



COURT OF APPEALS

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The Court of Appeals issued these opinions:

Filipetti v. Dept. of Fish and Wildlife (Clackamas)
Tahvili v. Washington Mutual Bank (Multnomah)
State ex rel Dept. of Human Services v. G. R. (Linn)
Simpson v. Coursey (Umatilla)
State v. Graves (Multnomah)

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

Jackson v. Board of Parole
Severy v. Board of Parole
Amalgamated Transit Union Div. Local 757 v. Tri-County Metro. Transp. Dist. (ERB)

The Court of Appeals affirmed these cases without opinion:

Tardy v. Belleque (Marion)
State v. Coleman (Umatilla)
Werdell v. State of Oregon (Jackson)
State v. Harris (Clackamas)
State v. Cochran (Crook)
State v. Kessell (Lincoln)
Barnum v. Hall (Marion)
State v. Watson (Wasco)
State v. Canada (Baker)
State v. Trevino (Josephine)
State v. Huff (Jackson)
State v. Waldon (Multnomah)
State v. Adams (Deschutes)
State v. Martinez (Marion)

State v. Vongsoury (Washington)
State v. Walsh-Mann (Washington)
State v. Sanchez-Abendano (Multnomah)
Brinson v. State of Oregon (Clackamas)
State v. Mann (Clackamas)
State v. Herr (Multnomah)
Knox v. Hall (Umatilla)
State ex rel Dept. of Human Services v. C. S. (Klamath)
State ex rel Dept. of Human Services v. B. F. S. (Jackson)
State ex rel Juv. Dept. v. P. L. L. (Linn)
State ex rel Dept. of Human Services v. R. B. (Jackson)
Cascade Geographic Society v. Dept. of Environmental Quality (LUBA)

* * * * *

In Re one black-tailed doe deer named "Snowball." James Filipetti and Francesca Mantei, Plaintiffs-Respondents, v. Department of Fish and Wildlife, Defendant-Appellant. Haselton, P. J.

The Oregon Court of Appeals today reversed a trial court's order granting the return of a black-tailed doe named "Snowball" to plaintiffs James Filipetti and Francesca Mantei. The Court of Appeals determined that plaintiffs were not entitled to the doe's return under ORS 133.633 and ORS 133.643, which govern the return of items seized in criminal investigations, because plaintiffs lacked the necessary wildlife permits to possess the doe. The court emphasized that its "role is not to assess the 'equities' of the parties' interactions" or to determine "the doe's 'best interests.'" Rather, the court stated its "exclusive, properly focused judicial function" is to interpret the statutes governing return of items seized and "to effectuate the legislature's intent in enacting" those statutes.

The dispute over "Snowball" arose when law enforcement officers and Oregon Department of Fish and Wildlife (ODFW) agents seized the doe from plaintiffs' property pursuant to a search warrant permitting the search and seizure of evidence of the crime of "Unlawful Holding of Wildlife (deer)" and "Unlawful Possession of Cervid to include any live deer (native or non-native) held in captivity." Plaintiffs were in possession of the doe without a permit or license to hold wildlife.

Plaintiffs brought an action against ODFW when, after the state failed to bring charges against plaintiffs, plaintiffs sought to recover possession of the doe. Plaintiffs filed a "motion for return or restoration of things seized," pursuant to ORS 133.633, which allows "an individual from whose person, property or premises things have been seized" to "move the appropriate court to return things seized to the person or premises from which they were seized." Specifically, plaintiffs asserted that they satisfied the requirements for "return or restoration" prescribed by ORS 133.643(4), which states that "[a] motion for the return or restoration of things seized shall be based on the ground that the movant has a valid claim to rightful possession thereof, because * * * [a]lthough the things seized were subject to seizure * * *, the movant is or will be entitled to their return or restoration upon the court's determination that they

are no longer needed for evidentiary purposes[.]” Plaintiffs argued that, because no charges were brought against them, the doe was no longer needed for evidentiary purposes and, thus, they were entitled to its return. ODFW opposed the motion, arguing that, given the "entitled" language in the statute, plaintiffs were required to establish that they could lawfully possess the doe--and, because plaintiffs did not have the legally required wildlife permits, they did not, and could not, meet that requirement.

The trial court granted plaintiffs' motion and ordered ODFW to return the doe to plaintiffs. ODFW appealed that order. On appeal, the parties essentially adhered to their positions before the trial court.

The Court of Appeals reversed the trial court's order. After concluding that the text of ORS 133.643(4), in context, was open to multiple constructions, the Court of Appeals examined the statute's legislative history. Based on that examination, the Court of Appeals concluded that the legislature intended for the state to retain items seized if the movant's possession of them would be unlawful. The court thus held that a party seeking to compel the return or restoration of seized property based on a "valid claim to rightful possession" pursuant to ORS 133.643(4) must establish (1) the item is "no longer needed for evidentiary purposes" and (2) the person is "entitled" to the return or restoration of--that is, can lawfully possess--the item sought to be recovered. Because the plaintiffs did not possess a permit or license to possess or hold wildlife and, consequently, could not lawfully possess the doe, plaintiffs failed to establish a "valid claim to rightful possession" of the doe under ORS 133.643(4).

Tofigh Tahvili, aka Tony Tahvili, an individual; and TMT Homes of Oregon, Inc., an Oregon corporation, Plaintiffs-Appellants, v. Washington Mutual Bank, a Washington corporation; Wilfried Blum, an individual; and Mary Tamara Hamm, an individual, Defendants-Respondents. Washington Mutual Bank, a Washington corporation, Counterclaim Plaintiff-Respondent, v. Tofigh Tahvili, aka Tony Tahvili, an individual; and TMT Homes of Oregon, Inc., an Oregon corporation, Counterclaim Defendants-Appellants. Haselton, P. J.

Plaintiffs appeal from a judgment in defendant Washington Mutual Bank's favor on numerous tort and contract claims. On appeal, plaintiffs make two related arguments. First, plaintiffs argue that the trial court erred in revoking the *pro hac vice* status of their out-of-state trial counsel during trial. Second, plaintiffs argue that the trial court erred in granting defendants' motion to dismiss based on plaintiffs' local counsel's refusal to proceed with the trial. *Held*: The trial court properly revoked the *pro hac vice* status of plaintiff's out-of-state trial counsel. Pursuant to UTCR 3.170, upon good cause shown, a court "may revoke the out-of-state attorney's permission to appear in the matter." The considerations pertinent to the revocation of *pro hac vice* status include the severity, willfulness, frequency, and seriality of counsel's misconduct, the extent to which the court has previously admonished counsel, the context in which the misconduct occurs, and the impact on the parties and the conduct of the litigation if *pro hac vice* status is revoked. Given those considerations, the court did not err in revoking out-of-state counsel's *pro hac vice* status. The trial court did not abuse its discretion in refusing to reschedule the trial, which was already underway. Affirmed.

In the Matter of T. G. R., aka T. R. R., a Minor Child. State ex rel Department of Human Services, Respondent, v. G. R., Appellant. Haselton, P. J.

Father appeals a judgment entered pursuant to ORS 419B.819(7) that terminated his parental rights to his child after he failed to appear on time for the scheduled termination trial. On appeal, father argues that the trial court abused its discretion in failing to set aside the judgment under these circumstances. The record shows that, although father was not present when court convened at 9:00 a.m., when the trial was scheduled to begin, the evidence was undisputed that father's failure to arrive on time was a result of a misunderstanding about the time the hearing would begin, and father was en route to the courthouse and arrived several minutes after the court had decided to proceed with summary termination pursuant to ORS 419B.819(7). Moreover, uncontroverted evidence was presented that, had father been in court at 9:00 a.m. as required, his case would not have gone to trial at that time, because another case was scheduled for trial the same day and would have taken precedence over father's case. *Held:* Under ORS 419B.923(1)(b), a court may set aside a previously entered judgment if the moving party demonstrates "excusable neglect." Where, as here, the material circumstances concerning father's nonappearance were uncontroverted, the question of whether father demonstrated "excusable neglect" is a matter of law. On review of the text of ORS 419B.923 and its legislative history, "excusable neglect" encompasses situations in which a parent makes a reasonable, good faith mistake as to the time or place of a dependency proceeding. Reversed and remanded with instructions to set aside the judgment terminating father's parental rights.

Nicholas Paul Simpson, Petitioner-Appellant, v. Rick Coursey, Superintendent, Eastern Oregon Correctional Institution, Defendant-Respondent. Rosenblum, J.

Petitioner appeals a judgment denying his petition for post-conviction relief, in which he claimed that he was denied adequate assistance of counsel at his criminal trial, Article I, section 11, of the Oregon Constitution. The lead detective in the case testified that he thought that the victim's demeanor was calm and "honest." Petitioner's counsel objected to the statement, which the criminal trial court sustained, but did not move for a mistrial or to strike and request a curative instruction. *Held:* Counsel's decision not to move for a mistrial or to strike and request a curative instruction when the lead detective in the case vouched for the victim's credibility was a failure by counsel to exercise reasonable skill and judgment, which had a tendency to affect the outcome of the prosecution. The post-conviction court erred in denying petitioner's petition for post-conviction relief. Reversed and remanded for entry of judgment granting post-conviction relief.

State of Oregon, Plaintiff-Respondent, v. Alonzo Dwight Graves, aka Anthony Leroy Robinson, Defendant-Appellant. Huckleberry, S. J.; Edmonds, P. J., concurring.

Defendant appealed convictions for felony assault in the fourth degree and two counts of menacing, arguing that the admission of certain statements made by the victim and her son, D, violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. The Court of Appeals concluded that the trial court had, in fact, erred in admitting certain testimonial statements by the victim and her son, and it therefore reversed defendant's convictions. *State v. Graves*, 212 Or App 196, 157 P3d 295 (2007). The Supreme Court then

vacated that decision and remanded the case for reconsideration in light of *State v. Camarena*, 344 Or 28, 176 P3d 380 (2008). *Held*: On remand, the Court of Appeals adhered to its previous conclusions that (1) statements that the victim's son made during a 9-1-1 call and then to police who first arrived at the scene were nontestimonial; and (2) subsequent statements that the victim and her son made to police after the officers had searched the residence and determined that defendant was not an imminent threat were testimonial. The admission of those later, testimonial statements violated defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution, and the error was not harmless. Reversed and remanded on Counts 1, 2, and 3; otherwise affirmed.

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