



# COURT OF APPEALS

## Media Release

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June 03, 2021

ADDITIONAL PROCEDURAL CHANGES DUE TO COVID-19  
INCLUDING THE USE OF VIDEO CONFERENCING TECHNOLOGY TO  
CONDUCT ORAL ARGUMENTS  
AT LEAST OCTOBER 2021  
AND  
SUPPLEMENTED GUIDELINES ON THE  
USE OF FACE COVERINGS  
IN COURT FACILITIES

A MESSAGE FROM CHIEF JUDGE JIM EGAN

Due to the emergency conditions that have resulted from the spread of the COVID-19 virus, I have issued several iterations of Chief Judge Order 20-03, which ordered procedural changes at the Court of Appeals. Pursuant to Chief Judge Order 20-03 (Fifth Amended), which issued on May 26, 2021, I continued to order several procedural changes at the Court of Appeals, including the use of face coverings in court facilities as described in Chief Justice Order 20-45, which issued on October 28, 2020, and Chief Justice Order 21-016, which issued on May 25, 2021, and supplements CJO 20-045. I also ordered that oral arguments by remote means will continue at least through October 2021. The court is extending the period of remote arguments now to assist stakeholders in their planning. You can read the full text of CJO 20-03 (Fifth Amended) on the appellate courts' webpage at <https://www.courts.oregon.gov/courts/appellate/Pages/default.aspx>

The court has received positive feedback about its use of video conferencing technology to conduct oral arguments by remote means. If you have additional feedback that you think will help improve the remote argument experience, please feel free to send it to [AppealsClerk@ojd.state.or.us](mailto:AppealsClerk@ojd.state.or.us).

On behalf of the court, I want to express its appreciation to the appellate bar for its flexibility and professionalism. Together we have and will continue to serve the public.

The Court of Appeals issued these opinions:

- State of Oregon v. C. A. M.-D.  
(A171383 - Multnomah County Circuit Court)
- Mat, Inc. v. American Tower Asset Sub, LLC  
(A163930 - Marion County Circuit Court)
- State of Oregon v. Dionne Mechele Dillard  
(A168932 - Curry County Circuit Court)
- Bradford Scott Stewart v. Board of Parole and Post-Prison Supervision  
(A170529 - Board of Parole and Post-Prison Supervision)
- State of Oregon v. Christopher Daniel Sorrow  
(A172166 - Coos County Circuit Court)
- Justyne M. Strand v. James P. Garvin  
(A174451 - Marion County Circuit Court)
- State of Oregon v. Awes Sheikhuna  
(A164153 - Multnomah County Circuit Court)
- Cory Noel Sause v. Jordan Director Schnitzer  
(A167020 - Multnomah County Circuit Court)
- State of Oregon v. Ricardo Santos Ramirez  
(A167114 - Umatilla County Circuit Court)
- Senadija Hercenberger v. Robert Hercenberger  
(A169274 - Washington County Circuit Court)
- State of Oregon v. Jordan Christian Phillips  
(A169187 - Yamhill County Circuit Court)
- Jack L. Edwards v. Cavenham Forest Industries  
(A171184 - Workers' Compensation Board)

The Court of Appeals issued these *per curiam* opinions:

- State of Oregon v. Catherine Anne Price  
(A167517 - Yamhill County Circuit Court)
- State of Oregon v. Joshua Jonathan Hicks  
(A171598 - Linn County Circuit Court)
- State of Oregon v. Frank Anthony Adams  
(A171821 - Lane County Circuit Court)
- State of Oregon v. Justin Casey McClour  
(A172132 - Hood River County Circuit Court)
- State of Oregon v. David Arthur Krediet  
(A172218 - Clackamas County Circuit Court)
- K. E. J. v. Joshua Blackwell Jessee\*  
(A174312 - Marion County Circuit Court)

\*This case title has been redacted in this media release and in the online version of the opinion, in compliance with

The Court of Appeals affirmed these cases without opinion:

Jessie Potters IV v. Tim Causey  
(A170007 - Jefferson County Circuit Court)  
Wilmington Savings Fund Society, FSB v. Cari Lampshire  
(A172096 - Lane County Circuit Court)  
State of Oregon v. L. M. W.  
(A172223 - Yamhill County Circuit Court)  
Michael Lee Hochgreve v. Brad Cain  
(A172363 - Malheur County Circuit Court)  
State of Oregon v. Jermaine Keith Lewis-Taylor  
(A172885 - Multnomah County Circuit Court)  
State of Oregon v. Shane Anthony Gonzales  
(A173119 - Multnomah County Circuit Court)  
State of Oregon v. Troy Charles Averill  
(A173121 - Linn County Circuit Court)  
State of Oregon v. Matt Ryan Frazier  
(A173207 - Deschutes County Circuit Court)  
State of Oregon v. Bobby Charles Alexander III  
(A173263 - Clackamas County Circuit Court)  
State of Oregon v. Justin Phillip Sisson  
(A173585 - Klamath County Circuit Court)  
State of Oregon v. Virginia Louise Morris  
(A173635 - Linn County Circuit Court)  
State of Oregon v. Ty Austin Zeigler  
(A173742 - Umatilla County Circuit Court)  
State of Oregon v. Scott Gordon Reed, Jr.  
(A173869 - Jefferson County Circuit Court)  
Calyx Farms, LLC v. Department of State Lands  
(A173961 - Department of State Lands)  
State of Oregon v. C. M. C.  
(A173978 - Lane County Circuit Court)  
State of Oregon v. Juan Francisco Moreno  
(A174002 - Washington County Circuit Court)

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**State of Oregon v. C. A. M.-D.**  
(DeVore, P. J.)

Youth appeals a supplemental judgment imposing restitution based on his admission to committing acts that would constitute fourth-degree assault, ORS 163.160(1)(a), if committed by an adult. Youth contends that there is insufficient evidence to support the juvenile court's conclusions that his actions caused the victim's

medical expenses or that the expenses were reasonable. Held: On this record, the evidence was sufficient to support the juvenile court's conclusions that youth's conduct caused the medical expenses and that the bills were for reasonable amounts. Affirmed.

**Mat, Inc. v. American Tower Asset Sub, LLC**  
(Lagesen, P. J.)

Plaintiff MAT, Inc., owns the farmland on which defendants own and maintain a television tower. MAT and defendants have a lease agreement that provides that MAT gets half of all revenue generated by any subtenants that use the tower. Upon discovering that defendants had not disclosed all rent-paying subtenants or given MAT its share of the revenue, MAT sued defendants for breach of contract. MAT sued outside of the statute of limitations but argued that the statute tolled because defendants fraudulently concealed the breach. Before trial, defendants requested in camera review of documents relating to revenue from certain subtenants. The trial court denied that request, relying on MAT's representation that an in camera review would not reveal any material, unprivileged information. The case went to a jury trial, and the jury returned a verdict in favor of MAT. Defendants appeal, assigning error to, among other things, (1) the trial court's denial of defendants' motion for directed verdict on the issue of fraudulent concealment, (2) the court's jury instructions on fraudulent concealment, and (3) the court's refusal to conduct an in camera review. Held: The trial court erred in refusing to conduct an in camera review. After defendants made the threshold showing that review might reveal material, unprivileged information, the court was required to apply the proper factors in determining whether to conduct review. The court did not err in denying defendants' motion for directed verdict, because the evidence adduced at trial was sufficient for the jury to find fraudulent concealment, and the court's jury instructions on fraudulent concealment were correct statements of the law. Vacated and remanded for the trial court to determine whether to conduct in camera review.

**State of Oregon v. Dionne Mechele Dillard**  
(Lagesen, P. J.)

Defendant was involved in taking merchandise from a Fred Meyer store without paying for it. A jury returned a verdict of guilty for first-degree theft for taking property with an aggregate value of "\$1,000 or more," ORS 164.055(1)(a). On appeal, defendant contends that the evidence is insufficient to support a finding that the property she took had a value of \$1,000 or more because some of the stolen items could have been on sale when she took them. She argues that the trial court should have granted her motion for judgment of acquittal on that basis. Defendant also assigns plain error to the court's failure to issue a curative instruction or declare a mistrial in response to part of the prosecutor's closing argument. Held: The trial court did not err. It was properly a jury question whether the aggregate base price of the stolen items was the price that those items could have been sold for at the time that they were taken. As for the prosecutor's closing argument, any error was not obvious. Affirmed.

**Bradford Scott Stewart v. Board of Parole and Post-Prison Supervision**  
(Lagesen, P. J.)

Petitioner seeks judicial review of a final order of the Board of Parole and Post-Prison Supervision classifying him as a Level 3 sex offender using the Static-99R risk assessment tool. Petitioner contends that the board made multiple mistakes in its use and scoring of the Static-99R, which raised his sex offender classification level, including a mistake in finding that it is more likely than not that petitioner had committed certain offenses for which the charges were dismissed. Held: The board erred in concluding that petitioner

had more likely than not committed the offenses underlying the dismissed charges. Nothing in the record could refute petitioner's claim that the charges were dismissed because officials had located the true perpetrator. Therefore, the board's finding was not supported by substantial evidence. Reversed and remanded.

**State of Oregon v. Christopher Daniel Sorrow**

(Lagesen, P. J.)

To obtain access to mental health treatment, defendant handed a bank teller a note that stated, "I have a bomb. Put the money in the bag," then sat in the lobby of the bank with the money, waiting for police to arrive. At the close of defendant's bench trial for first-degree theft, ORS 164.055, and second-degree robbery, ORS 164.405, defendant argued that the state was required to prove that defendant had had the intent to permanently deprive the bank of its money, and that the state had failed to do so. The trial court concluded that the state only needed to prove that defendant had exercised control over the money, and it found defendant guilty except for insanity. Defendant appeals, contending that the court applied an incorrect legal standard in finding him guilty. Held: The trial court erred in concluding that theft merely required proof that defendant intended to exercise control over the bank's money without considering whether defendant, in exercising that control, intended to cause a permanent or nearly permanent loss to the bank. Reversed and remanded.

**Justyne M. Strand v. James P. Garvin**

(Lagesen, P. J.)

Father, who is incarcerated, appeals an order denying his motion under ORS 107.135 to modify a default judgment that denied him parenting time with his child based on a finding that it would not be in the child's best interests. Father argues, among other contentions, that the trial court failed to make a sufficient record for meaningful appellate review of the court's exercise of discretion. Held: At the time that father filed his motion, the trial court would have been aware that father initially had taken reasonable actions to protect his interest in parenting time but was denied that opportunity for reasons beyond his control; the findings about parenting time in the default judgment were based on somewhat conclusory representations by mother about father and about the effects of prison on children; father wished to challenge those representations; and father had not had a previous opportunity to fully develop a factual record or otherwise challenge mother's representations. Given that context, and without any explanation from the trial court for its summary denial of father's motion, the Court of Appeals had no way of determining whether the court's denial of the motion was within the permissible range of the court's discretion. Reversed and remanded.

**State of Oregon v. Awes Sheikhuna**

(DeHoog, P. J.)

Defendant appeals a conviction for first-degree assault, ORS 163.185, and first-degree criminal mistreatment, ORS 163.205. Defendant assigns error to the trial court's denial of his motion for judgment of acquittal on both counts. Defendant argues that the evidence was insufficient to prove that he intentionally or knowingly caused injury to his three-month-old infant, who suffered catastrophic brain damage while in his care. Held: The evidence presented by the state was sufficient to support a finding that defendant acted with a "knowingly" mental state, because the evidence supported an inference that the cause of the infant's injuries was assaultive in nature and that defendant would have been aware of the assaultive nature of his conduct. The trial court did not err in denying defendant's motion. Affirmed.

**Cory Noel Sause v. Jordan Director Schnitzer**  
(DeHoog, P. J.)

This action involves a dispute over the legal rights, status, and relationship of respondent Sause to a child, who, after being conceived by in vitro fertilization using appellant Schnitzer's sperm and an unfertilized egg that Sause had provided, was then carried and birthed by a gestational carrier. In legal proceedings that were initiated after the child was born, the parties sought determinations of their respective rights and interests as to the child. Sause asserted that she is the child's mother with all of the legal rights afforded that status, and Schnitzer asserted that Sause had no parental rights to the child. The trial court entered a general judgment declaring Sause to be the child's legal mother and dismissed Schnitzer's petition, which sought a declaration that Sause was not the child's legal mother and an affirmance that he was the child's sole legal parent. On appeal, Schnitzer contends that the trial court erred in denying his motion to dismiss Sause's claim and in determining that Sause is the child's legal mother by virtue of being the child's undisputed female genetic parent and having taken every legal step available to her to protect and assert her constitutionally-protected parental right. Held: The trial court erred in concluding, based largely on Sause's genetic connection to the child, that Sause is the child's legal mother. Because Sause did not establish a right to parent the child, the trial court erred in denying Schnitzer's motion to dismiss Sause's petition and in denying Schnitzer's request for a declaration that he is the child's sole parent. Reversed and remanded for entry of judgment declaring the rights of the parties.

**State of Oregon v. Ricardo Santos Ramirez**  
(DeHoog, J.)

Defendant appeals a judgment of conviction for driving under the influence of intoxicants (DUII), ORS 813.010, contending, among other things, that the trial court erred in relying on two earlier out-of-state convictions in permanently revoking defendant's driving privileges under ORS 809.235(1)(b). Specifically, he contends that the trial court erred in concluding that his Washington conviction for first-degree negligent driving qualified as a predicate offense under ORS 809.235(1)(b)(B). Held: The trial court erred. Under ORS 809.235(1)(b)(B), an out-of-state conviction cannot serve as a predicate offense unless the offense requires proof that the person's impaired driving was causally related to the person's use of an intoxicant. The Washington offense that the trial court relied on in permanently revoking defendant's driving privileges does not have that requirement. Remanded for resentencing; otherwise affirmed.

**Senadija Hercenberger v. Robert Hercenberger**  
(DeHoog, P. J.)

Respondent appeals an order of contempt and a supplemental judgment awarding petitioner attorney fees incurred in the course of enforcing a previously entered dissolution judgment. Respondent was found to be in contempt for failing to comply with the dissolution judgment's requirement that he convey a deed to the family residence to petitioner so that the property could be sold and he could be paid an equalizing judgment. Respondent raises a number of contentions, among them that the trial court violated the Oregon Code of Judicial Conduct in appointing itself a limited power of attorney to effect the execution of the deed. Held: The Court of Appeals held that, although the court's appointment to itself of a limited power of attorney to effect the execution of the deed was an unusual remedial sanction, respondent has not identified any reversible error. Affirmed.

**State of Oregon v. Jordan Christian Phillips**  
(Kamins, J.)

Defendant appeals from a judgment of conviction for six counts of sexual abuse in the first degree, ORS 163.427, involving several different underage victims. He argues that the trial court committed legal error by sentencing him for a felony sexual offense without first receiving a presentence investigation report (PSI), as required by ORS 144.791. The state responds that defendant waived his right to a PSI, as permitted by the 2005 amendments to ORS 144.791. Held: The trial court erred in sentencing defendant without a PSI. Because the PSI requirement protects society's independent interest in ensuring responsible sentencing, defendant cannot waive preparation of a PSI. Remanded for resentencing; otherwise affirmed.

**Jack L. Edwards v. Cavenham Forest Industries**  
(Kamins, J.)

Petitioner seeks judicial review of a final order of the Workers' Compensation Board. In that order, the board determined that medical services, including the prescription of antibiotics and the surgical scrubbing of claimant's prosthetic hip to remove an infection, were not compensable under ORS 656.245(1)(a) because, although claimant's prosthetic hip was the result of a workplace injury, the medical services were directed to the infection, a condition for which claimant had been denied coverage. On review, claimant contends both that the board applied the incorrect legal standard and that the board's order was not supported by substantial reason. Held: Although the existence of the prosthesis increased plaintiff's risk of infection and required more intervention to remove the infection, there is no but-for causation standard in the first sentence of ORS 656.245(1)(a). The fact that the treatment (prosthesis) for a consequential condition stemming from the original accepted condition (hip fracture) increased plaintiff's risk of developing this new condition (infection) does not mean that the services were for the hip fracture. Moreover, there is no evidence in the record connecting the surgical removal of the infection or the prescription of antibiotics to the hip fracture itself. Because the disputed medical services were not for the original condition, and claimant did not appeal the denial of the hip infection as a consequential condition, the board did not err when it determined the disputed medical services were not compensable under ORS 656.245(1)(a). Affirmed.

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