

IN THE SUPREME COURT OF THE STATE OF OREGON

DWIGHT G. PURDY, Conservator
for ISABELLE EVE NORTON, a
minor,

Plaintiff- Appellant,
Petitioner on Review,

v.

DEERE AND COMPANY, a foreign
corporation, and RAMSEY-WAITE
CO., a corporation,
Defendants-Respondents,
Respondents on Review.

SC No. S060993

CA No. A144265

Lane County Circuit Court No.
16-08-00466

**BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION
IN SUPPORT OF PETITION FOR REVIEW (Amended)**

Petition for Review of the Opinion of the Court of Appeals dated
October 10, 2012

Opinion by Schuman, Presiding Judge; Wollheim and Nakamoto, concurring.
Appeal from the Judgement of the Lane County Circuit Court
The Honorable Karsten H. Rasmussen, Judge

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I. Introduction

The Oregon Trial Lawyers Association (OTLA) offers this amicus brief in support of plaintiff's Petition for Review of the Court of Appeals' decision holding that plaintiff's assigned instructional and evidentiary errors were not cognizable on appeal because plaintiff had failed to show that the jury "in fact did" base its decision on those errors. *Purdy v. Deere*, 252 Or App 635, 639 (2012). OTLA asks the court to grant review to clarify the required showing of "error substantially affecting the rights" of an appellant under ORS 19.415(2)¹, for the following reasons:

II. The ORAP 9.07 factors

1. The case presents a significant issue of law.

The issue on which the court of appeals resolved this case requires interpretation of ORS 19.415(2), which controls the scope of appellate review of Oregon trial court judgments. The issue is therefore potentially of dispositive significance in every Oregon appellate cases.

2. The issue, or a similar issue, arises often.

The appellant in every case must show that there was "error substantially affecting" her rights. While the issue is not disputed in

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

most cases, since this court's 2003 decision in *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164 (2003), the "substantially affecting" standard of ORS 19.415(2) has been discussed in some 50 cases. Requiring appellants to show that the jury "in fact did" reach the wrong result because of trial court error, as the court of appeals decision below requires, will force trial courts and counsel in all civil tort cases and in many other cases, to reconsider existing practice and to litigate the contents of verdict forms in detail. Unless the rule is clarified, the issue will occupy trial courts and counsel in hundreds of cases every year.

The implications of the court of appeals' decision are not limited to requiring trial courts to split the traditional verdict form question in a negligence case – "Was defendant at fault, and, if so, did that cause injury to plaintiff?" – into two questions. Indeed, to satisfy the court's requirement that the appellant prove that the jury "in fact did" reach the wrong result because of trial court error, the parties would have to ask the jury to state its opinion as to every theory of claim and defense, and every argument of counsel, on the verdict form. Every specification of fault or contributory fault and every argument on the merits would have to be addressed individually so that the implications of any potential error could be diagnosed accurately. Only then could the parties be

sure that the effect of any trial court error would be clear and that appellate courts could know with certainty what the jury “in fact did”.

3. Many people will be affected by the result in this case.

Many people will be affected by the result in this case because the specificity of the verdict form is an issue in every civil case.²

4. The issue is an issue of state law.

The issue is the construction of ORS 19.415(2).

5. The legal issue is properly preserved, free of procedural disputes and presented on the record below.

The question whether plaintiff’s rights were substantially affected by instructional or evidentiary error was properly raised at the first opportunity by defendant in the court of appeals, fully argued and decided there. No procedural or factual disputes prevent this court from reaching the issue. The record does in fact present it clearly.

6. Present case law is inconsistent and confusing

ORS 19.415(2) provides that an Oregon appellate court may reverse or modify a lower court’s judgment only “for error substantially affecting the rights of a party.” The nature of the “substantial effect” a

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This court has not thusfar applied *Shoup* in a criminal case. See *State v. Pine*, 336 Or 194, 200 (2003)(noting significant “procedural differences” and distinguishing *Shoup* on other grounds).

party must demonstrate, however, differs from case to case. Of course it makes sense for the *analysis* of “substantial effect” to vary depending on the nature of the error assigned and the procedural and factual circumstances in a particular case. *Lyons v. Walsh & Sons Trucking Co. Ltd*, 337 Or 319, 326 (2004)(“other kinds of asserted trial error, such as a faulty jury instruction, ... may call for a different analysis”). The effect on a jury’s decision of an erroneous instruction, the exclusion of certain evidence or the submission to the jury of an unsupported claim must be considered in its own factual and procedural context to measure the effect on the appellant’s rights. However, the answer to the question whether a party’s rights were “substantially affected” must ultimately be given as some degree of probability. Because that probability defines the meaning of “substantially affect”, it should be the same in all civil cases. The effect considered to be “substantial” ought to inhabit a point somewhere on the continuum that runs from “possible” to “definite”. The decisions of this court and the court of appeals, however, have landed at widely disparate points on that continuum:

In cases involving asserted error in jury instructions, this court has held that

when a trial court incorrectly instructs the jury on an element of a claim or defense and when that *incorrect instruction permits the jury to reach a legally erroneous result*, a party has established that the instructional error substantially affected its rights within the meaning of ORS 19.415(2).

Wallach v. Allstate Ins. Co., 344 Or 314, 329 (2008)(emphasis added).

The court of appeals has recently interpreted this holding in *Wallach* to mean that an appellant's rights have been substantially affected where "the jury verdict *might have been affected* by the instructional error".

248 Or App at 257 (emphasis added).

Where the alleged error is in allowing improper jury argument by counsel, this court has asked whether the argument created an "unacceptable risk that the jury would" make improper use of counsel's statements. *Cler v. Providence Health System-Oregon*, 349 Or 481, 493 (2010)(counsel's statements in closing about what a witness who never testified would have said).

Where the error asserted is the submission to the jury of several claims, one of which does not state a claim for relief, of course, this court has said the "possibility that an error might have resulted in a different jury verdict" is not enough to show that appellant's rights were substantially affected under the statute. *Shoup, supra*, 335 Or at 173.

Not only are different degrees of probability of effect applied to different cases. It is also unclear whether the effect measured is the effect on the appellant's rights or the effect on the outcome of the case. The statute requires a substantial effect on "the *rights* of a party", not on the outcome of the case. ORS 19.415(2)(emphasis added). This court in *Cler, supra*, asked whether there was an "unacceptable risk that the jury would consider [a factual assertion in closing argument] as that of the unsworn witness and not solely that of the lawyer." That is, was there an unacceptable risk that the plaintiff might have lost his right to have the jury limit its consideration of facts to the record – not that plaintiff might have lost the case. By contrast, other cases, such as *Shoup* and *Lyons* have discussed the chance of a different trial result. *Shoup*, 335 Or at 173 ("a different jury verdict"); *Lyons*, 337 Or at 326 (analyzing effect on jury's verdict). Parties have many rights at trial. However, at least where juries decide facts, it is difficult to speak of a party's "right" to a particular verdict.

The court should grant review to clarify both the degree of probable effect meant by "substantially affect" and whether that effect must have been on the appellant's rights or on the outcome of the trial.

7. The court of appeals published a written opinion.

8. The court of appeals decision appears to be wrong.

If the rule is that different kinds of error require the application not only of different analysis, but of different “substantial effect” standards under ORS 19.415(2), one thing that is clear is that instructional error, under *Wallach, supra* is subject to a “verdict might have been affected” standard:

[W]hen a trial court incorrectly instructs the jury on an element of a claim or defense and when that incorrect instruction permits the jury to reach a legally erroneous result, a party has established that the instructional error substantially affected its rights within the meaning of ORS 19.415(2).

344 Or at 329. This standard does not require the appellant to show that in fact the jury took advantage of the permission given by the trial court’s erroneous instruction, only that the instruction gave the jury that permission. The “incorrect instruction permits the jury to reach a legally erroneous result”, whether the jury actually did so or not.

The court of appeals decision below reads *Shoup* and *Lyons, supra* to require the appellant to “eliminate[] the possibility” that the jury decided the case correctly in spite of trial court error. 252 Or App at 642-43. Indeed, the court recognized that there were a number of ways to explain the jury’s answers on the verdict form, “many of which may be

more plausible” than the assumption that the jury made a correct decision in spite of the trial court’s errors. *Id.* at 645. Nevertheless, the court held that appellant must show not only that the jury could have erred under the trial court’s instructions but rather that it *erred beyond question*. That is not consistent with this court’s decision in *Wallach*.

The court of appeals’ error in this case results in a serious distortion of the legal principle set out by the legislature in ORS 19.415(2). The statute requires trial court error “substantially affecting the rights of a party”. To require that appellant “eliminate[] the possibility that the jury decided the case correctly” is to require a showing that the jury *in fact* reached the wrong decision *on the merits*. Instead of “substantially affecting rights”, the test becomes “dispositively affecting the outcome”. That is not what the statute provides.

The error cannot realistically be corrected other than by granting review and reversing the court of appeals’ decision.

9. A Note on Other Similar Incidents and Causation

The court of appeals decision below assumes that plaintiff’s four assignments of error concerning the exclusion of evidence of “other similar incidents” (“OSIs”) caused by defendant’s mower were “addressed to culpability only”, not to causation. 252 Or App at 642.

In fact, evidence of OSIs is relevant to prove causation as well as fault in a product liability case. This court's previous cases do not distinguish between the use of OSI evidence in non- product negligence cases and in product liability cases. There is a distinction to be drawn. While prior individual acts of negligence may lack probative value to show that an individual defendant acted in the same way in a current case, substantially similar products have, by definition, the same or similar defects – the same or similar tendency to cause harm.

The court of appeals wrote in *Lakin v. Senco Products*, 144 Or App 52 (1996):

Although evidence of prior similar occurrences is not admissible to prove a specific act of negligence, such evidence is admissible

“to prove the existence of a continuing defect or a continuing course of negligent conduct, and that the condition or course of conduct is in fact dangerous, or that the defendant had notice of its dangerous character. The admissibility of such evidence for these purposes is, however, subject to the requirement that the prior accidents must have occurred under similar conditions and circumstances.”

144 Or App at 61, *quoting Rader v. Gibbons and Reed Company*, 261

Ore. 354, 359-60 (1972). (emphasis added) "Is in fact dangerous"

means "is likely to cause harm". A dangerous product is more likely to

have caused harm in the present case. OSI evidence is therefore relevant to prove causation in a product liability case.

The court of appeals' assumption that OSI evidence concerns only fault, and not causation, is central to its analysis of the *Shoup* question, and OTLA would intend to address this issue as well should review be granted.

10. Amicus is available.

If review is granted, OTLA will seek leave to file a brief on the merits.

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CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(d) & ORAP 8.15(3)

Brief length:

I certify that (1) this *Amicus Curiae* brief filed on behalf of the Oregon Trial Lawyers' Association complies with the word-count limitation in ORAP 5.05(2)(b)(I) & ORAP 8.15(3) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,079 words.

Type size:

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

Dated January 28, 2013.

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CERTIFICATE OF FILING

I certify that on January 28, 2013, I filed the original of the foregoing **Motion to Appear *Amicus Curiae* & Brief on the Merits of *Amici Curiae* Oregon Trial Lawyers Association** along with the required filing fee, with the State Court Administrator at the following address:

ATTN: Records Section
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by the following method of filing: e-file.

CERTIFICATE OF SERVICE

I also certify that on January 28, 2013, participants in this case who are registered eFilers will be served via the electronic mail function of the eFiling system as follows:

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