

# SUPREME COURT



## Media Release

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Cases decided October 6, 2011

*Michael Arken, et al., v. City of Portland, et al.*, (TC 060100536) (SC S058881)  
(Control); *Ruth Robinson, et al., v. Public Employees Retirement Board* (TC 060504584)  
(SC S058882)

On certified appeals from the Court of Appeals on appeals from judgments of the Circuit Court for Multnomah County, Henry J. Kantor, Judge. The judgment of the circuit court in *Arken, et al. v. City of Portland, et al.*, is affirmed. The judgment of the circuit court in *Robinson, et al., v. Public Employees Retirement Board* is reversed, and the case is remanded to the circuit court for further proceedings. Opinion of the Court by Chief Justice Paul J. De Muniz. Justice Jack L. Landau did not participate in the consideration or decision of this case.

Today, the Oregon Supreme Court decided two related cases that challenged an order issued by the Public Employees Retirement Board (PERB) that established repayment methods that PERB intended to use to recover overpayments to so-called Window Retirees (public employees who are Tier One members of PERS who retired under the Money Match retirement allowance formula and who retired with an effective retirement date on or after April 1, 2000, and before April 1, 2004). In a unanimous opinion, the Court held that PERB's Order Adopting Repayment Methods is within the statutory authority of the agency and that PERB properly can recoup the overpayments made to the Window Retirees under ORS 238.715.

PERB originally established 20 percent as the earnings allocation credit for calendar year 1999. That determination by PERB was timely challenged by certain public employers. While that litigation was pending, the Legislative Assembly enacted legislation in 2003 that codified that the correct earnings allocation credit for calendar year 1999 was 11.33 percent, rather than 20 percent. These cases involve challenges to PERB's efforts to recoup the overpayments to Window Retirees that were predicated on the original 20 percent earnings allocation credit.

In *Arken*, the Court first held that it was not a breach of the contract rights of the Window Retirees for PERB to recover the overpayments. The Court further determined that no representations were made by PERB that could support the Window Retirees claim that PERB should be estopped from recovering the overpayments. The Court also determined that the Window Retirees had not established any basis for a wage claim where the overpayments made to the Window Retirees were greater than the cost of living adjustments (COLAs) to which the Window Retirees were entitled. Finally, the Court held that the Window Retirees had not established any basis for declaratory and injunctive relief under the Administrative Procedures Act (APA), because PERB acted reasonably and within its statutory authority in determining that the best course of action was to simultaneously calculate the reduction in benefits caused by the reduction in the 1999 earnings allocation credit and the effect of providing the Window Retirees with the COLAs to which they were entitled, and because PERB provided notice to the Window Retirees before taking action to reduce their benefits.

In *Robinson*, the Court first held that neither of two alternative cost recovery mechanisms that the legislature enacted as part of its 2003 PERS reform legislation could be applied to the overpayments made to the Window Retirees. The Court determined that treating the overpayments made to the Window Retirees as administrative expenses violated well-established trust fund principles that prohibit PERB from categorically favoring one class of PERS beneficiaries over other PERS beneficiaries. Because treating the overpayments to Window Retirees as administrative expenses of PERS favors the Window Retirees over Tier One and Tier Two PERS members with existing accounts, the court determined that that cost recovery mechanism could not be used because it would violate the statutory contract rights of those Tier One and Tier Two PERS members. The Court also held that suspension of COLAs on the retirement benefits of Window Retirees was invalid because it violated the statutory contract rights of the Window Retirees. The Court noted, however, that in enacting the 2003 PERS reform legislation, the Legislative Assembly left intact PERB's authority under ORS 238.715 to recover overpayments made to retirees, which is "supplemental to any other remedies that may be available to the board for recovery of amounts incorrectly paid from the fund to members of the system or other persons." The Court held that ORS 238.715 provides PERB with statutory authority to recover the overpayments made to the Window Retirees and that PERB's Order Adopting Repayment Methods is within the scope of the agency's authority.

*John Goodson, et al., v. Public Employees Retirement System*, (Agency Nos. 900900, 900901, 900903, 900915, 900916, 900937) (SC S059056).

On certified appeal from the Court of Appeals in a judicial review from a ruling on summary determination and final order of the Public Employees Retirement

Board. The order of the Public Employees Retirement Board is affirmed. Opinion of the Court by Chief Justice Paul J. De Muniz.

Today, in a companion case to *Arken v. City of Portland*, \_\_\_ Or \_\_\_, \_\_\_ P3d \_\_\_ (decided October 6, 2011), the Oregon Supreme Court held that the Public Employees Retirement Board (PERB) has authority under ORS 238.715 to recoup benefit overpayments that so-called "Window Retirees" had received because of an erroneous 20 percent earnings credit for 1999.

Petitioners in this case are "Window Retirees," public employees who retired on or after April 1, 2000, but before April 1, 2004. Petitioners challenged PERB's recalculation of their retirement benefits to reflect an 11.33 percent earnings credit for 1999 and to recoup the overpayments on retirement benefits that had resulted from the prior 20 percent earnings credit. PERB rejected their arguments, and petitioners sought judicial review. The Court of Appeals certified the matter to the Supreme Court.

In a unanimous opinion written by Chief Justice Paul J. De Muniz, the Supreme Court affirmed the final order of PERB. First, the Court rejected petitioners' argument that the reduction in their retirement benefits unconstitutionally impaired the obligation of contract in violation of Article I, section 21, of the Oregon Constitution. They had argued that PERB had promised particular retirement benefits when they retired, based on the 20 percent earnings credit in 1999. The Court explained that the terms of the contract between the state and its retirees are determined by statute; PERB had no authority to make or change that statutory contract by its alleged promises.

Second, the Court also rejected petitioners' contention that procedural due process had required PERB to give petitioners notice, once it learned of their plans to retire, that pending litigation challenged the 20 percent earnings credit for 1999. The Court explained that procedural due process had not been violated; petitioners had not been deprived of "property," because they had no legitimate claim of entitlement to the 20 percent earnings credit, and because they could not reasonably have relied on PERB's representations regarding the earnings credit.

Finally, the Court rejected petitioners' request for an award of interest on wrongly suspended cost-of-living adjustments to their retirement benefits. ORS 238.470 prohibits any such award.

*State of Oregon v. Tyler Juro Kurokawa-Lasciak*, (TC 07CR1309FE) (CA A140430) (SC S058898)

On review from the Court of Appeals in an appeal from the Douglas County Circuit Court, Joan Glawe Seitz, Judge. 237 Or App 492, 239 P3d 1046 (2010).

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further proceedings. Opinion of the Court by Justice Martha L. Walters. Justice Jack L. Landau did not participate in the consideration or decision of this case.

Today, the Oregon Supreme Court unanimously held that the warrantless search of defendant's parked van was unconstitutional because it did not fall within the "automobile exception" to the warrant requirement of Article I, section 9, of the Oregon Constitution.

Defendant was charged with various drug offenses based upon evidence discovered during a warrantless search of his van. The police first encountered defendant after he had parked, exited, and walked away from his van. Defendant moved to suppress the evidence, and the trial court granted his motion. The Court of Appeals reversed, determining that the search of defendant's van was justified under Oregon's automobile exception to the warrant requirement, as articulated in *State v. Brown*, 301 Or 268, 274, 721 P2d 1357 (1986). In *Brown*, the Supreme Court explained that there is an exception to the warrant requirement for an automobile if (1) the automobile is mobile at the time it is stopped by police, and (2) probable cause exists for the search of the automobile. The Court of Appeals determined that later Supreme Court cases expanded the automobile exception to apply to vehicles that are operable.

The Supreme Court held that the automobile exception does not apply to vehicles that are parked, immobile, and unoccupied at the time that the vehicle is encountered in connection with a crime. Although, the Court recognized that, logically, defendant's parked vehicle was as capable of mobility as was a vehicle that was moving when it was stopped by the police, the Supreme Court has specifically elected not to extend the Oregon exception to a vehicle that is merely capable of mobility. Therefore, the Court adhered to its prior decisions and determined that, because defendant's van was parked, immobile, and unoccupied at the time it was first encountered, the warrantless search was invalid. The Court remanded the case to the Court of Appeals to determine whether the police obtained valid consent to search the van.

*Balboa Apartments et al. v. Lisa Patrick, et al.*, (TC FE08-0910) (CA A139660) (SC S059058)

On review from the Court of Appeals in an appeal from the Clackamas County Circuit Court, Eve Miller, Judge. 237 Or App 391, 241 P3d 317 (2010). The decision of the Court of Appeals and the judgment of the circuit court are affirmed. Opinion of the Court by Justice Jack L. Landau.

Today, the Oregon Supreme Court held that, in an action for forcible entry and detainer (FED), failure to serve a summons and amended complaint within one day of payment of filing fees does not require dismissal.

In this case, plaintiff, Balboa Apartments, filed an FED complaint against defendant for nonpayment of residential rent. At the same time, plaintiff paid the requisite filing fee. The complaint erroneously listed the wrong unit number, and, as a result, the process server posted the summons and complaint at the wrong residential unit. Plaintiff learned of the error, filed an amended complaint, and properly served the summons and amended complaint on defendant more than seven judicial days before the initial appearance date.

At trial, defendant moved to dismiss the action for failure to serve the complaint within one judicial day of payment of the filing fee, as required under ORS 105.135(3). Defendant asserted that, because the FED procedures were not "meticulously followed," the trial court lacked jurisdiction. The trial court denied the motion, holding that defendant received adequate notice and, thus, dismissal was not required. Ultimately, the trial court determined that plaintiff was entitled to restitution of the property and entered judgment in plaintiff's favor, awarding plaintiff costs and attorney fees. Defendant appealed, and the Court of Appeals affirmed.

In a unanimous opinion by Justice Jack L. Landau, the Supreme Court affirmed the decision of the Court of Appeals and the judgment of the circuit court. The Court began by noting that ORS 105.135(3)(b) requires a plaintiff in an FED action to serve the summons and complaint "by the end of the judicial day next following the payment of filing fees." The Court explained that, although it was undisputed that plaintiff failed to serve defendant with the original complaint within one day of payment of the filing fee, ORS 105.135(3) did not address the consequences of failing to comply with that requirement when the plaintiff also files an amended complaint.

The Court held that, pursuant to ORCP 23 A, plaintiff was entitled to file an amended complaint. The effect of the amended complaint was to supersede the original complaint. Furthermore, the Court explained, ORS 105.135(3) does not explicitly require the service of the amended complaint within one judicial day of payment of the filing fee. Instead, the Court stated, ORS 105.135(3) requires that an amended complaint be served at least seven judicial days before the first appearance. In this case, because plaintiff clearly complied with that requirement, dismissal was not required.

*Gail Rasmussen et al. v. John R. Kroger*, (SC S059368)

On petition to review ballot title. Ballot title referred to the Attorney General for modification. Opinion of the Court by Justice Virginia L. Linder.

Today, the Oregon Supreme Court referred the Attorney General's certified ballot title for a proposed ballot measure, Initiative Petition 15 (2012), back to the Attorney General for modification. The Court held that the caption and "yes" and "no" vote result statements in the certified ballot title failed to substantially comply with the relevant standards.

If enacted, the proposed measure would add a provision to the Oregon Revised Statutes that would phase out all estate and inheritance taxes, and related taxes on intra-family property transfers, that the state currently has statutory authority to collect. Neither the caption of the ballot title that the Attorney General certified, nor the "yes" and "no" results statement, mentioned that the present estate tax applies only to estates with a gross value of \$1 million or more.

Petitioners Gail Rasmussen and Bethanne Darby, who previously had submitted comments to the Secretary of State concerning the Attorney General's draft ballot title for the proposed measure, sought review of the certified ballot title by the Supreme Court. They argued that the ballot title's caption was misleading because it erroneously suggested that the measure would phase out a tax that presently applies to *all* estates. They also argued that the ballot title's "yes" and "no" vote result statements were inadequate because they failed to inform voters that the current estate tax applies only to estates valued at \$1 million or more and that passage of the proposed measure would eliminate that tax.

In a unanimous opinion authored by Justice Virginia L. Linder, the Oregon Supreme Court concluded that the Attorney General's caption and "yes" and "no" vote result statements failed to substantially comply with the statutory standards for ballot titles. The court first explained that, insofar as the proposed measure was explicitly directed at changing the existing statutory scheme for taxing estates, the caption of the ballot title must disclose an essential element of the existing estate tax scheme -- that only estates that exceeded \$1 million in value were subject to taxation. The Court went on to state that, insofar as the "yes" and "no" vote result statements in the Attorney General's ballot title failed to mention the \$1 million threshold in the existing estate tax statutes, it would not inform voters that enactment of the proposed measure would affect only a limited number of persons. The court noted that an indefinite reference, in the "no" vote result statement, to the present scheme's tax on "estates of certain value," was too vague and general to inform voters of the policy choice that would be reversed if the proposed measure were adopted.

Having identified those problems in the Attorney General's caption and "yes" and "no" vote result statements, the Court concluded that the ballot title must be referred to the Attorney General for modification. The Court invited the Attorney

General to modify the ballot title's summary as well, to correct an inaccuracy in that section that the Attorney General had identified to the court.