

IN THE SUPREME COURT OF THE STATE OF OREGON

PHILIP C. LANG, personal representative of the Estate of Ruth M. Miller,  
Petitioner on Review

v.

ROGUE REGIONAL MEDICAL CENTER, ASANTE, ALISON SAVAGE M.D.  
and CANCER CARE OF SOUTHERN OREGON,  
Respondents on Review

S064053  
August 4, 2016

Jackson County Circuit Court Case No.113198L2  
CA158182

Review of the Decision of the Court of Appeals on Appeal from the Judgment of  
the Circuit Court for Jackson County, Honorable Ronald Grensky, Judge  
Decision Affirming without Opinion Filed : February 18, 2016 by Duncan,  
Presiding Judge, DeVore, Judge and Flynn, Judge

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**Petitioner's Brief on the Merits**

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#### First Sub-Question Proposed Rule of Law

Dismissal pursuant to ORCP 54 B(1) requires a finding of willfulness, bad faith, or fault of a similar degree on the part of the disobedient party

#### Second Sub-Question Presented

Does a dismissal pursuant to ORCP 54 B(1) require a finding of prejudice to the opposing party or to the operation of the legal system?

#### Second Sub-Question Proposed Rule of Law

Dismissal pursuant to ORCP 54 B(1) requires a finding of prejudice to the opposing party or to the operation of the legal system.

#### Fourth Sub-Question Presented

Alternatively, does a dismissal pursuant to ORCP 54 B(1) for failure to comply with an order related to additional allegations of a complaint require a finding of prejudice or a finding that justice would not be served if leave to add the additional allegations was given?

#### Fourth Sub-Question Proposed Rule of Law

Dismissal pursuant to ORCP 54 B(1) for failure to comply with an order related to additional allegations of a complaint requires a finding of prejudice to the defendant or a finding that justice would not be served if leave to add the additional allegations was given.

#### First Question Proposed Rule of Law

Dismissal pursuant to ORCP 54 B(1) requires a defendant to demonstrate and a trial court to find: 1) willfulness, bad faith, or fault of a similar degree on the part of the disobedient party; 2) prejudice to the opposing party or to the operation of the legal system; and 3) why any less onerous sanction would not be just or would be inadequate.

#### Second Question Presented by the Court

What is the standard of review of a trial court's ruling on a motion to dismiss under ORCP 54 B(1)?

#### Second Proposed Rule of Law

The Standard of Review Is Abuse of Discretion with the Requirement of Special Findings Necessary to Ensure Appellate Review.

#### Third Question Presented

Did the trial court abuse its discretion by imposing dismissal - the sanction of last resort - on this record and the Court of Appeal committed legal error in affirming the trial court's dismissal?

#### Fifth Sub-Question Presented

Are the historical facts insufficient to support a finding of a wilful violation of the court's order to file the third amended petition within ten days?

#### Fifth Sub-Question Proposed Rule of Law

Because the record does not establish when the court's leave to file an amended pleading starts before the period expires, failure to file within that period is insufficient to support a finding of a wilful violation of the court's order.

#### Sixth Sub-Question Presented

Are the historical facts insufficient to support a finding of a second or successive violation of the court's orders related to filing a third amended petition?

#### Six Sub-Question Proposed Rule of Law

Because the record demonstrates a reasoned rejection of an argument that a party violated an order, the court may not later change course and deem a violation to have occurred to support a sanction without specific reasoned analysis and reasonable basis for rejection the prior decision and reliance on such violation without such reasoning insufficient to support a finding of a second or successive violation of the court's orders.

#### Seventh Sub-Question Presented

Are the historical facts sufficient to support imposition of the sanction of dismissal, or are they particularly because the parties framed the issues to include the limitations applicable to ORCP 46 B to apply to the exercise of the court's discretion pursuant to ORCP 54 B(1)?

#### Seventh Sub-Question Proposed Rule of Law

Failure of a party to comprehend ambiguous orders related to the time to file and the contents of an amended petition are insufficient to support imposition of the sanction of dismissal, particularly in the context of the significant resources expended conducting discovery and the wrongful death grievance presented in this case?

#### Third Proposed Rule of Law

The Trial Court abused its discretion and the Court of Appeals committed legal error because the historical facts in this case are insufficient to support a finding of a wilful violation of the court's order, are insufficient to demonstrate any prejudice to the proceeding or defendants and are insufficient to justify the imposition of the harshest sanction of dismissal.

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## STATEMENT OF THE CASE

### Statement of Facts Relevant to Review

#### Decision On Appeal

The Court of Appeals affirmed without opinion Jackson County Circuit Court Judge Grensky's dismissal of Mr. Lang's action for wrongful death, negligence and medical malpractice pursuant to ORCP Rule 54 B(1). The factual basis of the dismissal was that the court had ordered the filing of the third amended complaint within ten days of the last hearing and Mr. Lang's counsel "willfully" filed it four days after that deadline. That filing it late was in "bad faith" because Mr. Lang's counsel "took the position" that he thought ordered that it be filed within ten days of the execution of the written order and that the sanction of dismissal was just because this was a second timeliness violation of the court's orders to file an amended complaint. ER 71-72.

The record demonstrates that the starting date for the 10 day period is not articulated in the transcript of the hearing (Tr 148, *passim*), that at the hearing there was discussion of the relevant ORCP rule requiring filing of amended petitions within 10 days of service of a written order (Tr 128 ), that the amended complaint was filed before the written order directing an amendment to be filed was executed and served (TCR 4/28/14; ER 43 5/5/14), that prior to executing the order the court

had received Mr. Lang's counsel objection to order stating that the amendment would be due within 10 days of the hearing as opposed to 10 days of service of the order as provided by ORCP 15 because that was not what he believed the Court had said (ER 34).

### **Nature of the Circuit Court Case Dismissed <sup>1</sup>**

#### **Merits of Underlying Case as Stated in the Third Amended Complaint - Context to Issue of Whether Dismissal Was Appropriate**

Ruth Miller was diagnosed with multiple myeloma and had a stem cell transplant at Oregon Health Sciences University (OHSU) prior to her referral to Dr. Alison Savage at the Cancer Care of Southern Oregon for follow up oncology. ER 10. Dr. Savage saw Ms. Miller on July 23 and July 30, 2008 and Ms. Miller's glucose levels and other lab results showed that she was becoming increasingly dehydrated and was developing metabolic acidosis. ER 11. Ms. Miller's symptoms included weakness, loss of appetite, inability to eat, blurred vision and confusion. Dr. Savage did not address these symptoms. ER 12.

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<sup>1</sup> This narrative is derived primarily from the Proposed Third Amended Complaint that was developed after the completion of over 18 months of discovery but was not accepted by Judge Grensky before he dismissed the case. ER 3 - 33. Where indicated, however, the narrative is supported by reference to deposition testimony in the record in opposition to the defendants' motions for summary judgement.

Philip Lang was Ms. Miller's life partner of 26 years and her health care representative appointed under an Advance Directive Ms. Miller executed January 28, 2008. ER 9-10. On August 1, 2008, Mr. Lang contacted Dr. Savage and asked her to provide hydration, tube feeding and other treatment to Ms. Miller as Ms. Miller was very weak. ER 12. Dr. Savage agreed and admitted Ms. Miller to the hospital. ER 13. Neither Dr. Savage nor the hospital, however, provided any nutrition to Ms. Miller, through a feeding tube or otherwise.<sup>2</sup> ER 14. Ms. Miller was hyperglycemic; her glucose level had risen from 295 mg/l to 500 mg/l.<sup>3</sup> ER 13. Mr. Lang and Ms. Miller subsequently asked for a feeding tube several times the rest of that day. ER 14. The CNA assigned to Ms. Miller was ordered to attend to another patient and unbeknownst to Mr. Lang, Mrs. Miller's vital signs were not taken after 4 p.m. ER 16.

Because the care providers were not listening to him, Mr. Lange submitted an emergency petition to the Jackson County Circuit Court to be appointed temporary guardian for Mrs. Miller, arguing in the petition that the hospital was refusing to honor the Advanced Health Care Directive and Mr. Lang's orders for a

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<sup>2</sup> Dr. Savage admitted during her deposition that Mrs. Miller was not fed that day in any way. (TCR 63, AS Depo at p. 82, 11.26.12).

<sup>3</sup> According to Dr. Savage, hyperglycemia effects the brain and causes confusion, depression, personality changes and impaired reasoning and can lead to temporary loss of consciousness or coma. (TCR 63, AS Depo at p. 5-6, 11.26.12).

feeding tube. ER 16-17. The petition was granted upon a finding that there was an immediate and serious danger to Mrs. Miller's life or health and that her welfare required immediate action. ER 17. Afterward, Mr. Lang again asked for a feeding tube for Mrs. Miller and that her life be maintained. ER 17. At 5:00 p.m. a feeding tube was inserted but no nutrition was provided and no other treatment was provided to bring Mrs. Miller's glucose levels down. ER 18.

At 7:00 p.m. a registered nurse indicated on the inoculation form that Mrs. Miller was a "comfort/terminal care" patient. ER 19. At the nurse's deposition in this case, he admitted the designation was a mistake and that it was never checked for correctness as indicated by Dr. Rabinovitch's signature on the form because the form came off the printer "pre-signed" by Dr. Rabinovitch. ER 19. Because of the designation, Mrs. Miller's vital signs were not taken and no one checked on her. Mrs. Miller died around 11:30 p.m. on August 1, 2008.<sup>4</sup> ER 20-21.

### **Proceedings in the Circuit Court - Relief Sought**

#### **Challenges to the First and Second Amended Complaints Alleging Negligent Wrongful Death**

July 1, 2011, Mr. Lang, as personal representative of Ms. Miller's estate,

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<sup>4</sup> The proposed Third Amended Complaint goes on to list numerous policies and protocols that were ignored while Mrs. Miller was in the care of Dr. Savage and the hospital.

filed a complaint alleging, *inter alia*, negligence, medical malpractice/wrongful death. (TCR 7/1/2011). A First Amended Complaint was filed in October 2011, that was challenged by defendants pursuant to Rule 21 motions (TRC 10/27/11). The court granted partial relief and directed Mr. Lang to file a second amended complaint in conformance with the rulings on the challenges. That order was filed in December 2011. (TCR 12/9/11). The second amended complaint was filed on January 6, 2012. (TCR 1/6/12).

After answering the second amended complaint, while discovery was proceeding, and after the defendants moved for and obtained a continuance of the trial date (TCR 7/12/12; TCR 7/27/12), the defendants filed motions for summary judgment. (TCR 11/2/12). In response, Mr. Lang represented that discovery was on-going and listed what documents had not been received and stated that depositions that had not been completed. (TCR 63 p.4-6, 11/26/12). In December 2012, before discovery was completed, Judge Gensky ruled on defendants' motions for summary judgment. The resulting written order was signed and filed on January 8, 2013. It merely stated which paragraphs of the complaint were effected by the court's resolution of the motions. (SER 1-4; TCR 78, 1/8/13). The order did not specifically direct or grant leave to file an amended petition.

**After Summary Judgment Motions, the Court Ordered  
Continued Discovery, Granted Leave to File Third Amended**

### **Complaint after Discovery and Took The Case off the Active Trial Calendar**

Prior to the trial court's January 8, 2013, execution of the order resolving the summary judgment motions, on January 7, 2013, Mr. Lang moved to continue the trial date, extend discovery, and to file an amended complaint. At a hearing held on January 7, 2013, the court granted the motions and the resulting written order was filed on January 25, 2013, directed Mr. Lang to file a motion for leave to file an amended complaint "if and when he needed" after the parties concluded discovery. ((Reply Brief) F[urther]ER 41; Tr 108-10). At the hearing, the parties agreed that the case would be taken off the active trial calendar although there was some discussion about setting the trial in November. (Tr 108-10). The written order did not state a new trial date; it merely directed the parties and the court to work on setting a new date. (FER 41).

Discovery in the case was extensive, including multiple rounds of depositions, retention of a medical expert, and requests for production of documents. ((TCR 63 p.4, 11/26/12 and Response to MOSM - Declaration of Thomas Dimitre 11/26/12). Defendants objected to some of Mr. Lang's requests for document production. For example, inconsistent statements were made regarding the existence of written notes and policies for feeding tube placement, confirmation and feeding. (TCR 63 p 5-6, 11/26/12).

Spanning more than 17 months, discovery included at least thirteen to fifteen depositions. (TCR 3/13/13, Declaration of David C. Landis p.-2) (TCR 66 12/3/12 p. 5). Those deposed included Dr. Alison Savage, nursing assistant Beth Anne Potts, registered nurse John Genaw, nursing assistant Jason Shaw, registered nurse Amy Stoner (Dirmeyer), clinical manager Kathy Breitenbach, and nursing education manager Jennifer Brusca. Discovery was not completed, however, by the time defendants filed their motions for summary judgment because of complications posed by litigation related to the admissibility of investigations by the hospital Grievance Committee under Oregon's Peer Review Privilege Statute (ORS § 41.675) which continued past March of 2013. (TCR 84 2/19/13) (TCR 87, 2/28/13; TCR 313.13).

**Proposed Third Amended Complaint Rejected Because it Was Not Solely Responsive to The Order on Summary Judgment; Court Rejected Defendant's Argument that it was Untimely.**

When Mr. Lang later filed his notice of motion for leave to file third amended complaint in March 2014, defendants objected arguing, *inter alia*, that Mr. Lang had violated ORCP 15, requiring amended complaints to be filed within 10 days after the service of the order granting leave.<sup>5</sup> (TCR 4/2/14 p. 2). The

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<sup>5</sup> Oregon Rules of Civil Procedure 15B (2013) states:

B Pleading after motion.

B(1) If the court denies a motion, any responsive pleading required shall be

defendants argued that the court should apply the rule in relation to the January 8, 2013, order on summary judgment and argued that Mr. Lang had only 10 days from the completion of discovery to file the amended complaint and that it was filed too late. *Id.* Defendants asserted that discovery was “complete” at the last deposition in October 2013. *Id.* Mr. Lang responded arguing that even if the rule applied there was no prejudice to defendants because the trial setting was six months away. Tr. 122.

At a hearing on April 14, 2014, Judge Grensky rejected the defendants’ untimeliness argument. He acknowledged that the argument was creative but stated he would not adopt it because the direction regarding leave to file an amended petition would need to be in an order for the rule to apply. Tr. 128. He further noted that any error was not “black and white,” and that the trial was over five months away. Tr 128.

Judge Grensky rejected the amended complaint, however, because, as understood, the amended complaint did not just merely respond to the January 8, 2013, order ruling on the summary judgment motions, which is apparently what the

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filed within 10 days after service of the order, unless the order otherwise directs.

B(2) If the court grants a motion and an amended pleading is allowed or required, such pleading shall be filed within 10 days after service of the order, unless the order otherwise directs.



court wanted. It added factual allegations learned through discovery and added punitive damages claims:<sup>6</sup>

THE COURT: This particular Third Amended Complaint is not going to be received. It's not going to be filed. I'm denying your motion, and I'll tell you why.

This is a medical malpractice case in its generic description of it. That requires consultation with very expensive experts. That requires a lot of discovery and a lot of preparation.

\* \* \*

In no way, shape, or form, was I envisioning a revisitation [sic.], to this extent, of the pleadings when we had our second amended complaint attacked. I envisioned that you would clean this thing up, you'd go forward, and we'd have a trial date. And this just keeps, basically, growing exponentially every time you come in here.

Tr 145. At the conclusion of the hearing, Judge Gensky told Mr. Lang's counsel that he would have to file an amended complaint that was responsive to the January 8, 2013, ruling and that before he filed another proposed amended complaint that included new punitive damages claims he should confer with defendants' counsel - "put your heads together and figure out if you can come up with something that will work" - so that the parties are not still "fooling around with the complaint" a month or two before trial. Tr. 147.

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<sup>6</sup> During the hearing Judge Gensky complained that Mr. Lang's inclusion of additional allegations was like stating plaintiff's whole case in the pleadings as opposed to just alleging ultimate facts. Tr 144.

When asked if there was anything else, defendants asked the judge to direct that the amended complaint be filed within ten days. Neither the defendants nor the court, however, articulated whether it should be filed within the 10 days as Rule 15 provided and had just been discussed or within 10 days of the hearing:

THE COURT: Anything else?

MR. LANDIS: Your Honor, should the order provide that Plaintiff...

THE COURT: Ten days.

MR. LANDIS: ....has -- may file a motion to file a next amended complaint in conformity with the Court's order on the -- the Court's order on the motions for summary judgment against the second amended complaint?

THE COURT: Yes, that should be in the order.

Tr. 148.

Defendants' proposed order submitted to the court stated that the amended complaint had to be filed within 10 days of the hearing. Mr. Lang's counsel objected to that directive stating that he believed the court intended that Mr. Lang would have 10 days to file it after the order was signed, as if the rule applied. SER 15. Defendants did not amend the order or otherwise respond to Mr. Lang's objection because the proposed order had already been filed with the court. *Id.* Mr. Lang filed a formal objection to the proposed order and the third amended complaint on April 28, 2013. ER 34. The Court adopted the defendants proposed order and executed it on May 1, 2014, 17 days after the hearing. (ER 43).

**Mr. Lang's Motion for Leave to File Third Amended Complaint  
Was Filed Three Days Before the Order Denying the First Was**

**Executed and Only Fourteen Days after the Hearing;  
Nevertheless, it Elicited Defendants' Motion to Dismiss for Wilful  
Failure to Comply with The Ten Day Directive**

While the proposed order was pending before the court but fourteen days after the hearing on April 28, 2014, Mr. Lang filed a proposed third amended complaint. ER 3-33. The amended complaint continued to include allegations supporting the prior claims (but which defendants complained included new sub-allegations of negligence) which were learned through discovery but excluded the punitive damages allegations.

Defendants filed a motion to dismiss the complaint arguing that it was untimely:

Plaintiff willfully failed to comply with the court order. [Plaintiff's counsel] participated in the hearing on April 14, 2014. He knew that the Court ordered that the new motion be filed by April 24, 2014, and he voluntarily delayed until April 28.

[Plaintiff's counsel's] position that he believed that the Court's ordered (sic) that the new motion be filed within ten days of the date that the order was signed is in bad faith, in that it is entirely devoid of legal or factual support in light of the language of the transcript of the Court's ruling.

ER 21. At a hearing held on June 23, 2014, at which Mr. Lang's counsel was not present due to confusion about the court notice and the pendency of the defendants motion to dismiss, Judge Gensky stated his belief that there had been three or four continuances of the case and asked defendants whether it was all due to the

litigation over the proposed third amended complaint. Tr. 153-54. Counsel for defendants corrected the court, stating that only two continuances had been requested. The court asked for the basis of the motion to dismiss and defense counsel stated it was for failure to comply with the court's order under ORCP 54 B(1).<sup>7</sup> Judge Grensky granted the motion without making any specific findings. Tr 155.

### **Nature of Judgment Rendered by the Circuit Court**

#### **Defendants' Proposed Order Dismissing Case Adopted**

Mr. Lang objected to the proposed order and explained that he had not received notice of the hearing but it was ultimately adopted by Judge Grensky. (ER 60-66). The proposed order asserted findings in addition to a failure to comply with the directive for filing within ten days of the April 14, 2014 hearing. ER 70-72. It also stated that Mr. Lang's amended complaint did not conform to the January 8, 2012, order because it contained additional allegations of negligence. ER 71. This basis for dismissal was not separately raised in the

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<sup>7</sup> Rue 54 B (2013) states:  
Involuntary dismissal.

\* \*\*

B(1) Failure to comply with rule or order. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for a judgment of dismissal of an action or of any claim against such defendant.

motion. ER 47, *passim*.

The order stated that the failure to file within ten days was in bad faith because Mr. Lang took the position that he believed the court had ordered that the third amended complaint be filed within ten days of the date that the order was signed and because “[t]he Court clearly stated in its ruling from the bench on April 14, 2014, that the (new) third amended complaint and the new motion were to be filed within ten days.” ER 71.

The order stated that the sanction of dismissal was “just” because, the late filing was Mr. Lang’s second successive wilful violation regarding filing a third amended complaint. Specifically, in contravention of the actual findings the court made in 2013, the order stated:

Pursuant to the Court's order dated January 25, 2013, and ORCP 15 B(2), plaintiff was required to file a motion seeking leave to file a third amended complaint within 10 days after completion of discovery and that discovery was complete on October 8, 2013. However, in willful violation of the court's order, plaintiff delayed filing his motion until March 19, 2014, five months after it was due.

ER 72.

## **STATEMENT OF LEGAL QUESTIONS AND PROPOSED RULES**

### **First Question Raised by the Court**

What standards and procedures including burdens of proof must a trial court employ in determining whether to dismiss under ORCP 54(B)(1)

**First Sub-Question Presented**

Does a dismissal pursuant to ORCP 54B require a finding of willfulness, bad faith, or fault of a similar degree on the part of the disobedient party?

**First Sub-Question Proposed Rule of Law**

Dismissal pursuant to ORCP 54B requires a finding of willfulness, bad faith, or fault of a similar degree on the part of the disobedient party.

**Second Sub-Question Presented**

Does a dismissal pursuant to ORCP 54B require a finding of prejudice to the opposing party or to the operation of the legal system?

**Second Sub-Question Proposed Rule of Law**

Dismissal pursuant to ORCP 54B requires a finding of prejudice to the opposing party or to the operation of the legal system.

**Third Sub-Question Presented**

Does a dismissal pursuant to ORCP 54B require a finding of why any less onerous sanction would not be just?

### **Third Sub-Question Proposed Rule of Law**

Dismissal pursuant to ORCP 54B requires a finding of why any less onerous sanction would not be just or would be inadequate.

### **Fourth Sub-Question Presented**

Alternatively, does a dismissal pursuant to ORCP 54 B (1) for failure to comply with an order related to additional allegations of a complaint require a finding of prejudice or a finding that justice would not be served if leave to add the additional allegations was given?

### **Fourth Sub-Question Proposed Rule of Law**

Dismissal pursuant to ORCP 54 B(1) for failure to comply with an order related to additional allegations of a complaint requires a finding of prejudice to the defendant or a finding that justice would not be served if leave to add the additional allegations was given.

### **First Question Proposed Rule of Law**

Dismissal pursuant to ORCP 54B requires a defendant to demonstrate and a trial court to find: 1) willfulness, bad faith, or fault of a similar degree on the part of the disobedient party; 2) prejudice to the opposing party or to the operation of the legal system; and 3) why any less onerous sanction would not be just or would be inadequate.

## **Second Question Presented by the Court**

What is the standard of review of a trial court's ruling on a motion to dismiss under ORCP 54 B(1)?

## **Second Proposed Rule of Law**

The Standard of Review Is Abuse of Discretion with the Requirement of Special Findings Necessary to Ensure Appellate Review

## **Third Question Presented**

Did the trial court abuse its discretion by imposing dismissal - the sanction of last resort - on this record and did the Court of Appeal committed legal error in affirming the trial court's dismissal?

## **Fifth Sub-Question Presented**

Are the historical facts insufficient to support a finding of a wilful violation of the court's order to file the third amended petition within ten days?

## **Fifth Sub-Question Proposed Rule of Law**

Because the record does not establish when the court's leave to file an amended pleading starts before the period expires, failure to file within that period is insufficient to support a finding of a wilful violation of the court's order.

## **Sixth Sub-Question Presented**



Are the historical facts insufficient to support a finding of a second or successive violation of the court's orders related to filing a third amended petition?

### **Six Sub-Question Proposed Rule of Law**

Because the record demonstrates a reasoned rejection of an argument that a party violated an order, the court may not later change course and deem a violation to have occurred to support a sanction without specific reasoned analysis and reasonable basis for rejection the prior decision and reliance on such violation without such reasoning insufficient to support a finding of a second or successive violation of the court's orders.

### **Seventh Sub-Question Presented**

Are the historical facts sufficient to support imposition of the sanction of dismissal, or are they particularly because the parties framed the issues to include the limitations applicable to ORCP 46B to apply to the exercise of the court's discretion pursuant to ORCP 54 B(1)?

### **Seventh Sub-Question Proposed Rule of Law**

Failure of a party to comprehend ambiguous orders related to the time to file and the contents of an amended petition are insufficient to support imposition of the sanction of dismissal, particularly in the context of the

significant resources expended conducting discovery and the wrongful death grievance presented in this case?

### **Third Proposed Rule of Law**

The Trial Court abused its discretion and the Court of Appeals committed legal error because the historical facts in this case are insufficient to support a finding of a wilful violation of the court's order, are insufficient to demonstrate any prejudice to the proceeding or defendants and are insufficient to justify the imposition of the harshest sanction of dismissal.

## **BRIEF ON THE MERITS OF PETITIONER ON REVIEW**

### **Summary of the Argument**

Or. Rule Civ. P. § 54 B(1) states the courts' inherent authority to control its proceedings with the limitation that a defendant must file a motion to invoke that authority if there is a failure to prosecute or a failure to comply with a rule or order. The Rule is identical to the first sentence of F.R.Civ.P. § 41 (b). At the time Rule 54 B(1) was adopted the relevant authority limited the exercise of inherent authority to willful violation of orders and the duty to prosecute. At the time Rule 54 B(1) was adopted the relevant authority required a showing of prejudice to the proceedings or the defendant. At the time Rule 54 B(1) was adopted courts were required to articulate why there was no less onerous sanction than dismissal to

impose that would be adequate to address the plaintiff's failure.

Following this Court's rationale in *Pamplin v. Victoria*, 319 Or. 429, 434, 877 P.2d 1196 (*en banc*)(1994), the Court should adopt these limitations which are similar to those limiting the dismissal discretion related to discovery violation under Or. Rule Civ. Pro. § 46 B. Because the Rule 54 B(1) calls for the defendant to file a motion to dismiss, it is defendant's burden to demonstrate that the plaintiff's failure was wilful, that there is prejudice to the proceedings or the defendant and that there is no less onerous sanction that would be adequate. Trial Court are required to make special findings of fact when dismissing pursuant to Rule 54 B(1) as they are when dismissing pursuant to ORCP 46 B to provide for adequate appellate review.

Finally, because the historical facts do not support such findings in this case, the matter should be remanded to the trial court for further proceedings.

### **Argument**

- I. Dismissal pursuant to ORCP 54 B(1) requires a defendant to demonstrate and a trial court to find: 1) willfulness, bad faith, or fault of a similar degree on the part of the disobedient party; 2) prejudice to the opposing party or to the operation of the legal system; and 3) why any less onerous sanction would not be just or would be inadequate.**
  - A. Dismissal Pursuant to ORCP 54 B(1) Requires a Finding of Willfulness, Bad Faith, or Fault of a Similar Degree on the Part of the Disobedient Party

ORCP 54 B(1) provides a basis for invoking an aspect of the courts' inherent authority - a violation of rule or order upon motion by a defendant, and particularly a failure to prosecute. The courts' inherent authority to impose order, respect, decorum, silence, and compliance with lawful mandates exists regardless of statute or rule authorizing its use or identifying when it may be sought. See, *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (court has inherent power to vacate judgment procured by fraud). Those inherent powers may be controlled or overridden by statute or rule, however, and otherwise, they may be employed only when they are "a reasonable response to the problems and needs that provoke it." *Degen v. United States*, 517 U.S. 820, 823-24 (1996). "Because the exercise of an inherent power in the interest of promoting efficiency may risk undermining other vital interests related to the fair administration of justice, a [] court's inherent powers must be exercised with restraint." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1893 (2016) (citing to *Chambers* 501 U.S., at 44 ("Because of their very potency, inherent powers must be exercised with restraint and discretion"))).

This Court has not similarly discussed limitations on the courts' exercise of inherent authority outside of the context of the fugitive disentitlement doctrine. This Court has, however, identified limitations on inherent authority to dismiss based upon discovery violations.

In *Pamplin*, this court held that, to impose a sanction of dismissal under ORCP 46 B(2)(c), the trial court must find that a disobedient party acted with "willfulness, bad faith, or fault of a similar degree" 319 Or. at 434. The Court found that this limitation on the authority to dismiss was based upon the text of the rule (albeit it did not specifically state that willful disobedience was a prerequisite), the legislative history and authority related to a nearly identical federal provision that held that a dismissal sanction is justified only when there is willfulness, bad faith, or fault of a similar degree on the part of the disobedient party. *Id.* at 433-437.

Applying a similar analysis to Rule 54 B(1), the same limitations should apply. Rule 54 B is derived from FRCP 41(b). In 1963 that rule was amended to include what is now the first sentence: "If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." At the time Oregon adopted the similar provision stated in Rule 54 in 1978, it was understood that Rule 41(b) was a parallel expression of inherent powers and but exercise of that power was limited to a showing bad faith. *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767 (1980) (discussing inherent authority to dismiss and the lesser sanction of imposing attorney fees and finding that under prior authority any sanction under such

inherent powers must be based upon a finding that the conduct constituted or was tantamount to bad faith.); *See also, Kung v. FOM Inv. Corp.*, 563 F.2d 1316 (9th Cir. 1977) (upholding dismissal where counsel was found to be in flagrant violation of repeated warnings to prosecuted with diligence, and a specific warning that dismissal would result if counsel was not ready for the pre-trial conference).

The test for dismissal pursuant to Rule 41(b) has further evolved in the various circuits. An articulation of the test in the ninth circuit was stated in *Dahl v. City of Huntington Beach*, 84 F.3d 363 (1996):

Before imposing dismissal as a sanction, the district court must weigh several factors: the public's interest in expeditious resolution of litigation; the court's need to manage its docket; the risk of prejudice to the defendants; the public policy favoring disposition of cases on their merits; and the availability of less drastic sanctions. *Thompson v. Housing Auth. of Los Angeles*, 782 F.2d 829, 831 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 829, 107 S.Ct. 112, 93 L.Ed.2d 60 (1986). "Dismissal, however, is so harsh a penalty it should be imposed as a sanction only in extreme circumstances." *Id.* This court reviews a district court's dismissal under rule 41(b) for abuse of discretion, determining whether the sanction was clearly outside the acceptable range based upon the facts of the particular case. *Chism v. National Heritage Life Ins. Co.*, 637 F.2d 1328, 1331 (9th Cir.1981), overruled on other grounds, *Bryant v. Ford Motor Co.*, 844 F.2d 602, 605 (9th Cir.1987) (en banc); *see also Hyde & Drath v. Baker*, 24 F.3d 1162, 1169 (9th Cir.1994).

84 F.3d at 366; *See also, Hearn v. San Bernardino Police Dept.*, 530 F.3d 1124, 1132–33 (9th Cir. 2008) (quoting *United States v. Nat'l Med. Enters., Inc.*, 792 F.2d 906, 912 (9th Cir.1986) (citations omitted) for the rule that "[t]he sanction of

dismissal should be imposed only if the deceptive conduct is willful, in bad faith, or relates to the matters in controversy in such a way as to interfere with the rightful decision of the case." ).<sup>8</sup>

Moreover, the Court of Appeals has required a demonstration of wilful misconduct for dismissal pursuant to Rule 54 B(1) by analogy to Rule 46 B and party agreement. What is lacking is this Court's determination that such limitation is required. In *Lambert v. American Dream Homes Corp.*, 148 Or. App. 371, 375, 939 P.2d 661 (1997) (We are unable to discern either evidence or reason to support the dismissal of this case for want of prosecution) and *Johnson v. Eugene Emergency Physicians, P.C.*, 159 Or. App. 167, 974 P.2d 803 (1999) the court of appeals reversed Rule 54 B(1) dismissals applying the Rule 46 B limitations to the application of ORCP 54 B(1). The court in *Johnson* found that:

In light of that alternative [monetary sanction], as well as by analogy

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<sup>8</sup> In *United States v. Shaffer Equipment Co.*, 11 F.3d 450 (1993), the Fourth Circuit articulated the long standing - at least since 1976 - factors relevant to the consideration of dismissal sanction: (1) the degree of the wrongdoer's culpability; (2) the extent of the client's blameworthiness if the wrongful conduct is committed by its attorney, recognizing that the court seldom dismiss claims against blameless clients; (3) the prejudice to the judicial process and administration of justice; (4) the prejudice to the victim; (5) the availability of other sanctions to rectify the wrong by punishing culpable persons, compensating harmed persons, and deterring similar conduct in the future; and (6) the public interest. See *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976) asserting the same factors relevant to the dismissal decision.

the statutorily provided sanctions for discovery violations in ORCP 46, and keeping in mind that dismissal defeats a litigant's right to redress grievances in a court, *Stasch v. '69 Investment, Inc.*, 147 Or.App. 46, 52, 934 P.2d 630 (1997), we conclude that the court's summary statement here does not adequately explain why less onerous sanctions would not be just under these circumstances.

*Id.* at 143. *See also Sternberg v. Lechman-Su*, 271 Or.App. 401 (2015) (avoiding question of whether a court may dismiss an adequately pleaded claim as a sanction for failure to comply with a court order requiring more specificity and, if it may, whether it must make findings before doing so)

Thus, as in the case of dismissal pursuant to ORCP 46 B, the sanction of dismissal, whether it is imposed pursuant to inherent authority to enforce obedience or that similar authority indicated in Rule 54 B(1), requires the trial court to find that the plaintiff's acted with "willfulness, bad faith, or fault of a similar degree" in failing to comply with the rule or order.

**B. Dismissal Pursuant to ORCP 54 B(1) Requires a Finding of Prejudice to the Opposing Party or to the Operation of the Legal System.**

Although *Pamplin* expressly determined that a finding of prejudice to the party seeking discovery is not required to authorize a dismissal pursuant to Rule 46 B, it found that the sanction is to provide a deterrent effect which is aimed at avoiding prejudice to the operation of the legal system. 319 Or. at 436 (discussing the application of F.R.C.P. 37 in *National Hockey League v. Metro. Hockey Club*,



*Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976)). The Court noted that prejudice to the party seeking discovery may demonstrate why the sanction chose is "just," but that such prejudice was not always necessary to justify the sanction imposed.

Prejudice to the defendant seeking dismissal pursuant to Rule 41 (b) was considered a factor in 1978 and in any event, the rationale of *National Hockey League* is equally applicable to the application of that harshest of sanctions regardless of the whether it is imposed through inherent authority or Rule 41 (b). In *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974), the Fourth Circuit provided a survey of the relevant law:

A district court unquestionably has authority to grant a motion to dismiss for want of prosecution. Fed.R.Civ.P. 41(b). Indeed, as the Supreme Court held in *Link v. Wabash R.R.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), the trial court can take such action on its own motion. But courts interpreting the rule uniformly hold that it cannot be automatically or mechanically applied. Against the power to prevent delays must be weighed the sound public policy of deciding cases on their merits. See generally, *Wright & Miller, Federal Practice and Procedure: Civil* §§ 2369, 2370 (1971). Consequently, dismissal 'must be tempered by a careful exercise of judicial discretion.' *Durgin v. Graham*, 372 F.2d 130, 131 (5th Cir. 1967). While the propriety of dismissal ultimately turns on the facts of each case, criteria for judging whether the discretion of the trial court has been soundly exercised have been stated frequently. Rightfully, courts are reluctant to punish a client for the behavior of his lawyer. *Edsall v. Penn Central Transportation Co.*, 479 F.2d 33, 35 (6th Cir. 1973). Therefore, in situations where a party is not responsible for the fault of his attorney, dismissal may be invoked only in extreme

circumstances. *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1970). Indeed, it has been observed that 'the decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff.' *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967). Appellate courts frequently have found abuse of discretion when trial courts failed to apply sanctions less severe than dismissal. See e.g., *Richman v. General Motors Corp.*, 437 F.2d 196, 199 (1st Cir. 1971); *Flaksa v. Little River Marine Construction Co.*, 389 F.2d 885, 887 (5th Cir. 1968); *Dyotherm Corp. v. Turbo Machine Co.*, 392 F.2d 146, 148 (3d Cir. 1968). And generally lack of prejudice to the defendant, though not a bar to dismissal, is a factor that must be considered in determining whether the trial court exercised sound discretion. *Pearson v. Dennison*, 353 F.2d 24, 28 (9th Cir. 1965).

*Id.* at 1135. See also *Natl. Med. Enterprises, Inc.*, 792 F.2d at 913 ("Although prejudice is not required for a dismissal,... it is an important factor that the district court should weigh before granting the extreme sanction of dismissal," citing to *N. Am. Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986); *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 n. 1 (9th Cir. 1983) and *Raiford v. Pounds*, 640 F.2d 944, 945 (9th Cir. 1981)).

Thus, Rule 41 (b) had been interpreted to require a balancing test, which included factors related to prejudice to the defendants and avoiding prejudice to the operation of the legal system. Application of Rule 54 B(1) to support a dismissal must similarly require a balancing test that includes a requisite finding of either prejudice to the defendants or prejudice to the operation of the legal system.

Alternatively, when, as here, there is another rule that provides a more specific or relevant response to the offending conduct, and that rule requires certain findings, such as prejudice to the opposing party, that standard should apply to a dismissal under Rule 54 B(1). For instance, when as here, the order violated concerns an amended complaint, ORCP 23 provides an important context for determining the scope of the violation and propriety of the sanction. It limits the trial court's exercise of discretion to disallow an amended pleading. It requires allowance when "justice requires" and there is no prejudice to the opposing party. See, *Family Bank of Commerce v. Nelson*, 72 Or.App. 739, 697 P.2d 216 (1985).

Therefore, dismissal pursuant to ORCP 54 B(1) requires a finding of prejudice to the opposing party or to the operation of the legal system. Alternatively, dismissal pursuant to ORCP 54 B(1) for failure to comply with an order related to additional allegations of a complaint requires a finding of prejudice or a finding that justice would not be served if leave to add the additional allegations was given.

**C. Dismissal Pursuant to ORCP 54 B(1) Requires a Finding of Why Any less Onerous Sanction Would Not Be Just or Would Be Inadequate**

*Pamplin* held that a trial court considering dismissal for a discovery violation must make express findings of fact and explain why the sanction of

dismissal is "just in view of those facts and in view of the other sanctions that are available." 319 Or. at 437. *See also Klau-Med, Inc v. Bodyworks Medical, Inc.* 156 Or.App. 138, 144-45 (1998), ("[the Trial Court must] make express findings that lesser sanctions are not appropriate." ). When the case was back at the court of appeal after remand, the court of appeals interpreted that holding to require that the ultimate sanction of dismissal should not be imposed without considering whether less onerous sanctions are available. *Pamplin v. Virginia*, 138 Or App 563, 567, 909 P.2d 1245, 1247 (1996). This holding is rooted in the fact that dismissal is the harshest sanction and should be considered a last resort sanction.

As we have seen, the balancing tests developed and factors adopted for application of the dismissal sanction of Rule 41 (b) include consideration of alternative sanctions. This specific factor and limitation of findings related to alternative sanctions predates the adoption of Rule 54 B(1). *See Hearn*s, 530 F.3d at 1132–33 ("Because dismissal with prejudice is a harsh remedy, our precedent is clear that the district court 'should first consider less drastic alternatives.'").

Therefore, dismissal pursuant to ORCP 54 B requires a finding of why any less onerous sanction would not be just or would be inadequate.

#### **D. The Burden of Proof Is on the Defendant as the Moving Party**

Rule 54 B requires defendants to invoke the court's authority to dismiss for

plaintiff's failure to prosecute, or failure to comply with rule or order. Generally the moving party has the burden of proof and none of the cases surveyed speak specifically to this issue or suggest otherwise. For the same reasons that a defendant has a "heavy burden" to obtain dismissal for *forum non conveniens* which requires application of a multi-factor test, defendants seeking dismissal under Rule 54 B should have a similar burden. See, *Espinoza v. Evergreen Helicopters, Inc.*, 359 Or 63, 84, 376 P.3d 960 (2016). This is because of the great interest in reaching the merits of claims is no less equal to the interests in allowing litigation of an action in Plaintiff chosen forum. Moreover, as is the general rule related to dismissal motions, the non-moving party should have the benefit of all favorable inferences. *Id.*; See also, *Bradbury v. Teacher Standards and Practices Comm.*, 328 Or. 391, 393, 977 P.2d 1153 (1999) (stating general standard applicable to a motion to dismiss)

## **II. The Standard of Review Is Abuse of Discretion with the Requirement of Special Findings Necessary to Ensure Meaningful Appellate Review**

Abuse of discretion is the general standard of review applied to involuntary dismissals. It is not the typical highly deferential abuse of discretion standard, however. It is said that reviewing courts will "carefully scrutinize" such orders and occasionally will find it necessary to set them aside. 9 Wright & Miller, *Federal Practice & Procedure*, s 2370, p. 203, n. 1.

This is the standard applied in Oregon. *Blue Horse v. Sisters of Providence*, 113 Or.App. 82, 85, 830 P.2d 611, rev. den. 314 Or. 727, 843 P.2d 454 (1992). An abuse of discretion occurs when the trial court's decision is "not justified by and clearly against the evidence and reason." *Lutz v. State of Oregon*, 130 Or.App. 278, 285, 881 P.2d 171 (1994).

In *Pamplin* the Court further held that, to support a sanction of dismissal, a trial court must make specific findings resolving any factual disputes and explaining why such a sanction is warranted. *Id.* at 436–37. The Court required special findings because they are a prerequisite to meaningful review by an appellate court:

To assess the propriety of imposing that sanction, an appellate court needs to know (1) the historical facts on which the trial court based its decision to impose it and (2) the analytical process by which the trial court concluded that dismissal is 'just' in view of those facts and in view of the other sanctions that are available.

*Id.* at 436–37 (internal quotation marks omitted; citation omitted). For similar reasons, similar findings should be required in the context of the standards and required to be met. In other words, to conduct an appropriate review, the trial court must state the historical facts and the analytical process by which it determines: 1) that the plaintiff's failure to abide by rule or order was willful, in bad faith or by fault of a similar degree; 2 that defendant or the operation of the legal system was

prejudiced by plaintiff's failure; and 3) why any less onerous sanction would not be just or would be inadequate.

### **III. The Trial Court Abuse its Discretion by Imposing Dismissal - the Sanction of Last Resort - on this Record and the Court of Appeal Committed Legal Error in Affirming the Trial Court's Dismissal**

The historical facts in this case are insufficient to support a finding of a wilful violation of the court's order to file the third amended petition within ten days. This is because the record does not establish a clear directive to file the amended complaint within ten days of the hearing. Judge Grensky and defense counsel were talking over each other and the transcript reflects that the Judge did not state ten days from the date of the hearing. Moreover, the dialogue occurred after there was extensive discussion about the relevant rules' requirement that such amendments be filed within ten days of service of an order directing the filing. Finally, defense counsel was aware and the court was aware before issuing the ten day order and before dismissing the action that Mr. Lang's counsel believed the court had stated that the amended complaint would be due in accordance with the rule - ten days after service of the order.

The record fails to demonstrate any prejudice to the proceeding or defendants. Instead it discloses, defendant's overreaching and manipulation of the situation and misrepresentation of the facts. The record demonstrates Judge

Grensky's reasoned rejection of defendants' argument that Mr. Lang's counsel violated an order to file his amended complaint in the first instance within 10 days of discovery. Nevertheless, defendants purposely misstated that ruling in the subsequent proposed order in order to create - out of thin air - a finding that counsel committed a second violation of the same rule. There is no historical evidence to support a finding that the process was in any way prejudice by a second violation. Neither was there evidence that the defendants would have been prejudiced by Mr. Lang's counsel's filing of the amended complaint merely four days after the date defendants believed it should be filed.

Finally, the historical facts are insufficient to justify the imposition of the harshest sanction of dismissal. Alternative sanctions were not considered. The harshest sanction is not justified by Mr. Lang's counsel's failure to comprehend ambiguous orders related to the time to file and the contents of an amended complaint, particularly in light of the policy to reach the merits of this wrongful death action and the significant resources expended conducting discovery and the wrongful death grievance presented in this case.

### **CONCLUSION**

Mr. Lang respectfully requests that the Court interpret Rule 54 B(1) to require the specific standards and procedural requirements as outlined above which



are necessary to avoid the arbitrary dismissal of actions seeking redress of grievances before a ruling on the merits. He also asks that the Court determine that the historical facts do not support such dismissal and remand to the lower courts for further proceedings.

Respectfully submitted on September 15, 2016.

/s/ Tonia Moro

Tonia L. Moro

Attorney for Petitioner on Review

## CERTIFICATES OF FILING AND SERVICE

I hereby certify that on September 15, 2016, using the court's electronic filing system, I filed the original of petitioner's Amended Petition for Review with the State Court Administrator.

I hereby also certify that on September 15, 2016, using the electronic filing system, I served a true copy of petitioner's Amended Petition for Review on defendants' attorneys of record:

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### CERTIFICATE OF COMPLIANCE

I hereby certify that (1) this Merits Brief complies with the word count limitation in ORAP 9.05(3)(a) and (2) the word count of this petition is less than 9,000 words. I further certify that the size of the type in this petition is not smaller than 14 point for both the text of the petition and footnotes as required by ORAP 5.05(4)(f).

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