IN THE SUPREME COURT OF THE STATE OF OREGON

WILLIAM R. LYONS and BARBARA A. LYONS, Co-Personal Representatives of the Estate of Scott Alan Lyons, Deceased, Appellants-Petitioners on Review, vs. WALSH & SONS TRUCKING CO., LTD., an Oregon Corporation, Respondent-Respondent on Review	Multnomah County Circuit Court No. 98-06-04337 S.C. No. S49907 CA A110332
WALSH & SONS TRUCKING CO., LTD., Third Party Plaintiff, vs. JAMES EUGENE MAY, JR., Third Party Defendant.	

PETITION'S BRIEF ON THE MERITS

Petition for Review of the Decision of the Court of Appeals July 31, 2002

Opinion by: Haselton, PJ
Concurring: Landau and Armstrong, JJ

In an Appeal from the Judgment of the
Circuit Court for Multnomah County; Honorable Janice Wilson, Judge.

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Filed June 2003

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First Question Presented

Does the proscription in ORS 18.470(2) that "there shall be no comparison of fault with any person" immune from liability to the claimant apply only to the process of apportioning fault?

First Proposed Rule of Law

ORS 18.470(2) prohibits all consideration of the fault of a person immune from liability. If a person not liable to the claimant was the "sole and exclusive" cause of injury, then the defendant's fault cannot be a substantial factor. Short of that – if the person's contribution is only partial or even "principal" – then the person's fault is not an issue for the jury The trial court should exclude evidence and argument of fault and caution the jury regarding the limited relevance to be given other evidence of the person's conduct.

Second Question Presented

Does the jury's causation inquiry permit a comparison with other contributing factors to determine whether the defendant's causal contribution is "sufficiently substantial to warrant the imposition of liability," as the Court of Appeals concluded?

Second Proposed Rule of Law

The jury should not engage in an exercise of comparative causation. Judgments about whether conduct warrants the imposition of liability should not be added to the causation inquiry. Thus, evidence that a person immune from liability was a partial or even "principal" cause of injury is not relevant to any issue before the jury.

Third Question Presented

If an immune person's conduct was negligent or blameworthy, does this make it any more or less likely that the defendant's negligence was a cause of injury?

Third Proposed Rule of Law

Evidence attributing culpability to the conduct of an immune person is not relevant to the jury's causation inquiry and should be excluded. The trial court should caution the jury regarding the limited relevance to be given other evidence of the person's conduct.

Nature of the Case

Plaintiffs are the co-personal representatives of their son, Scott Lyons, an Oregon State Police Trooper, who was killed in a motor vehicle collision while on duty. Plaintiffs brought this action for wrongful death against Walsh & Sons Trucking Company, whose truck driver collided with the Oregon State Police jeep in which Scott Lyons was riding. Defendant filed a third-party claim against James May, who was responsible for a one-car accident to which Scott Lyons and his partner were responding at the time of the collision. The Honorable Janice Wilson presided over the trial, granted judgment as a matter of law to defendant on the claim of negligent failure to test its driver for drug use and sent the remainder of the case to the jury. The jury returned a verdict in favor of defendant Walsh & Sons and third-party defendant May.

Material Facts

Scott Lyons was killed when the State Police Jeep Cherokee in which he was a passenger collided with a tractor-trailer truck driven by Defendant's employee William

(Second Amended Complaint ¶¶ 2, 3; Answer ¶¶ 1-3). The Jeep was driven by State Police Sergeant James Rector, who was also killed. (Tr. 560). At the time, Scott

Lyons and Sergeant Rector were responding to a request for help from a fellow State Police officer, Trooper Chin. (Tr. 550-51). The Walsh truck was traveling on the same road behind the state police jeep for approximately 1700 feet. (Tr. 916; Ex. 228/App A-1).[1] In words, he "accelerated, trying to get going, and [he] gained on it." (Ex. 228/App A-1)

Ahead, on the opposite side of the road, across from a "T-intersection" with a side road, Trooper Chin's patrol car was parked off the shoulder of the road with its flashing front grille lights activated. (Tr. 548; Ex 219[2]). Before he noticed the grille lights, recognized Trooper Chin's car as an undercover state police car that he had seen "up there a lot of times." (Ex. 228/App A-3). As the State Police Jeep approached Chin's location, it began to reduce its speed. (Tr. 1337). Four seconds before impact, as the Jeep approached the location of the "T-intersection," the Jeep began to gradually move onto the right-hand shoulder. (Tr 1340; Ex. 228/App A-1). By this time, the Jeep had slowed to 18 miles per hour and the truck was two- or three-hundred feet behind the Jeep, traveling approximately 50 mph.[3] (Tr. 907, 1239, 1330, 1339, 1407).[4] though the jeep was about to turn right onto the side road at the. (Tr. 631; Ex. 228/App A-1-2). He moved his truck to the left, partly across the double-yellow centerline and continued to close the distance. (Tr 914, 936; Ex. 219). Unfortunately, Sergeant Rector

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[1] Exhibit 228 is the edited video deposition of William that plaintiffs played for the jury in their case in chief. This testimony was not transcribed by the trial court reporter. Excerpts of the transcript from the deposition testimony played for the jury are included for the court's convenience at Appendix A.

[2] Part of Exhibit 219 is attached as Appendix B.

[3] speed did not exceed the posted limit for the road.

[4] The police reconstructionists and defendant's expert calculated speed at 53 miles per hour. (Tr 907, 1239, 1330). Third-party defendant May called a reconstructionist who calculated speed at 49 miles per hour. (Tr 1407).

was not turning right; he was beginning a left-hand u-turn to respond to Trooper Chin on the opposite side of the road. (Tr 926). When the Jeep turned, speed and following distance made it impossible for him to stop in time to avoid the collision. (Tr. 914, 1345). The truck and the jeep collided in a t-bone fashion. (Tr. 560, 863).

It is undisputed that William was driving his tractor-trailer with illegal methamphetamine in his system. (Defendant's Response to Plaintiffs' Request for Admissions). There was also no dispute that if had decreased his speed slightly, increasing his following distance by one half of one second, the collision would not have occurred. (Tr 936, 993, 1260). According to the State Police accident investigator, Sergeant Rector made an "improper u-turn" that was the "principal cause" of the collision, and failure to "perceive, react and slow to an appropriate speed" was a "secondary contributing factor." (Tr. 1241-43, 1262).

Summary of Argument

With ORS 18.470, the legislature has prohibited all consideration of partial fault on the part of a person immune from liability to the claimant. If an immune person is the "sole and exclusive" cause of injury, this precludes any finding that the defendant was at fault. Beyond that defense, evidence of the immune person's fault is not relevant to any issue before the jury. Contrary to the reasoning of the Court of Appeals, the evidence is not relevant to the jury's substantial factor inquiry because that inquiry does not incorporate a weighing or comparison among various causes-in-fact. Moreover, evidence of fault is particularly irrelevant to the causation inquiry because that inquiry is not concerned with culpability.

Argument

I. THE JURY SHOULD NOT HAVE HEARD EVIDENCE AND ARGUMENT ATTRIBUTING PARTIAL FAULT TO THE STATE POLICE DRIVER IMMUNE FROM LIABILITY TO PLAINTIFFS.

As plaintiffs argued to the trial court, defendant should have been precluded from introducing evidence or arguing that the jury should "attribute any fault for the accident to the actions of Sergeant Rector." (Plaintiffs' Motion in Limine #4). In their other motions to exclude evidence, plaintiffs drew the court's attention to anticipated testimony that would be covered by the requested exclusion, specifically the opinion of the Oregon State Police investigators that Sergeant Rector attempted an "improper left U-turn," which was "the principal contributing factor to this crash." (Plaintiffs' Motion in Limine at 5).

The trial court denied plaintiffs' motion, and defendant proceeded to introduce the objectionable evidence through several witnesses and to argue Sergeant Rector's negligence to the jury. For example, defendant presented the opinion of State Police Senior Trooper Frank Morton that Sergeant Rector should not have turned as he did and that the collision would not have occurred without the contribution of Sergeant Rector. (Tr. 926-27). Defendant invited State Police Lieutenant Gary Miller to testify that Sergeant Rector made an "improper U-turn," to describe how the turn should properly have been performed and to offer the opinion that Sergeant Rector was the "principal cause" of the collision. (Tr. 1241-43). Defendant also invited its emergency response expert to testify that Sergeant Rector turned improperly and to emphasize the number of additional measures that should have been taken to perform the turn properly. (Tr. 1288-92, 1308-09). Additionally, both defendant's counsel and counsel for third-party

defendant James May stressed repeatedly in voire dire, opening and closing statements that Sergeant Rector was negligent: "I really kind of understated it yesterday when I said that Sgt. Rector attempted an improper U-turn." (Tr. 395); and "He shouldn't have made the turn. Everybody knows that." (Tr. 1648); and "Sergeant Rector made a horrible and fatal error in judgment."(Tr. 1707). (See also Tr. 1658-59, 1710 and 1715).

A. ORS 18.470 precludes the jury from considering the evidence and argument to which plaintiffs objected.

The evidence and argument should have been excluded. ORS 18.470(2) provides:

> "The trier of fact shall compare the fault of the claimant with the fault of any party against whom recovery is sought, the fault of third party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled. The failure of a claimant to make a direct claim against a third party defendant does not affect the requirement that the fault of the third party defendant be considered by the trier of fact under this subsection. ***Except for persons who have settled with the claimant, there shall be no comparison of fault with any person:***
>
> "(a) ***Who is immune from liability to the claimant;***
>
> "(b) Who is not subject to the jurisdiction of the court; or
>
> "(c) Who is not subject to action because the claim is barred by a statute of limitation or statute of ultimate repose." (Emphasis added).

It is undisputed that Sergeant Rector is immune from liability based on the exclusive remedy provision of the Workers' Compensation Law, ORS 656.018(3). The prohibition on comparing his fault makes evidence that Sergeant Rector was negligent or a partial cause of the collision inadmissible.

The Court of Appeals wrongly concluded that the prohibition on comparing fault addresses only "the jury's apportionment of comparative fault." Lyons v. Walsh & Sons Trucking Co., Ltd., 183 Or App 76, 85, 51 P2d 625 (2002). As with the interpretation of

any statute, the Court of Appeals should have looked in the first instance to the text and context to determine the intended meaning. PGE v. Bureau of Labor and Industries, 317 Or 606, 610, 859 P2d 1143 (1993).

1. The text of ORS 18.470(2) shows that the legislature intended a broad prohibition on comparing fault with immune persons.

The text of ORS 18.470(2) does not say "there shall be no apportionment of fault to any immune person"; it says "there shall be no comparison of fault with any person" immune from liability. The prohibition on comparing fault is not limited to apportionment. In fact, ORS 18.470 does not even address apportionment of fault. That concept is covered by ORS 18.480(1)(b), which permits any party to request that the jury assign a degree of fault to "each person specified in ORS 18.470(2)." The ORS 18.470 prohibition on comparing the fault of immune persons applies whether or not a party requests apportionment under ORS 18.480. It applies to all aspects of the jury's deliberation.

2. The context of ORS 18.470(2) shows that the legislature intended a broad prohibition on comparing fault with immune persons.

The context of ORS 18.470(2) demonstrates that the prohibition is not limited to comparison for purposes of apportioning fault. The context of a statute includes other parts of the same statute, related statutes and this Court's case law interpreting the statutes. PGE, 320 Or at 610-11; Davis v. O'Brien, 320 Or 729, 742, 891 P2d 1307 (1995). Here, the context includes ORS 18.470(4), which provides:

> "Any party to an action may seek to establish that the fault of a person should not be considered by the trier of fact by reason that the person does not meet the criteria established by subsection (2) of this section for the consideration of fault by the trier of fact."

As with paragraph (2), this provision does not limit the purposes for which fault "shall not be considered" by the trier of fact. Moreover, it treats as interchangeable the term "consideration" and the term "comparison," used in paragraph (2). Use of the term "consider" suggests a broader scope than merely the comparison necessary to assign a percentage of fault. The definitions of "consider" that are potentially applicable to the context of this statute include: "to reflect on: think about with a degree of care or caution"; "to look at or gaze on steadily or with earnest reflection"; and "to think of: come to view, judge, or classify." Webster's *Third New International Dictionary*, 483 (1993).[5] Use of this broad term "consider" to describe what the jury may not do again demonstrates a legislative intent that the fault of immune persons is not before the jury for any purpose.

ORS 18.470(5) also suggests a broad scope to the prohibition on comparing fault. That paragraph specifies that ORS 18.470 "does not prevent a party from alleging that the party was not at fault in the matter because the injury or death was the sole and exclusive fault of a person who is not a party in the matter." This statement of the legislature's intent regarding what the statute will not prevent implies a corresponding intent of what the statute will prevent. See Owens v. Motor Vehicles Div., 319 Or 259, 266, 875 P2d 463 (1994) (statute specifying some challenges that could be brought implied a legislative intent to preclude other challenges). It implies that paragraph (2) will prevent a party from alleging the party was not at fault because the injury or death was something less than the "sole and exclusive" fault of an immune person; i.e., that the statute did prevent

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[5] The alternative definitions that would not make sense in this context include: "to think of, regard, or treat in an attentive, solicitous, or kindly way"; "obs. REQUITE, REMUNERATE"; "to regard highly: RESPECT, ESTEEM"; "to be of the opinion: SUPPOSE"; and "to give thought to with a view to purchasing, accepting or adopting."

Walsh & Sons from alleging that it was not at fault because negligence of Sergeant Rector was the "principal cause" of Scott Lyons' death.

2. The legislative history shows that the legislature intended a broad prohibition on comparing fault with immune persons.

If the broad reach of ORS 18.470(2)(a) is not clear from the text and context of the provision, the legislative history confirms that the jury is not to consider the fault of immune persons for any purpose except to consider an allegation that fault of that person is the "sole and exclusive" cause of injury. ORS 18.470 was significantly amended by the 1995 legislature through Senate Bill 601. Or Laws 1995, ch 696, §3. The context for that amendment includes several cases decided by this Court. First, in Mills v. Brown, this Court concluded that the jury was precluded from deciding the relative fault of participants who were not parties at the time of deliberations. 303 Or 223, 230, 735 P2d 603 (1987). Then, during the 1995 legislative session, this Court decided Davis v. O'Brien, which explained, "Under the rule of law from Mills, [the non-party's] fault would not have been an issue for the trier of fact in this case." 320 Or at 740. After determining that legislative changes to the comparative fault scheme did not overrule Mills, this Court reaffirmed that the fault of non-parties was not an issue for the trier of fact. Senate Bill 601 was crafted to overrule Davis. Testimony of Tom Tongue, Oregon Association of Defense Council, Senate Judiciary Committee, SB 601, May 10, 1995, Tape 157, Side A. ("[I]f you think Davis v. O''Brien is a fair result then you can put 601 at rest and vote against it, or any amendment to it.")

To understand what the legislature intended by the ultimate language of amended ORS 18.470, it is important to understand the balance the statute was designed to strike. Both proponents and opponents of the bill addressed concerns that a similar comparative

fault scheme had been recently ruled unconstitutional by the Montana Supreme Court. Testimony of Tom Cooney, Oregon Medical Association, Senate Judiciary Civil Process Subcommittee, SB 601, March 1, 1995, Tape 30, Side B; Testimony of Lawrence Wobbrock, Oregon Trial Lawyers Association, Senate Judiciary Civil Process Subcommittee, SB 601, March 1, 1995, Tape 31, Side B.

In the Montana case, Newville v. State of Montana, 267 Mont 237, 883 P2d 793 (1994), the court concluded that Montana's comparative fault statute violated substantive due process. 883 P2d at 802. The court agreed with the plaintiffs' contentions that the scheme unreasonably required plaintiffs "to examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of unrepresented parties," particularly without any advance notice. Id.

With Newville as a backdrop, SB 601 incorporated several procedural safeguards. As originally proposed, the bill required the defendant to give advance notice if it wanted to point to another participant as at fault and required the defendant to bear the burden of proof regarding fault of that other participant. Testimony of Tom Cooney, supra. The ultimate version of ORS 18.470 retains the requirement that the defendant bear the burden of proof but also reveals a significant substitution: in the final version of the bill, the range of persons whose fault the jury could consider was narrowed to only persons against whom the plaintiff did or could recover, but the advance notice provision was removed. ORS 18.470. A reasonable interpretation of this dynamic is that the legislature saw the added prohibition on comparing the fault of immune (and other unreachable) persons as eliminating the need for advance notice. Notice would be unnecessary if the plaintiff could not be required "to examine jury instructions, marshal evidence, make

objections, argue the case, and examine witnesses from the standpoint" of these unrepresented persons.

However, the Court of Appeals' restrictive interpretation of "there shall be no comparison of fault" reimposes that unreasonable burden on plaintiffs without even the original protection of advance notice. As the present case demonstrates, efforts to shift blame to an immune (and therefore unrepresented) person require a defensive response from the plaintiff whether the shifting of blame is aimed at assigning a percentage of liability on the verdict or, more insidiously, at convincing the jury to find the defendant not liable at all. But this is precisely the position that the Montana Supreme court identified as constitutionally problematic and precisely the situation that concerned the Oregon legislature when it crafted the ultimate version of ORS 18.470.

On the other hand, this procedural infirmity does not arise if ORS 18.470 is properly read to prohibit all comparison of fault with immune persons, except to consider an allegation that the injury is the sole and exclusive fault of the immune person. This defense, recognized in paragraph (5) of the statute, has been identified in Oregon case law for almost 100 years as part of a general denial. See, e.g., Multnomah County v. Willamette Towing Co., 49 Or 204, 218, 89 P 389 (1907) (applying rule that a general denial permits defendants to show "that the injury arose from some other cause, such as the act of some person for whom they were not responsible"); Duff v. Willamette Steel Works, 45 Or 479, 483, 78 P 363 (1904) (stating but not applying rule).

Retention of the historical defense did not present the same due process concerns for the legislature. If the defendant, even without advance notice, makes the plaintiff prove that an immune person was not the "sole cause" of injury, this is simply "a reverse

way of saying that plaintiff must prove that defendant's negligence was a cause of the accident." Shane v. Oberding, 254 Or 214, 217, 458 P2d 930 (1969). The plaintiff counters the defense with the same proof she otherwise would present, i.e., that the defendant's negligence was a substantial factor in its own right. Short of being the "sole cause," the fault of the immune person cannot be made a consideration for the jury without imposing on the plaintiff a different and unreasonable burden of defending that person. ORS 18.470 makes the immune person's fault not an issue for the jury, and evidence inviting the jury to consider that fault is not relevant. See OEC 401 (to be admissible as relevant, evidence must have some tendency to make the existence of any fact of consequence to the determination more or less probable).

B. Regardless of the meaning of the ORS 18.470(2) prohibition, partial fault of an immune person is not relevant to any issue before the jury.

Even if the Court of Appeals were correct that when ORS 18.470(2) says "there shall be no comparison of fault with any person *** immune from liability" it really means only "there shall be no apportionment of fault" to such persons, the objectionable evidence was still not relevant to any issue the jury needed to decide. The Court of Appeals wrongly allowed the evidence as relevant to the jury's determination of whether negligence was a substantial factor in causing Scott Lyons' death. Lyons, 183 Or App at 85. The conclusion is wrong for two reasons: first, it wrongly assumes that the substantial factor inquiry in Oregon incorporates an element of comparative causation and second, it wrongly assumes no distinction between evidence of causation and evidence of negligence.

A. Oregon juries do not engage in a comparison of causation.

As discussed in plaintiffs' Petition for Review, the Court of Appeals adopted the position of the Restatement (Second) of Torts, section 433 (1965), and its comment d, which this Court has never adopted and should not adopt. The comment takes the position that a contributing factor, i.e, a cause in fact, may be not substantial by comparison with another contributing factor that has a "predominant effect" in bringing about the injury. Comment d, at least as applied by the Court of Appeals, imbues the "substantial factor" inquiry with an element of the appropriateness of assigning liability. Lyons, 183 Or App at 84 (Comment d recognizes that the jury must determine "[w]hether any particular cause, or any individual actor's conduct, is sufficiently 'substantial' to warrant the imposition of liability ***." (Emphasis added.)) But whether an actor's conduct warrants the imposition of liability is not part of the causation inquiry in Oregon. Stewart, v. Jefferson Plywood Company, 255 Or 603, 606, 469 P2d 783 (1970) (Oregon has made scope of liability a part of the negligence inquiry). As this Court has explained, "[c]ausation in Oregon law refers to causation in fact, that is to say, whether someone examining the event without regard to legal consequences would conclude that the allegedly faulty conduct or condition in fact played a role in its occurrence." Sandford v. Chevrolet Division of General Motors, 292 Or 590, 606, 642 P2d 624 (1982).

Plaintiffs have never suggested that the facts of Sergeant Rector's conduct were irrelevant to the substantial factor inquiry, but opinion testimony describing Sergeant Rector as negligent and quantifying his causal contribution was irrelevant.[6] When the inquiry is whether a defendant was a cause in fact of injury, the presence of other

[6] During argument on the motions in Limine, counsel for plaintiffs drew this distinction, agreeing that Sergeant Rector's involvement was relevant to an argument by Walsh & Sons that "here's why this happened" but that evidence attributing partial fault to Sergeant Rector was not relevant. (TR 167-68).

negligent actors or another "principal" or "predominant" cause has no relevance. It is clear that the existence of other substantial factors that concur in causing the injury does not relieve a defendant from liability. See, e.g., Rice v. Hyster Company, 273 Or 191, 207, 540 P2d 989 (1975). Indeed, this Court has never set a limit on the number of concurrent causes that may all be substantial, and there is no conceptual reason to do so under Oregon's causation framework. Thus, the jury did not need to be told that Sergeant Rector made a "horrible and fatal error" or that the State Police believed Sergeant Rector was the "principal cause" of the collision because a finding that Sergeant Rector was at fault or a partial cause of Scott Lyons' death does not make it any more or less likely that defendant was also a substantial factor, particularly in circumstances, as here, where the defendant's contribution is as one of two moving vehicles that collide with each other. See OEC 401.

2. Evidence of negligence has nothing to do with causation.

Even if the Court of Appeals were correct that the substantial factor inquiry permits an element of comparative causation, that comparison would not open the door to evidence of negligence of a party immune from liability. As articulated in the Petition for Review, this Court has repeatedly drawn a distinction between the concept of causation and the concept of fault or culpability. Sandford, 292 Or at 606 ("What can be a cause in fact is a person's behavior, which is a fact, not its faulty or faultless character, which is a legal characterization."); Dewey v. A.F. Klaveness & Co., 233 Or 515, 526-27, 379 P2d 560 (1963) (O'Connell, J, concurring) (substantial factor inquiry looks at "the actual or physical cause issue free from any idea of culpability"). Even if the jury is permitted to compare defendant's causal contribution with Sergeant Rector's causal contribution, it

must remain a comparison of the physical cause issue alone, "free from any idea of culpability."

Walsh & Sons' right to argue that it could not be liable because the collision was the "sole and exclusive" fault of Sergeant Rector did not open the door to evidence that Sergeant Rector was negligent. The defense is simply a refutation of causation; if the actions of a third party are the sole and exclusive cause of injury, then the defendant cannot be liable, regardless of whether the actions of the third party were negligent or completely authorized. See Brown v. Jones, 137 Or 520, 523, 3 P2d 768 (1931). In Brown, this Court explained that evidence the flooding to plaintiff's land was caused by a non-party's operation of a dam on Upper Klamath Lake, "merely reinforced the defendants' denial that they had flooded the plaintiff's land by showing that inundation was inevitable whenever the [non-party] raised the level of the lake *** as it had a right to do." Although some of this Court's cases discussing that defense refer to "negligence" of the non-party being the sole cause of injury, that is because the arguments presented in those cases did not ask the Court to distinguish between causation evidence and negligence evidence. See, e.g., Conner v. Mertz, 274 Or 657, 660, 548 P2d 975 (1976), (objection that "sole cause" instruction imputed negligence to plaintiff); Raffaele v. McLaughlin, 229 Or 301, 307, 366 P2d 722 (1961) (same); Brindle v. McConnick Lumber & Mfg. Corporation, 206 Or 333, 338-39, 292 P2d 221 (1956) (objection to "sole result" instruction on grounds defendant had not produced evidence of non-party's negligence or alleged it as affirmative defense). Walsh & Sons could not be liable if the actions of Sergeant Rector were the sole cause of the collision. The character of those actions, faulty or not, was irrelevant to the jury's evaluation of Walsh's denial of liability.

II. THE JURY SHOULD HAVE BEEN INSTRUCTED TO AVOID CONSIDERING FAULT OF THE IMMUNE SERGEANT RECTOR TO DETERMINE WHETHER DEFENDANT WAS AT FAULT.

Because the jury was presented with extensive information about the actions of Sergeant Rector – some appropriate– plaintiffs requested a cautionary instruction and several alternative formulations of a final jury instruction to limit the use to which the jury would put the information about Sergeant Rector's fault. The cautionary instruction that the trial court initially proposed but then refused to give would have advised the jury:

> "If you find that Sgt. Rector's negligence was the sole and exclusive cause of the accident between the Oregon State Police Jeep and the Walsh truck, then neither defendant Walsh & Sons Trucking nor third-party defendant James May is liable to the estate of Scott Lyons." (Tr. 818-19).

For instructions at the close of evidence, plaintiffs proposed the following, alternative, instructions:

"PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 17

"No Consideration of Sergeant Rector Fault

"Many factors or things may operate either independently or together to cause injury. In such a case, each may be the cause of the injury even though the others would have been sufficient of themselves to cause the same injury.

"Defendants have argued that Sergeant Rector may be responsible for the collision. I instruct you that Sergeant Rector cannot be liable for the collision as a matter of law. In determining whether the defendants are liable for the death of Scott Lyons, you need not find that the conduct of the defendants was the only cause of the injury. However, you are not to weigh or consider the conduct of Sergeant Rector unless you find that Scott Lyons' death was the sole and exclusive, meaning 100%, result of the conduct of Sergeant Rector."

"PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 18

"No Consideration of Sergeant Rector Fault

"Defendants have argued that Sergeant Rector is responsible for the collision. I instruct you that Sergeant Rector is not liable for the collision as a matter of law. In determining whether the defendants are liable for the death of Scott Lyons, you are not to weigh or consider the conduct of Sergeant Rector unless you find that Scott Lyons' death was the sole and exclusive result of the conduct of Sergeant Rector."

"PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 22

"No Consideration of Sergeant Rector Fault

"If you find that either or both defendants was negligent, then you must determine whether that negligence was a cause of Scott Lyons' death. Many factors or things may operate either independently or together to cause injury. In such a case, each may be the cause of the injury even though the others would have been sufficient of themselves to cause the same injury.

"Defendants have argued that Sergeant Rector may be responsible for the collision. If you find that the collision was the sole and exclusive result of the conduct of Sergeant Rector, then defendants are not liable for Scott Lyons' death. However, if you find that the collision was not the sole and exclusive result of the conduct of Sergeant Rector, then you are not to weigh consider any partial contribution that Sergeant Rector's conduct may have made to the collision."

Although a trial court has discretion to choose among competing instructions that supply the same information, this Court otherwise reviews for errors of law a trial court's refusal to give a requested instruction. State v. Moore, 324 Or 396, 427, 927 P2d 1973 (1996). As explained above, opinions that Sergeant Rector acted negligently and the opinions that he was the "principal" cause of the collision should never have been admitted. But they were admitted, as was evidence of Sergeant Rector's conduct, which – though relevant for some purposes – could lead the jury to improperly undertake a comparison with fault of Sergeant Rector. Upon plaintiffs' request, the trial court should

have instructed the jury on the limited relevance of the evidence. OEC 105[7].

Even if the instructions cannot be construed as pure limiting instructions, plaintiffs were entitled to at least one of the requested instructions because they reflect plaintiffs' theory of the case, correctly state the law and are supported by the evidence. See Hernandez v. Barbo Machinery Co., 327 Or 99, 106, 957 P2d 147 (1998) (reciting general rule). Plaintiff's theory of the case was that was negligent and a cause in fact of the collision and that a comparison with Sergeant Rector's concurrent or even primary fault could not be a basis for finding defendant not at fault. The proposed instructions reflected this theory of the case and were a correct statement of the law. Nevertheless, the trial court was persuaded that the requested instructions were not correct statements of the law because they might be construed as shifting some of the burden of proof to defendant. This concern was misplaced because the jury was otherwise instructed that plaintiffs bore the burden of proving that defendant was negligent and a cause of Scott Lyons' death. (TR 834, 1575). The proposed instructions said nothing contrary to those burden of proof instructions, and it should have been presumed that the jury would follow those instructions. See, e.g., Holger v. Irish, 316 Or 402, 420, 851 P2d 1122 (1993).

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[7] OEC 105 provides:

> "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

Failure to give at least one of the proposed instructions was error because they addressed a point not covered by any other instruction and because the jury needed to understand how it could and could not use the evidence of Sergeant Rector's contributory fault. See Hernandez, 327 Or at 106. Although the jury was instructed that Sergeant Rector was immune from liability, the jury was not informed about the full significance of that fact. The instructions told the jury not to compare negligence after they found negligence to be a substantial factor. (TR 1575).[8] But the jury was not told to avoid comparing fault of Sergeant Rector while deciding the primary issue of whether negligence on the part of was a substantial factor in causing the collision.

Perhaps ironically, the trial court best articulated the need to instruct the jury on the limited relevance of the evidence. As that court explained to defense counsel:

> "I think the evil of what [Walsh & Sons has] done, though, is that it would suggest that – or might leave the impression that if the jurors could find that Sgt. Rector was, you know, even 75 percent at fault or 90 percent at fault, but still had ten percent for that that somehow lets Walsh & Sons off the hook, and I think under the posture of this case, it would not." (Tr. 822).

Although defendant's counsel successfully persuaded the trial judge to ignore her concern, the "evil" remained. Without guidance on what to do with the information about Rector's fault, there is a substantial risk that the jury improperly compared it with contribution to find defendant not at fault. Indeed, that is precisely what the Court of Appeals said the jury should be able to do.

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[8] The jury was instructed: "If you find that defendant Walsh was negligent and that this negligence was a substantial factor in causing the accident and the death of Scott Lyons, you will not compare that negligence with any negligence of Sgt. Rector." (Tr. 1575).

III. THE EVIDENTIARY AND INSTRUCTIONAL ERRORS REQUIRE REVERSAL.

The error in permitting the jury to consider evidence describing Sergeant Rector as negligent and the "principal" cause of the collision, particularly in combination with the instructional error, requires reversal. As this Court has explained:

> "[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." Baker v. English, 324 Or 585, 591, 932 P2d 57 (1997).

The errors here all relate to the primary issue before the jury – whether any negligence on the part of was a substantial factor in causing the collision. Although defendant emphasized that in the last seconds before impact only Sergeant Rector had the ability to prevent the collision, there was abundant evidence that conduct prior to that narrow window was negligent and was a cause of the collision:[9]

- Four witnesses, including the State Police investigator, testified that was traveling at an excessive speed under the circumstances. (Tr. 618-619, 780-81, 1003-04, 1261).
- The state police reconstructionists calculated that if had allowed an extra one-half second of following distance, there would have been time for the jeep to complete its turn safely. (Tr. 936, 1228).

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[9] As the jury was advised, plaintiffs' allegations of negligence against defendant included the expected: failing to maintain proper lookout and control, driving too fast, following too closely, driving while impaired and fatigued, passing in a no-passing zone and failing to honk to warn of the truck's presence. (Tr. 1576-77).

- As the court correctly instructed the jury, was negligent as a matter of law if the jury found that he followed closer than 500 feet behind an emergency vehicle responding to an emergency or if the jury found that he reported for duty or remained on duty after using methamphetamine. ORS 811.150; 49 CFR §382.213.[10] (Tr. 1580-81). It was undisputed that had some methamphetamine in his system at the time of the collision, that he was less than 500 feet behind the State Police jeep at the time Sergeant Reetor began his turn and that Sergeant Reetor's emergency lights and left turn signal were activated at the time of the collision.[11] (Tr. 876-82, 1339).

- Dr. Gary Jacobson testified that the methamphetamine found in system after the collision represented the remnants of a much more significant high, which would have left him exhausted and his judgment and perception impaired. (Tr. 1093-98).

- According to Lieutenant Miller of the State Police, failure to "perceive, react and slow to an appropriate speed" was a "secondary contributing factor." (Tr. 1262).

This evidence of fault and contribution on the part of Melillo was muddled by the competing evidence attributing partial fault to Sergeant Reetor. As the trial court feared, and as the Court of Appeals sanctioned, there is a significant likelihood that the jury compared the relative fault of the two participants and determined that negligence was not a substantial factor by comparison to the "principal" fault of Sergeant

[10] Federal regulations prohibit any use of methamphetamine, not just consumption of specific impairing quantities. 49 CFR § 382.213.

[11] The evidence permitted competing inferences regarding how long before the collision the lights were activated.

Rector. As explained above, this was an improper use of the Sergeant Rector evidence. Had the jury not been exposed to the improperly admitted evidence, or had the jury been cautioned not to engage in any comparison with fault of Sergeant Rector, there is a significant likelihood that the outcome would have been different. The decision of the Court of Appeals should be reversed. See Baker, 324 Or at 591.

CONCLUSION

The judgment of the Court of Appeals and trial court should be reversed and the case remanded for a new trial.

DATED: June 10, 2003.

Respectfully submitted,

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[redacted]
Attorneys for Plaintiffs-Petitioners
William and Barbara Lyons

CERTIFICATE OF MAILING BY FIRST

CLASS (PRIORITY) MAIL TO STATE COURT ADMINISTRATOR

I hereby certify that the original and twelve copies of the foregoing PETITIONER'S BRIEF ON THE MERITS were filed June 10, 2003, by mailing by First Class Mail with the United States Postal Service, postage prepaid, addressed to the State Court Administrator, Records Section, Supreme Court Building; 1163 State Street; Salem, Oregon 97310, pursuant to ORAP 1.35.

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I also certify that I served two copies of the foregoing PETITIONER'S BRIEF ON THE MERITS on counsel for Respondent Walsh and Sons Trucking, on June 10, 2003, by mailing in a sealed envelope addressed to:

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