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,

Plaintiffs-Appellants and PETITIONERS ON REVIEW,

v.

WALSH & SONS TRUCKING CO., LTD., an Oregon corporation,

Defendant-Respondent and RESPONDENT ON REVIEW.

WALSH & SONS TRUCKING CO., LTD.,

Third-Party Plaintiff,

v.

JAMES EUGENE MAY, JR.,

Third-Party Defendant.

Multnomah County Circuit Court
No. 98-06-04337

CA A110332

SC S49907

DEFENDANT'S ANSWERING BRIEF ON THE MERITS

On Review from the Decision of the
Court of Appeals on Appeal from the
Judgment of the Circuit Court for
Multnomah County

The Honorable Janice R. Wilson, Judge

Court of Appeals' Opinion filed	:	July 31, 2002
Author of Opinion	:	Haselton, P.J.
Joining in Opinion	:	Landau and Armstrong, J.J.

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DEFENDANT'S ANSWERING BRIEF ON THE MERITS

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Defendant does not accept the statement of the questions presented and the proposed rules of law on pages 1-2 of the Brief on the Merits filed by Plaintiffs. Following is the question and proposed rule of law presented by Plaintiffs' Petition for Review:

Question Presented: Did the trial court correctly allow the jury to hear and consider evidence and arguments about whether Oregon State Police Sgt. James Rector caused the accident, and did the trial court correctly instruct the jury that, although Sgt. Rector and the Oregon State Police are immune from liability and are not parties to the lawsuit, the jury could consider whether Sgt. Rector caused the accident but could not apportion any fault to Sgt. Rector or compare any negligence of Sgt. Rector with any negligence of Defendant?

Proposed Rule of Law: ORS 18.470 does not render inadmissible evidence of an immune nonparty's conduct that is relevant to determining whether a defendant's conduct was a substantial factor in causing an injury. That is the rule of law correctly established by the Court of Appeals in this matter. *Lyons v. Walsh & Sons Trucking Co., Ltd.*, 183 Or App 76, 85, 51 P3d 625 (2002).

NATURE OF ACTION, RELIEF SOUGHT AND JUDGMENT

This wrongful-death lawsuit was brought by Plaintiffs as the parents and personal representatives of the estate of their son, Scott Lyons, who was an Oregon State Police Trooper fatally injured when the police vehicle (driven by Sgt. Rector) in which he was a passenger collided with Defendant's truck while making a sudden U-turn in front of the truck. Plaintiffs alleged that Defendant was negligent in the operation of its truck.

The lawsuit was tried before a jury over the course of 10 days and resulted in a jury verdict in favor of Defendant. Plaintiffs appealed from the Judgment entered in favor of Defendant based on that jury verdict.

STATEMENT OF FACTS

In addition to the facts set forth in the decision of the Court of Appeals (183 Or App at 78-79), the following facts are pertinent to this matter[1/]:

Scott Lyons, an Oregon State Police Trooper, was a passenger in a State Police Jeep Cherokee vehicle driven by Sgt. Rector. Defendant's truck was traveling behind the Jeep and in the same direction on the highway as the Jeep. Rector and Lyons were on police business driving on a state highway when the Jeep suddenly made a U-turn in front of and collided with Defendant's truck, which was driven by William Defendant's employee. Both Lyons and Rector were fatally injured in the accident. (SER-2, 6, 10; Tr 454, 475, 560, 1215, 1288; Ex 55)

The reason the Jeep made the sudden U-turn, and what did not know, was that Rector and Lyons were responding to a single-vehicle accident on the opposite side of the same highway on which the Jeep and Defendant's truck were traveling.[2/] Rector and Lyons were summoned to the scene of that accident by an Oregon State Police officer who was already there, but who had not put out any road flares or signs or any other traffic controls to warn of an accident. (Tr 546-52, 565-64, 575-77, 855, 1287, 1428-29)

The Jeep's emergency lights were not activated while Defendant's truck was following the Jeep on the highway. Consequently, did not know that there was an emergency to which the Jeep was responding. Those emergency lights were not activated until the very last minute just before the collision between the Jeep and Defendant's truck. (Tr 555, 569, 570-71, 625, 629, 809-11, 921, 1285-87, 1307-09; Ex 228)

[1/] The facts included in Plaintiffs' statement of the facts (Pl Br 2-4) are incomplete and not construed in the light most favorable to Defendant, in whose favor the jury verdict was rendered. *See Brown v. J.C. Penney Co.*, 297 Or 695, 705, 688 P2d 811 (1984).

[2/] Third-Party Defendant May admitted his negligence in causing the single-vehicle accident in which his vehicle left the road and went down an embankment. (Tr 222, 224, 639, 836, 845, 1574; ER-24)

Four or five seconds before the collision (when the Defendant's truck was 232 to 285 feet behind the Jeep), the Jeep began moving to the right of the highway and slowing down. Between three and four seconds before the collision (when Defendant's truck was 184 to 232 feet behind the Jeep), Defendant's truck began moving to the left of the highway toward the center line as the Jeep moved to the right shoulder of the highway.[3/] The collision occurred approximately one and one-half seconds after Rector began his U-turn (when Defendant's truck was approximately 115 feet behind the Jeep). (Tr 571-72, 631-34, 903, 913, 1240, 1328-47, 1337-79)

A substantial number of Oregon State Police officers who investigated the fatal accident observed for several hours after the accident and did not observe any impairment on his part, and he was not cited for any traffic violation. (Tr 605, 614, 615, 637-38) The Oregon State Police concluded that was not at fault or even a substantial factor in causing the accident, that the accident was "unavoidable" for that Sgt. Rector made the sudden U-turn in order to pull his vehicle behind another parked police vehicle on the opposite side of the highway, and that the principal cause of the accident was Rector's improper, unsafe and, to unexpected U-turn in front of Defendant's truck. (Tr 914, 915, 925-27, 931, 959, 1241-43, 1345; Ex 55)

SUMMARY OF ARGUMENT

The issue in this lawsuit is causation, not comparison or apportionment of fault or negligence. The jury had to determine the cause of the fatal accident.

In deciding the crucial issue of causation, the jury correctly was allowed to consider whether Sgt. Rector, in making an improper, unsafe, and unexpected U-turn in front of

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[3/] Contrary to Plaintiffs' insinuation (Pl Br 3), was not attempting to pass the Jeep by accelerating the truck, he was not in violation of any speed limits (he was traveling approximately 50 mph), and, in fact, he had eased up on the accelerator when he noticed the Jeep moving to the right of the highway. (Tr 572, 811, 914, 1239, 1316, 1344, 1347, 1382, 1400, 1414, 1499-1500)

Defendant's truck, caused the accident. Consistent with ORS 18.470 and Oregon case law, the trial court correctly instructed the jury that Sgt. Rector was not a party to the lawsuit because he is immune from liability, that the jury, in determining the cause of the accident, could consider Sgt. Rector's actions, but that the jury could not compare (*i.e.*, apportion in terms of a percentage on the verdict form) Sgt. Rector's fault or compare his negligence with that of either the Defendant or Third-Party Defendant. The jury correctly followed that instruction.

Evidence about Sgt. Rector's role in causing the accident, including the expert opinion of the Oregon State Police that Sgt. Rector's U-turn was the principal cause of the accident, was relevant because of Plaintiffs' allegations of Defendant's negligence. The jury was correctly instructed that Plaintiffs had the burden of proving that Defendant's conduct was a "substantial factor" in causing the accident. Plaintiffs' effort to shift the burden of proof to require Defendant to prove that Sgt. Rector's actions were the "sole and exclusive cause" of the accident was correctly rejected by the trial court and is not supported by either the text, context, or legislative history of ORS 18.470, which only prohibits a jury, on its verdict form, from apportioning fault between a party to the lawsuit and an immune nonparty.

In any event, even if Plaintiffs are correct that the trial court somehow erred in this regard, that error was harmless because the jury found that Defendant was not negligent and did not cause the accident, and therefore the jury necessarily found that the accident was the "sole and exclusive fault" of Sgt. Rector.

ARGUMENT

The jury correctly was allowed to consider whether Sgt. Rector caused the accident, and the jury correctly was instructed not to apportion fault or negligence between Sgt. Rector and Defendant.

This case is not nearly as complicated as Plaintiffs and *amicus curiae* Oregon Trial Lawyers Association suggest. In their lawsuit, Plaintiffs alleged that Defendant's conduct

was negligent and a legal cause of Plaintiffs' damages. Defendant presented evidence that Plaintiffs' damages were caused by Sgt. Rector, an immune nonparty. The trial court correctly allowed such evidence and also correctly instructed the jury that it could not compare Sgt. Rector's negligence with Defendant's or allocate a percentage of fault to Sgt. Rector, but that the jury, in determining whether Plaintiffs had proved their claim against Defendant, could consider Sgt. Rector's actions. The jury concluded that Defendant was not negligent or was not a substantial cause of Plaintiffs' damages.

Consistent with the text and context of ORS 18.470, the jury correctly was instructed that Sgt. Rector was not a party to the lawsuit because he is immune from liability, that the jury, in determining the cause of the accident, could consider Sgt. Rector's actions, but that the jury could not compare (*i.e.*, apportion in terms of a percentage on the verdict form) Sgt. Rector's fault, if any, with that of either the Defendant or Third-Party Defendant:

The precautionary jury instruction:

> "Sgt. Rector is not a party to this case because, under Oregon law, he and the Oregon State Police are immune from liability for negligence to the estate of Scott Lyons.
>
> "You may, however, consider his actions *as part of the overall circumstances existing at the time of this accident* in assessing the claims of negligence in this case. If you find that Defendant Walsh & Sons' truck driver was negligent and that his negligence was a substantial factor in causing the accident and the death of Scott Lyons, *you will not compare that negligence with any negligence by Sgt. Rector.*" (Tr 833-34; ER-11-12; *Lyons*, 183 Or App at 80; emphasis added)

The jury instruction:

> "As I told you earlier, Sgt. Rector and the Oregon State Police are immune from liability and are not parties to this lawsuit. If you find that [D]efendant 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.*
>
> "* * * * *

> "You will not compare any negligence of Sgt. Rector and any negligence of Walsh or [Third-Party Defendant] May. Plaintiffs have the burden of proving by a preponderance of the evidence that [D]efendant Walsh was negligent and that this negligence was a cause of the accident and the death of Scott Lyons and their damages." (Tr 1574-76; ER-24-26; *Lyons*, 183 Or App at 81; emphasis added)

> "* * * In order to be a cause of injury, an act must be a substantial factor in producing the injury. 'Substantial' means important and material, and not insignificant. Many factors or things may operate independently or together to cause an accident. In such case, each may be a cause of the accident, even though the other would have been sufficient to cause the same accident. You need not find that one person's conduct was the sole cause of the accident." (Tr 1582; ER-32; *Lyons*, 183 Or App at 81)

Those jury instructions were correct and consistent with Oregon case law and statutes. Plaintiffs' argument suggests that the order of proof or consideration of causation somehow should be changed. Plaintiffs contend not only that the jury instructions were improper because they allowed the jury to consider Sgt. Rector's actions as part of the overall circumstances existing at the time of the accident in assessing the claim of negligence in this matter, but Plaintiffs also contend that the jury should have been instructed to determine whether Defendant's negligence was a substantial factor without even considering Sgt. Rector's conduct. That argument is without any case authority and is contrary to the well-established rule, recognized by the Court of Appeals in this matter, that a determination of liability -- whether a defendant's conduct was a "substantial factor" in causing a particular result -- must be based on *all* of the circumstances existing at the time of the accident, *i.e.*, on "the totality of potentially causative circumstances." *Lyons*, 183 Or App at 83.

Jurors are presumed to follow a trial court's instructions, and copies of the jury instructions were given to the jury to be used during the jury's deliberations in this matter. (Tr 833, 1569; ER-19) *See State v. Walton*, 311 Or 223, 250, 809 P2d 81 (1991). Consistent

with ORS 18.470, the jury correctly was told not to apportion fault to an immune nonparty (Sgt. Rector) on its verdict form, and the jury correctly followed that instruction.

Plaintiffs' arguments are premised on an incorrect interpretation of ORS 18.470 and its context in light of Oregon case law, which allows a defendant to counter a plaintiff's negligence claim by presenting evidence that another person caused the plaintiff's injuries or damages. ORS 18.470 does not take away a defendant's ability to present such evidence. Neither ORS 18.470 nor its legislative history supports Plaintiffs' argument that the only way that the jury could consider whether Sgt. Rector caused the accident was if Defendant proved that Rector's actions were the sole and exclusive cause of the accident.

A. ORS 18.470 does not prevent a jury from considering whether a nonparty caused an accident or injury.

The crucial issue in this matter is *causation*, not comparison or apportionment of fault or negligence. The jury correctly was instructed that it had to determine the *cause* of the fatal accident. ORS 18.470 does not conflict with the jury instructions given by the trial court.

In determining the meaning and effect of ORS 18.470, as amended in 1995, this Court applies the familiar methodology of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993). Pursuant to *PGE*, the Court determines the meaning of a statute by first examining the text and context of the statute itself. If the text and context of the statute clearly indicate the legislature's intent with regard to the statute, further inquiry is unnecessary. 317 Or at 611. If the legislature's intent is unclear, however, the Court will examine the statute's legislative history. *Id.* at 611-12. If the meaning of a statute still is uncertain, after consideration of legislative history, then the Court "may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.* at 612.

The text and context of ORS 18.470 clearly and plainly demonstrate that the statute does not address *causation*, but only *apportionment* of fault. The legislative history of the statute supports and reinforces that conclusion. Neither the text nor legislative history of ORS

18.470 indicates that the Oregon legislature intended the statute to dramatically transform Oregon's common law, with regard to causation, in the way that Plaintiffs and *amicus curiae* OTLA propose. Because the Court of Appeals' interpretation of ORS 18.470 is consistent with the statute's text, context, legislative history, and prior Oregon case law, this Court should affirm the decision of the Court of Appeals.

1. The text and context of ORS 18.470 demonstrate that the statute concerns apportionment, not causation.

ORS 18.470, as amended in 1995, provides:

> "(1) Contributory negligence shall not bar recovery in an action by any person or the legal representative of the person to recover damages for death or injury to person or property if the fault attributable to the claimant was not greater than the combined fault of all persons specified in subsection (2) of this section, but any damages allowed shall be diminished in the proportion to the percentage of fault attributable to the claimant. This section is not intended to create or abolish any defense.
>
> "(2) 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.
>
> "(3) A defendant who files a third party complaint against a person alleged to be at fault in the matter, or who alleges that a person who has settled with the claimant is at fault in the matter, has the burden of proof in establishing:
>
> "(a) The fault of the third party defendant or the fault of the person who settled with the claimant; and

> "(b) That the fault of the third party defendant or the person who settled with the claimant was a contributing cause to the injury or death under the law applicable in the matter.
>
> "(4) 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.
>
> "(5) This section 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."

Plaintiffs and *amicus curiae* OTLA contend that ORS 18.470 prohibits a defendant from producing evidence that an immune nonparty caused the injury or damages unless the defendant affirmatively proves that the immune nonparty was the "sole and exclusive" cause of injury or death. The Court of Appeals correctly rejected that argument:

> "The text of ORS 18.470 is explicit: It addresses the jury's apportionment of *comparative fault* and precludes the jury, in performing that allocation, from considering the fault of an immune person. The statute does not speak to a jury's determination of 'substantial factor' *causation* – that is, whether a party is at fault *at all*."

Lyons, 183 Or App at 85 (emphasis in original). The text of ORS 18.470 does not involve causation; it unambiguously concerns *only* apportionment of fault.

Evaluation of each section of ORS 18.470, in turn, demonstrates that the statute addresses only apportionment of fault and does not involve causation. ORS 18.470(1) provides that comparative negligence bars a plaintiff's recovery from one or more defendants only if the plaintiff's fault is greater than the combined fault of all of the persons specified in ORS 18.470(2). ORS 18.470(1) plainly addresses only comparative fault -- the comparison of a plaintiff's fault to a defendants' fault. Significantly, ORS 18.470(1) specifies that ORS 18.470 "is not intended to create or abolish any defense."

ORS 18.470(2) provides that, for the purpose of the contributory negligence evaluation, the plaintiff's fault is compared to the fault of "any party against whom recovery is sought," "third party defendants who are liable in tort to the [plaintiff]," or to "the fault of any person with whom the [plaintiff] has settled." That subsection further provides that "there shall be no comparison of fault" with any person who is "immune from liability to the [plaintiff]," who is not subject to the court's jurisdiction, or who is protected from liability due to the statute of limitations or statute of ultimate repose, unless that person has settled with the plaintiff. ORS 18.470(2), therefore, designates the class of persons with whom the plaintiff's fault can be compared in the comparative negligence analysis. It is undisputed that Sgt. Rector and the Oregon State Police are not within the class of persons to which a percentage of liability can be apportioned, because they are immune from liability. Again, ORS 18.470(2) plainly concerns comparison and apportionment of fault, but not consideration of a nonparty's actions with regard to determining causation.

Pursuant to ORS 18.470(3), a defendant who files a third-party complaint, or who claims that a settled party is at fault, bears the burden of establishing the fault of that other person and that the person's fault was a "contributing cause" of the injury or death. Subsection (3) concerns third-party defendants and nonparties who can be apportioned a percentage of fault pursuant to ORS 18.470(2). If a defendant wishes to have a third-party defendant or a qualifying nonparty apportioned a percentage of fault, the defendant bears the burden of establishing that the other person is liable to the plaintiff. In context with subsection (2), subsection (3) plainly addresses apportionment of fault.

ORS 18.470(4) provides that any party to an action "may seek to establish" that a person's fault should not be considered by the jury "by reason that the person does not meet the criteria established by subsection (2) of this section for the consideration of fault." Therefore, if a defendant attempts to have a percentage of fault attributed to a nonparty, a

party can argue that no apportionment is allowed because the nonparty does not fall within the class of persons established by ORS 18.470(2). This subsection, in conjunction with subsection (2), concerns the designation of the parties to which fault can be allocated.

Plaintiffs correctly note that ORS 18.470(4) uses the term "consider" instead of the term "compare." (Pl Br 8) ORS 18.470(2) also uses the term "consider." However, Plaintiffs' assertion that the legislature's use of the term "consider" broadens the effect of the statute beyond its unambiguous scope is incorrect. The statute (and the legislative history, discussed below) appears to use the terms "compare" and "consider" interchangeably. In context, the word "consider," like the word "compare," plainly refers to the jury's analysis and allocation of a percentage of fault. Use of the word "consider," in this comparative fault statute and context, does not prevent or preclude a jury from "considering" an immune nonparty's role in causing a plaintiff's injuries for the purpose of determining whether a plaintiff has proven its *prima facie* case against a defendant.

ORS 18.470(5) provides 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." Plaintiffs' interpretation of ORS 18.470(5) would require a defendant to prove that a nonparty bears the sole and exclusive fault for the injuries or damages in order for the defendant's evidence about the nonparty's fault to be relevant. (Pl Br 8-9) However, the text of that statute does not impose any such requirement. The phrase "does not prevent a party from alleging" cannot be read as "requires a party to prove." Plaintiffs' interpretation of the statute would impermissibly insert into the statute wording and meaning not supported by the text of the statute. *See* ORS 174.010 (providing that a court is "not to insert [into a statute] what has been omitted").

Additionally, as the trial court correctly noted, Plaintiffs' interpretation of the statute would shift the basic burden of proof from the plaintiff to the defendant. To recover from a

defendant, the plaintiff bears the burden of proving the defendant's liability. In a negligence action, the plaintiff has the burden of proving that the defendant's conduct was a "substantial factor" in bringing about the plaintiff's injury. *Lyons*, 183 Or App at 83, *citing Brennen v. City of Eugene*, 285 Or 401, 413, 591 P2d 719 (1979) ("For legal causation to exist under general principles of negligence, the act of the defendant must at least be a 'substantial factor' in bringing about the injury to plaintiff."). As discussed below, a defendant does not need to prove that another party is solely responsible for the plaintiff's injuries in order to escape liability; the *plaintiff* has the burden of proving that the defendant's conduct was a "substantial factor" in causing the plaintiff's injuries in order for the defendant to be liable. Plaintiffs' attempt to reverse that burden of proof, whenever another person caused or contributed to the plaintiff's injury, is simply wide of the mark.

In order for evidence of the nonparty's conduct to be admissible, Plaintiffs' interpretation of the statute would require a defendant to prove that the nonparty's conduct was the "sole and exclusive fault" of the plaintiff's injury even where the defendant is not asking the jury to apportion fault or negligence to that nonparty. That interpretation is inconsistent with ORS 18.470(3), which requires a defendant to prove that a nonparty's fault is simply a "contributing cause" of the plaintiff's injury where the jury *is* apportioning a percentage of fault to a nonparty. The statute cannot and should not be read to place a higher standard of proof on a defendant who uses evidence of a nonparty's conduct to counter the argument that the defendant's conduct caused the plaintiff's injury than on a defendant who is affirmatively attempting to have the jury assign a percentage of liability to a nonparty. Plaintiffs' interpretation is illogical and contradictory to the wording of the statute.

Plaintiffs also suggest that, because ORS 18.480 concerns apportionment of fault, ORS 18.470 cannot apply only to apportionment or allocation of fault.[4/] (Pl Br 7) However, Plaintiffs' conclusion does not follow from their premise. ORS 18.480 was enacted by the same bill that amended ORS 18.470 in 1975. Or Laws 1975, ch 599, §2. In *Sandford v. Chev. Div. Gen. Motors*, 292 Or 590, 609, 642 P2d 624 (1982), this Court explained the interaction between those statutory sections:

> "[A]fter the determining whether and how far each party's conduct was at fault, measured against the norm governing that party's conduct [as required by ORS 18.470], these respective degrees of fault are to be converted into a percentage which will be applied to the plaintiff's total damages to determine his actual recovery [as provided in ORS 18.480]."

As explained in *Sandford*, ORS 18.470 and ORS 18.480 set out the steps to an *apportionment* of fault. Neither statute limits evidence or arguments with regard to *causation*.

Because the text and context of ORS 18.470 demonstrate that it does not prevent a defendant from offering evidence that a nonparty's actions caused the plaintiff's injury, reference to the legislative history of the statute is unnecessary. However, the statute's legislative history enforces the plain language of the statute.

[4/] ORS 18.480 provides in pertinent part:

> "(1) When requested by any party the trier of fact shall answer special questions indicating:
>
> "(a) The amount of damages to which a party seeking recovery would be entitled, assuming that party not to be at fault.
>
> "(b) The degree of fault of each person specified in ORS 18.470 (2). The degree of each person's fault so determined shall be expressed as a percentage of the total fault attributable to all persons considered by the trier of fact pursuant to ORS 18.470."

2. The legislative history of ORS 18.470 confirms that it addresses only allocation of percentages of fault.

The Court of Appeals did not examine the legislative history of ORS 18.470, because the Court concluded that the text of the statute unambiguously expresses the legislature's intent. *See Lyons*, 183 Or App at 85 (stating that the Court's "construction of the statute comports not only with its unambiguous text but also with common sense"). An examination of that legislative history, however, confirms the conclusion reached by the Court of Appeals and demonstrates that the legislature intended ORS 18.470 to address *only* apportionment of fault, not evidence or arguments with regard to causation.

ORS 18.470, first enacted in 1971 (Or Laws 1971 ch 668, §1), provided:

> "Contributory negligence, including assumption of the risk, shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property if such negligence contributing to the injury was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of such negligence attributable to the person recovering."

Thus, the original version of the statute addressed only comparison of fault -- the "proportion" of fault -- as between the plaintiff and a particular defendant.

In 1975, the legislature amended ORS 18.470 to read:

> "Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for death or injury to person or property if the fault attributable to the person seeking recovery was not greater than the combined fault of the person or persons against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the percentage of fault attributable to the person recovering. This section is not intended to create or abolish any defense."

Or Laws 1975 ch 599, §1. Those amendments, among other things, "substituted a comparison of the parties' relative 'fault' for their relative 'negligence,' and also substituted the combined fault of several defendants for the previous reference to a single defendant." *Sandford*, 292 Or at 596 (analyzing differences between 1971 and 1975 versions of ORS 18.470). The

amendments also "specified that the 'proportion' of the claimant's fault be stated as a 'percentage of fault.'" *Id.* Therefore, the 1975 version of the statute also explicitly concerned only the apportionment of fault between a plaintiff and defendant.

In 1995, the legislature again amended ORS 18.470 and added subsections (2) through (5). Or Laws 1995 ch 696, §3 ("Senate Bill 601"). Those amendments reflected and responded to the judicial decisions applying and interpreting ORS 18.470. Therefore, a summary of those decisions is instructive.

In *Sandford*, this Court considered whether a plaintiff's ordinary negligence could be compared to a defendant's strict products liability for purposes of the comparative fault analysis. This Court assessed different methods and theories of apportioning fault and concluded that ORS 18.470 requires a factfinder "to assess the relative magnitude of the parties' respective 'fault'" in comparison to otherwise blameless conduct. 292 Or at 598-99, 606-07. Apportionment of fault does not become an issue, the Court noted, until after causation has been established -- "if either party convinces the factfinder that its misconduct in fact was not a cause of the injury, there is no occasion for allocating partial damages." *Id.* at 601-02. ORS 18.470, together with ORS 18.480, addresses only the comparison of and allocation of a percentage of liability; it does not concern causation. This Court in *Sandford* stated that "[t]here is no reference [in ORS 18.470] to causation." *Id.* at 606. The Court rejected the theory that the comparison required by ORS 18.470 involved a comparison of causation. *Id.*

In *Mills v. Brown*, 303 Or 223, 735 P2d 603 (1987), the plaintiff was injured when his vehicle was hit from behind while the plaintiff was stopping behind another vehicle that had run out of gas. 303 Or at 225. The plaintiff brought suit against the estate of the driver whose vehicle had rearended his vehicle, the driver of the vehicle that had run out of gas, and the owners of those vehicles. *Id.* The plaintiff settled with the rearending driver's estate, and the

trial court instructed the jury not to allocate any fault to the settled party. *Id.* This Court upheld the trial court's decision. "We interpret [ORS 18.470] as addressing itself only to those persons against whom recovery is sought when the case is submitted to the trier of fact for comparison of fault." *Id.* at 226. Therefore, the jury was allowed to allocate fault only to persons who were still parties in the action, at the time of the jury's comparative fault analysis. *Id.* at 230.

In *Davis v. O'Brien*, 320 Or 729, 891 P2d 1307 (1995), the trial court allowed the jury to allocate a percentage of fault to a settled party in a motor vehicle accident case. The jury allocated 96.5% fault to the settled party and 3.5% fault to the remaining defendant. Applying the *Mills v. Brown* rule, this Court ruled that the trial court had erred in allowing the jury to allocate fault to the settled party and that, instead, the jury should only have been allowed to allocate fault to the remaining defendant. 320 Or at 740, 746. This Court held that a 1987 amendment of the statute concerning reallocation of liability did not overrule *Mills v. Brown* and require the jury to allocate fault (if it found such fault) to the settled party. *Id.*

Senate Bill 601 appears to have been proposed largely as a response to the rulings in *Mills v. Brown* and *Davis v. O'Brien*. The legislative history of the Bill demonstrates that the Bill, like the cases it responded to, addressed *apportionment* of percentages of liability, not *consideration* of nonparty conduct within a causation analysis. The legislative history is replete with references to percentages of fault and allocation,[5/] and it contains extensive

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[5/] *See, e.g.*, Testimony of Tom Cooney, Oregon Medical Association, SB 601, Senate Judiciary Civil Process Subcommittee, March 1, 1995, Tape 30, Side B (discussing procedural requirements that original version of the bill placed "upon the defendant who wishes to have the jury consider and assess a percentage of fault to a nonparty * * *"); Testimony of Tom Tongue, Oregon Association of Defense Counsel, Senate Judicial Committee, SB 601, May 10, 1995, Tape 157, Side A (discussing amendments to bill "that would permit a jury to include the fault of settling parties in allocating shares of fault"); Testimony of Tom Tongue, Oregon Association of Defense Counsel, House Committee on the Judiciary, SB 601, June 2, 1995, Tape 44, Side A (stating that, under the bill, the jury is "asked to allocate the percentages of fault among those people in the case that they find are legally responsible"); Testimony of Peter Glazer, Mothers Against Drunk Driving, House

[Footnote continued on next page]

discussion of how Senate Bill 601 changed Oregon joint and several liability and comparative fault law. That legislative history does not discuss or demonstrate any intent to change Oregon's common law with regard to *causation*.

Plaintiffs correctly note (at Pl Br 9-10) that the drafters of the original version of Senate Bill 601 were cognizant of a Montana Supreme Court ruling in *Newville v. State, Dept. of Family Services*, 883 P2d 793 (Mont 1994), in which the court held that a similar comparative fault scheme violated substantive due process. In *Newville*, the plaintiffs, guardians ad litem for a young girl abused by her foster father, brought suit against the foster father, foster mother, the foster parents' counselor, the Department of Family Services, and a Department employee. The trial court dismissed the Department employee, and the plaintiffs settled with the foster father and counselor before trial. 883 P2d at 798. The special verdict form included the foster mother, the Department, and the counselor. *Id.* (The court did not include the foster father on the verdict form because it ruled that his conduct was intentional, and he was thus jointly and severally liable for all damages under Montana law.)

The jury in *Newville* found the Department 30% liable, the foster mother 35% liable, and the counselor 35% liable. *Id.* The foster mother subsequently settled with the plaintiffs. *Id.* The trial court allowed the jury to allocate a percentage of fault to the counselor pursuant to a Montana statute that provided in part:

> "For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune

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[Footnote continued from previous page]
Committee on the Judiciary, SB 601, June 2, 1995, Tape 45, Side A ("[I]t's a revolution in Oregon law, to say that the defense, or at the time of trial, can bring up and use other individuals who are not defendants at the time of trial in allocating the fault"); Testimony of John DiLorenzo, Oregon Litigation Reform, House Committee on the Judiciary, SB 601, June 2, 1995, Tape 44, Side B ("Basically, what Senate Bill 601 does, it says that the jury can apportion fault not only among those who are presently before the court, but also parties who the plaintiff settled with.").

> from liability to the claimant, and any other persons who have a defense against the claimant. The trier of fact shall apportion the percentage of negligence of all such persons."

883 P2d at 800 [*quoting* §27-1-703(4), MCA (1987)]. The Montana Supreme Court held that the statute violated substantive due process by "unreasonably mandat[ing] an allocation of percentages of negligence to nonparties without any kind of procedural safeguard." *Id.* at 802.[6/]

In light of *Newville*, the original version of Senate Bill 601 included notice provisions apparently intended to provide the type of "procedural safeguards" discussed in *Newville*. The *Newville* decision, however, and the statute it addressed, explicitly concern only allocation of a percentage of fault to nonparties. Neither the statute nor the case discussed causation. The legislature's consideration of *Newville* does not indicate any intent to overrule Oregon's prior causation case law.

The Montana Supreme Court itself has made the distinction between allocation and causation clear. In *Pula v. State*, 40 P3d 364 (Mont 2002), a jail inmate was raped by another inmate. She subsequently brought suit against the state of Montana. 40 P3d at 366. At trial, the inmate objected to the state's submission of evidence that the actions of nonparties, including the rapist, were the intervening and superseding causes of the inmate's injury. *Id.* On its verdict form, the jury concluded that the state had been negligent, but that the state's negligence was not a cause of the inmate's injuries. *Id.* at 366-67. Relying on case law following *Newville*, the inmate argued that the introduction of evidence of a nonparty's fault

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[6/] In response to *Newville*, the Montana legislature in 1995 amended §27-1-703, MCA, to provide a variety of "procedural safeguards" that applied when a defendant sought to have the jury allocate a percentage of fault to a nonparty. *See* §27-1-703, MCA (1995). The Montana Supreme Court invalidated those amendments the next year, holding that the portion of the statute "which allows apportionment of liability to parties who are not named in the lawsuit and who do not have an opportunity to appear and defend themselves * * * violate[s] the [plaintiffs' and nonparty's] right of substantive due process." *Plumb v. Fourth Jud. Dist. Court*, 927 P2d 1011, 1021 (Mont 1996). As with *Newville*, *Plumb* explicitly concerns allocation of liability, not issues of causation.

violated her substantive due process rights. *Id.* at 367. The Montana Supreme Court rejected that argument:

> "The issue in this case * * * is not how to apportion blame among several liable parties but whether, because of the intervening negligence of another, the State's acts or omissions could be said to be the cause of [the inmate's] injuries."

Id. Its prior allocation decisions, the Court stated, "did not disturb the validity of the intervening cause exception to the general test for causation." *Id.*

The legislative history of Senate Bill 601 also contains references to Washington's comparative fault statute.[7/] Under Washington's statute, "the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant [pursuant to Washington's workers' compensation statutes]." RCW §4.22.070(1). As in Oregon, therefore, an employer in Washington that is immune as a result of workers' compensation statutes cannot be allocated a percentage of fault. Applying Washington law, the United States Court of Appeals for the Ninth Circuit has rejected a plaintiff's contention that a defendant could not submit evidence that the plaintiff's immune employer's actions, not the defendant's actions, caused the plaintiff's injury. *Geurin v. Winston Industries, Inc.*, 316 F3d 879 (9th Cir 2002). Regardless of whether a percentage of fault could be allocated to the employer, the court stated that "the evidence of third-party 'fault' would still have been admissible to negate an essential element of the plaintiff's case -- proximate cause." *Id.* at 884.

Viewed in its entirety, it is clear that the relevant portion of Senate Bill 601 concerned allocation of percentages of liability. The legislative history does not contain any indication that the legislature intended to take away a defendant's opportunity to argue that another individual or entity caused the plaintiff's injuries, or that the legislature intended to shift the

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7/ *See* Testimony of Lawrence Wobbrock, Senate Judiciary Committee, SB 601, May 10 1995, Tape 157, Side A (discussing similarities between SB 601 and Washington statute).

burden to a defendant to prove that a nonparty was the sole and exclusive cause of the plaintiff's injuries or damages. The contrary arguments of Plaintiffs and *amicus curiae* OTLA are not supported by the text, context or legislative history of ORS 18.470.

B. Oregon common law allows a defendant to submit evidence of a nonparty's role in causing a plaintiff's injuries or damages pursuant to the defendant's general denial.

Plaintiffs erroneously contend that ORS 18.470 prohibits the submission of evidence as to, or the jury's consideration of, the conduct of an immune nonparty unless the defendant proves that the immune nonparty was the sole and exclusive cause of the plaintiff's injury, and that evidence of an immune nonparty's conduct is not relevant to the question of whether the *defendant* was negligent and whether that negligence was a cause of the injury.

The Court of Appeals correctly ruled that evidence of another party's conduct is relevant to determining whether a defendant is legally responsible for the plaintiff's injuries or damages. *Lyons*, 183 Or App at 83-84. OEC 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence of a nonparty's role in causing a plaintiff's injury does have a tendency to make defendant's cause of the injury more or less likely. Such evidence is admissible if it is relevant; such evidence does not need to be definitive, as Plaintiffs seem to suggest.

Oregon law historically has allowed a defendant to counter a plaintiff's negligence claim by presenting evidence, under a general denial, that something or someone else caused the plaintiff's injuries or damages. In *Raffaele v. McLaughlin*, 229 Or 301, 366 P2d 722 (1961), for example, the plaintiff was injured while riding as a passenger in her sister's vehicle and brought suit against the other driver in the accident. The plaintiff objected to jury instructions that allowed the jury to consider the negligence of the plaintiff's sister in causing the accident. 220 Or at 305-06. This Court held that the sister's purported negligence was

relevant to a jury's determination as to whether the defendant's acts caused the plaintiff's injuries:

> "The jury was clearly informed that the negligence, if any, of plaintiff's driver could not be imputed to her; but, if the plaintiff's driver was guilty of negligence in failing to stop before entering the public highway from a private driveway, the hazardous conditions created by her conduct certainly bore a distinct relationship to the operation of his car by the defendant. If the jury found that the plaintiff's driver was negligent and that this negligence was the sole proximate cause of the accident, then the defendant would be relieved of all liability."

Id. at 306; *see also Conner v. Mertz*, 274 Or 657, 660, 548 P2d 975 (1976) ("It is well settled that the negligence of the driver of an automobile will not be imputed to a guest, but if the driver's negligence is the sole cause of the accident, then the guest cannot recover against the driver of the other vehicle."); *Denham et ux v. Cuddeback*, 210 Or 485, 489, 311 P2d 1014 (1957) (stating that the defendant has a right to give evidence under a general denial controverting any fact necessary to be established by the plaintiff for recovery); *Duff v. Willamette Steel Works*, 45 Or 479, 483, 78 P 363 (1904) (stating that, in contrast to a defense based on the fellow-servant rule, which had to be specifically pled, a defendant may show "under [a general] denial that the injury arose from some other cause, such as the act of some person not its agent or employee").

By definition, if a nonparty's acts are the sole cause of the plaintiff's injuries or damages, the defendant's acts were not a substantial cause of those injuries or damages, and the defendant cannot be liable. Consequently, a defendant may present evidence regarding a nonparty's fault, and the court may instruct the jury that, if the nonparty is solely at fault, the defendant is not liable. In *Brindle v. McCormick Lbr. & Mfg. Corp.*, 206 Or 333, 293 P2d 221 (1956), for example, the plaintiff was injured while riding as passenger in a vehicle driven by her husband. The plaintiff contended that the vehicle had been forced off the road by the defendant's log truck, but the defendant argued that the negligence of the driver, who

was not a party to the action, caused the accident. The Court affirmed the trial court's instruction to the jury that, if the driver's negligence was the "proximate and sole" cause of the accident, "then the plaintiff cannot recover and your verdict must be for the defendants." 206 Or at 338. The Court stated that "[i]f [the driver's negligence] was the sole proximate cause of the accident, then the defendants were not negligent as alleged," and that "under a general denial the negligence of a third party, for which the defendant is not responsible, may be shown to have been the proximate cause of an accident." *Id.* at 339, *quoting Whisnant v. Holland*, 206 Or 392, 292 P2d 1087 (1956).

A nonparty's negligence or fault is not an affirmative defense that must be proved by the defendant. *See, e.g., Brown v. Jones,* 137 Or 520, 3 P2d 768 (1931) (rejecting plaintiff's contention that defendant's assertions that another party had caused plaintiff's injuries had to be pleaded). Instead, evidence that another party, and not the defendant, caused the plaintiff's damages or injuries simply counters the plaintiff's *prima facie* negligence claim. *See Shane v. Oberding*, 254 Or 214, 216-17, 458 P2d 930 (1969) (explaining that, if the jury finds that another person solely caused plaintiff's injury, then defendant's actions cannot be a legal cause of the plaintiff's injury).

In *Shane*, this Court agreed that a jury instruction "that the plaintiff must satisfy [the jury] by a preponderance of the evidence that a third party was not the sole cause of the accident" correctly stated the law. This Court explained that "[t]his is simply a reverse way of saying that plaintiff must prove that defendant's negligence was a cause of the accident." 254 Or at 217. Moreover, this Court stated that, "[u]nless it was proved that a third party's negligence was not the sole cause, defendant's negligence could not be a cause." *Id.* The Court decided that the specific instruction in *Shane* was confusing, because it stated the plaintiff's burden of proof in a negative form. *Id.* However, this Court in *Shane* expressly stated that it is the plaintiff's burden to prove that the nonparty was not solely responsible for

the plaintiff's injuries -- in other words, that the acts of the defendant were a substantial factor in causing the plaintiff's injuries. The plaintiff continues to bear the burden of proving the essential elements of its claim, including causation.

As discussed above, and as the Court of Appeals correctly concluded, ORS 18.470 does not abrogate this well-established case law. Indeed, ORS 18.470(1) provides that "[t]his section is not intended to create or abolish any defense." Moreover, Plaintiffs recognize that, for nearly 100 years, defendants have been allowed to show that a plaintiff's injuries or damages were caused by another party. [Pl Br 11, *citing Multnomah Co. v. Willamette T. Co.*, 49 Or 204, 218, 89 P 389 (1907), and *Duff*, 45 Or at 483] Plaintiffs also recognize that it is a plaintiff's burden to prove that a nonparty is not the sole cause of the plaintiff's injuries or damages. These principles are inconsistent with Plaintiffs' argument that ORS 18.470 prevents the jury from "considering" an immune nonparty's fault for any purpose. Plaintiffs' interpretation of that statute would, in fact, represent a significant alteration of Oregon's causation case law.

Plaintiffs also contend that Defendant's interpretation of ORS 18.470, and the applicable case law, unfairly require a plaintiff to defend unrepresented parties. (Pl Br 10-12) That argument is a red herring. Plaintiffs did not need to defend any unrepresented parties in this case, because there was no chance that any percentage of liability would be allocated to any unrepresented party. Sgt. Rector was not on the verdict form, and Defendant never asked that Rector be placed on the verdict form. The jury absolved Defendant from liability because Plaintiffs did not prove their *prima facie* case against Defendant -- namely, that Defendant's actions were a substantial cause of Plaintiffs' injuries. If Plaintiffs had established any liability on the part of Defendant, Defendant would have been liable for all of Plaintiffs' damages.

C. Evidence that Sgt. Rector caused the accident was admissible.

Plaintiffs and *amicus curiae* OTLA erroneously contend that testimony that Sgt. Rector's "improper" U-turn was the "principle cause" of the accident was inadmissible, apparently because that testimony did not dispositively state that Sgt. Rector's actions were the "sole and exclusive" cause of the accident. Evidence of Sgt. Rector's acts -- and the effects of those acts -- was admissible, even if not dispositive, because that evidence was relevant to the jury's determination of whether Defendant's acts were a substantial cause of Plaintiffs' damages. Evidence regarding Sgt. Rector's actions in causing the accident had a tendency to make it more or less likely that Defendant was a cause of the accident. Therefore, the evidence was admissible under OEC 401, as the Court of Appeals correctly concluded. *Lyons*, 183 Or App at 83-84.[8/]

Moreover, as discussed above, Defendant did not bear the burden of proving that Sgt. Rector's conduct was the "sole and exclusive" cause of Plaintiffs' damages. An argument that a nonparty is at fault for a plaintiff's damages is not an affirmative defense. *Brown v. Jones*, 137 Or at 524-25. Such evidence simply counters a plaintiff's contention that the defendant was a substantial cause of the plaintiff's injuries or damages. *Shane*, 254 Or at 216-17. Defendant did not need to *prove* that Sgt. Rector was the "sole and exclusive" cause of Plaintiffs' damages in order to avoid liability. It was Plaintiffs' burden to prove that

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[8/] Plaintiffs take issue with the Court of Appeals' citation to Section 433 of the *Restatement (Second) of Torts* (1965). *Lyons*, 183 Or App at 83-84. Section 433 and its comments explain that there can be many causes of a plaintiff's injuries or damages, and some of those causes may be *de minimus* or insubstantial in light of all of the contributing causes. Section 433 has been cited with approval by both the Oregon Court of Appeals in *Davis v. Pacific Diesel*, 41 Or App 597, 604, 598 P2d 1228 (1979), and this Court in *Canada v. Royce et al.*, 199 Or 196, 202-03, 257 P2d 624 (1953). Neither *Stewart v. Jefferson Plywood Co.*, 255 Or 603, 606, 469 P2d 783 (1970) (Pl Br 13) (which discussed scope of liability with the presupposition that the plaintiff already had established that a defendant's conduct was a substantial factor in causing the plaintiff's injury), nor *Sandford* (Pl Br 13) indicates that a jury cannot consider the extent of another party's casual contribution in determining whether the defendant's conduct was a substantial factor in causing the plaintiff's injuries or damages.

Defendant was a cause of their damages, and they failed to do so. Evidence that countered Plaintiffs' basic case was relevant, admissible and appropriate.

D. This Court should reject Plaintiffs' argument that is not based on ORS 18.470, because that argument was not preserved and is incorrect.

For the first time on appeal, Plaintiffs contend that "[e]ven if the Court of Appeals w[as] 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." (Pl Br 12) Plaintiffs follow that assertion with four pages of argument (Pl Br 12-15) in which they attempt to distinguish between fault, causation and negligence in their erroneous argument that the trial court erred in allowing the jury to consider evidence of Sgt. Rector's actions in causing the fatal accident. That argument is being made for the first time before this Court, and it was not made either before the trial court or the Court of Appeals.

Plaintiffs' motions in limine were based *only* on ORS 18.470, and Plaintiffs' First Assignment of Error in their Opening Brief filed with the Court of Appeals made that abundantly clear, as did the argument by Plaintiffs' attorney that was quoted in that Assignment of Error: "[Defendant would] like to be able to introduce evidence just that [Sgt. Rector] was a substantial factor, and I don't -- it's irrelevant because of [ORS] 18.470." (Pl Op Br 7, *quoting* Tr 168) All of Plaintiffs' other Assignments of Error raised in the Court of Appeals were based on Plaintiffs' incorrect interpretation of ORS 18.470, and that is how the Court of Appeals correctly interpreted and ruled on those Assignments of Error. *Lyons*, 183 Or App at 79, 82. Consequently, this Court should reject Plaintiffs' effort at this late date to broaden their argument to include an "even if" argument. Plaintiffs simply failed to preserve that argument.

In any event, Plaintiffs' argument in this regard incorrectly characterizes Defendant's evidence and arguments as to why the trial court correctly allowed the jury to consider evidence of Sgt. Rector's conduct in causing the accident. Throughout their brief, Plaintiffs repeatedly assert that Defendant introduced evidence of Sgt. Rector's "negligence" and also that Defendant argued to the jury that Sgt. Rector was "negligent." (*See, e.g.*, Pl Br 5-6, 13) As discussed above, what Defendant did and what the trial court allowed Defendant to do was to present evidence of Sgt. Rector's *conduct* in causing the accident. That is an important distinction, as will now be discussed.

Plaintiffs and *amicus curiae* OTLA make a strained argument suggesting that Defendant cannot mention or present evidence of "fault" or "negligence" on the part of Sgt. Rector, only evidence of "causation." There is no dispute that "negligence" and "causation" are different legal concepts. A plaintiff attempting to prove liability on the part of a defendant must prove both negligence and substantial factor causation. In this matter, however, Defendant did not ask the jury to weigh or assign any proportion of liability to Sgt. Rector, because Sgt. Rector was immune from liability. Defendant did not ask the jury to assign *any* proportion of "fault" or "negligence" to Sgt. Rector. Instead, the trial court correctly instructed the jury to consider whether Defendant was negligent and a "substantial factor" cause of Plaintiffs' damages. The jury answered "No."

The distinction between a nonparty's negligence, causal contribution, and fault is not generally made with reference to a nonparty, because no "fault" is being apportioned to the nonparty. As Plaintiffs even acknowledge (Pl Br 15), a number of Oregon cases refer to the "negligence" and "fault" of nonparties in cases in which a defendant contends that the nonparty caused the plaintiff's damages.

State ex rel Sam's Texaco & Towing v. Gallagher, 314 Or 652, 660, 842 P2d 383 (1992), cited by OTLA (Amicus Br 4, 8), holds that jurors need not agree as to whether a

defendant was negligent if they agree that the defendant's acts did not cause the plaintiff's injuries. Whether it was negligence or causation that the plaintiff failed to establish, the jury's decision would constitute a valid verdict in favor of the defendant. 314 Or at 660. *Sam's Texaco & Towing* supports the form of the trial court's jury instructions and verdict form in this matter. That case does not indicate or suggest that a defendant cannot argue that another person *caused* a plaintiff's injuries or damages.

The evidence that Plaintiffs find objectionable was relevant to the jury's determination of whether Defendant's acts were a substantial cause of Plaintiffs' damages. Sgt. Rector's acts were "improper" because they caused the accident. As discussed above, Oregon case law establishes that it was not improper for Defendant to refer to Sgt. Rector's fault in causing the accident in order to counter Plaintiffs' negligence claim.

Plaintiffs also contend that the decision of the Court of Appeals endorses a comparative causation approach to the substantial factor inquiry. (Pl Br 12-14) If Plaintiffs' contention is that the Court of Appeals has adopted the type of comparative causation standard discussed in prior Oregon case law, that contention is incorrect. "Comparative causation," as described in Oregon cases, is an alternative approach to allocating damages. In *Sandford*, for example, the Court contrasted "comparative causation" with "comparative fault" and "mixed 'fault' and 'proximate' causation" as different methods for determining the "percentage of fault attributable" to the parties. 292 Or at 598-610. The Court concluded that ORS 18.470 indicated adoption of the comparative fault methodology for apportioning damages. *Id.* at 606-10; *see also Mills v. Brown*, 303 Or at 228-29 (discussing Wisconsin's adoption of a comparative causation approach for determining a party's percentage of responsibility and noting this Court's adoption of the comparative fault approach in *Sandford*). This matter does not involve any allocation or apportionment of damages.

If Plaintiffs' contention is that the jury cannot consider a nonparty's conduct in determining whether a defendant's acts were a substantial cause of a plaintiff's injuries or damages, that contention is disproved by the decades of Oregon case law (discussed above) allowing a defendant to argue that another party is at fault for the plaintiff's injuries or damages, pursuant to the defendant's general denial. As the Court of Appeals correctly stated, the determination of whether a defendant's conduct was a substantial factor cause of a plaintiff's injuries or damages "must be made with reference to the totality of potentially causative circumstances." *Lyons*, 183 Or App at 83.

Defendant did not ask the trial court or the jury to allocate a percentage of fault to any nonparties in this matter. Instead, Defendant argued only that, given Sgt. Rector's actions and conduct in causing the accident, Defendant's actions were not a "substantial factor" in causing Plaintiffs' injuries. Therefore, comparative causation is not at issue.

E. In any event, any claimed error was harmless.

By its verdict, the jury found that Defendant was not negligent and did not cause the accident. In its Verdict Form, the jury answered "No" to the first question: "Was [D]efendant WALSH & SONS TRUCKING CO., LTD. negligent in one or more of the ways claimed by the [P]laintiffs and, if so, was such negligence a cause of damage to the [P]laintiffs?" The Verdict Form instructed the jury that, if the answer to that question was "no," the jury's verdict was for Defendant and no other questions on the Verdict Form needed to be answered. (ER-9; *Lyons*, 183 Or App at 81-82) The jury followed that instruction.

Consequently, even if Plaintiffs are correct that the trial court somehow erred in instructing the jury, that error was harmless because the jury necessarily found that the accident was the sole and exclusive fault of Sgt. Rector.

CONCLUSION

The Judgment for Defendant should be affirmed.

In the event that this Court reverses the Judgment, this matter should be remanded to the Court of Appeals for consideration of Defendant's Cross-Assignment of Error raised at pages 15-24 of Defendant's answering brief filed in the Court of Appeals. Defendant cross-assigned error to the trial court's denial of Defendant's motions for a directed verdict and related motions *in limine* regarding Plaintiffs' evidence of Defendant's liability for the operation of its truck by Defendant's employee while he was allegedly impaired by a controlled substance. As discussed in Defendant's answering brief filed in the Court of Appeals, there was no credible or probative evidence that, when the accident occurred, Defendant's truck driver was operating the vehicle while impaired by a controlled substance. *See Lyons*, 183 Or App at 78 n 1.

DATED: October 21, 2003.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2003, two true and correct copies of the foregoing **DEFENDANT'S ANSWERING BRIEF ON THE MERITS** were served on each of the following by depositing the same in the United States mail in Portland, Oregon, enclosed in a sealed envelope with postage thereon fully prepaid and addressed as follows:

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/s/ I. Franklin Hunsaker
I. Franklin Hunsaker

I also certify that on October 21, 2003, the original and 12 copies of the foregoing **DEFENDANT'S ANSWERING BRIEF ON THE MERITS** were filed with the Oregon Supreme Court by depositing the same in the United States mail in Portland, Oregon, enclosed in a sealed envelope with postage thereon fully prepaid and addressed as follows:

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