COURT OF APPEALS
Media Release

COPIES:
Copies of the slip opinions may be obtained from the Appellate Records Section, (503) 986-5555.
The full text of the opinions can be found at http://www.publications.ojd.state.or.us.

CONTACT:
Julie E. Smith
(503) 986-5634

May 18, 2016

The Court of Appeals issued these opinions:

State of Oregon v. Stressla Lynn Johnson
(A154905 - Multnomah County Circuit Court)
The Village at North Pointe Condominium Association v. Bloedel Construction Co.
(A151032 - Lincoln County Circuit Court)
State of Oregon v. Joseph Steven Boss
(A157368 - Washington County Circuit Court)
Glen Alan Putnam v. Rick Angelozzi
(A152069 - Lake County Circuit Court)
Department of Human Services v. K. G. A. B.
(A160183 - Deschutes County Circuit Court)
Department of Human Services v. A. E. R.
(A160556 - Wasco County Circuit Court)
Kevinia L. Frazer v. Enterprise Rent-A-Car Co. of Oregon
(A156890 - Workers' Compensation Board)
Vernon L. Bowman v. SAIF Corporation
(A156919 - Workers' Compensation Board)
Department of Human Services v. S. R. H.
(A157977 - Lane County Circuit Court)

The Court of Appeals issued this *per curiam* opinion:

State of Oregon v. Silverio Lopez-Silva
(A157371 - Washington County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

State of Oregon v. Robertho Sanchez-Acosta
(A156415 - Washington County Circuit Court)

State of Oregon v. Carlos Jerman Orozco
(A156917 - Umatilla County Circuit Court)
State of Oregon v. Brian Mathew Hall
(A157005 - Clatsop County Circuit Court)
Michael W. Jenkins v. Board of Parole and Post-Prison Supervision
(A157018 - Board of Parole and Post-Prison Supervision)
State of Oregon v. Serafin Pahua-Pahua
(A157464 - Washington County Circuit Court)
State of Oregon v. Ibrahim Mubarak
(A157562 - Multnomah County Circuit Court)
State of Orergon v. Pedro Delgado Suarez
(A157589 - Marion County Circuit Court)
State of Oregon v. Kevin John Hurd
(A157669 - Lane County Circuit Court)
State of Oregon v. Ivan Terentyevich Seledkov
(A157673 - Marion County Circuit Court)
State of Oregon v. David Volkman
(A157685 - Washington County Circuit Court)
State of Oregon v. John Robert Tetrick
(A157745 - Washington County Circuit Court)
State of Oregon v. Dan Kaye Kjer
(A157814 - Klamath County Circuit Court)
Jennifer Alexander v. Douglas Paul Stanford
(A157815 - Multnomah County Circuit Court)
State of Oregon v. Steven Randolph Neal
(A157856 - Gilliam County Circuit Court)
State of Oregon v. Kyle Robert Ruml
(A157930 - Multnomah County Circuit Court)
State of Oregon v. Troy Lynn Brown
(A157979 - Multnomah County Circuit Court)
State of Oregon v. Brandy Lynn Upham
(A158063 - Clackamas County Circuit Court)
State of Oregon v. Scott Garrnett Boyd
(A158144 - Washington County Circuit Court)
State of Oregon v. Crystal A. Makin
(A158157 - Multnomah County Circuit Court)
State of Oregon v. James William Conrad
(A158195 - Lincoln County Circuit Court)
Providence Health System Oregon v. Jean M. Janvier
(A158210 - Workers' Compensation Board)
State of Oregon v. Raymond Allen Drennen, Jr.
(A158236 - Multnomah County Circuit Court)
State of Oregon v. Jared Weston Walter
(A158380 - Multnomah County Circuit Court)

State of Oregon v. Nicholas Eric Chappelle
(A158583 - Columbia County Circuit Court)
State of Oregon v. K. R. K. K.
(A158875 - Josephine County Circuit Court)
Deborah Arden v. Jess Borrevik
(A159614 - Columbia County Circuit Court)
Department of Human Services v. A. M. J.
(A160754 - Columbia County Circuit Court)

* * * * *

State of Oregon v. Stressla Lynn Johnson
(Armstrong, P. J.)

Defendant appeals a trial court order in two consolidated cases that denied defendant's motions under ORS 138.690 for DNA testing on the ground that defendant had waived in his 1993 plea agreement his right to seek that relief. The operative provision in the plea agreement provided that defendant agreed to "waive his right to collateral attack by state and/or federal post-conviction * * * filings with regards to the validity of the sentence, competence of counsel, the validity of these convictions and any attack on the validity of the proceedings involved underlying his plea of no contest, findings of guilt and sentencing in this matter." Held: Because a successful motion under ORS 138.690 yields, at best, an order for DNA testing, it is not a post-conviction attack on the validity of defendant's conviction, sentence, competency of counsel, or plea proceeding, and, therefore, it cannot be said to raise a challenge prohibited by the plea agreement. Reversed and remanded.

The Village at North Pointe Condominium Association v. Bloedel Construction Co.
(Egan, J.)

In this construction defect case, plaintiff, a condominium association, appeals from a general judgment entered on a jury verdict for the defendant developers of the condominiums and the third-party defendant subcontractors who built the condominiums. Plaintiff also appeals from a supplemental judgment awarding attorney fees to Bloedel Construction Co., one of the developers, and from supplemental judgments awarding costs to Belanger General Contracting, Inc., and Jagow & Sons Roofing & Siding Co., Inc., two of the third-party defendant subcontractors. Held: (1) Plaintiff failed to adequately present for review and failed to preserve below his contentions that the trial court erred in refusing to remove one of the jurors from the jury. (2) The trial court was required to apportion the attorney fee award between fees incurred on insurance coverage issues, which were not recoverable by Bloedel Construction Co., from the fees incurred on the litigated claims, which were recoverable because they shared common issues with the breach-of-contract claim. (3) The trial court erred in relying on ORS 20.096 as authority for the cost awards to Belanger and Jagow, but could have exercised its discretion under ORCP 68 B to make those awards. On appeal, supplemental judgment awarding attorney fees to Bloedel Construction Co. reversed and remanded; supplemental judgments awarding costs to Belanger General Contracting, Inc., and Jagow & Sons Roofing & Siding Co., Inc., vacated and remanded; otherwise affirmed. On cross-appeal, affirmed.

State of Oregon v. Joseph Steven Boss
(Egan, J.)

Defendant appeals a judgment of conviction for second-degree assault and unlawful use of a weapon, and a judgment of conviction for tampering with a witness. In the first case, the trial court ordered defendant to pay $13,525 in court-appointed attorney fees. Held: The trial court plainly erred in imposing the fees because the record contained no evidence that defendant was able, or might be able, to pay such a sum, and it was appropriate in this case to exercise discretion to correct that error. In case C130161CR, portion of judgment requiring defendant to pay attorney fees reversed; otherwise affirmed. In case C131463CR, affirmed.

Glen Alan Putnam v. Rick Angelozzi
(Lagesen, J.)

Petitioner appeals from a judgment dismissing, with prejudice, his petition for post-conviction relief. The trial court dismissed the petition after concluding that defendant was entitled to summary judgment on the ground that the claims alleged in the petition were ones that reasonably could have been asserted in petitioner's direct appeal and that, as a result, ORS 138.550(2) barred petitioner from raising them in a petition for post-conviction relief. Held: The summary judgment record evidences a genuine issue of material fact as to whether ORS 138.550(2) bars petitioner's claims; the post-conviction court, therefore, erred when it concluded, on that record, that ORS 138.550(2) barred petitioner's post-conviction claims as a matter of law. Reversed and remanded.

Department of Human Services v. K. G. A. B.
(Flynn, J.)

Mother appeals a judgment terminating her parental rights to her daughter after a hearing conducted in mother's absence. On appeal, mother contends that the Department of Human Services (DHS) failed to properly serve the termination petition and summons when it used the method of service by publication in a newspaper with general circulation in Deschutes County. Mother raises six assignments of error based on the premise that DHS had information that mother was located in Florida and was required to disclose that information in seeking authorization to serve by publication. Held: On the record before it, the trial court correctly determined that service by publication solely in Deschutes County was adequate to permit the court to terminate mother's parental rights in her absence. The record supports the trial court's finding that that the information DHS possessed was too tenuous for DHS to understand Florida to be a location that might reasonably result in actual notice to mother. Affirmed.

Department of Human Services v. A. E. R.
(Flynn, J.)

Father and mother appeal judgments changing the permanency plans for their three children from reunification to adoption. On appeal, father contends that the trial court erred when it conducted the final day of the permanency hearing in his absence, despite the fact that father, who was incarcerated, had secured an order to be transported to the hearing. Father contends that he "had a critical role yet to play" in the presentation of evidence that was pertinent to his theory of the case. Held: Father's right to "participate in hearings" under ORS 419B.875 included the right to consult with counsel about strategic evidentiary decisions and to complete the presentation of evidence. Reversed and remanded.

Kevinia L. Frazer v. Enterprise Rent-A-Car Co. of Oregon
(Shorr, J.)

Claimant seeks judicial review of the denial of her workers' compensation claim, following a remand to the Workers' Compensation Board in Enterprise Rent-A-Car Co. of Oregon v. Frazer, 252 Or App 726, 289 P3d 277 (2012), rev den, 353 Or 428 (2013) (Frazer I). On remand, the board determined that the only issue before it was whether the "parking lot" exception to the "going and coming" rule applied such that claimant's claim was compensable and concluded that the "parking lot" exception did not apply. Claimant argues that the board impermissibly limited the scope of its review on remand. Held: Based on Frazer I, the board was limited to considering only the application of exceptions to the "going and coming" rule. The board also had discretion to decline to review arguments that claimant raised for the first time on remand. Accordingly, the board did not err in limiting the scope of its remand to the application of the "parking lot" exception. Affirmed.

Vernon L. Bowman v. SAIF Corporation
(Shorr, J.)

Claimant seeks judicial review of a Workers' Compensation Board order awarding assessed attorney fees under ORS 656.386(1)(a), which requires an award of "a reasonable attorney fee" in "cases involving denied claims where an attorney is instrumental in obtaining a rescission of the denial." Here, an attorney fee of $6,000 was awarded after SAIF rescinded its denial of the claim shortly before the scheduled hearing on claimant's challenge to that denial. Claimant argues that the board erred in limiting its consideration of the attorney fee award to work that counsel performed before SAIF notified claimant that it would rescind its denial. Held: Because ORS 656.386(1)(a) does not impose any temporal limitation on rescission-based attorney fees, the board's limiting construction of the statute is erroneous. In considering the amount of time an attorney has dedicated to a case where a denial has been rescinded by the insurer prior to a formal agency decision, the board must consider all of the time counsel dedicated that related to the litigation of the denial and the rescission, including time spent relating to litigation work that occurred after the insurer notified counsel of its intent to withdraw its denial and accept the claim. Reversed and remanded.

Department of Human Services v. S. R. H.
(Haselton, S. J.)

Mother and father separately appeal from two judgments of the juvenile court continuing jurisdiction over the parents' children and continuing a permanency plan of "another planned permanent living arrangement" (APPLA), contending that the juvenile court erred in denying their motion to dismiss the wardship based on the court's failure to treat the matter at its inception as involving Indian children under the Indian Child Welfare Act (IWCA). Father additionally asserts that the case should be remanded to allow the juvenile court to apply an "active efforts" standard that it did not apply at the time it changed the placement plan from reunification to APPLA. The children also appeal, contending that the juvenile court erred in failing to change the permanency plan from APPLA to adoption. Held: The record supports the juvenile court's finding that the court did not have reason to know that ICWA was applicable at the time the court asserted jurisdiction or at the time it changed the permanency plan from reunification to APPLA. Thus, ICWA was not applicable at the time the court assumed jurisdiction or at the time of the change in plan, and the court did not err in assuming jurisdiction and implementing the permanency plan of APPLA under the "reasonable efforts" standard applicable to non-ICWA cases. The court did not err in rejecting the children's request for a change in plan from APPLA to adoption in light of the fact that the Tribe had not given explicit input on adoption. Affirmed in A157952, A157977, and A157978.

[End of Document]