

Filed: April 17, 2014

IN THE SUPREME COURT OF THE STATE OF OREGON

DWIGHT G. PURDY,
Conservator for Isabelle Eve Norton, a Minor,

Petitioner on Review,

v.

DEERE AND COMPANY,
a foreign corporation; and
RAMSEY-WAITE CO., a corporation,

Respondents on Review.

(CC 160800466; CA A144265; SC S060993)

En Banc

On review from the Court of Appeals.*

Argued and submitted September 20, 2013.

Kathryn H. Clarke, Portland, argued the cause and filed the briefs for petitioner on review. With her on the briefs were Don Corson and Travis Eiva.

Michael T. Garone, Schwabe, Williamson & Wyatt, PC, Portland, argued the cause and filed the brief for respondents on review.

Meagan A. Flynn, Preston, Burnell & Flynn, Portland, and James S. Coon, Swanson, Thomas, Coon & Newton, Portland, filed a brief on behalf of *amicus curiae* Oregon Trial Lawyers Association.

BREWER, J.

The decision of the Court of Appeals is reversed and the case is remanded to that court for further proceedings.

Balmer, C.J., concurred and filed an opinion.

*Appeal from Lane County Circuit Court, Karsten H. Rasmussen, Judge. 252 Or App 635, 287 P3d 1281 (2012).

1 BREWER, J.

2 In this product liability action, plaintiff appealed a judgment for defendants
3 following a jury trial. The Court of Appeals affirmed without considering the merits of
4 nine of plaintiff's ten assignments of instructional and evidentiary error. *Purdy v. Deere*
5 *and Company*, 252 Or App 635, 287 P3d 1281 (2012). The Court of Appeals explained
6 that consideration of those assignments of error would be futile because, even if it
7 determined that the trial court had erred in one or more of the ways that plaintiff asserted,
8 the court could not reverse the trial court's judgment because of the prohibition in ORS
9 19.415(2) that "[n]o judgment shall be reversed or modified except for error substantially
10 affecting the rights of a party." *Id.* at 639-44. Plaintiff contends that, in so holding, the
11 Court of Appeals misconstrued the standard for reversal in ORS 19.415(2) as it applies to
12 claims of instructional and evidentiary error like those that the court declined to consider.
13 For the reasons that follow, we reverse and remand to the Court of Appeals to address
14 plaintiff's assignments of error.

15 THE FACTUAL BACKGROUND

16 This action arose out of an accident involving a young child, Isabelle
17 Norton, who was seriously injured when her father, Kirk Norton, accidentally backed his
18 riding lawnmower into her. The lawnmower, which had been manufactured by defendant
19 Deere and Company, had been designed so that the cutting blades shut off automatically
20 when the lawnmower was driven in reverse. However, by design, the driver could
21 override that safety feature by pressing a button located on the lawnmower's dashboard.
22 Norton had engaged that override feature when, unbeknownst to him, Isabelle had

1 approached the mower from behind. As a consequence, the cutting blades were operating
2 when Norton backed the lawnmower into his daughter.

3 Plaintiff, Isabelle's conservator, brought this action on the child's behalf
4 against Deere, along with the business that sold the lawnmower to Norton, defendant
5 Ramsey-Waite Company. The complaint -- which included claims for strict liability and
6 negligence -- alleged that the mower was defective and unreasonably dangerous or had
7 been negligently designed or marketed, in three respects: (1) it provided a mechanism for
8 overriding the automatic shutoff feature, thus allowing the cutting blades to operate when
9 the lawnmower was being driven in reverse; (2) the button for overriding the automatic
10 shutoff feature had been placed on the mower's dashboard, allowing the driver to mow in
11 reverse without turning around to ascertain whether the path is clear; and (3) it included
12 no warnings or instructions that addressed the safe and proper operation of the
13 lawnmower in reverse.

14 In their pleadings and at trial, defendants defended on the theory that the
15 mower was not dangerously defective and that defendants had not been negligent in any
16 of the ways that plaintiff had alleged, and that Isabelle's injuries had been caused by her
17 father's failure to (1) use the lawnmower in the intended manner and as instructed, (2)
18 keep a proper lookout, and (3) ensure that his daughter was properly supervised.

19 Defendants also asserted at trial that any defect or negligence in providing an override
20 feature did not cause Isabelle's injuries because, even if Norton had *not* used that feature,
21 the blades still would have been rotating at a high rate of speed when the mower and the
22 child came into contact.

1 At the close of trial, the court submitted a verdict form to the jury that
2 asked the following three questions:

3 "1. Was Defendant Deere & Company's lawn mower/tractor
4 defective and unreasonably dangerous in one or more of the ways alleged
5 by Plaintiff and, if so, was that a cause of injury or damage to Isabelle
6 Norton?"

7 "2. Was Defendant Deere & Company negligent in one or more of
8 the ways alleged by Plaintiff, and, if so, was that a cause of injury or
9 damage to Isabelle Norton?"

10 "3. Was Defendant Ramsey-Waite negligent in one or more of the
11 ways alleged by Plaintiff, and, if so, was that a cause of injury or damage to
12 Isabelle Norton?"

13 The jury answered "No" to each of the three questions, and the trial court entered
14 judgment for defendants.

15 Plaintiff appealed, raising 10 assignments of error. Four of the assignments
16 of error asserted that the trial court had erred by excluding testimony from several
17 witnesses about instances in which other children had been injured by Deere riding
18 mowers being driven in reverse. Plaintiff asserted that the testimony of those witnesses
19 was relevant either to show that Deere had notice of the defect that plaintiff had alleged
20 or to show that the mower was defective and dangerous. A fifth assignment of error
21 challenged the trial court's refusal to admit evidence that Deere marketed small toy riding
22 lawnmowers. In plaintiff's view, that evidence was relevant to show that Deere had
23 advertised its riding lawnmowers as being safe around children, and had affected
24 consumer expectations accordingly. Four more assignments of error challenged jury
25 instructions concerning what constitutes a product defect; those instructions either were

1 given to the jury over plaintiff's objection or were requested by plaintiff but rejected by
2 the trial court. A tenth and final assignment of error concerned the trial court's ruling that
3 one of defendants' witnesses -- a retired Deere engineer -- was qualified to testify as an
4 expert about how long the mower blades would have continued to rotate by sheer
5 momentum, and how far the mower would have travelled in reverse, if the automatic
6 shutoff feature had not been overridden. That testimony was proffered to show that the
7 alleged defect in the mower's design was not the cause of Isabelle's injuries because, even
8 if the automatic shut off feature had not been overridden, the mower's blades still would
9 have been rotating at a high rate of speed when they came into contact with the child.

10 Confronted with those assignments of error, the Court of Appeals
11 concluded that the last one was the *only* assignment of error that pertained to the element
12 of causation, as opposed to defendants' culpability. *Purdy*, 252 Or App at 648. The
13 Court of Appeals considered and rejected that assignment of error on its merits. *Id.* at
14 645-48. The court declined to consider plaintiff's remaining assignments of error. The
15 court explained that each question in the verdict form included both the issue of
16 culpability -- either the existence of a defective and unreasonably dangerous product (in
17 the strict liability claims) or a breach of the applicable standard of care (in the negligence
18 claims) -- and the issue of causation. *Id.* at 642-44. The court reasoned that it therefore
19 could not tell from the verdict form whether the jury had answered "no" to each question
20 because it found that plaintiff had failed to prove that the mower was dangerously
21 defective or that the relevant defendant was negligent, or because it found that plaintiff
22 had failed to prove that the relevant defendant's conduct had caused Isabelle's injuries.

1 *Id.* at 644-45. Because it could not tell whether the asserted errors had affected the jury's
2 verdict, the Court of Appeals concluded that it was required to affirm. *Id.* at 648.

3 In so concluding, the Court of Appeals relied on *Lyons v. Walsh & Sons*
4 *Trucking Co., Ltd*, 337 Or 319, 96 P3d 1215 (2004), where this court had undertaken to
5 apply the standard for reversal in ORS 19.415(2). Expanding on this court's construction
6 and application of that standard in an earlier case, *Shoup v. Wal-Mart Stores, Inc.*, 335 Or
7 164, 61 P3d 928 (2003), this court in *Lyons* reiterated that a party seeking reversal of a
8 judgment bears the burden of showing from the trial court record that the asserted error
9 substantially affected his or her rights. *Lyons*, 337 Or at 326. The court further held that,
10 where a compound question on a verdict form asks whether a defendant's conduct failed
11 to meet the relevant standard of care and, if so, whether that failure was the cause of the
12 plaintiff's damages, a single answer of "no" does not reveal whether the jury's answer
13 means no failure to meet the standard of care, or failure to meet the standard of care, but
14 no causation. *Id.* at 325. In such a situation, the court concluded, if the assignment of
15 error challenges the jury's determination that there was no failure to meet the standard of
16 care, the plaintiff cannot prevail because, even if the assignment is well taken, it is
17 irrelevant (and the error, therefore, harmless) if that failure did not cause injury. *Id.* at
18 325-26. Likewise, if the assignment of error challenges causation, that argument may be
19 well taken, but it is irrelevant (and the error, therefore, harmless) if there was no failure in
20 the first place. *Id.*

21 The Court of Appeals concluded that *Lyons* controls the present case
22 because here, as in *Lyons*, the jury answered "no" to questions that combined two

1 different elements -- culpability and causation -- of plaintiff's claims. That is, the format
2 of the verdict form made it impossible to discern -- insofar as the jury's resolution of
3 those two elements was concerned -- the rationale for the jury's verdict. *Purdy*, 252 Or
4 App at 639-45. Having rejected the single assignment of error that, in its view, related
5 only to the element of causation, the Court of Appeals concluded that considering the
6 remaining assignments of error would be futile, because plaintiff could not eliminate the
7 possibility that the jury had based its answers solely on a finding that plaintiff had failed
8 to establish causation. *Id.* at 645-48. Accordingly, the Court of Appeals affirmed the
9 judgment in defendants' favor.

10 THE PARTIES' DISPUTE

11 Plaintiff principally argues that the Court of Appeals' overall approach to
12 the reversible error analysis was flawed.¹ Plaintiff asserts that, in a long line of cases,
13 this court has concluded that instructional and evidentiary errors, like the ones asserted
14 here, "substantially affect[ed] the rights of a party," ORS 19.415(2), and therefore were
15 grounds for reversal. Plaintiff acknowledges that a different conclusion, focusing on the
16 format and content of the verdict form, "may be inevitable" when multiple specifications

¹ Plaintiff's petition for review presented two questions; the second question challenged the Court of Appeals' resolution of the single assignment of error that it had addressed on the merits -- plaintiff's assertion that defendant's expert was not qualified to testify about his reconstruction of the accident. This court declined to review the Court of Appeals' decision on that issue; it limited review to the question of whether, to establish reversible error, an appellant must demonstrate that an asserted instructional or evidentiary error was necessarily implicated in the jury's verdict.

1 of liability -- only one of which is shown to be invalid -- are combined into a single
2 question in the verdict form. Plaintiff argues, however, that the statute does not require
3 an appellant to have requested a special verdict form to establish that an instructional or
4 evidentiary error substantially affected the rights of the appellant. Plaintiff contends that,
5 to the extent that this court's decision in *Lyons* can be understood to hold otherwise, it
6 should be disavowed. According to plaintiff, the reasoning in *Lyons* is inconsistent with
7 this court's controlling precedent, and it was effectively rejected by this court in *Wallach*
8 *v. Allstate Ins. Co.*, 344 Or 314, 180 P3d 19 (2008). In short, plaintiff argues that --
9 contrary to the Court of Appeals' understanding -- whether the asserted instructional and
10 evidentiary errors constitute grounds for reversal is not controlled by *Lyons*.

11 Defendants have a different understanding of *Lyons* and its relevance here.
12 According to defendants, the decision in *Lyons* represented a straightforward application
13 of a broad principle announced in *Shoup* -- a party claiming trial court error has an
14 affirmative burden under ORS 19.415(2) to show from the trial court record that "the jury
15 made an adverse finding regarding the issue to which [the appellant's] claims of error are
16 directed." Defendants argue that, in *Lyons*, and earlier in *Jensen v. Medley*, 336 Or 222,
17 82 P3d 149 (2003), this court indicated that the construct that this court applied in *Shoup*
18 governs *all* categories of trial court error, including instructional and evidentiary error.
19 Defendants also observe that -- irrespective of reservations that this court expressed in
20 *Wallach* about the holding in *Lyons* -- this court expressly declined to reconsider or
21 overrule *Lyons*, leaving intact *Lyons'* specific holding in the context of compound verdict
22 forms. Defendants assert, in short, that *Lyons* is good law and that its reasoning

1 (same).

2 To determine whether evidentiary error is a ground for reversal, this court
3 generally has looked to two related standards. The first is the standard in ORS 19.415(2);
4 the second standard is that "[e]rror may not be predicated upon a ruling which admits or
5 excludes evidence unless a substantial right of the party is affected." OEC 103(1); *see*
6 *Jett v. Ford Motor Co.*, 335 Or 493, 497, 72 P3d 71 (2003) (so holding). In making those
7 determinations, this court ordinarily has held that an error in admitting or excluding
8 evidence does not require reversal if there is little likelihood that the error affected the
9 verdict. *See, e.g., State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003) (applying that
10 construct for reversal in criminal case).

11 In *Shoup*, this court faced a novel issue that implicated ORS 19.415(2). In
12 that case, an elderly woman who was shopping in a store was knocked to the floor when a
13 store employee bumped into her. The woman sued the store, alleging three separate
14 specifications of negligence. The defendant moved to strike one of the specifications of
15 negligence from the jury's consideration, but the motion was denied. At the end of trial,
16 the jury returned a general verdict for the plaintiff. The defendant appealed, assigning
17 error to the trial court's refusal to withdraw the challenged specification of negligence
18 from the jury's consideration. *Shoup*, 335 Or at 166-67. The Court of Appeals agreed
19 with the defendant that the challenged specification should not have been submitted to
20 the jury, but it noted that the jury had returned a general verdict that might have been
21 based on one or the other of the remaining specifications of negligence, neither of which
22 had been challenged. *Id.* at 167.

1 The Court of Appeals concluded that it was required to reverse under ORS
2 19.415(2), based on the so-called "we can't tell" rule that this court had announced in
3 *Whinston v. Kaiser Foundation Hospital*, 309 Or 350, 788 P2d 428 (1990). In *Whinston*,
4 the court had held, in an appeal involving a trial court's ruling on a motion for judgment
5 notwithstanding the verdict (JNOV) that, "[i]f the court cannot determine whether the
6 verdict was based on a [specification] supported by the evidence or on one unsupported
7 by the evidence, the result is a new trial." *Whinston*, 309 Or at 359.

8 For the purpose of determining whether the error at issue in *Shoup* required
9 reversal, *Whinston* was not directly on point, because that case had not involved any
10 explicit consideration of the standard set out in ORS 19.415(2). Still, it had obvious
11 implications for that standard, at least in cases involving a specific pattern of
12 circumstances -- that is, where multiple specifications of negligence, one of which is
13 invalid, are submitted to the jury in a single, general verdict question. To state the
14 obvious: In such circumstances, a reviewing court cannot tell whether the error in
15 submitting the invalid specification affected the verdict, because the jury might have
16 based its verdict on one of the valid specifications. The Court of Appeals understandably
17 applied that rule in *Shoup* to hold that, because it could not tell whether the jury had
18 based its verdict on one or more of the valid specifications of negligence, or on the single
19 invalid specification, it must remand for a new trial.

20 On review in *Shoup*, this court stated that, when it adopted the "we can't

1 tell" rule in *Whinston*, it had failed to consider whether that rule was compatible with the
2 statutory standard for reversal set out in ORS 19.415(2).² *Shoup*, 335 Or at 170. With
3 that question squarely before it, the court began its analysis by rejecting the defendant's
4 defense of the rule -- that, in *any* case posing a "we can't tell" problem, the mere
5 possibility that the jury based its verdict on an invalid specification of liability establishes
6 that the appellant's rights were "substantially affected" within the meaning of ORS
7 19.415(2). The court explained that the "outcome might have been different" construct
8 appeared to be more lenient than the standard set out in ORS 19.415(2). The court
9 concluded that

10 "the 'we can't tell' rule, which this court relied upon in some earlier cases
11 and synthesized in *Whinston*, is inconsistent with ORS 19.415(2). Because
12 that court-made standard conflicts with the standard that the legislature
13 determined for reversal by an appellate court of a trial court judgment, it
14 must give way. In every case, the appellate courts must adhere to the
15 limitation of ORS 19.415(2) and reverse or modify a judgment only if it can
16 be determined *from the record* that the error 'substantially affect[ed] the
17 rights of a party.'"

18 335 Or at 174 (emphasis added). Applying that holding to the case before it, the court
19 concluded that the record -- in particular, the verdict form -- did not show that the jury

² The question before the court in *Whinston* involved the proper disposition of a motion for judgment notwithstanding the verdict in the described circumstances, not whether the error in submitting the one invalid specification to the jury required reversal. Thus, the court did not consider whether the "we can't tell" rule was compatible with the standard in ORS 19.415(2).

1 had based its verdict on the invalid specification of negligence. Therefore, the court
2 reasoned, the defendant had not shown that the trial court's error in submitting that
3 specification to the jury had substantially affected the defendant's rights. *Id.* at 178-79.
4 In that context, the court suggested, the problem could have been avoided by using a
5 special verdict form: "A special verdict would have allowed defendant to show the
6 claims or specifications upon which the judgment was based and thus to provide us with
7 a record that would allow us to determine whether the trial court error was prejudicial."
8 *Id.* at 178.

9 The court in *Shoup* made particular mention of two cases that bear on our
10 discussion here, and which we now describe briefly. The first was *Baker v. English*, 324
11 Or 585, 932 P2d 57 (1997), where this court applied the statutory standard for reversal in
12 the context of an erroneous discovery ruling; the second was *Hernandez*, where this court
13 applied the statutory standard to instructional error.

14 The court in *Baker* held that the erroneous denial of discovery in that case
15 did not require reversal because the requesting party "already knew or had possession of
16 qualitatively the same information as that contained in the denied discovery." 324 Or at
17 593. As pertinent here, the court acknowledged that it often had determined whether an
18 error required reversal by inquiring whether the error permitted the jury to reach an
19 erroneous verdict. The court explained, however, that although that inquiry was helpful
20 in some cases, "[the court's] focus in this and all similar cases is the statutory test set forth
21 in ORS 19.415(2): 'No judgment shall be reversed or modified except for error
22 substantially affecting the rights of a party.'" *Id.* at 592-93. The court concluded that the

1 discovery error in that case did not satisfy the statutory standard:

2 "In the context of this erroneous discovery ruling, the central issue is
3 whether defendant, before trial, already knew or had possession of
4 qualitatively the same information as that contained in the denied
5 discovery. If such information were known before trial through other
6 sources, the denial of discovery could not substantially have affected
7 defendant's rights under ORS 19.125(2). That is so because, having already
8 known or been in possession of qualitatively indistinguishable information,
9 defendant could have chosen to pursue or utilize that information in
10 formulating a theory of the case and a strategy of presenting evidence."

11 *Id.* at 593. Thus, in *Baker*, the denial of discovery could not have had the statutorily
12 required effect on the right that the defendant posited, that is, to formulate and execute a
13 trial theory and strategy. Accordingly, the trial court's erroneous ruling could not furnish
14 a basis for reversing the judgment.

15 In the other important case discussed in *Shoup, Hernandez*, a woodworker
16 who had been injured by a saw brought a product liability action against its manufacturer.
17 The defendant asserted an affirmative defense of comparative fault that alleged ten
18 separate specifications of the plaintiff's negligence that had contributed to the accident.
19 The plaintiff requested an instruction that limited the kind of conduct that qualified for
20 consideration by the jury as comparative negligence in the circumstances. The trial court
21 declined to give the instruction. After the jury returned a verdict for the defendant, the
22 plaintiff appealed, assigning error to the trial court's refusal to give the requested
23 instruction. *Hernandez*, 327 Or at 102-05. On review, this court concluded that the
24 instruction was proper and that the trial court's refusal to give it could have affected the
25 jury's verdict on one of the ten specifications of comparative negligence. *Id.* at 112. The
26 court further concluded that the error required reversal under the construct described in

1 *Baker*, 324 Or at 590, and *Waterway Terminals*, 256 Or at 370, because the jury "may
2 have based its comparative fault assessment on a misperception of the evidence resulting
3 directly from the court's failure to give plaintiff's requested jury instruction." *Id.* Thus, in
4 *Hernandez*, this court held that instructional error had "substantially affect[ed]" the
5 appellant's rights within the meaning of ORS 19.415(2), where, based on the record in
6 that case, the trial court's refusal to give a valid instruction permitted the jury to reach an
7 erroneous verdict.

8 In *Shoup*, this court commented on the decisions in *Hernandez* and *Baker*:

9 "[I]n *Hernandez*, [the court] cited *Baker* as indirect authority for the
10 proposition that the rights of a party are 'substantially affected' if 'the
11 outcome of the case either would have or may have been different had the
12 error not occurred.' In that regard, *Hernandez*, like defendant's argument in
13 this case, takes this court's statement in *Baker* out of context. We do not,
14 however, question the conclusion reached by this court in *Hernandez*. The
15 error in jury instructions at issue in *Hernandez* was 'reversible' under ORS
16 19.415(2)."

17 335 Or at 172 n 2. Viewed in the context of the overall discussion in *Shoup*, that
18 comment is most logically understood to mean that the generally-applied construct for
19 determining whether instructional error is a basis for reversal under ORS 19.415(2) is not
20 a universal proxy for the statutory standard, but that its application in *Hernandez* was
21 correct. That is how this court interpreted it in *Wallach*. 344 Or at 323-24.

22 Shortly after it decided *Shoup*, this court applied ORS 19.415(2) in *State v.*
23 *Pine*, 336 Or 194, 82 P3d 130 (2003). In *Pine*, the defendant appealed his conviction for
24 third-degree assault, arguing that the trial court had erred by instructing the jury that, to
25 be convicted of that offense, the defendant himself need not have caused physical injury

1 to the victim. The state countered that, under *Shoup*, any error in giving the instruction
2 was not a ground for reversal, because the verdict was supported by evidence that the
3 defendant himself had caused physical injury to the victim. On review, this court
4 acknowledged that *Shoup* might be distinguishable on the ground that it was a civil, not a
5 criminal, case, but the court instead chose to "rely on a more fundamental reason to
6 distinguish *Shoup* from th[e] case [before it]. * * * [I]f the jury had believed defendant's
7 version of the facts, it nonetheless *could have* convicted him under the challenged
8 instruction. If * * * that instruction incorrectly stated the law, then the jury's guilty
9 verdict effectively would have convicted defendant of a crime that the legislature did not
10 enact." 336 Or at 200 (emphasis added).

11 That brings us, finally, to *Lyons*, the case that the Court of Appeals deemed
12 to be controlling here. In *Lyons*, the plaintiffs' decedent, a state trooper, was killed, along
13 with his colleague, Rector, when the police vehicle that Rector was driving and in which
14 the decedent was a passenger was struck by a tractor trailer. The plaintiffs brought a
15 wrongful death action against the company that owned the truck and employed its driver,
16 alleging that the accident was caused by the negligence of the defendant's employee.
17 *Lyons*, 337 Or at 321-22. The plaintiffs asserted -- and the defendant did not dispute --
18 that, if Rector had been negligent, he and his employer, the Oregon State Police, were
19 immune from liability to the plaintiffs under the exclusive remedy provision of the
20 workers' compensation statutes. *Id.* at 322.

21 In accordance with their view of the effect of that immunity, the plaintiffs
22 sought various instructions admonishing the jury not to "weigh or consider" Rector's

1 conduct unless it found that it was the "sole and exclusive" cause of the accident. *Id.* at
2 323. The trial court declined to give the requested instructions and, instead, instructed
3 the jury not to compare Rector's fault with the truck driver's fault. At the close of trial,
4 the court submitted a special verdict form to the jury that combined the issues of
5 negligence and causation into a single, compound question: Whether the defendant was
6 negligent in any of the ways alleged and "*and, if so*, was such negligence a cause of
7 damage to the plaintiffs." *Id.* at 323 (emphasis added). The jury answered "no" to that
8 question, and thus the defendant prevailed.

9 The plaintiffs unsuccessfully appealed to the Court of Appeals and then
10 sought review before this court, on the grounds that the trial court had erred in giving the
11 comparative fault instruction and in refusing to give the requested "sole and exclusive
12 cause" instruction. Although this court initially allowed review to consider those issues
13 on their merits, it eventually concluded that it could not reach them "because of the
14 nature of the verdict that the jury rendered." *Id.* at 324. The court observed that the jury
15 had rendered its verdict on a compound question that made it impossible to tell whether
16 the answer rested (1) on a determination that the defendant was *not* negligent, or,
17 alternatively, (2) on a determination that the defendant *was* negligent but that its
18 negligence had not caused the plaintiff's damages. *Id.* at 325.

19 The court explained:

20 "Our inability to determine which ground led the jury to decide as it
21 did is important, because plaintiffs have focused all their arguments in this
22 court on the second part of the question. That is, plaintiffs assert that the
23 instructions that the trial court gave and the evidence that it admitted
24 improperly permitted the jury to consider Rector's conduct in assessing

1 whether [the defendant's] conduct was a substantial factor in causing the
2 accident. But such errors by the trial court, if errors they were, are
3 irrelevant if the jury decided the case instead on the pristine proposition that
4 [the defendant] was not negligent."

5 337 Or at 325. This court referred to the holding in *Shoup* that a party seeking reversal of
6 a judgment bears the burden of making a record that demonstrates prejudicial error, and
7 then held:

8 "What this court stated in *Shoup* applies equally to the narrow
9 problem that the form of jury verdict used in the present case poses. This
10 was not a case in which the plaintiff advanced a single factual theory of
11 liability that the form of jury verdict reflected. Nor did this case involve
12 other kinds of asserted trial error, such as a faulty jury instruction, that may
13 call for a different analysis of whether the error 'substantially affect[s] the
14 rights of a party' under ORS 19.415(2). The jury verdict could have been
15 based on one of two different rationales that the jury verdict for defendant
16 identified; it is impossible to tell which the jury used. Plaintiffs' claims of
17 error may or may not be well taken, but they depend on an assumption that
18 the jury's verdict was based on one rationale only. The present record does
19 not support plaintiffs' assumption, and because they are asserting error, the
20 consequences of the inadequacy of the record in that respect fall on
21 plaintiffs."

22 *Id.* at 326.

23 In at least two respects, the court's explanation of its holding was somewhat
24 opaque. First, the court stated that the plaintiff had not "advanced a single factual theory
25 of liability that the form of jury verdict reflected." *Id.* That statement was literally
26 accurate; the plaintiff in *Lyons*, like the plaintiff in *Shoup*, had pleaded several factually
27 distinct specifications of negligence. *See Lyons*, 337 Or at 322 (describing the plaintiff's
28 multiple theories of negligence). However, the "two different rationales that the jury
29 verdict form identified" in *Lyons* -- culpability and causation -- had no obvious
30 connection to the circumstance that the plaintiff had pleaded multiple theories of liability.

1 Rather, those different "rationales" were common *elements* (as opposed to "theories of
2 liability") in each of the specifications of negligence. Second, the court's explanation
3 suggested that the case did not involve "other kinds of asserted trial error, *such as a faulty*
4 *jury instruction*, that may call for a different analysis of whether the error 'substantially
5 affect[s] the rights of a party,'" even though the plaintiff's fundamental position on appeal
6 was that the trial court had improperly instructed the jury.

7 In *Wallach*, this court addressed some of the uncertainty that arose out of
8 *Lyons*. In *Wallach*, an insured who had been injured in an automobile accident brought
9 an uninsured motorist (UM) action against his insurer. The plaintiff thereafter was
10 involved in two more accidents and, in the UM action, sought to hold the insurer liable
11 for aggravation of the injuries sustained in the first accident that resulted from the second
12 and third accidents. The plaintiff proffered an instruction that was consistent with his
13 aggravation theory, and the trial court gave the instruction despite the insurer's objection
14 that the instruction erroneously stated the law. The jury returned a verdict awarding
15 significant money damages to the plaintiff. The insurer appealed, asserting that the trial
16 court had erred in giving the "aggravation" instruction. The Court of Appeals agreed
17 with the insurer that the instruction was erroneous and reversed and remanded the case to
18 the trial court. *Wallach v. Allstate Ins. Co.*, 206 Or App 137, 145, 135 P3d 404 (2006).

19 The plaintiff sought review, arguing that the instruction was correct and
20 that, even if it was not, the Court of Appeals was bound by *Lyons* to affirm, because the
21 defendant had failed to show that the asserted error actually affected the verdict. The
22 plaintiff argued that the defendant had failed to make the required showing because the

1 challenged instruction was relevant only to the claimed aggravation damages sustained in
2 the second and third accidents, and the jury's award may have been based solely on the
3 injuries that resulted from the first accident.

4 This court in *Wallach* distinguished *Lyons* on the ground that, in *Lyons*, this
5 court had described that case as one involving a "narrow problem" pertaining to the form
6 of the verdict, not a faulty jury instruction. *Wallach*, 344 Or at 328. The court noted that,
7 in an unbroken line of cases preceding *Lyons*, this court had determined whether
8 instructional error had "substantially affected" the rights of a party under ORS 19.415(2)
9 by asking whether, based on the instructions read as a whole, the erroneous instruction
10 told the jury to apply the wrong legal rules to a claim or defense and, if so, whether, in
11 light of the trial court record, the error permitted the jury to reach a legally erroneous
12 outcome. *Wallach*, 344 Or at 326. The court further observed that it had applied the
13 same construct of the statutory standard in two instructional error cases, *Hernandez* and
14 *Pine*, where verdicts could have been based on alternative theories of liability or guilt that
15 would have been unaffected by the instructional error. *Id.* at 323-26.³ In the absence of

³ This court discussed *Hernandez* at length in *Wallach*. The court observed that, although *Hernandez* involved an assertion of instructional error, the asserted error was relevant to only one of the plaintiff's ten specifications of negligence -- a circumstance that was parallel to the circumstances in *Shoup*. The court explained that,

"[b]ecause the trial court refused to give the plaintiff's requested instruction, the jury applied an incomplete and thus inaccurate legal rule to the facts, which *permitted the jury to reach an erroneous result*. That was sufficient, this court held in *Hernandez* and reaffirmed in *Shoup*, to say that the

1 an indication that the court in *Lyons* had meant to overrule *Hernandez* and *Pine*, this
2 court in *Wallach* applied the construct of the statutory standard that the court had applied
3 in those two cases. *Id.* at 328, 330.

4 The court's decision in *Wallach* was not unanimous. Noting that the
5 majority had attempted (1) to distinguish *Lyons* as a case involving an error in the form of
6 the verdict and (2) to limit the holding in *Lyons* accordingly, the dissent protested that the
7 distinction did not withstand scrutiny. *Wallach*, 344 Or at 341-42 (Durham, J.,
8 dissenting). The dissent opined that the underlying problem in *Lyons* was an erroneous
9 jury instruction and that, because the court had applied the "we can't tell" standard for
10 reversal against the appellant in that case, it was bound to apply the same standard to the
11 instructional error in *Wallach*. *Id.*

12 The majority responded that it need not
13 "decide whether *Lyons* was correct in positing that the jury verdict form in
14 that case and instructional error present distinct issues for purposes of ORS
15 19.415(2). This case does not involve a jury verdict form similar to the one

instructional error substantially affected the plaintiff's rights and required reversal. That was true even though the jury in *Hernandez* properly could have based its verdict on the other allegations of negligence and the plaintiff in *Hernandez* could have memorialized the effect of the trial court's refusal to give his requested instruction by asking the jury to specify which, if any, of the defendant's allegations of negligence it relied on in determining the parties' respective fault."

Wallach, 344 Or at 325 (citations omitted; emphasis added).

1 in *Lyons*; it thus provides no occasion for us to decide whether the
2 distinction that the court articulated in *Lyons* was correct. Rather, it is
3 sufficient for the purposes of this case to reaffirm the general rule stated in
4 *Pine, Hernandez*, and an unbroken line of cases that, when a trial court
5 incorrectly instructs the jury on an element of a claim or defense and when
6 that incorrect instruction permits the jury to reach a legally erroneous result,
7 a party has established that the instructional error substantially affected its
8 rights within the meaning of ORS 19.415(2)."

9 *Wallach*, 344 Or at 329.

10 THE PROBLEM OF *LYONS*

11 To sum up thus far, in *Wallach*, this court cabined the holding in *Lyons* to
12 circumstances involving a particular kind of verdict form. Without reconsidering the
13 holding in *Lyons*, this court in *Wallach* concluded that, because the case before it did not
14 involve a similar verdict form, the holding in *Lyons* was not controlling. This court's
15 holding in *Wallach* therefore permitted the bench and bar to infer that *Lyons* does govern
16 the analysis in instructional error cases that do involve such a verdict form. That is
17 precisely the conclusion that the Court of Appeals reached in this case when it decided
18 that, in the absence of a special verdict form that eliminated the possibility that the jury's
19 verdict was based solely on the issue of causation, it could not consider plaintiffs' claims
20 of instructional and evidentiary error, all of which were concerned with elements of
21 culpability. *Purdy*, 252 Or App at 642 n 2. As a consequence, the ongoing vitality of
22 *Lyons* looms prominently in our review.

23 As discussed, plaintiff contends that *Lyons* does not control here. Although

1 plaintiff suggests other reasons why that may be so,⁴ his primary thesis is that *Lyons* was
2 wrongly decided. Plaintiff asserts that, before *Lyons*, this court consistently had held that
3 instructional error required reversal of a trial court judgment if the error permitted the
4 jury to reach a legally erroneous result.⁵ Plaintiff further observes that *Shoup* did not
5 involve instructional or evidentiary error and that this court in *Shoup* took pains to
6 distinguish instructional error from the kind of error presented in that case. *Shoup*, 335
7 Or at 172 n 2. Finally, plaintiff argues that, although the court in *Wallach* expressly
8 declined to overrule *Lyons*, it did, in effect, limit the holding in *Lyons* to its own
9 procedural posture. Plaintiff nevertheless asserts that *Lyons* was wrongly decided, even
10 in the supposedly narrow circumstances in which it arose.

11 This court does not overrule its prior decisions lightly. As we stated in
12 *Farmers Ins. Co. v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011), "[s]tability and
13 predictability are important values in the law." Because of the importance of those
14 values, we will not overrule prior decisions "simply because the personal policy
15 preferences of the members of the court may differ from those of our predecessors who
16 decided the earlier case." *Id.* (internal quotation marks omitted). We set out the

⁴ In particular, plaintiff argues that the instructional and evidentiary errors that he asserted pertained to the issue of causation as well as to the issue of fault and that, as such, the factual basis for applying the "we can't tell" standard was not present.

⁵ Plaintiff notes that the court had regularly applied a similar construct for evidentiary errors.

1 governing considerations in *Mowry*:

2 "[T]his court's obligation when interpreting constitutional and statutory
3 provisions and when formulating the common law is to reach what we
4 determine to be the correct result in each case. If a party can demonstrate
5 that we failed in that obligation and erred in deciding a case, because we
6 were not presented with an important argument or failed to apply our usual
7 framework for decision or adequately analyze the controlling issue, we are
8 willing to reconsider the earlier case. Similarly, this court is willing to
9 reconsider cases when the legal or factual context has changed in such a
10 way as to seriously undermine the reasoning or result of earlier cases."

11 *Id.* at 698.

12 *Lyons* concerned the meaning and application of a statute, ORS 19.415(2),
13 and our determination whether to reconsider that case here places particular emphasis on
14 the court's use of the appropriate interpretive framework, which, broadly conceived,
15 would include adequate consideration of the relevant context, including case law
16 interpreting or applying the statute. *Mowry*, 350 Or at 698. Thus, the criticism that
17 plaintiff has leveled against this court's decision in *Lyons* -- that, on the questionable
18 premise that the case did not involve a faulty jury instruction, the court in *Lyons* failed to
19 consider a body of pertinent case law -- could be an adequate basis for reconsidering that
20 case.

21 Notably, this court accepted review in *Lyons* to address the merits of the
22 plaintiff's assignments of instructional error but, without consulting the parties in that
23 case, decided that it could not reach those assignments of error because of the inherent
24 ambiguity of the verdict that the jury had rendered. The court's analysis of the issue was
25 sparse; it consisted of (1) a brief quotation setting out the primary holding of *Shoup*,
26 unaccompanied by any explanation of the procedural circumstances in which that holding

1 arose; (2) a conclusion that *Shoup* applied equally to "the narrow problem that the form
2 of jury verdict used in the present case poses" -- presumably a reference to the facts that
3 the verdict form asked the jury to answer a two-part question and that the court could not
4 tell which part of the question had driven the jury's answer; and (3) a statement that the
5 case did not involve "other kinds of asserted trial error, such as faulty jury instructions,
6 that may call for a different analysis." *Lyons*, 337 Or at 326. As discussed, because the
7 particular error that the appellant had asserted was that the jury instructions were faulty,
8 the court's statement was questionable. Also as discussed, the court did not directly
9 consider the line of cases that set out and applied a different construct of the standard for
10 reversal in the context of asserted instructional error. Those concerns provide sufficient
11 grounds for reconsidering the analysis applied in that case. *See Mowry*, 350 Or at 693
12 (stating pertinent considerations for decision whether to reexamine precedent). We now
13 turn to that task.

14 We begin by reiterating that the task before the court in *Lyons* was to
15 determine the meaning of, and apply, a statute. The standard currently codified in ORS
16 19.415(2) has been a part of this state's civil and criminal law since the Deady Code. *See*
17 *General Laws of Oregon, Civ Code, ch VI, § 533, p 284 (Deady 1845-1864)* (providing
18 that, in civil appeals, the judgment "shall only be reversed or modified for errors
19 substantially affecting the rights of the appellant"); *General Laws of Oregon, Crim Code,*
20 *ch XXIII, § 246, pp 482-83 (Deady 1845-1864)* (providing that, in criminal appeals, the
21 court "must give judgment, without regard to * * * technical errors, defects or exceptions
22 which do not affect the substantial rights of the parties").

1 As noted, this court construed ORS 19.415(2) in *Shoup*, and it reached two
2 conclusions that are pertinent here. First, to require reversal under the statute, an error
3 must -- in an important or essential manner -- have materially or detrimentally influenced
4 a party's rights; it is insufficient to speculate that the error might have changed the
5 outcome in the case. In that regard, the court said:

6 "Under the statute, 'no judgment shall be reversed * * * except for error
7 *substantially* affecting the rights of a party.'" (Emphasis added.) The words
8 of ORS 19.415(2) demonstrate that an error must cause something more
9 than the 'possibility' of a different result before the appellate court may
10 reverse a judgment. To 'affect' means, among other things, 'to act upon: a:
11 to produce an effect (as of disease) upon * * * b(1): to produce a material
12 influence upon or alteration in * * * (2): to have a detrimental influence on
13 * * *.'" *Webster's Third New Int'l Dictionary* 35 (unabridged ed 1993).
14 Thus, an error 'affecting' a party's rights is an error that can be said to
15 'produce a material influence' or 'to have a detrimental influence' on those
16 rights, and not merely one that 'might' have changed the outcome of the
17 case. The use of the adverb 'substantially' further limits the type of error
18 that can result in reversal of a judgment. 'Substantially' means 'in a
19 substantial manner,' and the relevant definition of 'substantial' is 'being of
20 moment: IMPORTANT, ESSENTIAL.' *Id.* at 2280."

21 *Shoup*, 335 Or at 173. Second, the statute imposes a burden on the party asserting an
22 error to demonstrate that the error had the required prejudicial effect. In that regard, the
23 court said:

24 "[T]he statute protects the trial court judgment from reversal or
25 modification 'except for' error substantially affecting a party's rights,
26 indicating that reversal of a judgment is the exception, not the rule. The
27 rule embodied in ORS 19.415(2) is neutral as between plaintiffs and
28 defendants; it places the burden to make a record that demonstrates
29 prejudicial error on whichever party loses in the trial court and then seeks
30 reversal or modification of the judgment on appeal."

31 *Id.* at 173-74.

32 As noted, defendants argue that, to satisfy those requirements, an appellant

1 must show that the jury actually made an adverse finding on the issue to which the
2 appellant's claims of error are directed. Plaintiff responds that the effects of the asserted
3 instructional and evidentiary errors on his rights in this case would not necessarily be
4 discernible from the content of a special verdict and, therefore, the generally applicable
5 constructs of the standard set out in ORS 19.415(2) for those types of errors ought to
6 govern here.

7 A careful reading of the words of the statute in light of this court's decision
8 in *Shoup* supports plaintiff's view. Just as the legislature could have conditioned reversal
9 on the mere possibility that an error affected the jury's decision if it had so intended, it
10 also could have conditioned reversal on a showing that the jury found against the
11 appellant on the particular element of a claim or defense to which the asserted error
12 pertained, if it had meant to impose that requirement. This court rejected the former
13 approach in *Shoup*, and we reject the latter here, because, it too, fails to correspond to the
14 statutory standard.

15 That standard asks, instead, whether -- in an important or essential manner --
16 - the error had a detrimental influence on a party's rights. *Shoup*, 335 Or at 172-73. It
17 does not pretend to measure mathematical probabilities; rather, it assesses the extent to
18 which an error skewed the odds against a legally correct result. This court's previous
19 decisions that have applied the standard to instances of instructional and evidentiary error
20 generally indicate that little likelihood is not enough, but more -- that is, "some" or a
21 "significant" likelihood that the error influenced the result -- will suffice for reversal. *See*
22 *State v. Lopez-Minjarez*, 350 Or 576, 587, 260 P3d 439 (2011) (because "erroneous

1 instruction had no significant likelihood of affecting the jury's verdict" on a charge, it did
2 not substantially affect defendant's rights); *see also Davis*, 336 Or at 29 n 7 ("under [ORS
3 19.415(2)] the analysis whether an appellate court must affirm a judgment despite trial
4 error is similar to the analysis that Article VII (Amended), section 3, requires.").⁶

5 In *Hernandez*, this court referred to "the general rule [that] the parties in a
6 civil action are entitled to jury instructions on their theory of the case if their requested
7 instructions correctly state the law, are based on the current pleadings in the case, and are
8 supported by evidence." *Hernandez*, 327 Or at 106. The court in *Hernandez* concluded
9 that, because the trial court refused to give the plaintiff's requested instruction, the jury
10 applied an incomplete and inaccurate legal rule to the facts, which, in the context of the
11 record as a whole, permitted the jury to reach a legally incorrect outcome; accordingly,
12 the error substantially affected the appellant's rights. *Id.* at 112; *see also Wallach*, 344
13 Or at 329 (erroneous instruction that permitted jury to find defendant liable for damages
14 for which it was not liable, as well as damages for which it was liable, substantially
15 affected defendant's rights); *Pine*, 336 Or at 209-10 (instruction that permitted jury to

⁶ Article VII (Amended), section 3, of the Oregon Constitution, provides, in part:

"If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial[.]"

Oregon's constitutional test for affirmance despite error consists of a single inquiry: Is there *little likelihood* that the particular error affected the verdict? *Davis*, 336 Or at 32.

1 convict defendant based on facts contrary to statute defining crime substantially affected
2 defendant's rights).

3 That approach to analyzing the effect of error under ORS 19.415(2) is
4 consistent with a presumption to which this court has adhered for many years; that is,
5 "[w]e presume that a jury follows a trial court's instructions." *Wallach* 344 Or at 326. It
6 does not mean, however, that all or most instructional error substantially affects a party's
7 rights for the purposes of ORS 19.415(2). "A jury instruction does not constitute
8 reversible error unless it prejudiced the defendant when the instructions are considered as
9 a whole." *State v. Bowen*, 340 Or 487, 516, 135 P3d 272 (2006), *cert den*, 549 US 1214
10 (2007). Moreover, in making that determination, the court not only considers the
11 instructions as a whole, it considers the instructions in the context of the evidence at trial
12 and the parties' theories of the case with respect to the various charges, claims, and
13 defenses at issue. *Lopez-Minjarez*, 350 Or at 578 (2011) (to assess whether error in
14 instructing jury substantially affected appellant's rights on various charges involved, "it is
15 important to describe both sides' respective evidence and theories of the case"); *see also*
16 *State v. Phillips*, 354 Or 598, 613, 317 P3d 236 (2013) (erroneous failure to give jury
17 concurrence instruction did not substantially affect defendant's rights because, "on the
18 facts in this case, the factual findings necessary to find defendant liable on one theory
19 either subsumed or were the same as the factual findings on the other theory"); *U.S.*
20 *National Bank v. Boge*, 311 Or 550, 566, 814 P2d 1082 (1991) (giving erroneous
21 instruction regarding standard of conduct substantially affected plaintiff's rights because
22 "[t]he standard for [plaintiff's] conduct was the central issue to be decided," and error

1 permitted jury to reach incorrect result).⁷

2 That kind of record-based review is consistent with this court's statement in
3 *Shoup* that ORS 19.415(2) "places the burden to make a record that demonstrates
4 prejudicial error on whichever party * * * seeks reversal," and that that rule applies "in
5 every case." 335 Or at 173-74. As noted, in *Shoup*, this court concluded that the
6 defendant was "unable to show that the trial court's error [in allowing the invalid
7 specification to go to the jury] substantially affected [its] rights." *Id.* at 179. In so
8 holding, the court relied on two factors in the record. First, the court noted that identical
9 evidence applied to all three specifications of negligence in that case, two valid and one
10 invalid:

11 "The evidence that plaintiff introduced in support of her negligence claim
12 was straightforward: Plaintiff, her husband, her physician, and the store
13 employee were the only witnesses at trial. There was no dispute that
14 plaintiff was injured when she was struck by the store employee, who was
15 backing up to get out of another shopper's way. All three specifications of
16 negligence were based on the same evidence, and the jury concluded that
17 plaintiff had proved her negligence claim."

18 *Id.* at 178. In sum, the record showed that there was little likelihood that the jury had
19 found for the plaintiff on the invalid specification without also finding for the plaintiff on

⁷ The same is true for evidentiary error. If, for example, evidence that was erroneously admitted related to a central issue in the case, then it is more likely that the error substantially affected the jury's decision. *See State v. Marrington*, 335 Or 555, 566, 73 P3d 911 (2003) (concluding that the error could have affected the verdict because the evidence related to a central factual issue in the case).

1 one or both of the valid specifications.

2 Second, the court stated that

3 "[a] special verdict would have allowed defendant to show the claims or
4 specifications upon which the judgment was based and thus to provide us
5 with a record that would allow us to determine whether the trial court error
6 was prejudicial. *See Whinston*, 309 Or at 359 n 10 (describing benefits of
7 special verdict or interrogatories to jury). In this case, however, defendant
8 objected to plaintiff's proposed special verdict form, and the court used
9 defendant's general verdict form."

10 *Id.* at 178-79. Thus, it was significant that the defendant had affirmatively eschewed --
11 by objecting to a theory-specific verdict form -- the opportunity to create a record that
12 would have established whether the jury had found for the plaintiff on only the invalid
13 theory of liability. In that circumstance, the court held, the defendant had "not identified
14 anything in the record to demonstrate that the jury based its verdict on [the invalid
15 specification of negligence]" and that the defendant, therefore "[was] unable to show that
16 the trial court's error substantially affected [the] defendant's rights." *Id.* at 178-79.

17 That holding constituted a particular application of the standard in ORS
18 19.415(2) based on the record before the court. The error did not substantially affect the
19 defendant's rights, because the same evidence applied to all three theories of liability, and
20 there was little likelihood that the jury had based its verdict on the invalid theory alone.
21 And, to punctuate the analysis, the record showed that the defendant had actively
22 prevented the use of a verdict form that would have shown whether the jury had based its
23 verdict on the invalid theory of liability. Accordingly, the defendant was in no position
24 to complain about the error.

25 Here, the verdict form that the trial court submitted to the jury was not as

1 specific as the type of verdict form to which this court referred to in *Shoup*. That is, the
2 form in this case required the jury to enter separate verdicts on plaintiff's claims for strict
3 liability and negligence, but it combined the various specifications of liability for each
4 claim into a single verdict on that claim. However, for two reasons, a theory-specific
5 verdict form like the one that the court referred to in *Shoup* would not necessarily have
6 revealed whether the posited instructional and evidentiary errors in this case adversely
7 influenced the result that the jury reached. First, although plaintiff asserted several
8 theories of liability on each claim, culpability and causation were common elements in
9 each of those theories. In that circumstance, a separate verdict on each theory of liability
10 would not have shown the jury's findings as to those elements.

11 Second, for good reason, this court in *Shoup* was careful to distinguish the
12 problem in that case from circumstances involving instructional error. Where multiple
13 theories of liability are advanced and a challenged jury instruction or evidence applies to
14 one or more (but not all) theories, a verdict showing the jury's decision on a theory-
15 specific basis might indicate (if, for example, the error pertained only to a theory of
16 liability on which the jury found for the appellant) that the error did *not* adversely
17 influence the jury's decision. However, a theory-specific verdict would not necessarily
18 demonstrate whether the converse is true. In the case of instructional error, to show more
19 about the likelihood that the error adversely influenced the jury's decision, a verdict form
20 would have to create a decision tree setting out the jury's deliberative path in
21 considerably greater detail. Because jury instructions often apply to single elements of a
22 claim or defense, the verdict form would need to include separate findings with respect to

1 each triable issue of fact to which a disputed instruction might apply. And even that level
2 of detail would not necessarily reveal that (or the extent to which) any particular error
3 substantially affected the appellant's rights, because, as discussed, that determination --
4 for both instructional and evidentiary error -- generally turns on broader, record-based,
5 considerations that are not reflected in the content of a verdict form. *See, e.g., Lopez-*
6 *Minjarez*, 350 Or at 584-91 (determining effect of instructional error on appellant's rights
7 by examining evidence and parties' theories as to each charge); *Jett*, 335 Or at 500-01
8 (evidentiary error was harmless under ORS 19.415(2) and OEC 103(1) because "ample
9 evidence in the record made the same point that" the appellant sought to make by
10 introducing the excluded evidence).

11 Thus, it comes as no surprise that, apart from the import of its holding in
12 *Lyons*, this court has never suggested that an appellant must have proposed an element-
13 by-element or factual issue-by-issue questionnaire format for a jury verdict to
14 demonstrate the existence of reversible instructional or evidentiary error under ORS
15 19.415(2).⁸ In particular, this court in *Shoup* did not suggest that, in every circumstance,

⁸ This court's decision in *Jensen* does not undercut the point that we make here. In *Jensen*, this court concluded that the trial court had erred in giving a jury instruction pertaining to one of two theories of whistleblower liability that the plaintiff had advanced. *Jensen*, 336 Or at 238-39. The jury returned a verdict for the plaintiff, but the verdict form did not distinguish between the two theories of liability; thus, this court was unable to determine on the defendant's appeal whether the jury's verdict had been based on the theory of liability to which the erroneous instruction applied. *Id.* at 240. In affirming the judgment, we treated the error in giving the instruction as analogous to the problem of submitting an invalid specification of liability to the jury. *See Strawn v.*

1 the effect of an error on an appellant's rights must (or even could) be shown through the
2 use of a special verdict. Nor did this court in *Shoup* purport to disavow previous
3 decisions in which it had applied ORS 19.415(2) to assignments of instructional or
4 evidentiary error.

5 If the court had taken those decisions into account in *Lyons*, the answer that
6 the court gave in that case would -- and should -- have been different. *Lyons* involved an
7 instructional error problem, and the proper application of the statutory standard for
8 reversal in that case was the familiar one that this court had earlier used in *Pine*, and later
9 used in *Wallach* and *Lopez-Minjarez*. Generally speaking, if a trial court incorrectly
10 instructs the jury on an element of a claim or defense, and -- when the instructions are
11 considered as a whole in light of the evidence and the parties' theories of the case at trial -
12 - there is some likelihood that the jury reached a legally erroneous result, a party has
13 established that the instructional error substantially affected its rights within the meaning
14 of ORS 19.415(2). *Lopez-Minjarez*, 350 Or at 584-91; *Wallach*, 344 Or at 329; *Pine*, 336
15 Or at 200, 210.⁹ That is so, logic dictates, even if it cannot be definitively shown that the

Farmers Ins. Co., 350 Or 336, 370, 258 P3d 1199 (2011) (describing holding in *Jensen* as "affirming judgment, despite erroneous jury instruction on one of plaintiff's theories of liability, where defendant did not challenge another basis for liability."). This court in *Lyons* did not discuss *Jensen*, nor was there a reason to do so. Unlike in *Jensen*, there was no indication in *Lyons* that the plaintiff's assignment of instructional error in that case applied to one or more, but fewer than all, of the plaintiff's theories of negligence.

⁹ As noted, since deciding *Shoup*, this court has continued to apply the "little likelihood that the error affected the result" construct to assignments of evidentiary error.

1 jury *did* base its verdict on the erroneous instruction or if a more elaborate, element-by-
2 element verdict form might have shown that the jury *did not* base its verdict on the
3 erroneous instruction. Thus, the fact that the verdict form in *Lyons* did not pose separate
4 questions for the jury to answer on particular factual elements of plaintiff's multiple
5 theories of liability did not require a different construct of the statutory standard in that
6 case. We therefore disavow and overrule our contrary holding in *Lyons*.¹⁰

7 APPLICATION

8 With that understanding, we return to this case. As discussed, the Court of
9 Appeals concluded that it could not consider nine of plaintiff's ten assignments of error
10 because, even if established, none of those errors would constitute a ground for reversal.
11 That was so, in the court's estimation, because, in the absence of a special verdict that
12 separated the issues of culpability and causation, it could not tell whether, after it had
13 rejected the sole claimed error regarding causation, any of the remaining claimed
14 instructional or evidentiary errors (all of which pertained only to the issue of culpability)
15 had affected the jury's decision. The court concluded that it was bound by this court's

See Davis, 336 Or at 32 (applying construct).

¹⁰ Chief Justice Balmer's concurrence offers sound practical guidance for creating a record to assist an appellate court in determining whether trial court error was prejudicial. We agree with the Chief Justice that careful practitioners always should consider taking steps -- including, where practical, the thoughtful use of appropriately tailored verdict forms -- to create a record that exceeds the requirements of the legal standard set out in ORS 19.415(2).

1 holding in *Lyons* to apply that construct to all categories of trial court error, including the
2 instructional and evidentiary errors at issue here. 252 Or App at 642.

3 Because we have overruled our holding in *Lyons*, we reverse and remand to
4 the Court of Appeals to consider plaintiff's remaining assignments of error. If that court
5 concludes that one or more of plaintiff's assignments of error are meritorious, it can then
6 determine whether the error substantially affected plaintiff's rights.

7 The decision of the Court of Appeals is reversed and the case is remanded
8 to that court for further proceedings.

9 **BALMER, C. J.**, concurring.

10 This case raises the ubiquitous and difficult issue of what an appellate court
11 should do in the face of trial court error: When should error lead to reversal and when,
12 notwithstanding error of some kind, should the judgment below nevertheless be affirmed?
13 The question has vexed appellate court review of criminal and civil cases for centuries
14 and touches on such fundamental concerns as fairness, the protection of constitutional
15 rights, the role of juries, the legitimacy of trial and appellate court processes, and the
16 prudent use of judicial resources. *See generally* Roger J. Traynor, *The Riddle of*
17 *Harmless Error* (1970). Courts have struggled to articulate the appropriate test and, once
18 articulated, to undertake the more nuanced task of applying it to specific cases.

19 The majority opinion is a useful addition to the ongoing effort of the
20 Oregon appellate courts to articulate and apply the proper test for reversing a trial court
21 judgment when the appellant demonstrates error in the trial court proceedings. I agree
22 with the majority's analysis and disposition of this case and with its discussion of *Shoup*

1 *v. Wal-Mart Stores, Inc.*, 335 Or 164, 61 P3d 928 (2003) and ORS 19.415(2). I write
2 separately to emphasize several aspects of the task at hand and to suggest at least some
3 ways that a party seeking to reverse a trial court judgment can provide assistance to the
4 appellate court.

5 Few legal proceedings are flawless, of course, and to reverse every trial
6 court judgment because there was error of some kind in the proceeding would undermine
7 critical goals of justice, finality, and efficiency. In fact, courts at various times have done
8 just that -- reversing convictions because, for example, the indictment charged a
9 defendant with entering a building with the intent to commit "larceny," and the statute
10 criminalized only entry with intent to commit "larceny," or when the indictment stated
11 that the offense was "against the peace of the State," instead of "against the peace *and*
12 *dignity* of the State." Traynor, *The Riddle of Harmless Error* at 3-4, 85 n 3. Yet to
13 require an appellant to demonstrate that the trial court judgment was "clearly wrong," as
14 some courts have, *see id.* at 17-18, 89 n 45, would pose an often insurmountable hurdle
15 for the party seeking reversal and would countenance serious legal error at the trial level.

16 The Oregon statute providing for appellate review of trial court judgments
17 sets a standard for reversal between those two extremes. It requires a party seeking
18 reversal to demonstrate that trial court error "substantially affect[ed]" the party's rights,
19 but does not require a showing that the error necessarily led to an incorrect judgment.
20 ORS 19.415(2) puts it this way: "No judgment shall be reversed * * * except for error
21 substantially affecting the rights of a party." In *Shoup*, we analyzed and applied that
22 provision, noting that "reversal of a judgment is the exception, not the rule" and that,

1 while the standard for reversal is neutral as between plaintiffs and defendants, "it places
2 the burden to make a record that demonstrates prejudicial error on whichever party loses
3 in the trial court and then seeks reversal or modification of the judgment on appeal." 335
4 Or at 173-74.¹¹ Moreover, when a party seeks reversal of a jury verdict, the Oregon
5 Constitution imposes a further barrier by barring "re-examin[ation]" of any fact tried to a
6 jury, "unless the court can affirmatively say there is no evidence to support the verdict."
7 Or Const, Art VII (Amended), § 3. The obvious and intended (and salutary) effect of
8 those legal principles is to place a thumb on the scale in favor of the trial court judgment.

9 The more difficult questions are how to articulate the legal standard -- other
10 than simply repeating the words of ORS 19.415(2) -- and how to apply it to specific
11 cases. The majority correctly points out that it is not enough for the appellant to argue
12 that the error "possibly" affected the outcome of the case. ___Or at ___ (slip op at 26,
13 lines 8-14). Except for the most trivial of errors, it almost always can be argued that an
14 error at trial -- in evidence admitted or excluded, in an instruction given or not given, in a

¹¹ As the majority opinion discusses, *Lyons v. Walsh & Sons Trucking Co., Ltd.*, 337 Or 319, 96 P3d 1215 (2004), extended the logic of *Shoup* beyond its proper scope. That result perhaps can be traced in part to the comment in *Shoup* that ORS 19.415(2) places on the appellant the "burden to make a record that demonstrates prejudicial error." *Shoup*, 335 Or at 173-74. As the majority points out, that statement should not be taken to mean that the appellant must ensure that the appellate court can determine from the record that the error *necessarily* or *actually* affected the judgment. Rather, it asserts the unsurprising point that the appellate court will conduct its review as to whether the error "substantially affect[ed]" the appellant's rights based on the record before it -- and if the record includes nothing that would permit the appellate court to reach that conclusion, the result will be affirmance. The appellant bears that risk.

1 comment by a judge, attorney, or witness that should not have been made -- "possibly"
2 affected the outcome. Nor, as the majority states, must the appellant show that the jury
3 actually found against the appellant on the claim or defense to which the error pertained.
4 *Id.* Lacking access to the jury room or the individual and group decision making
5 processes that occur there, parties and courts rarely will be able to determine whether the
6 error actually had an effect on the verdict. To set the bar that high would be inconsistent
7 with ORS 19.415(2), which does not require a party to demonstrate that it would have
8 prevailed, absent the error, but only that the error "substantially affect[ed]" its rights.

9 So, the bar for the appellant is somewhere above "possibly affected" the
10 result, but below "necessarily affected" the result. Elaborating on *Shoup*, the majority
11 articulates the statutory standard to be "whether -- in an important or essential manner --
12 the error had a detrimental influence on a party's rights"; the appellate court must
13 "assess[] the extent to which an error skewed the odds against a legally correct result."
14 ___Or at ___ (slip op at 26, lines 15-18). That is not like a preponderance of the
15 evidence test to determine whether a plaintiff in a civil case has met its burden of
16 showing that a particular assertion or fact was "more likely true than not." "Some"
17 likelihood -- more than "a little" -- that the error influenced the result is required, *id.* (slip
18 op at 26, lines 18-21), but "how much" more will depend on factual and legal issues in
19 the case as determined from the trial court record. The majority, correctly in my view,
20 eschews a more precise quantification of the probability that the error affected the result.
21 Of course, the critical task is applying the statutory standard to the record in a particular
22 case.

1 Fortunately, there are other aspects of appellate review that this court
2 routinely considers that make the problem less daunting than it might appear in the
3 abstract. First, we have long recognized that some trial errors are substantial and more
4 likely to have affected the result, while others are less likely to have done so. Evidentiary
5 error, for example, is "not presumed to be prejudicial," OEC 103(1), and we have relied
6 on that presumption in affirming judgments notwithstanding the erroneous exclusion or
7 admission of evidence. *See State v. Gibson*, 338 Or 560, 575-77, 113 P3d 423, *cert den*,
8 546 US 1044 (2005) (citing OEC 103(1) and concluding that improperly admitted
9 evidence was not prejudicial). Similarly, when considering a claim of instructional error,
10 we do not look at the challenged instruction in isolation, but rather examine the
11 instructions as a whole to determine whether they accurately state the law. *State v.*
12 *Oatney*, 335 Or 276, 290, 66 P3d 475 (2003), *cert den*, 540 US 1151 (2004). If the
13 instructions as a whole provide a complete and accurate statement of the law sufficient
14 for the jury to properly decide the issues before it, an appellate court is unlikely to find
15 that a claimed instructional error was prejudicial and to reverse a judgment on that
16 ground. *See State v. Bowen*, 340 Or 487, 516-17, 135 P3d 272 (2006), *cert den*, 549 US
17 1214 (2007) (concluding that, because instructions considered as a whole included
18 complete and correct statements of the law necessary to decide the charges, fact that
19 instructions perhaps should have been given in different sequence and that lesser-
20 included offense instruction should have been given in connection with aggravated
21 murder charge, rather than intentional murder charge, was not prejudicial).

22 Moreover, we do not look at trial court errors in the abstract -- rather, we

1 examine those errors in the context of the trial record as a whole, including the parties'
2 claims and defenses, the evidence admitted and excluded, the parties' theories of the case,
3 and the instructions. This court was able to reach the result it did in *Shoup* only after
4 considering those factors. *Shoup*, 335 Or at 178-79. As the majority notes, in both civil
5 and criminal cases, this court has generally engaged in that kind of contextual, record-
6 based review to assess whether error is prejudicial. ___ Or at ___ (slip op at 28-29, lines
7 10-22, 1; slip op at 32, lines 1-10) (discussing cases).

8 The approaches just discussed regarding evidentiary and instructional error,
9 and the appellate courts' commitment to reviewing the trial court record, provide some
10 structure to the ORS 19.415(2) inquiry. That difficult inquiry, however, inevitably
11 requires the exercise of some amount of discretion by the appellate court. *See* Traynor,
12 *The Riddle of Harmless Error* at 15-17 (discussing discretion in harmless error review).

13 But litigants need not leave themselves at the mercy of an appellate court
14 trying to determine from the record whether trial court error "affected" the judgment "a
15 little," "some," or "a lot." Special verdict forms, such as the form proposed by the
16 plaintiff (but objected to by the defendant) in *Shoup* that would have asked the jury to
17 state separately whether it found the defendant negligent based on its own negligence or
18 that of its employee, can greatly assist an appellate court in determining whether error
19 was prejudicial. Verdict forms separating liability, causation, and damages can clearly
20 demonstrate that an error did -- or did not -- affect the verdict. *See* ORCP 61 B
21 (authorizing use of special verdict). Interrogatories can separate jury determinations as to
22 the liability of one party among multiple defendants or one claim among multiple claims

1 and can even address issues related to specific evidence, the admissibility of which might
2 become a critical issue on appeal. *See* ORCP 61 C (authorizing use of interrogatories).

3 I fully agree with the majority that an appellant need not "prove," by means
4 of a verdict form or an interrogatory, that the jury based its verdict on improperly
5 admitted evidence or an instruction that turned out to be erroneous. And the majority is
6 correct that attempting to come up with a verdict form or interrogatories that would allow
7 an appellate court to determine whether any particular jury instruction or evidentiary
8 ruling -- later asserted to be erroneous -- necessarily affected the judgment could, in a
9 complicated case, quickly lead to a complex "decision tree" for the jury's deliberative
10 path that might create more problems for jurors, parties, and the court than it would solve.
11 *See ___Or___* (slip op at 31-32, lines 18-22, 1-5) (discussing limitations of verdict
12 forms).

13 However, lawyers aware of the difficulty that appellate courts face in
14 determining whether error is prejudicial or harmless -- and of the amount of discretion
15 appellate courts inevitably exercise in that area -- should consider whether they and their
16 clients would be better off on appeal if they used verdict forms or interrogatories that
17 provided greater insight into the basis for the jury's verdict. Here, the verdict form
18 consisted of separate questions about products liability and negligence as to Deere and
19 Company and negligence as to Ramsey-Waite Company. However, each question
20 actually was a compound question asking both about a theory of liability (products
21 liability or negligence) and about the very different issue of causation. Because causation
22 was vigorously disputed at trial, it would have made sense for one or all parties to have

1 requested a verdict form that separately addressed that issue.

2 Similarly, in *Lyons v. Walsh & Sons Trucking Co., Ltd.*, 337 Or 319, 96
3 P3d 1215 (2004), the court was confronted with a verdict form that asked the compound
4 question of whether the defendant was negligent and, if so, whether its negligence was a
5 cause of the plaintiff's damages. The jury answered "no." 337 Or at 323. Causation was
6 a key issue at trial and the subject of assignments of error related to instructions and a
7 requested interrogatory. Yet the compound question posed to the jury prevented the court
8 from determining whether the jury had concluded that the defendant was not negligent or
9 that the defendant, although negligent, did not cause the plaintiff's damages. Again,
10 simply separating the question of liability from the question of causation on the verdict
11 form would have provided substantial assistance to the appellate courts in seeking to
12 determine whether any trial court errors had "substantially affect[ed]" the judgment. In
13 appropriate cases, lawyers can assist their clients, and the fair and efficient administration
14 of justice, by crafting verdict forms and interrogatories that will help appellate courts
15 determine when trial court errors should result in reversal. *See* Traynor, *The Riddle of*
16 *Harmless Error* at 23 (advocating use of special verdicts and interrogatories).

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