



# COURT OF APPEALS

## Media Release

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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>.

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November 16, 2016

### **Important Notice**

#### **Anticipated Interruption of Oregon Appellate eFiling System November 30, 2016 – December 5, 2016**

**It is anticipated that Oregon's Appellate eFiling system will be unavailable from November 30, 2016, at 3:00 p.m. until December 5, 2016, at 8:00 a.m.**

The Oregon Judicial Department anticipates installing enhancements relating to the processing of appellate case financial information beginning Wednesday, November 30, 2016, at 3:00 p.m. Because of the complexity of the enhancements, and to ensure proper installation and testing, the appellate courts will discontinue use of the appellate electronic court system, including eFiling and eService, from Wednesday, November 30, 2016, at 3:00 p.m. until Monday, December 5, 2016, at 8:00 a.m.

The Chief Justice of the Oregon Supreme Court and the Chief Judge of the Oregon Court of Appeals have found that good cause exists to temporarily waive ORAP 16.60 (concerning mandatory eFiling) and ORAP 16.25(1) (governing the filing deadline for eFiled documents). The Chief Justice and Chief Judge have issued an order describing how litigants must file documents during the period that the eFiling system is unavailable.

**IMPORTANT NOTICE:** The unavailability of the system does not extend any jurisdictional deadline, including those related to the filing and service of a notice of appeal, a petition for judicial review, or any other case initiating document. Your circumstances may require you to conventionally file your initiating document.

The Chief Justice and Chief Judge's order may be viewed on the Online Services page on the Judicial Department's website at: <http://courts.oregon.gov/OJD/docs/OnlineServices/eFile/CJO16-052CJO16-09.pdf>

Neither the enhancement installation nor the temporary unavailability of the appellate electronic court system will affect the trial courts in any way.

Please plan your business with the appellate courts accordingly. The appellate courts will be open normal business hours on Wednesday, November 30, through Friday, December 2. If you need assistance during that time, please call the Appellate Court Records Section at (503) 986-5589.

We apologize for the inconvenience.

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The Court of Appeals issued these opinions:

State of Oregon v. Catalin Voda Dulfu  
(A153918 - Lane County Circuit Court)  
Thomas M. Ha v. Board of Parole and Post-Prison Supervision  
(A154375 - Board of Parole and Post-Prison Supervision)  
Kenneth E. Genova, D.V.M. v. Oregon Veterinary Medical Examining Board  
(A148617 - Board of Medical Examiners for the State of Oregon)  
J. D. v. S. K.\*  
(A159550 - Lane County Circuit Court)  
Regina Handley and James Handley  
(A158801 - Multnomah County Circuit Court)  
Hector Manuel Osuna-Bonilla v. Teacher Standards and Practices Commission  
(A156542 - Teacher Standards and Practices Commission)  
State of Oregon v. Brandon Lee Jenkins  
(A159294 - Multnomah County Circuit Court)  
Sheila Landis v. Wayne Limbaugh  
(A159429 - Clackamas County Circuit Court)  
Dennis L. Sloan v. Apogee Medical Group, P.C.  
(A152989 - Jackson County Circuit Court)  
State of Oregon v. Wendell Kenneth Tate  
(A155551 - Clackamas County Circuit Court)  
State of Oregon v. Christopher Allen Edwards  
(A156021 - Coos County Circuit Court)  
State of Oregon v. Sean Ulysses Dawson  
(A155787 - Washington County Circuit Court)  
Samantha Miller v. Columbia County  
(A158838 - Columbia County Circuit Court)

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

State of Oregon v. Robby Foss Schell  
(A159588 - Coos County Circuit Court)  
State of Oregon v. P. H. D.  
(A161853 - Marion County Circuit Court)

\*The case title has been redacted in this media release and in the online version of the opinion, in compliance with 18 USC section 2265(d)(3).

The Court of Appeals affirmed these cases without opinion:

Marc Robinson Welch v. Sara Lea Edmond  
(A156309 - Multnomah County Circuit Court)

Daniel Ray Clinebell v. Mark Nooth  
(A156980 - Malheur County Circuit Court)

Branch William Niehouse v. John Myrick  
(A158437 - Umatilla County Circuit Court)

State of Oregon v. Joel D. Echelbarger  
(A158608 - Hood River County Circuit Court)

State of Oregon v. P. B. H.  
(A158653 - Washington County Circuit Court)

State of Oregon v. Cale Paul Arritola  
(A158685 - Klamath County Circuit Court)

Jonathon Brian Kelly v. Rob Persson  
(A158703 - Marion County Circuit Court)

State of Oregon v. Sergio David Espinoza-Flores  
(A158828 - Marion County Circuit Court)

State of Oregon v. Kyle Thomas Scheible  
(A158829 - Multnomah County Circuit Court)

State of Oregon v. Gulpinder Singh  
(A158832 - Marion County Circuit Court)

State of Oregon v. Ricky Scott Exe, Jr.  
(A158833 - Marion County Circuit Court)

Michael W. Jenkins v. Board of Parole and Post-Prison Supervision  
(A158847 - Board of Parole and Post-Prison Supervision)

State of Oregon v. Anthony Richard Stanton  
(A158859 - Lincoln County Circuit Court)

State of Oregon v. Kurtis Richard Duggan  
(A158945 - Hood River County Circuit Court)

John L.V. Platt, D.C., P.C., v. Kathy C. Snellgrove  
(A158959 - Multnomah County Circuit Court)

State of Oregon v. Ivan Bladimir Reyes-Ostorga  
(A159009 - Washington County Circuit Court)

State of Oregon v. Lynette Alberta Bullington  
(A159020 - Baker County Circuit Court)

Lemuel Fred Hentz v. John Myrick  
(A159021 - Umatilla County Circuit Court)

State of Oregon v. Kenneth Mark Wilkey  
(A159199 - Jackson County Circuit Court)

James Arthur Ross v. John Myrick  
(A159233 - Umatilla County Circuit Court)

State of Oregon v. Ryan James Hamann  
(A159248 - Washington County Circuit Court)

State of Oregon v. Richard Lee Hall  
(A159308 - Lincoln County Circuit Court)  
State of Oregon v. Linda Beth Taylor  
(A159403 - Coos County Circuit Court)  
Fred Meyer Stores, Inc. v. Monika M. Gage  
(A159788 - Workers' Compensation Board)  
Melany J. Bailey v. Phillip Duane Parker  
(A159828 - Josephine County Circuit Court)  
Delta Airlines, Inc. v. Lauren A. Johnson  
(A159927 - Workers' Compensation Board)  
Kaon-Jabbar East El v. 24 Hour Fitness USA, Inc.  
(A160037 - Multnomah County Circuit Court)  
Charles L. Chase v. SAIF Corporation  
(A160041 - Workers' Compensation Board)  
Barbara J. Corrinet v. Dr. Daniel Tseng, M.D.  
(A160719 - Multnomah County Circuit Court)  
Steven Smith v. Department of Consumer and Business Services  
(A160720 - Department of Consumer and Business Services)  
State of Oregon ex rel Lemuel Fred Hentz v. State of Oregon  
(A161278 - Umatilla County Circuit Court)  
Department of Human Services v. L. J. C.  
(A161974 - Malheur County Circuit Court)  
Department of Human Services v. J. S.  
(A161987 - Malheur County Circuit Court)  
Department of Human Services v. L. A. P.  
(A162001 - Lane County Circuit Court)  
State of Oregon v. E. G. L.  
(A162142 - Multnomah County Circuit Court)

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**State of Oregon v. Catalin Voda Dulfu**

(Hadlock, C. J.)

Defendant appeals a judgment of conviction for 15 counts of encouraging child sexual abuse in the first degree, and 15 counts of encouraging child sexual abuse in the second degree. On appeal, defendant assigns error to the trial court's exclusion of testimony from an expert (a psychologist) who would have opined that some people possess child pornography for reasons other than sexual gratification. Additionally, defendant argues that the trial court erred when it elevated his criminal-history score for certain counts based on his convictions for Counts 1 through 4 and, thereby, erred in sentencing him. Held: Defendant failed to lay an adequate foundation for the expert's scientific testimony regarding individuals' possible motivations for possessing child pornography. Further, because defendant took possession of each pornographic image on a different day, the trial court did not err when it decided that each of those acts was a separate "criminal episode" for the purposes of calculating his criminal history score. Affirmed.

**Thomas M. Ha v. Board of Parole and Post-Prison Supervision**  
(Hadlock, C. J.)

Petitioner challenges orders of the Board of Parole and Post-Prison Supervision denying his rerelease on parole and setting a new parole release date for ten years in the future. Petitioner argues that the board was restricted to imposing limited incarceration terms, as outlined in certain administrative rules in effect at the time petitioner committed his crimes. Held: The administrative rules upon which petitioner relies were not applicable to him because the rules expressly do not apply if the board revokes parole and denies rerelease. Because the board had determined to revoke petitioner's parole and not grant him rerelease, the board was not limited to imposing the short, additional terms of incarceration set out in the administrative rules. Thus, the board did not err in requiring petitioner to serve the remaining balance of his sentence as provided by law. Affirmed.

**Kenneth E. Genova, D.V.M. v. Oregon Veterinary Medical Examining Board**  
(Ortega, P. J.)

Petitioner, a licensed veterinarian, seeks judicial review of a final order issued by the Oregon Veterinary Medical Examining Board (the board) in which it concluded that petitioner engaged in "unprofessional conduct," ORS 686.120 and ORS 686.130, and, as a sanction, ordered him to pay a \$750 penalty and \$5,594.28 for the costs of the proceedings, ORS 686.150. Petitioner contends that the board erred in concluding that he engaged in unprofessional conduct. Held: The board's order lacks substantial reason because the board failed to adequately explain the reasoning in support of its legal conclusion. Reversed and remanded.

**J. D. v. S. K.**  
(Ortega, P. J.)

Respondent appeals a judgment granting petitioner's request for a permanent stalking protective order (SPO) against him under ORS 30.866(1), raising two assignments of error. In his first assignment, respondent contends that the trial court erred by determining that petitioner experienced "reasonable apprehension" regarding her "personal safety." In his second assignment, respondent argues that the court erred by denying him the right to cross-examination and by refusing to allow him to call two of his witnesses. Held: The court's management of the proceedings was within its allowable discretion. Further, the court could conclude, based on a preponderance of the evidence, that petitioner experienced "reasonable apprehension" regarding her "personal safety" as a result of respondent's contacts. Affirmed.

**Regina Handley and James Handley**  
(Duncan, P. J.)

Father appeals the trial court's supplemental judgment regarding custody, parenting time, and child support. He assigns error to the trial court's denial of his request for an increase in mother's child support obligation. Held: The trial court erred in concluding that there had not been a change in circumstances sufficient to justify modification. The trial court reasoned that, because, under the parties' parenting time plan, the child could change her residence on a flexible basis, it could not tell how much time the child would spend with each parent, and, therefore, it could not conclude that there had been a substantial change in circumstances justifying modification of mother's child support obligation. That reasoning was erroneous, because, since the last child support order, the child had come to live with father full time (increasing his parenting time from 41% to 100%), and, at the time of the modification hearing, there was no indication that the child was going to change her residence. Reversed and remanded.

**Hector Manuel Osuna-Bonilla v. Teacher Standards and Practices Commission**  
(DeVore, J.)

Petitioner seeks judicial review of an order of the Teacher Standards & Practices Commission (TSPC), revoking for one year his privilege to reapply for a teaching license. Petitioner contends that TSPC's order is not supported by substantial evidence primarily because TSPC relied on hearsay statements of students accusing petitioner of making inappropriate contact with them. Held: Prior testimony given under oath and subject to cross-examination in a criminal trial satisfied the standard of reliability for evidence in an administrative proceeding, and substantial evidence supported TSPC's order. In *Reguero v. Teacher Standards and Practices*, 312 Or 402, 417, 822 P2d 1171 (1991), the Supreme Court identified a nonexclusive list of factors to assess hearsay evidence. Like *Reguero*, the facts to be proved by the hearsay were central to the proceeding, and the consequence of reliance on hearsay was serious. Unlike *Reguero*, there were more indicia of reliability including corroboration of the hearsay statements through petitioner's own admissions and the fact that the students' statements were found in sworn, cross-examined testimony from a prior criminal case. Affirmed.

**State of Oregon v. Brandon Lee Jenkins**  
(DeVore, J.)

Defendant appeals a judgment revoking his probation for violating a condition of probation prohibiting contact with P. Defendant contends that the trial court erred in admitting (1) the testimony of a police officer about P's out-of-court statement identifying herself, and (2) the officer's statement about P's verbal or nonverbal assertion that text messages on her phone were from defendant. Held: Any error in admitting a hearsay statement about P's identity was harmless and the officer's testimony about the text messages contained no verbal or nonverbal hearsay. Assuming without deciding that the officer's testimony about P's self-identification was erroneously admitted, that error was harmless because the officer also testified that he overheard defendant identify P at the scene of the probation violation. Defendant's own statement was not hearsay. OEC 801(4)(b)(A). Absent testimony from the officer that repeated a verbal statement of P that defendant had sent the text messages, there was no verbal hearsay from P. The officer's testimony that P "showed [him] her cell phone" did not qualify as a nonverbal assertion. Affirmed.

**Sheila Landis v. Wayne Limbaugh**  
(DeVore, J.)

Plaintiff fell and was injured while she was jogging on a sidewalk in Washington County. She brought a negligence action against the county, alleging a failure to properly maintain the sidewalk or warn of its condition. The county moved for summary judgment contending that it was immune from liability under Oregon's recreational use statute, ORS 105.682, because plaintiff's use of the sidewalk was recreational. Alternatively, the county contended that it was not the owner of the property that might be liable under the Beaverton City Code, because the deed dedicating the land conveyed an easement rather than a fee interest. The trial court granted summary judgment on the basis that the county was immune under ORS 105.682. Plaintiff appeals, challenging the summary judgment. Held: The trial court erred in granting summary judgment. Washington County was not immune from liability under ORS 105.682. That statute does not provide immunity based solely on the plaintiff's recreational use. Immunity does not apply because the county had not exercised its volition to make the property available for recreational uses. Here, the property was already available for general public use as an ordinary sidewalk beside a public road. The county was not entitled to summary judgment on the alternative basis that the county was not the owner of the property abutting the right-of-way, because the deed conveying the land to the county conveyed an interest in fee. Reversed and remanded.

**Dennis L. Sloan v. Apogee Medical Group, P.C.**

(Tookey, J.)

In this wrongful death action, plaintiff, the son of the decedent, appeals from a judgment in which the jury found defendant negligent but did not find defendant's negligence to be the cause of the decedent's death. Plaintiff's claim of negligence against defendant alleged that the decedent, who was 85 years old, had suffered a fall at home and received treatment at a hospital from defendant's doctors, that those doctors failed to diagnose and treat rib fractures that the decedent suffered from his fall, and that the rib fractures caused bleeding into the decedent's chest cavity, which eventually caused the decedent's death. Defendant's main defense was that the decedent's death occurred while in the care of a nursing home, and that "something happened" at the nursing home that caused the decedent's death. Plaintiff requested two jury instructions pertaining to defendant's liability even if the nursing home's subsequent conduct caused additional injury to the decedent. The trial court refused to give the requested instructions, and plaintiff appeals the judgment assigning as error the refusal to give the requested instructions and the trial court's denial of plaintiff's motion for a new trial. Held: The trial court erred in failing to give one of the requested instructions, entitled "Liability for Subsequent Conduct of Third Party," which addressed a tortfeasor's liability for injury caused by a third party. In light of the evidence offered at trial and the parties' competing theories of the case, the "Conduct of Third Party" instruction was necessary to avoid jury confusion, and, consequently, the trial court's error in refusing to give the "Conduct of Third Party" instruction required reversal of the judgment for defendant. Judgment for defendant Apogee reversed and remanded; otherwise affirmed.

**State of Oregon v. Wendell Kenneth Tate**

(Tookey, J.)

Defendant appeals a judgment of conviction for aggravated murder. Defendant raises four assignments of error concerning the original penalty-phase proceeding of his trial and the sentence of life without parole that was imposed following the Court of Appeal's remand in State v. Tate, 254 Or App 509, 295 P3d 683, rev den, 353 Or 562 (2013). In his first assignment, defendant argues that the trial court erred by "denying defendant's request for a new sentencing proceeding wherein he could present further evidence and argument, \* \* \* ignor[ing] this court's remand order[,] and deny[ing] defendant his statutory right to a new sentencing proceeding under ORS 138.222(5)." Held: ORS 138.222(5)(a) applies and, as a result, the trial court erred when it concluded that the Court of Appeal's remand order would not allow it to consider defendant's arguments pertaining to the true life sentence being imposed at the resentencing proceeding. Remanded for resentencing; otherwise affirmed.

**State of Oregon v. Christopher Allen Edwards**

(Tookey, J.)

Defendant appeals a judgment of conviction for unlawful use of a weapon, fourth-degree assault constituting domestic violence, harassment, coercion, and two counts of menacing constituting domestic violence. Defendant contends that the trial court erred by admitting evidence of a previous uncharged act against the complainant, because that evidence was relevant only for a propensity purpose and, thus, pursuant to State v. Williams, 357 Or 1, 346 P3d 455 (2015), a remand is appropriate to allow the trial court to conduct OEC 403 balancing. Held: The trial court erred in admitting evidence of the uncharged act without conducting OEC 403 balancing, because evidence of defendant's uncharged act was relevant for the nonpropensity purpose of proving his motive to commit the charged acts and defendant requested that the trial court engage in OEC 403 balancing. Reversed and remanded.

**State of Oregon v. Sean Ulysses Dawson**  
(Flynn, J.)

Defendant appeals from a judgment of conviction for unlawful delivery of cocaine, possession of cocaine, and criminal forfeiture. Defendant assigns error to the trial court's denial of his motion to suppress the evidence that the state obtained in a search of defendant's vehicle during a traffic stop. Despite defendant's consent to the search, defendant argues that the search was unlawful because the officer's request for consent occurred after the officer had unlawfully extended the traffic stop. Held: The trial court erred when it denied defendant's motion to suppress. The officer extended the traffic stop when, instead of continuing to the next step in processing the traffic infraction, he questioned defendant about a new matter unrelated to the reason for the stop. The extension was not supported by a reasonable suspicion of criminal activity, and, as a result, the extension was unlawful. The record did not permit the Court of Appeals to consider the state's argument, presented for the first time on appeal, that defendant's consent was sufficiently attenuated from the officer's unlawful conduct. Reversed and remanded.

**Samantha Miller v. Columbia County**  
(DeHoog, J.)

In this civil action, plaintiff sued defendant Columbia County for, among other things, false arrest and malicious prosecution. Defendant appeals from a judgment awarding damages and costs entered after a jury found in plaintiff's favor on both of those claims. Defendant raises five assignments of error, the second of which assigns error to the trial court's denial of defendant's directed-verdict motions. Defendant argues that each of plaintiff's claims fails as a matter of law because the officer who arrested plaintiff had probable cause to believe that plaintiff had committed the crimes of menacing, ORS 163.190, and pointing a firearm at another, ORS 166.190. Held: The Court of Appeals concluded that the arrest was supported by probable cause and that the trial court therefore erred in denying defendant's motions. In light of that conclusion, it was unnecessary for the Court of Appeals to address defendant's remaining assignments of error. Reversed and remanded.

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