IN THE SUPREME COURT OF THE STATE OF OREGON

DWIGHT G. PURDY, Conservator for ISABELLE EVE NORTON, a minor, Plaintiff-Appellant, Petitioner on Review, v. DEERE AND COMPANY, a foreign corporation, and RAMSEY-WAITE CO., a corporation, Defendants-Respondents, Respondents on Review.	Supreme Court No. S060993 Court of Appeals No. 144265 Lane County Circuit Court No. 16-08-00466

PLAINTIFF'S REPLY BRIEF ON THE MERITS

On Review of the Opinion of the Court of Appeals dated October 10, 2012
Opinion by Schuman, Presiding Judge; Wollheim and Nakamoto, concurring.
Appeal from the Judgment of the Lane County Circuit Court
The Honorable Karsten H. Rasmussen, Judge

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PLAINTIFF'S REPLY TO RESPONDENTS' BRIEF ON THE MERITS

Defendants confuse what is and isn't before this Court.

In the Petition for Review, plaintiff presented two questions to this court. The first question and the primary focus of the petition was the Court of Appeals' refusal to consider nine of plaintiff's ten assignments of error. Petition at 2. Plaintiff contends that the Court of Appeals drew an untenable distinction between evidence and instructions relating to "culpability" and evidence and instructions relating to "causation," and then relied inappropriately on this court's opinion in *Lyons v. Walsh & Sons Trucking Co., Ltd,* 337 Or 319, 96 P3d 1215 (2004) while relegating to a footnote the opinion in *Wallach v. Allstate Ins. Co.,* 344 Or 314, 180 P3d 19 (2008). *Id.*

The second question addressed the Court of Appeals' rejection of the one assignment of error that, the court said, related to causation, contending the trial ocurt had erred in holding certain accident reconstruction testimony admissible:

> "Is a witness who has no relevant experience in the process of reconstructing an accident by converting photographs to on-the-ground measurements qualified to offer accident reconstruction opinions that rely on such measurements?"

This court declined to review that second question.

Defendants now begin their merits brief by contending that what this court declined to review was the Court of Appeals' conclusion that the other nine assignments related solely to "culpability" rather than to "causation." Resp Merits at 4-5. That is sheer nonsense. Plaintiff's entire argument for review was focused on the first question; after a brief summary of case law that argument began with the assertion that plaintiff's other assignments of evidentiary and instructional error implicated both culpability and causation, and that the Court of Appeals had drawn "an untenable bright line" between the issues.

Because this court declined to review the second question, the Court of Appeals' disposition of plaintiff's sixth assignment of error is now final. What remains for discussion before this court is the lower court's refusal to consider the other assignments, and its rationale for doing so. That includes the Court of Appeals' conclusion that none of the remaining assignments implicate causation, and therefore, under *Lyons,* the compound questions on the verdict form mean that no such error could be reversible.

Defendants exaggerate and mischaracterize plaintiff's arguments.

Plaintiff does not "seek adoption of a *per se* reversal-friendly rule for evidentiary and instructional error." Resp Merits at 11. Defendants point to

plaintiff's observation that "by the time an appellant demonstrates an 'error' was made in instructions, the appellant has probably already met the standard for reversibility." Resp Merits at 11, quoting Opening Brief at 18. Plaintiff made that statement after quoting extensively from this court's opinions regarding what it takes to persuade the court that there was an instructional error: by the time the court agrees that there is error, an appellant has already had to establish that the error "probably created an erroneous impression of the law" which was likely to affect the jury's deliberations. *See* Opening Brief at 12-17.

Neither plaintiff nor OTLA have ever suggested that a court should "saddl[e] respondent with the burden of establishing harmlessness." Resp Merits at 10. The burden of establishing reversible error has always been placed on the appellant.

Neither plaintiff nor OTLA are seeking reversal, or even modification, of *Shoup v. WalMart Stores, Inc.,* 335 Or 164, 61 P3d 928 (2003).[1] The question plaintiff presents here has to do with the application of *Shoup's* principles in the context of evidentiary and instructional error.

[1] Indeed, OTLA appeared in *Shoup* to argue that *Whinston v. Kaiser Foundation Hosp.,* 309 Or 350, 788 P2d 428 (1990) should be overruled.

The parties have significant points of agreement.

Plaintiff and defendants agree that ORS 19.415(2) controls and requires that an error "substantially affect[] the rights of a party" to justify reversal or modification of a judgment. Plaintiff and defendants agree that the policy underlying the statutory provision "has constitutional roots."[2] Resp Merits at 23. Perhaps most surprisingly, in its exegesis of "this court's jurisprudence regarding prejudicial error," defendants' refrain is that the court, to reverse, must be able to say that the error "likely produced a harmful effect," a concept it shortens to the "likelihood-of-harm requirement." *Id.* at 20. That is precisely the standard plaintiff asks the court to apply here: an evidentiary or instructional error is reversible when there is a reasonable likelihood that it affected the jury's deliberation.

But what *Shoup* does not say, and where the parties part company, is how the court must determine whether there is such a reasonable likelihood. Recourse to the verdict form may be inevitable when the error involves submission of a legally faulty or factually insufficient claim or theory – as it

[2] In this context, the most significant clause of Oregon Constitution, Article VII §3 is the re-examination clause of the first sentence, providing that "no fact tried by a jury shall be otherwise re-examined in any court of this statute, unless the court can affirmatively say there is no evidence to support the verdict." Plaintiff submits that *Shoup's* reversal of *Whinston* was required by the re-examination clause, because the court could not say that the verdict was unsupported by evidence if one specification was in fact supported.

did in *Shoup*. But it is not mandated, and this court's jurisprudence suggests other concerns that may affect the question in other contexts, and other ways of formulating the impact of an error on a litigant's rights. *See, e.g., Wallach, supra,* 344 Or at 329 ("[W]hen a trial court incorrectly instructs the jury on an element of a claim or defense and when that incorrect instruction permits the jury to reach a legally erroneous result," a party has met the statutory standard for reversibility); *Cler v. Providence Health System-Oregon,* 349 Or 481, 493, 245 P3d 642 (2010)(In determining reversibility, "we focus first on the particular right at issue in this case: the right to require opposing counsel to confine her closing argument to the jury to facts admitted into evidence and permissible inferences from those facts.").

Jensen v. Medley does not help defendants.

Defendants fault plaintiff for not citing and discussing *Jensen v. Medley,* 336 Or 222, 82 P3d 149 (2003). Resp Merits at 11. In *Jensen,* the Court held a jury instruction on an agency issue critical to one theory of liability was erroneous. However, the jury's verdict was supported by another theory of liability, unaffected by the erroneous instruction, and defendant had not challenged that theory on appeal – a fact defendants fail to mention in their discussion of the case. *See* Resp Merits at 15. Because there was an

alternative basis for the award of noneconomic damages, not challenged on appeal, the court affirmed that portion of the judgment.

Plaintiff believes it is a well-accepted proposition that the court will not reverse where the verdict, or court order, is supported on alternative grounds not challenged on appeal. *Strawn v. Farmers Ins. Co.,* 350 Or 336, 369-70, 258 P3d 1199 (2011)("On appeal, Farmers failed to preserve any challenge to the waiver and other procedural grounds on which the trial court's order was alternatively based. Any error by the trial court concerning the constitutionality of the punitive damages award therefore was necessarily harmless."); *also State ex rel DHS v. Radiske,* 208 Or App 25, 59, 144 P3d 943 (2006)(court "must affirm" where appellant does not challenge an independent ground for the trial court ruling); *State ex rel DHS v. Parmentier,* 203 Or App 677, 682, 127 P3d 652, *rev den* 340 Or 359, 132 P3d 1056 (2006)(consideration of arguments challenging one basis for a ruling was "necessarily precluded by the failure to assign error to the alternative grounds" for that ruling); *Roop v. Parker Northwest Paving Co.,* 194 Or App 219, 236, 94 P3d 885 (2004), *rev den* 338 Or 374, 110 P3d 113 (2005)(affirming a motion to strike a punitive damages claim: "where plaintiffs fail to challenge the alternative basis of the trial court's ruling, we must affirm it."); *State ex rel SOSCF v. Duncan,* 164 Or App 610, 612, 993

P2d 818 (1999), *rev den* 330 Or 361, 6 P3d 1102 (2000)("Because mother's challenge is directed to only one of two grounds on which the termination order is based, we affirm."). Plaintiff did not cite to *Jensen* because it did not, and does not, shed much light on the question presented here. Perhaps that is the reason why this court also did not cite *Jensen* in either the *Lyons* or the *Wallach* opinions.

Defendants accuse plaintiff and OTLA of making "overblown" claims for the significance of the *Wallach* opinion in the analysis of this case. Resp Merits at 15. This is an interesting claim in light of defendants' reiteration of *Jensen* with sufficient frequency to deserve a "*passim*" in the table of authorities.

There is no *stare decisis* concern.

As set forth above, plaintiff is not asking the court to overrule *Shoup,* and certainly makes no such request with regard to *Jensen.* As to *Lyons,* plaintiff questions its predicate – that the assigned errors were solely relevant to causation – for many of the same reasons plaintiff believes that no bright line between "culpability" and causation can be drawn in this case. But in *Lyons*, plaintiffs "focused all their arguments" on the proposition that the evidence allowed and instructions given by the trial court improperly permitted the jury to consider the conduct of a third party in determining causation, but made no such argument regarding negligence. As the court

pointed out in *Wallach* (344 Or at 328), the *Lyons* opinion itself characterizes the problem presented in that case as a "narrow" one (337 Or at 326).

Plaintiff is not urging this court to discard precedent in order to reverse the Court of Appeals' disposition.

"Culpability" and causation.

Plaintiff stands on the arguments set out in the Opening Brief (pp. 26-36), with these brief additional comments.

Plaintiff was restricted to evidence of other similar incidents that existed in defendant's own files, generated by Deere. Plaintiff was not permitted to demonstrate that the risk of injury was significantly more substantial than Deere represented it to be, nor that Deere's "child safety" design failed to solve the problem. The extent of the risk is relevant to the existence of a defect or the question of negligence; but it is also relevant to show that the injury to this plaintiff resulted from an unreasonable degree of danger in the product, or the defendant's failure to exercise reasonable care. Defendants may have conceded that Isabelle Norton's leg was cut off by the tractor, but it assuredly did not concede that the cutting was caused by anything unreasonably dangerous about its design. It may be easy, particularly for lawyers, to separate the concepts of defect or negligence on

the one hand, and causation on the other. But that does not mean that evidence can only be probative of one element. And plaintiff has never suggested that proof of the "potential" for harm can substitute for proof that the potential was realized in this particular instance. Resp Merits at 53. Here, of course, as defendants say several times in their brief, the tractor's involvement in cutting plaintiff's leg was not in question. What was in question was the existence of a link between defendant's design and plaintiff's harm. That link, plaintiff submits, is causation, and proof of the product's "potential" for harm – its involvement in other similar incidents – is proper evidence for a factfinder to consider in determining whether that link exists. The evidence was relevant to both "culpability" and causation.

Defendants downplay both the extent and the vigor with which counsel argued that plaintiff's injury was caused by Kirk Norton. Resp Merits at 7-8. On 12 of the 34 pages of the transcript containing defendants' closing,[3]

[3] In addition to the two quotations provided in plaintiff's Opening Brief (at 4, fn 1 and 2, quoting Tr 12:129-130), defendants focused on Kirk Norton or consumer error as follows: Tr 12:132: "All of [the hazards related to this machine] require some level of care by those who operate the machine." Tr 12: 32: The ANSI standard, while focused on encouraging the operator not to mow in reverse "is not intended to replace the operator's responsibility to keep children out of the mowing area and to look carefully behind the machine before and while backing." Tr 12:150: Injury to a child "doesn't happen very often, because most folks, on any given week or month, six million almost, think before they go outside to mow, or think before they turn and back up the lawn tractor." Tr 12:153-157: A lengthy discussion of what

counsel pointed to Kirk Norton as the cause of the injury. Defendants go so far as to deny any argument that Kirk Norton was the "sole" cause of this injury (Resp Merits at 7). That is a surprising argument, considering that the the jury can only consider the conduct of a nonparty is the sole cause of the injury, and the jury was so instructed. ER-41 (Tr 12:56). There is simply no room on this record for defendant to argue that the giving of an instruction on consumer "mishandling," and the failure to give the *Hernandez* instruction limiting the kind of consumer conduct that can be claimed as contributing to an injury, are not relevant to causation.

Finally, plaintiff has not "missed the point" of defendants' focus on Kirk Norton's conduct. Resp Merits at 56, n. 23. [4] Defendants appear to concede: evidence of Kirk Norton's conduct was relevant to counter plaintiff's evidence of causation. It follows, then, that the two instructions regarding consumer conduct – the one given and the one not given – also related to a causation issue. Defendants now appear to agree there was no basis to refuse

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Kirk Norton knew about the risks of the product. Tr 12:160-161: "This is not a toy." "[P]eople understand that a machine like this has some dangers associated with it." Plaintiff's experts "conceded that they would not use a tractor with their best designs in the presence of children."

[4] Defendants misrepresent the nature of the alleged defect in the tractor: the visibility problem was the hazard, the defect was the design that permitted the operator to override the child safety system that was supposed to deal with the hazard. *See* Opening Brief at 28.

to consider plaintiff's remaining assignments – they did not all relate solely to "culpability."

Conclusion

The Court of Appeals erred in using the compound verdict to foreclose consideration of plaintiff's remaining assignments of error. Plaintiff urges the court to reverse the Court of Appeals, and remand for consideration of plaintiff's remaining assignments.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Brief length:

I hereby certify that (1) this brief complies with the word-count limitation of ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2440 words.

Type size:

I hereby certify that the size of the type in this brief is not smaller than 14 point for both text and footnotes as required by ORAP 5.05(4)(f).

CERTIFICATE OF SERVICE AND FILING

I certify that on this date I e-filed the foregoing **Plaintiff's Reply Brief on the Merits** with the State Court Administrator and, by so doing, caused true copies to be served electronically on:

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DATED this 27th day of August, 2013.

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