No. 19-6770

In the Supreme Court of the United States

ORIGINAL

Vinca S. Chiu,

Petitioner,

v.

First Group America, et al,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon and the Court of Appeals State of Oregon

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Is a trial court authorized to expand the scope of a legal remedy that was not requested in a motion for summary judgment before the court?
2. Does a letter issued by a judge constitute an order for the purpose of dismissing a claim?
3. Was Petitioner's claim of strict liability for "ultrahazardous" or "abnormally dangerous" activities dismissed in error by the trial court?

List of Parties

The parties in the lower court were:

Vinca S. Chiu, Plaintiff - Petitioner

First Group America, Defendant

TriMet, Defendant

Penske Truck Leasing, Defendant - Respondent

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Petition for Writ Of Certiorari

Petitioner, Vinca S. Chiu, respectfully petitions this court for a writ of certiorari to review the judgment of the Oregon Court of Appeals and Oregon Supreme Court.

Opinions Below

The Oregon Court of Appeals denied Ms. Chiu's appeal without opinion at *Chiu v. First Group America,* 295 Or. App. 668, 433 P.3d 787 (2019). A copy of that decision appears at *Appendix A.* The Oregon Supreme Court denied Ms. Chiu's Petition for Review on July 3, 2019. A copy of that decision appears at *Appendix B.* The Oregon Supreme Court denied Ms. Chiu's Motion for Reconsideration on August 29, 2019. A copy of that decision appears at *Appendix C.*

Jurisdiction

Ms. Chiu's Motion for Reconsideration petition for hearing to the Oregon Supreme Court was denied on August 29, 2019. Ms. Chiu invokes this Court's jurisdiction under 28 U.S.C. §1257, having timely filed this Petition for a Writ of Certiorari within ninety days of the Oregon Supreme Court's judgment.

Statement of the Case

This case involves a civil cause of action for products liability, strict liability and negligence brought by Petitioner, Vinca S. Chiu, against Respondent, Penske Truck Leasing. At all times relevant to her lawsuit, Vinca Chiu worked as a lift bus driver for Portland's TriMet transit service for 4 years 10 months and became ill on

October 29, 2012. Portland's TriMet transit service is operated by First Transit, Inc., part of Cincinnati-based FirstGroup America. First Transit, Inc. provides full paratransit service for Portland's TriMet transit service.

At all times during Ms. Chiu's employment, Penske Truck Leasing altered, distributed, inspected, modified, tested and/or maintained vehicles for Portland's TriMet transit service. Penske has been under contract to maintain TriMet's paratransit fleet, since 1999.

During Ms. Chiu's employment as a bus driver with TriMet, she was consistently exposed to and was forced to inhale toxic fumes, vapors, chemicals, solvents, carcinogens and/or a toxic combination thereof. These included, but were not limited to known dangerous toxic fumes, such as carbon monoxide, diesel fuel mixed with anti-freeze, diesel exhaust, vaporized mixtures of chemicals, exhaust, and noxious particulate matter as well as other unknown substances. These toxic fumes emanated from vehicles altered, distributed, inspected, modified, tested and/or maintained by Penske for Portland's TriMet transit service.

During her employment, Ms. Chiu was unable to avoid the inhalation and exposure to toxic fumes while on the job for FirstGroup America. She was exposed to these toxic fumes while driving the buses and while the buses were idling before, after, and during departure times. She also inhaled and was exposed to direct exhaust which seeped into the driving area of her bus from other buses and vehicles directly in front of her while at stops and in departure areas. These toxic fumes

emanated from vehicles altered, distributed, inspected, modified, tested and/or maintained by Penske for Portland's TriMet transit service.

Prior to Ms. Chiu becoming ill from the aforementioned toxic fumes, she had no previous related illness or diagnosis. In fact, she has no family history of related illnesses of the respiratory system, tissue oxygenation, cancers and/or any of the other medical calamities, such as those made the basis of her claims, suffered by her and proximately caused by Penske.

On or about October 29, 2012, Ms. Chiu became severely ill. As a direct result of the constant exposure to the toxic fumes emanating from the vehicles maintained by Penske, Ms. Chiu suffered serious damage. These physical damages included infections of the lungs, injuries to her respiratory system, hypertension, high blood pressure, headaches, fatigue, memory loss, brain damage, nasal infections, pelvic and vaginal infections, elevated blood toxin levels, cancers and/or other currently unknown or undiagnosed illnesses. Subsequent to these serious health problems arising and Ms. Chiu seeking medical treatment, she returned to work with a doctor's note, which requested specific accommodations. However, she continued to be exposed to the toxic fumes. As a result of her illnesses and symptoms, Ms. Chiu was unable to return to work.

Prior to and following the discovery of her illness and deteriorating health, Ms. Chiu filed complaints with FirstGroup America, TriMet and/or Penske about the toxic fumes emanating from the vehicles maintained by Penske. Specifically,

Ms. Chiu made several reports to FirstGroup America, TriMet and/or Penske about Penske's poorly maintained vehicles and lack of proper safety equipment, filters, seals, or other ventilation devices to limit and/or remove entirely the toxic fumes emanating from the engine compartment and exhaust system of the vehicles into the driver's area and/or buses. However, no action was taken by FirstGroup America, TriMet and/or Penske. These complaints were disregarded to the detriment of Ms. Chiu's health and well-being.

On October 1, 2015, Penske filed a motion for summary judgment on Ms. Chiu's claims for products liability and negligence only. *Appendix D.* In their motion for summary judgment, Penske moved for summary judgment, because "Plaintiff has not and cannot establish the existence of a material fact on her claims of **products liability and negligence** against defendant." *Appendix D*: 2 at 8-10. [emphasis added].

At the end of the section of Penske's motion for summary judgment limited only to products liability, Penske requested "an Order from this Court granting summary judgment in its favor as to plaintiff's products liability claim as well as her claim entitled 'strict liability.' The same law of products as addressed above applies to plaintiff's second claim for relief." *Appendix D*: 4 at 1-3. However, Penske's motion for summary judgment did not provide Judge Bushong with a memorandum of support for this argument regarding strict liability. *Appendix D*; ORCP 14 A; UTCR 5.020. Nor did Penske submit any legal authorities in its motion

for summary judgment to support this claim that Plaintiff was not entitled to pursue a cause of action for strict liability for "ultrahazardous" or "abnormally dangerous" activities. *Appendix D*; ORCP 14 A; UTCR 5.020.

In fact, none of the cases cited by Penske in its motion for summary judgment were about strict liability for "ultrahazardous" or "abnormally dangerous" activities. *Appendix D.* Moreover, the "topics" briefed by Penske in said summary judgment were limited to products liability and negligence. *Appendix D.* In any event, no Order was ever signed and entered specifically dismissing Ms. Chiu's claim for strict liability. *Appendix E*; *Appendix F.*

On September 12, 2016, Judge Bushong signed an Order granting Penske partial summary judgment on Ms. Chiu's claims for products liability. *Appendix E.* The September 12, 2016 Order was submitted to Judge Bushong by Christie Moilanen, an attorney for Penske. *Appendix E.* Despite Penske's continued unsupported assertions, this Order did not rule or make any reference to the "strict liability" cause of action in Plaintiff's Second Amended Complaint. *Appendix E.* Nor did it indicate that a claim sounding in common law strict liability claim distinct from the "products liability" claim was also being dismissed. *Appendix E.*

The Order specifically states: "Defendant's Motion for Summary Judgment is granted as to plaintiff's products liability claim. Defendant's Motion for Summary Judgment is denied as to plaintiff's negligence claim." *Appendix E.* The Order

submitted by Penske to Judge Bushong makes no mention whatsoever of Ms. Chiu's strict liability claim, yet they have continued to claim it does. *Appendix E.*

On March 10, 2017, ten days before trial, Judge Hodson, who had not presided over the hearing on the motion for summary judgment, sent the parties a letter stating that he had "confirmed" that the September 12, 2016 order had also dismissed the common law strict liability claim. *Appendix F.* This alleged "confirmation" is not supported by the facts, nor was Judge Hodson authorized to expand the scope of the legal remedies sought in Penske's motion for summary judgment. Moreover, no formal Order was ever issued dismissing Ms. Chiu's cause of action for strict liability. *Cf., Appendix E*; *see McCollum v. Kmart Corp.*, 347 Or. 707, 226 P.3d 703 (2010) (a letter is not an order).

On March 20, 2017, the case proceeded to a jury trial before Judge Hodson. On April 5, 2017, despite the fact there had been no formal order dismissing the cause of action for strict liability, the case was presented to the jury only on the cause of action for negligence. On April 5, 2017, the jury returned a verdict that Penske was not negligent.

Ms. Chiu timely appealed the judgment entered on June 15, 2017, and the Court of Appeals erroneously affirmed the judgment of the Multnomah County Circuit Court without an opinion on January 3, 2019. *Appendix A.* On March 11, 2019, Ms. Chiu timely filed a Petition for Review with the Oregon Supreme Court, which was denied on July 3, 2019. *Appendix B.* On July 17, 2019, Ms. Chiu timely

filed a Motion for Reconsideration with the Oregon Supreme Court, which was denied on August 28, 2019. *Appendix C.*

Reasons for Granting the Petition

This case presents significant issues of law that have the potential to impact a wide range of Oregonians. These include the use or effect of a rule of trial court procedure, specifically the interpretation of *Oregon Rules of Civil Procedure* (ORCP). The ORCP govern civil court procedures in Oregon courts, "to the extent they are made applicable to such courts by rule or statute." ORCP 1 A. The consequence of the decision is important to the public, even though the issues regarding the interpretation of ORCP and strict liability as it relates to this case may not arise often. The legal issue regarding strict liability as it relates to this case was also one of first impression for the Oregon Supreme Court. It was apparent that the Oregon Supreme Court had never decided at least one of the questions arising in the present case.

Instead of dealing with these issues that have the potential to impact a wide range of Oregonians, the Oregon Court of Appeals and Oregon Supreme Court merely affirmed the judgment of the Multnomah County Circuit Court without an opinion. The decisions by the Oregon Court of Appeals and Oregon Supreme Court has resulted in a serious and/or irreversible injustice for Petitioner. Petitioner respectfully requests this Honorable Court grant her Petition for Writ of Certiorari.

Argument and Authorities

A. A trial court is not authorized to expand the scope of a legal remedy that was not requested in a motion for summary judgment.

It is well established in Oregon, by controlling authorities, rules and/or court decisions that a trial court is not authorized to expand the scope of a legal remedy that was not requested in a motion for summary judgment. Despite these controlling authorities, rules and/or court decisions, Ms. Chiu's Petition for Review and Motion for Reconsideration were inexplicably denied by the Oregon Supreme Court.

On October 1, 2015, Penske filed a motion for summary judgment on the grounds that "Plaintiff has not and cannot establish the existence of a material fact on her claims of **products liability and negligence** against defendant." *Appendix D*: 2 at 8-10. [emphasis added]. At the end of the section of Penske's motion for summary judgment, which was limited **only** to products liability, Penske requested "an Order from this Court granting summary judgment in its favor **only** as to plaintiff's products liability claim as well as her claim entitled 'strict liability.' The same law of products as addressed above applies to plaintiff's second claim for relief." *Appendix D*: 4 at 1-3.

Penske's motion for summary judgment, however, **did not** provide Judge Bushong with a memorandum of support for this argument regarding strict liability. *Appendix D*; ORCP 14 A; UTCR 5.020. Nor did Penske submit any legal

authorities in its motion for summary judgment to support this claim that Plaintiff was not entitled to pursue a cause of action for strict liability for "ultrahazardous" or "abnormally dangerous" activities, which is **specifically required** by the applicable rules of civil procedure in Oregon. *Appendix D*; ORCP 14 A; UTCR 5.020.

In Penske's motion for summary judgment, it only cited two cases in the product liability section of the motion, and neither of them dealt with strict liability for "abnormally dangerous" activities.[1] *Appendix D*: 4 at 9-23. Nor does Penske's citation in the product liability section of their motion for summary judgment to ORS 30.900 and ORS 30.920 involve strict liability for "abnormally dangerous" activities. *Appendix D*: 3 at 19; *Appendix D*: 4 at 20. Penske's entire argument for summary judgment is limited to issues of liability for the manufacture, sale, lease, and/or distribution of products and does not support dismissal of Ms. Chiu's strict liability claim. *Appendix D*: 3 at 15 to *Appendix D*: 5 at 5.

The following Rules of the *Oregon Rules of Civil Procedure* are applicable to the matter before this Court:

> ORCP 14 A defines "motion" and the requisites of motions: "An application for an order is a motion. Every motion, unless made during trial, shall be in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought." ORCP 14; *Cf., Appendix D.*

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[1] *Mason v. Mt. Sf. Joseph, Inc.*, 226 Or. App. 329, 203 P3d 329 (2009) and *Johnston v. Water Sausage Corp.*, 83 Or. App. 637, 733 P.2d 59 (1987).

Penske's motion for summary judgment **did not** adequately request judgment on Ms. Chiu's claim of strict liability. Penske's motion for summary judgment was limited to the particular grounds of products liability and negligence. *Appendix D.* Even the Order submitted to Judge Bushong was limited to those issues, and made no mention of strict liability. *Appendix E.*

As stated in ORCP 67 C, "A judgment for relief different in kind from or exceeding the amount prayed for in the pleadings may not be rendered unless reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered." *Cf., Mulier v. Johnson*, 332 Or. 344, 29 P.3d 1104 (2001)(trial court erred awarding relief not pled in motion for summary judgment; COA erred in affirming judgment).

Under UTCR 5.020(1), "[e]very motion **must** be accompanied by or include a memorandum of law or a statement of points and authorities, explaining how any relevant authorities support the contentions of the moving party." [emphasis added]. Penske's motion for summary judgment failed to provide a memorandum of law or a statement of points and authorities, explaining how it was entitled to summary judgment on Ms. Chiu's claims for strict liability. *Appendix D.*

In fact, Penske provided no such authorities in its motion for summary judgment regarding Ms. Chiu's claims for strict liability. *Appendix D.* The trial court may not *sua sponte* consider an argument that is not pleaded. *Fox v. Collins*, 238 Or. App. 240, 241 P.3d 762 (2010). The trial court has no authority to raise

defenses on its own and then to dismiss the complaint on the basis of its determination of the defenses. *See, e.g., Hendgen v. Forest Grove Community Hospital*, 98 Or. App. 675, 780 P.2d 779 (1989); *Francke v. Gable*, 121 Or. App. 17, 20, 853 P.2d 1366 (1993).

It is a **reversible error** for the trial court to allow a summary judgment when no motion had been made on a cause of action. *Industrial Underwriters v. JKS, Inc.*, 90 Or. App. 189, 750 P.2d 1216 (1988); *Hendgen v. Forest Grove Community Hospital*, 98 Or. App. 675, 780 P.2d 779 (1989) (order granting motion for summary judgment on emotional distress claim not included in motion for summary judgment was reversible error). Penske was not entitled to summary judgment on Ms. Chiu's strict liability claim, because it never moved for summary judgment with a legally supported argument on that claim.

ORCP 47 C states, in part, that "the court shall grant the motion if the pleadings, depositions, affidavits, declarations, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." Penske was not entitled to summary judgment, because their motion did not prove there was no genuine issue of fact regarding Ms. Chiu's strict liability claim and that it was entitled to prevail as a matter of law. Penske failed to properly brief the issue, and the order it submitted to the court by Penske did not mention strict liability. *Appendix D.* Yet, Penske still contends the September 12, 2016 Order somehow encompasses Ms. Chiu's

claim for strict liability. It does not. It is not even mentioned in the Order prepared and submitted by Penske's counsel. *Appendix E.*

At a pretrial hearing on October 20, 2016 before Judge Hodson, defense counsel Moilanen noted the "silence" of the September 12, 2016 Order (an order she had prepared and submitted) on the issue of strict liability, and asked him "how we should address that." No written motion was submitted by Penske, nor was Plaintiff allowed to prepare a response. Instead, Judge Hodson ruled **orally** that Ms. Chiu's claim for strict liability was dismissed. No written order was ever signed by Judge Hodson memorializing his oral ruling from the bench. *Cf., McCollum v. Kmart Corp.*, 347 Or. 707, 226 P.3d 703 (2010) (there must be a written order).

Even if a written order had been signed by Judge Hodson, ORCP 67 C provides that a judgment "different in kind from" than requested in the pleadings "may not be rendered unless reasonable notice and opportunity to be heard are given to [the] party against whom the judgment is to be entered." Clearly, Plaintiff never received notice of this oral motion by Penske, nor was she given an opportunity to be heard before Judge Hodson issued his ruling from the bench.

According to UTCR 5.020(1), "[e]very motion **must** be accompanied by or include a memorandum of law or a statement of points and authorities, explaining how any relevant authorities support the contentions of the moving party." [emphasis added]. Penske's motion for summary judgment failed to provide a memorandum of law or a statement of points and authorities, explaining how it was

entitled to summary judgment on Ms. Chiu's claims for strict liability. Moreover, UTCR 5.020(1) provides that, "[e]very motion **must** be accompanied by or include a memorandum of law or a statement of points and authorities, explaining how any relevant authorities support the contentions of the moving party." [emphasis added].

Clearly, Penske's motion for summary judgement failed to adhere to the applicable rules, and summary judgement should not have been granted.

In fact, Penske provided no such authorities in its motion for summary judgment regarding Ms. Chiu's claims for strict liability. *Appendix D.* The trial court may not *sua sponte* consider an argument that is not pleaded. *Fox v. Collins*, 238 Or. App. 240, 241 P.3d 762 (2010). The trial court has no authority to raise defenses on its own and then to dismiss the complaint on the basis of its determination of the defenses. *See, e.g., Hendgen v. Forest Grove Community Hospital*, 98 Or. App. 675, 780 P.2d 779 (1989); *Francke v. Gable*, 121 Or. App. 17, 20, 853 P.2d 1366 (1993).

It is a reversible error for the trial court to allow a summary judgment when no motion had been made on a cause of action. *Industrial Underwriters v. JKS, Inc.*, 90 Or. App. 189, 750 P.2d 1216 (1988); *Hendgen v. Forest Grove Community Hospital*, 98 Or. App. 675, 780 P.2d 779 (1989) (order granting motion for summary judgment on emotional distress claim not included in motion for summary judgment was reversible error). Penske was clearly not entitled to summary judgment on Ms.

Chiu's strict liability claim, because it never moved for summary judgment with a legally supported argument on that claim.

ORCP 47 C states, in part, that "the court shall grant the motion if the pleadings, depositions, affidavits, declarations, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." Herein, Penske was not entitled to summary judgment, because their motion did not prove there was no genuine issue of fact regarding Ms. Chiu's strict liability claim and that it was entitled to prevail as a matter of law. Penske failed to properly brief the issue, and the order it submitted to the court by Penske did not mention strict liability. *Appendix D.* Yet, Penske throughout these proceedings has contended the September 12, 2016 Order somehow encompasses Ms. Chiu's claim for strict liability. It does not. It is not even mentioned in the Order prepared and submitted by Defendant's counsel. *Appendix E.*

At a pretrial hearing on October 20, 2016 before Judge Hodson, defense counsel Moilanen noted the "silence" of the September 12, 2016 Order (an order she had prepared and submitted) on the issue of strict liability, and asked him "how we should address that." No written motion was submitted by Penske, nor was Ms. Chiu allowed to prepare a response. Instead, Judge Hodson ruled **orally** that Ms. Chiu's claim for strict liability was dismissed. No written order was ever signed by

Judge Hodson memorializing his oral ruling from the bench. *Cf., McCollum v. Kmart Corp.*, 347 Or. 707, 226 P.3d 703 (2010) (there must be a written order).

Even if a written order had been signed by Judge Hodson, ORCP 67 C provides that a judgment "different in kind from" than requested in the pleadings "may not be rendered unless reasonable notice and opportunity to be heard are given to [the] party against whom the judgment is to be entered." Clearly, Ms. Chiu never received notice of this oral motion by Penske, nor was she given an opportunity to be heard before Judge Hodson issued his ruling from the bench.[2]

Even though a court has initial jurisdiction over the parties and the subject matter, it does not authorize it to act without appropriate notice to the parties. If a proposed order would grant relief different from that contemplated by the original proceeding and would affect a party's personal rights, due process requires that there be reasonable notice and an opportunity to be heard. *Cooley v. Fredinburg*, 144 Or. App. 410, 927 P.2d 124 (1996), citing *Scarth v. Scarth*, 211 Or. 121, 126, 315 P.2d 141 (1957)(court modified without notice the defendant's child support obligation).

If the notice of the proposed relief is so defective or lacking that it does not satisfy the requirements of due process, the court is deprived of jurisdiction to enter

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[2] See ORCP 14 A ("Every motion, unless made during trial, **shall be in writing**.") [emphasis added]; UTCR 5.020(1): "Every motion **must** be accompanied by or include a memorandum of law or a statement of points and authorities, explaining how any relevant authorities support the contentions of the moving party." [emphasis added].

an order arising out of such a defective procedure. *Cooley v. Fredinburg*, 144 Or. App. 410, 927 P.2d 124 (1996), citing *Hood River County v. Dabney*, 246 Or. 14, 21, 423 P.2d 954 (1967); *see also Griffin v. Griffin*, 327 U.S. 220, 66 S. Ct. 556, 90 L. Ed. 635 (1946) ("an order docketing arrears of alimony as a judgment, without notice to the defendant, was held wanting in due process"); *Industrial Underwriters v. JKS, Inc.*, 90 Or. App. 189, 750 P.2d 1216 (1988)(it was a **reversible error** for the trial court to allow a summary judgment when no motion had been made).

As argued and supported above as well as throughout these proceedings below, Penske was not entitled to summary judgment on Ms. Chiu's claim for strict liability. Penske's motion for summary judgment did not properly allege and/or prove that it was entitled to summary judgment on Ms. Chiu's claims for strict liability. *Appendix D.* Nor did the September 12, 2016 Order, signed by Judge Bushong and prepared by Christie Moilanen, an attorney for Penske, specifically mention strict liability whatsoever. *Appendix E.*

Despite Penske's unsupported assertions, it was not entitled to summary judgment on Ms. Chiu's strict liability claim. A trial court's decision to dismiss an action on its own motion, on the basis of an unasserted legally supported argument is a serious error and should be reversed. It is an abuse of discretion and deprives the parties of the expectation - created by the rules of procedure - that the defendant, not the court, will decide whether to assert an argument for summary judgment. *Hendgen v. Forest Grove Community Hospital*, 98 Or. App. 675, 780 P.2d

779 (1989) (order granting motion for summary judgment on emotional distress claim not included in motion for summary judgment was **reversible error**).

As such, this Honorable Court should grant the Ms. Chiu's Petition for Writ of Certiorari, because it is well established in Oregon, by controlling authorities, rules and/or decisions that a trial court is not authorized to expand the scope of a legal remedy that was not requested in a motion for summary judgment. *Industrial Underwriters v. JKS, Inc.*, 90 Or. App. 189, 750 P.2d 1216 (1988) (it was a reversible error for the trial court to allow a summary judgment when no motion had been made).

B. The letter issued by Judge Hodson dismissing Ms. Chiu's strict liability claim is not an order.

The Oregon Supreme Court has recognized that "[l]egally, a letter opinion itself does not become effective until it is reduced to an order." *McCollum v. Kmart Corp.*, 347 Or. 707, 714, 226 P.3d 703 (2010), citing *Beardsley v. Hill*, 219 Or. 440, 442, 348 P.2d 58 (1959). Despite those established precedents, the Oregon Supreme Court denied Ms. Chiu's Petition for Review and Motion for Reconsideration on these grounds.

In the case at bar, there was never and has never been any formal written order specifically dismissing Ms. Chiu's claim for strict liability, only Judge Hodson's **letter** dismissed that claim. *Appendix E*; *Appendix F*. Judge Hodson's letter of March 10, 2017 to the parties merely stated that he had "confirmed" that

the September 12, 2016 Order had also dismissed the common law strict liability claim. *Appendix E*; *Appendix F*. There is nothing in the September 12, 2016 Order, which could be construed that Ms. Chiu's claim for strict liability was dismissed. *Appendix E*. Strict liability is not mentioned whatsoever - in any shape or form - in the September 12, 2016 Order. *Appendix E*.

The letter dismissing Ms. Chiu's claim for strict liability without a formal written order is at odds with the established precedent of the Oregon Supreme Court. The Oregon Supreme Court has held that "[l]egally, a letter opinion itself does not become effective until it is reduced to an order." *McCollum v. Kmart Corp.*, 347 Or. 707, 714, 226 P.3d 703 (2010), citing *Beardsley v. Hill*, 219 Or. 440, 442, 348 P.2d 58 (1959); *Charco, Inc. v. Cohn*, 242 Or. 566, 411 P.2d 264 (1966); *see also Schunk and Schunk*, 14 Or. App. 74, 76, 511 P.2d 1240 (1973) (same).

"The requirement of an actual order is not just a matter of certainty and sound practice." *McCollum,* at 347 Or. 715. "[A letter or] memorandum opinion of the trial court does not become effective until it is reduced to a proper order, judgment or decree and entered in the records of the case in the office of the clerk. Anything less than a rigid adherence to such a rule gives rise to uncertainty." *McCollum,* at 347 Or. 714-715, quoting *Beardsley v. Hill*, 219 Or. 440, 442, 348 P.2d 58 (1959). The uncertainty of the lack of a formal written order in this case was reversible error.

Despite this well-established precedent, the Oregon Supreme Court inexplicably denied Ms. Chui's Petition for Review and Motion for Reconsideration.

ORS 3.070 provides that orders and judgments "[i]f signed other than in open court, all such orders, findings and judgments issued, granted or rendered * * * shall be transmitted by the judge to the clerk of the court * * * and shall become effective from the date of filing." In this case, no such orders, findings and judgments issued, granted or rendered were signed by Judge Bushong. Nor did Judge Hodson preside at the summary judgment proceeding. Judge Hodson had no authority to dismiss Ms. Chiu's claim for strict liability. This was solely within the power of Judge Bushong, because he presided over the summary judgment proceeding.

Penske contends that "[b]oth Judge Hodson and Judge Bushong ruled orally that the only remaining claim for trial was Plaintiff's claim based on negligence." Penske has never produced, nor has either judge signed or entered a written order, which specifically states Ms. Chiu's claim for strict liability had been dismissed.

Even if either judge ruled orally that Ms. Chiu's strict liability claim was dismissed, it would not become effective until it is reduced to a proper written order, judgment or decree and entered in the records of the case in the office of the clerk, not a letter. Considering there was no such written order, the Oregon Supreme Court's standards announced again most recently in *McCollum v. Kmart Corp.* should have applied to this case, but they were not.

Clearly, the letter issued by Judge Hodson dismissing Ms. Chiu's claim for strict liability is not a written order as contemplated by the Oregon Supreme Court. The Oregon Supreme Court failed to follow its own established precedent in denying Ms. Chiu's Petition for Review and Motion for Reconsideration.

As such, this Honorable Court should grant the Ms. Chiu's Petition for Writ of Certiorari, because the foregoing recognized Oregon Supreme Court precedents require a formal written order, as opposed to a letter or oral pronouncement, to dismiss Ms. Chiu's claim for strict liability.

C. Ms. Chiu's Claim of Strict Liability for "Ultrahazardous" or "Abnormally Dangerous" Activities was Dismissed in Error by the Trial Court.

Ms. Chiu also urges this Honorable Court to reconsider the denial of her Petition for Review and Motion for Reconsideration that her claim for strict liability was dismissed in error by the trial court, because the lower courts overlooked material facts in the record, statutes, rules and/or decisions which are controlling as authority and which would require a different judgment from that rendered by those lower courts.

Whether an activity is "ultrahazardous" or "abnormally dangerous" is a question of law for the court. *Loe v. Lenhardt*, 227 Or. 242, 249, 362 P.2d 312 (1961). The trial court failed to properly apply the law regarding strict liability for "ultrahazardous" or "abnormally dangerous" activities and erroneously dismissed

Ms. Chiu's strict liability cause of action. As indicated herein, Judge Bushong's September 12, 2016 Order only dismissed Ms. Chiu's cause of action for product liability. *Appendix E.* It made no mention of Ms. Chiu's cause of action for strict liability. *Appendix E.*

Penske's motion for summary judgment only argued that Penske could not be found liable under the products liability statutes "as a matter of law," as it was not a "distributor" of vehicles. The motion did not request summary judgment with respect to Ms. Chiu's strict liability claim. Instead, Penske alleged it cannot be held strictly liable, except under a products theory. This argument is without merit, nor is it supported by the law.

The modern evolution of strict liability for "abnormally dangerous" activities in Oregon can be traced from *Bedell v. Goulter*, 199 Or. 344, 261 P2d 842 (1953). In *Bedell*, the Oregon Supreme Court imposed strict liability at common law on a defendant who engages in an "abnormally dangerous" activity, where harm results which is of the kind whose potential occurrence is what makes the activity "dangerous."

What constitutes an "abnormally dangerous" activity has been explored by Oregon courts in a number of decisions. *See, e.g., Ellis v. Ferrellgas, L.P.*, 211 Or. App. 648, 156 P3d 136 (2007); *Loe v. Lenhardt*, 227 Or. 242, 362 P.2d 312 (1961) (strict liability on aerial spraying of crops with destructive chemicals); *Nicolai v. Day*, 264 Or. 354, 506 P.2d 483 (1973); *McLane v. Northwest Natural Gas Co.*, 255

Or. 324, 467 P.2d 635 (1970) (storage of large amounts of natural gas in a populated area is abnormally dangerous); *Bella v. Aurora Air, Inc.*, 279 Or. 13, 25, 566 P.2d 489 (1977) (aerial chemical spraying is an abnormally dangerous activity); *Koos v. Roth*, 293 Or. 670, 652 P.2d 1255 (1982) (activity of field burning was abnormally dangerous).

Whether an entity subjecting employees and/or members of the general public, such as operators and passengers of public transport, to hazardous chemicals, gases and/or fumes, as of the type or similar to those alleged by Ms. Chiu's Second Amended Complaint, constitutes an "ultrahazardous" or "abnormally dangerous" activity is an issue of first impression, and has not been explored by the Oregon Supreme Court or the Oregon Court of Appeals. Nor has it been explored by the Supreme Court of the United States.

In *Ellis v. Ferrellgas, L.P.*, this Court cited the six factors listed in Restatement (Second) of Torts, § 520 (1965). These include the high degree of risk of harm and the likelihood that the harm will be great. The Oregon Supreme Court in *Ellis* noted that they had stopped short of "adhering" to that list, instead stating that the focus should be on "assessing abnormal hazards by their potential for harm of exceptional magnitude or probability despite the utmost care." *Ellis v. Ferrellgas, L.P.*, 211 Or. App. 648, 653, 156 P3d 136 (2007), citing *Burkett v. Freedom Arms Inc.*, 299 Or 551, 557-558, 704 P2d 118 (1985) (quoting *Koos v. Roth,* 293 Or. 670, 683, 652 P.2d 1255 (1982)).

Two types of information, legal and factual, are relevant to the resolution of the question whether Penske should be subjected to strict liability for an "abnormally dangerous" activity. *Speer & Sons Nursery v. Duyck,* 92 Or. App. 674, 676-77, 759 P.2d 1133 (1988). For sources of legal information, the courts look at statutes and regulations that reflect policy and value judgments regarding an activity by the legislature or administrative agencies. *Id.* at 677, 759 P.2d 1133. The second source of information focuses on the facts relating to the activity in issue. *Id.* at 677, 759 P.2d 1133.

Ms. Chiu's Second Amended Complaint clearly alleged that Penske, had placed aging vehicles on the road long past their recommended service lives with defects and/or alterations that allowed toxic fumes to leak into the interiors of the vehicles, where drivers including but not limited Ms. Chiu would be routinely exposed. Moreover, it was quite evident that not only drivers could be exposed, but passengers as well.

In fact, Ms. Chiu alleged that Penske had a responsibility to exercise "extraordinary care" in maintaining "specialized commercial vehicles," because of the "exceptional magnitude or probability" of harm to the public. A heightened duty of care is generally only applicable where a "special relationship" exists, such as between an innkeeper and guest, or common carrier and passenger. This application of a "special relationship" extends to maintenance of public transport and passengers as well as operators of public transport.

"Under the laws of the State of Oregon, an activity is not free from being held strictly liable because it is appropriate in its place; the abnormally dangerous nature of the activity can be proved by a showing that the activity is governed by stringent legislative or administrative safety regulations and by proof that there is a slight likelihood of a mishap that could potentially be highly destructive of health or property." *Buggsi, Inc. v. Chevron U.S.A., Inc.*, 857 F. Supp. 1427 (D.Or.1994).

In her Second Amended Complaint, Ms. Chiu expressly referenced 42 U.S.C. 7521(d), which specifies the maximum recommended useful life of a vehicle for purposes of enforcement of emissions standards.

These allegations and the standards outlined extensively in *Ellis v. Ferrellgas, L.P.* were sufficient to state a cause of action for strict liability for an "abnormally dangerous" activity, and it was reversible error for the trial court to dismiss the claim.

Penske has argued that the maintenance of vehicles is not an "abnormally dangerous" activity, because "a dangerous activity is not extraordinarily so if nearly everyone routinely does it or expects to have it done for him." *Koos v. Roth,* 293 Or. 670, 683, 652 P.2d 1255 (1982). This argument is misplaced. That is, it narrows the scope to personal vehicles, not those utilized by operators of public transport and the citizens of Oregon that use pubic transport. The failure to properly maintain vehicles used in public transport and the possible "abnormally dangerous" activity created is important to the public throughout the United States, even if the issue

may not arise often. This was an issue of first impression, which should have been resolved by the Oregon Supreme Court and which should be resolved by the United States Supreme Court.

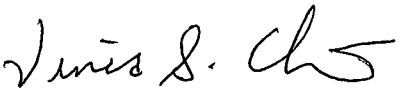
As such, this Honorable Court should grant the Ms. Chiu's Petition for Writ of Certiorari.

Conclusion

For the foregoing reasons, Ms. Chiu respectfully requests that this Honorable Court issue a writ of certiorari.

Dated: November 16, 2019

Respectfully submitted,



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