In short, the rule states that if there is a question

The \$1 Plaintiff

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whether non-economic damages were sustained, a verdict awarding economic damages without non-economics is proper, but only if:

- a. Evidence of plaintiff's injury is subjective,
- b. There is evidence that plaintiff's injuries were not caused by the accident, and
- c. The objective evidence of substantial injury is controverted by other competent evidence.

The rule further provides that even if plaintiff is entitled to non-economic damages, but the amount is in controversy, an unsegregated verdict for the exact amount of the claimed economics is valid.

The Wheeler Rule has been memorialized in Uniform Civil Jury Instruction 70.04, titled: "Non-economic Damages When Economic Damages Awarded." The instruction itself is somewhat misleading, harkening back to the pre-Wheeler days. The text is simple: "If you find that plaintiff is entitled to recover economic damages, you must award some non-economic damages."

On its face, it appears contrary to the exceptions laid out in Wheeler. However, upon closer inspection, the attached comment states that instruction 70.04 should not be given when one of the Wheeler conditions applies, thus bringing it within the rule.

So, the Wheeler Rule remained the law of the land for over a quarter century, and only recently did the Oregon Supreme Court decide to once again take up the question. Therefore, in September, 2006, the Court handed down Fatehi v. Johnson, 207 Or App 719 (2006).

Under Fatehi, the rules in Wheeler remain intact. However, the exceptions recognized in

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that earlier case have been somewhat expanded. Whereas the Wheeler court was concerned with whether evidence of injury was subjective versus objective, Fatehi expands the analysis to whether the claimed injury was “minor” versus “substantial.”

Essentially, in Fatehi, the plaintiff served a Request for Admissions upon defendant. One of the requests asked defendant to admit that plaintiff was injured as a result of the accident. Defendant admitted that plaintiff sustained a “minor injury.” The jury later awarded plaintiff’s economic damages, but awarded \$0.00 for non-economics.

On appeal, the Court held that defendant’s admission that plaintiff sustained “some minor physical injury” did not automatically en-

title plaintiff to non-economic damages. Rather, plaintiff must have suffered a substantial, as opposed to minor, injury before he would be necessarily entitled to recover for pain and suffering.

So keep an eye out for that despicable plaintiff. Don’t be surprised when an angry jury hands down a zero non-economic verdict. Most importantly, however, do not let an aggressive, but misinformed, plaintiff’s lawyer tell you that the jury can’t do that. If the elements of Wheeler or Fatehi are met, then they most certainly can. ❖

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