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.	SC No. S060993 CA No. A144265 Lane County Circuit Court No. 16-08-00466

BRIEF ON THE MERITS OF AMICUS CURIAE OREGON TRIAL LAWYERS' ASSOCIATION

Petition for 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 Judgement of the Lane County Circuit Court
The Honorable Karsten H. Rasmussen, Judge

James S. Coon, OSB 771450
Swanson Thomas & Coon
820 SW Second Ave., Suite 200
Portland, OR 97204
Phone: 503-228-5222
Email: jcoon@stc-law.com

Meagan A Flynn, OSB 923078
1200 NW Naito Pkwy, Suite 690
Portland, OR 97209
Phone: 503-227-5445
Email: meaganf@pbandf.com

Of Attorneys for *Amicus Curiae* Oregon Trial Lawyers Association

Kathryn H. Clarke, OSB 791890
PO Box 11960
Portland, OR 97211
Phone: 503-460-2870
Email: kathrynclarke@mac.com

Don Corson, OSB 851777
Travis Eiva, OSB 052440
The Corson & Johnson Law Firm
101 East Broadway, Suite 303
Eugene, OR 97401
Email:dcorson@corsonjohnsonlaw.com
Email: teiva@corsonjohnsonlaw.com

Of Attorneys for Plaintiff Purdy

(Continued on Reverse)

Jeffrey S. Eden, OSB 851903
Michael T. Garone, OSB 802341
Schwabe, Williamson & Wyatt
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Phone: 503-796-2837
Email: jeden@schwabe.com
Email: mgarone@schwabe.com

Of Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

SUMMARY OF ARGUMENT

Amicus curiae Oregon Trial Lawyers' Association ("OTLA") offers this brief to address the proper application of ORS 19.415(2) to this case. OTLA believes the Court should continue, as it has in every case but *Lyons v. Walsh & Sons Trucking Co., Ltd.*, 337 Or 319 (2004), to apply the "we can't tell" rule of *Shoup v. Wal-Mart*, 335 Or 164 (2003), only in its original context. Prejudice caused by instructional error, evidentiary error and other error in the trial process should be analyzed as it always has been in Oregon, according to its likely effect on the jury's decision-making process in light of the whole record. OTLA urges the Court to reverse the Court of Appeals' decision and remand for consideration of plaintiff's assignments of instructional and evidentiary error on their merits.

ORS 19.415(2) provides:

> No judgment shall be reversed or modified except for error substantially affecting the rights of a party.

Although the statute applies in all civil appeals, this Court and the Court of Appeals have enunciated different rubrics for applying the statute in the context of different types of errors.

ARGUMENT

I. Instructional Error[1]

In the case of instructional error, the touchstone for prejudicial error has been the likely effect on the jury. *E.g. Wallach v. Allstate Ins. Co.*, 344 Or 314, 329 (2008), ("incorrect instruction permits the jury to reach a legally erroneous result"); *Bjorndal v. Weitman,* 344 Or 470, 480 (2008) *("*When an instruction gives 'the jury the wrong legal rule to apply [,]' and thus permits the jury to reach a legally incorrect result, this Court consistently has held that the error substantially affects a party's rights"); *Hernandez v. Barbo*, 327 Or 99, 106-07 (1998) ("instruction probably created an erroneous impression of the law in the minds of the members of the jury, and ... that erroneous impression may have affected the outcome of the case"); *Waterway Terminals v. P.S. Lord*, 256 Or 361, 370 (1970) ("instruction probably created an erroneous impression of the law in the minds of the jurymen which affected the outcome of the case"). Thus, in cases of instructional error, the party advocating reversal has been able to meet the reversible error standard of ORS

[1] This brief refers to "error" rather than to "asserted error" or "assigned error" for convenience and clarity unless the context requires otherwise.

19.415(2) by pointing to aspects of the record as a whole – whether other instructions given the jury or the nature of evidence, pleadings or argument – that indicate the instructional error may have affected the jury's decision. *Bjorndal, supra* at 480; *Hernandez, supra* at 106; *Waterway Terminals, supra* at 370.

II. Evidentiary Error

The same focus on the record as a whole is found in this Court's decisions concerning error in the admission or exclusion of evidence. *State v. Davis,* 336 Or 19, 32 (2003) (applying "similar" constitutional standard for prejudice, evaluating "likelihood that the error affected the jury's verdict"); *Keys v. Nadel*, 325 Or 324, 331 (1997) (in light of other testimony, plaintiff "was prejudiced by being unable to rebut that testimony with her prior consistent statements"); *Pearson v. Galvin,* 253 Or 331, 341 (1969) ("result of the trial might have been different"); *Ferrante v. August,* 248 Or 16, 22-23 (1967) (error prejudicial because court "cannot say with any assurance that the jury's verdict ... was not influenced to the detriment of the plaintiff"); *Jennings v. Baxter Healthcare Corp.* 152 Or App 421, 431 (1998) (error reversible unless "'little likelihood' that the trial court's ruling affected plaintiff's case").

See also Dew v. Bay Area Health Dist., 248 Or App 244, 258 (2012) (“evidentiary errors substantially affect a party's rights and require reversal when the error has some likelihood of affecting the jury's verdict.")

III. Invalid Specifications of Fault (“We can’t tell”)

The path to establishing reversible error has differed 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; 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 either legally or factually insufficient to go to the jury at all. These are the “we can’t tell” cases, such as *Shoup v. Wal-Mart*, 335 Or 164 (2003), in which one of several claims submitted to the jury proved to have been legally invalid – it failed to state a claim. The defendant in *Shoup* argued that the error was *per se* reversible under *Whinston v. Kaiser Foundation Hospital,* 309 Or 350 (1990), a case in which the Court said that this type of error is presumptively reversible if the Court “can’t tell” whether the jury based its verdict on an invalid specification of fault. 335 Or at 168. But this Court in *Shoup* rejected the defendant’s position as contrary to the standard of ORS 19.415(2): “The possibility that an error

might have resulted in a different jury verdict is insufficient under the statute." 335 Or at 173. This Court held that the burden is on the appellant to show that the the jury *actually* based its verdict on the invalid specification, that is that the erroneous submission of the invalid specification *in fact did* affect the result. 335 Or at 174.

In the process, the Court overruled *Whinston.*[2] 335 Or at 176.[3] But *Shoup* did not hold that special verdicts must be used to establish reversible error. 335 Or at 178. Where the only challenge on appeal is to the possibility that the jury based its decision on an improperly submitted specification of fault, rather than on other, entirely proper and supported specifications of fault, there is no role for weighing the record to decide the probable effect on the jury. In that narrow context, the jury either did or did not return a legally invalid verdict, and a special verdict will answer that question categorically. That is the rule of *Shoup.*

---

2 Although the verdict in *Whinston* was set aside through a JNOV, rather than on appeal, the Court could "discern no reason to reject the "we can't tell" rule when the appeal is from a judgment entered on a jury verdict, as in this case, and to continue to adhere to that rule when the appeal is from a JNOV, as in *Whinston* ***." 335 Or at 176.

3 Two of three specifications of negligence sent to the jury in *Whinston,* though they stated claims for relief, failed for lack of proof. 309 Or at 356. OTLA does not believe the distinction between legal and factual invalidity of a specification of fault makes any difference here.

The jurisprudence described above is coherent, appropriately ramified to account for real differences in context, and practical in application. Except for the move from *Whinston* in1990 to *Shoup* in 2003, the jurisprudence has developed with consistency over many years as the Court has endeavored to apply a statutory standard for reversible error that has been substantially the same since the Deady Code of 1845-1864. *Wallach, supra* at 326 n12. Those decisions reveal that whether an error is one "substantially affecting the rights of a party" requires case-specific and context-specific analysis. The resulting landscape of authority makes sense; what is "substantial" depends on the nature of the "rights" allegedly affected. That consistency is marred only by the procrustean attempt in *Lyons v. Walsh* to stretch *Shoup*'s categorical, "we can't tell" standard beyond its original, unique context.

IV. *Lyons v. Walsh*

The basis for the Court of Appeals' decision below is this Court's decision in *Lyons*. The *Lyons* jury at trial answered "no" to a compound fault-and-causation question,[4] and the plaintiff assigned as error the trial

[4] The verdict asked, "Was defendant * * * negligent in one or more of the ways claimed by the plaintiff and, if so, was such negligence a cause of damage to the plaintiffs?" 337 Or at 323.

court's refusal to instruct the jury on a particular theory of causation.[5] On appeal, this Court refused to consider the error because the requested instruction concerned only causation and the Court believed that the jury's answer to the compound question made it "impossible to tell" whether failure to give the requested causation instruction had substantially affected the plaintiff's rights. *Id.* Because the jury might have answered "no" as to fault, the instruction on causation might have made no difference. *Id*. at 325. The Court reasoned:

> What this court stated in *Shoup* applies equally to the narrow problem that the form of jury verdict used in the present case poses. 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 analysis6* of whether the error "substantially affects the rights of a party" under ORS 19.415(2).

337 Or at 326 (emphasis added).

But unlike the unique context of *Shoup,* instructional error does

---

[5] Plaintiff requested jury instructions based on ORS 31.600(5) that the jury could not consider the fault of an immune person unless the accident was the "sole and exclusive result" of that person's conduct. 337 Or at 323.

[6] The Court's statement that the case did not involve an assertion of "faulty jury instruction" on appeal is puzzling because that was exactly the error plaintiff assigned on appeal – the trial court's refusal to give the requested "sole cause" instruction.

not produce a verdict that is either absolutely improper or absolutely proper, and a verdict form could never establish conclusively that the instructional error affected the jury's verdict. Although the *Lyons* opinion properly recognized that different kinds of asserted error "may call for a different analysis," the Court inexplicably failed to analyze the potential effect of the error under the standard the Court has long applied to instructional error.

Further, the Court's suggestion that the posture of the *Lyons* case at trial was unusual, presenting a "narrow problem," is incorrect. On the contrary, in the experience of OTLA, it would be a rare tort case in which the plaintiff "advanced a single theory of liability", and the use of the compound liability-and-causation verdict form is common to most negligence and product liability cases. The verdict form used in *Lyons* and in *Shoup* was typical. Unlike *Shoup,* however, *Lyons* involved instructional error, not invalid specifications of fault.

V. *Wallach's* distinguishing of *Lyons* was not enough.

In *Wallach v. Allstate, supra,* this Court noted that *Lyons* had recognized "that the jury verdict form in that case and a faulty jury instruction present distinct issues for the purposes of ORS 19.415(2)."

344 Or at 328. The *Wallach* opinion did not, however, confront the fact that the error assigned on appeal in *Lyons had also been instructional error.*[7] Because *Wallach* did not involve error implicating a compound verdict form[8] the Court distinguished *Lyons* and left that confrontation for another day:

> We need not decide whether *Lyons* was correct in positing that the jury verdict form in that case and instructional error present distinct issues for the purposes of ORS 19.415(2). This case does not involve a jury verdict form similar to the one in *Lyons*; it thus *provides no occasion for us to decide whether the distinction that the court articulated in Lyons was correct.* Rather, it is sufficient for the purposes of this case to reaffirm the general rule stated in [*State v.*] *Pine,* [336 Or 194 (2003)], *Hernandez*,[*supra*] and an unbroken line of cases that, when 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 established that the instructional error substantially affected its rights within the meaning of ORS 19.415(2).

344 Or at 329 (emphasis added).

That day has arrived. OTLA believes the Court should decide that

---

[7] Justice Durham, dissenting alone in *Wallach*, highlighted that fact and urged that a requirement for showing that error *did in fact* change the trial result be applied across the board without regard to the nature of the error assigned on appeal. 344 Or at 330.

[8] Defendant insurer assigned error on appeal to the trial court's giving of a jury instruction that allowed consideration of damage caused by two injuries suffered after the injury considered at trial.

the distinction between error in allowing the jury to find fault on an invalid specification and errors affecting the deliberation process – that was articulated, but ignored, in *Lyons* – is correct. *Lyons* wrongly failed to make that distinction in the case before it. And *Wallach's* effort to wall-off *Lyons* was not successful because the Court of Appeals' decision below relies on *Lyons* to extend *Shoup's* categorical "we can't tell" rule to instructional and evidentiary error. *Purdy v. Deere & Co.,* 252 Or App 635 (2012). Relegating *Wallach* to a footnote, the Court of Appeals reads *Lyons* to apply to any case in which the jury decides a compound question on a verdict form:

> Thus, *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.

252 Or App at 642 n2.

As set out above, the use of a compound verdict form does not present a "narrow circumstance[]" in Oregon trial practice. Moreover, showing the impact of instructional or evidentiary error on the jury's deliberative process is far more nuanced and circumstance-dependent than simply asking the jury to separately address causation and fault. Unlike the independent-specifications context of *Shoup*, fault and

causation are not alternative bases for affirming the jury's verdict; they are both elements of a single claim for relief. Knowing that the jury answered "yes" or "no" to both elements will not reveal whether those determinations were affected by the process-type errors of *Lyons* or this case.

But the harm of *Lyons* goes even farther because there is no meaningful basis for distinguishing the separate elements of a claim that the jury must address on the road to reaching its verdict from the other separate determinations a jury must make on that road. If the parties are expected to craft verdict forms that isolate each decision on which a disputed ruling may have impact, preserving a record for appeal would require far more than simply separating fault from causation. It would require of the jury a matrix of responses to verdict form questions concerning all possible theories and arguments of counsel in an effort to explain every appealable aspect of their decision. Verdict forms could need to include interrogatories such as "Did you accept as credible the testimony of Dr. Smith?"; "Would your verdict have been different if you learned that another child was injured in the same way by this product?"; or "Would your verdict have been different if you had been instructed not to consider insurance." This would dramatically alter the role of the jury

and invade the freedom of deliberation historically afforded juries. *See Ertsgaard v. Beard,* 310 Or 486, 497 (1990) (identifying the value of freedom of deliberation in cautioning trial courts against too readily scrutinizing allegations that a juror engaged in misconduct during deliberations). And the implications under the "same nine" rule[9] are, to understate the fact, highly impractical. Neither ORS 19.415(2) nor *Shoup* requires that result.

Further, *Lyons,* as interpreted by the Court of Appeals' decision below means that the court must apply two filters to each claim of error – the "we can't tell" from the verdict filter and the traditional "effect on the jury" filter – before reaching the merits of an assignment of error. In any case in which a verdict form does not divide the jury's decision into small enough subparts to reveal the numerous ways an error may have affected the decision-making process, the appellant will be unable to obtain review of errors regardless of the ability to otherwise demonstrate that the error likely affected the outcome.

That is not what the Court required in *Shoup.* The "we can't tell" rule as enunciated there should be applied only in its original setting – to

[9] Oregon Constitution, Art VII, § 5(7) (amended) ("In civil cases, three-fourths of the jury may render a verdict.")

a case 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.[10] The rule should not be used, as it was in *Lyons*, to nullify the holdings of the "unbroken line of cases" concerning the showing of prejudice required for instructional error. *Wallach, supra,* 344 Or at 329.

/ / /

/ / /

/ / /

/ / /

[10]These rules, of course, work the same way for plaintiffs and for defendants. Specifications of defendant's fault or plaintiff's contributory fault can be invalid legally or factually. Either plaintiff or defendant can be the appellant, and the appellant's burden to show prejudicial error is the same for either. *Shoup,* 335 Or at 173-74 ("The rule embodied in ORS 19.415(2) is neutral as between plaintiffs and defendants;")

CONCLUSION

The Court of Appeals' decision should be reversed and the case remanded for consideration of plaintiff's assignments of error on their merits.

RESPECTFULLY SUBMITTED: July 9, 2013.

s/ Meagan A. Flynn
James S. Coon
Swanson, Thomas, Coon & Newton
and
Meagan A. Flynn,
Preston, Bunnell & Flynn
Of Attorneys for *Amicus Curiae* OTLA

CERTIFICATE OF COMPLIANCE

WITH ORAP 5.05(2)(d) & ORAP 8.15(3)

Brief length:

I certify that (1) this *Amicus Curiae* brief filed on behalf of the Oregon Trial Lawyers' Association complies with the word-count limitation in ORAP 5.05(2)(b)(I) & ORAP 8.15(3) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3486 words.

Type size:

I 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(4)(f).

Dated July 9, 2013.

s/ Meagan A. Flynn

James S. Coon
Swanson, Thomas, Coon & Newton
and
Meagan A. Flynn,
Preston, Bunnell & Flynn
Of Attorneys for *Amicus Curiae* OTLA

CERTIFICATE OF SERVICE

I hereby certify that the following participants in this case who are registered eFilers will be served on July 9, 2013, via the electronic mail function of the eFiling system with this **BRIEF ON THE MERITS OF AMICUS CURIAE OREGON TRIAL LAWYERS' ASSOCIATION**:

Kathryn H. Clarke, OSB 791890
PO Box 11960
Portland, OR 97211
Email: kathrynclarke@mac.com

Don Corson, OSB 851777
Travis Eiva, OSB 052440
The Corson & Johnson Law Firm
101 East Broadway, Suite 303
Eugene, OR 97401
Email:dcorson@corsonjohnsonlaw.com
Email: teiva@corsonjohnsonlaw.com

Of Attorneys for Plaintiff Purdy

Jeffrey S. Eden, OSB 851903
Michael T. Garone, OSB 802341
Schwabe, Williamson & Wyatt
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Email: jeden@schwabe.com
Email: mgarone@schwabe.com
Of Attorneys for Respondents

PRESTON BUNNELL & FLYNN, LLP

s/ Meagan A. Flynn
Meagan A. Flynn, OSB No. 92307