IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

EUGENIA BRITT, individually, as surviving child of GEORGE GIANOS, deceased, and on behalf of the Estate of GEORGE GIANOS; ANNA GIANOS, surviving spouse of GEORGE GIANOS, deceased; FOTINI GIANOS, surviving child of GEORGE GIANOS, deceased,

Plaintiffs/Appellees,

vs.

TOYOTA MOTOR SALES, U.S.A., INC.; ESKRIDGE LEXUS OF OKLAHOMA CITY; ESKRIDGE, INC.; ESKRIDGE AUTO GROUP, INC.; and ESKRIDGE IMPORTS, INC.,

Defendants/Appellants.

and

TOYOTA MOTOR SALES NORTH AMERICA, INC.; TOYOTA MOTOR MANUFACTURING, INC.; TOYOTA MOTOR ENGINEERING & MANUFACTURING NORTH AMERICA, INC.;

Defendants.

Case No. 121,330

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ANTHONY L. BONNER, JR., TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

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OPINION BY STACIE L. HIXON, JUDGE:

Toyota Motor Sales, U.S.A., Inc.; Eskridge Lexus of Oklahoma City; Eskridge, Inc.; Eskridge Auto Group, Inc.; and Eskridge Imports, Inc. (Defendants) appeal judgment entered in favor of Plaintiffs Eugenia Britt – Individually and on Behalf of the Estate of George Gianos; Anna Gianos; and Fotini Gianos in this wrongful death action, as well as denial of their Motion to Vacate Judgment or in the Alternative Motion for New Trial or Remittitur.[1] We find the trial court committed reversible error by instructing the jury to apportion damages between the three individual Plaintiffs and the "Estate" of Mr. Gianos and through the court's instruction regarding seat belt non-use on their claims of manufacturer's products liability. Thus, the trial court abused its discretion by denying Defendants' Motion for New Trial. We vacate the trial court's judgment and remand for proceedings consistent with this Opinion.

[1] Toyota Motor Sales North America, Inc.; Toyota Motor Manufacturing, Inc.; and Toyota Motor Engineering & Manufacturing North America, Inc. were also named as Defendants in this action. The record does not indicate they were ever served.

BACKGROUND

George Gianos (Decedent) was fatally injured in a motor vehicle accident in July 2010 while driving a 1994 Lexus LS400. Decedent's wife, Anna, was a passenger in the vehicle, and was seriously injured but survived the accident. Decedent struck two vehicles while traveling down a highway and, after exiting, struck a curb, and collided with a pillar next to a gas pump. Decedent died shortly after the accident. The vehicle's airbags and seat belt pretensioners did not deploy at the time of the accident. [2]

Plaintiffs, Anna as surviving spouse and the Gianos' daughters, Fotini Gianos and Eugenia Britt, "individually and on behalf of Mr. Gianos' estate," filed the underlying products liability suit contending the vehicle was defective and caused or contributed to Decedent's death.[3] Plaintiffs claimed individual damages. Defendants answered and did not object to naming the three individual Plaintiffs or address whether the action was brought by the correct representative under the wrongful death statutes. The case proceeded to jury trial from October 10 through 20, 2022.

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[2] Generally, a seat belt pretensioner triggers to tighten the seat belt at the time of a collision.

[3] The record indicates this action was a refiling of an earlier action, CJ-2011-8958 (Okla. Cty.), which was voluntarily dismissed.

At trial, Plaintiffs contended Defendants failed to adequately design, manufacture or inspect the vehicle and failed to warn of its dangerous characteristics. Plaintiffs did not assert Defendants caused the initial accident.[4] However, they asserted Decedent would not have been fatally injured if the airbags and seat belt pretensioner had deployed. Defendants did not dispute that the air bag and seat belt pretensioner did not deploy, though they disputed the vehicle was defectively designed. Defendants asserted, however, that any defect in the vehicle did not cause or contribute to Decedent's death, because Decedent was not wearing his seat belt at the time of the accident and was out of position for the air bag to protect him from serious injury from the collision.

The evidence at trial was conflicting as to whether Decedent was wearing a seat belt, and whether Decedent's death was caused by defects in the vehicle, or because he was unbelted. It was undisputed at trial that Decedent struck the windshield and steering wheel during the collision, sustaining fatal injuries to his head and chest. The medical examiner testified Decedent did not have seat belt marks on his body, though he had an abrasion on his hip, and could not testify

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[4] The reason for Decedent's initial collision with the pillar appears to be unresolved. Though Anna testified at trial that Decedent could not stop or did not have brakes, the jury was instructed that Plaintiffs did not contend the brakes were defective. Prior to the collision, the tread on a tire separated. According to Plaintiffs, the airbags and seat belt pretensioners did not deploy because a curb strike or metal from the failing tire disabled one of the vehicle's crash sensors. The vehicle was designed so that the air bags and pretensioners would not deploy if the crash sensor was disabled. Plaintiffs argued this design rendered the vehicle defective and unreasonably dangerous. Defendants disputed this contention.

whether Decedent was wearing a seat belt. Decedent's passenger, Anna, was unable to confirm whether he was wearing his seat belt at the time of the accident, but the family testified Decedent had a habit of wearing his seat belt. Plaintiffs' biomechanics expert testified there was evidence Decedent was belted, though the forensic evidence was inconclusive.[5] Plaintiffs also presented expert testimony that the windshield impact did not mean Decedent was unbelted, suggesting he could have slipped forward if the belt did not tighten because the pretensioner did not fire. Their expert also opined that airbags were designed to protect both belted and unbelted occupants, and that Decedent's life would have been saved if the airbag had deployed.

In contrast, Defendants presented evidence showing Decedent's head struck near the center of the windshield just left of the rearview mirror and the steering wheel was deformed from contact with Decedent on its right side, suggesting he was unbelted and not in the proper position, having moved inboard within the vehicle. They presented testimony of an investigating state trooper who concluded from the injury pattern that Decedent was not belted at the time of the accident.

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[5] Plaintiffs' expert concluded the lack of seat belt marks on Decedent's body was due to the failure of the pretensioner to fire, potentially causing Decedent to slip out of the belt. The expert also noted a lack of knee injuries he would expect Decedent to incur from sliding forward unbelted into the knee bolster, as well as the abrasion on his hip which might have been from a seat belt. Further, he identified some subtle marks on the seat belt components indicating occupant loading during the accident.

Though Defendants' expert acknowledged the seat belt pretensioners did not fire or were disabled, he testified the vehicle's seat belts remained functional, were equipped with a base locking mechanism not dependent on the seat belt pretensioner, and were intended to be the vehicle's primary restraint. However, he testified there was no sign of collision-induced abrasions or loading on the various pieces of Decedent's seat belt assembly, in contrast to Anna's side of the vehicle. Defendants' expert testified that if Decedent had been belted, he would have had seat belt marks on his body similar to those Anna sustained. Among other evidence, Defendants' expert also testified Decedent could not have reached the windshield had he been wearing his seat belt. He opined the airbag would not have protected Decedent from making contact with the windshield if unbelted, given his position to the right of the steering column. He also opined the force of the airbag had the potential to produce a more serious injury if the driver is not belted, or increase its likelihood, depending on how close Decedent was to it upon deployment.

In sum, both sides presented evidence in support of their theories as to the cause of Decedent's death. The trial court instructed the jury on the elements of a manufacturer's products liability claim, including the requirement that Decedent sustained personal injuries directly caused by the product defect. The court also instructed the jury that Defendants bore the burden of demonstrating Decedent was

not wearing a seat belt and that "some or all" of Decedent's injuries were directly caused by his failure to wear a seat belt. It further advised the jury that if it could separate Decedent's injuries caused from the failure to wear a seat belt from the remainder of his injuries, Plaintiffs could not recover for those injuries. Conversely, if Decedent's injuries were indivisible, Defendants were liable for the entirety of his injuries if Plaintiffs satisfied the elements of their products liability claim.

The jury was also instructed on the elements of damages to award as a result of Decedent's wrongful death under Oklahoma Uniform Jury Instruction (OUJI)-Civil 8.1. Over Defendants' objection, the jury was directed to apportion damages between each Plaintiff, as well Decedent's estate. The jury ultimately returned a verdict of $17,000,000, awarding $5,000,000 to each individual Plaintiff and $2,000,000 to the estate.

Thereafter, Defendants filed a Motion to Vacate, Motion for New Trial, Remittitur and Motion for Judgment Notwithstanding the Verdict. Defendants argued the verdict form was contrary to law and inflated the jury award. Defendants also argued the trial court's seat belt instruction was inapplicable in a products liability case, could not apply in the case of Decedent's indivisible injury, and improperly shifted the burden of proof to Defendants to disprove causation.

The trial court denied the motions, finding the verdict form was proper because it "allowed for one verdict or claim of damages, and then subsequently allowed for the jury to apportion the respective damages from the one verdict." Further, it found the seat belt instruction was not given in error because it had been modified to instruct the jury that Plaintiffs must meet the elements of manufacturer's products liability.

Defendants appeal.

STANDARD OF REVIEW

Defendants assert that none of the named Plaintiffs had standing to bring the underlying action and that the correct party cannot be substituted. The question of Plaintiffs' standing involves jurisdiction. We are "duty bound to inquire into [our] own jurisdiction and the jurisdiction of the court below from which the case came by appeal." *Hall v. GEO Grp., Inc.*, 2014 OK 22, ¶ 12, 324 P.3d 399. The question of jurisdiction is reviewed on appeal by a *de novo* standard. *Jackson v. Jackson*, 2002 OK 25, ¶ 2, 45 P.3d 418.

"When reviewing jury instructions, the standard of review considers the accuracy of the statement of law, the applicability of the instructions to the issues when the instructions are considered as a whole, and above all, whether the probability arose that jurors were misled and reached a different conclusion due to

an error in the instruction." *Cimarron Feeders, Inc. v. Tri-Cty. Elec. Coop., Inc.*, 1991 OK 104, ¶ 6, 818 P.2d 901.

The trial court's denial of a motion for new trial is reviewed for abuse of discretion. *Head v. McCracken*, 2004 OK 84, ¶ 2, 102 P.3d 670; *Jones, Givens, Gotcher & Bogan, P.C. v. Berger*, 2002 OK 31, ¶ 5, 46 P.3d 698. "An abuse of discretion occurs when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling." *Spencer v. Okla. Gas & Elec. Co.*, 2007 OK 76, ¶ 13, 171 P.3d 890 (emphasis omitted) (footnote omitted). "[U]nless it clearly appears that the trial court erred in some pure simple question of law or acted arbitrarily, its judgment will not be disturbed on appeal." *Dominion Bank of Middle Tenn. v. Masterson*, 1996 OK 99, ¶ 16, 928 P.2d 291.

ANALYSIS

1. Wrongful death and standing

Defendants assert this action was not brought by the party authorized to bring the action under the wrongful death statutes, 12 O.S.2021, §§ 1051 *et seq.* Specifically, Defendants assert Anna was Decedent's personal representative, but that she brought suit only in her individual capacity while also improperly naming

Fotini and Eugenia, individually. Plaintiffs acknowledge Anna was appointed as Decedent's personal representative but assert the issue has been waived.[6]

Standing refers to a person's legal right to seek relief in a judicial forum. *Fent v. Contingency Rev. Bd.*, 2007 OK 27, ¶ 7, 163 P.3d 512.

> The three threshold criteria of standing are (1) a legally protected interest which must have been injured in fact—*i.e.*, suffered an injury which is actual, concrete and not conjectural in nature, (2) a causal nexus between the injury and the complained-of conduct, and (3) a likelihood, as opposed to mere speculation, that the injury is capable of being redressed by a favorable court decision. The doctrine of standing ensures a party has a personal stake in the outcome of a case and the parties are truly adverse.

Id.

At common law, an action for personal injuries abated with the death of the person. *Haws v. Luethje*, 1972 OK 146, ¶ 7, 503 P.2d 871. The right of action known as a "wrongful death action" exists by creation of statute, which creates an independent wrongful death claim. *See* 12 O.S.2021, §§ 1053, 1054; *Oullette v. State Farm Mut. Auto. Ins. Co.*, 1994 OK 79, ¶ 8, 918 P.2d 1363. The claim may be brought "*only* by persons authorized to bring it" under sections 1053 and 1054. *Id.* at ¶ 9. Moreover, "[t]here can be *only one wrongful-death claim and one recovery*." *Id.* at ¶ 11.

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[6] Plaintiffs' Answer Brief states, "Defendants were aware prior to the filing of the present Petition that Anna Gianos was appointed Personal Representative."

By the express terms of sections 1053(A) and 1054, a wrongful death action may be brought by the decedent's personal representative. If no personal representative has been appointed, "then by the widow, or where there is no widow, by the decedent's next of kin. . . ." *Id.* at ¶ 9. As recognized in *Murg v. Barnsdall Nursing Home*, 2005 OK 73, ¶ 15, 123 P.2d 21, individuals authorized to bring suit under the wrongful death statute, such as spouses, children or next of kin, satisfy constitutional standing requirements because they have an interest in the distribution of a wrongful death damage award. *Id.* at ¶ 15. However, sections 1053 and 1054 establish a "*hierarchy* of potential plaintiffs . . . to preclude concurrent causes of action filed by the potential parties enumerated therein." *Id.* (emphasis added). In other words, while the enumerated parties may have an interest in distribution of damages for wrongful death, only one may file suit. The statute governs the priority of who may bring that action.

Defendants answered in November 2019 and raised no issue as to the naming of the individual Plaintiffs along with Decedent's estate, or whether Plaintiffs were proper parties to bring the underlying action pursuant to Oklahoma's wrongful death statutes. The parties also proceeded through jury verdict without raising this issue.[7] Defendants' Motion for New Trial preserved

[7] Defendants' proposed instruction on statement of the case, for instance, informed the jury all three individuals were Plaintiffs, along with the estate.

the alleged error in apportioning damages on the verdict form. While the Motion for New Trial mentions failure to name Anna as personal representative, it did not clearly argue the court was without jurisdiction or seek dismissal of the suit.[8]

Here, Anna had standing to bring suit as personal representative. However, Plaintiffs' petition named Anna, Fotini and Eugenia as individual Plaintiffs. It did not state who was appointed Decedent's personal representative. The caption further listed Eugenia "individually, as surviving child of GEORGE GIANOS, deceased, and on behalf of the Estate of George Gianos." Thus, Anna incorrectly brought the underlying action in her individual capacity.[9]

Oklahoma courts recognize that administrative requirements for filing a wrongful death action "should [not] override the substantive right of recovery of

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[8] Exhibits filed with the Motion for New Trial supplied the order appointing Anna personal representative. Plaintiffs contend Defendants had long been aware Anna was the representative. Meanwhile, Defendants sought leave following the filing of Plaintiffs' Answer Brief on appeal to supplement the record with correspondence they contend shows Plaintiffs had knowledge that Anna was the personal representative at various times since her appointment. Plaintiffs admit in their Answer Brief that Anna was appointed personal representative. Because we are vacating the judgment, it is unnecessary for us to resolve issues related to when the parties were aware of Anna's status. Defendants' Motion to Supplement is therefore denied.

[9] Fotini and Eugenia also had *standing* but were not statutorily authorized to bring suit and are not proper parties to this action. Plaintiffs argue that Defendants' argument is not one of standing, but lack of capacity of a party to sue, which can be waived if not raised in responsive pleadings or at the time of the pretrial conference. *See, e.g.*, 12 O.S.2021, § 2012(F)(2). Thus, they contend Defendants waived any argument that Fotini, Eugenia and Anna individually were not proper parties to the underlying action. Whether or not Defendants waived an objection to the inclusion of all Plaintiffs in this action, Defendants preserved the related issue of how the damages should be awarded and allocated in the jury instruction and who should perform that allocation, which we address below.

potential beneficiaries." *Weeks v. Cessna Aircraft Co.*, 1994 OK CIV APP 171, ¶ 15, 895 P.2d 731 (approved for publication by the Oklahoma Supreme Court). In *Weeks*, the Court rejected the notion that the failure of a proper party to file a wrongful death action prohibits a court from hearing the claim, i.e., that this failure was jurisdictional. *Id.* at ¶ 12. Rather,

> timely filing by any of the enumerated parties 'who may sue' will properly commence a wrongful death action. If [later] it transpires that the person who filed did not have the preeminent right to prosecute the action, that person should be substituted by the real party in interest, according to 12 O.S.1991 § 2017, so as to prevent multiplicity of actions.

Roth v. Mercy Health Ctr., Inc., 2011 OK 2, ¶ 19, 246 P.3d 1079 (quoting *Weeks*, 1994 OK CIV APP 171, ¶ 15). *See also*, *Beal v. McCann,* 1995 OK CIV APP 118, 910 P.2d 1099 (filing by next of kin properly invoked jurisdiction of trial court, though special administrator should be allowed substitution as the real party in interest). This principle is well-established and repeated extensively in Oklahoma jurisprudence. *See, e.g.*, *Calvert v. Tulsa Pub. Sch., Indep. Sch. Dist. No. 1 of Tulsa Cty.*, 1996 OK 106, ¶ 13, 932 P.2d 1087, *superceded by statute on other grounds*; *Weeks*, 1994 OK CIV APP 171.

Thus, the trial court's jurisdiction was properly invoked by the filing of the suit, notwithstanding Plaintiffs' failure to file suit through the correct party. We therefore decline to dismiss this action for lack of standing.[10]

2. The verdict form

Defendants assert the submission of the verdict form directing the jury to award individual damages to each Plaintiff or apportion damages among them was reversible error. We agree.

At trial, the jury was properly instructed to award wrongful death damages pursuant to OUJI Civ. 8.1 (Supp.2014), which directed the jury to consider: (1) the loss of financial support to the surviving wife and children; (2) grief of the surviving wife; (3) loss of society, services, companionship and marriage relationship of the surviving wife; (4) grief of surviving children; (5) loss of companionship and parental care, training, guidance or education that would have been forthcoming from Decedent to the children, and the loss of companionship of Decedent by the children; and (6) Decedent's pain and suffering.

The jury was also provided a Plaintiffs' verdict form which stated in pertinent part:

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[10] Because we vacate the judgment for other reasons, we need not address whether the judgment rendered was valid for lack of a proper party at the time it was rendered. The issue of naming a proper party to bring suit remains for the trial court on remand.

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2. If you found in Plaintiffs' favor, then you must fix the dollar amount of each Plaintiffs' damages. What is the total amount of damages suffered by the Plaintiffs?
   $_____
3. You may apportion the damage to each plaintiff from the total listed above. The collective amount to each respective plaintiff should not exceed the total amount identified in paragraph 2.
   a. Anna Gianos $_____
   b. Fotini Gianos $_____
   c. Eugenia Britt $_____
   d. The estate of George Gianos $_____

As noted, the jury found for Plaintiffs and awarded damages to each, as well as Decedent's estate. The trial court denied Defendants' motion for new trial, finding allocation by the jury was appropriate.

First, Plaintiffs do not have individual claims for which they may receive an award at trial. As addressed above, the statutes and ample and longstanding Oklahoma case law make clear that there may be *one* wrongful death action, pursued by *one* plaintiff on behalf of all survivors. While the survivors' damages are to be considered in determining damages, and damages will ultimately be distributed to them individually, the survivors *do not* have individual claims that may be brought alongside a decedent's estate.

Second, section 1053 provides a specific list of damages that may be recovered in a wrongful death action on behalf of the decedent and his survivors, and the way the damages are to be distributed. Contrary to Plaintiffs' assertion at

trial, section 1053 *does not* provide for those damages to be allocated among the survivors by the jury.[11]

Specifically, the statute provides:

> B. The damages recoverable in actions for wrongful death as provided in this section shall include the following:
>
> 1. Medical and burial expenses, which shall be distributed to the person or governmental agency as defined in Section 5051.1 of Title 63 of the Oklahoma Statutes who paid these expenses, or to the decedent's estate if paid by the estate. . . .;
>
> 2. The loss of consortium and the grief of the surviving spouse, which shall be distributed to the surviving spouse;
>
> 3. The mental pain and anguish suffered by the decedent, which shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent. . . .;
>
> 4. The pecuniary loss to the survivors based upon properly admissible evidence with regard thereto including, but not limited to, the age, occupation, earning capacity, health habits, and probable duration of the decedent's life, which must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin, and shall be distributed to them according to their pecuniary loss. . . .;

[11] Plaintiffs' counsel specifically contended in favor of the verdict form that "the wrongful death statute is very clear that we have [the grief and loss of companionship of Decedent's children] decided by the jury so they can be properly distributed."

> 5. The grief and loss of companionship of the children and parents of the decedent, which shall be distributed to them according to their grief and loss of companionship.
>
> C. In proper cases, as provided by Section 9.1 of Title 23 of the Oklahoma Statutes, punitive or exemplary damages may also be recovered against the person proximately causing the wrongful death or the person's representative if such person is deceased. Such damages, if recovered, shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent. . . .
>
> **D. Where the recovery is to be distributed according to a person's pecuniary loss or loss of companionship, the judge shall determine the proper division.**
>
> E. The above-mentioned distributions shall be made after the payment of legal expenses and costs of the action.

Id. (emphasis added).

As is immediately apparent, the statute expressly directs the *trial court* to apportion pecuniary loss and loss of companionship among the survivors, after fees and expenses are paid. *This has been the law since 1979. See, e.g., Superior Supply Co. v. Torres*, 1995 OK CIV APP 18, ¶ 14, 900 P.2d 1005 (on 1979 amendment to wrongful death statutes: "this amended version changed the responsibility for division of damages for pecuniary loss and loss of companionship in wrongful death actions from the jury to the trial court. . . ."). It was therefore error to submit a jury instruction reflecting each Plaintiff plus the

estate had an individual claim to recover damages and to allow the jury to allocate damages which were, by law, to be allocated by the trial court alone.

Plaintiffs argue that even if they do not have individual claims (which they dispute), the form simply provides a total award of damages, merely allocated among Plaintiffs. As stated, it is not the jury's province to allocate wrongful death damages awarded among Plaintiffs. Further, even assuming the damages could be allocated by the jury, the instructions were misleading and an incomplete statement of Oklahoma law. The instructions do not make clear which Plaintiff, or the estate, is to receive which element of damage, or if each Plaintiff is to receive a measure of damages based on every element of damage set out in the jury instructions.

The damages instruction itself states, in part, "If you decide for Plaintiffs on the question of liability, in determining the amount of damages they are entitled to recover, you may consider the following items . . . [listing damages]. You must fix the amount of money which will reasonably and fairly compensate for those above-named elements of damage. . . ." None of the instructions advise the jury which damages are recoverable by the estate and which should be allocated to the individual Plaintiffs.

For instance, section 1053 requires that medical or burial expenses be awarded to a provider or the estate if the estate paid them. The jury instruction does not tell the jury where to allocate these expenses. The statute also requires

that Decedent's own mental pain and anguish be distributed to his survivors "in the same proportion as the personal property of the decedent." The jury was not instructed to allocate Decedent's pain and suffering in this manner or to whom to allocate it. Meanwhile, Plaintiffs' counsel encouraged the jury in closing to award the *estate* $2,000,000 in damages for Decedent's pain and suffering, contrary to law.

Similarly, the statute directs pecuniary loss to be distributed according to the pecuniary loss of the survivors; Anna's loss of consortium be allocated to her; and Eugenia and Fotini's grief and loss of companionship be allocated to them. The wrongful death damage instruction contains no direction to the jury on how these should be allocated among Plaintiffs or the estate. The instruction does not limit each Plaintiffs' recovery to only those damages which should ultimately be allocated to them per the statute.

While the trial court clearly erred by submitting the subject verdict form to the jury, this Court does not reverse a judgment based on an error in the jury instructions unless, when the instructions are considered as a whole, the probability arose that jurors were misled and reached a different conclusion due to the error. *Cimmaron Feeders, Inc.*, 1991 OK 104, at ¶ 6. Further, we will not reverse a judgment based on misdirection of a jury unless the error probably resulted in a miscarriage of justice. *See Aduddell Lincoln Plaza Hotel v. Certain Underwriters*

at Lloyd's of London, 2015 OK CIV APP 34, ¶ 6, 348 P.3d 216; 20 O.S.2021, § 3001.1.

Defendants argued that the verdict form misled the jury that each Plaintiff had a separate claim for damages, causing confusion over the real party in interest and awarding of inflated damages for all. We agree the verdict form was plainly misleading and failed to instruct who could be awarded the individual elements of damages or how they should be allocated. The way in which the jury was instructed potentially led to Plaintiffs recovering damages to which they were not entitled, potentially inflating their damages or depriving them of damages that were to be allocated to them as opposed to the estate. Thus, a probability arose that the jury was misled and reached a different conclusion due to the error, resulting in a miscarriage of justice. The trial court abused its discretion by denying Defendants a new trial on this basis.

3. Seat belt instruction

Defendants also assert the trial court erred by giving the jury Instruction No. 28, instructing the jury on non-seat belt use based on a modified version of OUJI No. 10.17. *See In Re Amendments to Oklahoma Uniform Jury Instructions-Civil*, 2022 OK 75 (Sept. 20, 2022). They contend the statute and resulting instruction do not apply to product liability cases, do not apply in a case concerning an indivisible

injury, and that the instruction incorrectly stated the law by shifting the burden of proof on Plaintiffs' theory of causation to Defendants.

At trial, the jury was presented Instruction No. 20, which set forth the standard elements of a products liability claim Plaintiffs were required to prove at trial: (1) that Defendants manufactured, sold or leased the product, (2) that they were in the business of manufacturing, selling, or leasing the product, (3) that the product was defective, and because of the defect, the product was unreasonably dangerous to a person who uses, consumes or might reasonably be expected to be affected by the product, (4) the product was defective at the time it was manufactured, sold, or leased, or left Defendants' control (5) Decedent was the person who used, consumed or could have reasonably been affected by the product, (6) and Decedent sustained personal injuries directly caused by the defect in the product.[12]

The jury was also provided a non-OUJI Instruction No. 32, which directed that the jury should find for Plaintiffs if they established Decedent's death was directly caused by the defect but should find for Defendants if they proved there was no defect, or that the defect did not cause Decedent's death.[13]

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[12] *See* OUJI-CIV No. 12.1 (Supp. 2014). *See also Kirkland v. General Motors Corp.*, 1974 OK 52, ¶ 29, 521 P.2d 1353. The OUJIs also supply related instructions to define certain terms within this instruction, which were given and not at issue here.

[13] Instruction No. 32 states in full:

Meanwhile, the jury was also given the disputed instruction No. 28, which instructed that Defendants bore the burden of proving Decedent was not wearing a seat belt, and the burden of establishing "some or *all*" of Decedent's injuries were due to non-use of seat belt, and even *if* Defendants met that burden, Plaintiffs could nevertheless recover all damages from Defendants if the injury was indivisible.

Specifically, Instruction No. 28 stated in full:

> **Evidence of Nonuse of Seat Belt**
>
> An operator of a vehicle is required to wear a seat belt. Defendants have the burden of showing by the greater weight of evidence that [Decedent] was not wearing a seat belt at the time of the collision, and that some or all of [Decedent's] personal injuries, if any, were directly caused by his failure to wear a seat belt.
>
> If you find that [Decedent]was not wearing a seat belt at the time of the collision and you are able to separate the personal injuries that were due to the failure

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> You are instructed that if you find by a preponderance of the evidence in this case that the 1994 Lexus LS400 was defective, making it unreasonably dangerous, and that this defect was a direct cause of George Gianos' death, and that such defect existed at the time the vehicle left the control of Defendants, then your verdict should be for Plaintiffs and against Defendants.
>
> You are also instructed that if you find by a preponderance of the evidence that the 1994 Lexus LS400 was not defective at the time it left Defendants' control, or if you do find by a preponderance of the evidence that Defendants' conduct [sic] that the defect was not a direct cause of Mr. Gianos' death, or if you find that Mr. Gianos' death was solely caused by some other reason, then your verdict should be for Defendants.

This instruction was proposed by Defendants and was not challenged on appeal. We offer no opinion on whether this instruction is or is not a correct statement of law.

> to wear the seat belt, then Defendants are not liable for personal injuries directly caused by [Decedent's] failure to wear a seat belt.
>
> If you were not able to separate the personal injuries that were due to the failure to wear the seat belt, Defendants are liable for all the personal injuries to [Decedent], provided Plaintiff satisfies the elements of Manufacturer's product [sic] Liability provided in Instruction No. 20.[14]

Instruction No. 28 modified OUJI-CIV 10.17. OUJI 10.17 addresses a circumstance in which a defendant causes a motor vehicle accident and seeks to interpose failure to wear a seat belt as a defense to some or all of a plaintiff's claim for damages. It places the burden on defendant to prove plaintiff was not wearing the seat belt, and that his injuries are divisible. If met, defendant is not liable for damage attributable solely to non-use of a seat belt but remains liable for all indivisible harm from the accident he caused. Such an instruction treats failure to wear a seat belt somewhat similar to contributory, comparative negligence, or other affirmative defense. *See, e.g. Black's Law Dictionary* (12 ed. 2024)(defining affirmative defense as "[a] defendant's assertion of facts and arguments that, if

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[14] OUJI 10.17 was adopted following passage of 47 O.S.2021, § 12-420 in 2013, which provides, "[the] use or nonuse of seat belts shall be submitted into evidence in any civil suit in Oklahoma unless the plaintiff in such suit is a child under sixteen (16) years of age." Prior thereto, section 12-420 prohibited use or nonuse of seat belts as evidence in any civil suit. *See* 47 O.S.2001, § 12-420. The purpose of the prior version was to prevent negligence or fault from being imputed to the occupant of a motor vehicle for failure to wear a seat belt during a motor vehicle accident. *See generally Clark v. Mazda Motor Corp.*, 2003 OK 19, ¶ 1, 68 P.3d 207, *Bishop v. Takata Corp.*, 2000 OK 71, 12 P.3d 459. The Court has not addressed whether the revised version applies in a products liability case.

true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true."); *see* 71 C.J.S. Pleading § 159 ("An affirmative defense admits that the plaintiff has a claim but asserts some legal excuse or reason why the plaintiff cannot have any recovery on that claim."). The failure to wear a seat belt does not negate defendant's liability for an accident he otherwise caused, unless he can separate injury from the accident from injury solely due to lack of seat belt.[15] For this reason, the burdens set forth in the instruction regarding seat belt use and allocation of liability make sense, as akin to an affirmative defense that a defendant must plead and prove. *See generally Hair v. Wilson*, 1964 OK 92, ¶ 8, 391 P.2d 789.

In this case, Decedent's seat belt use was not offered as an affirmative defense or to support contributory negligence.[16] Defendants do not concede Plaintiffs' products liability claim, yet assert seat belt non-use as a legal excuse to limit or avoid liability nevertheless. Rather, Decedent's seat belt use was relevant

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[15] OUJI 10.17 appears crafted to ensure that a defendant who has caused a motor vehicle accident or the initial harm-causing event remains liable for all damages flowing therefrom, notwithstanding the injured party's failure to wear a seat belt (apart from any injuries attributable purely to the lack of seat belt). *See, e.g., Stroud v. Arthur Andersen & Co.*, 2001 OK 76, ¶ 14, 37 P.3d 783 (plaintiff is entitled to recover those damages which are foreseeable and naturally flow from a defendant's negligent acts, but defendant is not liable for damages attributable solely to the plaintiff's conduct). This same instruction as written does not fit in this circumstance where the distinction between damages caused by the initial collision and the harm caused by the defective product is at issue.

[16] Contributory negligence is not an available defense to a products liability action. *See generally Fields v. Volkswagen of America, Inc.*, 1976 OK 106, ¶ 22, 555 P.2d 48.

to whether Decedent's death was caused by a collision Defendants did not cause, via failure to wear a seat belt, or by the alleged defect. However, Instruction No. 28 requires *Defendants* to disprove Decedent was wearing a seat belt.

In this products liability action, *Plaintiffs* bore the burden of proof to demonstrate Decedent's death was caused by the defect. Causation, or lack thereof, was not an affirmative defense on which Defendants bore the burden of proof. *See, e.g., Long v. Ponca City Hospital, Inc.*, 1979 OK 32, ¶¶ 19-20, 593 P.2d 1081. Under the facts of this case, Plaintiffs could meet their burden by showing either that Decedent was wearing his seat belt, and his injuries were caused or contributed to by the failure of the air bag and pretensioners to deploy, *or* that even if Decedent was not wearing his seat belt, Decedent's death would not have occurred absent the defect. While Defendants were entitled to assert Decedent was not wearing his seat belt to challenge Plaintiffs' causation theory, they did not bear the burden to prove Decedent was unbelted or to *disprove* a fact essential to one of Plaintiffs' two theories of recovery, i.e., that Decedent was properly belted and would have been saved by the airbag or pretensioners.

Additionally, the instruction informed the jury that even if Defendants established that "some or *all*" of Decedent's personal injuries were directly caused by his failure to wear a seat belt, Defendants remained liable for the entirety of Decedent's injuries, if indivisible. Again, this is an incorrect statement of law in

this case. If Defendants established that *all* of Decedent's injuries were caused by the failure to wear a seat belt, Plaintiffs' burden on causation failed, and Defendants were not liable.

Plaintiffs argue the instruction was not misleading because it was needed to address the burden of proof in a "second impact" case, and because it directed Plaintiffs were also obligated to meet the elements in Instruction No. 20.

When reviewing jury instructions, we consider the applicability of the instructions when considered as a whole. *Cimarron Feeders, Inc.*, 1991 OK 104, ¶ 6. However, "where a jury is instructed on more than one issue and error affects one of the issues, 'the error affecting one issue or theory in a case will be regarded as prejudicial where it is impossible to determine upon which of the two issues or theories the jury based its decision.'" *Hightower v. Kansas City Southern Railway Co.*, 2003 OK 45, ¶ 7, 70 P.3d 385.

First, a second impact instruction was not needed in this case. A "second impact" case refers to a case where the product defect was not the cause of the first collision, but the defective product acted as a causative agent after the original impact. *See Lee v. Volkswagen of America, Inc.*, 1984 OK 48, ¶ 11, 688 P.2d 1283; *Johnson v. Ford Motor Co.*, 2002 OK 24, 45 P.3d 86. When the injuries between the initial impact and the defect are separate and divisible, "the burden of proof remains solely upon the plaintiff, including the burden of proving

'enhancement,' i.e., the plaintiff must prove which of the several injuries are attributable to the manufacturer's defective product." *Lee*, 1984 OK 48, ¶ 25. When the injury is single and indivisible and incapable of apportionment, the "plaintiff has the burden of presenting sufficient evidence to prove to the jury that each defendant's act was a contributing factor in producing the plaintiff's injuries." *Johnson*, 2002 OK 24, ¶ 14. "Once the plaintiff meets this burden, the burden of proving the plaintiff's injury was either the result of a third party's negligence or only in part attributable to the manufacturer's defective products shifts to the manufacturer." *Id.*

The OUJIs supply a jury instruction intended for use in a "second impact" products liability cases," addressed to a defendant's liability for increased harm, OUJI-CIV No. 9.8B.[17] Generally, it instructs the jury, that if it finds that injuries

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[17] OUJI-CIV 9.8B provides:

> If you find by the greater weight of the evidence that the [**Specify Product**] was defective and that the defect was a contributing factor in increasing the harm to [**Plaintiff**] beyond what was due to other causes, then [**Defendant**] is liable for the increased harm.
>
> If you are able to separate the harm that was due to the other causes from the increased harm from the defect, [**Defendant**] is liable only for the increased harm from the defect.
>
> But if you are not able to separate the harm that was due to the other causes from the increased harm from the defect, [**Defendant**] is liable for all the harm to [**Plaintiff**].

by the defect and other causes are separable, defendants are liable only for damages from the defect, but that the defendant is liable for the entirety of the harm if jury finds the injuries are not divisible. However, that instruction is to be used only "where there is an issue whether the plaintiff's injury is separable into multiple injuries with different causes, and it is not needed for cases where it is clear that there is only a single injury to plaintiff." Instruction No. 9.8B, Notes On Use, citing *Johnson*, 2002 OK 24, ¶¶ 15-17.[18]

It was undisputed that Decedent suffered an indivisible injury. Thus, a second impact instruction would not ordinarily be applicable and was unnecessary in this case. If Plaintiffs established that the defect caused or contributed to Decedent's injuries as set forth in the products liability instruction, they were entitled to recover for the entirety of the harm.

> [**Defendant**] has the burden of proving by the greater weight of the evidence, that the increased harm from the defect can be separated from the harm due to the other causes.

[18] Plaintiffs argue that the seat belt instruction was needed to address the "second impact" showing addressed in *Johnson* and *Lee*. Nothing in Instruction No. 28 actually addresses the defect, or the law set forth in those cases. Moreover, as noted in the Notes on Use to OUJI No. 9.8B, *Johnson* held it was not reversible error to refuse a similar instruction requested by a defendant. The plaintiff alleged a single brain injury incurred during a collision, as opposed to claiming the defect enhanced injuries from a collision. The issue, therefore, was whether the accident or the defect caused the injury. The Court held the general causation instruction was sufficient to address the issues for trial and applicable law in that instance. If the defendant was successful in negating causation, the plaintiff would be unable to show causation required under a standard instruction. *Id.* at ¶¶ 15-17. The second impact instruction is unnecessary, unless needed to address the issues of whether an injury is divisible, and if so, how to allocate harm to a defendant between the initial impact and the increased harm from the defect.

Further, Instruction No. 28 differs significantly from 9.8B. The latter instruction specifically directs the jury, that if it finds a *defect* caused or contributed to a plaintiff's injuries, the defendant is liable for the increased harm, or all harm, if indivisible. Instruction No. 28 does not mention the defect or distinguish between fault for the accident and the defect.

Additionally, though Instruction No. 28 does direct that Defendants are liable for all injuries, provided Plaintiffs establish the elements set forth in Instruction No. 20, we find this addition to the Instruction insufficient to cure or correct these issues. Even though the instruction directs the jury to consider whether Plaintiffs met the elements of a products liability claim set forth in Instruction No. 20, it nevertheless improperly shifts the burden to Defendants to essentially refute or disprove a key element of Plaintiffs' causation theory. Moreover, at the very least, it creates confusion as to whether proof that the seat belt caused *all* of Decedent's injuries is a complete defense, or whether Plaintiffs may nevertheless recover because Decedent suffered an indivisible injury.[19]

We note also that the additional instruction on causation, Instruction No. 32 on "Verdict-Manufacturers' Products Liability," did not resolve this confusion. As noted above, the instruction directed the jury to find for Plaintiffs if they proved

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[19] The parties mention that the jury submitted a note regarding Instruction No. 28 during deliberations, though they do not reveal what the note said. It is not mentioned in the trial transcript and was not included in the record. Therefore, we do not consider it.

the defect was a direct cause of Decedent's death, and to find for Defendants if they found the vehicle was not defective, the defect was not a direct cause of Decedents' death, or his death was solely caused by some other reason. Though this instruction addresses that the jury should not find in Plaintiffs' favor if causation by the defect was absent, it offers no language to harmonize this instruction and Instruction No. 20 with Instruction No. 28, and simply does not address the incorrect statements of law set forth in Instruction No. 28 described above. In total, the jury received three different instructions on the same issue, one of which (Instruction No. 28) conflicted with the others.

Causation was a central issue in this case. While Plaintiffs presented sufficient evidence to support their theory at trial, Defendants also presented evidence that, if believed, could have resulted in a defense verdict. Instruction No. 28 misstated the law and foreclosed a defense verdict even if Defendants successfully challenged causation. It was not clear which causation instruction the jury should follow, and thus we find Instruction No. 28 to be prejudicial. *See Fletcher v. Monroe*, 2009 OK 10, ¶ 13, 208 P.3d 926 (a jury instruction which deviates materially from a dispositive legal issue is prejudicial). Though we are loath to reverse a jury verdict, we find the probability arose that the jury was misled by Instruction No. 28 and thereby reached a different result, leading to a miscarriage of justice. Defendants are therefore entitled to a new trial.

CONCLUSION

For the foregoing reasons, we find the trial court erred in instructing the jury, and that these errors were prejudicial and require reversal of the trial court's judgment. Thus, we find the trial court also abused its discretion in denying Defendants' Motion for New Trial. We reverse and remand this action for further proceedings consistent with this Opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HUBER, P.J., concurs, and BLACKWELL, J., dissents.

BLACKWELL, J., dissenting:

I would vacate and remand for the limited purpose of allowing the trial court to distribute the damages pursuant to 12 O.S. § 1053. Although the trial court did error in allowing the jury to allocate the damages, there is no need for a new trial on this issue.

Additionally, though the seat belt instruction may not have been needed on these facts, I do not find it likely that the instructions as a whole misled the jury. The defendants complain that the seat belt instruction shifted the burden of proof on a key issue to them. I disagree. While perhaps out of place, the seat belt instruction was clear that the defendants would only be liable "provided Plaintiff satisfies the elements of Manufacturer's product Liability provided in Instruction

20." Instruction 20 was clear on the plaintiffs' ultimate burden and accurately stated the law. Likewise, Instruction 13 was clear that "[a] party who seeks to recover on a claim . . . has the burden to prove all the elements of the claim . . . ." Instruction 32 correctly informed the jury the several ways it might find in favor of the defendant. It did not. I would uphold the jury's general verdict but vacate and remand the judgment entered thereon for the limited purpose stated above.

October 10, 2024