IN THE SUPREME COURT OF THE STATE OF OREGON

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

PLAINTIFF'S OPENING BRIEF ON THE MERITS (AMENDED)

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

Kathryn H. Clarke OSB 791890
kathrynhclarke@mac.com
PO Box 11960
Portland, Oregon 97211
(503) 460-2870

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

Attorneys for Plaintiff

Jeffrey S. Eden OSB 851903
jeden@schwabe.com
Michael T. Garone OSB 802341
mgarone@schwabe.com
Schwabe, Williamson & Wyatt
1211 SW 5th Avenue Suite 1900
Portland, Oregon 97204
(503) 796-2837

Attorneys for Defendants

July 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

This is a product liability action against the manufacturer and retailer of a ride-on lawn tractor, claiming compensation for the injury caused 2½-year-old when the mower backed over her and amputated her leg. Plaintiff appealed the judgment on a verdict for the defendants, contending that the trial court erred in several evidentiary rulings and in several instructions given or not given. The Court of Appeals concluded that only one of the ten assignments of error implicated causation, and held that assignment was not well-taken; this court has declined to review that conclusion. Because the verdict form asked compound questions regarding fault (or the existence of a product defect) and causation, the Court of Appeals then concluded that plaintiff "has not demonstrated" that any of the nine remaining assigned errors, even if well-taken, were prejudicial, because they were relevant only to defendants' "culpability." *Purdy v. Deere and Co.*, 252 Or App 635, 648, 287 P3d 1281 (2012). The court therefore affirmed the judgment, relying on this court's opinions in *Shoup v. WalMart Stores, Inc.*, 335 Or 164, 61 P3d 928 (2003) and *Lyons v. Walsh & Sons Trucking Co., Ltd.*, 337 Or 319, 96 P3d 1215 (2004), and distinguishing this court's opinion in *Wallach v. Allstate Ins. Co.*, 344 Or 314, 329, 180 P3d 19 (2008) in a footnote. *Id.* at 640-42.

This court granted review to address the following question.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Must an appellant demonstrate than an asserted instructional or evidentiary error was necessarily implicated in the jury's verdict in order to establish reversible error?

Proposed Rule: When evidentiary error has a reasonable likelihood of influencing a jury's factual determination in a way that could affect the outcome, or when instructional error gives the jury the wrong legal rule to apply and permits it to evaluate the evidence on an inappropriate basis, the error substantially affects the appellant's rights and is reversible.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

Plaintiff accepts the first portion of the Court of Appeals' summary of the facts, describing the injury to plaintiff and the plaintiff's contentions at trial:

> In May 2006, while mowing his lawn with a Deere riding lawnmower purchased from Ramsey-Waite, Kirk Norton came to a spot where he wanted to drive the mower in reverse. The mower was equipped with a "Reverse Implement Option," or "RIO" feature, that cuts power to the spinning blade, causing it to slow and stop. However, the mower also had a small button on the dashboard that, when pressed, would override RIO, allowing the operator to move in reverse while the blades are engaged. Norton pressed the override button; at approximately the same time, he also

> looked over his right shoulder and did not see any hazards. Tragically, his two-year-old daughter had approached the tractor from the left, in Norton's "blind spot." Moving in reverse with the cutting blades engaged, Norton backed into her. She sustained serious injuries resulting in the amputation of one of her legs.
>
> Plaintiff brought this product liability action, ultimately alleging negligence as to both defendants and strict liability against Deere. As developed at trial, plaintiff's theory of the case was that Deere designed and marketed a defective and unreasonably dangerous mower, and both Deere and Ramsey-Waite failed to provide Norton with adequate warnings and instructions. In particular, plaintiff alleged that the mower was defective in three respects: because it "had mowing blades that could be engaged and rotating while driving in reverse" by virtue of the RIO override button; because that button was located in front of the operator on the mower's dashboard, instead of behind the seat, so that the operator could choose to keep the blades fully powered without turning completely around to look to the rear; and because defendants provided inadequate instructions "in the safe operation of a lawnmowing machine that had mowing blades that could be engaged and rotating while driving in reverse."

Contrary to the Court of Appeals' description (252 Or App at 638), defendants' primary argument at trial was not just "that the mower was not defective or unreasonably dangerous," but that the injury was caused by operator error, "misuse," consumer "mishandling," or inattention, including the operator's choice to leave the young children in the supervision of an older child while he was mowing. Within a few sentences of beginning his closing argument, defendants' counsel focused on the conduct of Mr. Norton as

causing injury. *See, e.g.*, Tr 12:129 ll. 14-17;[1] 12:130 ll. 9-14.[2] As a secondary argument, defendants relied on the "accident reconstruction" performed by a recently-retired Deere engineer (Stricker), testimony to which plaintiff objected and which was the subject of its sixth assignment of error. App Br at 31-34**.** According to Stricker's reconstruction, the alternative design offered by plaintiff would not have avoided the injury.[3]

The verdict form asked three compound questions:

> 1. Was Defendant Deere & Company's lawn mower/tractor defective and unreasonably dangerous in one or more of the ways alleged by Plaintiff, and if so, was that a cause of injury or damage to ?
>
> 2. Was Defendant Deere & Company negligent in one or more of the ways alleged by Plaintiff, and, if so, was that a cause of injury or damage to ?
>
> 3. Was Defendant Ramsey–Waite negligent in one or more of the ways alleged by Plaintiff, and, if so, was that a cause of injury or damage to ?

---

[1] "And that's where supervision and responsibility for folks who decide that they want to use a product that has dangers, such as this product does, have to take upon themselves."

[2] "But that's not where this accident began. Finding himself alone with five children, ages nine to two, Mr. Norton decided to cut the grass. And he left the children in that house under the care of a very, very brave and bright nine-year-old, but a nine-year-old nevertheless."

[3] A witness with expertise in reconstructions based on photographs (photogrammetrics) testified that if the button had not been pushed, the mower engine would have quit and the mower would have coasted back a short distance before it stopped completely; "I can't tell you [impact] wouldn't have occurred with the back tire, for example, but it would not have occurred with the blade." Tr 8:177-79.

After a 13-day trial, the jury returned a defense verdict, answering "no" to each question.

On appeal, plaintiff assigned error as follows:

1. To the trial court's rejection of any evidence of other similar incidents other than information in Deere's own files, and generated by Deere employees, that pre-dated the injury to (Assignments 1-4), and its rejection of evidence of other similar incidents that post-dated that injury;

2. To the trial court's rejection of plaintiff's proffer of promotional materials showing that Deere marketed its product as a family vehicle compatible with the presence of children, contrary to its insistence at trial that the mower operator should have been more vigilant to "keep the children out of the yard" (Assignment 5);

3. To the admission of accident reconstruction testimony from an expert who had no training or expertise in accident reconstruction (Assignment 6, discussed below); and

4. To jury instructions that mis-stated the law relating to Deere's liability, and failed to tell the jury of the established limitation on defendants' argument that the injury was caused by the operator's "mishandling" or inattention as opposed to a product defect (Assignments 7-10).

The Court of Appeals concluded that nine of the ten assignments of error related to culpability and not to causation; rejected the only assignment (No. 6) it believed related to causation; and then declined to address the other nine because it believed that no matter how serious the error, the compound questions on the verdict form prevented plaintiff from demonstrating that the other evidentiary and instructional rulings had affected a substantial right. 252 Or App at 648.

This court has declined to review the Court of Appeals' ruling on Assignment No. 6, but granted review to consider the Court of Appeals' application of *Shoup* to affirm the judgment without considering the other assignments.

SUMMARY OF ARGUMENT

It is a bedrock principle of law in Oregon that an appellate court will not reverse a judgment except for "error substantially affecting the rights of a party." A question whether there was error in submitting legally invalid or factually unsupported claims or specifications of misconduct can reasonably be answered by the use of special verdicts or interrogatories to the jury. However, there are few circumstances where the effect of evidentiary or instructional error can be so evaluated by consulting the verdict; drafting a

form of verdict that would serve that purpose would frequently be impossible. Therefore, in an unbroken line of cases, this court has said that instructional or evidentiary error is reversible when there is a reasonable likelihood that it created an erroneous impression of the law, or gave the jury an incomplete impression of the facts, which affected the outcome of the case. A general verdict should not foreclose plaintiff's assignments of evidentiary and instructional error before they are evaluated.

ARGUMENT

ORS 19.415(2) provides

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

As this court noted in *Wallach, supra,* that standard for reversibility has been a part of this state's statutory law, both civil and criminal, since the Deady Code. *See* General Laws of Oregon, Civ Code, Ch VI, ¶ 533, p. 284 (Deady 1845-1864)(same language); General Laws of Oregon, Crim Code, Ch XXIII, § 246, pp. 482-83 (Deady 1945-1864)(in criminal appeals, the court "must give judgment, without regard to ** * technical errors, defects or exceptions which do not affect the substantial rights of the parties."). The statutory standard has been applied without mentioning the statute. *See, e.g.,*

Honeywell v. Sterling Furniture, Inc., 310 Or 206, 212, 797 P2d 1019 (1990); *McIntosh v. Lawrance,* 255 Or 569, 572, 469 P2d 628 (1970).

In *Shoup,* as discussed in more detail below, this court held that a trial court error in denying a directed verdict motion against a legally invalid specification of negligence was not reversible under this standard, because the jury had returned a general verdict and the court could not identify the specification on which the verdict was based. In this case, the Court of Appeals applied that same analysis to foreclose review of nine out of ten assignments of evidentiary and instructional error

Plaintiff has two related arguments why the approach of the Court of appeals was wrong. First, a focus on *Shoup* and on the verdict form results in the wrong analysis, and in this case the wrong answer, to the question of whether an evidentiary or instructional error has substantially affected the appellant's rights and is reversible. Second, even if the emphasis on the verdict form is appropriate, the analysis was misapplied in this case.

I. The Proper Inquiry: Is it reasonably likely that the jury's decision-making was affected?

A. The "we can't tell" rule in Oregon

Whinston: "We can't tell" so we must reverse.

Whinston v. Kaiser Foundation Hosp., 309 Or 350, 788 P2d 428 (1990), was a medical negligence action. Three specifications of negligence were submitted to the jury, and the jury found in plaintiff's favor. The trial court granted defendant's motion for judgment notwithstanding the verdict. The Court of Appeals held the evidence sufficient to support one allegation of negligence, and reversed for entry of a judgment for the plaintiff. This court agreed that there was evidence to support one of the three allegations, and therefore entry of a judgment notwithstanding the verdict was error. However, the court could not tell from the general verdict whether the jury had based its finding on the allegation supported by evidence or the allegations that were not supported by the evidence. Therefore, a new trial was warranted, rather than a judgment for plaintiff. The court followed a rule that it said it had "announced over three decades" earlier:[4]

[4] In fact, the "longstanding precedent" (*Id.*) for this rule was not quite as longstanding as the court represented it to be. The oldest case cited was *Layne v. Portland Traction Co.*, 212 Or 658, 319 P2d 884 (1957), *reh den* 321 P2d 312 (1958). As this court subsequently pointed out in *Shoup* (335 Or at 175), the verdict in *Layne* was reversed because of a combination of

> If the court cannot determine whether the verdict was based on an allegation supported by the evidence or on one unsupported by the evidence, the result is a new trial. 309 Or at 359.

The *Whinston* opinion showed some signs of discomfort with its holding. It warned that a blanket motion for directed verdict would not be a sufficient predicate for a new trial based on the "we can't tell" rule, because such motions must be denied if *any* allegation is supported by the evidence. 309 Or at 360. And it cautioned that "a careful practitioner" may wish to employ special verdict forms or interrogatories in the event the court were "to retreat" from the "we can't tell" rule. 309 Or at 359.

***Shoup*: "We can't tell" so we can't reverse.**

That "retreat" was an outright abandonment. In *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 61 P3d 928 (2003), a negligence action, Wal-Mart appealed a verdict for plaintiff, contending that one of the three allegations of negligence failed to state a claim, and therefore it was entitled to a new trial under *Whinston*. The Court of Appeals agreed, and reversed. On review, this court held that "the 'we can't tell' rule is incompatible with ORS 19.415(2)."

---

instructional error (an instruction which excused plaintiff's conduct if due to an emergency, when there was no evidence of an emergency) **and** the submission of an unsupported specification of negligence. The court in *Layne* cited to the statutory standard, and held that the errors were "substantial." Since both negligence and causation were implicated by the errors, there was no basis for applying a "we can't tell" rule.

335 Or at 166. The jury had returned a general verdict for plaintiff that did not identify the specification on which it was based. This court could not say that the verdict rested on the invalid specification, and therefore could not say that the error had substantially affected the defendant's rights, as required by ORS 19.415(2). The court's conclusion was carefully phrased:

> [W]e hold today that appellate courts, to act within statutory limitations, may not apply the "we can't tell" rule to order a new trial in a case involving a judgment on a general verdict based on multiple specifications, one of which is invalid, if there is evidence to support another, valid specification. 335 Or at 176.

Shoup also reaffirmed the conclusion in *Baker v. English,* 324 Or 585, 932 P2d 57 (1997), that an outcome-related inquiry is not the sole test for reversibility under ORS 19.415(2), quoting with approval (335 Or at 172) this language from *Baker:*

> The case law summarized above demonstrates that an inquiry into the likelihood whether a trial court's error affected the outcome of the case below can serve as a useful tool in determining whether the error resulted in prejudice to a party. However, that inquiry, albeit helpful in some cases, is not the test for determining prejudice. Rather, our focus in this and all similar cases is the statutory test set forth in *ORS 19.125(2)*: "No judgment shall be reversed or modified *except for error substantially affecting the rights of a party."* (Emphasis in original).
>
> 324 Or at 592-93, quoted with approval in *Shoup,* 335 Or at 172.

B. Both before and after *Shoup*: reversible instructional and evidentiary errors.

The prejudicial effect of evidentiary or instructional error has been analyzed differently than the prejudicial effect of errors in ruling on directed verdict issues.

In *Waterway Terminals v. P.S. Lord*, 256 Or 361, 474 P2d 309 (1970), the appellant complained of three errors in the phrasing of an instruction on *res ipsa loquitur* as it applied to the risk of fire from defendant's welding activities: the instruction (1) did not specifically require a finding that the welding caused the fire, (2) referred to "someone" rather than "defendants" as failing to exercise care, and (3) did not anchor the reference to "due care" to the allegations of negligence in plaintiff's complaint. This court held the errors harmless because they were unlikely to affect the jury's decision-making:

> The exact wording of instructions is something which judges and lawyers, despite their technical training, often disagree upon and discuss in minute detail at great lengths. It is absurd to expect a layman to listen once to an oral rendition of a highly technical instruction and to appreciate immediately all of the fine legal distinctions. As a result, cases should not be reversed upon instructions, despite technical imperfections, **unless the appellate court can fairly say that the instruction probably created an erroneous impression of the law in the minds of the jurymen which affected the outcome of the case.** It is our conclusion that any juryman would realize that the court was referring to fire caused by defendants' lack of care in welding

> such as was specified in the plaintiff's complaint. The instruction was not given in a vacuum but in reference to the contentions of the parties in their pleadings and to the other instructions which were given. It is our conclusion that no prejudicial error resulted. 256 Or at 369-70.

In *Honeywell v. Sterling Furniture Co.*, 310 Or 206, 797 P2d 1019 (1990), the trial court instructed the jury regarding the statutory distribution of a punitive damages award. That was reversible error, this court said, because the potential effect would be to encourage the jury to award punitive damages for a purpose that was not valid under Oregon law, and "[o]ffering a jury **an additional, inappropriate basis** for awarding punitive damages harmed the defendant." 310 Or at 212 (emphasis added). This was true even though there was no direct evidence that the jury took the offer, and even though the award was otherwise supportable.

In *Holger v. Irish*, 316 Or 402, 851 P2d 1122 (1993), a medical negligence action, the court held that a trial court's error in instructing the jury about plaintiff's settlement with the hospital was reversible:

> The trial court's instruction did nothing to inform the jury about the issues that it was to decide. This court has held that it can be error to give an instruction that correctly describes the law if "the instruction distracts the jury from the appropriate line of analysis." In *Honeywell v. Sterling Furniture Co.*, [*supra*] this court held that it was reversible error to instruct a jury concerning the distribution that would be made of a punitive damages award, even though the instruction described the applicable statute accurately and even though the jury might have made a "benign" use of the

> information. In this case, **the jury could have been encouraged to conclude that plaintiff had been compensated fully for the claimed injury and thereby could have been distracted from the appropriate line of analysis.**
>
> After examining the entire record of the trial, we are convinced that the errors, considered cumulatively, were prejudicial. The "natural tendency [of the court's statement and instruction] was to plant in the jury's mind the idea]that they should allow no damages," [citation omitted] because plaintiff already was compensated for her loss. Accordingly, we hold that plaintiff is entitled to a new trial.
>
> 316 Or at 415 (emphasis added).

Plaintiff points out that it would be difficult indeed to devise a verdict form that would inform us whether and how the jury used the information regarding plaintiff's settlement with the hospital. The court made no reference to the verdict form in its analysis.

Similar concepts have been applied in evaluating whether evidentiary errors are prejudicial. In *Keys v. Nadel,* 325 Or 324, 937 P2d 521 (1997), also a medical negligence action, plaintiff appealed a defense verdict and assigned error to the trial court's ruling that certain evidence was inadmissible hearsay. This court concluded that the evidence was admissible, and because it was critical to corroborate plaintiff's own testimony that she complained after surgery to the defendant physician, its exclusion was reversible error. This court said:

> Because both defendant and another doctor testified that plaintiff never informed them of her symptoms, she was prejudiced by being unable to rebut that testimony with her prior consistent statements. 325 Or at 331

The trial court's error therefore "affected a substantial right with respect to plaintiff's allegation of post-operative negligence." *Id.* However, because that error could not have affected the two other specifications, both of which concerned negligence during the surgery, the new trial was limited to the affected specification. The court did not need to look at the verdict form, and did not require an answer to an interrogatory, to make the distinction between specifcations that were not affected by the error and the one that required reversal.

Hernandez v. Barbo, 327 Or 99, 957 P2d 147 (1998), was a product liability action. The defendant alleged that the plaintiff was contributorily negligent in ten different respects. Nine of those alleged that plaintiff "knowingly encountered" the risks created by the defective product; one of the specifications alleged simple negligence. Like the plaintiff in this case,[5]

[5] *See* Assignment of Error No. 8, App Br at 34, 40-43. The posture of this case is not exactly the same as *Hernandez*: here, there was no allegation of contributory fault on the part of the child, and defendants did not file a third party action against Mr. Norton alleging his negligence. Nevertheless, the same limitation articulated in *Sandford* applies to limit the defendants' contention that the injury in this case was the "sole and exclusive" fault of a nonparty. ORS 31.600(5)(the comparative fault statute "does not prevent a party from alleging that the party was not at fault in the matter because the

the plaintiff in *Hernandez* requested an instruction based on the court's holding in *Sandford v. Chev. Div. Gen. Motors,* 292 Or 590, 598, 642 P21d 624 (1982), that a user's negligence is **not** a defense to a strict product liability claim when it consists of "the kind of unobservant, inattentive, ignorant, or awkward failure to discover or to guard against the defect that goes toward making the product dangerously defective in the first place." The *Hernandez* court gave a detailed summary of the requirements an appellant must meet in order to persuade the court that the failure to give a requested instruction is error at all:

> Regarding a trial court's refusal to give a requested jury instruction, however, **there is no error if the requested instruction is not correct in all respects**. *Hall v. The May Dept. Stores Co.*, 292 Or 131, 143, 637 P2d 126 (1981); *Beglau v. Albertus*, 272 Ore 170, 179, 536 P2d 1251 (1975). **There also is no error by the trial court if the substance of the requested jury instruction, even if correct, was covered fully by other jury instructions given by the trial court.** *Kabil Developments Corp. v. Mignot,* 279 Or 151, 158-59, 566 P2d 505 (1977); *Hansen v. Bussman*, 274 Or 757, 781, 549 P2d 1265 (1976); *Transpacific Leas. v. Klineline Sand,* 272 Or 133, 148, 535 P2d 1360 (1975). **Neither is there error if the requested jury instruction is not necessary in order to explain the particular issue or point of law to the jury. That is, the requested jury instruction must pertain to a material issue in the case on which the court otherwise has not instructed the jury fully.** *Wills v. Petros et al,* 225 Or 122, 130-31, 357 P2d 394 (1960) (trial court's refusal to give "sudden emergency"

---

injury or death was the sole and exclusive fault of a person who is not a party in the matter."

> instruction not error where that legal issue did not pertain to facts of case); *cf. Resser v. Boise-Cascade Corp.*, 284 Or 385, 393, 587 P2d 80 (1978) (court commits error where it refuses to give a jury instruction needed to explain a material issue).
>
> 327 Or at 106.

The court then turned to the question of reversibility:

> Finally, an error in refusing to give a requested jury instruction requires reversal only if the jury instructions given by the trial court, considered as a whole, cause prejudice to the party requesting the instruction. [Cites omitted.] **The party requesting an instruction is prejudiced if the trial court's failure to give the requested instruction probably created an erroneous impression of the law in the minds of the members of the jury, and if that erroneous impression may have affected the outcome of the case.** 327 Or at 106 (emphasis added).

The court concluded:

> In this case, plaintiff was harmed, because the jury may have based its comparative fault assessment on a misperception of the evidence resulting directly from the court's failure to give plaintiff's requested jury instruction. Therefore, the Court of Appeals correctly concluded that the trial court's failure to give the requested instruction was reversible error. Accordingly, we affirm the decision of the Court of Appeals. 327 Or at 113.

Plaintiff points out that although this discussion was framed in terms of the issue presented in *Hernandez* (the failure to give a requested instruction), the same concerns have been articulated when the court reviews instructions given. *See Honeywell, supra.*

In the end, by the time an appellant demonstrates an "error" was made in instructions, the appellant has probably already met the standard for reversibility. What matters most is whether the refusing or giving of an instruction results in the jury being given an erroneous impression of the law that it is asked to apply in determining the facts. This is consistent with the court's expression in *Hernandez* of the "right" that is affected by instructional error:

> [A]s a general rule, the parties in a civil action are entitled to jury instructions on their theory of the case if their requested instructions correctly state the law, are based on the current pleadings in the case, and are supported by evidence. 327 Or at 106.

Or as restated in terms specific to the issue in *Hernandez:*

> The plaintiff is entitled to have the jury instructed correctly and adequately as to the kinds of negligent conduct that the jury may and may not attribute to him as a defense to a strict products liability action. 327 Or at 111.

See similarly Cler v. Providence Health System-Oregon, 349 Or 481, 493, 245 P3d 642 (2010) ("In addressing plaintiffs' contention that defense counsel's statements regarding facts not in evidence substantially affected plaintiffs' rights, we focus first on the particular right at issue in this case: the right to require opposing counsel to confine her closing argument to the jury to facts admitted into evidence and permissible inferences from those facts.").

In *State v. Pine*, 336 Or 194, 82 P3d 130 (2003), the trial court instructed the jury, over defendant's objection, that defendant himself need not have caused physical injury to the victim to be convicted of third-degree assault. That instruction was wrong. On review, the state invoked *Shoup* for the proposition that any such error could not be prejudicial, because the jury verdict was supported by evidence that the defendant was indeed involved in causing injury to the victim. The court rejected the idea that a *Shoup* analysis could be used in the context of instructional error, 336 Or at 200, and concluded:

> [T]he trial court's supplemental instruction created an erroneous impression of the law that, if the jury had believed defendant's version of the facts, would have affected the outcome of the case. That is so, because the jury could have convicted defendant of third-degree assault under that instruction even if it found that he had not caused physical injury to [the victim.] * * * We therefore must reverse defendant's conviction[.] 335 Or at 210.

The Court of Appeals has repeatedly followed these precedents and applied the same analysis. *See, e.g., Dew v. Bay Area Health Dist.*, 248 Or App 244, 258, 278 P3d 20 (2012)("We have held repeatedly and recently held that evidentiary errors substantially affect a party's rights and require reversal when the error has some likelihood of affecting the jury's verdict."); *Bray v. American Property Mgmt. Corp.*, 164 Or App 134, 142, 988 P2d 933 (1999), *rev den* 330 Or 331, 6P3d 1101 (2000)(Although the vicarious liability

instruction was "not a model of clarity," the court "[did] not believe that the instructions, in context, 'probably created an erroneous impression as to the applicable law * * * which affected the outcome of the case,'" quoting *Waterway Terminals, supra*); *Ellis v. Springfield Women's Clinic*, 67 Or App 359, 362, 678 P2d 268, *rev den* 297 Or 228, 683 P2d 91 (1984) (an instruction that a physician is not liable for a good faith error in judgment "has no place in an action for ordinary negligence;" reversal was warranted based on the extent to which defendant argued "good faith error" to the jury, with no mention of the verdict form.).

This review makes no pretense to being complete, and to some extent has focused on cases this court has cited in *Shoup, Lyons* and *Wallach.* It makes clear, however, that Oregon law has been consistent. An error in admitting or excluding evidence, or in the instructions given or not given when requested, is reversible—it substantially affects the rights of a party—when the error has a reasonable likelihood of affecting the decision-making process.

C. *Lyons:* A detour that became a road map for the Court of Appeals.

In *Lyons v. Walsh & Sons Trucking Co., Ltd.*, 337 Or 319, 96 P3d 1215 (2004), plaintiffs' decedent was an Oregon State policeman, who died when

defendant's truck collided with an OSP vehicle in which he was a passenger. The claim was solely against the trucking company, because OSP and the officer driving the vehicle were immune from suit under the "exclusive remedy" provision of the workers' compensation statutes. At trial the defendant blamed the OSP driver for the collision. Plaintiffs appealed a defense verdict, contending that the trial court had erred in refusing to instruct the jury that it could consider the conduct of the OSP driver only if the driver's conduct was the "sole and exclusive" cause of the accident. 337 Or at 322-23; ORS 31.600(2) and (5) (2003).

However, the jury had answered "no" to a compound question on negligence and causation, and the plaintiffs in *Lyons* had "focused all their arguments" on causation: the plaintiffs contended that the court improperly permitted the jury to consider the officer's conduct in assessing whether Walsh's conduct was a substantial factor in causing the accident. Such an error was irrelevant, the court said, "if the jury decided the case instead on the pristine proposition that Walsh was not negligent." Because of the compound question, the court was unable to tell whether the jury's answer was affected

by errors relating solely (as plaintiff argued) to causation,[6] and therefore any error, if there was one, was not reversible.

The *Lyons* opinion invited limitation by describing the issue presented by the verdict as a "narrow problem" and then stating:

> Nor did this case involve other kinds of asserted trial error, such as **a faulty jury instruction**, that may call for a different analysis of whether the error "substantially affects the rights of a party" under ORS 19.415(2). 337 Or at 326 (emphasis added).

It is not immediately clear what the court meant by this statement, because *Lyons* involved a failure to give a requested instruction that, plaintiffs contended, caused the actual jury instructions to be faulty by omitting the proper legal standard for evaluating certain evidence.

D. *Wallach*: A return to a familiar analysis.

In *Wallach v. Allstate Ins. Co.*, 344 Or 314, 180 P3d 19 (2008), this court accepted its own invitation and limited the *Lyons* approach to reversibility, calling into question whether a general verdict form could ever limit reversibility of instructional error. In that case, plaintiff was injured in

---

[6] The opinion acknowledges that the trial court refused plaintiffs' request to submit a special interrogatory to the jury that could have provided the information the court found essential. 337 Or at 323. The court disregarded that request in part because plaintiffs never argued the interrogatory was necessary to demonstrate harm (337 Or at 325 n. 3); trial, however, had occurred prior to the court's opinion in *Shoup*.

three separate accidents. Plaintiff claimed PIP and UIM benefits from defendant Allstate for injuries resulting from the first accident. The trial court instructed the jury that plaintiff's damages could include "enhancement or aggravation" caused by subsequent accidents if the aggravation would not have occurred but for the first accident. That instruction, the court concluded, "gave the jury the wrong legal rule to apply" because it failed to tell the jury that damages must be foreseeable to be recoverable. 344 Or at 322. The court said:

> [W]hen an instruction tells the jury to apply the wrong legal rule and the erroneous instruction permits the jury to reach an incorrect result, the court consistently has held that the error substantially affects the party's rights. 344 Or at 322.

In *Wallach,* the verdict form provided a single line for all plaintiff's damages. The verdict form did not ask the jury to differentiate between damages for the injuries directly caused by the first accident and damages for subsequent aggravation. Therefore, as in *Shoup* and *Lyons,* the jury's award could have been based solely on the legally permissible damages notwithstanding the instructional error. The plaintiff contended that any error was harmless under *Shoup* and *Lyons. Id.* This court rejected that proposition, for these reasons:

(1) *Shoup* involved a correctly instructed jury. 344 Or at 323.

(2) The court in *Shoup* had been careful to distinguish instructional error, and had specifically affirmed that the instructional error – more specifically, a failure to instruct -- in *Hernandez v. Barbo,* 327 Or 99, 957 P2d 147 (1998) was reversible error because it gave the jury an inaccurate and incomplete legal rule and therefore permitted the jury to reach a legally erroneous result. 344 Or at 325 (citing *Shoup,* 335 Or at 172 n. 2). That was true despite the fact that the *Hernandez* jury could have based its verdict on the **nine** other specifications of comparative fault that were unaffected by the omitted instruction. *Id.*

(3) This court had already decided in *State v. Pine, supra,* that an instruction that gave the jury an erroneous legal rule to decide an element of the state's case was reversible without regard to *Shoup* and the verdict form. 322 Or at 325, 329.

(4) The *Lyons* court had limited its holding, as pointed out above, and "the jury verdict form in that case and a faulty jury instruction present distinct issues for the purposes of ORS 19.415(2)." 344 Or at 328.

(5) *Wallach* did not "involve a jury verdict form similar to the one in *Lyons.*" 344 Or at 329. The court did not comment on the plaintiff's argument that the damages figure could well have been based on the first accident, without considering any aggravation claim.

This court stated that

> it is sufficient for the purposes of this case to reaffirm the general rule stated in *Pine*, *Hernandez*, and an unbroken line of cases that, **when a trial court incorrectly instructs the jury on an element of a claim or defense and when that incorrect instruction permits the jury to reach a legally erroneous result, a party has established that the instructional error substantially affected its rights within the meaning of ORS 19.415(2).**
>
> 344 Or at 329 (emphasis added).

E. The proper rule, properly applied.

In this case, the Court of Appeals declined to review the merits of plaintiff's other nine assignments. Some of those assignments are discussed briefly below, in explaining why *Shoup* was mis-applied in this case. If plaintiff is correct that the rejected evidence was relevant to the central issues in the case, and that the instructions permitted the jury to reach a legally erroneous result, then the errors substantially affected plaintiff's rights to present her case fully, and to submit it to a properly instructed factfinder. The form of verdict is and should be irrelevant to this inquiry.

This case should not have been resolved by refusing to consider the merits of the majority of plaintiff's assignments, relegating them to irrelevance because the parties employed a generalverdict form.

II. Even if a *Shoup* analysis is appropriate, it was mis-applied in this case.

After disposing of one of plaintiff's assignments, the Court of Appeals viewed all nine of the remaining assignments as directed solely to the questions of defendants' negligence or the existence of a product defect. The court said that because the answer to the combined question could have been directed to causation, plaintiff's remaining assignments focused on "culpability" could not result in reversible error under *Shoup*. Neither the law nor logic can sustain that ruling.

A brief review of the factual background

Defendant Deere manufactures and sells lawn tractors for family homes. TR 8:150-1. Deere, the lawn mower industry, and consumer advocates have recognized for decades that lawn tractors that keep their blades going while the machine is going backwards routinely causes toddlers and small children to be killed or suffer limb amputations. Tr 8:139-40; TR 11B: 34. In fact, lawn tractors are the single largest cause of amputations in young children. Tr 8: 138. This is because the combined profile of the machine, the position of the operator, and the operator's inability to turn completely around, creates a blind spot behind the machine that would conceal a small child even if the operator looks over his or her shoulder before going in reverse. Tr 2: 89-98; Tr 4:185-7, 189; Tr 138-41. Deere does not inform

consumers about this blind spot in the manual or other safety materials and the consumers do not expect it. Tr 8: 141-43, 150. Trial Ex 4 (Manual). The blind spot problem is exacerbated by children being attracted to lawn tractors as an object of family fun. Tr 8: 152, 155-57. Deere promoted that attraction by marketing the machine as an object of family enjoyment and by marketing Deere lawn tractor toys for toddlers. Court Exs. 23, 49-51 (offers of proof on Deere's promotion of lawn tractors as toys); Tr 9: 93-94 (The making of the offers of proof).

Due to such latent dangers, lawn tractors operating in reverse cause children to suffer death or amputation at a rate of 200 per year. Tr 4:184,199. Deere's own incident reports indicate that Deere lawn tractors account for at least one toddler-to-kindgartner amputation per month during the mowing season for decades. Trial Ex 26 (Deere's pre-injury incident reports which indicate injuries occurring almost monthly during the non-winter months); Court Ex 26 (offer of proof of post injury incident reports); Tr 2:117; Tr 11A: 31-32. That injury rate continued after the incident in this case. Court Ex 26.

In 1999, in response to consumer advocacy groups, Defendant Deere designed and installed a "child safety system" on its lawn tractors that it markets for family homes that would cause the machine to shut down if the driver attempted to drive backwards with the blades engaged. Tr 7: 128-132.

However, Defendant put a little yellow button on the dashboard of the machine that would override that child safety system. Tr 7:128-132. This button actually undermined the effectiveness of the child safety system. Tr 8: 162-64. To go backwards with the blades spinning, and thereby maintain the risk to children, the operator only had to press the yellow button on the dashboard once. Tr 7:128-132; Tr 8: 162-64. On the other hand, to go backwards without the blades spinning, the driver had to take the additional steps of first turning off the blades before going backwards and then turning the mower back on to move forward. Tr 8: 162-64. The increased efficiency of just pushing the little yellow buttons one time inevitably led operators to leave the blades on while going in reverse and thereby increase the risk to children. Tr 8: 162-64 (testimony of an expert in human factors analysis). Indeed, probably due to that increased ease of use, the defendants actually instructed consumers that when going backwards they should use the yellow button. Tr 6: 98-100. Tr 8: 165-66.

On May 10, 2006, Kirk Norton was mowing his family yard with a John Deere lawn tractor that included the "child safety system" described above. His children were in the house being watched by a babysitter. Tr 6; 153. While mowing, he needed to back up. Tr 6: 156-59. He had been instructed by the retailer, who was trained by Deere, to use the yellow button

while going in reverse. Tr 6: 98-100. Tr 6: 149.He pressed the yellow button, looked over his back shoulder and backed up. Tr 6: 156-59.Unbeknownst to him his 2-year old daughter had run up behind the machine. Tr 6: 156-59. Her leg was cut off by the blades as the machine went backwards. Tr 6: 159.

Defendants argued that (1) that the lawn tractor did not create a visibility problem, Tr 12: 136-38, (2) that plaintiff overstated the incidents of back-over injuries and that "the only incidents that are known to Deere are those incidents that were admitted into evidence in this case," Tr 12:148; (3) that the yellow button does not maintain the risk of back-over injuries to children but reduces it by "help[ing] an operator be reminded about what he or she was about to do, to raise awareness of reverse operation," Tr 12: 149; (4) that the back-over injuries to children are caused by parental failure to supervise children rather than the manufacturer, Tr 12: 129-30, 154; and (5) that the operator's inattention in this case was the sole cause of the toddler's leg amputation, Tr 12: 150.

The assignments of evidentiary error affect causation as well as product dangerousness and defendants' negligence.

Plaintiff assigned six evidentiary errors. Two of those assignments involved the trial court's exclusion of any evidence of incidents that occurred prior to this incident other than the reports generated by Deere (some of which did not disclose the nature of the injuries). *See* Assignments 1 and 2,

described in detail App Br at 8-12. Two of the assignments involved the exclusion of evidence that Deere lawn tractors continued to cut down children at the same rate after the implementation of the child safety system. *See* Assignments 3 and 4, App Br at 24-27. Plaintiff offered the following evidence:

1. Testimony of the parents of other children who were killed or maimed by John Deere lawn tractors, and of operators who were involved in such incidents, after the implementation of the child safety system.

2. Incident reports generated and kept in John Deere's own files that described incidents in which its lawn tractors killed or maimed other children after the implementation of the child safety system.

The Court of Appeals held that the exclusion of the above evidence was harmless, because it did not go to causation. The Court of Appeals analysis was flat out wrong.

At the trial court, Plaintiff repeatedly argued to the trial court that the evidence of other similar incidents was not only relevant to notice (negligence) but also to causation. For example, in one memorandum to the trial court on the issue, the plaintiff wrote:

> As explained in other memoranda to this Court, Oregon appellate courts have long recognized that evidence of similar events or accidents is **admissible to prove causation,** danger, and the existence of a particular defect. Kirkpatrick, *Oregon Evidence* § 401.10[1] at 152; *See Saunders v. A.M. Williams & Co.,* 155 Or 1, 62 P2d 260

> (1936) (evidence of other injuries *after* the plaintiff's injury admissible to show dangerousness); *Downey v. Traveler's Inn*, 243 Or 206, 412 P2d 524 (1962) (evidence of similar injuries admissible to prove causation); *Clary v. Polk County*, 231 Or 148, 373 P2d 524 (1962) (admissible to show the danger).
>
> TCF 159, p. 2 (emphasis added).

It should not be surprising that evidence that the same product has resulted in similar types of injury is relevant to causation. In *Downey*, this court plainly recognized that other incidents can show "causation." Similarly, in *Saunders*, this court recognized that other incidents can show danger. Danger is just another way of saying that a circumstance is capable of *causing* an injury. Evidence that a product defect is capable of causing injury is absolutely relevant to a jury's analysis on whether the product in the case at bar in fact *caused* this injury.

In another context, this court has recognized that evidence that the same product has caused similar injuries under similar circumstances can support a conclusion that the plaintiff's injury was actually caused by that product. *See Jennings v. Baxter Int'l Inc.*, 331 Or 285, 305-07, 14 P3d 596 (2000)(other incidents, or "case reports," could be sufficient to establish a causal link between a product and an injury, and therefore provided a basis for expert opinion testimony that plaintiff's symptoms were caused by silicone exposure from breast implants.); *Marcum v. Adventist Health Systems/West*, 345 Or

237, 247, 193 P3d 1 (2008) (recognizing that a correlation between a product's usage and other incidents of injury can support an opinion that the product causes that type of injury).

In this case, defendants' primary argument was that the injury was *caused* by the father's inattention as opposed to the product's dangerousness, unreasonable design, and inadequate instructions. However, when a jury is able to take into account that children are repeatedly injured in the same exact way in repeated incidents involving the same product, the jury can use that evidence to question the validity of defendants' argument that this was solely and exclusively caused by the simple inattention of the operator/father. Therefore, the other similar incidents are relevant to a jury's causation analysis as well as its analysis of the product's dangerousness and the defendant's negligence.

Also, in this case, the trial court limited plaintiff to evidence of other similar incidents that happened <u>before</u> the injury at issue in the case. However, the child's injury occurred in the year following Deere's introduction of the "child safety system." The jury could therefore have inferred that the new design did what Deere said it did and solved the problem. The post-Norton incidents were critical to show the continuing danger and the likelihood that the new design would still cause catastrophic

injuries. This is no different than the "continuing danger" evidence recognized by this Court in *Saunders* and *Downey*.

Nonetheless, the trial court excluded that evidence, and defendants were able to emphasize that the child safety system was an improvement and that the dangers of the past had been eliminated. This gap in the evidence further buttressed defendants' their arguments that the amputation was *caused* only by the inattention of the child's father as opposed to any flaws in the design. The evidentiary error went to causation as well as negligence and product defect.

These assignments of evidentiary error were relevant to the jury's causation analysis. The rule announced in *Shoup* and *Lyons* should not have precluded a showing of harm in this case.

The assignments of instructional error are related to causation as well as negligence and defect.

Plaintiff assigned error to the court's instruction that defendant could not be liable if mishandling subsequent to delivery made the product unsafe, and to the trial court's denial of plaintiff's request for a jury instruction, the absence of which was the basis for the court's reversal of the verdict in *Hernandez v. Barbo, supra*. Assignments 7 and 8, App Br at 34-42. As mentioned previously, defendants argued to the jury (and requested corresponding instructions) that the child's injuries were caused by the

father's inattention and mishandling of the lawn tractor. In response, plaintiff requested the instruction from *Hernandez*, that limited the jury from finding that the father *caused* the injury if his conduct was "the kind of unobservant, inattentive, ignorant, or awkward failure to discover or guard against the defect that goes toward making the product dangerously defective in the first place."

The problems raised by these instructions are clearly related to the issues of causation. Defendants argued that the father's inattention and mishandling of the product caused the injury, and the trial court gave a "mishandling" instruction at defendants' request. Plaintiff asked for, and was denied, an instruction to tell the jury that the law limits the viability of that argument, and that a product defect can be the cause of the injury even in the face of inattention and mishandling. The instructions as given were reasonably likely to create an erroneous impression of the law in the minds of the jury, a mis-impression that would affect the jury's assessment of what caused the injury in this case as well as its determination of whether the tractor was defectively designed.

The fact that evidentiary and instructional errors affect both causation and negligence or defect is not exceptional.

If simply paying attention would solve the problem, then the product isn't unreasonably dangerous, and defendants haven't failed to exercise

reasonable care. If simply paying attention would solve the problem, then both the problem and the injury aren't caused by the product but by operator error. However, the frequency and severity of similar injuries under similar circumstances proves that the product is unreasonably dangerous; and it also tends to show that an injury was more likely caused by a defect than an unforeseeable "mishandling." The frequency and severity of injury shows that this is not merely a case of lapsed attention, but is a problem that starts with the design.

In a product liability case, it is rarely possible to divorce questions of causation from the question of whether the product is defective and unreasonably dangerous, or whether the manufacturer has failed to exercise reasonable care to avoid a foreseeable risk. The premise on which the Court of Appeals relied – that all nine of plaintiff's assignments of evidentiary and instructional error (other than the rejected Assignment 6) were solely relevant to the question of "culpability" – was demonstrably wrong.

In *Lyons*, the plaintiffs' focus was on causation. They argued that the conduct of the immune "fellow servant" was irrelevant unless the defendant proved it was the "sole and exclusive cause" of the accident, and the jury should have been so informed. In the absence of the missing instruction, the jury also could have compared the conduct of the defendant with the conduct

of the co-worker, and decided that the latter simply outweighed the former. In other words, the ease with which *Lyons* distinguished culpability and causation was in large part a product of the way the issue was presented to the court. That kind of demarcation between issues is rarely available, and certainly was not possible in this case.

CONCLUSION

Plaintiffs urge the court to follow *Wallach,* and to hold that the verdict form in this case does not dictate the irrelevance of plaintiff's remaining assignments of evidentiary and instructional error. The disposition of the Court of Appeals should be reversed, and the case remanded for consideration of the remaining assignments, with reversibility to be determined by an inquiry into whether any or all of these errors were reasonably likely to affect the jury's decision.

Respectfully submitted,

/s/ Kathryn H. Clarke

Kathryn H. Clarke OSB 791890
Don Corson OSB 851777
Travis Eiva OSB 05
Attorneys for Plaintiff-Appellant Purdy

CERTIFICATE OF COMPLIANCE

Brief length:

I hereby certify that (1) this brief complies with the word-count limitation of ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.054(2)(a) is **8579** words.

Type size:

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

CERTIFICATE OF SERVICE AND FILING

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

Jeffrey S. Eden
Schwabe Williamson & Wyatt
1211 SW Fifth Avenue Suite 1900
Portland, Oregon 97204
Attorney for Defendants

DATED this 8th day of July, 2013.

/s/ Kathryn H. Clarke
Kathryn H. Clarke OSB 791890
Of Attorneys for Plaintiff/Appellant