



COURT OF APPEALS

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CONTACT:

Julie E. Smith
(503) 986-5634

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The Court of Appeals issued these opinions:

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The Court of Appeals affirmed these cases without opinion:

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Progressive Party of Oregon v. Jeanne Atkins
(Hadlock, C. J.)

Plaintiffs contend that defendant, the Oregon Secretary of State, violated a state election law in 2010 when she adopted former OAR 165-007-0320 (Aug 4, 2010), which required each candidate's political party to be identified by a specified "three character designation" on the general election ballot. Although defendant repealed that rule in 2012, plaintiffs continued this litigation. In their first amended complaint, filed after the rule's repeal, plaintiffs sought a declaration that any use of "three character designations" for political parties was unlawful in the past and would be unlawful in the future. They also sought to enjoin defendant from using such designations in the future. The trial court dismissed the action, concluding that it was moot and

that the issues raised did not fall within the "capable of repetition, yet evading review" exception to the mootness doctrine that is embodied in ORS 14.175. Held: Plaintiffs failed to demonstrate that they challenged an act that is "capable of repetition" or a "policy or practice" that "continues in effect," as required under ORS 14.175. Specifically, the challenged rule has been repealed, and plaintiffs have not alleged or established that defendant continues to have a policy or practice of using three-character (or other shorthand) designations for political parties on ballots. Further, plaintiffs have not identified evidence suggesting that there is any likelihood that defendant will take action in the future similar to the past action that plaintiffs challenged. Thus, the trial court did not err when it dismissed the action as moot. Affirmed.

Aaron Christopher DeShaw and Syeda F. Nahar-DeShaw
(Hadlock, C. J.)

Wife appeals a supplemental judgment that modified the child-support, parenting time, and custody provisions of the judgment that dissolved her marriage to husband and a second supplemental judgment that awarded husband attorney fees. Wife raises eight assignments of error, seven of which--when reduced to their core--assert that the amount of child support that the trial court ordered her to pay is too high because the trial court erred when it calculated husband's income under the Child Support Guidelines. The Court of Appeals rejected four of wife's assignments of error without published discussion and concluded two additional assignments were unreserved. On the merits, husband contends that the trial court followed the Child Support Guidelines when it calculated the support award and that the court's factual findings are supported by evidence in the record. Held: As to the remaining two assignments of error, both challenging the trial court's calculation of husband's income, the trial court did not commit legal error. Further, the trial court's factual findings are supported by evidence in the record and, therefore, it did not err in applying the Child Support Guidelines for determining husband's child support obligation. Affirmed.

Springville Corporation v. Stoel Rives LLC
(Armstrong, P. J.)

Plaintiff Springville Corporation appeals a judgment dismissing its action for legal malpractice against defendants Stoel Rives LLP and attorney James N. Westwood (Stoel Rives). Springville alleged that Stoel Rives provided erroneous legal advice about the appealability of a limited judgment in the underlying case that gave rise to Springville's malpractice action against Stoel Rives, see *Interstate Roofing, Inc. v. Springville*, 347 Or 144, 218 P3d 113 (2009). The trial court granted summary judgment to Stoel Rives, concluding that, although Stoel Rives had conceded that its legal advice was erroneous, Springville had failed to establish a genuine issue of material fact on the issue of causation and, therefore, Stoel Rives was entitled to judgment as a matter of law. Springville contends that the trial court erred because, had the limited judgment in the underlying case been timely appealed, Springville would have been entitled to a reversal of the limited judgment on three separate grounds. Held: The trial court correctly concluded that Springville would not have prevailed in a timely appeal of the limited judgment in the underlying case on any of the three grounds that Springville asserted. Accordingly, the trial court did not err in granting summary judgment to Stoel Rives. Affirmed.

State of Oregon v. Larry Wayne Pilgrim
(Armstrong, P. J.)

Defendant appeals a judgment of conviction for possession of a burglary tool or theft device, ORS 164.235. Defendant was a passenger in a car that an officer lawfully stopped for a traffic violation. The driver gave

officers consent to search the car, and the officers asked defendant to step out of the car. Once defendant was out of the car, an officer asked defendant whether anything in the car belong to him. Defendant did not give a verbal response; instead, he reached into the car and retrieved a bag of candy. The officer then searched a bag in the car and found incriminating evidence inside the bag. Defendant subsequently admitted that the bag was his. On appeal, defendant assigns error to the trial court's denial of his motion under Article I, section 9, of the Oregon Constitution to suppress evidence found in the bag on the ground that driver did not have actual authority to consent to the search of the bag, and, consequently, the search of the bag was unlawful. The state responds that the trial court did not err because defendant had manifested an intention to relinquish his possessory and privacy interests in the bag when, in response to an officer's question about whether anything in the car belonged to defendant, defendant removed an item from the car but did not remove the bag. Held: Defendant's actions did not unequivocally manifest an intention to relinquish his constitutionally protected interests in the bag. Hence, the trial court erred in denying defendant's motion to suppress evidence found in the bag. Reversed and remanded.

State of Oregon v. Russell Allen Baughman

(Sercombe, P. J.)

Defendant appeals a judgment of conviction for first-degree unlawful sexual penetration, first-degree sexual abuse, second-degree sodomy, second-degree unlawful sexual penetration, third-degree sodomy, and third-degree sexual abuse. All of the acts relating to those convictions involved B, the daughter of defendant's girlfriend. In light of *State v. Williams*, 357 Or 1, 346 P3d 455 (2015), defendant asserts that the trial court erred in admitting uncharged misconduct evidence from B as well as another witness, A, concerning prior sexual crimes committed by defendant against them. According to defendant, under *Williams*, all uncharged misconduct evidence is subject to OEC 403 balancing. And, in defendant's view, the trial court erred in admitting the evidence in question because it failed to properly conduct OEC 403 balancing, failed to make a record that reflects an exercise of discretion in conducting that balancing, and abused its discretion in refusing to exclude the evidence under OEC 403. Held: In conducting an OEC 403 analysis, the court must consider the quantum of probative value of the evidence in question. In doing so, the court considers why the evidence was relevant. Thus, in evaluating the trial court's application of OEC 403 in this case, the purposes for which it admitted the prior acts must be examined. Here, the trial court concluded that the prior acts evidence was relevant to three "non-propensity purposes"--identity, to bolster the credibility of the victim, and intent. However, the court was incorrect as to two of those three stated purposes. The evidence was not relevant to establish identity and, in these circumstances, the purpose of bolstering the victim's credibility is merely propensity by a different name. Having erred on both of those points in conducting its weighing, the trial court did not correctly consider the quantum of probative value of the evidence. Under *Williams*, it was error for the trial court to admit the prior acts evidence in the absence of proper OEC 403 balancing. Reversed and remanded.

State of Oregon v. Brett Nicholas Mazziotti

(Sercombe, P. J.)

Defendant appeals a judgment of conviction for failure to perform the duties of a driver, reckless endangerment, and reckless driving. In a supplemental memorandum submitted after the Supreme Court's decision in *State v. Williams*, 357 Or 1, 346 P3d 455 (2015), defendant argues that, under *Williams*, the trial court erred in allowing the state to present evidence relating to defendant's prior convictions for eluding and reckless driving without first conducting OEC 403 balancing. Held: In light of *Williams*, where a defendant requests that the trial court exclude other acts evidence under OEC 403 because the probative value of the evidence is outweighed by the danger of unfair prejudice, it is error for the court to admit the other acts

evidence without first conducting OEC 403 balancing. Here, although defendant raised his OEC 403 argument before the trial court, the court admitted the prior act evidence without first conducting OEC 403 balancing. That was error under Williams. Reversed and remanded.

Department of Human Services v. K. V.
(Sercombe, P. J.)

Parents appeal a juvenile court judgment assuming jurisdiction over their child, A, based on its determination that A's conditions and circumstances endangered her welfare. The court reached that conclusion because (1) mother abused S, another child in parents' care, causing S serious injury; (2) father is likely to fail to protect A from mother; (3) father's alcohol use interferes with his ability to safely parent A; and (4) father subjected mother and A to domestic violence, and he therefore presents a threat of harm to A. Parents do not challenge the court's decision with respect to mother but argue that the juvenile court erred in concluding there was a risk of serious loss or injury to A that was likely to be realized if she were in father's care. Parents contend that the evidence was too speculative to prove a current risk of harm to A, because mother and father were no longer living together at the time of the jurisdictional trial, the Department of Human Services (DHS) failed to present evidence that father needed substance abuse treatment, and father had engaged in only a single, isolated incident of domestic violence eight months before the trial. DHS responds that there was sufficient evidence to support jurisdiction. Held: There was sufficient evidence to support the juvenile court's explicit and implicit factual findings, and those findings were legally sufficient to support the conclusion that placing A in father care would pose a current risk of harm to A. DHS presented evidence to support the juvenile court's finding that father failed to protect S from mother and that his failure to protect S indicated that he would fail to protect A. Further, there was evidence from which the court could permissibly conclude that DHS proved a nexus between the likelihood that father would fail to protect A from mother and a current risk of harm to A. Additionally, DHS presented sufficient evidence from which the court could conclude that father's substance abuse and domestic violence in the presence of A would create a risk to A if she were to be placed in father's care. Based on that evidence, the juvenile court permissibly found that father's past conduct demonstrated that he was dangerous to A and that father had failed to take the steps necessary to address the underlying causes of that conduct. Therefore, the court could permissibly conclude that DHS proved a nexus between father's alcohol use and domestic violence and a current risk of harm to A. Accordingly, the court did not err in concluding that the conditions and circumstances endangered A and properly took jurisdiction. Affirmed.

Daniel N. Gordon, PC v. Ellen Rosenblum
(Egan, J.)

This civil case involves the Unlawful Trade Practices Act (UTPA), specifically ORS 646.607(1) and ORS 646.608(1)(b), and the Unlawful Debt Collection Practices Act (UDCPA), ORS 646.639. Plaintiffs, an attorney and his law firm, brought this action for a declaratory judgment against defendants, the Oregon Department of Justice (DOJ) and the Attorney General, seeking a declaration that the UTPA and UDCPA do not apply to their alleged litigation and debt collection practices. Plaintiffs also sought a permanent injunction. Plaintiffs moved for summary judgment on all claims. Defendants filed a cross-motion for summary judgment, contending, among other things, that plaintiffs had violated the UTPA and UDCPA. The trial court concluded that the UTPA and UDCPA did not apply to plaintiffs' alleged litigation and debt collection practices and, accordingly, granted plaintiffs a permanent injunction, enjoining defendants from filing an action against plaintiffs for violations of the UTPA. On appeal, defendant assigned error to three main issues: (1) whether the UTPA applies to plaintiffs' debt collection litigation, (2) whether the UDCPA applies to plaintiffs' debt collection litigation, and (3) whether the trial court erred in granting a permanent

injunction in favor of plaintiffs. Held: (1) The trial court erred when it declared that ORS 604.607(1) and ORS 646.608(1)(b) of the UTPA did not apply to plaintiffs' debt collection activities; (2) the trial court did not err in declaring that the UDCPA did not apply to plaintiffs' debt collection litigation; and (3) because the UTPA can apply to plaintiffs' challenged conduct, the trial court erred in granting the permanent injunction. Declaratory judgment reversed in part and remanded with instructions to enter judgment declaring the rights of the parties in accordance with this opinion; permanent injunction reversed; otherwise affirmed.

Department of Human Services v. K. M. J.
(Egan, J.)

Mother appeals a judgment terminating her parental rights to her children. The juvenile court terminated mother's rights after she failed to personally appear for her termination trial. Mother argues that, because the court did not provide her with the notice required by ORS 419B.819 and 419B.820, the court lacked authority to terminate her rights. The Department of Human Services concedes that the court did not provide mother the notice required by statute, but argues that mother failed to preserve her argument below and, even if we conclude that the court plainly erred, we should not exercise our discretion to correct the error. Held: The juvenile court plainly erred. Moreover, we conclude that the competing interests of the parties and the gravity of the error militate in favor of correcting the error. Accordingly, we exercise our discretion to correct the error. Reversed and remanded.

State of Oregon v. Ernie Joseph Garcia
(Tookey, J.)

Defendant appeals a judgment of conviction for coercion, menacing, harassment, and two counts of assault in the fourth degree. Defendant assigns error to the trial court's denial of his motion to suppress evidence obtained as a result of a warrantless search of his home. Held: The trial court did not err when it determined that the emergency aid exception to the warrant requirement justified the initial entry into defendant's home and that the emergency had dissipated when the officer encountered the potential domestic violence victim in the home. However, the trial court erred when it concluded that the inevitable discovery doctrine applied to allow the officers to remain in the home to obtain the challenged evidence. Consequently, the trial court erred when it denied defendant's motion to suppress. Reversed and remanded.

Arlen Porter Smith v. Department of Corrections
(Tookey, J.)

Petitioner seeks the invalidation of a rule, OAR 291-124-0016(2), adopted by the Department of Corrections (DOC), which requires the DOC's "Health Services clinical director" to appoint the chief medical officer at each DOC institution. Petitioner argues that the rule is invalid, because it is in direct conflict with a statute, ORS 179.360(1)(f), requiring the superintendent for a DOC institution to appoint the institution's chief medical officer. Petitioner also seeks the invalidation of "Health Policy and Procedure #P-A-02.1," adopted by DOC, arguing that the health policy constitutes a "rule" that should have been, but was not, adopted through rulemaking procedures. Held: The rule requiring the DOC "health services clinical director" to appoint the chief medical officer is in direct contravention with the provisions of a statute, and is, therefore, invalid. The health policy adopted by DOC is also invalid, because its provisions constitute a "rule," and the health policy, therefore, should have been adopted through rulemaking procedures. OAR 291-124-0016(2) held invalid; Health Policy and Procedure #P-A-02.1 held invalid.

Richard Hancock v. Pioneer Asphalt, Inc.

(Flynn, J.)

Plaintiff appeals from a judgment dismissing his personal injury action against defendant as barred by the statute of limitations. This is the second action that plaintiff has filed against defendant for the same injury, and he filed it after the first action was, likewise, dismissed as barred by the statute of limitations. Plaintiff argues that the trial court incorrectly applied the doctrine of issue preclusion to bar plaintiff from litigating an argument for timeliness that he had also raised--unsuccessfully--in the first action and, thus, incorrectly granted summary judgment to defendant on its statute of limitations defense. Held: Defendant failed to establish that the first action, which was dismissed without prejudice, ended in a final decision to which issue preclusion applies. Reversed and remanded.

State of Oregon v. Benjamin Tyler Brooke

(Shorr, J.)

Defendant appeals a judgment of conviction for strangulation and assault in the fourth degree. After a confrontation with his girlfriend, defendant was interviewed by police and then arrested. During that interview, the arresting officer read defendant his Miranda rights, including his right to counsel. When asked if he understood those rights, defendant asked, "Can I call my mom? She's a lawyer." The officers did not immediately cease questioning, and defendant made a series of incriminating statements to the officers. Before trial, defendant moved to suppress those statements, arguing that (1) he unequivocally invoked his right to counsel under Article I, section 12, of the Oregon Constitution, and the officers' continued questioning after that invocation was unlawful; and (2) even if defendant's invocation was equivocal, the officers' additional questioning was not limited to clarifying whether he was attempting to invoke his right to counsel, as is required under Article I, section 12. The trial court determined that defendant did not unequivocally invoke his right to counsel, and it admitted the challenged statements. Held: Under the totality of the circumstances, defendant's statement in response to the Miranda warnings constituted an unequivocal invocation of his right to counsel. Because the officers did not immediately cease questioning, as they were required to do under Article I, section 12, the statements defendant made after that point were inadmissible at trial. The trial court erred in admitting those statements. Reversed and remanded.

State of Oregon v. Anthony Joseph Cavallaro

(Shorr, J.)

Defendant appeals a judgment of conviction for attempted sexual abuse in the first degree. While in custody for a parole violation, defendant was approached by two detectives who intended to interview him about allegations of sexual abuse. Defendant unequivocally invoked his right to counsel under Article I, section 12, of the Oregon Constitution; after a brief exchange with defendant, the detectives continued to question him and defendant made a number of incriminating statements. Before trial, defendant challenged the admission of those statements on the grounds that they were obtained in violation of his right to have an attorney present. The trial court determined that, after unequivocally invoking his right to counsel, defendant waived that right by reinitiating conversation with the police. The trial court admitted the statements and defendant was found guilty at trial. On appeal, the state concedes that defendant did not reinitiate conversation such that it constituted a waiver of his right to an attorney, but argues that defendant's statements after the invocation made that invocation ambiguous and the officers were justified in asking follow-up questions to clarify defendant's intent. Held: Under the totality of the circumstances, defendant's invocation of his right to counsel was unequivocal and complete, and could not be rendered ambiguous by his subsequent

statements, which related to his custody. The trial court erred in admitting the statements defendant made after that invocation. Convictions on Counts 1 and 2 reversed and remanded; remanded for resentencing; otherwise affirmed.

Randall Royer v. Touch of Grey Ranch
(Shorr, J.)

Claimant filed a workers' compensation claim after cutting his leg while milling lumber for use on building repairs at employer's property. The Workers' Compensation Division of the Department of Consumer and Business Services subsequently determined that claimant was not a subject worker entitled to workers' compensation coverage. After claimant requested a hearing, an administrative law judge (ALJ) upheld that determination on the ground that claimant's activities fell within the scope of the "householder" exemption for workers "employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of the person employing the worker," ORS 656.027(2). Claimant now seeks judicial review of that order, arguing, among other things, that the ALJ erred in determining that claimant was subject to the householder exemption. Held: Because claimant's work repairing an apartment dwelling near employer's residence qualified as "maintenance, repair, remodeling or similar work in or about [employer's] private home," the ALJ did not err in determining that the exemption applied. Affirmed.

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