



COURT OF APPEALS

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The Court of Appeals issued these opinions:

Clifton J. Williams, Sr. v. CBS Corporation
(A158077 - Multnomah County Circuit Court)

Gregory Thomas Sako v. Jeri Taylor
(A155885 - Umatilla County Circuit Court)

Kemisha Anderson v. Department of Human Services
(A156525 - Department of Human Services)

Jessica Ann Sheil and Peter Murray Sheil
(A157377 - Jackson County Circuit Court)

Richard W. Courter v. City of Portland
(A157740 - Multnomah County Circuit Court)

Department of Human Services v. J. R. D.
(A162808 - Multnomah County Circuit Court)

Karlynn Jo Akins v. SAIF Corporation
(A158487 - Workers' Compensation Board)

State of Oregon v. Michael Andrew Chelemedos
(A157452 - Lane County Circuit Court)

Jerald C. Huntsinger v. BNSF Railway Company
(A156588 - Multnomah County Circuit Court)

State of Oregon v. Cody Marshall Edwards
(A157590 - Marion County Circuit Court)

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

State of Oregon v. Brett Angus Pearson
(A160614 - Marion County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

William Scott Baumhofer v. Department of Human Services
(A156543 - Office of Administrative Hearings)

State of Oregon v. Kenneth Everett Moore
(A158947 - Coos County Circuit Court)

State of Oregon v. Kenneth Everett Moore
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State of Oregon v. Shawn Michael Hankins
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State of Oregon v. Ruth Evelyn Giesking
(A160010 - Deschutes County Circuit Court)

Daniel George Graybill v. Mark Nooth
(A160117 - Malheur County Circuit Court)

State of Oregon v. Kyle Brian Long
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State of Oregon v. Jacquelyn Kelly Novack
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Calvin H. Charles v. Board of Parole and Post-Prison Supervision
(A160574 - Board of Parole and Post-Prison Supervision)

State of Oregon v. David Ben Rodriguez
(A160718 - Marion County Circuit Court)

State of Oregon v. Alexei Gabrielovich Sharipoff
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Lone Acre Mobile Home Park v. Marian Windham
(A161880 - Clackamas County Circuit Court)

Robert L. Derrick v. Board of Parole and Post-Prison Supervision
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Tyrone Washington v. Board of Parole and Post-Prison Supervision
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State of Oregon v. K. B.
(A162973 - Marion County Circuit Court)

Robert Lee Erskine v. Jeff Premo
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Randy T. McCormick v. Board of Parole and Post-Prison Supervision
(A163026 - Board of Parole and Post-Prison Supervision)

Birdsall Jones v. Jae Pudewell
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Department of Human Services v. K. D. N.
(A163592 - Lane County Circuit Court)

Pamela L. Arnett v. Employment Department
(A163594 - Employment Appeals Board)

Dean W. Devlin v. Linn County
(A164387 - Land Use Board of Appeals)

Rogue Advocates v. Jackson County
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Clifton J. Williams, Sr. v. CBS Corporation

(Ortega, P. J.)

Plaintiff is the personal representative for the estate of Clifton J. Williams, Sr. Williams worked in Portland's shipyards during the 1950s and later fell ill from asbestos-related diseases. Prior to his death in 2013, Williams filed suit against defendant for negligence, claiming that he had been exposed to asbestos while working on one of defendant's ships in 1957. Defendant moved for summary judgment on the ground that any of its liabilities "that may have existed prior to 1965 were transferred to another company" and, therefore, it could not be held liable for the alleged injuries suffered by Williams in 1957. The trial court granted defendant's motion. Plaintiff appeals the judgment granting the motion, assigning error to the court's determination that no genuine issue of material fact existed on the issue of transfer of liability. In particular, plaintiff contends that the court erred by denying her, the nonmoving party, the benefit of all reasonable inferences. Held: The trial court erred in granting summary judgment to defendant because there is a genuine issue of material fact regarding transfer of liability. Reversed and remanded.

Gregory Thomas Sako v. Jeri Taylor

(Sercombe, P. J.)

Petitioner appeals a judgment denying his petition for post-conviction relief from his convictions for first-degree rape and first-degree sexual abuse. He argues that the post-conviction court erred by denying his inadequate assistance of counsel claim based on his trial counsel's (1) failure to seek or obtain medical records from the victim's personal physician and (2) withdrawal of a successful motion to suppress, which permitted the suppressed evidence to be admitted at petitioner's criminal trial. Held: The post-conviction court did not err when it determined that petitioner was not prejudiced by trial counsel's failure to request the medical records or counsel's withdrawal of the motion to suppress. Affirmed.

Kemisha Anderson v. Department of Human Services

(Sercombe, P. J.)

Petitioner seeks judicial review of an order of the Background Check Unit (BCU) of the Department of Human Services (DHS) dismissing her request for hearing from a determination by the BCU that she is not fit for a position as a caregiver with a prospective employer, based on the results of a criminal background check. The BCU dismissed petitioner's request for hearing because it determined that petitioner had failed to participate in an informal administrative review by not answering nine of 29 questions submitted to her by the BCU. Held: The BCU's administrative rules provide that, when an individual subject to a criminal background check requests a hearing from an adverse determination, the BCU may conduct an informal administrative review before referring the matter for hearing. The rules provide that a failure to participate in the administrative review "shall result in termination of hearing rights." The rules state that participation in the administrative review "may include but is not limited to providing additional information or additional documents requested by the BCU within a specific amount of time." The Court of Appeals' review of administrative rules and dictionary definitions led the court to conclude that a "failure" to participate in an informal administrative review is an absence of participation, or nonparticipation, not merely incomplete participation. Petitioner participated in the administrative review process in a meaningful way. In its informal administrative review, the BCU had authority to adhere to its adverse determination so that the matter could

proceed to hearing, but it could not dismiss petitioner's request for hearing based on a failure to participate. Reversed and remanded.

Jessica Ann Sheil and Peter Murray Sheil
(Sercombe, P. J.)

Wife appeals from a supplemental judgment modifying the parties' stipulated judgment of dissolution to terminate spousal support. Wife contends that the trial court erred in failing to enforce a provision in the parties' stipulated judgment stating that the spousal support obligation is nonmodifiable. Husband responds that the trial court correctly concluded that the provision is not enforceable because it deprives the trial court of its authority to modify spousal support awards. Held: The Court of Appeals declined to interpret the parties' agreement as expressing an intention to deprive the trial court of its authority to modify spousal support awards. Rather, the court concluded, the parties expressed an intention not to seek modification of spousal support. Under ORS 107.104, the court was required to enforce the provision and therefore erred in terminating husband's spousal support obligation. Reversed.

Richard W. Courter v. City of Portland
(Sercombe, P. J.)

Plaintiffs appeal a judgment in favor of defendant City of Portland (the city) dismissing plaintiffs' inverse condemnation claim and their request for declaratory relief. In 2003, the city obtained a judgment condemning an easement to bury pipes on plaintiffs' property. According to plaintiffs, the city was required to bury the pipes at a depth of at least 18 feet but later buried them as shallow as four feet. Plaintiffs asserted that the city therefore exceeded the scope of its easement and effected a taking without just compensation and, additionally, requested a declaration that the terms of the judgment required the city to bury the pipes at a depth of at least 18 feet. Plaintiffs also contended that the placement of the pipes increased the cost of future development of their property. The city moved for summary judgment, arguing, inter alia, that plaintiffs' claims were not ripe, because it was uncertain whether plaintiffs could develop their property and any resulting damages were therefore speculative. The city also argued that the court lacked jurisdiction to consider plaintiffs' declaratory judgment action, because a declaratory judgment action may not be used to construe the terms of a prior circuit court judgment. The trial court concluded that plaintiffs' claims were not ripe and granted the city's motion. Held: The trial court erred in concluding that plaintiffs' claims were not ripe. If the pipes are physically occupying plaintiffs' property, there has been a taking, and nothing else needs to occur before a court can adjudicate that issue. Additionally, courts have jurisdiction to issue declaratory judgments construing or clarifying ambiguous terms in prior judgments. Plaintiffs' request for a declaratory judgment is based on an assertion that the terms of the 2003 judgment are ambiguous, so it is within the court's jurisdiction. Reversed and remanded.

Department of Human Services v. J. R. D.
(Sercombe, P. J.)

Mother appeals a judgment of the juvenile court taking jurisdiction over her child. When mother failed to appear at a pretrial conference before a juvenile court referee, the referee allowed the Department of Human Services (DHS) to proceed with its prima facie case, and the referee entered an order taking jurisdiction of mother's child. Pursuant to ORS 419A.150, mother requested a rehearing before a juvenile court judge and an opportunity to present additional evidence at the rehearing. The juvenile court denied mother's request to present additional evidence, concluding that it had discretion to decide whether to allow or deny a party the opportunity to do so under ORS 419A.150(3), which provides, in part, that "additional evidence may be presented" on rehearing. The court then entered an order "affirming" the referee's decision. On appeal, mother reiterates her argument that she was entitled to an opportunity to present new

evidence at the rehearing. DHS responds that the juvenile court correctly concluded that the decision whether to allow the parties to present additional evidence on rehearing is discretionary. Held: ORS 419A.150(3) unambiguously provides litigants with permission to present additional evidence at a rehearing of a referee's decision before the juvenile court. Litigants, not the court, "present" evidence. Therefore, the litigants are the implicit subject of the phrase "additional evidence may be presented," who have permission, under ORS 419A.150(3), to present evidence. Accordingly, the juvenile court erred in denying mother the opportunity to present additional evidence. Reversed and remanded.

Karlynn Jo Akins v. SAIF Corporation
(Lagesen, J.)

Claimant seeks review of a final order of the Workers' Compensation Board. In that order, the board upheld insurer SAIF Corporation's denial of claimant's "new and omitted condition" claims, and upheld SAIF's denial of claimant's "combined condition" claim. Claimant argues that SAIF was required to accept her claimed omitted conditions under ORS 656.267, even if those conditions, as a factual matter, were included within the previously accepted condition, and that the board erred in concluding otherwise. Claimant also challenges the board's affirmance of SAIF's denial of claimant's "combined condition" claim on the ground that the previously accepted combined condition no longer remained compensable. Held: The legislature intended for ORS 656.267 to permit a workers' compensation claimant to obtain acceptance of conditions that were not included within the scope of an insurer's acceptance of the claimant's claim, and nothing in the text, context, or legislative history of ORS 656.267 supports claimant's argument that the legislature intended to require an insurer to reaccept and reprocess a condition that already has been accepted. Substantial evidence supports the board's decision to uphold SAIF's denial of claimant's "combined condition" claim. Affirmed.

State of Oregon v. Michael Andrew Chelemedos
(Tookey, J.)

Defendant appeals a judgment of conviction for felony driving under the influence of intoxicants (DUII) and driving while suspended (DWS), raising two assignments of error. First, defendant contends that the trial court erred by denying his motion to dismiss for lack of a speedy trial. Second, defendant contends that the trial court erred by failing to dismiss the DWS count because the statute of limitations period had expired. Held: Because defendant failed to demonstrate that he suffered actual prejudice that would warrant dismissal of the charges, defendant was not denied a speedy trial in violation of Article 1, section 10, of the Oregon Constitution or the Sixth Amendment to the United States Constitution. Furthermore, because defendant did not preserve his second assignment of error, the Court of Appeals declined to review that unpreserved claim of error. Affirmed.

Jerald C. Huntsinger v. BNSF Railway Company
(Garrett, J.)

Plaintiff, a railroad employee, was injured after he fell from defendant's locomotive while preparing a train for departure. Plaintiff brought a negligence action against defendant under the Federal Employers' Liability Act, 45 USC §§ 51-60, basing five of his claims on the Locomotive Inspection Act (LIA), 49 USC §§ 20701-20703. The trial court granted partial summary judgment to defendant and dismissed plaintiff's LIA claims, concluding that the LIA was inapplicable because the locomotive was not "in use" at the time of plaintiff's injury. On appeal, plaintiff assigns error to that ruling. Held: The trial court erred in granting partial summary judgment to defendant because, viewing the summary judgment record in the light most favorable to plaintiff, the locomotive was "in use" within the meaning of the LIA. Based on reasonable inferences drawn in plaintiff's favor, the locomotive was "in use" because defendant's customary processes for detecting and repairing defects to the locomotive were complete, the locomotive was coupled to railcars

and being prepared for departure, and plaintiff was not engaged in tasks directed at detecting or remedying dangerous conditions in the locomotive itself. Judgment on Claims 2 through 6 reversed and remanded; otherwise affirmed.

State of Oregon v. Cody Marshall Edwards
(Garrett, J.)

Defendant committed first-degree assault and attempted aggravated murder when he fired at a police officer twice in succession. The first shot missed, and the second shot struck the officer, causing serious physical injury. The trial court ordered that defendant's sentence for assault run consecutively to his sentence for attempted murder, concluding that ORS 137.123(5) authorized consecutive sentences. On appeal, defendant assigns error to that ruling, arguing that consecutive sentences were not authorized under either ORS 137.123(5)(a) or (b). Held: The trial court erred in imposing consecutive sentences because the record does not support either predicate finding under ORS 137.123(5). First, the record lacks discrete facts indicating that defendant had a different intent in firing the second shot than he did in firing the first. ORS 137.123(5)(a). Second, the record lacks discrete facts demonstrating that the assault offense caused or risked "greater or qualitatively different" harms than those that were caused or risked by the attempted-murder offense. ORS 137.123(5)(b). Remanded for resentencing; otherwise affirmed.

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