

Oregon Court of Appeals

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# STANDARDS OF REVIEW

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OREGON JUDICIAL DEPARTMENT

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## INTRODUCTION

An appellate court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 US 709, 718 n 7, 125 S Ct 2113, 161 L Ed 2d 1020 (2005). For a court of review, the standard of review defines the court's role: how the court must treat the facts when they are disputed and what level of deference it must give a prior court's or agency's decision. It is the lens through which an appellate court must view any case that comes before it, sometimes requiring the court to view a particular question with "fresh eyes," *Dept. of Human Services v. T. L. M. H.*, 294 Or App 150, 153, 473 P3d 1152 (2020), sometimes requiring the court to credit a prior court's (or agency's) answer to a particular question if that answer is a reasonable one, even if not every decisionmaker would reach the same answer. *See, e.g., Anderson v. Sullivan*, 311 Or App 406, 411, 492 P3d 118, *rev den*, 368 Or 702 (2021) (explaining the "abuse of discretion" standard of review).

Understanding how the standard of review applies to a particular question is critical both for litigants bringing a case to a court of review, and for judges serving on one. Judge Walter Edmonds, who served in position two of the Court of Appeals from 1989 through 2009, recognized this and, during his twenty years on the court and subsequent service as a senior judge, Judge Edmonds became one of the court's foremost educators on the standard of review.

At oral arguments, Judge Edmonds educated the bar about the core function played by the standard of review for an appellate court. As a lawyer appearing before a panel on which Judge Edmonds was sitting, I knew that the first few minutes of my argument--and sometimes all of it--would need to address the standard of review and explain why, under the applicable standard of review, the court had the authority to do what I was asking it to do. Within the court, Judge Edmonds likewise instructed on the standard of review, both through CLE programs for law clerks and staff and through engagement with his colleagues about the standard of review.

The Oregon Court of Appeals offers this guide to the standard of review in the spirit of, and in honor of, Judge Edmonds' steadfast commitment to educating the bench and bar about the role of the standard of review in an appellate court. After Judge Edmonds' service as a senior judge ended, I inherited the responsibility of teaching the court's standards-of-review CLE. In that CLE, I shared with the court's law clerks an aspiration: that I hoped that our court could one day offer a guide to the standard of review like the one prepared by the Office of the Staff Attorneys at the United States Court of Appeals for the Ninth Circuit, [Standards of Review \(uscourts.gov\)](https://uscourts.gov/standards-of-review), a tool I'd found valuable in practice. A dedicated and energetic team of law clerks responded by organizing this project, which they modeled on the Ninth Circuit's guide and a similar guide prepared by the law clerks and staff attorneys of the Minnesota Court of Appeals, [THE MINNESOTA \(mncourts.gov\)](https://mncourts.gov/the-minnesota).

As with those guides, this guide is intended as a starting point for research; it is an outline of what the court's cases have said about the standard of review. Litigants must make their own assessments of the standard of review based on their own research. The guide is not intended to express the views of the court and may not be cited as authority to any court. It is intended simply as a potentially helpful tool. As time and resources allow, the court will update the guide periodically.

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## I. COMMON STANDARDS OF REVIEW FOR CIVIL AND CRIMINAL APPEALS

A. *"Any Evidence"*: This standard applies to questions of fact. Appellate courts consider whether there is any evidence in the record that would permit a reasonable factfinder to make the factual finding. Under this extremely deferential standard, the court will reverse only if it can say that no reasonable factfinder could make the challenged finding.

B. *"Legal Error"*: This standard applies to questions of law. Appellate courts analyze the issue without any deference to the trial court's conclusion.

C. *"Abuse of Discretion"*: This standard applies when the trial court has the discretion to choose among legally permissible alternatives.

D. *"De Novo"*: The Court of Appeals will try the case anew, making its own factual findings and reaching its own conclusions of law based on those findings.

## II. CIVIL – GENERAL

### A. *In General*

#### 1. *Jurisdiction*

##### a. Subject matter jurisdiction

"Whether a court has subject matter jurisdiction over a particular proceeding is a question of law, which we review for legal error." *Menten and Deatherage*, 302 Or App 425, 428, 461 P3d 1075 (2020).

##### b. Personal jurisdiction

We review a trial court's decision concerning whether the court lacks personal jurisdiction as follows:

"Initially, the plaintiff has the burden of alleging and proving facts sufficient to establish personal jurisdiction. In reviewing a trial court's grant of a motion to dismiss for lack of personal jurisdiction, we assume the truth of all well-pleaded allegations in the record and construe pleadings and affidavits liberally to support jurisdiction. However, in determining whether a defendant is subject to the jurisdiction of an Oregon court, courts look to the pleadings and affidavits of both parties. We review the trial court's factual findings to determine whether they are supported by any competent evidence, and, where the trial court failed to make express factual findings, we assume that the court found the relevant facts in a manner consistent with its ultimate ruling. Once jurisdictional facts are

established, we review the determination of personal jurisdiction for legal error."

*Munson v. Valley Energy Investment Fund*, 264 Or App 679, 700-01, 333 P3d 1102 (2014) (brackets, parentheses, internal citations, and internal quotation marks omitted).

### c. Venue

We review a ruling granting or denying a change of venue for an abuse of discretion. *Praegitzer Industries v. Rollins Burdick Hunter*, 129 Or App 628, 633, 880 P2d 479 (1994). *But see Miller v. Pacific Trawlers, Inc.*, 204 Or App 585, 591, 131 P3d 821 (2006) ("a petition for a writ of mandamus is the only way in which a party may challenge a trial court's action" regarding some types of rulings, including a trial court's decision regarding venue that is "based on legal, rather than discretionary, determinations"); *see also Mack Trucks, Inc. v. Taylor*, 227 Or 376, 382, 362 P.2d 364 (1961) (explaining "the procedure by which the issue of improper venue may be raised").

## 2. General standards of review

### a. Mixed questions of law and fact

"We review the trial court's findings of fact for any evidence to support them, \* \* \* and its legal conclusions for errors of law." *Allco Enterprises v. Goldstein Family Living Trust*, 183 Or App 328, 330, 51 P3d 1275 (2002).

### b. Equitable proceedings

"*De novo* review is mandatory in an appeal from a judgment in a proceeding for the termination of parental rights" and "is otherwise discretionary in appeals from judgments in equitable proceedings." *J. W. V. v. J. L. W.*, 324 Or App 393, 395, 525 P3d 1237 (2023); ORS 19.415(3).

### c. Preemption

Whether federal law preempts an Oregon statute is a question of law that we review for legal error. *Herinckx v. Sanelle*, 281 Or App 869, 873, 385 P3d 1190 (2016).

### d. Writ of review

"In an appeal from a writ of review where the parties' arguments raise only questions of law, \* \* \* we review for errors of law." *Oregon Shores v. Board of County Commissioners*, 297 Or App 269, 274, 441 P3d 647 (2019).

### 3. Rules of construction

#### a. Constitution

We review a court's interpretation of a constitutional provision for legal error. *State v. J. S. W.*, 295 Or App 420, 423, 434 P3d 481 (2018), *rev den*, 364 Or 849 (2019).

#### b. Statutes

Questions of statutory construction are "questions of law that we review for legal error." *State ex rel Rosenblum v. Living Essentials, LLC*, 371 Or 23, 33, 529 P3d 939 (2023). "We resolve those questions by seeking to give effect to the intent of the legislature as demonstrated by the text, context, and any helpful legislative history." *Id.*

#### c. Rules of Procedure

"We interpret Oregon's Rules of Civil Procedure in the same manner in which we interpret Oregon's statutes." *Waddill v. Anchor Hocking, Inc.*, 330 Or 376, 381, 8 P3d 200 (2000), *adh'd to on recons*, 331 Or 595, 18 P3d 1096 (2001). Where a rule of civil procedure has been amended or adopted by the legislature, the court's objective is to ascertain the intent of the legislature in adopting or amending the rule. *Lindell v. Kalugin*, 353 Or 338, 349 n 2, 297 P3d 1266 (2013). By contrast, where the rule at issue was not adopted or amended by the legislature, our aim is to determine the intent of the Council on Court Procedures. *Id.* at 382 n 2 (explaining that, "unless the legislature amended the rule at issue in a particular case in a manner that affects the issues in that case, the Council's intent governs the interpretation of the rule"). With that in mind, when we interpret an Oregon Rule of Civil Procedure, we give primary weight to the text and context of the rule because "there is no more persuasive evidence of intent of the [Council or legislature] than the words by which the [Council or legislature] undertook to give expression to its wishes." *See State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009) (internal quotation marks omitted). After examining the text and context, we consider "pertinent [rulemaking or] legislative history that a party may proffer." *Id.* at 172. Finally, if the Council's intent remains unclear after examining the text, context, and legislative history, only then will this court turn to general maxims of statutory construction. *Id.*; *see also State v. Ramoz*, 367 Or 670, 683 n 4, 483 P3d 615 (2021) (describing standard of review).

#### d. Municipal Ordinances

##### (1) Interpretation of municipal ordinances

"The proper construction of a municipal ordinance is a question of law,

which we resolve using the same rules of construction that we use to interpret statutes." *Waste Not of Yamhill County v. Yamhill County*, 305 Or App 436, 457, 471 P3d 769 (2020) (internal quotation marks omitted).

## (2) Preemption of ordinances

"Whether and the extent to which a state statute has preemptive effect is a question of legislative intent. We ascertain the intentions of the legislature by examining the text of the statute in its context, along with any relevant legislative history, and, if necessary, relevant canons of statutory construction." *Board of Cty. Comm. Of Columbia City v. Rosenblum*, 324 Or App 221, 239, 526 P3d 798 (2023) (internal quotation marks, citation, and brackets omitted).

## (3) Constitutionality of ordinances

We review for legal error a circuit court's ruling on the constitutionality of an ordinance. *State ex rel Smith v. Hitt*, 291 Or App 750, 754, 424 P3d 749 (2018).

## e. Contracts

### (1) In general

"Contract interpretation presents a question of law that we review for legal error." *Santoro v. Eagle Crest Estate Homesite Owners Assn.*, 319 Or App 793, 798, 512 P3d 828 (2022).

### (2) Ambiguity determination

We review for legal error a ruling that contract language is unambiguous. *Milne v. Milne Construction Co.*, 207 Or App 382, 388, 142 P3d 475, *rev den*, 342 Or 253 (2006).

### (3) Resolution of ambiguity

The meaning of an ambiguous contractual provision is a question of fact for the factfinder. *Yogman v. Parrott*, 325 Or 358, 363-64, 937 P2d 1019 (1997). The appellate courts review for any evidence: "The interpretation of the factfinder is binding on appeal if there is any evidence in the record to support it." *Dept. of Education v. Vantage*, 243 Or App 557, 566, 261 P3d 17 (2011).

## B. Pretrial Matters

### 1. Service of process



"Whether service was sufficient presents a question of law." *Option One Mortgage Corp. v. Wall*, 159 Or App 354, 358, 977 P2d 408 (1999) (quoting *Hoeck v. Schwabe, Williamson & Wyatt*, 149 Or App 607, 615, 945 P2d 534 (1997)). "We accept the trial court's findings of fact if they are supported by evidence in the record." *Id.* (internal quotation marks omitted).

## 2. Amendment of pleadings

Under ORCP 23 A, trial courts have discretion to grant or deny a motion to amend the pleading "when justice so requires." We review a court's denial of leave to amend for an abuse of discretion and will "uphold a trial court's ruling denying leave unless the court has exercised its discretion in a manner that is unjustified by, and clearly against, evidence and reason." *Dreyer v. Portland General Electric Co.*, 300 Or App 414, 421, 453 P3d 580 (2019), *rev den*, 366 Or 731 (2020).

"Although we generally review a court's denial of a motion to amend only for abuse of discretion, when the denial results from a substantive legal conclusion, we review the correctness of that conclusion for errors of law." *Cowan v. Nordyke*, 232 Or App 384, 386, 222 P3d 1093 (2009), *rev den*, 348 Or 114 (2010) (internal quotation marks omitted).

## 3. Discovery issues

### a. Motion to compel production

"We review a trial court's decision regarding whether a party may obtain documents created in anticipation of litigation for abuse of discretion." *Meyer v. Oregon Lottery*, 292 Or App 647, 669, 426 P3d 89 (2018).

### b. Discovery sanctions under ORCP 46

"We review a decision to sanction a party under ORCP 46 A for abuse of discretion." *Certain Underwriters v. TNA NA Manufacturing*, 323 Or App 447, 456, 523 P3d 690 (2022), *rev allowed*, 371 Or 127 (2023).

"We review for abuse of discretion a trial court's decision to strike a claim under ORCP 46 B." *Chang v. Chun*, 305 Or App 144, 147, 470 P3d 410 (2020).

"We review the trial court's decision to award fees under ORCP 46 C for errors of law and abuse of discretion." *Adams v. Hunter Engineering Co.*, 126 Or App 392, 396, 868 P2d 788 (1994).

We review the trial court's decision to impose sanctions under ORCP 46 D

for abuse of discretion. *Burdette v. Miller*, 243 Or App 423, 430, 259 P3d 976 (2011).

#### 4. *Intervention of parties/interpleader*

"[B]ecause ORCP 31 A and B are couched in permissive terms ('[p]ersons having claims \* \* \* *may* be joined'; '[a]ny property \* \* \* *may*, upon order of the court, be deposited with the court'; '[u]pon hearing, the court *may* order the plaintiff discharged' (emphasis added)), we review application of those provisions for abuse of discretion." *Country Casualty Ins. Co. v. Villa-Chavez*, 228 Or App 677, 682, 208 P3d 1036 (2009) (citations omitted).

"We review trial court rulings on motions for permissive intervention for abuse of discretion." *Gilbert Pacific Corp. v. Dept. of Transportation*, 110 Or App 171, 175, 822 P2d 729 (1991), *rev den*, 313 Or 210 (1992) (citation omitted).

Intervention as of right is available only "when a statute of this state, [the ORCP], or the common law, confers an unconditional right to intervene." ORCP 33 B. "We review decisions on motions based on those circumstances as matters of law." *Samuels v. Hubbard*, 71 Or App 481, 486, 692 P2d 700 (1984), *rev den*, 299 Or 118 (1985).

#### 5. *Recusal and removal of judges*

"We review the trial court's denial of a motion to recuse for an abuse of discretion." *Pinnell v. Palmateer*, 200 Or App 303, 310, 114 P3d 515 (2005), *rev den*, 340 Or 483 (2006) (citation omitted).

#### 6. *Claim preclusion and issue preclusion*

We review the trial court's conclusions with respect to issue preclusion and claim preclusion for errors of law. *OEA v. Oregon Taxpayers United*, 253 Or App 288, 299, 291 P3d 202 (2012) (citing *Reid v. Johnson*, 161 Or App 92, 94, 983 P2d 1061, *rev den*, 329 Or 527 (1999)).

#### 7. *Motion for continuance*

We review trial court rulings on motions for continuance for abuse of discretion. *Dickson and Dickson*, 262 Or App 451, 453, 325 P3d 760 (2014).

#### 8. *Temporary injunctions and restraining orders*

We "may order a circuit court to vacate a preliminary injunction if the

injunction was based on a 'fundamental legal error' or if the circuit court acted 'outside the permissible range' of its discretion." *Elkhorn Baptist Church v. Brown*, 366 Or 506, 522, 466 P3d 30 (2020) (quoting *State ex rel Keisling v. Norblad*, 317 Or 615, 623, 860 P2d 241 (1993)).

"The construction of a temporary restraining order is a matter of law for the court." *Walti v. Willamette Indus., Inc.*, 100 Or App 89, 93, 784 P2d 1118, *rev den*, 309 Or 522 (1990). When a respondent challenges a trial court order continuing a temporary restraining order entered under the Family Abuse Prevention Act, ORS 107.700 to 107.735, "[w]e review for legal error and defer to the trial court's findings if there is evidence to support them, unless we exercise our discretion under ORS 19.415(3)(b) to review the case *de novo*." *Sacomano v. Burns*, 245 Or App 35, 36, 261 P3d 54 (2011) (citation omitted).

## 9. Class certification

### a. ORCP 32 A

For purposes of class certification, all five initial requirements--numerosity, commonality, typicality, adequacy, and notice--must be satisfied. ORCP 32 A; *see also* ORCP 32 B ("An action may be maintained as a class action if the prerequisites of section A of this rule are satisfied[.]").

We review a trial court's commonality determination for legal error "based on the record before the trial court and the trial court's findings, if any." *Delgado v. Del Monte Fresh Produce, N. A., Inc.*, 260 Or App 480, 489, 417 P3d 419, *rev den*, 328 P3d 696 (2014) (citation and internal quotation marks omitted).

### b. ORCP 32 B

In addition to satisfying the initial requirements of ORCP 32 A, the court must also find that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." ORCP 32 B.

"Predominance is one of eight factors for determining superiority under ORCP 32 B for which it must be determined to what extent 'questions of law or fact common to the members of the class predominate over any questions affecting only individual members.'" *Migis v. Autozone, Inc.*, 282 Or App 774, 782, 387 P3d 381 (2016), *adh'd to on recons*, 286 Or App 357, 396 P3d 309, *rev den*, 362 Or 300 (2017) (quoting ORCP 32 B(3)). "The single predominance factor is reviewed for legal error, but superiority, which involves all the factors listed under ORCP 32 B, is reviewed for abuse of discretion." *Migis*, 282 Or App at 782 (internal citations omitted).

The "trial court has considerable discretion in weighing all of the factors that apply in a given case and determining if a class action will be a superior means of litigating the class claims." *Pearson v. Philip Morris, Inc.*, 358 Or 88, 106-07, 361 P3d 3 (2015) (citation omitted). Moreover, a "trial court's determination that [an] action may proceed as a class action 'is largely a decision of judicial administration \* \* \* [and, in] making such decisions the trial court is customarily granted wide latitude.'" *Id.* at 107 (quoting *Newman v. Tualatin Development Co., Inc.*, 287 Or 47, 51, 597 P2d 800 (1979)).

#### c. ORCP 32 I

"We review the trial court's construction of ORCP 32 I for errors of law, looking to the text and context of the rule and evidence of the intent of the Council on Court Procedures that promulgated it in 1978." *Stewart v. Albertson's, Inc.*, 308 Or App 464, 472, 481 P3d 978, *rev den*, 368 Or 138 (2021).

### 10. Governmental immunity

#### a. Qualified immunity

"The qualified immunity defense is a matter of law to be decided by the court. If, however, the availability of the defense depends on facts that are in dispute, the jury must determine the facts." *DeNucci v. Henningsen*, 248 Or App 59, 71, 273 P3d 148 (2012).

#### b. Discretionary immunity

Where the facts are undisputed, whether discretionary immunity bars a plaintiff's recovery is a question of law. *Stevenson v. State of Oregon*, 290 Or 3, 17 n 1, 619 P2d 247 (1980) (Tanzer, J., concurring) (discussing respective roles of judges and juries in assessing discretionary immunity).

#### c. Absolute immunity

Where the facts are undisputed, whether the absolute immunity bars recovery is a question of law and appellate court reviews to determine whether defendant is entitled to judgment as a matter of law on immunity grounds. *Harmon v. State of Oregon*, 320 Or App 406, 409-10, 514 P3d 1131 (2022).

### 11. Recusal of jurors

"We review the trial court's denial of a motion to excuse a juror for cause for an abuse of discretion." *Village at North Pointe Condo. Assn. v. Bloedel Constr.*, 278 Or

App 354, 362, 374 P.3d 978, *adh'd to as modified on recons*, 281 Or App 322, 383 P3d 409 (2016). "The trial court's judgment as to a prospective juror's ultimate qualifications is entitled to great weight." *Id.* (internal quotation marks omitted).

### C. Pretrial Judgments

#### 1. Default judgment and motions to vacate

"Although the trial court's ultimate determination granting relief from a default judgment under ORCP 71 B is reviewed for an abuse of discretion, whether defendants offered a reasonable explanation for their failure to take any action is a question of law that we review for legal error." *Saldivar v. Roberts*, 240 Or App 371, 376, 246 P3d 91 (2011).

We review the court's decision to set aside a default judgment for abuse of discretion. *Gilbert v. Stancorp Financial Group Inc.*, 233 Or App 57, 61-62, 225 P3d 71 (2009), *rev den*, 348 Or 218 (2010). "Under that standard, we will affirm the court unless its decision is not within the range of lawful alternatives. When the court's decision rests on factfinding, we are bound by the court's findings if they are supported by any evidence. Recognizing that a default judgment deprives a party of its 'day in court,' we liberally construe ORCP 71 B so as to avoid that result 'when it can be done without doing violence to the regular disposition of litigation.' One aspect of such liberal construction is that we view the facts in the light most favorable to the party seeking relief from default." *Id.* (citations omitted).

#### 2. Dismissal of actions

##### a. Failure to state a claim (ORCP 21A)

A motion to dismiss under ORCP 21 is reviewed for failure to state a claim as a matter of law. *Strizver v. Wilsey*, 210 Or App 33, 35, 150 P3d 10 (2006), *rev den*, 342 Or 474 (2007) (citing *Granewich v. Harding*, 329 Or 47, 51, 985 P2d 788 (1999)). "We assume the truth of all allegations in the pleading and view the allegations, as well as all reasonable inferences, in the light most favorable to the nonmoving party." *Id.*

##### b. Judgment on the pleadings (ORCP 21B)

"[T]o prevail on a motion for judgment on the pleadings, a party must show that the nonmoving party cannot prevail as a matter of law. On review of a judgment on the pleadings, the appellate court accepts as true all well-pleaded allegations in the complaint. Judgment on the pleadings may be granted only when the pleadings, taken together, affirmatively show that the plaintiff has no claim against the defendant." *Rowlett v. Fagan*, 358 Or 639, 649, 369 P3d 1132 (2016) (citation omitted).

c. Voluntary dismissal (ORCP 54)

We review the trial court's ruling on ORCP 54 for "legal error." *Ramirez v. Northwest Renal Clinic*, 262 Or App 317, 319, 324 P3d 581 (2014) (citing *Guerin v. Beamer*, 163 Or App 172, 174, 986 P2d 1241 (1999)).

3. Summary judgment

a. Standard of review

"We review a trial court's grant of summary judgment for errors of law and will affirm if there are no genuine disputes about any material fact and the moving party is entitled to judgment as a matter of law." *Beneficial Oregon, Inc. v. Bivins*, 313 Or App 275, 277, 496 P3d 1104 (2021) (internal quotation marks omitted). In so doing, "we view the facts in the light most favorable to the nonmoving parties," and we "examine whether no objectively reasonable juror could find in their favor on the question at issue." *Id.* In making that determination, "we examine 'the pleadings, depositions, affidavits, declarations, and admissions on file.'" *Id.* (quoting ORCP 47 C).

b. Cross-motions for summary judgment

"On review of cross-motions for summary judgment, we view the record for each motion in the light most favorable to the party opposing it to determine whether there is a genuine issue of material fact and, if not, whether either party is entitled to judgment as a matter of law." *O'Kain v. Landress*, 299 Or App 417, 419, 450 P3d 508 (2019). "A material fact is one that, under applicable law, might affect the outcome of a case." *Zygar v. Johnson*, 169 Or App 638, 646, 10 P3d 326 (2000), *rev den*, 331 Or 584 (2001) (citation omitted).

D. Trial Matters

1. Evidentiary issues

a. Admission and exclusion of evidence

(1) Relevance

We review evidentiary rulings on relevance for errors of law. *ODOT v. Alderwoods (Oregon), Inc.*, 358 Or 501, 517-18, 366 P3d 316 (2015); *Rugemer v. Rhea*, 153 Or App 400, 404, 957 P2d 184 (1998) (citations omitted).

(2) Hearsay

Whether evidence contains inadmissible hearsay presents a question of law that we review for legal error. *U.S. Bank National Assn. v. McCoy*, 290 Or App 525, 532,

415 P3d 1116 (2018).

b. Foundation for evidence

We review "whether there was sufficient evidence for the trial court to have submitted the issue to the jury; that is, whether the foundation evidence was sufficient for the jury reasonably to have found that the condition on which relevance depended was fulfilled. We view the record as consistent with the trial court's ruling, accepting reasonable inferences and reasonable credibility choices that the trial judge could have made." *Benjamin v. Wal-Mart Stores, Inc.*, 185 Or App 444, 467-68, 61 P3d 257 (2002), *rev den*, 335 Or 479 (2003).

c. Scientific evidence

We review the trial court's ruling on the admissibility of scientific evidence for errors of law. *Jennings v. Baxter Healthcare Corp.*, 331 Or 285, 301, 14 P3d 596 (2000). It is the role of appellate courts to set legal limits that govern the exercise of trial court discretionary authority to balance the probative value of scientific evidence against its unfairly prejudicial effect under OEC 403. *State v. Beauvais*, 357 Or 524, 536, 354 P3d 680 (2015).

2. *Witnesses*

a. Examination of witnesses

"[W]e review the court's exercise of control over the presentation of evidence and the examination of witnesses for abuse of discretion." *Daves v. Kohan*, 282 Or App 243, 244, 385 P3d 1161 (2016), *rev den*, 361 Or 439 (2017) (citing *Howell-Hooyman and Hooyman*, 113 Or App 548, 550, 833 P2d 328 (1992)).

b. Lay witnesses

"[T]he Oregon Evidence Code 'adopts a liberal standard for the admissibility of lay opinions' and lay witnesses may testify to their personal perceptions." *Kelley v. Washington Cnty.*, 303 Or App 20, 35 n 8, 463 P3d 36 (2020) (quoting *State v. Lerch*, 296 Or 377, 383, 677 P2d 678 (1984) (discussing OEC 701). "The admission of opinion evidence is within the discretion of the trial court and it will only be reversed for an abuse of discretion." *Lerch*, 296 Or at 383 (citations omitted).

c. Expert-witness testimony

"Determining whether an individual is qualified to testify as an expert witness is a matter that falls within the discretion of the trial court. Accordingly, we

review for abuse of discretion." *Mosley v. Owens*, 108 Or App 685, 687, 816 P2d 1198, *rev den*, 312 Or 527 (1991) (citing *Myers v. Cessna Aircraft*, 275 Or 501, 519, 553 P2d 355 (1976); *State v. Caulder*, 75 Or App 457, 460, 706 P2d 1007, *rev den*, 300 Or 451 (1985)).

Whether expert testimony is helpful to the factfinder is sometimes reviewed for abuse of discretion and sometimes for errors of law. *See State v. Jesse*, 360 Or 584, 598-99, 385 P3d 1063 (2016); *State v. Garlinghouse*, 323 Or App 640, 654-55, 524 P3d 103 (2023).

### 3. Directed verdict

We review a decision to grant a motion for directed verdict for legal error, and it is appropriate only when a defendant is entitled to judgment as a matter of law. *Miller v. Columbia County*, 282 Or App 348, 349, 385 P3d 1214 (2016), *rev den*, 361 Or 238 (2017). We view the evidence in the light most favorable the nonmoving party, affording the nonmoving party every reasonable inference that can be drawn from that evidence. *Wheeler v. LaViolette*, 129 Or App 57, 60, 877 P2d 665 (1994) (citation omitted); *Kelley v. Washington County*, 303 Or App 20, 21-22, 463 P3d 36 (2020) (stating the standard).

### 4. Jury instructions

We review a trial court's failure to give a requested jury instruction for errors of law. *State v. Reyes-Camarena*, 330 Or 431, 441, 7 P3d 522 (2000). In such review, we evaluate the evidence in the light most favorable to the establishment of the facts necessary to require the instruction. *Carter v. Mote*, 285 Or 275, 279, 590 P2d 1214 (1979); *see also Ossanna v. Nike, Inc.*, 365 Or 196, 199, 445 P3d 281 (2019) (applying the standard).

We review a trial court's decision to give a particular instruction primarily to determine whether the instruction, when read together with the other instructions given, completely and accurately stated the law applicable to the case and, if not, whether any error in giving the instruction was prejudicial to the party opposing the instruction. *See, e.g., Wallach v. Allstate Ins. Co.*, 344 Or 314, 318-22, 180 P3d 19 (2008) (applying that standard); *see also State v. Woodman*, 341 Or 105, 118, 138 P3d 1 (2006) ("In determining whether it was error to give a particular instruction, we read the instructions as a whole to determine whether they state the law accurately"); *Estate of Schwarz v. Philip Morris Inc.*, 348 Or 442, 454, 235 P3d 668, *adh'd to on recons*, 349 Or 521 (2010) ("For appellate courts reviewing claims of instructional error, the touchstones are legal accuracy and clarity[.]").

We review the trial court's decision to resubmit a verdict to the jury for



clarification for an abuse of discretion. *Biegler v. Kirby*, 281 Or 423, 429, 574 P2d 1127 (1978) (where jury in personal injury action initially returned verdict for plaintiff but assessed no general and special damages, trial court did not abuse discretion in resubmitting the case to the jury for further redeliberation); *see also Building Structures, Inc. v. Young*, 328 Or 100, 106, 968 P2d 1287 (1998) (where the verdict was insufficient, the party's remedy for that defect was to have the verdict "resubmitted to the jury with appropriate instruction or otherwise disposed of in the discretion of the court" (citation and internal quotation marks omitted)).

## 5. Jury findings

### a. General verdicts

"[N]o fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." Or Const, Art VII (Amended), § 3. "We review the record in the light most favorable to \* \* \* the jury verdict, drawing all reasonable inferences in \* \* \* favor [of the verdict]." *Henderson v. Nielsen*, 127 Or App 109, 111, 871 P2d 495, *rev den*, 319 Or 149 (1994) (citing *Brown v. J.C. Penney Co.*, 297 Or 695, 688 P2d 811 (1984)).

### b. Special verdicts

We review a trial court's decision to give or refuse a special finding for abuse of discretion. *See Hammagren v. Wald Construction, Inc.*, 274 Or 267, 270, 545 P2d 859 (1976); *see also Shepherd v. Hub Lumber Co.*, 273 Or 331, 347-48, 541 P2d 439 (1975) ("[T]he giving or refusal of [ ] a request for a special finding is a matter within the discretion of the trial judge."); ORCP 61 B.

## 6. Bifurcation

The trial court has broad discretion regarding whether to bifurcate under ORCP 53. *See Bremner v. Charles*, 312 Or 274, 279, 821 P2d 1080 (1991), *modified on recons*, 313 Or 339, 832 P2d 454 (1992), *adh'd to as modified on recons*, 315 Or 291, 844 P2d 204 (1993) ("Because a trial court's ruling on a motion for bifurcation of issues concerns 'the administration of the business of the trial court,' the trial judge is granted broad discretion in making such rulings.").

A trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. *Taylor v. Ramsay-Gerding Construction Co.*, 233 Or App 272, 292, 226 P3d 45, *adh'd to as modified on recons*, 235 Or App 524, 234 P3d 129 (2010); *Vander Veer v. Toyota Motor Distributors*, 282 Or 135, 144, 577 P2d 1343 (1978) (applying the standard).

## 7. Closing arguments

We review a trial court's ruling on one party's objections to the statements made in the other party's closing argument for an abuse of discretion. *Cler v. Providence Health System-Oregon*, 349 Or 481, 487-88, 245 P3d 642 (2010).

### E. Remedies

#### 1. Monetary remedies

##### a. Additur and remittitur

The trial court has discretion to reduce jury awards of punitive damages under ORS 31.730(3). *Groth v. Hyundai Precision and Ind. Co.*, 209 Or App 781, 796, 149 P3d 333 (2006). We therefore review a trial court's decision to grant or deny a remittitur for an abuse of discretion. *See Oliver v. Burlington Northern*, 271 Or 214, 215-16, 531 P2d 272 (1975) ("The only issues are the proper criteria to be applied by a trial judge in determining whether a remittitur should be granted, whether the trial judge applied these criteria, and whether the trial judge abused his discretion."). "Under that standard of review, the court's duty is not to redecide the historical facts as decided by the jury, but to decide where \* \* \* the conduct at issue falls on the scale of conduct that does or might warrant imposition of punitive damages." *Wieber v. FedEx Ground Package System, Inc.*, 231 Or App 469, 488, 220 P3d 68 (2009), *rev den*, 349 Or 664 (2011) (internal quotation marks omitted).

##### b. Special and punitive damages

"[W]hen reviewing a punitive damages award for excessiveness, the reviewing court must view the facts in the light most favorable to the jury's verdict if there is evidence in the record to support them. In other words, the reviewing court must resolve all disputes regarding facts and factual inferences in favor of the jury's verdict and then determine, on the facts as the jury was entitled to find them, whether the award violates the legal standard of gross excessiveness." *Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 556-57, 17 P3d 473 (2001) (citations omitted). "Whether the award of punitive damages violates that standard is a question of law." *Wieber v. FedEx Ground Package System, Inc.*, 231 Or App 469, 486, 220 P3d 68 (2009).

"[W]e hold that the legal standard to apply to post-verdict judicial review of a jury's award of punitive damages is as follows: Was the award of punitive damages within the range that a rational juror would be entitled to award in the light of the record as a whole? The range that a rational juror is entitled to award depends, in turn, on the statutory and common law factors that the jury is instructed and permitted to consider when awarding punitive damages for a given claim." *Oberg v. Honda Motor Co.*, 320 Or 544, 551, 888 P2d 8 (1995), *cert den*, 517 US 1219 (1996).

## 2. Equitable remedies

We no longer review judgment in all equitable proceedings *de novo*; *de novo* review is now discretionary in most equity cases, and we will exercise our discretion to do so "only in exceptional cases." ORAP 5.40(8)(c); *see Hammond v. Hammond*, 246 Or App 775, 777, 268 P3d 691 (2011).

In the absence of *de novo* review, we review the trial court's legal conclusions for errors of law and are bound by its factual findings if there is any evidence to support them. *Neff v. Sandtrax, Inc.*, 243 Or App 485, 487, 259 P3d 985, *rev den*, 350 Or 716 (2011); *see also Eagles Five, LLC v. Lawton*, 250 Or App 413, 415 n 2, 280 P3d 1017 (2012) (explaining that the 2009 amendments to ORS 19.415, Or Laws 2009, ch 231, §§ 2, 3, make *de novo* review discretionary in equity cases).

## 3. Other remedies

### a. Contempt of court

ORS 33.055(11) provides, "In any proceeding for imposition of a remedial sanction other than confinement, proof of contempt shall be by clear and convincing evidence." "On appeal, however, we do not reweigh the evidence to determine anew whether there is clear and convincing evidence of contempt." *Keller and Holdner*, 232 Or App 341, 344, 222 P3d 1111 (2009). Rather, a contempt proceeding is legal in nature, and we review "the trial court's findings under the same standard that applies to our review of jury verdicts, which is a review for any evidence to support the findings." *Id.*; *see also State ex rel S. M. v. A. S.*, 223 Or App 421, 425, 196 P3d 26 (2008) ("We review a judgment in a [contempt] proceeding for remedial sanctions in the same manner as a judgment in an action at law, examining whether any evidence in the record supports the trial court's factual findings.").

### b. Costs and disbursements

We review the trial court's decision whether to award a prevailing party costs and disbursements for abuse of discretion. ORCP 68 B; *Sherwood Park Business Center, LLC v. Taggart*, 267 Or App 217, 238, 341 P3d 96 (2014).

### c. Attorney fees

"Whether a party is entitled to attorney fees presents a question of law, but whether fees are reasonable is a factual determination that we review for abuse of discretion." *Makarios-Oregon, LLC v. Ross Dress-for-Less, Inc.*, 293 Or App 732, 739, 430 P3d 142, *adh'd to as modified on recons*, 295 Or App 449, 430 P3d 1125 (2018); *see*

also ORS 20.075(3) ("In any appeal from the award or denial of an attorney fee subject to this section, the court reviewing the award may not modify \* \* \* the decision of the court as to the amount of the award, except upon a finding of an abuse of discretion."); *Espinoza v. Evergreen Helicopters, Inc.*, 359 Or 63, 117, 376 P3d 960 (2016) (a trial court may abuse its discretion if a decision is based on "predicate legal conclusions that are erroneous or predicate factual determinations that lack sufficient evidentiary support").

## *F. Posttrial Matters*

### *1. Motion for new trial*

"When the trial court's order of a new trial is based on an interpretation of the law, we review that order for errors of law. If the trial court made no predicate legal error, then we review its decision for an abuse of discretion." *Golik v. CBS Corp.*, 306 Or App 202, 213, 472 P3d 778 (2020) (internal quotation marks omitted). With regard to whether the ground for a new trial involved conduct or evidence that materially affected the moving party's substantial rights, we will usually defer to a trial court's determinations of prejudicial effect, again reviewing for an abuse of discretion. *Id.* Because the trial court is the finder of fact at a hearing on a motion for a new trial, "we defer to the court's explicit and implicit findings of fact if they are supported by evidence in the record." *Id.*

### *2. Motion for judgment notwithstanding the verdict (JNOV)*

We review the denial of a JNOV motion under the same standard of review that we apply when the court has granted a JNOV. *Golik v. CBS Corp.*, 306 Or App 202, 225, 472 P3d 778 (2020). In both instances, "we review the evidence in the light most favorable to the party who prevailed before the jury." *Bennett v. Farmers Ins. Co.*, 332 Or 138, 142, 26 P3d 785 (2001); *see also Jacobs v. Tidewater Barge Lines*, 277 Or 809, 811, 562 P2d 545 (1977) (same). "[O]ur review of the record is circumscribed by the case actually presented to the jury through pleadings, evidence, and jury instructions." *Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 333 Or 304, 310, 39 P3d 846 (2002). We "must reinstate the jury verdict unless we can say affirmatively that there was no evidence to support it." *Bennett*, 332 Or at 147-48.

### *3. Motion to amend*

"We review a trial court's denial of a motion to amend after an ORCP 21 A dismissal for abuse of discretion." *Caldeen Construction v. Kemp*, 248 Or App 82, 86, 273 P3d 174 (2012) (internal quotation marks omitted). A trial court's discretion to grant or deny motions to amend a complaint after a motion to dismiss is not limitless; it is bounded by the requirement that motions to amend should be liberally granted if

amendment would preclude the entry of a judgment. *Id.* (citing ORCP 25).

#### 4. Motion to set aside judgement (ORCP 71 B)

We review the trial court's ultimate decision under ORCP 71 B(1) for abuse of discretion. *Johnson v. Sunriver Resort Limited Partnership*, 252 Or App 299, 306, 287 P3d 1153 (2012), *rev den*, 353 Or 280 (2013). We are "bound by the court's factual findings if they are supported by any evidence in the record." *Id.* at 301. However, "whether certain conduct or inaction constitutes excusable neglect is a question of law, and we review the trial court's answer to that question for legal error." *Id.* (internal quotation marks omitted); *see also Union Lumber Co. v. Miller*, 360 Or 767, 778, 388 P3d 327 (2017) ("Conclusions that a trial court reaches under ORCP 71 B as to whether a moving party's neglect, inadvertence, surprise, or mistake constitute cognizable grounds for relief, are legal rulings that an appellate court reviews for errors of law.").

#### G. Declaratory Judgment Actions

Our standard of review for a declaratory judgment proceeding depends on the underlying nature of the claim and issues presented on appeal:

"Declaratory judgment proceedings seeking the construction of a contract are legal in nature, and the factual determinations of the trier of fact are binding on appeal if there is evidence to support them. We review the construction of a contract, including whether it is ambiguous, as a matter of law. Where the construction of a contract may depend on extrinsic evidence, we review the court's explicit and implicit findings of fact for any evidence in the record to support them, and the legal consequences of those facts for legal error."

*Harris v. Warren Family Properties, LLC*, 207 Or App 732, 737, 143 P3d 548 (2006) (internal citations and quotation marks omitted). We review the record in the light most favorable to the party that prevailed at trial. *Id.*

### III. CIVIL – PROBATE (ORS chapters 111 to 123)

#### A. In General

Under ORS 19.415(3), unless we exercise our discretion to review the matter *de novo*, we are bound by the trial court's findings of historical fact that are supported by any evidence in the record; we review the court's dispositional conclusions for errors of law. *Hammond v. Hammond*, 246 Or App 775, 777, 268 P3d 691 (2011) ("[W]e no longer review judgments in all equitable proceedings *de novo*. Rather, *de novo* review is now discretionary in most equitable cases, like this one, in which the

notice of appeal was filed after June 4, 2009.").

Absent *de novo* review, ORS 19.415(3)(b), we review the probate court's decisions on requested equitable relief for abuse of discretion, its legal conclusions for errors of law, and its factual findings for any evidence. *Lynch v. Romano*, 285 Or App 243, 244, 396 P3d 267, *rev den*, 361 Or 800 (2017). That is true even when the question before us concerns an equitable doctrine. *See Cumming v. Nipping*, 310 Or App 780, 781, 489 P3d 119, *rev den*, 368 Or 787 (2021) (explaining that we conduct *de novo* review of a decision concerning alleged unjust enrichment, an equitable doctrine, only as provided in ORS 19.415(3)(b)).

## *B. Wills and Trusts*

### *1. Statutory will formalities requirement*

In determining whether a probate court erred in its determination whether a writing that does not satisfy statutory will formalities, ORS 112.238, may nevertheless be probated, "we review for legal error and are bound by the probate court's factual findings if there is evidence to support them." *Culver v. Deaver*, 297 Or App 21, 22, 441 P3d 633, 634 (2019) (citing ORS 111.105(2)).

### *2. Removal of personal representative*

The decision to remove a personal representative is a matter of discretion for the probate court, ORS 113.195(4) ("the court may remove the personal representative"). Thus, we review for an abuse of discretion. *Warkentin v. Shirey*, 308 Or App 1, 9, 480 P3d 289 (2020), *adh'd to as modified on recons*, 309 Or App 314, 481 P3d 444 (2021).

### *3. Testamentary capacity*

Absent *de novo* review, "we are bound by the trial court's findings of historical fact that are supported by any evidence in the record; we review the court's dispositional conclusions for errors of law." *Williamson v. Zielinski*, 326 Or App 648, 649, \_\_\_ P3d \_\_\_ (2013).

### *4. Undue influence*

Absent *de novo* review, "we are bound by the trial court's findings of historical fact that are supported by any evidence in the record; we review the court's dispositional conclusions for errors of law." *Williamson v. Zielinski*, 326 Or App 648, 649, \_\_\_ P3d \_\_\_ (2013).

### 5. Expenses and attorney fees

We review for abuse of discretion a probate court's determination of attorney fees to be allowed out of the funds of an estate. *Tilton v. Lee*, 255 Or App 244, 246, 298 P3d 559, *rev den*, 353 Or 868 (2013).

If a petitioner did not have an objectively reasonable basis for pursuing trust claims, a fee award under ORS 20.105(1) is mandatory. *Lewis v. Worley*, 318 Or App 127, 134, 507 P3d 814 (2022). A claim lacks an objectively reasonable basis if it is entirely devoid of legal or factual support; we review the trial court's ruling on that question for legal error. *Id.*

### 6. Counterclaims

We review for legal error a probate court's determination whether the probate code authorizes a personal representative to assert a counterclaim in a proceeding for summary determination under ORS chapter 115. *Flaig v. Emert*, 260 Or App 652, 657, 320 P3d 586 (2014)

### 7. Equitable trusts

When a trust is an equitable obligation, which a plaintiff must prove through clear and convincing evidence of the circumstances at the time of the conveyance, such as with resulting trusts, we review the probate court's factual findings to determine whether there is evidence that it could have found clear and convincing that a grantor intended for a grantee to hold the property in trust. *Hamlin v. Hamlin*, 271 Or App 647, 653-54, 352 P3d 737 (2015). We will not reweigh the evidence in reviewing the probate court's conclusion that there is clear and convincing evidence. *Id.* at 654.

## IV. CIVIL – INSURANCE (ORS chapters 731 to 755)

### A. Policy Interpretation

A trial court's interpretation of an insurance policy is reviewed as a question of law. *Phillips v. State Farm Fire and Casualty Co.*, 302 Or App 500, 504, 461 P3d 1008 (2020). In interpreting an insurance policy, "the goal is to determine the intentions of the parties. The parties' intentions are determined from the terms of the policy. We interpret those terms "according to what we perceive to be the understanding of the ordinary purchaser of insurance." *Id.* at 505 (internal citations and quotation marks omitted).

### B. Statutory Interpretation

When a question of statutory interpretation arises in an insurance-related dispute, "we resolve [it] by applying familiar rules requiring us to determine the meaning of the words of the statute most likely intended by the legislature that enacted it, taking into account its text in context and the relevant legislative history." *Spearman v. Progressive Classic Ins. Co.*, 361 Or 584, 590, 396 P3d 885 (2017) (citing *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009)).

### *C. Summary Judgment*

We review a trial court's decision on a motion for summary judgment for legal error. *Farmers Ins. Co. v. American Fire & Casualty*, 117 Or App 347, 349, 844 P2d 235 (1992), *rev den*, 315 Or 643 (1993); *see also Waxman v. Waxman & Associates, Inc.*, 224 Or App 499, 503, 198 P3d 445 (2008) ("We review a grant of summary judgment to determine whether any genuine issue of material fact exists and whether defendant is entitled to judgment as a matter of law." (Internal quotation marks omitted.)).

### *D. Legal Fees Incurred During Arbitration*

An appellate court reviews the question of whether an insurer is entitled to the protection of ORS 742.061(3), which pertains to attorney fees in cases submitted to binding arbitration, as a legal matter. *Congdon v. Berg*, 256 Or App 73, 86, 299 P3d 588 (2013).

## V. CIVIL – PROTECTIVE ORDERS (ORS chapters 107, 125)

### *A. General*

Our standard of review for a sexual abuse protective order is the same as it is for a Family Abuse Prevention Act restraining order or a stalking order. *E. H. v. Byrne*, 311 Or App 415, 416, 487 P3d 869 (2021). That is, we are bound by the trial court's express and implied factual findings if they are supported by any evidence in the record, and we review the trial court's legal conclusions for errors of law. *See H. L. P. v. Jones*, 309 Or App 108, 109, 481 P3d 415 (2021) (standard of review for stalking protective order); *J. V.-B. v. Burns*, 284 Or App 366, 367, 392 P3d 386 (2017) (standard of review for FAPA restraining orders).

### *B. Stalking Protective Order (SPO)*

Absent *de novo* review, "[w]e review the trial court's factual findings for any supporting evidence and its legal conclusions for legal error." *C. L. C. v. Cordell*, 318 Or App 654, 655, 508 P3d 73 (2022). "[W]e view the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the trial court's



disposition and assess whether, when so viewed, the record is legally sufficient to permit that outcome." *Id.*

### *C. Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA)*

We review an order issued under the Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA) "by accepting the trial court's findings of fact if they are supported by any evidence in the record. In the absence of explicit factual findings, we presume that the court found facts consistent with its judgment in petitioner's favor. We review the trial court's legal conclusions for errors of law." *A. K. F. v. Burdette*, 310 Or App 49, 51, 484 P3d 362 (2021) (internal citations omitted).

### *D. Guardians (ORS 125.300 to 125.330)*

Where a factual dispute exists, we accept the trial court's factual findings where there is evidence in the record to support them. *State v. P. M. S.*, 264 Or App 769, 771, 333 P3d 1170 (2014).

### *E. Attorney fees*

In an appeal from the award of or denial of a request for attorney fees under ORS 125.095 and ORS 125.098, we may not modify the decision of the probate court in making or denying an award, or the decision of that court as to the amount of the award, except upon a finding of an abuse of discretion. ORS 125.098(5).

## VI. CIVIL – DOMESTIC RELATIONS (ORS chapters 106 to 110)

### *A. Jurisdiction and Venue*

#### *1. Jurisdiction*

"Whether a court has subject matter jurisdiction over a particular proceeding is a question of law, which we review for legal error." *Menten and Deatherage*, 302 Or App 425, 428, 461 P3d 1075 (2020).

In Oregon, personal jurisdiction in general is governed by ORCP 4, with ORCP 4 K governing certain domestic-relations actions. *See Henry and Henry*, 81 Or App 426, 428, 725 P2d 943 (1986). Personal jurisdiction is a question of law that we review for legal error. *Adams and Adams*, 173 Or App 242, 245, 21 P3d 171 (2001).

#### *2. Venue*

Generally, we review a ruling granting or denying a change of venue for an abuse of discretion. *Praegitzer Industries v. Rollins Burdick Hunter*, 129 Or App 628,

633, 880 P2d 479 (1994).

## *B. Property Division*

### *1. In general*

Although we have discretion to review the property division in a domestic relations case *de novo*, "[w]e exercise that discretion sparingly and only in exceptional cases." *Morgan and Morgan*, 269 Or App 156, 159, 344 P3d 81, *rev den*, 357 Or 595 (2015); *see also* ORS 19.415(3)(b); ORAP 5.40(8)(c).

Unless the case is an exceptional one, we "review the trial court's determination of a just and proper property division for an abuse of discretion. In doing so, we are bound by the trial court's express and implicit factual findings if they are supported by any evidence in the record." *Morgan*, 269 Or App at 161 (internal quotation marks omitted). We will not disturb a trial court's "just and proper" determination unless we conclude that "the trial court misapplied the statutory and equitable considerations that ORS 107.105(1)(f) requires." *Kunze and Kunze*, 337 Or 122, 136, 92 P3d 100 (2004).

### *2. Settlement agreements*

Under ORS 107.104, the terms of a marital settlement agreement "are to be construed in the same fashion as other contractual terms." *Moon v. Moon*, 140 Or App 402, 407, 914 P2d 1133 (1996); *see Anderson v. Divito*, 138 Or App 272, 277-78, 908 P2d 315 (1995) (summarizing pertinent principles of contractual construction).

## *C. Spousal Support*

We review the court's ruling on spousal support for an abuse of discretion. *Morgan and Morgan*, 269 Or App 156, 157, 344 P3d 81, *rev den*, 357 Or 595 (2015); *see also* ORS 107.105(1)(d) (a court may provide awards of spousal support in "an amount of money for a period of time as may be just and equitable"). In reviewing that determination, we are bound by the trial court's findings of historical fact that are supported by any evidence in the record, and we will disturb the trial court's determination of what constitutes a "just and equitable" amount only if the court "misapplied the statutory and equitable considerations required by ORS 107.105." *Berg and Berg*, 250 Or App 1, 2, 279 P3d 286 (2012).

## *D. Adoption in Domestic Relations Proceedings*

When an adoption proceeding necessarily considers the termination of a parent's rights, even outside the dependency context, we are required to review the record

of an adoption proceeding *de novo*. See *J. W. V. v. J. L. W.*, 324 Or App 393, 395, 525 P3d 1237 (2023). Although *de novo* review is otherwise discretionary in appeals from judgments in equitable proceedings, in an adoption, if the "court is asked to terminate every right and interest of the natural parent," then the "adoption proceeding is, at least in part, a proceeding for the termination of parental rights." *Id.* (internal quotation marks and citation omitted).

## *E. Custody in Domestic Relations Proceedings*

### *1. In general*

We have the discretion to review the court's award of custody *de novo*, but we conduct *de novo* review only in exceptional cases. See ORS 19.415(3)(b); ORAP 5.40(8)(c); *Nice v. Townley*, 248 Or App 616, 618, 274 P3d 227 (2012) (citing *Turner and Muller*, 237 Or App 192, 196, 238 P3d 1003 (2010), *rev den*, 350 Or 231 (2011)). "[I]f an appellant seeks to have us exercise our discretion to review *de novo*, the appellant must include a concise statement explaining the reasons why we should do so in its statement of the case in the opening brief." *Muller*, 237 Or App at 196 (quoting *DHS v. Three Affiliated Tribes of Fort Berthold*, 236 Or App 535, 540, 238 P3d 40 (2010)).

Absent *de novo* review, we review for legal error, "stat[ing] the facts consistently with those found by the trial court to the extent that there is evidence to support them." *Nice*, 248 Or App at 618.

### *2. Modification of custody*

Unless we exercise our discretion to review *de novo*, which we will exercise it "only in exceptional cases," ORAP 5.40(8)(c), we review a trial court's best interest determination in a child custody modification proceeding for abuse of discretion. *Sjomeling v. Lasser*, 251 Or App 172, 187, 285 P3d 1116, *rev den*, 353 Or 103 (2012). Under that standard, we will uphold "the trial court's decision unless it exercises its discretion in a manner that is unjustified by, and clearly against, reason and evidence." *Stancliff and Stancliff*, 320 Or App 369, 371, 513 P3d 20 (2022) (internal quotation marks omitted).

## *F. Parenting Time*

"Absent *de novo* review, we review a trial court's decision relating to parenting time first for legal error to determine whether the trial court applied the correct legal standard in making the challenged best interests determination." *Davison and Schafer*, 308 Or App 513, 518, 479 P3d 1108 (2021) (internal quotation marks omitted). And "[w]e review the court's best-interests determination itself for an abuse of discretion, and we will reverse only if the trial court's discretionary determination was not a legally

permissible one." *Id.* (internal quotation marks omitted); *see* ORS 107.102; ORS 107.174.

## *G. Child Support*

### *1. In general*

Absent *de novo* review, we review the court's determination of a parent's child support obligation for "errors of law." *Garcia-Ascencio v. Gonzalez*, 321 Or App 751, 752, 517 P3d 332 (2022). "We 'state the facts consistently with those found by the trial court to the extent that there is evidence to support them.'" *Id.*

### *2. Modification of child support*

Unless we exercise *de novo* review, we are bound by the trial court's findings of historical fact as long as they are supported by any evidence in the record, and we review the trial court's legal conclusions for legal error. *Bock and Bock*, 249 Or App 241, 242, 275 P3d 1006 (2012). We review the trial court's interpretation of the child support guidelines for legal error. *Malpass and Malpass*, 255 Or App 233, 234, 296 P3d 653 (2013); *see id.* 237 n 6 (explaining guidelines).

## *H. Child's Name Change in Domestic Relations Proceedings*

The party requesting a name change for a child bears the burden of showing that the change of name is in the child's best interest. *Stoecklin v. A. L. C.*, 265 Or App 662, 665, 337 P3d 164 (2014). Unless we exercise *de novo* review, we review a trial court's best-interest determination for abuse of discretion and will reverse only if a trial court's discretionary determination is not a legally permissible one. *Id.* We are bound by the trial court's factual findings if there is any evidence to support them. *Id.* at 663.

### *I. Attorney Fees*

We generally review a trial court's discretionary decision to award attorney fees for abuse of discretion. *Callen and Callen*, 307 Or App 714, 718, 479 P3d 313 (2020). "However, the proper exercise of discretion may be predicated on the trial court's determinations of questions of law or fact--and those determinations, in turn, may implicate independent standards of review." *Id.* (internal quotation marks omitted).

## VII. JUVENILE – DEPENDENCY (ORS chapter 419B)

### *A. Jurisdiction and Venue*

#### *1. Jurisdiction*

We have discretion to review a juvenile dependency proceeding *de*

*novo* in exceptional cases. See *Dept. of Human Services v. R. H.*, 320 Or App 383, 385, 512 P3d 1279 (2022) (citing ORS 19.415(3)(b); ORAP 5.40(8)(c)).

In the absence of a *de novo* review, in reviewing a juvenile court's determination of jurisdiction in child protection proceedings, we:

"(1) assume the correctness of the juvenile court's explicit findings of historical fact if these findings are supported by any evidence in the record; (2) further assume that, if the juvenile court did not explicitly resolve a disputed issue of material fact and it could have reached the disposition that it reached only if it resolved that issue in one way, the court implicitly resolved the issue consistently with that disposition; and (3) assess whether the combination of (1) and (2), along with nonspeculative inferences, was legally sufficient to permit the trial court to determine that ORS 419B.100(1)(c) was satisfied."

*Dept. of Human Services v. N. P.*, 257 Or App 633, 639, 307 P3d 444 (2013).

## 2. Venue

We review the juvenile court's determination of proper venue for legal error. See *Dept. of Human Services v. R. M. S.*, 280 Or App 807, 383 P3d 417 (2016) (applying standard).

### *B. Indian Child Welfare Act (ICWA) (ORS 419B.600 to 419B.665)*

Generally, we review the juvenile court's legal conclusions for errors of law and are bound by its findings of historical fact if there is any evidence in the record to support them. *Dept. of Human Services v. J.G.*, 260 Or App 500, 504, 317 P3d 936 (2014).

"In juvenile proceedings that do not involve the termination of parental rights, it is within this court's discretion to review the record *de novo*. ORS 19.415(3)." *Dept. of Human Services v. S. R. H.*, 278 Or App 427, 431, 381 P3d 1059, *rev den*, 360 Or 422 (2016). In the absence of *de novo* review, "in reviewing the juvenile court's judgments, we view the evidence, as supplemented and buttressed by permissible derivative inferences, in the light most favorable to the juvenile court's disposition and assess whether, when so viewed, the record was legally sufficient to permit that outcome." *Id.* (internal quotation marks and brackets omitted).

In a juvenile case involving a question regarding the applicability of ICWA, "whether a person is a member of a tribe, or eligible for membership in a tribe, is a

question of fact." *Dept. of Human Services v. H. C. W.*, 311 Or App 102, 105, 489 P3d 139 (2021). Whether the facts about a child's membership or eligibility for membership ultimately mean that a child is an Indian child under the ICWA is a legal question for the court to be determined by reference to the terms of the statute. *Id.* at 110.

### *C. Termination of Parental Rights (ORS 419B.500 to ORS 419B.504)*

We review a juvenile court's judgment terminating a parent's rights *de novo*. ORS 419A.200(6); ORS 19.415(3)(a). "[W]hen we review *de novo*, we are not performing our more typical appellate-court function of assessing whether the evidence before a trial court was legally sufficient to support its ruling. Rather, we are deciding for ourselves whether the case made by the party with the burden of persuasion persuades us that that party has proven its case." *Dept. of Human Services v. L. M. B.*, 321 Or App 50, 52, 515 P3d 927 (2022). When the factual basis for the termination of parental rights is challenged on appeal, we review the record to determine whether that factual basis, "unless admitted, [is] established by clear and convincing evidence[.]" ORS 419B.521(1). *But see* ORS 419B.521(4)(a) ("[T]he termination of parental rights to an Indian child must be supported by evidence beyond a reasonable doubt.").

Given that the standard of proof is the clear-and-convincing-evidence standard, "we must be persuaded by the evidence that it is highly probable that termination" of the parent's parental rights is in the child's best interest in order to sustain the juvenile court's judgment. *Dept. of Human Services v. T. L. M. H.*, 294 Or App 749, 750, 432 8 P3d 1186, (2018), *rev den*, 365 Or 556 (2019) (citing *Dept. of Human Services v. M. P.-P.*, 272 Or App 502, 503, 356 P3d 1135 (2015)). To be clear and convincing, the evidence must make "the existence of a fact highly probable or be of extraordinary persuasiveness." *M. P.-P.*, 272 Or App at 503 (internal quotation marks omitted).

### *D. Other Juvenile Dependency Proceedings*

#### *1. Protective custody (ORS 419B.150 to 419B.175)*

In exceptional juvenile dependency cases, we have discretion to review the record *de novo*. *See* ORS 19.415(3)(b); ORAP 5.40(8)(c). In the absence of *de novo* review, "we review the evidentiary record to determine whether any evidence, and the inferences that reasonably can be drawn from the evidence, supports the juvenile court's findings." *Dept. of Human Services v. M. H.*, 256 Or App 306, 327, 300 P3d 1262, *rev den*, 354 Or 61 (2013).

#### *2. Permanent guardianship (ORS 419B.365)*

In exceptional cases, we have discretion to review a juvenile court's

establishment of a permanent guardianship *de novo*. See ORS 19.415(3)(b); ORAP 5.40(8)(c). In the absence of *de novo* review, we review the juvenile court's legal conclusions for errors of law but are bound by its findings of historical fact if there is any evidence in the record to support them. *Dept. of Human Services v. S. N.*, 250 Or App 708, 709, 282 P3d 901, *rev den*, 352 Or 564 (2012)

### 3. Change in Permanency Plan (ORS 419B.470 to 419B.476)

In juvenile proceedings that do not involve the termination of parental rights, there is a presumption against granting *de novo* review, and we do so only in exceptional cases. *Dept. of Human Services v. N. S.*, 246 Or App 341, 344, 265 P3d 792 (2011), *rev den*, 351 Or 586 (2012); ORAP 5.40(8)(c); see ORS 19.415(3) ("Upon an appeal in an equitable action or proceeding other than an appeal from a judgment in a proceeding for the termination of parental rights, the Court of Appeals, acting in its sole discretion, may try the cause anew upon the record or make one or more factual findings anew upon the record.").

Without *de novo* review, "we review the juvenile court's legal conclusions for errors of law but are bound by its findings of historical fact if there is any evidence in the record to support them." *N. S.*, 246 Or App at 344. "Where findings on disputed issues of fact are not made but there is evidence supporting more than one possible factual conclusion, we presume that the juvenile court decided the facts consistently with its ultimate legal conclusion." *Id.* at 345. "Ultimately, we review the facts found by the juvenile court to determine whether they are supported by any evidence and then to determine if, as a matter of law, those facts provide a basis for the juvenile court's change of the permanency plan from reunification to guardianship under ORS 419B.476." *Id.*

#### a. Compelling reason determinations

"Whether the juvenile court applied the correct legal standard in making its 'compelling reason' determination presents a question of law that we review for legal error." *Dept. of Human Services v. S. S.*, 283 Or App 136, 146, 388 P3d 1178 (2016) (citation omitted).

#### b. Reasonable efforts and sufficient progress determinations

"The juvenile court's determinations whether DHS's efforts were reasonable and the parent's progress was sufficient are legal conclusions that we review for errors of law." *Dept. of Human Services v. G. N.*, 263 Or App 287, 294, 328 P3d 728, *rev den*, 356 Or 638 (2014).

## VIII. JUVENILE – DELINQUENCY (ORS chapter 419C)

Procedures and practices applicable to appeals from juvenile court judgments and orders in juvenile-delinquency cases are governed primarily by ORS 419A.200, ORS 419A.205, and ORS 419A.208. However, many of the provisions of ORS chapter 19, which govern appeals generally, apply to appeals in juvenile court cases.

We have discretion to review delinquency matters *de novo*. ORS 19.415(3)(b). We "will exercise [our] discretion to try the cause anew on the record or to make one or more factual findings anew on the record only in exceptional cases." ORAP 5.40(8)(c).

When we do not exercise our discretion to review *de novo*, "we review the juvenile court's legal conclusions for errors of law, and we are bound by the court's findings of fact so long as there is evidence in the record to support them." *State v. J. J.-M.*, 282 Or App 459, 461, 387 P3d 426 (2016) (internal quotation marks omitted). We review a juvenile court's construction and application of governing statutes for errors of law. *See, e.g., State ex rel Juv. Dept. v. Strothers*, 195 Or App 372, 374, 97 P3d 1276 (2004).

We review most procedural rulings (such as a request for a continuance) for abuse of discretion. *See, e.g., State ex rel Juv. Dept. v. Garcia*, 180 Or App 279, 44 P3d 591 (2002) (the juvenile court erred in denying the youth's request for the court to set over the commitment hearing).

When the juvenile court's discretionary decision was based on a substantive legal conclusion, we review that legal conclusion for errors of law. *State ex rel Juv. Dept. v. Kopp*, 180 Or App 566, 579-80, 43 P3d 1197 (2002). Whether a juvenile court's decision was within the limits of its legal discretion is a question of law that we review for errors of law. *Id.*

The Oregon Supreme Court has discretion to limit its review of a Court of Appeals' decision to questions of law. ORS 19.415(4).

#### *A. Delinquency Adjudications*

On review of a juvenile court's determination that a youth is within the court's jurisdiction for committing conduct that, if committed by an adult, would constitute an offense, the reviewing court, "acting in its sole discretion, may try the cause anew upon the record or make one or more factual findings anew upon the record." *State v. J. L. C.*, 249 Or App 559, 561, 277 P3d 625 (2012) (quoting ORS 19.415(3)(b)). Otherwise, "we review the juvenile court's legal conclusions for errors of law, but we are bound by its findings of historical fact unless there is no evidence to support those findings." *Id.* We review questions of statutory interpretation as questions of law. *State*



*ex rel Juv. Dept. v. Fitch*, 192 Or App 56, 60, 84 P3d 190, *rev den*, 337 Or 282 (2004).

Where a youth challenges the sufficiency of the evidence underlying the juvenile court's adjudication of the youth as delinquent, "our task is to determine whether, viewing the evidence in the light most favorable to the state, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. J. C. L.*, 261 Or App 692, 700, 325 P3d 740 (2014).

### *B. Waiving Juvenile Offenders to Adult Court*

ORS 419C.349 provides the grounds for waiving a juvenile offender to adult court, or, if youth is under 15 years of age, ORS 419C.352 provides the grounds for that waiver. We review questions of statutory interpretation as questions of law. *See generally Perez v. Cain*, 367 Or 96, 110, 473 P3d 540 (2020) (applying standard).

### *C. Diversion*

"We review a trial court's determination of a defendant's eligibility for diversion for errors of law." *State v. Tuter*, 259 Or App 338, 339, 314 P3d 285 (2013).

### *D. Dispositions and Requirement of Findings*

"We are bound by the juvenile court's findings of fact so long as the record contains evidence supporting them, and we review the court's legal conclusions for errors of law. In reviewing questions of the sufficiency of evidence, we must determine whether a rational trier of fact, drawing reasonable inferences, could have found that the state proved the elements of the charged offense beyond a reasonable doubt." *State v. F. R.-S.*, 294 Or App 656, 657, 432 P3d 1149 (2018) (citation and internal quotation marks omitted).

## IX. CRIMINAL – GENERAL

### *A. General Standards of Review*

Generally, we review preliminary findings of fact by the trial court for whether any evidence in the record supports them, but we review ultimate legal conclusions for errors of law. *State v. Cazares-Mendez*, 350 Or 491, 510, 256 P3d 104 (2011).

#### *1. Questions of law*

When we consider whether a trial court's legal ruling was permissible, we make that call without "deference" to the trial court's views and apply either an "abuse of

discretion" or a "legal error" standard of review. *State v. Ramoz*, 367 Or 670, 703, 483 P3d 615 (2021). "We apply an abuse of discretion standard when application of the appropriate legal principles would permit more than one legally correct outcome, but, when there is only one legally correct outcome, an appellate court must determine whether the trial court erred as a matter of law." *Id.* (internal quotation marks and brackets omitted).

In a bench trial, an argument that the trial court applied an incorrect legal standard "is akin to an assertion that a trial court delivered an incorrect jury instruction"; accordingly, we review to determine whether the court instructed itself incorrectly as to the law, and, if so, whether the erroneous self-instruction was harmless. *State v. Zamora-Skaar*, 308 Or App 337, 353, 480 P3d 1034 (2020).

## 2. *Questions of fact*

On review of a trial court's determination of a preliminary question of fact under OEC 104(1), "we view the record in the manner most consistent with that ruling and draw all reasonable inferences and credibility choices that the court could have made in support of its ruling." *State v. Wilson*, 323 Or 498, 510-11, 918 P2d 826 (1996). Where the trial court does not make explicit factual findings, and the evidence would permit the facts to be decided more than one way, we presume that the trial court found the facts in a manner consistent with its ultimate ruling. *State v. Carlson*, 311 Or 201, 214, 808 P2d 1002 (1991). "Unless the evidence in a case is such that the trial court as finder of fact could decide a particular question in only one way, we are bound by the trial court's factual findings, including a finding that a party's evidence is not sufficiently persuasive." *Prime Properties, Inc. v. Leahy*, 234 Or App 439, 449, 228 P3d 617 (2010) (quoting *State v. Stevens*, 311 Or 119, 127, 806 P2d 92, 98 (1991) (internal quotation marks omitted)).

## 3. *Mixed questions of law and fact*

In reviewing mixed questions of law and fact, we generally engage in two distinct inquiries. First, we consider whether the trial court applied the correct legal standard. Second, if the court employed the correct legal standard, we consider whether it erred in the related factual determination. We will affirm that factual determination if it is supported by any evidence in the record. *State v. Jackson*, 172 Or App 414, 421, 19 P3d 925 (2001) (citing *Ball v. Gladden*, 250 Or 485, 443 P2d 621 (1968)).

## 4. *Harmless error review*

Oregon's constitutional test for affirmance despite error consists of a single inquiry: Is there little likelihood that the particular error affected the verdict? The

correct focus of the inquiry regarding affirmance despite error is on the possible influence of the error on the verdict rendered, not whether this court, sitting as a factfinder, would regard the evidence of guilt as substantial and compelling. *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). Rather, when we review the record, we do so in light of the error at issue. If the particular issue to which the error pertains has no relationship to the factfinder's determination of its verdict, then there is little likelihood that the error affected the verdict. However, that is not a finding about how the court views the weight of the evidence of the defendant's guilt. It is a legal conclusion about the likely effect of the error on the verdict. *Id.*

Whether an error is harmless is a question of law. *State v. Ramoz*, 367 Or 670, 703, 483 P3d 615 (2021). "In determining whether an error is harmless, this court analyzes whether there was 'little likelihood' that the error affected the verdict." *State v. Ramoz*, 367 Or 670, 704, 483 P3d 615 (2021).

a. Harmlessness of erroneous admission or exclusion of evidence

A trial court's error in admitting evidence is harmless if there is "little likelihood that the error affected the verdict." *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). To determine "whether erroneously admitted or excluded evidence affected the verdict, we consider the nature of the evidence in the context of the trial as a whole." *State v. Simon*, 294 Or App 840, 849, 433 P3d 385 (2018), *rev den*, 365 Or 502 (2019) (citing *Davis*, 336 Or at 33-34). In doing that, we "review all portions of the record, not just the evidence most favorable to the state." *Id.* If we conclude that a trial court's error was harmless, we must affirm the conviction. *Davis*, 336 Or at 32.

b. Harmlessness of erroneous jury instruction

A trial court's instructional error is harmless if there is "little likelihood that the error affected the verdict." *State v. McKinney*, 369 Or 325, 334, 505 P3d 946 (2022) (quoting *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003)). To make that determination, we consider the instructions "as a whole and in the context of the evidence and record at trial, including the parties' theories of the case with respect to the various charges and defenses at issue." *State v. Owen*, 369 Or 288, 323, 505 P3d 953 (2022) (quoting *State v. Payne*, 366 Or 588, 609, 468 P3d 445 (2020)). An instructional error is prejudicial if the jury instruction, or its absence, "probably created an erroneous impression of the law in the minds of the jury members and if that erroneous impression may have affected the outcome of the case." *McKinney*, 369 Or at 335 (internal quotation marks omitted).

5. *Structural error review*

"Some federal constitutional violations qualify as 'structural' errors, which is to say that the error is a 'structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *State v. Ramos*, 367 Or 292, 300, 478 P3d 515, 522 (2020) (quoting *Arizona v. Fulminante*, 499 US 279, 310, 111 S Ct 1246, 113 L Ed 2d 302 (1991)). A structural error is a constitutional violation of the type after which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* at 319 (quoting *Rose v. Clark*, 478 US 570, 577-78, 106 S Ct 3101, 92 L Ed 2d 460 (1986)). That is because the error "casts so much doubt on the fairness of the trial process that, as a matter of law, the error can never be considered harmless." *Id.* at 315-16 (quoting *Satterwhite v. Texas*, 486 US 249, 256, 108 S Ct 1792, 100 L Ed 2d 284 (1988) (internal quotation marks and brackets omitted)).

#### 6. Plain error review

ORAP 5.45(1) provides that "[n]o matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court and is assigned as error in the opening brief in accordance with this rule, provided that the appellate court may, in its discretion, consider a plain error." To review for plain error, several requirements must be met: The error must be (1) an error "of law"; (2) that is "apparent," meaning the legal point is obvious and not reasonably in dispute; and (3) appears "on the face of the record." *State v. Reynolds*, 250 Or App 516, 559-30, 280 P3d 1046, *rev den*, 352 Or 666 (2012). In other words, we need not go outside the record or choose between competing inferences to find it, and the facts that comprise the error are irrefutable. *Id.* at 520.

Even where those conditions are satisfied, we must determine whether to exercise our discretion to reach the error and correct it. *Id.* Among the considerations relevant to that determination are

"the competing interests of the parties; the nature of the case; the gravity of the error; the ends of justice in the particular case; how the error came to the court's attention; and whether the policies behind the general rule requiring preservation of error have been served in the case in another way \* \* \*."

*Id.* at 521 (quoting *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382 n 6, 823 P2d 956 (1991) (internal quotation marks omitted)). *See also State v. Spainhower*, 251 Or App 25, 26 n 1, 283 P3d 361 (2012) (declining to exercise discretion to review for plain error because defendant could have raised the issue to the trial court).

## 7. Abuse of discretion review

"Discretion" refers to the authority of a trial court to choose among several legally correct outcomes. *State v. Rogers*, 330 Or 282, 312, 4 P3d 1261 (2000). "If the trial court's decision was within the range of legally correct discretionary choices and produced a permissible, legally correct outcome, the trial court did not abuse its discretion." *Id.* "Where, however, a trial court's purported exercise of discretion flows from a mistaken legal premise, its decision does not fall within the range of legally correct choices and does not produce a permissible, legally correct outcome." *State v. Romero*, 236 Or App 640, 643-44, 237 P3d 894 (2010); *see also State v. Gollas-Gomez*, 292 Or App 285, 287-88, 423 P3d 162 (2018) (same).

### B. Interpretation and Construction

#### 1. Statutory construction

"We review for legal error whether the trial court properly construed a statute and applied a correct legal theory of criminal liability." *State v. Chandler*, 293 Or App 705, 707, 430 P3d 186 (2018) (citing *State v. Barboe*, 253 Or App 367, 375, 290 P3d 833 (2012), *rev den*, 353 Or 714 (2013)).

#### 2. Agency interpretation of statutory terms

"[O]ur standard of review of an agency's interpretation and application of a statute depends on the nature of the term or phrase at issue. We review an agency's interpretation and application of a nondelegative term for legal error under ORS 183.482(8)(a) without deference to the agency's construction. By contrast, we review an agency's interpretation and application of a delegative term with deference under ORS 183.482(8)(b). That is, we review to determine whether the agency's exercise of discretion is outside the range of discretion delegated to the agency by law, or otherwise contrary to constitutions and statutes or inconsistent with agency rules, formally stated positions, or past practices." *Vaughn v. Marion County*, 305 Or App 1, 7 n 3, 469 P3d 231, 235 (2020) (internal citations, brackets, and quotation marks omitted). We review the interpretation of statutory terms for substantial evidence only if the terms are "exact," meaning the terms impart relatively precise meaning. *Brundridge v. Board of Parole*, 192 Or App 648, 652, 87 P3d 703, *rev den*, 337 Or 327 (2004).

Considerations that are helpful in determining whether a given statutory term expresses an incomplete legislative meaning and, thus, is delegative, include: "(1) whether the court has concluded that the term, or one like it, is delegative in another context; (2) whether the term is defined by statute or, on the other hand, susceptible to many different interpretations; (3) whether the term is one that invites a value or policy judgment; and (4) whether other, related provisions suggest a legislative intent that the

term be considered a delegation." *Penn v. Board of Parole*, 365 Or 607, 628, 451 P3d 589 (2019); *see also OR-OSHA v. CBI Services, Inc.*, 356 Or 577, 585, 590, 341 P3d 701 (2014) (explaining difference between delegative and nondelagative terms, and factors used to make that determination).

### 3. *Interpretation of administrative rules*

We defer to the promulgating agency's interpretation of its administrative rules. *State v. Craigen*, 300 Or App 451, 454, 454 P3d 7 (2019), *rev den*, 366 Or 292 (2020). "In the absence of an interpretation by the promulgating agency that would be entitled to deference[,] \* \* \* we construe an administrative rule by utilizing the same analytical framework that applies to the construction of statutes." *Id.* (internal quotation marks and citation omitted). We examine the text of the rules in context in order to discern and give effect to the intent of the body that approved them. *Hostetter v. Board of Parole and Post-Prison Supervision*, 255 Or App 328, 335, 296 P3d 664, *rev den*, 353 Or 747 (2013).

### 4. *Other matters of interpretation and construction*

Whether a statute is facially invalid because it restricts speech or assembly is a question of law that we review for legal error. *Couey v. Clarno*, 305 Or App 29, 33, 469 P3d 790 (2020), *rev den*, 367 Or 496 (2021); *see also* Or Const, Art I, §§ 8 & 26.

## C. *Pretrial Matters*

### 1. *State pretrial appeals*

ORS 138.045(1)(d) provides for interlocutory appeal of a pretrial order suppressing evidence and ORS 138.045(1)(e) provides for interlocutory appeal of a pretrial order "for the return or restoration of things seized." *See State v. Jackson*, 368 Or 705, 712, 498 P3d 788, 793 (2021). Some evidentiary determinations are reviewed for errors of law, while others are reviewed for abuse of discretion. *State v. Iseli*, 366 Or 151, 161, 458 P3d 653 (2020). When a question involves application of principles that can lead to "only one legally correct outcome," the appellate court must determine whether the trial court erred as a matter of law. *Id.* By contrast, if application of the appropriate legal principles would permit more than one legally correct outcome, then the appellate court reviews for abuse of discretion. *Id.*

### 2. *Suppressing evidence*

#### a. In general

We review a trial court's ruling on a motion to suppress for errors of law. *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993). We are bound by the trial court's

factual findings if there is constitutionally adequate evidence to support them. *State v. Edwards*, 319 Or App 60, 62, 509 P3d 177 (2022), *rev den*, 370 Or 212 (2022) (citing *Ehly*, 317 Or at 75). If the trial court did not make express findings of fact on all pertinent issues, we "presume that the facts were decided in a manner consistent with the court's ultimate conclusion," but only if the evidence allows for application of that presumption. *Ehly*, 317 Or at 75.

#### b. Suppression of confessions and admissions

Under Article I, section 12, of the Oregon Constitution, individuals have a right against compelled self-incrimination in criminal prosecutions, including the right to remain silent. *State v. Schrepfer*, 288 Or App 429, 435, 406 P3d 1098 (2017). We review the denial of a motion to suppress confessions or admissions for errors of law. *State v. Tellez-Suarez*, 312 Or App 531, 534, 493 P3d 28, *rev den*, 368 Or 788 (2021). We defer to the factual findings of the trial court--including as to what transpired during a custodial interrogation and what a defendant did or did not say. *State v. Avila-Nava*, 356 Or 600, 609, 341 P3d 714 (2014). If the trial court did not make express findings of fact on all pertinent issues, we presume that the facts were decided in a manner consistent with the court's ultimate conclusion, but only if the evidence allows for application of that presumption. *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968). However, we assess anew whether those facts suffice to meet constitutional standards. *State v. James*, 339 Or 476, 481, 123 P3d 251 (2005). *See also State v. Davis*, 350 Or 440, 459, 256 P3d 1075 (2011); *State v. Castillo*, 295 Or App 121, 127-28, 433 P3d 467 (2018), *rev den*, 364 Or 749 (2019).

##### (1) Compelling circumstances

We review for legal error a trial court's determination as to whether a defendant was in "compelling circumstances," so as to require the provision of *Miranda* warnings, accepting the trial court's findings of historical fact, provided that there is evidence in the record to support them. *State v. Courville*, 276 Or App 672, 673, 368 P3d 838 (2016). If the trial court did not make express findings of fact on all pertinent issues, we "presume that the facts were decided in a manner consistent with the court's ultimate conclusion," but only if the evidence allows for application of that presumption. *Id.*

##### (2) Invocation of right to silence

We review for legal error if defendant's statement amounted to an unequivocal invocation of their right to remain silent, an equivocal invocation, or no invocation. *State v. Castillo*, 295 Or App 121, 128-29, 433 P3d 467 (2018), *rev den*, 364 Or 749 (2019).

### (3) Suppression of statements made during investigation

We review a challenge to the admissibility of a defendant's statements during custodial interrogation as an issue of law. *State v. James*, 339 Or 476, 481, 123 P3d 251 (2005). The question of what transpired during a custodial interrogation, however, is an issue of fact for the trial court and the facts found are usually dispositive of the legal inquiry. *Id.* We are bound by the trial court's findings of historical fact if evidence in the record supports them, although we assess anew whether the facts suffice to meet constitutional standards. *Id.* If the trial court did not make express findings of fact on all pertinent issues, we presume that the facts were decided in a manner consistent with the court's ultimate conclusion, but only if the evidence allows for application of that presumption. *State v. Caprar*, 214 Or App 434, 439, 166 P3d 567 (2007), *rev den*, 345 Or 317 (2008).

#### c. Suppression of video or audio evidence

We review a trial court's ruling on a motion to suppress for errors of law, and we are bound by the trial court's findings of fact, provided they are supported by constitutionally sufficient evidence. *State v. Hayes*, 272 Or App 1, 3, 353 P3d 1237, *rev den*, 358 Or 145 (2015). "If the trial court did not make findings on particular issues and there is conflicting evidence in the record, 'we will presume that the facts were decided in a manner consistent with the court's ultimate conclusion.'" *Id.* (quoting *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993)) (reviewing denial of defendant's motion to suppress video evidence).

#### d. Voluntariness of consent to search

The determination about whether a consent to search is voluntary is a legal issue that we review independently. *State v. Venturi*, 166 Or App 46, 50, 998 P2d 748, *rev den*, 330 Or 375 (2000). However, we are bound by the trial court's findings of historical fact if there is evidence in the record to support them. *Id.* If the trial court did not make express findings of fact on all pertinent issues, we presume that the facts were decided in a manner consistent with the court's ultimate conclusion, but only if the evidence allows for application of that presumption. *State v. McCray*, 304 Or App 279, 284, 466 P3d 1042 (2020).

#### e. Suppression of evidence obtained by otherwise illegal search or seizure

"When reviewing a denial of a motion to suppress, we are bound by the facts found by the trial court that are supported by evidence in the record." *State v. Gerety*, 286 Or App 175, 179, 399 P3d 1049, *rev den*, 362 Or 39 (2017). If the trial court



did not make express findings of fact on all pertinent issues, we presume that the facts were decided in a manner consistent with the court's ultimate conclusion, but only if the evidence allows for application of that presumption. *State v. Young*, 268 Or App 688, 694, 343 P3d 277 (2015). Whether those facts describe circumstances that justify a warrantless search or seizure is a question of law. *State v. Portulano*, 320 Or App 335, 338, 514 P3d 93 (2022).

### 3. Probable cause—criminal charges

In a cause for malicious prosecution, whether a prosecutor had probable cause is a question of law for the court to decide if the facts and the inferences from the facts are undisputed. *Merrill v. A. R. G.*, 286 Or App 487, 494, 398 P3d 954 (2017) (citing *Varner v. Hoffer*, 267 Or 175, 178-79, 515 P2d 920 (1973)). "If the facts or inferences are in dispute the jury must decide the facts and the court must instruct the jury what facts constitute probable cause." *Id.* at 494-95. Thus, we review the trial court's probable-cause determination for legal error. *Id.* at 495.

In cases where a defendant alleges that there was no probable cause to support their arrest, we review whether a warrant affidavit established probable cause for legal error. *State v. Webber*, 281 Or App 342, 346, 383 P3d 951 (2016). A police officer may also arrest a person without a warrant if the officer has probable cause to believe that the person has committed a felony. *State v. Vasquez-Villagomez*, 346 Or 12, 23, 203 P3d 193 (2009) (citing ORS 133.310(1)(a)). Regardless, whether probable cause exists to support an arrest is a question of law, not fact. *Id.*

### 4. Probable cause—search warrants

When a trial or appellate court reviews a challenge to the sufficiency of an affidavit supporting a magistrate's issuance of a warrant, the question before the reviewing court is a legal one. A reviewing court asks whether, based on the facts shown by the affidavit, a neutral and detached magistrate could conclude (1) that there is reason to believe that the facts stated are true; and (2) that the facts and circumstances disclosed by the affidavit are sufficient to establish probable cause to justify the search requested. *State v. Castilleja*, 345 Or 255, 264, 192 P3d 1283, *adh'd to on recons*, 345 Or 473, 198 P3d 937 (2008). When determining whether the issuing magistrate could have concluded that the affidavit established probable cause, we are in the same position as was the trial court to evaluate "the sufficiency of the facts alleged in the affidavit, the reasonableness of any inferences involved in resolving the legal question presented by the probable cause determination, and, ultimately, the existence of probable cause to support the warrant." *Id.* at 265-66. We are not bound by nor deferential to the trial court's findings or conclusions. *Id.* at 266; *see also, e.g., State v. Marsing*, 244 Or App 556, 559-61, 260 P3d 739 (2011) (applying standard); *State v. Chase*, 219 Or App 387, 391-94, 182 P3d 274 (2008) (same).

"When evaluating the sufficiency of a search warrant affidavit, our task is to determine whether the affidavit alleged sufficient facts to permit a neutral and detached magistrate to determine that seizable evidence probably would be found at the place to be searched. That standard requires an affidavit to do more than allege facts that support a mere suspicion that evidence will be found; even a well-warranted suspicion does not suffice. Rather, the standard of probability requires the conclusion that it is more likely than not that the objects of the search will be found at the specified location." *State v. Williams*, 270 Or App 721, 725, 349 P3d 616 (2015) (internal citations and quotation marks omitted); *see also Castilleja*, 345 Or at 264; *State v. Goodman*, 328 Or 318, 325, 975 P2d 458 (1999).

a. Abandonment of property

Whether a person's statements and conduct unequivocally demonstrate that the person has relinquished all constitutionally protected interests in property involves both factual and legal questions, which we review in the same manner as we review other search or seizure questions under Article I, section 9. *State v. Cook*, 332 Or 601, 607, 34 P3d 156 (2001). Thus, we defer to the trial court's findings of historical fact if evidence supports them but determine as a matter of law whether those facts are sufficient to constitute abandonment. *Id.* If the trial court did not make express findings of fact on all pertinent issues, we "presume that the facts were decided in a manner consistent with the court's ultimate conclusion," but only if the evidence allows for application of that presumption. *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993). The state, as the proponent, bears the burden of proving by a preponderance of the evidence that a defendant has abandoned her constitutionally protected interests in the property. *State v. Bunch*, 305 Or App 61, 68, 468 P3d 973 (2020).

b. Consent to search

In reviewing the voluntariness of a defendant's consent to search, we will not disturb the trial court's findings of historical fact if they are supported by the evidence; this court is not, however, bound by the trial court's ultimate holding as to voluntariness, but "assesses anew whether the facts suffice to meet constitutional standards." *State v. Bea*, 318 Or 220, 230, 864 P2d 854 (1993). If the trial court did not make express findings of fact on all pertinent issues, we presume that the facts were decided in a manner consistent with the court's ultimate conclusion, but only if the evidence allows for application of that presumption. *State v. McCray*, 304 Or App 279, 284, 466 P3d 1042 (2020).

c. Traffic stop

Under Article I, section 9, of the Oregon Constitution, before a police officer may stop a citizen, for example, for a traffic violation, the officer must have probable cause to believe that a violation occurred. An officer has probable cause when the officer subjectively believes that an offense occurred and when the officer's subjective belief is objectively reasonable. *State v. Ankeny*, 306 Or App 300, 302, 474 P3d 406 (2020). To satisfy the objective component, the facts that the officer perceives to exist must establish the elements of an offense, even if not the offense that the officer believed the defendant committed. *Id.* at 302-03. Whether the facts establish probable cause to stop someone is a question of law that we review for legal error. *Id.*

### 5. Grand jury proceedings

Oregon appellate courts do not review sufficiency of evidence at grand jury proceedings. *State v. Belleque*, 313 Or App 339, 347, 494 P3d 1004, *rev den*, 368 Or 597 (2021).

Notwithstanding the Fourteenth Amendment Due Process Clause, a delay in prosecution due to resubmission of the charges to a grand jury is permissible if it is in the interest of justice; we review such a decision for abuse of discretion. *State v. Stokes*, 350 Or 44, 52, 248 P3d 953, *cert den*, 565 US 920 (2011).

### 6. Guilty pleas

Oregon appellate courts have "no authority to review the validity of the defendant's plea of guilty or no contest, or a conviction based on the defendant's plea of guilty or no contest." ORS 138.105(5). Exceptions include a trial court's "adverse determination of a pretrial motion reserved in a conditional plea of guilty or no contest under ORS 135.335." ORS 138.105(5)(a). Appellate courts also have authority to review "whether the trial court erred by not merging determinations of guilt of two or more offenses, unless the entry of separate convictions results from an agreement between the state and the defendant." ORS 138.105(5)(b). *See State v. Colgrove*, 370 Or 474, 481-497, 521 P3d 456 (2022) (construing ORS 138.105(5)).

#### a. Withdrawal

Appellate courts generally do not have authority to review a trial court's denial of a defendant's motion to withdraw a plea of no contest or guilty. *See generally State v. Clevenger*, 297 Or 234, 683 P2d 1360 (1984); *see also State v. Clements*, 265 Or App 9, 23, 333 P3d 1177 (2014), *rev den*, 356 Or 689 (2015).

#### b. Plea agreements

"Unless otherwise provided," pursuant to ORS 138.105(5), "we have no authority to review on appeal challenges seeking to invalidate convictions based on pleas." *State v. Merrill*, 311 Or App 487, 491, 492 P3d 722, *adh'd to as modified on recons*, 314 Or App 460, 495 P3d 219 (2021), *rev den*, 370 Or 789 (2023).

In cases where a defendant challenges a court's departure from a plea agreement at sentencing, we review the claim of sentencing error for errors of law. *State v. Johnson*, 288 Or App 220, 224, 406 P3d 139 (2017). A trial court's participation in plea negotiations is governed by statute. *Id.* (citing ORS 135.432). If the parties have reached a tentative plea agreement with the expectation of a reduction in charge or a sentencing concession, the trial court may allow them to share that agreement with the court before the defendant enters a negotiated plea. *Id.* The court may then indicate whether it concurs in the proposed disposition. *Id.* The trial court's participation in those discussions does not bind it to the terms of the resulting plea agreement, and the court may independently decide whether to impose the negotiated sentence. *Id.* If, however, a trial court concurs in the proposed disposition, then later decides to depart from the agreed-upon sentence, the court must notify the defendant of that decision and allow the defendant a reasonable period of time in which to either affirm or withdraw a plea of guilty or no contest. *Id.*

#### 7. Competency of defendant

In exercising its ultimate decision-making authority over fitness proceedings, the trial court is the trier of fact, charged with weighing the medical and all other relevant evidence, and then coming to a decision. *State v. Simon*, 294 Or App 840, 867, 433 P3d 385 (2018), *rev den*, 365 Or 502 (2019). Our role in reviewing the trial court's decision is not to reweigh evidence or assess whether the evidence supports factual findings different from those made by the trial court. *Id.* As in other contexts where the factfinding is entrusted to the trial court, we review only to determine if the record and all reasonable inferences that could be drawn from the evidence, viewed in the light most favorable to the trial court's decision, supports the court's findings. *Id.* In short, we review to determine whether, "viewed in the light most favorable to the trial court's resolution of the issue, the record supports the trial court's competency determination." *Id.*

#### 8. Double jeopardy

"We review the trial court's denial of defendant's motion to dismiss on double jeopardy grounds for errors of law, deferring to its factual findings that are supported by the record." *State v. Shaw*, 317 Or App 746, 747, 507 P3d 280 (2022).

## 9. Continuances

We review a trial court's grant or denial of a motion for continuance for abuse of discretion. *State v. Hoffman*, 321 Or App 330, 335, 515 P3d 912, *rev den*, 370 Or 602 (2022) (grant); *State v. Thomas*, 266 Or App 642, 643, 338 P3d 762 (2014) (denial).

## 10. Issues concerning counsel

### a. Invocation of right to counsel

We review legal conclusions regarding the invocation of the right to counsel for legal error. *State v. James*, 339 Or 476, 481, 123 P3d 251 (2005). We defer to the factual findings of the trial court--including as to what transpired during a custodial interrogation and what a defendant did or did not say. *State v. Avila-Nava*, 356 Or 600, 609, 341 P3d 714 (2014). However, we assess anew whether those facts suffice to meet constitutional standards. *James*, 339 Or at 481.

### b. Waiver of counsel

Whether a defendant validly waived the right to counsel is a question of law that we review in light of the circumstances particular to each case. *State v. Erb*, 256 Or App 416, 420, 300 P3d 270 (2013).

### c. Withdrawal and substitution of counsel

We review a trial court's decision to grant or deny a motion for withdrawal of counsel for an abuse of discretion. If a trial court grants a motion to withdraw and does not appoint substitute counsel, thus requiring the criminal defendant to proceed *pro se*, we review for error of law whether the defendant has knowingly and intentionally waived his or her right to counsel. *State v. Langley*, 351 Or 652, 666, 273 P3d 901 (2012).

## 11. Speedy trial

We review the grant or denial of a motion to dismiss on speedy trial grounds for legal error, accepting the trial court's findings of historical fact, including those concerning the length and reasons for the delay, if there is evidence in the record to support them. *State v. Johnson*, 342 Or 596, 608, 157 P3d 198 (2007), *cert den*, 552 US 1113 (2008); *State v. Delatorre*, 316 Or App 559, 561, 502 P3d 767 (2021), *rev den*, 369 Or 705 (2022); *State v. Stinnett*, 291 Or App 638, 639, 422 P3d 372 (2018). Where the trial court does not make factual findings, we recount the undisputed facts and resolve factual disputes in a manner favorable to the trial court's legal conclusion. *State v. Lewis*,

249 Or App 480, 482, 278 P3d 51, *rev den*, 352 Or 564 (2012).

## 12. Joinder and severance

### a. Of defendants

ORS 136.060(1) mandates a joint trial for jointly charged defendants "unless the court concludes before trial that it is clearly inappropriate to do so and orders that a defendant be tried separately," and further requires the court to "strongly consider the victim's interest in a joint trial." Or Laws 1987, ch 2, § 6. We review the application of that mandate for legal error. *State v. Turnidge*, 359 Or 364, 388-90, 374 P3d 853 (2016), *cert den*, 137 S Ct 665 (2017) (construing ORS 136.060(1)).

### b. Of charges

"Joinder of charges is governed by statute. ORS 132.560. A trial court's interpretation of a statute is reviewed for legal error. Therefore, we review a trial court's determination that the state met the statutory requirements for joinder of charges for legal error." *State v. Thompson*, 328 Or 248, 256-57, 971 P2d 879, *cert den*, 527 US 1042 (1999). "Under ORS 132.560(3), severance of joined charges is permitted when it appears that a party is 'substantially prejudiced' by joinder." *State v. Delaney*, 370 Or 554, 565, 522 P3d 855 (2022). "Whether the joinder of charges substantially prejudiced a particular defendant" is a question of law, and "involves a case-specific assessment of the charges and the facts alleged to support them." *State v. Cox*, 272 Or App 390, 396-97, 359 P3d 257 (2015). "The reviewing court must be able to determine from the record that the trial court engaged in the required prejudice analysis." *Id.* at 397.

"We also review a trial court's determination whether the facts stated in a defendant's motion to sever show the existence of prejudice for legal error." *Thompson*, 328 Or at 257. "We review a trial court's determination that a defendant failed to demonstrate the existence of substantial prejudice for errors of law based on 'the record at the time of the court's ruling on defendant's motion to sever.'" *Cox*, 272 Or App at 396.

## 13. Jurisdiction

"Whether a court has subject-matter jurisdiction over a particular proceeding is generally a question of law which we review for legal error." *State v. Hill*, 277 Or App 751, 763, 373 P3d 162, *rev den*, 360 Or 568 (2016).

## 14. Change of venue

"We review a ruling granting or denying a venue motion only for abuse of discretion." *Praegitzer Industries v. Rollins Burdick Hunter*, 129 Or App 628, 633, 880

P2d 479 (1994) (examining ORS 14.110, which provides grounds for change of venue).

#### *D. Trial Matters*

##### *1. Jury selection*

###### a. Challenges for cause

"We review the denial of a motion to strike a juror for cause for abuse of discretion." *State v. Gollas-Gomez*, 292 Or App 285, 287, 423 P3d 162 (2018) (citing *State v. Fanus*, 336 Or 63, 83, 79 P3d 847 (2003), *cert den*, 541 US 1075 (2004)).

###### b. Peremptory challenges

The trial court's determination that a peremptory challenge was not the product of purposeful discrimination is a question of fact, which we review for clear error. *State v. Curry*, 298 Or App 377, 389, 447 P3d 7 (2019), *adh'd to on recons*, 302 Or App 640 (2020); *see also* ORCP 57 D(4) (setting forth a burden-shifting process for peremptory challenges); ORS 136.230 (providing that peremptory challenges in criminal cases are subject to ORCP 57 D(4)).

###### c. Batson challenges

###### (1) General

To bring a *Batson* challenge, which arises from the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, (1) a litigant must make a *prima facie* showing that a peremptory strike was based on race or gender; (2) the state must provide a neutral explanation for challenging jurors within an arguably targeted class; (3) the trial court must, after consulting all of the circumstances that bear on racial animosity, determine whether the defendant has shown purposeful discrimination by the state. *State v. Henderson*, 315 Or 1, 4-5, 843 P2d 859 (1992).

"If it is clear from the 'entire record' that the trial court's rejection of defendant's *Batson* objections was in error, then it is our obligation to say so and to correct that error." *State v. McWoods*, 320 Or App 728, 735, 514 P3d 1151, *rev den*, 370 Or 602 (2022). A *Batson* error, if found, is structural error under federal constitutional law and requires automatic reversal without an assessment of harmless error. *State v. Curry*, 298 Or App 377, 392, 447 P3d 7 (2019), *adh'd to on recons*, 302 Or App 640 (2020).

###### (2) Purposeful discrimination

"We review a trial court's determination that a peremptory strike was not the product of purposeful racial discrimination as a question of fact." *State v. Vandyke*,

318 Or App 235, 237, 507 P3d 339, *rev den*, 370 Or 56 (2022). We are to affirm the trial court's ruling unless it is "clearly erroneous." *State v. McWoods*, 320 Or App 728, 733, 514 P3d 1151, *rev den*, 370 Or 602 (2022) (quoting *Snyder v Louisiana*, 552 US 472, 477, 128 S Ct 1203, 170 L Ed 2d 175 (2008)).

## 2. Trial management

### a. Removal of judge

Pursuant to ORAP 8.30 "a party or attorney for a party in a case before the Supreme Court or Court of Appeals may move to disqualify a judge of the Supreme Court or Court of Appeals for one or more of the grounds specified in ORS 14.210, or upon the ground that the judge's participation in the case would violate the Oregon Code of Judicial Conduct." ORAP 8.30(3)(a).

We review rulings on a defendant's motion to disqualify a judge for legal error. *See State v. Langley*, 363 Or 482, 491-508, 424 P3d 688 (2018), *adh'd to as modified on recons*, 365 Or 418, 446 P3d 542 (2019), *cert den*, 141 S Ct 138 (2020).

### b. Discovery violations

"We review the trial court's determination that there was no discovery violation for errors of law, viewing the predicate facts and reasonably derived inferences in the light most favorable to the trial court's ruling." *State v. Nistler*, 268 Or App 470, 487, 342 P3d 1035, *rev den*, 357 Or 551 (2015).

"We review the trial court's sanction for discovery violations for abuse of discretion." *State v. Moss*, 147 Or App 658, 663, 938 P2d 215, *rev den*, 325 Or 491 (1997).

### c. Trial in absentia

The constitutional right to be present at trial derives from Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution. *State v. Peltier*, 318 Or App 267, 272, 508 P3d 567 (2022), *rev den*, 370 Or 197 (2022); *Illinois v. Allen*, 397 US 337, 338, 90 S Ct 1057, 25 L Ed 2d 353 (1970).

"Whether a defendant has knowingly and intentionally waived his right to be present at trial is a question of law that we review for legal error." *Peltier*, 318 Or App at 272 (reviewing trial court's determination to conduct criminal trial *in absentia*).

### d. Restraints on defendant



The right of a criminal defendant to appear free of physical restraints during a jury trial is grounded in Article I, section 11, of the Oregon Constitution, and in the Sixth Amendment to the United States Constitution. *State v. Washington*, 355 Or 612, 627-28, 330 P3d 596, *cert den*, 574 US 1016 (2014). We review a trial court's order requiring that a defendant be physically restrained for an abuse of discretion. *Id.* at 629.

e. Mistrial

"We review the trial court's denial of the motion for a mistrial for an abuse of discretion. A trial court abuses its discretion in denying a motion for a mistrial if the effect is to deny the defendant a fair trial." *State v. Cox*, 272 Or App 390, 409, 359 P3d 257 (2015); *State v. Thompson*, 328 Or 248, 271, 971 P2d 879, *cert den*, 527 US 1042 (1999).

f. Reopening case-in-chief

ORS 136.445 precludes a court from considering evidence adduced "after close of the state's evidence or of all the evidence," but a court does have authority to reopen a case for the presentation of additional evidence. *State v. Agee*, 223 Or App 729, 734, 196 P3d 1060 (2008). "We review rulings on motions to reopen a case in order to present additional evidence for abuse of discretion." *Id.*

3. Evidentiary rulings

a. In general

OEC 103(1) provides the general standard of review for evidentiary error. OEC 103(1)(b) provides that "[e]vidential error is not presumed to be prejudicial. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and \* \* \* [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." *State v. Cameron*, 323 Or App 783, 787, \_\_\_ P3d \_\_\_ (2023).

b. Privilege

"Determining whether a privilege applies to proffered evidence is a preliminary fact question decided by a trial court under OEC 104(1). We review for errors of law the trial court's determination" of whether privilege applied. *State v. Langley*, 314 Or 247, 263, 839 P2d 692 (1992), *adh'd to on recons*, 318 Or 28, 861 P2d 1012 (1993); *see also* OEC 503-514.

### c. Expert-witness testimony

"We review for legal error whether a trial court properly applied OEC 702 in deciding whether an expert is qualified to testify." *State v. Threlkeld*, 314 Or App 433, 436, 496 P3d 1147 (2021); *see also* OEC 701-706.

### d. Competency of a witness

Our review of whether a person is competent to be a witness involves a two-step process: "First, we determine whether the trial court applied the correct legal standard for determining competency. Second, if the trial court applied the correct standard, we review the record to determine whether the trial court abused its discretion in determining competency." *State v. Sarich*, 352 Or 601, 615, 291 P3d 647 (2012); *see also State v. Milbradt*, 305 Or 621, 624, 756 P2d 620 (1988).

### e. Scientific evidence

"We review for legal error whether [a] trial court properly applied OEC 702 to determine that an expert was qualified to give testimony about a particular topic." *State v. Rivera-Ortiz*, 288 Or App 284, 285, 406 P3d 73 (2017), *rev den*, 362 Or 665 (2018). "We also review for legal error whether evidence is 'scientific,' and, if so, whether it is admissible." *Id.* In some cases, "a trial court's determination of whether OEC 702 evidence would be helpful to the trier of fact [is] reviewed for abuse of discretion, and other cases treat[] the question as a matter of law." *State v. Garlinghouse*, 323 Or App 640, 654, 524 P3d 103 (2023) (citing *State v. Jesse*, 360 Or 584, 599, 385 P3d 1063 (2016) ("[T]his court's prior decisions discussing a discretionary standard have involved the question whether proffered expert testimony would help the jury comprehend the evidence. And, those decisions have confined the role of judicial discretion to circumstances involving factual issues neither clearly within, nor beyond, the jury's assumed level of understanding.")).

### f. Identification evidence

"We review a trial court's admission of eyewitness identification evidence for legal error and defer to the trial court's findings of fact as long as they are supported by any evidence." *State v. Escobar*, 322 Or App 69, 72, 519 P3d 137 (2022). "If the challenge to the admission of evidence is based on unfair prejudice weighed against probative value under OEC 403, we review for abuse of discretion." *Id.*

### g. Other-acts evidence

#### (1) Of the victim

A defendant may be entitled to impeach a victim by questioning the victim about prior accusations when "there is some evidence that the victim made prior accusations that were false, unless the probative value of the evidence which the defendant seeks to elicit on cross-examination (including the probability that false accusations were in fact made) is substantially outweighed by the risk of prejudice, confusion, embarrassment[,] or delay." *State v. LeClair*, 83 Or App 121, 130, 730 P2d 609 (1986), *rev den*, 303 Or 74 (1987). We review such balancing for abuse of discretion. *State v. Arellano*, 149 Or App 86, 90, 941 P2d 1089 (1997), *rev dismissed*, 327 Or 555, 971 P2d 411 (1998).

## (2) Of the defendant

We review a trial court's determination "to admit evidence of uncharged misconduct under OEC 404(3) \* \* \* for legal error." *State v. Wright*, 283 Or App 160, 168, 387 P3d 405 (2016).

### h. Impeachment by prior conviction

"Whether evidence is admissible under OEC 609[] is a question of law, which we review for errors of law." *State v. Miller*, 272 Or App 737, 743-44, 358 P3d 301 (2015); *State v. Verardo*, 263 Or App 452, 455, 328 P3d 788, *rev den*, 356 Or 398 (2014). "[A]n erroneous decision to exclude evidence relevant to bias is reversible if it denies the jury an adequate opportunity to assess the credibility of a witness whose credibility is important to the outcome of the trial." *State v. Davis*, 317 Or App 794, 799, 505 P3d 1057, *rev den*, 370 Or 56 (2022) (internal quotation marks omitted).

### i. Hearsay

We apply a two-part standard of review to a trial court evidentiary ruling that a statement fits within an exception to the hearsay rule. *State v. Cunningham*, 337 Or 528, 538-39, 99 P3d 271 (2004), *cert den*, 544 US 931 (2005). We will uphold the trial court's preliminary factual determinations if any evidence in the record supports them. *Id.* at 537-38. However, we review the trial court's ultimate legal conclusion, as to whether the hearsay statement is admissible under an exception to the hearsay rule, to determine if the trial court made an error of law. *Id.* at 538; *see also State v. Cook*, 340 Or 530, 537, 135 P3d 260 (2006) (restating that standard); OEC 801-806 (defining hearsay and explaining the respective exceptions).

### j. Confrontation clause violations

We review a trial court's legal conclusion that hearsay evidence could be admitted without violating defendant's confrontation rights under the Due Process Clause

of the Fourteenth Amendment for legal error. *State v. Martin*, 370 Or 653, 657-58, 522 P3d 841 (2022).

Violations of a defendant's Sixth Amendment confrontation right are subject to a harmless error review. *State v. Willis*, 219 Or App 268, 274, 182 P3d 891, *rev den*, 345 Or 416 (2008). Violations of federal constitutional rights must be analyzed under the federal harmless error test; if that test is satisfied, reversal may not be required. *State v. Cook*, 340 Or 530, 544, 135 P3d 260 (2006); *see Chapman v. California*, 386 US 18, 23, 87 S Ct 824, 17 L Ed 2d 705 (1967) (providing test); *Delaware v. Van Arsdall*, 475 US 673, 681, 106 S Ct 1431, 89 L Ed 2d 674 (1986) (describing test announced in *Chapman*).

#### k. Physical evidence

"We review the denial of a motion to suppress [physical evidence] for legal error and are bound by the trial court's factual findings if they are supported by constitutionally sufficient evidence." *State v. Chittenden*, 305 Or App 483, 485, 470 P3d 424 (2020).

#### l. Photographs

In reviewing an evidentiary ruling, including the admission of photographic evidence, we "first determine whether, in the circumstances presented \* \* \*, the correct application of the proper legal principles can yield more than one legally correct outcome. Only if it can, permitting a choice among legally permissible alternatives," we then review the ruling for an "abuse of discretion." *State v. Nelsen*, 219 Or App 443, 449, 183 P3d 219 (2008), *rev den*, 346 Or 66 (2009) (internal quotation marks omitted); *see also* OEC 1001-1008 (concerning the admissibility of, among others, photographic evidence).

#### m. Scope of cross-examination

"We review [a] court's decision limiting the scope of cross-examination for abuse of discretion." *Schlimgen v. May Trucking Co.*, 189 Or App 478, 484, 75 P3d 903 (2003). We review the trial court's "conclusion that a party's line of questioning during cross-examination exceeded the scope of direct examination for errors of law." *State v. Wirfs*, 250 Or App 269, 274, 281 P3d 616, *rev den*, 352 Or 378 (2012).

#### n. Scope of closing arguments

"We review a trial court's decision to overrule an objection to closing arguments for abuse of discretion. A trial court's discretion is not unbounded. If an

argument was improper, properly challenged, and likely to prejudice the jury unfairly, upon review, we must reverse. In conducting our review, we view statements made by a party during argument in context, not in a vacuum." *State v. Mayo*, 303 Or App 525, 530, 465 P3d 267 (2020) (internal quotation marks and citations omitted).

"Generally, we review a trial court's ruling to limit argument for abuse of discretion." *State v. Sanchez-Cacatzun*, 304 Or App 650, 660, 468 P3d 964 (2020), *rev den*, 367 Or 559 (2021). "However, when the court's decision to limit argument is based on a legal determination, as it was in this case, we review the court's decision for legal error." *Id.*

#### o. Relevance

We review a trial court's determinations of relevance under OEC 401 for errors of law. *State v. Titus*, 328 Or 475, 481, 982 P2d 1133 (1999).

"Under OEC 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *State v. Boauod*, 302 Or App 67, 72, 459 P3d 903 (2020) (internal quotation marks and brackets omitted). "Although we examine whether the trial court properly applied the balancing test that OEC 403 prescribes for errors of law, we review the trial court's ultimate determination as to whether evidence is unfairly prejudicial under OEC 403 for abuse of discretion." *Id.* at 72-73 (quotation marks omitted). "In evaluating a trial court's discretionary ruling under OEC 403, our role is to assess whether the court's decision falls within the range of legally permissible choices." *Id.* at 73 (quotation marks omitted). "Absent a claim that a trial court has made a legal or factual error in making a discretionary determination under OEC 403, to determine whether the court's evidentiary ruling represents an abuse of discretion, we examine whether the court exercised its discretion to an end not justified by, and clearly against, evidence and reason. *Id.* (quotation marks and brackets omitted); *see also* OEC 401-413 (concerning relevance, admission, and exclusion of evidence).

#### p. Judicial notice

For a court to take judicial notice of any matter, that matter must be "not subject to reasonable dispute" and either "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *State v. Kindler*, 277 Or App 242, 253, 370 P3d 909 (2016) (internal quotation marks and brackets omitted); *see also* OEC 201(b)) (concerning kinds of facts to which judicial notice is applicable), OEC 201(c), (d) (concerning when judicial notice is discretionary or mandatory). Such error is reversible only if it is not harmless. *Id.*; *see also Frady v. Frady*, 185 Or App 245, 248, 58 P3d 849 (2002) (affirming the trial court's decision upon observing that "although the

trial court erred in employing judicial notice to admit the contents of the return of service, that error was harmless").

#### 4. Jury instructions

##### a. In general

"We review a trial court's failure to give a requested jury instruction for errors of law." *State v. Ashkins*, 357 Or 642, 648, 357 P3d 490 (2015). "Generally speaking, an instruction is appropriate if it correctly states the law and is supported by evidence in the record, when the evidence is viewed in the light most favorable to the party requesting the instruction." *Id.*; see also *State v. Payne*, 366 Or 588, 603, 607, 468 P3d 445 (2020) (outlining the reason that the court was reviewing for legal error, holding that evidence is viewed in the light most favorable to the party requesting the instruction, and explaining that an abuse of discretion standard of review may arise in the future).

We review a trial court's choice from among various requested instructions for abuse of discretion; we review a trial court's complete refusal to give a requested jury instruction for legal error. *State v. Labossiere*, 307 Or App 560, 565, 477 P3d 1 (2020) (citing *Payne*, 366 Or at 603 & n 4).

##### b. Lesser-included offenses

"We review the trial court's refusal to instruct the jury on a lesser-included offense for errors of law." *State v. Lee*, 174 Or App 119, 125, 23 P3d 999, *rev den*, 332 Or 559 (2001). "A crime is a lesser-included offense of another crime if either of two circumstances exist: (1) the elements of the lesser offense necessarily are included in the greater offense because the elements of the former are subsumed in the latter; or (2) all of the elements of the lesser offense are expressly set forth in the accusatory instrument." *Id.* We have authority under Article VII (Amended), section 3 of the Oregon Constitution to direct entry of a lesser-included offense that we determine should have been entered by the trial court; in other words, where there is insufficient evidence to support the defendant's conviction for the charged offense, but where the state proved all the elements of an offense that is subsumed in the charged offense, we may direct entry of a lesser-included offense. *State v. Pittman*, 276 Or App 491, 495, 369 P3d 99 (2016).

##### c. Accomplice-testimony corroboration instruction

"We review the trial court's refusal to give a requested jury instruction for errors of law." *State v. Egeland*, 260 Or App 741, 742, 745-46, 320 P3d 657 (2014) (reviewing trial court's refusal "to give defendant's requested 'corroboration' instruction" set forth in Uniform Criminal Jury Instruction 1056).

#### d. Elements of offense

We review a trial court's jury instructions for legal error and reverse if the trial court incorrectly instructed the jury on a material element of a claim or defense and that instructional error permits the jury to reach a legally erroneous result. *State v. Tardie*, 319 Or App 229, 232, 509 P3d 705, *rev den*, 370 Or 303 (2022).

#### e. Defenses

"In reviewing a trial court's denial of a defense, 'we review the record to determine whether the defendant presented any evidence to support the defenses he sought to assert and evaluate that evidence in the light most favorable to the defendant.'" *City of Eugene v. Adams*, 313 Or App 67, 68, 495 P3d 187, *rev den*, 368 Or 787 (2021) (quoting *State v. Miles*, 197 Or App 86, 88, 104 P3d 604, *rev den*, 338 Or 488 (2005) (brackets omitted)). "We review a trial court's refusal to give a jury instruction [on a defense] for legal error and state the facts that support giving the instruction in the light most favorable to the party who requested it." *Adams*, 313 Or App at 68.

#### 5. Prosecutorial misconduct

##### a. Unobjected-to misconduct

If a defendant does not object to prosecutorial misconduct or move for a mistrial, defendant is entitled to review only if we find "plain error" and are willing to consider it. ORAP 5.45(1); *State v. Chitwood*, 370 Or 305, 310-11, 518 P3d 903 (2022).

##### b. Objected-to misconduct

The leading cases on prosecutorial misconduct involve motions for mistrial. We review a trial court's decision on a motion for mistrial for abuse of discretion. *State v. Smith*, 310 Or 1, 24, 791 P2d 836 (1990); *see State v. Serrano*, 355 Or 172, 197, 324 P3d 1274 (2014), *cert den*, 576 US 1037, 135 S Ct 2861 (2015). Where the decision does not stem from a "mistaken legal premise," *State v. Romero*, 236 Or App 640, 643-44, 237 P3d 894 (2010), or a factual question, a court abuses its discretion only when the alleged misconduct denies the defendant a fair trial. *State v. Washington*, 355 Or 612, 659-60, 330 P3d 596, *cert den*, 574 US 1016, 135 S Ct 685 (2014). The trial court's findings concerning the prosecutor's intent are binding on review as long as there is evidence in the record to support them. *State v. Mays*, 269 Or App 599, 618, 346 P3d 535, *rev den*, 358 Or 146 (2015).

We review for errors of law "whether the trial court correctly precluded a retrial, on double jeopardy grounds, because the prosecutor's misconduct was so prejudicial that it could not be cured short of a mistrial." *State v. Garner*, 234 Or App

486, 492, 228 P3d 710, *rev den*, 348 Or 621 (2010).

#### 6. *Juror misconduct*

"Whether to grant a new trial because of juror misconduct is a discretionary decision for the trial court." *State v. Miller*, 167 Or App 72, 75, 1 P3d 1047, *rev den*, 330 Or 553 (2000). The evidence must, however, meet a threshold level before the court has any discretion to exercise. *Id.* at 75-76. Thus, in cases of actual misconduct, in which a juror engages in deliberation that in some way violates their oath, "the verdict will stand unless the evidence clearly establishes that the misconduct constitutes a serious violation of the juror's duty and deprives complainant of a fair trial." *State v. Gardner*, 230 Or 569, 575, 371 P2d 558 (1962). "Whether the misconduct rises to such a level depends on the nature of the conduct considered in the context of the trial proceedings as a whole, including the instructions given to the jury to channel its deliberations." *State v. Vogh*, 179 Or App 585, 596, 41 P3d 421 (2002).

#### 7. *Ineffective assistance of counsel*

"Resolving inadequate assistance claims during trial promotes finality in court decisions and avoids duplicative proceedings." *State v. Smith*, 339 Or 515, 529, 123 P3d 261 (2005). However, due to disadvantages of a factual inquiry into a defendant's complaints about counsel during trial, a post-conviction proceeding may be preferable; it "provides a constitutionally sufficient mechanism for a person convicted of a crime to raise any claim of inadequate counsel and to obtain appropriate relief." *Id.* at 528-30. A trial court does have "an obligation to consider and grant or deny a motion for substitute counsel and to exercise its discretion in doing so"; we review such decisions for abuse of discretion. *Id.* at 523, 525.

#### 8. *Sufficiency of the evidence*

##### a. In General

We review questions of sufficiency of evidence in a criminal case, following conviction, by examining the evidence in the light most favorable to the state and determining whether a rational trier of fact, accepting reasonable inferences and reasonable credibility choices, could have found the essential elements of the crime were proved beyond a reasonable doubt. *State v. Walters*, 311 Or 80, 82, 84, 804 P2d 1164 (1991).

##### b. Motions for judgment of acquittal

A judgment of acquittal is appropriate if the evidence is insufficient to support a verdict. *State v. Cunningham*, 320 Or 47, 61-62, 880 P2d 431 (1994), *cert den*,



514 US 1005 (1995); *State v. Newkirk*, 319 Or App 131, 133, 509 P3d 757, *rev den*, 370 Or 214 (2022). We review questions of the sufficiency of the evidence in a criminal case following a conviction by examining the evidence in the light most favorable to the state to determine whether a rational trier of fact, accepting reasonable inferences and reasonable credibility choices, could have found the essential elements of the crime beyond a reasonable doubt. *Cunningham*, 320 Or at 63. This court's decision is not whether we believe that defendant is guilty beyond a reasonable doubt, but whether the evidence is sufficient for the factfinder to so find. *Id.* We have rejected the argument that circumstantial evidence may never be sufficient to convict. *Id.*

When our "review of a ruling on a motion for a judgment of acquittal centers on the meaning of the statute defining the offense, the issue is one of statutory construction that we review for legal error." *State v. McQueen*, 307 Or App 540, 544, 478 P3d 581 (2020) (citation and internal quotation marks omitted). After construing the statute, we review the facts in the light most favorable to the state to "determine whether a rational trier of fact could have found that the essential elements of the crime had been proved beyond a reasonable doubt." *Id.* (citation and internal quotation marks omitted).

## 9. *Nonunanimous jury verdict*

We review claims concerning nonunanimous jury verdicts--which qualify for reversal and remand as plain error--for legal error. *State v. Poston*, 309 Or App 377, 386, 482 P3d 778 (2021) (a "court's entry of judgment based on nonunanimous jury verdicts \* \* \* [is] plainly erroneous and requires reversal").

### *E. Sentencing*

#### *1. In general*

"[T]he appellate court has authority to review any sentence to determine whether the trial court failed to comply with requirements of law in imposing or failing to impose a sentence." ORS 138.105(7); *see State v. Capri*, 248 Or App 391, 394, 273 P3d 290 (2012) (applying statute). There are several exceptions though. For example: the court has limited authority to review guidelines presumptive sentences, ORS 138.105(8), and "no authority to review any part of a sentence resulting from a stipulated sentencing agreement between the state and the defendant. ORS 138.105(9); *see State v. Rusen*, 369 Or 677, 679, 509 P3d 628 (2022) (applying statute).

#### *2. Multiple convictions*

We review the trial court's rulings on merger of separate convictions for legal error. *State v. Ortiz-Rico*, 303 Or App 78, 84, 462 P3d 741, *rev den*, 366 Or 827 (2020). "In reviewing merger rulings, we are bound by the trial court's factual findings,

so long as there is constitutionally sufficient evidence in the record to support them." *Id.*

### 3. Interpretation of guidelines

"Because the legislature approved the sentencing guidelines adopted by the Criminal Justice Commission, their interpretation is a question of the legislature's intent that we resolve by applying the familiar principals of statutory construction"--*i.e.*, "by examining the text in its context, along with any relevant legislative history, and, if necessary, canons of construction." *State v. McFerrin*, 289 Or App 96, 99 n 3, 100, 408 P3d 263 (2017), *rev dismissed*, 365 Or 194 (2019) (ellipsis and internal quotation marks omitted).

### 4. Calculation of sentence

Challenges to the trial court's calculation of a sentence generally require construal of the statute or statutes imposing criminal penalties for the charged conduct. Such arguments "raise[] a question of statutory interpretation that we resolve by considering the text, context, and any helpful legislative history." *State v. Kragt*, 368 Or 577, 586, 495 P3d 1233 (2021).

#### a. Criminal history score

"We review the calculation of a defendant's criminal history category--including the treatment of out-of-state convictions--for legal error." *State v. Shields*, 309 Or App 516, 523, 482 P3d 784, 789 (2021) (citing ORS 138.105(7), (8)(c)(A); *State v. Provencio*, 153 Or App 90, 94, 955 P2d 774 (1998)). "Whether the elements of an out-of-state offense correspond to an Oregon offense is a question of law." *Id.* (citing *State v. Gunter*, 187 Or App 461, 462, 67 P3d 996 (2003)).

#### b. Consecutive sentences

"We review a trial court's decision to impose consecutive sentences for errors of law and to determine whether the trial court's predicate factual findings are supported by any evidence in the record." *State v. Russell*, 309 Or App 554, 556, 482 P3d 799, *rev den*, 368 Or 638 (2021) (internal quotation marks omitted).

#### c. Proportionality of a sentence

We review whether a sentence is constitutionally disproportionate under Article I, section 16, of the Oregon Constitution for legal error. *State v. Ryan*, 361 Or 602, 614-15, 396 P3d 867 (2017; *State v. Hawthorne*, 316 Or App 487, 502, 504 P3d 1185 (2021), *rev den*, 369 Or 856 (2022)). "In conducting that review, we are bound by

any findings of historical fact that the trial court may have made, if they are supported by evidence in the record." *Ryan*, 361 Or at 615.

When a defendant raises proportionality arguments under Article I, section 16, of the Oregon Constitution and the Eighth Amendment to the United States Constitution, the Court of Appeals first analyzes whether defendant's sentence was disproportionate under the Oregon Constitution, and we consider defendant's federal constitutional claim only if we conclude that no state constitutional violation occurred. *See Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981) (describing first-things-first approach).

As to misdemeanors, when determining the amount of jail time imposed, we look at how much jail time a defendant is at risk of serving as a result of the sentence. *State v. Foster*, 186 Or App 466, 469, 63 P3d 1269 (2003) (citing *State v. Harding*, 116 Or App 29, 32, 840 P2d 113 (1992), *rev den*, 318 Or 26 (1993)). We review for errors of law. *Id.* at 468.

#### 5. *Imposition of presumptive sentence*

We have no authority to review "[a] sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission." ORS 138.105(8)(a)(A); *see State v. Miller*, 291 Or App 599, 605, 422 P3d 327 (2018) (applying statute).

#### 6. *Departures from the sentencing guidelines*

To impose a departure sentence, the trier of fact must determine, as a factual matter, whether alleged aggravating or mitigating factors are present. *State v. Jimenez*, 318 Or App 221, 222, 506 P3d 500, *rev den*, 369 Or 785 (2022). On appeal, we will not disturb those factual findings as long as they are supported by evidence in the record. *Id.* "Once proven, whether facts constitute 'substantial and compelling reasons' required for a departure sentence is a question of law, reviewed for errors of law." *Id.*

We have "no authority to review any part of a sentence resulting from a stipulated sentencing agreement between the state and the defendant." ORS 138.105(9). The scope of that bar "applies only when the parties' agreement is a stipulation as to sentencing of a kind described by ORS 135.407." *State v. Rusen*, 369 Or 677, 693, 509 P3d 628 (2022) (internal quotation marks omitted); *see also State v. Neill*, 324 Or App 608, 611, 526 P3d 1221 (2023) (barring appellate review when "a defendant's stipulation to a sentence upon probation revocation is like those in ORS 135.407[,] though not explicitly included within that statute).

## 7. Restitution

We review an order for restitution for legal error and are "bound by the trial court's factual findings if they are supported by any evidence in the record." *State v. McClelland*, 278 Or App 138, 141, 372 P3d 614, *rev den*, 360 Or 423 (2016) (quoting *State v. Pumphrey*, 266 Or App 729, 730, 338 P3d 819 (2014), *rev den*, 357 Or 112 (2015)). Consequently, in reviewing the trial court's order, we review whether the trial court's factual findings are supported by the evidence in the record, and whether those factual findings indicate a causal relationship between the criminal activities and the economic damages. *Id.*

## 8. Compensatory fines

"We review a trial court's imposition of a compensatory fine for legal error." *State v. Grismore*, 283 Or App 71, 73, 388 P3d 1144 (2016). When the issue is whether the victim's award was "reasonable," the challenge is to the sufficiency of the evidence. *Id.* We examine the evidence in the light most favorable to the state, as the prevailing party at trial, to determine "whether a rational factfinder, accepting all reasonable inferences, could have found the facts necessary to support the award." *State v. Aguirre-Rodriguez*, 367 Or 614, 620, 482 P3d 62 (2021).

## 9. Probation revocation

"We review a trial court's decision to revoke probation for abuse of discretion, unless an assignment of error raises a question of law, in which case we review that question for legal error. If the trial court's decision was within the range of legally correct discretionary choices and produced a permissible, legally correct outcome, then the trial court did not abuse its discretion." *State v. Dowty*, 299 Or App 762, 770-71, 452 P3d 983 (2019) (citations and internal quotation marks omitted).

## F. Postconviction

### 1. In general

We review the post-conviction court's denial of relief for legal error. *Green v. Franke*, 357 Or 301, 312, 350 P3d 188 (2015). We are bound by the post-conviction court's findings of historical fact if those findings are supported by the evidence in the record. *Id.*

### 2. Inadequate / ineffective assistance of counsel

"[I]f counsel exercises reasonable professional skill and judgment, a reviewing court will not second-guess the lawyer in the name of the constitution, but

neither will the court ignore decisions made in the conduct of the defense which reflect an absence or suspension of professional skill and judgment." *Krummacher v. Gierloff*, 290 Or 867, 875-76, 627 P2d 458 (1981). "[A] court reviewing a claim of inadequate assistance of counsel must make every effort to evaluate a lawyer's conduct from the lawyer's perspective at the time, without the distorting effects of hindsight." *Lichau v. Baldwin*, 333 Or 350, 360, 39 P3d 851 (2002).

### 3. Summary denial of postconviction relief

Viewing the evidence in the light most favorable to the opposing party, we review a post-conviction court's grant of summary judgment to determine "whether the court correctly concluded that there are no genuine issues of material fact and that [the moving party] was entitled to judgment as a matter of law." *Bean v. Cain*, 314 Or App 529, 530, 497 P3d 1273 (2021) (brackets and citation omitted).

### 4. Court reduction of sentence

"We review a sentencing court's decision to deny a defendant sentencing reduction programs for legal error, and its factual findings for any evidence in the record to support them." *State v. Messer*, 317 Or App 803, 804, 507 P3d 337 (2022).

### G. Expungement

"We review for legal error a trial court's determination of whether a movant is entitled to have his \* \* \* conviction set aside." *State v. Kindred*, 314 Or App 280, 283, 499 P3d 835 (2021). "ORS 137.225 provides a mechanism for certain defendants, under specific circumstances, to have a record of arrest and a criminal conviction set aside." *State v. Singleton*, 317 Or App 49, 50-51, 503 P3d 499 (2022). When defendants have established that they are eligible to have their conviction set aside, the court may deny such a motion if the court determines that the "circumstances and behavior of the applicant" since the arrest and conviction do not "warrant" granting the set-aside remedy. *Id.* (citing ORS 137.225(3)).

## X. HABEAS CORPUS

### A. Review of Circuit Court's Decision

We review for legal error the denial of a petition for a writ of habeas corpus under ORS 34.680(1). *Foust v. Nooth*, 276 Or App 38, 39, 366 P3d 767, *rev den*, 360 Or 236 (2016). A motion to deny a writ of habeas corpus under ORS 34.680(1) is analogous to a motion to dismiss a civil complaint under ORCP 21 A(1)(h). *Barrett v. Williams*, 247 Or App 309, 311, 270 P3d 285 (2011), *rev den*, 352 Or 25 (2012). "We assume the truth of well-pleaded factual allegations, giving plaintiff the benefit of any reasonable,

favorable inferences that can be drawn from those allegations, and assess whether those allegations, if true, would entitle plaintiff to habeas corpus relief." *Foust*, 276 Or App at 39. A petition must state more than mere conclusions; it must allege with particularity facts which, if true, would entitle the plaintiff to habeas corpus relief. *Id.* at 41.

### *B. Extradition*

"A person subject to extradition can challenge the extradition in a habeas corpus proceeding, but the scope of that inquiry is limited. In particular, a habeas corpus court reviewing an extradition warrant can examine only whether: (1) the documents supporting extradition are facially flawed; (2) the plaintiff has been charged with a crime in the demanding state; (3) the plaintiff is, in fact, the person named on the request; and (4) the plaintiff is a fugitive." *Betschart v. Spinden*, 172 Or App 668, 672, 20 P3d 202, *rev den*, 332 Or 326 (2001) (citing *Michigan v. Doran*, 439 US 282, 289, 99 S Ct 530, 534-35, 58 L Ed 2d 521 (1978)).

## XI. CIVIL COMMITMENT

### *A. Review of Circuit Court's Findings of Fact*

#### *1. Generally*

"We review whether the state presented sufficient evidence to support appellant's civil commitment for legal error and are bound by the trial court's factual findings that are supported by evidence in the record." *State v. C. M. C.*, 301 Or App 206, 207, 454 P3d 30 (2019); *see also State v. M. J. M.*, 301 Or App 638, 639, 456 P3d 363 (2020). We therefore "view the evidence, as supplemented and buttressed by permissible derivative inferences, in the light most favorable to the trial court's disposition and assess whether, when so viewed, the record was legally sufficient to permit the outcome." *State v. T. Y.*, 285 Or App 21, 22, 396 P3d 986 (2017) (internal quotation marks omitted). "[A] determination of whether the evidence was sufficient for commitment must be made in light of the *whole* record." *State v. N. S.*, 306 Or App 140, 146, 472 P3d 818 (2020) (emphasis in original). Appellate courts also may exercise their discretion to review *de novo* in exceptional cases. ORAP 5.40(8)(C) (providing that the court will exercise its discretion to review *de novo* "only in exceptional cases"); *M. J. M.*, 301 Or App at 639 (noting availability of *de novo* review in civil commitment appeals).

#### *2. Particular findings: Mental illness (ORS 426.130)*

##### a. Person with mental illness who is dangerous to self or others (ORS 426.005(1)(f)(A))

When reviewing whether a trial court's determination that an appellant has a mental disorder that causes them to be dangerous to others, we "review the sufficiency of the evidence for legal error, mindful of the state's burden to prove its case by clear and convincing evidence and viewing the evidence and inferences permissibly drawn from

that evidence in the light most favorable to the trial court's disposition of the case." *State v. K. M.*, 314 Or App 586, 587, 496 P3d 1099 (2021); *see also* ORS 426.005(1)(f)(A) (defining "person with mental illness"). Appellate courts also may exercise their discretion to review *de novo* in exceptional cases. ORAP 5.40(8)(C) (providing that the court will exercise its discretion to review *de novo* "only in exceptional cases"); *K. M.*, 314 Or App at 587 (noting availability of *de novo* review in civil commitment appeals).

b. Person with mental illness who is unable to provide for their basic needs (ORS 426.005(1)(f)(B))

Unless we exercise our discretion to review *de novo*, "we view the evidence, as supplemented and buttressed by permissible derivative inferences, in the light most favorable to the trial court's disposition and assess whether, when so viewed, the record was legally sufficient to permit that outcome." *State v. M. B.*, 300 Or App 522, 523, 452 P3d 1006 (2019) (internal quotation marks omitted); ORAP 5.40(8)(C).; ORS 426.005(1)(f)(B) (defining "person with mental illness" who is unable to provide for their basic needs).

c. Mental Illness under the expanded criteria of ORS 426.005(1)(f)(C)

"[W]e view the record in the light most favorable to the trial court's determination and review the evidence, as supplemented and buttressed by permissible derivative inferences, to assess whether, when so viewed, the record was legally sufficient to permit a rational factfinder to reach" the determination that the appellant has a mental illness that falls under the expanded criteria enumerated in ORS 426.005(1)(f)(C). *State v. T. Z.*, 287 Or App 8, 9, 401 P3d 1266 (2017). We also have discretion to review *de novo* in exceptional cases. ORAP 5.40(8)(C).

d. Person with mental illness who is "extremely dangerous" (ORS 426.701)

Unless we exercise our discretion to review *de novo*, we view the evidence, as supplemented and buttressed by permissible derivative inferences, in the light most favorable to the trial court's disposition and assess whether, when so viewed, the record was legally sufficient to permit that outcome." *State v. A. B. K.*, 323 Or App 246, 247, 522 P3d 894 (2022) (citation omitted); *see also* ORS 426.701(1)(a) (defining a person who is "extremely dangerous" in a petition for civil commitment); ORAP 5.40(8)(C) (permitting *de novo* review). "We review questions of statutory construction for legal error." *A. B. K.*, 323 Or App 247.

3. *Particular findings: Intellectual disability (ORS 427.290)*

Whether the record contains sufficient evidence to support the involuntary

commitment of persons with intellectual disabilities is a question of law, which appellate courts review for legal error. *State v. J. W.*, 302 Or App 104, 105-06, 458 P3d 1137 (2020); *see also* ORS 427.005(10) (defining "intellectual disability").

## XII. ADMINISTRATIVE

The Oregon Administrative Procedures Act (APA), ORS Chapter 183, provides for judicial review of a variety of agency actions or inactions, including rulemaking, contested case proceedings, agency orders, agency actions and agency declaratory rulings. *See Bay River v. Envir. Quality Comm.*, 26 Or App 717, 720, 554 P2d 620, *rev den*, 276 Or 555 (1976) ("The Oregon Administrative Procedures Act, ORS 183.310 *et seq*, establishes a comprehensive pattern for the judicial review of administrative decisions."); *see also* ORS 183.480(1) ("Except as provided in ORS 183.417 (3)(b), any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order[.]").

The Oregon APA applies to all state agencies except those specifically exempt from its requirements by statutes. *See* ORS 183.315 (enumerating specific agencies exempted from provisions of Oregon APA).

### *A. Orders in Contested Cases*

#### *1. Defined*

"Contested case" means, generally, a case in which a person has the right to a hearing before the agency. *See* ORS 183.310(2) (defining "contested case"); *see also* ORS 183.482 (providing jurisdiction for judicial review and describing the procedure for review of contested cases). "Contested case" does not include proceedings in which an agency decision rests solely on the result of a test. ORS 183.310(2)(b).

"Order" means "any agency action expressed orally or in writing directed to a named person or named persons, other than employees, officers or members of an agency" and includes "any agency determination or decision issued in connection with a contested case proceeding." ORS 183.310(6)(a) (defining "order").

"Final order" means "final agency action expressed in writing," but "does not include any tentative or preliminary agency declaration or statement that[] [p]recedes final agency action" or that "[d]oes not preclude further agency consideration of the subject matter of the statement or declaration." ORS 183.310(6)(b) (defining "final order").

"Jurisdiction for judicial review of contested cases is conferred upon the Court of Appeals." ORS 183.482(1); *see Norden v. Water Resources Dept.*, 329 Or 641, 648, 996 P2d 958 (2000) (applying ORS 183.482).



## 2. Standard of review

We review an agency's order in a contested case under the standards set forth in ORS 183.482(8), which include review for "errors of law, abuse of agency discretion, and lack of substantial evidence in the record to support the challenged findings of fact." *Stop B2H Coalition v. Dept. of Energy*, 370 Or 792, 800, 525 P3d 864 (2023).

"Under ORS 183.470(2), an agency's order must contain findings of fact and conclusions of law. Because the order is the 'instrument by which an agency demonstrates that a particular interpretation or application of a statute is within a generally expressed legislative policy,' the agency's findings of facts and conclusions of law must be supported by 'substantial reason.'" *Coffey v. Board of Geologist Examiners*, 348 Or 494, 512, 235 P3d 678 (2010) (quoting *Springfield Education Assn. v. School Dist.*, 290 Or 217, 227, 621 P2d 547 (1980)).

In "contested case proceedings in which an ALJ from the central Office of Administrative Hearings has rendered 'findings of historical fact,' and the agency, in its final order, has modified those findings, our standard of review is *de novo*." *Corcoran v. Board of Nursing*, 197 Or App 517, 525, 107 P3d 627 (2005)

### a. Conclusions of law and the exercise of discretion

Questions of law are reviewed to determine whether the agency committed legal error and whether a correct interpretation requires a particular result. ORS 183.482(8)(a). We review an agency's exercise of discretion for whether it is outside the range of discretion committed to the agency by law, inconsistent with agency rule, or otherwise in violation of a constitutional or statutory provision. ORS 183.482(8)(b). Where there is only one legally correct outcome, the agency has no discretion, and we review for errors of law. *Murphy v. Board of Parole*, 241 Or App 177, 193, 250 P3d 13, *rev den*, 350 Or 571 (2011). "Review of a contested case shall be confined to the record, and the court shall not substitute its judgment for that of the agency on any issue of fact or agency discretion." ORS 183.482(7).

"We review agency rulings on the admissibility of evidence using a two-step process: (1) we determine as a matter of law whether the admitted evidence is of a type on which prudent persons commonly rely in the conduct of their serious affairs; and (2) we review the agency's rulings on the admissibility of evidence for abuse of discretion." *Waisanen v. Clatskanie Sch. Dist. #6J*, 229 Or App 563, 573-74, 215 P3d 882 (2009) (citing ORS 183.450(1)).

## b. Findings of fact

Agency findings of fact are reviewed for "substantial evidence in the record," which "exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). The only exception is in "contested case proceedings in which an ALJ from the central Office of Administrative Hearings has rendered 'findings of historical fact,' and the agency, in its final order, has modified those findings. In those cases, our review is *de novo*. *Corcoran v. Board of Nursing*, 197 Or App 517, 525, 107 P3d 627 (2005).

### (1) Substantial evidence / substantial reason

"[A] court's review function is not to substitute a court's findings of fact for an ALJ's findings of fact, when there is substantial evidence in the record for the ALJ's finding[;] [t]his is true even when there is also substantial evidence to the contrary; \* \* \* [r]eview for substantial evidence is 'review to determine whether a reasonable person could have made the findings supporting the decision, not whether a reasonable person could have made different findings.'" *Gaylord v. DMV*, 283 Or App 811, 822, 391 P3d 900 (2017) (internal quotation marks and citations omitted).

We "determine whether the record, taken as a whole, would permit a reasonable person to make the disputed finding. When a finding hinges on an inference, we ask whether the record allows the conclusion that 'there is a basis in reason' for the inferred fact," which is a two-step inquiry: "(1) whether the basic fact or facts are supported by substantial evidence, and (2) whether there is a basis in reason connecting the inference to the facts from which it is derived." *United Academics of OSU v. OSU*, 315 Or App 348, 355, 502 P3d 254 (2021) (citations omitted).

"[W]hether an agency's ultimate conclusions from its findings of fact are supported by substantial reason turns on whether the agency's order supplies a 'rational connection between the facts and the legal conclusions it draws from them' such that the conclusions are sufficiently reviewable by an appellate court. Confronted with a substantial-reason challenge, our review is simply to determine whether the order supplies the necessary reasoning." *Id.* at 355-56 (citations omitted).

Reviewing for substantial evidence includes reviewing for substantial reason. *Jenkins v. Board of Parole*, 356 Or 186, 201, 335 P3d 828 (2014) ("[T]he substantial reason requirement is part of the substantial evidence *standard of review*." (Emphasis in original.)). "Substantial reason exists where the agency has articulated a 'rational connection between the facts and the legal conclusion' that the agency draws from them." *Dorn v. Teacher Standards and Practices Comm.*, 316 Or App 241, 243, P3d (2021) (citation omitted).

## (2) *De novo* review

In "contested case proceedings in which an ALJ from the central Office of Administrative Hearings has rendered 'findings of historical fact,' and the agency, in its final order, has modified those findings, our standard of review is *de novo*—and *not* for 'substantial evidence.' In engaging in *de novo* review under [ORS 183.650(4)], we apply a 'preponderance of evidence' standard." *Corcoran v. Board of Nursing*, 197 Or App 517, 525, 107 P3d 627 (2005) (quoting *Becklin v. Board of Examiners for Engineering*, 195 Or App 186, 204-05, 97 P3d 1216 (2004), *rev den*, 338 Or 16 (2005)) (emphasis in original); *see also id.* at 526 (discussing the limits of *de novo* review); *see also* ORS 183.650(4) ("[I]f a party seeks judicial review of an agency's modification of a finding of historical fact under subsection (3) of this section, the court shall make an independent finding of the fact in dispute by conducting a review *de novo* of the record viewed as a whole. If the court decides that the agency erred in modifying the finding of historical fact made by the administrative law judge, the court shall remand the matter to the agency for entry of an order consistent with the court's judgment."); *Weldon v. Bd. of Lic. Pro. Counselors and Therapists*, 266 Or App 52, 62-3, 337 P3d 911 (2014), *rev den*, 356 Or 690 (2015) ("[A] petitioner seeking to invoke our *de novo* review under [ORS 183.650(4)] must still—as we explained in *Corcoran*—specifically identify *each* challenged medication of a finding of historical fact and *explain* why that modification was erroneous as unsupported by a preponderance of the evidence." (Emphasis in original.)).

### B. Orders in Other Than Contested Cases

#### 1. Defined

"Non-contested cases" refer to circumstances "other than" contested cases. *Oregon Env. Council v. Oregon State Bd. of Ed.*, 307 Or 30, 36, 761 P2d 1322 (1988); *see also* ORS 183.484 (providing guidance about jurisdiction and procedure for review of orders other than contested cases). Orders in other than contested cases are orders as defined by ORS 183.310, "but not orders resulting from one of the four kinds of proceedings defined as 'contested cases.'" *Id.* at 37.

"Order" means "any agency action expressed orally or in writing directed to a named person or named persons, other than employees, officers or members of an agency" and includes "any agency determination or decision issued in connection with a contested case proceeding." ORS 183.310(6)(a) (defining "order").

"Final order" means "final agency action expressed in writing," but "does not include any tentative or preliminary agency declaration or statement that[] [p]recedes final agency action" or that "[d]oes not preclude further agency consideration of the subject matter of the statement or declaration." ORS 183.310(6)(b) (defining "final order").

## 2. Procedure

Judicial review of an order in other than contested case first takes place in the Circuit Court of Marion County or "the county in which the petitioner resides or has a principal business office." ORS 183.484(1). Any party to the circuit court action reviewing an order in other than contested case may appeal the circuit court's decision. ORS 183.500.

## 3. Standard of review

Orders in other than contested cases are reviewed by the Court of Appeals for legal error, abuse of agency discretion, and lack of substantial evidence in the record. ORS 183.484(5); *see Cervantes v. Dept. of Human Services.*, 295 Or App 691, 694-95 & 695 n 3, 435 P3d 831 (2019). Substantial evidence review of an agency order in other than contested case occurs on the record created in the circuit court, such that when the Court of Appeals reviews for substantial evidence, it reviews the order against the circuit court record, not the record on which the agency based its decision. *Querbach v. Dept. of Human Services*, 369 Or 786, 790-91, 512 P3d 432 (2022).

## 4. Standing

Standing to contest an order in other than contested cases under the APA is governed by ORS 183.484(3).

To have standing to contest an order in other than contested cases, the petitioner must have been either "adversely affected" or "aggrieved." *Local No. 290 v. Dept. of Environ. Quality*, 323 Or 559, 565, 919 P2d 1168 (1996) (interpreting ORS 183.484(3)).

Generally, we do not have jurisdiction to review any agency action except a final order. ORS 183.480(3). An order that is not final may be reviewed only "upon [a] showing that the agency is proceeding without probable cause, or that the party will suffer substantial and irreparable harm" unless interlocutory relief is granted. *Id.* An agency has probable cause to proceed "if the facts and circumstances provide an objectively reasonable basis for the agency to proceed." *Brian v. Oregon Government Ethics Commission*, 320 Or 676, 683-84, 891 P2d 649 (1995).

## C. Rulemaking

### 1. Defined

A rule is defined, in part, as "any agency directive, standard, regulation or

statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency." ORS 183.310(9).

"An agency's explanation of how a validly promulgated rule operates in a specific context need not itself be promulgated as a rule if the unpromulgated elaboration merely explains what is necessarily required by the rule to which it applies. In other words, if an agency merely provides information about an existing administrative rule, then there is no rule to review. However, the interpretive amplification or refinement of an existing rule is a new exercise of agency discretion and must be promulgated as a rule under the APA to be valid. If a rule is susceptible to reasonable interpretations other than that given by the agency in purporting to apply it, then it has been amplified and refined."

*Brown v. State Historic Preservation Office*, 296 Or App 886, 892, 443 P3d 1170 (2019) (internal quotation marks and citations omitted; brackets omitted).

## 2. *Standing*

ORS 183.400(1) provides that "any person" may challenge the "validity of any rule" by petition to the Court of Appeals. *Kellas v. Dept. of Corrections*, 341 Or 471, 477, 145 P3d 139 (2006) ("The legislature intends by the statute to authorize any person to invoke the judicial power of the court to test the validity of every administrative rule under existing statutory and constitutional law and, thus, to advance the objective that all agency rulemaking shall remain within applicable procedural and substantive legal bounds.").

"The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, but not when the petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court." ORS 183.400(1). When a petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court, judicial review of the validity of the agency rule must be sought in accordance with ORS 183.482 (jurisdiction and procedure for review of contested cases) or 183.484 (jurisdiction and procedure for review of orders in other than contested cases).

## 3. *Standard of review*

Our determination of whether an administrative rule is valid is governed by ORS 183.400. *BP West Coast Products, LLP v. Dept. of Justice*, 284 Or App 723, 726, 396 P3d 244, *rev den*, 361 Or 800 (2017). "[I]n reviewing a rule challenge under [ORS

183.400], we may declare the rule invalid only if we conclude that it violates constitutional provisions, exceeds the statutory authority of the agency that adopted the rule, or was adopted without complying with rulemaking procedures." *Id.* at 725-26 (quoting *Assn. of Acupuncture v. Bd. of Chiropractic Examiners*, 260 Or App 676, 678, 320 P3d 575 (2014)).

#### 4. *Scope of judicial review*

The scope of judicial review is governed by ORS 183.400(3), which provides that:

"Judicial review of a rule shall be limited to an examination of:

"(a) The rule under review;

"(b) The statutory provisions authorizing the rule; and

"(c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures."

ORS 183.400(3); *but see Western States Petroleum Assn. v. EQC*, 296 Or App 298, 309, 439 P3d 459 (2019) ("when a petitioner \* \* \* directly challenges a rule under ORS 183.400(4)(c) based on an agency's alleged failure to follow applicable rulemaking procedures, we may consider copies of all documents necessary to demonstrate compliance with any 'applicable rulemaking procedures,' ORS 183.400(3)(c), and not just those documents necessary to determine compliance with APA rulemaking procedures").

#### 5. *Interpretation of agency rules and statutes*

"[O]ur standard of review of an agency's interpretation and application of a statute depends on the nature of the term or phrase at issue." *Vaughn v. Marion County*, 305 Or App 1, 7 n 3, 469 P3d 231 (2020). Specifically, we "review an agency's interpretation and application of a nondelegative term for legal error under ORS 183.482(8)(a) without deference to the agency's construction. By contrast, we review an agency's interpretation and application of a delegative term with deference under ORS 183.482(8)(b). That is, we review to determine whether the agency's exercise of discretion is outside the range of discretion delegated to the agency by law, or otherwise contrary to constitutions and statutes or inconsistent with agency rules, formally stated positions, or past practices." *Id.* (citation, internal quotation marks, and brackets omitted).

#### a. Deference / ambiguity

Whether an agency's construction of a statute is entitled to deference "depends on whether the disputed term is exact, inexact, or delegative. Exact terms impart relatively precise meanings, and their applicability in a particular case involves only agency factfinding. Inexact terms are less precise and are open to various interpretations, but they embody a complete expression of legislative meaning. Delegative terms express incomplete legislative meaning that the agency is authorized to complete[.]" *Multnomah Cty. v. Mult. Cty. Corrections Deputy Assn.*, 317 Or App 89, 95, 505 P3d 1037 (2022) (internal citations and quotation marks omitted).

"In interpreting an administrative rule we apply the same analytical framework that applies to the interpretation of statutes." *OR-OSHA v. A & B Sheet Metal Works, LLC*, 302 Or App 455, 463, 461 P3d 1094, *rev den*, 366 Or 760 (2020). However, "we defer to--that is, give legal effect to--an agency's interpretation of its own rule if that interpretation is plausible given the wording of the rule, its context, and any other source of law." *OR-OSHA v. United Parcel Service, Inc.*, 312 Or App 424, 434, 494 P3d 959 (2021).

#### b. Standard of review

"We review interpretation of administrative rules for legal error." *Schaefer v. Marion County*, 323 Or App 390, 400, 523 P3d 1142 (2022). "In construing an administrative rule, absent a controlling construction by the authoring agency, we apply the same analytical framework that applies to the construction of statutes. That is, we seek to divine the intent of the rule's drafters by considering the text of the rule in its regulatory and statutory context." *Id.* (Internal quotation marks omitted; citation omitted.)

#### D. Declaratory Rulings

ORS 183.410 permits an agency to provide a binding ruling on the applicability to particular facts of any statute or rule enforceable by the agency. An agency has discretion to give or refuse to give a declaratory ruling. *Id.* However, if it chooses to do so, it is binding on the agency, the petitioner and on any intervening party as to the facts on which the ruling is based. *Id.* "Declaratory rulings of an agency are reviewable in this court in the same manner as an order in a contested case." *Rhine v. Racing Comm.*, 40 Or App 651, 656, 596 P2d 576 (1979) (citing ORS 183.480).

#### E. Specific Agencies

##### 1. Board of Parole and Post-Prison Supervision (BoPPS)

We review the board's decision for errors of law." *McClure v. Board of Parole*, 236 Or App 606, 609, 237 P3d 879 (2010), *rev den*, 350 Or 241 (2011) (citing ORS 183.482(8)(a)).

"[W]e conclude that the substantial reason standard [of review] continues to apply to the board's decisions to postpone a prisoner's scheduled release date under ORS 144.125." *Jenkins v. Board of Parole*, 356 Or 186, 205, 335 P3d 828 (2014).

ORS 144.335(3) governs judicial review of a final order of the State Board of Parole and Post-Prison Supervision, which provides that we "may affirm, reverse or remand the order on the same basis as provided in ORS 183.482(8)."

### 2. *Employment Relations Board (ERB)*

We review Employment Relations Board (ERB) findings of fact for substantial evidence and its conclusions for legal error. *Amalgamated Transit Union, v. Trimet*, 298 Or App 332, 333, 447 P3d 50 (2019) (citing *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 87, 45 P3d 162 (2002); ORS 183.482(8)(a)).

"We review ERB's order for substantial evidence and substantial reason. ORS 183.482(8)(c). Substantial evidence to support a finding of fact is evidence that, viewing the record as a whole, would permit a reasonable person to make that finding. Substantial reason requires us to review the reasoning that led ERB from those facts to its conclusions and evaluate whether that reasoning reflects a correct interpretation of the law." *Clackamas County Employees' Assoc. v. Clackamas County*, 308 Or App 146, 149, 480 P3d 993 (2020) (citation and internal quotation marks omitted).

### 3. *Workers' Compensation Board (WCB)*

We review an agency's order in a contested case, including WCB's orders, under the standards set forth in ORS 183.482(8), which include legal error, abuse of discretion, and substantial evidence. In other-than-contested cases, we review the agency's order under the standards set out in ORS 183.484(5). *See Hoekstre v. DLCD*, 249 Or App 626, 634, 278 P3d 123, *rev den*, 352 Or 377 (2012) (applying that standard).

"In determining whether the WCB's order is supported by substantial reason, we consider whether that order articulates the reasoning that leads from the facts found to the conclusion drawn." *Long v. SAIF*, 278 Or App 88, 93, 372 P3d 610 (2016) (citation and internal quotation marks omitted).

"We review the board's legal conclusions for legal error, and its determinations on factual issues for substantial evidence, which includes substantial reason." *Double Tree Hotel v. Ansarinezhad*, 316 Or App 51, 53, 504 P3d 41 (2021)



(citing ORS 183.482(8)(a), (c); SAIF v. Camarena, 264 Or App 400, 404, 332 P3d 341 (2014)). "[R]eview of a disability-extent determination at a hearing before an ALJ and on review before the Board is *de novo*." *Precision Castparts Corp - PCC Structural v. Cramer*, 316 Or App 18, 21, 502 P3d 1189 (2021) (citation omitted).

"We review the board's statutory interpretation for errors of law." *Baker v. Liberty Northwest Ins. Corp.*, 257 Or App 205, 210, 305 P3d 139, *rev den*, 354 Or 597 (2013) (citing ORS 183.482(8)(a)(B)).

"We review the [Workers' Compensation Board's] interpretation of the applicable statutes and administrative rules for error of law, ORS 183.482(8)(a), and the board's findings for substantial evidence under ORS 183.482(8)(c)." *Deschutes County v. Leak*, 322 Or App 396, 397, 519 P3d 1277 (2022).

#### 4. Oregon Land Use Board of Appeals (LUBA)

ORS 197.850 governs judicial review of the decisions of the Oregon Land Use Board of Appeals (LUBA).

"We review LUBA's order to determine whether it is 'unlawful in substance or procedure[.]' ORS 197.850(9)(a). A LUBA order is unlawful in substance if it represents a mistaken interpretation of the applicable law." *Kine v. Deschutes County*, 313 Or App 370, 372, 496 P3d 1136, *rev den*, 369 Or 69 (2021) (citation and internal quotation marks omitted).

We review a LUBA order for whether it is unlawful in substance, ORS 197.850(9)(a), and we do not substitute our judgment for LUBA's as to any factual issue. ORS 197.850(8). We review LUBA's construction of statutes for legal error, under the methodology of *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009), and *PGE v. Bureau of Labor Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). *See 1000 Friends of Oregon v. Clackamas County*, 309 Or App 499, 504, 483 P3d 706, *rev den*, 368 Or 347 (2021) (reviewing LUBA's construction of ORS 215.448). LUBA's order is unlawful in substance if it "represents a mistaken interpretation of applicable law." *Central Oregon Landwatch v. Deschutes County*, 315 Or App 673, 676, 501 P3d 1121 (2021) (citing *Kine v. Deschutes County*, 313 Or App 370, 370-71, 496 20 P3d 1136 (2021)). The "[p]etitioner has the burden before this court to show that [a] LUBA's order was unlawful in substance." *Young v. Crook County*, 224 Or App 1, 7, 197 P3d 48 (2008).

A LUBA decision is unlawful in substance "if, in contravention of the standard of review set out at ORS 197.829(1), LUBA substitutes its own interpretation of a local government's land use regulations for a plausible interpretation of those regulations offered by the local government." *Siporen v. City of Medford*, 349 Or 247,

261, 243 P3d 776 (2010).

"ORS 197.829(1) requires LUBA to defer to a local government's interpretation of its own land use regulations unless the interpretation is inconsistent with the express text of the regulation, the purpose of the regulation, the underlying policy implemented by the regulation, or a state law that the regulation purportedly carries out." *Gould v. Deschutes County*, 322 Or App 340, 347, 520 P3d 433 (2022).

"Where LUBA has properly understood and applied the 'substantial evidence' test of ORS 197.835(9)(a)(c), a reviewing court should affirm its order, notwithstanding the reviewing court's disagreement with LUBA as to whether the evidence is 'substantial.'" *Schaefer v. Oregon Aviation Board*, 312 Or App 316, 322, 495 P3d 1267, *adh'd to as modified on recons*, 313 Or App 725, 492 P3d 782, *rev den*, 369 P3d 69 (2021) (quoting *Younger v. City of Portland*, 305 Or 346, 358, 752 P2d 262 (1988) (internal quotation marks and brackets omitted)).

"To the extent that the parties' assignments of error challenge LUBA's determinations as to whether substantial evidence supports the county's order, we review to assess whether LUBA correctly understood its role in conducting its review for substantial evidence." *Columbia Riverkeeper v. Columbia County*, 297 Or App 628, 640, 443 P3d 1184, *rev den*, 365 Or 721 (2019).

However, "appellate courts cannot review issues that LUBA decided in an earlier order in the same case, for which judicial review was not sought." *Wetherell v. Douglas County*, 226 Or App 320, 326, 203 P3d 300 (2009) (citing *Beck v. City of Tillamook*, 313 Or 148, 151, 831 P2d 678 (1992)).

We review LUBA's final order concerning conditional-use permits "to determine whether it is unlawful in substance or procedure, ORS 197.850(9)(a), that is, for whether it represents a mistaken interpretation of the applicable law." *Central Oregon LandWatch v. Deschutes County*, 320 Or App 650, 651, 514 P3d 1201 (2022) (internal quotation marks and brackets omitted).

### XIII. ARBITRATION

#### A. Determination of Arbitrability

Oregon courts recognize a presumption in favor of the enforceability of an arbitration provision. *Lewis v. Varde*, 322 Or App 746, 748, 521 P3d 522 (2022); *see also Snow Mountain Pine Ltd. v. Tecton Laminates Corp.*, 126 Or App 523, 529, 869 P2d 369, *rev den*, 319 Or 36 (1994) ("Arbitration is required, unless we can say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, and we resolve all doubts in favor of coverage."). Ambiguities as to the scope of an arbitration clause are resolved in favor of arbitration. *Industra/Matrix Joint*

*Venture v. Pope & Talbot*, 341 Or 321, 332-33, 142 P3d 1044 (2006).

## *B. General Standards of Review*

We review the denial of a motion to compel arbitration for legal error. *Citigroup Smith Barney v. Henderson*, 241 Or App 65, 69, 250 P3d 926 (2011).

We review a court's confirmation of an arbitrator's award and whether an arbitrator exceeded its powers for legal error. *Nieto v. City of Talent*, 295 Or App 625, 629, 436 P3d 82 (2019).

Under Oregon law, "the grounds for obtaining the vacation of an [arbitration] award are extremely narrow in comparison with the scope of review available to litigants in court." *Nieto v. City of Talent*, 295 Or App 625, 629, 436 P3d 82 (2019) (quoting *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or App 553, 568, 152 P3d 940 (2007) (brackets in *Nieto*)). Courts can vacate arbitrator awards only under very limited circumstances, including when an "arbitrator exceeded the arbitrator's powers." ORS 36.705(1)(d). Whether an arbitrator exceeds the arbitrator's powers is a question of law. *Couch Investments, LLC v. Peverieri*, 270 Or App 233, 239, 346 P3d 1299 (2015), *aff'd*, 359 Or 125, 371 P3d 1202 (2016) (applying the standard of review for determining whether an arbitrator exceeded the arbitrator's powers from former ORS 36.355 (1997), *repealed by* Or Laws 2003, ch 598, § 57, to ORS 36.705).

## *C. Standards for Particular Issues*

### *1. Evident partiality or misconduct prejudicing the rights of a party*

Whether an arbitrator manifested an actual, discernable inclination to favor one side is a question of historical fact. *Prime Properties, Inc. v. Leahy*, 234 Or App 439, 449, 228 P3d 617 (2010). "Unless the evidence in a case is such that the trial court as finder of fact could decide a particular factual question in only one way, we are bound by a trial court's factual findings, including a finding that a party's evidence is not sufficiently persuasive." *Id.* (quoting *State v. Johnson*, 335 Or 511, 523, 73 P3d 282 (2003) (internal quotation marks and brackets omitted)).

### *2. Exceeding powers*

We review for legal error the trial court's determination of whether the arbitrator exceeded his powers. *Couch Investments, LLC v. Peverieri*, 270 Or App 233, 239, 346 P3d 1299 (2015), *aff'd*, 359 Or 125, 371 P3d 1202 (2016); *Seller v. Salem Womens Clinic, Inc.*, 154 Or App 522, 527, 963 P2d 56, *rev den*, 328 Or 40 (1998).

A trial court shall vacate an award made in an arbitration proceeding if

"[a]n arbitrator exceeded the arbitrator's powers[.]" ORS 36.705(1)(d). The starting point for considering the extent of an arbitrator's powers is "whether the parties agreed to arbitrate and, if so, the contours of the dispute that they agreed to arbitrate." *McKeown v. McKeown*, 317 Or App 616, 625, 505 P3d 455 (2022) (quoting *Couch Investments, LLC v. Peverieri*, 359 Or 125, 130, 371 P3d 1202 (2016)). A court may not disturb an arbitration award if "the issues that were arbitrated were within the scope of the parties' agreement[.]" *Floor Solutions, LLC v. Johnson*, 322 Or App 417, 420, 520 P3d 902 (2022) (citing *Seller*, 154 Or App at 527).

### 3. Public policy

"Under Oregon law, unconscionability is a question of law that must be determined based on the facts in existence at the time the contract was made." *Gist v. ZoAn Management, Inc.*, 305 Or App 708, 716, 473 P3d 565 (2020), *aff'd*, 370 Or 27, 513 P3d 578 (2022). The party asserting unconscionability bears the burden of showing that the arbitration clause is unconscionable. *Id.* The test for unconscionability has procedural and substantive components: "Procedural unconscionability refers to the conditions of contract formation, and substantive unconscionability refers to the terms of the contract." *Id.* (internal quotation marks and emphasis omitted).

### D. Collective Bargaining Agreements

"Collective bargaining agreements \* \* \* generally are interpreted in the same manner as are other contracts. First, the court must examine the text of the disputed provision in the context of the agreement as a whole. At the first step, the court also may consider evidence of the circumstances underlying the formation of the contract. If the provision is unambiguous, no further analysis is necessary or appropriate, and the court must 'give the appropriate effect to the parties' intentions. A provision is ambiguous only if it is reasonably susceptible to more than one plausible interpretation." *Amalgamated Transit Union v. TriMet*, 298 Or App 332, 336, 447 P3d 50 (2019) (internal quotation marks and citations omitted).