IN THE SUPREME COURT OF THE STATE OF OREGON

DWIGHT G. PURDY, Conservator for ISABELLE EVE NORTON, a minor, Plaintiff-Appellant/ Petitioner on Review, vs. DEERE AND COMPANY, a foreign corporation, and RAMSEY-WAITE CO., a corporation, Defendants-Respondents/ Respondents on Review.	Supreme Court Case No. S060993 Court of Appeals Case No. A144265 Lane County Circuit Court Case No. 16-08-00466

RESPONDENTS' BRIEF ON THE MERITS

Petition for Review of the Opinion of the Court of Appeals,
On appeal from the Judgment of the Circuit Court for Lane County,
Honorable Karsten H. Rasmussen, Circuit Court Judge

Opinion filed: October 10, 2012
Authored by: Schuman, Presiding Judge
Concurring: Judge Wollheim and Judge Nakamoto

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I. INTRODUCTION

This case presents the question whether this Court will adhere to, reverse, or severely limit its decisions in *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 61 P3d 928 (2003), *Jensen v. Medley*, 336 Or 222, 82 P3d 149 (2003), and *Lyons v. Walsh & Sons Trucking Co., Ltd.*, 337 Or 319, 96 P3d 1215 (2004), regarding the standards for demonstrating prejudicial error on appeal. Through these cases, which should be followed, the Court squarely rejected the notion that an appellant establishes prejudicial error under ORS 19.415(2) by showing a mere possibility that the outcome of the trial might have been different if the trial court had not erred. *See Shoup*, 335 Or at 171 (stating that such a standard is based on "an incorrect interpretation of the statute"). Instead, the Court required an appellant to demonstrate "something more," that the asserted error was a substantial one that "can be said to '*produce* a material influence' or 'to *have* a detrimental influence' on [the rights of a party]." *Id.* at 173 (emphasis in original).

Focusing on the effects of trial court error that are demonstrated by the record and are not the product of speculation, the Court has endeavored in the above-mentioned cases to craft a rule, colloquially known as the "we can't tell" rule, which is "neutral as between plaintiffs and defendants" and which indicates that "reversal of a judgment is the exception, not the rule." *Id.* And, importantly for this case, the Court has recognized that ORS 19.415(2), which

deals broadly with all forms of trial court error, does not set forth different standards of reversibility based on the type of error. *See id.* at 174 ("In every case, the appellate courts must adhere to the limitation of ORS 19.415(2) and reverse or modify a judgment only if it can be determined from the record that the error 'substantially affected the rights of a party.'"). Thus, the standard for establishing prejudicial error is the same regardless of the error asserted. *See Lyons*, 337 Or at 319 (applying *Shoup* to evidentiary and instructional error); *Jensen*, 336 Or at 240 (applying *Shoup* to instructional error); *Shoup*, 335 Or at 179 n 6 (declining to "create different rules depending on the reason for which the specification [of negligence] is invalid").

The Court's case law also "places the burden to make a record that demonstrates prejudicial error on whichever party loses in the trial court and then seeks reversal or modification of the judgment on appeal." *Shoup*, 335 Or at 173-74. Accordingly, the "we can't tell" rule places a high value on the use of special and not general verdicts. *See, e.g.*, *Jensen*, 336 Or at 240 (because the verdict form did not demonstrate the basis for the verdict, appellant could not show that the verdict was based on a particular erroneous jury instruction).

The positions espoused by Petitioner on Review, Dwight Purdy ("Plaintiff"), and his amicus, the Oregon Trial Lawyers' Association ("OTLA"), ignore each of the aforementioned principles underlying this

Court's jurisprudence regarding prejudicial error on appeal.[1] For example, their arguments signal a retreat from *Shoup* and permit reversal of a jury verdict on a simple finding that an asserted trial court error might have affected the verdict, making reversal the norm and not the exception. *See, e.g.*, Plaintiff's Opening Brief on the Merits (Amended) ("Opening Brief"), p. 2 (proposing rule that evidentiary error is reversible if it "could affect the outcome"). Additionally, their suggestion that *Shoup* should be limited to its facts transforms this Court's "we can't tell" rule from one intended by the Court to be pro-respondent into one that will favor appellants. And their contentions further make a finding of prejudicial error dependent on the type of error asserted, transforming the current unitary rule demanded by ORS 19.415(2) into a compound rule with differing applications. *See, e.g.*, Opening Brief, p. 2 (proposing different rules for evidentiary and instructional error). Finally, their contentions remove a party's motivation to use special verdict forms since reversal of an unfavorable verdict may be obtained even under a general verdict, making jury verdicts less transparent and retrials more common. In this regard, Plaintiff now complains about the effect of a compound verdict form that he wanted, seeking to profit from ambiguity he helped create.

The positions espoused by Plaintiff and OTLA should be rejected. The

[1] Plaintiff and OTLA also fail to cite or address the Court's decision in *Jensen*.

Court should not abandon its current jurisprudence regarding prejudicial error on appeal and should reemphasize that the principles of *Shoup* apply to any type of trial court error, including evidentiary and instructional error. The Court of Appeals' decision in favor of Defendants-Respondents Deere and Company ("Deere") and Ramsey-Waite Co. (collectively "Defendants") should be affirmed.

II. QUESTION PRESENTED

In its order granting review, the Court, under ORAP 9.20(2), limited review to only one of the issues presented by Plaintiff in its Petition: Must an appellant demonstrate that an asserted instructional or evidentiary error was necessarily implicated in the jury's verdict in order to establish reversible error?

Despite this limited grant of review, Plaintiff persists in asking the Court to decide a second issue: Whether the Court of Appeals properly held that nine of Plaintiff's assignments of error were directed solely to the questions of Defendants' alleged negligence or the claimed existence of a product defect. Opening Brief, pp. 26-36. Plaintiff seeks review of this question despite its concession that the Court declined to grant it. *See* Opening Brief, p. 1 ("The Court of Appeals concluded that only one of the ten assignments of error implicated causation, and held that assignment was not well-taken; this court

has declined to review that conclusion.").[2]

Plaintiff's request for expanded review is improper and the Court should decline to entertain Plaintiff's request for the Court to review the Court of Appeals' decision on this separate issue. *See, e.g.*, *Atkinson v. Bd. of Parole & Post-Prison Supervision*, 341 Or 382, 386 & n 5, 143 P3d 538 (2006) (after limiting issues on review, the Court, citing ORAP 9.20(2), declined to consider "additional claims" raised in petitioner's brief).

However, to the extent the Court concludes that Plaintiff's additional issue is properly raised despite its limited grant of review, Defendants will amplify in this brief on the discussion of this issue contained in their response to the Petition. *See* Defendants' Response to Petition for Review, pp. 5-9, 17-20 (describing factual and legal support for Court of Appeals' conclusion that all of plaintiff's assignments except the one directed to Stricker's qualifications focused on defendants' culpability and not causation).

III. STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

The Statement of Historical and Procedural Facts contained in Plaintiff's Opening Brief is nearly identical to the one contained in the Petition and is

[2] OTLA raised an issue regarding the character of the assignments in its amicus brief supporting the petition but properly dropped the issue from its brief on the merits.

mostly accurate.[3] However, because the Plaintiff's Statement is incomplete and misleading in some respects, supplementation is required.

First, Plaintiff's reluctance to accept the Court of Appeals' recitation of the basic historical and procedural facts of this case is misplaced. *See* Opening Brief, p. 2 (accepting only "the first portion of the Court of Appeals' summary of the facts"). The second portion of the Court of Appeals' summary is correct and should be accepted by this Court on review. *See Purdy v. Deere & Co.*, 252 Or App 635, 638-39, 287 P3d 1281 (2012) (containing portions that Plaintiff failed to accept). Thus, the Court of Appeals properly described Defendants' factual and legal positions at trial as follows:

> Defendants' theory was that the mower was not defective or unreasonably dangerous because ordinary consumers know that all riding lawnmowers inherently present certain dangers, and Deere had taken all reasonable steps to ensure that, when delivered to Norton, the product was as safe as a riding mower possibly could be. Defendants also argued that the child's injuries would have occurred even if Norton had not engaged the RIO button, because, even though the mower's power to the blades would automatically have shut down when he put the mower in reverse, the blades would have continued to move by momentum for several seconds, during which time the accident would have occurred. After a 13-day trial, the jury returned a defense verdict.

Id. at 638.

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[3] While Defendants accept as essentially accurate the facts stated by the Court of Appeals, they disagree with the notion that the evidence was undisputed that the father, Kirk Norton, looked behind him before he backed up or that there was a blind spot. These facts were contested at trial. *See, e.g.*, Tr. Vol. 12, p. 218.

Plaintiff attempts to distract from this accurate account of Defendants' position at trial by plucking certain statements out of context from Defendants' closing argument regarding the conduct of Isabelle Norton's father, Kirk Norton. However, Plaintiff's references do not alter the conceded fact that Defendants "did not file a third party action against Mr. Norton alleging his negligence" as a cause of the accident. *See* Opening Brief, p. 15, n 5 (in which Plaintiff admits the same). Nor did the verdict form require the jury to assess Kirk Norton's fault in any way. And, despite Plaintiff's claim to the contrary, Defendants never stated during closing argument that Kirk Norton's conduct was the sole cause of the accident.[4]

Second, Defendants' argument that Isabelle Norton's injuries would have occurred even if the Deere lawn tractor had been designed precisely as Plaintiff suggested was not a mere secondary argument to some unmade argument that Kirk Norton's negligence was the sole cause of the accident, as Plaintiff would have this Court believe. Opening Brief, p. 5. Rather, Defendants placed substantial emphasis on this causation-in-fact argument in their closing

[4] Plaintiff cites Tr. Vol. 12, p. 150, for this proposition. Opening Brief, p. 29. However, a review of that page, or the balance of Defendants' closing argument, reveals no such contention.

argument. Tr. Vol. 12, pp. 150, 157-60.[5] And Plaintiff devoted significant time in his rebuttal argument attempting to counter Defendants' contention. Tr. Vol. 12, pp. 166-67. Based on the prominent attention given to this defense by the parties, the Court of Appeals correctly found that the jury could permissibly have concluded the accident would have occurred "even if Deere's decision to allow RIO override, and Deere's and Ramsey-Waite's instructions about the override, did not meet the appropriate standard of care" because "those facts did not cause the accident." *Purdy*, 252 Or App at 648.

In this regard, Plaintiff's reference in his brief to the testimony of his expert that, had the lawn tractor been designed as Plaintiff proposed, the blades would not have made contact with the child, is unhelpful. Opening Brief, p. 4 n 5. Defendants' expert witness, Stricker, testified that the moving blades would have contacted the child and her injuries would have occurred even if the lawn tractor had been designed as Plaintiff preferred, with power to the blades cut off while the tractor progressed in reverse. *Id.* at 643. Because the Court of Appeals rejected Plaintiff's assignment of error regarding the propriety of Stricker's testimony and concluded that he was fully qualified to offer this expert opinion, the jury was entitled to credit his testimony in support of

[5] However, Defendants also placed substantial emphasis on their contention that the lawn tractor at issue was not dangerously defective and had been manufactured with the utmost of due care. Tr. Vol. 12, pp. 144-52.

Defendant's causation-in-fact defense. *Id.* at 645-48. And because this Court has, in granting only limited review, declined to review that portion of the Court of Appeals' opinion, the issue of Stricker's qualifications has been definitively decided and is not properly before this Court.

Plaintiff also neglects to inform the Court that he agreed to presentation of the jury verdict form in this case which combined issues of negligence and product defect with the issue of causation, creating the "we can't tell" problem which he now seeks to avoid. *See, e.g.*, Tr. Vol. 12, pp. 38-39 (Plaintiff's verdict form proposed combining not only culpability and causation but also the product defect and negligence claims against Deere in a single interrogatory); TCF 196 (Plaintiff's verdict form). Plaintiff's proposed verdict form precipitated discussion by the trial judge of "a we-can't-tell problem on appeal." Tr. Vol. 12, p. 39.

IV. SUMMARY OF ARGUMENT

The result in this case is governed by the Court's decisions in *Shoup*, *Jensen*, and *Lyons* because there is no way to tell from this record whether the jury made an adverse finding regarding the issue to which Plaintiff's claims of error are directed. Plaintiff has failed to demonstrate any reason for the Court to disregard *stare decisis* and overrule its previous cases. These cases were correctly decided, reflect a balanced approach to determining when asserted error is harmless and when it is prejudicial, and are consistent with other

precedents of the Court regarding instructional and evidentiary error. As such, they should be adhered to.

Because the remaining assignments of error in this case relate to culpability and not causation-in-fact and because there is no way for this Court to tell whether the jury found for or against Plaintiff on culpability, application of the "we can't tell" principle applied in *Shoup* and its progeny compels affirmance of the Court of Appeals' decision.

V. ARGUMENT

This case involves the issue of who bears the risk of an Oregon appellate court being unable to determine if asserted trial court error was directed towards an issue that was decided against the losing party at trial. Defendants contend that, under *Shoup*, *Lyons*, and *Jensen*, the answer is clear: The appellant, the one challenging the trial court error, bears the risk that the appellate court will be unable to determine prejudicial error. However, Plaintiff asks this Court to go backwards and place the risk on respondent, saddling respondent with the burden of establishing harmlessness. The Court should follow its precedents and decline Plaintiff's invitation to rewrite the standards for determining prejudicial error on appeal.

A. Plaintiff Seeks Reversal of *Lyons* and *Jensen* as Well as the Severe Restriction of *Shoup*.

Both Plaintiff and OTLA concede that the Court of Appeals' decision in

this case was based on its application of this Court's decision in *Lyons*. Opening Brief, p. 1; Brief on the Merits of Amicus Curiae Oregon Trial Lawyers Association ("Amicus Brief"), p. 6. Neither suggests that the facts of this case are not "on all fours" with the facts in *Lyons*. *See* Opening Brief, p. 20 (describing *Lyons* as the "road map" for the Court of Appeals). Neither suggests that the jury verdict form in this case was not identical, or at least substantially similar, to the one utilized in *Lyons* or that the Court of Appeals acted erroneously in concluding that *Lyons* was "controlling authority" under the circumstances of this case. *Purdy*, 252 Or App at 642 n 2.

Instead, each levels an attack on the validity of *Lyons*, in essence seeking its reversal, while completely ignoring this Court's decision in *Jensen*, which would, if recognized, presumably be subject to a similar attack. *See, e.g.*, Opening Brief, pp. 20, 22 (stating that *Lyons* was a "detour" and the Court's decision in *Wallach v. Allstate Insurance Co.*, 344 Or 314, 180 P3d 19 (2008), was a "return to a familiar analysis"); Amicus Brief, p. 9 (stating the "day has arrived" for the Court to determine whether *Lyons* was correctly decided). In seeking to overrule *Lyons*, both Plaintiff and OTLA also question *Shoup* and seek adoption of a *per se* reversal-friendly rule for evidentiary and instructional error in opposition to the principles of that case. *See, e.g.*, Opening Brief, p. 18 (stating that, despite *Shoup*, "by the time an appellant demonstrates an 'error' was made in instructions, the appellant has probably already met the standard

for reversibility"); Amicus Brief, p. 13 (stating that *Shoup* should be limited to cases "in which a compound verdict form makes it impossible to say that the jury's verdict is other than one properly based on specifications that are legally and factually sufficient").

The attacks being leveled against *Shoup* and its progeny should be rejected, first, because principles of *stare decisis* demand that a heavy burden be imposed to reverse decisions of this Court, and second, because the Court's cases, including *Lyons* and *Jensen*, reflect a careful and nuanced analysis of the circumstances in which trial court error may be deemed prejudicial. This analysis is wholly consistent with well-established decisions of this Court regarding evidentiary and instructional error in the absence of compound verdict forms.

B. The Court Should Not Reverse Its Prior Decisions.

In *Farmers Insurance Co. v. Mowry*, 350 Or 686, 261 P3d 1 (2011), this Court adopted a clearer, more unified and arguably stricter standard for overturning its prior decisions, concluding that reconsideration of the Court's interpretation of statutes should turn on the same considerations as those that govern reconsideration of the Court's holdings regarding constitutional interpretation or common-law principles. *Id.* at 695, 697. In formulating its unified rule, the Court in *Mowry* began with "the assumption that issues considered in our prior cases are correctly decided, and 'the party seeking to

change a precedent must assume responsibility for affirmatively persuading us that we should abandon that precedent,'" observing that the Court "will not depart from established precedent simply because the 'personal policy preference[s]' of the members of the court may differ from those of our predecessors who decided the earlier case." *Id*. at 698 (quoting *State v. Ciancanelli*, 339 Or 282, 290, 121 P3d 613 (2005), and *G.L. v. Kaiser Foundation Hospitals, Inc.*, 306 Or 54, 59, 757 P2d 1347 (1988)).

The Court in *Mowry* recognized, however, its competing obligation to reach "the correct result in each case," concluding that it will depart from the presumption that a prior decision was properly decided only if a party demonstrates that the Court decided the prior case incorrectly for any of the following reasons: (1) an important argument was not presented; (2) the Court failed to apply its usual framework for decision or adequately analyze the controlling issue; or (3) the legal or factual context has changed in such a way as to seriously undermine the reasoning or result of the earlier case. *Id*. at 698.

In rejecting the attack being made on its precedent in *Mowry*, the Court concluded that defendant did not raise any new arguments demonstrating that its prior decision was incorrect nor did it demonstrate that "the statutory or factual context of this issue has changed, so that [the prior case], even if not erroneous when decided, should no longer be followed." *Id.* at 700. The Court also rejected defendant's argument that departure from the principle of *stare*

decisis was justified by an intervening decision which distinguished the decision being attacked. *Id.* at 701-02. Noting that the decision being attacked "decided the precise issue presented in this case" and that the intervening decision was not "directly in conflict," the Court concluded that interests in "stability and predictability strongly support adherence to precedent." *Id.* at 700, 702-04.

Mowry fully supports Defendants' contention that this Court should decline to overturn its prior cases here. First, it is apparent that, in *Lyons*, the Court decided the precise issue presented here, whether an appellant can demonstrate prejudicial error under a verdict form that combines issues of fault and causation when the appellant's assignments of both evidentiary and instructional error are directed to only one of those two issues. *Lyons*, 337 Or at 321. The Court in *Lyons* answered this question in the negative, concluding that, because the verdict in favor of defendant "could have been based on one of two different rationales that the jury verdict form identified, it is impossible to tell which the jury used" and hence the plaintiffs could not shoulder the burden of establishing error substantially affecting their rights. *Id.* at 326.

Similarly, this Court's decision in *Jensen* is also squarely on point, at least with regards to Plaintiff's claim of instructional error. In *Jensen*, plaintiff alleged that an international union was liable for the actions of a local union on two separate theories, common law agency and ratification. *Jensen*, 336 Or at

239. The verdict form did not distinguish between the two grounds. *Id.* The Court held that the jury was correctly instructed regarding ratification but was incorrectly instructed regarding common law agency. *Id.* at 238-39. Under these circumstances, the Court applied *Shoup* and upheld the jury's verdict awarding compensatory damages to plaintiff because defendant "cannot demonstrate that the verdict was based on the erroneous instruction on agency, rather than on the correct (or at least unchallenged) instruction on ratification." *Id.* at 240.

Neither Plaintiff nor OTLA makes any claim under *Mowry* that important arguments were not presented to the Court in these earlier cases, that the Court failed to apply its usual framework for decision or adequately analyze the controlling issue, or that the legal or factual context regarding prejudicial error on appeal changed in such a way as to seriously undermine their reasoning or results. Instead, each, without mentioning *Jensen*, relies exclusively on this Court's decision in *Wallach* as somehow calling *Lyons* into question. Thus, Plaintiff argues that *Wallach* calls "into question whether a general verdict form could ever limit reversibility of instructional error," while OTLA claims, without support, that *Wallach* constituted an unsuccessful "effort to wall-off *Lyons*." Opening Brief, p. 22; Amicus Brief, p. 10.

In making these overblown claims for *Wallach*, both Plaintiff and OTLA overlook several important points. First, the Court in *Wallach* expressly

declined to reconsider or overrule *Lyons*, concluding instead that *Lyons* governed situations, exactly like the one in this case, where a compound verdict form combined issues of fault and causation and an allegedly improper jury instruction applied to only one of the two issues. *Wallach*, 344 Or at 328-29. The Court in *Wallach* stated that the jury "instructions [in *Lyons*] thus provided two alternate paths by which the jury could have answered 'no' to the question on the special verdict form." *Id.* at 328. Because the jury instruction in *Lyons* regarding fault "was a correct statement of the law" while the instruction regarding causation was in plaintiff's view incorrect, the Court in *Wallach* explained that, in *Lyons*, "it could not say that any error in instructing the jury on causation had substantially prejudiced the plaintiff's rights" because "the jury could have based its answer on the special verdict form on the correct instructions regarding negligence." *Id.*

The Court in *Wallach* distinguished the situation before it from the situation in *Lyons*, noting that "[t]his case does not involve a jury verdict form similar to the one in *Lyons*." *Id.* at 329. In *Wallach*, the trial court's jury instructions were defective on multiple grounds and permitted the jury to "hold [defendant] liable for damages for which the jury could not, on this record, hold it legally responsible." *Id.* at 322. While it was conceivable that the jury's damage award was confined to permissible damages, the Court was unwilling to extend the rationale of *Shoup* and *Lyons* to that factual scenario. Instead, it

held that defendant demonstrated an error substantially affecting its rights because the jury was told it could find defendant liable for damages that it was not legally permitted to award and the Court presumed that, in awarding damages, the jury followed this instruction. *Id.* at 326 n 10.

Wallach and *Lyons* stand on their own facts. Because the Court in *Wallach* did not overrule *Lyons*, the Court of Appeals correctly concluded that "*Lyons* remains controlling authority in the narrow circumstances presented here—*i.e.*, where the verdict form presents a compound question that makes it impossible to determine whether any of the claimed errors substantially affected the appellant's rights." *Purdy*, 252 Or App at 642 n 2. Thus, as in *Mowry*, the intervening decision being relied upon to overcome the doctrine of *stare decisis* is insufficient to do so because it merely distinguished the decision being attacked and does not directly conflict with it. *Mowry*, 350 Or at 701, 703.[6] As in *Mowry*, "there is no principled reason" for this Court to conclude that the unanimous decisions in *Lyons* and *Jensen* were wrong and should be overruled. *Id.* at 700.

[6] This is especially true because *Wallach* was not a unanimous decision. *See Wallach*, 344 Or at 330 (Justice Durham's dissenting opinion).

C. This Court's Jurisprudence Regarding Prejudicial Error Demonstrates a Careful and Nuanced Balance Between Fairness and Finality That Should Not Be Disturbed.

This Court's jurisprudence regarding prejudicial error both before and after *Shoup* demonstrates that its decisions in *Lyons* and *Jensen* are in accordance with well-established principles and should be adhered to and not jettisoned in favor of the rule proposed by Plaintiff, a proposed rule that will lead to more appeals, more reversals, and more retrials with the accompanying waste of private and judicial resources that would entail. Rather than embarking on such a new course, the Court should adhere to its existing case law, which previously extended the principles set forth in *Shoup* to cases involving claims of evidentiary and instructional error. The Court's existing cases reflect a proper balance between, on the one hand, fairly permitting litigants to obtain appellate redress for trial court errors and, on the other hand, ensuring finality and stability through respect for, and deference to, jury verdicts.

While this Court has grappled with discerning the proper dividing line between prejudicial and harmless error in numerous cases over many years, a good place to trace the Court's modern jurisprudence is *Baker v. English*, 324 Or 585, 932 P2d 57 (1997). In that case, the Court held that a defendant in a medical malpractice action whose motion to compel production of plaintiff's prior medical records was erroneously denied had not demonstrated prejudicial

error on appeal. *Id.* at 589.

In evaluating whether the trial court's error constituted grounds for reversal of the jury's verdict in favor of plaintiff, the Court began with "the law governing our task," ORS 19.415(2), which provides that "[n]o judgment shall be reversed or modified except for error substantially affecting the rights of a party." *Id.* Explicating the statutory text which made no distinction between different types of trial court error, the Court concluded that an error that substantially affects the rights of a party is "prejudicial" and requires reversal, while other errors are "harmless" and do not support reversal. *Id.* at 590.

To distinguish between prejudicial and harmless error, the Court in *Baker* stated that it "often examines whether it is likely that a trial court's error affected the outcome of the case below." *Id*. The Court then conducted a review of its cases to illustrate that "an inquiry into the likelihood whether a trial court's error affected the outcome of the case below can serve as a useful tool in determining whether the error resulted in prejudice to a party." *Id*. at 592. Under that approach, "a trial court's error is harmless when such error was <u>not likely</u> to have affected the outcome of the case below." *Id*. at 591 (emphasis added); *see also id*. at 592 n 6 (noting the "general principal that a party's rights ordinarily are not substantially affected by an error that <u>likely did not</u> affect the outcome of the case" (emphasis added)).

However, notwithstanding the Court's frequent reliance on an inquiry

focused on whether an error likely affected the trial's outcome, the Court in *Baker* ultimately concluded that such an inquiry, "helpful" though it may be, "is not the test for determining prejudice;" instead, the focus should be the statutory test set forth in ORS 19.415(2). *Id*. at 592 (emphasis added). In applying that test, *Baker* applied the rule that prejudice requires that the error must have likely produced a harmful effect. *See id*. at 593 n 8 ("To rise to the level of prejudicial error, however, the error must have affected the rights of a party *substantially*." (emphasis in original, citing ORS 19.415(2))). As discussed above, *Baker* involved a discovery error, where the trial court erroneously denied a motion to compel production of medical records. *Id*. at 588–89. For such a pre-trial error, where the link between the error and the trial outcome is attenuated, the Court applied the likelihood-of-harm requirement by inquiring not into the outcome at trial but instead into whether the party knew, through other sources, the information sought through the denied discovery. *Id*. at 594.

Baker recognized only one exception to the likelihood-of-harm requirement for prejudice: When an error involves the exercise of a party's peremptory challenge to a juror, that error is *per se* prejudicial. *Baker*, 324 Or at 592 n 6 (recognizing errors in this context as "a narrow exception to the general principle" because there is no way for a party to show prejudice (citing *Highway Commission v. Walker et ux*, 232 Or 478, 376 P2d 96 (1962))). The Court concluded that this "prophylactic, *per se* rule" regarding refusal to permit

peremptory challenges "should not be interpreted to reach beyond that context." *Id.*

As of the date of *Baker*'s publication, then, the only error that was considered *per se* prejudicial was an error involving peremptory challenges. Notably, prior to *Baker*, the Court often applied the likely-effect-on-outcome approach when analyzing the prejudice of instructional error, typically asking whether, in the context of the instructions as a whole, the relevant law was adequately presented to the jury. *See, e.g.*, *McBee v. Knight*, 239 Or 606, 609, 398 P2d 479 (1965); *Smith v. Fields Chevrolet*, 239 Or 233, 236, 396 P2d 200 (1964). In identifying the rule of *per se* prejudice for error involving peremptory challenges, *Baker* identified no parallel rule for instructional or evidentiary error. That approach is consistent with ORS 19.415(2)'s characterization of reversal (and therefore prejudice) as the exception, not the rule. *See Shoup*, 335 Or at 173.

In *Shoup*, a unanimous decision, the Court followed and reaffirmed *Baker*, including the general rule that prejudice requires likelihood of harm, but it rejected, as an "overly broad" reading of *Baker*, an argument that focused on the following portion of that opinion:

> [I]n cases in which a trial court's error either did or may have affected the outcome, such as an error concerning a key issue before the jury, this court has concluded that the error substantially affected the rights of a party and, therefore, was prejudicial. The rationale behind such a conclusion is obvious: The rights of an

> aggrieved party are substantially affected if the outcome either would have or may have been different had the error not occurred.

Shoup, 335 Or at 171 (emphasis added, quoting *Baker*, 324 Or at 590). The Court in *Shoup* rejected the argument that, through the phrases emphasized above, *Baker* had created an "'outcome might have been different' standard," noting that such a standard—requiring nothing more than a possibility that error might have affected the outcome—would lead to the absurd result of "retrial of most, if not all, cases in which there was trial court error in submitting claims to the jury, among other possible trial court errors." *Id.* at 172–73. In so doing, *Shoup* also disavowed one of only two Oregon Supreme Court cases that followed the language in *Baker* emphasized above. *See id.* at 172 n 2 (observing that when the Court, in *Hernandez v. Barbo Machinery Co.*, 327 Or 99, 106–07, 957 P2d 147 (1998), relied indirectly on *Baker* "for the proposition that the rights of a party are 'substantially affected' if 'the outcome of the case either would have or may have been different had the error not occurred,'" it had taken the emphasized portion of *Baker* "out of context").[7]

Aside from its unambiguous rejection of the notion that prejudicial error

[7] The only other Oregon Supreme Court case to have followed the "might have been different" reasoning is *Faro v. Highway Div., DOT*, 326 Or 317, 323, 951 P2d 716 (1998) ("Because the error here may have affected the outcome of the case, we conclude that the trial court's erroneous exclusion of * * * testimony substantially affected defendant's right to present its defense."). *Shoup* did not discuss *Faro*, but it seems fair to say that the latter decision is subject to the same criticism that *Shoup* laid upon *Hernandez*.

is established whenever there is a "possibility" that error affected the outcome of trial, *Shoup* set forth several other important principles regarding prejudicial error generally and not just in the context of improper specifications of negligence. First, the Court concluded that the requirement of ORS 19.415(2) that the trial court's error must substantially affect the rights of the losing party indicated that "reversal of a judgment is the exception, not the rule." *Id.* at 173. *Shoup* thus recognizes and furthers a state policy of upholding jury verdicts.

Although unstated in *Shoup*, this policy has constitutional roots. Thus, ORS 19.415(1) states that the scope of review on appeal is governed by Article VII, § 3, of the Oregon Constitution. This constitutional provision states that, on appeal of any case, "[i]f the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding <u>any</u> error committed during the trial * * *." (Emphasis added.) The purpose of Article VII, § 3, enacted by initiative in 1910, was to discourage unnecessary reversals. *See Official Voters' Pamphlet, General Election, Nov 8, 1910, 177* ("[o]ne purpose" of the provision was to avoid multiple appeals and reversals and the "injustice" resulting from rich individuals or corporations being best able to afford such appeals). *See also Van Lom v. Schneiderman*, 187 Or 89, 98-99, 210 P2d 461 (1949) (comparing Article VII, § 3, with the Seventh Amendment to the United States

Constitution, the Court concluded that jury verdicts are less reversible in Oregon courts than federal courts).

Second, the Court in *Shoup* concluded that ORS 19.415(2) was "neutral as between plaintiffs and defendants" because "it places the burden to make a record that demonstrates prejudicial error on whichever party loses in the trial court and then seeks a reversal or modification of the judgment on appeal." *Shoup*, 335 Or at 173-74. In this regard, the use of special verdict forms was referred to by the Court as a benefit and not a burden. *Id.* at 178-79. The Court thus rejected the notion set forth in the Court of Appeals' decision in *Shoup* that "[t]he prevailing *plaintiff* bears the burden of developing a record (most often through a special verdict) sufficient to establish the harmlessness of the error of submitting a defective specification to the jury" and that "the defendant need not do anything." *Id.* at 167-68 (quoting *Shoup v. Wal-Mart Stores, Inc.*, 171 Or App 357, 373, 15 P3d 588 (2000) (emphasis in original). Instead, this Court placed the burden of establishing a record sufficient to demonstrate prejudicial error squarely on the appellant, making clear that the respondent was not required to establish harmlessness.

Third, the Court indicated that its new rule would have a broad and not a narrow application, stating that, "[i]n <u>every case</u>, the appellate courts must adhere to the limitation of ORS 19.415(2) and reverse or modify a judgment <u>only if it can be determined from the record</u> that the error 'substantially affected

the rights of a party.'" *Id.* at 174 (emphasis added).[8] The efforts of Plaintiff and OTLA to limit *Shoup* to cases in which there are invalid specifications of negligence is therefore contrary to the Court's express directive that a consistent, unitary standard be applied. And, aside from being inconsistent with the Court's ruling, there is no intellectually honest or reasonable justification to uphold a jury verdict that may have been based on a specification of negligence that was either not legally cognizable or unsupported by the evidence while reversing other verdicts which involve no greater, and perhaps a lesser, risk that the outcome was affected by error.

Thus, in overruling its decision in *Whinston v. Kaiser Foundation Hospital*, 309 Or 350, 788 P2d 428 (1990), the Court in *Shoup* was not concerned with the relatively narrow problem encountered in that case, in which both valid and invalid specifications of negligence were presented to the jury upon a general verdict, but with the much broader problem of how to differentiate prejudicial error from harmless error across the board in all types

[8] Focusing on the narrow issue of invalid specifications of negligence presented to it, the Court also "decline[d] to create different rules depending on the reason for which the specification is invalid, although we recognize that other jurisdictions have chosen to do so." *Id.* at 178 n 6. Accordingly, the Court refused to adopt an Ohio case which treated instructional error differently than the erroneous submission to the jury of a legally defective claim. *See id*. (declining to adopt holding of *Ricks v. Jackson*, 169 Ohio St 254, 159 NE2d 225, 227 (Ohio 1959), that prejudice is presumed when trial court commits instructional error).

of cases and with regards to all types of asserted error. For this reason, the Court analyzed the case in light of the broad commandment of ORS 19.415(2) that appellate courts are constrained from reversing a trial court judgment in a civil case based on any type of error if that error did not "substantially" affect the rights of a party.

Due to the breadth of the Court's decision in *Shoup* and its admonition that, in every case, the appellate courts must adhere to the limitations of ORS 19.415(2), it is unsurprising that the Court proceeded to broadly apply *Shoup* outside its narrow factual context. For example, in its first decision citing *Shoup* issued five months later, the Court held in *Jett v. Ford Motor Co.*, 335 Or 493, 497, 72 P3d 71 (2003), that the standard set forth in *Shoup* "govern[s] our consideration of evidentiary questions on appellate review."[9] The Court further held, citing *Shoup*, that the burden of establishing prejudicial error was on the party who lost at trial and sought reversal. *Id.* at 501. Because the evidence that the losing defendant claimed was erroneously excluded was cumulative of

[9] The Court in *Jett* recognized that OEC 103(1) sets forth a standard governing appellate review of evidentiary questions that was "related" to the standard set forth in *Shoup*. *Jett*, 335 Or at 497. OEC 103(1) states that "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected [.]"

other admitted evidence, the Court in *Jett* held that, even assuming the trial court committed evidentiary error, defendant "failed to demonstrate prejudicial error sufficient to justify reversal of the trial court judgment under ORS 19.415(2)." *Id.* *Jett*, which goes unmentioned by both Plaintiff and OTLA, established that this Court did not intend for *Shoup* to be limited to its facts.

Just a few months after *Jett*, the Court decided *Jensen*, in which the principles of *Shoup* were extended to claims of instructional error. *See infra* pp. 14-15 (describing basic facts and holding of case). In *Jensen*, Justice Balmer, the author of *Shoup*, and again writing for a unanimous court, engaged in a two-part analysis. *Jensen*, 336 Or at 240. The first part involved considering whether there was "an alternative basis to support the jury's finding" that was unaffected by trial court error. *Id.* The Court concluded that there was such an alternative basis, because there was no instructional or other error regarding plaintiff's claim that defendant was liable based on ratification of unlawful conduct as opposed to common law agency. *Id.* The second part involved consideration of whether there was "sufficient evidence to support liability on

that alternative basis." *Id.*[10]

It is the first part of the Court's analysis in *Jensen* that matters here. If, as Plaintiff argues, reversal is warranted whenever "instructional error gives the jury the wrong legal rule to apply and permits it to evaluate the evidence on an inappropriate basis," Opening Brief, p. 2, the Court should have reversed the judgment in *Jensen* because the jury in that case was given seriously erroneous instructions which "allowed [it] to impose liability on International for Local's acts in circumstances in which neither Oregon's existing agency cases * * *, common law agency principles * * *, nor federal cases * * * would permit." *Id.* at 238-39 (internal citations and legal references omitted). But despite the fact that the jury was given a faulty map on the road to imposing liability based on agency, a road that it may very well have taken in reaching its verdict in favor of plaintiff, this Court upheld that verdict because it was at least equally possible that the jury relied on the untainted ratification road to liability. Thus, adoption of Plaintiff's proposed rule here, which comes close to imposing a *per se* rule of reversal for instructional error, requires the Court to reverse *Jensen*.

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[10] In *Jensen*, the Court upheld plaintiff's verdict for non-economic damages based on the alternative ratification basis of liability which was unaffected by instructional error because defendant did not challenge the sufficiency of evidence supporting those damages on appeal. *Jensen*, 336 Or at 240, 243. However, with regards to the punitive damage award, the Court found that there was no evidence upon which a reasonable jury could have awarded such damages. *Id.* at 242-43.

The next case demonstrating this Court's broad view of *Shoup* is *Lyons*, a case which bears a striking resemblance to this case. Contrary to Plaintiff's view and that of OTLA, *Lyons* is neither a judicial "detour" nor a "procrustean attempt" to stretch *Shoup*'s standard "beyond its original, unique context." (Opening Brief, p. 20; Amicus Brief, p. 6.) Rather, the Court's decision in *Lyons* is a natural outgrowth of both *Shoup*, which was intended by the Court to have broad application, and the Court's post-*Shoup* cases, which extended the principles of *Shoup* beyond the facts of that case to claims of evidentiary and instructional error.

As in this case, *Lyons* involved a jury verdict form which combined the issues of negligence and causation in a single jury question. *Lyons*, 337 Or at 323.[11] As in this case, the jury answered the compound question regarding fault and causation with a simple "no." *Id.* As in this case, the losing plaintiffs appealed, arguing that the trial court committed both evidentiary and instructional error. *Id.* at 321.

Reaching the merits of plaintiffs' claims of evidentiary and instructional error, the Court of Appeals affirmed in a decision predating *Shoup*. *Lyons v. Walsh & Sons Trucking Co.*, 183 Or App 76, 51 P3d 625 (2002). On review, this Court, in another unanimous decision, this time authored by Justice

[11] The verdict forms in the two cases are nearly identical.

Gillette, affirmed the Court of Appeals, not on the merits of plaintiffs' claims of error, but on the basis of *Shoup*. In reaching this decision, the Court first noted that the jury verdict form asked whether defendant was "negligent in one or more of the ways claimed by the plaintiffs and, if so, was such negligence a cause of damage to the plaintiffs," and that "the jury's answer to that question was a simple 'No.'" *Lyons*, 337 Or at 325. The Court further stated:

> Because the instruction asked a compound question, the issue naturally arises: Did the jury decide that Walsh was not negligent or, instead, did the jury decide that Walsh, although negligent, did not cause damage to plaintiffs? The answer is that we cannot tell; either decision would have been permissible on the evidence presented.

Id. Such an "inability to determine which ground led the jury to decide as it did is important, because plaintiffs have focused all their arguments in this court on the second part of the question." *Id.* Therefore, any trial court errors directed to causation, "if errors they were, are irrelevant if the jury decided the case instead on the pristine proposition that Walsh was not negligent." *Id.*

As a result of the compound verdict form and the focus of plaintiffs' assignments of error, the Court was compelled to follow *Shoup*, noting that the Court in *Shoup* "explained that [ORS 19.415(2)] requires more than speculation concerning whether an alleged error affected a jury's verdict." *Id.* Quoting *Shoup*'s statements that "[t]he possibility that an error might have resulted in a different jury verdict is insufficient under the statute" and that "the court must

be able to conclude, from the record, that the error 'substantially affected' the rights of the losing party," the Court stated that "[w]hat this court stated in *Shoup* applies equally to the narrow problem that the form of jury verdict used in the present case poses." *Id.* at 326. The Court concluded:

> This was not a case in which the plaintiff advanced a single factual theory of liability that the form of jury verdict reflected. Nor did this case involve other kinds of asserted trial error, such as a faulty jury instruction, that may call for a different analysis of whether the error "substantially affects the rights of a party" under ORS 19.415(2). The jury verdict could have been based on one of two different rationales that the jury verdict form identified; it is impossible to tell which the jury used. Plaintiffs' claims of error may or may not be well taken, but they depend on an assumption that the jury's verdict was based on one rationale only. The present record does not support plaintiffs' assumption, and, because they are asserting error, the consequences of the inadequacy of the record in that respect fall on plaintiffs. *Id.* at 174. That is, plaintiffs cannot show, on this record, that any of the alleged errors about which they complain "substantially affected" their rights. Plaintiffs thus cannot prevail here.

Id.[12]

Thus, *Lyons* is wholly consistent with *Shoup*, *Jett*, and *Jensen*, in eschewing speculation regarding the likelihood of prejudice in favor of an

[12] The statement in *Lyons* that the case did not involve a faulty jury instruction which "may call for a different analysis" is perplexing because the case did involve an alleged failure to instruct properly. *Lyons*, 337 Or at 321, 326. As recognized by Justice Durham in his dissent in *Wallach*, this ambiguous and perhaps erroneous statement is not a holding of the Court and is not entitled to significant weight in determining whether, in a particular case, "an appealing party's claim of harm from an allegedly erroneous jury instruction is not shown clearly in the record." *Wallach*, 344 Or at 340.

inquiry focused on the trial court record. Because the Court in *Lyons* was unable to conclude from the record that the jury made a finding adverse to the appellant on the legal issue which was the subject of the asserted instructional error, the Court properly applied *Shoup*'s interpretation of ORS 19.415(2) and declined to find prejudicial error.

D. *Jensen* and *Lyons* Are Consistent with This Court's Cases Regarding Prejudice Due to Instructional or Evidentiary Error.

Plaintiff and OTLA suggest that this Court's application of *Shoup* to cases of instructional and/or evidentiary error is somehow contrary to the Court's long-standing treatment of these issues. Opening Brief, p. 22; Amicus Brief, p. 13. This is untrue. First, the Court's prior cases for the most part do not present *Shoup* issues because they were either decided pre-*Shoup* or no party raised arguments presenting such issues. But even putting that aside, an examination of the cases cited by Plaintiff and OTLA establish they are fully consistent with, and not contrary to, *Jensen* and *Lyons*.

The cited cases come mostly in two forms. In the first, the courts conclude that the allegedly erroneous jury instruction or evidentiary error did not result in prejudice to the appellant. *See, e.g.*, *Bray v. American Prop. Mgmt. Corp.*, 164 Or App 134, 142, 988 P2d 933 (1999). In the second, unlike *Jensen* or *Lyons*, there is support in the trial court record for the conclusion that the jury found against the appellant on the legal issue regarding which the jury was

erroneously instructed or regarding which evidence was wrongfully admitted or excluded. Neither type of case is contrary to *Jensen* or *Lyons*, in which it was simply not possible to make such a finding.

The first case cited by Plaintiff regarding instructional error is *Waterway Terminals v. P.S. Lord*, 256 Or 361, 474 P2d 309 (1970). In that case, the Court, while finding that the erroneous jury instruction at issue was not prejudicial, stated the general rule that "cases should not be reversed upon instructions, despite technical imperfections, unless the appellate court can fairly say that the instruction probably created an erroneous impression of the law in the minds of the jurymen which affected the outcome of the case." *Id.* at 370 (emphasis added).

This case, and the standard it applies, does not support Plaintiff's simplistic position, bordering on a *per se* rule, that "by the time an appellant demonstrates an 'error' was made in instructions, the appellant has probably already met the standard for reversibility." Opening Brief, p. 18. Rather, *Waterway Terminals* sets a much higher bar, demanding that the appellant establish that the instruction "probably" affected the outcome of the case, a standard Plaintiff cannot meet in this case.

Honeywell v. Sterling Furniture Co., 310 Or 206, 797 P2d 1019 (1990), also does not assist Plaintiff. In *Honeywell*, the jury was erroneously instructed that, if it awarded plaintiff punitive damages, plaintiff's attorney and the State

of Oregon would be entitled to a substantial portion of the award. *Id.* at 209. After being so instructed, the jury awarded plaintiff the sum of $1,795 in compensatory damages and $20,000 in punitive damages. *Id.* at 210. The Court set aside the award of punitive damages and stated that the instruction did "nothing to further or even to inform the jury as to the proper goals of punitive damage awards" and instead distracted "the jury from the appropriate line of analysis that this Court has said a jury should follow in cases involving potential awards of punitive damages." *Id.* at 211.

The Court in *Honeywell* made clear, however, that the "fact that it was error to give the instruction does not complete our inquiry" because the question of prejudice remained. *Id.* The Court concluded that prejudice was established because the instruction permitted the jury "to consider as a part of its deliberations on punitive damages that a plaintiff should receive a certain amount of money and, in order to ensure that he does, to add additional amounts to pay for attorney fees and contributions to" the state victim's compensation fund. *Id.* at 211. The instruction also posed an "even more serious problem" in that it "encouraged the jury to award punitive damages for a purpose, [increasing the victim's compensation fund], that is not a reason for awarding punitive damages under Oregon law." *Id.* at 211-12.

Plaintiff's treatment of *Honeywell* is unhelpful. Opening Brief, p. 13. Of course, one cannot say with certainty that the jury in fact applied the

improper factors regarding punitive damages which the instruction permitted the jury to consider. Under that standard, it would be nearly impossible to ever demonstrate prejudicial error. However, in *Honeywell*, the record demonstrated that the jury found against appellant on an issue, entitlement to punitive damages, upon which it had been seriously mis-instructed by the trial court. This was sufficient, according to this Court, to demonstrate that appellant was harmed. *Id.* at 212.[13] However, in the present case, there is no way to determine if the jury made a finding regarding culpability that was adverse to Plaintiff because, for all we know, the jury could have ruled in favor of Plaintiff on culpability and ruled against Plaintiff on the pristine conclusion that, despite any product defect or negligence, causation-in-fact was lacking.

In many of the other cases cited regarding instructional error, it is equally clear from the record that, unlike this case, the error related to an issue regarding which the jury in fact ruled against the appellant. For example, in *Bjorndal v. Weitman*, 344 Or 470, 473, 184 P3d 1115 (2008), the jury was mis-instructed on negligence and "returned a special verdict in which it found that defendant had not been negligent * * *." *See also Ellis v. Springfield Women's*

[13] *Holger v. Irish*, 316 Or 402, 851 P2d 1122 (1993), is similar. In that case, the jury was mis-instructed about a prior settlement, which distracted it from the required line of analysis for assessing damages. *Id.* at 415. Because the "natural tendency" of the instruction was to plant in the jury's mind that they should award no damages because "plaintiff already was compensated for her loss," the defense verdict was set aside. *Id.*

Clinic, 67 Or App 359, 362, 678 P2d 268 (1984) (erroneous instruction which improperly injected the issue of a physician's good faith in the assessment of negligence was prejudicial error where the jury found in favor of physician on the negligence claim).

This Court's decision in *Hernandez* is no exception. In *Hernandez*, a product liability case, defendant alleged ten specifications of comparative fault, labeling nine as involving the knowing encounter of a risk and one as negligence. *Hernandez*, 327 Or at 102-03. While the instruction plaintiff claimed was erroneously denied technically applied only to the negligence specification, the trial court in its instructions to the jury referred to all "ten allegations of plaintiff's alleged comparative fault" as constituting negligence. *Id.* at 104. In deciding that the "trial court failed to instruct the jury on an issue material to the outcome of the case," the Court noted that the trial judge "characterized defendant's other nine allegations of comparative fault as 'negligence'" and "[t]he jury thus was invited to consider <u>any of the ten allegations</u> as negligence without the leavening effect of the * * * instruction requested by plaintiff." *Id.* at 112 & n 7 (emphasis added).

The Court properly determined that "plaintiff was harmed, because the jury may have based its comparative fault assessment on a misperception of the evidence resulting directly from the court's failure to give plaintiff's requested

jury instruction." *Id.* at 113.[14] Thus, the jury made an adverse finding against plaintiff, that he was 50.5 percent at fault and was entitled to no recovery, based on instructional error affecting all ten specifications of comparative fault.[15]

As with the cases regarding instructional error, the cases cited by Plaintiff and OTLA regarding evidentiary error are notable because the trial court records in those cases also establish that, in fact, the jury made a finding adverse to the appellant on an issue infected by error. The Court's decision in *Keys v. Nadel*, 325 Or 324, 937 P2d 521 (1997), is illustrative. In that case, the jury was faced with three specifications of negligence, two involving the physician's conduct during surgery and one involving post-surgical care. The jury found for defendant on all three specifications. *Id.* at 327-28. The Court

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[14] As discussed earlier, the statement in *Hernandez*, based on *Baker*, that prejudicial error is established if the outcome of the case might have been different in the absence of error was expressly disavowed in *Shoup*. 335 Or at 172 n 2.

[15] As a result, Plaintiff's statement that "the *Hernandez* jury could have based its verdict on the **nine** other specifications of comparative fault that were unaffected by the omitted instruction" is wrong. Opening Brief, p. 24 (emphasis in original). Since all ten specifications of comparative fault were described by the trial court in the jury instructions as constituting negligence, the omitted instruction affected all ten specifications. Unfortunately, Plaintiff's misapprehension in this regard was shared by the majority in *Wallach*, which also assumed that the jury "properly could have based its verdict on the other allegations of negligence * * *." *Wallach*, 344 Or at 325. Thus, viewed properly, the facts of *Hernandez* support the *Shoup* Court's conclusion, expressed in a footnote, that the "error in jury instructions" in *Hernandez* was reversible error. *Shoup*, 335 Or at 172 n 2.

held that the trial court erred in excluding certain testimony that "was central to [plaintiff's] allegation of post-operative negligence." *Id.* at 331. The Court found that the wrongful exclusion of the evidence "affected a substantial right with respect to plaintiff's allegation of post-operative negligence" but was irrelevant, and hence non-prejudicial, with regards to the claims of surgical negligence. *Id*. Because the record in *Keys* established that the jury found against plaintiff on the post-operative negligence claim, it was evident that plaintiff was prejudiced by the exclusion of relevant testimony central to that claim.

Other cases cited by Plaintiff and OTLA involving reversal due to evidentiary error are similar. *See, e.g.*, *Pearson v. Galvin*, 253 Or 331, 454 P2d 638 (1969) (in a false arrest case in which "[m]ost of the defense was based on the theory that the plaintiff had been guilty" of a felony, the erroneous admission of hearsay evidence consisting of a statement from a local judge that no crime had been committed was "sufficiently prejudicial" to warrant setting aside plaintiff's verdict); *Ferrante v. August*, 248 Or 16, 432 P2d 167 (1967) (where jury verdict awarded plaintiff in a motor vehicle accident case the exact amount of her special damages and awarded no general damages, the erroneous exclusion of her doctor's testimony about the effects of the accident on plaintiff's health constituted prejudicial error); *Dew v. Bay Area Health Dist.*, 248 Or App 244, 258-59, 278 P3d 20 (2012) (where jury found that defendant

was negligent but that his negligence did not cause decedent's death, erroneous exclusion of an admission by defendant that was directly relevant to causation constituted prejudicial error).

Thus, *Jensen* and *Lyons* are not, as Plaintiff and OTLA suggest, contrary to long-standing decisions of this Court regarding instructional and evidentiary error. Rather, *Jensen* and *Lyons* are clearly consistent with this Court's precedents. If the record demonstrates that the jury decided an issue regarding which the trial court committed instructional or evidentiary error adversely to appellant, the error will often be found prejudicial.[16] However, if there is no way to determine from the record whether such an adverse finding was even made, as in *Jensen*, *Lyons*, or this case, then the Court should decline to find prejudicial error.

E. *State v. Pine* Is Also Consistent with *Jensen* and *Lyons.*

Contrary to Plaintiff's suggestion, this Court's decision in *State v. Pine*, 336 Or 194, 82 P3d 130 (2003), is also consistent with *Lyons* and *Jensen.* In

[16] Although *Cler v. Providence Health System*, 349 Or 481, 245 P3d 642 (2010), deals with objectionable closing argument, not instructional or evidentiary error, it is also consistent with *Jensen* and *Lyons*. In *Cler*, a medical malpractice case, defense counsel stated during closing argument that an expert witness who was not called to testify would have supported defendant's position on the "central issue in the case," whether defendant met the standard of care. *Id.* at 493. Since the jury found against plaintiff on the negligence issue, the Court found that the trial court's error in permitting the argument substantially affected plaintiff's rights. *Id.*

Pine, the jury convicted defendant of third-degree assault. In instructing the jury regarding the elements of this crime, the trial judge stated that a defendant could be found guilty either by proof that he caused physical injury while being aided by another or by proof that he aided another who caused such physical injury. *Id.* at 209. The Court held that this jury instruction was erroneous because the statute "required the jury, before rendering a guilty verdict, to have found that defendant himself caused the injury in question * * *." *Id.* While the State provided evidence that defendant caused physical injury, defendant's evidence was to the contrary. *Id.* at 208.

Under these circumstances, the State raised *Shoup* and argued that, because its version of the evidence supported defendant's conviction, defendant had not established that the jury instruction was prejudicial and the verdict should be affirmed. *Id.* at 199. In countering this argument, defendant emphasized "the differences between civil and criminal proceedings—most notably, the routine use of special verdict forms and interrogatories in civil proceedings contrasted with the statutory requirement for general verdicts in criminal proceedings" and the fact that *Shoup* was a civil case in which the Court applied ORS 19.415(2), the "statutory standard for reversing verdicts in such cases." *Id.*[17]

[17] *See* ORS 136.485 (requiring general verdicts in criminal trials).

Although the Court "[agreed] with defendant regarding the significance of the procedural differences between civil and criminal proceedings," it relied "upon a more fundamental reason to distinguish *Shoup* from this case." *Id.* at 200. The Court stated:

> As discussed later in this opinion, if the jury had believed defendant's version of the facts, it nonetheless could have convicted him under the challenged instruction. If, as defendant contends, that instruction incorrectly stated the law, then the jury's guilty verdict effectively would have "convicted" defendant of a crime that the legislature did not enact.

Id. Put another way, the trial court's instruction "created an erroneous impression of the law that, if the jury had believed defendant's version of the facts, would have affected the outcome of the case" because "the jury could have convicted defendant of third-degree assault under the instruction even if it found that he had not caused physical injury" to the victim of the assault. *Id.* at 210.

The defendant in *Pine*, unlike Plaintiff in this case, had no procedural vehicle within his control in order to ensure that the record would permit a reviewing appellate court to determine upon which ground the jury found him guilty. But even more fundamentally, the instruction rendered the conflict between the State's evidence and defendant's evidence immaterial because, no matter whether the jury found defendant caused injury to the victim or not, conviction would result. Under these circumstances, defendant was essentially

deprived of his defense. Harm was therefore established.[18]

This case is different. Here, we are dealing with well-recognized elements of two separates cause of action, one for design defect and one for negligence, regarding which plaintiff has the burden of proof, and not simply which version of the facts the jury credited. To prevail, Plaintiff was required as a legal matter to establish both culpability on the part of Defendants and that their culpability actually was the cause-in-fact of the accident. Despite the fact that Plaintiff could easily have requested a special verdict requiring the jury to separately determine the presence of each element, Plaintiff failed to do so. As a result, the Court is unable to conclude that the jury found against Plaintiff regarding culpability.

Nothing in *Shoup* or any of the cases following it suggests that the "we can't tell rule" requires that a verdict form establish which evidence the jury credited in order to demonstrate prejudicial error.[19] This is for good reason. If *Shoup* was taken this far, it would be difficult to ever demonstrate prejudice

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[18] Applying the "we can't tell" rule against a criminal defendant under these circumstances might also violate the constitutional requirement of proof beyond a reasonable doubt. *See In Re Winship*, 397 US 358, 363 (1970) (declaring constitutional stature of the reasonable-doubt standard).

[19] Requiring juries to disclose what evidence they credit is inconsistent with ORCP 61B and 61C, which permit the trial court to utilize special verdicts or general verdicts accompanied by written interrogatories to obtain in a brief and categorical fashion the jury's decision on issues of fact and not to explain whether or to what extent the jury credits specific testimony or evidence.

from the erroneous admission of evidence because it is always possible that the jury disbelieved certain evidence or gave it little or no weight.

F. Plaintiff's Attempt to Limit *Shoup* Is Misguided.

The efforts by Plaintiff and OTLA to convince this Court to overrule *Jensen* and *Lyons* and, at the very least, to severely limit *Shoup*, should not succeed because they are not based on any consistent rationale. For example, OTLA contends that it is acceptable to apply *Shoup* "where the appellant assigns error to the submission to the jury of one or more invalid specifications of fault, and the jury returns a compound verdict" because, under these circumstances, "the question is not the effect of an error on the jury's deliberative process but the effect of the error in allowing a specification of fault that is legally or factually sufficient to go to the jury at all." Amicus Brief, p. 4. However, OTLA fails to explain why this distinction makes a difference or why there should be one rule for invalid or insufficient specifications of fault where the burden to show prejudicial error is on the appellant and a different rule for evidentiary and instructional error where the burden is placed on the respondent.

In fact, there is no good explanation. When a specification of negligence that is legally or factually invalid is submitted to the jury, the jury is told by the trial court that it can find defendant liable for the conduct encompassed by that specification. How is that any different from a situation in

which the trial court gives the jury an erroneous instruction regarding the specification or in which inadmissible evidence is introduced regarding the specification? The answer is that there is no difference. And can it fairly be said that the jury's deliberative process is more affected in the latter situations than in the former? It surely cannot. In each situation, the jury's deliberative process is infected by error.

There is therefore no logical reason to place the burden of establishing prejudicial error on the appellant in one situation and on the respondent in the other. Many civil trials involve situations in which a party (whether plaintiff or defendant) could win (or lose) on one, some, or all of various alternative claims or theories. When that is true, each party must assess its chances in deciding whether to accept a general verdict or, instead, to request a special verdict under ORCP 61. If a party is confident, it may choose to accept a general verdict. If in doubt, it may seek a special verdict. But, in either case, under *Shoup* and its progeny, if a party chooses to accept a general verdict and loses before the jury, that party will be foreclosed on appeal from seeking reversal on any error, even evidentiary or instructional error, that would not impact the validity of the verdict on all theories.

Additionally, the rule in *Shoup* was intended to be neutral as between plaintiffs and defendants but to favor respondents over appellants. *Shoup*, 335 Or at 173. And broadly construed to encompass all types of error as it has been

by this Court, it has been fairly applied to all. However, limiting *Shoup* to its facts means that the rule will be given a decidedly pro-appellant slant. Applied in this fashion, the rule undermines ORS 19.415(2), which "places the burden to make a record that demonstrates prejudicial error on whichever party loses in the trial court and then seeks reversal or modification of the judgment on appeal." *Shoup*, 335 Or at 173-74. Additionally, it undermines Article VII, § 3, of the Oregon Constitution, which favors the affirmance of jury verdicts despite claims of error.

Adopting Plaintiff's position that *Shoup* should not be applied to cases of instructional or evidentiary error also lessens the incentive for the parties to utilize special verdict forms as the chances of obtaining a reversal in the event of a loss at trial are increased by ambiguity and lessened by specificity. This will increase the number of appeals and, perhaps more importantly, the number of reversals because the burden of establishing prejudicial error will be significantly reduced. As a result, the constitutionally-grounded policy of protecting trial court judgments from unnecessary reversal or modification is thwarted. Thus, in this case, Plaintiff's proffer of a compound verdict form mandates the conclusion under *Shoup*, *Jensen*, and *Lyons* that he has waived on appeal the assignments of error directed to Defendants' culpability. Plaintiff seeks to avoid such a waiver by asking this Court to overrule or severely limit these cases.

However, Plaintiff and OTLA offer no legitimate reasons why this Court should fundamentally alter the way it assesses prejudicial error on appeal and overrule or substantially limit case law that has served this State well. Extending the principles of *Shoup* to evidentiary and instructional error, as this Court has already done, serves the salutary purpose of limiting reversal to situations in which harm is established. Where, as here, there is no way to tell whether the jury found against Plaintiff on the issues of culpability to which his assignments of error are advanced, the jury verdict should be affirmed.[20]

G. All of Plaintiff's Remaining Assignments Involve Culpability.

The Court of Appeals concluded that "all of plaintiff's assignments of error except the one directed toward Stricker's qualifications focused on defendants' culpability and not causation * * *." *Purdy*, 252 Or App at 648. In the Petition, Plaintiff contended that this holding was erroneous and, for the first time, argued that all of his assignments of error were directed to causation. Petition for Review, pp. 11-15. Despite the fact that this Court limited its grant

[20] The jury might have found in favor of Plaintiff on culpability but against him on causation. Or it may have jumped directly to causation without ever addressing product defect or negligence. *See State ex rel Sam's Texaco & Towing, Inc. v. Gallagher*, 314 Or 652, 660 842 P2d 383 (1992) (jury could properly decide the second question regarding causation on a special verdict form rather than the first question regarding negligence because "[t]here is no requirement at common law that the legal conclusion of negligence be reached before causation is considered").

of review to considering the proper legal standard to determine the prejudicial effects of instructional and evidentiary error and declined to review other issues, Plaintiff improperly seeks to challenge the Court of Appeals' conclusion about the nature of his assignments.

Plaintiff's procedurally improper argument is meritless for three reasons. First, it mischaracterizes the way this case was tried. Second, it ignores the way in which Plaintiff argued the evidentiary and instructional issues forming the basis of his assignments of error before the Court of Appeals. Third, it ignores the distinction in product liability actions between proof that a product is defective and poses an unreasonable risk of harm to consumers and proof that the product's defect was a cause-in-fact of particular harm to a particular individual.

Plaintiff's primary allegation at trial was that any lawn tractor that permits the cutting blades to rotate under power while operating in reverse is defective and unreasonably dangerous because operators believe their ability to see objects behind them is better than it really is. (Tr. Vol. 12, pp. 78-79.) Defendants contended that the lawn tractor at issue, which permitted reverse blade movement under power only when the operator made a conscious decision to permit the same, was not defective or unreasonably dangerous. (Tr. Vol. 12, p. 131.) Defendant further contended that the tractor was "safe for its intended use if it is handled properly" and that no other design was "incapable

of causing" the type of injury suffered by Isabelle Norton. (Tr. Vol. 12, pp. 129, 131.) Defendants did not file a third-party complaint against the child's father, Kirk Norton, or otherwise ask the jury to assess his comparative fault. Nor did Defendants claim that lawn tractors do not pose serious dangers or that the blades of the lawn tractor did not injure Isabelle Norton.

However, Defendants did argue that, even if the lawn tractor was designed as Plaintiff proposed, Norton's injuries would still have occurred because the cutting blades would still have been rotating when contact was made. (Tr. Vol. 12, pp. 157-60.) Plaintiff fails to adequately explain how any of his assignments of error other than the one involving Stricker's expert testimony have any relevance to this central issue of causation-in-fact.

Plaintiff asserted ten assignments of error in the Court of Appeals. The first two complained of the trial court's exclusion of evidence regarding back-over injuries involving Deere lawn tractors that occurred prior to the accident in this case. Appellant's Opening Brief, pp. 7, 10. Plaintiff failed to argue to the Court of Appeals that this evidence was relevant to causation. Instead, Plaintiff argued that this evidence "was relevant (1) to the negligence claim, to show notice to Deere of the hazards and dangerousness of its product; and (2) to the strict liability claim, to show defect or dangerousness." *Id.* at p. 20. In arguing that it preserved these assignments, Plaintiff pointed only to arguments before the trial court that the evidence was relevant to notice and/or dangerousness. *Id.*

at pp. 9, 11-12.

Plaintiff's third and fourth assignments complained of the trial court's exclusion of evidence regarding back-over injuries involving Deere lawn tractors that occurred after the accident in this case. *Id.* at pp. 24, 26. Again, Plaintiff failed to argue to the Court of Appeals that this evidence was relevant to causation. Instead, Plaintiff claimed only that the evidence was relevant "to show the degree of dangerousness or risk, or the existence of a continuing defect." *Id.* at p. 27.

Plaintiff's fifth assignment complained of excluding "evidence of marketing and promotional devices that emphasized use of the lawn mower in a family setting with children present." *Id.* at p. 28. Plaintiff argued below that this evidence was relevant to consumer expectations and supported the conclusion that the lawn tractor was defective and unreasonably dangerous because it failed to perform as the ordinary consumer would expect under *McCathern v. Toyota Motor Corp.*, 332 Or 59, 79, 23 P3d 320 (2001). Appellant's Opening Brief, p. 30. Plaintiff failed to argue that this evidence was relevant to causation.

Plaintiff's seventh, eighth, ninth and tenth assignments alleged instructional error. Like the first five assignments, none of these assignments dealt with causation and Plaintiff did not argue as such. The seventh assignment complained that the trial court incorrectly gave Defendants'

requested instruction that a manufacturer or distributor "is not liable when it delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is used." *Id.* at p. 34 (emphasis added). By its very terms, this instruction focused on strict liability and the existence of defects in the product at the time of use. Plaintiff initially described this instruction in its brief to the Court of Appeals as part of the trial court's "instructions on strict liability." *Id.* at p. 38. Plaintiff later argued that the instruction constituted "an incomplete and misleading statement of the law governing Defendants' liability." *Id.* at p. 40 (emphasis added).

The eighth assignment of focused on Plaintiff's claim that, despite the fact that Defendants did not raise a comparative fault defense, the trial court erred by refusing to give a comparative fault instruction under this Court's decision in *Hernandez*. *Id.* at p. 41. As with the instruction at issue in the seventh assignment, Plaintiff characterized this instruction in the Court of Appeals as bearing on "the existence and scope of the Defendants' liability." *Id.* at p. 42 (emphasis added).

The ninth and tenth assignments also have nothing to do with causation. The ninth assignment complains that the trial court erred by instructing the jury that "[t]he law assumes that at the time a product is manufactured and sold, it was reasonably safe for its intended use." *Id.* at p. 43. The tenth assignment complains about an instruction directing the jury to consider whether an

alternative product design would have increased the overall safety of the product. *Id.* at p. 45. Plaintiff's arguments concerning these assignments raised issues relevant to the existence of a product defect and not causation-in-fact. *Id.* at pp. 43-50.

In light of the object of Plaintiff's assignments, Defendants cited *Shoup* and *Lyons* to the Court of Appeals in a Memorandum of Additional Authorities and contended that "the assignments of error in this case, with the possible exception of the sixth, relate exclusively to liability and not causation." Memorandum of Additional Authorities, p. 2. Plaintiff failed to respond to Defendants' Memorandum or otherwise refute Defendants' contention about the nature of his assignments.

Ignoring his previous characterizations in the Court of Appeals, Plaintiff now seeks to recast all his assignments as involving causation. As a result of his failure to raise this argument before the Court of Appeals, Plaintiff has waived the same. *See State v. Burgess*, 352 Or 499, 508, 287 P3d 1093 (2012) (stating that "[i]t has long been the rule in this court that we will not address arguments that were not raised in the Court of Appeals"). But even if not waived, Plaintiff's current argument is meritless because it merely raises theoretical and abstract issues about product liability cases, issues which are not posed by the facts of this case.

First, Plaintiff claims that evidence of allegedly similar incidents ("OSI

evidence") may be relevant to causation, citing *Jennings v. Baxter Healthcare Corp.*, 331 Or 285, 14 P3d 596 (2000). Opening Brief, p. 31. As a general matter, Defendants do not quarrel with this proposition but contend that it has no application here. Thus, in *Jennings*, defendant denied that its breast implants caused plaintiff's medical condition and attacked the testimony of plaintiff's expert witness regarding medical causation. *Id.* at 288-89. A central issue in the case was whether the breast implants were "capable of causing plaintiff's complaints." *Id.* at 299. In ruling that the expert's opinion was admissible, the Court held that case reports regarding other individuals may be considered by an expert in reaching a conclusion on medical causation. *Id.* at 305-07.

Unlike *Baxter*, in this case Defendants conceded the obvious, that lawn tractors are capable of causing serious injury and death. There was no question that Isabelle Norton was injured by the blades of the lawn tractor. Therefore, even if OSI evidence could be relevant to causation when a defendant argues that its product is incapable of causing the damage complained of, such evidence was not relevant under the facts of this case where the product's capability to cause injury was never questioned.

Despite this undeniable fact, Plaintiff persists in arguing, without legal support, that its OSI evidence demonstrated that the lawn tractor was "capable of causing injury" and posed a "continuing danger," and that these issues are the same as, or at least implicate, causation. Opening Brief, pp. 31-32. Aside

from the fact that this is inconsistent with how Plaintiff argued his first four assignments in the Court of Appeals, Plaintiff's argument fails to recognize that there is clearly a distinction between proof that a product is defective because it poses an unreasonable risk of harm to consumers, a question that goes to culpability, and proof that the product's defect actually was the cause-in-fact of specific harm to a particular plaintiff. *See McCathern*, 332 Or at 77 n 15 (describing five separate elements of a design defect claim, the third being whether the product was sold in a defective condition unreasonably dangerous to the user, and the fifth being whether the product's defective condition caused injury or damage). The typical means of proving that a product is defective and unreasonably dangerous is to show that the gravity or magnitude of the potential harm posed by the product "outweighs its utility, which often is demonstrated by proving that a safer design alternative was both practicable and feasible." *Id.* at 78.

However, the fact that the potential for harm is relevant to whether a product is unreasonably dangerous beyond that which would be contemplated by the ordinary consumer does not substitute for proof that the defective product actually caused plaintiff's injuries. *See, e.g.*, *Glover v. BIC Corp.*, 6 F3d 1318, 1327 (9th Cir 1993) (strict products liability claim under Oregon law requires plaintiff to "prove a causal connection between the * * * defective product and the injuries sustained"). Thus, in this case the jury was properly

instructed that Plaintiff was required to prove that Defendant's negligence or the alleged product defect was a substantial factor in causing Isabelle Norton's injuries. (Tr. Vol. 12, p. 56.)[21]

That there is a clear distinction between the proof necessary to show that a product has the potential to cause harm and the proof necessary to show that it actually did so in a particular case can hardly be questioned. Thus, an automobile may be defective and unreasonably dangerous if it does not have working windshield wipers or headlights but, if the accident occurred on a sunny day, those defects likely were not the cause-in-fact of plaintiff's injuries. Plaintiff's assignments relating to OSI evidence simply do not relate to causation-in-fact under the circumstances of this case and the Court of Appeals was correct to so hold.

Plaintiff's claim that his asserted instructional errors relate to causation also fails. Plaintiff expends no effort arguing that his ninth and tenth assignments relate to causation because they plainly relate to the claimed

[21] The substantial factor causation test will rarely be met unless the injury would not have occurred "but for" the defendant's conduct. *Joshi v. Providence Health Sys. of Or. Corp.*, 342 Or 152, 161-62, 149 P3d 1164 (2006); *Simpson v. Sisters of Charity of Providence*, 284 Or 547, 561, 588 P2d 4 (1978).

existence of a product defect.[22] Instead, Plaintiff focuses exclusively on his seventh and eighth assignments. But these assignments also relate to culpability and not causation-in-fact.

The "mishandling" instruction that forms the basis for the seventh assignment is taken directly from the *Restatement (Second) of Torts* § 402A, *comment g* (1965), which has been codified under Oregon law. *See* ORS 30.920(3) (adopting comments a to m of Section 402A). Section 402A is entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer" and "*comment g*" is entitled "Defective Condition." The challenged instruction thus focuses on the safety of the product when delivered and governs only liability and not causation-in-fact.

The failure to give the so-called *Hernandez* instruction, the subject of Plaintiff's eighth assignment, also does not implicate causation-in fact under the circumstances of this case. The instruction Plaintiff sought originates from this Court's decision in *Sandford v. Chevrolet Division of General Motors*, 292 Or 590, 642 P2d 624 (1982). *See Hernandez*, 327 Or at 104 (stating same). The instruction is only warranted where there is an allegation of comparative fault, which is not present here. *Id.* at 110 (instruction was warranted only because defendants raised comparative fault as a defense). But, perhaps more

[22] Plaintiff also makes no effort to argue that his fifth assignment relates to causation.

importantly, even when comparative fault is raised, the issue of apportionment of damages to which the instruction is directed never arises unless the jury first determines both that the product is defective and that the defect is a cause of the injury. *Sandford*, 292 Or at 601. Here, the issue of causation referred to the jury asked whether the alleged defect in the lawn tractor was the cause-in-fact of the injury. The giving of a *Hernandez* instruction relating to comparative fault simply had no relevance to that causation issue.[23]

VI. CONCLUSION

The decision of the Court of Appeals, which was properly grounded on this Court's decision in *Lyons*, should be affirmed.

DATED this 20th day of August, 2013.

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[23] Plaintiff's argument that Defendants mentioned Kirk Norton's conduct during closing misses the point. Opening Brief, pp. 3-4. Defendants' contention that Kirk Norton did not look behind him before backing up was not offered to establish comparative fault, which was not an issue in this case. Rather, in addition to providing background about the circumstances of the accident, it negated causation-in-fact because, if Norton never looked, the alleged visibility problem alleged by Plaintiff as the defect in the product could not have caused the accident.

Of Attorneys for Defendants-Respondents DEERE AND COMPANY and RAMSEY-WAITE CO.

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS UNDER ORAP 5.05(2)(d)

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i); and (2) the word-count of this brief as described in ORAP 5.05(2)(a) is 13,996.

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(d)(ii).

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 20, 2013, I filed the original of this Respondents' Brief on the Merits with the State Appellate Court Administrator by the Court of Appeals' eFiling system.

I further certify that on August 20, 2013, I caused a true copy of the Respondents' Brief on the Merits on the following parties by electronic service through the Court of Appeals' eFiling system and, additionally, by the United States Postal Service, first-class mail, at the following addresses:

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